

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: St. Jude Medical, Inc. File No. 01-MD-1396
Silzone Heart Valves (JRT/FLN)
Products Liability Litigation

Minneapolis, Minnesota
August 11, 2004
9:15 A.M.

BEFORE THE HONORABLE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT JUDGE

(STATUS CONFERENCE)

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1 (In open court.)

2 THE COURT: You may be seated. Good morning,
3 everyone. For the record, on the Court's calendar today
4 civil case number 01-1396, In Re: St. Jude Medical,
5 Incorporated, Silzone Heart Valves Products Liability
6 Litigation.

7 Counsel, would you note your appearances this
8 morning?

9 MR. CAPRETZ: James Capretz for the class.

10 MR. ANGSTREICH: Steven Angstreich for the class.

11 MR. RUDD: Gordon Rudd for the class.

12 MS. WESNICK: Jennifer Wesnick for the class.

13 THE COURT: Good morning to all of you.

14 MR. KOHN: Steve Kohn for St. Jude Medical.

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

16 MS. PORTER: Liz Porter for St. Jude Medical.

17 MS. VAN STEENBURGH: Tracy Van Steenburgh for
18 St. Jude Medical.

19 THE COURT: Good morning, all of you. We're here
20 today for a status conference. Let's see.

21 Mr. Capretz, are you going to proceed?

22 MR. CAPRETZ: Yes, Your Honor.

23 THE COURT: Go right ahead.

24 MR. CAPRETZ: Before proceeding with the matter

25 at hand, we have another special occasion, at least in my

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1 mind I do. We had Gordon's 40th birthday on one of these
2 status conferences, and we just heard that Jennifer of Pat
3 Murphy's office was approved by the bar and is now a fully
4 licensed lawyer, so we welcome her to the profession.

5 THE COURT: Very well.

6 MR. CAPRETZ: Your Honor, we have submitted a
7 joint status report which covers pretty extensively the
8 issues I will skim through and some of the overall
9 procedural matters and -- we'll cover, and Mr. Angstreich
10 will go to some of the substantive things as far as the
11 motions and class notice are concerned.

12 As this Court is now aware, there are a couple of
13 matters pending before the Eighth Circuit. St. Jude
14 petitioned the Court for a mandamus on the preemption issue
15 as well as did a 23(f) on the two class certifications and
16 consumer fraud class.

17 We requested, and the Court granted, a response
18 time of Friday the 13th, so that will be forthcoming from
19 us at that time.

20 THE COURT: Is that just on the 23(f) petition?

21 MR. CAPRETZ: Yes, Your Honor. Yes. Perhaps we

22 can overview some of these and get to, if we might, go
23 through some of the procedural issues, and we'll flip back
24 up to the motions of counsel.

25 MR. KOHN: Fine.

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1 MR. CAPRETZ: Let's just try to cover where we
2 are now. As the Court knows, we have been in a mediation
3 process for some time. There was a hiatus as the insurance
4 layers changed, and I understand -- and beyond Mr. Kohn's
5 withstanding might better address this, that the companies,
6 the new insurance company, Kemper, has rescheduled
7 depositions to start the later part of this month.

8 MR. KOHN: Mediations.

9 MR. CAPRETZ: Mediations, excuse me, and go
10 through September?

11 MR. KOHN: Right.

12 MR. CAPRETZ: Okay. I've asked Mr. Stanley, so
13 I'm not totally putting him on the spot here, to give us an
14 overview of the number of cases that have been mediated. I
15 think it reports on 17 successful mediated out of
16 approximately 27, but he knows the numbers as to how many
17 we still have pending.

18 And we are in the process of other housekeeping
19 matters of dismissing those matters, so you might be aware
20 that those dismissals will be to you shortly for those of
21 us that did settle some claims, and we are going to dismiss

22 certain medical monitoring claims that we wanted to
23 preserve their rights through this particular point in time
24 with a stipulation that it would be without prejudice to
25 any rights they may have under any classes that are formed

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1 and at the cost of the respective parties, and it would be
2 without prejudice.

3 So Mr. Stanley?

4 MR. STANLEY: Good morning, Your Honor.

5 THE COURT: Good morning, Mr. Stanley.

6 MR. STANLEY: If you exclude the cases that have
7 been settled through the mediation process, we have about
8 39 pending cases before the Court. Of those, 10 we have
9 been notified by plaintiffs' counsel, they're agreeing to
10 dismiss those without prejudice.

11 Those include some of the medical monitoring
12 class plaintiffs that Mr. Capretz was referring to as well
13 as some others.

14 THE COURT: So 10 out of the 39?

15 MR. STANLEY: 10 out of the 39, and then 3 of the
16 39 are the Grovatt, Redden and Bailey cases which are
17 pending just as the class representatives for the
18 monitoring and consumer protection classes. There are 8 of
19 the 39 are what St. Jude Medical is determined to be fear
20 of cases.

21 They're not explant with no evidence of leak that

22 we will not mediate. 6 of the 39 are currently set for
23 mediation. An additional 6 are to be set for mediation,
24 and then the rest, I don't have that number. I didn't add
25 it up, but the rest of the cases that were failed

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1 mediations that we'll proceed on.

2 THE COURT: May be 6 more?

3 MR. STANLEY: Yeah. Yeah. Somewhere around that
4 number, Your Honor.

5 THE COURT: Okay. Thank you.

6 MR. STANLEY: You're welcome.

7 MR. CAPRETZ: I would like to mention, Your
8 Honor, that we are interested for those that do not settle
9 their claims to get these cases in a position to be
10 remanded as early as possible, but we do have certain
11 procedural steps that we need to go through including the
12 expert, generic experts' review of their situation.

13 So they won't be ready for some time, and in that
14 regard, we had conversations with St. Jude Medical about
15 extending the deadlines, and I don't think we perhaps have
16 a final version of what will be pretrial order number 34,
17 extending deadlines, but we've stipulated that we can push
18 back the case specific discovery 60 days from September
19 5th, I think it currently is reflecting, to November 5th,
20 with flexibility on both sides since that is an open issue.

21 We're not ready for closure, and that doesn't

22 threaten or delay any remand proceedings, but that will be
23 forthcoming. Report on the Canadian litigation, to the
24 best of my knowledge, the last that we heard is that the
25 parties are still waiting for a decision on the argument

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1 that was held and raised and initiated by St. Jude Medical
2 requesting a right to appeal that class certification.

3 I think that's still correct, right? And on
4 September 17th --

5 THE COURT: So it's been argued but no decision
6 yet on whether you would be permitted to appeal, is that --

7 MR. KOHN: That's correct, Your Honor. We aren't
8 sure when that will be decided.

9 THE COURT: Okay.

10 MR. CAPRETZ: It's a bit extraordinary from what
11 I am involved and been told. Usually they rule on those
12 pretty promptly. It may just be a holiday issue, but it's
13 still pending, and I believe it's September 17th or so
14 St. Jude Medical has challenged the cost award.

15 If the Court recalls, there was seven hundred or
16 so thousand dollars in costs awarded under the Canadian law
17 to the plaintiffs, and St. Jude Medical is challenging that
18 award, and that will be argued on September the 17th.

19 Ramsey County litigation, according to what
20 St. Jude Medical has tendered to ourselves and the Court,
21 there are approximately 20 cases still pending. I know

22 that we have a case management order on one of these
23 matters that is set for trial in March 2005.

24 THE COURT: That would be the first one set?

25 MR. CAPRETZ: That would be the first one set.

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1 We had, of the current group, we did have some earlier
2 ones, and they were resolved through mediation. This is
3 going to be a tough one to resolve through mediation, so we
4 may have a case of first impression here.

5 THE COURT: Is this one of the cases that you're
6 handling, Mr. Capretz?

7 MR. CAPRETZ: Yes, it is. We have a slot for
8 report of state liaison counsel. I think Mr. Murphy is
9 tied up in a trial or litigation proceeding in Nevada, and
10 so we will have to pass. I don't think there is anything
11 new developing anywhere else? Is anyone aware of any other
12 state litigation? So that should take care of that
13 particular matter.

14 And with that, we have two motions, and -- that
15 are before the Court. One of these was an oversight
16 response to just yesterday, and Mr. Angstreich will address
17 that, and then we have the motion to protect the
18 confidentiality in the Gove deposition.

19 The one point I would raise there before
20 Mr. Angstreich speaks is, there are discussions going on,
21 at least two other depositions, concerning the

22 confidentiality provisions. I don't know if the Court is
23 going to want to hear these matters directly or not, but it
24 would seem like they are going to be related because it
25 would seem like we're going to have a disagreement on each

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1 of these principals, the depositions of principals of
2 St. Jude Medical, something for the Court to consider in
3 light of this Gove deposition.

4 MR. ANGSTREICH: Thank you. Good morning, Your
5 Honor.

6 THE COURT: Good morning, Mr. Angstreich.

7 MR. ANGSTREICH: Your Honor, we just received the
8 response yesterday, but that really is not necessary to
9 have had in advance. Essentially, the defendant's position
10 is that we should have met and conferred with respect to
11 the objection lodged.

12 Mr. Stanley and I did discuss the fact that they
13 were going to object to it and that they weren't going to
14 change their position with respect to that. Quite frankly,
15 if you read Dr. Fratter's deposition at page 13 when
16 Mr. Coren asked him, "Would you agree that there is
17 methodology from which one can compute the TE incident
18 rates, the paravalvular rates and explant rates?"

19 And he says, "Yes."

20 And then he asks him, "And you would agree that
21 St. Jude knows those particular rates for its valves?"

22 And he says, "Yes."

23 And then he asks him, "As medical director,

24 that's known to you?"

25 And he says, "Yes."

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1 I don't see any wiggle room with an answer that
2 is yes. We didn't misunderstand. We didn't misinterpret.
3 The doctor said that these rates are known to St. Jude
4 Medical. He knows them. We want to know what they are.
5 To tell us now that we don't know how to read, we don't
6 understand, we should have discussed it, the doctor didn't
7 mean what he said, makes no sense to us.

8 The doctor did not change his testimony. There
9 was no errata sheet for Dr. Fratter's deposition where he
10 said, I misunderstood what the question was. I didn't mean
11 yes. I didn't mean that I knew what the answer was. What
12 I really thought you asked me and what I really intended to
13 say was, I could compute it going through textbooks and
14 some other methodology. He never said that.

15 So he is stuck with his words. We believe that
16 they know the rates, firmly believe it because that's part
17 of their marketing campaign. They use those rates, and the
18 fact that in certain circumstances they have lower incident
19 rates of TE than CarboMedics to convince people to take
20 their Master Series valve as opposed to CarboMedics'.

21 So our motion is very clear. The deposition

22 testimony is very clear. This is an after the fact attempt
23 to tell us something different from what they told us at
24 the deposition.

25 Now, we recognize that if they continued to

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1 insist that they don't have this information, I don't know
2 how Your Honor can order them to give us what they claim
3 they don't have, but whatever Dr. Fratter was talking about
4 that is known to him, they should be compelled to give
5 those to us.

6 If he knows these rates, then somehow they should
7 be in a position to respond, either by giving us the
8 documents or by giving us an answer verified or certified
9 by the appropriate person giving us those rates.

10 If for some reason we have included too many of
11 the valves, the different models that they don't have the
12 same information for all of them, they can just give it to
13 us for those that they have, and I think that there is
14 nothing more that I can say about it, other than we relied
15 upon the man's sworn testimony.

16 Thank you.

17 THE COURT: Thank you, Mr. Angstreich.

18 Mr. Kohn?

19 MR. KOHN: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. KOHN: First, I apologize for the fact that

22 our opposition was filed late. There was a
23 miscommunication between my office and the Halleland firm.
24 It should have been here a week ago, so I hope that didn't
25 inconvenience the Court.

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1 I was at Dr. Fratter's deposition, and the
2 testimony as characterized by Mr. Angstreich is virtually
3 simply incorrect. The questions that were asked by
4 Mr. Coren early in the deposition did not relate to the
5 Silzone valve or to the conventional valve.

6 They were related to a study that was published
7 in the medical literature written by Dr. Fratter long
8 before the Silzone valve was even conceived. I think it
9 was in 1994. So when he was answering those questions
10 about rates, he was answering questions about a study he
11 had written ten years ago.

12 They have nothing to do with the interrogatories
13 that were propounded after the deposition.

14 THE COURT: This was an earlier version of the
15 valve?

16 MR. KOHN: Well, I'm not even sure that it was
17 addressed specifically to the valve. It was a study that
18 he authored having to do with thromboembolic events and the
19 risk factors for thromboembolic events, and that study
20 didn't even have anything to do with, specifically, with
21 linearized rates.

22 So there was a total disconnect between the
23 question and the answer and how it relates to the
24 interrogatories that were ultimately propounded.

25 He was later asked in the deposition, Well, if we

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1 sent you an interrogatory about linearized rates, would you
2 be able to answer it? They didn't show him the
3 interrogatory, and they didn't explain to him what
4 linearized rates they would be asking about, and he said
5 yes.

6 So he never had the opportunity to see the
7 linearized rate interrogatories that were ultimately
8 propounded. They were totally different than what he was
9 asked about in the deposition.

10 As framed, the interrogatories ask the company to
11 provide linearized rates which need to be calculated based
12 upon the total number of patients which are then divided
13 into the total number of adverse events by each valve type
14 and then distinguishing between the mitral position and the
15 aortic position.

16 So that information similarly does not exist at
17 the company. It doesn't exist at any other medical device
18 manufacturer. It's not the kind of information that could
19 ever be developed because what you need to have to develop
20 that kind of information would be absolute knowledge of
21 every patient, every patient's mental history, their

22 follow-up time and what adverse events have occurred, and
23 that information simply isn't available.

24 What is available are numerous studies in the
25 medical literature that are equally available to plaintiffs

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1 and their experts which contain linearized rate data on
2 select study populations, and Dr. Fratter acknowledged that
3 that information exists. In fact he said when asked about
4 linearized rates, if you wanted to know what they were, how
5 would you find out, he said, well, I would have to go look
6 it up. That's the truth.

7 If you want to know linearized rates for a
8 particular study group, you need to go look it up in the
9 medical literature. We can't go and survey the medical
10 literature and somehow plug those numbers into these
11 interrogatories because the medical -- the linearized rates
12 in the literature are going to vary from what study it is
13 you're talking about, whether it's European or it's
14 American and so forth and what time period you're talking
15 about.

16 That would not be responsive to these
17 interrogatories.

18 THE COURT: So Dr. Fratter when he was answering
19 those questions, it's your view that he was in his mind
20 thinking back to the earlier study that he had authored?

21 MR. KOHN: In the first part of the deposition in

22 the testimony that is cited in their motion, that's
23 correct. In the second part of the deposition, the
24 testimony was more generic about what information was
25 available, but in that part of the deposition, he said if I

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1 wanted to know linearized rate data, I would need to go
2 look it up, and what that means is in the medical
3 literature.

4 Now, in our opposition, we filed an affidavit by
5 Dr. Fratter explaining all of this, and the information
6 simply is not there, but more importantly, plaintiffs have
7 been given all of the underlying data relating to the AVERT
8 trial.

9 And from that data, it's possible for them or for
10 their experts to calculate linearized rate information for
11 the conventional valve and for the Silzone valve by valve
12 type on the patients in the AVERT trial. That's the best
13 scientific evidence there is about linearized rates.

14 To a very limited extent, the researchers at the
15 University of Pittsburgh that run the AVERT trial have
16 calculated that for certain complication rates, and we have
17 provided that to counsel, but the data is there. They can
18 calculate these rates.

19 They don't need to get it from us because we
20 don't have it, and we aren't obligated, we feel, to
21 undertake a massive project to calculate it for them. So

22 that's our position, and I'll let counsel respond.

23 MR. ANGSTREICH: Your Honor, we had simply asked

24 that you examine pages 11 through 14 of Dr. Fratter's

25 deposition. These are marketing tools. He's acknowledged

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1 that they're marketing tools. He acknowledges that they
2 compare the experiences between manufacturers, and they use
3 that to sell their valves.

4 What is amazing is the statement that Mr. Kohn
5 just made, that the best evidence is AVERT. There are 800
6 people, maximum, that were in AVERT. There are no longer
7 800 patients being followed in AVERT. In fact it's less
8 than 50 percent.

9 There are 11,000 Silzone patients in the United
10 States, which means that there are more than 11,000 people
11 in the United States that have the Silzone valve that have
12 had incidents that they are aware of that are outside of
13 AVERT.

14 There are more than 10,000 people that have had
15 the Masters Series valve outside of AVERT for whom they
16 have incident rates. They compute them. They know them.
17 To tell us to look at AVERT, which is the smallest of
18 smallest samples for two of their valves, when we have
19 asked for more than just two of the valves, is just not
20 being straight with us and telling us that we can compute
21 them.

22 The other thing that is very difficult for us and
23 very frustrating for us, we have tried to get some of the
24 information from the University of Pittsburgh. In fact, we
25 have been told that with respect to three of the

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1 investigators, we have to go deal with their counsel to
2 take their deposition.

3 We have asked for documents from the University
4 of Pittsburgh. There is a document. All they have to do
5 is scan it in and turn it over to us. They have refused to
6 do that because it identifies the institution, the
7 physician and the patient.

8 We have tried to explain that we have a certified
9 class. Those patients are within our class. The
10 institutions and the doctors are not privileged
11 information, and we have been told that we have to wait.
12 They're going to see what they can do, and they will talk
13 to counsel for St. Jude.

14 We've asked counsel for St. Jude to just get us
15 the information. It's holding up our experts, so not only
16 do we need the piece of information that deals with linear
17 rates, which we say clearly there was no confusion on the
18 part of Dr. Fratter as to what he was being asked about and
19 the methodology for calculating them.

20 We believe that they have applied the methodology
21 and have calculated the linear rates. They have done that

22 already. We want that information from them. We don't
23 have to reinvent the wheel. We should be given that which
24 they have already computed, and we can't say any more than
25 that.

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1 We know that we're going to be back before Your
2 Honor on the issue of just getting us the document from the
3 University of Pittsburgh identifying the patients and the
4 institutions and the physicians because based upon
5 Mr. Kohn's earlier statement to me, I don't think we're
6 going to get an agreement on that, so we're going to have
7 to be back before Your Honor on that.

8 All of this is delaying the issuance of expert
9 reports. We've identified the experts, but they can't get
10 to the next step without getting these pieces of
11 information.

12 Thank you.

13 THE COURT: Mr. Kohn?

14 MR. KOHN: Your Honor, I could truthfully
15 represent to the Court without question that St. Jude
16 Medical has not calculated any linearized rates that would
17 be responsive to the interrogatories, and they have no
18 evidence of ever having done such calculations.

19 With respect to AVERT, it is the largest
20 randomized clinical trial that has ever been done for heart
21 valves. If you go to the medical literature and you look

22 at other studies that are published where linearized
23 information is available, almost every one of those studies
24 is significantly smaller than AVERT. So for counsel to say
25 that AVERT is not enough or is not representative is simply

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1 untrue.

2 As to the issues with the University of
3 Pittsburgh and problems getting the data, I heard about
4 that for the first time this morning. I have had no
5 opportunity to check with counsel at the University of
6 Pittsburgh and find out exactly what the situation is.

7 I can say, however, that half of the patients in
8 the AVERT trial are outside the United States. They're at
9 foreign medical centers that are not part of this class,
10 and there is different kinds of privacy issues that may
11 come into play with respect to those patients.

12 So we're going to need an opportunity to find out
13 exactly what the issues are, and we'll report back to the
14 Court with respect to the data that they're seeking, but in
15 the past, they have been provided, each time there has been
16 a database closure at the AVERT trial, they have been given
17 the complete data set.

18 I don't know what the current status is, but I
19 intend to check it out, and I'll get back to counsel and
20 see if we can work it out. If we can't, we'll have to come
21 back. Thank you, Your Honor.

22 THE COURT: Mr. Kohn, are there other trials or
23 data or studies on other valves that have not been produced
24 that are kept by St. Jude Medical?

25 MR. KOHN: Not that I'm aware of, Your Honor. I

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1 mean, there may be pieces of medical literature, I'm sure,
2 that are in the St. Jude Medical libraries, but they're the
3 same medical literature that is available to counsel.

4 So I'm not aware of any study or calculations
5 that the company has done on linearized rates. There have
6 been marketing surveys where they have gone to the medical
7 literature and made comparisons from time to time, but that
8 information is not responsive to the interrogatories that
9 we were provided with.

10 THE COURT: Mr. Angstreich?

11 MR. ANGSTREICH: Yes, Your Honor. We have never
12 been given the document, so I don't know how we can be told
13 that they have information which has established or done
14 comparisons of incident rates between a St. Jude valve and
15 another company's valve but it's not responsive.

16 I don't know what that word "responsive" means.
17 We've asked for it. If somehow we didn't use the right
18 word, that's just not how you respond in discovery. If
19 they have that information, we should have it. If it deals
20 with incident rates of thromboembolic events, paravalvular
21 leak and the specific subject matter of the interrogatories

22 that St. Jude has calculated with respect to valves, that's
23 enough.

24 And they should give that to us, so if there are
25 such summaries and if there are such pieces of information,

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1 they should just provide it to us, Your Honor.

2 THE COURT: Well, it seems to me that in this
3 case it really would be helpful for the parties to confer
4 about this. There seems to be a bit of a gulf between the
5 positions of what is available and what is not, and I tend
6 to agree with the plaintiffs that the testimony seemed to
7 suggest that there was something more there, so I
8 understand why the motion is being brought.

9 I'm just going to order the parties to meet and
10 confer on this issue. It seems to me that if there are any
11 studies, data, trials, any internal data that St. Jude has
12 conducted regarding their other valves, it seems relevant
13 to this case.

14 If it is simply medical literature that is
15 available in any medical library, I don't see where that is
16 necessary to be produced. Plaintiffs' experts can probably
17 look that up just as fast as the defendants can.

18 We may have some issues with this University of
19 Pittsburgh document. It sounds to the Court to be
20 discoverable, perhaps a protective order might be necessary
21 with regard to some of the private information, but it does

22 sound like the information is relevant to this case.
23 So the Court will order the parties to meet and
24 confer and report back to the Court within ten days. Okay.
25 We had, let's see, the issue relative to Mr. Gove's

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1 deposition?

2 MR. CAPRETZ: That's St. Jude Medical's motion.

3 MR. KOHN: Right. Your Honor, what's at issue
4 with respect to Mr. Gove's deposition are approximately 200
5 odd pages of his testimony that we designated as
6 confidential, and it's our belief because of the volume of
7 testimony that is being challenged and because we
8 understand that there are similar challenges forthcoming
9 for Dr. Fratter's deposition, perhaps for several other
10 depositions as well, that there could be -- I don't know
11 what the total number of pages at issue, but certainly in
12 the high hundreds, if not thousands, of pages potentially.

13 THE COURT: These are pages of testimony,
14 transcript?

15 MR. KOHN: Pages of testimony in the transcript.
16 While it's possible to summarize those pages and put them
17 into buckets or categories, ultimately someone is going to
18 have the task of having to review the testimony and review
19 the underlying documents that the testimony was discussing
20 and then review the pertinent law and decide whether or
21 not -- and also the protective order in this case and

22 decide whether or not they're entitled to confidentiality.

23 With that in mind, it was our feeling that this

24 kind of an issue, because of the size of the task, would be

25 best suited to be referred to the special master as the

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1 disputes over privileged documents had been done
2 previously. So if the Court decides it does want to take
3 this up, then I'm prepared to argue it this morning.

4 And we would lodge the entire deposition of
5 Mr. Gove with the Court under seal, which hasn't been done
6 up to this point. So the plaintiffs would prefer to have
7 it heard here. It's just our feeling that it's time
8 consuming and fairly painstaking process to go through this
9 testimony, and it would be better suited for Special Master
10 Solum.

11 THE COURT: You would anticipate issues such as
12 these for Dr. Fratter, is that correct?

13 MR. KOHN: Counsel has already written us a
14 letter challenging our confidentiality designations for
15 Dr. Fratter. We have responded. They haven't brought a
16 motion, so I don't know what their intent is.

17 Similarly, I believe for Mr. Shepard's
18 deposition, he is a former CEO, there has been a similar
19 challenge. We have some other depositions that have yet to
20 be taken, and we haven't made confidentiality designations,
21 but I anticipate that we will.

22 So I don't think that this is an issue that is
23 necessarily going to be resolved even if we were to go
24 through the Gove testimony today. I think it will be an
25 issue that is going to continue to arise.

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1 THE COURT: Thank you.

2 Mr. Angstreich?

3 MR. ANGSTREICH: Your Honor, we have advised
4 St. Jude Medical with respect to I believe Mr. Shepard that
5 we didn't agree with the designations, and they should go
6 forward with a motion for protective order.

7 We think that the procedure that would be best to
8 be followed is what we did with respect to the privileged
9 log. Your Honor effectively set the ground rules, and then
10 when we had the massive grouping of documents, we sent them
11 off to the special master for review.

12 I don't think it would be appropriate for
13 Mr. Solum to begin the process. This is very, very easy.
14 It may be massive pages, and in fact at one point, it was
15 90 percent of the deposition, and it now is about 87
16 percent of the deposition, maybe 85 percent of the
17 deposition.

18 The fact of the matter is that the categories and
19 the bases for it are very simple for I believe the Court to
20 address as to whether they come within the four corners of
21 the confidentiality order.

22 We would ask that Your Honor do the first one,
23 and with respect to any of the others if that ground -- if
24 the ground rules laid out by Your Honor can't be agreed to
25 afterwards by counsel when we go through the meet and

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1 confer process with each of the others, then rather than
2 burden the Court with it, we could submit it to Mr. Solum,
3 but I think that we really need Your Honor to deal with the
4 first one.

5 MR. CAPRETZ: Your Honor, if I may. If we do
6 follow that procedure that Mr. Angstreich suggests,
7 Mr. Solum is very effective at what he does, and thank you
8 for appointing him. I know I did get to attend part of the
9 deposition Mr. Angstreich took yesterday of Mr. Ladner,
10 which was concluded.

11 I expected to see, I had not met him before, with
12 a six gun. Particularly here in Minnesota you can carry
13 them, to make sure he would be an effective peace keeper,
14 but it was a relatively calm, cool and collected
15 deposition after a very contentious one.

16 But I would ask that the Court consider if the
17 Court does do guidelines and Mr. Solum is brought in to
18 review, since his rates are fairly expensive and we're
19 representing a class of people, we're not large corporate
20 America client, that perhaps the losing party in that
21 circumstance bear the cost of his rulings.

22 THE COURT: Mr. Kohn, anything else?

23 MR. KOHN: No. I think a loser pays rule is

24 adequate and appropriate, although it may be difficult to

25 determine depending upon how the outcome is who wins and

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1 who loses.

2 THE COURT: Well, I think the best way to proceed
3 here is to take the disputed part of the Gove deposition,
4 it sounds like it's a substantial amount designated as
5 confidential, and ask Mr. Solum to review it in the first
6 order.

7 The difference now is that he is well acquainted
8 with the case. There is a standard set up with the
9 confidentiality order. If there are problems with anything
10 that he does, appeal is available to the Court. I think
11 given where we are right now with the case, it would be
12 appropriate to submit this in the first instance to
13 Mr. Solum.

14 And so that's what I'm going to refer the
15 St. Jude motion for a report and recommendation from
16 Mr. Solum. Okay. What else do we have to go over today?
17 We have class notice on the agenda here?

18 MR. ANGSTREICH: Yes, Your Honor. Well, Mr. Kohn
19 and I conferred. We didn't meet on anything, but we did
20 confer. The first real main issue is when do we send the
21 notice, and that also ties into the question of the medical

22 monitoring class.

23 When Your Honor initially issued the order, the
24 first conditional order, Your Honor asked for a trial plan
25 and an identification of who the appropriate class

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1 representatives would be.

2 When Your Honor ruled on the inclusion of the
3 additional three jurisdictions, we were unclear as to
4 whether or not it was still Your Honor's view that a trial
5 plan was necessary with respect to the medical monitoring
6 class and the question of whether or not the three named
7 plaintiffs, Redden, Bailey and Grovatt, were adequate
8 representatives of the medical monitoring group since they
9 come from states that do not require an injury.

10 They have a stand-alone medical monitoring cause
11 of action, Grovatt from New Jersey and Bailey from
12 Pennsylvania, and we have the Redden's case in Pennsylvania
13 which lists seven factors to be complied with, it was our
14 view that we would take the most expansive test since they
15 really are -- it's a homogenous group now, and therefore
16 really didn't have a real issue about the trial plan.

17 If, however, there is an issue about a trial plan
18 and if there is going to be a challenge to our class
19 representatives, we certainly can't dismiss the other
20 class, potential class cases that we had agreed to dismiss.
21 They may be necessary to be replacement class plaintiffs.

22 So I don't know where St. Jude is -- what
23 St. Jude's position is, although I suspect since St. Jude
24 has asked for a trial plan in the status report that they
25 suggest that that's necessary, I'm unclear as to where Your

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1 Honor really wants us to go on that aspect.

2 So there is a question of, one, is the medical
3 monitoring class notice timing appropriate because we have
4 not addressed the trial plan and the class representatives,
5 and, two, is the timing appropriate for notice of any -- to
6 any of the classes because of the 23(f) application.

7 St. Jude Medical wants us to wait until the
8 Eighth Circuit has ruled. Our desire would be to send out
9 the notice now. Your Honor previously delayed the notice
10 to await the resolution of the motion to decertify,
11 et cetera.

12 It's my understanding that the Eighth Circuit
13 will timely let us know. It's not that we're going to be
14 waiting for months and months as to whether the 23(f) will
15 be heard.

16 If they take the 23(f) then it might be an
17 indication that we shouldn't send out the notice until they
18 rule, and if they're going to deny the 23(f), we can at
19 least put in place the mechanism for getting the notice
20 ready and then go forward without having to come back to
21 the Court.

22 So while we are not happy with the prospect of
23 waiting for the Eighth Circuit's decision, from a practical
24 standpoint, it makes sense to wait, but that then takes us
25 to the question of assume that they reject the 23(f) and we

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1 need to go forward with notice, is it one notice or two
2 notices?

3 The medical monitoring class that consists of, I
4 think, 17 states and the District of Columbia are all
5 subsumed within the consumer fraud class. Therefore, to
6 send two notices we believe would be inappropriate, as
7 St. Jude would ask that we do.

8 It could be confusing, and it really serves no
9 useful purpose. Those people in states that have not been
10 put in the medical monitoring will know that they have no
11 claim for medical monitoring because it will be so
12 articulated. So the first question that really now is on
13 the table, should it be one or two notices.

14 While Mr. Kohn and I did discuss the fact that if
15 the Court believes two notices would be more appropriate,
16 we suggested that that second notice be paid for by
17 St. Jude Medical, but we really think that it could only
18 create greater confusion by having multiple notices go to
19 the same people.

20 We also have requested that the personal injury
21 decertification be included. Going back to the medical

22 monitoring, by the way, their position is that it's
23 discretionary. We argued this before when Your Honor put
24 it on hold awaiting the other rulings, but their position
25 is it's discretionary and there shouldn't be notice in the

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1 first place.

2 We recognize it's discretionary. We believe it's
3 appropriate under the circumstances here. Turning to
4 decertification, we also argued that before. There has
5 been publicity of the certified class. The people in the
6 consumer fraud class are all members, all 11,655.

7 They need to know that there is no personal
8 injury claim being advanced, that if they have suffered a
9 personal injury -- we're talking about a physical injury as
10 opposed to an economic injury -- that they need to do
11 something about it, and we think that it is -- appropriate
12 due process requires that we explain that.

13 They want no mention of a personal injury,
14 seeking counsel. They say that that's solicitation. I
15 don't believe that it's solicitation. I believe that it's
16 information, but when one uses a word that has a negative
17 connotation, "solicitation," I guess it gives some credence
18 to an objection.

19 They are our clients. They're all our clients.
20 We're not asking that they call us. We're saying that they
21 should obtain a -- obtain legal advice. So we believe that

22 there needs to be that information, both as to
23 decertification and as to the noninclusion of those kind of
24 recoveries.

25 We also have a disagreement over the language of

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1 the claims and the rights of the parties. We've written
2 Section 5 in a certain way. St. Jude has written Section 5
3 in a different way. Those have been given to Your Honor
4 previously.

5 We believe that there are certain aspects of
6 their section which are inappropriate. For example, they
7 suggest that people consult with a doctor. There is no
8 reason why a notice should tell a member of the class to
9 consult with a doctor. They want them to call St. Jude
10 Medical if they have any question as to whether they have a
11 Silzone valve.

12 We made a suggestion that instead of calling that
13 we put their web site in the notice, and they could go on
14 line to check to see whether or not the serial number of
15 their valve matches the serial number of a Silzone valve.

16 If there is still confusion and they do want
17 people to call, we want a log of everybody who called. We
18 want their name and telephone number. There is no reason
19 why St. Jude Medical should have ex parte communications
20 with members of the class that we represent without us
21 knowing about it.

22 So either that shouldn't be in the notice at all,
23 or alternatively, we should have access to that
24 information. There is another issue relating to
25 information. They do not want us to mention the fact that

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1 they lost summary judgment on preemption.

2 We think that's an important piece of
3 information, especially if we're going to send out the
4 notice while their mandamus petition is pending. As long
5 as it's pending and we send out the notice, the class
6 should know that that is an issue that may come back and
7 which might affect their rights in the class.

8 Now, it may become academic because the Eighth
9 Circuit may not accept that petition. It may reject it,
10 and therefore they have lost their summary judgment, and
11 then the Court can decide whether or not that is
12 informational and the people should know it.

13 THE COURT: Has the circuit requested any
14 briefing on the petition yet?

15 MR. ANGSTREICH: No. No, Your Honor, and it's
16 our understanding that without notification from the
17 circuit, we need not respond to the petition. We're
18 waiting to see what they're going to do about that.

19 There is also a disagreement with respect to the
20 class notice relating to who gets the opt-outs. They want
21 a neutral to get the opt-out. They don't believe Mr. Rudd

22 is neutral.

23 The fact of the matter is, we don't care who gets
24 the opt-outs. We want to know who opted out. They don't
25 want us to know, and I've never heard of such a thing in a

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1 class action where class counsel, neither class counsel nor
2 defense counsel know the name and information about who is
3 opting out, only the number.

4 That makes little or no sense, especially if
5 somebody might become confused and send letters asking
6 questions to whoever is identified and/or the opt-out may
7 not be in an appropriate format. Somebody has to
8 communicate with the people.

9 So we said okay, if you want a neutral, that's
10 fine. We want a list. Name and address of who is opting
11 out. The final points of contention relate to the language
12 that they want in the notice that people's personal medical
13 information will become -- may become available or used
14 during the trial of the case and that if you opt out,
15 you're opting out your family's derivative claims.

16 In the discussion that I had with Mr. Kohn, I
17 pointed out to him that neither of those statements are
18 true. In fact, they are both false. There are no
19 derivative claims that are being advanced in either the
20 medical monitoring class or the consumer fraud class.

21 The consumer fraud class seeks economic recovery

22 of out-of-pocket moneys. There is no opportunity for
23 somebody to seek loss of consortium. There is no
24 derivative claim that anybody has, and therefore if you opt
25 out, you can't be opting out anybody's claim.

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1 The medical monitoring is for medical monitoring
2 of that person and not their family, so I don't understand
3 how there is any appropriateness of that statement,
4 although the interesting thing is that that statement may
5 stop somebody from opting out as opposed to encouraging
6 them to opt out.

7 They may think that if they opt out, they're
8 defeating their family's claims, and they shouldn't do
9 that. They may stay in the class, and that would be to the
10 benefit of the class. However, it's an incorrect and an
11 inaccurate statement.

12 With respect to the medical records of the
13 putative class members, they're not coming into the trial
14 of this case. This is not a trial where every class
15 member's claim is going to be put before the Court where
16 they have to prove their medical information.

17 With respect to the medical monitoring, all you
18 have to have is the value in you being within one of the 17
19 states and the District of Columbia, or alternatively
20 you're in the consumer fraud class, and medical monitoring
21 is the injunctive relief that the Court grants to us.

22 You don't need any more than showing that you
23 have a valve, Silzone valve within you. With respect to
24 the economics of it, there is no medical record that is
25 necessary. All you have to do is show the bills from the

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1 hospital if that's one of the items to be recovered, the
2 cost of the valve if that's an item to be recovered, lost
3 wages if that's an item that is found to be recoverable.

4 The medical history of these people are not going
5 to be made known. Now, granted at the end of the day, if
6 there are many hearings, if there are issues that need to
7 come up to establish that somebody in fact has a valve,
8 that also does not impact upon their entire medical record
9 and personal information.

10 All that requires is that you show that you had
11 the Silzone valve and that you're entitled to be within the
12 class. It is an attempt at a chilling effect, to create a
13 chilling effect that somehow people are going to know their
14 personal medical conditions which may go beyond just having
15 a valve. It's inappropriate. It can't come into the trial
16 and shouldn't be in the notice.

17 I believe that covers the issues. We would ask
18 that the Court decide these issues even if the Court agrees
19 that delaying the issuance of the notice should await the
20 Eighth Circuit's ruling.

21 We should still be in a position once that

22 happens to have put in place the notice or notices as the
23 Court decides appropriate. Thank you.

24 THE COURT: Mr. Kohn?

25 MR. KOHN: Well, Your Honor, first I have to

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1 point out, as I'm sure the Court knows, that we have fully
2 briefed the notice issue and set forth the law that we
3 believe covers each one of the issues that Mr. Angstreich
4 has just discussed.

5 The second point is that I certainly agree that
6 sending out notice before the Eighth Circuit has decided
7 the 23(f) petition and even decided on whether to take the
8 writ would be wasteful and inappropriate and create
9 confusion, so I think that it's far better to wait. I'm
10 sure that both of these issues will be resolved, I would
11 guess, within the next 60 days if not sooner.

12 With respect to some of the issues that
13 Mr. Angstreich has brought forth here, again, these are
14 fully briefed. We argued them once before. I would just
15 remind the Court that the purpose of notice is to provide a
16 clear, concise summary of the issues in the case and to
17 give the class member an opportunity to opt out.

18 And the notice that has been proposed by counsel
19 I think because it addresses the decertification of the
20 personal injury class, because it combines a non opt-out
21 class with an out-opt class and for a variety of other

22 reasons that are in our papers creates a huge amount of
23 confusion that doesn't necessarily have to be there.

24 We believe that if a notice does go out, it
25 should be short. It should be simple. It should just

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1 address the issues in the consumer fraud class. The
2 monitoring class is a B2 class. Notice in that case is
3 discretionary. There is no opt-out out of the medical
4 monitoring class, so why send out the notice? It doesn't
5 add anything.

6 For someone to get a notice who is part of the
7 medical monitoring class and also part of the consumer
8 protection class and for them to be told that in the one
9 instance they have no right to opt out but in the other
10 they do to me doesn't accomplish anything other than to
11 create confusion.

12 More importantly, they haven't filed a trial
13 plan. The landscape of this monitoring class isn't
14 entirely clear. It was my understanding based on the
15 Court's order that there could well be some subclasses
16 created that haven't been determined yet, but even if
17 that's not the case, it seems to me sending notice out to
18 the monitoring class is unnecessary and inappropriate.

19 As to the discussion about the need to notify
20 class members about the decertification of the injury
21 class, there is an abundance of cases cited in our papers

22 that notice of that type where there has not been an
23 initial notice to the class is inappropriate. It's nothing
24 more than a solicitation device. It has been characterized
25 as such by courts across the country. There is simply no

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1 reason to do it in this instance.

2 As to the issue of the medical records being made
3 available to the parties, we believe it's unclear and that
4 there may well be a need to have individual medical records
5 made available as part of the consumer protection case if
6 it's tried because there needs to be a causal nexus for
7 each individual class member between whatever the injury
8 is, if they have lost wage claim, if they have a claim for
9 medical expenses.

10 They need to show that those lost wages and that
11 those medical expenses were in fact related to some valve
12 issue, and without seeing their medical records, there is
13 no way to do that. So I don't know how this case could be
14 tried without giving the defense an opportunity to look at
15 the medical records of those people who are asserting those
16 kind of damages.

17 And similarly for medical monitoring, I think
18 it's too simplistic to simply say that just because someone
19 has a Silzone valve that automatically they just step up
20 and get a medical monitoring right. We need to know what
21 their condition is.

22 We need to know what kind of monitoring they
23 need, and all of these people are different. So there has
24 to be some kind of a causal nexus shown. The only way to
25 know their situation is either some kind of statement from

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1 their physician or from their medical records.

2 So I think, at least at this point to us, it's
3 unclear, and if I'm incorrect or we're incorrect about
4 this, then that statement doesn't need to be in the notice,
5 but at this point, it seems to us, anyway, it would not be
6 possible to try this case without access to those records.

7 As to the desire of counsel to make a reference
8 to preemption, I think that we ought to wait and see what
9 happens with the writ. If the writ is taken, we can
10 address it. If the writ is not taken, we can address it a
11 different way.

12 But I think at this point, it's simply not
13 something that needs to be in the notice. Thank you, Your
14 Honor.

15 THE COURT: Thank you, Mr. Kohn.

16 MR. ANGSTREICH: Your Honor, I have to respond to
17 what Mr. Kohn just said. It's my recollection that this is
18 a class action. All of the arguments he just made about
19 causal nexus and individual issues were raised in their
20 papers as to why this shouldn't be a class action. Your
21 Honor said it's a class action.

22 In fact, the test is that medical monitoring is a
23 stand-alone claim, and all you need is the valve, the
24 Silzone valve, and we need to establish through expert
25 testimony that the implanted Silzone valve has caused or

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1 could cause injury, subcellular or whatever, for those
2 additional three states that effectively were added, that
3 monitoring will give a salutary effect so that there could
4 be early detection of a problem and early treatment.
5 That's the test.

6 Whether Mr. Jones is 50 years old and Mrs. Smith
7 is 25 years old is an irrelevancy. All those
8 individualized issues Your Honor said don't exist. With
9 respect to consumer fraud, if you have a valve, Silzone
10 valve implanted, which is found to have been defective in
11 the sense that it was a misbranded, mislabeled,
12 mismarketed, a consumer fraud was perpetrated as it relates
13 to that valve, that's what gives rise to your right to
14 recover, no different than being induced to purchase
15 something which was through an inducement that was a
16 misrepresentation through the marketing level.

17 That's the cause of action. We were caused to
18 have implanted within us a Silzone valve based upon these
19 misrepresentations in connection with the marketing,
20 et cetera. That's under the consumer fraud statute. The
21 minute that happens, we're entitled to damages.

22 Now, we say those damages relate to the cost of
23 the valve. If you therefore had the valve explanted,
24 whether you wanted it explanted because you were now
25 concerned that this had been recalled and there was nothing

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1 else wrong with you, you had it explanted and then you had
2 additional costs for the surgery, for the explanting
3 surgery, and you lost wages in connection with that, that's
4 also an economic recovery that you can get.

5 All you have to do is show that you had the
6 valve, you had it explanted, and you incurred these other
7 damages in the individual cases after there has been a
8 recovery. Each one of the plaintiffs will not come into
9 this courtroom. There is no requirement in a consumer
10 fraud case for us to have individual issues with respect to
11 one class member, otherwise we are -- we don't have a class
12 action.

13 Your Honor has addressed this at least twice,
14 maybe three times, as it relates to consumer fraud. Your
15 Honor has determined that this is an appropriate consumer
16 class, and the issue now is, I guess, before the Eighth
17 Circuit as to whether they're going to accept a 23(f) and
18 view Your Honor's decision on this to have been
19 appropriate.

20 Absent a reversal of Your Honor's ruling, it's a
21 class action, and it will get tried just the way we

22 identified it in our trial plan and what we have said.
23 There will never be in the trial of this case somebody's
24 individual medical records being presented in order for us
25 to establish to a jury that there is a consumer fraud

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1 claim.

2 Now, later on whether Your Honor directs by way
3 of proof of claim, which can be challenged by St. Jude
4 Medical if they believe that it's appropriate and then have
5 special masters appointed to investigate those individual
6 specific cases, if there is truly a challenge because they
7 believe the person didn't have a Silzone valve implanted,
8 we'll address it that way.

9 But in the trial of this case, that can't happen.

10 So the point is that I think St. Jude really has to
11 recognize that we really do have two classes here, and
12 class actions get tried differently than individual cases.
13 That's why those pieces of information shouldn't be in
14 there.

15 One other point: If -- if the medical monitoring
16 class is still not a definitive class, then I don't know
17 why a 23(f) would have been appropriate. It would be
18 untimely if there is something else that needs to come
19 forward.

20 At this point in time, Your Honor, we have what I
21 believe Your Honor has viewed to be a class no different

22 than the consumer fraud class. There are no differences
23 with respect to the right to have a medical monitoring
24 claim absent specific injury.

25 And since we have presented to the Court our

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1 experts that have said everybody that had the Silzone valve
2 implanted sustained subcellular damage, among others, we
3 have satisfied the test for those three additional states
4 that required some form of injury.

5 So we think that with respect to that, those
6 pieces of information, that the notice should be addressed.
7 Thank you.

8 THE COURT: Anything else, Mr. Kohn?

9 MR. KOHN: Well, I would just say we have a
10 fundamental agreement on how this case is going to be
11 tried, and I suppose there will be clarity down the road,
12 but at this point, we don't believe you can sweep the
13 individual issues under the rug just because you have a
14 class action.

15 There are a lot of class actions tried and
16 individual issues still need to be resolved, and they will
17 need to be resolved in this case.

18 THE COURT: Well, with respect to the notice
19 issues, I think the best procedure for us to follow is to
20 give the circuit a little bit of time to rule on the two
21 pending matters that are there. I do think that it is

22 likely that they will rule quickly, particularly on the
23 first matter.

24 On the petition, I think, I'm not as familiar
25 with their process there, but I think they will likely rule

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1 relatively quickly there. If the circuit decides not to
2 take an appeal or any aspect of the case, I would
3 anticipate that the Court would indicate to the parties
4 that it's going to proceed to rule on the notice issues
5 that had been raised, the positions of both sides.

6 I would likely give each side an additional
7 opportunity if there is anything else that the Court should
8 be made aware of by way of a submission to the Court,
9 relatively short period of time for that, but then to
10 proceed ahead and issue a ruling on the notice issues that
11 are pending before the Court.

12 I'm not going to do that, however, until the
13 circuit has given an indication on the two matters how it's
14 going to proceed. So in terms of timing, I would
15 anticipate it probably would be at least 60 to 90 days
16 before the Court would move into the notice issues, and
17 given that time frame, I will give the parties an
18 opportunity for any additional submissions that they wish
19 to make.

20 MR. ANGSTREICH: Your Honor, the notice that we
21 submitted previously needs to be brought up-to-date anyway

22 because of the recent ruling. So we will be providing to

23 Your Honor a revised notice.

24 THE COURT: Good. Okay. What else do we have

25 today?

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1 MR. CAPRETZ: One second, Your Honor. Yes, Your
2 Honor, just a few catch-up points. One of the requests we
3 have made and we are still discussing with St. Jude
4 Medical, and I understand Mr. Stanley is prepared to
5 address the issue for St. Jude today, is in the individual
6 case discovery, that has come in, St. Jude Medical with
7 those cases that have not resolved as a result of
8 mediation, has commenced discovery by way of taking
9 depositions.

10 And there has been discovery propounded by both
11 sides, at least from the claims that we have, for example,
12 and by St. Jude Medical. We have suggested to St. Jude
13 Medical that we have an extension, as we do in the MDL, of
14 a number of interrogatories that might be propounded.

15 For example, if you ask contention
16 interrogatories, in one of our cases there are 25
17 affirmative defenses. You would have 25 questions using up
18 those, if you go with a contention interrogatories format.
19 So some additional space is needed for not only our own,
20 but the other lawyers that have cases that have not
21 resolved.

22 We have suggested that originally an additional
23 25 and had some discussions with Mr. Kohn about this, and
24 it got down to, well, maybe an additional 10 might work if
25 we would allow that for all pending cases subject to any

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1 individual case coming in if it has a specific need to
2 increase the number of interrogatories.

3 That's where we left it. Mr. Stanley can address
4 their side.

5 MR. STANLEY: Your Honor, I've seen the
6 interrogatories. Mr. Capretz is the only one who has
7 propounded them on behalf of the plaintiffs in the MDL
8 cases, and I've seen his interrogatories, and I think that
9 it's not an issue of the number, but of the interrogatories
10 themselves.

11 And what I think would be a good idea would be
12 for Mr. Capretz to submit sort of a set of interrogatories
13 he would want to send on each case, and we can meet and
14 confer and have an agreed upon set. If that number is 25
15 or 30 or 35, we've, you know, we have an agreed upon set he
16 will send in each case.

17 A lot of his interrogatories as currently phrased
18 are objectionable, and I think we can work them out if we
19 have a meet and confer on this. We prefer to do it that
20 way as opposed to arbitrarily set another 10 or 20 or
21 however many interrogatories. I think we can come to a

22 quick agreement on an agreed upon set.

23 THE COURT: Mr. Capretz?

24 MR. CAPRETZ: The issue, Your Honor, it's not the

25 question of just what our office may have. We have a

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1 fiduciary responsibility to not only our class members, but
2 to our co-counsel who are not here representing the
3 plaintiffs.

4 It's our job to protect their rights and see that
5 they have the maximum opportunity to prove their case.
6 Now, I would not want to burden everybody in an individual
7 case. We have increased this with the MDL with no problem
8 the number of interrogatories that were allowed.

9 We see no reason why, say, a number like 35
10 shouldn't be allowed. Perhaps some won't be using them at
11 all, as Mr. Stanley suggests. They're not doing it as of
12 yet.

13 THE COURT: Why don't you meet and see if you can
14 agree on a set. It seems that the parties are looking at
15 this in a slightly different way, and I think a meeting on
16 this issue would probably be helpful. See if you can agree
17 on at least a presumed set.

18 There might be individual cases where that can be
19 altered because of the needs of the individual client.

20 MR. CAPRETZ: Okay. A couple of follow-through
21 and miscellaneous points: Going back to Mr. Solum, it is

22 still a point with myself as concerning the cost allocation
23 on the work that he is to do. Would the Court empower him
24 to make a disproportionate allocation of costs? Do you
25 think that's fair to do?

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1 THE COURT: What's the position of the defendant?

2 MR. KOHN: That's fine, Your Honor. I think you
3 can leave it up to the special master to decide based upon
4 his rulings. That seems fair to me.

5 THE COURT: Well, that's fine with the Court. I
6 guess that seems likely that whatever it is will come back
7 here at some point in time, but let's allow him to make
8 that initial determination. He's probably in the best
9 position to make that determination.

10 MR. CAPRETZ: One other point concerning the
11 gentleman is that after the deposition was completed
12 yesterday, he approached Mr. Angstreich and myself and
13 suggested that there should be, he didn't use these terms,
14 but an end game and discussion of a possible resolution.
15 It's been four plus years the litigation has been underway.

16 I think both parties were polite but said the
17 other party doesn't seem to -- you can't dance with them if
18 they don't want to dance. I don't know if he has that
19 charge, but the Court might want to consider exploring an
20 option.

21 I can certainly say that the class would be

22 willing to talk and at any time at any reasonable place to
23 discuss this issue if it is found to be appropriate.

24 THE COURT: Well, I think there is a time coming
25 when we should pursue that. It seems that probably it

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1 would not be worth it until the circuit has indicated
2 whether it's going to take these matters up because that
3 potentially could have a significant impact on the case.

4 So once that is decided, then I think we probably
5 ought to start turning our attention a little bit more to
6 the committee that we set up to focus on the end game as
7 well.

8 MR. CAPRETZ: Very well. And finally, unless you
9 have any other issues? I congratulate the Court. I
10 happened to be listening to public broadcasting last
11 evening, and I heard the Court was over in Eastern Europe
12 promoting Americanism and American judicial system.

13 I congratulate your work on behalf of the
14 citizenry. Very interesting situation.

15 THE COURT: Hawaii might be a better destination,
16 come to think of it.

17 MR. CAPRETZ: Did the wife agree to go on that
18 vacation or holiday with you?

19 THE COURT: No.

20 MR. CAPRETZ: Thank you very much.

21 THE COURT: Shall we set a time for another

22 hearing?

23 MR. ANGSTREICH: I think that would be

24 appropriate, Your Honor. Your Honor, I think we should set

25 a tentative date. If the Eighth Circuit hasn't ruled by

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1 then, we should postpone until after the ruling, but at
2 least have it somewhere towards the end of September, which
3 hopefully will give the Eighth Circuit ample opportunity to
4 deny their filings.

5 MR. CAPRETZ: If we could look at the first part
6 of October, Your Honor, it might even be better. The end
7 of September is a tough schedule.

8 THE COURT: We could do it either the last week
9 of September or the beginning of the first week of October.
10 Either would fit in the Court's schedule. October 4th is
11 the first week in October. September 27th is the last week
12 in September.

13 The 27th and 28th are available on the Court's
14 schedule, and then the 4th through the 6th are pretty
15 available the following week.

16 MR. CAPRETZ: Mine, October the 4th through the
17 6th would work, but I couldn't make the end of September.

18 MR. ANGSTREICH: October 5th is fine.

19 MR. KOHN: Actually the 6th would be preferable,
20 Your Honor.

21 MR. ANGSTREICH: The 6th is good, too.

22 MR. KOHN: If it would be possible to do it in

23 the morning.

24 THE COURT: The date is wide open right now. Why

25 don't we set it for nine o'clock?

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1 MR. CAPRETZ: What day of the week is that? I'm
2 sorry.

3 THE COURT: Wednesday the 6th, 9:00 a.m., okay?

4 MR. CAPRETZ: Very well.

5 THE COURT: Anything else for today?

6 MR. ANGSTREICH: Your Honor, we will submit a
7 form of order. I think it's appropriate for Mr. Solum to
8 understand what his job is with respect to the depositions
9 and his power to assess disproportionately the charges to
10 St. Jude.

11 I must have misspoke, Your Honor.

12 THE COURT: That's fine. The Court will take a
13 look at the submission and get out an order promptly.

14 MR. ANGSTREICH: We'll send it to the other side
15 first, Your Honor.

16 THE COURT: Okay. Very well. There being
17 nothing else for the hearing today, status conference
18 today, thank you, everyone, and we will see you soon. The
19 Court is in recess.

20 MR. ANGSTREICH: Thank you, Your Honor.

21 MR. CAPRETZ: Thank you.

22 MR. KOHN: Thank you.

23 * * *

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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: August 23, 2004

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