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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE:)	
MEDTRONIC, INC.,)	Multidistrict
SPRINT FIDELIS LEADS)	Litigation
PRODUCTS LIABILITY LITIGATION)	File No. 08-1905
)	(RHK/JSM)
THIS DOCUMENT RELATES)	
TO ALL CASES)	Saint Paul, Minnesota
)	January 28, 2009
)	9:40 a.m.
)	

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

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P R O C E E D I N G S

I N O P E N C O U R T

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3 THE COURT: Okay. We're here on In Re Medtronic,
4 Inc., Sprint Fidelis Leads Product Liability Litigation,
5 file number 08-1905. Let's start with the appearances for
6 the Plaintiffs.

7 MR. GUSTAFSON: Good morning, your Honor. Dan
8 Gustafson on behalf of the Plaintiffs.

9 MR. ZIMMERMAN: Good morning, your Honor. Charles
10 Zimmerman on behalf of the Plaintiffs.

11 MR. DRAKULICH: Nick Drakulich on behalf of the
12 Plaintiffs.

13 MR. ARSENAULT: Richard Arsenault, Plaintiffs.

14 MR. SHELQUIST: Rob Shelquist on behalf of the
15 Plaintiffs.

16 MR. BECNEL: Daniel Becnel on behalf of the
17 clients I represent.

18 THE COURT: Anyone else want to have their
19 appearance noted for the Plaintiffs?

20 MR. DOYLE: Jim Doyle on behalf of the Plaintiffs.

21 MR. JOHNSON: Mike Johnson on behalf of the
22 Plaintiffs.

23 MR. STEVENSON: Marcus Stevenson on behalf of the
24 Plaintiffs.

25 MS. GLUEK: Karla Gluek on behalf of the

1 Plaintiffs.

2 MS. SCHAEFFER: Karren Schaeffer on behalf of the
3 Plaintiffs.

4 THE COURT: If any of you haven't given cards to
5 our court reporter, maybe sometime before you leave the
6 courthouse you can do that so she can get the spellings
7 right. Is that everybody for the Plaintiffs?

8 For the Defendants.

9 MR. RING: Dan Ring on behalf of the Medtronic
10 Defendants.

11 MR. SOULE: George Soule on behalf of the
12 Medtronic Defendants.

13 THE COURT: Good morning to the two of you. You
14 are outnumbered.

15 MR. RING: That's okay. I like the odds.

16 THE COURT: Okay. We're here for a status
17 conference and there's been a proposed, I think, agenda
18 submitted. And unless the parties have other views of it, I
19 would suggest we take up the items as they are listed in
20 that proposed agenda. Now, if anybody has any different
21 views as to what we should take up out of order, let me
22 know. Mr. Gustafson.

23 MR. GUSTAFSON: I think that's fine, your Honor.

24 MR. RING: I agree, your Honor.

25 THE COURT: First is the request for leave for

1 Plaintiffs to file a Motion for Reconsideration. I should
2 also state for the record that I have received several
3 letters from the parties, from counsel, with respect to
4 various matters on the agenda today. I think everybody has
5 been copied on those. I got them from Mr. Gustafson and his
6 group, and Mr. Ring. I also have a letter from Mr. Becnel.

7 MR. GUSTAFSON: Judge, I'm having trouble hearing
8 you. I don't know if the microphone is on.

9 THE COURT: I'll get it over here. I have a
10 tendency to put my head down and mumble. You're not the
11 first one. You said it a little more gently than others
12 tell me.

13 MR. GUSTAFSON: I apologize for interrupting.
14 It's better now.

15 THE COURT: No apologies necessary. It's either
16 you telling me that or the court reporter is going to turn
17 around and tell me the same thing.

18 Okay. Motion for Reconsideration.

19 MR. GUSTAFSON: Your Honor, we put our position in
20 the letter as required by the local rules. I would like to
21 make a couple of points which I think are important.

22 First of all, we'd like you to reconsider your
23 ruling because we think you didn't apply the standards that
24 Twombly requires. I'm going to give you a specific example
25 of what we put more in our letter.

1 In our complaint we allege that the Medtronic
2 Defendants violated the manufacturing requirements of their
3 product. And as you know, we haven't had a chance to do
4 discovery so we don't know what the actual requirements are.
5 But we said that the Good Manufacturing Practices and the
6 quality control guidelines that the FDA issues were violated
7 by this Sprint Fidelis manufacturing process.

8 Now, Twombly requires that you accept those
9 pleadings as true and that you give any inferences that need
10 to be drawn from those pleadings in the favor of the
11 Plaintiffs. But what the Court did instead was took
12 Defendants' position that these guidelines are too vague to
13 impose requirements on the devices. And of course we
14 know -- what we know for sure is that we don't know because
15 we don't know what Medtronic told the FDA and we don't know
16 what the FDA told Medtronic. But if you look at your order,
17 what you did was you took the Defendants' view that these
18 were too vague to constitute requirements and you accepted
19 that as true instead of what Plaintiffs alleged as true.
20 That's the first reason that we think that you should allow
21 us to file a Motion for Reconsideration.

22 The second reason, Judge, is because you, in your
23 order, said that we needed to plead specifically what the
24 requirements are that Medtronic had that we claim were
25 violated in order to make out a parallel requirements

1 exception to Riegel. And while we don't disagree that we
2 need to make an allegation that there were parallel
3 violations, it's impossible for us to allege that.

4 Medtronic's filings with the FDA are secret. They are not
5 available to us on any -- in any way except through either
6 discovery in this litigation or through a Freedom of
7 Information Act, which people have made but not yet received
8 full production of.

9 And so by requiring us to say specifically what
10 the requirements are that Medtronic was operating under, you
11 imposed upon the Plaintiffs an impossibility standard, not a
12 plausibility standard, because there is no way that we could
13 know that. And the example that I would use is if I were
14 going to sue Mr. Ring for something, and the Court said to
15 me you have to tell me Dan Ring's Social Security number
16 before I will allow this claim to go forward, it's
17 impossible. Unless he tells me, I can't know it. And
18 that's what you have done by imposing on us the obligation
19 to plead the specifics of the requirements that Medtronic
20 told the FDA.

21 Third, and I'm going to be brief on these, Judge,
22 but the presumption against preemption which seemed dead
23 after Riegel because it was only in the dissent in Riegel
24 and not in the majority opinion, was revived by the Supreme
25 Court in Altria. And if there was any doubt about it, you

1 can look at Justice Thomas's dissent and he says hold on.
2 In Riegel we just pushed that aside and the majority opinion
3 says, Well, yeah, but we put it back in.

4 And so to the extent there was any doubt about
5 whether a claim was preempted, this Court was obligated to
6 apply that presumption and not find preemption. Instead
7 your Honor did the opposite. You said to the extent that
8 it's not clear, I'm going to find these claims preempted.

9 Finally, with respect to your application of
10 Buckman, the law in the Eighth Circuit was not changed by
11 Riegel. It was -- it's in my view absolutely clear that if
12 there is an express preemption statute, that that counsels
13 or preempts or, I'm sorry, presumes that that's the extent
14 of the preemption that Congress intended. Now, it used to
15 be -- I think it's fair to say that the law used to be that
16 if there was an express preemption statute there could be no
17 implied preemption, and that certainly is not the law
18 anymore.

19 But the Eighth Circuit law is that if there is an
20 express preemption statute, you need to go back and find an
21 ex -- some intention of Congress to allow additional implied
22 preemption. Buckman is clearly an implied preemption
23 decision in the face of an express preemption statute, but
24 it's limited to a fraud on the FDA claim. And here there is
25 no -- nothing in the congressional record that supports the

1 notion that they intended other implied preemption in
2 addition to the express preemption statute. In fact, the
3 legislative history, which we didn't brief but we could
4 brief, suggests exactly the opposite. It suggests that this
5 express preemption statute was going to be all there was,
6 and that the exception for parallel requirements was to
7 be -- was to be honored as part of this preemption.

8 For those reasons, Judge, we think that we ought
9 to brief this Motion for Reconsideration. We think that
10 there are bases that were not argued in the original papers
11 and we would ask you permission to have this motion
12 reconsidered.

13 THE COURT: Before you sit down, how much of this
14 motion of yours is dependent upon your view that you were
15 denied the opportunity for discovery?

16 MR. GUSTAFSON: Well, certainly the notion about
17 what we have to plead. I mean, without access to
18 Medtronic's filings with the FDA it's impossible for us to
19 meet the standard that you apply. I mean, if -- so to the
20 extent that that's the standard, we couldn't do it without
21 discovery.

22 Now, this is not a hard discovery. I mean, to the
23 extent that, you know, we sort of want to be cognizant of
24 Twombly's notion that we don't want to go into full-blown
25 discovery in order to -- you know, in cases where it's not

1 necessary. This discovery, the Medtronic's requirements
2 discovery is as simple as ordering Medtronic to turn over
3 the FDA filings in unredacted form. I mean, the FOIA
4 requests that various Plaintiffs' counsel have made have
5 been responded to in part by the FDA but they redact 99
6 percent of it because Medtronic has said it's confidential
7 information.

8 THE COURT: But if I read your letter correctly,
9 and perhaps other letters of the Plaintiffs, there's a more
10 basic complaint that you should have had discovery and that
11 I denied it. And I guess I'm somewhat -- I won't say
12 troubled, but I'm concerned about that because I thought it
13 was as clear as could be when we started out going down this
14 road on the Motion to Dismiss that discovery was not needed
15 and that everybody agreed. Mr. Becnel, you can sit down,
16 please. Discovery was not needed.

17 MR. GUSTAFSON: Well, I looked back at the
18 transcript that you cited and I thought I made clear that if
19 we're going to take this as a 12(b)(6) motion and not impose
20 any other requirements other than the pleading requirements,
21 I didn't need discovery. But that's not what you did. What
22 you did was you said you have to tell me specifically what
23 Medtronic violated. But I can't. I can't know what the
24 requirements were without discovery because it's secret. So
25 in my view you brought something else into the process that

1 a normal 12(b)(6) motion wouldn't bring. Normally I would
2 say that we pleaded that they violated those requirements
3 and that would be a sufficient pleading to get by 12(b)(6).
4 And in that regard I don't need discovery. But you're
5 holding me to a higher standard. Now, I disagree with you
6 that that's the standard that Twombly requires. I
7 understand that. But to the extent that you're going to
8 impose that standard on me, then I need discovery.

9 Remember, Judge, that the FDA has already
10 determined that Medtronic violated federal law, okay,
11 because under the federal regulations they can't issue this
12 as a recall without a conclusion that federal law has been
13 violated.

14 THE COURT: Well, wasn't that issue basically
15 briefed?

16 MR. GUSTAFSON: That issue was briefed. But our
17 view is that you ignored that in your order because you
18 can't square those things. The FDA has said this product
19 violates federal requirements, okay. And you've said the
20 Plaintiffs didn't plead a sufficient violation of federal
21 requirements. And the missing link here is the FDA papers
22 that only discovery will allow.

23 So I'm happy if -- if that's going to be the
24 standard, again, I disagree that that's the standard -- but
25 if that's going to be the standard for you then to say and

1 I'm not going to let you have discovery, well, then it's
2 impossible. I can't meet the standard without discovery.

3 So that's the issue that I thought when I said at
4 the status conference, you know, I thought when I said
5 unless we bring something else we don't need discovery, I
6 thought that I had made that clear but I obviously should
7 have said it more clearly.

8 THE COURT: But wasn't the briefing on that
9 particular issue or a lot of these issues very clear as to
10 what at least Medtronic was asking to be done here and no
11 issue was raised about discovery in the briefs?

12 MR. GUSTAFSON: Well, I disagree that we didn't
13 raise it. We raised it at the hearing. But in Medtronic's
14 response they said we have the burden to demonstrate which
15 requirements were violated. We don't disagree with that as
16 a general premise, okay. But on a Motion to Dismiss I
17 disagree that I have to plead it with the specificity that
18 you've said I do.

19 So it really wasn't an issue that was joined in
20 the briefing because if you look at the cases that say the
21 Plaintiff has the burden to demonstrate which requirements
22 were violated so there is to be made out a parallel
23 violation, those cases are cases in which summary
24 judgment -- you know, they are summary judgment cases. So
25 there's been discovery about what the requirements were and

1 what the violations were.

2 Here I have to make that claim that's plausible.
3 The plausible claim is they violated the requirements. The
4 proof of that for the pleadings stage is that the FDA agrees
5 with that. In fact, Medtronic agrees with it because
6 Medtronic wouldn't recall this product from the marketplace
7 under the federal regulations unless they believed it
8 violated federal law.

9 So in fact what I think has happened here is
10 Medtronic admitted that it violated federal law. The FDA
11 has confirmed that this product violates federal law, and
12 I've pleaded that in the Master Consolidated Complaint. But
13 you want me to be more specific and I can't do that without
14 discovery.

15 So I don't think the issue was one that was
16 briefed before. I think the issue was one that was sort of
17 like two ships passing in the night.

18 THE COURT: Mr. Ring.

19 MR. RING: Let me start with Twombly. I think the
20 Court's opinion properly applied Twombly. The aspect of
21 Twombly that Plaintiffs forget is that the Court said it is
22 no longer sufficient to offer conclusory statements. You
23 need more. That was briefed and already decided so it need
24 not be briefed and decided again.

25 As to the discovery point, I don't agree that it

1 was two ships passing in the night and the issue was not
2 joined. I think the record was clear. If it was not clear
3 at the beginning it was certainly clear, as your Honor
4 pointed out, that Medtronic's position was that they needed
5 to plead more and had failed. And thus if Plaintiffs
6 believed that they were at risk for not meeting the standard
7 that we set forth, they could have asked at that time and
8 could have briefed the issue of discovery as to whether it
9 was needed or not. They didn't. Time and time again they
10 didn't, and that has to have some consequence.

11 But beyond that, your Honor, the master pleading
12 itself affirmatively pleads statements relating to
13 Medtronic's submissions. That's in quite a lot of tension
14 with the now asserted claim of a lack of sufficient
15 knowledge. In paragraphs 20, 21, 22 and 23, there are
16 explicit references to Medtronic's applications to the FDA.
17 And over and over again assertions that they were
18 fraudulent, that they failed to contain proper facts. And
19 that was affirmatively pled. We were entitled to move to
20 dismiss on those affirmative pleadings. That issue was
21 fully briefed and argued before the Court, and the Court
22 ruled properly on that basis that those claims were
23 preempted.

24 The Court didn't set an impossibility standard.
25 The standard is difficult, but difficult by design. That

1 was Congress's intent in enacting an express preemption
2 provision that the Court applied on its terms. This
3 argument bleeds a bit into the Altria versus Good decision.
4 That decision took pains to distinguish Riegel and the more
5 explicit statute in the MDA. So the Court dealt with the
6 difference in Altria and Riegel and that issue, too, was
7 briefed and argued already. It need not be briefed and
8 argued again.

9 On the issue of Buckman and whether the Eighth
10 Circuit standards were violated by the Court's decision, I
11 think if you look at both Buckman and Brooks you'll see that
12 there's no substance to that argument. Neither Brooks nor
13 Buckman allows a conclusory pleading of regulatory
14 violations to state a parallel claim. Even if they did, you
15 have to read them in light of Riegel and in light of
16 Twombly. In fact, one of the interesting things about
17 Brooks is that the one thing that the majority and the
18 dissent agree on is that the Plaintiff had failed to
19 properly plead a claim for negligence per se based on
20 violation of general warning standards by the Defendant
21 there.

22 And so even there a generic statement of a failure
23 to comply with warning standards in that case was deemed
24 insufficient as a matter of law. And so neither of those
25 arguments supports reconsideration here.

1 At bottom, in our view, this is a request to
2 re-argue aspects of the Court's decision. It is not the
3 demonstration of compelling circumstances and a manifest
4 error of law in the Court's prior decision and it should be
5 denied.

6 THE COURT: Anything further?

7 MR. GUSTAFSON: Nothing further on that issue,
8 your Honor.

9 THE COURT: Okay. What's the next issue we have
10 here? Motion for Leave to Amend which I guess takes up some
11 of the same issues.

12 MR. GUSTAFSON: It takes up some of the same
13 issues, Judge, but I won't repeat those arguments. I think
14 there's two things here. Although I guess you could say
15 that the Master Consolidated Complaint was, you know, sort
16 of after the initial complaints were filed, it's really not
17 an amended complaint in the sense that the case law uses it.
18 The case law I think is -- certainly indicates this is
19 within your discretion, Judge. But it also indicates if you
20 look at all the cases what it says is, look, you get one try
21 to plead around the dismissal order. It's a very rare
22 circumstance where the Court dismisses a complaint and gives
23 the reasons for it and then says, "And you don't get a
24 chance to fix it."

25 Now, there are circumstances and you can find lots

1 of cases for this proposition where it can't be fixed
2 because, you know, the statute of limitations has run and
3 it's absolute and there's no exceptions or things like that
4 where there's just nothing you can do. That's not the
5 situation here.

6 You know, we don't have any discovery but we do
7 have a FOIA request that's pending. We got the first
8 production of those FOIA documents I want to say a week
9 before the hearings. You saw we made those supplemental
10 filings just before the Motion to Dismiss argument just to
11 put some of those documents before the Court, but we hadn't
12 had a chance to look at them. There's in excess of a
13 thousand pages that have been produced and we have some
14 facts from those that we can add to the complaint.

15 THE COURT: Are those the only -- is that the only
16 way you want to amend the complaint?

17 MR. GUSTAFSON: Well, I think we would certainly
18 respond to some of your Honor's criticisms of the way we
19 alleged our parallel violations. I mean --

20 THE COURT: But you had all of that information.

21 MR. GUSTAFSON: We didn't.

22 THE COURT: You don't need new information on
23 discovery for that.

24 MR. GUSTAFSON: We didn't. We didn't have the
25 information that you didn't think it was sufficient. That

1 we didn't allege that the particulars of the legal court, we
2 didn't have that information. I mean, if you look at it --

3 THE COURT: What do you mean you didn't have that
4 information?

5 MR. GUSTAFSON: Well, we didn't know what your
6 criticisms of our complaint were.

7 THE COURT: Well, you knew what Medtronic's
8 position was going to be.

9 MR. GUSTAFSON: Sure we did. But the complaint
10 was -- we certainly wouldn't have amended the complaint
11 after we saw their brief. That would not be the way the
12 system is designed to work.

13 THE COURT: You wait until you get an order that
14 you don't like and you say, Well, let's go back and try it
15 again. That seems to me that's what's happening here.

16 MR. GUSTAFSON: It is what is happening here. I
17 acknowledge that. But I think that's what the law says.

18 THE COURT: How many bites at the apple do you
19 get?

20 MR. GUSTAFSON: Well, we ought to get one.

21 THE COURT: You already had one when you filed the
22 complaint.

23 MR. GUSTAFSON: Well, I understand that. What I'm
24 saying is that if you look at the case law, the normal
25 situation is you file a complaint. There's a Motion to

1 Dismiss. You get leave to amend once.

2 THE COURT: Usually that comes, at least in my
3 experience, when that comes, you get the Motion to Dismiss,
4 and then the Plaintiff comes in and wants to amend or does
5 amend the complaint before we have a hearing on it. They
6 don't go all the way through and brief it and get the
7 decision and then say, Oh, Judge, we'd like to have another
8 shot at this because now we know how you're going to rule on
9 this and we weren't expecting that. That's the position
10 you're in right now.

11 MR. GUSTAFSON: Yeah, I think that's fair. I
12 don't disagree with that characterization. I think that you
13 ought to give us a chance to respond to your order. I don't
14 think there's anything unfair about that. We essentially
15 have never amended this complaint.

16 THE COURT: Well, you can respond to the order by,
17 as you've done here, attempting to make a Motion to
18 Reconsider what I've done, but a Motion for Leave to Amend
19 is a different animal. You're going to open up everything
20 then. You're basically changing -- changing the playing
21 field, so to speak, after you've run one game all the way
22 out and the score has come up against you and now you want
23 to change the rules. At least that's the way I read it in
24 my simplistic fashion.

25 MR. GUSTAFSON: With all due respect we don't

1 agree on this. I think that the rules contemplate freely
2 getting leave to amend. I think that we have -- this is not
3 a circumstance in which we have taken repeated bites at the
4 apple. We did a Master Consolidated Complaint based on the
5 information we had. Your Honor has called to our attention
6 some -- your views on why that complaint is inadequate, and
7 I think we ought to be entitled to respond to those.

8 It's not a situation where prejudice is going to
9 be imposed upon Medtronic here. I mean, nothing has
10 occurred. So --

11 THE COURT: Well, I think -- they have won the
12 case. That's what's occurred. There's a little bit of
13 prejudice to them. They are back where they started.

14 MR. GUSTAFSON: Yeah, I agree with you. I suppose
15 it depends on how you characterize prejudice. These folks
16 who have got these devices implanted have been deprived of a
17 remedy and it shouldn't be because the pleadings were --
18 that we didn't jump over all the hurdles. If we can jump
19 them, we ought to be able to jump them. It's not quite the
20 analogy of the game has been played and we lost. We weren't
21 exactly sure what the rules were until halftime. Which is
22 where I view us at now. And I think that --

23 THE COURT: Seems to me that halftime is probably
24 when the briefs were written.

25 MR. GUSTAFSON: Well, you know, that's not been my

1 experience. Maybe your experience is different than mine,
2 but my experience has been that it's not the proper time to
3 ask for leave to amend after the briefs have been written.

4 THE COURT: No, but I think you normally -- it's
5 not uncommon when the briefs are in to say -- when the first
6 briefs come in to have the Plaintiffs say we need some
7 discovery. Make that motion under Rule 56(f) or whatever
8 the rule is and convert it to a Motion for Summary Judgment.
9 That was available here.

10 MR. GUSTAFSON: Again, I have to disagree with
11 you, Judge. If this were a Summary Judgment Motion, a Rule
12 56(f) affidavit would have been appropriate. But this is a
13 Rule 12 motion and we don't think --

14 THE COURT: But under a Rule 12 you have the
15 opportunity to convert it to a Rule 56.

16 MR. GUSTAFSON: I understand that. And the
17 conversion occurs when you put facts into the record that
18 would otherwise change it to a Rule 56 motion. But at that
19 time I didn't have any facts to put into the record because
20 I haven't had any discovery.

21 So I feel like I'm getting whipsawed here and I
22 understand we have a disagreement about how this process
23 ought to work. But I'm of the view that we haven't had a
24 chance to amend this complaint. I don't think it's the norm
25 that we should amend it during the process. I do think we

1 should have the right to one amendment after the order comes
2 out. And I don't think that any analogy about how Medtronic
3 is prejudiced by this is right. They -- true enough,
4 perhaps we can't fix it, but I don't think that's the case
5 here. I think we can fix it. I think there's additional
6 facts that have become available and I think that to the
7 extent that we didn't say the right magic words, we ought to
8 have a chance to fix that.

9 THE COURT: Well, I'm not sure it's the right
10 magic words. I certainly don't view my concerns right now
11 that there's some hyper-technical view of the pleadings
12 rules. But it does bother me that we've gone through a long
13 process which at least at the outset it was announced by you
14 on behalf of your clients that discovery was not needed.
15 And -- because I asked the question. It was -- we had a
16 couple of sessions on it. One out here I think on the
17 record and I think we had another one in the pre status
18 conference.

19 And the question is should we have discovery or
20 should we move immediately to Rule 12(b) to tee up the
21 preemption issue, and everybody thought that was the way to
22 go. And we teed it up and we've gone through an extensive
23 briefing and hearing on that and I've issued an opinion and
24 obviously you disagree with me. Obviously I didn't expect
25 the Plaintiffs were going to jump up for joy when they got

1 the order.

2 But now it's sort of let's go back. Now we see
3 we've got some holes in this thing. Let's go back and try
4 to fill them in and start it all over again. I have
5 troubles with that.

6 MR. GUSTAFSON: I understand you're troubled with
7 that but here is my response to it, Judge. If we were just
8 talking about whether claims were preempted or not, I would
9 agree with you and I don't think my statement at the status
10 conference would be inaccurate. We did not take the
11 position in opposition to this motion that claims for design
12 defects were not preempted. I think Riegel has made that
13 clear. That those claims as a matter of law are preempted.
14 Those are the kinds of things that you can't avoid.

15 But what we're talking about here is parallel
16 exceptions and what you said in your order was you need to
17 tell me what the violations are. Well, at the status
18 conference back at the beginning I didn't understand that
19 you were going to put me to that burden. Okay. So it's a
20 little bit out of context to say you need discovery in a
21 12(b)(6). No, I don't. If it's a 12(b)(6) on the law, I
22 don't need any discovery. But if you're going to put me to
23 the additional burden of having to demonstrate the facts
24 that were violated, it's not the same as to allege facts
25 that make our claim here. It's to tell me the facts -- tell

1 me the requirements that they violated. Okay.

2 And so I think you imposed upon us a standard that
3 can't be met on a Rule 12(b)(6) motion and that's really
4 where we disagree on discovery. And to the extent that
5 it's -- to the extent that it's just you didn't plead
6 enough, you know, you didn't say enough things to make out a
7 claim, then I think you ought to give us a chance to
8 replead.

9 THE COURT: Okay.

10 MR. GUSTAFSON: I understand you're troubled. I'm
11 troubled, too. But I think the outcome here that we're
12 trying to --

13 THE COURT: I understand your being troubled more
14 than you understand mine.

15 MR. GUSTAFSON: Well, I think we just disagree on
16 what the procedure should have been. I don't think the
17 Master Consolidated Complaint was an amended complaint. I
18 think that was our first bite at the apple and I think we're
19 entitled under the law to one more.

20 Thank you, Judge.

21 THE COURT: Mr. Ring, just a minute.

22 (Pause in proceedings)

23 THE COURT: Excuse me. Go ahead.

24 MR. RING: I think the first bite at the apple
25 were the initial pleadings that were filed on October 15th

1 and thereafter. The second bite of the apple and a lengthy
2 and detailed attempt at it was the Master Consolidated
3 Complaint. I think it was well understood by Plaintiffs
4 that it was Medtronic's view that that issue could be
5 decided, the Motion to Dismiss could be decided as a matter
6 of law. That discovery was inappropriate. Certainly at the
7 point where Medtronic filed its brief there could be no
8 doubt in Plaintiffs' mind that we believed they had failed
9 to meet the applicable legal standards.

10 But it's also true that Twombly wasn't decided
11 after we filed our brief. It was decided long before. The
12 standards set in Riegel, the standards set in the cases we
13 cite and the Court thoroughly analyzes and reviews in its
14 opinion were all there for Plaintiffs to understand whether
15 there would be -- what burdens were imposed upon them to
16 plead a claim under the law as set forth. They might
17 disagree with the law but they can't say they didn't know
18 about it. And certainly when Medtronic filed its opening
19 motion, they knew exactly, exactly, the standard we thought
20 should be imposed.

21 You can't find in their opposition brief any
22 request for leave to amend if the Court were to agree with
23 us. We can't find really even very much of the request in
24 oral argument. And even now, three weeks after the Court's
25 ruling, we still don't have any real assertions of what such

1 an amendment would even conceivably look like. All we have
2 is a statement, Well, there are additional facts. As the
3 Court rightly pointed out in its opinion, it seems that
4 Plaintiffs may want to change their theory. But that's not
5 appropriate. And there's ample legal support for the
6 Court's decision that a change in theory, a change in course
7 now, would be prejudicial and shouldn't be allowed.

8 I disagree that the Court set a standard that is
9 inappropriate, that is not based in the law. That it is
10 somehow a new standard that could not have been anticipated
11 when Plaintiffs pled their claim. And to argue, again, that
12 there are new facts and perhaps with the benefit of
13 discovery they could do a better job does change the rules
14 of this proceeding and it's not merely a situation of the
15 Court applying hyper-technical constructions of pleading
16 rules or engaging in a game of gotcha. You tried, you lost,
17 so be it. It's based on substantive legal principles that
18 were properly applied and shouldn't be re-argued now. And
19 underlying the requests for Motion for Leave to Amend is
20 really an attempt to re-argue those legal standards and that
21 shouldn't be allowed at this point.

22 THE COURT: Okay.

23 MR. GUSTAFSON: All I want to add, your Honor, you
24 know, we can't debate the merits of the amendment until we
25 put it in front of you. And so we would ask that you let us

1 file the motion. If you disagree that we have changed the
2 pleading, then you can, you know, deny it as futile. But we
3 ought to be able to file the motion.

4 I just want to add, you know we looked at this
5 issue about whether you asked for leave to amend in your
6 opposition papers and we think that it's squarely against
7 Eighth Circuit law. It does not preserve your right. It
8 does not preserve -- you know, saying if you don't think my
9 pleading is good enough in my opposition papers doesn't
10 preserve the leave to amend. You have to file a motion.
11 It's not enough to put a footnote in the brief and say, By
12 the way, if you don't like it let us have another whack at
13 it. And so we think that we have to file a motion to make
14 the record complete and we would ask for permission to do
15 that.

16 THE COURT: So do I have to give you permission to
17 file it?

18 MR. GUSTAFSON: I think in the normal --

19 THE COURT: I suppose because I said I wasn't
20 going to allow it. In the normal course I wouldn't have to.

21 MR. GUSTAFSON: In the normal circumstance I think
22 the answer to that question is no. But given the fact that
23 your order addresses it and it's an MDL, and I sort of
24 learned over the years that MDLs are always a little bit
25 different. The judge has a supervisory role that normally

1 is not quite the same as the rest of them. So I don't think
2 so normally, but given your order I thought that we needed
3 permission.

4 THE COURT: Mr. Ring.

5 MR. RING: Just briefly, your Honor. If the Court
6 is going to allow them to file a motion, we would ask that
7 it set a very short time frame to do that. This issue
8 should not delay this proceeding. In light of your -- the
9 Court's ruling and the positions the parties have taken,
10 this shouldn't get in the way of further proceedings here.
11 And it shouldn't delay application of the Court's order.

12 THE COURT: Okay. Let's -- well, let's deal with
13 the issue for purposes of -- you have something else,
14 Mr. Gustafson?

15 MR. GUSTAFSON: No, I was just coming back for
16 whatever you guys wanted to talk about next.

17 THE COURT: You're ready to go, whatever it was?

18 MR. GUSTAFSON: I'm ready to go.

19 THE COURT: Well, I think one of the issues that
20 we should address while we're here -- and I know there's a
21 Motion for Reconsideration or a request for reconsideration,
22 a Motion to Amend. But let's just for purposes of the next
23 few minutes assume that both of those are denied. The
24 question is where do we go now in terms of appeals or what?
25 At least I would like to get the parties' views on that.

1 I directed the parties to specifically respond to
2 the possibility of certifying this up to the Eighth Circuit
3 and I've gotten those responses. But we have some other
4 issues. Medtronic's position is that the 229 cases that are
5 basically wrapped within the Master Consolidated Complaint
6 should go ahead on appeal, at least as I understand that's
7 their view. The Plaintiffs probably have some other views.

8 MR. GUSTAFSON: Let me just say, Judge, although I
9 know this is not a topic you want to revisit over and over,
10 those 229 people have never had the chance to amend the
11 complaint. And so what I lead into here with the appeal
12 issues, everybody is in a little bit of a different
13 situation here and for that reason we don't think
14 certification is appropriate now. We think it's premature.

15 THE COURT: Just out of curiosity, when we got
16 going on this whole process of teeing this thing up, at
17 least it was my understanding, and maybe I misconstrued it,
18 but the whole purpose here was we knew we had the preemption
19 issue. We wanted to get it teed up and we wanted to get it
20 resolved at the District Court level so it could go to the
21 Court of Appeals. I just want to figure out how we get it
22 there. And I've done my part right now. That wasn't the
23 purpose of the ruling. But I've done my part now and I seem
24 to be getting some sort of resistance as to how we're going
25 to get there from everybody.

1 MR. GUSTAFSON: We ultimately agree with you that
2 this should go to the Court of Appeals. The big difference
3 between Medtronic and the Plaintiffs at this point is that
4 we think that we ought to put together the best record that
5 we can put together for the Court of Appeals and we don't
6 think we're at the stage yet where there is the best record.
7 And if we're really going to do this on a sort of
8 quasi-consolidated basis, which is what the Master Complaint
9 has kind of done for administrative purposes, you know, we
10 think we need to exhaust all of the motion practices that
11 makes people different.

12 THE COURT: Let me just go back a moment and
13 review. You mentioned that in a letter that this Master
14 Complaint is just sort of an administrative piece of paper.
15 I don't think it was treated that way in any of the briefs.
16 That's the first time I've heard that that's what it is. It
17 seems to me that this is the complaint.

18 MR. GUSTAFSON: It's always a little bit of an
19 unusual situation. I think that the language I think that
20 we put in the letter comes out of your order that this is an
21 administrative document and it's not going to be actually
22 for any particular case, you know, and those claims are
23 still the same, I think. We have to have some way to manage
24 this MDL. I don't think those were my words. I think those
25 came from you but perhaps it came from an order that we

1 submitted jointly. I can't remember right now.

2 But I'm not suggesting that it was an exercise in
3 law school academics. That's not what I'm suggesting. What
4 I'm saying is that what Medtronic would like to have you do
5 now is have you enter judgment in a bunch of cases and have
6 those go up to the Eighth Circuit. We just don't think
7 that's the best way to go about this. We do this 1292(b)
8 ultimately is the way to do it because otherwise you're
9 going to have all kinds of issues about who represents whom
10 and who is entitled to write briefs and all the rest of it.

11 THE COURT: I'm not going to have that issue. The
12 Eighth Circuit is going to have that issue.

13 MR. GUSTAFSON: The Eighth Circuit is going to
14 have those issues. But it seems to me the job of the MDL is
15 to facilitate a process in which people have the opportunity
16 to be heard and all the rest of it. As I mentioned in
17 chambers when we were there, that using 1292(b) facilitates
18 the Eighth Circuit has a chance to weigh in on how they want
19 this appeal to be done as well. Because you will certify it
20 and they will accept it or not accept it or accept it with
21 some sort of modifications.

22 What we think is the process that should be
23 undertaken here is that you should set a deadline to file
24 whatever motions that we want to file and we should brief
25 those and if you want to have argument on it, fine. Or not,

1 fine. You should rule. We should make the record what it
2 is so it's consistent with as many cases as possible.

3 I think we probably, if we had an opportunity to
4 file motions, I believe we can make the record consistent
5 for the most part so that, you know, people sort of have a
6 chance to put into the record what they need for appeal.

7 And then I think that we should -- that 1292 is
8 the vehicle that we should use because I can't see -- I
9 can't see a circumstance in which we could pick a particular
10 case as a test case, like if we were going to have
11 bellwether trials where you would pick some cases and say
12 let's try them and see how they -- I don't see how that
13 works on appeal. I think we need to get a pleading that we
14 can live with. We need to get the record established with
15 respect to amends to discovery that we need to get
16 established and then we need to tell the Eighth Circuit now
17 we want you to rule but we want it to be on a record as
18 complete as it can be.

19 So I think we're generally in support of what you
20 have in mind. We just think it's premature right now and I
21 think it's a couple -- go through a motion cycle and then
22 you will go rule on the matters.

23 THE COURT: Let's assume hypothetically that your
24 request to amend has been denied and the Motion for
25 Reconsideration has been denied. So now the issue is right

1 there. What is your view as to what the Court should do? I
2 can enter judgment obviously on the 229. Those are, as far
3 as I'm concerned, those are done.

4 MR. GUSTAFSON: Yeah, I think that -- I think that
5 the thing you should do, after you give us a chance to file
6 those motions, then I think we should certify the order to
7 the Court of Appeals and take it up on that.

8 Look, there's always going to be -- in these MDLs
9 where there's thousands of cases, there's always going to be
10 people who want to take a run at it that it doesn't apply to
11 me. The show cause order that you issued earlier, there's
12 going to be people that have filings that have serious
13 injuries and they are going to try to avoid the impact of
14 your ruling. But I think that that process can be
15 undertaken better if we have some understanding of what the
16 Eighth Circuit will do. The problem with the record --

17 THE COURT: In other words, you would put off all
18 of the show cause until --

19 MR. GUSTAFSON: I think you can do it either way.
20 My instinct is that if you force judgments to go in, you're
21 going to get a whole bunch of motions from people saying I
22 want to amend mine under Rule 59(e) because I have different
23 claims, I'm from a different state, I have different issues.
24 Whereas if we go through that process as much as we can in
25 general terms and then make sure the record is complete, we

1 can do an appeal. We can do an appeal.

2 So I think you can do it either way. But I think
3 that, you know, it -- I get the impression your inclination
4 is to get it up there now.

5 THE COURT: Well, I guess you may be right. I
6 guess I started out with the view once my order issued that
7 the purpose of all of this Motion to Dismiss was to get it
8 up there and get it up there promptly because it was a key
9 issue. Getting it up there is not quite as simple as maybe
10 I thought it would have been earlier on. I mean, we've got
11 so many cases and we've got judgment entered and things like
12 that.

13 So I'm, frankly, looking for some guidance from
14 counsel in that regard. And if we dealt with just the 229,
15 let those go up in some form, then the other issue of course
16 is what do we do with the order to show cause? Do we
17 proceed with that process or do we put that on hold? I
18 mean, it's going to take, even if we certify it, I'm
19 guessing that the Eighth Circuit is -- it will be, I would
20 guess, at the earliest late next year before we had a ruling
21 on it, assuming they took it. I don't know whether they
22 will take it or not.

23 MR. GUSTAFSON: Sure. I understand they are
24 averaging about 14 months in civil cases right now, which I
25 thought it was pretty quick when I heard that number.

1 THE COURT: I'm not going to get into that. They
2 will read about my comments.

3 MR. GUSTAFSON: That comes from the clerk's office
4 so I think it's a safe citation.

5 THE COURT: Okay.

6 MR. GUSTAFSON: Here is the thing. I think that
7 the big difference between where Medtronic is on this and
8 where the Plaintiffs are on this is that they think that you
9 can enter the 229 now and it will go up on appeal. And of
10 course they are technically correct on that. For the
11 purposes of the MDL, if you want the Eighth Circuit order to
12 have some meaning, you can't send up ones that are
13 significantly differently situated than the other ones
14 because all you'll get when it comes back is, okay, that's
15 true for the 229 but my situation is different because. And
16 that's why we think that you ought to take up the
17 differences first and then let it go up.

18 THE COURT: Okay. Thank you.

19 Mr. Ring.

20 MR. GUSTAFSON: Thank you.

21 MR. RING: I guess I'm struggling with Plaintiffs'
22 view on when they actually think the case would be ready to
23 go up on appeal. If I take the last statement from
24 Mr. Gustafson, I think what he's suggesting is the Court
25 should wait until every individual circumstance is ruled

1 upon in some way, shape or form, and then certify a lot of
2 issues or a lot of individual rulings after the order to
3 show cause process is done.

4 That seems an inefficient way to get the core
5 issues up to the Eighth Circuit and, as you noted, it will
6 take some time for them to decide.

7 And I'm also struggling with Plaintiffs' position
8 that the three factors for 1292(b) certification are not met
9 right now but how any aspect of ruling on a Motion for Leave
10 to Amend or Motion for Reconsideration would change any of
11 their analysis of those three factors.

12 That's why in our view the most efficient way --
13 and it is not perfect but I think here we're looking for the
14 best and most efficient solution. The most efficient way to
15 get the Court's ruling up is to enter judgment on those 229.
16 There won't be any dispute in the Eighth Circuit about
17 taking those appeals. They need to. And true, there may be
18 difficulties for the Eighth Circuit in managing that
19 process.

20 But that in effect will happen in any number of
21 variations of how these cases proceed. If the Court goes
22 through the amended order to show cause process, there will
23 be individual judgments. Those will be subject to appeal.

24 I think it's very difficult for -- for any process
25 to be free from some procedural difficulties. But the

1 process of entering judgment does eliminate the uncertainty
2 of a 1292(b) appeal. It gets all the core issues up to the
3 Eighth Circuit in a prompt fashion.

4 And as to Mr. Gustafson's point that these people
5 have never had a chance to amend, that's just wrong.

6 Because not only did they file an initial complaint, in
7 adopting the master pleading they had, as many have done,
8 the opportunity to add any allegations they wished, any
9 additional claims they wished. They chose simply to adopt.

10 And I do think it's unfair to describe the Master
11 Consolidated Complaint as simply an administrative device.
12 It certainly has that function. But when you look at the
13 Court's order, that order did other things. It, for
14 example, deemed the allegations of the master pleading an
15 amendment to all existing pleadings. And one of the reasons
16 for that was to protect Plaintiffs against runnings of
17 statutes of limitations so that there was no doubt that
18 those allegations were encompassed. Not only were they
19 encompassed in any individual pleading, but if a Plaintiff
20 chose they could disclaim them. If they wanted to say
21 that's not my theory, my theory is different, they had that
22 ability to do it.

23 So for these 229 the issue is pretty simple. They
24 adopted the master pleading. There's no doubt about the
25 application of the Court's ruling to those. It eliminates

1 some uncertainty about 1292(b). I don't think the record is
2 going to be in any different shape that matters to the core
3 issues that are set forth in the Court's ruling if the Court
4 were to enter that judgment.

5 Let me switch now to what we should do with the
6 amended order to show cause process. I agree that
7 reasonable minds can differ about whether continuing with
8 the process is apt to advance the litigation. Given how
9 long it will take for the Eighth Circuit to rule, and given
10 that there may be individuals who have truly unique issues
11 that in themselves may be unique appellate issues that might
12 in turn warrant certification, there is some value -- and we
13 said this in our joint status report -- there is some value
14 in continuing that. For those cases that --

15 THE COURT: Continuing with the orders?

16 MR. RING: Continuing with the amended order to
17 show cause process as set forth. There's some value in
18 that. I would note that the Plaintiffs' process if it's a
19 1292(b) certification of the Court's ruling as to the master
20 pleading and the Eighth Circuit rules on that, that that
21 solution also leaves for another day any individualized
22 issues. So that solution doesn't obviate the need to deal
23 with individual arguments that the Court has permitted under
24 the amended order to show cause process.

25 And so there is some value in getting those

1 individualized issues determined. I recognize that there's
2 a burden on the Court in ruling on those issues if the
3 Eighth Circuit were to disagree in whole or in part with its
4 preemption rule. It's of course difficult to predict which
5 way that balance will ultimately fall. We think the Eighth
6 Circuit will affirm the Court's ruling; but if it should
7 reverse, then the Court may have done things in ruling on --
8 in the amended order to show cause that were not necessary
9 or might be altered by the Eighth Circuit ruling. That is a
10 risk, but it is a risk that's not uncommon to MDLs when
11 interlocutory issues go up on appeal.

12 You know, so in our view there is value to the
13 amended order to show cause process. We are happy, to the
14 extent our views are informed by what the Court does
15 following today's proceedings, we are happy to consider
16 further whether there are other alternatives that best
17 manage both the need to proceed with determinations in
18 individual cases versus the potential risk of doing things
19 that may not be necessary if your ruling is overturned on
20 appeal.

21 And I'm happy to come back to the Court and
22 provide any further views that might bear on that.

23 THE COURT: But right now we're just sort of
24 addressing, at least both of your arguments, proceeding as
25 if we had an appeal of the 229 proceeding with the order to

1 show cause, the amended order to show cause as is or, I
2 suppose, staying everything.

3 MR. RING: Right. You could stay everything. You
4 could provide a permissive process where the Court might be
5 notified of the parties who seek to challenge its ruling if
6 it's affirmed and allow others who wish to go ahead and
7 assert individual issues or require others who wish to go
8 ahead and assert individual issues to go ahead with the
9 amended order to show cause process. That's not free from
10 difficulty either but that's another option. It is not a
11 perfect setting under any of these scenarios, in part
12 because we can't predict what's going to happen. If I knew
13 today how many individual pleadings and arguments were going
14 to be filed in their general nature, we could all plan
15 better for that.

16 If, as I suspect, what you'll see is that a --
17 even if there's a large number of submissions, that they
18 will raise the same issues over and over and over again and
19 probably some of the same issues that the Court is being
20 presented with now. So the Court's views on the issues that
21 are presented today may short circuit that process further.

22 But I think you're going to see a lot of overlap
23 in similarity that would let the Court rule on those issues
24 not one-by-one but in an efficient group process if we do go
25 forward. And that's also why in our joint status report we

1 suggested that to prevent this from becoming a duplicative,
2 inefficient, repetitive free-for-all, that there should be
3 some order imposed so that multiple parties don't simply
4 repeat and duplicate arguments over and over and over again
5 in those submissions. Those can be joined together in a
6 single filing.

7 I should comment on the idea that's expressed in
8 some of the correspondence and in the joint status that
9 somehow individual issues of state law have some bearing on
10 the preemption decision. We simply don't understand that
11 argument. Individual state law labels on the allegations
12 and individual pleadings won't transform those allegations
13 into a parallel claim or a not parallel claim. Just as this
14 Court did in ruling on the master pleading, you look at the
15 allegations, the factual allegations, the substantive
16 allegations, and compare to see if they are imposing
17 different or additional requirements. There's not going to
18 be a choice of law exercised that relates to preemption in
19 our view.

20 So I think we're all willing to help the Court
21 find a path to appellate review here. In our view, the
22 quickest, simplest, most direct path is to enter final
23 judgments in those 229 and we can help the Court manage the
24 process from there.

25 THE COURT: If we enter judgment on the 229, who

1 is representing those Plaintiffs now? Your group,
2 Mr. Gustafson?

3 MR. GUSTAFSON: You know, I don't know the answer
4 to that, Judge, because I don't have the list. But it
5 certainly is going to be people outside the PSC are going to
6 be representing some of them. People on the PSC are going
7 to represent some of them. But I think it's -- this is yet
8 another issue that is a bit of a problem because it's not --
9 those 229 are not the people who this Court appointed to --
10 I mean, it's clearly going to be an issue that will have to
11 be addressed. So I don't have the list. I can get the list
12 and provide you that information.

13 THE COURT: Well, I think right now I don't need
14 it right now.

15 MR. GUSTAFSON: I suspect it's a lot of different
16 lawyers.

17 MR. RING: I agree that it's going to be different
18 law firms but I submit that that problem, if it's a problem,
19 is one that isn't solved by a 1292(b) appeal.

20 MR. GUSTAFSON: I disagree with that. I'm sorry I
21 didn't mean to interrupt you. I thought you were done.

22 MR. RING: And here is the reason why. A 1292(b)
23 appeal still wouldn't deal with any individual case. So
24 assume the Eighth Circuit affirms and the case then comes
25 back for some form of amended order to show cause process,

1 involving either the 229 or 700 plus cases that are now in
2 front of you represented by individual lawyers who then are
3 going to decide, assuming the Court enters judgment, then
4 well, I'm going to appeal. I'm going to make my individual
5 arguments.

6 And so I don't think the 1292(b) process, while it
7 may make things easier on the Eighth Circuit, I don't think
8 it's the magic solution to prevent any individual lawyers
9 from later seeking to appeal the ruling. It may postpone
10 that but I don't think it eliminates it.

11 THE COURT: Well, I think its big advantage, if
12 there is one, of probably having one appeal basically. And
13 it would be different issues but it would be rather than
14 having 229 or more than that. But there are -- both counsel
15 have pointed out that there are downsides to it. There's
16 no -- I mean, I have been searching my mind to figure out a
17 quick, easy solution to the situation we're in right now and
18 I haven't found it yet.

19 Okay. What else do we have on the agenda?

20 MR. GUSTAFSON: We have the tolling order issue
21 which we have raised. We would like to file a motion -- the
22 problem is at some point your order is going to become the
23 final order and the potential tolling from the class
24 allegations are going to start ticking because, you know,
25 the dismissal of the case is tantamount to denying the class

1 even though we haven't had a class motion. And so that's
2 going to create some American Pipe issues.

3 We haven't briefed that issue. We haven't
4 finished researching it but we intend to file a motion on
5 tolling that we're going to ask you to toll.

6 THE COURT: Magistrate Judge Mayeron issued the
7 first order on that, right?

8 MR. GUSTAFSON: She did.

9 THE COURT: Probably you should talk with her
10 initially on that.

11 MR. GUSTAFSON: And that's really what we want
12 here is some guidelines if you would like us to file it with
13 her.

14 THE COURT: I would. I haven't talked with her.
15 I talked to her I guess last week to confirm whether she was
16 going to be here today and was told she wasn't going to be
17 here today so it hasn't gone beyond that.

18 MR. GUSTAFSON: All right. And this is a similar
19 question. We intend to file a motion. Again, I think I
20 understand your views, but we want to make a record that we
21 have asked for discovery and that as part of that that we
22 would ask that Medtronic withdraw its objections to the FOIA
23 production.

24 THE COURT: On the FOIA.

25 MR. GUSTAFSON: Is that something that I should

1 bring with Magistrate Judge Mayeron also?

2 THE COURT: I think you should. I think that's
3 really a discovery issue.

4 MR. GUSTAFSON: Okay. The last thing that I have
5 on my agenda, and I don't think I've skipped anything, is
6 that Judge Reilly had initially ordered a status conference
7 for this afternoon.

8 THE COURT: She's sort of busy.

9 MR. GUSTAFSON: She's a little busy. She has
10 canceled it now. I think she has something else on her
11 mind.

12 THE COURT: And she will for some time.

13 MR. GUSTAFSON: It looks like it's going to be
14 several weeks if not months, the trial. So we had initially
15 thought that we would need a state court liaison appointed.
16 Now I think we can wait.

17 THE COURT: I don't think anybody knows the time
18 table on that.

19 MR. GUSTAFSON: We don't expect to see anything
20 for a few months.

21 So that's all we have. Mr. Becnel wants to be
22 recognized.

23 THE COURT: Mr. Becnel.

24 MR. GUSTAFSON: So when I say that's all we have,
25 I mean from the PSC.

1 MR. RING: Judge, I won't comment further. We'll
2 just deal with Magistrate Judge Mayeron on the others.
3 We've set forth our position but we'll deal with that with
4 her.

5 THE COURT: Mr. Becnel, let me before you start,
6 we aren't going to spend a good chunk of the morning on
7 whatever you have to say. You have a tendency, at least
8 from my first one, to go on at some length with passion.
9 And I understand that and appreciate it but I'm going to cut
10 you off if you go more than 10 minutes here this morning.

11 MR. BECNEL: I don't plan on going more than 10
12 minutes.

13 THE COURT: Okay.

14 MR. BECNEL: Your Honor, your ruling said no one
15 requested discovery. I did repeatedly and said there's an
16 elephant in the room and it's called preemption. And that
17 that elephant in the room without discovery being done in
18 Puerto Rico, the manufacturing defect that occurred in
19 Puerto Rico. That in addition to that, the Good
20 Manufacturing Practices Act are not being followed. If you
21 look at my transcript it's clearcut.

22 In addition, I said it would be virtually
23 malpractice to file a Master Complaint without that
24 discovery taking place first. Those are my exact words in
25 the transcript.

1 Now, these are fine lawyers. But when there's a
2 divergence of views based upon what I considered things
3 necessary to protect my clients, and they filed a Master
4 Complaint in which the Court didn't appoint me to any
5 position of authority for anything. In fact, basically
6 prohibited me from doing anything because the PSC was
7 appointed, didn't ask my input, nor did maybe they need my
8 input. But at least based on your opinion, you said because
9 you didn't ask for discovery.

10 Now, remember when Mr. Gustafson was talking about
11 that, he had no authority of this Court to act on anybody's
12 behalf other than his individual clients. He had not been
13 appointed to the PSC at that time or as the lead counsel at
14 that time. Nor was anyone.

15 I was simply representing my clients, all of whom
16 had filed cases either in Puerto Rico or Louisiana, which
17 are both civil law states requiring specific pleadings that
18 were not done in the Master Complaint.

19 THE COURT: Where have you been on this whole
20 issue before right now? You've known what Mr. Gustafson's
21 position was, right or wrong, from the outset. And there's
22 a procedure set up by which if you had contrary views, you
23 could have filed them here and brought them to the Court's
24 attention.

25 MR. BECNEL: Your Honor, I put it on the record.

1 I don't think I need to recontact him and say please don't
2 file a Master Complaint.

3 THE COURT: I'm not talking about contacting him.
4 I'm talking about there's a procedure in this court before
5 me to have those views expressed and we didn't hear a word
6 from you. And you're not a shy individual.

7 MR. BECNEL: Well, I don't know what else I could
8 do when I'm told, number one, the guy with the most cases
9 filed at that time, you're not on the PLC. Obviously the
10 Court didn't want me involved. And I had a conflict of
11 interest with the people on the PLC on the issue of
12 discovery, on the issue of parallel claims, on the issue of
13 filing a Master Complaint. Those views were put on a record
14 before this Court and before everybody that was here that
15 day.

16 Now, if they take it from there and a week or two
17 later you appointed them, what am I to do? I'm going to go
18 file some motion and say I want to retell you what I said
19 before the Judge that don't do a Master Complaint. Let's do
20 discovery first, limited discovery. And let's find out if
21 we fit within the exception to Riegel, namely a
22 manufacturing defect; and secondly, a violation of the PMA.

23 Now, there's nothing further I can do. We're at
24 such a conflict of interest between those two positions and
25 they -- I don't know what you and the PSC and the Defendants

1 did when you go in the back room. Nobody issues me a
2 report. There was no report given and, look, Mr. Gustafson,
3 Mr. Zimmerman and the whole group are very fine lawyers.
4 But there is -- you know, sometimes you're right and
5 sometimes you're wrong. I may be dead wrong.

6 And even after doing what I asked to do, it may be
7 of no moment to you and you issued the same order but it may
8 not. And how can my clients be bound by Mr. Gustafson who
9 said I don't need discovery under certain circumstances when
10 he had no authority to act on behalf of my clients? He
11 wasn't contracted by them. He wasn't asked. He didn't
12 become a fiduciary to me and my clients until after you
13 appointed the committee.

14 And after you appointed the committee, they knew
15 my views. They knew my requests. They knew that I said
16 these magic words. "It would be malpractice on behalf of
17 the lawyers."

18 THE COURT: It's not like you to be silent.

19 MR. BECNEL: When you get shut out, Judge, there's
20 not much you can do.

21 THE COURT: I'm not talking about being shut out.
22 You didn't get on the committee. Okay. You're disappointed
23 with that or you're upset about it or you're mad about it, I
24 don't know. I made a decision and you were not part of the
25 crew. And that decision was made. I considered what I

1 thought it was appropriate consideration and I'm not
2 changing my mind about it.

3 But that doesn't mean because you don't like what
4 I did that you can now sit on the sidelines and not follow
5 the procedures which were set up for if you disagree with
6 counsel, file something. Nothing was done. You waited
7 around and watched this thing now and now you're up here
8 growling about it.

9 MR. BECNEL: I don't think that that's correct,
10 your Honor. I don't think that that's correct in the
11 slightest. I talked to people about it after that.

12 THE COURT: You didn't talk to me about it. The
13 only way I find out people's views is if you file something.
14 We've got a procedure set forth and you ignored it. And you
15 ignored it apparently because you thought it was going to be
16 useless, Kyle doesn't like me or everything else and I'm not
17 going to go through it.

18 MR. BECNEL: Well, your Honor, all I can do, I've
19 never not shown up at one of your conferences yet, at great
20 expense and a great hardship to get here. So I come here to
21 listen. It's not like this was an ongoing MDL where you
22 have monthly or reports that people can get. There's nobody
23 on the phone right now, for example. Every MDL I'm in,
24 there's a phone conference. We had one yesterday in
25 Milwaukee. People got on the phone from all over the

1 country. They didn't participate orally, but they could
2 listen to what was going on. Judge Fallon has one every
3 time and most MDL judges do that. So I can't know what
4 you're doing in private.

5 THE COURT: We're not doing anything in private.

6 MR. BECNEL: Well, there was a meeting this
7 morning.

8 THE COURT: We have a session before this morning
9 for about 20 minutes to go over the agenda. That's what it
10 is so we can come out here and have some order to this. And
11 I'm not going to bring everybody in here and do that. I
12 just think it makes sense to do it that way and I'm sure you
13 have participated on steering committees in the past where
14 the same thing has been done.

15 MR. BECNEL: I've never been in back.

16 THE COURT: Never gone?

17 MR. BECNEL: I have went twice here in Minnesota
18 but never before.

19 THE COURT: Okay.

20 MR. BECNEL: And I have been doing this for 40
21 years. For 40 years, and in the MDL settings for 35 years.

22 But that's the only problem I have now. You're
23 talking about disjointed. This is going to be the most
24 disjointed appeal to the Eighth Circuit if it goes up now
25 because then I have to make decisions. I'm in conflict with

1 them. They know it. I put them on notice. They know it.

2 I don't want to be in a position that I get sued
3 for malpractice for not standing up for the clients that I
4 represent that contracted me. I said it in that hearing.
5 These clients have hired me to file suit for them, to file
6 discovery for them, to take depositions for them. And then
7 if we all get on board in the same Master Complaint, for
8 example, in Louisiana, the cases I have, I asked --

9 THE COURT: You are in disagreement with Gustafson
10 and company. I understand that.

11 MR. BECNEL: But it's a material disagreement,
12 Judge.

13 THE COURT: I understand that, too.

14 MR. BECNEL: It's a very serious disagreement.

15 THE COURT: I can't solve that for you.

16 MR. BECNEL: But you took what he said and applied
17 it to me under some fiduciary relationship that you gave to
18 him to represent this whole group in an MDL setting. And so
19 my clients are bound by a lawyer that they didn't hire, by a
20 committee that they had no input to be involved in, and then
21 you bind them and dismiss them and then put a footnote you
22 didn't ask for discovery and therefore you're out of court.

23 THE COURT: Okay.

24 MR. BECNEL: That's my position and that's why I
25 would like an opportunity to at least file the necessary

1 briefs at this time and I think the Court is going to have
2 to allow that for due process to these clients.

3 Other than that, then where are we? Who is going
4 to file the brief? I can file -- and I'm scared of you, to
5 be quite honest. You said if you do this, this and this,
6 you're sanctioned.

7 THE COURT: You don't look like you're afraid of
8 me.

9 MR. BECNEL: Well, I am. I didn't file the papers
10 directly because you had a little footnote on that when I
11 sent it to Mr. Gustafson. And Mr. Gustafson can tell you
12 I've talked to him repeatedly. I have the greatest respect
13 for Dan. As I told you before, I consider all of these
14 people my good friends. I've worked with them on many cases
15 in the past. This is a fundamental disagreement --

16 THE COURT: I understand.

17 MR. BECNEL: -- on the law and issues.

18 THE COURT: Okay. Thank you, sir.

19 MR. BECNEL: Thank you.

20 THE COURT: Anybody want to respond or say
21 anything?

22 MR. RING: Judge, I think -- I don't think so. I
23 think we covered it in our letters and that's sufficient.

24 THE COURT: Mr. Gustafson?

25 MR. GUSTAFSON: I don't have anything further,

1 your Honor, other than just a general conclusion. You know,
2 there's no good answer to this question about how to handle
3 this appeal and I think that what we need to try to do is
4 make it as seamless as possible. There are downsides to
5 every bit of it. And it seems to me that taking care of
6 these administrative matters, the motions that need to be
7 filed and then certifying it, then we can get the Eighth
8 Circuit's view on how they want to handle it. It seems to
9 me to be the best. It's not perfect, but that seems to me
10 to be the best way to handle it.

11 THE COURT: Well, I'll take the matters that we
12 have talked about today under advisement. I'll try to get
13 an order out and some communication to counsel as to where
14 we're going to go. To the extent that it's an order
15 granting or denying any of the requests, it will be in order
16 form. It will at least clear things up so we know where to
17 go. If we need to come back after that for another
18 conference here you will all be advised.

19 MR. GUSTAFSON: Just so I'm clear, Judge, on this,
20 until you issue this order, this communication, you don't
21 want us to file anything? Because otherwise I'm going to
22 feel obligated to file these motions to protect the record.

23 THE COURT: No, I think that's right. Why don't
24 you hold off. If a week goes by and --

25 MR. GUSTAFSON: I'm not trying to put a deadline

1 on it.

2 THE COURT: Well, I know that. I want to get the
3 matter on some track myself. And the one thing I have
4 learned, it doesn't get any easier by putting it off. So
5 I'll turn my attention to it and try to get something out in
6 the next week. If it isn't in the next week, I will get on
7 the horn with everybody and we'll see what needs to be done.
8 And if something has to be done we'll let you know.

9 MR. GUSTAFSON: Thank you, Judge.

10 THE COURT: Anything from anybody else? Thank you
11 all for coming in. You missed the 24 below zero weather but
12 it's still not that warm out there.

13 Yes, sir?

14 MR. GUSTAFSON: Your Honor, Mr. Becnel has raised
15 an issue about a filing with respect to the statute of
16 limitations. I will talk to him about it and if we need to
17 communicate with you, I will send a letter and copy to
18 Defendants.

19 THE COURT: Okay.

20 MR. GUSTAFSON: Thank you.

21 THE COURT: Thank you all for coming in. We are
22 in recess.

23 (Court adjourned at 10:50 a.m.)

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I, Carla R. Bebault, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Carla R. Bebault
Carla R. Bebault, RPR, CSR