

Minneapolis, Minnesota 55401

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GREEN, SCHAAF & JACOBSON
JOE D. JACOBSON, ESQ.
7733 Forsyth Blvd., Suite 700
St. Louis, Missouri 63105

JENNIFER WENSICK, ESQ.
1701 W. Charleston Blvd., Suite 550
Las Vegas, Nevada 89102

For the Defendant: HALLELAND, LEWIS, NILAN, SIPKINS &
JOHNSON
TRACY J. VAN STEENBURGH, ESQ.
600 Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402

REED, SMITH, CROSBY, HEAFEY
STEVEN M. KOHN, ESQ.
DAVID E. STANLEY, ESQ.
PAUL D. FOGEL, ESQ.
355 South Grand Avenue
Suite 2900
Los Angeles, California 90071

LIZ PORTER, ESQ.

Court Reporter: KRISTINE MOUSSEAU, CRR-RPR
1005 United States Courthouse
300 Fourth Street South
Minneapolis, Minnesota 55415
(612) 664-5106

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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1 (In open court.)

2 THE COURT: You may be seated, everyone. Good
3 morning.

4 MR. ANGSTREICH: Good morning, Your Honor.

5 THE COURT: On the Court's civil calendar today
6 is case number 01-1396, in re St. Jude Medical,
7 Incorporated, Silzone heart valves products liability
8 litigation.

9 Counsel, would you note your appearances this
10 morning, and we'll start with Mr. Capretz who is here by
11 telephone, I believe.

12 MR. CAPRETZ: Yes, I am, Judge, good morning,
13 Judge. Jim Capretz.

14 MR. ANGSTREICH: Steven Angstreich for the class.

15 MR. RUDD: Gordon Rudd for the class, and also
16 with me did is Ryan Dahlen who is a law clerk in my office
17 and just finished his first year of law school.

18 MS. WENSICK: Jennifer Wensick for the class.

19 THE COURT: Good morning to all of you.

20 MR. KOHN: Good morning, Your Honor. Steven Kohn
21 for St. Jude Medical, and I would like to introduce my
22 partner Paul Fogel, who will be arguing a portion of the
23 case for St. Jude Medical.

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

25 MS. VAN STEENBURGH: Tracy Van Steenburgh on

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1 behalf of St. Jude Medical.

2 MS. PORTER: Liz Porter on behalf of St. Jude
3 Medical.

4 THE COURT: Good morning, all of you. I guess
5 we're going to proceed first with the status conference.
6 Okay. Who is going to begin here? Mr. Stanley?

7 MR. STANLEY: Thank you, Your Honor. My
8 colleagues are anxious to get to the O'Neill argument, so I
9 will try to be brief. In terms of the mediation program,
10 we have had 27 mediations. 17 of the cases have settled.

11 There are 18 mediations waiting to be reset as we
12 transition from the TIG/Gulf layer to the Kemper layer, and
13 I will provide the Court with some information in our joint
14 status report.

15 And I believe that there are twelve cases out
16 there that at this time we're not mediating either because
17 we don't believe there is a compensable injury or because
18 we just simply don't have any medical records to evaluate
19 the case, and as far as the MDL bank account, it's been
20 opened.

21 I made two deposits into the account last week,
22 and so that's going fine. That's the report on the
23 mediation.

24 THE COURT: Great. Thank you, Mr. Stanley.

25 MR. CAPRETZ: May I ask you a question, Your

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1 Honor?

2 THE COURT: You may, Mr. Capretz.

3 MR. CAPRETZ: David, could you kindly tell us if
4 the numbers you gave, the 18 and 12, included the three
5 cases that were relatively recently transferred to the MDL,
6 although I understand one of them has been sent back for
7 lack of jurisdiction, lack of a \$75,000 claim.

8 MR. STANLEY: I'm not sure, Your Honor. If we
9 need precise numbers, I would be glad to provide them.

10 THE COURT: Okay. Mr. Angstreich, do you have
11 anything?

12 MR. ANGSTREICH: No, Your Honor.

13 THE COURT: Okay. Mr. Capretz, are you reporting
14 next?

15 MR. CAPRETZ: Yes, Your Honor. It's for a point
16 of information and request or desire for the Court to be
17 cognizant of the need from our perspective, class
18 perspective or class representatives' perspective, of
19 getting these cases that did not resolve remanded or in a
20 position to be remanded back to the courts for final
21 disposition.

22 We are still in the discovery stage, as we will
23 be discussing in the next agenda item, but several of these
24 claims, several of the ones that we have personally, I
25 think the same with Mr. Angstreich's --

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1 THE COURT: Mr. Capretz, we're having a hard time
2 hearing you. If you could just speak up for us. Just
3 speak real loudly. Okay?

4 MR. CAPRETZ: Let me know if you can't hear. I
5 don't know where it trailed off or where you couldn't hear
6 me, but the question really is the question addressing the
7 needs of the individual cases to be completed and finally
8 prepared for remand back to the courts where they were

9 filed.

10 And in that regard, we have discovery that is
11 still ongoing, and they are not ready yet for any motions
12 to remand, but we just want the Court to be cognizant of
13 the fact that we believe that we need to have an early
14 completion of these cases so that we might get them sent
15 back if they are not resolved through settlement or
16 mediation.

17 THE COURT: That's fine. When the time is
18 appropriate, we will take that issue up and then work out a
19 plan for them, and I think it's important to keep that on
20 our agenda.

21 MR. CAPRETZ: Okay. Appreciate that.

22 THE COURT: The discovery status?

23 MR. ANGSTREICH: Thank you, Your Honor. We have
24 a discovery deadline for merits discovery towards the end
25 of August. There are several issues that will impact upon
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1 that.

2 The first relates to the depositions that we have
3 asked for, ten additional depositions. There is an issue,
4 as Your Honor is aware from the joint status report, that
5 under the original PTO, we had 20. We took 17, leaving 3.
6 There is 7 additional depositions, correct?

7 MR. STANLEY: (Moves head in affirmative manner.)

8 MR. ANGSTREICH: That we need. Actually, there
9 is three nonSJM depositions, former or present employees
10 which does not come within the 20. There are 7 that do.
11 Of those 7, 4 would come outside the 20 number.

12 The proposal that St. Jude has made is that we be
13 limited to three hours. We've asked that the number be
14 enlarged so that we could take more than the normal number
15 of one day, seven hours.

16 Some of the depositions were not anticipated
17 until we took the depositions of the individuals in this
18 last go-around, of which by the way, Mr. Healy is scheduled
19 for June 28, and Mr. Mirsch has not been scheduled as yet.
20 That would complete the first 10.

21 Although Mr. Shepard also has to be completed.

22 MR. STANLEY: (Moves head in affirmative manner.)

23 MR. ANGSTREICH: He was started, and that one has
24 to be completed as well. So we have clearly -- three of
25 them unless St. Jude Medical will bring these witnesses
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1 from Brussels, and we are sort of hoping that they won't,
2 we have to take them or have to schedule those. That may

3 impact upon the end of merits discovery.

4 So what we're asking for at this moment is to
5 enlarge the number to 24. We cannot represent to Your
6 Honor that that would be the end. It would obviously be
7 determined by the information that is presented by these
8 additional witnesses to see whether or not somebody has
9 additional information, and with respect to depositions, we
10 are still completing the deposition of Mr. Ladner.

11 Mr. Kohn would like Mr. Solum to be present
12 during the deposition to make certain that we have no
13 disputes, and Mr. Solum has a scheduling problem, so we're
14 trying to work that out. That will also impact upon the
15 August 20th date because right now the earliest we can take
16 Mr. Ladner would be the week of the 8th or the 9th of
17 August.

18 THE COURT: August, okay.

19 MR. ANGSTREICH: So that plays into it. Unless
20 St. Jude wants to respond to the number of depositions, we
21 can talk about the other discovery matters that are extant.
22 Okay.

23 MR. STANLEY: As the Court will recall, we had a
24 good deal of discussions about this, the number of
25 depositions, early on in the litigation. We decided on 20.
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1 The seven additional depositions that Mr. Angstreich has
2 requested, four of those witnesses have been deposed at
3 length in other cases before.

4 Mr. Holmberg has been deposed half a day in the
5 MDL on so-called class issues, two days at Ramsey County,
6 half a day in Texas and a half day in Orange County.
7 Ms. Schultz, Monica Schultz, has been deposed for two days
8 in Ramsey County.

9 Mr. Hosek has been deposed for nearly two days in
10 Ramsey County, and our FER person has been deposed a day
11 and a half in Ramsey County and a half a day in the MDL
12 already, and Ms. Illingworth was deposed for a day in
13 Ramsey County and a half a day by Mr. Capretz in another
14 Ramsey County case.

15 So what we were asking, Your Honor, was for the
16 three witnesses that haven't been deposed before, and those
17 are the European witnesses, that we have no objection to
18 producing for the full seven hours, and for these other
19 witnesses, it just seems like since they have been deposed
20 extensively, we're not talking about a half a day here.
21 We're talking about most of these at least two full days
22 that perhaps we could limit those depositions to a half a

23 day.

24 That's really what we're requesting. As far as
25 the European witnesses, we might be able to bring two of
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1 them over here, but one of them certainly is going to have
2 to happen overseas. Thank you.

3 THE COURT: Thank you, Mr. Stanley.
4 Mr. Angstreich?

5 MR. ANGSTREICH: Yes. Your Honor, we have taken
6 depositions of witnesses who were deposed in other cases,
7 Dr. Flory being the perfect example, and despite the fact
8 that he was deposed three times before, his deposition had
9 to go at least the full day.

10 As I told Mr. Stanley, we will make every effort
11 not to be repetitive. I don't know that we have all of the
12 transcripts from all those cases, and the understanding was
13 that we would get them, so we have to double-check that we
14 have them. We're not looking to ask the same questions.
15 We want to make certain that we are complete in our
16 questioning of those witnesses.

17 And if it requires that we go beyond three hours,
18 which is what was offered, that we don't have to get into a
19 fight about it during the deposition. We used Dr. Flory's
20 transcripts as a jumping off point and really made very
21 good use of it, and we also used it to expand upon.

22 So I think that we're going to do the best that
23 we can, but to have an arbitrary limit of three hours
24 doesn't make sense. We have not tried to extend
25 depositions, and even depositions where we had the full
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1 seven hours, there were occasions where we completed them
2 sooner than that.

3 So I think that we just need -- we just need that
4 as the ground rule rather than imposing that limitation on
5 us.

6 MR. CAPRETZ: Your Honor, if I may?

7 THE COURT: Yes, Mr. Capretz.

8 MR. CAPRETZ: Your Honor, I think the burden is
9 clearly on St. Jude Medical here. I think to put an
10 arbitrary and capricious limitation on these depositions
11 without seeing the good faith of the plaintiffs' counsel in
12 taking these depositions is not warranted or appropriate.

13 I think we're entitled to the full seven hours.
14 If for some reason the defense believes that it's
15 unreasonable or we are being repetitive, then they can
16 always stop and ask for instruction and perhaps involve the

17 Court if it would make itself available or a special master
18 if Mr. Solum would be available for that purpose.

19 I certainly think to draw a blanket and cast
20 these people for three hours only is unreasonable. If we
21 have additional need for further settings of depositions
22 in, it would delay the discovery process.

23 THE COURT: Mr. Stanley, did you have anything
24 else?

25 MR. STANLEY: Briefly on the burden, Your Honor,
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1 we're sailing past 20 depositions. It's clearly their
2 burden to show good cause for the depositions and for the
3 extra time.

4 THE COURT: Well, in the Court's view, the fact
5 that all four of these individuals have been deposed on
6 numerous occasions before is relevant to this
7 consideration.

8 What I am going to do is, I'm going to permit all
9 four to be deposed for a total of four hours, assuming that
10 all transcripts have been made available at least two weeks
11 in advance to the plaintiffs for their complete review.

12 If all the transcripts are not available, then
13 the Court will entertain a request for some additional
14 time.

15 MR. ANGSTREICH: Thank you. Your Honor, by all
16 four witnesses a total of four hours, you didn't mean one
17 hour per witness, did you?

18 THE COURT: No. No. Four hours for each of the
19 four witnesses.

20 MR. ANGSTREICH: Thank you, Your Honor.

21 THE COURT: I think Mr. Stanley suggested that.

22 MR. ANGSTREICH: I know, but he was very
23 persuasive when he just got up, so I thought -- that takes
24 us to written discovery, Your Honor, and we have served two
25 additional sets of interrogatories.

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1 One we got objections to, and I'm getting the
2 answers or we're getting the answers on the 24th, but we
3 served an interrogatory and a request for documents
4 requesting information on linear rates of incidence of
5 certain problems with the valves and different valves, and
6 we got an objection.

7 And the objection essentially was that it goes
8 beyond the number of interrogatories that we agreed to in
9 the PTO and it's burdensome and oppressive, and part of the
10 problem with respect to this interrogatory is that it's

11 critical for some of our experts to compare these incidence
12 rates, especially since St. Jude Medical is contending that
13 certain problems with respect to thromboembolic events,
14 thrombus and the like are not causally connected to the
15 Silzone valve, so we need this information.

16 It's not on the, specifically on the agenda.

17 It's something that we're going to have to provide to the
18 Court. We would like to do that as quickly as possible. I
19 don't know that we need to have oral argument on it, unless
20 the Court wants it, but it's something that is critical.

21 We would like to provide you with our position in
22 ten days and then ask that St. Jude do the like, and then
23 if Your Honor wants to have argument, we can do that or
24 just have Your Honor rule on it.

25 It's one interrogatory. I don't know whether the
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1 set that we just are waiting for answers we're going to
2 face the objection on too many interrogatories. Is that an
3 objection?

4 MR. KOHN: I don't know. I haven't seen the
5 answers, but in response, I would say too many
6 interrogatories is not the primary objection to the linear
7 rates. It's one objection. There are many others. I'm
8 agreeable to the proposal.

9 If they want to put forth their position in ten
10 days, we will respond ten days thereafter and see where it
11 goes from there.

12 THE COURT: That's fine. I don't anticipate the
13 Court will need any oral argument on that.

14 MR. ANGSTREICH: The documents that Mr. Solum
15 ruled upon were delivered to me yesterday. Unfortunately,
16 I was catching a plane, so I don't know what the disk
17 shows. I am certain that they're all there, and there is
18 total compliance, but if there is an issue, rest assured,
19 we will let Your Honor know.

20 THE COURT: I would expect that you would.

21 MR. ANGSTREICH: The only other item is to, as
22 the Court is aware having signed PTO 34, we have modified
23 the expert presentation. We will provide the names and the
24 areas of our experts by July 16th, and St. Jude Medical
25 will provide theirs on August 16th or 15th.

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1 THE COURT: 17th.

2 MR. ANGSTREICH: 17th. You get an extra day, and
3 then 60 days following the completion of discovery, which
4 is a date certain in PTO 34, but may in fact not be that

5 date certain. The concept was that 60 days following the
6 completion of merits discovery we would then be in a
7 position to provide the actual reports, and that's really
8 the status of discovery.

9 We're working on it, and hopefully we can meet
10 the August 20th deadline, but with summer schedules and
11 vacations and the like, there is a good possibility that we
12 will not meet that date.

13 THE COURT: Okay. Thank you, Mr. Angstreich.

14 MR. CAPRETZ: May I?

15 THE COURT: Yes, Mr. Capretz.

16 MR. CAPRETZ: The only other issue I heard that
17 Mr. Angstreich could address is on the confidentiality
18 issue and the Gove deposition, was that resolved.

19 Mr. Angstreich.

20 MR. KOHN: The Gove deposition.

21 MR. ANGSTREICH: We had, I did not -- I did not
22 mention that. Your Honor, we got a letter in from Mr. Kohn
23 essentially designating the entire deposition of Mr. Gove,
24 every question and every answer, as confidential.

25 We have sent the letter to Mr. Kohn asking him to
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1 give us the basis for the confidentiality because if you
2 look at the definitions in our PTO, it's almost impossible
3 to really argue that each and every question and answer
4 falls within that area of confidentiality.

5 We offered to meet and confer. That hasn't
6 happened yet, and I don't know that at this moment there is
7 anything to deal with. The order provides that we meet and
8 confer. If we can't resolve it, then St. Jude Medical has
9 21 days to bring a motion on to enforce the
10 confidentiality.

11 If they don't do that, then obviously the
12 designation doesn't apply, but in the interim, the
13 deposition is deemed confidential, so I was hoping that we
14 would get some guidance as to when we would be in a
15 position to discuss that.

16 MR. KOHN: We're taking a second look at the
17 deposition, Your Honor, and we will be prepared to respond
18 to counsel probably by the end of this week. I think we
19 can work most of these issues out.

20 MR. ANGSTREICH: Very good.

21 THE COURT: If you can't, let me know if you need
22 to bring a motion on that. Okay. Anything else?

23 MR. CAPRETZ: Your Honor, this is pretty much the
24 Court's discretion being put in here the pending motions

25 and related matters, I don't know if there are any
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1 questions of the Court for clarification and we want to
2 give on the motions that we might offer.

3 THE COURT: No. The Court is close to getting
4 that out, and I think we're hoping for next week resolution
5 of, final resolution of those matters.

6 MR. CAPRETZ: Thanks.

7 THE COURT: Is there any report on the Canadian
8 litigation?

9 MR. CAPRETZ: Yes, I can report. Mr. Kohn can
10 probably supplement it. Within the last 30 days, the
11 parties have held a further mediation session. That
12 session, from what I understand, did not lead to any
13 meaningful result except there is some further fact finding
14 that the parties agreed to do that might lead to further
15 productive talks.

16 I do want to point out one thing in this regard.
17 It's my understanding, I was not there, so I could stand to
18 be corrected, but it is my understanding that St. Jude
19 Medical has not raised the issue or problem of the
20 insurance in the Canadian litigation, which they have in
21 our litigation.

22 If the Court has an opportunity to review the
23 joint status report, it will say that St. Jude Medical has
24 raised the fact that this next layer of insurance that is
25 now in effect from the Kemper group, Lumberman, is a
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1 potential problem but that the -- to the extent they intend
2 to go forward with the mediation program notwithstanding
3 that problem.

4 Again, I call this to the Court's attention
5 because I really fail to see or appreciate the relevance of
6 that, and I continue to believe that this particular
7 problem and the continual raising of this problem in the
8 St. Jude Medical independent case mediation, it's more of a
9 method of persuasion than an actual issue that must be
10 dealt with.

11 And this causes me concern because I believe the
12 companies have been found to be liable, and they have to be
13 accountable to the individuals who may have suffered from
14 defective product, and I'm not quite sure I appreciate why
15 this is an issue in the individual case mediation.

16 In this regard, perhaps we could ask Mr. Kohn if
17 we have, if we're in a hiatus, the parties bring themselves
18 up to speed involved with the Kemper mediation program, but

19 we were hopeful to have some time when that might be reset
20 or rescheduled, the mediations might be rescheduled. I
21 should have probably raised this earlier, but if we could
22 have that point addressed, I would certainly appreciate it.

23 THE COURT: Mr. Kohn?

24 MR. KOHN: Your Honor, the best information we
25 have at this point is that we're ready to proceed with the
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1 mediation program on or about August 1st and that Kemper
2 will be participating at that point in time. As far as
3 Mr. Capretz's continuing allegation that we're somehow
4 using this as a lever, it's simply not true.

5 There have been press releases. You can go to
6 the web site of the Illinois Department of Insurance. The
7 fact of the matter is that Kemper is in a run-off
8 situation. They're in financial difficulty, and if we
9 weren't forthcoming about this information, we would be
10 accused of concealing it.

11 But we are ready to proceed with the mediations,
12 and we understand that Kemper is ready to participate, and
13 that's the best information we have.

14 THE COURT: So at this point, there is no delay
15 or significant problem holding anything up. It's just
16 identified as a potential problem because of the financial
17 difficulties of the company, correct?

18 MR. KOHN: That's exactly, correct, Your Honor.
19 Thank you.

20 THE COURT: I think that's fair. It's fair to
21 raise that issue and make sure that everyone is aware of
22 it, and if there are any further problems, I'm sure the
23 parties will be in touch with me.

24 MR. CAPRETZ: Thank you. I can report further on
25 what I understand the Canadian situation to be.
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1 THE COURT: Mr. Capretz, we are losing you again,
2 if you could speak up just a little louder.

3 MR. CAPRETZ: As the Court probably recalls at
4 the last status conference we spoke to the fact that
5 St. Jude Medical filed a request for the right to appeal
6 the decision of the class certification and Daubert
7 hearings.

8 And it's my understanding as of today that the
9 justice of the divisional court of Canada that has heard
10 that matter has not yet ruled, and we are still waiting for
11 his ruling. And the last point on the Canadian litigation
12 is Justice Cullity, who is the justice who heard the class

13 certification and Daubert motion, has issued an order, a
14 support order of approximately \$700,000, Canadian dollars,
15 to the plaintiffs' counsel for their taxation of costs and
16 expenses in connection with the litigation.

17 And it's my understanding that St. Jude Medical
18 has made a request, I believe, to appeal, and also a
19 request to stay any execution of that order.

20 Maybe Mr. Kohn wants to reflect further.

21 THE COURT: Do you have anything else, Mr. Kohn,
22 on the Canadian litigation?

23 MR. KOHN: No, Your Honor. Thank you.

24 THE COURT: Okay. Thank you, Mr. Capretz.

25 MR. CAPRETZ: Okay. I will be on the next one,

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1 too, if I may, the Ramsey County.

2 THE COURT: Go ahead.

3 MR. CAPRETZ: It's simple. It is still pending.
4 I don't have the number of cases. Gordon Rudd may or
5 perhaps Liz Porter, the number pending, but there will be a
6 status conference on one of the cases this afternoon that
7 is being discussed for trial in the first part, first
8 quarter of 2005, and the rest of the cases are just pending
9 on hold in that particular litigation, to the best of my
10 knowledge.

11 THE COURT: Mr. Rudd, do you have anything else?

12 MR. RUDD: I know there are at least five cases
13 still pending in Ramsey County. There may be more.

14 THE COURT: Okay. Ms. Porter, did you want to
15 add anything?

16 MS. PORTER: No.

17 THE COURT: Okay. Anything else on Ramsey
18 County? Any other matter for the status conference today?

19 MR. ANGSTREICH: The only other matter, Your
20 Honor, would be whether or not and when we're going to have
21 the next status conference.

22 THE COURT: I've got a few proposed dates here.
23 In August, I'm looking about six weeks out. I know that
24 everyone is real busy with the discovery deadline
25 approaching, but we can always put off the conference, too,

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1 if everyone is too busy and there aren't matters to
2 resolve, but I've got three dates here to throw out.

3 August 11th, 18th or 25th? Anything about those
4 dates?

5 MR. ANGSTREICH: My preference would be if
6 Mr. Ladner's deposition could be scheduled the week of the

7 9th that we shoot for the 11th so that we can do
8 Mr. Ladner's deposition and have the status conference.

9 After that, after the week of the 9th, since
10 Mr. Solum is going to be on vacation for two weeks.

11 MR. KOHN: He's in a mediation.

12 MR. ANGSTREICH: He's in a mediation for two
13 weeks, then it probably won't matter, but I think August
14 11th is probably the better target date anyway even if
15 Mr. Ladner's deposition isn't ongoing.

16 MR. CAPRETZ: That would work with me, Your
17 Honor. The 25th is out. The 11th or the 18th is fine.

18 THE COURT: Mr. Kohn, what do you think about the
19 11th?

20 MR. KOHN: The 11th is fine, Your Honor. I don't
21 know whether we will be able to work out the depositions
22 for that week, but we will give it our best.

23 THE COURT: Let's set August 11th, then, for the
24 next status conference, and what time is preferred, if
25 you're going to be here for deposition anyway?

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1 MR. ANGSTREICH: The preference, Your Honor, is
2 to do it in the morning. That way if we can resume
3 Mr. Ladner's deposition, I don't know that we're going to
4 be going seven hours anyway.

5 We might be able to complete it that afternoon,
6 or even if we have to do it the day before, at least we
7 will have the morning for the status conference.

8 THE COURT: Nine o'clock work?

9 MR. ANGSTREICH: Nine is perfect, Your Honor.

10 THE COURT: Okay. Nine o'clock on August 11th it
11 is. Okay. Anything else on the status conference? If
12 not, let's turn to case number 04-1211, Shane O'Neill and
13 Gabrielle Sanio-O'Neill versus St. Jude Medical,
14 Incorporated.

15 MR. CAPRETZ: Thank you, Your Honor. I'm going
16 to sign off the call, and I would thank you very much for
17 the opportunity to do this by telephone.

18 THE COURT: Thank you, Mr. Capretz.

19 MR. CAPRETZ: Have a good day.

20 THE COURT: Thank you. Okay. We have the
21 plaintiffs' motion to remand. Let's take that first if
22 that's okay, and then we have defendant's motions to
23 dismiss on several grounds.

24 MR. ANGSTREICH: Your Honor, I know that the
25 Court is pressed for time today, and we appreciate the

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1 opportunity. Our motion for remand is predicated upon the
2 fact that one of the cases removed, the doubts of the
3 remand is sort of the doubts of whether or not remand is
4 appropriate are to be resolved in favor of the party
5 seeking removal.

6 The burden is a strict and difficult one for the
7 party making the removal. There must be an establishment
8 of federal jurisdiction in order for removal to be
9 appropriate.

10 When you seek removal, you look to the four
11 corners of the complaint to see if there is a federal cause
12 of action that's pled, a federal basis for relief. There
13 is not any of that here, so we look at what St. Jude has
14 effectively said.

15 And what they say is that this involves the
16 federal common law of foreign relations, that somehow the
17 allegations of our complaint implicate and require
18 construction of laws of each EU nation, which we say is
19 incorrect since all we're looking at is a directive and
20 it's a uniform law, and their own submission confirms that
21 it's a uniform law, involves interpretation of unspecified
22 foreign treaties.

23 But, of course, there are no treaties that are
24 identified, and the EU directive is not a treaty, and the
25 medical monitoring relief somehow implicates questions of
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1 international dimension. Two cases are cited by St. Jude
2 in their removal, neither of which have anything remotely
3 to do with this case, and we will go over it very briefly.

4 There is no individual EU member law that needs
5 to be interpreted, as I said. There is no foreign
6 government that has been named. There is no agency of any
7 foreign government that has been named. There is no claim
8 of wrongdoing that's been made against any foreign
9 government.

10 There are no fundamental national or sovereign
11 rights involved. There are no borders of control of
12 national lands that are involved, as with the cases
13 involving Peru and the copper mines.

14 The regulation of this product and the remedy
15 that is involved that we seek does not affect any EU
16 nation's gross products, as was the case in some of the
17 other cases. The fact that there is an EU directive as one
18 of the bases for relief, as opposed to the Minnesota laws,
19 does not mean that automatically there are foreign
20 relations involved.

21 As we have cited in our brief, this Court and
22 other U. S. courts have applied foreign laws where that is
23 the law to be applied in the case. By the way, there has
24 been no ruling that in this case the Minnesota laws would
25 not be the more appropriate law to be applied.

0026

1 When you look at Torres and you look at Sequihua,
2 you find factors that just don't exist here. The first and
3 most important in both of those cases, the foreign
4 government said, we don't want this case to go forward.

5 The -- Ecuador complained that a half a million
6 people to be medical monitored would be inappropriate. We
7 don't want that. The government of Peru said, you're going
8 to adversely affect one of our major issues and major
9 programs and impact our gross product.

10 At page 8 of our memorandum or brief, we
11 highlighted each of the factors in Torres that impacted
12 upon the Court saying, yes, it involves foreign relations.
13 We did that with respect to the Sequihua case on page 9.
14 Those factors are not implicated here.

15 THE COURT: Does the fact that various health
16 ministries and European governments have been monitoring
17 the situation and have, I guess in some cases, issued
18 advisories or whatever they might call their warnings that
19 they issued from time to time, is that a factor or not?

20 MR. ANGSTREICH: That is not a factor as it
21 relates to what law is involved, and we also know that the
22 interrelationship between St. Jude Medical and the MDA,
23 which is the one that issued the advisory and the cease and
24 desist order in England, all of that was orchestrated out
25 of the home office in the United States for St. Jude

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1 Medical.

2 It was governed -- it was handled by Mr. Ladner.
3 He was the one that had all the communications allegedly
4 based upon the privileged log that we have been litigating
5 over, and whether or not the MDA or the FDA issued any
6 rulings per se would not impact a foreign law or require
7 this Court to say no, you need to look at that foreign law
8 under any of the tests.

9 I mean, Torres simply does not apply, and the
10 less liberal test of the Eleventh Circuit in Patrickson
11 makes it clear that there still has to be some sovereign
12 involvement, major involvement in order for the law of
13 foreign relations to be implicated.

14 We simply say to this Court that it's not there.

15 The EU directive is simply not the kind of law that is
16 impacted or involved in any of the cases in which this
17 concept of creating a federal cause of action can be found.

18 THE COURT: Is the EU directive a substantive
19 basis for recovery?

20 MR. ANGSTREICH: The EU directive is similar to
21 our Uniform Commercial Code. It is a methodology for
22 establishing liability and as cited by St. Jude Medical in
23 one of their footnotes -- and I will give you the footnote
24 exactly, Your Honor -- they acknowledge that it is in
25 effect a uniform law.

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1 It's at page 6. They recognize, and this is in
2 our footnote 10 on page 6 of the reply, defendant's
3 recognition that it is the responsibility of the European
4 court of justice to resolve any inconsistencies between
5 those schemes and the directive and of ensuring uniformity
6 and interpretation and application of the directive
7 throughout the EU.

8 So effectively it's not that you have to look at
9 16 or 17 nations' interpretation of the EU. It's supposed
10 to be uniform, and therefore, there is no requirement.
11 There is no implication of this Court treading upon a
12 foreign national's interest.

13 And certainly when you look at where it was
14 manufactured, where it was marketed, where the issues are,
15 where the communications were with the European entities,
16 where it emanated from, it's all here. So we have no
17 foreign nation coming forward to say we don't want you to
18 be involved.

19 We have a limited medical monitoring class of 10
20 to 14 thousand people, not the half a million people in
21 Sequihua that made that so incredibly difficult, on top of
22 which the foreign government said we don't want you
23 involved.

24 We have no treaties that are involved, and so
25 what has happened here is that St. Jude Medical has

0029

1 attempted to create the appearance of some foreign
2 relations because of an EU directive, but that does not
3 bring it within the ambit of the Fifth and the Eleventh
4 Circuit or the Ninth Circuit in the interpretation of
5 whether there is a federal question.

6 There simply is no federal question here. Remand
7 is required and remand with the award of costs.

8 THE COURT: Just so I understand this better,

9 Mr. Angstreich, so the EU directive does not create a
10 private right to sue in and of itself? Is that true or --

11 MR. ANGSTREICH: That's correct, Your Honor.

12 THE COURT: It simply requires the member nations
13 to enact within certain parameters the laws which would
14 create a private right to sue.

15 MR. ANGSTREICH: That's right, and it's got to be
16 uniform within the scope of the EU directive, but that,
17 again, you're only going to be involved in analyzing the
18 directive if at some point, if this Court has the case,
19 whatever judge is involved will determine that the
20 directive should be the guiding or the pulse star of the
21 case as opposed to Minnesota law.

22 THE COURT: Yeah, I understand that. I think
23 it's helpful for me to understand the directive from the
24 context of just exactly what message that directive is
25 sending to this country for purposes of determining whether
0030

1 there is any foreign interest in this case for a federal
2 request for jurisdiction.

3 MR. ANGSTREICH: We understand, Your Honor.
4 We've said it in both our submission and our reply. I
5 don't think that there is anything further that need be
6 stated. We haven't pled a federal cause of action, and
7 St. Jude Medical by the arguments that it has advanced
8 hasn't created one.

9 Thank you.

10 THE COURT: Thank you, Mr. Angstreich.

11 Mr. Fogel? Welcome.

12 MR. FOGEL: Thank you, Your Honor. Exporting
13 American law abroad and importing a foreign based lawsuit
14 are highly controversial propositions. U. S. Supreme Court
15 said only eight days ago that Congress can't willy-nilly
16 engage in acts of legal imperialism and impose America's
17 law on the rest of the world.

18 That's why we have come before this Court and
19 said that this case doesn't belong in any United States
20 court, but if it's going to remain in the United States, it
21 should remain in this court and not in Ramsey County
22 because this court and not the state court should as a
23 matter of international relations deal with the fallout
24 from supplanting legislative and judicial functions that
25 inevitably are going to happen when you get into the
0031

1 European directive, the medical monitoring, the other
2 issues that they've raised.

3 The state of Minnesota, of course, has no
4 diplomatic relations with the 15 or 25 European union
5 members. Our federal government has that sort of
6 relationship, and it's the consensus for decades that when
7 you have a case that raises the kinds of international
8 relations issues that this case raises, that's a subtle
9 basis for federal common law jurisdiction.

10 THE COURT: Just assume for a moment, Mr. Fogel,
11 that a medical monitoring class were certified and this is
12 set up to do medical monitoring. Does that necessarily
13 implicate the European governments involved?

14 MR. FOGEL: Absolutely.

15 THE COURT: Okay.

16 MR. FOGEL: We have six unchallenged affidavits
17 before you from reputable people, people on the plaintiffs'
18 side. The Italian professor is a plaintiffs' lawyer.
19 People on the defense side, Dr. Magnus. These are people
20 involved in the struggle between the directive and the
21 implementing legislation. All six say medical monitoring
22 is not a form of relief recognized by any European country.

23 So the medical monitoring relief that the
24 plaintiffs want is necessarily a foreign policy matter.
25 For a state court, of course, we're not -- we believe that
0032

1 any court, any United States court, to impose its view of
2 medical monitoring on this class would be an infringement.

3 Ms. Van Steenburgh is going to argue the
4 international comity concerns, but the fact that, Your
5 Honor, the fact that state courts will even have to deal
6 with this conflicting foreign policy, we have EU policy,
7 individual state policy saying medical monitoring, no, we
8 don't deal with worried well damages that way.

9 What we deal with is, we deal with it through our
10 socialized medical system, our public health system. If
11 you feel you need testing, you go, and we will pay for it.
12 It's not done through the civil litigations through the
13 civil justice system, and for a state court to even get
14 into that issue is going to raise issues of international
15 dimension.

16 The whole objective here and the inquiry that you
17 have to make under the remand standards, which are
18 basically undisputed, is whether leaving this with the
19 state court would potentially get the state court involved
20 in issuing a disparate or parochial decision that might
21 butt up against some international law principle, and the
22 whole objective here is to ensure that the federal rather

23 than state government deals with international law
24 concerns.

25 Now, plaintiffs' counsel says well, we don't have
0033

1 a treaty. We don't have a treaty, but federal common law
2 is, you know, that three-part test under 1331 is
3 constitution, treaties and laws of the United States. Laws
4 of the United States mean federal common law. That's what
5 1331 says.

6 We don't have to have a Geneva convention, a
7 human rights, UN convention on human rights where the
8 United States should sign on to the international criminal
9 court. We don't have to have that. We have the Torres
10 case. We have the Sequihua case. Those cases involve
11 state law tort causes of action.

12 We have something very different here. We have a
13 European, a cause of action in its own right, freestanding
14 claim under the European product directive. Now, Your
15 Honor's questions to plaintiffs' counsel, you asked whether
16 the product liability directive is binding or is -- creates
17 a private right of action.

18 In itself, it does not. The way it works is, it
19 requires the 15, now 25, member states to enact
20 implementing legislation, and it's that -- whether that
21 implementing legislation conforms with the principles of
22 the directive and that struggle as Europe moves to
23 unification is an issue very near and dear to the 15 now 25
24 countries of the European union.

25 The test here is whether plaintiffs' claims will
0034

1 directly and significantly affect foreign relations,
2 whether there will be determinations of international
3 relations at issue.

4 The Chapalain case, as it puts it, says,
5 questions whether the claims will actually and
6 substantially involve a dispute or controversy concerning
7 the interpretation or effect of federal common law, the
8 determination of which will have a direct impact on the
9 plaintiffs' case. Again, they have alleged a cause of
10 action under the product liability directive.

11 Three reasons why we have federal common law
12 jurisdiction here. First is the directive, which I have
13 alluded to. Second is the medical monitoring claim, which
14 I have also alluded to; and third is regulation, as Your
15 Honor points out, by individual health ministries of the 15
16 or more countries involved.

17 Let's go to the directive. As I said, we have
18 six unchallenged affidavits by European law experts --

19 MR. ANGSTREICH: Excuse me, Your Honor. The
20 rules relating to motions for remand prohibit this. This
21 is outside their notice of removal which limited them to
22 two cases. These affidavits were not submitted in
23 connection with the remand application.

24 This is totally improper. This relates to the
25 comity issue and is not part of, nor should it be,
0035

1 considered part of a remand motion or opposition to it.

2 THE COURT: I will listen to Mr. Fogel, and I
3 will bear that in mind, Mr. Angstreich.

4 Go ahead.

5 MR. FOGEL: We just ask that you look at the
6 Masepohl case cited in our papers, which is a Minnesota
7 case from 1997 which did look outside the complaint. These
8 experts have established, and you have before you in
9 Ms. Van Steenburgh's affidavit, that there is going to be a
10 lot of issues.

11 I ask you to look at the product liability in the
12 European union, Exhibit C to her affidavit. You will see
13 in tables 2 and 3, there are lots and lots and lots of
14 issues where the product liability directive and the
15 implementing legislation diverges.

16 We have the European court of justice which is
17 very much interested in how this all shakes out. That
18 European court of justice serves many roles. One role is,
19 it serves as an advisory court to tribunals of first
20 instance, trial courts in Europe who want to know are we
21 doing it right.

22 It serves as a mandatory tribunal from the high
23 courts of each European country to answer the question, are
24 we doing it right, and it can commence what is called an
25 infringement proceeding, which happened in France over
0036

1 the -- whether the code CV was consistent with the European
2 directive. It initiates infringement proceedings to
3 determine whether a country is out or in compliance.

4 Now, this isn't like the UCC. The UCC is a take
5 it or leave it, you know, do you want it? We don't have
6 the European court of justice involved. We don't have
7 disparate state laws sort of fighting with the product
8 liability directive.

9 So their characterization of this is just sort of
10 an ALI, UCC kind of, you know, if you want it that's fine,

11 just doesn't work. Look at the issues that a state court
12 would have to deal with.

13 It would have to deal with the differing
14 legislation between the member states, the different
15 definitions of defect, different definitions of product,
16 the different definitions of damages caused by personal
17 injury or death, the applicability of damages caps, the
18 applicability of the development risk defense, whether
19 preexisting national contract and tort liability laws apply
20 because the directive did not erase, you know, centuries of
21 law from the books and whether predirective case law of
22 these countries is viable.

23 Plaintiffs' counsel talks about this case being
24 so different from the Torres case that had -- in which the
25 court recognized that there was an impact, an economic
0037

1 impact in leaving the case in state court.

2 Two aspects of these affidavits, two aspects of
3 this case, show that leaving this case in state court will
4 have an economic impact. One is the damages cap. In
5 Germany, you will note from the Magnus affidavit, Germany
6 enacted the optional 100 million dollar damages cap.

7 If a state court were to exceed that cap or even
8 interpret that cap, that involves a matter that is near and
9 dear to the government of Germany. The development risk
10 defense, you have the Feeney affidavit which unchallenged
11 states, The reason we adopted the development risk defense,
12 state of the art defense as we were allowed to do under the
13 directive is, we wanted to encourage economic development
14 by medical, pharmaceutical, other manufacturers in Ireland.

15 If that doesn't affect economics, you know, the
16 economic well-being of the country, I don't know what does.
17 In this case alone, we know from the affidavit of
18 Mr. Underhill, QC admitted in 1992 from England, we have
19 issues about the legitimate expectation of safety, the
20 liability of producers. Who is a producer under the
21 directive? Does a supplier? Is an importer a producer?

22 We have issues about whether there will be full
23 and proper compensation and whether worried well damages,
24 medical monitoring relief is recoverable.

25 Let's go to the second basis. We have a class of
0038

1 10 to 14 thousand putative class members. They live not
2 only in Europe but all over the world because the class as
3 framed is residents anywhere.

4 Remember this is a class for whom the AVERT study

5 shows that all individuals by now have the same risk as
6 those patients who have had a conventional valve. They are
7 not asking for personal injury damages. They are only
8 asking for medical monitoring relief. So to allow medical
9 monitoring, as I said before, would butt up against the
10 system of medical care that the foreign governments have
11 decided to deal with through their public health systems.

12 That is a foreign policy choice that will
13 necessarily involve a state court in dealing with the
14 foreign policy of other nations, and that fits squarely
15 within a basis for common law federal jurisdiction.

16 THE COURT: In theory, Mr. Fogel, a medical
17 monitoring system set up through litigation, which this
18 would necessitate the defendants making some payments for
19 that, would I think tend to remove some of this cost or
20 burden from the European governments, in theory, right?

21 MR. FOGEL: And some of them might really like a
22 pot of money come flowing into them, but other people might
23 say, you know, we don't deal with -- that's not how our
24 system works. We deal with medical monitoring through our
25 public health system.

0039

1 If you're going to pay the public health system
2 to relieve the cost, well maybe we will consider it, but if
3 you're going to pay them, it's not how our system works.
4 The issue is not whether it's good or bad. The issue is,
5 should a state court be dealing with that? Should a state
6 court even be considering that kind of issue?

7 That's what the test is. You don't have to
8 answer. We don't have to answer the question whether it's
9 a great idea for money to pour into these countries for
10 medical monitoring. The mere fact that a state court might
11 have to deal with it and might butt up against public
12 health policies or as the Sequihua case said, step into the
13 shoes of the Ecuador health ministry, that raises an issue
14 of international concern.

15 Again, we don't need -- plaintiffs' counsel says
16 we don't have 500,000. We only have 14,000. That was not
17 the turning point for the Sequihua case. It's true. We
18 don't have a government yet. We're only at the pleadings
19 stage. We're only at the beginning of the pleadings stage.
20 We don't have a government coming in here and saying, stop,
21 stop, amicus brief, intervention, stop. We want you, you
22 know. We don't want the state court.

23 But we do have expressions of policy, loud and
24 clear from these affidavits, loud and clear from the laws

25 themselves, loud and clear from the monograph I showed
0040

1 about -- that describes the differences between the product
2 liability directive and implementing legislation.

3 The third and last basis, third and last reason
4 why this case raises issues of federal common law is that,
5 as I said, the medical monitoring relief would require the
6 court, the state court now, to coordinate relief with a
7 variety of government organizations like the European
8 commission, the European economic area; and also the
9 European member nation medical device authorities were
10 involved here, both before and after the marketing of the
11 Silzone health valve.

12 As the Court knows from our briefs and as the
13 Court can see on the slide, these are the 18, what they
14 call, notified bodies. These are the different public
15 health or product medical device agencies that deal with
16 the regulation of medical devices in their countries. They
17 not only approved this medical device, but they are
18 following what is happening.

19 Incident reports need to be reported to these
20 medical bodies, these notified bodies. The European
21 commission receives reports, these reports. There is
22 investigation by competent members, member state agencies,
23 and there is coordination between the European commission.
24 We know that from the Roland Gerard affidavit.

25 Again, the goal here is to avoid state court
0041

1 involvement in foreign policy choices. Merely asking for
2 relief under the product liability directive, which is
3 essentially asking for relief under the 15 member nations
4 laws, merely asking for medical monitoring relief, merely
5 saying we want to achieve by litigation things that --
6 results that different countries have achieved through
7 their through own legislation, through their own public
8 health system, that raises an issue of concern.

9 The Ninth Circuit in the Patrickson case said, we
10 have to ensure that claims that involve an evaluation of
11 the active state -- of an active state or foreign policy
12 choices are dealt with in federal court. It was echoing
13 the words of the Sabbatino case, the U. S. Supreme Court
14 case.

15 We submit that this case easily fits into any
16 test, the Fifth Circuit test, the Ninth Circuit test and
17 that a remand would be improper.

18 THE COURT: Thank you, Mr. Fogel.

19 Mr. Angstreich?

20 MR. ANGSTREICH: Can you turn this off, please?

21 Your Honor, the argument that was just made needs
22 to be stricken. It is unrelated to and improper in
23 response to our motion for remand. As stated in the McGee
24 and First National Bank of Aberdeen case, you can't look at
25 stuff outside the record. The notice of removal is the
0042

1 basis for which removal was sought. These affidavits are
2 wholly improper. Cannot be considered and are irrelevant
3 to establish whether or not there is a federal cause of
4 action.

5 Now, it's really fascinating how you do these
6 jumps. There is a potential for something. The state
7 court has to look at potentially some other law. As cited
8 in our brief, the state court in Minnesota was able to
9 determine whether to apply Ontario law or Minnesota law in
10 an automobile accident.

11 It wasn't so difficult for them to apply, for
12 that court to apply. Raising damages issues, whether there
13 are caps, that doesn't implicate foreign relations, and by
14 the way, the medical monitoring claim doesn't involve a
15 claim for damages. It involves a claim to establish a
16 protocol and a fund so that their monitoring can be taken
17 forward.

18 To try to pigeonhole this case into Torres,
19 Sequihua or Patrickson is a feat of major proportions. The
20 state of Peru protested the lawsuit. Peru maintains the
21 litigation implicates some of its most vital interests.
22 What vital interests are implicated with respect to a
23 product that is off the market and is no longer being sold?

24 And will it affect its relations with the United
25 States? What relations with the United States are being
0043

1 impacted here? The mining industry in Peru is critical to
2 that country's economy, contributing up to 50 percent of
3 its export income and 11 percent of its gross domestic
4 product.

5 Where is the relationship? The Peruvian
6 government has participated substantially in the activities
7 for which SPCC is being sued. The government owns the
8 land, owns the minerals, owns the refinery.

9 Where is the ownership? Where is the
10 relationship there? Where is the situation where Ecuador
11 is coming forward and saying, we do not want this case to
12 go forward. We do not believe that it is appropriate. It

13 will do violence to our international legal system. That's
14 not here.

15 Patrickson, Patrickson says that it must
16 centrally involve the validity or invalidity of a foreign
17 active state or precepts or doctrines of international law,
18 not the mere application of another nation's substantive
19 law. That's what is required. They centrally involve the
20 validity or invalidity.

21 There is no central involvement of the validity
22 or invalidity. Whether it's this court determining the
23 application of the EU directive or a state court doesn't
24 create a federal question, and that's what is being
25 suggested to you, that somehow because the state court is
0044

1 being asked or potentially will be asked to determine
2 whether or not the case should go forward under the EU
3 directive with respect to a claim for medical monitoring
4 somehow implicates international relations.

5 It's conceivable that the state court will
6 determine that the law of Minnesota is the appropriate law
7 to apply for all of the factors that led this court to
8 determine that Minnesota substantive law dealing with
9 consumer fraud is the law that should apply as opposed to
10 the law of the other 49 states.

11 But that, again, doesn't create the federal
12 jurisdictional requirement which you must look to only from
13 the four corners of the complaint and the two cases upon
14 which St. Jude Medical sought removal. Neither of which
15 are -- are closely aligned to this one.

16 Thank you.

17 THE COURT: Thank you, Mr. Angstreich.

18 Let's move on to the defendant's motions.

19 Ms. Van Steenburgh, are you taking both of them?

20 MS. VAN STEENBURGH: I am, Your Honor.

21 THE COURT: Go ahead.

22 MS. VAN STEENBURGH: Good morning.

23 THE COURT: Good morning.

24 MS. VAN STEENBURGH: Mr. Fogel cogently explained
25 why the O'Neill case if it is to remain in an American

0045

1 court should remain in this court. I am here to explain
2 why there are compelling legal and practical reasons that
3 the Court should dismiss the O'Neill complaint.

4 I think you have foreshadowed some of the issues
5 that I'm going to speak about. I'm going to first with the
6 Court's permission, unless you want the order otherwise,

7 argue the 12(b) motions, and then I will argue the forum
8 non conveniens.

9 Before I get there, though, I do want to pick up
10 on an issue that seems to be a thread that goes through all
11 three motions, and that is, the plaintiffs have placed
12 great emphasis on Judge Gearin's order in two individual
13 cases in Ramsey County in which she denied a forum non
14 conveniens motion, the Randall and Kozak cases, and argue
15 that we've already lost that motion, and that's why we're
16 here in federal court.

17 Quite clearly, those are not identical motions as
18 the plaintiffs would try to emphasize. You have individual
19 plaintiffs there. You have a class action here. Damages
20 versus medical monitoring. One country versus up to 16
21 countries and a separate basis. I mean, the plaintiffs are
22 seeking to bring claims under European law.

23 So to say that this is an identical situation
24 almost goes so far as to say it's law of the case is just
25 improper. Given that, it is the international dimension,
0046

1 it is the impact on foreign relations that causes St. Jude
2 Medical to bring a motion under 12(b)(1) on international
3 comity grounds.

4 International comity asks that the Court answer
5 the question: Is the interest that this Court or any court
6 might have in adjudicating a dispute subordinate to the
7 laws and interests of a foreign sovereign? It's really
8 interesting.

9 The timing on this is very coincidental because
10 the Supreme Court just last week really looked at the issue
11 of the international comity in the Hoffman-LaRoche case and
12 emphasized and reiterated how important it is for a court
13 to examine and give due consideration to the issues.

14 With the Court's indulgence, I do believe that
15 that case is critical and important to what is going on
16 with the O'Neill complaint, and for just a second, I would
17 like to focus on the Hoffman-LaRoche case. That involved
18 the application of the Sherman Act and an exception to
19 alleged anti competitive conduct in Europe by vitamin
20 manufacturers and distributors.

21 A Supreme Court looked at whether there was going
22 to be interference with foreign relations, and the Court
23 said look, the application of antitrust laws to foreign
24 anti competitive conduct may be reasonable where it will
25 redress domestic injury, but it may not be reasonable where
0047

1 the claims rest solely on independent foreign harm.

2 The Court looked at the principles of
3 international comity and said, why is it reasonable to
4 apply American law when the application of that law creates
5 a serious risk of interference with a foreign nation's
6 ability to independently regulate its own affairs?

7 The Court looked at the fact that in fact there
8 were antitrust counterparts in Europe, but said yes, there
9 are differences, and more importantly looked at something
10 that is critical in this case, and that is, the treble
11 damages provision that applies in the Sherman Act.

12 The Court took note of the briefs that were filed
13 by the various nations arguing that to apply treble damages
14 would unjustifiably permit foreign citizens to bypass their
15 own less generous remedial schemes. It would undermine a
16 foreign nation's notion of enforcement of the antitrust
17 laws.

18 In the end the Court said, the exercise of
19 jurisdiction amounts to legal imperialism, and the Court
20 was rather vehement and said why should American law
21 supplant, for example, Canada's or Great's Britain or
22 Japan's own determination about how best to protect
23 Canadian or British or Japanese customers from anti
24 competitive conduct engaged in significant part by Canadian
25 or British or Japanese or other foreign countries.

0048

1 In this case, those kinds of interference and a
2 risk of that kind of interference applies in the O'Neill
3 case. If a court is required to interpret the European
4 product liability directive, there is a serious risk of
5 interference with the EU countries' interests.

6 As Mr. Fogel has explained, and I won't go
7 through it all again, the individual countries have said,
8 we want to establish a directive. We want it adjudicated
9 and interpreted by a European commission of justice, and
10 they have agreed amongst themselves to create a separate
11 and independent court system. Interpretation of that by an
12 American court could run into a serious risk of
13 interference with the European countries' interests.

14 Second, imposing Minnesota's consumer fraud laws
15 creates a serious risk of interference with the EU
16 countries' interests. There is an assumption, as the Court
17 said in Hoffman-LaRoche, that Congress takes into account
18 the interest of sovereign nations when it enacts laws.
19 Presumably Minnesota did, too.

20 It's hard to believe that Minnesota would be

21 thinking that the consumer laws of Minnesota would be
22 applying to Europeans in European countries where the
23 conduct at issue presumably all occurred in Europe.

24 Interference with European regulation of medical
25 devices creates a serious risk of interference. As the
0049

1 Court has pointed out, there is an MDA. The medical
2 devices in Europe are regulated by independent agencies,
3 and there has been a scheme set up for that, and
4 adjudication and standards are set. And the standards and
5 conduct should be judged by the standards that are set in
6 Europe.

7 And finally, administering a worldwide medical
8 monitoring and research trust fund creates a serious risk
9 of interference with EU countries' interests, and, again,
10 Mr. Fogel said and I think the Court had asked the
11 question, there is no provision for medical monitoring in
12 any of the EU countries, and the Supreme Court, if you look
13 at it, raised this very issue.

14 Why should an American court impose a remedy that
15 doesn't exist necessarily in those EU countries? With
16 respect to the treble damages, why should we take the
17 position that we should impose that remedy when the
18 European countries have said, no, we have our own remedies,
19 and we should be allowed to regulate and administer those
20 remedies as we see fit.

21 On top of that, this Court has actually said,
22 look, there are only those plaintiffs who are in states
23 where medical monitoring is recognized as a cause of action
24 who are going to be part of the class. The plaintiffs here
25 are saying, look, you should impose medical monitoring,
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1 whatever state's law it is, for all of these putative class
2 members in Europe, which would be allowing a remedy that
3 the Court hasn't even allowed in the U. S. jurisdictions.

4 The Supreme Court also looked at whether there
5 was an issue -- whether you could justify interfering with
6 a foreign government's interests, and here, the comity of
7 nations factor strongly favor dismissal of the complaint
8 because there is no justification for interfering with the
9 interests the foreign countries in Europe would have.

10 The paramount concern, of course, is the interest
11 and effect on the European countries, and they do have an
12 interest in regulating and adjudicating activity. The
13 location of a substantial amount of the activity or the
14 conduct that is at issue here is in Europe also.

15 The plaintiffs have said, well, all of the
16 documents are here, but that is not a factor to be
17 considered. It's where the conduct was. The valves were
18 sold there. The valves were implanted there. The
19 plaintiffs received medical care there. The evidence is
20 primarily in Europe. There is no justification for
21 interfering with the adjudication of the conduct that
22 occurred in Europe.

23 The expectations of the interested parties, the
24 plaintiffs say, wait, why shouldn't we have an expectation
25 that the U. S. Government through the court system will

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1 adjudicate claims according to the U. S. system on our
2 behalf, but again, the expectations, are those reasonable?

3 I mean, is there a justification for interfering
4 with the interests of the European countries by imposing
5 medical monitoring? I think the Supreme Court has said no,
6 and there are also other expectations. The government, the
7 regulators in Europe, there are expectations that they have
8 that have not been addressed by the plaintiffs at all.

9 Consistency in the international system is
10 another factor where there would have to be justification
11 for interference. The plaintiffs would have this Court
12 adjudicate their claims, but that does not necessarily
13 promote consistency. You know, the European court alone
14 has the power to interpret the directive, and there are
15 also res judicata concerns.

16 There is no customary international legal
17 requirement that a foreign give effect to the judgment of a
18 foreign nations court, and if you look at the Timberlane
19 case, which is a case that we cited and the Supreme Court
20 has cited that approval, res judicata concerns were in fact
21 a comity issue that the Court found to be important.

22 Finally, the likelihood of conflict with a
23 foreign nation, can we justify interference where there
24 might be a conflict? Well, administration of a medical
25 monitoring trust fund highlights this factor. It

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1 implicates the healthcare system, as we have said before,
2 and even though there might be an influx of money, the
3 European nations have said, this is the way we want to
4 administer our healthcare system and have set it up in a
5 particular way.

6 Now, the plaintiffs point to the fact in this
7 regard that they aren't residents of one country, and there
8 is a difference there, but scattering this among the

9 nations doesn't necessarily make the conflict any less
10 real. It was interesting. I would like to point out, they
11 also took the position that it's the U. S. Government, that
12 somehow they are in the place of the U. S. Government.

13 We shouldn't forget. This isn't the U. S.
14 Government bringing this lawsuit. These are private
15 litigants, and it is their interests. They are prosecuting
16 under Minnesota common law and statutory claims.

17 For all of those reasons, Your Honor, we believe
18 that international comity mandates dismissal of this case.
19 I mean, quite clearly, there is no doubt. I mean, you've
20 heard Mr. Fogel. You have now heard me. There are foreign
21 relation interests here, and there is a substantial risk of
22 interference. On that basis alone, the Court has a basis
23 for dismissing under 12(b)(1).

24 But we also brought to the Court's attention
25 another basis that I would like to bring to the Court's
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1 attention, and that is due process concerns, and we brought
2 a motion under 12(b)(6) on that ground.

3 The plaintiffs have said no, this is not an issue
4 that the Court has to look at, but just as the Court has to
5 look at subject matter jurisdiction, which is the basis
6 with international comity, the Court also has to look up
7 front at some of the due process concerns that might be
8 implicated by the O'Neill case.

9 Now, the plaintiffs would have the Court ignore
10 those and just say, no, this is something that you could
11 look at at a class certification stage, but really I think
12 the Supreme Court in the Shutts case has said no, due
13 process is always a concern, and it should be a court's
14 paramount concern and should be something that is looked at
15 at the beginning, why wait until a later time.

16 Two issues of due process are implicated here.
17 The first is the notice issue. Class notice, it's not a
18 question of whether you do it by first class mail or
19 whether you do it by publication. It's a more fundamental
20 issue of potential worldwide publication.

21 We don't know where the plaintiffs live. I mean,
22 we found out Mr. O'Neill had his valve implanted in Europe,
23 and he lives in Canada now. We don't know where these
24 people are. European privacy laws would make it very
25 difficult, and the plaintiffs' answer to that, which is,

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1 well, just notify the hospitals where they had them
2 implanted is not going to satisfy due process concerns.

3 There is no good way to satisfy due process with
4 respect to the notice, and truly the same applies with the
5 res judicata issues. I mean, St. Jude Medical really could
6 be faced and forced to litigate to conclusion a claim that
7 would result in some kind of binding judgment and then
8 otherwise foreclose litigation on its behalf.

9 It might have to litigate all over again, and,
10 again, that's a real concern and a due process concern that
11 the Court should recognize. Denmark, as an example, does
12 not recognize foreign judgments unless it's obligated to do
13 so by treaty, and there is no treaty in place.

14 Now, I know the response could be well, that's
15 just Denmark. No. No. It is just Denmark. That's one of
16 the problems. That's one of the countries. The fact that
17 another country might do so doesn't help in terms of
18 administering and making sure that due process obtains
19 here.

20 Again, Your Honor, a second basis for dismissal
21 with respect to the O'Neill complaint would be the due
22 process concerns, and we would suggest that the Court
23 dismiss on either basis. I will allow Mr. Angstreich to go
24 before I go to the next.

25 THE COURT: Very well.

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1 MR. ANGSTREICH: Thank you very much.

2 THE COURT: Thank you, Ms. Van Steenburgh.

3 MR. ANGSTREICH: Your Honor, I hadn't intended to
4 spend much time on Hoffman-LaRoche because I think it's
5 irrelevant to this case, but since counsel thought it was
6 so controlling, the first aspect of it is, it does not
7 involve the Sherman Act per se. It involves the foreign
8 trade antitrust improvements act of 1982, and that was the
9 main issue in the case as to the impact of that.

10 There is some very important language which
11 should be looked at. The Court said the FTAIA seeks to
12 make clear to American exporters and to firms doing
13 business abroad that the Sherman Act does not prevent them
14 from entering into business arrangements, say joint selling
15 arrangements, however anti competitive as long as those
16 arrangements adversely affect only foreign markets.

17 So the question is, what was involved in that
18 case, and in that case only foreign markets were involved,
19 and therefore there was no reason for the Court to be
20 involved in that at all, but they go on to say, we now turn
21 to the basic question presented, that of the exceptions
22 application because the underlying antitrust action is

23 complex, potentially raising questions not directly at
24 issue here.

25 We reemphasize that we base our decision upon the
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1 following: The price fixing conduct significantly and
2 adversely affects both customers outside the United States
3 and customers inside the United States, but the adverse
4 foreign effect is independent of any adverse domestic
5 effect, and therefore they were looking at beyond that
6 basis.

7 The Court then has an interesting statement, and
8 that's at page, that looks like it's at page 7, 2004 WF
9 1300131, page 7. It says, no one denies that American
10 antitrust laws when applied to foreign conduct can
11 interfere with a foreign nation's ability independently to
12 regulate its own commercial affairs, but our courts have
13 long held that application of our antitrust laws to foreign
14 anti competitive conduct is nonetheless reasonable, and
15 hence consistent with principles of prescriptive comity
16 insofar as they reflect a legislative effort to redress
17 domestic antitrust injury that foreign anti competitive
18 conduct has caused.

19 So if foreign anti competitive conduct causes
20 injury in the United States, prescriptive comity, we will
21 apply the United States laws, and they conclude that the
22 principles of prescriptive comity counsel against the Court
23 of Appeals interpretation of the FTAIA, where foreign
24 interpretation of the F -- where foreign anti competitive
25 conduct plays a significant role and where foreign injury
0057

1 is independent of domestic effects, we're going to leave it
2 alone. That's what that case says.

3 That's not this case under 12(b)(1). This case
4 does not involve those issues. This case involves an
5 American company manufacturing product in the United
6 States, marketing that product from the United States,
7 controlling all aspects of the marketing and sale of that
8 product worldwide from the United States and the injuries
9 it causes.

10 This company always knew that it was subject to
11 being sued by any individual from around the world if they
12 wanted to come here. Judge Gearin has determined that the
13 Canadian plaintiffs have a right to sue St. Jude in state
14 court and that she will not send the case back to the -- to
15 Canada.

16 So the question is, is there a 12(b)(1) issue

17 here, and you have to, and although counsel did not address
18 it, St. Jude Medical makes the argument that there doesn't
19 have to be a conflict between the laws, between the foreign
20 laws and the U. S. laws. Hoffman-LaRoche makes it clear
21 that it does.

22 Societe Nationale at page 22, actually it's 555
23 says, in the choice of law analysis which from the very
24 beginning has been linked to international comity, the
25 threshold question in a comity analysis is whether there is
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1 in fact a true conflict between domestic and foreign law.

2 We've established in our submission that there is
3 no conflict both under the application of the EU directive
4 and Minnesota's laws, so it is critical that we are not
5 faced with a 12(b)(1) motion. Applying the Section 403,
6 the restatement of foreign relations law, we have
7 identified all of the reasons why.

8 It's a very interesting thing. Suddenly in this
9 case, in the O'Neill case, we've got to get all of the
10 doctors. There is only one plaintiff here, but we've got
11 to get all of the doctors of all 14,000 people, and we've
12 got to take their depositions, and we've got to get their
13 medical records.

14 You know, Your Honor, they haven't asked for one
15 medical record of any of the 11,655 members of this class
16 in the MDL except for the named plaintiffs and those that
17 have brought individual suits. They haven't asked for the
18 deposition of one treating physician or one implanting
19 physician except for the class representatives.

20 Yet, in arguing the 403 criteria, suddenly we
21 have all of these treating physicians, all of the medical
22 records. It's a red herring. It's nonsense. The
23 witnesses relating to liability are here. The documents
24 relating to liability are here. The orchestration of the
25 sale of the product is here, and the impact is negligible
0059

1 with respect to any discovery outside of this country.

2 There is a shortness of hours, so I want to ask
3 Your Honor to just examine the remainder of our brief on
4 the 12(b)(1) argument, but I do have to address the
5 12(b)(6) argument because I find it an astounding argument.

6 Yes, due process is always an issue. Plaintiffs
7 should be given due process. Plaintiffs are seeking due
8 process by going to the state court in Minnesota, but the
9 advocates of due process, the people who are waiving the
10 due process flag is the defendant who caused all of these

11 people to be subject to having to bring this lawsuit in the
12 first place.

13 What is the due process that they're worried
14 about? Whether or not if the state court of Minnesota
15 certifies this class, there will be an ability to give
16 notice. Well, they gave notice in the breast implant case
17 to people outside the United States. It was a worldwide
18 class.

19 They have given notice in security fraud class
20 actions to people who have purchased securities outside the
21 United States. They were within the definition. We cited
22 them in our brief. That's -- that's a total red herring.

23 Is there an issue of res judicata? Sure. There
24 might be, but there is the same issue in every class action
25 in the United States when somebody brings a lawsuit who was
0060

1 a member of the class who didn't opt out but wants to bring
2 their own private action as to whether or not they're
3 barred, but that certainly isn't the test of whether or not
4 this Court should dismiss this case, assuming that this
5 Court keeps the case.

6 So our first argument is, Your Honor, we should
7 be arguing this in state court and not here, but as long as
8 we're here and we're arguing it, the fact of the matter is
9 that if Your Honor denies remand, Your Honor must deny the
10 12(b)(1) and 12(b)(6) motions because there is no problem
11 with respect to the claims here. There is no conflict
12 between the laws.

13 There is a Pandora's box of horrors, but we
14 have gone through that in every motion from St. Jude.
15 Every horrible thing that could ever happen to St. Jude was
16 going to happen in O'Neill just like in the MDL,
17 notwithstanding the fact that all of the problems that
18 brought us here was caused by that.

19 So we would ask that the 12(b)(1) and 12(b)(6)
20 motion be denied, Your Honor. Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Angstreich. Forum non
22 conveniens.

23 MS. VAN STEENBURGH: Can you give me two seconds
24 to respond?

25 THE COURT: Sure. Go ahead.

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1 MS. VAN STEENBURGH: On the Hoffman-LaRoche
2 issue, I think Mr. Angstreich misses the point. Certainly
3 there was a statute involved, but there were bigger issues
4 of international comity the Court was addressing.

5 The Court also said, you know, if somebody is
6 going to enact a law and apply extraterritorially, Congress
7 gets to do that. Minnesota common law here and statutory
8 law is what is at issue, and Congress has done that with
9 some of the anti terrorist acts and those kinds of things,
10 but Congress has to do that, and it has to do that
11 expressly, and that's not what this is about here.

12 Finally, with respect to the conflict issue, this
13 is not a case of whether two laws conflict and clash. The
14 Supreme Court said, look, a conflict can exist where there
15 is a conflict of policy or procedure or whatever the
16 standards are that have been set, so it is more than just a
17 clash in a traditional conflict of laws analysis.

18 Well, I said that the other compelling reason
19 that the Court should dismiss really has more to do with
20 the practical aspects, and that's kind of the way I look at
21 forum non conveniens.

22 Forum non conveniens is a notion that where is
23 this case going to be tried and where is the best place and
24 what are the factors that you look at. Some of the same
25 considerations that are critical to the examination of
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1 subject matter jurisdiction of course really apply in forum
2 non conveniens context, but the question posed is slightly
3 different.

4 You know, should the Court resist the imposition
5 of jurisdiction if the litigation can more appropriately be
6 conducted in a foreign tribunal. As the Court knows, and I
7 know that the Court has had these motions before it, there
8 is a threshold inquiry which is, is there an adequate
9 alternative forum available.

10 There is no dispute that there is in Europe an
11 adequate forum available. Is there an adequate forum in
12 the sense that the plaintiffs would not be deprived of a
13 remedy. Last time I looked, I can't think of a European
14 nation that is involved in the EU where there would be some
15 question as to whether there would be an adequate remedy.

16 The question isn't whether there is a substantive
17 law difference. That's not relevant to the adequacy if
18 there is some remedy available, so the fact that maybe one
19 of the claims isn't available to them or the remedy isn't
20 available, doesn't make it an inadequate forum.

21 THE COURT: Are there ways to distinguish Judge
22 Gearin's ruling on the cases brought by the Canadian
23 plaintiffs?

24 MS. VAN STEENBURGH: Judge Gearin looked at the

25 question. She looked at the Frazier case, which was a case
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1 that Judge Murphy has decided, and looked at one of the
2 aspects in that case which had to do with a medical
3 malpractice claim that was involved because in that case
4 strangely enough, St. Jude Medical was involved in that as
5 well.

6 St. Jude Medical had looked at the valve, and
7 there was no explanation other than that there had been
8 some issue with the doctor and the way the doctor put it
9 in. Judge Gearin said that because there was not an issue
10 of pleading third parties, that was one of the bases for
11 not granting the motion, but if you look at the Frazier
12 case, Judge Murphy had other bases for granting the motion.

13 And I think that one of those is very significant
14 in this case, and that is that the standards by which the
15 conduct should be governed should be the standards of the
16 community in which the conduct took place, and that was one
17 of the reasons that she granted the motion in that case
18 because the conduct occurred in Denmark and should be
19 judged by the standards that are established in Denmark.

20 Now, if the Court looks at some of the factors
21 that it must as part of the balancing test, and we've put
22 together a handy dandy scale here for you, Your Honor, you
23 have to look at the private factors and also public factors
24 in determining whether that balance is tipped in favor of
25 dismissal or not.

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1 One of the first ones is the ease or difficulty
2 of proof. You know, where is the relevant evidence
3 located? It's true some of the relevant evidence in the
4 O'Neill case would be located in Minnesota, but it's not as
5 the plaintiffs say that all we have to do is trot down the
6 road to Little Canada, rent out a conference room and try
7 the case because all the documents are there.

8 A lot of the substantial portion of the key
9 evidence is located in Europe. The plaintiffs are going to
10 have to prove causation in any medical monitoring kind of
11 case as a proximate cause that they were likely to suffer
12 greater risk of latent disease. So there is going to be
13 physician testimony and medical testimony.

14 The consumer fraud claim, the plaintiffs in their
15 own consumer fraud trial plan in the class action here say
16 plaintiffs plan to offer direct testimonial evidence of
17 physicians reliance on St. Jude's statements that the
18 Silzone valve was superior to similarly designed nonsilver

19 coated valves.

20 Well, the sales reps are in Europe. The
21 implanting physicians to whom the alleged
22 misrepresentations were made are in Europe. There is going
23 to have to be a substantial amount of discovery done in
24 Europe with respect to the consumer fraud claims.

25 So those records, some of the records will be
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1 here. Some of the records will be in Europe, but the bulk
2 of those tips in the favor of dismissal on the proof. And
3 St. Jude Medical can actually dispel any concern that some
4 of the domestically based documents would not be available
5 to plaintiffs by producing those in the foreign
6 jurisdiction as well.

7 So again, that tips in favor of dismissal. The
8 cost of the litigation, because many of the key witnesses
9 are located in Europe, there would be significant cost and
10 significant expense in having them testify in the U. S.

11 Lack of compulsory process, this is one of the
12 factors that Judge Murphy noted in the Frazier case, that
13 the Court would have the inability to compel production of
14 documents and witnesses here in the U. S., and frankly, I
15 still think the gold standard is live witness testimony as
16 part of any trial.

17 And there would be difficulty, and that's
18 critical, and that would be critical to St. Jude Medical.
19 Now, the plaintiffs brush that aside and say any scrutiny
20 of any third party witnesses is irrelevant because all they
21 have to do is prove defect, but St. Jude Medical believes
22 otherwise, and there would not be an ability to get many of
23 those witnesses here.

24 With respect to the logistical difficulties and
25 costs, the plaintiffs argue that as a matter of fact, one
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1 of the impediments is the fact that there is a lose or pay
2 rule and that here we have a contingent fee basis for
3 payment of plaintiffs' attorneys, and they claim they would
4 not get a fair shake overseas because that is an
5 unavailable remedy.

6 It's a factor to be considered, but I don't think
7 it's the determining factor, and I don't think the Eighth
8 Circuit has ever said that as the plaintiffs tried to put
9 that to a higher level. It is a factor to be considered,
10 and there is also some question about the emphasis because
11 if that were the only factor, every lawsuit would be
12 brought in the U. S.

13 It tends to diminish and look down on other
14 judicial systems, and again harking back to
15 Hoffman-LaRoche, that is something the Court should take
16 into consideration. Furthermore, there are alternatives in
17 the UP and other places with uplifts and legal aid.

18 And if it were such a concern, the Leigh Day
19 firm, which is apparently co-counsel to plaintiffs here,
20 perhaps wouldn't have brought some lawsuits in the UK, and
21 there have been other claims in Spain and Belgium and other
22 places, and there is no impediment.

23 People are bringing those claims, and there are
24 those lawsuits in Europe. So even though the lose or pay
25 goes on the Minnesota side of the ledger, there is also
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1 significant, significant ways to overcome that.

2 Turning to the public factors, the administrative
3 difficulties, again, weighs on the side of dismissal.
4 Administering a medical monitoring trust fund for thousands
5 of European citizens could be an extraordinary
6 administrative burden.

7 Another factor is Minnesota and Europe's interest
8 in the litigation. This factors weighs in favor of
9 dismissal as Judge Murphy noted in the Frazier case even
10 though Minnesota could conceivably have an interest in
11 holding its corporate citizens accountable, and I think
12 that is the argument the plaintiffs make.

13 Any interest is outweighed by the interest that
14 it would also have in assuring that St. Jude Medical has
15 access to procedures that permit it to defend itself, and
16 those obstacles would be substantial if the case were kept
17 here. So even though that goes on the Minnesota side, also
18 Minnesota has an interest.

19 The plaintiffs' emphasis on Minnesota also really
20 overlooks the fact that the European nations have an
21 interest, and I alluded to that when you asked the question
22 about the Frazier case, and that is that Judge Murphy noted
23 that the countries where the alleged conduct occurred do
24 have a significant interest in setting the standards that a
25 foreign manufacturer should meet and judging those

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1 standards and that the community affected should be judging
2 that conduct.

3 And Judge Davis also in the Polanco case echoed
4 that sentiment as well more recently. Finally, with
5 respect to choice of law, the question isn't whether the
6 Court may have to apply a foreign law. I mean the Court is

7 quite capable of doing that, but the fact is the Court
8 would have to conduct a burdensome exercise in choice of
9 law and analysis.

10 It's not one time. It could be up to 16 or more
11 times, and a choice of law analysis is not something to be
12 taken lightly. So when the balance is weighed, it tips
13 toward dismissal under all of the factors that the Court
14 must consider, and given all of those factors, St. Jude
15 Medical requests that the Court dismiss this on forum non
16 conveniens grounds.

17 Thank you.

18 THE COURT: Thank you, Ms. Van Steenburgh.

19 Mr. Rudd?

20 MR. RUDD: Mr. Angstreich is going to give me a
21 chance to speak today again, which is always nice. I'm
22 going to address obviously the forum non conveniens issues,
23 and really the issue is one of practicalities in terms of
24 convenience, and so I would ask the Court to really look at
25 what the practicalities are here versus what these

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1 theoretical issues that St. Jude is proposing would make it
2 inconvenient to pursue the case here and more convenient in
3 Europe.

4 It's just similarly not the case. Really, the
5 issue is one of equity, what makes the most sense from a
6 practical perspective, one single case here in Minnesota
7 whether it be before this Court or in Ramsey County versus
8 as many as 16 cases pending in various jurisdictions in
9 Europe.

10 Importantly, St. Jude does bear the burden of
11 persuasion here, and they bear the burden to prove that
12 Minnesota is an inconvenient forum, and there is a
13 presumption that the plaintiffs' choice of forum is correct
14 and should not be disturbed.

15 Now that presumption is provided a little less
16 deference when the plaintiff is foreign, but nonetheless,
17 the plaintiff does have presumption of choosing its
18 particular forum, and in fact, Judge Gearin noted that in
19 her opinion.

20 And I think the fact that St. Jude bears the
21 burden as well as the presumption in favor of the plaintiff
22 is what led Judge Gearin to the correct decision in the
23 Ramsey County cases. Remember in those two cases, the
24 Kozak and the Randall cases, we weren't dealing with
25 personal injury -- we weren't dealing with medical

0070

1 monitoring, excuse me.

2 We were dealing with personal injury cases. We
3 were dealing with issues of treating physicians, medical
4 records and those types of things, and even though we were
5 looking at having to take those depositions and get that
6 discovery in Canada, Judge Gearin nonetheless said that
7 it's more convenient to pursue the case here.

8 In the case currently before this Court or if it
9 was sent back to Ramsey County, there won't be those
10 issues. This issues of treating physicians and needing to
11 get information from sources in Europe is simply not the
12 case.

13 We're seeking medical monitoring where we will be
14 establishing a fund, a protocol, and we will be proving our
15 case by way of expert opinion, very much like what is
16 happening in the MDL. Mr. Angstreich alluded earlier to
17 the fact that there haven't been any depositions of
18 treating physicians of individual putative class members in
19 the medical monitoring class.

20 We're nearing the end of merits discovery, and
21 yet there haven't been those depositions. That case is
22 going to be proved by conduct of the defendant in
23 depositions that we're taking of St. Jude and expert
24 opinions.

25 In fact, Your Honor, in the denial of the summary
0071

1 judgment motion on preemption stated, in general a medical
2 monitoring plaintiff must establish exposure to a hazardous
3 substance that as a proximate result of exposure plaintiff
4 suffered a significantly increased risk of contacting
5 serious latent disease, that the increased risk makes
6 periodic diagnostic medical examinations reasonably
7 necessary and that medical monitoring and testing
8 procedures exist which make the early detection and
9 treatment of the disease possible and beneficial.

10 We will prove our case by way of testimony from
11 witnesses right here in Minnesota and expert opinions
12 showing that there is an increased risk of future injury by
13 having the Silzone valve. Therefore, when you look at the
14 private interests factors, they weigh heavily in favor of
15 Minnesota.

16 All the documents are here. All the witnesses
17 are here. There won't be any depositions of foreign
18 witnesses other than the named plaintiffs' treating
19 physicians, but certainly as Judge Gearin noted, those
20 depositions can in fact be taken.

21 Sales representatives, Ms. Van Steenburgh alluded
22 to. All the sales representatives were trained right here
23 in Minnesota. All the marketing material to prove our
24 consumer fraud case emanated right here from Minnesota, and
25 in fact, this Court has already said with regard to the
0072

1 consumer fraud claim that it has extraterritorial
2 application.

3 There is no reason that if that statute applies
4 outside of the state of Minnesota that it can't apply to
5 these other individuals who were affected by conduct that
6 was originated and emanated right from Minnesota, and in
7 fact, as we've stated to the Court before back when the
8 Grovatt case was being transferred or there was a motion to
9 transfer it to this Court, St. Jude made the arguments that
10 in fact this forum was more convenient than New Jersey
11 because all of the relevant evidence, the relevant
12 information was located in Minnesota.

13 With regard to the compulsory process of
14 witnesses, again, we think that's a red herring. We don't
15 think there is going to be an issue there. First of all,
16 the witnesses have to be unwilling to appear, and second of
17 all, there is not going to be some great need to take
18 hundreds or even tens of depositions of the treating
19 physicians. The case is going to be proven through the
20 O'Neill treating physicians on behalf of a medical
21 monitoring class.

22 Other practical considerations involve gathering
23 all of the information. If the case were to proceed
24 abroad, all of the documents would have to be gathered and
25 then sent to Europe, and depositions would have to occur
0073

1 presumably here for those witnesses that are located here
2 on behalf of the foreign plaintiffs.

3 In terms of cost of litigation, the cost of
4 litigation would be astronomical if the case is to proceed
5 in Europe which does lead to whether or not there is an
6 appropriate alternative forum. Yes, these individuals can
7 bring the case there, but is the cost of litigation so
8 prohibitive, especially when there is a lose or pay rule,
9 that in fact the case can't be pursued in Europe. The
10 costs would be astronomical.

11 Here the evidence has already been gathered. In
12 large part it will be able to be used in this court or in
13 the Ramsey County court right here. The Frazier case that
14 Ms. Van Steenburgh alluded to that Judge Murphy decided did

15 involve the fact that the treating physicians had actually
16 been brought into the case by St. Jude based upon
17 professional malpractice.

18 That's certainly not the case here. No doctors
19 have been sued in the MDL. No doctors we don't believe
20 will be sued with regard to the medical monitoring case.
21 Turning to the public interest factors, again, all of those
22 factors really point to Minnesota.

23 It's crucial that a court in this state, whether
24 it be the federal court or the state court, regulate within
25 its borders the corporation inside its borders. We think

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1 that local controversy should be decided here, and the fact
2 is that the controversy that exists here relates directly
3 to the conduct of St. Jude. All decisions affecting these
4 citizens were made here.

5 With regard to choice of law issues, yes, there
6 will be choice of law issues. This Court has already
7 addressed choice of law issues in the MDL proceeding. It
8 is possible to do it. We believe that only if there is a
9 conflict, of course, would we need to look at the other
10 foreign laws, but certainly it's entirely possible that
11 Minnesota law would apply.

12 This Court in the Aero Systems case said that
13 federal courts are quite capable of applying foreign laws.
14 We believe that the analysis on choice of law would really
15 be no different than what the Court has already engaged in
16 in the MDL.

17 Lastly, we don't believe that the medical
18 monitoring relief that we seek will create some
19 administrative burden for the Court that St. Jude alludes
20 to in its papers. We seek the establishment of a protocol.
21 The protocol would be overseen by most likely a third
22 party, so we wouldn't be taking up the time or resources of
23 this Court beyond getting a judgment in the case.

24 In closing, we think that this is the only place
25 for the case to proceed, otherwise these individuals in

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1 Europe will be denied a remedy. In deposition testimony
2 and discovery in the MDL, an memorandum or e-mail was
3 produced and a deposition was taken where an employee of
4 St. Jude referred to the individuals who received this
5 device abroad as the guinea pig continent of Europe, and
6 the deposition was taken.

7 The witness, Mr. Phillips, stated that he was
8 just joking, he didn't really mean that, but in fact, there

9 was never any reprimand of this individual. He was never
10 asked to retract his statements, and the fact that either a
11 statement like this was made as to these individuals really
12 being guinea pigs in Europe was either made very callously
13 or it was a moment of extreme honesty.

14 But we believe that the taxpayers, the citizens
15 and the jury in this state, whether it be in the federal
16 court or state court, has a very strong interest in
17 regulating a corporation that would make such a statement
18 and that the individuals in Europe who were frankly used as
19 guinea pigs have a right to monitoring just as U. S.
20 citizens do.

21 THE COURT: Thank you, Mr. Rudd.

22 MR. RUDD: Thank you.

23 THE COURT: Anything else, Ms. Van Steenburgh?

24 MS. VAN STEENBURGH: I am affronted by the
25 inflammatory comments Mr. Rudd just made relative to some
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1 deposition testimony. I'm a taxpayer, and if I need to sit
2 listening to claims of someone from Europe, actually I
3 might have some concern about that, and already there are
4 procedures in place in the MDL for those claims in the
5 U. S.

6 The issue with respect to the roll back I think
7 is a far cry and doesn't make this forum automatically
8 appropriate for 10 to 14 thousand putative class members
9 just because it was more convenient to have them all
10 consolidated here.

11 Something else that struck me and that was that
12 Mr. Rudd said, you know, this just isn't fair to those
13 European plaintiffs. They just might not get the fair
14 date. Nobody stood up and said this is not going to happen
15 in Europe.

16 There is no affidavit or representation that
17 these people cannot bring claims in Europe. It is that
18 well, that's just not fair. Maybe they wouldn't be
19 financially as well off, and they won't be able to use the
20 contingent fee system.

21 The other thing that struck me was, there is a
22 huge difference between one or two individual plaintiffs in
23 the Randall and Kozak cases than there are 10 to 14
24 thousand putative class members, and the distance between
25 Canada and distance and across the great pond over to
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1 Europe also makes it a significant issue with respect to
2 forum non conveniens considerations.

3 Finally, you know, actually I think it would be
4 interesting to try a case when I think about some of these
5 issues that Mr. Rudd has brought up. So they're going to
6 have the sales reps testify about their training here, but
7 I thought the proof was that they had to testify about what
8 representations were made to those physicians.

9 You know, by virtue of the fact they were trained
10 here doesn't do anything for the fact that you have to get
11 the discovery as to what those representations were and
12 what was said to the implanting physicians. The witnesses
13 are going to include, and we do dispute that it's going to
14 be as simple as you prove up a defect, you get some experts
15 and boom, you have now won your case.

16 There are a lot of people who would be involved
17 in some kind of medical monitoring that have all kinds of
18 risk factors that might not make them candidates for
19 medical monitoring. There are going to be all kinds of
20 issues with respect to the extent of that monitoring and
21 what that monitoring is, and that is going to involve some
22 kind of discovery and information inquiry over in Europe.

23 Finally, I was very interested to hear that --
24 and I would like to poll the legislature on this -- that
25 Minnesota should apply its consumer protection laws to 10
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1 to 12 to 14 thousand putative class members in Europe.
2 That's less a forum non conveniens than it is an
3 international comity issue.

4 I don't think the legislature, nor should any
5 court, impose the statutory law of Minnesota on European
6 nations. Thank you, Your Honor.

7 THE COURT: Thank you, Ms. Van Steenburgh.

8 Thank you, Counsel, for your argument this
9 morning.

10 MS. VAN STEENBURGH: Would you care for a copy of
11 the Power Point?

12 THE COURT: That would be fine. You can supply
13 it to Ms. Johnston.

14 MR. ANGSTREICH: And would you supply us a copy,
15 too?

16 MS. VAN STEENBURGH: Okay.

17 THE COURT: The Court will take the three motions
18 under advisement and intends to issue a written order
19 shortly.

20 Thank you.

21 MR. ANGSTREICH: Thank you, Your Honor.

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1 I, Kristine Mousseau, certify that the foregoing
2 is a correct transcript from the record of proceedings in
3 the above-entitled matter.

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7 Certified by:

Kristine Mousseau, CRR-RPR

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Dated: July 9, 2004

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