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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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IN RE: FRESINIUS GRANUFLO/)	
NATURALYTE DIALYSATE)	No. 1:13-md-02428-DPW
PRODUCTS LIABILITY LITIGATION)	
)	
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)	

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

MOTION HEARING AND
PRETRIAL CONFERENCE RE: LASTORKA V FMCNA, ET AL
1:13-CV-13066-DPW

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Tuesday, December 15, 2015
10:10 a.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617) 439-3214

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1 (The following proceedings were held in open court
2 before the Honorable Douglas P. Woodlock, United States
3 District Judge, United States District Court, District of
4 Massachusetts, at the John J. Moakley United States Courthouse,
5 One Courthouse Way, Courtroom 1, Boston, Massachusetts, on
6 Tuesday, December 15, 2015):

7 THE CLERK: All rise. This is MDL 13-02428, In Re:
8 Fresenius GranuFlo NaturaLyte Dialysate Products Liability
9 Litigation. Court is in session. You may be seated.

10 THE COURT: Well, I apologize for keeping you. An
11 emergency arose, and I had to attend to it. Let me start with
12 a general observation, which is, the briefing seemed to me a
13 little obscure in this. Perhaps I am not reading it carefully
14 enough. And so, I think I would like to focus a little bit
15 differently on the issues here. And let me use just the three
16 dimensions of documentation that the Plaintiffs' Executive
17 Committee has asked for in its motion and go step by step.

18 First, with respect to the notebooks, is there any
19 question of attorney-client privilege in the notebooks
20 themselves?

21 MR. KETTLEWELL: I think, your Honor, there is.

22 THE COURT: Give me an example.

23 MR. KETTLEWELL: Judge Hinkle has been --

24 THE COURT: Put that to one side. Now I have to deal
25 with it, I think, directly. We may get back into the layered

1 decision-making here, but maybe if you have a copy of a
2 notebook that contains something that I should consider or that
3 might reasonably be considered to be attorney-client privilege,
4 I would like to see it.

5 MR. KETTLEWELL: Your Honor, we will get you one.

6 THE COURT: So, the answer is you do not have one
7 here.

8 MR. KETTLEWELL: Well, I may. I will talk to
9 Ms. Silva. But I think the issue is the notebooks may contain
10 references to sending information to lawyers. That's what I'm
11 talking about.

12 THE COURT: To?

13 MR. KETTLEWELL: To sending information to attorneys.

14 THE COURT: So what? Let me step back even farther.
15 We all do the dance about attorney-client privilege. Are the
16 Crown Jewels in there somewhere?

17 MR. KETTLEWELL: No, the Crown Jewels aren't in there
18 somewhere. We are not saying that at all.

19 THE COURT: So, then a question I have, which is maybe
20 a rough-justice approach to it, is to say, okay, there was a
21 back and forth in discovery, as sometimes happens with
22 discovery, particularly sprawling discovery. I do not really
23 know yet whether there was a failure to disclose. I do not
24 know yet whether there was lack of complete diligence and this
25 is a last-minute kind of rattle to get at things, and I am not

1 sure I want to engage in the historic reconstruction that is
2 necessary for that. I simply want to be sure that nothing has
3 been missed that ought properly to be assessed in a case, and
4 so I will start back with first principles.

5 If somebody says they wrote to a lawyer, at this stage
6 in the game who cares? What would I do if somebody tried to
7 introduce something like that? Probably exclude the part that
8 says, "I sent it to a lawyer," thereby protecting the
9 attorney-client privilege to the degree that it is meaningful.

10 I have always had this view about discovery, which is,
11 let them have it and then we will sort it through afterwards.
12 Now, some of it is the balance of advantage, and you do not
13 want to have people wasting their time on unimportant things,
14 and I am sure not going to change the trial schedule in this
15 case. But I guess I am coming from a different view, and I was
16 going to start with the notebooks as a way of thinking about
17 it, because I could not imagine anything that was
18 attorney-client privilege in the notebooks, or I was having a
19 hard time figuring out what it could be, and say why shouldn't
20 they have it, but just without getting into *The Prodigal Son*
21 aspect of this, at the last minute they want to come to the
22 feast. I do not think I want to get into that theological
23 discussion. I simply want to figure out, if they want to spend
24 their time looking at these things, they can perhaps look at
25 these things. They have got other things to do, I think, but

1 they can take a look at them. So, maybe from that perspective
2 you want to respond.

3 MR. KETTLEWELL: Well, your Honor, as I said, there is
4 a review ongoing. Nine out of the 34 have been reviewed by
5 Judge Hinkle. I know you want to do this, I guess --

6 THE COURT: I keep interrupting you, but that is, of
7 course, my prerogative.

8 MR. KETTLEWELL: Quite all right. I am used to it,
9 your Honor.

10 THE COURT: Yes, I suppose you are. There is a
11 layering, I had not really thought of it in these terms, a
12 layering of the decision-making process that goes on, and her
13 immediate responsibility is to Judge Kirpalani and there are
14 time constraints necessary there, less here. I have not
15 assigned a Magistrate Judge to this yet. It is not my
16 intention to do so at this point. So, maybe I can look at this
17 and respond more precisely on it. It looks to me like she is
18 not going to be able to get through all of this in a timely
19 fashion.

20 MR. KETTLEWELL: Well, she's had two -- I'm sorry to
21 interrupt, your Honor.

22 THE COURT: No, go ahead.

23 MR. KETTLEWELL: But she's had 2 1/2 days and she's
24 reviewed nine out of the 34. Ten of the 34 are post-recall,
25 are from a time after some point in 12 after the recall, so

1 that it's hard to see how those would provide notice or any of
2 the types of things the plaintiffs are looking for. And, in
3 fact, they asked her to begin with the oldest notebooks, the
4 ones farthest back in time.

5 She has a session scheduled for tomorrow at 9:00 a.m.
6 and says she would be available sometime right after Christmas
7 as well. I don't know when that date would be. But I believe
8 a reasonable prognostication would be she could get through the
9 balance of the notebooks in approximately three to four more --
10 perhaps three sessions, maybe four.

11 THE COURT: Three in addition to tomorrow and between
12 Christmas and New Year's?

13 MR. KETTLEWELL: Yes. Well, I can't speak for her
14 schedule, your Honor. She committed to tomorrow. She did not
15 make a commitment beyond that.

16 THE COURT: I did cut you off on this aspect of it,
17 but let me just ask, from her perspective has she identified
18 attorney-client privilege materials in the notebooks and what
19 is the general category of them?

20 MR. KETTLEWELL: She has identified some, and if you
21 would just hear from Ms. Silva, she has been with Judge Hinkle
22 throughout the entire process, your Honor. I have not.

23 THE COURT: Sure.

24 MS. SILVA: Thank you, your Honor. Judge Hinkle has
25 seen some entries that contain within them pretty clear

1 references to communications with counsel, counsel's name,
2 notes of what counsel said. She has seen references to
3 subpoenas and litigation. And so, in those entries she has
4 affirmed the assertion of privilege on both attorney-client
5 and, I believe, work-product basis. Other than those entries
6 she has not yet ruled in favor of the attorney-client privilege
7 or Work Product Doctrine on any other of the notebook entries
8 she has looked at.

9 THE COURT: Than any other? I'm sorry?

10 MS. SILVA: Any other of the notebook entries she has
11 looked at to date.

12 THE COURT: So, what would be the disposition that she
13 would have with respect to these entries, a redaction?

14 MS. SILVA: In some she has ordered that we could
15 redact the entire entry; in others she has ordered that we
16 redact only a portion of the entry.

17 THE COURT: So, she is going line by line?

18 MS. SILVA: Exactly right, your Honor.

19 THE COURT: And so, you have suggested to me, in
20 addition to what Mr. Kettlewell said, not merely references to
21 talking to an attorney but the substance of the conversation
22 with the attorney?

23 MS. SILVA: That's correct, your Honor. She has seen
24 a few entries like that.

25 THE COURT: And is it fulsome? I am not asking bigger

1 than a bread basket, but I am asking whether there is something
2 that, if not the Crown Jewels, at least costume jewelry that
3 you would like to keep protected.

4 MS. SILVA: There is some costume jewelry. I will
5 tell your Honor that the legal issues that we have seen
6 discussed to date seem irrelevant to this litigation. For
7 example, we have seen conversations or the evidence of
8 conversations with lawyers in regards to an employment decision
9 that had to be made coming out of an adverse event that one of
10 the CQMs reviewed. We have also seen references to litigation
11 subpoenas from family members of a patient. Certainly, nothing
12 that I think would be considered Crown Jewels in this
13 litigation but what appeared to us to be clearly privileged
14 material.

15 THE COURT: Realistically, in terms of Judge Hinkle's
16 process, is she going to be through all whatever the number is
17 now, 34 I think is what Mr. Kettlewell said, of the notebooks
18 before the first week in January?

19 MS. SILVA: I think some of that will be dependent on
20 her schedule, your Honor. We certainly, assuming that she has
21 the time to give us, we could get through at the very least all
22 of the notebooks that predate the date of the recall,
23 March 29, 2012.

24 THE COURT: And let me understand how her process
25 works.

1 MS. SILVA: We have evolved the process over time to
2 make it more efficient. Initially, she was looking very
3 closely at the complete notebook just to get a sense of how
4 notes were taken. We then began to look only at those portions
5 of the notebook that we, as defense counsel, had excerpted
6 dealing with the cardiac-related events that plaintiffs have
7 indicated they want us to review. And from there we've
8 actually evolved our process even further, where we are only
9 showing her now and asking her to review those entries on which
10 we believe on their face they raise attorney-client or
11 work-product claims so that she is not having to review the
12 entire notebook or even the entire note entries for the
13 excerpted portions of the notebook.

14 THE COURT: In that connection is there rolling
15 disclosure? I am told that there were eight that had been -- I
16 am using the figure eight -- but something like eight that had
17 been reviewed. Have those, except for the ones as to which
18 some attorney-client privilege as to particular notations has
19 been asserted, are they being disclosed?

20 MS. SILVA: We have produced two complete notebooks at
21 Judge Hinkle's recommendation, one from Marcia McIntyre and one
22 from Melissa Baker, and the reason that Judge Hinkle suggested
23 we produce those two notebooks in part was because one did not
24 on its face raise an attorney-client privilege issue that we
25 could see. The other one raised limited issues. She allowed

1 us to redact I believe it was five pages from the excerpts, and
2 we produced the rest to plaintiffs. We did ask her that she
3 stay the time in which we can inform her whether we're going to
4 object to her rulings or not pending this hearing, because we
5 knew at that point that you would be looking at this issue as
6 well, and we are to report to her at 9:00 a.m. tomorrow morning
7 as to our position.

8 THE COURT: So, let us assume that I do not take a
9 position today. Are you going to turn over the other six?

10 MS. SILVA: I think, your Honor, we need to talk to
11 the client and decide what we're going to do. We have asserted
12 as grounds for privilege, there is a category of documents that
13 have been litigated heavily in the state court called --
14 they're referenced as "Attorney Notifications." They are
15 internal memoranda that are written by --

16 THE COURT: But, as I understand it, maybe
17 Mr. Tarricone will refine this for me, but they are not asking
18 for attorney notification. Now, it may be that it is hard to
19 disentangle something that is attorney notification from what
20 they are asking for, and so saying they are not asking for
21 attorney notification is just a label. But I understand them
22 not to be asking for that.

23 Is that right, Mr. Tarricone?

24 MR. TARRICONE: Your Honor, if I may, let me introduce
25 Mr. Tisi, who is going to address this issue.

1 THE COURT: Oh, okay. I'm sorry. The name?

2 MR. TISI: My name is Chris Tisi, your Honor. It's a
3 pleasure to be before you. I have been working on this issue
4 for about a year now, so hopefully I can answer your question.

5 The attorney notification is a somewhat vague issue to
6 us, because the testimony has been in this case that some
7 reports that emanated downstream from these notebooks not only
8 went to attorneys but they also went to other people for other
9 purposes. And so the question, and I think Judge Hinkle put
10 her finger on it, the existence of the notebooks create an
11 entirely different record than that was before her and
12 Judge Kirpalani, because what we see here is --

13 THE COURT: Let me just pause for a moment.

14 MR. TISI: Yes.

15 THE COURT: You will become familiar with
16 interruptions from the Bench.

17 MR. TISI: We are used to it.

18 THE COURT: Others have become familiar with it. Let
19 us assume that there is something we can call "attorney
20 notification letters" or whatever. Those you are clearly not
21 entitled to, right?

22 MR. TISI: Well, unless -- let me give you an example
23 of something that we might be interested in. In the normal
24 course of business Ms. McIntyre does an evaluation, an
25 investigation of a case and determines that bicarbonate played

1 a role in a cardiopulmonary arrest in clinic. Let's assume
2 that that happens. She does several things. Number one is she
3 might, for litigation purposes, send an attorney notification
4 to in-house counsel, but she may also say, "You know, I've seen
5 enough of these cases," and this is what Dr. Lazarus testified
6 to, "I've seen enough of these cases that I think we need to
7 take steps in order to address the risk to patients, and
8 therefore I'm sending the same or similar report, maybe dressed
9 up slightly differently, to the Chief Medical Officer who is
10 dealing with policies on how to treat patients." And so,
11 something that might be styled as an attorney notification may
12 also be waived, because in the normal course of business you
13 are sending it to somebody else for a completely different
14 reason. And so, the answer to your question is it really
15 depends upon how that information was used.

16 THE COURT: Right. Not to be flip, but they answered
17 every question as always, "It depends," and so let's talk about
18 what it depends on. Are you saying, and maybe Ms. Silva will
19 may be able to help us on this, that when something becomes
20 attorney notification, at least it involves giving a heads-up
21 to counsel? That same document may be turned over to
22 business-type people --

23 MR. TISI: It may be.

24 THE COURT: -- but with the same heading, that is,
25 "Attorney Notification, CC: Business people"?

1 MR. TISI: It may be, and, in fact, we know from the
2 record of this case that that, in fact, may have happened --
3 well I say, "in fact, may have happened." Dr. Lazarus
4 testified in his deposition, and we were here before you back
5 in April on this issue --

6 THE COURT: Right.

7 MR. TISI: -- he testified that he received reports
8 attributing bicarbonate to cardiopulmonary arrest from these
9 ladies beginning back in 2007. Now, I'm assuming, reading tea
10 leaves from a lot of the documents that we have seen, that
11 those reports emanated from the investigations that are
12 contained in these notebooks. What is unclear is whether those
13 reports also passed through the hands of an attorney. But one
14 way or the other you can't shield -- at least my understanding
15 of the privilege is you can't shield documents that in the
16 normal course of business go to business people by essentially
17 laundering them through an attorney, and in this case
18 Dr. Lazarus testified repeatedly, and I asked him many
19 questions about this, testified repeatedly that he got reports
20 going back to 2007 that would raise the question of whether or
21 not bicarbonate and the way in which it was administered with
22 GranuFlo or NaturaLyte was a potential cause, pushing the date
23 back to 2007.

24 And, in fact, Judge, and I think this is a really
25 important point, in the normal course of business these adverse

1 events that came from these ladies became the basis of the
2 statistical analysis that you have heard of involving the
3 November 4th memo. So, they used this data not for legal
4 purposes -- I mean, they may have used it for legal purposes in
5 some other sense -- but this data was usable in the business to
6 protect patients and should have been used to protect patients.

7 THE COURT: I think I understand maybe the merging of
8 the distinctions. There is an old line, I am trying to think
9 of from whom, but maybe it was Thomas Reed Powell who said that
10 the distinguishing feature of a lawyer is the ability to think
11 about two things that are inextricably intertwined and talk
12 about one without talking about the other. That is what we are
13 engaged in here, or attempting to engage in, the difference
14 between fact development and the engagement of attorneys,
15 either the fact of engagement or the products of engagement.

16 So, maybe, Ms. Silva, I will ask you a question first,
17 going back to these notebooks. Without trenching on the more
18 fine-grained analysis that Judge Hinkle is undertaking, can't
19 they be turned over, redacted, at least under your model of
20 what is necessary for redaction?

21 MS. SILVA: Your Honor, I think they probably can. We
22 would, obviously, need to review them entry by entry, which is
23 what we have been doing with Judge Hinkle. We could do that
24 outside of that process.

25 THE COURT: But you are not waiting until you get

1 before Judge Hinkle to be doing that analysis, I assume.

2 MS. SILVA: Not at all, your Honor. We are reviewing
3 them on a rolling base to familiarize ourselves with as many of
4 the entries as we can before we walk in the door to see
5 Judge Hinkle. We can certainly take a look at those entries
6 like, for example, in the Melissa Baker Notebook Number 2 we
7 provided, that we didn't see anything on the face of those
8 entries to suggest there may have been a communication about
9 that event to lawyers or some work product investigative work
10 bound up in the notes. We produced that, and we can certainly
11 look at the other notebooks with an eye to producing entries
12 like that.

13 THE COURT: Well, I am inclined to think that that is
14 where I would want to go on this, which is to say, look it,
15 whatever you are fighting about before Judge Hinkle you can
16 continue to fight about, but let's get the stuff over to them
17 now. Now, the problem with redaction, of course, the black box
18 that appears on that is, you do not have to have just fallen
19 off the turnip truck to figure out that there was some form of
20 communication that is being protected there, but it does not
21 seem to me to be so critical. But I would like to get the
22 process rolling, I think. These are provisional views about
23 this right now, but I would like to get the process rolling, if
24 there are not going to be disputes about that. I will hear
25 questions about timeliness and that sort of thing, but that

1 would be my general inclination, if I were writing tabula rasa
2 on this, with parallel mechanisms for evaluation going on.

3 Now let's turn to this attorney notification stuff.
4 So, is this when we get to the AER analytical reports? Is that
5 what we are talking about there?

6 Before you get up, Mr. Kettlewell, unless you are
7 intimately involved with it, I would like to talk to someone
8 who has been in the weeds on it. Not to suggest that you do
9 not go in the weeds, but perhaps --

10 MR. KETTLEWELL: I try and stay out.

11 (Laughter)

12 THE COURT: -- not unless you are forced to. Is that
13 what these are, the AER reports? For instance, are they three
14 copies of the same document labeled attorney -- what was the
15 phrase?

16 MS. SILVA: "Attorney Notification."

17 THE COURT: "Attorney Notification" but also going to
18 business people?

19 MS. SILVA: What we have seen, we've actually seen
20 this in litigating this issue before Judge Hinkle and
21 Judge Kirpalani, we have seen emails, for example, to in-house
22 counsel and the Chief Medical Officer at Fresenius attaching
23 these attorney notification documents.

24 THE COURT: To both, to one cc'd to the other, but the
25 same addressees in some form or another --

1 MS. SILVA: Exactly.

2 THE COURT: -- with the same information?

3 MS. SILVA: Yes, the same document. We have also seen
4 at times other types of reports being provided to Dr. Lazarus
5 who at the time, this was around 2009, was the Chief Medical
6 Officer at Fresenius. We have seen, for example, emails going
7 to Dr. Lazarus with different documents attached to it. They
8 don't have a lawyer on the receiving end.

9 THE COURT: When you say "different documents attached
10 to it," a smorgasbord of exhibits, is that it?

11 MS. SILVA: Exactly right, some of which are attorney
12 notification documents, some of which aren't. In those
13 instances we have claimed the privilege, both attorney-client
14 and work product, on just the attorney notification and
15 produced everything else. So, it's really this one category of
16 document that we have not produced to plaintiffs and that Judge
17 Kirpalani has ruled is properly protected under the
18 attorney-client privilege.

19 THE COURT: So, let's go back to things that jointly
20 go to the Chief Medical Officer and to an attorney. Assuming
21 that they report just facts, why shouldn't they be turned over
22 with a redaction of whoever the attorney was?

23 MS. SILVA: They do report more than just facts, your
24 Honor, and I think we have some examples in our exhibits.

25 THE COURT: Why don't you point me to them.

1 MR. KETTLEWELL: Your Honor, we handed up a file,
2 Exhibit 20, which was -- well, that's not in that large book,
3 your Honor. It was separate. It was filed *in camera*. I have
4 a copy here, if you would like to look at it. It's the smaller
5 of the two.

6 THE COURT: I have both. So, point me to what you
7 want me to look at to understand this as exemplary.

8 MS. SILVA: So, your Honor, if you turn just past
9 Tab 20 and then the first page, the second page of this --

10 THE COURT: With the Bates Number 263?

11 MS. SILVA: Yes, exactly. Page Number 263 is an
12 example of the document that we refer to as an "Attorney
13 Notification."

14 THE COURT: I am glad I am not the attorney, because I
15 do not think this would notify me of much. What does it
16 purport to tell me?

17 MS. SILVA: Your Honor, I apologize. You know what?
18 It's not very helpful, but the privilege Bates number is the
19 same on all of the pages of the document. If you could turn
20 three pages into the exhibit, it's a document that starts out,
21 "Privileged and Confidential."

22 THE COURT: All right.

23 (Pause)

24 THE COURT: All right. So, that looks like it is
25 covered by the privilege.

1 MS. SILVA: And that is the form of the document that
2 we call an "Attorney Notification." There are many of them.
3 Judge Kirpalani has seen many, Judge Hinkle has seen many, but
4 they all take this form.

5 THE COURT: But back to the inscrutable initial Bates
6 Number 263.

7 MS. SILVA: That, your Honor, is from Melissa Baker's
8 spiral notebook.

9 THE COURT: Right. So, where is the glittering jewel
10 in this?

11 MS. SILVA: That's right.

12 THE COURT: Where is it?

13 MS. SILVA: This, your Honor, as we look at it, again,
14 on its face this does not suggest communication with lawyers,
15 but we know that Ms. Baker gathered this information in part to
16 provide this attorney notification.

17 THE COURT: So what? So she is developing facts and
18 she gives it to the Chief Medical Officer, her grandmother and
19 a lawyer. That does not cover all of them with attorney-client
20 privilege. I look at this and say it does not appear to be
21 attorney-client privilege. Admittedly, one would need an
22 interpreter to read this, or at least I would, but this is the
23 kind of stuff that should be turned over.

24 MS. SILVA: That's absolutely right, your Honor. With
25 regard to this note, again, these are really entry-by-entry

1 reviews. Some of the notes are quite fulsome. This one is
2 not, and certainly Judge Hinkle has looked at some notes that
3 are connected to attorney notifications and found that those
4 notes are not covered by the privilege.

5 THE COURT: I do not know how any of them could be.
6 If we go back to the notebook discussion that we had, I have
7 some reservations about the what I will call latitudinarian
8 approach to attorney-client privilege that seems to be applied
9 here, but I am not getting into that so specifically yet. But
10 those notebooks sound to me like things you turn over without
11 blinking your eye. Now, if there is something in there that is
12 specific and demonstrates actual communications as opposed to
13 contact, that is maybe a different thing, but I am not even
14 sure about that.

15 If that is what we are talking about in notebooks,
16 can't it be turned over -- let me put it a different way.
17 Can't it be turned over under a protective order? That is,
18 these things are not going to see the light of day at trial,
19 maybe ever. I understand the broad theory that the plaintiffs
20 have. How that broad theory applies to particular cases is a
21 little bit uncertain to me now. But they want them. Most of
22 it seems to me to be appropriate for them to have. To the
23 degree that we have to tidy up afterwards, I suppose it could
24 be done pursuant to a protective order. This may be beyond
25 your salary bracket too, so I will look maybe at the others to

1 respond to it.

2 But why not turn it over that way? It is not that I
3 am frustrated before Christmas with this lump of coal that has
4 been deposited on my docket, but I do not know why they cannot
5 look at it. If there is attorney-client privilege, it is
6 without prejudice to attorney-client privilege being asserted.
7 But it gets them going so that we do not have the impact of --
8 or minimize the impact of time on these determinations. This
9 is as to the notebooks themselves.

10 MR. KETTLEWELL: I understand, your Honor. Your
11 Honor, I think we will need to talk to the client, obviously,
12 who is engaged as the client corporate representative up in a
13 trial today. That's why he's not here.

14 THE COURT: Right.

15 MR. KETTLEWELL: But I think it does make some sense
16 to redact the notebooks such as they are and turn them over,
17 and we would be very judicious with the redactions, shall I
18 say, and limit the number of redactions that Judge Hinkle would
19 have to deal with. I think that that is the easiest way to go
20 forward. I can understand there would be an alternative track
21 where we turn them over subject to some clawback, but I think
22 that has the potential to get much messier, and I think
23 Judge Hinkle will be able to push forward with her review,
24 particularly if we telescope down and limit the number of
25 redactions she actually has to review over these next few days.

1 THE COURT: So, let me understand, or you consult
2 first, but let me understand the plaintiffs' view on that.

3 MR. TISI: Let me just make two very quick points that
4 I think are really important.

5 THE COURT: Sure.

6 MR. TISI: Number one is, they have not agreed to
7 waive their right to appeal Judge Hinkle's ruling to Judge
8 Kirpalani.

9 THE COURT: I cannot deal with that, but nobody is
10 appealing mine. Well, there is one way they can appeal. There
11 is a way that they can appeal, and that is they go in contempt.
12 Maybe they think they are going to do that. I suspect they
13 will not. I suspect they will not. So, there is no
14 interlocutory appeal here, because you are not dealing with a
15 magistrate.

16 MR. TISI: Okay.

17 THE COURT: You are appealing from "Paul drunk" to
18 "Paul sober" in the same courtroom at the same time.

19 MR. TISI: Gotcha. The second issue is, I want to
20 address directly the point that you made before, which is the
21 attorney notification, and you looked at a document which we,
22 obviously, have not seen.

23 THE COURT: I will not even preface any longer with "I
24 do not mean to interrupt you." I will interrupt you and just
25 say I want to focus now on the notebooks.

1 MR. TISI: Okay. So, let me be clear about the
2 notebooks. Number one is, our view of it is before mid-2009,
3 when the attorney notification process went into effect, these
4 notebooks were both developed and maintained and collected in a
5 normal course of business. Just because somebody happens to
6 say the word "lawyer" on a notebook --

7 THE COURT: Let's assume that it is not just "say the
8 word 'lawyer.'" I tend to think that it is not a magic
9 incantation to say the word "lawyer," but let's assume -- this
10 is altogether hypothetical -- but they look at this and they
11 say, "We ought to can this guy for doing 'X' and 'Y,' and we
12 had better talk to employment counsel about dealing with that."
13 That, it would seem to me, is covered by attorney-client
14 privilege. It does not deal with your case, but it deals with
15 somebody's case in some fashion.

16 MR. TISI: That would be a very, very narrow
17 circumstance, I would suspect, and if there are those
18 circumstances what we would propose is that they just be given
19 to your Honor for a quick review and we would be done with the
20 issue.

21 THE COURT: Well, I am thinking about orderliness and
22 not just what I will spend my time on in the next several days.
23 But for orderliness purposes I would think that it would go to
24 Judge Hinkle here. If there remains dispute about it, I will
25 deal with it for the federal cases and for the state cases and

1 go through whatever that process is.

2 MR. TISI: My concern is a practical one, Judge. I
3 have before Judge Hinkle now since this issue arose, and, while
4 she has been really diligent in attempting to get through this,
5 she has been very candid about her limitations on her time,
6 particularly as we get closer to the holidays. And so, my
7 concern, frankly, is that we have been at this for, what, three
8 or four weeks now, and we have got through nine notebooks.

9 Now, I assume things are going to speed up because you
10 get used to it, get used to the process, Judge Hinkle has. But
11 I am really concerned that we are going to get through this in
12 time that we can actually make use of this document for -- make
13 use of these documents, if we can, with experts in order to
14 present it at a trial in mid-January. So, I have a real
15 practical concern about getting through this if we punt this to
16 Judge Hinkle.

17 THE COURT: Well, I guess it is not a matter of
18 punting. Here is what I am thinking about: of course it is
19 provisional, but they turn over everything that they do not
20 judiciously assert attorney-client privilege to now. I mean
21 now, this week, it gets turned over. Then we think about how
22 we deal with the redacted stuff. I suspect that what I am
23 going to say is let me see what you have redacted too. They
24 are saying the same thing to Judge Hinkle, or maybe not, but I
25 think they will --

1 MR. TISI: Sure.

2 THE COURT: -- and that makes it run a little bit
3 faster, I think. That is, first cut is on them. You get to
4 look at whatever they have turned over, which presumably will
5 be -- well, it certainly will be more than you have gotten so
6 far --

7 MR. TISI: Sure.

8 THE COURT: -- and, in any event, it will clarify
9 these issues substantially. But I think that is where I am
10 going on this.

11 MR. TISI: Okay.

12 THE COURT: I do not want to deal with this without
13 going through each one of these to see what value I can add to
14 this process. But where I stand now on this, using this as the
15 basis for further discussion about other things, is, they turn
16 over the notebooks except for those very narrow areas in which
17 they in good faith believe there is an attorney-client
18 privilege that can properly be asserted -- and I must say that
19 I have a narrow view of the attorney-client privilege in this
20 context -- and at the same time they collect those things that
21 have been redacted and present them separately to me and
22 whatever process Judge Hinkle asks for for her. But I will
23 look at them too. It may be that she will have ordered things
24 turned over before I get a chance to do it, but we are moving
25 on a parallel track.

1 MR. TISI: That sounds like something, with respect to
2 the notebooks, that's something that I think that, as long as
3 it's expedited and we are moving quickly and we're headed down
4 the road, I think we can live with that, your Honor.

5 THE COURT: All right. So, then, let's move on to
6 these investigative files here. Where do these get infected
7 with attorney-client privilege? Maybe, Ms. Silva, if you
8 can --

9 MS. SILVA: Your Honor, the investigative files are
10 actually what the CQMs did in order to create these attorney
11 notifications.

12 THE COURT: Can I see a copy, perhaps?

13 MS. SILVA: Yes. Actually, Exhibit 20, which is the
14 exhibit that you have in front of you --

15 THE COURT: Right.

16 MS. SILVA: -- is a complete -- it's actually three
17 complete work files.

18 THE COURT: So, I page through these very quickly and
19 find it difficult to find where it is infected by
20 attorney-client privilege as documentation. Now, if you say to
21 me, "We gathered all of these facts and documents and we turned
22 them over to a lawyer," that is not enough for me. So, where
23 would I look at this and say, "Oh, this is attorney-client
24 privilege"?

25 MS. SILVA: Well, your Honor, we have taken the

1 position, and certainly have taken it in front of Judge Hinkle,
2 that the fact of gathering these documents, maintaining them in
3 this way was done for the purpose of drafting this attorney
4 notification, which is itself a memoranda to in-house counsel
5 about the facts and potential root causes of adverse events
6 that carry with them -- that have been selected because the CQM
7 believes that they carry with them litigation risk. So, the
8 files themselves are all part and parcel of the process of
9 creating the attorney notification document.

10 THE COURT: Have either Judge Hinkle or
11 Judge Kirpalani ruled with respect to that praxis for
12 attorney-client privilege?

13 MS. SILVA: Judge Hinkle ruled on -- Judge Hinkle
14 found that the attorney notifications themselves were not
15 covered by the attorney-client privilege, and she found that --

16 THE COURT: You mean, if I, for example, look at the
17 three-page memorandum that is in 263, that is not being turned
18 over, but the underlying documentation is?

19 MS. SILVA: No. What Judge Hinkle ruled was that even
20 the attorney notification itself should be turned over. She
21 found that it was not covered by the attorney-client privilege.
22 We appealed that decision to Judge Kirpalani. Judge Kirpalani
23 reversed that and found that the attorney notifications were
24 covered. As a part of that order we provided to Judge
25 Kirpalani not only the documents that were the subject of a

1 particular day of review that had been brought to him but also,
2 at plaintiffs' request, additional documents that we had
3 reviewed with Judge Hinkle on later days. And the three
4 documents that are in Exhibit 20 are three of the documents
5 that we provided to Judge Kirpalani. So, while his order did
6 not expressly cover these, he certainly had them before he
7 issued his order. He had asked -- or, rather, plaintiffs had
8 asked that we provide them to him. We did provide them to him,
9 and it was thereafter that he issued his order.

10 THE COURT: But I still want to be sure I understand
11 the scope of his order. Is it simply narrative memoranda that
12 more or less begin 263, 2502 and 2567, or is it the memorandum
13 and the underlying documents that bear that Bates stamp?

14 MS. SILVA: Your Honor, the memoranda and the
15 underlying documents were before him, however, the express
16 language of his order applied only to certain documents for
17 which Judge Hinkle had issued a written report and
18 recommendation, and those documents are not the documents that
19 were in Exhibit 20; they were just the memoranda or email
20 communications and the memoranda.

21 THE COURT: Well, I am not sitting as a Mass. Appeals
22 Court on this, but it sounds to me like Judge Kirpalani took
23 what would be my position, which is the memoranda do not go.

24 But I am uncertain about the underlying materials
25 here. Certainly Judge Hinkle said that the underlying

1 materials -- well, she said everything had to go. That
2 includes the underlying materials. The only portion that Judge
3 Kirpalani expressly countermanded is the memorandum. So, I
4 suppose you could be asking me to be more specific about what
5 has to be turned over. If you do, I probably will tell you
6 turn all the exhibits over.

7 Yes, there is a collection function, but a proper
8 development of documentation independently, whether it is done
9 by sampling or search protocols or whatever, would have dug
10 these things up anyway, right?

11 MS. SILVA: I'm not sure, your Honor. These documents
12 were selected by the witnesses, and each of them had within
13 them this attorney notification document that the underlying
14 work files create, essentially. So, these stand in a little
15 bit of different footing. I understand that the parties
16 dispute about whether plaintiffs were on notice or not that
17 there were notebooks, but plaintiffs have been on notice for
18 many months that these work files are on the privilege log. We
19 litigated it --

20 THE COURT: Well, but is it so clear? And that is why
21 I had some difficulty going through -- I familiarized myself
22 with the underlying materials that the parties submitted, but
23 is it so clear that you were withholding in addition to
24 narrative memoranda underlying materials like this?

25 MS. SILVA: I believe it was, your Honor.

1 THE COURT: Show me where I can look at that and say,
2 "Oh, yes, any damn fool can see that they are withholding
3 something in addition to this," maybe pointing me to a
4 particular portion.

5 MS. SILVA: Yes. There's a hearing transcript from
6 when we were before Judge Kirpalani in August. This was after
7 briefing and argument on the second round of his review of
8 attorney notifications and before his order. It was at that
9 hearing where the parties discussed with Judge Kirpalani these
10 additional materials that Judge Hinkle had seen and ruled upon,
11 and I specifically told him that there is another category of
12 documents in the materials she has ruled on, and those are
13 where the attorney notification is combined with the underlying
14 work files.

15 THE COURT: But I guess what I was focusing on was
16 they have known all along that the entire ball of wax includes
17 all of this other stuff and they never took a step to try to
18 obtain just that?

19 MS. SILVA: Yes, your Honor, they have. They have
20 challenged them on the log, yes.

21 THE COURT: I do not deny the fervency of your
22 response. I just want to see where it is reflected in some
23 documentation other than your response here today.

24 MS. SILVA: It's in Exhibit 21, your Honor.

25 THE COURT: Page number?

1 MS. SILVA: That is Page Number 39. And this was on
2 August 7th, I believe, of this year.

3 THE COURT: Right. Lines 8 through 10?

4 MS. SILVA: Exactly right, your Honor. And this
5 hearing was attended by plaintiffs' leadership. It came after
6 months of litigation on the attorney notifications themselves.
7 It came after plaintiffs identified for challenge before
8 Judge Hinkle these work files that exist in Exhibit 20.

9 THE COURT: So, Judge Kirpalani says on Page 40, "I
10 guess I'm not really hearing what the parties want me to do,
11 and I'm hearing an offer that I might take it up." So, what
12 happened?

13 MS. SILVA: So, after that, your Honor, plaintiffs
14 requested that Judge Kirpalani review the documents. We sent
15 them to him, and a few weeks after that he issued his order.

16 THE COURT: Let me see the order again, if you can
17 point me to that. Is it 22?

18 MR. KETTLEWELL: I believe it's 22, your Honor.

19 THE COURT: 23?

20 MR. KETTLEWELL: 22.

21 THE COURT: All right.

22 MR. KETTLEWELL: That is his second order.

23 THE COURT: His as opposed to Judge Hinkle's order.

24 MS. SILVA: That's right.

25 (Pause)

1 THE COURT: Looking at Page 8, the order itself, the
2 exhibits that are identified, are they both what I will call
3 the narrative memoranda and the underlying documents?

4 MS. SILVA: I don't believe so, your Honor. I believe
5 those exhibits that are specifically called out in his order
6 are only the documents that we looked at on a particular day,
7 May 21st, 2015, and I believe all of those were simply attorney
8 notifications or emails attaching attorney notifications.

9 Your Honor, there is another place where we notified
10 plaintiffs in writing of the existence of these files, and that
11 is at exhibit, I believe it's 17 in your book. It's a
12 March 2nd, 2015 letter to plaintiffs' leadership, and on the
13 second page, the last paragraph, we discussed again the
14 attorney notification documents and informed plaintiffs'
15 leadership that such memoranda and communications from
16 corporate quality managers to in-house counsel and the
17 documents underlying those communications were, if responsive
18 to plaintiffs' discovery requests, withheld on the basis of
19 attorney-client privilege and the Work Product Doctrine and
20 logged on FMCNA'S privilege log. We actually cite three work
21 files in that letter. None of those three work files was ever
22 challenged to Judge Hinkle by plaintiffs.

23 THE COURT: What are those work files?

24 MS. SILVA: They are similar in substance to what you
25 have at Exhibit 20. I do have a set of the three that are

1 cited I could hand up to the Court.

2 THE COURT: Well, maybe you can just tell me about
3 them. You say they are similar in kind. So, if I looked at
4 them I would see a cover memoranda called, "Internal
5 Memoranda," and then I would see attached various exhibits,
6 underlying materials?

7 MS. SILVA: Exactly. That's right, your Honor.

8 THE COURT: All right. So, let me understand from the
9 plaintiffs how, if I were recognizing, and I am not bound to
10 follow Judge Kirpalani, but if I were inclined to follow
11 Judge Kirpalani but for some good-faith different reason you
12 argued that I should not, I would like to know what that is,
13 because it strikes me that now, looking at this more carefully,
14 that there was a determination with respect to attorney-client
15 privilege that does extend to the attached exhibits here, and
16 you had an opportunity to address that in some fashion.

17 MR. TISI: Well, yeah, let me first address that.
18 First of all, his order on Page 5 talks specifically about the
19 attorney notifications themselves. That was his focus. As I
20 read the order, he was not focused on the work files
21 themselves, number one.

22 THE COURT: No, but he does go through that line of
23 case law that says that a communication is privileged if it
24 would not have been made but for the client's need for the
25 legal advice. So, you get this package and it says, "We are

1 seeking your advice, and here are the materials by which we are
2 seeking your advice." So, in this form communicated in this
3 way the communication would not have been delivered but for the
4 desire to receive legal advice or service.

5 MR. TISI: Let me address that in two ways. First of
6 all, as I understand the process, the process was to collect
7 this information and investigate certain adverse events -- and
8 I have a PowerPoint that Ms. Baker did -- they investigate
9 adverse events for multiple purposes. And, actually, I pulled
10 together a little graph that demonstrates this.

11 THE COURT: If you want to pass that up, I will take a
12 look at it.

13 MR. TISI: Sure, I'm happy to do that.

14 (Document provided to the Court)

15 MR. TISI: What I think is getting lost here is that
16 this is a linear funnel as it speaks from the clinics where
17 there's an adverse event to the Clinical Quality -- the CQM and
18 then directly to the attorney. What appears to be the case,
19 and what we learned recently from these depositions that we've
20 taken, is that, in fact, what seems to happen is when they
21 choose to investigate an adverse event, and that's why these
22 notebooks are key, your Honor, because what it demonstrates is
23 that they do this in the normal course of business, and then
24 they may funnel some of this information. This file may be
25 collected for one purpose, which might be for the lawyers, but

1 it may also be investigated for other purposes, which are the
2 normal business purposes --

3 THE COURT: Not to tweak your metaphorical use of
4 language, but it is a funnel, then a spray? Is that it?

5 MR. TISI: It's a funnel and then a spray. And then
6 the other issue is, and I think this is where Judge Hinkle,
7 frankly, parted ways a little bit with Judge Kirpalani when she
8 looked at this, there are two privileges, and sometimes we kind
9 of confuse them. One is the work product, which is a qualified
10 privilege, and the other one, which is attorney-client, which
11 is the advice-seeking function. The extent to which they
12 collect information and then analyze it, and they analyze it
13 for multiple reasons, is a work product, and what I think Judge
14 Hinkle found was that there was a compelling need for us to get
15 it because there was no other place we can get the information.

16 THE COURT: Well, but here is where I see this
17 somewhat differently. I am starting to evolve. Put to one
18 side the notebooks.

19 MR. TISI: I'm sorry. I didn't hear.

20 THE COURT: I will put to one side the notebooks
21 themselves.

22 MR. TISI: Sure.

23 THE COURT: Now I am dealing with the materials that
24 have been pulled together, which probably include notebook
25 materials but maybe other things that are drawn from different

1 places by the CQM group. But the CQM group for these materials
2 that are I guess called AER Analytical Reports are
3 communicating for purposes of getting advice of counsel.

4 MR. TISI: Well, your Honor, and they are also, if you
5 look at the graphic that we prepared, they are also being used,
6 and I think counsel admit it as such, some of these files --
7 well, let me back up. They may do an investigation on, let's
8 say, everybody at this table. Some of those files they've done
9 in the normal course of business. If each one of us, each one
10 of the six people here have an adverse event, they may
11 determine separately that Mr. Tarricone and myself may go to a
12 lawyer for whatever reason they decide. But the fact that each
13 one of us had a file that was collected in the normal course of
14 business, including Mr. Tarricone and mine, for the normal
15 business purposes -- remember, these were being directed by Ms.
16 McIntyre and Ms. Baker's supervisor -- that they were done for
17 multiple purposes.

18 THE COURT: So, let me pause with that. What I have
19 in front of me in 20 appears to be materials directed to an
20 attorney with exhibits below. Now, using the graph or graphic
21 that has been tendered to me, with respect to any of these
22 internal memoranda was there something that was communicated to
23 Mr. Lazarus independently, or did Mr. Lazarus simply get a copy
24 of the internal memoranda directed to the general counsel?

25 MR. TISI: Are you asking me, your Honor?

1 THE COURT: No, I am asking defense counsel.

2 MR. BENNETT: Ms. Silva can correct me if she had a
3 different experience, but what we have logged are emails that
4 include Dr. Lazarus and the lawyer on the same one, and, in
5 fact, in the middle of Exhibit 20 I think there's a page folded
6 over where you go to the next example. You can see when the
7 Bates number changes.

8 THE COURT: Yes, I have got it.

9 MR. BENNETT: And you can see there that the Chief
10 Medical Officer is the "CC" on the same memo. In general I
11 think that's what we are talking about here.

12 THE COURT: That's not true with respect to 263, and
13 it is not true, I do not think, but I have not absorbed this
14 material as much as I might otherwise --

15 MR. BENNETT: Right, your Honor.

16 THE COURT: It is not as to 3200.

17 MR. BENNETT: That's right. And I think that what the
18 record shows is that the attorney notifications were done and
19 that we acknowledge that some number of those went to both
20 lawyers and to the Chief Medical Office. But if the CQMs had
21 communications with Dr. Lazarus separate from the attorney
22 notifications about the same incident, those would be just
23 produced in the normal course of discovery, and what the
24 privilege was asserted over are attorney notifications, and we
25 definitely did assert the privilege over notifications that

1 copied the Chief Medical Officer.

2 THE COURT: This may be too formalistic, but it would
3 be useful, I think, to me or provide a distinction that may
4 make a difference to ask who is the "To" person, the "To"
5 addressee on all of these, or the principal addressee or
6 perhaps the first addressee, and who was cc'd as a way of
7 drawing a distinction. So, I will look at the one that you
8 have --

9 MR. TISI: Judge, may I just seek clarification on
10 this? And I wanted to be clear about what the record showed on
11 this. It's not just Dr. Lazarus. There were multiple people
12 who may have gotten these reports.

13 THE COURT: Right. I am not focusing so much on
14 Dr. Lazarus.

15 MR. TISI: Okay.

16 THE COURT: I am just using these as exemplars. So, I
17 take 263, and that is not addressed in any way to Dr. Lazarus
18 or any other non-attorney in the memorandum itself. Then I
19 take 2567. That also is directed solely, at least initially,
20 to an attorney, that is the first of these documents, but I
21 thought I had seen Dr. Lazarus on this one.

22 I am the last person to bitch about multiple Bates
23 stamp numbers or redundant Bates stamp numbers, but is there
24 some way we can find the one that I think was referred to here
25 as the memorandum?

1 MR. BENNETT: That shows the CCs?

2 THE COURT: Yes.

3 MR. BENNETT: Your Honor, I have it open to that. I
4 could give you my copy.

5 THE COURT: That will just proliferate
6 misunderstanding.

7 MR. BENNETT: It is the very first page that changes
8 from 263 to 2502. It's the second document. So, as soon as
9 the Bates numbers stop at 263 --

10 THE COURT: I see.

11 MR. BENNETT: -- you will see the one that has
12 Dr. Maddux, Dr. Hymes, Dr. Lazarus.

13 THE COURT: All right. So, let me use this as a way,
14 because now I am looking at this. We are using but-for
15 analysis, I think, in this area. If the "To" is an attorney
16 alone, it seems to me the memo would not have been written but
17 for the effort to obtain attorney advice. Admittedly, it went
18 to other people, it went to a variety of other people from a
19 Chief Medical Officer to a senior litigation paralegal, but it
20 seems to me that this memorandum -- I can use that as a way of
21 dealing with it -- this memorandum would not have been written
22 and the underlying materials would not have been transmitted
23 but for the effort to obtain legal advice.

24 MR. BUCHANAN: Your Honor, I'm David Buchanan.

25 THE COURT: Sure.

1 MR. BUCHANAN: And I'm rising because to some extent
2 us burdening you with this motion arose following my deposition
3 of Mr. Castle a few weeks back, and, as I stated then, but I
4 will just restate for the record today, at Mr. Castle's
5 deposition, and it arose, it was a 30(b)(6) in the context of
6 Mrs. Lastorka's case, the issue was what information does the
7 company have relating to our client's event? And what we had
8 was a three-sentence or four-sentence entry in a computer
9 database called a "Clinical Variance Report." We had learned
10 almost simultaneously that Ms. Baker and Ms. McIntyre also kept
11 notebooks, and that stimulated the further inquiry.

12 But the testimony from Mr. Castle that day, because I
13 was rather confrontational with him in terms of my examination,
14 "Do you mean to tell me that a lady died in the clinic and the
15 extent of the investigation concerning her event was this
16 three-sentence entry in a computer system and you closed the
17 file?" And he said, "Well, that's all that happened at the
18 clinic level, but further investigation happens at the CQM
19 level." And I then explored that with him, and it concerned --
20 it's an exhibit before you, your Honor. It's Exhibit 27 in the
21 plaintiffs' papers, and it really describes the role and
22 function of this middle box, the CQM box on the graph. And
23 what happens is, is events that happen in the clinic get
24 escalated to the CQMs, various regional or eight individuals
25 with nursing backgrounds, to, quote, investigate the events.

1 And when you look at the third page of that exhibit,
2 and this exhibit is from 2010, it describes what an adverse
3 event is, and then it talks about why report adverse events,
4 and it talks about that it's required by CMS, insures patients'
5 safety, and it assists in identifying and prioritizing root
6 causes in order to save lives and cost.

7 So, this entity in our middle box that really is the
8 focus of our discussion today, the CQM level, which is what
9 Ms. Baker and Ms. McIntyre are, is focused on the investigation
10 of the events that they are getting up from the field to
11 develop a record, a picture, to get the information, to assess
12 that information, to try and determine root causes, as this
13 says, to save lives and costs.

14 THE COURT: I think I understand that.

15 MR. BUCHANAN: I wasn't sure whether we made that
16 clear. And, obviously, there are the three prongs where it
17 sprays out to.

18 THE COURT: But to respond to where I was going on
19 this, which is to say this package, we will call these
20 "packages," would not have been created, both the cover
21 memorandum and the underlying identifiable material would not
22 have been created but for the desire to obtain legal advice.

23 MR. TISI: We don't agree, your Honor, because --

24 THE COURT: Well, how would I make this distinction?
25 The alternative, I guess, looking at the materials, is to say

1 whenever I see a Chief Medical Officer in there or Director of
2 PSO, then I can say it was not created but for among the
3 addressees, even if they are "CCs" as opposed to "Tos".

4 MR. BUCHANAN: I think the reason why it would have
5 happened before is the testimony that we have from Ms. Baker
6 and Ms. McIntyre is that this process began in 2007, at least
7 with these witnesses, so the investigation concerning these
8 events was happening in 2007. The attorney notification
9 process was not even instituted until 2009. And so, they were
10 doing this practice, these notebooks go back to 2007, well
11 before.

12 THE COURT: But we are past the notebooks. Now I
13 think what we are dealing with here that would be disputable --
14 because I do not think there is any question that the cover
15 memoranda are attorney-client privilege, put to one side work
16 product, they are attorney-client privilege, as far as I can
17 see, and there I flock with Judge Kirpalani and not with
18 Judge Hinkle.

19 More questionable, perhaps, or at least not as clear
20 to me is the underlying documentation. Now, if you say
21 something like this, "I understand your position on memoranda,
22 I may not agree with you, but I understand that distinction,
23 but we want the underlying documents, and they cannot just
24 protect the underlying documents by attaching them to this
25 memorandum," I think I understand that. I think the

1 distinction that I would draw is that they would be required to
2 turn over all the documentation that they had in their file
3 which may include more than the stuff that is attached as
4 exhibits but would not disclose whether or not this was what
5 they provided to the attorneys for attorney-client
6 communications, because the selection process is part of the
7 communication, the editing process.

8 MR. BUCHANAN: In some respects, your Honor, I feel
9 like I'm having one of those kind of arguments that I have to
10 kind of envision what the documents might contain, because not
11 having seeing them --

12 THE COURT: That is one of the challenges.

13 MR. BUCHANAN: It's one of the challenges on our side.
14 So, envisioning what they might contain and envisioning what
15 they might have contained at earlier points in time in terms of
16 investigative memos that preceded the attorney notification
17 process, I would submit that the exhibit I highlighted, your
18 Honor -- I'm sorry -- Tab 27 of the plaintiffs' papers, which
19 describes and goes through great detail the role and function
20 that is the non-litigation role and function of this group, and
21 to me it suggests that this is existing as a vigilance and
22 safety function to protect patients.

23 THE COURT: Part of it is labeling, I know. But let
24 me go back to Ms. Silva.

25 So, let me understand, if I took the top off of, the

1 cover memorandum off this thing, and said, "Turn over
2 everything underneath that" -- I am not saying whether or not
3 it was attached to the cover memoranda -- "I want you to turn
4 over everything that deals with the particular incident, every
5 underlying factual material that deals with a particular
6 incident," but I am not making you do it in a way that calls
7 out that the CQM may have thought that this was useful for a
8 lawyer to look at or not, what is the problem with that?

9 MS. SILVA: Well, I think --

10 THE COURT: I envision that these CQMs are surrounded
11 by file cabinets, and there is a name in each one of the file
12 cabinets for an event, and in the file cabinet is maybe an
13 attorney notification letter. They are not going to get that.
14 If the two, if the addressee, the principal addressee, is an
15 attorney, they are not going to get that unless it is, "Let's
16 go to lunch." But the underlying documentation that is in the
17 file, yes, you turn over. What is the problem with that?

18 MS. SILVA: Well, your Honor, I think there are a
19 couple of concerns. One is the fact that the work product
20 claim is exactly as you say, that the work product protection
21 is in part what information these witnesses gathered in order
22 to provide the necessary communications to in-house counsel.

23 THE COURT: But you have to have the link. That is to
24 say I am trying to de-link this. It is a little bit like the
25 old hearsay question. You ask a question, "What did you hear

1 him say?" And he said, "Jump out the window." And then the
2 judge sustains the objection, says you cannot have that, and
3 then you ask the question, "Did you have a conversation with
4 him? I do not want you to tell me what he said." "And after
5 that conversation, what did you do?" "I jumped out the
6 window." Well, that suggests what the conversation was in some
7 fashion. But I am not even asking for that. All I am saying
8 is they have got the file. They have got documents in the
9 file. The documents in the file relate to the injury or
10 adverse event. Turn over the documents in the file that are
11 not themselves attorney-client privilege.

12 MS. SILVA: I think, your Honor, the concern that we
13 have is that the documents themselves reflect the
14 investigation, and I hear your Honor that they are not the
15 actual communication, and so why not turn them over. I think a
16 second issue that we have is time. In this litigation we have
17 redacted for PHI all medical records. Obviously, these are
18 documents that are loaded with PHI. Plaintiffs have been on
19 notice of them for months.

20 THE COURT: Remind me of PHI, what I should be
21 concerned about with PHI, or is this just another hypervigilant
22 HIPAA concern?

23 MS. SILVA: It is a HIPAA concern. I hope it's not
24 hypervigilant, but, at the very least --

25 THE COURT: I think it is redundant to say "HIPAA" and

1 "hypervigilant."

2 The short of it is, I understand it is good to keep
3 people, medical professionals, from unloading materials. On
4 the other hand, we are in litigation. Protective orders can
5 deal with that kind of problem, unless it is something more
6 fundamental.

7 MS. SILVA: Understood, your Honor. I think the other
8 real concern is that, and I think plaintiffs are aware of this,
9 these medical records were not used, these underlying notations
10 were not provided to the PSO, so far as we know. I mean, they
11 deposed Ms. McIntyre and Ms. Baker for multiple days, they
12 deposed Dr. Lazarus for multiple days. We have seen no
13 evidence that these documents were sent to the PSO or to
14 Dr. Lazarus.

15 THE COURT: Well, let's just deal with 2502.

16 MS. SILVA: Yes.

17 THE COURT: It is cc'd to the PSO.

18 MS. SILVA: Yes, the memoranda is, and I certainly
19 have seen, and plaintiffs have seen, Judge Kirpalani has seen
20 evidence of the Attorney Notification itself being attached to
21 an email and sent to various folks in the Chief Medical Office.
22 It's not an issue that plaintiffs ever raised before in
23 litigating this now twice before Judge Kirpalani, and I believe
24 they have also litigated it in St. Louis and lost the
25 litigation there where they did raise this dual-purpose

1 argument. So, I appreciate that this is a separate court, and
2 you will make your own decision, but this is something that has
3 been litigated now multiple times.

4 THE COURT: Well, now you have taken me to St. Louis,
5 and I was just dealing with Woburn. I guess I need to know a
6 little bit more. I saw references to St. Louis here. But,
7 first, facts. Are you telling me that, for example, this
8 memorandum in 2502 with the various CCs, the only person who
9 received the underlying materials is the addressee, the "To"
10 addressee?

11 MS. SILVA: Your Honor, I think it's a case-by-case
12 issue, and I can't represent to you with this document whether
13 Sarah Schuler actually requested the underlying materials or
14 not. I don't know that.

15 THE COURT: Why did they all get the same Bates
16 number?

17 MS. SILVA: Because they are all part of the file that
18 Marcia McIntyre or Melissa Baker maintained in the course of
19 creating the attorney notification.

20 THE COURT: Well, but then why is this not a case in
21 which the file was -- I do not mean this in a confrontational
22 way, but to provoke discussion -- that the file was just taken
23 and says, "The file for this particular patient, we have got an
24 attorney notification in there, we have got one addressed," now
25 that you have outed Sarah Schuler, "we have got a memo to Sarah

1 Schuler. Now let's staple everything else in the file to that
2 and give it an immunity bath."

3 MS. SILVA: Because I think, your Honor, the problem
4 with that is that eviscerates the work product.

5 THE COURT: It does not eviscerate it. What it does
6 is essentially manipulates the concepts of privilege and work
7 product by how thick your staple machine is. And so I am back
8 to this earlier thing of, put to one side whatever the
9 doppelganger that you have for HIPAA is. I cannot remember
10 what the acronym is, which maybe I should be more sensitive or
11 hypervigilant about, but I am not. In the context of discovery
12 it can be dealt with by protective order.

13 Why not turn over this? What is the problem with it,
14 except maybe at this point it would give them insights? But
15 this is all underlying factual material, as far as I can see,
16 after I get past the letter to Ms. Schuler and others or the
17 memo to Ms. Schuler and others.

18 MS. SILVA: Your Honor, I think that certainly the way
19 we have always looked at these documents is that they are not
20 simply a medical record. They are selected portions of a
21 medical record requested, notated and collected all for
22 purposes of drafting this memo. In the Court's words, but for
23 the decision that this memo needed to be drafted these
24 documents, we do not believe, would have been collected and
25 maintained in this way.

1 THE COURT: How would they have been maintained? This
2 goes back to Mr. Buchanan's relentless cross-examination of
3 Mr. Castle. "You mean to say only three lines and a guy died?"
4 Is that what you are saying?

5 MS. SILVA: Not at all you, your Honor.

6 THE COURT: So, you have got somebody doing CQM. They
7 gather together documents that bear on the issue. They seek
8 advice in certain ways, but they are independent too. And so,
9 I am trying to figure out how they can be turned over. It
10 seems to me that they can be turned over. I just do not see
11 that. We would not have looked at this unless we were
12 concerned about the lawyers. That may work after 2009. But I
13 just see them as a bunch of stuff that is in a file. Now, if
14 somebody starts talking about, "Why did you pick this one, why
15 did you pick that one," that kind of thing, somebody puts these
16 CQMs on the stand, God forbid, then maybe I will think about
17 that differently. But if we are just trying to do
18 woolgathering, this is, it seems to me, wool that they ought to
19 be to able to gather. I do not understand otherwise.

20 But I want to understand the word from the heart of
21 the country, St. Louis. What was going on there? What was the
22 resolution of that?

23 MR. BENNETT: We have had two things I think come up
24 in St. Louis that may have bearing on this. The first is, in
25 St. Louis the plaintiffs identified these exact type of

1 documents as ones that they wanted to challenge privilege on,
2 and the judge actually had a live evidentiary hearing on it and
3 upheld the privilege as a result of that and identified those.

4 THE COURT: Did the judge write?

5 MR. BENNETT: Yes.

6 THE COURT: And is it in the materials I have?

7 MR. BENNETT: It's not in the materials.

8 THE COURT: I want to see it.

9 MR. BENNETT: I'll file it today, okay?

10 THE COURT: All right.

11 MR. BENNETT: And then the other thing that came up in
12 St. Louis is what we mentioned there, which is, they actually
13 raised the issue of other CQMs and so on, and we worked it out
14 with them and produced notebooks to them. My take on the
15 situation is that we asserted work product -- attorney-client
16 on the memo itself and then work product, much like we would do
17 if it was one of our own files, you know, a lawyer file that I
18 think you traditionally view as work product. I think you're
19 correct that when you look at it, it's, for example, a lab
20 report. It contains information. Your point that those are
21 factual information is true. It's also true that we have
22 asserted work product that hasn't been overruled in these.

23 THE COURT: In?

24 MR. BENNETT: In Massachusetts State Court and in
25 St. Louis as to at least several of the entries, including work

1 files. So, if you're saying that it's either, A, not work
2 product because it's factual, or, B, they have shown a
3 substantial need, the production exercise would be the same as
4 the notebooks, which would be going through and identifying if
5 there is any privilege and then distinguishing between the
6 facts.

7 THE COURT: That is where I am leaning on this.

8 MR. BENNETT: I understand where you're leaning.

9 THE COURT: I think it was clear where I was leaning,
10 but that is where I am leaning on this, because otherwise there
11 is a way to avoid the distinction that the Courts have
12 developed between facts and opinions and the development of
13 facts and opinions and the solicitation or protection of
14 attorney-client privilege. It is one thing for it to be in
15 your file. It is another thing for it to be in the file of
16 somebody who is the point person for adverse reports.

17 MR. BENNETT: And mechanically how it would happen is
18 the adverse report would come in on the computer, and the CQM
19 would call down and say, "Send me this, this, this and this,"
20 and then they would get that, and then if they made notes on
21 them or they became relevant they would stick them in the file.
22 So, that's the process.

23 THE COURT: Right. And then they would take another
24 step, which is a judgment step of, "This is one of those ones I
25 want a lawyer to look at," right?

1 MR. BENNETT: That's true.

2 THE COURT: They do not do it for all of the adverse
3 events.

4 MR. BENNETT: Absolutely. And attorney notifications
5 are only done for certain types. They did not keep their files
6 associated with every single adverse event. These are ones
7 that they maintained and kept for years.

8 THE COURT: And that may or may not suggest that they
9 are ones of more enduring interest that might be of interest to
10 lawyers.

11 MR. BENNETT: Well, they are ones that were associated
12 with an attorney notification, so what you said is correct.

13 MR. BUCHANAN: Your Honor, if I might, one of the
14 exhibits that I called to the Court's attention, it was in our
15 papers, Exhibit 27, I just wanted to call to the Court's
16 attention two other pages in that exhibit.

17 THE COURT: Hold on. Let me just get my hands on it
18 quickly.

19 MR. BUCHANAN: Again, it's the presentation by Melissa
20 Baker entitled "Understanding Adverse Events."

21 THE COURT: Right.

22 MR. BUCHANAN: If we look at the third page, it's the
23 last three numbers Bates 957, "Why report adverse events?"
24 First, they note because it's require by CMS Regulations, state
25 credentialing authorities and others, two, to ensure patient

1 safety, and, three, to assist in identifying and prioritizing
2 root causes in order to save lives and costs.

3 If you scroll down -- and we highlighted that page a
4 moment ago -- but if you scroll to 963, "The Clinical Quality
5 Manager will," and this is, again, the CQMs, which include
6 Ms. Baker and Ms. McIntyre, "analyze root causes of adverse
7 events and recommend actions, connect you with appropriate
8 departments and resources, act as a clinical resource, and if a
9 systemwide problem is identified, to take some measures."
10 Again, when you scroll through this legal notification is not
11 the primary role and function of these ladies in this tier.

12 THE COURT: I think I understand that, and I take you
13 to be arguing that you are entitled to these memos.

14 MR. BUCHANAN: And not having seen them, your Honor,
15 only you can judge the true content and whether it is
16 bootstrapping what might be the underlying analysis or whether
17 it's, in fact, purely we may have a liability issue on this
18 case. I haven't seen them.

19 THE COURT: And the first one is disclosable, and the
20 second is not?

21 MR. BUCHANAN: I'm sorry. If it's an analysis of the
22 potential root causes, which this PowerPoint demonstrates
23 that's the underlying role and function --

24 THE COURT: It is one of the functions.

25 MR. BUCHANAN: -- of the CQMs, or at least one of

1 them, and taking you to the next page in the Bates stamp, your
2 Honor, it would be 970, "Adverse event prevention, avoid the
3 perfect storm," and, again, they are highlighting issues
4 particular of relevance in this case, and it's early 2010,
5 highlighting electrolyte imbalances, hypotension and then
6 notifications to the physicians regarding potassium and
7 bicarbonate imbalances. There is no focus in this effort, as I
8 highlighted, on legal notification. So, if there is a
9 distinct, "FYI, we might have a liability issue on this case,"
10 I assume that could be redacted, but the underlying workup of
11 the file would strike me as ordinary course activity by their
12 own admissions.

13 THE COURT: I disagree about that. I do not want to
14 be a slave to labeling here, but it is frequently helpful to
15 have categorical approaches to it. When it gets kicked to the
16 legal department by a cover memo or by a memo, it seems to me
17 fairly clear that we have gotten ourselves into attorney-client
18 privilege matters, even if within the memorandum one can find
19 discussions of potential root causes, other actions taken, that
20 sort of thing. So, the memoranda themselves I feel comfortable
21 saying are not disclosable. The underlying documents, to the
22 degree that they are disclosed in a fashion that does not
23 necessarily make them part of the memoranda themselves, are
24 disclosable, I think, but I, of course, have not looked at
25 these carefully for purposes of whether or not within the

1 underlying documents there are attorney-client privilege or
2 work-product kinds of materials.

3 I view the underlying documents, when attached or
4 associated directly with the memoranda, to be work product.
5 They disclose the kinds of things that in the course of the
6 interaction with attorneys are viewed as material to the
7 attorneys' understanding, and so thereby disclose what it is
8 that is on the attorneys' mind in the fashioning of attorney
9 advice. But I do not see why they have to be disclosed in the
10 fashion that shows them to be associated with the memoranda,
11 unless somebody says, "We never created and never kept files
12 unless they went to attorneys." It takes it a bit farther than
13 I want to go, but I have not done an evidentiary analysis of
14 the way apparently one or more of the judges in St. Louis have
15 done.

16 So, I want to see the opinion or the written
17 memorandum from the judge in St. Louis, judge or judges in
18 St. Louis. I would like to have that filed today.

19 But my broader guidance here is this is disclosable
20 materials. They may well have this stuff elsewhere, too. They
21 probably do, at least for some of it. But I think it is also
22 disclosable in this fashion.

23 MR. BENNETT: Your Honor, as I understand your
24 guidance on the notebooks, there's one mechanical question I
25 have that I think I agreed with Mr. Buchanan on earlier but I

1 didn't want to leave today without clarity. The notebooks
2 cover, of course, things from needle sticks to falls and to all
3 of those things. He suggested that I look at those and
4 identify ones that are solely cardiac arrest, which me and one
5 of my partners did. I assume it's just the cardiac arrest ones
6 and not the whole notebooks.

7 MR. BUCHANAN: It would be cardiac arrest, sudden
8 death of the cardiac events.

9 THE COURT: So, "cardiac events" is the term of art,
10 which includes cardiac arrest and sudden death.

11 MR. BENNETT: Yes. And that's what I did. So, that
12 will speed things along and narrow the grouping.

13 The second thing is that, if this is how this proceeds
14 and we do it in an expeditious way, I understood the Court to
15 say that a protective order can be handled, that if we miss
16 something because we do it in a hurry but it turns out there is
17 something privileged we are not waiving the right to say, "Oh,
18 this little sentence should be redacted," still.

19 THE COURT: Yes. I understand this is not quite warp
20 speed, but it is pretty fast for the Christmas season, so
21 inadvertent disclosures that would otherwise be protected -- I
22 may look at it and say, "You missed that?" So, understand that
23 you will face that, if you raise it, but generally inadvertence
24 will be understood to be, if it is, in fact, inadvertence, a
25 proper way to claw it back, to use Mr. Kettlewell's term.

1 All right. So, that is by way of guidance. I want to
2 go back to not interfering with the process that Judge Hinkle
3 is going through too, but I have got my trials coming up. I
4 want to be sure I do not have problems with my trial.

5 MR. TISI: Judge, may I ask a clarification?

6 THE COURT: Sure.

7 MR. TISI: And I apologize. I don't want to try your
8 patience here --

9 THE COURT: Everybody here knows that it has been
10 sorely tried. You can try hard and you will not be able to
11 succeed any further than people have already.

12 MR. TISI: Okay. I'm always afraid being the new guy
13 on the block. But I understood your distinction if a cover
14 memorandum had a "To" and a "CC" -- just one thing. If it had
15 a "To" and multiple medical people were on that, can I assume
16 that that would be turned over, if it went to multiple
17 people as a --

18 THE COURT: No. I am saying that if "To" -- I am
19 using "To." I am not sure it is a distinction that makes a
20 difference. My guess is that all these things go to a lawyer,
21 and perhaps Ms. Schuler is the further funnel, and they also go
22 to other people, and if they go to the lawyer, she is in the
23 "To," that is where I think I am going to draw the line. Now,
24 it may be, if somebody is concerned about it, that you ought to
25 come back to me and tell me about it, but it looks to me what I

1 have seen here is the "To" is to the lawyer and the "CC" --

2 MR. TISI: The reason why I'm asking it, and, again,
3 it probably goes to my experience in questioning Dr. Lazarus,
4 but I asked him, I specifically asked him this question, and I
5 think it is important for today's analysis. I asked him -- he
6 said, "I didn't see their write-ups, the forms that they filled
7 out, but I saw their conclusions and their summaries, and I
8 would make further determinations, medical determinations,
9 scientific determinations, as to what further steps to take."
10 And so the reasons for him being provided, whether he was a
11 "CC," a "Blind CC" or, frankly, an apple or a pear, the reason
12 why he was getting these summaries that they did was so he
13 could further the company's business.

14 THE COURT: I think I understand where this is going,
15 but let me talk about it in a practical sort of way. That he
16 looks at attorney-client privileged materials and does
17 something with it does not make the attorney-client privilege
18 disclosable. What you get is, after looking at this, this is,
19 "Did you jump out the window?" You get whatever he did, but
20 you do not get back into the specifics of the attorney-client
21 privilege, I do not think.

22 MR. TISI: Unless it has been waived, your Honor.
23 Because the purpose of him -- this is how I look at it. And,
24 again, I don't want to try your patience here, but if
25 Mr. Tarricone here is my lawyer, I give him that I did

1 something, and, "You need to help me with this," but then I
2 also need to file it as part of my tax returns, and I also
3 disclose that to the Government, or I disclose it to my
4 accountant, or I disclose it to somebody else --

5 THE COURT: These are people outside of the entity
6 that is seeking legal advice.

7 MR. TISI: But Dr. Lazarus is not using it for seeking
8 legal advice. It is being provided to him for a business
9 purpose.

10 THE COURT: But I guess I do not parse it that closely
11 for the document itself. It does not become the means for
12 disclosing the document. Now, you turn it over to the CPA, you
13 turn it over to the Government, that is disclosure. But you
14 keep it within the corporate organization, it may have multiple
15 purposes, but if it would not have been created but for, and
16 the categories that I have tried to use to identify that are
17 two, then you do not get it. You do not get to pierce into
18 that, because that is part of the ganglion of materials that
19 are used for purposes of obtaining legal advice. That it is
20 used for something else in the corporation, you can find out
21 whether or not they looked at something, a document, and they
22 did something.

23 MR. TISI: And he did testify to that. He said, "And
24 actually we took this data, this root cause analyses that were
25 done, we took it and we did further analysis and we did X, Y

1 and Z." So, it was pretty important stuff that was central to
2 their function, frankly, as a provider of medical devices.

3 THE COURT: It may be, but that is the problem with
4 privileges.

5 MR. TISI: It is.

6 THE COURT: And we have made these choices about
7 privilege that are hard in particular circumstances.

8 MR. TISI: I understand your ruling. I just wanted to
9 make sure you understood his testimony on that.

10 THE COURT: I do. I understand it better as a result
11 of your trying my patience.

12 MR. TISI: Thank you.

13 THE COURT: But you did not. So, we, I think, have
14 dealt with the universe, haven't we, here?

15 MR. BENNETT: Yes.

16 THE COURT: Now, let's go back to what process we are
17 talking about here. I have given my, I call it "guidance." It
18 is not meant to interfere with the process that is going on in
19 the state court. As you, I am sure, have gathered, my view is
20 that it is important for these cases, being both in state court
21 and federal court, and particularly for the bellwether context,
22 for there to be real comparability, and so, unless there is
23 some good reason, which is generally a legal reason, for me to
24 depart from what is going on in the state court, I am not
25 necessarily going to depart from what goes on in the state

1 court. I make my own independent determinations, but I am
2 trying to be assured that you do not get, without good and
3 sufficient warrant, a disparate treatment in the federal court
4 than you get in the state court. But "warrant" means a lot,
5 and there may be warrant for dealing with it differently.

6 What I do know is that there is an informed, ongoing
7 and nuanced evaluation being undertaken by Judge Hinkle that
8 Judge Kirpalani has otherwise engaged, and I do not want to
9 interfere or unduly distort what is happening in the state
10 court.

11 MR. TISI: The files are not before Judge Hinkle, your
12 Honor. She made it really clear that the only thing that was
13 really before her and that she was really dealing with was the
14 notebooks. She was not dealing with the production, and
15 Ms. Silva will correct me if I'm wrong, she was absolutely
16 clear that she was not going to be dealing with things other
17 than the notebooks. So, that is, for lack of a better word,
18 before you.

19 THE COURT: All right. But I am outlining my general
20 view, and if I am not interfering, I am not interfering. I
21 have given guidance on this. I have a feeling that some of
22 these underlying documents are not going to come that easily,
23 because looking at them I can see markups on them, inscrutable
24 to me, but markups on them that may well inflect the analysis.
25 I do not know. But I stand ready to see you whenever. You

1 have reached a critical mass or a critical -- I will call it a
2 critical point in the ongoing process to try to provide
3 guidance in this area. I think I have given enough for
4 purposes of the notebooks, unless something that Judge Hinkle
5 says is different from what I have done with these notebooks.
6 Get them over to them as fast as possible with redactions, and
7 let me see what those redactions are so I can decide whether or
8 not you have been over-inclusive in your redactions.

9 Similarly, documents that are in the possession of the
10 CQMs should be turned over. The memoranda that we have been
11 identifying as attorney notification that are essentially
12 memoranda directed to persons in the general counsel's office
13 do not seem to me to be disclosable, but that does not mean
14 that the underlying documents there are just for that reason
15 protected, but they are disclosed in some fashion that does not
16 necessarily tie them to the attorney notification document. I
17 think that does it.

18 Now, apart from the devil being in the details, are
19 there fundamental legal issues that the parties want me to look
20 at? I want to be sure that I have fully considered what
21 happened in St. Louis, and if that poses a different legal
22 issue, I would like to know about it.

23 Mr. Buchanan.

24 MR. BUCHANAN: The only issue I just wanted to make
25 sure your Honor was aware of, Judge Hinkle indicated that,

1 obviously, the premise for her consideration of the issue
2 preceded an awareness, really, of the full process with regard
3 to the CQMs and the notebooks and how this was an ordinary
4 course, and I just wanted to advise the Court I believe there
5 may be applications in the state court with regard to
6 Judge Kirpalani's underlying rulings in light of new evidence.

7 THE COURT: That is fine, and I want to be kept
8 up-to-date on it. But this is a moving train and taking its
9 dimensions and its velocity is new to me, but I want to be sure
10 that at least we are seeing the same thing.

11 MR. BUCHANAN: I just wanted to make sure the Court
12 had that context, that there may be a parallel path proceeding
13 to reinvestigate --

14 THE COURT: And I am sure the persons adversely
15 affected by that will not be shy in telling me about that in
16 seeking some disparate treatment here. The door is open. Come
17 on down, at the risk of saying that.

18 MR. BUCHANAN: Thank you. Very cautiously we'll do
19 so, your Honor.

20 Beyond that, I think we have what I would characterize
21 more as practical and logistical issues around timing and
22 consideration of producing materials by experts and potential
23 inquiries of witnesses who drafted them. Not having seen
24 everything yet, I'm not sure what shape --

25 THE COURT: Let me shape that as well. We are going

1 to trial on the schedule we are on. So, have that in mind.

2 MR. BUCHANAN: Your Honor, no way do I want to try and
3 shift schedules in any respect. I would like to make sure that
4 witnesses can be made available; if experts need to consider
5 this information, that we be permitted to provide that
6 information to experts who were deprived the ability to do that
7 earlier on.

8 THE COURT: The short of it is, do the best you can,
9 and I hold everyone to high standards about what they have to
10 do. But, beyond that, the declarant sayeth not.

11 MR. BUCHANAN: Thank you, your Honor. If, on the
12 practical side, just to anticipate our ability to review this
13 material and perhaps for your Honor's consideration of withheld
14 redacted pages, I think we would all benefit from getting a
15 sense of timing from the defense as soon as possible and
16 perhaps just, if we have a fuss about that, finding a way to
17 address it with the Court.

18 MR. BENNETT: We will start as soon as we can, and
19 hopefully in a day or two we will realize there is not a
20 problem, and if there is we will be here. But we are going to
21 start as soon as we walk out of the courtroom.

22 THE COURT: Yes. I do not want to say, "With all
23 deliberate speed." That carries a different connotation. But
24 my question is always going to be, "Why not?"

25 MR. BENNETT: I agree, and, as the person who read all

1 of those notebooks before you -- oh, one question we did have
2 is, what we had reviewed previously stopped at the May 2012
3 time period when we understand the purposes of notice and other
4 things to no longer be an issue.

5 Do you still want these produced today, or are you
6 still doing them?

7 MR. BUCHANAN: I think for purposes of prioritizing
8 efforts, your Honor, in terms of notebooks and also events they
9 should proceed in that chronological sequence. I can see
10 content of them giving root cause analyses being within the
11 notebooks with regard to time, 2013 or 2014, being relevant in
12 a broader context, but, having said that, our priority is
13 certainly the earlier in sequence, and I suggest that that's
14 where the parties put their focus.

15 THE COURT: I understand that to be not withdrawing
16 the question for every notebook that has been created but a
17 priority. If there is a dispute about that I will deal with
18 it. I have a feeling it is going to be dealt with practically
19 here.

20 MR. BENNETT: Just three or four years. It's a lot of
21 work, but we will see how that goes, and maybe we can avoid it.

22 You asked about legal questions. We had asserted work
23 product over those before, and Judge Kirpalani's ruling hadn't
24 had to reach that because he ruled on privilege grounds, but we
25 won't raise that with you in terms of asking you for a legal

1 ruling, that this isn't work product, unless our client gets
2 back to us and we talk to them about it.

3 THE COURT: You know my preliminary view --

4 MR. BENNETT: Exactly.

5 THE COURT: -- with respect to it. I say
6 "preliminary" in the sense that sometimes it is developed more
7 fully if it has to be developed more fully. But I do not see
8 myself moving from that judgment with respect to these cases.
9 How much can be incorporated by the experts here and how
10 relevant it is going to be, we will have to see that.

11 I have probably told you, because I tell every group
12 of lawyers who spend any amount of time before me, that there
13 is a famous, but perhaps apocryphal story, involving Phillip
14 Heymann, who was the Assistant Attorney General for the
15 Criminal Division. Someone once asked him, "What is the single
16 most effective restraint on prosecutorial misconduct?" And he
17 said, "Lack of time and money. The Government does not always
18 have all the money and all the time that it needs to do all of
19 the dumb things that it wants to do." And so, this process of
20 focusing on the trial I think may have a way of sorting through
21 some of the issues that might not have been so important.

22 MR. BENNETT: And I assume that, if we produce in
23 reliance on your indications, relying on indications is not a
24 waiver, because we do not have a formal ruling at this point in
25 time.

1 THE COURT: Oh, if I understand you correctly, you
2 have been directed to do this, unless there is a good reason
3 not to. I do not want to be, and I know I will not be,
4 sandbagged by, "Never issued an order, we do not have to do
5 it." You have guidance which I consider to be an order, and if
6 there is noncompliance, then that is enforceable, and, as a
7 consequence, you are not just voluntarily saying, "Here you go.
8 We do not care anymore." I understand you still care.

9 MR. BUCHANAN: The only other issue remaining, your
10 Honor, and it caught me when I was reviewing the defense papers
11 last night, where they excerpted the note relating to
12 Mrs. Lastorka -- you may have seen it embodied, a handwritten
13 note.

14 THE COURT: Right.

15 MR. BUCHANAN: There is a slash through it, and it
16 says, "Kerry," which is another CQM, Ms. Holloway, Kerry
17 Holloway.

18 THE COURT: Can you point me to that? I looked at it
19 too, and I was not quite sure I understood it.

20 MR. BUCHANAN: Let's see if I can pull the page number
21 out. It's Page 21 of the defense brief, your Honor.

22 The information we received previously at the
23 deposition of Mr. Castle and in the production is that a fax
24 was sent from the clinic to both Ms. McIntyre and Ms. Holloway,
25 first name is "Kerry." We don't have the notebooks for any of

1 the -- we don't have even sample notebooks for any of the other
2 CQMs. We only have them for Ms. McIntyre and Ms. Baker. Given
3 the urgency of the trial, I would certainly request
4 Mrs. Lastorka's full file, to the extent it's not in Ms.
5 McIntyre's or Ms. Baker's possession, if it's in Ms.
6 Holloway's. I have sent an informal request to the defense to
7 see if that can be done. I haven't heard, but we have limited
8 time.

9 THE COURT: Any problem with it?

10 MR. BENNETT: No. Our view is, if it relates to
11 Ms. Lastorka, we would produce it. My preliminary
12 investigation indicates there isn't additional material, but
13 I'll confirm that.

14 THE COURT: Well, in any event, I think it is correct
15 that, if there is additional material with respect to -- so, I
16 should know her as Jackie Lastorka -- then it should be
17 disclosed.

18 MR. BENNETT: Understood.

19 MR. TARRICONE: One other matter, your Honor,
20 unrelated to this discussion.

21 THE COURT: Sure.

22 MR. TARRICONE: We were surprised to receive a Motion
23 for Summary Judgment for the second bellwether trial, the Dial
24 case, and the motion in large part is premised on, because this
25 is a NaturaLyte case and it's plus 4 instead of plus 8, there's

1 no case, there's no liability.

2 THE COURT: I have not seen it.

3 MR. TARRICONE: Okay. The parties got together and we
4 agreed on the bellwether trials, and we recommended them to the
5 Court, and the reason the Dial case was selected was because it
6 was a NaturaLyte case, and to now receive this Motion for
7 Summary Judgment, I mean it seems like an effort to derail the
8 bellwether --

9 THE COURT: Well, let me just ask this. I have been
10 just speculating, as you know. I have been getting daily copy
11 to try to keep up with what is going on. I have this
12 generalized view, but maybe it will be made more nuanced, that
13 at least the first three bellwethers, that is, Ogburn and
14 Lastorka and Dial, will go to trial. I was not thinking about
15 summary judgment as a vehicle for the resolution of them. Now,
16 "going to trial" means that I might at the end say, if there is
17 a verdict for the plaintiff that does not work, but that is a
18 post-trial motion kind of thing, I do not think I want summary
19 judgment practice in this area early on. I was not aware that
20 there was any summary judgment practice early on. I will hear
21 from the defendants about that.

22 It may be that summary judgment practice starts to get
23 involved after the first three bellwethers and including as to
24 the next bellwether that is chosen. Now, we have not chosen
25 the next one for me, but the other two have been chosen for

1 Judge Kirpalani, or I think they have, haven't they? At least
2 he plans on two more in April and May, I think. So, the short
3 of it is, I think that summary judgment process is premature,
4 but that is not to close off the possibility that there may be
5 some summary judgment process.

6 MR. TARRICONE: Oh, I understand. Right now we are
7 faced with responding to this.

8 THE COURT: Yes, you have got to try a case.
9 What is the story on that?

10 MR. BENNETT: Yes, your Honor. There was a Case
11 Management Order that had a deadline for Daubert and summary
12 judgment. In light of Dr. Waikar's testimony in the state
13 court on behalf of the plaintiffs that the issue is the extra 4
14 in GranuFlo, and in light of all the other experts who have
15 testified similarly by the plaintiffs, we filed a Motion for
16 Summary Judgment that is very straightforward that just says
17 NaturaLyte doesn't fit any of their theories.

18 THE COURT: Let me ask you this: I always take
19 summary judgment motions seriously, in part because they are
20 serious, but in part to edify me so that I understand the case,
21 although I do not solicit summary judgment for kind of remedial
22 reading, but that is something that I want. On the other hand,
23 are you really expecting me to pretermite the Dial case on the
24 basis of a summary judgment motion?

25 MR. BENNETT: In light of what their expert said in

1 the trial, we think that would be appropriate, but I
2 understand, and the last case I tried in front of you I think
3 you carried summary judgment with the case.

4 THE COURT: Yes.

5 MR. BENNETT: So, in many respects we think it is a
6 proper summary judgment we view that would help clear out a lot
7 of the cases that we have to deal with. We also view it as an
8 equivalent of a trial brief that would be of assistance to the
9 Court.

10 MR. TARRICONE: Your Honor, I just want to respond to
11 the characterization of what is being tried out in Woburn.

12 THE COURT: No, no, you do not have to. Let's talk
13 about it some more. I guess, Dial is on for --

14 MR. TARRICONE: Mid-February.

15 THE COURT: Well, the trial is, but the pretrial is
16 mid-January, isn't it?

17 MR. BENNETT: Late January.

18 MR. TARRICONE: I think it's the end of January, your
19 Honor, late January, your Honor.

20 THE COURT: I do not want you to devote a lot of time
21 on it, but maybe a five-page preliminary brief in opposition
22 that just outlines these things, recognizing that if I think we
23 ought to go further on it I will. My present inclination,
24 which is not unusual, as Mr. Bennett has already identified in
25 these kinds of things when I am not so sure what I want to do

1 is go to trial and then I sort out the wounded and the dead
2 afterwards, and that may be what I will do here. But I would
3 like you to respond to it, and maybe if you could respond to
4 it -- it is the end of this week?

5 MR. TARRICONE: Well, right now it is due
6 December 29th, which is the same date as the Daubert
7 oppositions, which is a real problem for us.

8 THE COURT: But I am just trying to remember what I
9 have to get to -- I am living day by day, I must tell you --
10 when I have to get to the pretrial here. It is next Monday,
11 right?

12 MR. TARRICONE: Next Monday on Lastorka, your Honor.

13 THE COURT: So, what do you want?

14 MR. TARRICONE: I think we would be addressing this
15 motion I think at the very end of January. Could we submit
16 something mid-January?

17 THE COURT: Yes. Find a time.

18 MR. TARRICONE: January 12th?

19 THE COURT: I will look at it January 12th, and it may
20 be that, although I do not think it is likely, that I may say I
21 want more on this in light of the issues that are raised. I am
22 innocent of the contentions right now on it, and my
23 inclinations are, as I have indicated, to go to trial and then
24 sort things out.

25 MR. TARRICONE: Thank you, your Honor.

1 THE COURT: But January 12th you will have some
2 opposition.

3 MR. TARRICONE: Yes.

4 THE COURT: But it does not have to be full borne, but
5 just alert me to the oppositions.

6 MR. TARRICONE: Understood.

7 MR. BUCHANAN: Yes, your Honor. The additional
8 scheduling considerations allowed me to look over my notes from
9 your guidance. I think I understand the process as it relates
10 to notebooks with regard to generally turning them over and
11 turning over redacted pages or entries to your Honor
12 simultaneously or on whatever schedule Judge Hinkle has for her
13 submissions.

14 With regard to the broader production of the events
15 and the CQM files, one of the challenges we experienced, and
16 there is some debate about the level of detail or not in the
17 privilege log, was really discerning what was withheld and what
18 was not withheld and the extent to which it was a certain type
19 of document or another. My question is how are the materials
20 that are being withheld from that broader production to be
21 managed? It may be more voluminous, it may not be, I am not
22 sure. But, to the extent there is some volume of material and
23 it is not going to be submitted to your Honor for *in camera*
24 review, I just ask that we be provided with some level of
25 detail in a supplemental privilege log so that we can

1 understand and take up matters if we need to.

2 MR. BENNETT: I think the process can be the same for
3 both kinds of documents, and we will do that, or at least
4 provide a, I think Rule 26 says reasonable notice sufficient to
5 challenge it, and we will communicate with them. I understand
6 what we are supposed to do.

7 THE COURT: I do not think I want to make it anything
8 more specific. At the risk of extending this further, this is
9 a little bit like the dog that chased the car. Now you have
10 got the car and you are going to have to decide what you do
11 with it, but you are going to have a lot of material and you
12 are going to have to sort through it.

13 MR. BUCHANAN: I hope it's a dog that chased a car
14 filled with bones, your Honor.

15 THE COURT: Right. Or sometimes cars turn on dogs.
16 But the short of it is, if there is a problem, you bring it to
17 my attention I guess by next Monday and we will deal with it
18 there.

19 MR. BUCHANAN: That's fine, your Honor.

20 THE COURT: I am going to try to be practical about
21 that.

22 MR. BUCHANAN: Understood, your Honor. Thank you.

23 THE COURT: Anything further we need to talk about?

24 MR. TARRICONE: No, your Honor.

25 MR. GOTZ: Except we are going to see you Monday for

1 motion practice.

2 THE COURT: Right.

3 MR. GOTZ: I haven't talked to the other side, but
4 Mr. Buchanan, as co-counsel for Lastorka, has asked me to ask
5 the Court would you be open to starting at 10:00 instead of
6 9:00 a.m.?

7 THE COURT: Sure. Maybe I am just "The wish is father
8 to the hope," but it did not look to me like it was going to be
9 a lot of work here.

10 MR. BUCHANAN: I think we will be able to do it in a
11 day. That's my hope, your Honor, and I think, given the
12 holidays and everyone's desire to be efficient, maybe we will
13 --

14 THE COURT: They are inextricably intertwined, as I
15 said earlier. Let me just be sure. I have no problem with
16 starting at 9:00. I have to tell you that I have a pretty
17 heavy sentencing at 2:00, so it may be that I will not be able
18 to give you the afternoon, or if I do it is late in the
19 afternoon, and it involves some staffing issues that I think I
20 would prefer not to address. I can then see you on Tuesday
21 morning, but it looks like I have got some stuff on Tuesday as
22 well. If I do it Monday and Tuesday mornings, realistically do
23 you think we will be through that? I think we will.

24 MR. BUCHANAN: I think we would be, your Honor. I was
25 thinking we would be done Monday. I understand you have a

1 sentencing in the afternoon.

2 THE COURT: I apologize, but it is a --

3 MR. BUCHANAN: Understood. Would it be possible,
4 then, to at least push back the start time on Monday to, say,
5 9:30?

6 THE COURT: I think it was asked for 10:00.

7 MR. BUCHANAN: Oh, your Honor just said "9:00" back.

8 THE COURT: You two negotiate about it.

9 MR. BUCHANAN: I thought your Honor just said "9:00."

10 THE COURT: No. 10:00 is fine, if that works for
11 everybody.

12 MR. BUCHANAN: 10:00 works for me.

13 MR. GOTZ: What we have on the table for your Honor is
14 competing Daubert motions, case-specific and competing motions
15 *in limine*.

16 THE COURT: Right. There are the questions of what
17 conflicts in the law apply and that kind of stuff. It is heavy
18 lifting, but I am not sure it is time consuming in the
19 courtroom.

20 All right. Thank you very much.

21 THE CLERK: All rise.

22 (The Honorable Court exited the courtroom at 1:15 p.m.)

23 (WHEREUPON, the proceedings adjourned at 1:15 p.m.)

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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *In Re: In Re: Fresenius GranuFlo/ Naturalyte Dialysate products Liability Litigation*, No. 1:13-md-02428-DPW.

Date: December 21, 2015

/s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter