

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)	January 23, 2014
)	9:17 a.m.
)	

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

STATUS CONFERENCE PROCEEDINGS

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1 people on the phone, and have the lawyers present note their
2 presence for the record and in what capacity they appear in.
3 Should we start with the Plaintiffs first?

4 MS. ZIMMERMAN: Genevieve Zimmerman on behalf of
5 the Lead Counsel Committee --

6 THE HONORABLE JUDGE FRANK: And actually, as
7 awkward as it is, you'll probably have to speak into the
8 microphone; otherwise, the people on the line cannot hear
9 you.

10 MS. ZIMMERMAN: Good morning, Your Honor.
11 Genevieve Zimmerman on behalf of the lead counsel committee
12 for Plaintiffs.

13 MR. GORDON: Do that again.

14 MS. ZIMMERMAN: Sure. Take 3. Genevieve
15 Zimmerman on behalf of the Lead Counsel Committee for
16 Plaintiffs.

17 MR. GORDON: Your Honor, Ben Gordon on behalf of
18 the Lead Counsel Committee. Sorry it's so loud.

19 MR. FLOWERS: Good morning, Your Honor. Pete
20 Flowers on behalf of the Lead Committee Counsel for
21 Plaintiffs.

22 MS. FLEISHMAN: Good morning, Your Honor. Wendy
23 Fleishman on behalf of the Lead Committee Counsel for
24 Plaintiffs.

25 MR. LANDEVER: Good morning. David Landever here

1 for Eric Kennedy on behalf of Lead Counsel for Plaintiffs.

2 MR. BERNHEIM: Good morning, Your Honor. Jesse
3 Bernheim as State Court Liaison. Thank you.

4 MR. NEMO: Good morning, Your Honor. Tony Nemo
5 from Meshbesh & Spence, Liaison Counsel.

6 THE HONORABLE JUDGE FRANK: Moving over to
7 Defense?

8 MR. GRIFFIN: Good morning, Your Honors. Tim
9 Griffin on behalf of the Defendants.

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

12 THE HONORABLE JUDGE FRANK: And absent objection,
13 unless objection from counsel, I'll decline from announcing
14 either the temperature outside or the windchill factor. And
15 I do apologize for those of you that have probably come here
16 in good faith and experiencing this quite extraordinary
17 temperature swing. I guess we're going to experience it
18 tomorrow, too, the other way.

19 I'll first indicate that I think we had a very
20 productive discussion in chambers, as we generally meet at
21 8:15. So, absent objection from Defense counsel, I will
22 call upon Mr. Flowers or whoever is -- you've agreed that
23 we'll -- maybe you could go through and give us a status
24 report with respect to -- frankly speaking, not only, if
25 that's agreeable, maybe two of you together can come up and

1 do that. And not only on what we discussed and the issues,
2 but kind of anything else that you think those present and
3 on the phone would be helpful to know kind of where we are
4 and where we're headed, so...

5 MR. FLOWERS: Thank you, Your Honor.

6 MS. WOODWARD: Sure. Your Honor, with regard to
7 the current case filings in the MDL and around the country,
8 we actually submitted with the Joint Report, the map, and
9 the Plaintiffs' list. That was at the request of your
10 courtroom staff --

11 THE HONORABLE JUDGE FRANK: Yes.

12 MS. WOODWARD: -- and that's what we'll do going
13 forward.

14 Those numbers were up to date as of January 16th.
15 As of yesterday, I can tell you we have 542 cases that are
16 either in the MDL or on their way. 597 cases in New Jersey.
17 In other states, a combination of 74 cases; some of those
18 are removable, some are not. And our total right now is
19 1,213 cases.

20 THE HONORABLE JUDGE FRANK: Thank you.

21 MR. FLOWERS: Your Honor, moving to (b) on the
22 agenda, the Plaintiffs had submitted a proposed Pretrial
23 Order No. 10 which included a master long and short-form
24 Complaint, I believe it was a week ago, for your
25 consideration.

1 We also had talked about and were in the process
2 of submitting an order which would be PTO No. 11, which
3 dealt with service of fact sheets and preliminary
4 disclosure, electronically. We have talked about it between
5 the parties and there is a slight issue in terms of privacy
6 that we're trying to work out. We clearly want to make sure
7 that this happens, but we would hope within the next week we
8 can work out the issue of privacy in terms of HIPAA-related
9 information so that we can get this done and submit an order
10 to you.

11 THE HONORABLE JUDGE FRANK: Well, as we discussed
12 in chambers -- it's not an unusual subject to come up. It
13 comes up in a number of contexts. It came up in the *Guidant*
14 *Boston Scientific* case, that MDL. So, with or without
15 complete agreement, we'll probably get that resolved and
16 I'll do whatever is necessary to help do that in fairness to
17 both parties in the interest of -- you know, we can do it
18 and still, I think, maintain the privacy as is contemplated.
19 So, as we discussed in chambers, it's not an unusual issue
20 to come up.

21 MS. WOODWARD: And so Your Honor, I just want to
22 add: The Defendants are supportive of PTO No. 11. We think
23 it's a good idea from a case management perspective.

24 Until we work it out, though, Plaintiffs should
25 serve their disclosures and fact sheets by mail, rather than

1 electronically. We've gotten a few electronically and
2 they've come to my inbox directly. And that's fine; we're
3 not going to raise an issue about that. But I don't want to
4 wake up one day to 800 fact sheets in my inbox.

5 THE HONORABLE JUDGE FRANK: Now, this will make
6 everybody's day. We have a Sametime system. They have now
7 some other issue with the conference bridge where it appears
8 that nobody can hear what we're saying. So, whether someone
9 wants to break out in song for the next minute or two, why
10 don't we sit tight just for a moment or two and see if --
11 they're working on it -- to see if they can get it resolved.

12 I am not sure what -- it's not unique -- we had
13 both, on our video bridge, for some things between British
14 Columbia this past week and some other state courts --
15 similar issues. But if we can maybe just sit tight for a
16 couple of minutes -- I'm not going to leave the courtroom
17 and we will -- because I think the concern is until they
18 verify it, that no one can -- we assumed, because it's not
19 unusual to mute the other way, but we assumed they could
20 hear us. Well, it looks like they cannot. So -- and I
21 wished I could put on some music for someone, but -- so,
22 unless there's an objection, while we're sitting here
23 waiting, why don't the other individuals, whether they're
24 lawyers or nonlawyers, I recognize a number of you, unless
25 one or more of you are saying: Look it. This is a public

1 courtroom. We can anonymously come and go if we want. It's
2 none of your business who we are.

3 Why don't we just have people introduce
4 themselves. I know some of you, maybe not all of you. So
5 we can start over on this side of the room and go my right,
6 your left. We'll work all the way over to --

7 MR. TALLEY: Stuart Talley from Sacramento,
8 California.

9 THE HONORABLE JUDGE FRANK: All right.

10 MS. RASO: Ashleigh Raso from Meshbesh & Spence.

11 MR. WILSON: I'm Gary Wilson from Robbins, Kaplan
12 Miller & Ciresi.

13 MS. PEARSON: I'm Gale Pearson from Pearson,
14 Randall and Schumacher.

15 MS. SPAULDING: Good morning, Your Honor. My name
16 is Pam Spaulding with Meshbesh & Spence. I work with
17 Tony.

18 MR. SCHLUETER: Good morning, Your Honor. Richard
19 Schlueter from Atlanta, Georgia and I'm really enjoying the
20 weather.

21 THE HONORABLE JUDGE FRANK: I thought you might,
22 yes.

23 MR. DAVICK: Andrew Davick, Your Honor, with
24 Meshbesh & Spence.

25 MR. HELLUMS: Chris Hellums with Pittman, Dutton

1 and Hellums in Birmingham, and I'm enjoying the weather, as
2 well.

3 MS. OLSON: Good morning, Your Honor. Jackie
4 Olson from Zimmerman Reed.

5 MR. JOHNSON: Good morning. Jason Johnson from
6 Zimmerman Reed.

7 THE HONORABLE JUDGE FRANK: Now, for those of you
8 from Meshbesh & Spence, obviously someone who I've known
9 for many years, the claim is that Ron Meshbesh is going
10 to, in addition to receiving this award soon from the state
11 bar association, he's going to be retiring. But, his
12 definition of retire may be different than -- is he really
13 going to retire, semi-retire?

14 MR. NEMO: He is, Your Honor. I don't think from
15 an observer's standpoint he'll look any different than he
16 does now. I think he'll still come to the office every day;
17 but yes, he's officially retiring.

18 THE HONORABLE JUDGE FRANK: I will believe that
19 when I see it.

20 MR. NEMO: So will I.

21 (Discussion off the record.)

22 THE HONORABLE JUDGE FRANK: With apologies to
23 whatever the technology problem is -- and if somebody needs
24 to blame somebody, it's my case, my courtroom. I can be
25 blamed. We're not sure what the issue was, but we'll start

1 over, actually, with permission of counsel, so that we --
2 once we discovered that everybody couldn't hear because some
3 of you, thankfully, called in. And Brenda, my calendar
4 clerk, will make sure that people can hear now and then get
5 that message to me; otherwise, we'll stop again.

6 We'll start over. And so that we can try to at
7 least make amends to a limited extent. So, shall we begin
8 as if we just came into the courtroom?

9 MR. FLOWERS: Sure, Your Honor.

10 THE HONORABLE JUDGE FRANK: If, in the unfortunate
11 circumstance, I get a note saying it's still a problem, I
12 will let you know.

13 MR. FLOWERS: We'll become good at this on the
14 third try, Your Honor.

15 THE HONORABLE JUDGE FRANK: Well, just so it's I'm
16 hoping this is just a second try, because, you know, for the
17 baseball fans out there that -- what's that phrase? Three
18 strikes and you're out.

19 Whenever you're ready. Thank you.

20 We're going to go down the agenda now for those
21 listening on the phone. And then at the end of this -- at
22 the end of this hearing, I will -- we'll be passing out -- I
23 made some changes we discussed back in chambers on some of
24 the upcoming couple of the months' schedules, and that's
25 mostly my trial schedule and so that's my doing, not the

1 lawyers.

2 But, we'll announce those and we'll put actually a
3 sheet out on line and pass one out today on a couple of
4 changes. The first one comes in April and May. So, but we
5 can proceed whenever you're ready, Counsel.

6 And I'm wondering, since no one could hear
7 anything, if you don't mind, if I could just have both
8 counsel at the podium and then counsel just repeat their
9 introductions and in what capacity they appear.

10 So we can start with Mr. Flowers.

11 MR. FLOWERS: Good morning again, Your Honor.
12 Pete Flowers on behalf of the Lead Counsel Committee for the
13 Plaintiffs.

14 MS. WOODWARD: Good morning, Your Honors, Karen
15 for the Defendants.

16 MS. ZIMMERMAN: Good morning, Your Honors,
17 Genevieve Zimmerman, the Stryker, LCC.

18 MR. GORDON: Ben Gordon for the LCC also.

19 MR. NEMO: Good morning, Your Honor. Tony Nemo
20 Liaison Counsel for the District Court.

21 MR. BERNHEIM: Good morning, Your Honor. Jesse
22 Bernheim, State Court Liaison Counsel.

23 MR. LANDEVER: Good morning, Your Honor. David
24 Landever here for Eric Kennedy on the Lead Counsel
25 Committee.

1 MS. FLEISHMAN: Good morning, Your Honor. Wendy
2 Fleishman on behalf of the Plaintiffs.

3 MR. GRIFFIN: Good morning, Your Honors. Tim
4 Griffin on behalf of the Defendants.

5 THE HONORABLE JUDGE FRANK: Whenever you're ready.

6 MS. FLEISHMAN: All right, Your Honor. So dealing
7 with Item 1 on the agenda, we submitted with the filing of
8 the Joint Report and Status Conference Agenda, the list of
9 Plaintiffs' counsel, the number of cases by counsel, as well
10 as the map that we typically provide to the Court at each
11 status conference. That will be the procedure going
12 forward. Those numbers will be provided at the staff's
13 request with the filing of the Joint Report. But I do have
14 some updated numbers.

15 Those numbers that were filed with the Joint
16 Report were updated as of January 16th. As of yesterday,
17 the cases that are in the MDL are on their way, total of
18 542, cases in New Jersey State Court, 597. In the other
19 states where there are cases, we have a total of 74. Some
20 of those -- that's actually different from what was
21 previously submitted because some of those have now been
22 transferred to the MDL, so that number actually dropped.
23 And that gives us a total at this time of 1,213 cases.

24 THE HONORABLE JUDGE FRANK: And actually, before
25 you move on to the next item, even though on the agenda it

1 says "Report on Judicial Contacts," I'll just mention
2 something that I think, hopefully, is self evident, in
3 addition to stating it appears the system is now working.
4 But, consistent with prior weeks -- and I think what's
5 really contemplated by the MDL Panel, Counsel when we were
6 in chambers for the conference earlier this morning
7 indicated a couple of cases with new state judges. And it's
8 my practice, I will reach out and give a call just in the
9 interest of: One, they have the contact information; and
10 two, that they know that one of our primary goals is to
11 coordinate things together if at all possible, without
12 compromising the rights or responsibilities of whether it's
13 the Court or the parties.

14 So, I will do that with a couple of the newer
15 cases filed. So, with that, we can move on with the agenda.

16 MS. WOODWARD: So, Your Honor, with regard to
17 judicial contacts, we identified two new judges. And we'll
18 provide that information to you, but wanted to point out
19 that there is a new consolidated proceeding in Palm Beach
20 County, Florida that's been assigned to a Judge Hafele and
21 we'll provide you his information --

22 THE HONORABLE JUDGE FRANK: And I will reach out
23 to him.

24 MR. FLOWERS: Then on Agenda Item No. 2,
25 Your Honor, back in January we had drafted a master

1 long-form and short-form complaints, provided them to
2 Defendants. They made comments. And then we submitted on
3 January 14th to you PTO No. 10 which includes both an order,
4 as well as the long-form and short-form complaints, and
5 we're just waiting for your ruling on it.

6 THE HONORABLE JUDGE FRANK: We'll do that today.

7 MR. FLOWERS: Terrific. Thank you. The next item
8 2(b), Your Honor, is proposed PTO No. 11, which deals with
9 electronic service of fact sheets and preliminary
10 disclosures. While we all generally agree that that is
11 something that we want to accomplish for efficiency
12 purposes, there is a privacy issue that we need to deal with
13 concerning the electronic service of HIPAA-related
14 information. We're working together to solve that problem.
15 Hopefully, we'll have it solved by next week so that these
16 documents can be served electronically on the Defendants.

17 MS. WOODWARD: And I do want to state, Your Honor,
18 until that problem is solved, if the parties could serve
19 their fact sheets and preliminary disclosures the
20 old-fashioned way, service by mail, that would be
21 appreciated.

22 THE HONORABLE JUDGE FRANK: And then I'll just
23 indicate as I did earlier so that the folks listening in can
24 hear, this is not a unique issue to come up in cases, and
25 oftentimes -- not every case, but oftentimes if there's some

1 specially-tailored order that needs to be done so the
2 responsibility is placed on the shoulders of the Court so we
3 can make sure there's no concerns by either party -- without
4 minimizing the importance of it, of course -- we'll work
5 with you on whatever is necessary to do that.

6 MR. FLOWERS: Thank you, Your Honor. Agenda Item
7 No. 3 are matters subject to ongoing conferral. The first
8 one is Defendants' response to master complaints, which
9 we've talked about and continue to talk about.

10 Similarly, (b) is Defendants' fact sheets. We
11 have talked about this, and are proposing something similar
12 to New Jersey. We'll continue to talk about that and
13 hopefully have that issue, as well as (a), set for either
14 briefing or entry of an order here before the next status
15 conference.

16 THE HONORABLE JUDGE FRANK: All right.

17 MR. FLOWERS: And then C concerns alternative
18 dispute resolution, Your Honor. We've had preliminary
19 conversations about that, and we're going to sit down and
20 have a long conversation about that whole potential process.
21 At the same time, however, we're going to continue to plow
22 ahead obviously with the case, with the discovery, with the
23 litigation, itself. But maybe we can see if there is a
24 possibility to go through some sort of ADR on some cases.
25 However, we want to make sure it's very structured from both

1 sides so that it's efficient and actually accomplishes its
2 intended purposes. That is why we're going to sit down and
3 really refine how to potentially do this.

4 MS. WOODWARD: And Your Honor, Defendants feel
5 that it makes sense for the parties to sit down and discuss
6 implementing a mediation program similar to what's in
7 New Jersey. But, I think, as Mr. Flowers stated, we will --
8 there will be some differences, most likely, to accommodate
9 for this litigation in the MDL. The New Jersey mediation
10 program, from our perspective, has been very successful.
11 They settled another case yesterday. They're moving on to
12 identifying ten more cases for mediation from what they call
13 the general pool of cases that are eligible to be mediated.
14 And then five additional cases that will be mediated
15 involving Plaintiffs who are over the age of 80.

16 THE HONORABLE JUDGE FRANK: Now, are these
17 cases -- and I'll repeat a couple of things in a moment that
18 I said back in chambers. Are these cases being -- and this
19 came up at a prior status conference. Are they being
20 randomly selected, or are they kind of trying to pick
21 representative cases, you know, with an eye towards the
22 bellwether system, if you know?

23 MS. WOODWARD: Well, I think the way they set it
24 up was a general pool of cases was created. Plaintiffs had
25 an option to go in, put their cases into this general pool.

1 From that general pool, the Judge chose some at random, and
2 then each side chose some cases to participate.

3 I'm sure, as the sides chose their cases, they had
4 certain parameters in mind. I don't know that they have,
5 however, gotten into the details about, you know, buckets of
6 injuries and that sort of thing, which is what I think Mr.
7 Flowers and I want to sit down and talk about.

8 MR. FLOWERS: Agreed.

9 THE HONORABLE JUDGE FRANK: The other question on
10 that, and then I'll just repeat a couple of things I said in
11 chambers about that. Are the terms of the settlement and
12 the very specific details -- not only the settlement, but
13 the characteristics of the plaintiff and the merits of the
14 case, are they then disclosed to everyone?

15 MS. WOODWARD: No, Your Honor. The terms of the
16 settlement have been held confidential.

17 THE HONORABLE JUDGE FRANK: Because that's,
18 like -- as I said in chambers, there's all sorts of
19 different techniques, but apart from New Jersey, one of the
20 -- even though I'm a -- I've said before in these hearings,
21 that apart from settlement issues, I'm going to be a poster
22 child for the bellwether system.

23 But the key to that, and I would suggest the key
24 to kind of settlements that are meaningful, and there is
25 more than one way to do these things, we discussed this in

1 chambers. On the one hand, the criticism of the bellwether
2 system is, well, if one side picks their best case or the
3 other side the weakest case, and then they get settled or
4 tried, the majority of the people look at it and say: Well,
5 that case -- and it's public -- that case bears no
6 resemblance to mine, so my case is worth a lot more than
7 that or less. So picking truly representative cases becomes
8 so crucial; and again, emphasizing that one size doesn't fit
9 all. There are many useful ways to customize, whether it's
10 the case management plan, which to the credit of the
11 attorneys here, I know you've been discussing that, so we
12 understand that.

13 And consistent with my responsibility to structure
14 a case management plan with trial dates and bellwether cases
15 in back, at the same time discuss where settlement or ADR
16 fits into that in our District. Of course, as I've
17 mentioned, in the past we've had one of our Magistrates; in
18 this case, it would be Magistrate Judge Noel. And then, of
19 course, in the *Guidant* case, the parties could agree on one
20 additional person, and that was Pat Juneau out of New
21 Orleans.

22 And I'll just use *Guidant* as an example. They
23 picked five categories of recovery. And there was some
24 discussion about, well -- and there was five bellwether
25 trials set. And I think I've said before, some of the

1 parties said: We need some decisions. So, I think I
2 decided eight or nine or ten summary judgment motions, maybe
3 15 *Daubert* motions and some other issues.

4 I don't -- frankly, I'd have to retrace the
5 steps -- I don't claim those were crucial to these five
6 categories of settlement, but there were five categories
7 with numbers associated. Like examples would be explant
8 with complications, explant without, no explant, and we had
9 five categories. And, amazingly, as a number of lawyers
10 know, out of a couple thousand cases, all cases settled
11 because they could all see the range of recovery. And even
12 though there were rights of an appeal, to me, I think I
13 heard one or two.

14 And so there's more than one way, but whatever we
15 can do, because -- I won't say this more than once today,
16 hopefully, but obviously one of the ongoing criticisms of
17 the MDL process is it's very costly. And so, as the saying
18 goes, if the Judge can't help all parties realize the
19 economies of scale and spend less money and move the case
20 along without compromising your rights, there is no other
21 justification for an MDL. So, whatever we can do to assist
22 in that. I know both Magistrate Judge Noel had some
23 questions when he was on the phone back in chambers this
24 morning and we had, I think, a very useful discussion. And
25 I do appreciate the high level of communication going on

1 between all parties.

2 And maybe more than enough said by me. I don't
3 know if either one of you want to say anything further on
4 that because I think we're all kind of on the same page on
5 moving along both with a case management order in the near
6 future, and to discuss where in there a mediation or ADR
7 process would fit and what decisions need to be made or what
8 discoveries are needed, if any, to make that meaningful.
9 So, probably enough said by me, so...

10 MR. FLOWERS: That's all from our perspective,
11 Your Honor.

12 THE HONORABLE JUDGE FRANK: We can move on.

13 MR. FLOWERS: Sure, Your Honor. So moving on to
14 (d), which is ESI and (e) which is discovery, since they
15 kind of run hand-in-hand. We had a productive ESI meeting
16 in New York in December where some of us were in person, for
17 instance Mr. Gordon was there, and some of us were on the
18 phone. And we worked out a lot of the issues, a lot of key
19 issues.

20 Obviously, there are a lot of ongoing issues. We
21 have another meeting scheduled today right after court where
22 we're going to sit down probably for several hours and go
23 through some of the issues.

24 In terms of discovery, documents have been turned
25 over to us, the same documents that were turned over in

1 New Jersey. In going through those documents, or beginning
2 to go through those documents, one issue that we're going to
3 discuss today is a lot of the documents are in French. And
4 some may be in German, as well. And we're going to try and
5 work out some issue on that, because we're not sure if
6 they've been translated in English or not. But it's clearly
7 going to be -- potentially be an issue that we have to deal
8 with going forward.

9 THE HONORABLE JUDGE FRANK: You're not fluent in
10 French?

11 MR. FLOWERS: Mr. Gordon actually is.

12 THE HONORABLE JUDGE FRANK: Well, I guess.

13 MS. WOODWARD: Problem solved, right?

14 MR. FLOWERS: However, he only has 24 hours in a
15 day, so we figured it might be a little bit too much for
16 him. So that is an issue. We're also hoping to discuss the
17 beginning of how Stryker is going to roll out the remaining
18 discovery, including custodians and all of the stuff that
19 you would normally see in any litigation. But that's
20 something that hopefully we're going to have a discussion
21 today. This will undoubtedly be on every agenda and we'll
22 just slowly and surely move forward. Because, to me, the
23 key to having a successful litigation from everyone's
24 perspective is to get the discovery, move through the
25 discovery, so we can continue to push forward.

1 MS. WOODWARD: And Plaintiffs actually did serve
2 discovery on Tuesday, so I think that will help guide the
3 issues in the discussions in the coming weeks.

4 THE HONORABLE JUDGE FRANK: All right.

5 MR. FLOWERS: Then on (b), Your Honor, which
6 you've alluded to, we will submit to the Defendants a
7 proposed case management plan, full case management plan
8 early next week and we will meet and confer and talk about
9 it.

10 Our goal is if we cannot reach an agreement, we
11 will set it up for briefing prior to the next hearing so
12 that you can rule on it.

13 THE HONORABLE JUDGE FRANK: So, if some of the
14 other parties that are either present in the courtroom or
15 listening -- and you probably recall the understanding that
16 we have, and it just seems to have worked in other cases.
17 The lawyers understand, the parties understand they can
18 submit letter briefs, then, to hold down costs and extra
19 hearings absent some emergency, because then we promise to
20 be available, not just when we get together for these
21 conferences. That then we, with or without oral argument --
22 oftentimes with brief oral argument -- we will hear those
23 the day that we're here. So it would be the next
24 conference, if there are any issues. And that system has
25 usually served us well in the past.

1 So that's what we -- so when they refer to
2 briefing schedules, they understand that we've agreed that
3 those would come in in advance of the hearing consistent
4 with the existing orders. Then we'd hear those when you're
5 here in town, so to speak. So, all right?

6 MR. FLOWERS: The next issue on the agenda is (g)
7 which is tolling. We have agreed on -- the parties have
8 agreed on tolling for Stryker Ireland Corporation, which we
9 will submit an order to them on. We're also asking for
10 tolling on a French entity, given the production that we've
11 received thus far and potentially the issues. I believe
12 that's an issue that we're going to get a response on early
13 next week.

14 Similarly, we asked for previously and discussed
15 today, potentially tolling non-revised Stryker cases in
16 order to not clutter up the MDL system and the Court.
17 Obviously there is a concern always from the Plaintiffs'
18 perspective on not filing a case because of the statute of
19 limitation. But the flip side of it is if you're filing
20 cases where the person hasn't been revised yet, that can be
21 inefficient. So, our suggestion to the Defense was to toll
22 those cases. And I think they're taking it under
23 consideration.

24 MS. WOODWARD: Yes. This issue was raised as we
25 were putting together the Joint Report. And as Your Honor

1 recognizes there are lots of concerns around that issue.
2 So, it's going to take some careful thought.

3 THE HONORABLE JUDGE FRANK: Well, and as we
4 discussed in chambers, one of the observations -- and I
5 guess, frankly speaking, sometimes apart from this case,
6 criticisms of MDLs is well, the cases -- the very best cases
7 maybe don't recover what they should recover, and then
8 there's a lot of cases that wouldn't be free-standing cases
9 that kind of get grouped in.

10 Well, that's in part where tolling comes in,
11 because on the one hand, the added expense and everybody's
12 saying: Well, the two-year statute is up or the three or
13 the four. So in comes a bunch of cases, so there are pros
14 and cons to both that and the expense associated with it,
15 and the inventories versus some type of tolling agreement.
16 So, there are issues important to both of you, and I
17 understand that.

18 I guess that comes up in almost every one of these
19 cases. So, hopefully, with or without court decision, we'll
20 -- the important thing it's obviously something on your
21 radar. And I'm sure there are other people out there, as
22 you've mentioned a couple of examples in states with
23 two-year statutes where those are things being discussed
24 probably as we speak. So --

25 MR. FLOWERS: Right. Then, Your Honor, moving on

1 the disputed items, proposed PTO No. 12, which is the common
2 benefit proposed order. We have talked on that. We
3 circulated a newer version of it more recently. What's
4 clearly going to happen is we're going to need to
5 letter-brief it.

6 Ms. Woodward and I are going to come to some
7 agreement today on the letter briefing schedule, and we'll
8 file our briefs and wait for you to rule.

9 MS. WOODWARD: That's correct, Your Honor.

10 THE HONORABLE JUDGE FRANK: So hopefully we can
11 coordinate that, too, so maybe even at the next hearing.

12 Usually, again for those of you listening and some
13 of the folks in the courtroom, depending upon what the
14 schedule is, like on a day like today, then we in advance of
15 people arriving in town, everybody is given notice that goes
16 out on the website, in addition to notice of the parties.
17 We'll hear those arguments -- it would be late in the
18 morning, or depending on what's going on, right away in the
19 afternoon.

20 That will all be set up in advance, so that -- and
21 hopefully, the goal is for either a ruling off the bench or
22 a ruling within a couple of days so that we can move on. So
23 that has served us well in the past, kind of, that approach.
24 Because for some people -- and perhaps there are not many --
25 new to MDLs, they might look at our Local Rules and say:

1 Oh, no. They're looking at briefing these issues. Well,
2 there's 40 days for this if it's a dispositive motion.

3 Well, that does not work absent some extraordinary
4 circumstance, until we get to truly dispositive motions. So
5 we owe it to the parties to use this schedule. And as long
6 as there is not someone saying, We deserve input before you
7 drop the gavel or make a decision. So that will be up on
8 the site, as well, when that briefing is done. And then
9 we'll say here's -- when we're hearing it. And if at
10 possible, to respect all of your respective times, if we
11 know that the conference gets over, you know, mid-morning or
12 10:30-ish or whenever it is, then we usually will try to
13 hear those in the morning. So, all right?

14 MR. FLOWERS: Okay. And then similarly, 4(b),
15 which is proposed -- well, it's PTO No. 9, which already has
16 been entered, which is an interim protective order. There
17 were two issues -- and this is why it was interim. There
18 were two issues, one dealing with essentially the definition
19 of competitor and how that relates to Plaintiffs' selection
20 of experts.

21 Similarly, a secondary issue concerned contact by
22 either party with treating physicians. That similarly is
23 going to have to be briefed. We'll also agree upon a
24 briefing schedule to file simultaneous briefs today, because
25 I don't think either of those issues can be resolved between

1 the parties.

2 MS. WOODWARD: I'm not convinced we've concluded
3 our meet and confer efforts on that issue. So it is an
4 issue that does need to be decided, but I hope we can take
5 one more run at it later today.

6 THE HONORABLE JUDGE FRANK: Well, as I mentioned
7 in chambers, it's not, again, an issue unique to this case.
8 Not the exact same issues, although there were some related.
9 I'll just use again, not to overuse or over-reference the
10 *Guidant* case, because there are others as well, whether they
11 are freestanding or MDLs.

12 Similar issues came up with not just the nature of
13 contact with the treating physician, but then availability
14 of certain of those attending physicians or others as
15 witnesses and expert witnesses. And so I don't think we'll
16 have to reinvent the wheel. We'll just take into account
17 the concerns that each of you have, and then we'll get an
18 order in place that hopefully will be workable for everyone
19 and your clients. So...

20 MR. FLOWERS: We will work on it this afternoon.
21 If we can't reach on an agreement, Your Honor, we'll agree
22 on a briefing schedule so that it's decided before the next
23 hearing.

24 THE HONORABLE JUDGE FRANK: Certainly.

25 MR. FLOWERS: The next agenda item here is other

1 issues, which I can't think of any other issues.

2 MS. WOODWARD: Nor can I.

3 THE HONORABLE JUDGE FRANK: Well, and I'm just
4 going to send back a note, because I promised to pass out a
5 schedule and announce a couple of changes in the schedule.
6 So, I'll just -- and they were going to bring me -- unless
7 you want to poll the group and see if there's any other
8 issues that want to come before the Court today?

9 MR. FLOWERS: Not from our perspective,
10 Your Honor.

11 THE HONORABLE JUDGE FRANK: Do you want a -- when
12 you say you're going to be meeting, do you want a conference
13 here to be provided to you?

14 MR. FLOWERS: Mr. Griffin has been nice enough to
15 buy us lunch today, so --

16 MS. WOODWARD: No. Mr. Gordon is buying lunch.
17 Mr. Griffin is -- no teasing.

18 MR. GORDON: Two tacos.

19 MR. FLOWERS: So, we will take them up. We're
20 planning to do it back in Minneapolis at one of the offices.
21 But, thank you.

22 THE HONORABLE JUDGE FRANK: Not the other city,
23 St. Paul?

24 As we speak, Brenda's coming down the hallway with
25 the schedule. So, I'll put a couple of things on the record

1 even though we'll put those up on the website, as well. But
2 I'll have a sheet to pass out that will be consistent with
3 what we discussed, obviously. Because what we discussed in
4 chambers was that if unless, essentially, everyone on the
5 respective Lead Counsel Committees for each side could not
6 be here, if we're going to make a couple of changes, frankly
7 speaking because of my trial schedule, then we would have to
8 go to Plan B.

9 So I'll go over those just very briefly in a
10 moment and give you hard copies. But, we'll put this up on
11 the website. It's just two or three changes to the
12 prospective dates. Most everything stays the same. So
13 we'll do that just shortly if she brings them down.

14 Anything else for the Plaintiff other than me
15 going through that, briefly, or defense?

16 MS. WOODWARD: No, Your Honors.

17 MR. FLOWERS: No, Your Honors.

18 THE HONORABLE JUDGE FRANK: Can I just have one?
19 And then I'll just put a couple of things on the record here
20 and you can just take those back there to everyone.

21 (Discussion off the record.)

22 As Brenda passes those out, I'll just indicate for
23 the record, all the dates remain the same as we've had this
24 model. And so, for example, it'll be same time and place.
25 February 20th remains the same, March 20th remains the same.

1 We will have no status conference in April for two reasons.
2 Well, actually -- well, probably three reasons. It doesn't
3 really matter.

4 The primary reason is, any date that would work
5 for me because of a trial I'll be in wouldn't work for a
6 fair number of attorneys involved here. So, there will be
7 no status conference in April, with my promise to make
8 myself available, as well as Magistrate Judge Noel. If
9 there is some issue that needs to be decided. We won't say,
10 See you in May. Then here come the changes, in addition
11 to -- and there are just two -- in addition to no status
12 conference in April. In part we're doing -- we felt
13 justified in doing that because we're moving up the date in
14 May, which is again, because of my trial schedule. From May
15 15th, we're going to go on May Basket Day -- but that
16 doesn't mean we have to exchange May baskets -- on May 1st
17 of 2014. So it will be May 1st. And then in June, we're
18 moving from June 19th to June 12th of 2014.

19 And I'm hoping, both Plaintiff and Defense
20 counsel, does that square with kind of what we chatted back
21 there to make sure, as we hand this out? And all the other
22 dates, until otherwise noted, after June remain the same; no
23 changes.

24 Now, does that mean if something comes up, we
25 couldn't change it or cancel one or add an additional

1 hearing, depending upon what is needed from the Court? Of
2 course not. But, those are the changes, and we'll put those
3 up on the website today, as well.

4 And so, one thing: Did you want a conference room
5 here or you're going to go to -- you're going to head for
6 beautiful Downtown Minneapolis?

7 MR. FLOWERS: We are, Your Honor. Thank you.

8 THE HONORABLE JUDGE FRANK: Anything further on
9 behalf of the Plaintiffs at this time?

10 MR. FLOWERS: No, Your Honor.

11 THE HONORABLE JUDGE FRANK: Defendant?

12 MS. WOODWARD: No, Your Honor.

13 THE HONORABLE JUDGE FRANK: Well, my apologies for
14 the weather for those of you that -- unless there are some
15 hardcore folks that say: This is what we come to Minnesota
16 for. And if you would have been back in chambers, you would
17 have heard Magistrate Judge Noel say on the phone: Well,
18 don't be too negative about the temperature because
19 sometimes we use that as a settlement tool, because people
20 don't much like it.

21 But, thank you everybody for being here today.
22 And I do want to note before we adjourn that I do appreciate
23 -- I don't think anybody has pulled the wool down over my
24 eyes. So I believe that all the appearances are, and maybe
25 contrary to the stereotype some of the nonlawyer public has

