

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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IN RE: STRYKER REJUVENATE ) Case No. 13-MD-2441 (DWF/FLN)  
AND ABG II HIP IMPLANT )  
PRODUCTS LIABILITY LITIGATION )  
\_\_\_\_\_)  
This Document Relates to ) St. Paul, Minnesota  
All Actions ) September 9, 2013  
) 2:15 p.m.  
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BEFORE **THE HONORABLE DONOVAN W. FRANK**  
UNITED STATES DISTRICT COURT JUDGE  
AND BEFORE **THE HONORABLE FRANKLIN L. NOEL**  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**INITIAL PRETRIAL CONFERENCE PROCEEDINGS**

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**APPEARANCES (Continued):**

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(List of additional counsel in the courtroom, as well as on the courtroom phone can be found on Attachment A and Attachment B filed with the minutes in the docket.)

**P R O C E E D I N G S****I N O P E N C O U R T**

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2  
3 THE HONORABLE JUDGE DONOVAN FRANK: Thank you.

4 You may all be seated. Judge Noel and I would like to  
5 welcome you all here. For those of you that have not -- and  
6 I will try to have due regard, Judge Noel, for all the folks  
7 on the phone, if we all don't speak into the microphones,  
8 they won't pick up, whether it is a lawyer or one of us on  
9 the Bench.

10 This is, obviously, the initial get-together, for  
11 lack of a former legal term, for Judge Noel and I to have  
12 the initial conference, this MDL. To the extent one or more  
13 of you is frustrated that, well the agenda came out at the  
14 end of last week -- that responsibility should be placed on  
15 my shoulders, no one else's.

16 What I thought we would do, in addition to having  
17 introductions of the attorneys, then we will have a few  
18 remarks about what we hope to accomplish. And then we will  
19 describe -- there is some narrative on some of the agenda  
20 items. Because this isn't typically -- as I will hold off  
21 until we get to the status conference aspect of the agenda.  
22 And then at the end of the conference, we will discuss if  
23 there is other agenda items to be discussed.

24 The other thing that I will say in advance for the  
25 individuals on the phone and perhaps some other individuals,

1 a good friend of mine, because we have had a number of MDLs  
2 over the years, Judge Fallon down in New Orleans, we are  
3 going to be checking in with other individuals. Just to  
4 make sure if we take advantage of all of the technology,  
5 whether it is webex or some other technology issues to  
6 maximize participation by anyone and everyone across the  
7 country, because as many of you know, the MDL Panel  
8 contemplates -- and we fully accept that as one of our  
9 responsibilities -- to move the case along in some  
10 efficient, but fair-handed manner.

11 But also, if we can't realize economies of scale  
12 to hold down costs, to hold down delay and move the case  
13 along, that is the primary, if not only justification to  
14 have MDL, whether it is a bellwether approach to cases or a  
15 class action approach. And we will discuss some of those  
16 issues today. And I will sit tight before we discuss the  
17 status conference, what has worked well for us in the past.

18 I guess I didn't introduce myself. First name  
19 Donovan, last name Frank. For those of you who don't know  
20 me, you're thinking I inverted my name. You can take that  
21 up with my mother or father. It probably sounds better  
22 Frank Donovan; but it is first name, Donovan, last name  
23 Frank. I have been on the Bench here for 15 years, was a  
24 State Judge for 14. So I am an older chap, so to speak. It  
25 is my fourth or fifth MDL. And so, one size doesn't fit

1 all.

2 I will say this -- that I hope is of some comfort  
3 to everybody in the room and on the telephone. Obviously,  
4 when a judge gets called and says: Will you take the case?  
5 Our District is the same as other Districts across the  
6 country. You can say yes or you can say no.

7 Usually most of us who say, "of course," are  
8 interested in the case because most Districts have the same  
9 rule that we do. You can't reduce your local caseload if  
10 you opt to take a case.

11 And so I think the candid response is, most of us  
12 in this District find it a very worthwhile experience to be  
13 involved in a hands-on approach to MDL cases. So, with  
14 that, I will let His Honor introduce himself. And we will  
15 run across the individuals that are at counsel table in the  
16 front. And then if there are individuals at counsel  
17 table -- and Brenda is putting a seating chart together for  
18 us. If there are individuals that you feel strongly should  
19 be introduced in the courtroom as, I think, Brenda showed  
20 you, we'll have in the minutes, on the docket -- we will  
21 have confirmation and note who is on the phone today, even  
22 though it is not practical to take a rollcall of over 40  
23 lawyers. And we will have it on the docket sheet. And we  
24 had you all sign in who was present today in the courtroom.  
25 And then we will make sure before that is published in its

1 final form that we have accounted for everyone. So, Your  
2 Honor?

3 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL:

4 Just to confuse things even further, my first name is Frank.  
5 I am Frank Noel. I'm a Magistrate Judge on this Court. I  
6 have been a Magistrate Judge for 24 years, and the District  
7 Judges in their wisdom have just appointed me for another  
8 eight years. So I am here to do whatever Judge Frank wants  
9 me to do to assist in getting this matter moved along. So,  
10 welcome to all of you and look forward to working with you  
11 all.

12 THE HONORABLE JUDGE DONOVAN FRANK: Should we  
13 start on my right, Counsel's left? Mr. Zimmerman, if we  
14 want to start over here and we will walk across the room,  
15 here?

16 MR. ZIMMERMAN: Good afternoon, Your Honor.

17 THE HONORABLE JUDGE DONOVAN FRANK: And could you  
18 perhaps stay close to the mike? We don't have a lavalier to  
19 move around -- just for the benefit of the folks on the  
20 phone? Otherwise they won't hear who is saying what.

21 MR. ZIMMERMAN: Thank you. Good afternoon,  
22 Your Honors. I am Bucky Zimmerman, and I am on behalf of  
23 the Plaintiffs and it's a pleasure to be here. Thank you.

24 MS. ZIMMERMAN: Good afternoon. I am Genevieve  
25 Zimmerman, also on behalf of the Plaintiffs. No relation to

1 my partner, Bucky.

2 THE HONORABLE JUDGE DONOVAN FRANK: So you know  
3 that one of us are going to ask that kind of dorky question:  
4 Oh, sure. They're going to ask, so...

5 MS. ANDERSON: Good morning, Your Honor. Carolyn  
6 Anderson, from Zimmerman Reed.

7 MR. GORDON: Your Honor, good morning. My name is  
8 Ben Gordon, Levin Papantonio, on behalf of the majority  
9 slate and hundreds of Plaintiffs from the Southeastern  
10 United States.

11 MR. DeGARIS: Your Honor, Annesley DeGaris from  
12 Birmingham, Alabama on behalf of the Plaintiffs.

13 MR. FLOWERS: Good morning, Your Honors, or good  
14 afternoon. Pete Flowers from Chicago on behalf of  
15 Plaintiffs.

16 MR. NEMO: Good afternoon, Your Honors. Tony  
17 Nemo, here from Meshbesh & Spence on behalf of the  
18 Plaintiffs.

19 THE HONORABLE JUDGE DONOVAN FRANK: Are you kind  
20 of sitting on the wrong side of the runway here, Mr.  
21 Gustafson?

22 MR. GUSTAFSON: Good afternoon, Your Honors. I am  
23 trying out this side for a little variation.

24 THE HONORABLE JUDGE DONOVAN FRANK: So we may need  
25 some help. He may have an identity crisis before the --

1 MR. GUSTAFSON: Some counseling, and I know right  
2 where to get it, too. Gustafson Gluek on behalf of the  
3 Plaintiffs. I thought I had a majority slate, but  
4 apparently not.

5 MR. RAITER: Good afternoon. Shawn Raiter, Larson  
6 King, also on behalf of the Plaintiffs sitting on the left  
7 side.

8 THE HONORABLE JUDGE DONOVAN FRANK: All right.

9 MR. CAMPILLO: Your Honor, Ralph Campillo,  
10 Sedgwick LLP for the Defendants, sitting on the "right" side  
11 of the courtroom -- (laughter) for Stryker Corporation.

12 UNIDENTIFIED VOICE ON THE PHONE: Can't hear  
13 counsel.

14 THE HONORABLE JUDGE DONOVAN FRANK: Yes, if you  
15 could just -- we appreciate you standing up, which is kind  
16 of the normal mode of operation in the Federal Court, but if  
17 we are not fairly close to the mike -- it is not one of  
18 those fancy entertainment mikes you can kind of sing along  
19 and jive around. If you're not fairly close, it won't pick  
20 you up.

21 MR. CAMPILLO: I represent the three Defendants in  
22 this litigation, Your Honor.

23 MS. WOODWARD: Good afternoon, Your Honor. My  
24 name is Karen Woodward. I'm also with the Sedgwick Law  
25 Firm, and also an attorney for the Defendants.

1           MR. GRIFFIN: Good afternoon, Your Honor.  
2 Tim Griffin from Leonard, Street and Deinard on behalf of  
3 the Defendants.

4           THE HONORABLE JUDGE DONOVAN FRANK: What I thought  
5 we would do, I touched on it a little bit on Agenda Item 2,  
6 on the Court's objectives. As you can see -- and I will sit  
7 tight on the issue of when we will start seeing some  
8 meaningful case management orders. And we'll address later  
9 on in a few moments any coordination issue, just not with  
10 New Jersey. And I have talked to the Judge there. We have  
11 talked to one another on at least two occasions, and tried  
12 to keep each other informed; but, we will talk about that.

13           In terms of objectives, as I had touched on a  
14 moment ago, there is no doubt that -- and again, it should  
15 come as some comfort to the groups, and I am actually -- to  
16 the extent it is relevant -- one of the Judges who does the  
17 training -- maybe because nobody else wants to do it -- for  
18 the newest -- not the new, new Federal Judge, but the Judges  
19 that are -- when we suffer through the Breakers down at  
20 West Palm Beach every October for all of the Federal Judges  
21 with MDL cases. For those MDL Judges who -- Federal Judges  
22 who have their first MDL.

23           The message that the Panel wants us to give  
24 everyone, which I think serves everyone's best interest is,  
25 manage the case effectively and early, and don't farm out or

1 delegate all the work to Special Masters, unless the parties  
2 agree, whether it is in a settlement context or some other  
3 context.

4 So, we will team-approach the case. And there is  
5 more than one way to handle these. But, for example, in the  
6 last two cases I have had, maybe the best example is the  
7 *Guidant Boston Scientific* case. The Magistrate Judge in  
8 that case, relevant or not, was Art Boylan. And much like  
9 other MDLs in our District, he did the heavy lifting at an  
10 appropriate time early on on settlement. And I essentially  
11 handled everything else, whether it was dispositive,  
12 nondispositive.

13 Because the MDL Panel really and appropriately  
14 contemplates that we will manage the case whether it is in a  
15 bellwether context or class action context. So we don't --  
16 if we can't resolve all of the cases, we will be discussing  
17 before we are done here, are there key issues? And if we  
18 don't discuss it today, we will discuss it not later than  
19 November.

20 But, key issues that, whether it is on the  
21 liability piece, the settlement piece, that: Well, if we  
22 could get certain issues decided by the Court and certain  
23 limited discovery, that would really precipitate moving the  
24 case along, either for global settlement purposes, or  
25 getting these cases ready for a trial early on, in some

1 meaningful, but fair and efficient way.

2 That is clearly the charge of the Panel, as  
3 opposed to perfunctorily going through getting discovery  
4 done and shipping them back to the home districts, which  
5 means, as we will talk later on, I will be trying to set as  
6 early as possible, no later than November, maybe any pending  
7 motions for remand and other such things. But, probably  
8 what you will find is that within the next month or less --  
9 well, it will be no more than a month out, perhaps less, we  
10 will be issuing an order, with or without agreement of the  
11 parties, on the structure for Plaintiffs and Defense, so we  
12 can move on down the road. And if there is an agreement,  
13 fine; as long as everybody has had their fair say, whether  
14 it's by input or application. But, we will have that in  
15 place, so we can move on down the road, as contemplated,  
16 since there is probably one or more of you in the room are  
17 listening on the phone that are frustrated or saying: Well,  
18 we have a pending motion for remand or we have a pending  
19 motion for this. When is the Judge going to hear it? We  
20 will hear it soon. And we will set up a process -- I  
21 telegraph a little bit how that works, as we talk about  
22 status conferences; but, there may be other ways to handle  
23 some of those issues.

24 So, that is really the objective, to try to have  
25 some economies of scale, but avoid some of those criticisms

1 of large national cases that, well, nobody really benefits  
2 because of the costs and the delay. We will try to mention  
3 that. I will probably confess that based upon my  
4 experience, I am kind of a poster child for the Bellwether  
5 system. I think some of you were involved in that.

6 I heard approximately, either 32 or 38 summary  
7 judgment, *Daubert* and Rule 12 motions. It is on those five  
8 or six cases that we had selected for trial, but we will  
9 talk about that.

10 No predisposition here; it is just that I have  
11 seen that work. If it is truly a fair process and truly  
12 representative of the cases that are selected, it may be  
13 premature to discuss that now, but it won't be soon down the  
14 road.

15 So, with that, did you want to say anything,  
16 Judge Noel about kind of the Court's objectives here?

17 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL:

18 Nothing really to add, other than I am here to assist Judge  
19 Frank in any way I can, either with settlement or discovery  
20 disputes, or handling some of the -- participating in the  
21 periodic status updates that are described in Pretrial Order  
22 No. 3.

23 So, my experience with MDLs, I have had several  
24 others, as well, and I have played different roles. One of  
25 the more successful ones that I have been involved in

1 entailed a drug product. And there was two bellwether  
2 trials, or a trial and a half, actually, and then a number  
3 of settlement conferences that have been going on for some  
4 time. And most all of those cases have now been settled.

5 THE HONORABLE JUDGE DONOVAN FRANK: Brenda, do we  
6 have an update on -- I may ask counsel, too, right now, the  
7 number of cases transferred in here?

8 THE CLERK: If you give me a moment, I can run it  
9 through.

10 THE HONORABLE JUDGE DONOVAN FRANK: Maybe I'll ask  
11 both sides of the aisle if they have a view on where they  
12 think we are at with the number of cases in here? She just  
13 does a final check.

14 I saw counsel for the Defense raise their hand?

15 MS. WOODWARD: Yes, Your Honor. Yes, Karen  
16 Woodward for the Defense. We brought some information that  
17 we hoped will be helpful for the Court today regarding that  
18 very question, and brought some copies also for the  
19 Plaintiffs. But, I clearly underestimated the number of  
20 copies that would be needed today. So, with Your Honor's  
21 permission --

22 THE HONORABLE JUDGE DONOVAN FRANK: If there is  
23 some copying that needs to be done, we can do that. So, as  
24 people leave, if not before, we'll make as many copies as  
25 anybody in the room wants; so not a problem.

1 MS. WOODWARD: Very good, Your Honor. May I have  
2 permission to deliver this?

3 THE HONORABLE JUDGE DONOVAN FRANK: Oh, certainly.

4 MS. WOODWARD: What I am handing Your Honor, is a  
5 list of cases that we know have been filed or transferred to  
6 the MDL, broken down by Plaintiffs' counsel. We have also  
7 prepared a map that is just a different graphic  
8 representation of that information that can show you the  
9 states that have transferred the most cases in, so on and so  
10 forth. Right now our total, and this should be up to date  
11 as of --

12 THE HONORABLE JUDGE DONOVAN FRANK: Let's see how  
13 close. She just whispered to me 253.

14 MS. WOODWARD: Well, there were quite a few  
15 filings at the end of last week. So, we believe it is up to  
16 date as of Friday at noon. And probably, administratively,  
17 haven't even hit the books in your courtroom. So, our  
18 number is 275 total cases.

19 I can certainly give Your Honor some more  
20 information about the breakdown of those cases if you have  
21 any additional questions. We do have 20 cases that are  
22 currently pending in State Court, most of which will  
23 probably remain in State Court. And obviously, you know  
24 about the New Jersey proceeding --

25 THE HONORABLE JUDGE DONOVAN FRANK: Right.

1 MS. WOODWARD: -- and the cases that are pending  
2 there. So, whatever information Your Honor needs, questions  
3 you have, we will be do our best to answer them.

4 THE HONORABLE JUDGE DONOVAN FRANK: We will check  
5 in with you at the end of the day, depending on where we are  
6 at, to the extent that -- well, if one or more of you say:  
7 Well, it's important -- and I will have Brenda copy, so  
8 whether every single individual in the courtroom wants a  
9 copy or whatever, we will make them. We will have a stack.  
10 So everybody, if they want that, they will have it. All  
11 right?

12 MS. WOODWARD: Good, thank you.

13 THE HONORABLE JUDGE DONOVAN FRANK: All right. Is  
14 that number in the neighborhood for the Plaintiffs?

15 MR. NEMO: It is in the neighborhood, but it's  
16 down the block a bit. I came up with 250 --

17 THE HONORABLE JUDGE DONOVAN FRANK: That is what  
18 we had, too, but Ms. Woodward may be exactly correct, that  
19 it's -- just by the administrative downtime and delay, it is  
20 over -- must have been 20 some cases filed just in the last  
21 day or two.

22 MR. NEMO: I thought I counted them, but...

23 THE HONORABLE JUDGE DONOVAN FRANK: All right.  
24 Well, who would like to step off the curb and talk about the  
25 conferring that has been done between Plaintiffs and --

1 Interim Plaintiff counsel and the Defense, and what you are  
2 hoping we are going to see down the road in the near or not  
3 too distant future?

4 MR. GUSTAFSON: Good afternoon again, Your Honor,  
5 Dan Gustafson and Genevieve Zimmerman. I had kind of fun  
6 sitting on the Defense side of the table. I'm going to have  
7 to try that again a little. It is an easier group to deal  
8 with than the Plaintiffs.

9 We have an agreement, if it is acceptable to  
10 Your Honor, which I would describe as the process -- the  
11 product of a very rigorous and contentious negotiation.  
12 Nobody is particularly happy with it, but I think that it  
13 gets at the heart of what both sides want here, which is  
14 competent lawyers who have experience in MDL proceedings,  
15 lawyers who have experience in hip proceedings, lawyers who  
16 have cases where they represent a fair number of clients,  
17 and people who have a vested interest in making this MDL  
18 successful for a variety of reasons; and, therefore,  
19 encompassing many of the objectives that we seek.

20 So, we would like to submit it to you, Your Honor.  
21 I'm not sure exactly how long it will take us to submit it.  
22 But, the notion is that it would be four co-lead counsel and  
23 five people on an executive committee -- not an executive  
24 committee, but a PSC, whatever you would call it. And that  
25 those people would meet about the number of additional PSC

1 members there might need to be.

2 And we couldn't get any further today with where  
3 we were at, because of the timing. And we apologize for  
4 keeping you waiting as it was.

5 THE HONORABLE JUDGE DONOVAN FRANK: Well, but  
6 let's put some of this on my shoulders, too. I mean I put  
7 the Order out at the end of last week and then just kind of  
8 dropped in a paragraph. You know it and the group over here  
9 knows it; but, neither side got input. And then I dropped  
10 in the phrase, "This Order contemplates that the parties  
11 should get together and talk." So, half of it belongs right  
12 here, as well.

13 If you are suggesting -- and I am sorry to  
14 interrupt -- if you are suggesting that, well, we can come  
15 up with a timeline -- and I don't know when you say, if you  
16 are thinking of one week, two weeks, something more,  
17 something less, to put a proposal in front of us, I will be  
18 looking, for one, to see if there is kind of a relatively  
19 diverse group.

20 And two, it assumes -- and I hope for a lot of  
21 reasons it is an accurate assumption -- we'll maybe find out  
22 before today is out, if there are other individuals who will  
23 say that: Well, look it, we haven't made any submissions,  
24 but we want to be part of the action where we will chat with  
25 the group. We will soon find that out. But I think the

1       sooner we do that, the sooner we can probably, in everyone's  
2       best interest, move on down the road.

3               Because, let's have it right out in the open,  
4       here. One of the criticisms of MDLs and the lawyer  
5       structure is that, well, it's all kind of done secretly in  
6       advance by the Judge with who he or she knows. And so that  
7       is why the more open we are about this, I think everyone  
8       benefits. I think I interrupted you in terms of a time  
9       frame.

10              MR. GUSTAFSON: I think we could get it to you in  
11       a week, Your Honor. And I think what we will do, given your  
12       suggestion about openness, is we would send out an e-mail or  
13       a communication to anyone who is interested in seeking  
14       additional PSC spots, to contact us so, they could be in the  
15       mix of the discussion.

16              We expect at the end of the week that we will be  
17       able to submit an order to you that will be a consensus  
18       order. I didn't mention we had the four co-lead, the five  
19       people on the PSC, two liaison counsel. So, a local liaison  
20       counsel, Mr. Nemo; that has been decided. And the New  
21       Jersey liaison counsel, Mr. Szerlag, I think has been  
22       decided.

23              THE HONORABLE JUDGE DONOVAN FRANK: Is the New  
24       Jersey -- not to interrupt again, but the New Jersey issue  
25       is a fairly significant one. I try to coordinate some of

1 those activities, as well.

2 MR. GUSTAFSON: It is, and we fully expect to  
3 reach out to those New Jersey folks and see what economies  
4 of scale we can get with them. But, if that is acceptable  
5 to you on the leadership issue, we will submit something. I  
6 can submit what we just described today by tomorrow; but  
7 then give us a week to hammer out these final details, and I  
8 think we will have a final consensus.

9 MR. GORDON: Your Honor, can I be heard briefly on  
10 that portion?

11 THE HONORABLE JUDGE DONOVAN FRANK: All right.

12 MR. GORDON: I apologize for interrupting.  
13 Your Honor, in all fairness, we are talking, we have met and  
14 conferred, and we are very close. But I don't want the  
15 record to reflect that we are in 100 percent agreement with  
16 the structure that Mr. Gustafson has just outlined. It does  
17 require further effort, before we can actually agree to the  
18 proposed --

19 MR. GUSTAFSON: I was going to conclude with that,  
20 Your Honor. Mr. Gordon is right. The idea is that if we  
21 can't agree on who ought to be on the PSC and the remaining  
22 details, all bets are off and then you would have to pick.  
23 So, I am optimistic.

24 But, it isn't a final deal yet; it's a partial  
25 deal with the idea that during the next week, we'll talk

1 about it. And if we can finalize all the points, we'll  
2 submit a consensus order. And if we can't, we'll tell you  
3 we can't, and then we'll suggest a process by which we can  
4 go forward.

5 MS. ZIMMERMAN: And we kind of jumped ahead on the  
6 agenda, as well. The agenda contemplated cooperation  
7 potentially between Plaintiffs and Defendants, that may be  
8 where you are headed, but --

9 THE HONORABLE JUDGE DONOVAN FRANK: We are good.

10 MS. ZIMMERMAN: -- we will just check that one  
11 off.

12 THE HONORABLE JUDGE DONOVAN FRANK: We are good.  
13 Ms. Zimmerman, do you want to -- or Mr. Gordon, do you want  
14 to say anything else about what Mr. Gustafson has said?

15 MR. GORDON: Your Honor, I do want to say a few  
16 words in the interest of the --

17 THE HONORABLE JUDGE DONOVAN FRANK: Is your  
18 microphone on there?

19 MR. GORDON: I'm not sure. I think it is, but...

20 THE HONORABLE JUDGE DONOVAN FRANK: Is your little  
21 green light on there?

22 MR. GORDON: No, it is not.

23 Thank you, Your Honors. I appreciate the  
24 opportunity to address the Court. And I'll try to be very  
25 brief. I only met Mr. Gustafson today, as it were. And I

1 find him to be a very engaging and a very articulate and  
2 driven spokesperson on behalf of his clients and the other  
3 lawyers, particularly here in Minnesota. And to that  
4 extent, we are happy to have him as a part of a team that  
5 heretofore he has not been part of, in terms of our  
6 suggested majority slate.

7 That said, there are some other fine lawyers in  
8 this room who represent various Plaintiffs from across the  
9 country, throughout the southeast, in particular, I'm  
10 close to a lot of lawyers in this courtroom who have  
11 hundreds of cases, and are, frankly, concerned about the  
12 idea of leadership being vested in the hands of a very  
13 limited number of lawyers, particularly if those lawyers  
14 they perceive, at least, do not have significant numbers of  
15 cases and do not adequately represent these diverse  
16 interests, geographically and otherwise.

17 For that reason, it is important, I think, for the  
18 Court to know, at least from my point of view and those I  
19 represent, that we are hopeful of having a pluralistic, very  
20 diverse group that can represent the Plaintiffs from around  
21 the country. And sometimes, you know, less is more and  
22 sometimes less is not more.

23 THE HONORABLE JUDGE DONOVAN FRANK: That is true.

24 MR. GORDON: And in my view, Your Honor, sometimes  
25 the hardest thing for a leader to do is to say no.

1 Leadership is about service to me; nothing else. I am  
2 proposed on this leadership slate with Ms. Zimmerman and  
3 others as co-lead, and I have agreed as part of these  
4 negotiations to step down from that role and to accept a  
5 subcommittee role, a PSC role, a chairmanship, whatever we  
6 call it.

7 As part of that, I am hoping that others in the  
8 group will understand that if we want to avoid a mass  
9 exodus, frankly, from this litigation, from this MDL,  
10 because there are other venues that are being looked at, and  
11 have been looked at, and want this MDL to be as productive  
12 and efficient as it can be, I think we need to make sure  
13 that the group is at least large enough to ensure  
14 representative leadership in this group.

15 And so the model that we are proposing, and the  
16 model that we've discussed with Dan and I think he has made  
17 peace with is somewhat larger than may be historically  
18 typical in terms of having one or two co-leads. We think  
19 multiple leads are a good idea in this case.

20 It's like -- my daughter is 28 now, but it seems  
21 like the hardest thing throughout her life has been for me  
22 to say no to her. Sometimes it is easier just to say yes,  
23 but I was happy to step down, and say: No, I will withdraw  
24 my application for co-lead because I think the important  
25 thing here is service. And I hope that others who have

1 appeared before in these other groups would be willing to  
2 work with us, and, if not to withdraw their applications, at  
3 least to agree on representative democracy for this group,  
4 so that people across the country will support this MDL and  
5 it can be a productive, efficient process.

6 We have people like Annesley DeGaris and  
7 Pete Flowers, for example, who have tried many jury trials  
8 in implantable medical device cases, and worked with hip  
9 replacement cases, specifically, for years. It is important  
10 to me that we have that kind of representation and  
11 leadership.

12 And happy for Dan to be very involved. And  
13 obviously, he is a very fine lawyer, but I just want to be  
14 sure at the end of the day that the groups that have  
15 hundreds of cases are happy with the leadership and willing  
16 to put their cases in this MDL.

17 THE HONORABLE JUDGE DONOVAN FRANK: Well, and  
18 obviously, that is why the process should be open. Like I  
19 said earlier, this assumes that there may not be other  
20 individuals saying: Look it, Judge, here is the way it is.  
21 We have X number of cases. Here is what we see as an  
22 acceptable structure here. Our recommendations -- and  
23 frankly, as I said earlier so I won't dwell on it, that is  
24 one of the criticisms sometimes of MDLs is, well, there was  
25 this closed process where nobody is even quite sure how this

1 group got selected.

2 Well, absent some agreement, but that agreement  
3 implies that everybody is essentially on board. And whether  
4 there is a complete agreement or, well, we have agreed on  
5 all of this; but, this is what the Court has to decide, or  
6 no, we can't. I think the key is that whatever we do, it  
7 will be open; and two, we will do it in the immediate  
8 future. We won't cut a corner just to say we've got it  
9 done, but we'll get it done soon.

10 Do you have something to say?

11 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL: I  
12 would just like to add, if you do reach agreement and  
13 everybody is in agreement on a structure, that the order you  
14 submit clearly delineate the responsibilities of each titled  
15 position. So, if you have got co-leads, what is the  
16 responsibility of the leads? If you have got a committee,  
17 what is the committee's responsibility? If there are  
18 subcommittees, what is that? And then what the reporting  
19 structure is. So, when the Court deals with lawyers, it  
20 wants to know that the word is getting out to all of the --  
21 all of the lawyers that have clients, and that we know whose  
22 responsibility that is when we issue stuff.

23 MR. GORDON: I frankly agree, Your Honor, a  
24 hundred percent. And I think, as one last point, that  
25 another thing that's important to the diverse groups that

1 Annesley and Pete and I represent, is that because we  
2 represent so many people, we frankly don't need to make our  
3 money on the common benefit assessments in the case. It's  
4 important to us that lawyers who have cases will make their  
5 fees according to the representation of their clients with  
6 those contracts.

7 We are not looking at -- there are concerns based  
8 on history, Your Honors, that a large assessment will drive  
9 cases out of the MDL. People are worried about that. And i  
10 understand there have been different historical models done  
11 and we're working on the *ASR Litigation* right now which uses  
12 a very low historical model, comparative historical models.

13 And it is our view, at least, that having a large  
14 group who are united in this can ensure that there is not a  
15 concern across the country of people trying to simply get  
16 common benefit time, and instead to work both on behalf of  
17 the MDL and on behalf of their individual cases. That's  
18 important to us.

19 THE HONORABLE JUDGE DONOVAN FRANK: We should just  
20 be out in the open, regardless of the structure, two things.  
21 One, a primary topic at MDL conferences each October, which  
22 I think is a good thing, is this issue of attorney fees,  
23 common benefit issues and the like.

24 And two, let's just be out in the open. A fairly  
25 common and quite legitimate oftentimes criticism of the

1 administration of these cases, and the criticism usually  
2 rains down more, I would say, appropriately, on the Judge  
3 who is supposed to be in charge of setting up the ground  
4 rules, so that there is some control and accountability,  
5 whether it is the common benefit, the cost issue, the fee  
6 issue.

7 And so I think the earlier that that is kind of  
8 set in stone -- and obviously that is one of the reasons the  
9 cases are attractive to Judges. Lots of very experienced  
10 lawyers are involved in the cases. So, I think we are  
11 mostly on the same page. It doesn't mean everybody is going  
12 to sing "Kumbaya" and have an agreement at the end of the  
13 afternoon; but, we will get it done, and hopefully in a way  
14 that's acceptable to people, whether it's Plaintiffs or  
15 Defendants in a diversity of the groups across the country.  
16 Because after all, that is one of the charges that we have  
17 from the MDL Panel.

18 MR. GORDON: Thank you, Your Honor.

19 MS. ZIMMERMAN: To that end, I think without  
20 belaboring the point, happy to talk with the Court about all  
21 of the efforts we have made, both with counsel that are  
22 present in the courtroom, counsel that are likely present on  
23 the telephone, counsel that weren't able to make it for  
24 whatever reason, and as well as the counsel that were  
25 previously perhaps supportive of just a slate submitted by

1 Mr. Gustafson.

2           There has been a lot of very open communication.  
3 I have been, as you might imagine, very busy on the phone  
4 and by e-mail trying to build a consensus of attorneys with  
5 the experience and the clients that we all need to represent  
6 and the reason that we are here in court today. So, it has  
7 been a very democratic process. Sometimes the labor has not  
8 been an easy one. As you might imagine, everybody's got an  
9 opinion. But, I do think that we are headed to where we  
10 need to be, and it has been a very collaborative process.

11           MR. GUSTAFSON: If a week is acceptable,  
12 Your Honor, we will --

13           THE HONORABLE JUDGE DONOVAN FRANK: It is.

14           MR. GUSTAFSON: -- submit something by close of  
15 business -- what would it be? On the 16th? Telling you,  
16 here's the structure, that we have a deal and we will  
17 explain the process we went through so you have some comfort  
18 with the transparency. And if we can't reach a deal, we  
19 will tell you as soon as we reach a log jam and we'll have  
20 to have a process that goes from there.

21           THE HONORABLE JUDGE DONOVAN FRANK: Yeah, and one  
22 thing that would be helpful is to know -- is everybody --  
23 let's say that there is an agreement reached. Is anyone  
24 involved -- whether it is people directly involved or people  
25 with large numbers of cases. Are they aware, kind of, where

1 we're at?

2 So whether it is the issue of an exodus or the  
3 issue of: Well, you should know there are a number of  
4 people that proposed this option, we have got an agreement,  
5 but we just set that aside.

6 I don't want to create an issue where there isn't  
7 one or make it more complicated. And again, if it is an  
8 entirely open process, that will probably take care of  
9 itself.

10 MR. GUSTAFSON: I think so, Your Honor. And I  
11 suspect that if we have an agreement, it will be a consensus  
12 agreement that will be supported by all; otherwise, we won't  
13 reach one. We will let you know no later than a week from  
14 today. Thank you.

15 THE HONORABLE JUDGE DONOVAN FRANK: That is fine.

16 MS. ZIMMERMAN: Should we circle back to the  
17 efforts that we have made with defense counsel thus far to  
18 working together?

19 THE HONORABLE JUDGE DONOVAN FRANK: Yes, that  
20 would be perfectly fine.

21 MS. ZIMMERMAN: I don't know if we want to join --  
22 we have had a number of discussions, myself as Interim Lead  
23 Counsel; and particularly, Mr. Griffin, in his role as  
24 Interim Defense Counsel. I think that that's your official  
25 title. We have had a very good, cordial, productive working

1 relationship, and look forward to continuing to have that  
2 kind of relationship going forward in this litigation.

3 We're able to enter into at least a temporary  
4 agreement on a protective order. There were cross-noticed  
5 depositions in New Jersey that I appeared at up in Newark a  
6 couple of weeks ago. At least one of those depositions has  
7 carried over and has not yet concluded; but, we continue to  
8 work together on a number of different issues.

9 And I don't know if now is a good time to talk  
10 about direct filing issues, or service agreements or things  
11 like that, if the Court would like us to go into  
12 particularities.

13 THE HONORABLE JUDGE DONOVAN FRANK: Certainly.

14 MS. ZIMMERMAN: We have exchanged different ideas  
15 about what a direct filing order might look like.  
16 Plaintiffs have proposed and we are going to just address  
17 very briefly to the Court, Plaintiffs have proposed a direct  
18 filing order that simply allows from an administrative  
19 standpoint counsel that are licensed in good standing in  
20 other jurisdictions to file their cases directly here in  
21 Minnesota, just to alleviate the paperwork nightmare that  
22 is, you know, filing in Colorado or Tennessee or Florida,  
23 and then going to the JPML and then heading back here where  
24 the Clerk here is going to still need to do the same work.

25 We would propose that the cases be allowed to be

1 filed directly into the District of Minnesota without any  
2 regard, by the virtue of the filing, in terms of choice of  
3 law or that sort of thing. I won't speak for Mr. Griffin, I  
4 am sure he can speak for himself.

5 MR. GRIFFIN: Thank you, Your Honor. Tim Griffin  
6 on behalf of the Defendants. I just want to make a couple  
7 of brief comments. We have enjoyed a strong working  
8 relationship thus far. And as the Plaintiffs sort out their  
9 structure, our only request is that we have a single point  
10 of contact, which has worked thus far quite well, and we  
11 hope that that can be part of the Plaintiffs' structure.

12 Now I am going to contradict myself, because we do  
13 have a dispute about the direct filing, Your Honor.

14 THE HONORABLE JUDGE DONOVAN FRANK: All right.

15 MR. GRIFFIN: It is a very narrow one. We're in  
16 agreement that a direct filing order makes good sense. It  
17 will simplify and streamline the process.

18 THE HONORABLE JUDGE DONOVAN FRANK: And I can say  
19 there is more than one type of those orders, but that's a  
20 fairly common thing to see. It has been for some time. So,  
21 it is a matter of, what should it look like?

22 MR. GRIFFIN: That is where we are having a  
23 disagreement. In particular, it is the issue of what  
24 procedural law will apply to a case that is directly filed  
25 in the District? It is our position that binding

1 Supreme Court precedent says Minnesota law applies,  
2 procedural law to a case filed in the District, and then  
3 that rule applies in the MDL context.

4 And our goal is to have a clear understanding, so  
5 that Plaintiffs can make a choice whether to file in another  
6 District and go through the process if the choice of law  
7 issue is important to them, or make the choice to come  
8 directly to Minnesota and file here and have Minnesota  
9 procedural law apply.

10 The reason that that concerns us is we don't want  
11 to find ourselves 12 months, 24 months from now, having a  
12 fight about what would a plaintiff have done 12 months ago.

13 As you mentioned, Judge Fallon wrote a very  
14 thoughtful decision in the *Vioxx Litigation* on this very  
15 point. Your Honor flagged the issue in the *Guidant*  
16 *Litigation*, in *Duron*. So, we are trying to set an even  
17 playing field up front so we can all play by the same rules,  
18 Your Honor. And we would be happy to submit a page or two  
19 supporting our position, if that would be helpful.

20 MS. ZIMMERMAN: We are in agreement with that,  
21 Your Honor. There's been a few other MDLs of recent. The  
22 *ASR Hip Litigation* with Judge Katz in the Northern District  
23 of Ohio, essentially said, for administrative streamline  
24 purposes, we are just not going to address what law applies  
25 at this point.

1           The same thing has been done in, I think, six MDLs  
2           that are now assigned to Judge Goodwin in West Virginia --  
3           the poor guy. It's involving the *Transvaginal Mesh MDLs*.  
4           There are six separate MDLs. Plaintiffs are allowed to file  
5           directly into the MDL.

6           And in the short-form complaint, they are required  
7           to identify where jurisdiction would be proper absent direct  
8           filing. But I think that we can certainly agree to outline  
9           our various positions and submit something to the Court.

10           THE HONORABLE JUDGE DONOVAN FRANK: What I would  
11           suggest is you -- and I'll ask you each here in just one  
12           moment what you view as a reasonable time for what I'll  
13           refer to as a simultaneous submission. Submit a proposed  
14           order with a -- is it too much to ask if I say a letter  
15           brief under three pages? And if you say: We can't possibly  
16           represent this issue in that.

17           And then, absent that unusual circumstance where  
18           one of you may say: We can't believe what opposing counsel  
19           submitted. We are going to have to request to make an  
20           immediate response. Simply my policy is, unless you -- you  
21           can, with notice to other counsel say, we are contacting the  
22           Court. If I don't get such a request within 12 hours of  
23           whatever submission we are about to agree on, I will go  
24           ahead and agree to do a virtually immediate turnaround time.  
25           And so, we can move that issue down the road.

1           It is not unique to this case, that issue comes  
2 up. It is not an issue of whether the direct filing will  
3 serve everybody's interest, but the jurisdictional and  
4 choice of law issue. And you pointed out it came up in  
5 *Duron*. It's come up in other cases that you have both  
6 cited. So, what is a reasonable amount of time?

7           MS. ZIMMERMAN: Within a week, Your Honor?

8           THE HONORABLE JUDGE DONOVAN FRANK: That is fine.  
9 Why don't we just make it the end of business day, a week  
10 from tomorrow, end of business day?

11          MS. ZIMMERMAN: Perfect, the 18th.

12          THE HONORABLE JUDGE DONOVAN FRANK: And as some  
13 people say, these days of ECF: Well, please make it five so  
14 there's not some young associate doing something until  
15 midnight. But, we'll just -- end of business day a week  
16 from tomorrow; then I will agree to do any immediate  
17 turnaround time.

18           The only concern I would have is if there is some  
19 issue of another lawyer, but then I think, worst case  
20 scenario -- this isn't a very bad scenario. I make a  
21 decision, and a lawyer comes forward, more likely it would  
22 be from the Plaintiffs' side saying: Well, I wish somebody  
23 would have told us they were going to do this, because now  
24 here is our view. But, they won't get the word, "W" word  
25 waiver out of my mouth, or pen. We will go ahead and deal

1 with it, because those issues come up from time to time. We  
2 will give as much guidance as early as we can.

3 MS. ZIMMERMAN: Would you like the letter briefs  
4 and proposed orders submitted by ECF?

5 THE HONORABLE JUDGE DONOVAN FRANK: I would  
6 appreciate that.

7 MS. ZIMMERMAN: We discussed a number of items  
8 both in the last few weeks and again this morning. We will  
9 be working -- Plaintiffs will be working on a master short  
10 and long-form Complaint. And together with that, obviously,  
11 the Defendants will need some time to respond to it; but, we  
12 anticipate that a short-form Complaint will be submitted to  
13 Defendants along with, essentially, we're calling it a  
14 Plaintiffs' initial disclosure. We have not sorted out what  
15 that form will be yet --

16 THE HONORABLE JUDGE DONOVAN FRANK: All right.

17 MS. ZIMMERMAN: -- but something sufficient to  
18 give Defendants understanding and notice of proof of product  
19 identification, something to that effect. It has been done  
20 in a number of the other hip litigations and I am confident  
21 we can work something out to that end.

22 Similarly, we would like to come up with a service  
23 agreement so that we can be more efficient in terms of costs  
24 that are going to be passed on to our clients in serving  
25 these complaints. And also, certainly recognize, to try to

1 reduce any administrative burden on Defendants, so that we  
2 could have one point of contact that they will let us know  
3 about. They are going to identify somebody in a process,  
4 and we will work that out so that it is easier for  
5 Defendants and saves some money for the Plaintiffs in these  
6 cases, as well. So, we have been making progress. We don't  
7 have something finalized, but we are moving in that  
8 direction.

9 THE HONORABLE JUDGE DONOVAN FRANK: I didn't  
10 anticipate there would be some finalized thing today, but  
11 obviously, you each had some input into the agenda items  
12 today. So, just so we get it out there, so if someone is  
13 saying: Well, I've overlooked this issue or that, everyone  
14 can see, because we will also be putting all updates on the  
15 website that I will address before we are done here, as  
16 well.

17 The website is up. It is just of little use now,  
18 because other than what is on there or any order that we  
19 file -- did you want to get into this conversation?

20 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL:  
21 Yeah, if I could just ask, do you have a time frame on when  
22 you think you are going to reach agreements on the short,  
23 long form and service agreement things? A week, two weeks,  
24 a month?

25 MS. ZIMMERMAN: I would hope that we have an

1 agreement on a short-form and long-form complaint before we  
2 are back here before Your Honors at the end of November,  
3 certainly.

4 I think it depends a little bit on what agreements  
5 we have from leadership structure, and getting our heads  
6 around that. But, we will certainly work on it with all  
7 deliberate speed, and then try to have something within a  
8 month?

9 THE HONORABLE JUDGE DONOVAN FRANK: Okay.

10 MS. ZIMMERMAN: So, are we on Agenda Item 11?

11 THE HONORABLE JUDGE DONOVAN FRANK: We will  
12 back-up here in a minute, because I promised two people,  
13 promised may not be quite the right word, but agreed to have  
14 two individuals who requested to give an update on the --

15 MS. ZIMMERMAN: New Jersey?

16 THE HONORABLE JUDGE DONOVAN FRANK: -- 7 and 8 on  
17 the New Jersey cases.

18 MS. ZIMMERMAN: We will step right aside while  
19 they do that.

20 THE HONORABLE JUDGE DONOVAN FRANK: So we can come  
21 back to this? Who would like to step to the podium first?

22 MS. SUTTON: Good afternoon, Your Honors, Tara  
23 Sutton from Robins Kaplan Miller & Ciresi.

24 MR. SZERLAG: Good afternoon, Your Honors, David  
25 Szerlag from Pritzker Olsen.

1 MS. SUTTON: I am here on behalf of the Plaintiffs  
2 Steering Committee in the New Jersey coordinated State Court  
3 litigation. And we very much appreciate the opportunity to  
4 update the Court on the progress of the New Jersey *Stryker*  
5 *Litigation*, which has been going on for some time.

6 My firm does not have any cases filed in this MDL  
7 and there are no members of our six-person PSC who are  
8 seeking leadership in this litigation. So, we really are  
9 appreciative of this opportunity from Your Honors to address  
10 the Court.

11 THE HONORABLE JUDGE DONOVAN FRANK: What about the  
12 position of leadership, as this structure gets put together?  
13 It seems to me -- well, why don't I just -- we will see what  
14 I get back in the next week.

15 And so, of course, I do have an issue with -- and  
16 I would have -- not because of anything -- I have had two  
17 different conversations with the presiding Judge, there.  
18 But, just to stay on top of that, because again, that is a  
19 criticism of, legitimately, the failure to coordinate. And  
20 I could just promise everybody in the room, and I think this  
21 is more positive than negative, and I would say it even if I  
22 hadn't been a former -- I would like to think I would say  
23 it, even if I hadn't been a former State Judge, and I have  
24 done it in the other MDLs.

25 We will reach out and work with all of the State

1 Courts, as opposed to saying: Well, we are the federales,  
2 everybody step aside, here we come.

3 Good lawyers won't let that happen, anyway. But,  
4 no, we have some responsibility to try to -- and we have in  
5 the past, so we will do it here. Why don't you, for the  
6 benefit of all of us, including, not Just Judge Noel and I,  
7 we are all ears.

8 MS. SUTTON: Right. As of this morning, and the  
9 number really changes, day-to-day. There are 348 cases  
10 filed in the New Jersey Litigation. They include cases not  
11 the just from New Jersey, but from all over the country.

12 When I checked this morning, there are cases filed  
13 from 31 states in the New Jersey litigation. The states  
14 with the most cases are Minnesota, New Jersey, and New York,  
15 closely followed by Pennsylvania and Arkansas.

16 And just so the Court has some background, because  
17 I don't think there has been much disclosure, preliminary  
18 disclosure of information in the MDL, the breakdown of the  
19 New Jersey cases is about 75 percent Rejuvenate --

20 THE HONORABLE JUDGE DONOVAN FRANK: All right.

21 MS. SUTTON: -- and 25 percent ABG II. We also  
22 have some demographic information that I can share. The  
23 gender breakdown is pretty much 50/50, which is unlike what  
24 we have seen in the *ASR Litigation*.

25 We anticipate that there will be hundreds of more

1 cases filed in New Jersey, and that is in part predicted on,  
2 we know who is involved in the leadership and the attorneys  
3 who have been filing cases there. And there are hundreds of  
4 law firms that, like here, represent hundreds of clients.

5 Judge Martinotti, beginning in February has  
6 conducted monthly status conferences --

7 THE HONORABLE JUDGE DONOVAN FRANK: Which we will  
8 be doing, as well; but, go ahead.

9 MS. SUTTON: Right, and our next status conference  
10 is on September 24th. Judge Martinotti, as you probably  
11 know, is a very experienced Jurist in multi-party  
12 litigation. He currently presides over the *DePuy ASR New*  
13 *Jersey Litigation*. He is scheduled to try a bellwether  
14 trial there in October, and then he is going to try another  
15 bellwether trial in ASR in January, where he is combining  
16 two Plaintiffs' cases in one trial.

17 He also presides over a number of other mass tort  
18 coordinated litigation in New Jersey, including the *Yaz* and  
19 *NuvaRing Birth Control Litigation*, and the *Mirena IUD*  
20 *Litigation*. One of the first things that Judge Martinotti  
21 did in the New Jersey litigation in February was he  
22 appointed a Plaintiffs' Steering Committee. And the Chair  
23 of that Plaintiffs' Steering Committee who couldn't be here  
24 today is Ellen Relkin from the Whites and Luxembourg Firm.  
25 And she is very familiar with *Metal on Metal Litigation*.

1 She co-chairs the *ASR MDL Litigation* for the Plaintiffs  
2 before Judge Katz.

3 He then appointed five additional attorneys to the  
4 PSC, and he appointed lawyers as far away as me from  
5 Minnesota to serve on that Committee, I think recognizing  
6 the large concentration of cases here in Minnesota. He also  
7 appointed an attorney from Florida, an attorney from New  
8 York, and attorneys from Pennsylvania to, I think, get  
9 geographic representation on that leadership structure.

10 All of the members of the New Jersey PSC have been  
11 either lead or co-lead counsels in MDLs. I was co-lead in  
12 the -- the lead counsel in the MDL that Magistrate Noel  
13 referred to as being a successful model. So, there is a lot  
14 of experience on that PSC in both trying bellwether cases  
15 and in managing multi-party litigation.

16 He also gave the PSC the authority to organize  
17 subcommittees, which has happened. We have subcommittees on  
18 science and law and discovery. And Mr. Szerlag is a member  
19 of a subcommittee in New Jersey. And he also allowed us and  
20 directed us to raise capital to finance the litigation.

21 So, the PSC has created a common fund in New  
22 Jersey, we have assessed ourselves. And we are using the  
23 common fund to conduct our discovery. We have hired a  
24 document vendor to set up a virtual document depository, we  
25 have contracted with a deposition company to do all of the

1 deposition work in our cases, and we have also retained and  
2 are in the process of retaining some of the leading experts  
3 in the field to be experts in our case and to perform  
4 testing on devices.

5 But, Judge Martinotti has done quite a bit more  
6 than that. He has a website with a lot of Orders, and this  
7 is just a binder --

8 THE HONORABLE JUDGE DONOVAN FRANK: I have got a  
9 copy of all of those Orders. I have had a chance to read  
10 them, so...

11 MS. SUTTON: And briefly, just to summarize, we do  
12 have a preliminary disclosure form that every plaintiff has  
13 to submit within 30 days of their case being filed. It  
14 requires early identification of very important information,  
15 including the product identification, the product stickers.  
16 I think it is very important information for the Defendants  
17 to have so they get an understanding of the scope of the  
18 case. You also have to disclose the implanting surgeon. If  
19 there has been a revision surgery, who did that. You have  
20 to share important information about any medical lab testing  
21 that was done. And you also have to provide some more  
22 detail about the types of damages that you are going to be  
23 seeking in the case.

24 To ease direct filing into New Jersey, he has  
25 implemented a long-form and short-form complaint; that is

1 done. Stryker has prepared their answer to both of those.  
2 The parties have also agreed upon and Judge Martinotti has  
3 implemented the Plaintiffs' fact sheet. The Plaintiffs'  
4 fact sheet is required to be served sixty days after a case  
5 is served. And you also have to provide medical records and  
6 other information about your losses have to accompany that,  
7 you have to provide them on a CD, and it has to be provided  
8 within sixty days.

9 We also have an interim stipulated protective  
10 order. And the only reason it is interim is we are still  
11 negotiating over the provision that governs disclosure of  
12 Stryker confidential information to Plaintiffs' experts who  
13 have also consulted in the past, or currently, with a  
14 competitor of Stryker. That is the only provision we are  
15 hung up on. We are working on that. We hope maybe to get  
16 that resolved at the next status conference. But, it is not  
17 a stumbling block to discovery.

18 Right now we have just agreed that we won't share  
19 information with experts that fall into that category until  
20 we get a procedure set forth.

21 And the Court has mentioned at the beginning the  
22 desire of every MDL Judge to get a settlement process up and  
23 going in these large matters. And I think that Judge  
24 Martinotti had a pretty unique idea at the very beginning of  
25 the case that he wanted to have concurrent tracks.

1 Well, Plaintiffs would be permitted to pursue  
2 discovery, and Stryker would be permitted to seek  
3 information regarding our cases. He also wanted to have a  
4 mediation program.

5 So, very early on he appointed six retired former  
6 Jurists from the New York and New Jersey and Pennsylvania  
7 area to serve as mediators. He also set up a first round  
8 bellwether mediation. And in that bellwether mediation, 10  
9 cases have been selected for mediation.

10 THE HONORABLE JUDGE DONOVAN FRANK: And I  
11 recently -- I read that Order, so --

12 MS. SUTTON: Yes, and six of the cases were  
13 randomly selected by the Judge. And Mr. Szerlag has one of  
14 the cases; I do.

15 THE HONORABLE JUDGE DONOVAN FRANK: When you say  
16 randomly selected --

17 MS. SUTTON: Parties under his Order had the  
18 opportunity to submit their case for mediation. So, it  
19 wasn't a mandatory process. You had to opt into it. And  
20 the first deadline is your case had to be filed and served  
21 by April 2nd. About 60 cases were eligible for mediation.  
22 60 cases were submitted.

23 And the Plaintiffs were given the right to choose  
24 two cases with a very strict direction from the Court that  
25 they be representative cases, and not outliers.

1 All 60 of the cases when our PSC looked at them  
2 were all revision cases. So, we weren't in the situation of  
3 even having a possibility of a non-revision being mediated.  
4 So, we selected two. The Judge randomly selected six. And  
5 Stryker is in the process of selecting their final two. And  
6 I think the deadline is close to coming on that.

7 Stryker, of course, had -- also, the fact sheets  
8 had to be produced so Stryker could see, which seems fair,  
9 more information about the cases before they make their  
10 selections.

11 The ten cases have to be mediated under the  
12 Court's order by December 15th. So, there is going to be a  
13 bit of work that is going to happen before then. And  
14 hopefully, if the program is successful, it will be a track  
15 that people can opt into in New Jersey for resolution of  
16 their cases. And I think after this first round is done, we  
17 will have a better sense if resolution is going to be -- if  
18 the mediation process is going to work.

19 THE HONORABLE JUDGE DONOVAN FRANK: And this is  
20 going to be done by six different --

21 MS. SUTTON: The idea, initially, is we appointed  
22 six, because we think, and what we have seen is a lot of  
23 attorneys are making their cases eligible for mediation.  
24 So, we needed to have a bank of mediators available if the  
25 program is successful.

1 I think the idea at first is the initial cases  
2 will be mediated by the first two or three mediators on the  
3 list. And then we will go down the list if we get busier,  
4 with mediation. It may be an efficient disposition of the  
5 cases, it is may not be; but, I think it is an encouraging  
6 signal that both sides were very willing to engage in the  
7 idea of mediation and get behind the Judge's idea. So, that  
8 is starting -- that has started with a collection of cases.

9 THE HONORABLE JUDGE DONOVAN FRANK: And I read  
10 that in the Order. All right?

11 MS. SUTTON: A couple other orders, he has tolled  
12 the statute of limitations with respect to naming  
13 Helmedica's parent, Stryker, pending further discovery.

14 THE HONORABLE JUDGE DONOVAN FRANK: Which is a  
15 common thing to do, yes.

16 MS. SUTTON: And that was an agreed upon  
17 Stipulated Order with Stryker counsel. We have had a good  
18 working relationship with Stryker counsel in New Jersey. It  
19 is different counsel than its leadership structure proposed  
20 by the Defendants here. It is the Gibbons Firm in New  
21 Jersey that we have been working with.

22 We also have a procedure of preserving the  
23 testimony of Plaintiffs who are in extremis, who potentially  
24 will die before their case can be heard.

25 Item 8 of your agenda specifically, I think, asks

1 for an update on discovery. As the Court is aware, there  
2 have been two 30(b)(6) depositions in the New Jersey  
3 Litigation: One on corporate structure that is half done,  
4 that will be reconvened; and one on electronically-stored  
5 information, ESI.

6 The depositions were cross-noticed by the MDL.  
7 And MDL attorneys were present. I don't believe they asked  
8 questions, but they were there. The PSC has also served  
9 far-ranging discovery in the New Jersey litigation. I think  
10 there have been four sets of document requests that were  
11 served, and one set of interrogatories.

12 So far, just to give you kind of a run-down of  
13 what we have, we have a description of their insurance  
14 coverage. They have also, in addition to charting their  
15 insurance coverage, and the layers of insurance, they have  
16 produced declaration pages for each of their insurance  
17 policies. We have some additional discovery to do in that  
18 regard, but we do have some basic information in that area.  
19 They have also produced documents that pertain to their  
20 corporate structure and organization.

21 They have produced information about their  
22 inventory of unused revision -- unused ABG II and Rejuvenate  
23 Implants that were returned to them after the recall. And  
24 the reason they gave us that information is because we have  
25 served discovery requests seeking the production of what we

1 call native or virgin, unused devices, so we can get them to  
2 the hands of our experts to start that failure analysis.  
3 And we anticipate that is going to happen fairly soon now  
4 that we know what they have on their shelves.

5 On Friday of this week, we are scheduled to  
6 receive the biggest production so far, which should probably  
7 number in the thousands of pages, because we are going to  
8 receive the FDA and the European regulatory files. We also  
9 are going to get the instructions for use, the surgical  
10 protocols, and a variety of different types of marketing and  
11 product information that was used by the sales  
12 representatives.

13 And then on 30 days from this Friday, which I  
14 think is October 12th, they have committed to another  
15 production, which will be a production of patents, and also  
16 their product experience reports, their PERs, which is kind  
17 of like, in drug context, an adverse event report, too. So,  
18 we are going to get that.

19 Then on November 11th, they have committed to  
20 producing their design files and their recall files. And we  
21 continue to meet and confer with them, and we have one  
22 coming up shortly to get a timeline for the remainder of the  
23 production of documents that is responsive to our request.

24 I think point 8, you also asked for information  
25 about coordination or communications that we have had with

1 the attorneys that are involved in the MDL. There have been  
2 no formal agreements or even regular communications with the  
3 competing slates for the MDL leadership or with the interim  
4 leadership counsel. Part of that has been because the  
5 leadership is in flux, here.

6 We have also, as a PSC, have decided we didn't  
7 want to get involved in this leadership battle that was  
8 going on in the MDL, and we are going to remain neutral  
9 about the competing slates. But, I think most importantly,  
10 the focus in New Jersey really has been on the litigation  
11 there, and that pushing that forward in the interest of our  
12 clients and conducting discovery and staying focused on  
13 these bellwether mediations and a bellwether trial.

14 You know, one issue that I think the Court will  
15 hear more about and has maybe been somewhat of a stumbling  
16 block is the issue of assessments and whether or not there  
17 will be an MDL assessment, or the MDL will try to assess the  
18 New Jersey State Court cases. And because the New Jersey  
19 case is so far out in advance, and most of the common  
20 benefit work that has happened, has happened there.

21 At this point we haven't made any agreements  
22 there, and frankly we don't think it is appropriate or  
23 something that we feel is warranted at this point, given the  
24 differences in the litigation.

25 THE HONORABLE JUDGE DONOVAN FRANK: All right,

1 thank you.

2 MR. SZERLAG: Thank you, Your Honor. I will try  
3 to be much briefer. And I know Ms. Sutton has done a great  
4 job in summing up the New Jersey litigation. I have been  
5 very actively involved over there. My firm has a number of  
6 cases filed there. We do have one case filed currently here  
7 in Minnesota in the Federal Court for the MDL. And I think  
8 that is one of the reasons that one of the slates asked if I  
9 would consider appointment as liaison counsel between the  
10 State and Federal Court actions.

11 In any event, certainly no reason to rehash New  
12 Jersey. The only current active litigation in other State  
13 Courts, where I believe the litigation will stay in the  
14 State Court, will not -- there have been motions to remand,  
15 that I believe have been denied, and that is in Florida.  
16 There are about twenty cases pending in Florida, most of  
17 them in Broward County, and I believe five in Palm Beach  
18 County at this time.

19 Since getting notice of the hearing and being  
20 asked to speak here, I have talked to a number of other  
21 lawyers around the country. I know that there may be some  
22 actions that are started in the California State Court, in  
23 which people believe that they will be able to keep the  
24 cases in the State Court system there.

25 There has also been some interest in St. Louis, in

1 State Court there, as well as perhaps Oregon. And I think a  
2 lot of that is really dependent on how the leadership  
3 structure comes out in this Court here, and whether or not  
4 people are going to look for other venues. But, Florida is  
5 really the only active venue at this point.

6 As far as discovery and discussions that I have  
7 had with the Florida attorneys, there has been some standard  
8 discovery that has been filed there; and that also,  
9 Plaintiffs and Defendants have had some meet and confers on,  
10 both an ESI order, as well as a protective order, but it  
11 hasn't really gone much further than that.

12 THE HONORABLE JUDGE DONOVAN FRANK: All right.  
13 Thank you. Anything else?

14 MS. SUTTON: No. Thank you very much.

15 THE HONORABLE JUDGE DONOVAN FRANK: Thank you  
16 both.

17 MS. WOODWARD: Your Honor?

18 THE HONORABLE JUDGE DONOVAN FRANK: Yes?

19 MS. WOODWARD: May I speak to the same topic?

20 THE HONORABLE JUDGE DONOVAN FRANK: All right.

21 MS. WOODWARD: This is Karen Woodward for the  
22 Defense.

23 THE HONORABLE JUDGE DONOVAN FRANK: Why don't you  
24 come up to the podium if you don't mind?

25 MS. WOODWARD: Certainly, certainly. Ms. Sutton

1 did do a wonderful job summarizing the litigation in New  
2 Jersey. I think what we want to point out is that the work  
3 that has been done in New Jersey bodes well for this  
4 proceeding in terms of the cooperation that has taken place  
5 among the parties, and hopefully for the fact that much of  
6 the work that has been done in New Jersey can be adapted for  
7 use here in the MDL. There doesn't necessarily have to be  
8 duplication, necessarily, of a lot of the work that has been  
9 completed. So, that is encouraging to us.

10 A couple of points to add. You had asked in your  
11 agenda about motion battles in New Jersey. There are no  
12 motion battles to date. We wanted to clarify that.

13 With regard to the stipulation regarding Stryker  
14 Corporation and Stryker Ireland, they were never named as  
15 Defendants in New Jersey, a little bit different situation  
16 here, at least with regard to Stryker Corporation and  
17 Stryker Sales.

18 With regard to the document productions that were  
19 referenced by Ms. Sutton, I am not exactly sure of the date  
20 when certain productions had been agreed to be made.

21 However, we do want to advise the Court that  
22 whatever is produced in New Jersey, we will be happy to  
23 produce here in the MDL; and that is all, Your Honor.

24 THE HONORABLE JUDGE DONOVAN FRANK: All right.  
25 Did you want to say anything about the mediation?

1 MS. WOODWARD: No, not necessarily, Your Honor.

2 THE HONORABLE JUDGE DONOVAN FRANK: All right.

3 MS. WOODWARD: Okay.

4 MS. ZIMMERMAN: Your Honor, just a few more  
5 housekeeping matters on the New Jersey piece. In  
6 coordinating with the MDL, I did appear on behalf of the MDL  
7 on the cross-noticed depositions.

8 The corporate organizational deposition concluded  
9 partway through the day, partially because not all of the  
10 documents that were produced in the New Jersey litigation  
11 were provided to counsel of record in the MDL. So, that was  
12 the reason I reserved my ability to inquire of that witness  
13 about organizational issues, because we did not yet have all  
14 of the documents.

15 The deposition that actually continued through the  
16 entire course of, I think it was a Thursday, was adjourned,  
17 reserving the right to revisit and recall the witness  
18 regarding ESI or electronically-stored information. So, the  
19 reason I didn't get to ask any questions there was that New  
20 Jersey wasn't quite done with him -- or with her, actually.

21 A few other things that I would say with respect  
22 to New Jersey, that they have appointed at this point, I  
23 think it is a six-person lead or a PSC with committees of --  
24 I think the number is around 18 involved in the various  
25 subcommittees in New Jersey, to the extent that is helpful

1 to the Court.

2 And then finally, concerning New Jersey, they have  
3 been coordinated for longer; but, as Ms. Sutton certainly  
4 artfully described to the Court, they have been making some  
5 efforts towards moving this litigation along. But, they are  
6 still at the point where there really hasn't been a great  
7 deal of documents produced. I believe that the number, at  
8 least, that has been produced to us is somewhere around six  
9 to 900 pages. So, it may be a little north of that; but, I  
10 think it wouldn't be fair to say that the discovery has  
11 really been pushed along aggressively, or complete at this  
12 point.

13 And again, there was a brief discussion about  
14 whether it's appropriate to talk about common benefit fees  
15 and whether there is a reach towards New Jersey, and what  
16 kind of cooperation we may have, and it would just be the  
17 MDLs position that it is premature to talk about that at  
18 this point.

19 I was certainly --

20 THE HONORABLE JUDGE DONOVAN FRANK: And that is  
21 again a common issue that comes up in -- it has come up in  
22 one or two of my other MDLs, and it will come up again,  
23 here. So --

24 MS. ZIMMERMAN: Absolutely. And the MDL  
25 Plaintiffs' attorneys will be committed to the goals that

1 Your Honor indicated at the beginning in terms of moving  
2 this litigation forward in an efficient and fair-handed  
3 manner and taking advantage of all economies of scale, and  
4 to that end certainly will cooperate both with counsel in  
5 New Jersey to the extent possible, and also with Defense  
6 counsel.

7 Circling back, just briefly, on a few of the  
8 issues on the agenda that we didn't quite touch on, one of  
9 the agenda items was the proper protocol for contact with  
10 the Court. And I thought I would circle us back and offer  
11 an opportunity for you to speak to that.

12 THE HONORABLE JUDGE DONOVAN FRANK: Well, and the  
13 key here is just so everybody is on the same page. And  
14 again, so there is efficiency -- well, why don't I hear from  
15 Counsel? Generally, we agree on this, but we are also  
16 looking at, again, economies of scale, efficiency, and an  
17 open, transparent process.

18 But, you can indicate -- obviously, there are a  
19 lot of experienced lawyers in the room. You know what works  
20 and what doesn't work, just to keep everybody apprised.  
21 And, of course, separate from the contact issue, itself, we  
22 have a website up and running; but, as you can see, I am  
23 going to give -- once we have got all of the lawyers in  
24 place -- a chance to put up on the website the description  
25 of the case, but we will get to that in just a moment. So

1 --

2 MS. ZIMMERMAN: Sure. One of the other items on  
3 the agenda was addressing a common benefit order, and  
4 Your Honor alluded to that earlier. Rather than submit it  
5 as part of any leadership structure, we thought that perhaps  
6 it made sense to ask the Court when the Court would like  
7 that and what the Court would like to see reflected in the  
8 common benefit order.

9 THE HONORABLE JUDGE DONOVAN FRANK: Well, what I  
10 had in mind, I didn't say it in so many words here, is  
11 obviously, I put it on as an agenda item, for lack of a  
12 better word, to get it on everybody's radar screen. It is  
13 premature in some ways, not in others.

14 What I mean by that is once we get the attorney  
15 structures on both sides set up, it seems to me that absent  
16 some global stipulation -- and obviously, I wasn't always on  
17 the top of the Hit Parade in the *Guidant* case because of the  
18 fees I reduced, and did some things in that case; but, you  
19 know, we worked through it with the common benefit issues  
20 and the other issues.

21 Well, the Orders will speak for themselves. They  
22 are out there. But, I was thinking, we will get the  
23 committee structure, the lawyers in place, and then whether  
24 it is a directive from the Court, or an agenda item placed  
25 on -- because I will explain how these status conferences

1 work, both when we all get together in chambers, and here in  
2 the courtroom, because that is where I felt that a lot of  
3 the work early on got done, whether it was key issues in the  
4 case, motion practice, global settlements, and the like. I  
5 will touch on that in a few minutes when we get to how that  
6 works and how we start in chambers, and then we move into  
7 the courtroom, each month when we start getting together.  
8 So, I thought we would do that.

9 Do you have something you wanted to add about the  
10 protocol? I mean, I didn't put it on because I thought it  
11 would be an issue, I just wanted to make sure everybody  
12 knows that we will set up some ground rules for that. That  
13 part of it is rarely controversial.

14 MS. ZIMMERMAN: Perfect. We will look forward to  
15 your instructions on that.

16 THE HONORABLE JUDGE DONOVAN FRANK: Does the  
17 Defense want to have at it on any of that? Or, why don't  
18 you finish up, Ms. Zimmerman, on that, before we move on  
19 here?

20 MS. ZIMMERMAN: I think the next thing we talked  
21 about as we met and conferred earlier this morning, or this  
22 afternoon, was Agenda Item 11, which is, "Rules and  
23 Procedures."

24 We have committed to working across the aisle on  
25 essentially a master procedures order.

1 THE HONORABLE JUDGE DONOVAN FRANK: Right.

2 MS. ZIMMERMAN: And there is not one drafted at  
3 this time, but we certainly will do that and submit it to  
4 the Court in advance, certainly, of the next status  
5 conference at the end of November.

6 We think that some of the orders that have been  
7 drafted in New Jersey will certainly be a good starting  
8 place for some things like preservation of evidence and  
9 protective order of confidential documents.

10 (Background music playing through the phone.)

11 THE HONORABLE JUDGE DONOVAN FRANK: And a lot of  
12 those read similarly to others. What I actually contemplate  
13 here for timing, for those on the phone and in the courtroom  
14 is, once again, in the next couple of weeks when we get the  
15 attorney structure set and in place with or without Court  
16 decisions, then there will be a short order from the Court  
17 so we can probably have these proposed orders in place, if  
18 not signed, sealed, delivered before the November hearing.

19 MS. ZIMMERMAN: Somebody put us on hold, I think.

20 THE HONORABLE JUDGE DONOVAN FRANK: It must be  
21 somebody -- should we try to sing along with this?

22 MS. ZIMMERMAN: I will leave that to you.

23 THE HONORABLE JUDGE DONOVAN FRANK: And Brenda, if  
24 you are listening back there, I think maybe we need you.  
25 She can hear back there. Let's see. No.

1 Well, hopefully she will be in here so we can  
2 begin -- we can put an end to the background -- she is  
3 listening back there, so I suspect they will be back. It is  
4 incoming from somewhere. Why don't we continue on?

5 MS. ZIMMERMAN: Sure. So, let's see, so item  
6 number 14 I think the Court addressed in terms of pending  
7 motions and --

8 THE HONORABLE JUDGE DONOVAN FRANK: Well, what I  
9 didn't say about that is --

10 (Music getting louder.)

11 (Discussion off the record.)

12 MS. ZIMMERMAN: The gallery says that as long as  
13 we are talking, we can't hear the music. Perhaps we should  
14 just talk fast.

15 THE HONORABLE JUDGE DONOVAN FRANK: All right.  
16 Let's --

17 MS. ZIMMERMAN: Is that solving the problem?  
18 Never tell a lawyer to start talking, I guess. The pending  
19 motions.

20 THE HONORABLE JUDGE DONOVAN FRANK: Go right  
21 ahead, yes. Well, what I was going to say about that is I  
22 feel the very latest I should set those -- but again, I was  
23 going to give a week or two to go by. There is one here --  
24 I would, in a perfect world where that would be set up, if  
25 not sooner, is in the November date when everybody is here.

1 So, even if it is not a moving party, I will hear oral  
2 argument on the motion, and the attorneys will be contacted.

3 If there is some reason they say, well, we need  
4 this heard before that November status conference date, then  
5 we will -- I will act accordingly. But, I mean, I have a  
6 responsibility to hear those, whether it is one or twenty,  
7 as soon as I can.

8 The parties have waited long enough. So --

9 MS. ZIMMERMAN: I am sure all of the parties will  
10 be appreciative of that.

11 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Griffin,  
12 did you want to get in on that? Or did you have something  
13 you wanted to say about the background music?

14 MR. GRIFFIN: Just a couple of comments, Your  
15 Honor. I think you referred to the Aiken Motion to Remand.

16 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

17 MR. GRIFFIN: And we have not filed an opposition  
18 to that per the Court's instruction, and we would be able to  
19 do so in the next week or two in preparation for the  
20 November hearing.

21 There is also one other motion, it's the Lewis  
22 Joint Motion. It is a suggestion of remand. The  
23 Plaintiffs --

24 (Discussion off the record.)

25 THE HONORABLE JUDGE DONOVAN FRANK: Somebody needs

1 to mute their phone. Try again.

2 MR. GRIFFIN: Shall I try again?

3 THE HONORABLE JUDGE DONOVAN FRANK: The beauty of  
4 technology. Yes, let's try again.

5 MR. GRIFFIN: So, the Lewis Joint Motion,  
6 suggestion to remand, the Plaintiff amended his Complaint, I  
7 believe it is a "him," right before the case was  
8 transferred. It is now alleged to be a different product,  
9 not part of the MDL.

10 THE HONORABLE JUDGE DONOVAN FRANK: All right.

11 MR. GRIFFIN: So, we would ask the Court to review  
12 that motion and enter the order for --

13 THE HONORABLE JUDGE DONOVAN FRANK: We have got  
14 some malfunction here somewhere. We can hear somebody  
15 talking on their telephones. The quote was, somebody put me  
16 on hold.

17 UNIDENTIFIED VOICE ON THE PHONE: Can you hear  
18 that music, Court?

19 THE HONORABLE JUDGE DONOVAN FRANK: We sure can.  
20 We sure can.

21 UNIDENTIFIED VOICE ON THE PHONE: That is someone  
22 on the phone who apparently decided to put the conference  
23 call on hold. The rest of us are now no longer really able  
24 to hear anything.

25 MR. GORDON: Your Honor, I suggest what happened

1 once in another MDL that I was in, the Judge merely hung up  
2 and had the people call back in, and the person that had the  
3 music didn't hear to call back in.

4 THE HONORABLE JUDGE DONOVAN FRANK: I will wait  
5 for Brenda to come in to see what I create for her. I want  
6 to move along, here, but I want to have her come in, because  
7 that may be the only option, especially if nobody else can  
8 hear, now, on the 40 plus individuals that are on the phone.

9 We will be evaluating other ways. I will talk to  
10 my friend Judge Fallon, because they have had a lot more  
11 than 40 on the phone in the past.

12 Brenda, we still have a problem, here. Why don't  
13 we sit tight just for a moment. I promise not to sing.

14 (Discussion off the record.)

15 Can we take just a -- I don't want anybody  
16 leaving, because I want to talk about the status conference.  
17 Can we take about a three-minute recess so we can shut this  
18 off? Or five minutes, if you want to use the restroom or do  
19 jumping jacks in here? And then we will finish up. But,  
20 there are a couple of things on status conferences that I  
21 would like to talk to you about. So, let's take a couple of  
22 minutes, here.

23 (Recess.)

24 THE HONORABLE JUDGE DONOVAN FRANK: You may all be  
25 seated, thank you.

1           As some of you know, individuals that were on the  
2 phone, because it was one individual who put their phone on  
3 hold and activated the music, and they were disconnected.  
4 Right now I think they are going to try to activate other  
5 individuals, but I said we simply couldn't hold up the  
6 hearing because we have all of these other individuals here  
7 who would like to finish this up and move on.

8           So, if you know individuals who are trying to  
9 figure out what happened, other than that music in the  
10 background, you can pass it on to them. If you don't -- are  
11 we going to have anybody on the phone at all?

12           THE CLERK: Your Honor, if you could ask in the  
13 microphone if there is anybody there? It is uncertain to  
14 me.

15           THE HONORABLE JUDGE DONOVAN FRANK: Is there  
16 anyone listening at the present time?

17           SEVERAL VOICES ON THE PHONE IN SERIATIM: Yes,  
18 Your Honor.

19           THE HONORABLE JUDGE DONOVAN FRANK: She didn't  
20 think the call came through, so that is progress.

21           UNIDENTIFIED VOICE ON THE PHONE: Approximately  
22 20, I'd say, Your Honor.

23           All right. We have whoever is here, so for  
24 individuals who may have got cut off, we are going to do a  
25 combination of the audio call and webex from here on out.

1 We will set up something so there can be a mode of  
2 communication, as well.

3 The Court can extend its apologies after the fact  
4 so we can move on and finish up here this afternoon. We  
5 will just make sure that we capture what has happened, here,  
6 so that everybody can be appropriately informed.

7 Where were we? I think Mr. Griffin was trying to  
8 take the stage, when we left, for the podium.

9 MR. GRIFFIN: Thank you, Your Honor. On pending  
10 motions, we have Aiken. It is my understanding that the  
11 Court would like to hear that at the November conference.

12 THE HONORABLE JUDGE DONOVAN FRANK: I would.

13 MR. GRIFFIN: We will get our opposition brief in  
14 in 10 days if that is acceptable to the Court.

15 THE HONORABLE JUDGE DONOVAN FRANK: That is  
16 acceptable.

17 MR. GRIFFIN: We have Lewis, which is a joint  
18 motion, suggestion to remand, because it is a different  
19 product. So, that is before the Court and appropriate for  
20 consideration.

21 One point of clarification?

22 THE HONORABLE JUDGE DONOVAN FRANK: All right?

23 MR. GRIFFIN: On the production of documents in  
24 the New Jersey action, there were a few documents that were  
25 not produced to the MDL counsel. Those documents related to

1 discovery that was apart from the corporate structure dep.  
2 As we said earlier, we are happy to provide those and  
3 develop a fair level playing field among the jurisdictions  
4 by producing all records and all jurisdictions, New Jersey  
5 and the MDL going forward, so that there isn't that  
6 confusion that one jurisdiction is moving ahead of the  
7 other.

8 THE HONORABLE JUDGE DONOVAN FRANK: And has there  
9 been discussion -- and again, one size doesn't fit all,  
10 whether you call it a depository or some other issue for  
11 discovery, is there any other discussion?

12 Is there anything we can do here to -- not trying  
13 to upstage anyone, but to try to coordinate, but yet maybe  
14 do something efficiently to save time and money for everyone  
15 so we don't get duplicative, which sometimes happens,  
16 sometimes it is unavoidable.

17 MS. ZIMMERMAN: Your Honor, I think your question  
18 goes right to Agenda Item 19, and Plaintiffs and Defendants  
19 had differing opinions about whether it was ripe to talk  
20 about ESI issues. But, I think, electronically-stored  
21 information is certainly the first point of potential  
22 collaboration between the MDL and New Jersey and something  
23 that the Plaintiffs would like to move forward on sooner  
24 than later.

25 It is my understanding from speaking with Defense

1 counsel that there is in fact a litigation hold in place.  
2 And what we would propose, either at the next status  
3 conference, or beforehand, if Your Honors would be available  
4 to it, would be to have, essentially an expert in the area,  
5 whether it be a specific vendor or somebody to talk us  
6 through some of the ESI issues so we can an informed  
7 decision about how to be most cost-conscious for the  
8 Plaintiffs and for the Defendants in this litigation as we  
9 move into the real meat of the discovery.

10 There is some very interesting technology that has  
11 developed since the *Guidant Litigation*, in terms of  
12 protective coating and other kinds of things that we would  
13 welcome the opportunity to present to the Court on, and  
14 would hope and expect that we could get something together  
15 certainly before the end of November.

16 THE HONORABLE JUDGE DONOVAN FRANK: Well, ideally,  
17 it would be nice to, once we get all of the attorney  
18 committee structures in place in the next couple of weeks,  
19 and maybe I will just say on that regard, unrelated to this  
20 ESI and other discovery issues, that when you get a week  
21 out, and this goes back to the Plaintiffs' -- the management  
22 structure. If there is not complete agreement, then the  
23 best case scenario is to submit a proposed order, much like,  
24 I suppose you might say, joint jury instructions. Here is  
25 what we agree on, here is what we don't. So that we could

1 with due dispatch give an immediate turnaround, and get a  
2 decision out. Because then I think once that is in place  
3 and we had talked, then what I envision is setting up a  
4 situation so we have agenda items with some short summaries,  
5 whether it is on this discovery issue. Or, if one or more  
6 of you say: We need to get something in place before that  
7 November get-together.

8 The November get-together wasn't there to suggest  
9 that you don't have access to us between now and then, but  
10 rather to give notice to everyone to say, here is when these  
11 formal status conferences -- when we hear motions, we have  
12 agenda items, both by lawyers and the Court, and we get  
13 together in chambers and really get down to discussion of  
14 what would move this case along, and what needs to be done  
15 to do that.

16 And as I will talk about in a moment, the only  
17 ground rule in chambers is if one or more lawyers say they  
18 are so outraged at something that was said, they want to  
19 bring it out when we come to the courtroom for a hearing  
20 like this, fine. But that didn't happen in *Guidant*, while  
21 we did have to excuse a couple of people that came in  
22 uninvited. They would wait for the door to open and come on  
23 in. But, we learned much about each other and I think  
24 accomplished a lot with those "in chamber" conferences to be  
25 followed in a timely fashion -- because then what would

1 happen is there would be usually a conference with the  
2 lawyers and then we would meet for 45 minutes to an hour.  
3 And then we would head for the courtroom for the  
4 on-the-record status conference.

5 And so, I am hoping it works as well here as it  
6 has in the last two MDLs I have had. And so, I think most  
7 lawyers that participated would agree on both sides that  
8 that was productive. So, what I was thinking on these  
9 issues, where there was disputed items, we get the structure  
10 in place, you get the guidance from us almost immediately to  
11 say, here is what we expect to be teed up with notice to  
12 everyone before that November conference so we can put  
13 something in place after -- immediately, or off the Bench, a  
14 ruling right on the spot, unless one or both of you come  
15 forward and say: Here is a decision that needs to be made  
16 by the Court long before that November get-together, because  
17 I think we have to be sensitive to that so we can move this  
18 on down the road.

19 MS. ZIMMERMAN: Sure. Backing up, I think agenda  
20 number 18 involves scheduling recommendations. And I think,  
21 again, it is really early for some of that, but I hope that  
22 if we are able to come to some agreement to put before  
23 Your Honor even yet today, that we, the Plaintiffs, will  
24 work together with the goal of serving discovery requests  
25 before the November status conference.

1           We talked, obviously, about the leadership  
2 paperwork that needs to come in, a direct filing letter  
3 brief inside of the next week. We will be working on the  
4 Master Complaint and common benefit things. So, those are  
5 kind of the first few things that I see in terms of  
6 scheduling and moving this litigation forward.

7           Your Honor talked about both electronic -- ESI  
8 issues and early trials and things that the Court might be  
9 helpful with in terms of moving this thing forward, and we  
10 are certainly interested in any ideas that the Court may  
11 have to that end, as well.

12           THE HONORABLE JUDGE DONOVAN FRANK: Well, I  
13 think -- and I would be surprised if anyone in the room  
14 disagrees. The key will be that no later than the November  
15 status conference, and perhaps sooner, at least with input  
16 from everybody, kind of a global case management order with  
17 some meaningful deadlines and some day certain settings for  
18 things, the key issues. I mean, those, I think, are the  
19 things, whether it is in a Rule 26 context or other issues  
20 you raised. The earlier we identify those, the more likely  
21 it is we can move on down the road. Again, without cutting  
22 a corner or without someone saying: Well, we are being  
23 pushed aside because this is an MDL, because that is not  
24 what we intend to do.

25           So, Mr. Griffin, do you want to --

1           MR. GRIFFIN: I don't want to unnecessarily extend  
2 the hearing, Your Honor --

3           THE HONORABLE JUDGE DONOVAN FRANK: Come right up,  
4 Ms. Woodward. Whether it is a whisper in the ear or a  
5 statement by counsel, either one or both is fine.

6           MS. WOODWARD: Thank you, Your Honor. Just in  
7 response to the issue about service of discovery requests in  
8 this proceeding, the requests that have been served in New  
9 Jersey are robust, to say the least. Hundreds of document  
10 requests in a set of interrogatories.

11           We have been meeting and conferring with the New  
12 Jersey Plaintiffs counsel on narrowing this request, on  
13 staggering production, so on and so forth. Discovery in  
14 this proceeding is stayed right now. We would like it to  
15 remain stayed, and perhaps encourage that counsel here  
16 review what has been served in New Jersey and if there are  
17 new requests, things that are not duplicative; that is a  
18 different issue. And perhaps those types of requests and  
19 discovery should be served, but if it is duplicative, I  
20 don't think that serves anyone's purposes and would  
21 encourage that not to happen.

22           THE HONORABLE JUDGE DONOVAN FRANK: Ms. Zimmerman?

23           MR. ZIMMERMAN: I think to the extent that the  
24 requests are duplicative, we certainly would agree with  
25 that; but also, are mindful of the fact that this is a

1 separate litigation at this point. And while we will need  
2 to -- I should slow down a little -- cooperate and  
3 coordinate as much as possible and communicate with  
4 everybody in New Jersey; that we do need to move forward and  
5 we wouldn't be agreeable to a stay of discovery at the  
6 initiation of this case.

7 We will be mindful and review the requests that  
8 have been made in New Jersey, but we would also be kind of  
9 catching up with a race that is underway in terms of the  
10 meet and confer process and that sort of thing. We could do  
11 our best, but we certainly think that discovery should start  
12 in full swing here in the MDL, as well.

13 THE HONORABLE JUDGE DONOVAN FRANK: Ms. Woodward?

14 MS. WOODWARD: Well, I think, Your Honor, perhaps  
15 the middle ground would be to perhaps leave this open for  
16 the next two months to allow there to be an opportunity to  
17 look at the request, for the parties to meet and confer as  
18 soon as the Plaintiff structure is in place. And then we  
19 will be reasonable.

20 To the extent requests aren't duplicative, we will  
21 reach agreements on that. But then come to court prepared  
22 at the next status conference to really discuss the issue of  
23 discovery, rather than just lifting the stay now and  
24 proceeding in a manner that just may not be the best in  
25 terms of case management.

1           THE HONORABLE JUDGE DONOVAN FRANK: I think the  
2 issue probably is going to be -- it is not likely that we  
3 would keep a stay on until November. Whether the right word  
4 is middle ground or some appropriate Case Management Order  
5 in the Rule 26 context, or whether it is some get-together  
6 by phone, or else if we need to do something by Court  
7 decision with or without submission before November, but I  
8 think we will have some responsibility -- and of course, in  
9 line with what has been said all afternoon, the coordination  
10 principle, we are not going to, hopefully, an unknown or an  
11 unintended consequence is not duplicity. I mean, that is  
12 the whole point of the coordination, in a mutuality of  
13 approach like that.

14           So, what we will promise to do is make sure, even  
15 if we can't all agree, everybody will get input into it, but  
16 I think we will have to move forward.

17           THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL: I  
18 would just add one thing. What I thought I heard Ms. Sutton  
19 say, that whatever discovery they are getting is going to be  
20 available to the MDL Plaintiffs. And so for sure, at a  
21 minimum, the MDL Plaintiffs should review what discovery  
22 requests have been made by the New Jersey Plaintiffs, so not  
23 to duplicate anything. But, I think it would be  
24 inappropriate at this stage to have a continuation of the  
25 stay between now and November. I think everybody needs to

1 start moving along.

2 THE HONORABLE JUDGE DONOVAN FRANK: So, if you  
3 need us, or if you need some guidance, again, I think that  
4 is something that we are here for. You won't hear coming  
5 out of our mouths, absent some stipulation of the people,  
6 some Special Master or other individual for the discovery.  
7 I mean, that's -- that really should be the rare, rare case.

8 But, we want to get this moving. It is going to  
9 require some coordination on everybody's part, but  
10 obviously, if there is not complete agreement, which there  
11 may not be, then we will act where we need to in some  
12 responsible manner. And if it requires me, and even though  
13 there has been telephone contact between myself and the  
14 Court in New Jersey, if we need to pick that up, or if there  
15 is something we can do, maybe that won't be the issue, we  
16 will do that, as well.

17 So, what I think the bottom line here is, I think  
18 once we get the structure in place, with or without  
19 agreement by everybody on both sides, the Court will step in  
20 in some appropriate way and won't be blind-siding anyone, so  
21 we can move on down the road, hopefully with some  
22 coordination with, just not New Jersey, but whoever else is  
23 out there so they can see what we are doing, as well, on the  
24 website. All right?

25 MS. ZIMMERMAN: Two other, I think, agenda items,

1 and I think we will turn it back over to the Court.

2 The Plaintiffs have proposed an update to the  
3 Court on Defendants' reimbursement program. The Court may  
4 or may not have read about this either in our papers or in  
5 news reports about the recall of these devices.

6 THE HONORABLE JUDGE DONOVAN FRANK: I did see it,  
7 yes.

8 MS. ZIMMERMAN: So, there is a company that has  
9 been retained by Plaintiffs. And some Plaintiffs in this  
10 litigation, some patients who are not yet part of any  
11 litigation have been seeking reimbursement of certain  
12 medical expenses and other things through this process. And  
13 Defense counsel has agreed to help facilitate issues to the  
14 extent that any Plaintiffs have that in this litigation.  
15 Sometimes there are some questions about reimbursement and  
16 speeding things up. And Defendants have been very helpful  
17 in trying to get some of these things streamlined or  
18 expedited if there is a question. So, we just brought it up  
19 to the Court in case there was questions.

20 THE HONORABLE JUDGE DONOVAN FRANK: I don't really  
21 have a question, other than an observation that sometimes in  
22 those reimbursement plans -- because I have seen that in  
23 other cases I have had. Sometimes the issue is the  
24 condition of the reimbursement. In other words, well, we  
25 reimburse -- and I don't really think this is the hearing

1 for me to start making some specific inquiries, sometimes  
2 there are conditions, and sometimes both sides of the aisle,  
3 are aware of them, sometimes they are not. Even if the  
4 amount, as agreed upon, or set, is there any condition to it  
5 that reflects, well whether we want to call it a release or  
6 modified release or some other issue, maybe that is a  
7 non-issue in this case, but oftentimes, I have seen it in  
8 other cases. So --

9 MS. ZIMMERMAN: I think those are outstanding  
10 questions that will likely be addressed at future status  
11 conferences.

12 THE HONORABLE JUDGE DONOVAN FRANK: Go ahead, Ms.  
13 Woodward?

14 MS. WOODWARD: No, I have nothing to add with  
15 regard to this issue.

16 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Griffin?

17 MR. GRIFFIN: Just briefly, Your Honor, it is  
18 correct --

19 THE HONORABLE JUDGE DONOVAN FRANK: Perhaps you  
20 can come to the mike. We have some people that have been  
21 patient on the phone, despite the music that we all listened  
22 to.

23 MR. GRIFFIN: Briefly, Your Honor, it is correct  
24 that in an instant or two where a claimant in the Broadspire  
25 Program has run into an issue, we have offered to help

1 resolve that issue.

2 But, our view, to be perfectly clear, is that the  
3 Broadspire Program is separate and apart from this  
4 litigation, and it really plays no role in the context of  
5 this litigation. So, I just wanted to make that point.  
6 Thank you.

7 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL: So,  
8 just so that I am clear, the program that you are  
9 describing, though, there are some Plaintiffs who are  
10 participating in the program?

11 MS. ZIMMERMAN: Yes, Your Honor. Seeking --  
12 perhaps if they have had to have revision surgery, and we  
13 can talk to the Court about what that involves, but they  
14 have had to go have this hip replacement. I have got a  
15 plastic model, actually, if the Court would like to see it.  
16 I wouldn't represent that it is perfect, but with permission  
17 I will approach and you can look at it.

18 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL:  
19 That is okay. I am just concerned about -- as long as the  
20 lawyers are all happy, then I guess I am happy. But, if  
21 there's releases that are being obtained from clients who  
22 are represented by counsel -- that is not happening, I  
23 assume? Mr. Griffin?

24 MR. GRIFFIN: I can confirm, Your Honor, there are  
25 no releases required as part of the Broadspire Program.

1 THE HONORABLE JUDGE DONOVAN FRANK: All right.

2 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL:

3 Thank you.

4 MS. ZIMMERMAN: In the last item of contention, or  
5 dispute in terms of whether it belonged on the Agenda is the  
6 last one under 19, exemplar devices. This is a plastic  
7 model that an expert that we have been consulting with made  
8 of -- we will call it an exemplar device, an unused  
9 Rejuvenate. There are two different ones. This is a  
10 Rejuvenate. There is an ABG II, as well.

11 And we have been in consultation with Defense  
12 counsel about obtaining access to a certain number of  
13 non-implanted devices so that experts for the Plaintiffs can  
14 do certain kinds of testing. And we have an agreement that  
15 they are going to do some investigation. It sounds like  
16 perhaps some of that has happened in New Jersey in terms of  
17 the inventory or universe of potential exemplar devices out  
18 there. We have made, as a preliminary request, at least 10  
19 of these exemplar devices to be used by our experts. And  
20 they are going to look to see if that is a possibility. We  
21 may need more than that, but just to kind of get the ball  
22 rolling for our experts, as well, and that is really the  
23 last, I think, formal agenda that we have.

24 MS. WOODWARD: Absolutely, we will continue to  
25 meet and confer with Plaintiffs on that.

1 THE HONORABLE JUDGE DONOVAN FRANK: All right.

2 MR. GORDON: Your Honor, may I be heard -- I'm  
3 sorry, may I be heard on that briefly?

4 I have a lot of respect for these attorneys,  
5 because I think Plaintiffs' counsel, or Genevieve, has done  
6 just a marvelous job as our lead counsel, and we have a  
7 great deal of admiration and respect for the work she has  
8 done on behalf of the firm, and all of us.

9 This device, in particular, the necessity of  
10 having experts look at a virgin device is critically  
11 important to understanding several issues in this case for  
12 us. As soon as we have these devices, the better. In other  
13 words, if there is an issue with respect to this production  
14 being soon -- I don't know what New Jersey is doing. It  
15 would really help us if we could get some kind of  
16 commitments. Obviously, we will meet and confer, but the  
17 sooner we have the devices, the sooner we can fully  
18 understand the basis for the failure and the tissue damage  
19 that is happening to our clients so we understand whether or  
20 not the settlement process -- or what it should entail, what  
21 the parameters should be.

22 It is very difficult for them to know in the  
23 abstract exactly what the mechanism failure is of these  
24 devices without having virgin devices to compare to the  
25 retrieved devices.

1 MS. WOODWARD: Understood.

2 THE HONORABLE JUDGE DONOVAN FRANK: Thank you.

3 MR. GORDON: Thank you.

4 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL: Can  
5 I ask a curiosity question? What happens to the retrieved  
6 devices? Is there some protocol for maintaining those  
7 somewhere? Or that is not an issue?

8 MR. GORDON: Yes, sir, that is actually another  
9 issue that -- I'm not sure here whether it is, but it is an  
10 issue that has come up in past hip litigation models. We do  
11 have a model from the *DePuy Litigation*. We are willing to  
12 certainly sit down with the Defendants and discuss, but the  
13 sooner we have that in place, the better. Because  
14 obviously, we have experts who are looking at these devices  
15 in nondestructive ways and maintaining them; but, there are  
16 tests that need to be done. Obviously, the Defendants will  
17 want to do tests, as well. So, we would be in favor of  
18 trying to have the protocols for a preservation and testing  
19 order in place as soon as possible.

20 MR. CAMPILLO: Your Honor, if I may, Ralph  
21 Campillo. I have been fairly quiet all afternoon. Just to  
22 clarify on the last point, this Court's initial order  
23 provides for preservation of the explants, and that no  
24 destructive testing be done. And so, right now, the parties  
25 have been guided by that. And I don't think there is any

1 need today to take any further action on that particular  
2 point.

3 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL:  
4 Okay, thank you.

5 THE HONORABLE JUDGE DONOVAN FRANK: All right?

6 Let me discuss a couple of things not necessarily  
7 in the order of most importance. I will first go on to the  
8 Court website. And this isn't anything unique to this case.  
9 One thing I have done in the past is -- and we have already  
10 got it up on our external District of Minnesota website  
11 under MDLs, and you will see this listed.

12 Once we get the counsel structures in place, as  
13 soon as that happens, you will probably either with or  
14 without a short minute documentary order or a phone call or  
15 both or short order, be requested just to follow through  
16 with portions of 15, here; and that is to see if counsel can  
17 agree on, here, let's give a summary of the positions of  
18 each party, and we will put that in our website in the  
19 introduction aspect of the case for the benefit of any and  
20 all who go on and take a look; that has worked.

21 And after a meet and confer you can't agree on  
22 what you would like to have that summary be as kind of a  
23 joint understanding of the facts in the litigation and what  
24 the -- if you can agree on it, it is even more helpful, I  
25 think, to the world around us if you can agree on the

1 factual and legal issues.

2 And you get numerous examples, probably, at least  
3 on Minnesota's website, and perhaps New Jersey's, on other  
4 examples of what lawyers -- because most of the summaries  
5 you will see -- *Guidant* is one example. That was a joint  
6 effort by the lawyers on both sides, approved by the Court,  
7 perhaps with a few additions.

8 And so, that is one thing that we will -- I would  
9 like to do, sooner rather than later, and there is no need  
10 to wait absent some significant disagreement, once the  
11 structure is in place until we roll back in here in  
12 November.

13 May I ask the Defense before I go on to the status  
14 conference? Any issues on the structure of the Defense  
15 team, both --

16 MR. CAMPILLO: Your Honor, you see the Defense  
17 team right here. The three of us will interchangeably  
18 attend these meetings, participate, and I don't anticipate  
19 any significant changes. If and when we need a New Jersey  
20 liaison, which is a possibility, we may augment our team  
21 with that, if necessary, but I am in direct contact with the  
22 folks in New Jersey and elsewhere.

23 THE HONORABLE JUDGE DONOVAN FRANK: Yeah, because  
24 it seems to me that could be, at least to maximize  
25 coordination, minimize duplicity, and if there was some

1 involvement you need by the Court, it would seem to me that  
2 might be a very beneficial -- that could be something that  
3 would be more of a help in the short and the long run than  
4 the other.

5 MR. CAMPILLO: We will be happy to augment our  
6 team to that effect, but beyond that I think the three of us  
7 is the structure, unless for whatever reason the Court  
8 thinks that is too much or too little, and we can certainly  
9 adjust.

10 THE HONORABLE JUDGE DONOVAN FRANK: We can set it  
11 up that way. And then, again, if we have this open process,  
12 I suspect that one or more individuals or firms more  
13 involved in the -- more involved in that structure in New  
14 Jersey won't be bashful about saying: Well, but I would  
15 obviously defer to your input on that, as long as we feel we  
16 have got open channels of communication.

17 MR. CAMPILLO: We can assure you we have that,  
18 Your Honor.

19 THE HONORABLE JUDGE DONOVAN FRANK: The status  
20 conference, it was to my chagrin, at last year's -- I am not  
21 willing to name the Judge or the District or the MDL. When  
22 I was in West Palm Beach and we were doing our breakout  
23 sessions for the new Judges. And they said: I can't  
24 believe you allow all of these lawyers into your chambers  
25 without a court reporter.

1           And I said: Well, I guess I must be old-fashioned  
2           or something, but I said that is where we got a lot of our  
3           work done. We meet an hour before the conference. As you  
4           can see in here, and set it for Thursday, the 21st of  
5           November at 9:00 a.m.. That contemplates we would meet  
6           at -- I hope we don't have too many late risers, at 8:00 in  
7           my chambers. And then we would move right in the courtroom  
8           at 9:00 for a -- and there would be an agenda. And usually  
9           after the agenda, then I try to, again, to maximize  
10          efficiency, hear the same day motions. And that will all be  
11          set up in advance of the time. Because absent a  
12          stipulation, even, sometimes then proceed with oral  
13          argument.

14                 I won't repeat what is in paragraph 16, but we try  
15          to set up an agenda, so whether it is a discovery issue, a  
16          motion issue, dispositive, nondispositive, we can maximize  
17          the likelihood of ruling off the Bench that day when we are  
18          here on any issues. So, what precedes it is a discussion  
19          that usually we don't. I suppose I could be persuaded  
20          otherwise. I know a couple of other Judges around the  
21          country have the same technique. And at least one will let  
22          people call in and listen in in chambers. I haven't done  
23          that in the past, but we would bring the leadership folks  
24          in. In other words, everybody is not invited. And we will  
25          either do it in my chambers in the front corner here, or in,

1 as it turns out, the largest conference room in the building  
2 for Judges is right next to my chambers. So, one way or the  
3 other, I have found those very useful. So, that is how we  
4 would begin the conference.

5 And then between now and then, once the leadership  
6 structure is in place, if someone has a strong view about,  
7 well, the Judge has suggested we are going to put these  
8 agenda items on and then we will calendar any issues to be  
9 decided so we can decide when everybody is in town on that  
10 date.

11 And so, I won't repeat what is there, but I will  
12 ask Plaintiffs' counsel and Defense counsel and anybody else  
13 who wants to, I guess, have some input.

14 As you read that paragraph 16, and if you haven't  
15 seen it, I can briefly summarize it. Does anyone press any  
16 alarm buttons to say: Well, we are not so sure that is  
17 going to work the way you have set up how you are going to  
18 hear cases, and the agenda items and issues to be decided  
19 the way you have set this up with notice. Anybody from the  
20 Plaintiffs' side of the runway or side of the courtroom have  
21 a --

22 MS. ZIMMERMAN: No, Your Honor.

23 THE HONORABLE JUDGE DONOVAN FRANK: And that  
24 doesn't mean it is all written in stone if we get here on  
25 November 21st and for some reason or before somebody said:

1 Well, we were all thinking maybe we could tweak it this way.  
2 But, something substantially similar to this, I think, it  
3 would serve the interest of all parties quite well.

4 MS. ZIMMERMAN: Yes, Your Honor, and we met and  
5 conferred earlier today and agreed that we would meet and  
6 confer on agenda items and work together about a week, I  
7 think, beforehand so that we could come to an agreement and  
8 present it to Your Honor in time.

9 THE HONORABLE JUDGE DONOVAN FRANK: And we will  
10 put a schedule out months in advance. So, long before you  
11 get here, probably sometime in October, you will see the  
12 schedule for the next year. It will be all set up, because  
13 we will want to get some definitive deadlines in place, and  
14 I will mention one, here, in just a moment.

15 But, we will have a schedule set up so people can  
16 see each date. So if there is a large group of people who  
17 said: Well, you couldn't have picked a worst Thursday, is  
18 there any way we could move this? But, trying to set it up  
19 so you can see months in advance each of the dates so  
20 everybody can rely on those and plan for those.

21 So, that will be coming out, as well. But, just  
22 to get the first one started, it will be every month unless  
23 we get together and say, well -- and then we will talk about  
24 who is necessary for those and we will set it up, hopefully,  
25 without the distraction today, we will set up the proper

1 phone conference. And with or without the help of webcast  
2 and we will get that set up in advance and get it on the  
3 website.

4 Brenda, was there anything you wanted me to add to  
5 that about how we will do our best --

6 THE CLERK: Not that I can think of. Thank you.

7 MR. CAMPILLO: Your Honor, if I could add just one  
8 thing very briefly?

9 THE HONORABLE JUDGE DONOVAN FRANK: Certainly.

10 MR. CAMPILLO: We realize it is important not to  
11 have last minute add-ons the night before the conference.  
12 That is why having the four days makes a lot of good sense.  
13 And since we are going to have monthly conferences,  
14 something that comes up after the agenda has been agreed  
15 upon can be taken up in 34 days at the latest, which  
16 shouldn't be an issue.

17 THE HONORABLE JUDGE DONOVAN FRANK: What I have  
18 seen happen is, almost more important than the agenda items,  
19 but maybe that is subsumed under that category, is that it  
20 is designed to make decisions in the courtroom, not back in  
21 chambers. But, make decisions, hopefully, off the Bench,  
22 whether they are a discovery issue or they are something  
23 else, or in advance say: They need time for oral argument,  
24 or we have a request. And so, we will make sure -- that  
25 seemed to work well.

1           And hopefully, this will be of some comfort. It  
2 was rare, except as we got close to trial time on six -- we  
3 had six back-to-back trials set with 10 days for each. And  
4 other than the 40 or 50 motions I heard and decided,  
5 dispositive motions on *Daubert*, summary judgment, and some  
6 other issues, those we would end up setting -- even a lot of  
7 those, I think, if memory serves me, is set for the  
8 afternoon of the same day. But, there we clump those  
9 together. But, other than that, we were able to get most of  
10 this done in the morning, early afternoon. So, it seemed to  
11 work well for everybody, both whether it was travel plans or  
12 efficiencies.

13           And then what we found out in advance and we could  
14 make that work here, if you want us -- I mean, to set aside  
15 certain conference rooms, there are eight out there and  
16 there's others behind the security. To say, well, can you  
17 set aside both the day before or the early morning of, or  
18 the time after two or three or four of those conference  
19 rooms for us? Yes. We can do that if that is helpful.

20           So, anybody else want to get in before I call on  
21 this gentleman here to see if he had anything? We would be  
22 very appreciative of knowing, much like if we were together  
23 now at a scheduling conference, if not today, what are  
24 those -- what are some key issues that will develop, whether  
25 it is a Court decision or a staged discovery issue, and

1 whether it is to address a liability issue, an expert  
2 witness issue, a damage issue, if there are some of those  
3 early-on decisions -- it's just effective case management.  
4 The sooner we know about those -- and I will ask that same  
5 question in November.

6 And I will just give you an example that's worked  
7 well, and this happens to be in a settlement context in the  
8 two larger MDLs I've had -- again, I will use *Guidant*. In  
9 that case the Magistrate Judge in that case -- it was Art  
10 Boylan. And I will lean in that way as His Honor and I have  
11 talked, a global settlement with one person, with one  
12 exception. And then in some cases we had categories of  
13 settlement, once there was limited discovery on, okay, we  
14 will do the explant with complications, the explant without,  
15 those individuals that still have the hip, in that case,  
16 defibrillators. We had six categories and then we had a  
17 range of settlement. And I won't go over that now. So, we  
18 had one person in charge of everything. Then the parties  
19 said we need a second person to come in.

20 And as one of you in the room know, there was one  
21 person everybody could agree on. So, we had two people,  
22 then we had an appeal process to me, and we were able to  
23 settle large numbers of cases in that regard.

24 I will just indicate, as we think about that, and  
25 there may be some other decisions that we have to make in

1 advance before we get there, because that is the whole  
2 nature -- the world has to see what the settlement was and  
3 what the facts of the case was that was settled, otherwise  
4 it is not really a bellwether case, to say, that case is  
5 just like mine. We were able to do much of that even before  
6 we got to the first trial of six that were set.

7 And I will just indicate without making any plug  
8 here, that obviously in that case by agreement of everybody  
9 and the Court, we brought in a second person in addition to  
10 Magistrate Judge Boylan. Well, it just happens to be that  
11 he is retiring in December and there was a rather nice  
12 piece, he must have a good publicist -- a nice piece. And I  
13 said, even if he and I weren't good friends and had many  
14 cases together and knew each other as State Judges years  
15 ago, but he would be willing to treat this case as a top  
16 priority after he is retiring in -- well, his last day, I  
17 think, is in January. I don't think he would mind me saying  
18 he turned 65 in December. And so, it is a big loss for us,  
19 but a big gain for him.

20 But, apart from who is involved, historically, and  
21 that is why it shows up in some of the MDLs matters, in this  
22 District, since the primary responsibility of our  
23 Magistrates in our District is settlement, that carries  
24 through with the MDL, absent some agreement of the parties.  
25 So, we will talk about that sooner, rather than later, and

1 what would need to be done to facilitate that and have some  
2 true meaningful examples for the rest of the potential  
3 people to see.

4 So, do you have some parting words of wisdom for  
5 these fine folks here?

6 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL: No,  
7 I don't.

8 THE HONORABLE JUDGE DONOVAN FRANK: They probably  
9 want to go out and -- well, party is probably too strong a  
10 word for some of us older folks, but --

11 THE HONORABLE MAGISTRATE JUDGE FRANKLIN NOEL: I  
12 think we have covered all of the items on your Pretrial  
13 Order No. 3 and I think we are off and running. And I don't  
14 have anything to add to what you have covered. I am just  
15 here to help in any way I can.

16 THE HONORABLE JUDGE DONOVAN FRANK: Our only other  
17 promise is that if something comes up, we won't become the  
18 classic enablers so people won't have to communicate with  
19 each other; but, on the other hand, if something comes up,  
20 you won't hear from Ms. Schaffer, or a law clerk -- and we  
21 will create some contact individuals. And Brenda will be  
22 the key person. But, sooner rather than later, we will give  
23 a contact of one of my lawyer/law clerks, as well.

24 You won't hear, look it, the Judge is -- because  
25 emergencies come up. And if there has to be a short

1 on-the-record telephone conference of some kind, those come  
2 up. As long as the proper parties are notified, we will  
3 make ourselves available. Because one of the promises we  
4 give the MDL Panel is we are to give this case calendar  
5 priority. So, you will have calendar priority, here. So,  
6 with that, anything further on behalf of the Plaintiffs'  
7 group today?

8 MS. ZIMMERMAN: I don't think so, Your Honor.

9 UNIDENTIFIED VOICE ON THE PHONE: Your Honor?

10 THE HONORABLE JUDGE DONOVAN FRANK: Yes? Hello?

11 UNIDENTIFIED VOICE ON THE PHONE: Yes, I was one  
12 of the attorneys who was on the phone during the musical  
13 interlude, unfortunately, and I missed the discussion, if  
14 any, on the initial disclosures.

15 THE HONORABLE JUDGE DONOVAN FRANK: What I would  
16 suggest is you touch base with one of the attorneys. And  
17 then we are going to have an order out in the next couple of  
18 weeks on attorney structure, and I would keep your eyes on  
19 our website and on that issue. And then if those questions  
20 aren't answered for you, because it was basically discussed  
21 that we will take that up in the immediate future, other  
22 than there won't be a permanent stay across the board  
23 between now and November.

24 So, I would urge you to talk with one of the  
25 attorneys that either was here that you heard from, or that

1 is here in the room, because that will be docketed on who  
2 was here, because we took rollcall. So, all right?

3 UNIDENTIFIED VOICE ON THE PHONE: Thank you,  
4 Your Honor.

5 THE HONORABLE JUDGE DONOVAN FRANK: All right.  
6 Mr. Gustafson, or anybody else for the Plaintiffs' group  
7 today?

8 MR. GUSTAFSON: Nothing further from me,  
9 Your Honor.

10 THE HONORABLE JUDGE DONOVAN FRANK: For the  
11 Defense?

12 MR. CAMPILLO: Nothing further, Your Honor.

13 THE HONORABLE JUDGE DONOVAN FRANK: Appreciate  
14 everybody for your patience with some of the problems we  
15 had. We will not promise to memorize your name, but we will  
16 go through the roll -- we will look at the sign-up sheet to  
17 make sure we are aware of everybody who was here.

18 So, enjoy your get-together shortly. I hope we  
19 didn't delay that. I don't know if there were happy hour  
20 prices or not, so I hope we didn't contravene that. We are  
21 adjourned. Thank you very much.

22 ALL COUNSEL: Thank you, Your Honor.

23 (Adjournment.)

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I, Jeanne M. Anderson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/ Jeanne M. Anderson  
Jeanne M. Anderson, RMR-RPR  
Official Court Reporter