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

* * * * *	* * * * *	MDL NO. 07-MD-1842ML
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IN RE:	KUGEL MESH HERNIA	*
	PATCH PRODUCTS	* MARCH 24, 2009
	LIABILITY LITIGATION	* 2:00 P.M.
		*
* * * * *	* * * * *	PROVIDENCE, RI

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

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

1 24 MARCH 2009 -- 2:00 P.M.

2 THE COURT: Welcome, everyone. Judge Almond  
3 sends his regrets. He had some issues that he needed  
4 to deal with, and so I made an executive decision and  
5 excused him from participation; but he will be required  
6 to read the minutes.

7 This is an open meeting. And, Mike, what that  
8 means is that anyone who has an interest in this  
9 litigation, whether they're lawyers or parties, are  
10 invited to attend. So if you want to open the door,  
11 you can keep the door open to allow people to come in  
12 if they wish to do so.

13 Everyone should have a copy of the agenda which  
14 was posted, and I guess we can get started with Item  
15 Number 1, which is a status report on discovery. Which  
16 of you want to start with that one?

17 MR. MIGLIORI: Thank you, your Honor, and good  
18 afternoon. Don Migliori for the Plaintiffs' steering  
19 committee. To date, your Honor, we have 531,791  
20 documents.

21 THE COURT: You better say that again.

22 MR. MIGLIORI: 531,791 documents, which is about  
23 4.7 million pages. We have -- we told the Court the  
24 last time we met that we're in the process now of  
25 de-duping, that is, finding out every document that was

1 the same or produced more than once, where there are  
2 gaps so that we could tailor very specific discovery  
3 responses to get answers as to whether or not certain  
4 items had been provided.

5 We were hopeful that we would be done doing that  
6 by now, but the electronic crunching has taken us all  
7 of this time, and still some more is needed. We have,  
8 to date, identified -- and, by the way, about 11,000  
9 documents, additional documents, were just submitted to  
10 us within the past two weeks. So we anticipate that  
11 these will still flow in, but we've identified gaps in  
12 Bates ranges which we intend to request more specific  
13 information.

14 And the reason we haven't shared this yet with  
15 Mr. Griffis is that this was being compiled quickly,  
16 but I think it's important to just sort of raise the  
17 issues now as a status.

18 There are no custodial files for certain  
19 employees that we've identified, and we'd like to  
20 follow up on those specifically. We've identified that  
21 some of the custodial files that we have are  
22 incomplete, and there's some inconsistencies in the  
23 sourcing, in the electronic sourcing of certain  
24 custodial files that we want to identify.

25 THE COURT: Tell me what you mean by that.

1 MR. MIGLIORI: There are things called naming  
2 conventions, the way that you identify a particular  
3 source. So somebody could be listed as Lee, Michael.  
4 Somebody could be M. Lee. There are different ways  
5 that the information is sort of identified  
6 electronically where it could be talking about the same  
7 person or it could be talking about a different person,  
8 and we're trying to just get some consistency so that  
9 at least we know that we've covered something and that  
10 we don't have to sort of backtrack.

11 So we're trying to pick out the inconsistencies  
12 within that metadata so we can make sure we know what  
13 we actually have.

14 There are some text files that are referred to  
15 within documents, within the data, that are not there  
16 that we're going to isolate and ask that they be  
17 followed up on.

18 We have no way of really knowing whether or not  
19 document attachments are attached or not attached. So  
20 we are going to request that the Defendants add a field  
21 within the data produced to us that gives us a count of  
22 how many pages are actually attached to a particular  
23 document so we can cross-reference to make sure that we  
24 have them.

25 Some of the e-mail production has metadata

1 that's not accurate, and it's information with -- that  
2 is, incorrect dates in the metadata. When you look at  
3 the actual e-mail, they don't correspond.

4 Drawing files, some of them are hard to open  
5 because they're a particular type of format that we  
6 can't draw on.

7 There's something called an IT asset map which  
8 helps us identify the origin of the material as  
9 produced. In some instances we're not able to identify  
10 that detail, that information, which is very helpful to  
11 know where the information came from, obviously.

12 And then we have very specific, as we referenced  
13 last time, source -- I'm sorry, substantive issues. To  
14 date, we still don't really know if we have all the  
15 Surgical Sense documents. And so we are going to  
16 propound a very specific request that we have each and  
17 every document relating to the transaction between  
18 Surgical Sense and Davol when they acquired the line,  
19 the Kugel line.

20 There is specific information about Dr. Grant's  
21 study that we can't identify and things used in  
22 Dr. Grant's study which was pursuant to a retaining  
23 agreement where Davol retained Dr. Grant on April 10th  
24 of 2006.

25 So there are -- taking the Court's admonitions,

1 we're trying to be as tailored as possible so that we  
2 don't have hundreds and hundreds of broad requests for  
3 more specific information.

4 The electronic crunching is ongoing. We hope  
5 that there aren't too many more 10,000-document dumps,  
6 they're not dumps, but productions; but that, of  
7 course, delays it a little further.

8 We're committed to sticking to the time line  
9 that the Court alluded to last week -- last month, and  
10 we'll be ready to try these as soon as the Court is  
11 ready to try them; but it has been more of an  
12 electronic crunch process than we anticipated, but  
13 we'll get it done.

14 THE COURT: Let me ask Mr. Griffis to respond,  
15 if you will, to the items that Mr. Migliori has  
16 identified. Is this the first you're hearing about  
17 some of these?

18 MR. GRIFFIS: This is the first I've heard of  
19 any of these issues.

20 THE COURT: Okay. Would you prefer to have  
21 Mr. Migliori complete his review and then send you a  
22 list of things that he's identified that he needs you  
23 to respond to, or do you want to get this on a rolling  
24 basis?

25 MR. GRIFFIS: As soon as an issue is identified,

1 we can start to work on it if it's a discrete issue.  
2 Whatever Mr. Migliori's preference is on that is fine  
3 with me.

4 MR. MIGLIORI: We'll start right away.

5 THE COURT: Why don't you start doing that,  
6 then. I mean, I think if this side is amenable to  
7 getting some of this rolling now, let's go ahead and do  
8 that rather than wait and then have to wait for this  
9 side to respond. So the more specific you can be,  
10 obviously, the better.

11 MR. MIGLIORI: People a lot more articulate and  
12 intelligent than I can get this on paper quicker, and  
13 so we'll get that to the Court -- I mean to Mr. Griffis  
14 immediately.

15 THE COURT: And then I'll ask you to update next  
16 month on where you are with all of this. If there are  
17 discrete areas that you've submitted over to the  
18 Defendants' side, let us know that so that we have a  
19 pretty good running tally of what's going on.

20 MR. MIGLIORI: And if I may, your Honor, there  
21 are actually -- beyond just documents, there is some  
22 other discovery status.

23 THE COURT: Let me stop you and ask you a  
24 question here. I know that you are on a schedule in  
25 the Superior Court matters that Judge Gibney has you

1 on. Is any of what you've just relayed to me also part  
2 of what's going on over there?

3 MR. MIGLIORI: We have worked to make them the  
4 same schedule as it relates to document production; and  
5 the Court is reviewing, in the state court, certain  
6 privilege claims and the like on specific documents not  
7 produced, but that Court has agreed to the same  
8 scheduling that we have here.

9 THE COURT: Okay. All right. Just make sure  
10 that Judge Gibney knows what it is that we're now  
11 dealing with on these that you've identified today.

12 MR. MIGLIORI: I will. Thank you, your Honor.

13 Within discovery, if the Court wants a status,  
14 there are also some activity in depositions. So very  
15 briefly, the Defendants have requested treating  
16 physician depositions in 10 ring break cases that are  
17 not part of either the trial selection process as we  
18 currently know it or part of an early neutral  
19 evaluation process.

20 And as we told the Court before, we're willing  
21 to take on as many parallel tracks as will help this  
22 litigation move along. So we're doing our best to  
23 arrange for those.

24 They did withdraw pending a request from a  
25 November letter for the same types of cases. I'm not



1       sure why, but we are willing to give them whatever  
2       depositions that help move this along. We're working  
3       on that.

4               There were -- we had asked the Defendants -- we  
5       had told the Court last session that we were going to  
6       request availability dates of certain liability  
7       witnesses now that we have these documents. And  
8       despite what I just reported about how hard it's been  
9       to sort of crunch the data, we're ready in about -- I  
10      think there are eight individuals who are -- range from  
11      regulatory to marketing to quality assurance to design  
12      issues, manufacturing issues. We've asked for eight --  
13      availability dates for eight Davol employees that have  
14      relevant knowledge, and we've asked that those  
15      depositions take place in May, and we've asked for  
16      dates for those depositions by April 3rd.

17              And I don't know what the status of that request  
18      is; but just so the Court's aware, we have requested  
19      those availability dates.

20              THE COURT: Okay. Where are we with that?

21              MR. GRIFFIS: Well, that's accurate. There have  
22      been -- a request came in on March 16th for eight  
23      current and former employees at Davol and at the  
24      Puerto Rico facility, which is not a Defendant in this  
25      litigation, and we are working on finding those people

1 and getting dates.

2 THE COURT: How many of the eight are current  
3 employees?

4 MR. GRIFFIS: I'm not even sure of that. The  
5 majority of them are former employees. As to one of  
6 these employees, one of these former employees, two  
7 years ago I know that he was too ill to be deposed. It  
8 would potentially kill him. And I believe that his  
9 condition was of the nature that that will not have  
10 changed; but we haven't yet figured that out, and we'll  
11 let Mr. Migliori know about that.

12 THE COURT: As soon as you know what the status  
13 is on that, you'll let Mr. Migliori know.

14 MR. GRIFFIS: Yes, we will, and we'll -- I have  
15 no problem with responding by April 3rd with dates in  
16 May to the extent that's possible with their schedules.  
17 I think it should be substantially possible.

18 THE COURT: Okay. What about the depositions that  
19 you've requested of the treating physicians in the 10  
20 cases?

21 MR. GRIFFIS: We -- that's an issue that came up  
22 I don't know how many hearings ago, maybe five hearings  
23 ago. We said that we'd like to take depositions in  
24 ring break cases that were not otherwise -- that  
25 everyone wasn't otherwise focused on so that we could

1 get an idea of the inventory, and Mr. Migliori said  
2 that that was no problem.

3 We quickly after that identified 10 such cases  
4 and asked for, in each case, one or two depositions.  
5 This would be of the key surgeon witnesses. This isn't  
6 even an early neutral evaluation level workup. It's  
7 short of that, but it's to give us more information  
8 than we get in the Plaintiff fact sheets.

9 It took some time for the Plaintiffs to respond  
10 to that, everyone was involved in other things, but we  
11 only got two depositions done. So I then withdrew the  
12 request as to those, as to the remaining ones that we  
13 had not yet been offered dates for, and substituted  
14 additional requests in other cases.

15 THE COURT: These are for different cases?

16 MR. GRIFFIS: Different cases but still the same  
17 situation, alleged ring break cases. The very first  
18 response we actually got to our initial letter was that  
19 case that you asked for isn't a ring break case after  
20 all. So I said, okay, never mind that one then. Let's  
21 do this one instead.

22 More -- most recently we -- Mr. Migliori said in  
23 light of the pending trial case selection, let me get  
24 back to you as to whether we're willing to proceed as  
25 to these dates. And I took that to be an expression of

1 his concern about the fact that some of the cases that  
2 we had requested were cases before your Honor.

3 And just so that there wouldn't be any question  
4 of whether it was appropriate for us to --

5 THE COURT: You mean direct filed cases here?

6 MR. GRIFFIS: Direct filed cases, whether it was  
7 appropriate for us to be doing discovery of direct  
8 filed cases before you've made a selection, we withdrew  
9 those five, and we're in the process of substituting  
10 those five.

11 So right now there are five cases in which we've  
12 got requests for dates pending.

13 THE COURT: Let me ask you realistically because  
14 over the next several months, once you all have  
15 submitted to me the 10 that each side will select for  
16 trial and then I make a determination, you're going to  
17 be working those up.

18 What I don't want to have happen, though, is  
19 that you get sidetracked off doing depositions of treating  
20 physicians on cases that are not part of that inventory  
21 which then delays my plans for trial on the 10 cases.

22 MR. GRIFFIS: It's nobody's intention to lose  
23 focus on the cases set for trial.

24 THE COURT: Well, let me just make myself clear.  
25 I understand that you want to engage in this process;

1 but to the extent that that in any way sidetracks you  
2 from getting the work done on the 10 that I'm going to  
3 tee up I think I told you in the fall, I don't want to  
4 hear, well, we're busy off in Oshkosh doing a depo of a  
5 treating physician on a case that's not at all related.

6 MR. GRIFFIS: I understand, your Honor. You  
7 won't hear that from us.

8 THE COURT: Well, I may not hear it, but I want  
9 to make sure it's not happening. Okay. Anything else  
10 on discovery?

11 MR. MIGLIORI: I think that's it, your Honor.

12 THE COURT: I know that's always your favorite  
13 topic.

14 MR. MIGLIORI: I'm anxious to move on from it.

15 THE COURT: So am I. Let's go to Item Number 2,  
16 and that is this was submitted by you which tells -- I  
17 take literally that you are working on an agreement  
18 with regard to a class action complaint.

19 MR. MIGLIORI: It's done. We told the Court we  
20 would report, and we've agreed, and we have a deadline  
21 for amendments, and then hopefully we can agree to  
22 later a scheduling order for certification motions.

23 THE COURT: Excellent. Will you have that  
24 submitted for the next meeting?

25 MR. MIGLIORI: We will. It's prepared, and we

1 just need to electronically sign it, I guess.

2 THE COURT: Great. Number 3, progress regarding  
3 nonring break cases for early neutral evaluation or  
4 settlement conferences with Judge Lovegreen, who is  
5 still very much committed to working with you. So  
6 where are we with those?

7 MR. MIGLIORI: That's wonderful news, your  
8 Honor, and we have committed to the Court that we would  
9 engage an expert for settlement purposes only who will  
10 give us specific causation reports to help Mr. Griffis  
11 understand the theory of a nonring break or a buckling  
12 type case and how our theory of liability would work in  
13 those cases in light of his no-offer position on all 10  
14 cases.

15 We did, in fact, engage an expert. He is  
16 reviewing all 10 cases as we speak, and we anticipate  
17 that his reports will be completed by April 10th.

18 THE COURT: Okay.

19 MR. MIGLIORI: So he has gone through all 10  
20 cases and a substantial amount of records.

21 THE COURT: And when will Mr. Griffis have those  
22 reports?

23 MR. MIGLIORI: We'll give them to him as soon as  
24 we get them.

25 THE COURT: And, Mr. Griffis, so you'll know, I

1 was presented with two versions of that paragraph 5 in  
2 the last practice and procedure order. I purposefully  
3 acceded to your wishes in hopes that that would  
4 generate on your side a real commitment to a fresh  
5 look.

6 You're going to get everything you asked for.  
7 And so I would expect that after taking a fresh look,  
8 after getting everything you asked for, that there  
9 would be at least some of those 10 that are more than  
10 zero cases.

11 MR. GRIFFIS: I understand, your Honor.

12 THE COURT: I would be very surprised to hear  
13 you come back in and say they're all zero cases.

14 MR. GRIFFIS: I understand, your Honor.

15 THE COURT: Okay. Number 4, compliance with the  
16 order issued on February 24 regarding the Plaintiff  
17 fact sheets for the cases that are eligible for trial  
18 selection. Where are we with that?

19 MR. MIGLIORI: I'll let Mr. Griffis talk about  
20 it. He asked for this on the agenda. I can report the  
21 only thing that I know, which is that there's one  
22 attorney, Rob Dassow, who has three clients with  
23 deficiencies still. We have literally papered and  
24 called and pushed everybody who's got an originally  
25 filed case --

1 THE COURT: Where is he located?

2 MR. MIGLIORI: He's based out of Indianapolis.  
3 And he sent a letter this morning to us, and I think  
4 he's sending one to Mr. Griffis now, explaining that  
5 he's done, he apologizes, he's going to get the  
6 information.

7 There will be, as we understand it from him, as  
8 he faxed a letter to us, full compliance. He's the  
9 only attorney, though, in three cases that we've  
10 identified that has not filed PFSS and cured them.  
11 There were a couple that were a day or two after the  
12 20th deadline, whatever the deadline was.

13 THE COURT: The 15th.

14 MR. MIGLIORI: The 15th, which was a Sunday, and  
15 it turned out to be the 16th; but as we understand  
16 them, we have pushed as hard as we could and we've  
17 tried to get as much compliance as we can on a timely  
18 basis. And it's just these three, which I understand  
19 are cured now or will be in the next several days, from  
20 the one law firm that's left.

21 THE COURT: Okay.

22 MR. GRIFFIS: There were -- of the 122  
23 Plaintiffs that are eligible for the case selection  
24 before your Honor, 170 deficiency letters were sent.  
25 Obviously, some of those were second-round deficiency



1 letters. So we got a response, and that response was  
2 deficient and required a further letter. And that is  
3 so far. There will be further deficiency letters.

4 On the 16th, which was the day after the  
5 deadline, we notified Mr. Migliori as liaison counsel  
6 and as counsel that in nine of -- the nine cases in  
7 which Motley Rice was co-counsel, we still received  
8 nothing, no Plaintiff fact sheet.

9 And we have subsequently received those  
10 Plaintiff fact sheets. They came in all last week,  
11 Monday through Friday or I think Tuesday through  
12 Friday.

13 There are 35 cases still deficient, seven  
14 seriously so. I've got an example of a Plaintiff fact  
15 sheet here that we received that we got on time, but  
16 every check mark for injuries is blank, the check marks  
17 for do you claim that you were injured by a ring break  
18 is blank, do you claim that you were injured by a Kugel  
19 patch is blank, there is no signature, there are no  
20 authorizations, et cetera. So there are clearly a  
21 small number of cases --

22 THE COURT: Show that one to Mr. Migliori.

23 MR. GRIFFIS: This is the Dodds case by the  
24 Miller firm.

25 THE COURT: Is this one of those with the fellow

1 in Indiana?

2 MR. MIGLIORI: No. This is a firm in Virginia.

3 MR. GRIFFIS: And there are two cases in which  
4 we -- two cases that I believe were on the list of nine  
5 from the 16th in which we received Plaintiff fact  
6 sheets but no medical records, and I pointed that out  
7 to Plaintiff's counsel. And I've gotten word from my  
8 office, while I was away, that we received those today,  
9 the medical records today.

10 So I can report that there are significant  
11 deficiencies but substantial compliance with the  
12 general directive of the Court to get us a bunch of  
13 information so that we're able to participate in the  
14 picking process.

15 We expect that further deficiencies will be  
16 cured as swiftly as possible and we'll be able to  
17 participate in the picking process.

18 MR. MIGLIORI: For the nine Motley Rice cases,  
19 just so the record's clear, all nine of those were sent  
20 on the Friday before the deadline was due. The  
21 deficiency came in -- the notice to us that they  
22 weren't there came in as ours was sent to them.

23 THE COURT: So they crossed in the mail.

24 MR. MIGLIORI: Everybody, and I can report this  
25 as liaison counsel, everybody that we reached out to

1 and told this is an absolute Court order has said, with  
2 the exception of the one Indiana firm, they're on it,  
3 they'll commit to it. In some instances, medical  
4 records were inadvertently not enclosed but sent the  
5 next day.

6 So every effort was made and in my view, your  
7 Honor, very much in good faith.

8 THE COURT: Well, I didn't hear Mr. Griffis  
9 suggest otherwise. It's just he's pointing out there  
10 are some deficiencies out there still, and hopefully  
11 those will be cleared up in the next couple of weeks.

12 MR. GRIFFIS: I just need the information. I'm  
13 not particularly interested in good or bad faith.

14 THE COURT: Right. Okay. Number 5 is related,  
15 procedure for updating them with new or corrected  
16 information.

17 MR. GRIFFIS: It actually isn't related. It  
18 sure sounds that way when they're placed next to each  
19 other.

20 The Plaintiff fact sheets -- can I have that  
21 back, Don? I'll hand it to you again in a moment.  
22 They all say, this is just part of the --

23 THE COURT: That you've got an obligation to  
24 update it.

25 MR. GRIFFIS: You must supplement your responses

1 if you learn that they are incomplete or incorrect in  
2 any material respect -- you must supplement your  
3 responses if you learn that they are incomplete or  
4 incorrect in any material respect. Should you need to  
5 correct or supplement any response made here, please  
6 contact your attorneys and they will assist you in  
7 doing so.

8 We have one real good example of this being  
9 done, and it's the only example I know of. This was in  
10 the Dillon case, which was a wave one ADR case. Prior  
11 to the depositions in that case, we received from  
12 Plaintiff's counsel, a firm in Missouri, this is a  
13 Missouri Plaintiff in the Dillon case, an updated  
14 Plaintiff fact sheet saying, you know, it's come to our  
15 attention that some of this information has changed,  
16 here it is. That was really useful.

17 As we move into taking really mission-critical  
18 depositions, I'd suggest that a lot of attention needs  
19 to be paid to that clause. And I proposed to  
20 Mr. Migliori that we have a rule in addition to the --  
21 when it comes to anybody's attention, which is a  
22 general rule that can possibly be overlooked, but we  
23 also have a bright-line rule that 10 days prior to any  
24 fact deposition in these cases, in these cases set for  
25 trial, we be notified of any changes in the Plaintiff

1 fact sheet.

2 THE COURT: Okay.

3 MR. MIGLIORI: If I may, your Honor. This may  
4 take a little bit of a running start because it's in a  
5 bigger context. Mr. Griffis in the state court  
6 attempted to have Plaintiff fact sheets converted into  
7 interrogatories. It was argued, and the request was  
8 denied.

9 The basic argument on our side was that  
10 Plaintiff fact sheets are a tool to help the Defendants  
11 get a better sense of the inventory. They're done  
12 early in the litigation without the benefit of a lot of  
13 investigation and discovery. There are many, many,  
14 many more questions than are allowed under the rules  
15 for interrogatories, even when there is sort of an  
16 allowance for extra questions.

17 This is a tool. It's a useful tool to get your  
18 arms around litigation, and Plaintiffs' firms  
19 throughout the country agree to it because the goal is  
20 to resolve and move forward.

21 Now to turn these into an interrogatory  
22 response, which have all of the legal obligations of  
23 reaching out and identifying everything in your care,  
24 custody and control at a level with potential sanctions  
25 under Rule 37 that are implicit in Rule 33, it makes

1 the PFS something very different than what it was  
2 created for.

3 Now, we're not opposed to giving Mr. Griffis the  
4 most accurate information that we can as soon as we  
5 can, and there is an obligation to do that in the PFS.  
6 But our concern has been that we didn't want to turn  
7 this into a Rule 33 interrogatory response because  
8 there are some very serious Rule 37 consequences to  
9 that.

10 So we have agreed to be as up-front and to share  
11 whatever information we have, but to cross-reference  
12 every medical record and then if a doctor -- which this  
13 actually happened in a case that I defended in Florida,  
14 then have a doctor say something totally different than  
15 the information that was available to the Plaintiff  
16 when they in good faith put together the Plaintiff fact  
17 sheet and then to have that hanging around as being us  
18 not living up to the 10-day rule is very problematic  
19 just from a management side.

20 And as liaison trying to get everybody on the  
21 same page, I simply said that kind of bright-line rule  
22 is not helpful here, especially when the language here  
23 requires that they update it if they can; but a  
24 Plaintiff fact sheet is not the place --

25 THE COURT: May I see that language again,

1 please. Okay.

2 MR. MIGLIORI: And if you read that, your Honor,  
3 it's addressed to the Plaintiff whereas an  
4 interrogatory, the onus is on the Plaintiff's lawyer as  
5 much as it is the Plaintiff.

6 So if the Plaintiff learns something, he needs  
7 to tell his or her lawyer immediately, that's  
8 absolutely the appropriate instruction to the  
9 Plaintiff; but to put a 10-day rule in now puts a  
10 burden on the Plaintiff's lawyer to go and analyze and  
11 make sure that everything in that PFS is as tight as it  
12 would be in a Rule 33 response, and I just think it's  
13 got too many complications.

14 That said, of course, we'll continue to put the  
15 word out. If you know something, update it. We've  
16 been very careful to coordinate these depositions in an  
17 organized and efficient way. We will remind people  
18 when their depositions are scheduled, update the  
19 information.

20 THE COURT: What I would suggest that you do  
21 short of a Court order to that effect is, when you  
22 notice the deposition, because it's primarily a  
23 deposition situation where you don't want to get caught  
24 not knowing about something new. Right?

25 MR. GRIFFIS: Sure.

1 THE COURT: What I would suggest that you do  
2 short of a Court order to that effect is, with your  
3 notice of deposition, you're going to send a cover  
4 letter probably, is remind the attorney about that  
5 provision in the PFS because they may not remember it,  
6 to be perfectly honest with you.

7 And that way when you get into the deposition,  
8 you know, the first question you ask is, do you have  
9 any changes.

10 MR. GRIFFIS: Right. That would -- I mean, that  
11 would apply to the deposition of the Plaintiff. My  
12 concern is with changes, substantial changes of facts  
13 that are known to Plaintiff or Plaintiff's counsel --

14 THE COURT: Follow up with Plaintiff's counsel.  
15 Once you've sent the notice out, follow up with  
16 Plaintiff's counsel.

17 MR. GRIFFIS: And since this is going to be in a  
18 limited number of cases set for trial, it seems that we  
19 can --

20 THE COURT: I think you can work something out  
21 short of an order.

22 MR. GRIFFIS: Okay. We'll try to do that short  
23 of an order, your Honor.

24 THE COURT: I think Mr. Migliori's point is well  
25 taken. You're doing Plaintiff fact sheets or the



1 Plaintiffs are. Because this is an MDL, you're getting  
2 a lot more than you ordinarily would have gotten at  
3 this stage of the game, but now to try to transmogrify  
4 this into something that it isn't I think creates  
5 problems down the road.

6 MR. GRIFFIS: When your Honor sets the cases for  
7 trial, we'll certainly be asking all these questions as  
8 interrogatories and RFPs. And given the importance and  
9 the bellwether status of the cases, we'll certainly  
10 expect the limits on interrogatories and RFPs will be  
11 lifted.

12 THE COURT: That's a different story. We're not  
13 there yet.

14 MR. GRIFFIS: So that it will be transmogrified.

15 THE COURT: Well, but they will be  
16 interrogatories at that point.

17 MR. GRIFFIS: Yes, your Honor.

18 THE COURT: Pursuant to the rule. So  
19 everybody's playing by those rules.

20 MR. GRIFFIS: Thank you, your Honor.

21 THE COURT: Okay.

22 MR. MIGLIORI: I want to make sure that the  
23 limit wasn't lifted in that exchange because I  
24 understood Mr. Griffis to say he expects that he can  
25 just send those out as interrogatories.

1           Obviously, if we get an interrogatory with 40  
2 pages of questions, Plaintiffs intend to object to it.

3           THE COURT: I don't think we were talking about  
4 that.

5           MR. MIGLIORI: I think he was. I just wanted to  
6 make sure that we aren't all talking about that.

7           THE COURT: We're going to play by the rules  
8 when it comes to interrogatories. That's what I meant.  
9 You're going to get much of the same information.

10          MR. GRIFFIS: I'm going to ask the Court for the  
11 rules to be expanded so that we can have more  
12 interrogatories than are permitted in the ordinary case  
13 for bellwether cases.

14          THE COURT: When you get to that point, what I  
15 would suggest that you do before you ask the Court is  
16 to talk with Mr. Migliori and try to come to an  
17 agreement so that you don't have to have the Court  
18 intervene.

19          He's a very reasonable guy. So are you on  
20 certain days. But what we need to do is get you both  
21 together on your reasonable days so that you can maybe  
22 come to some sort of an arrangement on that and then  
23 work off that. If you can't do that, then you'll have  
24 to file your motion with Judge Almond.

25          MR. GRIFFIS: Thank you, your Honor.

1 THE COURT: Okay. Oh, tell me about Number 6.  
2 There is a bright spot on this agenda.

3 MR. MIGLIORI: We've agreed to a stipulation.  
4 And, your Honor, this is where sort of the mass tort  
5 MDL and the individual case world collide. I have no  
6 problem. I have, in fact, for all my cases that I'm  
7 involved with, agreed to such a stipulation. I think  
8 that's where the law is. Quite frankly, if it's not, I  
9 don't believe that it's worth a fight for us.

10 But that said, this has to be a decision made by  
11 each counsel who brings a case. So what we've agreed  
12 to is a form of dismissal stipulation. We've asked  
13 Mr. Griffis to provide us a list of every case where he  
14 thinks he has to file a motion; and as liaison, I will  
15 explain the pros and cons of proceeding with such a  
16 defense of that count and hopefully, just like we do  
17 with other issues, be persuasive not to go forward.

18 THE COURT: Let me make sure I understand.  
19 Mr. Griffis is going to give you a list of the cases  
20 where he believes that he would need to file such a  
21 motion; but before he does so, he'll provide you with  
22 that list. You will engage with those counsel on those  
23 cases and give them the benefit of your expertise on  
24 the subject matter.

25 MR. MIGLIORI: And we'll --

1 THE COURT: Which will result in there being a  
2 dismissal stipulation being filed as opposed to a  
3 motion.

4 MR. MIGLIORI: If I have such juice, yes.

5 MR. GRIFFIS: The only thing that I would  
6 request, your Honor, is that the Plaintiffs put  
7 together the list since they're the ones who filed the  
8 Complaint and know what causes of action they asserted  
9 against us. I don't have a list ready.

10 MR. MIGLIORI: They're not all my cases.

11 THE COURT: Well, he's not suggesting that you  
12 do, but ultimately it's going to be up to you to decide  
13 which cases you're going to file it in. These are not  
14 all of his cases. So I would suggest that you come up  
15 with the list.

16 MR. GRIFFIS: All right. I will do so.

17 MR. MIGLIORI: Thank you, your Honor.

18 THE COURT: But before you file a motion, give  
19 it to him. Okay. That's always good news.

20 Let's get to the pending motions. It's not as  
21 bad as it looks.

22 MR. MIGLIORI: No, it's not.

23 THE COURT: Before we talk about A, let's talk  
24 about B, which is how do you spell this? Is it  
25 D-U-A-N-T or D-A-U-N-T?

1 MS. DONALDSON: D-U-A-N-T.

2 THE COURT: D-U-A-N-T, because I've seen it both  
3 ways. So it's Duant?

4 MR. MIGLIORI: Duant.

5 THE COURT: Apparently there was some mix-up in  
6 where an order got filed in the MDL versus in the  
7 individual case. All I'm looking for is somebody on  
8 which side, this side, to respond to the motion for  
9 remand.

10 MR. GRIFFIS: We've had discussions about this,  
11 and just to run -- I had a discussion with Mr. Cerilli,  
12 who is in charge of that case.

13 THE COURT: Who's here.

14 MR. GRIFFIS: Who's here, yes, right before the  
15 hearing. And the problem is just that we don't quite  
16 know how to proceed procedurally, and we think that we  
17 need your Honor to issue an order blasting through the  
18 procedural difficulties so that we can proceed.

19 THE COURT: That was the part that got mixed up.  
20 I did. I issued an order asking you to respond.

21 MR. GRIFFIS: Well, the order was issued in the  
22 individual case.

23 THE COURT: And that was the mix-up.

24 MR. GRIFFIS: And we didn't get -- and  
25 Spriggs & Hollingsworth didn't get notice of it.

1 Mr. Nugent did.

2 THE COURT: I understand. That was our mix-up.  
3 Are you writing that down? It happens.

4 MR. GRIFFIS: Do you want us to respond, then,  
5 in the individual case?

6 THE COURT: Yes.

7 MR. GRIFFIS: Okay. We'll do that then.

8 THE COURT: Okay. So if you just get that in to  
9 me so that I can rule on the motion, and then we'll run  
10 merrily along, and Mr. Cerilli will know whether he's  
11 here or there.

12 Don't you like it here?

13 MR. CERILLI: I'm enjoying it this morning, your  
14 Honor.

15 THE COURT: You don't want to stay with your  
16 case?

17 MR. CERILLI: Your Honor, I always enjoy being  
18 here.

19 THE COURT: Well, you're in very good company  
20 here.

21 MR. CERILLI: Well, I know that.

22 MR. MIGLIORI: In his defense, he's got a  
23 tremendously intellectual issue that he'd like to make  
24 sure that all of the bar has the benefit of.

25 THE COURT: It really is. This is one of those

1 how-many-angels-can-dance-on-the-head-of-a-pin kind of  
2 things. And I'm thrilled to get involved in it, and I  
3 know Mr. Griffis desperately wants to respond.

4 MR. CERILLI: That's true, your Honor. I just  
5 wanted to point out that we are in a slightly different  
6 context.

7 THE COURT: Oh, I know that. That's why I'm  
8 asking for a response. Otherwise, I'd have denied your  
9 motion out of hand; but you're in a different posture,  
10 and that's why I want the benefit of defense counsel's  
11 perspective on that.

12 MR. CERILLI: Thank you, your Honor.

13 THE COURT: Unless you have a change of heart  
14 and decide you really want to be here.

15 MR. CERILLI: Thank you.

16 THE COURT: And now we'll go back to A. All  
17 right. The pending motions listing, I think other than  
18 Duant, most of these relate to either motions to  
19 withdraw by counsel or cases where motions to show  
20 cause had initially been filed and now they've been  
21 transformed into motions to withdraw. And we have a  
22 pretty good system set up with those.

23 MR. GRIFFIS: We do. In the majority of these  
24 cases, your Honor, and I'll list them, we have filed  
25 our responses and submitted proposed orders and those

1 just await your signature.

2 THE COURT: Right. And so you'll know, I feel  
3 that I need to wait the, what is it, Barbara, 17 days  
4 or so that we wait, the 10 plus 3 plus 3 plus 1, in  
5 order to give the party, not the lawyer, the  
6 opportunity to respond. So that's the only holdup on  
7 those.

8 MR. GRIFFIS: Okay.

9 THE COURT: That's why they haven't been signed.

10 MR. GRIFFIS: All right. Do you want me to list  
11 those?

12 THE COURT: I have them. I have them.

13 MR. GRIFFIS: There are only two cases, I  
14 believe, that don't fit into that category. One is the  
15 Phillips case in which we've not yet responded to the  
16 motion to withdraw as counsel.

17 THE COURT: Right. That response was due  
18 yesterday.

19 MR. GRIFFIS: Oh, I showed it as due on the  
20 27th.

21 THE COURT: Well, it was filed on the 6th.

22 MR. GRIFFIS: There's a --

23 MR. MIGLIORI: The motion was filed on the 6th.

24 MR. GRIFFIS: It's 15 business days from the  
25 6th.



1 THE COURT: You're right. It's not yesterday.  
2 So you're right. You're not out of time on that.

3 MR. GRIFFIS: And the Plaintiff died four months  
4 before filing the Complaint, and there's been a  
5 suggestion of death filed. So we're a little puzzled  
6 as to whether the Complaint is a nullity.

7 THE COURT: Is there an estate?

8 MR. GRIFFIS: There was an estate, but it was  
9 closed.

10 THE COURT: You're saying the Plaintiff died  
11 four months before the Complaint was filed?

12 MR. GRIFFIS: That's correct, your Honor. This  
13 is what's holding us up in responding. Perhaps  
14 Mr. Migliori should --

15 MR. MIGLIORI: It's a firm that -- it's a firm  
16 in Texas. They had authority to represent the client.  
17 They prepared the Complaint. They filed it. When  
18 their client died, he was under a retainer that was  
19 signed by the client. And they filed it, and  
20 apparently when he died, nobody bothered to contact the  
21 law firm.

22 So it was inadvertent. As soon as they learned  
23 of it through the PFS process or whatever, they  
24 requested that a suggestion of death be made timely,  
25 which is --

1 THE COURT: That's fine, but it doesn't help us  
2 in terms of who the party in interest is. And so if  
3 there's no estate filed, is there a next of kin or  
4 somebody who can be substituted?

5 MR. MIGLIORI: They may even be refileing this  
6 with an estate at some point. First they moved to  
7 withdraw; but now they're actually trying to work out  
8 with the family now that things have settled, it's only  
9 been four months or so, they're trying to figure out  
10 the -- whether to proceed with the litigation with a  
11 different estate rep.

12 I think the appropriate thing to do personally  
13 if it were mine, I would withdraw the case and refile.

14 THE COURT: Refile.

15 MR. MIGLIORI: I think you've got relation back.  
16 I think you can fix anything on a statute basis. I can  
17 talk them through it from what I think would work  
18 procedurally, but it's not one that should be clogging  
19 up the Court's concern because I think it's just  
20 working through a sticky situation.

21 THE COURT: Would you --

22 MR. MIGLIORI: I would be glad to.

23 THE COURT: -- take the initiative on that one  
24 and do what you said, talk them through it, so that we  
25 get it squared away.

1 MR. MIGLIORI: Absolutely.

2 THE COURT: But I think that takes care of all  
3 pending motions. The one that your time's not run on  
4 and then --

5 MR. GRIFFIS: Then there's the Humphrey case.

6 MR. MIGLIORI: Which is just not due yet.  
7 Response is due on the 23rd.

8 MR. GRIFFIS: That was yesterday.

9 MR. MIGLIORI: Oh.

10 MR. GRIFFIS: We granted an extension to submit  
11 a Plaintiff fact sheet to cure that case, and it was  
12 due yesterday, and we haven't received it yet as far as  
13 I know.

14 MR. MIGLIORI: Which firm is it?

15 MR. GRIFFIS: Humphrey. I don't know.

16 MR. MIGLIORI: Your Honor, it's not our case.  
17 For some reason, it's not in our notes of which case it  
18 is.

19 THE COURT: Would you call them and find out  
20 where it is.

21 MR. MIGLIORI: I'll make sure that it's dealt  
22 with immediately. I, unfortunately, didn't pick it up  
23 as being late.

24 THE COURT: Okay. Anything else on those?

25 MR. MIGLIORI: Not on pending motions.

1 THE COURT: All right. I think that covers  
2 everything on the agenda unless someone has an item  
3 that you wish to address now.

4 Hearing none, our next meeting date with just  
5 liaison counsel will be April 28th, if that day is okay  
6 for counsel. I'm away the week before. The 28th is a  
7 Tuesday, at 1, and that's upstairs. Okay. Very good.

8 (Adjourned)

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

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

/s/ Karen M. Wischnowsky\_\_\_\_\_

Karen M. Wischnowsky, RPR-RMR-CRR

April 1, 2009\_\_\_\_\_

Date