

### Multiple Documents

Part	Description
1	32 pages
2	Notice of Filing Transcript

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

3	In re:	)	
		)	MDL Docket No. 2329
4	WRIGHT MEDICAL	)	
	TECHNOLOGY INC., CONSERVE	)	1:12-MD-2329-WSD
5	HIP IMPLANT PRODUCTS	)	
	LIABILITY LITIGATION	)	Atlanta, Georgia
6		)	
	_____	)	
7	Robyn Christiansen, et al.	)	
8		)	
	Plaintiffs,	)	
9	v.	)	Civil Action Case
		)	No. 1:13-CV-297-WSD
10	Wright Medical Technology	)	
	Incorporated, et al.	)	Atlanta, Georgia
11		)	
	Defendants.	)	
12	_____	)	

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WILLIAM S. DUFFEY, JR.,  
UNITED STATES DISTRICT JUDGE

**Thursday, January 21, 2016**

APPEARANCES OF COUNSEL:

18	For the Plaintiffs:	Michael Lee McGlamry,
		Raymond Paul Boucher
19		
20	For the Defendants:	J. Scott Kramer
		Alice Snedeker

*Proceedings recorded by mechanical stenography  
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Thursday Afternoon Session

January 21, 2016

1:00 p.m.

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P R O C E E D I N G S

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(In chambers by teleconference:)

THE COURT: Hello. Do I have Mr. McGlamry and Mr. Boucher for the plaintiffs?

MR. McGLAMRY: Yes, Your Honor.

MR. BOUCHER: Yes, Your Honor.

THE COURT: And Mr. Kramer and Ms. Snedeker for the defendants?

MR. KRAMER: Yes, sir. Good afternoon, Your Honor.

MS. SNEDEKER: Yes, sir.

THE COURT: Good afternoon.

Well, there are a couple of matters that we were going to discuss.

I think Mr. McGlamry, because Mr. Boucher has got to go to an appointment, wanted to take up the remand issue first.

So I have read your joint submission. Let me give you just some thoughts on this having read what you have said and we can decide what else needs to be done.

1           You know, I agree that when we first some time ago  
2 talked about bellweathers, you submitted and I agreed at that  
3 time to these ten cases, but it was on the representation  
4 that you thought this would lead to a global settlement.

5           And my thought was, whether it was warranted or  
6 not, that it probably wouldn't take ten, but I was certainly  
7 willing to invest time and resources into bellweathers if it  
8 would result in a resolution of all the cases. And I think  
9 everybody at the time was optimistic that that would happen,  
10 might even happen before that.

11           I do know that there is this other litigation  
12 regarding insurance coverage. You told me about that, you  
13 told me what the issue was, and generally what the  
14 interpretation of the carriers was as to coverage, and that  
15 you are using Diane Welsh up in Philadelphia to mediate  
16 that. And I communicated with her from time to time,  
17 including today.

18           And I agree that when we talked about doing  
19 Christiansen, that we put down a second case, the name of  
20 which I can't recall right offhand. But that was my thought  
21 and my understanding was that that represented a good case  
22 for the plaintiffs, and then there would be a good case for  
23 the defendants, which might give you some useful information  
24 as to how to approach a resolution.

25           You know, I believe that the purpose of an MDL is

1 to consolidate and save time and expense and make more  
2 efficient litigation that has common issues and thus likely  
3 has generally common discovery, and we have done that.

4 And I also believe that MDLs have the possibility  
5 where there is a common issue but different plaintiffs that  
6 are affected differently by the common issue, that that often  
7 leads to a resolution.

8 And I have been to enough MDL conferences to know  
9 that it's a rare instance that that does not happen,  
10 including in the now three hip replacement device litigation  
11 MDLs that have been processed by us, you know, including two  
12 of my colleagues.

13 I have talked to them some time ago about their  
14 experiences, but they didn't get -- I don't think either of  
15 them did a bellweather case. They ended up -- that was  
16 resolved short of that.

17 But at the end of the day, the purpose of an MDL is  
18 for efficiencies with the prospect that after those  
19 efficiencies are achieved, that there would be the  
20 possibility of a resolution.

21 There is this complicating factor with your  
22 insurance litigation. My understanding, although I haven't  
23 looked at the docket, put in a prior discussion with  
24 Judge Welsh, that she said that that litigation was not very  
25 mature, that the parties seemed to be pretty entrenched, the

1 parties being the insurance companies, and that she didn't  
2 expect that to be resolved any time in the near future, and  
3 that her sense is that further bellweathers will have no  
4 impact on the resolution.

5 Now, that's different from what has been submitted  
6 in this -- in this joint statement, and it could well be that  
7 the parties know something that she does not know. And  
8 I accept that.

9 But, you know, I want us all to be realistic about  
10 this too, that at some point if there is no global  
11 resolution, something is going to happen to the cases, and  
12 it's not realistic, nor am I willing to try five hundred  
13 cases. So that's why I have raised the question.

14 And I understand both of your positions. The  
15 question is what additional information, what would be the  
16 process for me getting that information that would give me  
17 confidence that I am operating from a full understanding of  
18 what I think is the principal issue, which is prospect for  
19 resolution.

20 And that's where I am. I know that there was some  
21 offer by the defendants to have meetings with me without the  
22 other party present to give me whatever information they have  
23 about what I think is the central issue, which is would one  
24 or more bellweathers advance the possibility of a global  
25 resolution at all, and if it will, to what extent.

1           So that's where I am.

2           MR. BOUCHER: Your Honor, this is Ray Boucher. I  
3 don't know what order you want us to weigh in, but I can  
4 weigh in, if the Court likes.

5           I think that the Court has provided an incredibly  
6 accurate and detailed synopsis of exactly where we are at.  
7 I think Judge Welsh has provided the Court with an accurate  
8 assessment of what's currently taking place and what the  
9 prospects are.

10           You know, at this point in time, I believe it's,  
11 as she communicated to us, it's Wright's position that their  
12 insurance carriers are not realistic and they are not  
13 cooperating, and without insurance, there is not truly a  
14 prospect of getting these cases settled at least through  
15 Wright absent trials.

16           You know, we have put a lot of time, energy and  
17 effort into -- and earnest attempts, and I think by both  
18 sides, to try to gain resolution or find creative ways to  
19 resolve the litigation globally, and quite frankly we are  
20 still at a very embryonic stage of those discussions because  
21 in part Wright is relying so heavily upon its insurance  
22 carriers.

23           At this point it's very clear to us that there is  
24 no information that is going to be gathered from any  
25 additional bellweather trials irrespective of how they go,

1 defense verdict, plaintiff verdict, large verdict, small  
2 verdict, that's not what's going to move these cases towards  
3 resolution and it's not going to impact the carriers. I  
4 think Wright candidly admits that. I certainly had a  
5 discussion, and it's really a question about insurance which  
6 is partially out of their control.

7 But we have another case going to trial in  
8 California as part of the JCCP. That goes to trial at the  
9 end of March or early April. So certainly to the extent that  
10 there is any sense that another verdict would give  
11 information, we will have another verdict very soon.

12 I think that from our standpoint, perhaps  
13 Your Honor has a way to evaluate, you know, is there any hope  
14 for progress, and perhaps focus over three months, let's see  
15 what happens with the verdict in California, and from our  
16 standpoint if we were to do that before the Court makes an  
17 ultimate determination of whether or not to remand these  
18 cases, you know, we would like to be ordered globally back to  
19 Judge Welsh so that we can have face-to-face dialogue and  
20 discussion so she could get more meaningfully engaged and  
21 involved, and we could all get a much better sense from her  
22 as to truly what the prospects are. And that's our  
23 position.

24 THE COURT: Well, one other thing before I let the  
25 defendants have their say just because I forgot to mention

1 this.

2 In trying to think about how I could get a handle  
3 on, other than just talking to Judge Welsh, on where  
4 everybody is with this insurance litigation and the coverage  
5 issues, because it is my understanding based upon what you  
6 all have told me is that there has to be coverage in order  
7 for a global resolution, if there ever was one to be  
8 funded.

9 So I thought, well, why don't I just make --  
10 because I would like to hear from the insurance lawyers that  
11 are litigating that and maybe in private conversations as to  
12 what their resolve is to litigate and to whether there is a  
13 possibility that that would be concluded earlier rather than  
14 later.

15 My distinct impression is that it is not, that like  
16 all insurance companies, every day that they keep this money,  
17 and even if they have to pay a lot of litigation expense in  
18 the interim, they are going to do that because it's to their  
19 economic benefit to do it when we are talking about this  
20 amount of money.

21 But I could at least say, you know, I have talked  
22 to everybody, I have got a real clear sense on where we are.

23 And I am assuming that, Mr. Kramer, lawyers other  
24 than you are handling that, although I suspect you are in  
25 communication with them. I don't even know if they are from

1 your firm. I have not gotten into that sort of detail with  
2 Judge Welsh.

3 MR. KRAMER: Right. They are not, sir. Different  
4 law firm.

5 THE COURT: So I am just saying I would be open to  
6 that. That might be a little difficult to manage, but that  
7 might give me some additional information that would help me  
8 make a decision.

9 MR. BOUCHER: Your Honor, we don't have any  
10 objection to a process being set up to do that.

11 I think you are going to learn exactly what you  
12 anticipate, and that is that that litigation is in its  
13 infancy. There hasn't been really any discovery.

14 I think the last conversations that we had with  
15 Dana Ash and Matt Taylor and general counsel, they are  
16 contemplating the possibility of filing a motion for summary  
17 judgment.

18 We have a very clear understanding of the insurance  
19 issues and, you know, our sense of what the likely outcome  
20 would be if they went forward, which, you know, we can  
21 certainly get into if the Court ever wants an assessment of  
22 that from our perspective.

23 But we don't have any objection to the Court making  
24 that inquiry.

25 THE COURT: Still with us, Mr. Kramer?

1 MR. KRAMER: I am, Your Honor. I was just waiting  
2 for you to give me my leave.

3 I know having spent time before you, I know you are  
4 not a cookie-cutter or recipe judge, but I took a look at the  
5 managing multidistrict litigation thesis from the judicial  
6 panel, and I thought a quote nicely summed up this decision  
7 on remand is whether the game is no longer worth the  
8 candle.

9 We strongly believe that the centralized control  
10 that the Court has exercised and we hope will continue to  
11 exercise for some time over this litigation is well worth --  
12 well worth it to the parties and well worth everyone's goal  
13 of a global settlement.

14 Centralization serves the convenience of the  
15 parties and the witnesses.

16 And it's interesting to me, sir, that when the  
17 plaintiffs are interested in getting an MDL assignment and  
18 they are gathering clients and advertising and promoting  
19 their skills in this type of litigation and then they conduct  
20 centralized discovery from us, yet when the time comes for us  
21 to take discovery and to move forward in some individual  
22 matters, it's all the rush is for us to be decentralized and  
23 to be addressing fifty different courts at a single  
24 occasion.

25 That's not fair to all the parties. It's not fair

1 to the defendants. And it's the charge of the Court to find  
2 efficiency and fairness to all parties, all counsel in this  
3 litigation, understanding, Your Honor, you are not going to  
4 try all the cases. We are talking about one more case that's  
5 previously been ordered that has been anticipated and relied  
6 upon by all the stakeholders.

7 And it's not just Duane Morris. We are the least  
8 ones affected. We are prepared to try before you or before  
9 any other judge in any other district. But the insurance  
10 representatives who faithfully attended these trials, our  
11 company management and other interested parties in this  
12 litigation.

13 I think the Court accurately sees that litigation  
14 is not going to be totally concluded without insurance, but  
15 it's also going to be greatly impacted by whatever money  
16 Wright Medical puts on the case. And there are many, many  
17 unanswered questions certainly from this single trial that  
18 would benefit from additional proceedings and a centralized  
19 approach.

20 It strikes me as abundantly obvious, sir, that  
21 there are additional novel issues that would be addressed in  
22 another trial. This is the trial, as you point out, that the  
23 defendants advanced as an average trial, as a trial that  
24 should point to issues relating to liability and trial  
25 strategies, issues relating to value of particular cases and

1 strengths of arguments.

2 And it will present a whole host of different  
3 issues because of the timing, the product used, the  
4 diagnosis, the evidence of defect, the evidence of causation  
5 and so forth, sir. So we have had this plan in place to try  
6 one more trial.

7 We have had a confusing, vexing,  
8 shocking-the-conscience type of trial with many different  
9 elements, some of which we will discuss in our secondary  
10 discussion today. So we would like to stay on track to give  
11 all the stakeholders an interest in getting more benefit from  
12 the Court's involvement.

13 I am personally encouraged, and I think I speak on  
14 behalf of all of us, if the Court wants to take additional  
15 steps to get involved with the global settlement process, I  
16 know, sir, that you have been in contact with Judge Welsh and  
17 that you have been monitoring that process, and I certainly  
18 think it's a good suggestion and would aid everyone if you  
19 could speak with us or with our -- and/or the insurance  
20 counsel involved. And if I heard you correctly, it sounded  
21 like you would be willing to do that privately, so there  
22 could be additional candor about approaches and eventual end  
23 games.

24 Sir, that's basically our position. We think much  
25 can be gained by continuation at least for the time through

1 this trial scheduled, anticipated trial of our second  
2 bellweather.

3 It's interesting and informing to me, sir, that Ray  
4 suggests that, well, we should put this on hold until after  
5 we try a case in some other jurisdiction. If trials are of  
6 no importance, what's the rush to try a representative case  
7 before the JCCP in California?

8 We are going to keep all the schedules all the  
9 managing judges have set, but I think truly all the parties  
10 would benefit from the Court's staying involved, keeping our  
11 present schedule and seeing if we can get additional benefit  
12 from the Court's ruling on the issues that come up in the  
13 Glasgow case.

14 THE COURT: Well, you know, I agree with your  
15 description of the purposes of an MDL.

16 I would say that most MDLs are authorized at the  
17 request of defendants because they are the ones that don't  
18 want to in multiple jurisdictions have to put up the same  
19 people as witnesses. So that's generally the motivating  
20 factor in an MDL is for a defendant not to have to submit a  
21 CEO to five hundred different depositions, or at least to the  
22 whim of five hundred different judges.

23 So that's generally where it comes from. It  
24 generally does not come from plaintiffs, although they have  
25 the benefit of it, but they often do that reluctantly,

1 although once they are required to do it, then they do tend  
2 to consolidate and join forces.

3 And I would say that -- you know, this is not my  
4 first MDL -- that generally once we are there, everybody  
5 likes the process because it is efficient and it is centrally  
6 managed and it makes it easier for the lawyers to get a sense  
7 where there are multiple cases as to the value and the  
8 prospects for settlement.

9 Where you and I disagree is if, in fact, we are at  
10 a point where the insurance issue will make unavailable maybe  
11 for years any proceeds and that the result of that is for  
12 years there cannot be a global resolution, that's important  
13 for me to know.

14 And you didn't address -- you didn't give me any  
15 assurance or comfort that if there was one more bellweather,  
16 that sometime maybe in a few months after that, you would  
17 have enough information that you could discuss a global  
18 settlement.

19 In fact, my deeper appreciation as a result of this  
20 call is that, one, you don't have any control, probably don't  
21 have a complete understanding of what everybody feels is the  
22 length of the process, and whether or not the process in the  
23 insurance case is one that will ultimately not reach  
24 conclusion for a long period of time.

25 MR. KRAMER: Well, you are right, sir, I don't

1 have -- I would be out of line to give you an assessment with  
2 any certainty on those topics.

3 But I can say that the issues are being examined  
4 not only in the lines of the insurance dispute and the  
5 language on the policies, but also the types of claims that  
6 have come up, the way those claims are presented in trial,  
7 the way the courts handle issues for different types of  
8 claims.

9 And I could never suggest to you if we rolled back  
10 the clock a year and a half, that one or two bellweather  
11 trials will guarantee a settlement. And that's happened in  
12 some instances, and I know the Court has familiarity with  
13 many MDLs and could easily point to situations where a number  
14 of bellweather trials existed and the cases still lingered  
15 on.

16 You know, I just think while that bellweather  
17 process is in place and all the stakeholders have relied upon  
18 it, let's do some things like you suggest, Your Honor:  
19 Meet with some of the insurance lawyers, get more involved  
20 in some of the -- in some of those settlement issues and  
21 finance issues that we can -- the defendants have shared  
22 with plaintiffs leadership, those kinds of things, while we  
23 stay on track to have the trial of the case that we  
24 presented.

25 I can easily hear our insurance company

1 representatives who we see in court and have gotten to know  
2 say, well, what happened to the case that you wanted to  
3 present, and are we going to hear cases on other types of  
4 products, and are we going to try cases where FDA issues are  
5 fully and openly litigated, things like that, Judge.

6 So I see no reason to change, and I think there is  
7 still value, and the game is worth the candle and more.

8 MR. McGLAMRY: Your Honor, this is Mike McGlamry.

9 THE COURT: You know, I just want to say,  
10 Mr. Kramer --

11 MR. McGLAMRY: I want to correct a couple of things  
12 that Mr. Kramer said.

13 Number one, nobody on this call has done any  
14 advertising, and so that was a misstatement.

15 But more importantly, leading up to our  
16 Christiansen trial, we were told at least twice -- and I know  
17 Judge Welsh was as well -- that whatever happened in that  
18 verdict didn't matter, whatever number that was did not  
19 matter.

20 And now, you know, because it came out the way it  
21 did, and because now we are dealing with the issue of remand,  
22 now we are reconsidering that, and the insurance companies  
23 are reconsidering that, and that's not what we have been  
24 told. And quite frankly, I think I know what that means is  
25 we are buying time.

1           And I think what Ray was suggesting is, Judge, if  
2 you want -- if you want to extend what they are saying, which  
3 is give us a chance to see what else happens, then let's see  
4 what happens in the case out here in California, where we try  
5 that one and see what happens.

6           But the bottom line of that is this. We are not  
7 close to settling these cases. These clients are entitled to  
8 get out there and have their cases tried, and we are just --  
9 we are kind of just treading water.

10           I think it's a good idea to get their insurance  
11 people in. I think it's a good idea for us if we are going  
12 to have any discussions with Wright to have them. But there  
13 needs to be sort of a definitive time frame where, okay, I  
14 will give you -- Ray mentioned three months -- two months,  
15 four months, whatever it is, to say, all right, I want to see  
16 what you are going to do. If you are going to do something,  
17 that's fine. If you are not, then these cases need to go  
18 back and people need the opportunity to get their cases  
19 tried.

20           And so all this let's wait for another year for the  
21 next trial, that doesn't mean anything.

22           The insurance litigation, what they have told us  
23 basically is it is immature, they have some ideas of what  
24 they are going to do, but they have not done them. My guess  
25 is, you know -- I don't even want to guess what that means.

1           But at the same time, unless we have meaningful  
2       discussions with them, Your Honor, we have got an old  
3       population, and these folks need to have their day in court,  
4       and we need to move this.

5           And if they are going to try to discuss this with  
6       us, that's great, we would appreciate that and that will be a  
7       good thing. But we have been at this now for almost two  
8       years, and we have been told and you have been told and  
9       Judge Welsh has been told the same thing every three months  
10      now for two years: We are working on this, we are working on  
11      that, we are talking with the insurance carriers, we're --  
12      you know, all these things, until we came up to the  
13      Christiansen trial, which they said, look, it doesn't matter  
14      what happens here, it's not going to impact the insurance  
15      carriers, it's not going to impact us.

16           And so, Your Honor, I would say give us some time  
17      frame, and either let us brief something sort of to frame  
18      that time frame or otherwise say to us, all right, guys, you  
19      have got to X date to make something happen, otherwise let's  
20      send this stuff back.

21           MR. KRAMER: Your Honor, Scott Kramer. Let me make  
22      perfectly clear. And you get this firsthand; I'm authorized  
23      to say this on behalf of the company, and this is our  
24      position: These trials do matter.

25           I know Mr. McGlamry wants to say that they don't

1 and that somebody has told him this, that or the other  
2 thing. All of our stakeholders benefit from the rulings, the  
3 process, the decision-making that goes -- that was involved  
4 with the Christiansen trial and that will be involved with  
5 the Glasgow trial that was our selection as a bellweather  
6 case, we got to pick second unfortunately, for a  
7 representative case presenting issues, products and  
8 injuries.

9 There should be no question that that's the  
10 position of the company. That's a fact. That's how we  
11 feel. That's how I feel.

12 And the Court -- we encourage the Court to inquire  
13 of the insurance carriers and management if we go forward  
14 with some private suggestions to find out how much the  
15 information has informed us on all the rulings the Court has  
16 made and the whole process of that initial two bellweather  
17 trials planned.

18 Your Honor, this is -- the whole system and the  
19 remand process is not for the convenience of Mr. McGlamry or  
20 his negotiating tactics. It's for fairness and for  
21 convenience of the parties.

22 THE COURT: Excuse me, Mr. Kramer. The one thing  
23 which when you get worked up is that your rhetoric tends to  
24 obscure what you are trying to say as a professional to a  
25 court.

1           You are the one that started this about advertising  
2 and the like. It was intemperate to do so.

3           If you want to make a reasoned, objective argument,  
4 you may do so, but let's keep the personalities out of it.  
5 Would you do that for me, please?

6           MR. KRAMER: Yes, sir. Yes, sir. And I  
7 apologize. I was perhaps moved by the suggestion that we  
8 had made representations different than those we have made to  
9 the Court today and in our papers.

10          THE COURT: Well, let me say that the  
11 representations that Mr. McGlamry has passed along are ones  
12 that you have made to me and that Judge Welsh has made to  
13 me.

14          So I'm trying to figure out when you say that you  
15 are authorized on behalf of your client to say that they  
16 benefit from these trials, my job is to divine what that  
17 benefit really is. And I will tell you this, I am not going  
18 to get that kind of candor in this conversation.

19          So you can make your pitch, but do so respectfully  
20 to everybody.

21          MR. KRAMER: Yes, sir. Yes, sir. And I think the  
22 benefit is that we present different scenarios to you as the  
23 presiding judge with the selected bellweather cases and the  
24 rulings that follow, your 144-page opinion, are digested and  
25 scoured and used in the resolution of all the cases and

1 guiding the judgments of the stakeholder decision-makers.

2 That's the benefit, among others, sir.

3 And excuse me for getting worked up, because this  
4 is an important issue to us, not because of a strategy for  
5 delaying, but also for our responsibility to report to all  
6 these people on a process that I think is meaningful to have  
7 the centralized management of all these cases.

8 Let's -- if we look at the alternative, as I point  
9 out, it is not the best system to have these cases go all  
10 back for trials before we have explored a good number of  
11 issues that didn't come up in Christiansen.

12 And we are not -- the Court is going to have  
13 control over the timing of when this next trial commences and  
14 concludes and can do lots of things in between to try and  
15 bring the parties to the reality that these cases can't all  
16 be tried, that there has to be a global settlement end game  
17 that the parties can live with or some other process.

18 THE COURT: My belief is that you have already  
19 concluded you can't try all these cases, so there is no need  
20 to try some more cases to reach that conclusion.

21 Anybody who has practiced as long as we have know  
22 that these cases cannot all be tried. Everybody who has  
23 practiced as long as we have know that the way that you  
24 resolve this sort of dispute has to be some sort of global  
25 resolution.

1           I will speak only for myself. I believe that you  
2           could try twelve of these cases or twenty of these cases and  
3           every one of them would give you a little bit of  
4           information. But that information is not meaningful if there  
5           isn't a resolve and a practical mechanism for a global  
6           resolution. And that's where I'm stuck, because I don't  
7           think there is, and I'm beginning to believe that it won't be  
8           for a while.

9           And the question is what's that while? My fear is  
10          and I think Judge Welsh's fear is that that while is a long  
11          time.

12          MR. KRAMER: Well, I think --

13          THE COURT: And you can't tell me anything that  
14          will convince me, because you are not involved in the  
15          insurance dispute -- I suspect that they have been careful,  
16          as all cases like this where there is double-track  
17          litigation, that the lawyers on the insurance side are  
18          careful not to communicate fully with you, because in their  
19          representation of their clients they might have concluded  
20          that there is a risk that if they did, that it could impede  
21          what they are trying to accomplish, whatever that is.

22          MR. KRAMER: I can't disagree with that, sir.

23          THE COURT: So my view is I will think about  
24          everybody's input.

25          I would suggest that nobody file motions yet

1 because it could be that I will want to -- it would make more  
2 sense for me to gather some information, and once I have  
3 that, even if it's only communicated to me, that that would  
4 be the time for you then to file whatever you want to file  
5 for me to consider based upon what you know, because among  
6 other things then I can test it against what I know.

7 But I don't know how that process is going to  
8 work. You know, I have a great capacity to work hard, but if  
9 you keep reminding me that I have had to issue 144-page  
10 orders, my desire to work hard is going to erode.

11 MR. KRAMER: That was a compliment, sir, not  
12 anything else.

13 THE COURT: Well, I appreciate the compliment, but  
14 it was also an ugly reminder of the amount of time that this  
15 takes, which I am doing above and beyond my regular case  
16 load. Nobody comes and says you get to do less cases because  
17 you are issuing 144-page orders. They say that was your  
18 decision, live with it.

19 But I like complex litigation, but I don't like  
20 complex litigation that doesn't have a reasonable prospect of  
21 ending in a result that's fair and just, a result that is  
22 reasonably available in the near future. And that's what I'm  
23 trying to figure out.

24 MR. KRAMER: Understood, Your Honor. Thank you for  
25 listening.

1 THE COURT: Anything else from the plaintiffs on  
2 this issue?

3 MR. BOUCHER: No, Your Honor. We look forward to  
4 hearing from the Court and appreciate very much your hearing  
5 us out.

6 I am late for my appointment, so I am going to get  
7 off the phone at this point, if that's okay?

8 THE COURT: You can.

9 If you want me to enter an order making your doctor  
10 see you, I will do that, but it won't make any difference,  
11 they won't see you until they want to see you.

12 MR. BOUCHER: Thank you, Your Honor. Everybody,  
13 have good day.

14 MR. KRAMER: So long, Ray.

15 MR. McGLAMRY: Thanks, Ray.

16 (Mr. Boucher leaves the teleconference.)

17 THE COURT: Now we are to the defendant's request  
18 to interview the jurors.

19 First, I can tell you having met with the jurors  
20 that they expressed an interest not to talk to the  
21 lawyers. So that was communicated to me in my session with  
22 them, which was pretty long after the trial.

23 Because among other things, I said, well, while you  
24 are not willing to do that, lawyers want to know about their  
25 performance. And so we took quite a few notes, and I can

1 pass along to you their evaluation of your performance and  
2 how your trial presentations went. And I am happy to do  
3 that.

4 I didn't volunteer it because I don't do that  
5 unless I am asked. And if you want me to, I will, but  
6 I would do that in separate sessions so that I can be candid  
7 with each of you.

8 The second as to these other matters that you are  
9 suggesting may have happened, the two specifics are this FDA  
10 510 (k) approval that was on a footer for one of the  
11 exhibits, I don't recall anybody asking for that to be  
12 redacted or objecting to that.

13 And then the second, a confidential designation  
14 contained in a footer, and that I think the argument by the  
15 defendant is that somebody back there must have just been  
16 poring over those two things and that that might have  
17 impacted their deliberations.

18 And then the second was that there is some lawyer  
19 who at some time I guess on the eve of or during the  
20 deliberations expressed some opinions. I have gone back and  
21 looked -- I have looked at that. That was attached to  
22 something, and I saw it.

23 I will tell you, the candor of this jury with me  
24 was that if that had happened, I think they would have told  
25 me. But there is no reference, nobody said, Hey, by the way,

1 there are these two stray marks that were probably in really  
2 tiny print or -- nobody -- that's not how they decided the  
3 case.

4 And certainly with the number of times that I told  
5 them that they couldn't access any outside resources, I am  
6 convinced that if that had happened, somebody would have  
7 mentioned it in this free-wheeling discussion we had. And  
8 there was no reference to that.

9 And I suspect that it would have been really,  
10 really hard for them to have violated my order, and that if  
11 they violated my order, I think it would have been hard for  
12 them to find this, but I don't know. Maybe. I haven't done  
13 any research on that.

14 But those are just not two very good reasons to  
15 interview jurors who have said that they have spent two and  
16 part of a third week in doing this, and I told them that  
17 their job was done, meaning that they didn't have to talk to  
18 the jurors if they didn't want to -- I mean talk to you if  
19 they didn't want to.

20 And if you had something that was more firm, maybe  
21 I would have felt differently, maybe I would agree to come up  
22 with a process. But the things that you have cited to me  
23 seem inconsequential and not relevant and a stretch that  
24 anybody would have been influenced by those.

25 But if you want to file a motion, you are happy to

1 do that. I just think these are thin reasons. But I haven't  
2 studied it. I certainly haven't gone back and scurried  
3 through the law.

4 MR. KRAMER: Well, I think the law is pretty  
5 straightforward, Your Honor. It's within your discretion.  
6 And we thought these were -- we filed a -- presented a  
7 proposed motion with supporting bases, which we thought  
8 presented reasonable grounds to permit an investigation.

9 But -- and I heard you, what you said. The only  
10 thing I would quarrel with you at all, sir, is that these  
11 communications, if seen, were inconsequential. I feel very  
12 strongly if these -- now, there is an inference whether these  
13 things were seen, but both the Twilight Zone blogging and the  
14 footer related to the product not being FDA approved are both  
15 very powerful bits of external information that could -- it  
16 would be hard to see how they wouldn't color someone's view  
17 if they were perceived.

18 Now, I understand that there is a gap between  
19 finding that they were actually perceived by the jury, and  
20 that's what we were looking -- hoping to pursue.

21 THE COURT: So why didn't you raise this during the  
22 trial?

23 MR. KRAMER: Well, on the point of the footer,  
24 there was nothing that could be done. It was an inaccurate  
25 statement about the FDA handling of this product where there

1 was no way the Court with an instruction could fix the  
2 problem. We would just be highlighting it.

3 On the issue of why didn't we do anything in the  
4 trial about this blogging, shame on me, I didn't see it, and  
5 I didn't see it until after the verdict. And when I saw it,  
6 I was stunned that a lawyer who has cases in the MDL would  
7 post something like that while the deliberation and where if  
8 any juror did violate their instructions or if a family  
9 member of a juror saw that and mentioned it to their spouse  
10 or to their sister, you know, that would -- that could --  
11 would impact someone because of the content in that critique  
12 of the closing arguments criticizing the defendants' Twilight  
13 Zone approach.

14 THE COURT: Well, if somebody blogging was a  
15 grounds to compel a judge to always allow people to --  
16 lawyers to interview jurors, in all my cases that are fairly  
17 high profile, they would always get to talk to the jurors  
18 because there is always that information, which is why every  
19 time they left I told them that they could not access the  
20 internet or outside information. Every time they left,  
21 including on breaks when I knew they didn't have PDAs or  
22 electronic devices, because I wanted that embedded in them.

23 And there is nothing that suggests to me that  
24 anybody accessed that. So I think that is a straw that has  
25 been blown away.

1           And this FDA 510 (k) approval, you had a chance to  
2 review documents that were being introduced. Why didn't you  
3 catch it before it was shown and ask it to be redacted?

4           MR. KRAMER: Because the document they gave us had  
5 it taken off. The one on the screen did not.

6           THE COURT: So you -- so it wasn't even a document  
7 that they had back with them in the jury room?

8           MR. KRAMER: No, sir. It was -- I don't believe  
9 so, no. No, we didn't let it go back in the jury room. It  
10 was shown before it could be corrected.

11           THE COURT: Well, first, I disagree with you on  
12 curative instructions. A curative instruction if this had  
13 been brought to my attention, even if it had been brought to  
14 my attention outside their presence, there would have been an  
15 instruction that would have resolved this, and I was denied  
16 that opportunity, assuming you saw it when it was up. But  
17 I'm assuming that you did and chose --

18           MR. KRAMER: Excuse me, sir. We did see it when it  
19 was up, and we did bring it to your attention. We did not  
20 ask for an instruction, just to be clear. That's probably  
21 the same thing, but -- and the reason we didn't ask for an  
22 instruction, because it would have punctuated the issue.

23           THE COURT: Yeah. Well, I think it's thin.

24           Please file your motion. I have looked at this for  
25 the purposes of this call. I don't want to deny you the

1 opportunity of making your full factual and legal arguments,  
2 and I'm inviting you to file it if you want.

3 MR. KRAMER: Well, thank you, sir. I don't think  
4 we will. We understand -- I know you gave it some thought  
5 and weren't just whistling here in the wind about the issue.  
6 But thank you for considering it.

7 THE COURT: What else do we have?

8 MR. McGLAMRY: I don't think there is anything  
9 else, Your Honor, that I am aware of.

10 MR. KRAMER: Nor I, Your Honor.

11 THE COURT: Separate and apart --

12 MR. KRAMER: Where should we go forward? Should we  
13 set a discussion of this topic for remand or have some  
14 dialogue about additional interaction with the Court?

15 THE COURT: I think what I said was --

16 MR. KRAMER: What's the next step?

17 THE COURT: -- I will think about our conversation,  
18 and I likely will propose what I want to do and let you know  
19 and again solicit your input.

20 MR. KRAMER: Thank you, sir.

21 MR. McGLAMRY: Thank you, Your Honor.

22 THE COURT: I will say on this, going back to the  
23 jurors for a second, that if somebody wanted to schedule time  
24 to discuss the feedback I got about trial performances and  
25 presentations which is specific to individuals and individual

1 lawyer's performance, I'm happy to do that.

2 I would like -- there is no need I guess to do it  
3 immediately, but I would prefer to do that in person first  
4 with one side and then with the other side.

5 MR. KRAMER: Thank you, sir. I am fairly certain  
6 we will take you up on that. I appreciate the offer.

7 THE COURT: I had the most comments about  
8 Ms. Snedeker. I'm just kidding.

9 MS. SNEDEKER: I was going to say, wow, I was  
10 trying to fly under the radar.

11 THE COURT: You flew well under the radar.

12 MS. SNEDEKER: Good.

13 THE COURT: Which was a smart thing to do.

14 MS. SNEDEKER: Yeah.

15 THE COURT: All right. Anything else?

16 MR. McGLAMRY: No, Your Honor.

17 MR. KRAMER: Nothing for the defendants. Thank  
18 you, sir.

19 THE COURT: Okay. We will be back in touch.

20 (Proceedings adjourn at 1:41 p.m.)

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C E R T I F I C A T E

UNITED STATES OF AMERICA :  
:  
NORTHERN DISTRICT OF GEORGIA :

I, Nicholas A. Marrone, RMR, CRR, Official Court Reporter of the United States District Court for the Northern District of Georgia, do hereby certify that the foregoing 32 pages constitute a true transcript of proceedings had before the said Court, held in the city of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 21st day of January, 2016.

*/s/ Nicholas A. Marrone*

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NICHOLAS A. MARRONE, RMR, CRR  
Registered Merit Reporter  
Certified Realtime Reporter  
Official Court Reporter  
Northern District of Georgia

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

_____	)	
	)	
Plaintiff(s)	)	
	)	Case No. _____
V.	)	
	)	
_____	)	
Defendant(s)	)	

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