

*IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA*

*CHARLESTON DIVISION*

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IN RE: C. R. BARD, INC., PELVIC REPAIR  
SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO.  
2:10-MD-2187

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IN RE: AMERICAN MEDICAL SYSTEMS, INC.,  
PELVIC REPAIR SYSTEM PRODUCTS  
LIABILITY LITIGATION

MDL NO.  
2:12-MD-2325

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IN RE: BOSTON SCIENTIFIC CORPORATION,  
PELVIC REPAIR SYSTEM PRODUCTS  
LIABILITY LITIGATION

MDL NO.  
2:12-MD-2326

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IN RE: ETHICON, INC., PELVIC REPAIR  
SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO.  
2:12-MD-2327

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**STATUS CONFERENCE**

**HELD ON FEBRUARY 7, 2013  
BEFORE THE HONORABLE JOSEPH R. GOODWIN, DISTRICT JUDGE  
AND THE HONORABLE MARY E. STANLEY, MAGISTRATE JUDGE  
AND THE HONORABLE CHERYL A. EIFERT, MAGISTRATE JUDGE**

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1 PROCEEDINGS had before the Honorable Joseph R. Goodwin,  
2 U. S. District Judge; and the Honorable Mary E. Stanley, U. S.  
3 Magistrate Judge; and the Honorable Cheryl A. Eifert, U. S.  
4 Magistrate Judge, for the Southern District of West Virginia,  
5 in Charleston, West Virginia, on February 7, 2013, as follows:

6 *JUDGE GOODWIN:* Well, good afternoon.

7 *COURTROOM DEPUTY CLERK:* The matter before the Court  
8 is In Re: C. R. Bard, Inc., MDL 2187; In Re: American Medical  
9 Systems, Inc., MDL 2325; In Re: Boston Scientific Corporation,  
10 MDL 2326; In Re: Ethicon, Inc., MDL 2327, Pelvic Repair Systems  
11 Products Liability Litigation.

12 *JUDGE GOODWIN:* Well, it's nice to see all of you  
13 again. I want to welcome and introduce Judge Eifert. Judge  
14 Eifert was appointed in 2010, and with Judge Stanley's  
15 impending retirement and global-galavantiing vacations, Judge  
16 Eifert will be participating now and eventually handling the  
17 discovery matters in this case.

18 I can tell you that her background is well suited to this.  
19 She, for many years, did medical malpractice litigation. She  
20 was counsel to the largest health care provider, CAMC, in the  
21 state, and she's interested in this. She's actually read all  
22 the stuff you-all have been filing and the disputes that we've  
23 had so far. I think it will be a pleasure for you to get to  
24 know Judge Eifert.

25 While I'm at it, I'm going to introduce Dwane Tinsley,

1 who's seated over here in the jury box. Dwane is a lawyer here  
2 in town. He was selected by the judges of this court to be  
3 Judge Stanley's replacement as magistrate judge and right now,  
4 absent some disappointment by the Federal Bureau of  
5 Investigation, he should officially be a magistrate judge in  
6 the very near future, and we're excited about that.

7 Today I excused Rob Adams from Boston Scientific and  
8 Christy Jones from Ethicon. If your name was not on that list  
9 and you are lead or liaison counsel, you have not been excused.

10 I hope you-all know that the portion of today's status  
11 conference that was to relate to Coloplast has been cancelled  
12 for lack of interest.

13 There are a number of discovery issues on the agenda, so  
14 I've changed the order of the agenda submitted by the parties.  
15 I will address the general issues and then I will turn the  
16 status conference over to Judges Stanley and Eifert to deal  
17 with the discovery issues.

18 The first topic I want to address is one that I'm  
19 interested in and one that will no doubt provoke some  
20 discussion after this hearing, and down the road maybe some  
21 creative, innovative solutions to problems we may run into.  
22 And I want to ask Mr. Garrard, who brought the idea up, to  
23 address the general topic of expediting the cases.

24 **MR. GARRARD:** Thank you, Your Honor. As a little bit  
25 of background, Judge -- Judges, for a good portion of my career



1 I've defended cases, and I defended mass tort cases, so I have  
2 a perspective that perhaps is unique that I have been on both  
3 sides. I don't defend cases anymore; I do plaintiffs' work.  
4 But I had the experience of being before Judge Robert Parker  
5 in Beaumont a number of times, and he had an incredibly  
6 innovative mind. I didn't necessarily always agree with him,  
7 and frequently didn't, because I was defending cases. And I  
8 had experience here with Judge McQueen, who also had an  
9 innovative mind. And I thought a lot about where we are and  
10 the concern that everyone in this room shares as to numbers  
11 of cases and how we can be more efficient. And one of the  
12 ideas - and I have other ideas that I won't bring to the court  
13 at this point - but one of the ideas that I have comes from  
14 experience of having done it; and that is that being mindful of  
15 Your Honor's admonition that you don't want to hear the same  
16 evidence five times, and frankly, we don't want to present the  
17 same evidence five times, in relation to bellwethers that why  
18 don't we consider bringing in three juries to the courtroom at  
19 one time. We can present liability evidence to all three.  
20 Could there be some issues that might be a little bit different  
21 for some? Of course. But that's easily managed in terms of  
22 instructions to precise juries of precise issues. And we  
23 present the liability issues. I know that as we have crafted  
24 our presentation of experts to the other side, most of our  
25 experts are going to testify as to all five bellwether cases,

1 so it's a matter of efficiency there. And most of our experts  
2 in terms of liability will be testifying as to each of the  
3 Avaulta products.

4 As an example of how this could work, three of the  
5 bellwether cases were filed in Georgia. Now, they come from  
6 different states, so there could be some little differences in  
7 terms of state law, but that's easy to deal with. And we could  
8 present the liability evidence to those three juries as to  
9 those plaintiffs, and then Your Honor and whatever other judges  
10 you assign, where necessary, could preside over proceedings  
11 that deal with specific damages to a plaintiff. I've had that  
12 done either that you separate the jury out and you present it  
13 that way or you instruct the other juries that, now, this  
14 particular witness is going to testify about Mrs. X, Mrs. Y and  
15 Mrs. Z. Jury A over here, you're to listen to what comes as to  
16 Mrs. Z; and Jury B over here, you're to listen to what comes as  
17 to Mrs. Y, et cetera. That can be done in the same courtroom  
18 or it can be done in separate courtrooms. Those juries then  
19 reach independent verdicts in terms of both liability and  
20 damages.

21 I believe this could be done, and I have done it in an  
22 efficient way. I think and believe in the court's instructions  
23 to juries that juries do pay attention to what courts tell them  
24 in terms of what you should listen to or not listen to. Your  
25 individual jury verdict forms can be tailored to the precise

1 case and the precise law. And I think we could try three cases  
2 by this methodology in almost the same amount of time that it  
3 will take to try one case. And so what I'm coming with, and  
4 the plaintiffs' side agrees with me, is a way that things can  
5 be done efficiently and move cases forward.

6 I tell this somewhat jokingly, but really not. I've spent  
7 a lot of time in court in this county before Judge McQueen when  
8 he was a judge, and Judge McQueen would bring us into court,  
9 and I remember the last mass trial that I had he consolidated  
10 2,000 cases and he put 10 exemplars up for trial. And we  
11 started trial and we went through trial for quite a while - a  
12 couple months. And I kept asking Judge McQueen, "Well, what  
13 are you going to do with these other cases?" Well, he never  
14 would tell me what he was going to do with the cases. But we  
15 got partially through the trial, and the wisdom of his  
16 methodology was that before it was over he had settled all  
17 the cases - 2,000 cases.

18 And so innovative ways work, and I'm not suggesting that  
19 as something this court would ever do, or perhaps I would even  
20 want the court to do. But trying exemplar cases -- and  
21 frankly, I think one can try them to a single jury, but trying  
22 exemplar cases to multiple juries at one time has been done; it  
23 can be done; and it can be done efficiently and fairly, and  
24 that would be the first proposition that we on behalf of the  
25 plaintiffs would make to the Court.

1           And I don't expect to hear raving "We agrees" from the  
2 left side over here, but I think that my challenge, and my  
3 challenge to the defendants, is that for dealing with mutual  
4 problems -- and we have mutual problems here. We have a lot of  
5 cases, and they have a lot of cases against them. It is a  
6 mutual problem, and it needs a resolution at some point, and I  
7 don't think any court is going to tolerate a system by which  
8 you just go one by one by one by one. There's got to be  
9 something innovative, and so I would challenge my brethren, who  
10 are all suburb lawyers, to let's have some ideas that are  
11 something besides, okay, we'll just try one case at a time.

12           And that would be my presentation, Your Honor.

13           **THE COURT:** Thank you, Mr. Garrard. I think I'm  
14 right that the defendants probably wouldn't immediately sign  
15 on to that idea.

16           **MR. GARRARD:** I'm sure Your Honor's right.

17           **JUDGE GOODWIN:** But I do appreciate the spirit of  
18 innovation and thinking about these problems innovatively. I  
19 would encourage counsel for every party to think of ways that  
20 we can expedite, handle fairly, this multitude of cases.

21           Where are we, Kate? How many have we got now?

22           **LAW CLERK:** Eleven thousand, four hundred-some.

23           **JUDGE GOODWIN:** Eleven thousand, four hundred cases  
24 now. I am under no illusion -- having been in this business  
25 for 45 years, I'm under no illusion that any of us are going to

1 try 11,500 cases, but I do believe that we may have to try  
2 several. But how we do it, and efficiencies that we can come  
3 up with, I would ask lead counsel for each of the defendants to  
4 think about that and have candid discussions with lead counsel  
5 for the plaintiffs about ideas such as the one that Mr. Garrard  
6 has put forth. I'm very willing to buy into creative solutions  
7 that both sides agree to. I am more reluctant to take one  
8 side's idea and impose it. That's not to say I am reluctant to  
9 come up with my own idea in the absence of joint ideas. This  
10 isn't too early to start thinking about those things. I  
11 realize it's too early for much, but I really appreciate that  
12 idea, and I think I'll just leave it at that and encourage the  
13 parties to discuss it with their clients and with their  
14 co-counsel and, frankly, with the counsel in the other MDLs, to  
15 the extent that you can, because the closer we get to a uniform  
16 process the easier it is for all the lawyers, and more  
17 importantly, for the judges. And I say "more importantly"  
18 because our attention spans are fading quickly.

19 *MAGISTRATE JUDGE STANLEY:* I have one question.

20 *JUDGE GOODWIN:* Yes, ma'am. Judge Stanley?

21 *MAGISTRATE JUDGE STANLEY:* Has there been any  
22 discussion or consideration of abbreviated advisory juries?

23 *MR. GARRARD:* Not at this point, Your Honor, but it's  
24 certainly worthy of discussion.

25 *MAGISTRATE JUDGE STANLEY:* Thank you.

1           **JUDGE GOODWIN:** Along that line, I was talking with  
2 Kate earlier. We were talking about the parties no doubt will  
3 do their own mock trials, but in a spirit of cooperation, you  
4 might be able to do mock trials jointly instead of having to  
5 have somebody in your own law firm pretend to be Mr. Garrard.  
6 He could actually show up and do those abbreviated mock trials,  
7 and instead of having somebody play the judge, I'll be glad to  
8 show up. So there are lots of things we could do, and I ask  
9 you to consider it.

10           The next topic I have got is the state court dockets,  
11 including hybrid cases with non-MDL defendants. Who wants to  
12 address that?

13           **MR. GARRARD:** Mr. Clark, Your Honor, I believe, has  
14 put some information together for the Court.

15           **JUDGE GOODWIN:** Mr. Clark?

16           **MR. CLARK:** Your Honor, Clayton Clark. I have a  
17 summary of the cases that we've been able to find so far, and I  
18 think just kind of a general overview, there are approximately  
19 3,500 to 4,000 state court cases on file right now, with the  
20 overwhelming majority of those cases being those in the Jersey  
21 court. There are multiple one off cases in many, many  
22 jurisdictions and, in fact, when I did deliver this information  
23 to the defendants today that we have compiled, everyone said,  
24 well, there's a few missing here and there; we need to get  
25 together and make certain that it's correct. Some of the

1 cases, in fact, that were in state court had moved -- had been  
2 removed to federal court and are pending either transfer or  
3 remand. So I think that -- I spoke with Kate about this before  
4 the hearing began, unless you would like to have a list right  
5 now that is not complete and, in fact, probably needs some  
6 attention, I've kind of gotten a loose agreement from the  
7 defendants to work with them over the next month to get you  
8 something more specific. With that information, we have, of  
9 course, the judges' phone numbers, the specific jurisdictions,  
10 the type of case it is, and we're going to attempt to add more  
11 information and populate that spreadsheet a little bit to give  
12 you an idea of which products are involved. I think that the  
13 majority of the cases that we were able to find in the state  
14 courts individually were multiple product cases.

15 And so with that, I have something I intended to leave  
16 with Kate that I've given to the defense here now, but I think  
17 that it would be more appropriate to maybe at the next status  
18 conference to plan on something a little bit more detailed with  
19 more information and more updated information, if that works  
20 for you.

21 *JUDGE GOODWIN:* That sounds fine, but I'm advised by  
22 Kate, who is my advisor on all things, that she has the feeling  
23 that there may be some of those cases that are hotter than  
24 others, and if you could -- when you do submit it, after joint  
25 discussion, if you could point out the defendants or

1 plaintiffs, what cases are causing heartburn on either side at  
2 the present time, and where they are, and who the judge is, and  
3 what stage the case is.

4 *MR. CLARK:* And there are a number of those cases in  
5 Texas and California specifically, one in New Mexico, and a  
6 couple in other places. And I will say that I think everybody  
7 has been working together to attempt to either get involved  
8 with those cases that involve non-MDL lawyers to where we can  
9 have some influence there, or in those situations where we can,  
10 move the cases outside of what this court is attempting to do  
11 here. We're working with that. As you would expect, there are  
12 state judges who have their own mind about when they want cases  
13 to go, and so there may be need of some assistance in the  
14 future with that.

15 *JUDGE GOODWIN:* It's apparent, just based on the  
16 number of cases filed and the rate at which they're being filed  
17 in the MDLs, that this is clearly the center of gravity for  
18 these cases. Three to four thousand is a little bigger number  
19 than I thought was out there in the hinterlands. My experience  
20 has been that the state judges fall into two categories: One,  
21 the larger category, is they'd just as soon I take care of it  
22 and are happy to slow things down; and then there's a smaller  
23 group, that you suggest, who have their own ideas about it and  
24 they, quite rightly, proceed quickly.

25 I do know that there is a more formalized process now, or



1 at least a more consistent process now, of MDL judges being in  
2 touch with and cooperating with state court judges, and  
3 realizing that we don't talk about the cases. The most we talk  
4 about is our docket and where we are with our dockets and  
5 theirs. It turns out state courts are busier than federal  
6 courts. I didn't know if you knew that. Federal judges don't  
7 usually --

8 *MR. CLARK:* With the filings here, I'm not sure  
9 that's going to be the case here.

10 *JUDGE GOODWIN:* Well, the MDLs are a much different  
11 situation.

12 *MR. CLARK:* We'll try to put a column in --

13 *JUDGE GOODWIN:* Put the list together and point out,  
14 as I say, the ones of interest, and we'll take it up again in  
15 March, if that's all right with everybody. Yes, ma'am?

16 *MR. CLARK:* Thank you, Your Honor.

17 *MS. BINIS:* Yes, Your Honor.

18 *JUDGE GOODWIN:* Yes, ma'am?

19 *MS. BINIS:* On this topic, we gave to Kate yesterday,  
20 and to plaintiffs as well, a list of the cases that for AMS are  
21 actually set for trial. Now, we in every instance tried to  
22 coordinate state cases with the MDL discovery, with the  
23 depositions, and with documents. In some of these cases that  
24 hasn't worked, and in the eight that I have put on the list  
25 that I gave you yesterday, we have not gotten agreement to do

1 that. Now, obviously, that's a huge drain on our resources,  
2 because at the same time that we're getting all our documents  
3 together for this court, we have eight state cases that are  
4 going to trial before this December MDL trial. I understand  
5 that that's the priority of the state judges. In some  
6 instances, though, it's lawyers here in this MDL who are not  
7 agreeing to put their case off until after the December trial.  
8 And so to the extent -- I'm actually throwing myself on your  
9 mercy. To the extent that I can get any help here from this  
10 court, I would appreciate it.

11 *JUDGE GOODWIN:* Well, I haven't seen the list that  
12 you gave to Kate. Nor have I -- do I know what -- if the  
13 plaintiffs agree with the list of hot topics, but I can say  
14 this, that because I've got so many of your cases, and so many  
15 of their cases, I have some influence; and I will exercise the  
16 influence to further the efficient disposition of the cases.  
17 And, in that regard, I recognize the gamesmanship that goes on  
18 in litigation, and I know that if I were a plaintiff sometimes  
19 I'd want to whipsaw defendants if I could have. And I know  
20 sometimes if I were a plaintiff I'd like two bites at the  
21 apple, and I'd like to cause you the kind of heartburn that  
22 you're talking about. But I am more inclined to try to urge  
23 everybody to come, let us reason together, all in Charleston,  
24 West Virginia. So I'm aware of it; I know why they want to do  
25 what they're doing; I know why you want me to intercede, and

1 I'm more inclined to your side of trying to pull things  
2 together.

3 *MS. BINIS:* Thank you, Your Honor.

4 *JUDGE GOODWIN:* And I'll do what I can.

5 *MR. NORTH:* Your Honor, if I may briefly, Richard  
6 North on behalf of C. R. Bard. I just wanted to note to Your  
7 Honor that one of the cases on Ms. Binis' list in Texas is a  
8 case where Bard is a codefendant, and that is set for trial in  
9 June, so obviously given the MDL setting here, that's very  
10 problematic for us.

11 *JUDGE GOODWIN:* The sooner I have the information,  
12 phone number, all that stuff, the sooner I might be able to  
13 deal with it.

14 *MR. CLARK:* Your Honor, I have that specific case  
15 here. I'll circle that case and give it to Kate at the close.

16 *JUDGE GOODWIN:* Okay. Mr. Garrard? You seem like  
17 you wanted to say something.

18 *MR. GARRARD:* No, sir.

19 *JUDGE GOODWIN:* All right.

20 *MR. GARRARD:* I thought I had the next topic when it  
21 came up.

22 *JUDGE GOODWIN:* You probably do. We're going to  
23 briefly I guess revisit the issue of multiple product  
24 restrictions.

25 *MR. GARRARD:* Yes, sir. The demographics of these

1 cases are such, Your Honor, that there are a significant number  
2 of --

3 *JUDGE GOODWIN:* I know where you're headed. Do you  
4 have the statistics on that?

5 *MR. GARRARD:* I thought I was going to have it by  
6 today, and I don't have it, but I will get it to the Court as  
7 soon as I can get it from my fellow counsel and we'll provide  
8 it to the Court. And the discussion really revolves around as  
9 we are trying to select bellwethers in the other MDLs, besides  
10 the Bard-Sofradim one, getting cases that are solely a POP case  
11 - prolapse case - or solely a stress urinary incontinence case  
12 is leaving out significant numbers of women who have both an  
13 SUI tape and prolapse mesh that come from the same defendant.

14 I'm not trying to revisit Your Honor's admonition to us  
15 that you don't want to deal, at this point, with cases that  
16 have, say, an SUI tape from Ms. Binis' client and a prolapse  
17 from J & J. I understand that at this point. But we've got a  
18 lot of cases that have both stress urinary incontinence tape  
19 and a prolapse material in the same woman.

20 And, as an example, Your Honor, in the Bard bellwether  
21 trials, of the five ladies who are going to have their cases  
22 up, four of the five have both an SUI product and a prolapse  
23 product. Now, as we are prosecuting those cases, what we are  
24 prosecuting in them is the prolapse material, but that's not  
25 uncommon among the demographics, and we are just asking the

1 Court if you would rethink the admonition to us that we have  
2 to select bellwethers that are purely one or the other.

3 *JUDGE GOODWIN:* Bellwether cases, as you know - and I  
4 won't bore you with the story about the sheep and all the  
5 business about where bellwether came from - but the idea is  
6 that they are cases that the parties put forward, and the court  
7 helps, that are representative enough that their early trials  
8 inform counsel sufficiently that if settlement is to be had the  
9 results of those trials are instructive. If, you know, out of  
10 these 10,000, 12,000, 14,000 cases, 10,000 of them are multiple  
11 product cases that you're relying on multiple products, then I  
12 would think both sides would want to have a multiple product  
13 case in the mix.

14 On the other hand, as I talked about the last time the  
15 issue came up, anytime that you put multiple products before  
16 the jury and multiple product testimony before the jury, you  
17 learn less about what juries think of one product; you only  
18 learn what they think of those products in combination.

19 So my inclination still is to take them as single  
20 products, but I'm not ruling it out. I just don't have your  
21 numbers --

22 *MR. GARRARD:* Yes, sir.

23 *JUDGE GOODWIN:* -- I don't know how you're pursuing  
24 it, and I don't know what the defendants think about it. So  
25 when you get those statistics together, why don't you get

1 together with Ms. Binis, and Ms. Moeller, and Ms. Cohen, and  
2 some of these people and let's talk about it.

3 **MR. GARRARD:** We will do that, Your Honor. We just  
4 were desirous of asking the Court to revisit that in the  
5 inclusion of bellwethers. I hear what the Court is saying and  
6 we will get the numbers and then we will have discussion with  
7 Ms. Binis and others.

8 **JUDGE GOODWIN:** Consistency is the hobgoblin of small  
9 minds, and while some people have said that my mind is small,  
10 consistency is not one of my problems, or so says the Fourth  
11 Circuit.

12 **MR. GARRARD:** I have seen a bellwether sheep, Your  
13 Honor, and it's an interesting experience.

14 **JUDGE GOODWIN:** The next item is plaintiffs' fact  
15 sheets in AMS, Boston Scientific, Ethicon. They're due in AMS  
16 for the discovery pool on March 18.

17 How soon can the parties submit a plaintiff fact sheet  
18 order, for AMS in particular, but also Boston Scientific and  
19 Ethicon?

20 **MR. GARRARD:** Your Honor, within the last couple of  
21 days the plaintiffs' side has agreed that it is willing to use  
22 the Bard plaintiff profile form for each of those three MDLs.  
23 That has been made known to the defendants. I don't think they  
24 have had the opportunity to respond yet, but I would hope --  
25 and Barbara, you're more --

1           **JUDGE GOODWIN:** I would like to have uniformity, so  
2 I'm very -- I would encourage that.

3           **MR. GARRARD:** I would presume that we can have some  
4 mutual meeting of the minds on that within a week.

5           Is that fair, Barbara?

6           **MS. BINIS:** Yes.

7           **JUDGE GOODWIN:** Anything else on that topic?

8           The New Jersey trial involving Ethicon, who from  
9 Ethicon -- the Ethicon MDL would like to report on this briefly  
10 for the group?

11          **MS. JACOBS:** Your Honor, I can do that --

12          **MR. AYLSTOCK:** Your Honor, if I could --

13          **MS. JACOBS:** -- if you would like for me to.

14          **JUDGE GOODWIN:** All right.

15          **MS. JACOBS:** Is it okay if I speak from the --

16          **JUDGE GOODWIN:** Well, let's start from the defense  
17 side, yes. Plaintiffs have been doing all the talking.

18          **MS. JACOBS:** You would just like to know where the  
19 trial stands?

20          **JUDGE GOODWIN:** I know it's in Day 18 and the  
21 plaintiffs have rested.

22          **MS. JACOBS:** Plaintiffs have rested; the defense is  
23 into its case. We have every reason to think it will be done  
24 well before the end of February, but I can't be much more  
25 specific than that. There were a number of short court days

1 this week that will have some impact.

2           **JUDGE GOODWIN:** Let me tell all of you, there won't  
3 be a Day 17 of plaintiffs' case in any of the ones I try, just  
4 for purposes -- I will follow the example of Judge Fallon in  
5 the Vi ox x cases, and when I am adequately informed to make a  
6 decent judgment, I will limit the number of trial days. It  
7 just -- there's just no reason to take that long to try a case.  
8 I'm not being critical. There probably were reasons. There  
9 probably were reasons; I just haven't seen any myself.

10           So you expect maybe it will be -- look for a verdict  
11 around the end of February?

12           **MS. JACOBS:** I think it will be before the end of  
13 February, Your Honor. I really do.

14           **JUDGE GOODWIN:** Do the plaintiffs agree with that  
15 assessment?

16           **MR. AYLSTOCK:** Your Honor, Brian Aylstock. Myself  
17 and Mr. Cartmell and Ms. Baggett have been there, one of us at  
18 least, during the entire trial; and I think there have been  
19 some issues, some sick jurors, even Judge Higbee was sick one  
20 day, and some half days just that were part of the plan. We  
21 did have the opportunity to speak with Mr. Garrard and he had  
22 conveyed, in fact, that we will not be in Day 18 in the  
23 plaintiffs' case in this courtroom, and we understood that from  
24 your comments at the last conference as well.

25           There have been a number of witnesses. A lot, we



1 anticipate, of the expert witnesses that were qualified in that  
2 court and so testified to that jury we think may, in fact, be  
3 presented to Your Honor in this court. And there was a  
4 stipulation about Johnson & Johnson and Ethicon that we're  
5 trying to work out, something similar for these MDLs, just  
6 to -- Ethicon in particular -- or Johnson & Johnson has many  
7 different companies all over the world, and it gets very  
8 confusing, so we're hoping and we're talking about working out  
9 a similar stipulation so that the jury is, one, not confused,  
10 and that when it comes to -- if we get to punitive damages, if  
11 we're so lucky, and that net worth becomes a relevant  
12 consideration that we don't have to add up all these entities  
13 all over the world.

14 *JUDGE GOODWIN:* You'd just as soon add them all up,  
15 wouldn't you?

16 *MR. AYLSTOCK:* I would just as soon have Johnson &  
17 John where they all flow and are controlled by one.

18 *MS. JACOBS:* And we understand perfectly, Your Honor,  
19 that that is the goal.

20 *JUDGE GOODWIN:* All right. Thank you both very much.

21 Turning to the next item, Proxy Biomedical, at the last  
22 status conference on December 6, I gave the parties fifty days  
23 to conduct jurisdictional discovery, with responsive briefs due  
24 two weeks later, which is coming up in just a few days.

25 Mr. Cosgrove, would you like to report on this?

1           **MR. COSGROVE:** Yes, Your Honor. The plaintiffs  
2 propounded extensive written discovery, including  
3 interrogatories and document requests. We responded to all of  
4 that. In fact, we had several meet-and-confer discussions. We  
5 made supplemental interrogatory responses. As far as I know,  
6 there's no issues with regard to the documents we produced.

7           The deposition of a representative from Proxy Limited on  
8 these issues was noticed. Several dates were provided; one was  
9 decided upon. It happened to be today. A couple days ago, for  
10 reasons that aren't clear to me, that deposition notice was  
11 withdrawn and the deposition was terminated.

12           That's basically the rundown on discovery for jurisdiction  
13 purposes.

14           **JUDGE GOODWIN:** And briefs are due when?

15           **MR. COSGROVE:** The supplemental briefs are due  
16 tomorrow in the Holizna case, the case specific motion, as well  
17 as the supplemental briefing on the global motion to amend.

18           **JUDGE GOODWIN:** Okay.

19           **MR. COSGROVE:** And Proxy Limited actually filed their  
20 supplemental memorandum this morning.

21           **JUDGE GOODWIN:** Yes, ma'am?

22           **MS. WAGSTAFF:** Yes, Proxy Biomedical served  
23 supplemental discovery responses this morning, and I haven't  
24 had a chance to review them yet, but assuming that they are, in  
25 fact, the discovery that we asked for, we'll be able to file

1 our supplemental brief tomorrow.

2 **JUDGE GOODWIN:** All right. Things are going  
3 swimmingly. Anybody have anything to add on Proxy? Okay.

4 We had a brief meeting this morning with counsel in Bard.  
5 Is there anything else we have to take up on this issue?

6 **MR. GARRARD:** I don't think so, Your Honor. I think  
7 we had a good discussion with the Court this morning.

8 **JUDGE GOODWIN:** Well, I know this will sadden you  
9 greatly, but thank you for your time today. It's always a  
10 pleasure to see all of you. I'll now turn the status  
11 conference over to Judge Stanley and Judge Eifert. I'll see  
12 you later. Thank you.

13 *(Judge Goodwin exited from courtroom.)*

14 **MAGISTRATE JUDGE STANLEY:** All right. The first item  
15 before us is deposition protocols and -- Mr. Garrard?

16 **MR. GARRARD:** Yes, ma'am. We have reached agreement  
17 with all three defendants as to deposition protocols. I have  
18 actual presentations to make for AMS and Boston Scientific that  
19 we can go ahead and present to the Court, hopefully with no  
20 typos. May I present?

21 **MAGISTRATE JUDGE STANLEY:** Yes.

22 **MR. GARRARD:** I'll give you two copies, if that  
23 helps. And we have as well the Boston Scientific, the same,  
24 and Mr. Aylstock promises me that he will have one -- he and  
25 Ms. Jacobs will have one to the Court for Johnson & Johnson

1 Ethicon by. . . ?

2 *MR. AYLSTOCK:* By tomorrow.

3 *MR. GARRARD:* By tomorrow.

4 *MAGISTRATE JUDGE STANLEY:* Great. Are there any  
5 material differences between these and Bard?

6 *MR. GARRARD:* Not material differences, Your Honor.

7 They are basically modeled off of that. There are a few little  
8 things, but nothing that the parties felt were significant  
9 enough to be issues.

10 *MAGISTRATE JUDGE STANLEY:* Okay.

11 *MR. AYLSTOCK:* The Johnson & Johnson one, Your Honor,  
12 will have a specific provision that kind of addresses the  
13 depositions that were taken in the New Jersey litigation that  
14 we fully intend to utilize in this court to the extent  
15 possible. As Your Honor recalls, we did have a conversation  
16 with you at the last conference about that, and we've been able  
17 to work through that and we'll be able to present that to you  
18 tomorrow.

19 *MAGISTRATE JUDGE STANLEY:* All right. Are you going  
20 to submit electronic versions through the clerk's office?

21 *MR. AYLSTOCK:* Yes, Your Honor, we can.

22 *MAGISTRATE JUDGE STANLEY:* Or just e-mail them to  
23 Kate.

24 *MR. AYLSTOCK:* Even better.

25 *MAGISTRATE JUDGE STANLEY:* Both of these. Anything

1 else on the deposition protocols?

2 **MR. GARRARD:** No, Your Honor.

3 **MAGISTRATE JUDGE STANLEY:** Next has to do with using  
4 documents which have been marked as confidential at the time of  
5 production and what to do with them with respect to using them  
6 with motions or responses to motions. And does this have to do  
7 with a particular defendant or all of them?

8 **MR. GARRARD:** Your Honor, it came up as my lawyer  
9 who is my brief writer and works on all these, Josh Wages, was  
10 working on responses in relation to Boston Scientific, but  
11 it's a problem that transcends Boston Scientific or any of the  
12 defendants that as documents are produced to us by the  
13 defendants, the vast, vast, vast majority of them are marked  
14 confidential. I suspect we could come into this court and we  
15 could challenge the confidentiality markings on a great number  
16 of them. We haven't chosen to do that because of the time it  
17 would involve, so we are placed in a difficult position that  
18 if we need to use documents that have been produced to us,  
19 either to make a motion or to respond to a motion, under the  
20 protocol we work with now, we have to go to the other side and  
21 say, "We want to use this document," to which they can object,  
22 they can redact, or whatever they may deem they want to do.  
23 There are two things that have happened with that. One  
24 is it's very time-consuming; secondly, we get into  
25 meet-and-confers; and thirdly, it forces us to tell them

1 before we ever file a motion where we're going. And we would  
2 like to have some way that we can file motions that include  
3 documents which have been marked confidential without having to  
4 do that process, and we're seeking the wisdom of the Court,  
5 quite frankly.

6 We had an issue earlier this week. I think they were  
7 going to invoke the Court, and then it was informed to me that  
8 it got worked out, and I frankly don't know whether they ever  
9 talked to Your Honor or not.

10 But that's what we're seeking is some help from the Court  
11 in terms of how to deal with this in a fair way.

12 **MAGISTRATE JUDGE STANLEY:** Well, you may think I  
13 have wisdom, but I want you to know I've had absolutely no  
14 effect on discouraging lawyers from marking documents as  
15 confidential, even in the *Felman* case where every single one  
16 was, and substantial monetary sanctions were imposed. It  
17 hasn't done any good.

18 I will say this: As far as I can tell, every defense  
19 attorney marks too many documents "confidential." Ultimately,  
20 it is always the burden of proof on the person marking the  
21 document as confidential to justify that marking, and I would  
22 expect that person with the burden of proof to be able to  
23 substantially justify under Rule 26 why this particular  
24 document is so critically important to be protected. Keeping  
25 in mind, of course, that you're disclosing these documents to

1 goodness knows how many attorneys, and with the understanding  
2 that protective orders work pretty well at keeping the flow of  
3 documents moving, which is why I think we all tolerate this  
4 somewhat - this over marking.

5 I went back to the Protective Order and looked at it,  
6 and the provisions of which you speak are really for post  
7 discovery, so that as soon as I remembered that, I realized  
8 that post discovery motions are motions for summary judgment,  
9 whatever. It's pretty obvious where people are going, there  
10 shouldn't be that many documents, and so it wasn't intended to  
11 be a particularly onerous burden to say, "Hey, can we now  
12 remove this marking?"

13 And I'm assuming that you're now talking about the  
14 difficulty of discovery motions.

15 **MR. GARRARD:** Yes, ma'am.

16 **MAGISTRATE JUDGE STANLEY:** Okay. Well, and the  
17 Protective Order is silent on discovery motions. Having  
18 thought about it overnight, it occurred to me that if it's  
19 necessary to refer to particular documents which have been  
20 marked as confidential, you could use the Bates number and  
21 that would at least have the lawyers understanding what the  
22 lawyer -- the opposing lawyer is talking about. Now, it  
23 leaves the judge in the dark, and so you could submit those  
24 Bates-numbered documents that you have specifically referred  
25 to *in camera*, hard copy, ship them in overnight. That's one

1 way to do it.

2 But let me -- let me say this: The judges in this  
3 district hate having documents filed under seal. All of the  
4 judges in this district are acutely aware that the American  
5 taxpayers pay our salaries, build these courthouses, and  
6 provide the forum for all of you to settle your disputes. And  
7 they can walk into our courthouse at any time and look at what  
8 we're doing and decide whether we're worth the money we're  
9 paid. They may not be able to do anything about that, but at  
10 least they can inform their own opinion.

11 And the extent to which the pleadings that are filed in  
12 important nationwide cases are impenetrable, incomprehensible,  
13 then we're not serving the public. And first and foremost,  
14 while I believe it's my job to help the lawyers, I'm a public  
15 servant.

16 So I think that -- I would hope that all of the attorneys  
17 would very carefully consider the extent to which they actually  
18 have to use examples, quote from, or otherwise refer to  
19 documents which have been marked "confidential," because you  
20 may be able to characterize documents without actually adding  
21 the specifics.

22 I say to the defense attorneys that you can really tick  
23 off a judge by over marking things. And, of course, the *Felman*  
24 case, which you may or may not have read, was egregious in that  
25 they were marking, oh, the instruction manual for the printer,



1 and pictures of puppies, and calendars, and things like that.

2 I mean, it was ridiculous.

3 I'm assuming that hasn't been the case here, but I do  
4 expect there to be a ready openness to removing documents.  
5 So, for example, if the defense gets served with a motion to  
6 compel, and all of a sudden you see these Bates numbers,  
7 perhaps the first thing you ought to do is take those Bates  
8 numbers and say, we'll take off the confidential marking on  
9 those documents, so that it becomes more transparent to  
10 everybody.

11 Do you think that is a proposal that, at least while we're  
12 in the discovery phase, will get us through this?

13 Could somebody turn off their Blackberry or whatever it is  
14 that's buzzing through the intercom? Your electronic devices  
15 should be off.

16 Go ahead.

17 **MR. GARRARD:** Not mine. I think that it can work,  
18 Your Honor, if we refer to documents by Bates numbers and be  
19 careful how we describe them, and if we can provide the  
20 documents to Your Honors *in camera*, we can deal with that.  
21 And hopefully we can engage in discussions with brethren across  
22 the aisle to consider removing some of the confidentiality  
23 markings.

24 **MAGISTRATE JUDGE STANLEY:** Does anyone from the  
25 defense have anything to say about that suggestion? Okay.

1 Next has to do with document preservation issues,  
2 apparently mostly with Ethicon. Mr. Aylstock?

3 *MR. AYLSTOCK:* Yes, Your Honor. Just to report to  
4 the Court, we have circulated and had at least one or two  
5 meetings on our document proposal for document preservation as  
6 it relates to Ethicon. And it came up in Ethicon because we  
7 learned that one of the facilities that manufactured some of  
8 the mesh over in Germany was being shut down, so we sought and  
9 have had some fruitful discussions I think with our  
10 counterparts at Ethicon about a more formal order than the  
11 federal rules for preservation of documents and the  
12 notification about disposal of maybe some manufacturing  
13 equipment and things like that.

14 And it relates, again - I alluded to this earlier - to the  
15 fact that Ethicon and Johnson & Johnson has a lot of different  
16 entities all over the world, and some of them aren't in this  
17 court and necessarily subject to the federal rules.

18 We do appreciate and know that the hold orders are in  
19 place at those foreign entities. We've been informed of that,  
20 but we thought it would be better for all involved that there  
21 would be an actual order from the Court so that that could  
22 then be circulated and we may not have translation issues and  
23 so forth. So we're working on that. We hope that we'll be  
24 able to come to a resolution on that in the next week or so and  
25 present that to the Court.

1 And I understand from some of the other co-leads that  
2 there may, in fact, be some similar proposals circulated. I  
3 don't know if they have or not, but we'd like to maybe kind of  
4 set the ground rules for this MDL in a little more formal way.

5 **MAGISTRATE JUDGE STANLEY:** Did Ethicon want to say  
6 anything about this?

7 **MS. JACOBS:** Your Honor, we had some concern about  
8 the breadth of the order. We have had one meet-and-confer.  
9 The plaintiffs have sent back a proposal based on that  
10 discussion, and we're looking at that now.

11 **MAGISTRATE JUDGE STANLEY:** And did you want to go see  
12 this place, Mr. Aylstock?

13 **MR. AYLSTOCK:** Potentially. I do not yet know  
14 exactly what may be being disposed of, but we have made --  
15 members of the MDL, and in New Jersey, have made several trips  
16 over to Germany. There's a very large mesh research facility  
17 that Ethicon runs over in Germany.

18 So we just want to make sure everything is there, and I  
19 know that they have the same interest in that.

20 **MS. JACOBS:** And I can assure Your Honor nothing is  
21 being disposed of at this time.

22 **MAGISTRATE JUDGE STANLEY:** All right. Thank you.

23 Next is treating and implanting physician scheduling and  
24 order of examination issues, and apparently there is an  
25 informal disagreement.

1           **MS. BINIS:** Your Honor, I asked that this be put on  
2 the calendar. Mr. Garrard and I have had a few conversations  
3 about it, but in discussing it with my team over the last few  
4 days we've come up with some new ideas that I haven't had a  
5 chance to discuss with him, so I suggest we table this and give  
6 us a chance to talk about it more.

7           **MR. GARRARD:** That's fine.

8           **MAGISTRATE JUDGE STANLEY:** Now, with respect to AMS,  
9 three motions have been filed lately. AMS has not had an  
10 opportunity to file a response.

11           I thought my order with respect to, first, the outside  
12 U.S. production and compliance was pretty clear. It's evident  
13 that we have thousands of plaintiffs who have experienced  
14 adverse consequences which they allege have to do with these  
15 devices manufactured and marketed by various defendants. So  
16 you go back to the old Watergate issues. What did the defense  
17 know? When did they know it? And then you can add to that:  
18 What did they tell physicians and sales reps about their  
19 product? And what did they expect those physicians to then  
20 tell their patients?

21           I see absolutely no difference whether the material is  
22 written in English, or Spanish, or Vietnamese, or Arabic as to  
23 what the product's for, what the rate of adverse consequences  
24 is understood to be, and what could those adverse consequences  
25 be.

1 Now, Judge Eifert has been very conscientious in reading a  
2 lot of materials, but we also -- I understand that I -- there's  
3 no way that I can keep up with the facts as you are developing  
4 them. And I was -- according to the most recent testimony,  
5 perhaps in New Jersey, do the plaintiffs now say that you-all  
6 think that there is a particular rate of potential adverse  
7 consequences to a given patient?

8 **MR. GARRARD:** Your Honor, when you look at the  
9 scientific literature, there are various rates reported. When  
10 you look at certain documents that come from various  
11 defendants, there are rates reported. I'm not sure anyone  
12 from our side can stand up and say that 15 percent is the rate,  
13 but we've got documents and we've got literature that shows  
14 substantial percentages of complications.

15 I'm not sure I've answered your question.

16 **MAGISTRATE JUDGE STANLEY:** Well, what I'm trying to  
17 determine, both as an assist to myself and Judge Eifert, is  
18 whether there is some body of testimony that's being developed  
19 now in the depositions to which we have no access, in the  
20 public testimony that we're not following, so that we have  
21 context for the discovery disputes that are now coming before  
22 us? I mean, the problem we always have is that you-all file  
23 certificates of service and we never have a clue what you're  
24 saying to each other about the answers to interrogatories or  
25 whatever. So I think, for both of us, it would help us if we

1 were getting some context for the positions of the parties.

2 So I hear from the plaintiffs that you say that there is  
3 a range of percentages of patients who experience problems.

4 **MR. GARRARD:** When one goes to the literature, that  
5 is correct, Your Honor, you know, and I've seen documents  
6 where they say, well, the average is such and such. But when  
7 you look at the literature, there is a range -- that's not me.

8 **MAGISTRATE JUDGE STANLEY:** We usually have the CSOs  
9 shoot whoever's phone is going off, because they are all armed.  
10 Usually that takes care of it.

11 Go ahead.

12 **MR. GARRARD:** I think we could give the Court a short  
13 paper, if that's what you want.

14 **MAGISTRATE JUDGE STANLEY:** No, I --

15 **MR. GARRARD:** But in terms of precise numbers, I'm  
16 not sure that we've got a single number.

17 **MAGISTRATE JUDGE STANLEY:** I'm not asking for that.

18 **MR. GARRARD:** Okay.

19 **MR. AYLSTOCK:** Your Honor, Brian Aylstock. From  
20 the testimony that's been developed and is now public from the  
21 New Jersey trial, in the internal TVM study that supported the  
22 ProLift launch, there was -- of any adverse event in that, it  
23 was two-thirds of the individuals in that - there was 175  
24 patients - experienced some adverse event.

25 The erosion rate varied depending on whether it was six

1 months, one year, three years, five years, but it has ranged  
2 anywhere from fifteen to twenty percent as far as the mesh  
3 eroding either into the bladder or through the vaginal wall.

4 **MAGISTRATE JUDGE STANLEY:** Okay. Now, I would also  
5 like to hear from the defense what you believe is a fair  
6 characterization of what is likely to be the rate at which  
7 there are some complications or adverse consequences. Or you  
8 can just say what your expert just testified in New Jersey, or  
9 what you've already disclosed, if anything.

10 I'm not asking -- you're not under oath; this isn't going  
11 to be shoved down your neck. I'm trying to figure out where  
12 we're going in this case.

13 **MS. JACOBS:** Your Honor, I'll just be honest, I'm  
14 not prepared to give those sorts of statistics. I certainly  
15 would have been if I had appreciated that's where we were going  
16 today.

17 **MAGISTRATE JUDGE STANLEY:** All right. Now, so the --  
18 yeah, Mr. Bard -- Mr. North?

19 **MR. NORTH:** Your Honor, this is just one piece of  
20 literature that I thought I could share with the Court, but I  
21 think we addressed this in the early days in the Bard MDL, in  
22 fact, on the record. For example, with our client's product,  
23 there is a study by a Dr. Patrick Culligan that focused on the  
24 product and focused on the erosion question, and he found  
25 eleven percent erosion with the product, but all but one of

1 the cases were treated in his facility without a subsequent  
2 surgery. So that's one study that's been done.

3 *MAGISTRATE JUDGE STANLEY:* I think I recall that  
4 study --

5 *MR. NORTH:* Right.

6 *MAGISTRATE JUDGE STANLEY:* -- being cited and also  
7 published by the FDA or something.

8 *MR. NORTH:* Exactly.

9 *MAGISTRATE JUDGE STANLEY:* Thank you.

10 *MR. GARRARD:* They also have studies, Your Honor,  
11 showing about fourteen percent also, that was sponsored by  
12 them.

13 *MAGISTRATE JUDGE STANLEY:* I know you're not going to  
14 let him have the last word, Mr. Garrard.

15 *MR. GARRARD:* I try not to.

16 *MAGISTRATE JUDGE STANLEY:* Okay. So that's the basic  
17 context of what we have.

18 Now, I am not pleased to hear that there has been such  
19 delay in producing documents with respect to those which are  
20 outside the United States, but one of the facts that I don't  
21 know is whether the products that were used and sold outside  
22 the United States are the exact same products that were sold  
23 inside the United States. Nobody ever told me that.

24 Ms. Eskin?

25 *MS. ESKIN:* Yes, Your Honor, Amy Eskin. The SPARC



1 and Monarc, Apogee and Perigee products --

2 *COURT REPORTER:* I'm sorry. I'm sorry. Could you  
3 start over? I didn't hear you.

4 *MS. ESKIN:* Sure, and I'll slow down. The SPARC and  
5 Monarc products -- the SUI products that were sold overseas,  
6 and they are the same as the products that were sold here in  
7 the United States, and there is a wealth of information we  
8 believe that exists outside the United States regarding adverse  
9 events related to those SUI products and registries and their  
10 locations. And there are many other sources of information  
11 overseas, including with overseas sales forces and other  
12 sources that we talked about in our brief and in our original  
13 motion. And the same would be true for Apogee and Perigee.

14 So we're looking to find out what was known or knowable  
15 by the defendant from sources outside the United States,  
16 because it does provide the context that Your Honor is talking  
17 about, not just in the published literature in terms of the  
18 reporting of erosion rates, but what was internally known to  
19 the company, either through registries, reports from  
20 physicians, and other sources, so that we can demonstrate what  
21 the adverse event rate is, what it should have been reported  
22 as by them.

23 *MAGISTRATE JUDGE STANLEY:* All right. Ms. Binis,  
24 your response is due no later than February 21?

25 *MS. BINIS:* Yes, Your Honor.

1                   **MAGISTRATE JUDGE STANLEY:** Any chance you can do it  
2 faster than that?

3                   **MS. BINIS:** Your Honor, let me introduce my partner,  
4 Janet Kwuon.

5                   **MAGISTRATE JUDGE STANLEY:** You have your face  
6 pointing toward the back of the courtroom; I couldn't  
7 understand a word you said when you introduced her.

8                   **MS. BINIS:** I apologize. Let me introduce my  
9 partner, Janet Kwuon. She's in charge of that.

10                  **MAGISTRATE JUDGE STANLEY:** Hello, Ms. Kwuon.

11                  **MS. KWUON:** Good afternoon, Your Honor. I'm from  
12 the Los Angeles office and I am managing this OUSP. In terms  
13 of the briefing, I believe we can probably get the brief to the  
14 Court a little bit in advance of February 21. I need to just  
15 doublecheck a couple things, because there are many pieces we  
16 want to put together to provide the Court a full picture.

17                  We very hurriedly tried to address one of the primary  
18 issues, which was the scope of the collection that's being  
19 done. And prior to our hearing today Ms. Eskin and I sat down  
20 and talked, and we agreed that there may have been a  
21 miscommunication about how broadly and comprehensively AMS is  
22 collecting documents related to women's health products  
23 worldwide. And so I think that issue actually is not really  
24 the issue that we have a little bit of disagreement about; it  
25 has to do with the timing and the perception of delays. We

1 definitely want to squarely address that in this briefing,  
2 because even the letter that we submitted to the Court very  
3 late this morning - so we're just trying to get some additional  
4 information to you and the court - did not focus on the issue  
5 of timing so much as to clarify that in terms of the scope of  
6 what we're collecting, as we are collecting everything related  
7 to the women's health products in the foreign OUS offices, and  
8 I think that's maybe where Ms. Eskin and I had a miss.

9 But in terms of briefing, I believe that we can get the  
10 brief to the Court earlier, and I need to just doublecheck sort  
11 of the date, and what day of the week even the 21<sup>st</sup> is, to see  
12 if we can do something a little sooner.

13 *MS. ESKIN:* Your Honor?

14 *MAGISTRATE JUDGE STANLEY:* Ms. Eskin?

15 *MS. ESKIN:* I agree our major issue now is timing in  
16 terms of the speed and amount of the production and the way  
17 it's being rolled out. I think we have a couple of issues  
18 that we posed in our brief that we have also met and conferred  
19 about having to do with how quickly after we identify  
20 custodians we can get those custodial files for the outside  
21 U.S. custodians. We have suggested fifteen days after that  
22 request is made to the defense. Ms. Kwon is going to get back  
23 to me on that.

24 We're also looking at reducing the notice period for OUS  
25 depositions to enable us to be able to get that discovery

1 rolling. And then, of course, the timing roll out as proposed  
2 and as being followed by AMS right now puts us really in an  
3 impossible position in terms of getting our case prepared,  
4 getting our depositions noticed and taken, getting our experts  
5 ready. We just feel like it needs to happen much faster,  
6 particularly in the context we have here where the document  
7 request went out in June of last year.

8 **MAGISTRATE JUDGE STANLEY:** How many lawyers do you  
9 have on this MDL, AMS?

10 **MS. KWUON:** It's a combination, so for the OUSPs  
11 we've had to add to the team in terms of obtaining local  
12 counsel in some of the OUS markets. And then we have the U.S.  
13 team, and then we have local counsel both in the U.S. in terms  
14 of, you know, there is a primary local counsel that's assisting  
15 with the documents and discovery in a very large way, and then  
16 there are individual counsel who have, you know, different  
17 roles depending on the particular matters.

18 You know, the complication with the OUSPs is, you know,  
19 not just our having to send somebody to conduct the interviews  
20 and to collect the documents and do similar to what we do in  
21 the U.S. on the same scale, but we are also running into, for  
22 many of the EU markets and Australia as well, the extra loop  
23 that you have to work in in terms of privacy, and then, you  
24 know, the retention of vendors, and, you know, that -- it has  
25 to go through that loop before it comes then to -- we can even

1 receive the documents here.

2 And so, I mean, rest assured from the minute we received  
3 the order at the end of October to today, we have been working  
4 like crazy to get our hands on those documents. And by the  
5 March 31 date, which was the first milestone that we have in  
6 place for the OUS countries that we have identified in our  
7 proposed schedule, plus what we have already provided to date,  
8 we think that we're going to be at like 75, 80 percent of sort  
9 of worldwide coverage. And then we needed that extra month to  
10 scoop in whatever is left.

11 And so from, you know, the beginning of November and  
12 December, we've been reaching out to the EMEA, which is our  
13 European-Middle Eastern market, the APLAC market, which is  
14 Asia, Pacific Latin America, and tapping each one of the key  
15 locations, the key people, to then, you know, retain local  
16 counsel, get a privacy review, determine what kind of  
17 logistical hoops we have to do.

18 And then we've been going out and scooping -- collecting  
19 not just electronic data, but hard copy data. In many of the  
20 locations, because we are OUS, they have very small space.  
21 It's not -- they're not the main office; so then they point us  
22 to a storage unit somewhere where they have boxes of documents.  
23 And we are sending lawyers out there and going through the  
24 boxes of documents, and having the copy service come out and  
25 scan and collect all of those materials.

1           So I think that's the part on the comprehensiveness. You  
2 know, I feel as though we are being extremely comprehensive,  
3 and there isn't any unilateral limitation or some threshold  
4 we're asking the plaintiffs to establish, because we understand  
5 what the order is, and we are doing everything we can. You  
6 know, it's the timing. And I think that while I understand the  
7 plaintiffs want the documents yesterday, and frankly I wished  
8 we could have provided the documents yesterday, we're off by  
9 thirty days for most of them, and then really another thirty  
10 days to kind of clean up the end of it.

11           **MAGISTRATE JUDGE STANLEY:** Thank you, Ms. Kwuon.

12           Ms. Eskin, after AMS files its response, can you file your  
13 reply in less than a week?

14           **MS. ESKIN:** Yes.

15           **MAGISTRATE JUDGE STANLEY:** Okay. Anything further on  
16 the OUS production? Okay.

17           Moving on to document production in relation to  
18 depositions scheduled and custodial production, and again,  
19 this is AMS and the motion is not ripe, but there appears to  
20 be a disagreement, as I understand it, on whether or not the  
21 plaintiffs can designate more than thirty custodians.

22           **MS. BINIS:** Your Honor, we have worked with  
23 plaintiffs over the last few days and agreed to produce the  
24 custodial files for the extra -- well, the ESI protocol order  
25 said up to thirty and then ask the Court for intervention. Now

1 we're up to forty five -- a request for forty five custodial  
2 files. So we've agreed to do that, but they want it yesterday,  
3 and the problem is that they gave us a list in August, which  
4 we've been working on and which is produced now. Then they  
5 gave us another list in October, which we are almost complete  
6 with. And then less than thirty days ago, they gave us a  
7 completely new list where there is only five people who overlap  
8 the August and October lists and the completely new list that  
9 we got in the beginning of January. And now they want us to  
10 do what we've been doing since October and November -- I mean,  
11 I'm sorry, August and October; they now want us to do  
12 everything that we've done then, for more people, in thirty  
13 days. And it's impossible for us to do. We're not saying we  
14 won't do it; we're saying to them we need to prioritize.

15 And of this brand new list of brand new custodians, the  
16 vast majority of them are ex-employees, which means that the  
17 files for all those ex-employees aren't within our usual  
18 databases. We go to archive databases to get those, so that  
19 takes a little bit longer as well.

20 So we're not saying, "We're not going to give it to you."  
21 All we're saying is, "Here is what we can do, and this is the  
22 schedule we can do it on." And they're saying, "That's just  
23 not acceptable; we need it tomorrow."

24 Now, we have given them deposition dates for the five  
25 current employees that we have that they have asked for. Even

1 though some of those were not on the original lists, we're  
2 going to do everything in our power to get those five -- the  
3 documents for those five produced, and those five depositions.  
4 But for the brand new people that we just heard about less than  
5 thirty days ago, it's impossible for us to get an entire  
6 custodial file together within the next twenty to thirty days,  
7 which is what we're being asked for.

8         We've gone to them and said, "Is there some compromise?  
9 Is there a way that we can get less than the entire custodial  
10 file? Can we limit it by time, or by product, or give you  
11 information?" Because some of the people, frankly, on their  
12 list -- one of them is a shipping and receiving clerk. Now,  
13 today they've told us, "Okay, we're not going to ask for the  
14 shipping and receiving clerk." Some of them have never worked  
15 on women's health products. So we have to have that discussion  
16 as well.

17         So again, this is a timing issue and not a scope issue.  
18 We are going to produce the custodial files, but the question  
19 is when. And we have laid out -- we have laid out a schedule  
20 for them, and I can't tell you what the schedule is, but  
21 Ms. Kwon can, and we're willing to do everything in our power,  
22 and we're working with plaintiffs to see if we can limit this  
23 in a way that will make it faster, but we're working as fast  
24 as we can. We have tripled the number of people that are  
25 working on this, because we have to get this done, and we



1 understand that, but there's a limit to what can get done.

2 *MAGISTRATE JUDGE STANLEY:* Yes, Ms. Fitzpatrick?

3 *MS. FITZPATRICK:* Your Honor, we did have a  
4 meet-and-confer. The issue that has come up is that we have  
5 been receiving documents, we have been scheduling discovery.  
6 We've got some custodial files, and we are now in a better  
7 position to identify people who we would like to depose who can  
8 give relevant information to the case.

9 This is something that was I think previewed back when we  
10 started talking about the ESI protocol and our concerns about  
11 identifying custodians at the front end before we even had a  
12 chance to do discovery. So we have been able to identify -- at  
13 this stage, we have noticed 23 particular depositions, across a  
14 broad range of topics, of people that we want to depose based  
15 on our review of the documents and our discovery.

16 And what our concern is at this juncture is it wasn't  
17 actually till this morning that we understood that AMS was  
18 willing to produce some custodial files, because the position  
19 had originally been that they weren't, and we do appreciate  
20 that, but it is a timing issue for us. We need to take these  
21 depositions. We have a deposition protocol that's been  
22 submitted that permits for 45 days -- we have to wait 45 days  
23 before taking depositions. It's a great concern for us if  
24 we're now hearing that it's going to be 80, or 90, or 100 days  
25 between noticing a deposition and actually getting to take that

1 deposition. Obviously, with a trial date, with expert  
2 disclosures that need to be done in July, we are concerned  
3 about having to wait that length of time.

4 We have agreed with AMS that what we will do, I think by  
5 Tuesday of next week, is present them with a priority. We  
6 will tell them which ones, which deponents we would like to go  
7 first, and go down the line so we can work on it that way.  
8 And we have also agreed to consider a somewhat reduced  
9 custodial file and are waiting for proposals that I believe we  
10 are going to get from them by next Tuesday.

11 And I would certainly hope that that process could allow  
12 us to get through and to move this along a little bit faster  
13 than AMS has been proposing. It's not quite as fast as we  
14 would like, but I think at this juncture we should go through  
15 that process next week and we should, hopefully by the end of  
16 next week, be able to see whether we can make progress on this  
17 again or we are going to be at an impasse and have to come back  
18 to Your Honor for a resolution.

19 **MAGISTRATE JUDGE STANLEY:** Is it -- are we at a  
20 situation where it would be acceptable for AMS not to file a  
21 response to this motion, and while you keep working on it?

22 **MS. FITZPATRICK:** Your Honor, what I would suggest is  
23 perhaps we have a date calendar for the response to the motion,  
24 maybe about two weeks out, in the hopes that over the next week  
25 we can resolve the situation, but if it doesn't get resolved we

1 would like to get it going quickly. We don't want to have to  
2 wait then for another two weeks to get a response, and then  
3 give a reply, and be out maybe about a month before we would  
4 get something from Your Honor on what we are looking for here.

5 *MAGISTRATE JUDGE STANLEY:* At the moment the response  
6 is due on the 21<sup>st</sup>.

7 *MS. FITZPATRICK:* And I think we can certainly work  
8 over the next week to see whether that's going to be necessary.

9 *MAGISTRATE JUDGE STANLEY:* All right. I went back --  
10 because I remembered that we had had a conversation at the  
11 July status conference on the 26<sup>th</sup>, I went back and looked at  
12 that transcript. And basically what it said was -- there was  
13 back and forth, just as we're doing right now. I think  
14 Ms. Binis, you were at ten or twenty, and the plaintiffs didn't  
15 want to set a number, and finally I said, well, how about  
16 thirty and beyond that by motion. And I appreciate the fact  
17 that we haven't had to have one motion after another about  
18 additional people, and so if you can't work it out, your  
19 response will be due on the 21<sup>st</sup>.

20 *MS. BINIS:* Thank you, Your Honor.

21 *MAGISTRATE JUDGE STANLEY:* Okay. All right. Now,  
22 there is an issue on document redaction. Go ahead.

23 *MS. FITZPATRICK:* Your Honor, we have worked that  
24 issue out. We have reached an agreement on how we're going to  
25 deal with that.

1                   **MAGISTRATE JUDGE STANLEY:** Great. Thank you.

2                   Is the same true with the scope of document searches?

3                   **MS. FITZPATRICK:** We have not completely resolved the  
4 issue, but we had a very productive meet-and-confer again this  
5 morning on that particular issue, and we plaintiffs are going  
6 to get back to the defendants with some additional information  
7 they want. I think that's an issue, Your Honor, we probably do  
8 not need to set forth briefing right now.

9                   **MAGISTRATE JUDGE STANLEY:** Okay. And how about  
10 production of product exemplars?

11                  **MS. FITZPATRICK:** We have -- we have reached somewhat  
12 of an agreement on that, and AMS has proposed a document  
13 preservation -- a document chain of command -- chain of custody  
14 issue. We just received that yesterday. We're going to be  
15 taking a look at that and getting that redlined back to them,  
16 but I'm optimistic that that's one that we are going to be  
17 able to resolve.

18                  **MAGISTRATE JUDGE STANLEY:** All right.

19                  **MS. FITZPATRICK:** And the privilege logs issue, Your  
20 Honor, we've also reached a date -- an agreement on how those  
21 are going to be redone, and a date for getting those completed.

22                  **MAGISTRATE JUDGE STANLEY:** Well, I'm delighted to  
23 hear that. There are few things in this world that I hate  
24 more than reviewing documents *in camera*. And I'm feeling  
25 grumpy about it, because in a completely different case I have

1 to look at several hundred documents. Okay.

2 Moving on to Ethicon, apparently there has been some  
3 dispute about foreign document production, but you're close to  
4 an understanding?

5 *MS. JACOBS:* We are working through that, Your Honor.  
6 The plaintiffs have been kind enough to prioritize what it is  
7 they're really interested in, both by type of document and by  
8 country, and we have folks working on those priority documents  
9 right now.

10 And then we are providing a chart for them about the  
11 various products, the countries in which they're sold, when  
12 they were first approved for sale there, so that if they want  
13 to further prioritize they have some additional information to  
14 use to do that.

15 *MAGISTRATE JUDGE STANLEY:* Okay. Mr. Aylstock?

16 *MR. AYLSTOCK:* Yes, Your Honor. I think you were  
17 about to move on to the trial pool discovery here in a minute,  
18 and I'm prepared to speak on that.

19 *MAGISTRATE JUDGE STANLEY:* Okay. I'll hear you now.

20 *MR. AYLSTOCK:* Really, it's just an update like our  
21 counterparts at AMS. We've had some productive discussions,  
22 including over a very nice dinner last night with Ms. Jacobs  
23 and Mr. Thomas. What we had discussed, in fact, at the  
24 invitation of defense counsel is perhaps narrowing the pool of  
25 cases that would be selected in bellwether to some of the more

1 representative cases. And what I mean by that is in the  
2 Ethicon situation, and I think more so than any of the other  
3 MDLs, there is actually eleven different products at issue in  
4 this MDL, four pelvic organ prolapse products, seven sling  
5 products. And some of the sling products don't have the market  
6 share of others, and they certainly do have some similarities,  
7 but they all have different design history files; they have  
8 different regulatory predicate products; they have different  
9 folks involved. And so we're hopeful that maybe we can  
10 continue talking about that.

11 But if we were to reach an agreement for just this first  
12 selection, it might help us with the number of depositions that  
13 we're facing, too, and experts to workup on each individual  
14 product. It might help us be able to get further down the road  
15 and ready for those trials, if the Court would entertain such a  
16 limitation.

17 Now, we do understand that it's our responsibility to work  
18 up all the cases, and we owe it to all of our clients with all  
19 of those products to do so, but we're continuing to discuss  
20 that, but thought we would introduce that to the Court as a  
21 potential option as we move down the road toward the bellwether  
22 trials.

23 **MAGISTRATE JUDGE STANLEY:** It certainly seems to make  
24 sense to focus on products that have the most cases.

25 **MS. JACOBS:** We are certainly interested, Your Honor,

1 in working out some limitation with respect to the plaintiffs  
2 that would be into the trial pool. Our primary concern is  
3 that we don't open up our employees to serial depositions.  
4 We would like for the discovery to continue, to the greatest  
5 extent possible, on everything with the understanding that, as  
6 Mr. Aylstock said, some of the products just don't have the  
7 extensive use and history of the others.

8 **MAGISTRATE JUDGE STANLEY:** Thank you. There was a  
9 request to put on the agenda something about the status of  
10 search term modifications?

11 **MR. AYLSTOCK:** Yes, Your Honor. Similar to the other  
12 agenda items, we think we'll be able to work that out. We have  
13 provided, based upon additional discovery in this case, a list  
14 of additional search terms that we would request that they,  
15 when they're doing their custodial productions, determine  
16 whether documents might have these. And I think there were  
17 only seven on our list that they had questions about, and we're  
18 just awaiting another meet-and-confer on that, but I think  
19 we'll be able to work that out successfully without any court  
20 intervention.

21 **MAGISTRATE JUDGE STANLEY:** Okay. And the last item  
22 is deposition scheduling. Mr. Garrard, or you, Mr. Aylstock?

23 **MR. AYLSTOCK:** Same thing, Your Honor. We're working  
24 through it, and we now have -- Ms. Jacobs was kind enough to  
25 provide us a number of different depositions. Some of the

1 folks are ex-U.S. that might be subject to blocking statutes,  
2 and we have a commitment to work that out and a notification  
3 process if they're not willing to appear voluntarily, perhaps  
4 in this country, giving us enough time so we can go through the  
5 Hague and go through the hoops that might be necessary in time  
6 for trial.

7 **MAGISTRATE JUDGE STANLEY:** That finishes my list.  
8 How about you-all?

9 **MR. GARRARD:** Thank you, Your Honor.

10 **MAGISTRATE JUDGE STANLEY:** Thank you, all. Next  
11 status conference, March 21<sup>st</sup>.

12 *(Court adjourned at 2:28 p.m., February 7, 2013.)*

13  
14 **CERTIFICATION:**

15 I, Teresa L. Harvey, Registered Diplomat Reporter, hereby  
16 certify that the foregoing is a correct transcript from the  
17 record of proceedings in the matters of In re: C. R. Bard,  
18 Inc., MDL No. 2187; In re: American Medical Systems, Inc.,  
19 MDL No. 2325; In re: Boston Scientific Corp., MDL No. 2326; and  
20 In re: Ethicon, Inc., MDL No. 2327, as reported on February 7,  
21 2013.

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25  
s/ Teresa L. Harvey, RDR, CRR

February 13, 2013