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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 \* SEPTEMBER 8, 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 8 SEPTEMBER 2008 -- 1:00 P.M.

2 THE COURT: We have a fairly short agenda today,  
3 so why don't we get right to it. I saw the exchange of  
4 letters regarding the document production. Let me just  
5 say that I do not wish to be copied in on your  
6 correspondence. I have plenty of things to read  
7 without receiving your dueling letters. So leave me  
8 out of it.

9 I had a letter that I was going to send to you  
10 that put it in pithier terms than that, but I thought  
11 better about sending it. If I ask you to send me a  
12 letter, that's fine; but otherwise, I don't want to get  
13 them. So tell me where you are.

14 MR. GRIFFIS: We'll be reporting on Thursday as  
15 our regular report both the MDL and the state court  
16 litigation. We told you on August 5th at your request  
17 that -- about the BIA situation, our vendor, that they  
18 had 2.6 million documents loaded. And the loading  
19 isn't really terribly relevant, the number of hits is a  
20 lot more relevant, and that was 754,000 hits using the  
21 Plaintiffs' list of search terms that we reached  
22 agreement on right at the start of April.

23 We've now reviewed 389,000 of those documents,  
24 and that includes our estimated production for  
25 September, which will be on or around the 15th of the

1 month per usual, of about 42,000 documents. And we  
2 estimate after that happens, that's over 200,000 pages  
3 of documents.

4 Now, a production of 43,000 -- I'm sorry, 42,000  
5 documents, which is our estimate, doesn't mean that you  
6 take that number and subtract it from the BIA count  
7 because a lot more than 42,000 documents were reviewed  
8 in order to come up with 42,000 documents for  
9 production.

10 I think that number is over 100,000 documents  
11 that were reviewed over this last period; but I'm not  
12 sure, so I don't want to make a representation about  
13 that number. We're still figuring that out.

14 THE COURT: Let me stop you there and ask you,  
15 of the 754,000, how many have been reviewed?

16 MR. GRIFFIS: 389,000.

17 THE COURT: So you are a little better than  
18 halfway through?

19 MR. GRIFFIS: That's right.

20 THE COURT: And you completed that review of the  
21 300-something thousand over what period of time?

22 MR. GRIFFIS: Well, that's slightly hard to  
23 answer. That's -- those documents were all reviewed  
24 since March, but they were reviewed with a varying  
25 number of document reviewers and with different

1 objectives in mind.

2 For example, in March, April and May, we were  
3 focused on reviewing documents in response to requests  
4 for sales representative depositions. We ended up  
5 producing quite a large fraction of the production in  
6 the course of that because one of the things that we  
7 did was find all the documents with the sales  
8 representatives' names that were loaded in the system  
9 at the time and that -- you know, that got a lot of  
10 documents that were not strictly associated with that.

11 THE COURT: And what is your projection to  
12 complete the review of the remaining roughly one half?

13 MR. GRIFFIS: We -- if we could apply the  
14 current review rate and number of reviewers without any  
15 caveats, which we can't do and I'll explain that in a  
16 moment, it would be before December of this year.

17 THE COURT: Before the end of '08?

18 MR. GRIFFIS: Oh, yes, before the end of '08.  
19 And the reason I said that there are caveats is because  
20 we can't fully predict future performance based on past  
21 performance because when you get into particular types  
22 of documents, the reviewers may go more quickly or more  
23 slowly.

24 THE COURT: Unless the Court orders you to make  
25 that production by the end of the year.

1 MR. GRIFFIS: That's right. The letter report  
2 that we made to your Honor reported 14 reviewers and a  
3 review rate of 300 documents per day. I've advised  
4 Mr. Migliori that both of those numbers have increased.  
5 Well, the review rate. I don't know if I've told you  
6 that. That's increased to about 500 quite recently,  
7 and the current number of reviewers is 17. And we are  
8 adding more, and we expect to add more reviewers this  
9 week on that.

10 THE COURT: Okay.

11 MR. GRIFFIS: So we think we're in a good place,  
12 particularly in light of the schedule that we've agreed  
13 on for early neutral evaluation cases that we'll talk  
14 about in a moment.

15 MR. MIGLIORI: Just to get from our side because  
16 things are produced differently from the way they're  
17 organized through their vendor and just to keep an  
18 ongoing record and be consistent with prior  
19 conferences, if I may, of course, on August 15th we  
20 received 161,000 pages of documents.

21 We're not able to decipher by looking at what we  
22 get whether or not that's a -- how many documents that  
23 is, so we can only speak in terms of pages.

24 THE COURT: Is there any reason why when you  
25 make the production that you can't also give a number

1 of documents that's included in that production?

2 MR. GRIFFIS: We could give that information in  
3 the cover letter, but the information is encoded in  
4 what we provide. When we produce documents, we do it  
5 per the protocol that this Court has entered in and  
6 that the parties agreed on. It includes -- I mean, the  
7 data Don gets, I know Don isn't an IT professional so  
8 I'm sure he couldn't figure it out, but it includes  
9 load files which say that the following six .tif images  
10 comprise a document and that document number is this  
11 Bates range to this Bates range.

12 And that gets loaded into a database, and the  
13 database can then inform you how many documents the  
14 document production consists of; but we can put the  
15 number in our cover letter.

16 THE COURT: Why don't you do that in your cover  
17 letters from now on as long as that information's  
18 available.

19 MR. MIGLIORI: The reason that's helpful is  
20 because the updates which we do get, which we  
21 appreciate, always speak in terms of documents. And  
22 while I can do that, just so the Court's aware, we have  
23 an outside vendor as well, and so when we receive these  
24 documents, we have to literally -- the term is push  
25 them, put them into the system. And until that whole

1 thing happens, we can't start getting information back  
2 on what it really is. We can look on a page-by-page  
3 basis to see what's there. So that would be very  
4 helpful if not inconvenient to the Defendants.

5 There are a couple of things that we did learn,  
6 though, that in prior productions we had received about  
7 a half million pages of documents that were reproduced.  
8 And I think we're realizing that of the reproduction,  
9 because of relevancy redactions, of the 550, I believe,  
10 530,000 pages of documents, only about 3,000 were in  
11 any way modified.

12 The reason why I'm raising it, your Honor, is  
13 that in the vendor process, the Defendants were  
14 asked -- required in the state court to go back and  
15 make less redacted submissions on the basis of  
16 relevancy.

17 So they reviewed a half million pages of  
18 documents and did that. About two to three thousand of  
19 them were modified as best we can judge, and the rest  
20 were just simply reproduced. The only way we can find  
21 that out is to push the half a million pages into the  
22 system.

23 THE COURT: When you say modified, explain to me  
24 what you mean.

25 MR. MIGLIORI: That they were subject to that

1 order, re-reviewed and re-redacted, that is, fewer  
2 redactions were made under the Court's order. The only  
3 reason this becomes an issue now is that when we push  
4 that into the system, the database, we get charged  
5 literally for the reproduction of everything.

6 So all -- if 2,000 out of 550,000 pages gets --  
7 was relevant to that particular thing, and having  
8 received a half million pages, we're now incurring a  
9 gigabyte hourly cost of trying to figure all that out.

10 THE COURT: Is there any way that the Defendants  
11 can somehow flag those?

12 MR. GRIFFIS: I believe so. I'll have to ask  
13 about that.

14 THE COURT: Why don't you ask. And if you can,  
15 so as to save some time and money, flag those for the  
16 Plaintiff so that they don't have to put everything  
17 through the vendor.

18 MR. GRIFFIS: I wouldn't have thought they did  
19 because we provided redaction logs both with the  
20 original production and with the second. A comparison  
21 of the two would show which documents they are, but  
22 I'll talk to the technical people.

23 THE COURT: If you can just flag them, I think  
24 that would take care of it.

25 MR. MIGLIORI: It would because they push not

1 the logs, they push the dual database. So everything's  
2 got to go in in order to figure out what needs to come  
3 out. So it's just expediency. It's just to get on the  
4 same page as we go forward.

5 We're learning that a lot -- some documents have  
6 now been -- very same documents in this process have  
7 been produced now four or five times. So I'm raising  
8 it again. This isn't a complaint. Things have been  
9 moving in terms of protocol in the right way.

10 We believe that the pace is still too slow, and  
11 we apologize for involving the Court. I thought the  
12 Court did ask for status on that part, but we can keep  
13 that between us, but we do think that --

14 THE COURT: I did on that. I got other things  
15 from you that I didn't. Let me ask you this,  
16 Mr. Migliori. I understand from the Defendants' side  
17 of things that they anticipate being able to complete  
18 this review and production by the end of the year. Is  
19 that timetable satisfactory to your side?

20 MR. MIGLIORI: In candor, because these were  
21 being handled on a biweekly basis in front of  
22 Judge Gibney with Magistrate Judge Almond, we have  
23 filed and subject -- there is a motion on Thursday  
24 seeking a date, and in that we requested a 60-day  
25 order, which would make it mid-November.

1           What I understood from Mr. Griffis this morning  
2           was that he could produce it before December, which  
3           if -- and he had no reason to call me about that; but  
4           on that basis alone, I would agree to that. If it's  
5           the end of December and he actually needs another  
6           month, I didn't understand that to be true, my gut  
7           instinct in representing everybody that I am that's not  
8           here would be to hold the line at December 1st.

9           THE COURT: Okay.

10          MR. MIGLIORI: But obviously we'll do what the  
11          Court wants.

12          THE COURT: Why don't the two of you try to come  
13          to terms with a realistic date; and if you can, work  
14          that out amongst yourselves.

15          MR. GRIFFIS: Certainly.

16          MR. MIGLIORI: We'll do that, and hopefully we  
17          can do that before Thursday so it can be entered as an  
18          order before Magistrate Judge Lovegreen -- I'm sorry,  
19          Magistrate Judge Almond.

20          And there is one other issue, your Honor, and I  
21          bring it up -- we talked about it so many times, and I  
22          don't know how else to bring it up, but it keeps coming  
23          up, and that's that the confidentiality designations  
24          just seem to never end.

25          And, again, it's got to be put into the system.

1 It's the only way we can be reasonable about it. But  
2 this is a hard drive that we received as production of  
3 documents on August 11th. The hard drive itself is  
4 marked confidential. Then when you go inside the hard  
5 drive and pull out some of the documents, this is again  
6 a production since the last status conference, very  
7 public documents are still being marked as confidential  
8 and subject to a protective order.

9 And I run the risk of being not just redundant  
10 but annoying on this issue, but it's a very important  
11 issue for us because we can't file motions using these  
12 documents without seeking leave to file under seal.

13 And one page, the very last page, one of them is  
14 their logo. And the very last page is a page just  
15 simply called "intentionally blank," and it's subject  
16 to the protective order. So it's clear that it's still  
17 a blanket --

18 THE COURT: How is the confidentiality label  
19 being affixed to these?

20 MR. GRIFFIS: The confidentiality label is  
21 applied automatically by the vendor to documents that  
22 have not been designated by our reviewers as not being  
23 confidential, which is why when an e-mail -- your Honor  
24 may have noticed in opening e-mails before that  
25 sometimes when an e-mail comes in from an outside

1 source, that it has an attachment -- seems to have an  
2 attachment. And if you open the attachment, it's the  
3 logo of the company because of the way the e-mail's  
4 processed.

5 An e-mail is a package of multiple documents,  
6 including in the case of Bard, Bard documents their  
7 logo. So this is probably the first time I've seen  
8 this particular document, a complaint about this  
9 particular document.

10 This is probably a confidential e-mail that was  
11 tagged as confidential, and its logo, the Bard logo,  
12 which was part of the e-mail, got tagged as a separate  
13 document as part of the electronic push process.

14 THE COURT: I'm not following you. This looks  
15 like a --

16 MR. GRIFFIS: I'm looking at just this document.

17 THE COURT: I'm looking at the whole package of  
18 them. The very first page refers to a symposium that  
19 apparently was conducted a while ago in St. Louis.

20 MR. GRIFFIS: Almost none of these are  
21 consecutive.

22 THE COURT: Then there's another one in Denver.

23 MR. MIGLIORI: For clarification, I pulled these  
24 just to be representative. This was not part of an  
25 e-mail document. I pulled these out myself with the

1 help of an IT person to say, look, even an American  
2 College of Surgeons Clinical Congress schedule of  
3 events for a symposium is somehow labeled as blanketly  
4 as the drive it came in as confidential. And I need to  
5 be able to know that I can file a motion and which ones  
6 I need to protect and don't protect.

7 THE COURT: I'll tell you what's going to happen  
8 is, if this continues to happen, you're going to lose  
9 the ability to mark as confidential the things that  
10 really need to be confidential.

11 So what I'm going to suggest that you do is to  
12 tell your reviewers -- I assume that these are lawyer  
13 reviewers and paralegal reviewers.

14 MR. GRIFFIS: Lawyer reviewers, your Honor.

15 THE COURT: They're all lawyers?

16 MR. GRIFFIS: Yes.

17 THE COURT: They ought to know what a protective  
18 order is, and they ought to know what's confidential  
19 and what's not. And at that level they ought to be  
20 removing, if anybody has already pre-labeled it  
21 confidential, they ought to be removing that as part of  
22 their review.

23 MR. GRIFFIS: Yes, your Honor. They're not  
24 relabeled as confidential.

25 THE COURT: So who's putting the confidential

1 label on?

2 MR. GRIFFIS: The instructions to the vendor are  
3 when each document comes in, they need to say yes or no  
4 on confidentiality. The instructions are if this has  
5 been coded as nonconfidential, don't mark it as  
6 confidential; otherwise, do. That's the one default  
7 direction.

8 You could go the other default direction and get  
9 the equivalent result; but what that means is that, and  
10 I was referring to the logo because that's what  
11 Mr. Migliori pointed to first, the logos get tagged as  
12 confidential because they're part of confidential  
13 e-mails. It's a piece of a confidential e-mail  
14 ordinarily.

15 THE COURT: I understand what you're saying, but  
16 at some point a pair of human eyes looks at every  
17 single document.

18 MR. GRIFFIS: A pair of human eyes doesn't look  
19 at the logo. What the human eyes see is the electronic  
20 version of the document. So they see the e-mail the  
21 way you would see it on your computer, and it looks  
22 like a normal e-mail with the logo and everything.

23 When it gets converted to .tif images on paper,  
24 in some cases the logo becomes a different document,  
25 and then you get this document which looks out of

1 context.

2 THE COURT: So does the reviewer know or not  
3 know whether or not it's been marked confidential?

4 MR. GRIFFIS: The reviewer would know that this  
5 e-mail, that the entire document from which this came,  
6 this one page of a document was marked as confidential.  
7 They would not have made a decision that the Bard logo  
8 that is part of the e-mail, it's not an attachment to  
9 the e-mail, it's -- it comes up in the e-mail when you  
10 look at it as part of the signature line.

11 THE COURT: I'm just trying to figure out where  
12 in the process we can eliminate the confidential label  
13 where it has been inappropriately placed.

14 MR. GRIFFIS: We've been trying to do that when  
15 Mr. Migliori brings something to our attention.

16 THE COURT: But that's not acceptable because if  
17 you've got stuff running through that has an  
18 advertisement for a symposium that's marked subject to  
19 protective order, I just don't understand how that got  
20 there in the first place.

21 You say it may have been attached to an e-mail.  
22 What I'm trying to figure out is, A, how does it get  
23 there and, B, how do we remove it in places where it  
24 ought to be removed.

25 MR. GRIFFIS: I had the experience, your Honor,

1 of a number of occasions Mr. Migliori handing me for  
2 the first time at a hearing a stack of documents like  
3 this that he says are inappropriately designated as  
4 confidential.

5 In each of those cases I've gone back and looked  
6 at those documents and found that the confidentiality  
7 designation was perfectly appropriate with regard to a  
8 majority of them, for example, documents are, in fact,  
9 draft documents or --

10 THE COURT: We're not talking about those now.  
11 What I'm talking about is something like this where  
12 it's clearly not subject to a protective order.

13 MR. GRIFFIS: I don't know that that's the case.  
14 If it's a draft, it's an internal draft, it may be; but  
15 what we do -- I mean, if that is the case, your Honor,  
16 then the reviewers got it wrong when they reviewed that  
17 document.

18 THE COURT: And that's what I'm trying to get  
19 at. If the reviewer --

20 MR. GRIFFIS: They have instructions.

21 THE COURT: -- sees it, do they have  
22 instructions to remove it?

23 MR. GRIFFIS: Yes.

24 THE COURT: They do?

25 MR. GRIFFIS: Right. It's not there in the

1 first place. They come up with a document. It's not  
2 marked confidential or nonconfidential. They make a  
3 call on whether to mark it as confidential or  
4 nonconfidential, and they make that decision.

5 Each of these documents represents a decision  
6 with the exception of this one and the "intentionally  
7 left blank," which are administrative sorts of things  
8 that I don't think are really --

9 THE COURT: Nobody's going to use the  
10 "intentionally left blank" anyways, but what I'm going  
11 to suggest that you do is to reiterate with your  
12 reviewers the need to be very careful about documents  
13 that are so marked and for them to make an assessment  
14 as to whether or not it truly falls within the  
15 protective order and if they have any concerns about  
16 any close calls, that they bring it to the attention of  
17 some superior, if not you.

18 I don't think you want to look at every one of  
19 these things, but some superior ought to be making that  
20 determination.

21 MR. GRIFFIS: Yes, your Honor.

22 THE COURT: Anything else?

23 MR. MIGLIORI: Your Honor, I think -- I do bring  
24 this up every week because it doesn't seem to get  
25 fixed. I can honestly tell you that I've seen no

1 evidence of anything but blanket confidentiality. I  
2 will take Mr. Griffis' word that, in fact, we've  
3 received anything that's been vetted this way.

4 But, your Honor, I would like the opportunity to  
5 check on that because, as I understand it today, we're  
6 not getting anything other than blanket  
7 confidentiality. And if I have to --

8 THE COURT: If that's the case, then put a  
9 motion together, and we'll deal with that.

10 MR. GRIFFIS: I know that to be false, your  
11 Honor.

12 MR. MIGLIORI: That's why I said I'll take your  
13 word for it. I have been advised -- this simply  
14 can't -- the idea of marking a whole hard drive  
15 confidential puts me in a difficult position. That  
16 obviously can't happen.

17 But we'll go through the process and see what,  
18 if anything, has survived the process. I've got other  
19 examples from the production after this.

20 THE COURT: Well, I can't deal with what I don't  
21 have before me.

22 MR. MIGLIORI: But the point I wanted to make  
23 simply, your Honor, is that for me to now have to go do  
24 this is doing exactly what this Court's ordered that is  
25 not our burden, which is it shifts the burden to us to

1 now police this when there needs to be a good faith  
2 effort.

3 THE COURT: And if you are successful in  
4 convincing us that that is the case and that the  
5 Defendants have failed in their obligation, then  
6 there's a way to fix that as well.

7 MR. MIGLIORI: Okay. I appreciate that. Other  
8 than that, your Honor, I think everything that  
9 Mr. Griffis has said about the document production is  
10 accurate. And on Thursday, I think we'll be able to  
11 move forward.

12 THE COURT: At our next meeting, I would like  
13 you, if you have come to an agreement as far as setting  
14 a deadline by which document production will be  
15 completed, that you let me know that. And you may, if  
16 you have a form order, then we can enter that order as  
17 well.

18 MR. MIGLIORI: Thank you.

19 THE COURT: Okay. Tell me where you are with  
20 the identification of the 10 so-called non-ring break  
21 cases.

22 MR. MIGLIORI: Your Honor, we've conferred as  
23 the Court directed us, and we are in agreement on the  
24 next 10.

25 THE COURT: You are?

1 MR. GRIFFIS: We are, yes.

2 MR. MIGLIORI: They're the submission we  
3 provided the Court.

4 THE COURT: I'm shocked.

5 MS. TORISEVA: I'm sorry for laughing, but your  
6 response was funny.

7 MR. MIGLIORI: I can read the names and case  
8 numbers if you'd like or I can submit a list.

9 THE COURT: Why don't you go ahead and submit a  
10 list to us. Let me make sure I understand completely.  
11 These are 10 cases that have been identified by you to  
12 which Mr. Griffis has agreed.

13 MR. MIGLIORI: That's correct.

14 MR. GRIFFIS: Yes, your Honor.

15 THE COURT: Okay. And the understanding is that  
16 these will be submitted for -- you can call it an early  
17 neutral evaluation/settlement conference with at this  
18 point I'm not sure whom, and I can report that to you  
19 at your next -- at the next meeting.

20 When I say representative cases, are these --  
21 when we talked about the last group, what I suggested  
22 was that you have an array of cases that run the gamut  
23 from someone who's not injured terribly to someone who  
24 claims a great deal of injuries. Is that where we are  
25 with this?

1 MR. MIGLIORI: There are. There are some that  
2 have less in terms of permanent injury but have a  
3 unique sort of course for the product in the body.  
4 That is, there are a couple of cases that wouldn't be  
5 as large a pain and suffering claim, for example, but  
6 have a unique sort of science to how the patch got to  
7 where it is.

8 THE COURT: And so that we don't have a repeat  
9 of the issue that we had with the gentleman from  
10 Kentucky in the last round, do I understand that the  
11 Defendants in this case -- in these 10 cases are  
12 expecting to at least come forward with a dollar figure  
13 that they think the case is worth, as opposed to  
14 whatever happened with the gentleman from Kentucky  
15 where there was no offer and a zero dollar amount?

16 MR. GRIFFIS: We don't know that yet, your  
17 Honor. Our understanding going into the mediation with  
18 the gentleman from Kentucky was that we were to meet  
19 for the purpose of conducting an early neutral  
20 evaluation regardless of where we are in the  
21 settlement.

22 We subsequently learned that was not Magistrate  
23 Lovegreen's expectation and not yours, I believe.

24 THE COURT: It's not mine either on these. And  
25 so I want to make clear if we're going to be dragging

1 these people in here and we're going to utilize the  
2 services of a judicial officer to spend time with you,  
3 that if the Defendants are taking the position that  
4 it's a zero dollar case, it is not going to be the  
5 subject of one of these sessions.

6 MR. GRIFFIS: Right.

7 THE COURT: That's a waste of everybody's time.

8 MR. GRIFFIS: And we believe that, accordingly,  
9 we need to notify the Court in advance if we believe  
10 that's going to happen.

11 THE COURT: Well, you need to do that by the  
12 next meeting because if any of these 10 are zero dollar  
13 cases from the perspective of the Defendants, they're  
14 not part of this round.

15 MR. GRIFFIS: Such an evaluation would be  
16 based -- would have to be based on discovery that we  
17 conduct of the Plaintiffs and their treating physicians  
18 and analysis of the science that the Plaintiffs have  
19 presented.

20 Mr. Migliori has said that there is science that  
21 demonstrates that there's -- that their causation  
22 theory is true, that there is a --

23 THE COURT: And you don't have that information  
24 yet?

25 MR. GRIFFIS: He's given us two scientific

1 articles that I don't think establish that. I assume  
2 that this will be developed in the course of discovery  
3 of the treating physicians and so on of these cases.

4 THE COURT: When do you anticipate completing  
5 that?

6 MR. GRIFFIS: For example, with the Collins  
7 case, to answer that question, your Honor, we've agreed  
8 to try to finish discovery of these cases by  
9 January 31st and have mediation sometime in February.

10 With regard to Mr. Collins, for example, we had  
11 no idea at the time that the 10 cases were agreed to  
12 that we would be in that position with regard to him,  
13 and during the course of discovery --

14 THE COURT: As soon as discovery is completed,  
15 if you are taking the position that any of them fall  
16 into the Collins category, then you are to notify both  
17 Mr. Migliori and the Court.

18 MR. GRIFFIS: Yes, your Honor.

19 THE COURT: I'm not going to drag people in here  
20 for no good reason.

21 MR. GRIFFIS: Yes, your Honor.

22 MR. MIGLIORI: Your Honor, there's a -- the  
23 Defendants now -- the last time I brought the boxes  
24 with me, and I think I frightened the Court that I  
25 might actually open them.

1 THE COURT: Don't bring them in here.

2 MR. MIGLIORI: But I had three banker boxes of  
3 material provided that were just the medical records  
4 and Plaintiff fact sheets for these 10 people.

5 There is a lot of work and expense that goes  
6 into even deposing these people. So if there's anybody  
7 on their face, because to date in the early neutral  
8 evaluation of the ring break cases which for recalled  
9 products with ring breaks we learned that there was,  
10 Mr. Collins' case, a zero offer, there's got to be some  
11 threshold representation that they believe that these  
12 non-ring break cases have merit because as I currently  
13 understand Mr. Griffis' position, I believe that he's  
14 representing to the Court and to us that he doesn't  
15 think anything outside of a ring break case for a  
16 recalled product is worth anything.

17 And we're trying to create this litigation on  
18 the Plaintiffs' side. There has to be at the outset  
19 some kind of good faith belief that these cases are  
20 properly here, and --

21 THE COURT: I thought I made that clear.

22 MR. MIGLIORI: I'm hearing that from the Court.  
23 I'm not hearing that from Mr. Griffis. And with all  
24 due respect, I don't have a warm fuzzy feeling right  
25 now that these are -- any of these are going to pass

1       muster if the Defendants continue to maintain the  
2       position that even some ring break cases for a recalled  
3       product aren't worth anything. So --

4               THE COURT: That's why I suggested, and I have  
5       no compunctions whatsoever about following through, is  
6       marking up some of the cases that originated here for  
7       trial.

8               MR. MIGLIORI: Is that something that we can do  
9       concurrently, or --

10              THE COURT: You can start looking at them  
11       because if this process is an exercise in futility, and  
12       the Defendants are well within their bounds to take  
13       whatever position they want, they can offer zero on  
14       every one of these cases, but eventually some of them  
15       are going to go to trial and I've got -- I lost count.  
16       Do you know how many originated here, Barbara?

17              MS. BARLETTA: Twenty-eight maybe.

18              MR. MIGLIORI: I was going to say 30.

19              THE COURT: So if we need to go that route, then  
20       we go that route, and then you'll know what they're  
21       worth.

22              MR. GRIFFIS: Yes.

23              MR. MIGLIORI: Thank you, your Honor.

24              THE COURT: Okay.

25              MR. GRIFFIS: Your Honor, may I put something on

1 the record about two of the cases because this is  
2 something that we've conferred about.

3 THE COURT: Two of the 10 that have been  
4 identified?

5 MR. GRIFFIS: That's right. One of them is the  
6 Dillon case, and I asked Mr. Migliori to give me a  
7 clarification on that. That was selected by the  
8 Plaintiffs as a representative non-ring break case.  
9 However, it was on the chart that the Plaintiffs  
10 provided us of ring break cases as a confirmed ring  
11 break.

12 So I asked him to clarify whether it was a ring  
13 break or non-ring break case, and he checked and spoke  
14 to Plaintiff's local counsel in that case, and they  
15 said, Oh, it's not a ring break after all. So based on  
16 that representation, we were willing to have that count  
17 as a non-ring break case for this process.

18 The Anglon case is another one of the cases  
19 selected. That is a case that was removed from  
20 California. It has local Co-Defendant doctors. The  
21 removal was based on fraudulent joinder and misjoinder,  
22 and there was no opposition ever filed, no motion for  
23 remand ever filed; but we said to the Plaintiffs that  
24 they needed to dismiss those doctors, and they said  
25 that they would do so, that they were in the process of

1 trying to work out a process to do that.

2 THE COURT: Where are we with that?

3 MR. MIGLIORI: On Anglon, we did confer, and  
4 there was a question about the timing of the removal  
5 and the transfer and whether or not remand is still an  
6 option.

7 So I don't think there's any deadline missed or  
8 there may have been some confusion about when a  
9 response was due, but they've represented to me this  
10 week that they are going to dismiss the physicians if  
11 they can do so without prejudice so that they can  
12 participate in this process with the understanding that  
13 it would be a meaningful process.

14 So right now it's in my hands to get dismissals  
15 without prejudice. It will involve, though, making  
16 sure that we can get that from not Davol but from the  
17 doctors.

18 THE COURT: Okay. Can you do that by the end of  
19 the week?

20 MR. MIGLIORI: We're working on it, yes. We'll  
21 do our best. On the Dillon case, your Honor, we, in  
22 fact, at Mr. Griffis' request, checked on 764 cases to  
23 try to see which were ring breaks and which were not.  
24 And Mr. Griffis did bring to our attention that Dillon  
25 was marked as one of the I think hundred or so ring

1 break cases; and, in fact, we've modified that list.

2 THE COURT: So it's not?

3 MR. MIGLIORI: So it's appropriately part of  
4 this.

5 THE COURT: All right. Number three, you want  
6 to add someone?

7 MR. MIGLIORI: We have a firm that's been active  
8 and interested in being more involved on the common  
9 benefit issues, and we've appreciated their input.  
10 It's actually two firms, two individuals from different  
11 firms who work together. So we're not asking for two  
12 firms.

13 THE COURT: Have you provided Mr. Griffis with a  
14 copy of their papers?

15 MR. GRIFFIS: I have said that I don't object to  
16 the addition of these folks.

17 THE COURT: I need some material on them similar  
18 to what you provided me in the first round, and you can  
19 include that Mr. Griffis doesn't object.

20 MR. MIGLIORI: Okay to do that by letter or by  
21 filing?

22 THE COURT: I think it's probably better to do  
23 it by a filing so that the record's clear.

24 MR. MIGLIORI: We'll do that right away. Thank  
25 you very much. So it's clear, although they're from

1 two different firms, it would be for one seat that they  
2 would jointly occupy.

3 THE COURT: Okay. The next item is the effect  
4 of Judge Gibney's August 26th order regarding the  
5 treating physicians/consultants.

6 MR. MIGLIORI: It was our motion, if you'd like  
7 me to give you --

8 THE COURT: Yes.

9 MR. MIGLIORI: Your Honor, as you know, this  
10 issue first came up in front of Magistrate Judge Almond  
11 as a sort of afterthought, if you will, to a pending  
12 motion, and it's now ripened into briefing in front of  
13 Magistrate Judge Almond for the federal cases.

14 Concurrently, to make sure that this issue was  
15 also handled for the cases that are pending solely in  
16 the state court, we filed a motion to get clarification  
17 on that Court's clear order that there should be no  
18 contact with Plaintiffs' treating physicians.

19 We argued that fully. Defendants represented at  
20 that time that it, in fact, as of the date of hearing,  
21 didn't apply to any of the treating physicians in the  
22 state court cases at all; but the Court still went on  
23 to rule that the existing ex parte order is intended to  
24 encompass the retention of consultants in any state  
25 court case for a treating physician.

1           The issue before Magistrate Judge Almond is not  
2 something raised by Plaintiffs. We actually agreed.  
3 We met and conferred beforehand, and Mr. Griffis and I  
4 agreed that we would leave this issue to be adjudicated  
5 before this Court in its current posture, which was a  
6 clarification motion filed by Defendants.

7           THE COURT: And is that scheduled for hearing  
8 any time soon?

9           MAGISTRATE JUDGE ALMOND: Frankly, I didn't know  
10 that it was referred to me. Has it been fully briefed  
11 yet?

12           MR. GRIFFIS: Let me address the briefing issue,  
13 your Honor.

14           THE COURT: It may not have.

15           MR. GRIFFIS: It hasn't been. We're a bit  
16 frustrated about that. Magistrate Almond issued his  
17 opinion about our ability to provide notices of  
18 subpoena -- notices of deposition and subpoenas to  
19 treating physicians on July 21st. And in that order he  
20 said that we hadn't raised the issue before him  
21 adequately for him to address it, the issue of our  
22 communications with experts who are also treating  
23 physicians.

24           So we promptly filed a motion to enforce the  
25 case management order three days later on July 24th.

1 We asked Mr. Migliori for expedited briefings so that  
2 that could be heard at the next MDL hearing in August.  
3 Mr. Migliori declined and said we'd like the full time  
4 for briefing. That full time for briefing expired on  
5 August 14th without an opposition being filed.

6 Judge Gibney's decision was issued on  
7 August 26th. On August 29th, Plaintiff asked for two  
8 more weeks to file their opposition. I agreed to that  
9 because I thought it should be fully briefed and that  
10 we shouldn't just --

11 THE COURT: So the time has not run yet?

12 MR. GRIFFIS: The time hasn't run yet, but it  
13 should have. Right now --

14 THE COURT: Well, it hasn't.

15 MR. GRIFFIS: No.

16 THE COURT: Because you were kind enough --

17 MR. GRIFFIS: I was kind enough to issue a  
18 stipulation.

19 THE COURT: So it hasn't.

20 MR. GRIFFIS: But their opposition will be due  
21 on September 8th, our reply one week later on the 15th.  
22 And the only issue for the Court, I suppose, is that  
23 we've asked that that be also heard the week of the  
24 15th. And if we could set a hearing time --

25 THE COURT: I do remember seeing that. And so

1 it hasn't been formally referred, I don't think.

2 MAGISTRATE JUDGE ALMOND: No. I'm positive it  
3 hasn't been, and it wouldn't be because if it's not  
4 briefed, you're not going to get it on your table to  
5 send it to me.

6 THE COURT: We'll have to get back to you on  
7 that on the 15th, week of the 15th.

8 MR. GRIFFIS: Our reply will be on the 15th, so  
9 I assumed it would be a little later in the week; but  
10 if we could do it that date. . .

11 MR. MIGLIORI: Your Honor, I just reviewed this  
12 morning our papers. We can have it filed sooner, so if  
13 Mr. Griffis wants to take all of his time or not, and  
14 it can be heard as soon as the briefing is in and the  
15 Court is free to hear it.

16 THE COURT: We'll get you a date.

17 MR. GRIFFIS: Thank you.

18 THE COURT: Pending motions. Palmer I thought  
19 we had taken care of. Is that still floating out  
20 there?

21 MR. GRIFFIS: Your Honor asked us to report with  
22 regard to Palmer as to whether the in-state Defendants  
23 had been served prior to removal.

24 THE COURT: Yes.

25 MR. GRIFFIS: My best information on that, not

1 having received returns of service, is what  
2 Plaintiffs -- local Plaintiffs represented, and they  
3 represented that they did serve one of the local  
4 Defendants prior to removing and another one not; but  
5 that was not the basis for our removal.

6 The basis of the removal was fraudulent joinder  
7 and misjoinder. The same Plaintiff's counsel filed a  
8 motion to remand in another California case called  
9 Sutton, that was the Eastern District of California as  
10 opposed to the Southern District, which is where Palmer  
11 was filed, on pretty much the same procedural posture,  
12 and the Eastern District ruled denying the motion for  
13 remand on May 28th.

14 One of the things that we did in our briefing  
15 was to file a notice of supplemental authority and send  
16 that decision along.

17 THE COURT: Okay.

18 MR. GRIFFIS: And my understanding is that now  
19 California Plaintiff's counsel wants to amend their  
20 Complaint in order to cure deficiencies to address  
21 this.

22 I don't think that that would solve any  
23 misjoinder or procedural misjoinder problems,  
24 particularly in light of Sutton, but I consented to  
25 allow them to do so.

1 THE COURT: You did?

2 MR. GRIFFIS: Yes.

3 THE COURT: And what's the time frame on that?

4 MR. GRIFFIS: I don't believe we've got one.

5 MR. MIGLIORI: We didn't, your Honor, and I  
6 believe that the basis, the gravamen of the motion was  
7 that it wasn't -- no specific facts were alleged  
8 regarding the doctors in terms of misjoinder.

9 THE COURT: So they're named as Defendants and  
10 they're in the caption but not named in the body of the  
11 Complaint?

12 MR. MIGLIORI: I don't know whether they're  
13 completely referred to or incompletely referred to in  
14 the Complaint. I was just simply told that the basis  
15 for the removal was that they didn't know enough from  
16 the face of the pleadings to say that these were  
17 properly joined people. So, therefore, they must be  
18 improperly joined.

19 They want time to amend the Complaint to cure  
20 that, and we'll work out a deadline for it. We'll do  
21 it as soon as possible; but the counsel in Palmer is  
22 clear in their hope, and that is that they have the  
23 opportunity to get it remanded.

24 Procedurally, I represented to the Court that I  
25 would talk to this counsel and if it were an issue that

1 this Court had previously addressed, I would tell them  
2 the outcome of that and proceed accordingly. I have  
3 not been aware of any instance where this Court has  
4 ruled on an issue like this.

5 THE COURT: No. If you cannot resolve it, by  
6 that I mean either they're in or they're out, and you  
7 need us to address it, why don't we put that on, Pat,  
8 for the next hearing, next meeting in October because  
9 that's been pending for a while.

10 MR. GRIFFIS: Yes, your Honor.

11 THE COURT: And then the next one under pending  
12 motions is this last issue that we've been talking  
13 about.

14 MR. MIGLIORI: I believe the Court entered the  
15 agreement that we had on the briefing schedule just the  
16 end of last week.

17 THE COURT: I think I did, yes. Okay. Anything  
18 else that we haven't talked about?

19 MR. GRIFFIS: On the pending motions list that  
20 was submitted to your Honor, there are a number of  
21 motions to show cause which we could discuss today.  
22 They've been briefed.

23 THE COURT: Are these having to do with failure  
24 to comply with the Plaintiff's fact sheet?

25 MR. GRIFFIS: Yes, they do, your Honor.

1 THE COURT: Some of the ones you sent in before?

2 MR. GRIFFIS: Let me summarize it because I do  
3 think it would be useful. We filed two motions, one  
4 for the Huerta and Walters case, I see that as the  
5 second item on the pending motions, and then one in  
6 Walker, Garrett, Gracyk and Lagoe. That was all the  
7 same Plaintiffs.

8 In Huerta, we filed our motion on July 8, and we  
9 received a Plaintiff fact sheet from Williams Kherkher,  
10 who was not counsel of record. They're not the people  
11 to whom we send deficiency letters.

12 THE COURT: Have they entered an appearance?

13 MR. GRIFFIS: No. We asked them to do so. We  
14 sent them a letter saying, Please send us proof that  
15 you're counsel of record, and they haven't responded to  
16 that yet.

17 I believe that the Huerta motion, because we did  
18 receive a Plaintiff fact sheet, whoever sent it to us,  
19 we got it, should be denied without prejudice; but I  
20 think there's a lot of housekeeping to be done on the  
21 Williams Kherkher side.

22 In addition to this issue where they need to  
23 enter an appearance, there may be other cases where  
24 they need to enter appearances. There are also  
25 dismissals that they have promised us that they haven't

1 done yet, and there are a number of cases in which they  
2 have told us that they need to withdraw as counsel.

3 They asked us to file a motion to dismiss in  
4 those cases because they couldn't get in touch with the  
5 Plaintiffs in those cases and they wanted to force the  
6 issue, and I responded to them -- we responded to them,  
7 I don't think I actually signed the letter, we  
8 responded to them saying, You need to comply with the  
9 rules of the District of Rhode Island on withdrawal,  
10 please do so, and they haven't said anything.

11 So what I would like is for Williams Kherkher  
12 to, by the next hearing, get their house in order on  
13 all of these matters. If there are -- I can't  
14 represent to you on 26 cases they need to do this and  
15 22 they need to do that, but any cases in which they  
16 need to withdraw as counsel, that they do that; any  
17 cases they need to dismiss, they do that.

18 THE COURT: Can you put those in lists? Can you  
19 give Mr. Migliori a list?

20 MR. MIGLIORI: I can actually -- I was involved  
21 in this issue when it was an issue maybe four, five  
22 sessions ago, and I wasn't aware that there was ongoing  
23 discussion about it. I'm sure I was copied on it, but  
24 I wasn't asked to run interference.

25 I can definitely run interference and do as we

1 did with some of the other show cause where counsel  
2 thought they had withdrawn from the case and didn't.  
3 We have a system set up in our office where we can show  
4 them how to navigate the local rules and do it.

5 So let me get with Williams Kherkher, and I'll  
6 compare the list with Mr. Griffis; but we can actually  
7 fix that.

8 MR. GRIFFIS: That's what I figured.

9 THE COURT: Why don't you then get him the ones  
10 that you have some concerns about, and he can work on  
11 those.

12 MR. GRIFFIS: I think Williams Kherkher probably  
13 has the better list than we do, but we certainly know  
14 of some of the picture, and we'll do that.

15 On the Walters case that was part of the Walters  
16 and Huerta motion, we did receive a Plaintiff's fact  
17 sheet. We've got some deficiency issues, but we'll  
18 continue with that process rather than insist on the  
19 motion to show cause.

20 THE COURT: In that case, are you willing to  
21 withdraw the motion to show cause?

22 MR. GRIFFIS: Yes.

23 THE COURT: Why don't you do that so it's not  
24 showing as a pending motion.

25 MR. MIGLIORI: Is that just Walters?

1 MR. GRIFFIS: That would be Walters and Huerta.

2 MR. MIGLIORI: Thank you.

3 MR. GRIFFIS: The next motion was for Walker,  
4 Garrett, Smith, Gracyk and Lagoe. We withdrew the  
5 Lagoe portion of it due to receipt of a Plaintiff fact  
6 sheet, which was deficient, but that wasn't the issue  
7 in the motion.

8 We will do the same with regard to Gracyk where  
9 we did receive a Plaintiff fact sheet. The Smith case  
10 has been dismissed by Plaintiff's counsel, so that's no  
11 longer an issue. And in the Walker and Garrett case,  
12 this is the Steven Johnson firm for all of these cases,  
13 we received no Plaintiff fact sheet and no response to  
14 our motion. So those are ripe to be decided.

15 THE COURT: Barbara, if there's been no response  
16 to the motion, you've got to let me know that.

17 MS. BARLETTA: I think you have them.

18 MR. MIGLIORI: Because of the Smith and Gracyk  
19 issues, I got involved with that firm, and I'd  
20 appreciate at least the end of this week to just check  
21 with them to make sure they're aware that there's still  
22 a remaining issue out there because it was my  
23 impression from talking to Mr. Johnson that we had sort  
24 of resolved the issues. So Walker and Garrett, can I  
25 have until Friday just to make sure?

1 THE COURT: Okay. Anything else?

2 MR. GRIFFIS: There were two cases that were  
3 double -- what we've been calling double dips when  
4 we've communicated with one another, double filed  
5 cases. One was the Pamela Darso case followed by both  
6 Douglas & London and Parker Waichman. And we've been  
7 told that Douglas & London will continue that case.

8 And the other is the Marie McCaffrey case. A  
9 Brian DelVecchio filed that case, and it's before this  
10 Court, and a state court version of the same case is  
11 pending filed by Tony Pletcher and the Watts firm. And  
12 my understanding is that they're to communicate with  
13 one another and work that out. I just wanted to put  
14 that --

15 MR. MIGLIORI: They communicated with both  
16 Mr. Griffis and me on Friday that they'll work that out  
17 today, so I don't foresee a problem.

18 I have one issue that came to my attention just  
19 last week. The Court should know that we have -- from  
20 our 12 or 13 Plaintiff steering committee firms, we've  
21 had a rotation every week of 5 to 10 lawyers and  
22 paralegals coming from all over the country into a  
23 repository working on the documents that we received.  
24 It has been very fruitful, and people have been  
25 enjoying our restaurants in our city.

1           We also learned, though, that we're learning  
2           some information that we wouldn't probably have gotten  
3           otherwise. There are a couple of firms that are  
4           getting cases filed in the federal court expecting them  
5           to be tagged along to here, cases where there's an  
6           actual product that's subject to this Court's scope  
7           order, but the panel saying it's not related to.

8           And I don't know the process, I don't know why  
9           the process is that way, but they're forced to file  
10          motions to reconsider and the like, including this  
11          Court's order.

12          I don't know if there's a procedural way to help  
13          those cases get through the system, but one of them was  
14          almost one of the next round of early neutral  
15          evaluation cases. So I don't know if the Court has any  
16          guidance for us. We're going to just keep being  
17          persistent with the panel, but --

18          THE COURT: I think that's the only thing that  
19          you can do. I can't control what they do.

20          MR. GRIFFIS: I think it is, too, your Honor,  
21          and we've actually intervened on behalf of one of those  
22          as well. There was a Composix EX case. We tagged it  
23          for removal, and the panel --

24          THE COURT: You did?

25          MR. GRIFFIS: And the panel rejected that on the

1 ground that it was not intended to be part of the MDL.  
2 And we provided the court clerk with a copy of your  
3 Honor's order clarifying the scope of the MDL, and I  
4 don't believe that they've yet done anything in  
5 response to that, but we provided them with that  
6 information.

7 THE COURT: Is there a change on the panel?

8 MR. MIGLIORI: Quite honestly, your Honor, I  
9 think it was more clerical or administrative than  
10 anything else, but --

11 THE COURT: Let's see what happens now that  
12 you've given them a copy of the order.

13 MS. TORISEVA: That's part of the problem. You  
14 have judges that have their own docket and own courts  
15 around the country. You have administrative law clerks  
16 or other people making those decisions. So you have to  
17 file the motion to get the attention of the judges, and  
18 then I think it probably gets corrected easily, but  
19 it's going through those motions.

20 THE COURT: It's kind of surprising if there's  
21 no opposition to it.

22 MR. MIGLIORI: Or that the Defendants are asking  
23 for it.

24 THE COURT: Okay. Well, hopefully it's just  
25 administrative. I don't think I have any authority to

1 do anything other than to accept what they send me.

2 MR. GRIFFIS: I believe that's right.

3 THE COURT: Okay. All right. Well, maybe  
4 somebody will get the hint when they see that there's  
5 no opposition to it. Anything else?

6 MR. MIGLIORI: That's it, your Honor.

7 THE COURT: Okay. Next meeting by our  
8 calculation --

9 MAGISTRATE JUDGE ALMOND: I just have two quick  
10 things. I'm sorry to interrupt. What time are you  
11 meeting with Judge Gibney?

12 MR. MIGLIORI: One thirty.

13 MAGISTRATE JUDGE ALMOND: Where?

14 MR. MIGLIORI: Fifth floor, her courtroom. I  
15 don't remember the number, but it's the Benefit Street  
16 side.

17 MAGISTRATE JUDGE ALMOND: And one other issue.  
18 I received a fax last week from you, Mr. Migliori, a  
19 courtesy copy of a motion you had filed before  
20 Judge Gibney, which is fine, but it doesn't indicate if  
21 it was copied to Mr. Griffis.

22 MR. MIGLIORI: It was. I can make sure it's on  
23 the cover letter.

24 MAGISTRATE JUDGE ALMOND: Often I'll get  
25 courtesy copies of decisions, and it's advocacy, and so

1 I want to see that it's going to the other side.

2 MR. MIGLIORI: I appreciate that. It was the  
3 motion that I referred to earlier trying to set a  
4 deadline.

5 MAGISTRATE JUDGE ALMOND: The substance of it is  
6 fine. I just want to make sure he has it so he knows  
7 what you're giving to me.

8 MR. MIGLIORI: We'll make sure it's in the cover  
9 letter.

10 MAGISTRATE JUDGE ALMOND: That's it.

11 THE COURT: Okay. Next month I believe is the  
12 open session. Is everybody else in agreement on that?  
13 We will meet, then, on a Tuesday. Hopefully we'll go  
14 back to our Tuesday at 1:00 schedule. You're here  
15 today only because I'm a little tied up for the next  
16 few weeks. So we'll -- and hopefully I will not still  
17 be tied up at that point in time.

18 And so we'll set that for downstairs, and you  
19 can let whomever know that they're welcome to come.  
20 We've had fairly good attendance the past couple of  
21 times. Has it been helpful having that open session?

22 MR. MIGLIORI: They do. Even if it's  
23 psychological, but we've had substantive meetings  
24 before and after. So we make use of the day.

25 THE COURT: Good. Okay. Then I'll see you on

1           October the 7th.

2                       MR. GRIFFIS: Thank you, your Honor.

3                       THE COURT: If not sooner.

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

September 23, 2008\_\_\_\_\_

date