

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MINNESOTA

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4 In Re: St. Jude Medical, Inc. 01-MD-1396 JRT/FLN  
5 Silzone Heart Valves Products  
6 Liability Litigation.

7 Minneapolis, Minnesota  
8 January 23, 2003  
9 4:37 p.m.

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11 TRANSCRIPT OF PROCEEDINGS  
12 (Status Conference)

13  
14 BEFORE THE HONORABLE JOHN R. TUNHEIM,  
15 UNITED STATES DISTRICT COURT JUDGE.

16 APPEARANCES:

17 On behalf of plaintiffs: James T. Capretz  
18 Steven E. Angstreich  
19 (Via telephone): J. Gordon Rudd, Jr.  
20 Joe D. Jacobson  
21 Patrick J. Murphy

22 On behalf of defendant: Steven M. Kohn  
23 David E. Stanley  
24 Tracy J. Van Steenburgh  
25 Liz Porter

26 Court Reporter: Karen J. Grufman  
27 U.S. Courthouse, Suite 1005  
28 Minneapolis, MN 55415  
29 612-664-5105

1 THE COURT: Good afternoon. On the Court's civil  
2 calendar this afternoon is case number 01-1396, In Re: St.  
3 Jude Medical, Incorporated Silzone Heart Valves Products  
4 Liability Litigation.

5 Let's see, counsel, want to note your appearances?

6 MR. CAPRETZ: Jim Capretz for the class.

7 MR. ANGSTREICH: Steven Angstreich for the class.

8 MR. RUDD: Gordon Rudd for the class.

9 MR. MURPHY: Pat Murphy, plaintiff state liaison  
10 counsel.

11 THE COURT: Good afternoon, gentlemen.

12 MR. JACOBSON: Judge, Joe Jacobson by telephone for  
13 the injured class.

14 THE COURT: Good afternoon, Mr. Jacobson.

15 MR. KOHN: Steven Kohn, Your Honor, for St. Jude  
16 Medical.

17 MR. STANLEY: David Stanley for St. Jude Medical.

18 MS. PORTER: Liz Porter in-house for St. Jude  
19 Medical.

20 MS. VAN STEENBURGH: Tracy Van Steenburgh for St.  
21 Jude Medical.

22 THE COURT: Good afternoon to all of you.

23 We're gathered today for a status conference. Mr.  
24 Capretz, you want to lead us off here?

25 MR. CAPRETZ: Yes, sir. I have to say first and

1 foremost, Your Honor, I'm pleased to see the Court is in a  
2 good mood after reading over the agenda. Mr. Stanley insisted  
3 that I put the first issue being the class certification.

4 (Laughter.)

5 THE COURT: So that's Mr. Stanley's doing?

6 MR. CAPRETZ: No, that was my move. So if there's  
7 anything more we can do, ask, or answer, please let us know.  
8 We're all waiting with bated breath.

9 We should be able to move quite readily, Your Honor. We  
10 had a deposition today, as the Court probably knows. And that  
11 was on the agenda, but somewhat, it was formulated when we  
12 thought the hearing was going to be before the deposition.

13 And I felt we'll get a little bit more into the detail in  
14 that. But the Rodney King, "Can't we all get along," at least  
15 for the witness, not a problem with the attorneys so much. So  
16 we're going to need some instruction and help for certain to  
17 get that done.

18 Mr. Murphy is here to deliver a quote on the state  
19 liaison. Counsel, you want to say anything?

20 MR. MURPHY: I thought you were going to address the  
21 first issue first. He seems to be skirting that issue.

22 Your Honor, good afternoon. There are currently, my  
23 current count is 45 federal. And now the state count is down  
24 significantly to 96. The Ramsey count has been decreased by  
25 20 some cases. The Robins cases have been resolved in the

1 state court.

2 THE COURT: So run that by me again. The Ramsey  
3 County number of cases currently is what?

4 MR. CAPRETZ: Approximately 20 now, Your Honor,  
5 still pending.

6 THE COURT: There have been settlements in how many?

7 MR. MURPHY: They would know better than I. I think  
8 it's 27?

9 MR. KOHN: More than 20.

10 MR. MURPHY: That's right, there was --

11 MR. KOHN: Previous settlements some months ago, and  
12 recently there was a block of 20 or 22 cases that settled.

13 THE COURT: I see.

14 MR. MURPHY: So I guess it's about 35 that have  
15 settled. Somewhere in that neighborhood.

16 The one inquiry we do keep getting from the various  
17 people I've been keeping in touch with is kind of what's going  
18 on. It's somewhat akin to being in a position of trying to  
19 shoot pool with a piece of rope. Because I'm trying to tell  
20 them, well, we're waiting for developments and I'll keep them  
21 posted.

22 So we're ready to leap into it as soon as we know the  
23 direction that we're going to go. So, thank you.

24 THE COURT: Thank you, Mr. Murphy.

25 MR. CAPRETZ: Your Honor, I think we'll just cover

1 these, if it pleases the Court, just these other matters  
2 quickly.

3 Ramsey County, basically about 20 cases. We got first  
4 trial set for June 23. We've got a briefing schedule that's a  
5 bit earlier than the one in the MDL on the motion for summary  
6 judgment to be heard at the end of March.

7 THE COURT: Is this one of the cases before Judge  
8 Gearin?

9 MR. CAPRETZ: The one being tried? Yes.

10 THE COURT: So that would be the first trial date.

11 MR. CAPRETZ: The previous judge, Judge Bjorkman,  
12 had cases set in blocks of four to five. We're talking,  
13 meeting and conferring with the other side to see if we want  
14 to do that.

15 Mr. Johnson, Chuck Johnson, has the bulk of the cases in  
16 that Ramsey County litigation. He has one or two others that  
17 were in the second wave, I think, that moved up to the first  
18 wave, because all the others were Robins Kaplan cases that  
19 settled.

20 So we're talking to counsel maybe putting four cases  
21 together. There's a question whether or not we try them in  
22 seriatim, one after the other, or as a block, and see if we  
23 can agree to do some bellwether cases, one or two -- two or  
24 three, I should say, together. But these things remain to be  
25 resolved with counsel. But we're talking to see if we can

1 come up with a schedule.

2 The Canadian litigation, as the Court may have noticed,  
3 there was in December a class action filed on behalf of the  
4 Quebec province citizens. Basically, from what I understand,  
5 the only three provinces of the ten in the three territories  
6 that have class action provisions are British Columbia,  
7 Quebec, and Ontario. And once class actions are filed in each  
8 of those provinces, in essence, all citizens of Canada are  
9 covered.

10 It's an issue of comity. It's interesting legal  
11 questions. They don't have a Supreme Court over all of their  
12 people and all of their provinces. But they do it by way of  
13 comity, as I understand it.

14 That really brings us right to the discovery issues.  
15 Most of it I'll let Mr. Angstreich handle.

16 And I think we need to set a special section, as I  
17 suggested for the deposition of Mr. Ladner. That deposition  
18 of Mr. Ladner, for the Court's edification, it ties into the  
19 Ramsey County litigation in that defendants cross-noticed his  
20 deposition in that proceeding. So Mr. Angstreich has been  
21 questioning him for the MDL. And when that matter is  
22 complete, then the state attorneys will have an opportunity if  
23 they wish to question him further.

24 But with that, I think everything is set. The only thing  
25 I would call attention, and I'll let Steve follow through on

1 that, is on the privilege log. We're still fighting getting  
2 all the information. We still don't have, I don't think, a  
3 complete privilege log. And there are a lot of questions and  
4 areas of dispute in that area that Steve will further discuss.

5 THE COURT: Thank you.

6 MR. ANGSTREICH: Good afternoon, Your Honor.

7 THE COURT: Mr. Angstreich.

8 MR. ANGSTREICH: I'll bring you up to date on the  
9 third parties.

10 The Doctor Schoen documents have been received. They're  
11 going to be imaged. And that takes care of any problems we  
12 had with respect to that third-party subpoena.

13 Attorney Gary Lewis, who is a Carbomedics attorney, is  
14 having difficulty coordinating with counsel at Carbomedics to  
15 get the documents. But we've signed the necessary stipulation  
16 for confidentiality, and we're anticipating getting those  
17 documents hopefully before we go to trial in the case.

18 Those are --

19 THE COURT: So you don't have any Carbomedics  
20 documents yet. Is that correct?

21 MR. ANGSTREICH: That is correct.

22 THE COURT: But you signed a protocol, but they  
23 haven't been collected and turned over to you yet?

24 MR. ANGSTREICH: That's correct.

25 THE COURT: There's no further objection to

1 production?

2 MR. ANGSTREICH: That's correct, they're not  
3 objecting to any of the documents that we asked for. So that  
4 problem hopefully should be abated.

5 The issue that we had with Doctor Wilson is being worked  
6 on, and we're hoping that we will get that resolved so that we  
7 can move the issue on the slides off the table. And that  
8 would enable us to complete certain of the depositions that  
9 we're waiting on. Barbara Illingworth, and I forget Cameron's  
10 first name -- Douglas Cameron -- they have been put on the  
11 back burner until Doctor Wilson finishes the slides.  
12 Katherine Tweden's deposition is being taken the 31st of  
13 January.

14 So we're within two or three depositions of completing  
15 those that we've identified, at which appoint we're going to  
16 need to produce, ask them to produce a designated  
17 representative to complete the loop. But we'll deal with  
18 counsel on that, and hopefully we won't have any problems.

19 There is a major issue that we have -- actually, there  
20 are three major issues that we have.

21 One relates to the privilege log. And one of the  
22 problems that we have with respect to the privilege log is  
23 that the person primarily responsible, as I understand it, or  
24 tried to find out, in putting that privilege log together is  
25 James Ladner, who is the deponent of today, who I tried to ask

1 questions about the privilege -- who I tried to ask him about  
2 the privilege log. And he was instructed not to answer  
3 questions concerning that.

4 And as we will now have to brief for Your Honor, it's our  
5 position that if St. Jude wants to take the position that a  
6 particular document is attorney/client privileged or attorney  
7 work product privileged, they put it down on their log and we  
8 have a right to challenge it.

9 One of the problems that I think we're going to face is  
10 that in order to assert an attorney work product privilege,  
11 there has to be some kind of litigation that was either in  
12 existence or anticipated.

13 And I don't really know who has the burden on the issue  
14 of whether or not it's privileged or not privileged. If it's  
15 St. Jude's burden, sooner or later they have to tell us what  
16 litigation was extent or what was being threatened at that  
17 point in time. I tried to do that with Mr. Ladner today as  
18 well, getting into those subjects with him.

19 We are -- we have no ability right now to tell the Court  
20 why something should not be privileged, because from the face  
21 of the log, we cannot tell, other than what the document  
22 purports to relate to, and on its face we think that a very  
23 large number of the documents are not attorney/client or work  
24 product privilege.

25 So we have the privilege log, that's the first thing.

1       The second thing is that during Mr. Ladner's deposition,  
2       two documents which were produced to us in discovery, in fact,  
3       at least three or four versions of that document was produced,  
4       the witness was instructed not to answer because they were  
5       purportedly or allegedly inadvertently produced, and they are  
6       going to investigate as to whether or not they're going to  
7       assert a privilege.

8       And just as an example, but I know that we're going to  
9       have to brief this, there's a series of e-mails that begins  
10      with an e-mail from the FDA personnel to Doctor Flory. He  
11      responds. Then they respond back. And the last one is a  
12      Flory to the FDA personnel that was carbon copied to Mr.  
13      Ladner.

14      That document is being challenged -- I'm sorry, I'm  
15      trying to remember -- that's not the one that's being  
16      challenged.

17      A similar one is being challenged where it's a  
18      communication from Jonas Runquist to the FDA, to a Byron  
19      Tard. That is now going to be challenged as potentially a  
20      draft of a document and somehow is work product privilege.

21      We've asked the court reporter to put together the  
22      deposition as quickly as possible, in fact, we'll have what's  
23      known as a dirty version tonight, so that we can at least  
24      bring to the Court's attention the issues that we now face.  
25      And they relate to Mr. Ladner.

1       And it's not just issues of attorney work product and  
2 attorney/client privilege. For example, I asked him about  
3 insurance issues. Is the insurance company defending under a  
4 reservation of rights? What is the policy period? Do you  
5 have outside coverage counsel? When did you put your carrier  
6 on notice?

7       None of those questions were allowed to be answered by  
8 Mr. Ladner. And those are the kind of issues we have.

9       So we now have Mr. Ladner's deposition to complete.  
10 We've got the privilege log to deal with. And we now have a  
11 couple documents that now are deemed by St. Jude to  
12 potentially be privileged and not to be produced.

13       In addition to that, I received a letter from Mr.  
14 Stanley. I'm not sure how many are on that list. Do you  
15 recall the number? Maybe two dozen documents that they also  
16 wish us to return.

17       It's an interesting process. Because they're going to  
18 give us a new CD with that document not on there. We can't  
19 return the document. It's on a CD. And they want us to give  
20 the CD back on the basis that these were also privileged  
21 documents that were inadvertently produced.

22       Our position right now is that we'll review them and  
23 determine whether or not in reality we agree with that  
24 concept. And if we have a disagreement, we're going to follow  
25 I think the best procedure is that which we did with Your

1 Honor before, and that was to have Your Honor review it.

2 Unless Your Honor believes I shouldn't even look at the  
3 documents. I know I've looked at them already. Because we  
4 reviewed every document on the CD's to date. I can't say that  
5 I know which ones they are. But I know that we've looked at  
6 them. So it wouldn't be by looking at them again we would be  
7 seeing something that we haven't seen before.

8 But I think that's the procedure that we're going to have  
9 to go forward with. And I would hope that there aren't any  
10 other documents that we're going to be confronted with that we  
11 shouldn't be looking at, and hopefully there will come an end  
12 to this privilege log and the arguments on confidentiality and  
13 attorney/client and work product privilege.

14 THE COURT: So how many documents fall into this  
15 category of documents which should be returned, according to  
16 the defendant?

17 MR. ANGSTREICH: I have the letter here. There's  
18 two from today, Your Honor. There are 40 documents that have  
19 now been identified as being privileged. Two in addition were  
20 identified today. And we have 906 documents on the privilege  
21 log.

22 That's not the end of the privilege log, as we've been  
23 advised. Although it was our understanding that by the end of  
24 December, the privilege log would have been completed.

25 And that's really the status of what's going on.

1 Is there something I missed?

2 MR. CAPRETZ: Excuse me.

3 (Off the record.)

4 MR. ANGSTREICH: In the joint status conference  
5 report, Your Honor, we pointed out issues about animal study  
6 documents in item A, the EPIC valve animal study pathology  
7 slides in number B.

8 We also just discovered, and we've alerted Mr. Stanley,  
9 too, that apparently in one of the state court proceedings, a  
10 whole host of single-page TIFS were provided with respect to  
11 the EPIC valve that have not been produced in the MDL. And  
12 along those lines, what we're trying to determine is the  
13 identification of somebody whose deposition we could take, or  
14 some other fashion ascertain that the MDL has in fact gotten  
15 all the documents that all of the state court proceedings have  
16 in fact received.

17 That's a very important, of important concern for us that  
18 we know what that is.

19 There are a number of other issues that have been  
20 identified in here. And we're still in the process of  
21 attempting to meet and confer as it relates to personnel files  
22 and the declassification of top accounts, which is a subject  
23 that this addresses.

24 MR. STANLEY: We do have an agreement on that.

25 MR. ANGSTREICH: Yeah. But what I'm saying is the

1 report articulates, the main issue right now of major concern  
2 relates to the privilege documents and resolving that. And  
3 that I think would require an earlier status conference next  
4 month than a later one.

5 THE COURT: At this point, you intend to brief the  
6 issue. Is that correct, Mr. Angstreich?

7 MR. ANGSTREICH: I think that's what we have to do.  
8 I think we have to identify -- we have to provide to Your  
9 Honor the transcript.

10 THE COURT: When do you expect to have that ready?

11 MR. ANGSTREICH: Well, if the transcript is  
12 readable. Because sometimes even a dirty transcript you can't  
13 make out what's involved. But if we have that tomorrow, we  
14 will begin working on that, and hopefully by next Friday be in  
15 a position to provide to St. Jude the specifics of our  
16 position as well as a copy, obviously file it with Your Honor,  
17 and then see how much time they need.

18 There are a number of areas that as I said need to be  
19 addressed with respect to Mr. Ladner.

20 As it relates to the privilege log, however, I really  
21 don't want to start getting into which documents are or are  
22 not privileged until we know we've gotten the final one.  
23 Unless the Court's guidance on what we have might assist St.  
24 Jude in deciding which additional documents they may not  
25 really want to pursue. And if we can do it that way, then

1 we'll address those documents as well.

2 But as I said, I can challenge a particular document. I  
3 can tell Your Honor why on the privilege log a particular  
4 document does not appear on its face to be privileged. As for  
5 example, there's a 1997 document authored by Mr. Ladner  
6 involving the protocol, or some issues relating to one of the  
7 animal studies. That's in 1997. I have no idea why that  
8 would be attorney/client or work product privileged. And all  
9 we can do is identify that as something that we have an issue  
10 with, and then let St. Jude explain why it is that they say  
11 it's privileged. Then we would have to then come back to the  
12 Court and explain why we think that their explanation isn't  
13 sufficient, if that's the way Your Honor wants to do it. We  
14 can identify those documents.

15 THE COURT: Unless Mr. Stanley or Mr. Kohn has a  
16 different suggestion, that's probably what we'll have to do.  
17 Maybe we should hear from them, and then we can see where we  
18 go from there.

19 Mr. Kohn.

20 MR. KOHN: Yes, thank you, Your Honor.

21 Let me point out at the outset that there's been a  
22 challenge to the privilege log already in the Ramsey County  
23 litigation made by the Robins Kaplan firm. It might be  
24 instructive to give the Court some background on that.  
25 Because I think the way it was handled there was effective and

1 resolved the issue in a way that's more efficient than taking  
2 an extended deposition of Mr. Ladner.

3 What happened there is that counsel on the other side,  
4 and in this case it was the Robins Kaplan firm, identified  
5 specific documents from the privilege log at that time that  
6 they felt hadn't been properly identified, or at least didn't  
7 satisfy them that these documents were privileged.

8 There was then a meet and confer process where additional  
9 information was given. And finally, the list was narrowed  
10 down to a select group of documents.

11 Those were in turn produced to Judge Bjorkman, who had  
12 them at the time. And both sides briefed why they did or  
13 didn't feel that these particular documents were privileged.  
14 Judge Bjorkman reviewed those in camera and issued a ruling.  
15 That didn't require lengthy depositions, and it was a very  
16 efficient procedure.

17 I thought that was the way we were going to handle it  
18 here. Because prior to today, prior to Mr. Ladner's  
19 deposition, we had already received one e-mail from Mr.  
20 Capretz raising concerns about a few items on the privilege  
21 log.

22 And I think the most efficient way, as Mr. Angstreich  
23 suggested, is for them to identify to us those entries on the  
24 log that they feel they need more information on. We'll be  
25 happy to take a look and see if we can provide it. I think we

1 ought to try, for the Court's benefit, to narrow down that  
2 list and make it as small as possible. And if we reach an  
3 impasse where they don't feel we've given enough, I think at  
4 that point we have to involve the Court. I think if they can  
5 provide the list that they feel is inadequate, and we can get  
6 started right away.

7 As far as waiting until the privilege log is final, I  
8 don't believe that's necessary.

9 THE COURT: What is the status of the privilege log?

10 MR. KOHN: We have about 1100 entries I believe on  
11 the log at the time. There's approximately 300 more documents  
12 that are in the process of being reviewed that may or may not  
13 be put on the log. And then our review will be complete.

14 In terms of time, I'm hoping that within the next 30 days  
15 those documents will be reviewed and the log will be  
16 finalized.

17 But I don't see any reason to wait until that occurs.  
18 Because the categories of the documents being reviewed are  
19 really not dissimilar, I don't believe, from the categories  
20 that are on the log at this time. So these things can  
21 probably be grouped into discrete categories. Some of them  
22 are drafts prepared by attorneys that resulted in other  
23 documents that went out the door in final form. They can  
24 easily be grouped into categories.

25 So it's my view -- and that's the reason why today in the

1 deposition, when counsel wanted to go into entries on the  
2 privilege log with Mr. Ladner, I felt, under the Shelton case,  
3 which I think we're probably going to have to brief, that it  
4 was inappropriate to inquire of Mr. Ladner. That was not the  
5 efficient way to do it. There are other means to get at this  
6 issue and resolve it without having to get into it in his  
7 deposition.

8 In any case, addressing the broader picture of his  
9 deposition, I agree with the suggestion of counsel, that if we  
10 can get the transcript in readable form, if counsel on the  
11 other side can provide us with their briefing on the issues  
12 they want to raise, I think within a week of receipt of their  
13 briefing, depending upon the extent of it, ten days at the  
14 most we would be able to file a response. And that's what I  
15 would propose as a way of getting this teed up hopefully well  
16 before the next status conference.

17 The only other issue I think that I wanted to address is  
18 the inadvertent production of privileged documents was only  
19 discovered by us in the past few days. As soon as we became  
20 aware of the fact that documents that in most cases were on  
21 the privilege log had been inadvertently produced, we notified  
22 counsel on the other side and asked that the documents be  
23 returned.

24 I don't think the issue here is whether these documents  
25 are or are not privileged. That issue can be addressed at a

1 later time. The real issue is, were they inadvertently  
2 produced and was our response timely. And I believe we can  
3 demonstrate that it was.

4 If at a later point in time, if the Court -- well, if  
5 counsel feels they were inadvertently produced, they should be  
6 returned. Ethically, they're obligated to do that.

7 If they don't feel that the production was inadvertent,  
8 they can I suppose challenge that, and we can brief it and the  
9 Court can decide. But it's only after that process is  
10 completed we believe that the issue of whether these  
11 particular documents were privileged or not should be  
12 addressed.

13 But anyway, we're meeting and conferring with counsel.  
14 And I presume within a matter of days they'll let us know  
15 whether or not the documents will be returned, or whether we  
16 have to bring it to the attention of Your Honor.

17 Thank you.

18 MR. ANGSTREICH: Your Honor, if I might respond?

19 THE COURT: Go ahead.

20 MR. ANGSTREICH: One of the things we need to look  
21 at, since the documents have been in our possession we've  
22 taken I don't know how many depositions, how many of these  
23 documents were in fact used in any of those depositions that  
24 goes to the question of the timeliness of the request to  
25 return them.

1 But it really does go to a very important aspect. None  
2 of these documents are identified specifically as to whether  
3 they're attorney/client or work product privileged documents.  
4 And it would seem to me that the burden is on St. Jude.  
5 Instead of just sending me a letter with the TIF numbers, to  
6 have identified the specific documents and the basis for each  
7 of the specific documents the way they did in the privilege  
8 log.

9 The suggestion of Mr. Kohn that we narrow these down and  
10 we meet and confer about it, I have no problem doing that.  
11 What I have a problem with, however, is briefing whether or  
12 not a particular document is attorney/client privileged based  
13 upon the information that is set forth in this privilege log.  
14 Because on its face, a document from 1997 authored by Mr.  
15 Ladner in connection with clinical study issues does not  
16 appear to be attorney/client privileged under any stretch of  
17 the definition. And for us to try to argue that to you in a  
18 brief I think becomes extremely difficult, since we're arguing  
19 about documents that we have not actually seen. And what  
20 advice allegedly is being given with respect to the clinical  
21 study issues.

22 So I think the burden has to be first upon St. Jude to  
23 articulate how and why a particular document that we challenge  
24 is in fact attorney/client privileged and/or a work product  
25 privileged document. And then we can see what they've said

1 and then respond.

2 I think the procedure that we followed on the last  
3 document, and the only document that we did, which was an in  
4 camera inspection, has to be the only way to do it.

5 Obviously, by disclosing it, there's argument that the  
6 privilege may well have been waived. But clearly, we can't be  
7 in a position where we're disputing the particular privilege  
8 simply based upon the designation here.

9 Because we are challenging. In other words, every time  
10 we pick a document that we say is not truly a privileged  
11 document, we can't say anything more than what's on the face  
12 of it.

13 So the procedure will be, I think, we'll let them know  
14 from the log that we have. And the information that was given  
15 to me was that the most recent iteration was 906. So if  
16 there's 1100 now on the privilege log, that means there's 200  
17 documents that we don't even know about.

18 THE COURT: How many of those are you challenging,  
19 do you know?

20 MR. ANGSTREICH: Well, looking at what has been  
21 highlighted, it doesn't look like we're challenging more than  
22 maybe a hundred of them.

23 But this was the first pass at going through this on the  
24 face of what's supposedly here. And we need to go through it  
25 again. But we'll provide that information very promptly, and

1 then St. Jude can tell us what they view -- how they view  
2 this.

3 With respect to the inadvertent ones, we would ask that  
4 we get a privilege log with respect to these documents so that  
5 we know what they are, so that we can address that issue.

6 MR. KOHN: I believe I'm correct that almost all if  
7 not all of the inadvertently produced documents are already on  
8 the log that Mr. Angstreich has. I'll verify that.

9 He might be right about the 900 and being the total  
10 that's on the present log. So I don't want to stand on my  
11 earlier remark about 1100. That's just what I believe to be  
12 the case.

13 I am aware of the fact that two documents that were  
14 inadvertently produced that were clearly marked as  
15 attorney/client privilege were used by Mr. Angstreich in the  
16 deposition of Doctor Flory.

17 And just so the Court understands, when depositions are  
18 taken in this litigation, the documents are not passed around  
19 the room in hard copy form. They're portrayed on a screen  
20 electronically.

21 And I'm sure that counsel was not aware, nor was I, and  
22 we both attended the deposition, Mr. Angstreich took it and I  
23 defended it, that these two documents had attorney/client  
24 footers on them. Because if he had been aware of them, he  
25 would have been obligated to point that out to us before he

1 examined the witness.

2 So it only points out the fact that while this procedure  
3 of using electronic documents may be efficient, it also has, I  
4 believe, some problems in terms of our ability to really  
5 scrutinize the documents carefully and pick up things, such as  
6 the use of two clearly privileged documents in a deposition  
7 where 30, 40, 50 documents might be used.

8 MR. CAPRETZ: Your Honor, just a little surreply  
9 here.

10 I would like to convey a sense of urgency, Your Honor.  
11 Because this is going on three years since this litigation was  
12 originally filed.

13 And I don't -- while counsel had been somewhat  
14 cooperative, I'm not quite sure the client has been a hundred  
15 percent cooperative. And to consider the fact that we still  
16 do not have the total privilege log, it was promised,  
17 something was promised the end of December, etcetera. We're  
18 still waiting. I'm sure counsel is still waiting for  
19 documents.

20 We need to move forward with this. We're working with  
21 strict guidelines for the preemption briefing. We're going to  
22 be permanently prejudiced if we don't have the documents  
23 timely and can get these matters before the Court.

24 Mr. Angstreich, too, he's had a long day in a deposition,  
25 and highlighted the privilege points. But the other points

1 that are raised are very important ones that we need some  
2 rulings or guidance on. There has been, as Mr. Stanley  
3 pointed out, one area where there's an agreement. But there  
4 are several areas of disagreement in reference the pending  
5 discovery that we either need the magistrate or Your Honor to  
6 rule on.

7 And one further thing. After being a part of the  
8 deposition today, in my view, Your Honor, in order to get the  
9 process of the deposition of Mr. Ladner complete, we're going  
10 to either need to do it in this courtroom with a magistrate  
11 sitting and ruling on the spot, or have a Special Master sit  
12 in. Because there seems to be fundamental differences into  
13 what is work product and what is really privileged  
14 communication.

15 A case cited to you, for example, and was cited in the  
16 deposition today by Mr. Kohn, is a 1986 Eighth Circuit case.  
17 There's been one that clarified that, Pamida I cited to him,  
18 281 F.3d 726, which clarifies that. And even with that,  
19 that's not the be all end all, as has been suggested that  
20 that's the answer. There's some tough questions here.

21 But we're going to need some guidance and hand holding,  
22 in my view, if we're ever going to complete the deposition of  
23 Mr. Ladner. Because we've got to go through this whole  
24 privilege log, and we can't possibly complete without having  
25 all the information that they're claiming privilege and

1 determine whether or not it is privileged to ask him  
2 questions. And then the state counsel have the right to  
3 question him.

4 So I would ask the Court to consider -- I don't know the  
5 Court's schedule or inclination as far as getting involved in  
6 some of these discovery issues. And things have moved along  
7 pretty smoothly and civilly. But I think the time for some  
8 decisions is now. And we just need to move forward with this  
9 process in some way, the best way we can.

10 THE COURT: Well, I agree. We need to resolve the  
11 privilege issues just as quickly as we possibly can.

12 I think probably some of these issues are resolvable  
13 between the parties if you focus in on a better, perhaps  
14 description of the reason why a document is said to be  
15 privileged, so that the plaintiffs understand.

16 But as quickly as you can move this back and forth  
17 process along, the Court will review in camera any of these  
18 documents and issue rulings very quickly so that we can move  
19 this along. I do have a fear that this is going to, if we  
20 don't focus on this right now, this is going to delay the  
21 entire case needlessly.

22 So I think we need to move just as quickly as possible.  
23 You'll have surely my cooperation with whatever needs to be  
24 resolved by the Court.

25 MR. ANGSTREICH: Your Honor --

1 MR. KOHN: Could I just make one comment?

2 Frankly, I share the Court's view and counsel's view that  
3 we would like to see this resolved quickly. And I want to  
4 assure the Court that on St. Jude's behalf, we're going to do  
5 everything we can to get that done.

6 In terms of whether the deposition ought to continue in  
7 front of a magistrate, I frankly don't think that's a bad  
8 idea. These areas are extremely complicated, and these issues  
9 are extremely important to the parties on both sides. And I  
10 think that might be a suggestion, when and if this deposition  
11 resumes, that if we can reach agreement maybe we can stipulate  
12 to it, if not, maybe the Court can give us some guidance.

13 MR. ANGSTREICH: I'll stipulate to it.

14 THE COURT: We need to resolve some of the document  
15 issues first before you can even conceive of going forward  
16 with the Ladner deposition. Correct?

17 MR. ANGSTREICH: That's correct.

18 MR. KOHN: That's correct.

19 MR. ANGSTREICH: Your Honor, based upon the comment  
20 that was made that these 40 documents are on this list, I took  
21 the first one, and I found that on page 126. Unfortunately,  
22 the privilege log is not in numerical order. And so trying to  
23 find each of these TIFS through 127 total pages is  
24 problematic. If you just tell us what page they're on.

25 MR. STANLEY: I know Mike Coren has a version of the

1 privilege log in numerical order. He asked for one in  
2 numerical order. So you have one. You just got to call him.

3 MR. ANGSTREICH: I have to call my partner?

4 MR. STANLEY: You have to call your partner.

5 MR. ANGSTREICH: Darn. Okay. Thank you.

6 THE COURT: Well, that surely will help.

7 Is it possible that the Court could receive a bit of an  
8 update on this matter in a week to see how far we've  
9 progressed? I want to keep a close eye on this so we can get  
10 this taken care of as quickly as possible, both the matter of  
11 the challenged claim of privilege and the matter of the  
12 inadvertently produced privilege documents.

13 MR. ANGSTREICH: We should be able to advise Your  
14 Honor by the end of next week?

15 MR. KOHN: Sure.

16 THE COURT: As far as the privilege log goes, Mr.  
17 Kohn, you think within 30 days it's likely the log can be  
18 completed?

19 MR. KOHN: Thirty days or sooner, Your Honor.

20 THE COURT: Okay. How many additional documents did  
21 you say had to be reviewed?

22 MR. KOHN: I was informed approximately 300.

23 THE COURT: Okay. Well, as quickly as that can be  
24 done, that would be very helpful as well, because there's  
25 likely to be some additional issues that come out of those

1 decisions. And if we can wrap up as many of these issues at  
2 one time, that would be helpful, too.

3 MR. KOHN: All right. I will assure the Court I  
4 will do the best I can.

5 THE COURT: As to the suggestion of a magistrate  
6 judge involved in the Ladner deposition, that seems to be a  
7 good suggestion to me. Let's decide that matter when we get  
8 closer to the resumption.

9 MR. ANGSTREICH: Very good.

10 MR. CAPRETZ: Could we then, Your Honor, set a date,  
11 too? I appreciate the one week. But for the next conference,  
12 as Mr. Angstreich suggested, maybe earlier than later in  
13 March.

14 THE COURT: What were we talking about earlier?

15 MR. ANGSTREICH: If we get our paper in by next  
16 Friday, which would be February -- January 31, you would have,  
17 you would need ten days?

18 MR. KOHN: A week from the following Monday.

19 MR. STANLEY: February 10.

20 MR. ANGSTREICH: February 10. That would put us  
21 into the week of the 18th.

22 I have, right now I have a trial that starts February  
23 18th. And --

24 MR. CAPRETZ: Any idea how long?

25 MR. ANGSTREICH: Unfortunately, it may be two weeks.

1 And we don't try on Fridays, because that's motion day. But  
2 on the 21st, which is that first Friday, I have an argument in  
3 Mobile, Alabama.

4 If Your Honor were to set it for 12:30 on the 21st, if  
5 that would be possible? I'll just have somebody else cover  
6 that argument.

7 MR. CAPRETZ: That would be good for us.

8 THE COURT: It's not possible to do it the previous  
9 week? Is that correct? You're not in trial the week of the  
10 10th. I realize -- I mean can we squeeze the deadlines just a  
11 little bit on this matter, so we could possibly hear this at  
12 the end of the previous week?

13 MR. ANGSTREICH: That would be the 14th?

14 THE COURT: The 14th.

15 MR. ANGSTREICH: Valentine's Day?

16 MR. STANLEY: If you're willing to pay for my  
17 divorce lawyer.

18 THE COURT: We can always hide the calendar and  
19 claim it's on Saturday.

20 MR. CAPRETZ: I'm out of the country. But Mr.  
21 Angstreich --

22 MR. ANGSTREICH: How about the 13th?

23 THE COURT: That would be fine.

24 MR. MURPHY: Your Honor, I would have to ask the  
25 Court's leave. I don't think it's necessary for my

1 attendance. But actually, I'll be out of the hemisphere that  
2 day.

3 THE COURT: Can the defendant get the response done  
4 by the 7th, Friday of the previous week, rather than Monday,  
5 the 10th?

6 MR. KOHN: I think we can. Part of it depends on  
7 the number of items. We're talking now about the briefing on  
8 Mr. Ladner's deposition, or the briefing on the privilege log?

9 MR. ANGSTREICH: Hopefully, on both.

10 THE COURT: Hopefully, on both, yes. Let's give it  
11 a try. Let's set it for the 13th at 12:30.

12 MR. KOHN: All right. We will make every effort to  
13 get it to the Court by the 7th.

14 THE COURT: If it has to slip, then we'll surely  
15 consider it at that point. But I think it would be better to  
16 try to get it resolved at the end of the previous week, and  
17 then that doesn't conflict with the trial and some of the --  
18 and it gets this matter going a little bit faster.

19 MR. CAPRETZ: That's very much appreciated.

20 It was, as I say, a little troublesome to me if we ignore  
21 the other issues that are still pending, the discovery issues.  
22 So I don't know, was there going to be a conference with the  
23 Court? Am I not thinking? A telephonic conference before  
24 that time?

25 THE COURT: I just wanted to be notified by next

1 Friday of the progress that will be made over the next week on  
2 this matter. I just want to make sure it's moving along and  
3 keep an eye on it from my standpoint.

4 MR. CAPRETZ: If we could, if the Court would allow  
5 a few of us to try to wrap up those pending discovery items  
6 that are on your joint status report, if the parties will make  
7 another effort to get those issues resolved.

8 THE COURT: Okay.

9 MR. CAPRETZ: And report on that at that time.

10 MR. STANLEY: I believe that most of them either are  
11 resolved or will be resolved.

12 THE COURT: Okay. Well, check on that and see if  
13 there's anything left to be resolved there.

14 MR. STANLEY: I will.

15 MR. ANGSTREICH: Any open matters we'll just put on  
16 the calendar for the 13th.

17 THE COURT: And we've been a little busy around  
18 here, but we are working on the class certification order.  
19 And I hope to have it ready relatively soon.

20 MR. CAPRETZ: If you would like, we would tender an  
21 order.

22 THE COURT: I appreciate the suggestion.

23 MR. CAPRETZ: We appreciate your time and efforts.  
24 Thank you very much.

25 THE COURT: It should be done soon.

1 Anything else for today?

2 MR. CAPRETZ: No, sir, that's it.

3 THE COURT: Okay, very well. We'll be in recess on  
4 this matter, and we will see everyone in several weeks. And  
5 we'll hear from -- if it's just a report that one of you wants  
6 to make next Friday, that's fine. If there's any problems  
7 that are developing, then we can have a telephonic conference  
8 next Friday.

9 Okay? Very well. Court is in recess.

10 (Court recessed at 5:22 p.m.)

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20 CERTIFIED:

Karen J. Grufman  
Official Court Reporter

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