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

\* \* \* \* \* MDL NO. 07-MD-1842ML  
\*  
IN RE: KUGEL MESH HERNIA \*  
PATCH PRODUCTS \* APRIL 30, 2012  
LIABILITY LITIGATION \* 2:00 P.M.  
\*  
\* \* \* \* \* PROVIDENCE, RI

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

FOR THE PLAINTIFF: DONALD A. MIGLIORI, ESQ.  
Motley Rice LLC  
321 South Main Street  
Providence, RI 02903

FOR THE DEFENDANTS: JOHN P. HOOPER, ESQ.  
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Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR  
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1 30 APRIL 2012 -- 2:00 P.M.

2 THE COURT: Since it is now 2:00, I'd like to  
3 get started. For those of you who are physically in  
4 attendance, I want you to know that we have set up a  
5 phone line which is muted on this end so we won't be  
6 able to hear the catcalls, comments, woo-hoos, high  
7 fives, whatever, that may be announced by those who are  
8 listening in. But I did want to let you know that we  
9 do have a number of lawyers who have opted to phone in  
10 and listen.

11 I have a number of topics that I would like to  
12 cover today. I know also that Mr. Migliori and  
13 Mr. Hooper have some things that they would like to  
14 announce today as well.

15 In addition to the things that we would like to  
16 impart to you, this is the opportunity you have to  
17 address any concerns that you might have to the Court  
18 and also to counsel who have been working on trying to  
19 come to a resolution on these cases.

20 So if within the various topics that will be  
21 discussed you have a question or concern that is not  
22 addressed, I'll stop and recognize anyone who would  
23 like to come forward and say whatever you wish to say.

24 The only caveat is because we have people  
25 listening in, we will need you to speak into a

1 microphone so that your voice will carry, and so we've  
2 set up a podium here with a microphone for you. And if  
3 you do wish to speak, we'll ask you to please identify  
4 yourself and the firm that you're from.

5 I thought I would start off by telling you where  
6 we are in this litigation, which is fast approaching  
7 its fifth birthday here in the District of Rhode  
8 Island.

9 For those of you who have not been involved in  
10 an MDL, this is not an unusually lengthy period of  
11 time. That means that that was -- 2007 was the year  
12 that the cases were originally transferred to this  
13 Court. And as you know, in the ensuing five years,  
14 indeed, up until I think just a day or two ago, cases  
15 continue to be transferred to this Court by the JPML  
16 where appropriate.

17 I think it would suffice to say that this case  
18 is now in settlement mode. For those of you who do not  
19 know, this Court tried I believe the only two of these  
20 cases to be tried to conclusion. One was a Defendants'  
21 verdict. One was a Plaintiff's verdict.

22 And I think that the experience of the lawyers  
23 who lived through both of those cases informed much of  
24 what has transpired since then.

25 I know that the defense side has been working

1 arduously toward resolving as many cases as possible  
2 and that one of the things that has been developed in  
3 order to expedite that process is a methodology of  
4 categorizing cases by objective criteria.

5 And I think Mr. Migliori and Mr. Hooper can  
6 describe that process in more detail; but the point is  
7 that in order for your individual cases to be  
8 considered for mediation or settlement, whatever you  
9 want to call it, that it's important for both  
10 Plaintiffs' side and the defense side, in order to be  
11 able to properly evaluate those cases, to work within  
12 the structure that the parties have worked out.

13 So the first order of business for those of you  
14 who are seeking a speedy resolution of your case is to  
15 make sure that the Plaintiff fact sheet, A, has been  
16 filled out, and I think all of them now have been  
17 filled out, I've not been told of any where they're  
18 lacking; B, that the information is up to date; and C,  
19 to make sure that the information has been provided to  
20 the Defendants.

21 I know there were a few cases where those PFSs  
22 had been sent along to the previous counsel and for  
23 whatever reason didn't find their way into the hands of  
24 successor counsel.

25 So it's important for you to touch base with Don

1 Migliori and his team to make sure that, A, all of your  
2 information is up to date; that all of the requested  
3 authorizations have been provided and medical reports  
4 provided; and that, C, make sure that the other side  
5 has them.

6 So I'll stop there for a moment because I want  
7 to make sure I haven't left anything out. I'll start  
8 with Don.

9 Don, I'm going to need you to use the mike.

10 MR. MIGLIORI: Good afternoon, your Honor, and  
11 thank you for calling this meeting.

12 As has been reported previously, the remaining  
13 cases in the MDL are unique in that there are some  
14 cases where it's just one counsel representing one or  
15 two Plaintiffs and yet there are other counsel with  
16 dozens or even over a hundred cases.

17 So the attention of some counsel with respect to  
18 mediation discussions or things like that varies  
19 depending on many factors.

20 This structure that the Court proposed that we  
21 hope is implemented today is one where hopefully  
22 there's a structure and a process that anybody with any  
23 size inventory can get attention in the mediation track  
24 and, if not, move on as quickly as possible to a trial  
25 track.

1           We met this morning, your Honor, approximately  
2           20 to 30 lawyers, to go over sort of what to expect.  
3           It was reported to them this morning, as was requested  
4           by the Court, that the categorizations be described;  
5           and, in fact, they were handed out to all counsel  
6           available.

7           There's been some discussion about whether the  
8           categorizations fit and how other folks have organized  
9           their cases in the past, and those are things that I  
10          commit to the Court I and defense counsel can work out.  
11          Nothing of concern.

12          The most important thing that was represented  
13          and I think to be achieved by this process is that  
14          there is, in fact, now a process. **There's a way to get**  
15          **face-to-face time with defense counsel about inventory.**

16          I have found anecdotally that what's left in  
17          this litigation, especially for the firms that have  
18          fewer cases, is that there are some very, very strong  
19          cases that have significant work-up on an individual  
20          basis.

21          And so there's a lot of -- **I think we've gone**  
22          **from sort of the global approach to this now down to**  
23          **real case evaluation, less of a mass tort in that**  
24          **sense.**

25          And so I think this mediation process actually

1 will be very, very helpful to the folks that I'm  
2 representing to get real time to discuss real issues on  
3 more of a case-by-case basis than perhaps in the larger  
4 inventory deals that were done to date.

5 So I know there are some folks that may take you  
6 up on your invitation to speak their mind about how  
7 it's been for them.

8 But I think that at the end of the meeting  
9 today, which lasted a little more than two hours, I  
10 think the general sense was that this is all very, very  
11 good for the litigation; that the folks who are looking  
12 for time and attention feel like they have an  
13 opportunity now to do that.

14 I would request that there be sort of a deadline  
15 imposed at some point in the not-too-distant future for  
16 folks to get that information to me so that it can  
17 be -- so the scope of the litigation can be at least  
18 visualized by all parties.

19 THE COURT: Do you have a deadline in mind?

20 MR. MIGLIORI: You know, I think most folks here  
21 have been working on their cases for so long that 30  
22 days wouldn't be onerous if we're flexible with it. If  
23 folks need more, I'm assuming we can do that; but if  
24 within a month we can sort of get the scope of it.

25 As the Court put in its order, the basic

1 information that's critical would be the product  
2 information, the date of implant, the date of explant,  
3 the nature of the defect and then the general scope of  
4 injury and damages.

5 That can be organized and put into the  
6 categories that were shared. That at least gives a  
7 big-picture view; and then we can start to plan a  
8 rotation, of course with the magistrates' schedules in  
9 mind, where we have a regular process of bringing folks  
10 to the Court to try to see if their inventories can be  
11 moved.

12 There is, of course, a lot of -- there are  
13 several firms that have cases both here and in the  
14 state court. I believe the Court's aware that we're  
15 having a similar hearing tomorrow. We expect the same  
16 kind of process set up there. And to the extent that  
17 those processes can be coordinated, we have every  
18 intention of facilitating that.

19 So I think we're on the right track with a few  
20 deadlines and a few expectations set.

21 THE COURT: If need be, and I think there is  
22 need because if I don't set a deadline, it doesn't  
23 happen, the Court will be issuing an order after this  
24 meeting setting some of those scheduling deadlines.

25 Thirty days I think is legitimate. If someone



1 needs an additional couple of weeks, I think that's  
2 something you can work out. But for the kinds of basic  
3 information that Don is talking about, which five years  
4 post everybody ought to have, I would say that if you  
5 can get that information to him within the next month.

6 Judge Lovegreen, who is our recalled magistrate  
7 judge, has agreed to set aside blocks of time, that is,  
8 weeks at a time, to do nothing but these cases; but  
9 he's going to insist that there be warm bodies in the  
10 room.

11 It doesn't make any sense to try to settle the  
12 case if only half of the players are present. So you  
13 need to understand that as well.

14 Judge Almond has also made himself available to  
15 a lesser extent because he still has a day job, but --  
16 so we have two magistrate judges who are fully  
17 conversant with the issues, the facts, the kinds of  
18 injuries that have occurred in these cases.

19 So it's not like you're going to have to come in  
20 and educate them like somebody who's brand new to the  
21 process. And I would encourage you, if you are in this  
22 group that is looking to resolve your case through  
23 mediation, that you get that information to Don right  
24 away, and we will set you up on a schedule.

25 MR. MIGLIORI: We appreciate that. And, of

1 course, as we mentioned, my office is committed to  
2 helping with the categorization and analysis process to  
3 the extent it's helpful to the Court.

4 THE COURT: John, did you want to respond at  
5 all?

6 MR. HOOPER: Sure, your Honor. I guess I'm  
7 addressing this to the folks on the phone, but anyone  
8 in the audience as well, John Hooper and Michael Brown  
9 and some of the partners who represent Bard.

10 Some extraordinary things happened from a  
11 settlement standpoint, your Honor. After having tried  
12 two bellwether trials, the company went forward in a  
13 fairly aggressive fashion to try to resolve as much  
14 litigation as possible.

15 With that, and I'll clear this up quickly, the  
16 company took out a charge and a reserve. It's public.  
17 You can read about it. One of the mistakes that's made  
18 in terms of people negotiating with us, that was not a  
19 reserve for the cases we were negotiating.

20 We actually tried to project out what we believe  
21 the whole liability would be. It's a very conservative  
22 way to take a charge or reserve. So I guess I'm  
23 telling you, there's money. There's money that's been  
24 reserved, and we've gone around and we started to  
25 resolve blocks of cases.

1           The company initially, you know, we looked at  
2           the inventory, somewhere between 3,500 and 4,000 cases  
3           between the federal court and the state court, and went  
4           about trying to resolve the large blocks of cases so  
5           that we could sort of establish and move forward.

6           We, to date, have resolved seven large groups of  
7           cases. I announced that two of them actually have just  
8           recently signed off on their releases. So seven groups  
9           of settlements, over a hundred different law firms.

10           We have resolved over 2,600 cases to date in the  
11           federal and state court. We have received over 90  
12           percent in almost all categories with close to  
13           100 percent resolution in the most significant  
14           categories, Categories 1, 2, 3 and 4.

15           And if anybody in the audience doesn't know what  
16           I'm talking about, that's what Judge Lisi and Judge  
17           Gibney are going to be talking to you about in working  
18           with Don because this is how we've been evaluating the  
19           cases.

20           Bard did not establish the categorizations.  
21           Quite frankly, we don't agree with how they're  
22           categorized, but it's been a process that has worked.

23           So whether or not we agree with the values or  
24           whatever you call them, this process has worked to the  
25           extent that we've resolved 2,600 cases.

1           We're committed to going down that route because  
2           it has worked, and we had a lot of discussions within  
3           the categories.

4           Of the other large groups of cases, there are  
5           four groups that we've attempted to negotiate with and  
6           we were at an impasse. We're at an impasse over  
7           values. I'll just be honest.

8           Those four groups I think have a little under  
9           500 cases, and those are cases that are moving towards  
10          either further negotiations or trial.

11          Where we are today is, I think with the  
12          exception of maybe two firms, I think we've opened a  
13          dialogue with pretty much every firm that has more than  
14          30, 40 cases.

15          If that's not the case, we talked to everybody,  
16          but it does seem easier from what we're trying to do,  
17          which is close down the litigation. If we missed you,  
18          please let us know. We're happy to sit down with  
19          folks, all folks, but it does seem easier for what we  
20          do to have one meeting rather than hundreds.

21          But the problem identified by the Court and by  
22          Don that we're finding is, and unlike other mass torts  
23          that I've been involved with, we have somewhere between  
24          500 and 700 cases with law firms that have one or two  
25          cases, some three or four.

1           So while we haven't gotten to you, please  
2 understand that we've spent quite a bit of time trying  
3 to resolve big blocks of cases.

4           That doesn't mean we don't think your clients'  
5 cases are worthy. We just really have been focused on  
6 getting the majority of the litigation resolved.

7           So we're at point, I think Phase 2 of the  
8 negotiations, where we need the Court's help. We need  
9 your help. We're happy to have discussions. We're  
10 happy to resolve cases with real values. We may  
11 disagree with you, but we'd like to know why we  
12 disagree.

13           When the Court had this conference the last  
14 time, your Honor, you had asked lawyers to contact us.  
15 From that, we've opened negotiations with 35 firms. We  
16 are in various stages of discussions with 35 firms.

17           Some of them took place today. We met with  
18 four. We have two more firms coming in this afternoon  
19 just because they're in town.

20           What's interesting, at least in our experience,  
21 is the folks that came into town that we've been  
22 negotiating with typically have the ring break cases,  
23 and we're not getting a lot of traction on the rest of  
24 the inventory, and that leaves us with hundreds and  
25 hundreds of cases that we don't know anything about.

1           So we would very much like to start dialogue so  
2 we can get a sense of what the rest of the cases look  
3 like, see if we can resolve some cases.

4           You talked about a process, your Honor, and the  
5 process that has helped the most from our evaluation is  
6 one to identify the lawyers who have cases, categorize  
7 their cases.

8           And I appreciate that liaison counsel's offered  
9 because while we may not have agreed about a lot of  
10 things, we didn't have a lot of difficulty with any of  
11 the firms we spoke with in categorizing cases.

12           In fact, some of the other firms, you know,  
13 maybe we had -- one firm I can think of, we had five  
14 disagreements in 450 cases.

15           So categorizing is not hard. Finding the values  
16 has been harder. But if we don't know the categories  
17 at all, we can't even begin the process.

18           So if, in fact, your Honor, and through  
19 Mr. Migliori's help or the Court's help, we could get  
20 some time before the mediation where people categorize  
21 the cases, you don't necessarily have to come to  
22 mediation. I mean, we've seen enough of these cases  
23 that we think we can put values on them.

24           So I would invite that if we could get two weeks  
25 before a case actually goes to mediation, we would

1 start working real hard to resolve those cases before  
2 folks have to get on planes or take up the Court's  
3 time.

4 Maybe it's smarter to push it out four weeks if  
5 we can so we can knock off as many cases, but if we  
6 could get those cases in the door so that I can tell my  
7 client those 700 cases aren't all ring breaks. I know  
8 they're not all ring breaks because I've seen the  
9 percentage of categories that other firms have.

10 But right now I really don't know anything about  
11 those cases, so it makes it very hard for Bard to move  
12 forward and, frankly, even negotiate small groups of  
13 cases without knowing what's behind them.

14 So, your Honor, what I would simply suggest is  
15 we are happy to go forward, we're doing it in state  
16 court as well, on a monthly basis, maybe a day here and  
17 a day there.

18 We're happy to try to resolve those cases before  
19 they show up in court. We're happy to move forward.  
20 We have brought today five lawyers from various offices  
21 to meet with people this afternoon. These are folks  
22 that are already negotiating.

23 THE COURT: Where are your offices so that if  
24 people wish to go from here to there, they will know  
25 where to find you.

1 MR. HOOPER: Let me just suggest if I can, your  
2 Honor, at the end of the conference, if we could just  
3 meet over here, we could direct you, but just so we  
4 know who's coming in.

5 It's 10 Weybosset Street, which is right next to  
6 the Textron building. If you walk through the  
7 alleyway, there's an entrance. We're on the tenth  
8 floor, and we have enough room for, you know, as many  
9 people as come by.

10 I don't think we're going to be settling cases  
11 today, which we have the cases categorized. If you  
12 want to establish a relationship with one of us so we  
13 can get the process started, we're happy to meet with  
14 folks after the conference and try to do that. And  
15 we're happy to do it after today in any shape that your  
16 Honor thinks would help the process.

17 THE COURT: Well, I think in order to ensure  
18 that everyone understands what is required, that the  
19 Court at the end of today's conference will set out in  
20 order form a schedule of what needs to be provided to  
21 whom and that sort of thing.

22 Let me tell you the one thing I do not want to  
23 see, I've already seen a couple, and all they do is  
24 take time and clutter up everybody's docket, and that  
25 is a motion to set the matter for mediation or



1 settlement conference.

2 That's the whole point of this conference and  
3 the last one. We don't want you filing motions to get  
4 on the mediation train. You're already on it.

5 What you need to do now is buy a ticket in the  
6 form of a fully completed Plaintiff fact sheet, a  
7 categorization of your case in accordance with the  
8 module that Don and his team have worked out so that  
9 Defendants and you are speaking the same language.

10 So for those of you who are listening and those  
11 of you who are here and listening, no motions to set  
12 the matter for mediation. Thank you.

13 MR. HOOPER: Your Honor, my final point is what  
14 creates the greatest difficulty for us is the unknown.  
15 And to the extent that the Court considers a process  
16 where we will do this, we will put as many people on  
17 this, we would love if we had 400 new cases in the next  
18 month because it's easier for us to talk to our client  
19 about 400 than it is about four or five or ten.

20 It's the same group of people. We have to sit  
21 them down, and we have to get authority. But at some  
22 point we're going to return to your Honor and request  
23 that if counsel do not meet your Honor's orders, that  
24 we move to dismiss those cases because there's only one  
25 way for us to know whether they're real cases, either

1 they resolve, they set a trial date or they get  
2 dismissed.

3 And we're happy to consider resolution and  
4 putting all the resources possible, but it's a little  
5 bit frustrating. It's frustrating on the folks' part  
6 who want our time and attention, we get that, but it's  
7 difficult in trying to bring this to conclusion from  
8 the company's standpoint without having that.

9 THE COURT: Let me ask Don whether the  
10 categorization model, how you've developed that and  
11 what it actually requires is available on your Web site  
12 or somewhere that would be helpful to the folks who are  
13 listening and the people here.

14 MR. MIGLIORI: Your Honor, in anticipation of  
15 this, we actually handed it out to everybody today.  
16 We've e-mailed it. We had two meetings. The last  
17 conference, we did the same about three or four months  
18 ago.

19 The categorizations are basically you've got  
20 ring breaks, they're either very severe or they're not  
21 as severe; you've got buckles that are very severe or  
22 not severe; and then there's a little bit of dispute  
23 between both sides about what it means to be in a  
24 category that's less -- more difficult to prove or  
25 whether the device is still in and it still constitutes

1 an injury or the device maybe doesn't have a ring in  
2 it.

3 THE COURT: But even those, the Defendants need  
4 to know how many there are.

5 MR. MIGLIORI: Exactly.

6 THE COURT: And that's what's important here.

7 MR. MIGLIORI: So I think we're at the stage  
8 right now, your Honor, where the process of  
9 categorization and getting the information together so  
10 that we know the big picture so that when John goes  
11 back to his client, we have our arms around the entire  
12 scope of the issue irrespective of counsel and how  
13 many.

14 That's why instead of a two week before  
15 mediation type order, the 30-day order where everybody  
16 should get this basic information to us allows us to go  
17 and assess at this stage, in 30 days, this is what's  
18 left.

19 If John has to make an ask of his client or  
20 advise the client of what's left, he can now do that  
21 with a big picture. And that will mean that the folks  
22 who have one or two cases are part of the discussion  
23 already.

24 And so I would just simply ask that we have and  
25 will continue to advise folks and help them, physically

1 actually assess cases with them to get the package  
2 together over the next 30 days and then --

3 THE COURT: Let me just take the temperature in  
4 this room.

5 Are there any Plaintiffs' counsel here who think  
6 that they cannot comply with a 30-day order on at least  
7 providing the information that would be necessary in  
8 order to categorize your case or cases?

9 UNIDENTIFIED SPEAKER: I have one new case that  
10 hasn't made it to the MDL yet, and I was going to  
11 address this to everyone later.

12 THE COURT: Okay. Let's leave that for the  
13 moment because I have enough to do without the ones  
14 that they haven't sent to me yet.

15 Don, did you have anything more?

16 MR. MIGLIORI: No, your Honor.

17 THE COURT: Other than this issue, I don't hear  
18 anyone objecting to a 30-day order.

19 MR. STRINGER: And by that, your Honor, are you  
20 referring to, if I may, the completed -- not the fully  
21 completed Plaintiff fact sheet but, rather, the basic  
22 information?

23 THE COURT: Well, I mean, it depends. If you  
24 haven't provided information on the fact sheet that is  
25 necessary in order for the categorization model, then

1 you can't comply with that order.

2 So what it means for you folks who have cases  
3 still outstanding is you've got to get your hands into  
4 those cases.

5 I will tell you the most frustrating thing that  
6 I've had to deal with when we were -- and we're going  
7 to talk in a minute about setting cases for trial, was  
8 when I ask Plaintiffs' counsel basic questions about  
9 how's your client doing, has it been explanted, and  
10 that lawyer cannot answer those questions.

11 You folks need to start doing some spade work on  
12 these cases and dig down and find out what it is  
13 because if you can't answer those basic questions at  
14 this stage, you're not ready for mediation.

15 And what we're here about is setting a course  
16 for full mediation of whatever is left out there, and  
17 the only way to do that is to fit within this model.

18 MR. MIGLIORI: And, your Honor, these are the  
19 very -- these category type questions and the fields of  
20 information I mentioned earlier are so simple that if  
21 somebody's recently filed and still within the PFS  
22 deadline, it's so much more important right now to get  
23 the basic stuff together and then complete the PFS  
24 pursuant to the existing CMO.

25 MR. STRINGER: Yes, I understand.

1 THE COURT: Could you just tell us who you are.

2 MR. STRINGER: J.W. Stringer, your Honor.

3 THE COURT: What firm are you with?

4 MR. STRINGER: My own law office, J.W. Stringer.

5 THE COURT: Where are you?

6 MR. STRINGER: In Texas. Our case is recent.

7 It just was filed a couple months ago and just recently  
8 got transferred to the MDL.

9 THE COURT: How many do you have?

10 MR. STRINGER: Just one at this time. However,  
11 it's an unfortunate wrongful death case, and we can  
12 easily provide that basic information; but  
13 unfortunately our client has probably 10,000 pages of  
14 medical records from the time it was explanted to her  
15 death and Lord only knows how much medical expenses.

16 That full, complete set of records is what I was  
17 getting at may take a little bit more than 30 days to  
18 amass.

19 THE COURT: In a case like that -- these folks  
20 are reasonable. That's what I was saying. I'm looking  
21 for a general order that can go out there. In the  
22 unusual case where more time is required, these folks  
23 are reasonable.

24 MR. STRINGER: Understood. Thank you, your  
25 Honor.

1 MR. HOOPER: Your Honor, just picking up on  
2 something Don said, the two weeks I was really talking  
3 about is we'd like to try to resolve cases before the  
4 mediation.

5 I think Don is absolutely correct, if we could  
6 have a deadline and if we knew there were X number of  
7 cases.

8 Might I suggest the following. Why don't we get  
9 together, come up with the agreed-upon categorization  
10 that your Honor can issue in an order. We'd ask your  
11 Honor probably in the order to give people a certain  
12 amount of time. To the extent they need an extension  
13 of time, we can provide that in the order.

14 And I'd also add this, your Honor. If you  
15 recall when my firm, Michael Brown and I came into the  
16 case, we stopped challenging the Plaintiff fact sheets.

17 We had more trouble. Most of the Court time was  
18 taken up with Plaintiff fact sheets, and I think  
19 defense counsel was very appreciative. We focused on  
20 the cases we had to try. We didn't challenge them.

21 But at this stage, we're getting to a point  
22 where, yes, having a Plaintiff fact sheet would be  
23 helpful.

24 So what I would also suggest is, I'll meet with  
25 liaison counsel, perhaps we could have a deadline again

1 for a completed fact sheet; and if there's not a  
2 completed fact sheet and if there's not a  
3 categorization, that would provide a predicate for us  
4 to come to the Court to seek some sort of an order of  
5 relief.

6 I think that we would not be -- you know, just  
7 as in the past, we've been very practical about that.  
8 We would not be looking for that as some great  
9 advantage to take advantage of anyone who couldn't get  
10 it done.

11 Clearly, the gentleman here is right. If you  
12 have thousands of pages of medical records, we may not  
13 need those thousands of pages for what we're doing, but  
14 we could have that dialogue.

15 It would go a long way, to follow up on what Don  
16 was saying, if we could draw a line. If we have 700  
17 cases and we have a certain pot of money and we have  
18 300 cases with a certain pot of money, I can do a lot  
19 more with 300 cases.

20 So if there are two or three or one hundred  
21 cases which are never going to see the light of a  
22 resolution, it would help us and it would help other  
23 parties for us to try to resolve those cases.

24 THE COURT: Does everyone understand what  
25 Mr. Hooper is saying?



1           At the beginning of this case, I ordered through  
2 one of the case management orders that every Plaintiff  
3 complete what we've called a Plaintiff fact sheet.

4           Those are shorthand approaches to discovery in  
5 the case. It's the kind of information that every  
6 Plaintiff ought to be able to give over to the other  
7 side so the other side can understand what the claim is  
8 and to evaluate that claim.

9           When there was a change of counsel, as  
10 Mr. Hooper says, they decided that it made more sense  
11 to try to look at the big picture and resolve as many  
12 of these cases as possible without individualized  
13 litigation over the sufficiency of the PFS.

14           In the early stages of this MDL, I was ruling on  
15 motions to dismiss for a failure to comply with the  
16 case management order requiring a completed PFS and  
17 looking at the deficiencies and whether they were  
18 material or not.

19           We are well beyond that now, but that does not  
20 mean that the PFS is still not a valuable tool both for  
21 the Plaintiffs' side in order for you to understand  
22 your case, that digging down that I talked about, and  
23 also for the defense side.

24           So I think Mr. Hooper's statement on that point  
25 is well taken. The fact that they are no longer moving

1 to dismiss cases for insufficient PFSs doesn't mean  
2 that they're no longer important.

3 So to the extent that those listening and those  
4 here have cases where you've not completed those PFSs,  
5 you need to go back and start reworking those and  
6 bringing them to full completion. And I will make that  
7 order today once you folks get together and give me  
8 some wording on it.

9 The one thing that's come up that does give me  
10 some concern is this. Both Magistrate Judge Almond and  
11 Judge Lovegreen are busy people. What we don't want to  
12 do is to set up a schedule of mediations for them and  
13 have them sitting there twiddling their thumbs.

14 So I think that we will probably build in a  
15 deadline by which if you're not going to settle or if  
16 you are going to settle, that you do it so that we can  
17 put another case in your place.

18 We've got plenty of work out there to do, and  
19 both magistrate judges want to do that work. What they  
20 don't want to do is set aside two days or three days  
21 and find out that of the 10 or 12 cases that were  
22 scheduled, only two are going to show up and then have  
23 10 or 12 people who could have come having to wait.

24 So I think the point is well taken that just as  
25 I in my pretrial order require settlements to be

1 recorded one week before impanelment, that we build in  
2 a deadline of, I would suggest, two weeks before the  
3 scheduled mediation so that people can make travel  
4 plans.

5 Anyone with any questions on that? Are you okay  
6 with that?

7 MAGISTRATE ALMOND: Yes.

8 THE COURT: Okay. This is the important person  
9 on that one.

10 Anyone else? Okay.

11 Should we now start talking about what happens  
12 if the case doesn't settle?

13 We have, that is, the Court and counsel have  
14 over the past several months now engaged in a process  
15 to identify cases for trial.

16 In fact, we had a case scheduled for trial here  
17 I think in March which did not go. It was dismissed on  
18 motion of Plaintiff's counsel.

19 We had a second case scheduled to go to trial in  
20 May in Alabama. I was designated to go sit in the  
21 Northern District of Alabama. That case did not go,  
22 again, dismissed on motion of Plaintiff who had  
23 discharged counsel.

24 We're now on number three, and is that one  
25 going, too?

1 MR. HOOPER: Dismissed.

2 THE COURT: Dismissed. We had four. I'm down  
3 to one. I don't know where we are with that one yet.  
4 That one's still out there.

5 But the point of my telling you this is this.  
6 If you are serious about trying your case, there must  
7 be a true commitment on your part to doing so.

8 To simply say, Yup, we're ready trial in a case  
9 like this doesn't cut it. It's not like the typical  
10 case where each side is bluffing the other side. Yeah,  
11 we're ready. No, we're not.

12 When we work one of these things up, I am told  
13 that on the Plaintiffs' side the cost of working it up  
14 for trial is somewhere upwards of \$400,000. That's by  
15 the time you get your experts lined up and all of that.

16 So if you're serious about trying the case, I'm  
17 serious about trying the case. I didn't ask the chief  
18 justice for a designation to go sit in Birmingham,  
19 Alabama, in May if I weren't serious about going to try  
20 a case. I probably would have picked a better spot.

21 But Judge Blackburn in Alabama was very  
22 disappointed when she heard we weren't coming down to  
23 visit.

24 But if you're interested in trying your case and  
25 it's one that was transferred here, the first question

1 we're going to have for you is, will you waive lexicon.  
2 In other words, will you come and try it here.

3 If you are not willing to waive lexicon, then  
4 the next question will be, when do you want to try it.  
5 I will go through and get myself designated and go to  
6 wherever it is and try it there.

7 But the point is, if you are serious about  
8 trying the case, you have to be dead serious about it  
9 because it's going to go.

10 One of the things that has disturbed me greatly  
11 is that when we set these cases for trial, it is  
12 generally on an expedited fact discovery schedule so  
13 that we can get them lined up and ready to go. And  
14 that forces the defense side to spend money that's in  
15 Mr. Hooper's little pot or big pot, I guess.

16 MR. MIGLIORI: It's too little.

17 THE COURT: It's too little. It's still a big  
18 pot. But what it does is it siphons money off from the  
19 cases that he's trying to resolve without trial. And  
20 so that costs Plaintiffs, it costs Defendants, it costs  
21 the Court.

22 He has hinted at seeking sanctions where the  
23 party who says, Yes, I want to have my case tried, and  
24 then when you get your hands into it realize, oops,  
25 wrong one or, oops, should never have said yes, that if

1 there is not a good faith effort on the part of  
2 Plaintiff's counsel, he has intimated that he will be  
3 seeking sanctions from the Court for failure to make a  
4 good faith effort to try the case.

5 So we've had three out of four now where  
6 Plaintiffs have moved to dismiss the case after setting  
7 it for trial. And we're in a process now, the parties  
8 are, of identifying some additional cases. They don't  
9 want me to call them bellwethers anymore because I  
10 think we're beyond bellwether.

11 The two cases we did try, Whitfield and Thorpe,  
12 were true bellwether cases because they sort of gave  
13 you the parentheses of the universe of cases we have.

14 But we're at a point now where the cases we're  
15 selecting for trial, yes, they're somewhat  
16 representative of what may be in a particular lawyer's  
17 inventory or they may be, as Mr. Hooper sees the big  
18 picture, those five to seven hundred that are  
19 unidentifiable because they fall into the Category 5s  
20 and 6s; but they, too, have some value. The question  
21 is, what value.

22 So I wanted to throw that out there to you. If  
23 you're interested in trying cases, we will try them.

24 Don, I don't know whether you wanted to add  
25 anything to that.

1 MR. MIGLIORI: Just quickly. This is an area  
2 where it's a little more difficult having met with a  
3 lot of the firms today. In order for the trial process  
4 to be successful, it really has to be something that  
5 both sides can get together on to pick a case.

6 And so in defense of the folks that have  
7 dismissed their cases, those, as I understand them,  
8 were primarily defense picks.

9 MR. HOOPER: No.

10 MR. MIGLIORI: The first two were.

11 THE COURT: At least one was a Plaintiff's pick.

12 MR. HOOPER: Second one was a Plaintiff's.

13 MR. MIGLIORI: So the next one up, if it goes as  
14 the next one, is a Plaintiff pick. There are some  
15 dynamics in that that I just want -- whenever the word  
16 "sanctions" comes up, obviously from my side that's  
17 something that we take very, very seriously.

18 And we understand the Court's message, but I  
19 don't want the Court to be left with the impression  
20 today that the folks that are here and that are on the  
21 phone don't care about their cases.

22 They very much do, and they've articulated that  
23 to me daily, not just in these meetings. So I know  
24 that the folks I met with are very, very committed to  
25 their cases, to this Court's order, and we'll make sure

1 that the cases that come up are meaningful cases for  
2 trial so that we can move this along.

3 THE COURT: John, did you want to --

4 MR. HOOPER: Yeah. This might help some of the  
5 folks in the audience. Don't be surprised if you don't  
6 have a ring break case. Ninety-six percent of the  
7 cases that we've evaluated are not ring break cases.

8 Probably the big surprise in litigation on both  
9 sides was that number of ring breaks that have come  
10 forward.

11 The hard part for the Defendants in discussions  
12 is talking about the non-ring break cases. We've  
13 resolved -- in the cases that we've had the resolution,  
14 the 2,500 cases, I don't know of any ring breaks we  
15 didn't resolve. Maybe one or two, but nothing comes to  
16 mind.

17 And that's what sort of creates the difference  
18 of opinion over what cases should be tried or not  
19 tried. And one of the things about the Thorpe case is  
20 we tried a ring break. In Whitfield, we tried a  
21 non-ring break.

22 But there's a large variety of cases out there,  
23 as you evaluate your own cases, which are difficult to  
24 evaluate from a trial standpoint.

25 Some of you may have great cases. Some folks



1 may not. And in terms of how we've evaluated the  
2 cases, we've evaluated the broad inventory.

3 Your Honor, I don't know if I'm getting back up,  
4 if I could just introduce who is going to be here from  
5 my office. Would that be okay?

6 Anybody who wants to meet with us, just come on  
7 up. Maybe the folks here could just stand up. Chip  
8 Beaudreau, Jason Cohen, Jackie Seidel, Eric Gladbach  
9 and, not from my office, but Tom Robinson from Mark  
10 Nugent's office.

11 We'll take your names and numbers. And,  
12 frankly, we'd love to come back and spend some time  
13 with you if you have time today or tomorrow. We're  
14 doing the same thing tomorrow after Judge Gibney's  
15 conference.

16 Thank you very much, your Honor.

17 THE COURT: Could I ask with a show of hands how  
18 many of you also have cases in state Superior Court.  
19 So quite a few.

20 MR. HOOPER: Your Honor, could we get a show of  
21 hands who might be coming back?

22 THE COURT: How many of you intend to come back?

23 MR. HOOPER: Today.

24 THE COURT: Today to meet --

25 MR. HOOPER: To our office.

1 UNIDENTIFIED SPEAKER: I haven't been asked, but  
2 I'd like to.

3 THE COURT: Well, we've invited everyone.

4 So you have quite a few takers. Mr. Hooper told  
5 me before he had food. Does that change your minds  
6 about whether you will go? You've got at least two  
7 more on that.

8 MR. HOOPER: Lunch has been sitting there for an  
9 hour.

10 THE COURT: The sooner we end here, the sooner  
11 you get to have lunch.

12 Were there any other matters that either side  
13 wanted to address today?

14 MR. HOOPER: No, your Honor. Thank you.

15 MR. MIGLIORI: I don't know if anybody's -- I  
16 know other people said they wanted to address the  
17 Court.

18 THE COURT: That's what I was going to ask now.  
19 Is there anyone who would like to raise anything we  
20 haven't raised?

21 Yes, ma'am. Come on up.

22 MS. MORTON: Your Honor, I'm Kathy Morton from  
23 Marieville, Tennessee. I've got one case that it's  
24 been going on with my family Plaintiffs for eight  
25 years.

1           Mama had a hernia repair with the mesh in 2004,  
2           and after three surgeries, multiple abscesses --

3           THE COURT: I'm going to ask you not to get into  
4           the particulars of the case, ma'am. Just tell me what  
5           it is that you would like to do.

6           MS. MORTON: What I've tried to do and what I've  
7           heard here is there's been arduous work in good faith  
8           of trying to resolve these cases.

9           Well, I've been in touch with these Defendants'  
10          lawyers since 2008 over and over and over again trying  
11          to implement settlement discussions.

12          I finally got a response from Mr. Hooper last  
13          November that this man named Chip would be getting with  
14          me.

15          My concern is, and here's what I did, I filed a  
16          motion or a request to let us proceed with discovery of  
17          at least her treating physician because my time has  
18          been going on and on and I feel like his testimony will  
19          be very helpful in resolving this case.

20          THE COURT: All right. And I'm glad you raised  
21          that because we have had a number of attorneys who are  
22          concerned about not being able to conduct discovery  
23          with implanting and explanting physicians, treating  
24          physicians, that sort of thing.

25          What I would suggest that you do since you are

1 here today is to get with Mr. Hooper's group today.  
2 Have you completed a PFS?

3 MS. MORTON: Yes, ma'am.

4 THE COURT: Have you gone through the  
5 categorization process?

6 MS. MORTON: I didn't know about the  
7 categorization until now.

8 THE COURT: Was it ring break or not?

9 MS. MORTON: Yes, it's a ring break.

10 THE COURT: Then I would say you ought to get  
11 together with Mr. Hooper's merry band this afternoon.  
12 That's why you're here, that's why they're here.

13 MS. MORTON: What I was hoping, though, is maybe  
14 the Court may be thinking or could include that in the  
15 event -- I think the testimony of the treating  
16 physician may be important to mediation; but if the  
17 case did not get resolved, then we have a mechanism for  
18 at least allowing treating physician discovery as soon  
19 as possible.

20 THE COURT: I would say that once we've gone  
21 through the mediation process with the magistrate  
22 judges, and again I envision a system whereby most  
23 cases that are going to settle will probably not have a  
24 physical encounter with the magistrate judge, only a  
25 small percentage are going to end up there, once we've

1 gone through that exercise, then we see what's left.  
2 Then I think we can take up your situation as you've  
3 described it because then we're that much further  
4 along.

5 But to do that now will only siphon time away  
6 from these folks. You should have records that would  
7 indicate what they found. So you can get that  
8 information to the Defendants without having to conduct  
9 a deposition.

10 MS. MORTON: My point was, your Honor, I had  
11 provided that to them five years ago along with the  
12 affidavits.

13 THE COURT: I understand that, but that was five  
14 years ago, and a lot has happened since then. You're  
15 here now. Go see them this afternoon. That's why  
16 they're here. Get some lunch.

17 MS. MORTON: Appreciate it.

18 THE COURT: Anyone else?

19 All right. Well, I want to thank you all for  
20 coming. I know that this is not an easy thing for you  
21 to do, but I do think that those of you who have sat  
22 here today and have heard what both sides have had to  
23 say about where we are in the process -- and it's  
24 important to remember this is not like your typical  
25 case, you file it, you do your discovery, you wait for

1 a trial date, maybe you settle it, maybe you try it.  
2 What we're dealing with is, what, about 4,000 total  
3 cases?

4 MR. HOOPER: A little bit less.

5 THE COURT: A little bit less than that. And  
6 the point is to try to do this in as orderly a fashion  
7 as possible.

8 I can tell you I've been involved in the case  
9 since day one, and there has been a marked improvement  
10 in the administration of the case with the infusion of  
11 counsel from Reed Smith. Earlier counsel had a whole  
12 different approach to this thing.

13 So they're here. They've got a room or several  
14 rooms ready for you. They have repeatedly said they  
15 are ready to settle these cases.

16 You folks are in the driver's seat now. As soon  
17 as you can package that information, particularly the  
18 categorization because that's the way they're viewing  
19 the total inventory now, the sooner we can get you  
20 resolved.

21 And if you don't want to resolve it that way and  
22 want to go to trial, make sure it's a case that's  
23 really something you think needs to be tried. I would  
24 suggest that there are very few that need to be tried.  
25 And if they do, I hope they're in Honolulu.

1 With that, I'm going to turn you over to Don who  
2 may want to meet with some of you, and those of you who  
3 want to get together with defense counsel ought to meet  
4 with them here and find out where you're going.

5 (Adjourned)

6 \* \* \* \* \*

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

8  
9

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

14  
15  
16

17 /s/ Karen M. Wischnowsky

18 Karen M. Wischnowsky, RPR-RMR-CRR

19  
20  
21

22 April 30, 2012

23 Date

24  
25