

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * *		MDL NO. 07-MD-1842ML
		*
IN RE:	KUGEL MESH HERNIA	*
	PATCH PRODUCTS	* JULY 15, 2008
	LIABILITY LITIGATION	* 1:00 P.M.
		*
* * * * *		PROVIDENCE, RI

BEFORE THE HONORABLE MARY M. LISI,
CHIEF JUDGE
(Chambers Conference)

Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR
One Exchange Terrace
Providence, RI 02903
(401) 351-8311

1 15 JULY 2008 -- 1:00 P.M.

2 THE COURT: If you have ECF filing questions,
3 you have come to the wrong place; but Barbara hopefully
4 can help you.

5 MR. MIGLIORI: Meagan in my office has been
6 working very closely with Barbara and John, and these
7 were kind of discrete issues where I think at the end
8 of conversations back and forth it was said, Let's put
9 this on the next agenda.

10 I think I've boiled some of them down and
11 eliminated some questions just based on some
12 substantive legal decisions; but let's try it, and
13 maybe we can see what happens.

14 The first issue, the simplest issue is we're
15 required to file waivers of service with the federal
16 court; but in cases that were transferred where the
17 waiver was actually in the original case, we don't and
18 haven't.

19 We're not sure where to put those. We have had
20 a general request not to put on ECF waivers for the
21 MDL, entries of appearance and withdrawals of
22 appearance. We just don't want to be procedurally
23 deficient or defective, but we have some waivers that
24 would have been filed in the transferring court.

25 So I'm perfectly happy in a liaison capacity

1 holding them in the file, not putting them into the ECF
2 system, as long as I'm not waiving or creating any
3 motion -- you know, procedural problems.

4 THE COURT: Would you have a problem with
5 Mr. Migliori serving as an escrow agent for those?

6 MR. GRIFFIS: For notices of appearance and
7 waivers, not at all. Withdrawal, we --

8 THE COURT: Withdrawals we've got to deal with
9 because that's something that will require the Court to
10 act, but if it's a notice -- if it's a waiver,
11 certainly we don't need it. If it's a notice of
12 appearance, though, we need to have that filed somehow
13 so that we've got counsel of record.

14 MR. MIGLIORI: So there's a little conflict
15 because they've said not to do that in other contexts.
16 We'll do whichever -- this isn't really substantive.
17 This is sort of the technical what should we do as a
18 practical matter.

19 MS. BARLETTA: Did you want the main case, all
20 those appearances docketed in that?

21 THE COURT: No. I think what you can do, can
22 you docket them in the individual cases?

23 MS. BARLETTA: I can.

24 MR. MIGLIORI: That's perfect.

25 THE COURT: Let's do that because we don't

1 really need to gum up the main case with all of those,
2 but we need to put them somewhere. So let's put them
3 in the individual cases. I know it's more work for
4 you.

5 MR. MIGLIORI: I think it's relatively limited
6 because most people will come in transferred with their
7 case and stay with it. The only other type of notice
8 that's akin to that is not a withdrawal but
9 substitution of attorneys where they change firms, and
10 that would be the same thing.

11 THE COURT: Those should also go into the
12 individual cases.

13 MR. MIGLIORI: Did I satisfy that question? I'm
14 the last person to ask. I have to check with Leah.

15 The second ECF filing issue actually had to do
16 with withdrawals and appearances specifically as
17 opposed to waivers, so I guess we've covered it.

18 And then the last one is kind of -- it's a
19 little bit substantive and a little bit technical
20 issue; but in the class action litigation, we have
21 found in more than one class action that a noninjury
22 implant has become a second injury, has become an
23 actual injury. And under the case management order, we
24 didn't contemplate an amendment process or a
25 substitution process.

1 One of the things -- so on a legal substantive
2 basis, I've simply said that's a new injury, we need to
3 substitute for that named representative Plaintiff, get
4 somebody else who would fit that category and then file
5 a completely new action in ECF for the new injury.

6 THE COURT: I think that's what you have to do.

7 MR. MIGLIORI: So on a substantive basis, I
8 think that's fine. The only thing I don't want to run
9 into is on an ECF basis and not to run afoul of the
10 case management order, I want to be able to -- I think
11 there is a -- there could be a shortcut process for us
12 to do that as opposed to having to seek leave of court
13 or consent to add a new party for that purpose.

14 But I'm just -- I can approach the Defendants
15 and say, I want to substitute, will you consent to it;
16 but whether or not that is consented to, I'd like to
17 have some kind of facility in getting through that
18 process and then knowing what to do with the ECF side
19 of it.

20 THE COURT: I think first thing first is to
21 approach the other side; and if you can consensually
22 move to substitute a party, then you ought to do that.
23 And you can do it by way of a stipulation, and then you
24 can simply file that stipulation in the main case with
25 the notice on it that it applies only to that

1 particular individual case so that everybody's on board
2 and knows what's happened. I think that's the way to
3 do it.

4 MR. GRIFFIS: Sure. We've agreed to one of
5 those in the past with regard to Mrs. Montiel, and
6 actually you're overdue filing your substantive action.

7 THE COURT: What you're actually doing is you're
8 accomplishing multiple tasks from this side and this
9 side in one document, and the record then is clear that
10 that's exactly what you've done.

11 Now, in cases where you have no agreement from
12 the other side, obviously you're going to have to file
13 a motion.

14 MR. MIGLIORI: And that's why this is more
15 raised in the ECF context because, as Kirby indicated,
16 we've agreed in the primary case of process, we're
17 overdue because we're not quite sure on the ECF system,
18 Montiel was one of your very first filings, we're not
19 sure what we need to do on the ECF basis and the
20 logistical basis to let people know that that's now
21 going to be an individual case and that this case will
22 have a new caption.

23 THE COURT: Perhaps in a situation like that,
24 Barbara, we should have them file in both, file it in
25 the main and in the individual, because it's actually

1 going to change the name of the individual case.

2 MS. BARLETTA: So when you substitute a party?

3 THE COURT: Yes.

4 MR. MIGLIORI: I think that satisfies our ECF
5 concerns. And if something else comes up, I think we
6 generally will know where to go.

7 THE COURT: You will have more of these kinds of
8 questions, and I would suggest to you that the best
9 person to ask those kinds of questions of is Barbara,
10 who if she doesn't have the answer to it will find
11 somebody either in our office or at the JP --

12 MR. MIGLIORI: Panel. The panel.

13 THE COURT: Those guys, because they have
14 certain ways that they want things done as well in
15 terms of the docketing. So I would say start with
16 Barbara; and to the extent that you can agree on
17 something and simply file a stipulation that
18 accomplishes those tasks, obviously that makes
19 everything much simpler all around.

20 MR. MIGLIORI: That hasn't been a problem.
21 We'll do that. So that was ECF.

22 THE COURT: Okay. How are we doing on document
23 production? You alluded to it earlier today.

24 MR. MIGLIORI: Well, between that hearing and
25 now, I just learned that today we received 555,000

1 pages of documents, which is roughly 300 short of what
2 we anticipate this week.

3 THE COURT: Three hundred thousand or 300?

4 MR. MIGLIORI: Three hundred thousand pages
5 short of what we understood from last week we were
6 going to get, but it's a substantive production. Of
7 that 555,000, it includes the 250,000 previously
8 produced but now without redactions that were in
9 dispute.

10 So we've got a half million documents, which is
11 about 250, a little more than 250,000 more than we had
12 before, and it gives us some work to do on the coding
13 side. So that's a place to start. There are seven
14 DVDs.

15 One of the things that we proposed, and we
16 alluded to the fact that in the state court there is
17 some accelerated litigation, Mr. Griffis mentioned at
18 the last hearing that he thought it may take as long as
19 January to get this done. And the Court had asked us
20 to try to meet and confer and see if we can come to
21 some kind of agreement.

22 In trying to balance the two roles -- and to
23 advise the Court, just this past Thursday I was
24 appointed liaison for the state cases. So hopefully
25 there will be some facility in coordinating those two

1 efforts.

2 One of the things that we had proposed to
3 Mr. Griffis a few weeks ago was a November 1st deadline
4 where there was, generally speaking, in the beginning
5 of each month, beginning with August 1st, a 25 percent
6 production. I'm not so much worried that there
7 actually be 25 percent on the 1st of August, but if
8 there's at least a day at the beginning of each month
9 that we know to expect something, we can organize the
10 dozens of people from the different firms all over the
11 country to start working on them.

12 THE COURT: Didn't we also talk about you
13 developing some sort of a prioritization schedule so
14 that they could concentrate initially on those things
15 that were most important to you?

16 MR. MIGLIORI: We did, and Mr. Griffis and I
17 spent some time on the phone sort of thinking out that
18 idea. And I think we concluded, and he can correct me
19 if I'm wrong, but I think we concluded that that would
20 create sort of another layer of analysis. So if I said
21 all the marketing, now they have to look at really
22 marketing.

23 So I said, I don't care if we get all less
24 meaningful stuff in the beginning. I'm going to have
25 to read it at some point. So if you pick and choose

1 what you're saying is responsive but you know that
2 you're able to get us substantial productions on the
3 beginning of each month, again, I'm not going to stick
4 to a 25 percent but just some general expectation, then
5 I think November 1st would be a reasonable deadline for
6 95 percent substantial completion of the production,
7 and if there's more that comes after, again, it's just
8 to get some expectations and some kind of organization
9 so I can organize the people that now have to analyze
10 it, that we would do it.

11 I also said that knowing that in the state court
12 there are cases that as of right now we're still
13 pushing for trials this year, so it was sort of a
14 concession. I wanted to be more aggressive than
15 November 1st, but I said to balance the two courts and
16 try to play this sort of fair role, if you can do it in
17 both litigations on that schedule, then we would agree
18 to it.

19 And we asked -- that was about three or four
20 weeks ago or maybe three weeks ago; and as I understand
21 it, it's still being sort of contemplated to see if it
22 can be done.

23 THE COURT: Where are we?

24 MR. GRIFFIS: That's correct. It's a very
25 difficult thing to contemplate, as I told Judge Gibney

1 last week when we had this same conversation on the
2 10th. It involves both an assessment of the volume of
3 documents that there are and the nature of the
4 documents because the reviewers move more slowly when
5 they're reviewing some kinds of documents than other
6 kinds of documents.

7 And our experience is not yet of the entire
8 production, obviously, and won't be of the entire
9 production until we're done. So it's difficult to make
10 a projection for a whole lot of reasons, and I'm still
11 trying to do that.

12 I don't know that November 1st is realistic.
13 I'm certain that 25 percent, 25 percent, 25 percent,
14 25 percent I'm sure wouldn't come out that way, but --
15 and I know that Don's not insisting on that anyway.

16 THE COURT: But I think it's at least a
17 benchmark for you and your reviewers to aim toward.
18 Sometimes if you don't have a goal, you don't produce.

19 MR. GRIFFIS: Well, what we've committed to and
20 what we're doing is producing every month.

21 Mr. Migliori is going to receive an additional more
22 than 300,000 pages this week.

23 THE COURT: Okay. Which leaves how much left?

24 MR. GRIFFIS: That's what is so hard to tell
25 because it involves translating native electronic

1 documents into page counts, and it involves an
2 assessment of how fast those can be reviewed, and it
3 also involves documents that haven't yet been assessed
4 in terms of whether they are responsive, whether
5 they're producible.

6 THE COURT: I thought you said, though, that you
7 had an outside vendor that was reviewing all of this
8 and that you had 1.6 million.

9 MR. GRIFFIS: The outside vendor's responsible
10 for handling the electronic, and they've got the
11 documents electronically hosted. They handle things
12 like database productions, which I'll talk about in a
13 moment. They provide the technical assistance for that
14 sort of thing. They don't actually review the
15 documents. Our lawyers do that.

16 THE COURT: I understand that, but I thought you
17 gave me a number of 1.6 at that point.

18 MR. GRIFFIS: The number is higher now than 1.6.
19 I don't know what it is exactly. And the number that
20 they can give reliably is the number of documents that
21 they have collected, and that's -- what they can't get
22 reliably is how many documents there will be after
23 search terms have been run, certainly how many
24 documents there will be after we review them because
25 they have no idea about that.

1 THE COURT: When will you be able to answer that
2 first question? If they've now isolated all of the
3 documents in the universe and they then, as I
4 understand it, will run some sort of a program,
5 computer program that will send all of those search
6 terms in and then they get a response, when do they
7 anticipate having the answer to that question?

8 MR. GRIFFIS: I mean, they've already done that
9 process for lots of documents, and there are additional
10 documents that they haven't done that process for, and
11 I don't know what the answer is as to when they will
12 have done it for everything.

13 THE COURT: For our next meeting, would you come
14 prepared to answer those questions?

15 MR. GRIFFIS: I will.

16 MR. MIGLIORI: May I ask a question on that very
17 question? Because as I understood prior orders, that
18 by June 30th of -- that the population of documents
19 that were produced by the vendor were on the negotiated
20 search terms, that is, the number that they knew as of
21 June 30th was, in fact, after putting together the 80
22 search terms that we agreed upon or whatever they were,
23 that number was understood as of the end of last month.
24 But now you've --

25 MR. NUGENT: There was no order, though.

1 MR. MIGLIORI: It was a practice and procedure
2 order. We can get it for you. I think it was 9.
3 Which number is it?

4 MS. DONALDSON: Nine.

5 MR. MIGLIORI: I remember it was two sessions
6 ago. So there was a June 30th deadline, and that was
7 the vendor giving us a total population based on the
8 agreed-upon search terms. Was that -- that's what you
9 have.

10 MR. GRIFFIS: I was asked to project when the
11 vendor would have everything loaded up, and I did so.

12 MR. MIGLIORI: I'm not saying whether you
13 complied with it or not. I'm simply asking the number
14 that you understood at the end of June was not just
15 getting your arms around what documents existed but
16 what documents existed as a result of the search terms
17 that we negotiated. Correct?

18 MR. GRIFFIS: Right.

19 MR. MIGLIORI: And now you found other documents
20 beyond that that still need to be put into this
21 process?

22 MR. GRIFFIS: That's right.

23 THE COURT: And that's the answer I want next
24 month.

25 MR. MIGLIORI: That's point number one.

1 THE COURT: What difficulty would you have in
2 complying with an order that would require you to
3 produce 25 percent of what you've now identified each
4 month on, say, the same day or substantially around the
5 same day every month so that they can gear up for
6 receipt of all that?

7 MR. GRIFFIS: I wouldn't have any problem
8 setting the middle of the month as the regular time for
9 production. That's what we plan to do anyway.

10 THE COURT: Sure.

11 MR. GRIFFIS: It's impossible to say that next
12 month's production will be the same size as this
13 month's production because it depends on what kinds of
14 documents we're reviewing. If we were ordered to
15 produce a quarter of the documents by next month, I
16 think what we'd do is go find the ones that are easiest
17 to review and maybe make it next month and then fail
18 the following month because we'd be reviewing documents
19 that are harder to review and we'd be shifting the
20 hardest-to-review documents to the end of the process,
21 which I don't think is a good idea.

22 MR. MIGLIORI: And that's the bureaucracy we
23 were trying to avoid. I think the November 1st
24 expectation date -- and if we get into October and
25 there's something else to discuss, then that's fine.

1 We're not -- but what I would like at least on the
2 population of documents that were appreciated and
3 understood under PPO Number 9 of June 30th, if those
4 can be isolated now and we set November 1st so it would
5 be, you know, a six-month period to produce documents,
6 that should be plenty for that existing population, and
7 we'll do another wave of what they're finding now.

8 If we can get substantial completion of the
9 general expectation of production in the middle of each
10 month between now and then, then I would be satisfied
11 that we can do what we need to do to start analyzing
12 what we're receiving. And you can make whatever
13 decisions you want about priorities, manpower,
14 et cetera. And that just gives us each some -- again,
15 a general place to expect to be.

16 MR. GRIFFIS: What Judge Gibney ordered last
17 week was that we appear before her every two weeks
18 unless we mutually -- unless we talk and agree that we
19 don't need to meet because we're doing such a good job
20 meeting our discovery obligations.

21 So she's going to be tightly overseeing the
22 process of the rolling productions. We're completely
23 committed to moving as quickly as we can on this. I
24 just absolutely cannot with any confidence say that we
25 can meet November 1st, and I'm very concerned about

1 making a representation that's not completely within my
2 control and that involves things that I don't know
3 right now about how hard the documents that we haven't
4 gotten to yet are going to be to review, how many
5 documents will be responsive to search terms.

6 THE COURT: Let me make a suggestion to you. If
7 you have to appear before Judge Gibney every two weeks
8 or send in, I guess, a report that both sides are
9 satisfied, I will require you to do the same to
10 Judge Almond. And that way you're on the same schedule
11 in both cases and both sides in both cases will -- it's
12 the same universe of documents, so there's no point in
13 setting different schedules here and there.

14 If she's happy to have you come in every two
15 weeks, I'm sure Judge Almond would love to visit with
16 you as well. And if you're happy, then neither side
17 needs to come. You can just make your report, and
18 that's the end of it.

19 So as part of this month's order, Mr. Migliori,
20 I will ask you to include a provision that is
21 consistent with the one that Judge Gibney entered in
22 state court. I think that makes more sense since
23 they're already operating under that schedule and
24 that's actually even more than what you've asked for.

25 MR. MIGLIORI: Well, and let me just again take

1 a step back. She ordered that because in trying to
2 keep our trial dates this year, she actually is going
3 to, in this two-week review process, contemplate a
4 different priority, which I've alluded to on the record
5 would be much more aggressive than a November 1st
6 deadline.

7 So in doing this, I was trying to be respectful
8 of the process going on in the federal court, and I
9 said to Mr. Griffis this would be my compromise for
10 the -- for working both systems, that is, I won't ask
11 for September 1st completion. And we've been at this
12 for two years.

13 THE COURT: I know. I know.

14 MR. MIGLIORI: So I said I won't ask for a
15 60-day order in the state court. I'm trying to come up
16 with a system that's reasonable.

17 THE COURT: But you're already operating under
18 Judge Gibney's order there.

19 MR. MIGLIORI: But she has not yet heard my
20 prayer for deadline, that is, it's not that she did
21 that and --

22 THE COURT: Perhaps with a two-week review, you
23 may not need one.

24 MR. NUGENT: That's exactly what she said. He
25 asked for November 1st. He asked for 25, 25, 25, and

1 Judge Gibney said we can't --

2 MR. MIGLIORI: That's not true, Mark.

3 THE COURT: Just a minute. I've told you folks
4 before, direct your comments to me, not to each other.

5 MR. NUGENT: It was questioned, and the same
6 statement was made by Kirby.

7 THE COURT: I've heard enough on it. If you're
8 operating now under an order from Judge Gibney to do
9 this on two-week intervals, that means for the next
10 meeting I will or someone here will have seen or heard
11 from you or -- maybe not twice. And then if it's not
12 moving in accordance with what I think is the speed it
13 ought to move with, Mr. Griffis, move it along.

14 MR. GRIFFIS: Right.

15 THE COURT: I will enter an order that gives you
16 a deadline. I don't want to have to do that, but I
17 think it's time.

18 MR. GRIFFIS: Thank you, your Honor. I want to
19 state for the record that we disagree with Mr. Migliori
20 that there is any trial date in the state court, that
21 any trial date is being held.

22 THE COURT: I was going to ask what the status
23 is in state court on trial dates. Is Judge Gibney
24 going to be the trial judge in these cases?

25 MR. MIGLIORI: Yes.

1 MR. NUGENT: That's what my understanding is.

2 MR. MIGLIORI: If I can, your Honor. Judge
3 Gibney has accelerated four cases under Rhode Island
4 statutes for early consideration. She has not set a
5 deadline, a trial date.

6 THE COURT: She has not set a trial date?

7 MR. MIGLIORI: Because of this protracted
8 liability discovery. And what she has said, and unlike
9 what was just represented, what I represented to her
10 last week was that we'd like to keep this trial in 2008
11 or in the beginning of 2009, but we can't do anything,
12 we've done everything we can possibly do on the damages
13 side for these four cases, but we can't try a case
14 without the liability production. So we would like to
15 keep the pressure on.

16 I have not asked for a deadline in state court
17 because I am trying to figure out if we can come up
18 with a resolution that would be consistent. I would
19 relax the four trial dates -- and I am counsel of
20 record in those four cases along with Mr. Cory and
21 Ms. Toriseva. I would relax my request for this year,
22 which the Court is fully aware that I'm interested in
23 pursuing, if we can come up with this November 1st
24 deadline, again, not one that if on November 2nd they
25 haven't produced I'm going to file a technical motion

1 of noncompliance. I'm looking for progress and
2 movement and efficiency.

3 So the reality is that I can tomorrow file a
4 motion to compel and ask for a 60-day order on their
5 failure to produce in state court. I don't want to do
6 that. That's not my style.

7 THE COURT: I don't think that would be
8 productive at this point.

9 MR. MIGLIORI: It wouldn't, and that's why I
10 haven't specifically requested that. So what -- the
11 status of that case is, Judge Gibney is aware that we
12 are -- the basis for two of the cases being accelerated
13 is that they're over 65, and Rhode Island has a
14 specific statute for that, and that's because of age.

15 THE COURT: I know.

16 MR. MIGLIORI: The reality is that those four
17 cases are all our extremest in that there are very
18 serious health issues in those cases.

19 THE COURT: Are they ring break cases?

20 MR. MIGLIORI: They're ring break. There is
21 probably some disagreement as to what's a break or
22 what's a doctor issue, but they are break cases. So
23 we, in reality, are not likely to get a date this year,
24 not because we're not pushing it but because we don't
25 have the liability documents.

1 THE COURT: What, if anything, has Judge Gibney
2 said about mediation in those four cases?

3 MR. MIGLIORI: I can tell you -- nothing
4 specifically, but I can tell you that being on her
5 docket in the asbestos and lead poisoning litigations,
6 and all three of those are special assignment
7 litigations where each case is treated as an individual
8 case for trial but coordinated for discovery, she
9 typically, as a practice, will entertain mediation in
10 the weeks, that is, two weeks to four weeks out from
11 trial date, about when the expert discovery starts to
12 get complete and things like that. So she would not do
13 an early neutral evaluation; but we would, upon workup
14 of the punitive case, if we have one --

15 THE COURT: Does she do them herself?

16 MR. MIGLIORI: She does.

17 MR. NUGENT: For asbestos.

18 MR. MIGLIORI: And for lead, for the two dockets
19 she has.

20 THE COURT: But you haven't talked to her about
21 setting a schedule for that?

22 MR. NUGENT: She's never mentioned mediation.

23 THE COURT: Because you're not there yet.

24 MR. GRIFFIS: Right.

25 THE COURT: All right. Let's for now keep to

1 the two-week review procedure that she is utilizing in
2 those cases. And as I say, if I find that there's some
3 foot dragging going on, then I will be more amenable to
4 setting a deadline. So that ought to be a word to the
5 wise.

6 MR. GRIFFIS: Thank you, your Honor.

7 MR. MIGLIORI: Thank you, your Honor.

8 THE COURT: Before we talk about item number
9 three on the agenda, I'd like to talk about item number
10 four. I spoke briefly and only in general terms with
11 Judge Lovegreen at the conclusion of his having
12 conducted the nine -- I guess there were 10
13 conferences, one of which was the subject of a now
14 withdrawn motion for sanctions. Was that the Collins
15 case?

16 MR. MIGLIORI: Collins.

17 MR. NUGENT: Collins.

18 THE COURT: In Hyland and Swallow, Judge
19 Lovegreen in particular identified those two as cases
20 that he thought significant progress had been made.
21 And he thought that if the parties were willing, he
22 would also be willing to schedule a second or a
23 continuation of the initial settlement conference
24 because he thought, in his words, that he might be able
25 to work a resolution if the parties were willing.

1 I think you know him well enough by now to know
2 his ability and to know his commitment to trying to
3 work a resolution to these cases. He is not coming in
4 every day this summer, which he's entitled to do since
5 he's retired; but he has told me that he will be coming
6 in I think one day later this month and he would be
7 willing to devote that entire day to conducting an
8 additional or continuation, however you wish to view
9 it, settlement conference involving those two cases.

10 I told him that I would bring that up with you
11 today and that -- and that's why I included it on the
12 agenda. So you can think about it.

13 I do not wish to waste his time. So if the
14 positions that you took the last time you saw him are
15 intractable, then don't bother saying yes because you
16 think it's what I want to hear. But if you are truly
17 committed to trying to resolve those two cases, then I
18 would like to hear from you today and I will ask him to
19 schedule you in.

20 MR. MIGLIORI: Your Honor, if I may, for the
21 Plaintiffs, I spoke with both Andrew Carboy, who's the
22 local counsel on the Hyland case, and Robert Binstock,
23 who is the local counsel on the Swallow case. And by
24 the way, Swallow was originally filed here. Hyland was
25 filed in the Eastern District of New York.

1 Both counsel are very interested in continuing.
2 They thought the process was very helpful, not just on
3 the numbers side but on the valuation side, for all of
4 us, that we get a third party to really hear defenses
5 and arguments on each side, and I think it gives us a
6 better sense of the scope of our respective duties as
7 lead counsel, what kind of cases to move forward with
8 and to work on. So it's very productive. They're very
9 interested in it.

10 The mediator, without violating any of the
11 confidentialities, the mediator has a very clear idea
12 of where we are both currently in posture and where we
13 need to be. And for Plaintiffs, we're very interested
14 in doing it and, in fact, doing it with Magistrate
15 Lovegreen if he's available.

16 MR. GRIFFIS: I don't have the client's position
17 on this yet, and so I'm unable to commit to it. And I
18 don't think --

19 THE COURT: When can you get it?

20 MR. GRIFFIS: I don't think that they would be
21 in a position to have settlement talks this month, but
22 we were --

23 THE COURT: It's this month or none,
24 Mr. Griffis.

25 MR. GRIFFIS: With Magistrate Lovegreen.

1 THE COURT: Correct.

2 MR. GRIFFIS: I'll try to find out.

3 THE COURT: Twenty-four hours, Mr. Griffis. I
4 put it on the agenda so that you could speak to your
5 client about it. I didn't expect you to come here
6 today and tell me that you haven't talked to your
7 client about it.

8 So you've got 24 hours to speak to your client
9 and get me a letter as to whether or not your client is
10 amenable to having an additional session with Judge
11 Lovegreen.

12 MR. GRIFFIS: When this month?

13 THE COURT: It will be sometime in the next two
14 weeks. These cases have gone on. I can't remember
15 when those were filed, but this ought not to be a
16 surprise to your client. So you talk to whoever it is
17 that you have to talk to, and you get the thumbs up or
18 the thumbs down; but his availability ends on these two
19 -- I think he said he would be in one day during
20 August.

21 MR. GRIFFIS: Okay.

22 THE COURT: But I want to know, and I think it's
23 only fair to the Court that you make that inquiry, as I
24 say, in 24 hours I want to know.

25 MR. GRIFFIS: I understand.

1 THE COURT: And then I will ask him to have you
2 in.

3 MR. MIGLIORI: On that issue, and this is not a
4 pile-on issue by any stretch, and I know I run the risk
5 of making it sound this way, one of the things that
6 came up in these two cases was a need to go back to the
7 client about the recommendations made by the magistrate
8 judge.

9 THE COURT: No. I want to make this very clear.
10 When we conduct these, I want someone in that room with
11 full authority, full authority. That means somebody
12 with a checkbook.

13 I don't want to hear that you have to call
14 someone, that he's on vacation, that he's on a plane.
15 I don't want to hear any of those excuses. I want
16 someone in the room with full check-writing authority.

17 MR. GRIFFIS: We had that.

18 MR. NUGENT: We did.

19 THE COURT: Okay. Let's go to number three. I
20 saw what you filed, and what I -- and I've read it, and
21 what I want to do is ask Mr. Griffis whether he's had
22 an opportunity to review the Plaintiffs' position paper
23 and the list of proposed we're calling non-ring break
24 cases for early neutral evaluation or settlement.

25 MR. GRIFFIS: I've had a chance to review it,

1 yes.

2 THE COURT: And what is your position?

3 MR. GRIFFIS: Our position is that we don't have
4 any idea what these cases are from what has been
5 disclosed to us. Your Honor's order, PPO Number 11,
6 was that along with the identification of the cases we
7 be provided with a detailed description of the nature
8 of the failure alleged in each case and the reason for
9 inclusion of that case into this group of cases for ADR
10 as representative of a significant number of cases in
11 the litigation.

12 We simply haven't gotten that. The chart mostly
13 states -- there's no column that states nature of
14 defect in the chart that the Plaintiffs provided. The
15 column that comes closest to that is injuries. And for
16 eight out of the ten, it doesn't say a thing about what
17 allegedly happened with the patch.

18 The Kirk case says the mesh was now a large
19 complex ball and the mesh had contracted and balled up
20 but doesn't say anything about what defect in the patch
21 there may have been to cause that.

22 The Moreau case says the mesh was found rolled
23 inward but then says nothing about what defect was
24 involved, nor was there any attempt to say that these
25 cases fall into the following two or three or four or

1 ten categories of defect and they correspond to some
2 significant percentage of cases.

3 THE COURT: Okay. Mr. Migliori, I think you're
4 going to have to provide that information. Otherwise,
5 the Defendants can't be prepared to go into a
6 conference with you. And I don't think it's fair,
7 frankly, to the mediator, whoever that may be, if the
8 mediator doesn't understand what you contend to be the
9 defect.

10 It's a products liability case, so you've got to
11 identify the defect. It's not enough to say what the
12 injuries are.

13 MR. MIGLIORI: If I may, your Honor, the -- I'm
14 taken by surprise. We received no objection. So if I
15 had known that it was a technical issue about the
16 chart, I would have gladly provided that. We've had
17 this filed now since July 3rd.

18 THE COURT: I know.

19 MR. MIGLIORI: So on that basis -- and there was
20 never a phone call to say, Can you give me something
21 more specific. That said, I cited to two of dozens of
22 peer-review articles. I did a comprehensive overview
23 of what that type of defect actually is in the position
24 paper.

25 And this literally would have been inserted in

1 each of these individual columns; but instead of
2 creating that kind of document, I tried to point out to
3 the Court that beyond a ring break case, Kugel Mesh
4 goes from this new -- page 45 of the article materials,
5 *Characterization of Heavyweight and Lightweight*
6 *Polypropylene Prosthetic Mesh*, I'll give it to you
7 later, page 45, that's a new product on the bottom of
8 the page, and that's what it looks like when it's
9 explanted.

10 Now, for Defendants to come in here and say that
11 they don't understand what a migration case is or a
12 non-break case, that causes -- the consistency in the
13 column called injuries is that it doesn't say infection
14 and it doesn't say ring break, it doesn't say bowel
15 perforation from ring break; but when the injury does
16 say fistular adhesions, bowel perforations and the
17 category of cases is non-ring break, it's just a --

18 THE COURT: Are you saying that all of these are
19 migration cases?

20 MR. MIGLIORI: Absolutely, and these are
21 specifically for that purpose. We even refer to them
22 here in the first sentence, we put in parentheses
23 "migration." I can create another chart. I'm glad to
24 do it, but I didn't know this, and I would have done
25 that in a heartbeat. If I need to do more than two

1 peer-review cites, a five-page document and the chart,
2 I would be glad to do it; but I don't think two years
3 out where Mr. Griffis says we are --

4 THE COURT: With that clarification,
5 Mr. Griffis, what's your response?

6 MR. GRIFFIS: My response is that this is the
7 first I've heard that these are 10 migration cases.

8 THE COURT: Mr. Griffis, did you get
9 Mr. Migliori's July 3rd letter?

10 MR. GRIFFIS: Yes, I did.

11 THE COURT: Did you pick up the phone and ask
12 him what these were?

13 MR. GRIFFIS: No, I didn't. These two articles
14 that were attached as illustrative talk about oxidation
15 of the mesh. They don't say Bard products or Davol
16 products or Composix Kugel products or anything else
17 are prone to ball up.

18 THE COURT: Mr. Griffis, I have, to the point of
19 making myself sick hearing myself, said to talk to each
20 other in this case. If you had a question, don't wait
21 until today. Pick up the phone and ask Mr. Migliori
22 the question.

23 Now that he has clarified that these are all
24 migration cases and that is the defect, I want you
25 prepared at the very next meeting to respond to the

1 suggestion that the 10 cases selected by the Plaintiffs
2 go to early neutral evaluation.

3 If you have any further questions about the
4 nature of the defect that's been identified, I suggest
5 that you call and speak to Mr. Migliori long before
6 that date so you can clarify, but I want you prepared
7 on August 5th to answer that question. I will put this
8 on the agenda again for that meeting.

9 MR. GRIFFIS: Yes, your Honor. I do have two
10 questions right now. One of those questions is how
11 many cases are these 10 cases supposed to be
12 representative of if they're all the same, in the same
13 category. That's something that we were supposed to
14 know and I would like to know.

15 And secondly, we have no Plaintiff fact sheets
16 for three of the cases, Cathy Brezeale, Vivian Bruce
17 and Jolene Dillon. Two were filed last week, and one
18 was filed on June 20th. In order to talk about those
19 cases intelligently, I would like to have a whole lot
20 more information.

21 THE COURT: And that's a very reasonable
22 request, which if you had made it on any day before
23 today could have been taken care of.

24 So, Mr. Migliori, you also have an obligation to
25 provide the information to Mr. Griffis in a timely

1 fashion so that when we have this conversation next,
2 we're all on board with all of the information that we
3 need. So August 5 we'll take up that question with
4 respect to the 10 cases identified by the Plaintiffs.

5 MR. GRIFFIS: We have a related issue, your
6 Honor, with regard to disclosure of context for ADR
7 cases, and that was our request last time to get a list
8 of ring break cases. Your Honor ordered that
9 Plaintiffs' counsel make best efforts to provide that
10 by this hearing.

11 I spoke to Mr. Migliori about that before the
12 hearing, and he advised that they're 90 percent of the
13 way of being done doing that.

14 THE COURT: So by August 5, Mr. Migliori, or
15 sooner, you ought to have that information over to
16 Mr. Griffis.

17 MR. GRIFFIS: I do have a concern about what I
18 was told about that list. Mr. Migliori says that he
19 has been gathering information from multiple sources,
20 including representations directly by Plaintiffs'
21 counsel saying yes, we're saying this is a ring break
22 case or no, we're not saying it's a ring break case but
23 also, where they can't get that sort of information,
24 looking at the Plaintiff fact sheet or looking at the
25 Complaints to extract that information and that when we

1 get that list, it won't distinguish between those
2 sources.

3 What we would like is for each of the Plaintiffs
4 that has a case in the MDL to state whether it is their
5 position that it's a ring break case.

6 THE COURT: Isn't that part of the Plaintiff
7 fact sheet already?

8 MR. MIGLIORI: Yes.

9 MR. GRIFFIS: It's a question to the Plaintiff,
10 and they're free to say I don't know. Plaintiffs'
11 counsel should have a better ability to answer that
12 question. Your Honor's order was that we will get a
13 list, Plaintiffs' liaison counsel shall make best
14 efforts to provide by this hearing a list in which
15 Plaintiffs' counsel contends involves product failure,
16 including a break in the memory recoil ring of the
17 product.

18 I would ask for that to be an actual statement
19 by Plaintiffs' counsel, not something extracted from
20 the Complaint. And the reason for that is because a
21 lot of the Plaintiff fact sheets that we see are pretty
22 unclear as to what the injury is. They say I don't
23 know and I'll have to supplement or I don't really
24 understand what went wrong, something went wrong.

25 A lot of the Complaints are even more vague.

1 They go on at great length about the recall and the
2 ring breaks and you didn't warn us about the propensity
3 to break and migrate and perforate my bowel, even
4 though they're not claiming that all of those things
5 necessarily happened. The client is kind of a
6 blunderbuss, often --

7 THE COURT: Let me suggest to you that, and I
8 don't want to relieve Mr. Migliori of his
9 responsibility in this regard, I think that there will
10 be a category of cases where ring break is very clear
11 and Plaintiffs' counsel ought not to have any
12 difficulty at all in identifying and isolating those,
13 and that should be a list that is provided to defense
14 counsel immediately.

15 There will be an additional category where it
16 will probably be likely that the cause of injury was
17 ring break, although it can't be confirmed, and you
18 wouldn't have a problem receiving such a list from
19 Plaintiffs' counsel with that caveat that these look
20 like they may be but it's unclear at this point.

21 In other words, he's identifying for you from
22 his review of all of the papers they have at their
23 disposal and their access to the clients and their
24 physicians what they have.

25 And then there will be a third category of the

1 "I don't knows." That third category should get
2 smaller and smaller as time goes on; but at the very
3 least I think for those that you know for sure are ring
4 break cases where there's been an explantation and
5 you've got it, I think you ought to be able to produce
6 that list to Mr. Griffis by the end of this week if you
7 haven't done it already.

8 For the middle category, you ought to be able to
9 identify those in the next couple of weeks. So if you
10 categorize them that way, I think, Mr. Griffis, that
11 that makes your life and your job a little bit easier.

12 MR. GRIFFIS: Yes, your Honor.

13 MR. MIGLIORI: And just to complete the record
14 on that, your Honor, that's exactly what we've been
15 doing. And what we have that's 90 percent complete
16 right now is based on our inquiry.

17 Again, the same issue came up this morning. I'm
18 liaison counsel. I don't have client relationships
19 with each of these clients, but I do have access to
20 each of the attorneys. I don't even have associations
21 with them other than my role as liaison.

22 We've gone to the Complaints, my office, gone to
23 the Complaints, went to the PFSS and sent out e-mails
24 directly to counsel. We've set up three categories of
25 client, whether it was claimed to be a ring break,

1 whether it was a non-ring break failure alleged or I
2 don't know.

3 As long as -- as I understood our conversation
4 out in the hallway, Mr. Griffis seems to want me to
5 make representations of counsel that are binding. This
6 is organic, much like the class issues this morning.
7 This will necessarily change. I'm more than willing to
8 do that work for him for the efficiency of the
9 litigation as liaison counsel, but the Defendants keep
10 trying to pin this as a ring break only case as if
11 doctors when they write their report are sensitive to
12 the idea that this failed because of a break versus a
13 migration.

14 And when they both cause the same injuries, that
15 is, when they both cause bowel strangulation,
16 adhesions, it may never come out that this is a break
17 versus a balled-up product or that both didn't happen.

18 So I'm perfectly happy and consistent with this
19 Court's orders, I'm bound to and I agree to this week
20 produce our list as best as we can do it by the end of
21 this week; but I don't want this to turn into there
22 being any confusion later that this is, a-ha, I told
23 you, when a case gets tried.

24 So to the point where the negotiated Plaintiff
25 fact sheet -- remember, this was a process of going

1 back and forth, and we had one remaining issue in that
2 process, and it was this issue. Mr. Griffis wanted a
3 ring break or no break, and the Court --

4 THE COURT: I added the "I don't know."

5 MR. MIGLIORI: And that was our request. Again,
6 we're willing to do it, but I'm not willing again to go
7 back to redefining what the MDL is. It's not about
8 breaks only.

9 MR. GRIFFIS: What I asked for, your Honor, is
10 that it sounds like Mr. Migliori is acquiring
11 information of different qualities. Some of that
12 information has a relatively high quality, i.e., when a
13 Plaintiff's counsel responds to his e-mail and tells
14 him, Yes, we're contending this is a ring break case.

15 I'd like to know that that came from the
16 Plaintiff's counsel saying that, Yes, we're taking that
17 position, as opposed to Mr. Migliori not being able to
18 get in touch with someone and looking at the Complaint
19 and seeing that it mentions ring break.

20 THE COURT: Well, that's a differentiation that
21 I don't think was addressed in the initial request.

22 MR. MIGLIORI: And the Plaintiff fact sheets
23 from the attorney. That's the whole point. That
24 Plaintiff fact sheet with those three questions is from
25 that attorney. I'm only liaison. I can't make that

1 attorney say, I meant it then, but I really mean it
2 when you ask me, Mr. Migliori.

3 THE COURT: I think I've made it clear that
4 Mr. Migliori, to the extent that he can identify
5 clear-cut cases of contended ring break, ought to make
6 that list available.

7 As I said, I think there are essentially three
8 categories here, that category, the third category of I
9 just don't know and the middle category of it may be
10 so. The whole point of your having the ability to do
11 discovery in the case is to pin those down in the third
12 category, it seems to me, and the fourth category.

13 So, Mr. Migliori, how soon do you think you can
14 have part one of that list over to Mr. Griffis?

15 MR. MIGLIORI: I can have the entire list
16 actually by Friday.

17 THE COURT: Fine.

18 MR. MIGLIORI: Again, there are a few lawyers
19 that we're just wanting to firm up with.

20 THE COURT: Okay. Pending motions. We took
21 care of two of them this morning, and I saw the list of
22 what's pending.

23 MR. MIGLIORI: There's one that's under
24 advisement, a motion on clarification of an ex-parte
25 order.

1 THE COURT: That's before Judge Almond. Is that
2 right?

3 MR. MIGLIORI: Yup.

4 THE COURT: Okay. There is a motion to amend
5 the PFS which I think is fully briefed at this point.

6 MR. GRIFFIS: It is.

7 MR. MIGLIORI: I think so. Yes.

8 THE COURT: And I'm prepared actually to decide
9 that today. And then there are some other motions
10 pending, motion to remand in Palmer, there's another
11 motion to show cause in Huerta and Reynolds and Wilson.

12 On those, as we did this morning, to the extent
13 that the parties can work out a resolution as you did
14 this morning with some of these, on a couple of them
15 you agreed to a dismissal without prejudice on
16 condition, and then there were some additional
17 agreements that we struck this morning as to how to
18 handle those, be reasonable about it, and if you can
19 resolve them before the 5th, then do that.

20 I don't want to schedule these for hearing if
21 there's not a need for a hearing. I'll probably go
22 ahead and schedule them when they are fully briefed,
23 and it should be before the 5th for that morning as we
24 did today; but if you're going to resolve them, then
25 file a stipulation to that effect or send me a letter

1 that says you've worked it out.

2 So that's with respect to Huerta, Reynolds and
3 Wilson. Palmer, looks like that was -- that's not
4 fully briefed. There's a reply due on that.

5 MR. MIGLIORI: There is a reply due, your Honor.
6 That's counsel on the west coast, and I'll look at the
7 papers. If it falls into, just like this morning's
8 hearing, if there's a roadmap from prior hearings that
9 may apply to this, I'll do the appropriate thing with
10 the Plaintiff counsel and take the position.

11 THE COURT: I don't even know what the issue is
12 on that one in terms of the remand because I haven't
13 looked at it. So if you would take a hard look at
14 that, we'll probably schedule that also for the 5th;
15 but if we don't need to have a hearing on the 5th,
16 that's not a bad thing.

17 MR. MIGLIORI: I think I should be able to give
18 an answer by this week of whether we need to go forward
19 on that.

20 THE COURT: And what I would like to do now,
21 then, is to put to bed this question about tax
22 information and whether or not it should be required of
23 every single Plaintiff who fills out one of these
24 Plaintiff fact sheets.

25 I've read through all the papers on this, and

1 I'm also familiar with Judge Almond's ruling on the
2 motion to compel. I do not see a basis for a Plaintiff
3 in a case where the Plaintiff is not seeking economic
4 damages, that is, lost wages, lost earning capacity,
5 lost income, any of that, to provide tax return
6 information.

7 And so the Plaintiffs' motion to amend the fact
8 sheet to reflect that ruling is granted. To the extent
9 that at some point along the way, as the Defendants
10 claim, that information may be relevant because of
11 other things that develop within a case, then initially
12 the parties ought to work that out amongst yourselves
13 as you're required to do under the rules; and, if not,
14 then you can file an appropriate motion.

15 But I think it was probably somewhat -- strike
16 that. In any event, Plaintiffs' motion is granted, and
17 you can do whatever you need to do to make the
18 appropriate amended -- amendment to the fact sheets
19 that have yet to be sent out and to those that are out
20 there, and this is -- that are subject to this dispute,
21 then the Plaintiffs are not required to provide that
22 information at this time. So you can make that a part
23 of the order as well.

24 MR. MIGLIORI: The PPO. Okay.

25 MR. GRIFFIS: Thank you, your Honor.

1 THE COURT: August 5, 1:00, and then I want you
2 to think about September. I will not be here the first
3 week, which is the week of Labor Day, and then I'm
4 going to start a three-week-long public corruption
5 trial. So I would prefer not to meet with you, which
6 is not to say that I don't enjoy your company, but I
7 don't think I can give you my full attention when I've
8 got something of that magnitude going on.

9 So you have a choice. Judge Almond may be
10 available to conduct this conference with you so that
11 we can keep the momentum going, or you can think about
12 skipping September and moving to October. So be
13 prepared to address that one at the August 5th meeting.

14 MR. MIGLIORI: Thank you.

15 MR. GRIFFIS: Thank you, your Honor.

16 THE COURT: Okay. Thank you. Have safe trips
17 back.

18 (Adjourned)

19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Karen M. Wischnowsky, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Karen M. Wischnowsky_____

Karen M. Wischnowsky, RPR-RMR-CRR

August 6, 2008_____

Date