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

\* \* \* \* \* MDL NO. 07-MD-1842ML  
\*  
IN RE: KUGEL MESH HERNIA \*  
\* PATCH PRODUCTS \* AUGUST 5, 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 5 AUGUST 2008 -- 1:00 P.M.

2 THE COURT: Before we get started on the agenda,  
3 and I've actually added a couple of other things that  
4 we'll talk about that came up in the last couple of  
5 days, but before we get into my part of what I've added  
6 and also what is listed on the agenda notice that went  
7 out, there is a matter regarding some recent filings  
8 that have absolutely wreaked havoc with our ECF system.

9 I'm told it's primarily coming from the defense  
10 side, and I want to make it very clear to counsel of  
11 record who have been given ECF filing privileges in  
12 this court that it is incumbent on you to make sure  
13 that if anyone else within your firm with your  
14 permission is also utilizing your filing privilege,  
15 that that individual be fully schooled in how to do it  
16 correctly.

17 As I say, I have a wonderful staff who have just  
18 incredible patience in working with lawyers and parties  
19 who are working their way through the system; but when  
20 they tell me that they are frustrated, it means that  
21 something very bad happened. And so that it's clearly  
22 set out for you, I've asked John Duhamel to explain to  
23 you what the nature of the problem is so that you will  
24 understand what our problem is with what's been done,  
25 you can locate the source of the problem and fix it.

1 Otherwise, we'll have to do something much more  
2 drastic, and I don't want to have to do that.

3 So, John, can you let them know what's going on.

4 MR. DUHAMEL: I'll try to be brief. Between  
5 yesterday afternoon and this morning, I had to make 17  
6 modifications concerning Defendants' Documents 1248  
7 through 1264. They're all styled as Answer and  
8 Affirmative Defenses of Defendants Davol and C.R. Bard.  
9 And in every single instance, in the docket text the  
10 wrong Plaintiff and the wrong docket number was  
11 referenced in relation to the individual document  
12 scanned.

13 After the first nine of those documents were  
14 filed yesterday, I made a corrective docket entry  
15 notation hoping to stem the flow with an electronic  
16 notification to defense counsel; but when I came in  
17 this morning, I discovered an additional eight filings,  
18 all of them once again with incorrect information on  
19 the docket text, prompting me to issue yet another  
20 corrective docket entry.

21 So I don't know who filed these 17 documents,  
22 but they're just plain not paying attention. I wasted  
23 almost 45 minutes going in to correct those documents  
24 yesterday afternoon and this morning.

25 I can give you an example. 1248, the document

1       itself referenced an Answer to the Complaint of a  
2       Christina McClusky, and yet the docket text referenced  
3       a Kraig Valedez and again both referencing the wrong  
4       docket numbers and on and on and on through all 17  
5       documents.

6               There was not one that was correct. And, in  
7       fact, because a couple of them were scanned  
8       incorrectly, you have duplicative documents in two  
9       instances. Essentially you have Answers and  
10      Affirmative Defenses of the same Defendants in two  
11      different cases.

12              THE COURT: As you know, it is difficult enough  
13      to keep track of everything in this case as it is  
14      because of the sheer volume of number of cases and  
15      number of documents as they pertain to each of the  
16      cases; but when we have a situation like this, which I  
17      think John has now identified clearly for you, you  
18      ought to be able to find out who is responsible within  
19      your organization and take that individual or  
20      individuals aside and either teach them how to do it  
21      the right way or don't let them do it at all because  
22      it's really wasteful, it's confusing, and whoever did  
23      it after John sent the corrective notice doesn't  
24      understand the whole idea of sending a corrective  
25      notice if they didn't figure out that they did it wrong

1 in the first place.

2 So I would strongly urge those of you on the  
3 defense side of the table, we haven't experienced this  
4 so far with Plaintiffs, but this was massive and we  
5 need to have you stop it.

6 MR. GRIFFIS: We'll address it immediately.

7 THE COURT: So please do so. John, did you have  
8 more?

9 MR. DUHAMEL: No. I'm all set.

10 THE COURT: And Barbara --

11 MR. GRIFFIS: I'm sorry, John, about that.

12 MS. BARLETTA: I had already spoken to  
13 Mr. Griffis about the sealing problem.

14 THE COURT: I want to talk about the sealing  
15 problem that we had this week, and I want to talk about  
16 it on two levels. One is a legal question, and the  
17 second is a more practical consideration.

18 This week there were -- I believe they were  
19 motions to dismiss filed with respect to some of the  
20 Complaints which I think were the subject of some of  
21 our discussion last month where there are some  
22 deficiencies that have not been corrected in the  
23 Plaintiff fact sheets, and this is all in concert with  
24 the case management order. Everybody expects that this  
25 will happen.

1           However, we have a local rule that is very  
2           specific in telling you how to file something under  
3           seal, and it clearly tells you it is not to be done  
4           electronically; but, rather, it spells out procedurally  
5           how it's to be done.

6           Despite that, apparently what was filed  
7           electronically, and again this came from the defense  
8           side so you need to talk to whoever is pushing the  
9           buttons in your shop, I think three Plaintiff fact  
10          sheets were electronically filed.

11          What you must understand is that when those are  
12          electronically filed, they are immediately available to  
13          the general public. And those fact sheets, as you  
14          know, contain very, very sensitive personal  
15          information.

16          So immediately upon seeing them, which, of  
17          course, is several hours after they're already out  
18          there, we've restricted access to those. And I think  
19          Barbara contacted Mr. Griffis and told him, You'd  
20          better figure out how to do this the right way. That's  
21          the legal piece of it. You need to look at the local  
22          rule, and you need to follow it to a T.

23          The practical consideration is this. Unless I  
24          ask for it, I don't see a reason why the entire  
25          Plaintiff fact sheet needs to be appended as an

1 exhibit.

2 You appended the letters notifying the  
3 individual attorneys on the Plaintiffs' side of what  
4 portions you contend are deficient. That's sufficient  
5 for me without making these massive filings. Those  
6 fact sheets are very long and, as I say, contain a  
7 great deal of sensitive personal information that I  
8 don't even need to know to make your case out for  
9 claiming a deficiency that hasn't been addressed.

10 So unless the Court asks you for a copy of that  
11 Plaintiff fact sheet that you think I should pore  
12 through, I think that the deficiency letter is  
13 sufficient.

14 MR. GRIFFIS: All right.

15 THE COURT: Any questions on that one? Do you  
16 agree?

17 MR. MIGLIORI: I'm perfectly -- in fact, very  
18 grateful that we didn't catch it and that the Court  
19 did. So I do agree.

20 THE COURT: I have --

21 MR. MIGLIORI: The best.

22 THE COURT: -- the best. I absolutely do, and  
23 I'm including Karen in this, as you all know. You've  
24 been working with Barbara, John and Karen for over a  
25 year now. I am blessed with the best. We catch these

1 things.

2 But if we're going to live together with this  
3 for at least another year, I would say the way things  
4 are going, I want to make sure that we do it all right.

5 And I know for us electronic filing is still  
6 relatively new, but it's -- you've got to be extra,  
7 extra careful because people's rights are involved and  
8 Social Security numbers are out there for people who  
9 troll these kinds of files. I don't need to tell you  
10 about your own liability and exposure.

11 MR. GRIFFIS: Yes, your Honor.

12 THE COURT: Okay. Let's now turn to the agenda.  
13 Item number one, we were going to get a report on the  
14 documents that your vendor is working on. How are we  
15 doing with that?

16 MR. GRIFFIS: The current report from BIA is  
17 that they have 2.6 million documents loaded. There is  
18 no date by which searches are going to be completed on  
19 those 2.6 million because they're done running searches  
20 on all 2.6 million documents.

21 There's a 29 percent hit rate on those documents  
22 yielding 754,000 documents that are responsive.

23 THE COURT: How many?

24 MR. GRIFFIS: There are 754,000 documents that  
25 are responsive to the search terms.



1 THE COURT: Is that 29 percent hit rate done --  
2 is that an estimate based on a sampling or is that an  
3 actual --

4 MR. GRIFFIS: That's the actual count.

5 THE COURT: That's the actual count?

6 MR. GRIFFIS: That's the actual count.

7 THE COURT: So we have about three quarters of a  
8 million documents that are responsive.

9 MR. GRIFFIS: Well, that are electronically  
10 responsive, yes.

11 THE COURT: In terms of the hits.

12 MR. GRIFFIS: Right.

13 THE COURT: And they have not been reviewed by  
14 human eyes at this point.

15 MR. GRIFFIS: That's right. We find the  
16 responsiveness rate drops dramatically when that  
17 happens.

18 THE COURT: And how quickly -- let me ask this  
19 question. Of those 750,000 or so, how many of those  
20 can be categorized as research and development,  
21 something that would be helpful to the Plaintiffs?

22 MR. GRIFFIS: The Plaintiffs have asked us,  
23 rather than focusing on subject matter categories like  
24 that, to just proceed with whatever makes the most  
25 sense for us in terms of getting through the production

1 as quickly as possible, and we're following that  
2 mandate in our document review.

3 THE COURT: Okay. And now that these  
4 750-some-odd thousand have been identified  
5 electronically, what procedure do you have in place to  
6 conduct the human eyes' review that would precede the  
7 actual production?

8 MR. GRIFFIS: We have attorney document  
9 reviewers who look at all of those documents and make  
10 the necessary evaluations.

11 THE COURT: How many people do you have working  
12 on it?

13 MR. GRIFFIS: More than 10.

14 THE COURT: More than 10. And of those  
15 documents, how many of those are also a part of the  
16 discovery process in state court?

17 MR. GRIFFIS: All.

18 THE COURT: Okay. And so the same 10 reviewers  
19 or 10 plus reviewers?

20 MR. GRIFFIS: Right. There's not a separate  
21 review process for state court.

22 THE COURT: Are these 10 full time?

23 MR. GRIFFIS: Yes.

24 THE COURT: What does that mean, full time?

25 MR. GRIFFIS: More than 50 hours a week.

1 THE COURT: Okay. And what is their current  
2 rate of review on a weekly basis?

3 MR. GRIFFIS: I don't know the answer to that in  
4 terms of --

5 THE COURT: Ballpark?

6 MR. GRIFFIS: I don't have the answer. I can  
7 report on that in two days when we do our document  
8 production report.

9 THE COURT: Do you have even a sense of --

10 MR. GRIFFIS: I know that when I ask questions  
11 like that, I'm told that it varies a lot, and it varies  
12 because --

13 THE COURT: Because of the size of the document.

14 MR. GRIFFIS: The size of the document and the  
15 nature of the document.

16 THE COURT: Do you know -- you've said 754,000  
17 documents. Do you know how many pages that entails?

18 MR. GRIFFIS: I don't.

19 THE COURT: Can you get that information so we  
20 can get a handle on exactly the size of this?

21 MR. GRIFFIS: Not -- no. I'd love for you to  
22 have the experience of trying to talk to an electronic  
23 document vendor about this.

24 The issue is, basically, to put it in a  
25 nutshell, the documents are in native format and

1 they're being kept in native format and they can  
2 identify them by documents in native format.

3 For example, let's say you have a big Excel  
4 spreadsheet. That's one document. That's easy for  
5 them to count. They don't know what that would be  
6 printed out. It would depend on how you printed it  
7 out, and it may be meaningless to even come up with a  
8 count.

9 And what they tend to do is say based on  
10 statistical sampling or based on our experience of 500  
11 other document reviews for corporations, we estimate  
12 7.9 pages per document and, therefore, we estimate this  
13 number of pages. And they give you a list of caveats  
14 as long as your arm so you're not at all sure where you  
15 are as far as the page count goes.

16 THE COURT: And some of these 754,000 have  
17 already been produced?

18 MR. GRIFFIS: Yes. That's correct.

19 THE COURT: But some may have been produced in  
20 redacted form?

21 MR. GRIFFIS: Yes. That's correct.

22 THE COURT: Are these also the subject of  
23 Judge Gibney's every-two-week review?

24 MR. GRIFFIS: They are.

25 THE COURT: And Judge Almond has contacted me.

1 He's, as you've noticed, not here today, but he has  
2 contacted me. And I guess in order to conserve energy  
3 and resources, rather than have you report to him at a  
4 different time, he is going to be getting together with  
5 Judge Gibney so that one report is made at the same  
6 time.

7 MR. GRIFFIS: All right.

8 THE COURT: And I think that that will, as I  
9 say, conserve some of the resources. Is there any way  
10 that your -- this now is out of the hands of your  
11 vendor, is that it?

12 MR. GRIFFIS: Well, the vendor has the  
13 documents, and they have a review --

14 THE COURT: And they've got the hit list.

15 MR. GRIFFIS: They've got the hit list. They're  
16 done with most of their end. There are some new  
17 documents that come in on an ongoing basis, and they  
18 immediately process those and post them; but it's not a  
19 significant volume.

20 THE COURT: But the ones that you've had the  
21 hits on now are part of a list?

22 MR. GRIFFIS: Right.

23 THE COURT: And that list, do I take it now that  
24 your reviewers are now in the process of going through  
25 all of those?

1 MR. GRIFFIS: Yes. That's right.

2 THE COURT: But you can't tell me how many in  
3 any, say, given week on average they are able to  
4 review?

5 MR. GRIFFIS: Sitting here, I can't tell you  
6 that. I can probably report in a couple of days on the  
7 historical figures with the caveat that that's not  
8 necessarily a good predictor of future performance, but  
9 I can do that.

10 THE COURT: All I'm looking for is a ballpark so  
11 that any order I make is based on some valid historical  
12 reference and I'm not making an order that just doesn't  
13 make any sense.

14 MR. GRIFFIS: Right.

15 THE COURT: So if you can get to me and to  
16 Mr. Migliori by the end of this week based on your  
17 history of your 10-plus reviewers working 50-plus hours  
18 a week each on this, so now we're talking in the range  
19 of over 500 hours per week, how quickly they can turn  
20 these out on a weekly or monthly basis. Have they been  
21 at it for a month?

22 MR. GRIFFIS: They've been at it for more than a  
23 month.

24 THE COURT: Why don't we get it on a monthly  
25 basis.

1 MR. GRIFFIS: We are focused on monthly  
2 production. There was one on July 15th. There will be  
3 one on approximately August 15th.

4 THE COURT: So we get a sense of how fast  
5 they're moving and when we can anticipate that there  
6 will be a final production.

7 MR. GRIFFIS: Okay.

8 THE COURT: Final meaning of this batch. I  
9 understand that you're still looking and that there may  
10 be more in the future.

11 MR. GRIFFIS: I understand.

12 THE COURT: Did you have anything on this?

13 MR. MIGLIORI: If I may, I think the Court  
14 covered most of my questions. And there were a couple  
15 of issues about the documents that were reviewed by the  
16 vendor up to the June 30th date, and it sounds like  
17 those are done. And there are some stragglers that may  
18 still be coming in, but that's not going to wag the  
19 dog. I think I'm comfortable with everything.

20 If I can, though, I'd like to make sure that  
21 what I've received is accurate. So can I report on  
22 what I have?

23 THE COURT: Sure.

24 MR. MIGLIORI: And see if we're in the right  
25 place. On July 14th -- to date, we have of this

1 production 877,931 pages of documents produced in the  
2 month of July.

3 THE COURT: How many documents does that  
4 comprise?

5 MR. MIGLIORI: I think we had a calculation, and  
6 I think it was in the 60,000 range, I think, but they  
7 were produced to us as pages. And so the Court  
8 understands, when we get them, each page is a separate  
9 file. So we have to actually reconstruct, and the IT  
10 people do it. So for us it's easier to just identify  
11 pages because that's how we get them.

12 We have 555,000 pages on July 14th of which  
13 300,000 were already produced to us. These were just  
14 reproduced to us as less redacted under an existing --

15 THE COURT: Okay.

16 MR. MIGLIORI: So we have 255,000 pages of new  
17 documents on July 15th -- July 14th. On the 15th, the  
18 next day, we received approximately another 100,000  
19 documents, 100,000 pages. I'm sorry. On the 16th, we  
20 received another 53,000 pages; on the 17th, we received  
21 another 83,000 pages; on the 18th, another 80,000  
22 pages; and then on July 23rd, another 3,000 pages. So  
23 to date we have, again, about 875 -- 77 thousand pages  
24 of documents.

25 We now have our reviewers, which are more than



1 10 as well, closer to 30, going through them on a  
2 rotating basis. And we've learned lots of things about  
3 the production, and we'll raise precise concerns about  
4 how they're produced or the confidentiality  
5 designations that are appearing, we'll raise those in  
6 the Thursday meeting with Judge Almond in the first  
7 instance. But to date, of the 877,000 pages we've  
8 received, only about 500,000 of those are new.

9 So I don't know if that's helpful. I don't know  
10 when those started and when those didn't start; but in  
11 this production in the federal court, we have 500,000  
12 pages that have gone through their process as a  
13 historic number.

14 And I want to make sure, first of all, that  
15 seems consistent with your understanding.

16 MR. GRIFFIS: I believe that's about right.  
17 That's of the process that was initiated by Plaintiffs'  
18 request that we do this search-term review rather than  
19 the review that we initially did.

20 THE COURT: Okay.

21 MR. GRIFFIS: We made a production of 280,000  
22 pages or something like that using that methodology  
23 previously.

24 MR. MIGLIORI: Is there any sense of -- I know  
25 it's, again, not a good predictor, but is there a sense

1 for August, next week's production, that we're in the  
2 same volume or that it's bigger or smaller?

3 MR. GRIFFIS: I believe it's smaller because of  
4 the nature of the documents.

5 MR. MIGLIORI: So we'll have -- I guess the best  
6 thing to do is to see another round and see how it  
7 goes. But just to state the obvious, we're very  
8 concerned two years in that at this pace it's too slow,  
9 but we'll work within the system. It will be helpful  
10 to have both --

11 THE COURT: That's why I want the number. You  
12 say more than 10. He's saying he's got 30. Give me --  
13 you know how many you have. How many people do you  
14 have working on this?

15 MR. GRIFFIS: It's 10 reviewers on a day-to-day  
16 basis.

17 MS. LATIMER: Ten attorney reviewers.

18 THE COURT: That's all? Are there other  
19 reviewers besides the attorneys?

20 MS. LATIMER: Yes, because not all of the  
21 documents necessarily need a lawyer's review.  
22 Depending on the type of documents and the kind of bulk  
23 nature of some of the documents, they can be more  
24 easily processed; but those people are not devoted to  
25 the review full time. So Kirby's number is exactly

1 right on a full-time review team basis of lawyers.

2 THE COURT: Who are lawyers.

3 MS. LATIMER: It's about 10. Some have not  
4 necessarily been willing to do document review for  
5 their whole career and have moved on, but it's 10 at  
6 the moment devoted to that on a lawyer team.

7 THE COURT: And how many nonlawyers?

8 MS. LATIMER: That number, as I say, that  
9 depends on the collection on a given day. So I can't  
10 tell you that that's a full-time team.

11 In other words, there might be 10 legal  
12 assistants, but I can't suggest to you that they're  
13 working full time on that because they're not.

14 THE COURT: If you would, when you provide us  
15 with the number, average number of documents reviewed  
16 by either nonlawyer or lawyer reviewers, would you at  
17 the same time tell us, again, on average, the number of  
18 nonlawyer reviewers who have worked on a monthly basis.

19 And that's why I say, if you average it out,  
20 then that gives us an idea if it's one and a half, if  
21 it's three, whatever it is, so that I can get a  
22 ballpark of where we are so that when Mr. Migliori asks  
23 the Court for an order telling you to do it quicker, I  
24 know whether or not he's within his bounds asking for  
25 such an order and, if I'm inclined to grant such an

1 order, that I don't make it unreasonably onerous for  
2 you to comply with.

3 But I can almost guarantee you that he's already  
4 telling you this is too slow. So you may need to find  
5 other young associates who want to cut their teeth on  
6 document review to speed up the process.

7 MR. MIGLIORI: We've discussed at a prior status  
8 conference, chambers conference, the potential for  
9 slowing this process down even more on the issue of the  
10 confidentiality order.

11 And although I didn't file a motion, one of the  
12 things that this Court recognized in that conference  
13 was that there was some, in the first instance,  
14 obligation of the Defendants to make a good faith  
15 assessment.

16 I don't want to slow down this process anymore,  
17 but I also don't want to go back in the next wave and  
18 make the same observations; but in that 877,000, we've  
19 got confidentiality, protective order stamps on every  
20 page, including public filings with the Government.

21 THE COURT: That's got to stop.

22 MR. MIGLIORI: So, again --

23 THE COURT: That's not acceptable.

24 MR. GRIFFIS: That should not be the case, your  
25 Honor, and I'll look into it; but this is the first

1 time it's been raised with me.

2 MR. MIGLIORI: I just got these this morning, so  
3 I'm doing this just to not have the problem, not create  
4 the problem.

5 THE COURT: What I want you to do before you  
6 raise a problem with me is to talk to each other. It  
7 may be with so many people working on the project that  
8 somebody gets an order to do something and then takes  
9 off and starts going stamp happy.

10 So if that's the case, you've got to get the  
11 word out to whoever your young associates are who are  
12 working this that that's not acceptable.

13 MR. MIGLIORI: And that's the only reason I --  
14 these are some examples, and maybe that helps you  
15 isolate some of it.

16 THE COURT: You can figure out who's  
17 responsible, but ultimately it's going to be -- you're  
18 the warm bodies who sit around this table every month,  
19 so you're the ones who are going to get the directive  
20 and have the responsibility for bringing the  
21 information back.

22 Okay. So by the end of the week, you're going  
23 to get us that information, A, on average monthly how  
24 many pass through the individual review process and,  
25 secondly, how many nonattorney reviewers on average on

1 a monthly basis are working on this project so we can  
2 get a handle on that.

3 MR. GRIFFIS: Yes, your Honor.

4 THE COURT: Number two, these were -- you were  
5 going to report on detailed information regarding the  
6 proposed cases for ENE.

7 MR. GRIFFIS: This was actually our agenda item,  
8 your Honor, because we wanted to address the issue of  
9 reporting. And I'd like to address it together with  
10 three because I think they obviously go together.

11 At the last hearing, your Honor directed me to  
12 communicate with Mr. Migliori immediately about my  
13 questions about the cases that were selected for ADR.  
14 I sent him a letter the next day.

15 I ultimately got a response about 12 days later,  
16 and that letter and the conversation that we had last  
17 night constitute our conferring. And I made multiple  
18 efforts to confer about that.

19 Before I move further, I'd like to say so that  
20 people don't get all upset that we agree that some  
21 cases should be worked up. In fact, we think that more  
22 cases should be worked up than are on the Plaintiffs'  
23 list right now, but we have grave problems with the  
24 selection of the cases and the reporting on those  
25 cases.

1           What I learned in the letter that was sent to me  
2           and in the conversation with Mr. Migliori yesterday  
3           afternoon was, first of all, that the cases  
4           basically -- the cases before your Honor basically  
5           break down into two categories, ring break cases and  
6           non-ring break cases.

7           The letter that Mr. Migliori sent me said that  
8           685 cases have defects similar to the ones that were  
9           selected for ADR. There was no breakdown saying we  
10          picked the Anglon case because it has a foldover and  
11          there are 190 cases that were foldover, nothing like  
12          that.

13          There hasn't been, and I understand that there  
14          can't be, that sort of information doesn't exist, but  
15          685 cases have defects similar to the 10 that were  
16          selected.

17          That number is significant because we also  
18          received from Mr. Migliori a chart setting forth the  
19          cases that the Plaintiffs consider to be ring break  
20          cases.

21          The first column on that chart was cases that  
22          are confirmed ring break cases in the Plaintiffs' view.  
23          There were 71 of those. There were 764 cases on the  
24          entire chart, 764 minus 71 confirmed ring breaks is  
25          693, and so 685 cases that have similar defects is

1 pretty much all the other cases. So we have confirmed  
2 ring breaks and then everything else.

3 The second thing we learned is that the  
4 Plaintiffs believe that the non-ring break cases share  
5 common characteristics regarding defect and overlap in  
6 that sense. They have rolling, contraction,  
7 contortion, pulling away of the mesh from the body.  
8 Each case will have one or more of these components,  
9 although they didn't undertake to break down the  
10 inventory by those categories. They said they all  
11 shared those similar characteristics.

12 Mr. Migliori told me that they have no more and  
13 no better information on these cases, and particularly  
14 on the issue of how representative the cases are, than  
15 we do because we have the Plaintiff fact sheets, we  
16 have the medical records just as they do.

17 In other words, he can't tell us that there are  
18 specific defects in these cases beyond what the medical  
19 records say, what the surgeons happened to have said.

20 There wasn't, for example, an expert witness who  
21 worked up these cases or examined the product or  
22 anything like that.

23 And so we need to look to the medical records,  
24 and we need to look to forthcoming discovery in  
25 individual cases to learn what the defects at issue



1 are.

2 And certainly Mr. Migliori can't say, I can't  
3 say, nobody can say how many cases each particular case  
4 is representative of as your Honor ordered in the last  
5 two PPOs.

6 We also learned, and this was from the letter  
7 that I received, that all of the cases, all of the  
8 cases, all of the 685 cases involve a myriad of  
9 fact-specific differences, that's a quote, which are  
10 reflected within the other 600-plus similar MDL cases.

11 What we don't have and can't have, as I  
12 understand it, is any sense that the 10 cases selected,  
13 which include 10 cases that weren't even filed yet at  
14 the time that the -- that we received the initial  
15 proposal for them, were picked at all, picked by  
16 anybody at all, handpicked by anybody and why they were  
17 picked by the Plaintiffs particularly, if anybody  
18 picked them.

19 We think that given that there's this great mass  
20 of cases that are similar and not really  
21 distinguishable from one another, we should have a more  
22 objective process for picking them than the Plaintiffs  
23 like them.

24 And we propose as an objective process taking  
25 the first 10, the first 10 cases filed, we'll work

1 those up, the first 10 non-ring break cases which are  
2 also probably the first 10.

3 THE COURT: The first 10 filed?

4 MR. GRIFFIS: Yes, first 10 in the MDL. We also  
5 want to move forward with ring break discovery. We  
6 think that's very important. You know we think that  
7 it's the heart of this litigation. You know we think  
8 it's more than the heart of the litigation.

9 THE COURT: You think it's the only. You'd  
10 still like to believe it's the only.

11 MR. GRIFFIS: We do believe that.

12 THE COURT: Some of us are past that.

13 MR. GRIFFIS: We plan to pursue depositions, and  
14 we would like to have permission to pursue depositions  
15 and other discovery in ring break cases from the  
16 Plaintiffs' list in order to assess that inventory.

17 That wouldn't necessarily mean in each of those  
18 cases a preliminary workup, a full preliminary workup,  
19 such as we did for the early neutral evaluation. We  
20 may target some depositions, but the point of that  
21 would be for us to be able to assess how similar those  
22 cases are to the ones that were selected for the first  
23 round early neutral evaluation process.

24 THE COURT: Have you suggested this approach to  
25 Mr. Migliori?

1           MR. GRIFFIS: I haven't. As we drove over here  
2 from the airport, we were getting a report from  
3 Mr. Migliori that further confirmed that our initial  
4 request, which is that we understand how these are  
5 representative cases, wasn't going to be fulfilled.

6           THE COURT: Well, let me make a suggestion to  
7 both sides. We set these conference dates a month in  
8 advance, so it shouldn't be a surprise to anybody that  
9 I'm going to be interested in not hearing what you  
10 talked about in the car on the way from the airport.  
11 What I'm going to be interested in is hearing what  
12 you've talked about in the week before the meeting and  
13 what resolution you've had on some of these points.

14           So although I haven't ordered it in the past,  
15 but if it's necessary, I will order counsel to confer  
16 by telephone at least one week prior to the conference  
17 on all of these kinds of issues that ought to be  
18 addressed beforehand.

19           I think it makes a lot more sense for the two of  
20 you to have these conversations in the quiet of your  
21 office than slapdash on the way from the airport 20  
22 minutes before we all get together. I don't think it's  
23 a productive use of anyone's time to raise it here.

24           Now, I understand, Mr. Griffis, the concerns  
25 that you have about the manner in which these cases

1 have been identified and the problems that you perceive  
2 with proceeding to ENE on the ones that have been  
3 identified by Plaintiff. I don't know the answer to  
4 that, but I think you need to talk to each other.

5 There is another way that I think -- and I have  
6 much more control over doing it this way than in having  
7 Plaintiff select 10 cases. You argue about whether  
8 they're representative or not. There are a number of  
9 cases that were filed here over which I have plenary  
10 jurisdiction to take to trial, and I would suggest that  
11 we use some of those as the kinds of cases that might  
12 be helpful in terms of working up completely, meaning  
13 expert disclosures, meaning depositions such as you're  
14 suggesting, meaning I set a trial date.

15 And so that would be my suggestion to both  
16 sides, where I have complete jurisdiction of those, I  
17 don't have to worry about sending them back from whence  
18 they came if there's no resolution. You're going to go  
19 through this exercise in state court anyway.

20 So my suggestion would be rather than fight  
21 about whether this is representative or that's not  
22 representative or any of that, that perhaps you take a  
23 look at those. And I think there are a dozen or so of  
24 them that are about -- that by filing date are over a  
25 year old now. I don't have the list handy; but the

1 last time I checked, there are probably about 30 of  
2 them, 25 or 30 of them that -- and I would take out the  
3 class action cases. I'm talking about the individual  
4 claims that have been filed. I would say just the luck  
5 of the draw, whatever is there.

6 MR. MIGLIORI: Can I respond a little because I  
7 do think --

8 THE COURT: Sure.

9 MR. MIGLIORI: -- it deserves some more flushing  
10 out. I brought those boxes mostly as a visual. That's  
11 what we produced over the past month actually going  
12 back to March in response to Mr. Griffis' request with  
13 a summary chart of each case. And in the 10 that have  
14 been chosen, one, in fact, is a direct filing.

15 THE COURT: Which one is that one?

16 MR. MIGLIORI: It's called the Bruce versus  
17 Davol case. It was actually filed by Theresa  
18 Toriseva's office.

19 THE COURT: Do you know when that was filed?

20 MR. MIGLIORI: That's one of the new filings.

21 THE COURT: It's one of the new ones.

22 MR. MIGLIORI: Let me explain what we did. We  
23 spent several hours reaching out to every counsel in  
24 the country that has a case in this court. We had  
25 phone conferences with everybody. We had people send

1 in their pitches why this case would apply. And after  
2 going through the mediation with Magistrate Judge  
3 Lovegreen, we learned what Magistrate Judge Lovegreen  
4 thought was important for mediation purposes in terms  
5 of cases.

6 So unlike what was just represented to you, we  
7 actually went through each case and tried to find ones  
8 that were meaningful cases that had meaningful  
9 causation issues, that is, other medical problems that  
10 may or may not be related that could be discovered,  
11 Crohn's disease, fistulas.

12 We looked at cases that were not ring break  
13 because we're trying to distinguish it; but we also  
14 tried to keep out infection-only cases, which I imagine  
15 the first 10 filings we will find are infection-only  
16 cases which we don't want to drive the bus either  
17 because that time is not well spent, in our view, right  
18 now.

19 I did not know -- and my e-mail of this  
20 afternoon had nothing to do with anything to do with  
21 the ring break cases. If Mr. Griffis wants to do more  
22 discovery on ring break cases, I will say unequivocally  
23 we are absolutely willing to do it. And we would be  
24 glad to sit down and figure out a ring break-specific  
25 case management order for discovery. In fact, we

1 welcome it.

2 On this issue of these 10 cases, we actually  
3 spent a tremendous amount of time trying to find cases  
4 that were not just cases that, when we finally got to  
5 the mediation point, we're going to hear they're not  
6 worth anything.

7 THE COURT: Well, that's my concern. And I will  
8 tell you that although you may call it ENE, whatever  
9 you want to call it, it was my hope that the process of  
10 sitting with a skilled, very experienced magistrate  
11 judge would have produced at the very least a couple of  
12 settlements.

13 The fact that not a one of them settled, and  
14 frankly the Defendants' response to his invitation to  
15 continue the discussion as to two that he felt were  
16 very close, has caused me some concerns about the  
17 desire on the part of the Defendants to engage in  
18 meaningful discussion, I am not interested in wasting a  
19 judicial officer's time, nor am I interested in wasting  
20 Plaintiffs' time.

21 But it seems to me that where you have a  
22 situation where there's been an FDA recall of a device,  
23 where the device was implanted into a human being and  
24 caused great injury to that human being, that the  
25 defense needs to start thinking very seriously in terms

1 of settling these cases. I can't believe that of that  
2 first group there wasn't a single one that resulted in  
3 a settlement.

4 That having been said, I'm not interested in  
5 engaging in a meaningless exercise if the defense is  
6 not seriously interested in trying to resolve some of  
7 these cases. That's the whole point of the MDL being  
8 here.

9 The point is not for us to sit around and chat  
10 every month and then have me turn 700 cases back from  
11 whence they came. The point is resolution, and I think  
12 we're close to the time where both sides know an awful  
13 lot about each other's cases where in the typical  
14 situation counsel sits down and talks seriously about  
15 resolving them.

16 So whichever way you want to handle it, whether  
17 it is my taking I think a rather heavy-handed approach,  
18 which is mark them up for trial, and I don't want to do  
19 that because that's probably not the most expeditious  
20 way to handle this, or whether it is for Plaintiffs who  
21 are in the driver's seat on this to develop a list of  
22 what they believe are representative cases and have a  
23 true meaningful sit-down where defense counsel engage,  
24 not go through motions, but engage in true settlement  
25 discussions, then I'm all for having us continue the



1 dialogue.

2 But if the purpose is to simply waste time, I'm  
3 not interested in it and I'll resort to the  
4 heavy-handed approach, i.e., trial notices. I hope  
5 I've made myself clear.

6 What I would suggest that you do -- and I  
7 understand, Mr. Migliori, that you've gone through  
8 great effort to try to identify and respond to  
9 Mr. Griffis' concerns. I understand that you have  
10 concerns as well; but it seems to me that if counsel  
11 for Plaintiffs have identified 10 cases where there is  
12 rolling or turning or whatever the problem is that  
13 caused an injury to a human being in a product that  
14 isn't supposed to roll, isn't supposed to fold, isn't  
15 supposed to do any of those things, that you need to be  
16 able to sit down and evaluate the case and listen to  
17 what a judicial officer who's viewing it from both  
18 sides tells you.

19 So what I'm going to suggest is this because  
20 we're not going to resolve these differences today,  
21 that the two of you have meaningful conversation about  
22 trying to identify these, report back to me next month.

23 If you've come to terms, great. We'll move  
24 forward. If you haven't come to terms, I'm going to  
25 start looking at the cases that have been filed here in

1 Rhode Island, and I'll press you on those. And you  
2 won't want to try any of those any time soon, I'm sure.  
3 That's not -- I don't think that's the way to handle  
4 it, but that's the way I'll go if I have to.

5 MR. MIGLIORI: Thank you.

6 THE COURT: Okay. Number four, are we set on  
7 that, communication between defense counsel and the  
8 consulting surgeons who are treating physicians?

9 MR. MIGLIORI: That's a pending motion.

10 THE COURT: I think there's a motion pending on  
11 that.

12 MR. GRIFFIS: We have a pending motion, your  
13 Honor. The reason I put this on the agenda was that I  
14 wanted to express our concern about the issue and get  
15 it set on the calendar. Since Magistrate Almond isn't  
16 here, perhaps we can't accomplish that today; but I  
17 wanted to express our substantial concern about it. We  
18 haven't been able to communicate with our consulting  
19 surgeon experts since June.

20 THE COURT: Have you developed a list of them?

21 MR. GRIFFIS: A list of who the surgeons are?

22 THE COURT: Yes.

23 MR. GRIFFIS: I have a list of them.

24 THE COURT: Have you communicated that to  
25 Mr. Migliori?

1 MR. GRIFFIS: No, your Honor. We're under no  
2 obligation to tell, under the Federal Rules of Civil  
3 Procedure --

4 THE COURT: You will be if I order you to  
5 produce it. Consider yourself ordered. Produce the  
6 list of the surgeons that you are claiming to be your  
7 consulting surgeons.

8 How else can they know what they're doing if you  
9 won't even give them that? Give Plaintiffs a list of  
10 those physicians who you, the Defendants, have  
11 designated to be your consulting experts.

12 MR. GRIFFIS: Who we know to be treating  
13 physicians or all of them?

14 THE COURT: Well, I mean, eventually -- who you  
15 know also to be treating physicians in this case. I  
16 mean, that's all they want and that's all they need at  
17 this point.

18 MR. MIGLIORI: Can I make --

19 MR. GRIFFIS: What they've asked for is for us  
20 to be barred from communicating with anyone who's a  
21 treating physician.

22 THE COURT: That's the subject of the motion.  
23 I'll deal with the motion. But for now at least give  
24 them the list so they know who you're talking about,  
25 and then we'll take it from there, all experts who you

1 also know or believe to be treating physicians, and you  
2 should know that from the Plaintiff fact sheets.

3 MR. GRIFFIS: All right.

4 THE COURT: Okay. You can do that by the end of  
5 the week. And then the motion, I'll talk with Judge  
6 Almond and see when we can set that up for hearing,  
7 unless you can work something out. Other than that, I  
8 don't believe there are any pending motions that are  
9 ripe, perhaps with the exception of the motion for  
10 remand in Palmer. That one's been out there for a  
11 while, and --

12 MR. MIGLIORI: It's a California case.

13 THE COURT: I've got to check on that one. Do  
14 you know what the basis is for the request for remand?

15 MR. MIGLIORI: When we argued before your Honor  
16 on the class action case, it came up, actually during  
17 the show cause motions that were filed; and I said that  
18 if I found out from the local lawyer that it was one of  
19 the regular motions, I'd encourage him to withdraw his  
20 motion.

21 THE COURT: Right.

22 MR. MIGLIORI: And in reaching out to Attorney  
23 Ramon Lopez in California, I found out that what's  
24 unique about this motion is that served in the case is  
25 a local doctor.

1 THE COURT: Okay.

2 MR. MIGLIORI: With a potential medical  
3 malpractice case. Now, I don't have the file to know  
4 whether or not service was perfected, if they got it  
5 removed before that. There may be some of that issue  
6 about the local doctor, but there is a lack of  
7 diversity in that state based on who was sued.

8 THE COURT: Okay.

9 MR. MIGLIORI: I just don't know the timing of  
10 when it was.

11 THE COURT: Do you know whether this was one  
12 that was removed before the local person got served?

13 MR. GRIFFIS: I don't know the answer to that.  
14 I believe that -- I certainly believe that their  
15 response to our papers is overdue.

16 MR. MIGLIORI: I think it was stayed.

17 THE COURT: I think --

18 MR. MIGLIORI: I was at the last hearing, your  
19 Honor. I said I would check, and I think the Court  
20 effectively said I could go and see whether or not this  
21 was something that needed to be pursued.

22 THE COURT: Yes. Let me check on that one, and  
23 we'll get an order out on that; but in the meantime,  
24 Mr. Griffis, if you could check to see whether or not  
25 this is one that was removed before the local person

1 got served or after.

2 MR. GRIFFIS: Okay.

3 THE COURT: Then you may -- depending upon what  
4 you find, you may or may not want to withdraw your  
5 motion.

6 MR. MIGLIORI: Then this natural --

7 THE COURT: Or withdraw your opposition to the  
8 motion.

9 MR. MIGLIORI: There's the natural follow-up to  
10 that, too, the question of bringing an individual  
11 doctor into this jurisdiction to defend himself if  
12 malpractice is part of the component. And, quite  
13 frankly, I just don't know how that's handled. I don't  
14 know if that doctor is now required to defend himself  
15 here or herself here.

16 THE COURT: It's a good question.

17 MR. MIGLIORI: So I raise it, and we can talk  
18 further. I do have -- I can say to the Court that I do  
19 have a good relationship with Mr. Lopez. And if the  
20 expedient thing and right thing after the Court's  
21 educated on the facts is to go either way, then he and  
22 I, I'm sure, will be able to get it worked out.

23 THE COURT: It's one thing for you and he to  
24 work it out, but you need to work it out with  
25 Mr. Griffis.

1 MR. MIGLIORI: My point being if the Court  
2 thinks his motion should be withdrawn, he's a  
3 reasonable person, I can get that.

4 THE COURT: Let's do this, then, because, as you  
5 can probably figure out by now, I've got a pretty full  
6 plate these days. I'm about to begin another major  
7 trial on the 9th of September. That's why our next  
8 meeting is set for a Monday. I had thought maybe we  
9 would skip September, but I'm concerned about losing  
10 momentum. And if I lay off of you, I know you're just  
11 going to go off again. So I have to keep you under my  
12 thumb.

13 So we'll meet again on September 8th, but would  
14 you let me know before then because what I'm thinking  
15 is, if I've got to have a hearing on it, I'll do it  
16 that morning while you're all going to be here anyway.  
17 Otherwise, we're looking at October.

18 MR. MIGLIORI: I think once we identify the  
19 travel of the case, it's either properly removed or  
20 not, and we can get it worked out. I don't think we'll  
21 require a hearing.

22 THE COURT: And if you can do that, if you work  
23 it out, file a stipulation to that effect. If it stays  
24 here, then it stays here. If it's going back to  
25 California, it goes back to California, and you can do

1 that. I think because it's in the MDL, I do not have  
2 the authority on my own to remand. I can only make a  
3 recommendation to the MDL.

4 So if that's the route you're going to go, then  
5 just research that piece of it as to what kind of --  
6 what the order should look like.

7 MR. MIGLIORI: Thank you, your Honor.

8 MR. GRIFFIS: Thank you, your Honor.

9 THE COURT: Anything else?

10 MR. MIGLIORI: Just one issue, your Honor. At  
11 that same hearing I said that I would check with an  
12 attorney who thought he had properly withdrew from two  
13 cases that were subject to show cause motions. The  
14 cases were Amy Barlow and Judith Collins. And when I  
15 inquired with that counsel, Travis Holly of Louisiana,  
16 he indicated at first he thought he had withdrawn from  
17 the case. And then when we actually learned that he  
18 hadn't, it hadn't been perfected, that is, in the  
19 Collins case, Mr. Holly actually filed the motion  
20 before it got transferred to withdraw, and it was never  
21 ruled upon. So it's now, I guess, a pending motion  
22 here.

23 THE COURT: Okay.

24 MR. MIGLIORI: And he is prepared, in fact --

25 THE COURT: Is there a substitute counsel?



1 MR. MIGLIORI: There is not. Quite frankly, I  
2 think part of the problem is the communication between  
3 he and the client. So it's not even that he can try to  
4 get a stipulation from the client or some other -- so  
5 he has given me authority to file two motions to  
6 withdraw in both cases.

7 My view of this, your Honor, is that if the  
8 clients are not in contact with that attorney, if it's  
9 dismissed without prejudice, there being potentially a  
10 one-year stay, some kind of ability to refile if that  
11 client for some reason had a valid reason that he or  
12 she couldn't -- then there's still some protection for  
13 that client within a year to get their case together.

14 So I can file these motions to withdraw as  
15 counsel, and we can propose conditional orders that  
16 require Mr. Holly to send certified letters that advise  
17 the client.

18 THE COURT: You should look at -- we have a  
19 local rule on withdrawals, and it does require you to  
20 jump through a couple of hoops, which are really for  
21 the protection not only of the client but for the  
22 lawyer as well. What's your position on these?

23 MR. GRIFFIS: Mr. Migliori's plan is fine with  
24 me.

25 THE COURT: Okay. Did you get that?

1 MR. MIGLIORI: Can I have a copy of that?

2 THE COURT: Can you put it in bold letters?

3 MR. GRIFFIS: Every time he's reasonable, I  
4 agree with him.

5 THE COURT: Every time he's reasonable, you  
6 agree with him? My only concern is that the paperwork  
7 protects the parties who require the protection. And  
8 here it's not only the parties themselves, who, as you  
9 say, may have a valid reason, but make sure that all  
10 the I's are dotted and T's are crossed in terms of  
11 whatever it is that you file.

12 I've done conditional orders in the past where I  
13 issue an order. Do we have an address for the  
14 individuals?

15 MR. MIGLIORI: We have a last known address.

16 THE COURT: And what we do is we get a copy --  
17 we send a copy of the order to that last address with a  
18 30-day either enter successor counsel or enter pro se  
19 or the case is going to be dismissed without prejudice  
20 without further notice. And you're okay with that?

21 MR. GRIFFIS: Yes.

22 THE COURT: So why don't you just make sure,  
23 though, that you look at our local rule. And, as I  
24 say, there are a couple of hoops you have to jump  
25 through.

1 MR. MIGLIORI: We'll gladly take that on, your  
2 Honor.

3 THE COURT: Anything else?

4 MR. MIGLIORI: That's all.

5 THE COURT: Do we have a total number of cases  
6 that are currently part of this now? I heard you  
7 say -- did you have the number?

8 MR. GRIFFIS: 754 was a slightly old number.

9 MR. MIGLIORI: 764.

10 THE COURT: Because a bunch came in last week.

11 MR. MIGLIORI: That was as of the chart that we  
12 did.

13 THE COURT: Do you have a sense of how many  
14 additional cases may be filed in this?

15 MR. MIGLIORI: I can tell your Honor now that  
16 I'm sort of in this role in both the state and MDL  
17 litigation that the filings are slowing down  
18 significantly. And I think part of that is that the  
19 folks who have injury, the people that have implanted  
20 recalled products continue to come in; but they're, in  
21 our view, sort of covered by the class allegations.

22 THE COURT: So these are people without any  
23 active problems or injury.

24 MR. MIGLIORI: Yes. And so those continue to  
25 come in, and we're monitoring those. But the people

1 who are reporting that they had bowel perforation, they  
2 happen. We get calls very soon after surgeries, but  
3 they're coming in much slower. So I don't foresee a  
4 large filing unless another firm comes in and decides  
5 that they're going to file a lot of, you know,  
6 noninjury cases or infection-only cases or things like  
7 that.

8 THE COURT: As I recall, at the beginning of  
9 this I read that there were 100,000 of these. And when  
10 we say 100,000, we're talking about all of the  
11 different sizes.

12 MR. GRIFFIS: There are 100,000 recalled  
13 Composix Kugel patches.

14 MR. MIGLIORI: Implanted.

15 MR. GRIFFIS: If you include nonrecalled  
16 products, which are also defective in Mr. Migliori's  
17 view, and all of the other products in the MDL, it's  
18 more like north of 10 million products that are out  
19 there.

20 THE COURT: I'm just trying to get a handle on  
21 what we're looking at. I haven't seen any of the TV  
22 ads, and I did see a lot of those last summer. So it  
23 seems to have simmered down a little bit.

24 MR. MIGLIORI: One of the things that we're able  
25 to do uniquely because it's Rhode Island-based and the

1 same sort of core people are involved is to get the  
2 word out to many firms about what are appropriate, in  
3 our view, cases, not to just get people that ever had a  
4 Davol product but to really look at the issues that are  
5 getting more and more refined by the ADR process so we  
6 can really see -- we don't want to spend a lot of time  
7 on the case that has many causation problems either.

8 So while the MDL has expanded to include  
9 non-ring products, we have very few non-ring products  
10 filed. One of them is part of the 10 so we can do some  
11 discovery around it; but the non-ring products that may  
12 make up these millions of products, we're simply not  
13 filing them because there are some unique legal and  
14 medical issues to them. So we're choosing not to.

15 The core of these cases are products that  
16 contain rings, and whether the ring was a recalled  
17 product or not is not of any import to us other than  
18 proof. If it had a ring, it had a defect based on our  
19 current knowledge.

20 And the ring doesn't have to break to be a  
21 problem. It's sometimes just the nature of that ring  
22 with the materials that causes the migration, the  
23 bending, the folding, whatever.

24 So I do think that anything that will be filed  
25 prospectively will mostly be something that's got the

1 dual mesh technology and the ring, although there will  
2 be an occasional non-ring product; and I do think that  
3 they will be cases that have more bowel perforation,  
4 adhesions, things that are more specific to the product  
5 actually changing shape or breaking. And so those are  
6 fewer and fewer.

7 THE COURT: Okay. From your perspective, you're  
8 most concerned with the hundred thousand that are the  
9 subject of the recall.

10 MR. GRIFFIS: We're most concerned with cases  
11 where people allege that they were actually injured by  
12 a recalled product.

13 THE COURT: But you've got a hundred thousand of  
14 these things that are the subject of a recall.

15 MR. GRIFFIS: That's right. We believe that a  
16 tiny fraction of those have broken.

17 THE COURT: But even if you exclude those people  
18 who may have individual claims for individual damages.

19 MR. GRIFFIS: Right.

20 THE COURT: You still have a hundred thousand,  
21 99,000 if we subtract out the thousand or so that may  
22 become part of this MDL when it's all said and done on  
23 individual claims, who are potentially members of these  
24 classes for medical monitoring.

25 MR. GRIFFIS: That's correct, yes. There are no

1 injury class action claims pending for those people.

2 MR. MIGLIORI: Can I correct that?

3 THE COURT: I want to ask this question first.

4 Do we have, and I think I may have asked this before  
5 and you may have answered it, but maybe you have better  
6 information now, do we have any sense, I'm just now  
7 talking about ring products with recall, the hundred  
8 thousand, if it's been implanted for two years, three  
9 years, four years, five years, do we have any sense  
10 down the road of whether those will break, whether  
11 there's a point at which you can consider yourself --  
12 brush off your brow and say, I'm safe, this one's going  
13 to last? Do we have any information on that at all?

14 MR. GRIFFIS: I'm not aware of any reliable  
15 science on that subject.

16 THE COURT: The word is reliable.

17 MR. GRIFFIS: I'm not aware of any science,  
18 period, on that subject.

19 THE COURT: That makes it harder, I think,  
20 because if you can't tell somebody who's got one of  
21 these things in, Look, you're past, sort of like a  
22 doctor does with a cancer patient, you're five years  
23 out, your chances of success beyond today are really  
24 great, up until now we couldn't tell you that, but with  
25 someone who's got one of these in that's asymptomatic

1 at this point, we don't know -- from what you're  
2 telling me, there's no scientific evidence out there  
3 that this individual is home free.

4 MR. GRIFFIS: I would say there's no scientific  
5 reason to believe that they're at risk either.

6 THE COURT: Or the other way.

7 MR. GRIFFIS: There's -- I don't know the  
8 science on the subject. My understanding of the  
9 causation theory that the Plaintiffs have been talking  
10 about, and this is based, as far as I understand, on  
11 studies that have been emerging in 2007 and 2008 that  
12 are saying we are advancing hypotheses and testing  
13 those hypotheses and haven't moved past the hypotheses  
14 generation phase, the hypothesis is that there are --  
15 there is an acute phase of mesh contraction that goes  
16 on with any mesh that's implanted and just about any  
17 ePTFE-2.

18 THE COURT: That's part of the natural process.

19 MR. GRIFFIS: That's natural and normal. And  
20 some people are positing in the scientific literature  
21 that there's, in addition to that acute phase which  
22 happens over a pretty short period of time, a matter of  
23 months, I believe --

24 THE COURT: After implantation.

25 MR. GRIFFIS: Yeah. So if that were all that



1 was going on, then that would be your answer. But  
2 there's a chronic phase of contraction on top of that  
3 that applies to heavyweight meshes and not to lighter  
4 weight meshes, and they're trying to explore that  
5 hypothesis and theory.

6 And if that were the case, then there would be  
7 an additional slower phase of contraction for some  
8 period of time. I have no idea what.

9 THE COURT: But you say part of that equation is  
10 whether or not it's a heavy mesh or a thin mesh.

11 MR. GRIFFIS: I believe that's part of the  
12 hypothesis, yes, hypothesis being that the heavier  
13 weight the mesh is, the more likely it is to have a  
14 chronic phase like that.

15 THE COURT: And the chronic phase we measure in  
16 terms of years?

17 MR. GRIFFIS: I don't believe that anybody could  
18 give you an answer that they would express any  
19 confidence in.

20 MR. MIGLIORI: It's killing me because he's  
21 describing my hypothesis or my theories, and it's  
22 misstated. It's interesting, in 2007, Davol is saying  
23 there's some hypotheses in peer-review journals that  
24 put this product on the market in 2000 without testing  
25 it. That's our theory. That's our case. A hundred

1 thousand products of recall --

2 THE COURT: I understand that that may be your  
3 case. What I'm trying to get at, I'm looking down the  
4 road at the hundred thousand, even by Mr. Griffis'  
5 calculations, that may legitimately form one of these  
6 medical monitoring classes, and I'm trying to get my  
7 arms around trying to figure out whether there's a  
8 point after which someone in that class is  
9 definitely -- is definitely out of the woods, so to  
10 speak, or is not.

11 And it may be that the science is such that we  
12 won't know the answer to that.

13 MR. MIGLIORI: To accept that question is to, in  
14 my view, unknowingly accept their original premise,  
15 which is there's a point at which this thing will  
16 naturally break on its own as opposed to other forces.

17 This isn't about just rings that break. This is  
18 about an unwieldy piece of plastic in the body, and  
19 what we learned in a very short period of time in a  
20 very useful exercise with Magistrate Judge Lovegreen  
21 was that 3 of those 10 had breaks that caused unwieldy  
22 plastic to cause harm in the belly because of  
23 subsequent surgery on a different part.

24 So you have a piece of plastic in the abdomen  
25 that is in no way identifiable to a subsequent surgeon

1 who is going to do surgery in that area. That surgeon  
2 goes and cuts it. Now, that's a design issue. So  
3 there's no science that can say that for those hundred  
4 thousand people out there, they're safe because if they  
5 have any kind of surgery required in the area, doctors  
6 are trained to keep the scarring minimal by doing an  
7 incision exactly in the same place.

8 What they're not knowing is that when they do  
9 that, they can, and in 3 of 10 cases, not a perfect  
10 sampling, but in 3 of the 10 cases, they cut the ring  
11 that caused a subsequent problem.

12 So for me, I don't want to let this discussion  
13 continue without realizing that it's not just about  
14 whether it breaks at 12:00 at the weld. That was how  
15 Davol tried to limit the recall and the effects of the  
16 recall. It's about having this ridged piece of plastic  
17 in what is called hydrophobic heavyweight dual mesh  
18 technology contracting and getting into such a shape  
19 that it's causing real injury. Those breaks may be  
20 shattered off of the weld, they may be cut by a  
21 subsequent surgeon.

22 So the medical monitoring is much bigger, and  
23 there is some science, your Honor. There is one other  
24 thing. There is some CT science on how you can  
25 actually see the break now on CAT scan to monitor the

1 progress --

2 THE COURT: Okay. I only asked the question  
3 because I'm trying to educate myself as much as I can  
4 in terms of what exactly it is that we're looking at.  
5 I think individual cases are going to work their way  
6 out in the manner that most trial judges are used to.  
7 They're either going to be tried or they're going to be  
8 settled.

9 And in this case, if neither of which is  
10 happening in this district, then they're going to go  
11 back from whence they came. But I'm looking ahead at  
12 having to deal with the class action Complaints that  
13 are out there and how we address some of the claims  
14 that are made there.

15 So I may be getting ahead of myself a little  
16 bit; but the more I can learn from you, the better it  
17 is for me to try to figure out where I'm going.

18 Okay. I will wait to hear back from you on  
19 Palmer, if you can work that one out; on the two where  
20 there is a motion to withdraw pending by the attorney  
21 who filed the case, and it sounds like you and  
22 Mr. Griffis are going to be able to work those out; and  
23 on the number of nonlawyer reviewers you have and the  
24 per month average of documents that have been reviewed  
25 so we have a better fix on what is doable and maybe if

1 we need to adjust that upwards in the coming months.

2 If I need to, I guess there is one motion  
3 pending, and that is with respect to contact with these  
4 treating physicians who are also apparently serving as  
5 consultants to the Defendants in this case and how best  
6 to approach both sides' access to those individuals.

7 Again, if you can't work it out, I'll try to get  
8 that up for hearing on the 8th of September. I think  
9 we have some time in the morning that day. And then  
10 our next meeting will be September 8th, which is a  
11 Monday, at 1:00 here.

12 I think our next open meeting will be the  
13 following meeting, and that will be in October. And  
14 we'll have to look at the calendar to see what we have  
15 going in October to set up that date. It will not be  
16 the 8th, and it will not be during the week of the  
17 holiday.

18 MR. GRIFFIS: Your Honor, once we have disclosed  
19 the identities of consultants who we know to be  
20 treating physicians by the end of the week to  
21 Mr. Migliori, do we continue to be barred from talking  
22 to any surgeon consultant whether we know them to be a  
23 treater or not until --

24 THE COURT: You are until we -- I mean, unless  
25 you two can work this out. You're asking the Court to

1 make a ruling. So yeah, if you can work it out, even  
2 if it's as to a couple of people, whatever, fine. If  
3 you can't, then you'll get a ruling from the Court on  
4 the 8th. That's the best I can do for you.

5 MR. MIGLIORI: When we see the list --

6 THE COURT: That's why if you get a list, you'll  
7 have a better handle on who it is that we're talking  
8 about.

9 MR. GRIFFIS: We'd like an interim order that  
10 the Plaintiffs not talk to the consultants whom we  
11 disclose.

12 THE COURT: It's only a couple of weeks. What's  
13 good for the goose is good for the gander.

14 MR. MIGLIORI: If it's not subject to any  
15 deposition we have --

16 THE COURT: With the exception of an agreement  
17 by counsel as to individuals and having access, then  
18 both sides are barred. That ought to be an incentive  
19 for both of you to give a little.

20 MR. MIGLIORI: This may have -- I don't know if  
21 the patients have -- I assume this applies to counsel,  
22 not to the clients themselves.

23 THE COURT: Obviously. You're going to have to  
24 clear it with the patient.

25 MR. MIGLIORI: The patient may have appointments

1 and things.

2 THE COURT: Sure. Okay. Safe trip back for all  
3 of you.

4 (Adjourned)

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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 14, 2008

Date