

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)	
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)	
This Document Relates to)	St. Paul, Minnesota
All Actions)	November 21, 2013
)	9:20 a.m.
)	

BEFORE **THE HONORABLE DONOVAN W. FRANK**
 UNITED STATES DISTRICT COURT JUDGE
 AND BEFORE **THE HONORABLE FRANKLIN L. NOEL**
 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

STATUS CONFERENCE PROCEEDINGS

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1 capacity they appear.

2 MR. FLOWERS: Good morning, Your Honors.
3 Pete Flowers on behalf of the Plaintiffs' Steering
4 Committee.

5 MS. FLEISHMAN: Good morning, Your Honors,
6 Wendy Fleishman on behalf of the Plaintiffs' Steering
7 Committee.

8 MS. GENEVIEVE ZIMMERMAN: Good morning,
9 Your Honors. Genevieve Zimmerman for the LCC.

10 MR. GORDON: Good morning, Your Honors, Ben Gordon
11 on behalf of the LCC.

12 MR. KENNEDY: Good morning, Your Honors.
13 Eric Kennedy on behalf of the Plaintiffs.

14 MR. DeGARIS: Good morning, Your Honors.
15 Annesley DeGaris on behalf of the Plaintiffs.

16 MR. NEMO: Good morning, Your Honors. Tony Nemo
17 here for the Plaintiffs.

18 MR. BERNHEIM: Good morning, Your Honors.
19 Jesse Bernheim on behalf of the Plaintiffs' State Court
20 Liaison.

21 THE HONORABLE JUDGE DONOVAN FRANK: Shall we move
22 over to defense counsel?

23 MS. WOODWARD: Good morning, Your Honors.
24 Karen Woodward on behalf of the Defendants.

25 MR. CAMPILLO: Good morning, Your Honors.

1 Ralph Campillo on behalf of Defendants.

2 MR. GRIFFIN: Good morning, Your Honors.

3 Tim Griffin on behalf of the Defendants.

4 THE HONORABLE JUDGE DONOVAN FRANK: Well, I would
5 like to welcome everybody. And I do apologize in the event
6 it starts snowing if you're not leaving town earlier than
7 later, if you've come in for this --

8 THE HONORABLE MAGISTRATE JUDGE NOEL: Federal
9 Judges are responsible for a lot of things, but I don't
10 think it's the snow.

11 THE HONORABLE JUDGE DONOVAN FRANK: Or to use the
12 words of a couple of my five daughters, when I came on the
13 Federal Bench in 1998, "Dad, we don't think this Federal
14 Judgeship is that big a thing because you can't even get us
15 decent tickets at the Target Center for a concert." That
16 was true. Was then, and is now.

17 And Brenda, before I forget, I have about eight or
18 nine copies that Becky made, but I promised the lawyers
19 that -- well, here, I'll just give her the unstapled one.
20 If Becky could do -- and she's probably listening back
21 there -- another ten copies? It's a letter I mentioned in
22 chambers that I had forgot I sent out to 24 State Judges
23 back in the *Guidant* case kind of explaining our interest in
24 coordination, and a letter I had sent back in February of
25 2006. I suspect it was at the good advice of the lawyers

1 back then, not my own idea.

2 And I promised I would give each of them a copy so
3 they can review it, and say: Well, we would like you to
4 send something like this, or address these issues once we
5 identify all the State Courts, in addition to some of the
6 obvious ones, like New Jersey, Florida and some of the other
7 states.

8 THE CLERK: Very good. May I make a suggestion?

9 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

10 THE CLERK: Could you turn your microphone -- that
11 will be better.

12 THE HONORABLE JUDGE DONOVAN FRANK: Thank you.
13 Were you singing into this, Brenda?

14 THE CLERK: There was no singing.

15 THE HONORABLE JUDGE DONOVAN FRANK: Why don't we
16 have a joint agenda consistent with the Orders that have
17 been entered.

18 And in addition, we'll be discussing and just
19 confirming in the courtroom a submission or agreed upon
20 telephone conference next week.

21 As I mentioned to the lawyers in chambers, much
22 like other MDL's, at least, that we've covered here, we try
23 to give access to the lawyers for an on-the-record telephone
24 conference. So if an issue is coming up -- so the next
25 conference is set for December 19th, and there's some

1 issues, so we can move on down the road; that absent some
2 agreement on a couple of the issues and we'll put those on
3 the record today, we will have a telephone conference
4 perhaps Wednesday next week and get a ruling, likely during
5 the conference or within a day of the conference,
6 understanding it's Thanksgiving week. But, we'll agree on
7 that for next week. Then if it is needed, we have it. So,
8 we can move on down the road on any unresolved issues that
9 will help kind of move this along.

10 So, with that in mind, we can proceed with an
11 update on the cases filed in the MDL. Mr. Flowers?

12 MR. FLOWERS: Good morning again, Your Honors,
13 Pete Flowers.

14 As of last evening, according to our count, there
15 are 376 cases filed in the MDL. From our conversations with
16 colleagues around the country, we expect in the next 30 days
17 that there will be a significant number of additional
18 filings to come and then a significant number thereafter.
19 So, we suspect that in a short period of time, there will be
20 over four digits of cases filed in the MDL.

21 THE HONORABLE JUDGE DONOVAN FRANK: All right.

22 MR. FLOWERS: The second issue on the agenda,
23 Your Honor, was on service, both the agreement we have and
24 the issue we have.

25 And actually, Ms. Zimmerman is going to deal with

1 that, as well. So, I'll pass the microphone to her.

2 THE HONORABLE JUDGE DONOVAN FRANK: Thank you.

3 MR. FLOWERS: Thank you.

4 MS. WOODWARD: Your Honor -- I'm sorry,
5 Karen Woodward. We did bring with us our standard map and
6 case count by Plaintiffs' firm of cases in the MDL if you're
7 interested in having it and I've brought some extra copies.

8 THE HONORABLE JUDGE DONOVAN FRANK: I would be
9 very interested.

10 MS. WOODWARD: May I approach, Your Honor?

11 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

12 What we may well do, absent an objection, is we'll
13 work out whether it's best to get it e-mailed to us or scan
14 it. And we'll put it up on the website, as well.

15 Ms. Zimmerman?

16 MS. ZIMMERMAN: Thank you, Your Honor. Just a
17 brief update on service. We know, particularly given the
18 number of complaints filed thus far and the number we expect
19 in the coming weeks and certainly months, that this is going
20 to be an important administrative issue to get agreement on.

21 I do believe that we have an agreement in
22 principle for an e-mail service program on HOC, the
23 Howmedica Osteonics Corporation. And that at this point the
24 dispute is whether or not there will be a similar such
25 agreement entered into with respect to Stryker Corporation

1 and Stryker Sales, some of the other Defendants here.

2 So, as we indicated in chambers, we will continue
3 to meet and confer with defense counsel on that, and suspect
4 and plan to have written submissions provided to the Court
5 for an immediate, or very quick, turnaround hopefully in
6 advance of the December 19th status conference.

7 THE HONORABLE JUDGE DONOVAN FRANK: Now, was this
8 one of the issues that all sides were hoping could be
9 addressed absent an agreement next week, I believe?

10 MS. GENEVIEVE ZIMMERMAN: I believe so,
11 Your Honor.

12 THE HONORABLE JUDGE DONOVAN FRANK: So, maybe we
13 can agree, and maybe defense counsel can come up to the
14 podium, as well. And maybe everybody can just stay there.
15 And then we can, absent an agreement, we can agree on a time
16 right now, if needed. We'll have an on-the-record telephone
17 conference next week.

18 And I'll hear from defense counsel, if you wish.

19 MS. WOODWARD: Well, Your Honor, two things.
20 First of all, on the service issue, what Ms. Zimmerman
21 stated is correct. We can set up a conference call next
22 week and hopefully have an agreement by that time.

23 Also, I just wanted to advise Your Honor that on
24 the issue of service, we've been doing what you do initially
25 in these types of cases. We've been working with the

1 Plaintiffs, providing them information on the cases that
2 haven't been served and have been out there for a while. I
3 understand that they're going to be contacting Plaintiffs'
4 counsel about getting cases served.

5 Also, the agenda item with respect to pretrial
6 order number 4, which was agenda item 1(a), I just wanted to
7 just briefly comment. This is the direct filing order. We
8 have had a few hiccups, to be expected, some firms who have
9 not complied with that Order. And again, we will be working
10 with the Plaintiffs' counsel to give them the information
11 about the firms that need to maybe fix their complaints and
12 comply with the Order.

13 MS. ZIMMERMAN: And the LCC has been working with
14 the able help of Tony Nemo, Liaison Counsel here to the
15 District of Minnesota, to reach out to those attorneys who
16 perhaps were not in complete compliance with Pretrial Order
17 No. 4, request that get themselves in line. So, the
18 paperwork should be headed the right direction soon.

19 THE HONORABLE JUDGE DONOVAN FRANK: Is there a
20 time, without trying to ruin anybody's holiday plans or
21 anything next week? I will just arbitrarily suggest
22 Wednesday, if needed, next week. Is there a time -- taking
23 into account time zones and so forth, is there a -- one, is
24 Wednesday feasible to have a tentative time and date set
25 now? Or, are one or more of you saying: That's the worst

1 day of the week, Judge, to do it, other than Thursday.

2 THE HONORABLE MAGISTRATE JUDGE NOEL: Thursday, so
3 long as it's before the stores open.

4 THE HONORABLE JUDGE DONOVAN FRANK: I do mean
5 we're going to be getting together about midnight the night
6 before, so --

7 But, does that work?

8 MS. ZIMMERMAN: Wednesday would be great, Your
9 Honor. And certainly, perhaps we don't even need to make
10 written submissions. It may be that we can present argument
11 over the telephone.

12 THE HONORABLE JUDGE DONOVAN FRANK: Unless
13 somebody wants to, we can work on that; but, we won't
14 require it unless one or more of you say: Well, there's
15 something we want to get to the Court.

16 I see most people nodding their head in the
17 affirmative for Wednesday. If we arbitrarily or otherwise
18 set it to kind of build in the time zones for ...

19 (Discussion off the record.)

20 What if we set it for 1:00 Central Standard Time?
21 Will that work for everyone?

22 MS. WOODWARD: Would it be possible to set it
23 maybe an hour or two hours earlier, Your Honor, just for
24 travel schedules on Wednesday?

25 THE HONORABLE JUDGE DONOVAN FRANK: What about

1 noon, Central Standard Time? That way people cannot eat
2 lunch and be ready for Thursday. Will noon work?

3 MS. ZIMMERMAN: It works for us, Your Honor.

4 MS. WOODWARD: That's fine, Your Honor.

5 Thank you.

6 THE HONORABLE JUDGE DONOVAN FRANK: So, we'll set
7 it for noon. And then Brenda Schaffer will be in touch with
8 each of you and we'll set up a -- we'll figure out the best
9 way to set up a bridge that day. So, but right now we'll
10 tentatively set that for noon next Wednesday. And, of
11 course, if we need it, we have it.

12 And I will have my Court Reporter, obviously
13 available, so we'll have it at noon next Wednesday. All
14 right?

15 MS. ZIMMERMAN: Perfect. Thank you, Your Honor.

16 MS. WOODWARD: Thank you, Your Honor.

17 THE HONORABLE JUDGE DONOVAN FRANK: Anything else,
18 counsel, on service issues and agreements or on any updates
19 on the Pretrial Order No. 4? For the Plaintiffs?

20 MR. FLOWERS: No, Your Honor.

21 MS. WOODWARD: No, Your Honor.

22 THE HONORABLE JUDGE DONOVAN FRANK: Absent an
23 objection, I guess we can move on to the all-important issue
24 of current updates on State Court litigation. And then
25 acknowledging that there was a -- kind of an update with

1 specific reference to Florida sent to me with some of the
2 consolidation down there, separate from any letter I would
3 send out to all State Judges in the country if we do that in
4 the immediate future, I would like to know if it's the
5 expectation or hope of counsel on one or both sides for me
6 to reach out to the Florida Judge.

7 I have been -- I think as I said at the last
8 status conference, I exchanged Orders with the New Jersey
9 Judge, and also, we probably talked three or four times by
10 telephone. But, we can go down the list here. And then
11 shall we start with Plaintiffs first?

12 MR. BERNHEIM: Good morning, Your Honors. Yeah,
13 right now outside of New Jersey there are cases filed in
14 Illinois, Oregon, Florida and Massachusetts. New Jersey is
15 obviously the oldest litigation --

16 THE HONORABLE JUDGE DONOVAN FRANK: Right.

17 MR. BERNHEIM: So, I'll start with what's going on
18 over there.

19 It's a multi-county litigation in front of
20 Judge Martinotti. Judge Martinotti has entered 11 Case
21 Management Orders to date. The next case management
22 conference is on December 16th. So far they've conducted
23 two 30(b)(6) depositions. And currently, I don't believe
24 that there are any other depositions set.

25 THE HONORABLE JUDGE DONOVAN FRANK: Are those the

1 two depositions Ms. Zimmerman was at, I believe, two?

2 MR. BERNHEIM: Yes, Your Honor.

3 As Your Honor knows, Judge Martinotti has been
4 really pushing a mediation program up there from very early
5 on. So, there are eight mediations scheduled between now
6 and December 11th, and then two more in January.

7 THE HONORABLE JUDGE DONOVAN FRANK: Maybe
8 apologizing to you for interrupting, as I will indicate that
9 I asked in chambers; obviously, I had asked about how the
10 cases were selected. And then I said something I had said
11 at the first status conference, that soon-to-retire
12 Magistrate Judge Boylan is ready, willing and able if we get
13 to that point to take this as one of his first -- if not his
14 first, he'll be retiring -- happy for him, sad for us -- in
15 January of -- early January this year.

16 I've talked somewhat to Judge Martinotti about
17 that process, but we'll do whatever is needed. If it seems
18 like the right thing to do, once we discuss where we're at
19 with discovery and other issues, if there seems to be some
20 interest in coordinating early settlement discussions, I
21 guess we'll leave that for another day right now. But, that
22 sometimes is appropriate and sometimes premature; but, we
23 will see. All right?

24 And I think I interrupted you.

25 MR. BERNHEIM: No problem. Thank you, Your Honor.

1 There's rolling discovery going on. About 2,000
2 documents have been produced thus far. I understand there's
3 going to be another document drop, I believe, next week on
4 November 27th with some significant documents being
5 produced.

6 The Protective Order up there has been discussed.
7 There's a preliminary one that's been agreed to, but they
8 are still discussing mainly paragraph 14(b) which Mr.
9 Flowers is going to talk about -- explain further today.
10 But that pretty much pertains to providing documents to
11 experts and consultants. Currently, there are no trial
12 dates set in New Jersey.

13 The second oldest litigation is the Florida
14 litigation. The first filing there was a case that my firm
15 filed in September of 2012. Since that time, there has been
16 additional filings. Currently, the only case at issue is
17 that initial filed case. There's motions to dismiss
18 pending, or no service yet on all of the other 20 cases.

19 A consolidation order was recently entered. The
20 case -- the consolidation was recently transferred to the
21 Complex Division. And I'm talking about Broward County.
22 There's also a Palm Beach County litigation. But, in
23 Broward County the case was recently transferred to the
24 Complex Division with Judge Henning. And we have the first
25 case management conference in front of Judge Henning on

1 December 11th.

2 Typically at those initial case management
3 conferences, we enter a scheduling order and even get a
4 trial date. The Complex Division in Florida moves very
5 quickly. The Judge makes herself available for special-set
6 hearings within a couple of weeks out. That's pretty much
7 where we're at in Broward County.

8 THE HONORABLE JUDGE DONOVAN FRANK: And I'll
9 probably reach out and give a call to her in the next week
10 or so.

11 MR. BERNHEIM: Thank you, Your Honor.

12 In Palm Beach, that's a more recent filing on
13 August 14th, 2013 by Mr. Osborne filed the initial case in
14 Palm Beach. He's also a member of the PSC.

15 The consolidation -- they've moved for a
16 consolidation. I don't believe the order has been entered
17 yet, but they were supposed to have the hearing actually
18 today, which from what I understood earlier this morning was
19 rescheduled.

20 Outside of Florida, there are two cases filed in
21 Massachusetts in Suffolk County by -- actually, a partner of
22 my law firm, Walter Kelly, filed two cases there. There's
23 been three filings in Oregon, two of them are by
24 Mr. Bowersox, who is also on the Plaintiffs' Steering
25 Committee. So, that's the update on the state litigation,

1 Your Honor.

2 THE HONORABLE MAGISTRATE JUDGE NOEL: Can I raise
3 a question?

4 MR. BERNHEIM: Yes.

5 THE HONORABLE MAGISTRATE JUDGE NOEL: You
6 mentioned 20 cases in Florida. Was that just the Broward
7 County case or was that all of Florida?

8 MR. BERNHEIM: I'm sorry. There's 21 cases filed
9 in Broward County, and I believe there's four cases filed in
10 Palm Beach, 4 or 5.

11 MS. WOODWARD: That's more or less correct.

12 THE HONORABLE JUDGE DONOVAN FRANK: In the
13 neighborhood, so to speak.

14 MS. WOODWARD: In the neighborhood.

15 MR. BERNHEIM: In the neighborhood.

16 THE HONORABLE MAGISTRATE JUDGE NOEL: Also on the
17 list, Illinois? Do we have the number in Illinois?

18 MR. BERNHEIM: I believe it's one.

19 MS. WOODWARD: I have one, as well.

20 THE HONORABLE JUDGE DONOVAN FRANK: And two in
21 Oregon.

22 THE HONORABLE MAGISTRATE JUDGE NOEL: Two in
23 Oregon.

24 MR. BERNHEIM: Three in Oregon, Your Honors.

25 THE HONORABLE JUDGE DONOVAN FRANK: Three?

1 MR. BERNHEIM: Yes.

2 MS. WOODWARD: Three.

3 THE HONORABLE MAGISTRATE JUDGE NOEL: What's the
4 total in New Jersey up to?

5 MS. WOODWARD: The New Jersey case count that I
6 have is 478 total, 445 of which have been served.

7 THE HONORABLE MAGISTRATE JUDGE NOEL: Thank you.

8 THE HONORABLE JUDGE DONOVAN FRANK: Just bear with
9 me one moment.

10 An issue -- and I thought of it because you
11 mentioned the -- and we do the same here on standalone
12 cases, set trial dates. And I would suggest firm trial
13 dates as opposed to those useless notices that in both some
14 State and Federal Courts you get a notice for especially a
15 civil case, you're number 17, which is kind of an insult to
16 lawyers and their clients.

17 But, on an MDL setting like this, one size doesn't
18 fit all, so we individualize the case. But, I'll think back
19 to my experience in one of my prior MDL's, the *Guidant* case
20 where quite early on -- maybe not quite this early -- we did
21 in fact set -- I think I mentioned this in chambers. By
22 agreement of counsel, we picked -- separate from the
23 selection process, because I'm kind of a strong believer in
24 the bellwether system in picking truly representative cases
25 for a bellwether trial. And then I think in that case as I

1 may have mentioned last time we were together, I think I
2 heard 18 *Daubert* motions, 32 summary judgment motions on
3 those 6 cases. And we had them set for 10-day trials,
4 back-to-back for one summer, by agreement of counsel.

5 THE HONORABLE MAGISTRATE JUDGE NOEL: (Coughed.)

6 THE HONORABLE JUDGE DONOVAN FRANK: God bless you.

7 THE HONORABLE MAGISTRATE JUDGE NOEL: Thank you.

8 THE HONORABLE JUDGE DONOVAN FRANK: What I'm
9 saying is, we will, of course, work with counsel. In that
10 case, they came up with six categories of settlement and
11 appeal process with Art Boylan and then Pat Juneau that the
12 parties picked to join him, and we took all cases in the
13 country. But, I think the key was we had these six
14 settlement ranges, you know, for example: Explant, without
15 complication, with complication; no removal or explant; and
16 the list goes on.

17 But, if we get to the point where earlier, rather
18 than later, we want to discuss date certain settings, but I
19 think it really -- then we will probably at some later time
20 talk about the whole bellwether system and what discovery is
21 needed. We have already talked in chambers a bit, separate
22 from that, about the expert and exemplar issue that will no
23 doubt come up again. But, you won't hear from the Court
24 here that: Well, we can't get to you by a certain date.
25 We'll give people whatever access you need, because that is

1 indeed the expectation of the MDL Panel, that we move with
2 some dispatch, but in fairness to all parties.

3 So, we'll take that up at a different time when
4 deemed appropriate by counsel. That may be something I'll
5 touch on also if I end up sending a letter out to all the
6 involved State Judges. I exchanged orders with -- we keep
7 each other up to date in New Jersey and here.

8 So, more than enough said by me on that issue.
9 But, anything else on updates by Defense or Plaintiffs'
10 counsel on the status of the State Court litigation?

11 MR. BERNHEIM: I failed to mention it. The lead
12 case in front of -- that is in front of Judge Crow in
13 Palm Beach.

14 THE HONORABLE JUDGE DONOVAN FRANK: Okay.

15 MS. WOODWARD: Your Honor, I don't really have
16 anything to supplement in terms of the State Court cases.
17 We do appreciate Your Honors' offer to reach out to the
18 Florida State Court Judge in Broward County. And I believe
19 you've been provided with her contact information?

20 THE HONORABLE JUDGE DONOVAN FRANK: We have.

21 MS. WOODWARD: All right.

22 THE HONORABLE JUDGE DONOVAN FRANK: And that's why
23 I kind of assumed when I got that that maybe the expectation
24 was I should quite appropriately reach out, and separately
25 from that if I end up sending a letter out.

1 MS. WOODWARD: Yes, that would be appreciated.
2 And then as soon as we know who our Complex Judge will be,
3 or who it will be -- I don't know if it will be Judge Crow
4 in West Palm Beach. We'll provide that information to you,
5 as well.

6 MR. BERNHEIM: I don't believe there's a Complex
7 Division in Palm Beach, so I think it's going to stay with
8 Judge Crow. But, we have provided the Judge in Florida with
9 you and Judge Martinotti's contact information, Your Honor.
10 So she has that on file.

11 THE HONORABLE JUDGE DONOVAN FRANK: Thank you.

12 MS. WOODWARD: That's all.

13 THE HONORABLE JUDGE DONOVAN FRANK: Just maybe
14 relevant or not at this stage, when I've mentioned some of
15 the things I have about whether it's the bellwether system
16 or settlement issues, we sometimes in *Guidant*, and
17 Art Boylan, I had him do it more than I did; but, we would
18 travel to where the majority of the people were.

19 And I'll just indicate something that's entirely
20 premature, but one of the concerns, just so you know kind of
21 by way of context, one of the expectations by the MDL Panel,
22 consistent with some of the criticisms under the MDL process
23 is, well, the cases go on. And absent settlement or not,
24 then the cases that don't get resolved get sent back to the
25 District.

1 Well, most of us volunteer to take inter-circuit
2 assignments, and say: Well, depending on how far down the
3 road the cases are and their status, we'll say we will agree
4 to follow the case back. Because it would be unfair to the
5 local district or the judge to say: Well, here we are,
6 and -- now, that takes input from the Chief Judge of each
7 Circuit in that District. But, we will worry about that.
8 But, I mean, we try to provide that continuity, because
9 there has been some legitimate criticism over the years of
10 this MDL process and how efficient it is.

11 So, we'll do our very best to live up to that.
12 All right?

13 MS. WOODWARD: Thank you, Your Honor.

14 MR. BERNHEIM: Thank you, Your Honor.

15 THE HONORABLE JUDGE DONOVAN FRANK: Anything else
16 on that issue?

17 We can move on to the Protective Order issue.
18 Mr. Flowers?

19 MR. FLOWERS: Thank you, Your Honor. This issue I
20 think is a very important issue to all of us so that we can
21 begin discovery. We're ready, willing and able to start as
22 soon as possible on the documents that have been produced.
23 Based on our conversations with Mr. Campillo, it's my
24 understanding that the Defendant is in a position to turn
25 over the documents that have been produced in New Jersey.

1 And my understanding, as well, is that there is a November
2 25th production coming up with a substantial set of
3 documents which they're ready, willing and able to turn over
4 as long as we get the Protective Order issue out of the way.

5 The Defendant had originally proposed using the
6 New Jersey Protective Order, we had two problems with that
7 Protective Order. Two problems that we suggested we simply
8 push down the road for you to ultimately make a decision on
9 if we cannot reach consensus.

10 So, I had provided a redlined version of the New
11 Jersey Order with some additional comments in it just to
12 make it abundantly clear what those two issues were.

13 Today I think we have an agreement that, in
14 essence, that order is okay, with the understanding that
15 these two issues will be addressed shortly. We're going to
16 meet and confer before the 19th. If we cannot reach an
17 agreement by then, we were going to suggest some sort of
18 briefing on those two issues.

19 THE HONORABLE JUDGE DONOVAN FRANK: Exactly.

20 MR. FLOWERS: But, I wanted to be clear that it's
21 the Order, essentially, that we submitted with -- because I
22 think it's important that we're clear on what those two
23 issues are.

24 THE HONORABLE JUDGE DONOVAN FRANK: And I would
25 just note for the record, as all of the lawyers that were in

1 chambers knew, and you knew it before today, is we've been
2 provided a copy of that. And I heard -- not to sound like
3 Pollyanna in the Disney movie -- but I heard mostly positive
4 vibes back there from both counsel. Because the key here is
5 you're going to move forward without prejudice to either
6 party, reserving your rights to have this exchange of
7 coverage. And if you can't work it out, we will make a
8 decision, if not before, on the 19th of December.

9 But, it doesn't sound like -- why don't you come
10 on up, counsel? It doesn't sound like that's going to hold
11 up anything. To the credit of both sides, we're going to
12 move forward with the exchange of discovery.

13 MR. FLOWERS: I would just add that I think what
14 we envisioned was, we're going to work up until the 19th.
15 If we can't reach an agreement by then, we'll bring it to
16 you. Because these two issues are not issues that are
17 pressing in order to proceed forward with the discovery.

18 MR. CAMPILLO: That's exactly right, Your Honor.
19 But, I wanted to clarify that the interim order which has
20 been signed by some of the Plaintiffs' lawyers in this
21 proceeding in order to participate in the New Jersey
22 depositions is the interim order that I think, to the extent
23 folks sign it now, they could get access to the documents
24 produced as we're moving forward currently. So, all of that
25 is available. It includes the production that's scheduled

1 for next week.

2 And then, again, without prejudice, to the extent
3 that the Court ultimately rules on those two topics, two
4 issues, which would impact, if anything, who the documents
5 can be shared with outside of counsel. So, I think we can
6 be moving forward here with the discovery effective
7 immediately, as soon as people signed the interim order.

8 Those two topics are access to the confidential
9 documents to either competitors or consultants associated
10 with competitors of Stryker or Howmedica Osteonics Corp., or
11 sharing those documents with treating physicians, we've
12 asked the Court to be ruled upon at the appropriate time to
13 provide Defendants -- and these things go together without
14 adding a new topic here -- parameters for Plaintiffs' ex
15 parte contact with treating physicians, as well as access to
16 the Defendants to contact treating physicians. That's to be
17 decided later, but I wanted to be clear that that's
18 something we think is important and it will be part of this
19 access issue that is in some ways raised by the Protective
20 Order.

21 But, we're in agreement that if we can't resolve
22 this by December 19th, we'll report to the Court at that
23 time and hopefully have a briefing schedule established at
24 that point for resolution soon thereafter, be it by briefs
25 or letter briefs, or whatever. But, we can decide that on

1 the 19th.

2 MR. FLOWERS: Yeah, and that's relatively accurate
3 with the caveat that the only reason I asked for "our," the
4 version that we submitted in, is because it's crystal clear
5 on the record what those two issues are. Because the
6 interim order in New Jersey doesn't mention anything about
7 treating physicians. That's the reason why I wanted it in
8 there, so the record was crystal clear that this is an
9 issue. It has not been somehow waived in New Jersey.
10 That's it.

11 MR. CAMPILLO: That's understood.

12 THE HONORABLE JUDGE DONOVAN FRANK: I think you
13 both touched on those and focused right in on those in
14 chambers, as well. So, I think it's crystal clear.

15 MR. FLOWERS: Okay.

16 THE HONORABLE JUDGE DONOVAN FRANK: All right?

17 MR. FLOWERS: Yes. And then the next issue,
18 Your Honor, is the production of product exemplars. Again,
19 this is an issue that is important to us in building our
20 case. We need these exemplars to give to experts at the
21 early outset of the case, frankly even before oral discovery
22 begins, because that forms the basis of a lot of our oral
23 discovery.

24 We had previously submitted a list of the
25 exemplars that we wanted because this device comes in

1 multiple combinations. Per, previously, as well, the
2 Defendants indicated they were willing to produce these. We
3 understand now that the issue may be the extent of available
4 exemplars, meaning that there just aren't that many. And
5 they're concerned about what's going to happen in the future
6 if multiple jurisdictions arise and request them.

7 I think where we're at, overall, is they will
8 provide us, hopefully today, the list of what they believe
9 are available pristine exemplars. And then we will discuss
10 meet and confer and see if we can figure out a solution to
11 this problem. If we can't, it's something that we would
12 like to address with the Court shortly.

13 MR. CAMPILLO: That is correct. We have agreed to
14 provide counsel with a list of the exemplars available. And
15 we do have concerns with competing court orders, orders that
16 exist and are in place that say we cannot destroy evidence.
17 So, we cannot at this point agree to any kind of destructive
18 testing, unilaterally, by the Plaintiffs or even jointly by
19 the parties in this proceeding until we have some more sort
20 of consideration of these issues and how they interplay as
21 between the various courts where Plaintiffs and Defendants
22 will need some sort of exemplar testing or analysis thereof.

23 So, we have agreed to produce the list so we can
24 try to at least minimize the issues under dispute and so
25 that we can move forward. But, I think ultimately there

1 will have to be something brought to the Court for --

2 THE HONORABLE JUDGE DONOVAN FRANK: Well, and
3 maybe -- I think Mr. Flowers was about to say something. By
4 the way, Judge Noel, I just had the Federal Court's
5 equivalent of Sametime or text messaging say, people have
6 called in to say they can hear the lawyers just fine, but
7 they assume the Judges are wandering from the microphone
8 because they can't hear us. So, we'll try to do better.

9 Maybe this is a topic that may or may not be
10 prudent to address. And if I send out a letter to the --
11 just to say it's on the radar screen. Although, they can
12 see it on the website, too -- just stressing the importance
13 of coordinating that, nationwide. It is not the only issue,
14 but we can decide that as we zero down on the content of
15 letter to go out. But yes, I'll just confirm it's
16 consistent with what you've said in the status conference
17 earlier. All right?

18 MR. CAMPILLO: Thank you, Your Honor.

19 MR. FLOWERS: Thank you, Your Honor.

20 THE HONORABLE JUDGE DONOVAN FRANK: And as you
21 talk to one another, it's not an issue -- it usually comes
22 up in these types of cases, as you well know, the whole
23 exemplar issue. Next?

24 MR. FLOWERS: The next issue, Your Honor, is
25 Proposed Pretrial Order No. 6. I think we did reach

1 agreement on that and submitted it to you.

2 THE HONORABLE JUDGE DONOVAN FRANK: And I have it
3 here. And absent any further discussion, I will sign that
4 today. We will get it filed, and on we go.

5 I didn't mention, you know, in one of the original
6 orders -- I don't have the number in hand -- I had asked
7 counsel for both sides to kind of work on a joint summary of
8 the case and the issues to put up on our website.

9 And so, hopefully, at some time in the future so
10 we can be transparent -- I see Ms. Fleishman coming up -- so
11 someone from afar can come online and say --

12 MR. CAMPILLO: I think we have exchanged that --
13 Your Honor, I'm sorry to interrupt --

14 THE HONORABLE JUDGE DONOVAN FRANK: No, you
15 didn't.

16 MR. CAMPILLO: It's being exchanged. I think our
17 final draft is being sent to Plaintiffs' counsel.

18 THE HONORABLE JUDGE DONOVAN FRANK: All right, so
19 we're headed the -- all right. That's fine, thank you.

20 MR. FLOWERS: The next item is just a common
21 benefit order. The reason we put this on the agenda, Your
22 Honor, is this is something we want to get out of the way.
23 We intend on preparing the order -- the proposed order and
24 submitting it for the next status conference on the 19th of
25 December.

1 THE HONORABLE JUDGE DONOVAN FRANK: And I suspect
2 we'll have, whether I put it on the category of lessons
3 learned from a couple prior MDL's -- and I won't single out
4 a lawyer -- they're not involved in this case -- landing his
5 private jet down here at the St. Paul Airport. And I
6 happened to scrutinize the -- anyway, I will be more
7 careful. Most people do not do such things, but let's be
8 right up front.

9 That's been, again, one of the criticisms in
10 trying to move a case along and hold down costs of: Well,
11 are there some kind of agreed-upon -- and frankly speaking,
12 the good and experienced lawyers on cases well understand
13 the parameters, so we can keep trust and confidence in the
14 case moving along. But yes, any guidance we can give --

15 Now, I know there was an issue -- we don't need to
16 discuss it today and I don't need to create one where there
17 isn't one. And that issue was: Well, what impact, if any,
18 would a common benefit order have, for example, on cases in
19 New Jersey or elsewhere? And I don't know if that's
20 something being discussed. This isn't my way of trying to
21 bring this out now, because no one has contacted the Court.
22 I am not saying I'm aware of some issue; I'm not.

23 MR. FLOWERS: I think, Your Honor, in every
24 litigation it does potentially drive things, so that's why
25 we want to get it out of way. And I can also speak for --

1 there's no one on this PSC that has a private jet. I'm not
2 sure about Mr. Campillo, but...

3 MR. CAMPILLO: He does not have a private yet.

4 THE HONORABLE JUDGE DONOVAN FRANK: Well, a young
5 man I sentenced a few days ago standing where you're
6 standing now -- no offense, Mr. Flowers -- to 13 years and 8
7 months, or 12 years and 8 months. He had taken some of his
8 money from a lawyer friend and not only bought a jet, but
9 decided to leave the country and fake his death, and go to
10 Canada.

11 So, no, I wasn't trying to get an inventory of
12 private jets. And I won't know the lawyer's name -- I won't
13 say it, but if I said it, most of you in the room would
14 probably recognize the name. We'll leave that for another
15 day.

16 But, yeah, in all seriousness, that's an issue
17 that we'll work with you as much as possible, because then
18 there were -- I mean, let's get it right out in the open.
19 It's premature now, but in the *Guidant* case it wasn't
20 appealed, but that issue came up late in the case. And my
21 rulings speak for themselves on attorney fees and the effect
22 they had on the contingency agreements people had.

23 In most cases, those get worked out. So, I'm
24 confident that's going to be the case here, as well. But,
25 any -- obviously, any assistance we can give, we will give

1 it. So, the -- but, yes, I agree with you. It's usually an
2 issue in every case.

3 Does the defense want to step off the curb and
4 talk about --

5 MR. CAMPILLO: I just want to be clear that I do
6 own -- I have a private bicycle, that's about it.

7 THE HONORABLE JUDGE DONOVAN FRANK: Well, I can
8 probably make arrangements for you to park the bike
9 downstairs underneath.

10 Number 6?

11 MR. FLOWERS: Number 6, Your Honor, and number 7
12 kind of go hand-in-hand.

13 THE HONORABLE JUDGE DONOVAN FRANK: They do, yes.

14 MR. FLOWERS: We realize the timing of these are
15 important, meaning they need to be done here, quickly.

16 We have preliminarily reviewed disclosures and
17 fact sheets. We need to kind of reach a consensus and get
18 back to the defense, which we're planning on doing next
19 week.

20 Same issue with the master complaint and
21 short-form complaint. We would hope that this entire issue
22 will be handled and will be presented to you at the next
23 status conference, if not earlier.

24 MR. CAMPILLO: Just to clarify, I understood we
25 were going to try to get those things possibly handled by

1 the Court either next Wednesday's noon call, or soon
2 thereafter, if that's not practical. But, there is really
3 no reason to wait until December to resolve these things.
4 Our position has been made pretty clear. We want to keep
5 consistency and continuity and follow at least the fact
6 sheet and the preliminary disclosures as used in New Jersey,
7 which would work well. And I understand they're going to be
8 proposing something else.

9 But, for a number of reasons, including discussion
10 of exemplars and how many are relevant, all the way ranging
11 into possible case selections for mediations and things of
12 that nature, that information was provided by Plaintiffs in
13 the fact sheets, and preliminary disclosures are critical to
14 understanding what this litigation is about. So, that needs
15 to be resolved sooner, rather than later.

16 MS. FLEISHMAN: We agree it needs to be resolved.
17 We don't necessarily agree that all of the information in
18 those facts sheets is, A, necessary. And one thing I do
19 agree with Mr. Campillo on is these fact sheets are
20 important, not only for him, but also for us to assess what
21 the extent of the Plaintiffs' cases are. And that's what we
22 focused on and that's why we may have some tweaks to these
23 documents, as opposed to major changes.

24 THE HONORABLE JUDGE DONOVAN FRANK: Why don't
25 we -- unless you have something additional on that,

1 Judge Noel, why don't we agree that at a minimum, that
2 absent some agreement, we will discuss this as an item next
3 Wednesday? And there may or may not be an agreement,
4 procedurally, about: Well, we want to make this submission
5 or that to the Court, or you got what you need, Judge, can
6 you drop the gavel and make a decision on the issues we
7 can't agree on?

8 We'll just agree that -- obviously, if you agree
9 on a timeline -- in other words, it sounds like in a perfect
10 world, you would like a decision, unless there's an
11 agreement, not necessarily waiting until December 19th.
12 We'll accommodate that. And we will just agree to discuss
13 it. And if there's no agreement either on a timeline -- or
14 we'll just set that up next Wednesday. So, everybody will
15 know, well, here's the date it's going to be decided if it's
16 not next Wednesday. Fair enough?

17 MR. CAMPILLO: Yes, Your Honor.

18 MR. FLOWERS: Yes, Your Honor.

19 The next thing on the agenda is the Aiken Motion
20 to Remand. I do not think that's a Plaintiffs' Steering
21 Committee issue.

22 THE HONORABLE JUDGE DONOVAN FRANK: No. And I'll
23 just note for the record, for anyone who is interested, I'm
24 hearing that at -- all the briefs have been submitted. I'm
25 hearing it at 11:00 today.

1 And even though it's true that if you were to
2 inquire whether in a non-MDL case any Federal Judge in a
3 dispositive motion in our District has allowed people to
4 make oral argument by either phone or on the big screen, the
5 answer is no. It's a little different issue in an MDL
6 context depending upon the issue.

7 So, it will be heard by the Court at 11:00 today,
8 either in this courtroom, depending on -- they need about
9 15, 20 minutes so -- we have a back-up plan with our IT
10 people that we would move next door, but either way, I'll be
11 hearing that motion and either rule off the bench or we'll
12 have a ruling before Thanksgiving, if not off the bench.

13 And the issues there, to the extent anybody has
14 looked at, is either -- is both a motion to remand, and
15 both -- two issues, fraudulent joinder and misjoinder,
16 because that's the alternative position of the defense is:
17 Well, if you're going to not deny it, then it should -- the
18 Complaint should be severed and sent back, the health care
19 defendants, hospital defendants back to California.

20 So, that comes up at 11:00. And I would agree,
21 it's not a Lead Counsel Committee issue. Unless Defense
22 counsel wants to add anything to what I've said?

23 MR. CAMPILLO: No, Your Honor. I believe
24 Mr. Griffin will argue that at 11:00.

25 THE HONORABLE JUDGE DONOVAN FRANK: I believe so.

1 All right. We can move on.

2 MR. FLOWERS: In item of the Agenda, 9 and 10,
3 proper parties and ex parte contacts with physicians are
4 really the Defendants' issues. I would say that we have
5 large disagreement on these two issues, although there's no
6 briefing or actual issue before Your Honors as you sit there
7 today.

8 MR. CAMPILLO: That's correct, Your Honor. I
9 believe that once the Master Complaint issues are resolved,
10 then we can chart forward what needs to be done regarding
11 proper parties. We don't need to deal with that today, but
12 we will in due course.

13 THE HONORABLE JUDGE DONOVAN FRANK: All right.
14 Unless anyone else wants to be heard on that?

15 THE HONORABLE MAGISTRATE JUDGE NOEL: I have
16 nothing.

17 THE HONORABLE JUDGE DONOVAN FRANK: You better
18 speak up.

19 THE HONORABLE MAGISTRATE JUDGE NOEL: I have
20 nothing further.

21 THE HONORABLE JUDGE DONOVAN FRANK: Number 10,
22 which I think you may have touched on earlier, but I'll just
23 make sure.

24 MR. CAMPILLO: Yeah, I think we'll deal with that
25 as part of the Protection Order discussion that we've

1 already addressed. And whether or not that needs to be
2 briefed remains to whether the parties can resolve it in the
3 interim between now and December 19th.

4 MR. FLOWERS: Agreed.

5 THE HONORABLE JUDGE DONOVAN FRANK: Now, we have
6 on here next status conference.

7 Right now we have that set consistent with the
8 earlier orders for the 19th of December. And then I
9 promised the lawyers I would bring it up because of
10 potential scheduling conflict for some folks for January, so
11 we don't confuse it. So, it's 19th of December. January
12 23rd, the Court is contemplating moving it to, from the 24th
13 of January for the status conference here. And so, I would
14 just want to confirm with counsel, and we'll wait to hear
15 back from folks to say, you're going to make everyone
16 unavailable if you move to that January 23rd from the 24th.
17 Mr. Flowers?

18 MR. FLOWERS: That would be great, Your Honor, if
19 we could do that. I think our whole side is good with that.
20 We requested it and we appreciate it.

21 MR. CAMPILLO: And January 23rd is acceptable to
22 the Defendants. I just want to make one comment,
23 Your Honor. To the extent that -- and I don't mean for the
24 23rd of January -- but for any of the conferences there will
25 probably always be the three of us. But, if any one of us

1 cannot make it and the other two can, we will move forward.
2 So, I hope that's acceptable to the Court if one of us has
3 to miss for some unexpected reason.

4 THE HONORABLE JUDGE DONOVAN FRANK: That's
5 acceptable.

6 Well, so then I think what we'll do is go ahead
7 and set that for the 23rd day of January, now, and we'll put
8 that out on the website to give notice to everyone. And
9 then I'll ask the Plaintiffs, first. Are there other
10 issues, other than what we've discussed, where you would
11 say: Well, we have some issues that may be coming up that
12 we anticipate for December, to give everyone, not just the
13 Court, but other parties a heads-up on?

14 MR. FLOWERS: I would just say at this stage it's
15 going to be the common benefit order. If we're not done
16 with disclosures and fact sheets and the master complaint
17 and short-form complaint, those will be the issues that I
18 see right now.

19 The other issue that is always looming in any of
20 these cases is the whole ESI production issue. We don't
21 have any problems at that stage, but it's a constant issue
22 that we're dealing with.

23 THE HONORABLE JUDGE DONOVAN FRANK: It is, it is.
24 For the defense?

25 MR. CAMPILLO: Your Honor, we don't have anything

1 else. I did want to just bring up one brief point. And
2 that is -- and I made this comment maybe not clearly enough
3 at the first status conference; that if this Court believes
4 or feels that having our lead lawyer from the New Jersey
5 state proceeding attend any or all of these conferences, we
6 could do that.

7 Ms. Woodward and I are involved in that
8 proceeding, so we didn't feel the need to have a designated
9 liaison counsel. But I just wanted the Court to know that
10 if there's ever any reason or need to have someone there
11 who's directly involved in that proceeding with
12 Judge Martinotti on a regular basis, we'd be happy to do so.
13 If there's ever an agenda item that calls for that, we can
14 comply.

15 THE HONORABLE JUDGE DONOVAN FRANK: Do the
16 Plaintiffs have a strong view on that?

17 MR. FLOWERS: We don't. If there's an issue, we'd
18 ask; but I assume Mr. Campillo knows what's going on.

19 THE HONORABLE JUDGE DONOVAN FRANK: I would just
20 concur with what you said. And Judge Noel and I have talked
21 about it. And I think that if issues come up -- and like,
22 for example, I'll probably be in touch with a couple of the
23 State Court Judges in the next few days. And if something
24 would come up -- the roadway should run both ways. So, if
25 something comes up, whether it's a state coordination issue,

1 or it's some other issues, as long as the other party knows
2 that someone has reached out to the Court saying if there's
3 been some change in circumstance, obviously, we'll make
4 certain that we have access to the Court. Just because we
5 have these monthly status conferences, even though I find
6 both them and the get-together in chambers very helpful, if
7 something changes and you say: Well, maybe we shouldn't
8 wait until the next status conference to let the Judge know
9 because they may want to reach out to this particular State
10 Court, like I'll call Judge Martinotti, probably, if not
11 today, tomorrow, or Monday just to reach out. And he does
12 the same for me. Like I called him, the last time, right
13 before his last case management conference in New Jersey.
14 So, we'll keep those lines of communication open. I will
15 reach out to the Florida Judge.

16 And then I will disburse, before you leave, we had
17 additional copies made of the letter I sent back in 2006 to
18 21 or 22 State Judges. And there may be reasons not to send
19 the letter, or you may say, well, we can agree that these
20 topics should be discussed. I will wait to hear from
21 counsel on that issue. Because, frankly speaking, whether
22 it's an MDL or a non-MDL context, sometimes there's a
23 stereotype of Federal Judges and Courts. Well, they're just
24 going to come in and they don't care who they step on and
25 move forward. And hopefully, we won't behave or conduct

1 ourselves in that way.

2 So, other issues, anybody, on the Lead Counsel
3 Committee for Plaintiffs, first, that they want to put in
4 front of the Court today?

5 MR. FLOWERS: I don't think so, Your Honor.

6 THE HONORABLE JUDGE DONOVAN FRANK: Liaison
7 counsel, anything?

8 MR. NEMO: Not that I can think of, Your Honor.

9 THE HONORABLE JUDGE DONOVAN FRANK: Anything for
10 the defense?

11 MS. WOODWARD: No, Your Honor.

12 THE HONORABLE JUDGE DONOVAN FRANK: Judge Noel?

13 THE HONORABLE MAGISTRATE JUDGE NOEL: I have
14 nothing further.

15 THE HONORABLE JUDGE DONOVAN FRANK: Well, other
16 than our -- and then we'll know sometime before 11:00
17 whether they -- yesterday they couldn't make any of our
18 fancy screens work.

19 It will actually be my first oral argument on a
20 dispositive motion on the screen. We've had a couple of
21 witnesses testify there because it's piped into the sound
22 system here. And we'll -- but it will either be here, at
23 11:00, or next door.

24 The goal is here, and they need, because of the
25 time zone change with California, they were going to work

1 with them to make sure their system is up and operating, but
2 then that will be at 11:00. So, we'll be in touch, it
3 sounds like, as you exchange a summary to go up on the
4 website of the case, and then if there are other issues.
5 Otherwise, Brenda Schaffer will be in touch with you on just
6 the mechanics of the conference if it's necessary for next
7 Wednesday at noon, Central Standard Time.

8 So, thanks everyone for coming to what's soon to
9 be cold Minnesota if you're not native here. And we are
10 adjourned until 11:00 for any of those of you who wish to
11 stay for that hearing. So, we're adjourned. Thank you.

12 MR. FLOWERS: Thank you, Your Honor.

13 MR. CAMPILLO: Thank you, Your Honor.

14 THE HONORABLE JUDGE DONOVAN FRANK: By the way,
15 Happy Thanksgiving, everyone. Don't take this the wrong
16 way, but I hope at least some of you overeat or engage in
17 excess, because I know I will. And we'll see some of you at
18 11:00. All right.

19 (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