

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF RHODE ISLAND

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5 In re: KUGEL MESH HERNIA PATCH MDL CA 07-1842 ML

6  
7 PROVIDENCE, RI

8 SEPTEMBER 18, 2008

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11 BEFORE MAGISTRATE JUDGE LINCOLN D. ALMOND

12  
13 APPEARANCES:

14  
15 FOR THE PLAINTIFF:

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1 SEPTEMBER 18, 2008 - MORNING SESSION

2 THE COURT: Good morning. We're here today in the  
3 Kugel Mesh Hernia Patch MDL, Case No. 07-1842 ML. We're before  
4 the Court today on two motions that have been referred to me by  
5 Chief Judge Lisi for determination. They are document number  
6 1229, which is defendant's motion to enforce the amended case  
7 management order and document 1241, plaintiff's motion to compel  
8 identification.

9 Will counsel please identify themselves for the  
10 record?

11 MR. GRIFFIS: Kirby Griffis, Mark Nugent and Tom  
12 Robinson on behalf of Bard and Davol.

13 THE COURT: All right.

14 MS. DONALDSON: Leah Donaldson and Donald Migliori on  
15 behalf of plaintiff.

16 THE COURT: Okay. Why don't we start out with the  
17 first filed motion. I'll hear from defendants on their motion  
18 number 1229. I have obviously reviewed all of the filings in  
19 detail and I have some background on the issues so I don't need  
20 you to repeat everything in your brief. It would helpful to me  
21 if you could speak more in practical terms about your position  
22 on the motion and its impact on the processing of these cases.

23 MR. GRIFFIS: Certainly, your Honor. The issue before  
24 the Court today is not whether we may speak to treating  
25 physicians about their care and treatment of their patients.

1 We've already had that out before your Honor. We filed a motion  
2 to do that in the particular states of the union that explicitly  
3 allow that, and your Honor adopted a national rule that  
4 supersedes the laws of each individual state and barred us from  
5 doing that. That was in order to get direct discovery about  
6 care and treatment of plaintiffs from the people who treated  
7 them, and that's not on the table today.

8 THE COURT: I'm aware of that.

9 MR. GRIFFIS: What we prepared to do or have any  
10 intent to do, and we've had no such contacts, of course, either  
11 before or after your Honor's order on the subject.

12 It's also not an issue before your Honor whether we may  
13 approach groups of plaintiff's treating physicians in order to  
14 co-op them as some of the briefing implies that we may do. We  
15 have no intent to do that and we haven't done so. We do not  
16 take lists of treating physicians and use that as our starting  
17 point to find consultants. On the contrary, we try to avoid  
18 that as much as possible.

19 This isn't about whether we can undermine your Honor's ex  
20 parte ruling by meeting with treating physicians and nibbling  
21 around the issue by asking them general questions designed to  
22 elicit specific testimony about their care and treatment of  
23 plaintiffs. We're not interested in doing that. We're not  
24 interested in using any consultant in a case in which they  
25 treated a plaintiff. There would be no circumstance in which a

1 treating physician would be offering testimony, general  
2 causation testimony, or specific causation testimony against  
3 someone whom they treated.

4           The issue is, it is whether we are going to be left  
5 with a secure ability to retain and consult with consulting  
6 experts, and by secure ability, I mean an ability that won't be  
7 taken away from us. The one expert who we know about so far who  
8 has been retained by us as a consulting expert and who turned  
9 out to be a treating physician is Dr. Pete Milliken. Dr.  
10 Milliken is one of a very small group of nationally known hernia  
11 experts. He's a general surgeon, but we feel a general surgeons  
12 is not our hunting ground for experts. We're looking for people  
13 who specialize in hernia repair who are nationally known on the  
14 subject. Dr. Milliken has published articles on hernia repair  
15 and technique. He takes on the most complex of hernia repair  
16 cases. He gets referrals from all over the country on complex  
17 hernia cases and he has extensive experience with Composix Kugel  
18 Patch and other products. There are very few people like him.

19           We've had multiple meetings with Dr. Milliken starting in  
20 2007 and then the Kolb case was filed. The Kolb case was filed  
21 after those meetings. It was filed on June 5, 2008. And his  
22 named happened to have been mentioned in the complaint, which is  
23 relatively rare. The complaints often don't give us the  
24 implanting and explanting physician information. We often have  
25 to wait for the plaintiff fact sheet before we're given

1 information about but this complaint did state that the  
2 implanting and explanting physician was Dr. Milliken.

3 I think this is going to be typical, and obviously in  
4 any case in the future from now on where we learn that someone  
5 who we're working with as a consulting expert is also a treating  
6 physician that's going to be new news to us, as we've disclosed  
7 everyone who we know is in that situation right now. We will  
8 find out --

9 THE COURT: How would you learn that? You would ask  
10 the -- if you had consulted a potential expert, would you show  
11 that physician a list of plaintiffs and say cross-reference this  
12 with your records?

13 MR. GRIFFIS: No, your Honor. I don't think that  
14 would be fruitful because for multiple reasons. First of all,  
15 the list is always changing. Secondly, I don't think anyone  
16 would remember -- I don't think anyone -- I don't want to put  
17 potential experts --

18 THE COURT: Yeah, I'm confident the doctor wouldn't  
19 remember off the top of his or her head, but they could take the  
20 list and give it to their office manager or billing department  
21 and say are there any matches with anyone I've treated.

22 MR. GRIFFIS: Could do an extensive file review. I  
23 think that would be something that would deter, would tend to  
24 deter witnesses from participating in litigation with us. But  
25 what we do to find out as we talk to the expert, we tell them at

1 the very first meeting, at the initial contact, what we want to  
2 use them for, which is we would like to talk to you about  
3 general causation issues and we possibly after we talk with you,  
4 if you're interested in doing so, we'd like you to review some  
5 patient files, and give us information about those patient  
6 files. Other than that, we're not interested in talking to you  
7 about your individual care and treatment of people you've  
8 treated. And we're particularly interested in avoiding talking  
9 about talking about any plaintiffs in this litigation, so -- but  
10 for now let's just not talk about specific care and treatment at  
11 all. We do need to ask them some questions like what's your  
12 experience with the Composix Kugel Patch? Generally, have you  
13 had a satisfactory experience, or an unsatisfactory experience?  
14 Have you had ring breaks or not, have you had other  
15 complications or not, if you've had infections, et cetera. But  
16 they ordinarily can't give us, you know, names and details and  
17 information that we can match up. What we need to rely on is  
18 the information that's provided to us in complaints and in the  
19 plaintiff fact sheets. Particularly the plaintiff fact sheets  
20 which are intended to provide us with clear information about  
21 the physicians that these people saw. That information is often  
22 inaccurate but it's pretty good with regard to implanting and  
23 explanting surgeons who are what we're mostly concerned with.  
24 These people who ordinarily who would not have been their ENT or  
25 something like that on the side. It would be an implanting or

1 explanting surgeon. So the plaintiff actually is the main thing  
2 that we look to for that information.

3 So the questions for the Court, how many expert witnesses  
4 are we going to lose, and will we lose expert witnesses in the  
5 future if we discover through a later disclosure or a new case  
6 filing that they have treated a plaintiff? What will be the  
7 outcome when that happens? We will lose this person that we've  
8 worked with as an expert witness are we unable to use them?  
9 This particular event with Dr. Milliken, that question hasn't  
10 been answered with regard to Dr. Milliken but it's some ways  
11 from trial and we may be able to work with other experts and  
12 cover up, although he's one of the best in the country in all of  
13 these areas and he's a big loss if we can't use him. But we can  
14 lose people in more tenuous situations on the eve of trial.  
15 We're under an order right now that was entered --

16 THE COURT: How many experts are you going to need?

17 MR. GRIFFIS: That depends on how many cases go to  
18 trial. Experts have a shelf life. There's a limited number of  
19 times that they can be useful primarily based on their ability  
20 to spend time to focus on cases. They're all busy and they have  
21 their own professional lives, and there's only so much time that  
22 they can devote. But I expect that we would need a significant  
23 number, and they need to be this kind of high quality expert,  
24 not just any general surgeon that we can find.

25 The next question that's been raised by the briefing,

1 your Honor, do we lose the expert. Is do we lose our right to  
2 keep the identity of the experts confidential under Rule 26 once  
3 we learn due to a later disclosure or a later filing  
4 retroactively that they've treated the plaintiff?

5 The next question is whether we face a retroactive  
6 risk of having to --

7 THE COURT: Didn't Judge Lisi already tell you that  
8 you had to disclose those identities?

9 MR. GRIFFIS: Judge Lisi ordered us to disclose them  
10 as of a particular date. I don't know that she intended to rule  
11 on the motion that she's referred to your Honor on a going  
12 forward berth basis. Her order was produce the list of the  
13 surgeons that you're claiming to be your consulting surgeons,  
14 and when I asked for clarification, she added who you know also  
15 to be treating physicians in this case, and we've fully complied  
16 with that order. I believe it's still open.

17 THE COURT: The compliance with that was Dr. Milliken?

18 MR. GRIFFIS: Yes, was the letter that we sent to the  
19 Court that Friday when she requested that providing the  
20 information we knew.

21 THE COURT: All right.

22 MR. GRIFFIS: I believe it's still an open question  
23 whether that is a standing order on a going forward basis.

24 The next thing that the plaintiffs have asked for is  
25 for us to encounter a retroactive risk of having to disclose a



1 significant portion of the content of our confidential  
2 communications with consulting experts. People we may or may  
3 not choose to have testify, and may or may not choose to have  
4 testify in particular cases. Certainly we're under no  
5 obligation under Rule 26 absent a showing of extraordinary need,  
6 as the rule reads, under no obligation to disclose that  
7 information. But what we're faced with now is a request in both  
8 sets of motions that we provide to plaintiff's counsel, once we  
9 learn retroactively that somebody we have been working with  
10 turns out to have been a treating physician, information about  
11 when we started working with them, what communications we had,  
12 when we entered into a consulting agreement, and most  
13 significantly, what documents we provided to them and what  
14 documents they provided to us. The latter would clearly tend to  
15 reveal our thinking about the case, and what's important in the  
16 case, and the expert's feedback in the case, including possible  
17 case specific analyses, and including the medical records that  
18 we chose to provide in a particular case for them to analyze and  
19 work up in addition to whatever studies either of us may chose  
20 to focus on. We don't think that's fair. We don't think that's  
21 reasonable. We don't think that's justified by any  
22 interpretation of Rule 26, and certainly by no case law that  
23 anybody has cited.

24 And the over-arching issue is whether we lose the  
25 ability to retain ultimately all of the best and most qualified

1 expert witnesses in the country --

2 THE COURT: As a practical matter, this is -- so if I  
3 agree with you, then the plaintiff's side, there's a particular  
4 treating physician who they're dealing with, they would not know  
5 that that treating physician is working with you as an expert.  
6 When would they find that out?

7 MR. GRIFFIS: They'd find out when they took the  
8 deposition of that person. They'd find out that the person was  
9 a consulting expert, they'd find out whether they had been paid,  
10 they'd find out how much they were paid, they'd find out when  
11 that relationship started. This is all information that we  
12 asked Dr. Ramshaw to disclose and we were refused on by the  
13 plaintiffs. We think that that information is discoverable. We  
14 don't think that they would be entitled to discover, and we  
15 don't think we would be entitled to discover from Dr. Ramshaw  
16 what documents were exchanged as part of that consulting  
17 relationship, and information of that sort.

18 THE COURT: Okay.

19 MR. GRIFFIS: Also, as a practical matter, we're not  
20 talking about cases that are being worked up currently for  
21 alternative dispute resolution, or accelerated or set for trial  
22 or anything else. We're talking about a body of about 799  
23 cases, 850 plus plaintiffs, and we don't know when or if these  
24 cases will go to trial, but meanwhile the plaintiffs are asking  
25 to have a look at our thinking with consulting experts by

1 getting this documentation and getting this information right  
2 now, in any case in which it happens, or turns out to happen  
3 tomorrow, or next week, or a month from now.

4 THE COURT: Well, one part of their request is they  
5 want to know the identity and they ask for other information on  
6 top of that. But as to identity, what is the problem from the  
7 defendant's standpoint of disclosing the identity now if you're  
8 saying the identity would be disclosed at a deposition at some  
9 future date?

10 MR. GRIFFIS: It's just not something that we are  
11 obliged to do under the rules. It's not something that I see  
12 that the plaintiffs have any entitlement to, and it's not  
13 something that they've shown an extraordinary need for. It's  
14 also something that we're entitled to keep confidential as part  
15 of our workup of the case and our analysis of the case. It  
16 would also pose an ongoing obligation on us to keep track of  
17 that information for them and do the periodic reports to them  
18 with some jeopardy --

19 THE COURT: Do the rules contemplate the situation  
20 where somebody would be a treating physician of a plaintiff and  
21 a consulting expert of a defendant?

22 MR. GRIFFIS: It's been rarely addressed, as your  
23 Honor knows. The only --

24 THE COURT: Well, because it never happens in most  
25 cases. It would only happen in these --

1 MR. GRIFFIS: Absolutely. It would only happen --  
2 pretty much only happen in the MDL context and the context of  
3 consolidated litigation where the plaintiffs have filed so many  
4 lawsuits, and by the way, I'm leaving out the class action which  
5 would knock out every single treating physician in the country  
6 who has ever implanted or explanted and buys its Kugel patch,  
7 theoretically. I assume that the plaintiffs aren't holding us  
8 to the fire on that or we really would clearly be out of luck  
9 entirely.

10 The only federal MDL case I know of addressing this  
11 situation where it was explicitly put to the Court that, "Hey,  
12 defendants need to be able to actually retain some consulting  
13 experts who might be treaters, is the In re: Prempro litigation  
14 and the In re: Seroquel litigation. In both of those cases the  
15 Court found that it was all right with certain restrictions that  
16 we've already discussed and already stipulated to in the prior  
17 briefings. We've already been following. I think that would be  
18 perfectly appropriate here. We're perfectly happy to follow the  
19 orders of this Court. But there is very little case law  
20 addressing this situation. It's certainly an unusual situation.  
21 But it's important that we are not -- this isn't the first  
22 motion that was before your Honor. This isn't a motion like a  
23 Stempler motion in the State of New Jersey which explicitly  
24 allows for direct contact --

25 THE COURT: I don't know what that is.

1 MR. GRIFFIS: There's a case, In re: Stempler by the  
2 New Jersey Supreme Court that says that defendants can conduct  
3 discovery by going to treating physicians and asking them about  
4 their care and treatment of plaintiffs.

5 THE COURT: Okay.

6 MR. GRIFFIS: That's not what we want to do. We  
7 want to talk to them about things other than their care and  
8 treatment of the plaintiff. We want to talk to them about  
9 generalization issues, and we want to go to these national level  
10 experts who see all sorts of plaintiffs and are the most likely  
11 of anybody to be ultimately excluded because they've seen a  
12 plaintiff in this litigation, and we're fairly likely to find  
13 that out at some point. I haven't seen any challenge to the  
14 math that I put in our briefing on that subject saying that  
15 somebody sees -- does 25 Composix Kugel cases a year from the  
16 inception of the product would be -- would have a less than 2  
17 percent likelihood of not having seen the plaintiffs, just given  
18 the numbers of plaintiffs who have filed so far, and I'm very  
19 concerned that this is really going to foreclose our ability to  
20 work with anybody who's highly qualified. I'm not particularly  
21 interested in finding someone who has a general surgery practice  
22 and takes all comers, and occasionally does a hernia repair, and  
23 has used the -- and buys a Kugel patch five or six times in  
24 their life, which is what we would be forced to if all of those  
25 national level experts are knocked out by virtue of the fact

1 that they're very experiences and by virtue of the fact that  
2 they do a lot of these cases, and by virtue of the size of the  
3 litigation. That's what we're faced with, and that's the sort  
4 of situation that the In re: Prempro and In re: Seroquel is  
5 faced with, and they found that in those situations it was  
6 appropriate to allow the defendants to have expert witnesses who  
7 may or may not be treating physicians as long as they didn't use  
8 -- they didn't inquire about the care and treatment of the  
9 plaintiffs as long as they didn't use those experts in those  
10 particulars cases, and against those particular plaintiffs.  
11 We're perfectly happy with complying with all of that.

12 THE COURT: All right, let me hear from the  
13 plaintiffs.

14 MR. GRIFFIS: Thank you.

15 MS. DONALDSON: Good morning, your Honor.

16 THE COURT: Good morning.

17 MS. DONALDSON: First I'd like to say that I'm  
18 honored to be here. This is the first time I'm getting to argue  
19 in federal court, so I'm a little nervous --

20 THE COURT: It's not that exciting.

21 MS. DONALDSON: That's what they keep telling me  
22 but I don't believe it yet.

23 THE COURT: If Mr. Griffis and Mr. Migliori can  
24 do it, you can do it.

25 MR. GRIFFIS: Thank you.

1 MR. MIGLIORI: Thank you.

2 MS. DONALDSON: Okay.

3 THE COURT: Mr. Griffis addressed both his motion  
4 and your motion in his argument so feel free to address both in  
5 yours.

6 MS. DONALDSON: Thank you, your Honor. And I do  
7 think that Migliori will probably address our motion. I'm  
8 prepared to address -- I can address our motion but I'm prepared  
9 to address that defendant's motion.

10 The first thing that I just wanted to cover, and  
11 I know, is some of the relevant history because the defendants  
12 seemed to tie their motion to the amended CMO, and I just wanted  
13 to run through some of the dates that are relevant there.

14 In December 6th of last year, the original case  
15 management order was entered, and on December 27th is when the  
16 defendants first filed their first motion before this Court  
17 seeking ex parte contact with plaintiff's treating physicians.  
18 On January 22nd, that motion was denied. On the 30th, the  
19 amended motion, the amended CMO was entered to correct a few  
20 things as we brought forth to this Court.

21 THE COURT: I'm familiar with the history, and it  
22 has the same language that was in the first CMO that  
23 tangentially deals with these issues was in the amended CMO.

24 MS. DONALDSON: Yes, your Honor. And on the 25th  
25 of February, Judge Lisi affirmed this Court's order as far as

1 the ex parte order on prohibiting ex parte communications,  
2 holding that this order was sound and reasonable.

3 And then the other thing that I wanted to make  
4 sure gets noted is the July 21st order where the defendants were  
5 seeking to clarify and this Court narrowly granted -- granted  
6 that narrow request, and that the defendants can communicate  
7 with treating physicians but they have to do it within certain  
8 limits. They have to do it in writing. They have to notify the  
9 plaintiffs. They have to keep it to logistical issues only.

10 The next point --

11 THE COURT: Isn't the question whether I should  
12 do the same thing Judge Gibney did, or do the same thing that  
13 the judges in the MDL cases cited by Mr. Griffis did?

14 MS. DONALDSON: Well, yes, and this Court  
15 definitely should not use those cases that are cited by Mr.  
16 Griffis as a reason to allow the defendants in this case to talk  
17 with these treating physicians. Right now, I mean hernia  
18 surgery is extremely common, and general surgeons perform that  
19 procedure. There are currently, according to the American Board  
20 of Surgery, over 50,000 general surgeons in the United States.  
21 Even if you'd bring that number down to talk about general  
22 surgeons who do this hernia surgery, it's still a huge number of  
23 surgeons available to the defendants. There are approximately  
24 800 cases filed right now in the MDL. That is only about 1 and  
25 1/2 percent of general surgeons who may be affected by a case



1 and this MDL plaintiff is before your Honor.

2 The defendants list a few of these other cases.  
3 One of them is Astrazeneca, and the Seroquel case. There, there  
4 were 6,000 plaintiffs in the nationwide MDL, and according --

5 THE COURT: In which one of those cases?

6 MS. DONALDSON: That was Seroquel? In re:  
7 Seroquel.

8 THE COURT: All right.

9 MS. DONALDSON: And the order that was put in  
10 place there was just for the Florida plaintiffs, and there were  
11 174 Florida plaintiffs, and of those 174, the defendants in  
12 Seroquel identified over 3,000 healthcare providers. So if we  
13 do the math, for the 6,000 plaintiffs nationwide, there's over  
14 108,000 doctors that could be affected, so that would really  
15 wipe out -- I mean, that could really wipe out experts in a real  
16 practical way for the defendants in that case. We don't have  
17 that here.

18 The other case that is put forth by defendants is  
19 the Minnesota Penile prosthesis litigation. In that case, they  
20 needed experts in the field of penile prosthesis which honestly  
21 I don't really even know what that is, and they sought  
22 urologists with that expertise. In that case, there were 7,000  
23 cases, and only about 9,000 certified urologists in the United  
24 States. So again, you know, probably not very many urologists  
25 do this penile implant procedure. So again it was very limited.

1 Those defendants did have a real challenge finding an expert in  
2 that situation. These defendants do not have that same  
3 challenge. The defendants here, we have given the defendants  
4 approximately 600 of the 800 plaintiff fact sheets that are out  
5 there right now, so they've got 75 percent of the information.  
6 They already had the names of these doctors as of the 8th of  
7 August when they gave us their letter listing one physician.  
8 The defendants know who they sold their product to, they know  
9 who's been using their product, they have the ability to go out  
10 and find non-treating expert physicians that they can use.

11 THE COURT: So the problem I have is I'm not out  
12 searching for experts, and I don't represent plaintiffs who have  
13 treating physicians, and you tell me that they should have no  
14 problem finding one, and he says, hey look --

15 MS. DONALDSON: Well, your Honor, well, as to  
16 this point defense counsel is suggesting that at some point in  
17 the future they may have this problem, and that's not the issue  
18 before the Court today. The issue before the Court today is  
19 that at this point they should not be allowed to continue ex  
20 parte communications without notifying the Court, you know, we  
21 can -- if that hurdle happens, if we do reach that, you know, of  
22 course plaintiffs will object to it, and the Court can rule on  
23 it then. But at this point, this, the sky is falling, this may  
24 happen at some point in the future is not where we are today.  
25 And I know you asked us to speak very practically, and

1 practically this is an issue with one doctor. As of today,  
2 we've been notified that, you know, only one doctor in one case  
3 has been affected by this no ex parte contact order that's  
4 currently in effect.

5           The other thing I just want to mention is that  
6 the defendants seem to think that the CMO should be treated as a  
7 contract, and somehow the language of the CMO should enforce  
8 upon the plaintiffs, and that we should somehow have to let them  
9 do this, and there's no language, and I'm sure the Court is  
10 aware of this, there's no such language in the CMO. The CMO is  
11 not a contract. It's a management order. The CMO does state  
12 that the plaintiffs will continue to talk to their experts. It  
13 does not say the plaintiffs agree that they can continue to talk  
14 to experts once they've been identified as treating physicians.  
15 It does say that if we have a disagreement about ex parte  
16 contacts, we'll come to the Court, which is what we're doing  
17 today. But again, you know, that sub part the defendants point  
18 to is not as broad.

19           THE COURT: Which sub part?

20           MS. DONALDSON: I'm sorry.

21           THE COURT: One or three?

22           MS. DONALDSON: Three. Well, one either, but  
23 three specifically. You know, that sub part is within part 7(d)  
24 I think it's 7 -- I'm sorry, 6(d) of the amended CMO. That has  
25 to do with plaintiff fact sheets. That entire section goes to

1 as they receive the plaintiff fact sheets, they're going to  
2 start seeing, you know, folks who they didn't realize they  
3 treated before and now they are a treater, and this is what  
4 we've agreed to do, we've agreed to immediately tell the doctor  
5 stop talking about it, and we're going to come to the court to  
6 resolve these disagreements. It never says because plaintiffs  
7 wouldn't have agreed to that -- such a provision that defendants  
8 can continue to work with our treating physicians because, you  
9 know, plaintiff's privacy is at issue. Plaintiff's trust with  
10 the doctor is at issue. The fact that when he's treated, or put  
11 on the stand as a fact witness, there'll be work product  
12 protected, discussions that had taken place between that doctor  
13 and the defense, all those things are reasons why the plaintiffs  
14 would never have agreed to such a provision.

15 THE COURT: Okay.

16 MS. DONALDSON: So because this is an unnecessary  
17 risk and defendants have, you know, ample opportunity to find  
18 other experts, plaintiffs ask that this Court deny their motion.

19 THE COURT: All right.

20 MS. DONALDSON: And I believe Mr. Migliori will  
21 address --

22 MR. MIGLIORI: If you'd like me to address the  
23 combined issue on our motion I'd be glad to handle it.

24 THE COURT: Yeah, address it briefly and then  
25 I'll let Mr. Griffis reply briefly. I think he's already

1 addressed some of his concerns, but I'll give him another final  
2 shot.

3 MR. MIGLIORI: Thank you, your Honor. And I can  
4 be very brief because quite frankly if Mr. Griffis took Judge  
5 Lisi's order in earnest, which I believe he has, then we have  
6 most of the information that we were seeking in our motion.

7 There's one outstanding issue in our motion that  
8 the defendants produce the identity of these witnesses, and that  
9 is simply what the defendants have done to identify these  
10 witnesses themselves. We've had in our debates over what should  
11 go into practice and procedure orders very tense discussions  
12 about how far defendants have to go to figure out who these  
13 people are, and it's our position, and it's actually part of the  
14 transcript from Judge Lisi's chamber's conference, that the  
15 defendants need to produce to us the names of people that they  
16 know or believe to be with some element of good faith and  
17 reasonableness, believe to be doctors that have taken care of  
18 our plaintiffs. So if Mr. --

19 THE COURT: How could that be a gray area.  
20 You're suggesting it's a gray, isn't that a black and white?

21 MR. MIGLIORI: It is a black and white except if  
22 you simply say, well, we didn't receive the PFS on this case, I  
23 know from the complaint that he went to this hospital, I know  
24 from the complaint that at this hospital we sold a tremendous  
25 amount of product, but on the complaint before we see the

1 plaintiff fact sheet, we don't know that Dr. Smith did this  
2 explant. So therefore we don't know him to be a person that  
3 we're consulting with who happens to also be a treater. If  
4 that's as far as the inquiry goes, then I don't think that  
5 that's consistent with Judge Lisi's order. I think that if  
6 there is an abundance of evidence, or a reason to believe, and  
7 courts obviously in negligence cases have knowledge, actual,  
8 knowledge constructive, knew or should have known, it's not hard  
9 for an attorney to figure out that if a person is in a dense  
10 area of huge sales, information they have that we don't yet  
11 have, how much sales went to St. Joseph's Hospital in  
12 Providence, if they know that they sold a lot of product during  
13 certain years, and somebody has an explant in the relative  
14 relevant time frame, they should have more than the obligation  
15 to wait for the plaintiff to identify who that person is.

16 THE COURT: What do you propose they do?

17 MR. MIGLIORI: Just represent that on good faith  
18 belief and on what they actually know that there's nobody else.

19 THE COURT: That sounds like a real litigation  
20 generator.

21 MR. MIGLIORI: But at this point it could be. In  
22 a penile implant case where there are only a handful of people  
23 that do that, that could be a real problem. They've identified  
24 one person, and they have 75 percent of the information from us.  
25 Quite frankly, I was going to get up here today and simply say,

1 your Honor, they've identified Dr. Milliken, because Judge Lisi  
2 ordered them to, all I want to know is did they hire him before  
3 or after the complaint was filed, and voluntarily, even before I  
4 could make that concession, Mr. Griffis says we've talking to  
5 him a long time before we knew he was a doctor. That's fine.  
6 That's the information we sought. I just want to make sure,  
7 because we could not consent, we could not agree to this process  
8 in the practice and procedure order, I just want to make sure  
9 that it's clear that from the plaintiffs' perspective, it's not  
10 enough to hide behind the fact that 99 percent of the complaints  
11 don't actually make reference to Dr. Milliken or the treating  
12 doctor like this one happened to. I just want to make sure  
13 there's nothing cute, that there's some onus, that there's  
14 something on an attorney in this case, some kind of good faith  
15 representation by an attorney that a reasonable effort and  
16 inquiry has been made to see if a treater is somebody that  
17 they're spending hundreds of dollars an hour to talk to about  
18 general experiences, and I don't feel care what anybody says, a  
19 doctor cannot be asked general questions about his or her  
20 experience with the Kugel mesh product and not draw upon, in  
21 part, a particular plaintiff that's in the litigation if he was  
22 a treating physician. You can't create that Chinese wall. So  
23 it is appropriate, under HIPPA, and under Rhode Island law, it  
24 is extreme -- federal law under HIPPA, that privacy is not to be  
25 treated in a cavalier way. It is an important privacy, and we

1 feel very strongly that --

2 THE COURT: Wouldn't a doctor be constrained from  
3 discussing an individual's confidential medical information with  
4 somebody who's retained him as an expert?

5 MR. MIGLIORI: Absolutely. The doctor has his  
6 own, and her own obligation, under HIPPA, with quite frankly  
7 much bigger consequences, but the idea that somehow you cannot  
8 talk to the defense side in this case unless they're paying you  
9 to talk generally about the product, turns the ex parte orders  
10 on their head. It undermines Judge Fallon's reasoning, it  
11 undermines Judge Lisi's reasoning in adopting this Court's  
12 decision, and it totally undermines Judge Gibney's reasoning  
13 that you have to put a primacy on the privacy created under  
14 HIPPA, and when you weigh that against all other factors, there  
15 is no prejudice here. It's happened to one doctor over the  
16 course of the entire litigation. Mr. Griffis did not get up  
17 here to suggest to you that this is a problem because he's  
18 waiting with five doctors right now that might be. This is  
19 about talking to people that otherwise you cannot talk to, and  
20 just because you start out your argument by saying it's not  
21 about these issues, well those are the very issues that get  
22 implicated, on a very practical level, that get implicated by  
23 allowing for that kind of contact. So on our motion, your  
24 Honor, to compel the identification, we hope that the order, if  
25 granted, would say that it has to be a reasonable good faith



1 effort to determine if that person is a treating physician, and  
2 then what happens to what we're able to discover once we've  
3 learned they've already done that, we should leave to another  
4 day.

5 And by the way, on Judge Ramshaw -- Dr. Ramshaw, we have  
6 his deposition on all the substantive expert opinions that  
7 defendants have noticed coming up in November. The deposition  
8 we took months ago that was a very specific fact deposition.  
9 That has nothing to do with this case. But if it's happened to  
10 date, we want to know who the doctor is. We understand it's  
11 only Dr. Milliken. We want to know when he was retained. If it  
12 was before, that's all I need to know that it was before the  
13 filing of the complaint, that they didn't go and retain him  
14 afterwards, which gives us comfort, and then on all other cases,  
15 we want to know whether the defendants know or on reasonable  
16 inquiry should know that that doctor that they're talking to as  
17 a consultant is, in fact, a treating physician in one of the  
18 pending MDL cases. There are 800 here. The order that Judge  
19 Gibney entered only applies obviously to her court. So we're  
20 just talking about these 800 people. Thank you.

21 THE COURT: All right. Her docket is 1100?

22 MR. MIGLIORI: I believe it's around 11 to 1200,  
23 yes, your Honor.

24 THE COURT: Do you want to briefly respond or are  
25 you all set, Mr. Griffis?

1 MR. GRIFFIS: I would like to very briefly  
2 respond, your Honor.

3 THE COURT: You may, sir.

4 MR. GRIFFIS: I don't understand there to be much  
5 outstanding with regard to the issues that Mr. Migliori raised.  
6 It sounds like his requests are moot with regard to Dr. Milliken  
7 since I provided the one piece of information that he wanted.  
8 And since plaintiffs don't appear to be pressing for production  
9 of all the documents back and forth, but the question remains is  
10 Dr. Milliken out? Are we not allowed to use him in the future?  
11 I think that's an open question. And we'd like to.

12 THE COURT: Just let me make sure. Dr. Milliken,  
13 you provided that information in the letter you sent to Dr.  
14 Milliken.

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

16 THE COURT: All right. So it's not today that  
17 you're disclosing that.

18 MR. GRIFFIS: No. But today I disclosed the  
19 piece of information that Mr. Migliori said he was going to get  
20 up and ask me to disclose, i.e., when we retained him, and that  
21 was before the case was filed, and he said that's all I needed  
22 to know.

23 THE COURT: Okay. Got yeah.

24 MR. GRIFFIS: And it sounds like the rest of the  
25 things that they asked us to do such as providing exchanges of

1 documents back and forth, are no longer being requested.  
2 Instead, what's being requested is that you put something into  
3 your order so that we can't do anything cute, all I can do is  
4 assure your Honor that I don't understand what that means, but I  
5 wouldn't send Judge Lisi a letter I considered to be cute or  
6 that was playing around or bandying words. And I don't intend  
7 to be cute in complying with any order of this Court or of Judge  
8 Lisi. The order that she actually entered did not include, that  
9 she actually made on August 5th, did not include, "know or  
10 believe, "by the way. It said produce the list of surgeons that  
11 you are claiming to be your consulting surgeons. And she went  
12 on to say, "Who you know also to be treating physicians in this  
13 case." There was no believe language, but we did provide  
14 everyone who we knew or believed to be a treating physician in  
15 our letter and, of course, that was done in good faith, and  
16 everything else that Mr. Migliori has asked for.

17 Now I'm going to turn to the first motion. You asked  
18 Leah Donaldson whether isn't the question before the Court  
19 whether I should do what Judge Gibney did or I should do what  
20 the Prempro and Seroquel cases did, and she attempted to  
21 distinguish those cases by talking about the number of  
22 plaintiffs at issue in those cases, and the number of physicians  
23 at issue in those cases. What's unchallenged is that there's a  
24 very small group of hernia repair specialists in the country.  
25 We're not talking about all the general surgeons in the country.

1 And if we're forced to litigate cases with just anybody who  
2 happens to be a general surgeon, who hasn't treated the  
3 plaintiff in this case, I think we're going to be in trouble.  
4 Judge Gibney's order is inapplicable because her plaintiff's  
5 motion to her and her ruling were based primarily on the Rhode  
6 Island statute. You have not been asked until Mr. Migliori  
7 spoke to apply to this litigation. Instead, when the first  
8 round of ex parte briefing occurred which was focused on a  
9 completely different issue as we both said several times,  
10 focused on the issue of substantive ex parte contacts about care  
11 and treatment, that's what a substantive ex parte contact means  
12 in the case law. Plaintiffs argued that you should ignore state  
13 law, not just Rhode Island's law, but the law of each of the  
14 states that we ask you to apply, and instead apply a national  
15 federal MDL standard to the litigation and to the issue at hand.  
16 They haven't asked for Rhode Island law to apply here, and it  
17 shouldn't that's what Judge Gibney's motion -- order is  
18 primarily based on. That's an order we will be appealing, by  
19 the way.

20           Your Honor was asked to apply a national standard  
21 which is what happened in the Prempro and Seroquel cases where  
22 the defendants showed that they were placed in a difficult  
23 position, and we believe your Honor should do exactly the same  
24 thing. Ms. Donaldson posed the question as being purely a  
25 prospective one, that at some point in the future we may have

1 this problem. We think it's extraordinarily likely based on the  
2 unrefuted facts that there are very few of these doctors, that  
3 they are the ones that will have had a lot of this product sold  
4 to them, they are the ones who will be likely to have difficult  
5 cases referred to them. They are the ones who will be most  
6 likely to have done implants and explants in difficult cases  
7 such as those that end up eventually in this court, and they're  
8 the ones that were likely to end up losing when the information  
9 comes down. And still on the table is the very crucial issue of  
10 whether we lose Dr. Milliken. He's not just one doctor in one  
11 case. He's an important national level consultant, and he's a  
12 consultant in all the cases but that one case. As a matter of  
13 fact, we specifically will never use him in the Cole case, or  
14 any other case in which he turns out to be a treating physician,  
15 but we may use him in any other case. But so far he's only a  
16 consulting expert and not has been named in any case.

17           The arguments that have been made that talking to  
18 these doctors about general causation will invariably go too far  
19 because they will be calling upon their expertise and experience  
20 that they gain from treating patients, just goes too far. What  
21 that would mean is that anytime anyone retains an expert witness  
22 who relies not just on what they learned in medical school but  
23 also what they learned in the clinic treating patients, then  
24 when they talk to that doctor, that doctor will be violating  
25 patient confidences. Not necessarily the patient confidence of

1 the plaintiff in that litigation because as your Honor pointed  
2 out, this sort of situation that we have today is a rare one,  
3 but certainly the patient confidences of everyone else who he  
4 treated who he's relying on for his expertise, and if that were  
5 the case, then the retention of expert witnesses based on their  
6 experience would need to come to an end under HIPPA and under  
7 patient confidentiality concerns and that can't be the case that  
8 can't be the law. It has to be the case that experts are able  
9 to talk about their general experience, and that is not  
10 considered by the Court to invade province patient  
11 confidentiality otherwise the whole question of retaining expert  
12 witnesses is under challenge itself.

13 THE COURT: All right, thank you.

14 MR. MIGLIORI: Your Honor, on our motion, can I  
15 reply very briefly?

16 THE COURT: Is your point that you're still  
17 asking for everything that's in the motion?

18 MR. MIGLIORI: Your Honor, and that I said that.  
19 That I said that let's deal with what happens once it's been  
20 identified. But as I understand what Mr. Griffis just said, he  
21 used a good faith belief, not just who he knew but he believed  
22 to be. I accept that. Now I have the three component parts of  
23 what I'd like for all experts. On Dr. Milliken, we do very much  
24 want the documents. We do very much want the context of it. We  
25 want guidance from this Court how we're going, which direction

1 we're going into, what kind of, you know, there's no record  
2 before this Court that there's any limitation -- any small  
3 number of hernia repair specialists out there at all. There's  
4 not a single piece of evidence to suggest that there's a  
5 hardship created, but if there is going to be an acceptance of  
6 these facts that aren't even in the record as being a hardship,  
7 and so few out there that we really are getting squeezed in who  
8 we can pick, then, your Honor, we do want to know a process that  
9 we have to go into, about what we can learn about it. I can't  
10 put a plaintiff's doctor on the stand and only know that he got  
11 paid without knowing what that person received in terms of  
12 internal documents, all sorts of information, the things that  
13 they've given him in their consultancy. In that case, they may  
14 not want to put Dr. Milliken up in Mr. Colt's case, but I still  
15 have to. I can't prove my case without the treating physician.  
16 You can't have a device or a pharmaceutical case and not put the  
17 treating physician up. If you do that, in every instance the  
18 case is over. So I don't want to get to the issue of give me  
19 everything from Dr. Milliken. We can probably work out a lot of  
20 that when we have guidance on where this Court is going with  
21 this issue. But to suggest somehow that they've been put at a  
22 hardship, there's not a single piece of evidence in this record  
23 that shows any hardship at all. But if we go beyond that,  
24 there's got to be some kind of definition of what they can and  
25 can't do. I just don't think we're there. We want every

1 document, and I didn't mean to waive that. I just think there  
2 are so many issues before we get there that we've got to deal  
3 with.

4 THE COURT: All right.

5 MR. GRIFFIS: Your Honor, I will not respond to  
6 anything that Mr. Migliori said but I want your Honor to be  
7 aware of an important problem that we have. On June 6th we were  
8 ordered not to speak to any of our consulting experts in this  
9 litigation until this issue is resolved. I mean, it was  
10 slightly unfair what this issue is, but it was in the immediate  
11 context of my raising the issue of our retention of consulting  
12 expert witnesses who were also treating physicians, and I -

13 THE COURT: Okay. So --

14 MR. GRIFFIS: -- I just don't want this process  
15 that Mr. Migliori is talking about of ongoing negotiation and  
16 briefing, and appearing before your Honor again to count as part  
17 of that to forestall --

18 THE COURT: I have no desire to see you again or  
19 to receive briefs from you, so that's not an issue.

20 MR. GRIFFIS: I'd just like to be able to talk to  
21 our experts again some day, your Honor.

22 THE COURT: All right.

23 MR. GRIFFIS: And I hope that's some day soon.

24 MR. MIGLIORI: That order just relates to  
25 Milliken, as I understand it.



1 THE COURT: Well, you can leave the lights on,  
2 Ms. Noel, and I'll leave, and you guys can keep getting back up  
3 and down making counterpoints.

4 MR. GRIFFIS: Mr. Migliori stipulates that that  
5 order June 6th pertains to Dr. Milliken, then I don't have that  
6 concern. Is that right, Don?

7 MR. MIGLORI: When the lights go out we can talk  
8 about --

9 THE COURT: The Court will stand in recess.

10 THE CLERK: All rise.

11 (RECESS)

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

I, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/sJoseph A. Fontes/

JOSEPH A. FONTES, COURT REPORTER

October 7, 2008

DATE