

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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) February 20, 2014
) 9:28 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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P R O C E E D I N G S**I N O P E N C O U R T**

1
2
3 THE HONORABLE JUDGE DONOVAN FRANK: I can probably
4 check with the Marshal so that if you have flights cancelled
5 and want to see if we can get you a sleeping bag or
6 something, with the weather the way it is, who knows what it
7 is going to be and what, if any, effect it will have for
8 those of you that have got flights in and out.

9 So, I will -- I think this is the second or third
10 time it has happened. For those of you who have been
11 waiting, if anyone is to blame, it would be me for the late
12 start.

13 I don't claim I was forced by the lawyers to carry
14 over our conference in chambers, which we completed a few
15 minutes ago; that is my responsibility. So, with that, why
16 don't we have counsel -- we will start with Plaintiffs.
17 Note your presence for the record and go over to Defense
18 counsel, so the record is clear on who is present.

19 MS. ZIMMERMAN: Good morning, Your Honor,
20 Genevieve Zimmerman for the Plaintiffs.

21 MR. FLOWERS: Good morning, Your Honor, Pete
22 Flowers for the Plaintiffs.

23 MR. KENNEDY: Good morning, Eric Kennedy for
24 Plaintiffs.

25 MR. DeGARIS: Good morning, Your Honor. Annesley

1 DeGaris for the Plaintiffs.

2 MR. NEMO: Good morning, Your Honor, Tony Nemo for
3 the Plaintiffs.

4 MS. HAZAM: Good morning, Your Honor. Lexi Hazam
5 for the Plaintiffs on behalf of Wendy Fleishman.

6 MR. GORDON: Good morning, Your Honor, Ben Gordon
7 for Plaintiffs.

8 THE HONORABLE JUDGE DONOVAN FRANK: And for
9 Defense counsel?

10 MS. WOODWARD: Good morning, Your Honor, Karen
11 Woodward for the Defendants.

12 MR. GRIFFIN: Good morning, Your Honors, Tim
13 Griffin for the Defendant.

14 THE HONORABLE JUDGE DONOVAN FRANK: I will
15 acknowledge in a perfect world, even though we are supposed
16 to have a sophisticated electronic and telephone system, but
17 the way the conference system works, as long as we both --
18 we are all careful to speak into the microphone, I believe
19 everyone on the phone can hear us. At least they could as
20 of a bit ago. They had some issues, but they can't
21 participate by phone. We may reach a time when we will have
22 to change that and do something about that.

23 And just so the lawyers on the phone don't think
24 they are being discriminated against, unfortunately, we
25 can't even find an exception, electronically, at least at

1 this stage, for Judge Noel, either. So, he will listen in.
2 And with that, we will have an agenda here and I am sure
3 lawyers won't be bashful about discussing some of the key
4 issues that we focused on during the status conference.

5 And I will indicate before we begin a couple of
6 things. And it might come up directly or indirectly during
7 the course of going through the agenda. One, I sent a
8 similar letter I had sent before to -- once I was informed
9 of any additional cases and State Judges around the country,
10 and more importantly, I had, as I told the lawyers in
11 chambers this morning, extensive contact with the Judge
12 leading all of the New Jersey litigation. He and I had an
13 extensive discussion this week about reaching out to one
14 another, without compromising the rights of either side of
15 the aisle to try to increase communication and coordination
16 between the Courts.

17 So, with that, we can, absent an agreement that
18 counsel had -- we didn't really discuss other than we will
19 probably proceed as we have in other prior status
20 conferences, we can start with Plaintiff and go down the
21 agenda. Unless you said: Well, the Defense is going to
22 step in first and explain some of this. So, maybe both of
23 you can come up as you did before.

24 MR. FLOWERS: Sounds good, Your Honor.

25 MS. WOODWARD: Thank you, Your Honors. So, as to

1 item 1A on the agenda, the report on filing, we submitted
2 those numbers with our Joint Status Conference Report, as
3 well as a map, and a breakdown by Plaintiffs' counsel.

4 I do have some updated numbers for the Court. Our
5 records show that cases that are either in the MDL or on
6 their way total 597.

7 Cases in New Jersey State Court and that have been
8 served, that number is actually 699. And in the Status
9 Report we actually reported the number of cases that were
10 filed, and that number is a bit higher at 773.

11 THE HONORABLE JUDGE DONOVAN FRANK: Right, okay.

12 MS. WOODWARD: For other State Court cases, we
13 have a total of 84 right now. California has 2; Florida,
14 56; Illinois, 2; Massachusetts, 2; Michigan, 14; Ohio, 1;
15 Oregon, 7; Pennsylvania, 1; and West Virginia, 1. Our total
16 is 1,381 cases in all.

17 THE HONORABLE JUDGE DONOVAN FRANK: And I think I
18 said at the last hearing, I had reached out to, in addition
19 to the letters, I had made a phone call to Florida and just
20 emphasized that we will -- although it is just not one Judge
21 who has all of the cases down there, but that we would -- we
22 strive to coordinate and work with them, as well.

23 So, we will keep those lines of communication
24 open, as well. So --

25 MS. WOODWARD: Thank you, Your Honor.

1 MR. FLOWERS: The second agenda item, Your Honor,
2 is just the report on judicial contacts which you had
3 started to talk about.

4 THE HONORABLE JUDGE DONOVAN FRANK: Right. And I
5 think that the key -- but obviously, it is obvious why I
6 would be discussing New Jersey with the number of cases they
7 have and when they started, but the Judge and I had an
8 extensive -- I always mispronounce his name. I did when I
9 called. It's --

10 MS. WOODWARD: Martinotti.

11 MR. FLOWERS: Martinotti.

12 THE HONORABLE JUDGE DONOVAN FRANK: Yeah, and I
13 think the reason I do is I used to know someone up north who
14 was Martinetti. And that is different, and a different
15 spelling. But, he and I had a very extensive and cordial
16 discussion. And I will reserve some of those remarks as we
17 go down to a couple of the items we discussed in chambers a
18 few minutes ago.

19 But, I will just reemphasize that we had an
20 extensive discussion and promised to stay in contact with
21 each other, and with an emphasis on coordinating our efforts
22 to the extent that we can do that, and both of us can carry
23 out our responsibilities. And I will touch more on that
24 when we get to a couple of items, both mediation issues and
25 discovery, just to name two. So, I thought it was a very

1 good conversation.

2 And I said to him: Well, I am going to be telling
3 everyone today that we are working together and may even be
4 getting together. And we will talk more about that as we
5 did in chambers when we get to a couple of those issues.

6 And so, obviously, I don't think that should come
7 as a surprise, because I think that is the obligation,
8 especially for an MDL Judge, to reach out and work with the
9 respective State cases, as long as one doesn't adversely
10 affect the other.

11 So, with that, we can move on, unless one of you
12 had something to say about any -- and I will reserve
13 comments about discovery and mediation issues as it relates
14 to New Jersey until we get to a couple of those issues.

15 MS. WOODWARD: No, Your Honor, I can go ahead and
16 report on items 1C and D on the agenda.

17 1C, a brief report on the New Jersey litigation.
18 We continue to work out a document production schedule there
19 and have committed to the production of four custodial files
20 and two shared drives over the next, I believe, six weeks or
21 so. And they have continued to have incredible success with
22 their mediation program in New Jersey. I believe that they
23 have settled nine out of ten cases.

24 Everyone, including I believe Judge Martinotti,
25 feels very good about that program. And within the next

1 month to six weeks, they will be starting phase two of that
2 program, is my understanding, which will involve the
3 mediation of more matters.

4 THE HONORABLE JUDGE DONOVAN FRANK: And maybe this
5 is a time where I can indicate -- and then if one or both of
6 you want to supplement or say something now or later, that
7 is fine.

8 As I said in chambers, Magistrate Judge Noel, and
9 as some of you are probably aware -- and if you need to take
10 off for your flight to Alabama, I wish I had the authority
11 to call out there. I have done it in one immigration case
12 in my career, when I called to an airport and stopped a
13 plane. But, I don't think an airline would listen to me --

14 MR. DeGARIS: If you could call TSA and kind of
15 tell them to push me on through? And if not, if you would
16 save me a sleeping blanket and a warm place in your house
17 for this evening?

18 THE HONORABLE JUDGE DONOVAN FRANK: I will save
19 the blanket and -- all right, I can do that.

20 MR. DeGARIS: Thank you, Your Honor.

21 THE HONORABLE JUDGE DONOVAN FRANK: You take care.

22 Anyway, what I mentioned in chambers, first of
23 all, before I get to that, as most lawyers in the room
24 probably are aware, in our District, separate from MDLs
25 Magistrate Judges, one of their key functions is

1 participating in settlement discussions and mediation.

2 And just to use, by one example, not that one size
3 fits all, the *Guidant* defibrillator pacemaker cases I had,
4 Art Boylan, now retired Magistrate Judge Boylan, worked --
5 and then the parties agreed to use him, and then they picked
6 a second mediator for the couple thousand cases, a Pat
7 Juneau from New Orleans. It really couldn't have worked out
8 better than it did.

9 Why do I say that? Well, when I called and I
10 talked to New Jersey this week, we agreed that whether
11 Magistrate Judge Noel flies out or goes there, he will be
12 meeting with the mediators in New Jersey to say: Let's get
13 a lay of the land and discuss -- and then both the Judge and
14 I will discuss also whether it is realistic to coordinate
15 things, whether it is using some of their mediators, adding
16 our own, that will be up, in large part, to the parties, and
17 where we are at, what decisions need to be made. And I will
18 reserve a couple of these comments until we get to the
19 discovery issue that perhaps one or both parties want on the
20 record and where we are headed.

21 But, between now and then, we will be getting
22 together with the New Jersey Court, and that means
23 Magistrate Judge Noel with the mediators. So, like I did
24 say to the Judge -- so I wanted to make sure I have your
25 permission to announce in the courtroom, we are going to be

1 getting together and see where everybody is at and see if we
2 can, whether it is realistic or not, to have a global
3 approach to settlement discussions, and what discovery is
4 needed, what issues are needed to be decided, whether here
5 or there. So, this is repeat for the lawyers that were back
6 there. But, I view it as a very positive exchange that we
7 had. So that we will be going forward between now and
8 before the next status conference with that in mind. I
9 interrupted counsel, so --

10 MS. WOODWARD: Thank you, Your Honor. With regard
11 to other State Court litigation, I do want to report that
12 Florida has become very active. There have been discussions
13 between the parties about initial case management orders,
14 and putting those initial documents that are necessary to
15 every coordinated proceeding in place; but, there has also
16 been the service of discovery. And so to the extent that
17 there are efforts for coordination, we would ask that Your
18 Honor pull Florida into that discussion.

19 THE HONORABLE JUDGE DONOVAN FRANK: And I would
20 hope -- and I will be glad to do that. And I will maybe
21 reach out in the next week or so, again, to them by more
22 than just a letter with phone call; but, I would hope that
23 whether it is coming from both parties, or one or the other,
24 as long as the other knows you are contacting me, that if
25 one or both of you are concerned that: Well, can you

1 emphasize or reemphasize that we want to work with and
2 coordinate, not just to avoid duplication of other issues,
3 and whether it is a particular judge or state, I will be
4 glad to do that, because I think that really is the
5 responsibility of the MDL Judge to do just that. So, I will
6 be glad to do that.

7 Because, I mean, let's just say what some people
8 are thinking. Sometimes State Judges think, well, some
9 federale is going to come along and say, you are going to do
10 what we say. And I didn't take kindly to that when I was a
11 State Judge, but that is not the way we work these MDLs. We
12 work mutually together to the extent we can carry out our
13 roles that way. So, I will be glad to do that. Because
14 frankly, sometimes, that is a criticism by lawyers: Well,
15 we need more coordination between these to hold down costs,
16 to move things along, to avoid duplication. So, we will do
17 our best to do that.

18 MS. WOODWARD: Thank you, Your Honor. I
19 appreciate that. And I do want to report, also, that a
20 petition for coordination -- this would be state-wide
21 coordination -- has been filed in Michigan. And we will
22 keep Your Honor updated on the status of that.

23 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Flowers,
24 did you want to say anything about that?

25 MR. FLOWERS: Not at this point, Your Honor.

1 THE HONORABLE JUDGE DONOVAN FRANK: All right.

2 MR. FLOWERS: It summarizes it well. I will move
3 on to item 2.

4 MS. WOODWARD: At this point I am going to turn
5 the podium over to Mr. Griffin.

6 THE HONORABLE JUDGE DONOVAN FRANK: Okay, fair
7 enough.

8 MR. FLOWERS: On item two, Your Honor, the A is
9 "Service of Complaints." The issue here is that many cases
10 were filed initially with naming only two of the Defendant
11 entities, two or one entity.

12 When we filed the Master Long Form and Short Form
13 Complaint, it added several additional entities. Our hope
14 is that Stryker will agree to accept service on behalf of
15 those other entities, since they are related. We have
16 talked about that. We are going to try and provide them
17 with a list of cases that have this issue associated with it
18 and hope that they would agree to that. That is where we
19 are on that from the Plaintiffs' perspective.

20 MR. GRIFFIN: Nothing to add, Your Honor.

21 THE HONORABLE JUDGE DONOVAN FRANK: Well, and I
22 would just very briefly state that if that remains an issue,
23 because some of the lawyers who are here that weren't in the
24 status conference won't know what I am talking about. But,
25 they will before I am done, here.

1 Then I would assume if that remains an issue, that
2 would be one of those things teed up for us when you get
3 together with Magistrate Judge Noel on the other issues we
4 will talk about before we are done here this morning. So,
5 and hopefully, that will get resolved.

6 We can move on, then.

7 MR. FLOWERS: The next issue is discovery. Under
8 I, the first one is "Plaintiffs' Preliminary Disclosures and
9 Fact Sheets." Mr. Nemo, who is our liaison, keeps
10 incredible track of this, and actually last night calculated
11 that the compliance rate is over 90 percent. It is 91
12 point --

13 MR. NEMO: 2.

14 MR. FLOWERS: 2. People have complied with this.
15 And we are happy to provide -- the Defendant has different
16 numbers, but I can tell you that Mr. Nemo is very good at
17 what he does. And we are certain, or close to certain, that
18 those numbers are completely accurate. And we feel that
19 that is essentially in very good compliance with this, given
20 the number of cases that we are talking about.

21 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Griffin,
22 are your numbers not in that neighborhood?

23 MR. GRIFFIN: Our numbers are now.

24 THE HONORABLE JUDGE DONOVAN FRANK: Okay.

25 MR. GRIFFIN: As the parties were preparing the

1 report, they were different. So, we are happy with the
2 progress we are making. And from the Defendants'
3 perspective, we are looking forward to receiving the
4 Plaintiffs' Fact Sheets.

5 MR. FLOWERS: Your Honor, so B2 and B3 are ESI and
6 Plaintiffs' Discovery Requests.

7 MR. GRIFFIN: Can we back up one second?

8 MR. FLOWERS: Sure.

9 MR. GRIFFIN: In the Joint Report we discussed a
10 pretrial order dealing with electronic service of
11 disclosures and facts sheets. We recently received the
12 Plaintiffs' edits to a draft order to address some HIPAA
13 concern. And we are happy to notify the Court that that is
14 acceptable and the parties will be submitting that order
15 hopefully today or tomorrow.

16 THE HONORABLE JUDGE DONOVAN FRANK: All right.

17 MR. FLOWERS: Thank you. ESI and Plaintiffs'
18 Discovery Requests, I guess I was so excited to get to this
19 topic that I skipped over that.

20 Plaintiffs are, to say the least, very frustrated
21 with where we are in discovery. We believe that at the
22 current pace of production, this case is going to go on for
23 years.

24 No custodians have been produced thus far. There
25 is a time frame to produce four custodians in the next,

1 about sixty days, so that gets us almost until May.

2 The Defendant identified in the fall 26
3 individuals who may, quote, "be materially relevant to this
4 litigation." Given the size of this company, we expect
5 there is going to be a lot more people. And given the fact
6 that we have reviewed 80,000 documents, we have already
7 identified additional people. If the pace of the production
8 does not pick up, this litigation will literally go on
9 forever.

10 Additionally, on the document production, 80,000
11 pages or documents have been produced. Now, in a vacuum
12 that sounds like a lot. But, in hip litigation, that is
13 nothing. Normally you see potentially 15 to 20 million
14 documents produced. So, once again, at this pace, this
15 litigation will go on forever.

16 Additionally, this product was recalled in the
17 summer of 2012. A litigation hold was put on these
18 documents before then. There is no reason why these
19 documents haven't been either collected and reviewed, or at
20 least collected and partially reviewed.

21 We have been trying to get answers to how many
22 documents of the 26 custodians have been collected and
23 reviewed, and when will those be produced. The Defendants
24 have told us that they hope those will be produced by
25 October, which is eight months away, which we believe is

1 unreasonable. We also have numerous questions as to issues,
2 such as, there are many documents that are in French and
3 there are some documents that are in German. We have asked
4 for what is the volume of those documents.

5 The issue with that from our perspective is we
6 need to know approximately the volume in order to know
7 approximately the cost of translation for that. And then
8 try to figure out if there is a solution to it.

9 They have given us very general numbers, but we
10 have asked for specific ones, which they clearly would have
11 since they have collected these documents. Those are the
12 main issues. But, the pace of this discovery and their
13 unwillingness to engage us, individually, in what custodians
14 are going to be produced when is a huge frustration and
15 concern for us in order to proceed forward with the
16 litigation.

17 We are wholeheartedly in agreement that ADR is
18 always a good idea; that ADR is a good idea when you run it
19 with a parallel path of litigation. And we need to do this
20 litigation.

21 I can tell you, I am one of the individuals that
22 tried one of the ASR cases. And everyone said *DePuy* was
23 admitting liability. Well, *DePuy* didn't admit liability in
24 my case. And it went to verdict, and it was a not guilty.
25 And I will stand up here and happily say that. So, unless

1 the Defendant is in a position to say: We are admitting
2 responsibility that this product was defective, both from a
3 strict products perspective and a negligence perspective, we
4 need to proceed forward with that discovery. And right now,
5 we are nowhere with that discovery. So, that is our general
6 report and our general frustration.

7 THE HONORABLE JUDGE DONOVAN FRANK: And before I
8 hear from Mr. Griffin, I will just indicate for those of you
9 that weren't in the status conference, that we had an
10 extensive discussion about this in chambers; but, thought it
11 was appropriate that we make sure the record gets clear here
12 this morning. So, with that in mind, I will go to Mr.
13 Griffin.

14 MR. GRIFFIN: Thank you, Your Honor. And as the
15 Court mentioned, Ms. Woodward did a very nice job of laying
16 out the Defendants' perspective in chambers, and so I am
17 going to try and meet that.

18 We fundamentally disagree with the Plaintiffs'
19 discussion of what has occurred in this case. As we
20 discussed in chambers, the New Jersey litigation and the
21 discovery that was served back in May was extensive.
22 Thousands upon thousands of interrogatories, hundreds upon
23 hundreds of document requests.

24 The parties in that litigation met and conferred
25 and prioritized the information that was important to the

1 Plaintiffs. There were 38 categories of core documents that
2 the parties prioritized. Those documents were collected and
3 produced on a rolling basis. That was completed at the end
4 of 2013. Documents such as design documents, regulatory
5 documents, all of the documents that a plaintiff would need
6 to pursue their claim.

7 Part of that production included the corporate
8 organizational charts. HOC then identified the individuals
9 on the corporate organizational charts that were
10 meaningfully involved in the two products at issue. The
11 parties then met and conferred to discuss a rollout of
12 custodial files, and importantly, shared drives. Incredibly
13 large numbers of documents are kept on shared drives.

14 And so, to suggest that the rollout schedule
15 simply involves 26 individuals is not accurate. It involves
16 those individuals, and it includes a number of shared
17 drives.

18 With regard to the core documents, approximately
19 30 plus bankers boxes of documents have been produced in New
20 Jersey and have been produced to the Plaintiffs in this
21 litigation, the corporate organizational charts have been
22 produced. And we have identified the custodians for the
23 Plaintiffs in this case.

24 The Court may recall back in November in, I
25 believe it was, Pretrial Order No. 6, the parties reached an

1 agreement and the Court entered an Order that said the
2 Defendants will produce the discovery that is produced in
3 the New Jersey litigation to the Plaintiffs in this case.
4 In exchange, the Plaintiffs will coordinate their efforts
5 with the New Jersey Plaintiffs.

6 We do not believe adequate attempts to coordinate
7 with New Jersey have been completed or done by the
8 Plaintiffs. And we look forward to coordination so that we
9 are not in a position of influencing the New Jersey
10 litigation in a way that upsets the progress that they have
11 made, while advancing the litigation in this venue.

12 I think that summarizes our perspective. And I
13 think that the parties will benefit from the Court's help in
14 coordinating efforts not only with New Jersey, but across
15 the other State Court jurisdictions.

16 THE HONORABLE JUDGE DONOVAN FRANK: Mr. Flowers?

17 MR. FLOWERS: Your Honor, just so the record is
18 clear, we have never been produced 38 categories of
19 documents. We have been produced approximately 10
20 categories of documents. So, if there are 28 out there that
21 I am not aware of, we would ask for their production
22 immediately.

23 Number two is, we have asked Stryker to directly
24 involve us in conversations as to how and when they are
25 going to rollout custodians, and they have refused to do so.

1 They have not allowed us any conversation as of this date in
2 terms of who they intended to roll out, and when. And once
3 again, that is something we are asking for. We are looking
4 forward to the Court's involvement in this so that we can
5 actually move the litigation along.

6 THE HONORABLE JUDGE DONOVAN FRANK: Can you move
7 your -- we have got just a note that some of the people on
8 the phone are having a hard time listening. And these
9 aren't very fancy microphones. We have had this issue in
10 the past. So, I guess I have to practice what I preach
11 here, too. I will speak better into the microphone, as
12 well, so hopefully everyone on the phone can listen.

13 Not to interrupt counsel, and this relates not
14 just to this issue you just discussed, but a couple of
15 others that are going to come up. As the attorneys who were
16 in chambers know, what is going to happen because of some of
17 these disagreements and approach with both respect to
18 discovery and, well, what are the issues, or what discovery
19 is needed before we can have meaningful discussions with
20 respect to mediation or settlement, if there are these
21 disagreements, whether it is discovery or some other issue,
22 as the lawyers know, they will be getting a communication
23 from, at a minimum, Magistrate Judge Noel. It could be both
24 of us. And he will be getting together with the -- on, at a
25 minimum, on the discovery issues, and then discuss what is

1 needed that you need and you don't have.

2 So, we are going to set up a letter brief system
3 and a get-together, and a reach out before the next
4 get-together so everybody will know.

5 MR. GRIFFIN: May I respond just to two points?

6 THE HONORABLE JUDGE DONOVAN FRANK: Yes.

7 MR. GRIFFIN: All documents that have been
8 produced in New Jersey have been produced in the MDL, prior
9 to any requests by the Plaintiffs in the MDL. Whether those
10 categories are 38 or 10, we can argue about how to describe
11 them; but, all documents have been produced.

12 The second point is the suggestion that we have
13 somehow excluded the Plaintiffs from New Jersey. That is
14 not accurate. We have repeatedly encouraged the Plaintiffs
15 in the MDL to coordinate with the Plaintiffs in New Jersey.

16 MR. FLOWERS: My last response, Your Honor,
17 otherwise we will go back and forth forever, is the last
18 time I looked, Stryker has the documents. And when we --
19 when normal litigations I am involved in, when I ask for
20 documents, we try and reach some agreement. They don't
21 point me to the direction of another litigation and say:
22 That is what is going on. That is how we are going to
23 produce those documents.

24 I am just looking for normal engagement in any
25 lawsuit of how discovery works. We sit down and serve them

1 with interrogatories, which we served focused
2 interrogatories. They asked us to do that. We did that on
3 the things that we believed were important.

4 We just simply said we are going to include these
5 other interrogatories, as well. But, focused
6 interrogatories, to which they said they can't answer. They
7 have asked for extensions, we have given them; but, they
8 can't give us a date in terms of when they are going to
9 answer them. These are all fundamentally simple things that
10 usually in a litigation happen. So, we look forward to you
11 and Judge Noel being involved in the discovery aspects.

12 MR. GRIFFIN: The focused interrogatories were
13 served on January 21st and number in the thousands. The
14 discovery requests for documents were served on January
15 21st, 2014, and number in the hundreds.

16 They are in large part duplicative of the New
17 Jersey discovery served in May of 2013. The discovery that
18 the Plaintiffs agreed that they would not duplicate, as
19 memorialized in Pretrial Order No. 6. So, the notion and
20 the demand that we respond to those discovery requests
21 within 30 days, which was the Plaintiffs' original position,
22 is unreasonable. We are looking forward, and we believe we
23 have made significant progress today on coordinating the
24 response between the two jurisdictions.

25 MR. FLOWERS: Last point then, Your Honor. If

1 they think that the discovery requests are duplicative, then
2 please tell us. They won't even tell us whether there is a
3 problem with the requests. All I am asking for is some
4 involvement.

5 They keep talking about being reasonable in
6 discovery, we agree. But, it always comes down to what is
7 the definition of reasonable. And right now they are
8 providing no definition.

9 THE HONORABLE JUDGE DONOVAN FRANK: And again, for
10 the benefit -- this is somehow repetitive by me, but for the
11 benefit of those of you here that were not in the status
12 conference, including those of you on the phone, there was
13 some very extensive discussion and back and forth so that
14 both parties I think had a fair opportunity to say here are
15 the clearcut issues we do not agree on; and that in part, we
16 will be communicating and getting together between now and
17 then. And obviously, with or without agreement, either by
18 agreement or court decision, we will address these issues
19 soon.

20 And so, as we left the chambers, the lawyers all
21 knew we would be communicating and requesting letter briefs
22 on these issues and getting together before the next
23 get-together. So, we can either with partial agreement, no
24 agreement, complete agreement, we will get an order in
25 place. So, we can move on, then?

1 MR. FLOWERS: Yes, Your Honor.

2 THE HONORABLE JUDGE DONOVAN FRANK: And by the
3 way, just to repeat what Magistrate Judge Noel and I said
4 back there, nothing that we are saying today should be
5 implied to discourage communication and coordination. There
6 is no stay in place or anything like that, because that
7 question was asked in chambers.

8 We will be getting together, but we don't want to
9 discourage that, either, even though it is clearcut that
10 there are some issues here that will probably need the
11 Court's attention soon. All right.

12 MR. FLOWERS: Your Honor, I think we probably
13 already exhausted the discussion on ADR, at least from our
14 perspective.

15 THE HONORABLE JUDGE DONOVAN FRANK: I think the
16 only thing I would add, and I touched on it before, is based
17 upon my discussions earlier in the week with New Jersey, we
18 will be getting together.

19 And sometimes there is a concern by attorneys,
20 whether it is an MDL or a stand-alone case. Well, how any
21 conversations that go on -- at a minimum, Magistrate Judge
22 Noel, just like in our other MDLs or in stand-alone cases,
23 the Magistrate Judges participate in some specific way
24 unless the parties have chosen -- well, in *Guidant* they used
25 both the Magistrate Judge and another mediator. But,

1 basically what I said in chambers was, whether it is by
2 phone or Magistrate Judge Noel going to New Jersey, the
3 Judge has agreed that we will be sitting down with their
4 mediators, and it is probably going to be Magistrate Judge
5 Noel. So, there is no concern that, well, Judge Frank might
6 be hearing some issues. Are they going to tell him what
7 went on during these mediation sessions? It will be
8 Magistrate Judge Noel who is going to reach out.

9 And the judges agree not only for that to happen,
10 but to say that they will be getting together to discuss how
11 we can proceed from here without compromising anybody's role
12 there or here. And we discussed that at some length in
13 chambers, including, what do the lawyers here need in order
14 to move forward with meaningful mediation, ADR discussions?
15 Whether that is discovery issues, decisions, and so those
16 things are all going to be on the table in the next few
17 weeks. So, all right?

18 MR. FLOWERS: Thank you. The next thing on the
19 agenda is scheduling, Your Honor. What we are referring to
20 here is a full-blown case management order through trials.
21 We had provided one to the Defendant. They have provided
22 one back to us. Frankly, we need to have a discussion soon
23 about whether we can reach any middle ground on that. My
24 thought, as I stand here, is that at least that will be
25 thrown into this whole pot that we are going to deal with in

1 the next couple of weeks. And if we can't reach agreement,
2 we will bring it to you for the next status conference for
3 some sort of letter briefing, as well.

4 THE HONORABLE JUDGE DONOVAN FRANK: Anything on
5 that?

6 MR. GRIFFIN: That is accurate, Your Honor.

7 THE HONORABLE JUDGE DONOVAN FRANK: Yeah, and what
8 I said partly in chambers, and I don't think to be fair to
9 counsel, it doesn't really matter which lawyer it was or
10 which party it was. I don't know if they entirely agreed
11 with my comment; and that is, one of my messages to New
12 Jersey was, I feel responsibility to pick the pace up, both
13 whether it is case management or coordination or some issue.
14 And so, without compromising either side, because perhaps
15 there is not an agreement on: Well, the pace seemed just
16 fine to us. Whether it does or it doesn't, probably the
17 time has come either by Court decision or agreement of the
18 parties or both, to get some management order in place.

19 And then to the extent that either or both parties
20 need to be heard on some issue, I think the time has come to
21 do that.

22 In a perfect world if we can coordinate this, some
23 of the timing of things with the other State Courts without
24 prejudicing either one of your clients or their cases, we
25 will do that. But, I think the important thing is, I think

1 it is on everybody's radar screen that even if there is not
2 total agreement, the time has come to put some of these
3 things in place. So, we will make that happen with a fair
4 hearing, if necessary, by the parties.

5 So, we can move on.

6 MR. FLOWERS: The next issue, Your Honor, is
7 tolling. There is really three separate buckets here that
8 we are talking about. The Stryker Ireland Corporation we
9 have asked for tolling on, the Stryker French Corporation we
10 asked for tolling on. And then we discussed the possibility
11 of tolling of unrevised cases for an efficiency reason.

12 In terms of the first two entities, we provided
13 tolling agreements to the Defendants, and they are
14 considering them.

15 On the third issue, we talked about it. We will
16 provide here very shortly an actual written tolling
17 agreement on the unrevised individuals to see if we can
18 reach some sort of an agreement on that.

19 MR. GRIFFIN: I think we can say a little bit
20 more, Your Honor. The Defendants did agree to a tolling
21 agreement on Stryker Ireland. There were further
22 discussions about additional entities being incorporated
23 into tolling agreements. And at the Defendants' suggestion,
24 we are pursuing an alternative solution that would address
25 any and all of the entities. So, we are hopeful we can wrap

1 up those issues into one solution.

2 And then with respect to the unrevised cases, the
3 parties are talking about that, as well.

4 THE HONORABLE JUDGE DONOVAN FRANK: All right.
5 Mr. Flowers, anything else on that?

6 MR. FLOWERS: No, just once again the timing of
7 things, Your Honor. We just want to get that issue beyond
8 us.

9 THE HONORABLE JUDGE DONOVAN FRANK: Common Benefit
10 Order. And I will indicate again for those on the telephone
11 and in the courtroom that weren't in the status conference
12 in chambers that this was discussed briefly, and I had asked
13 that we will just make a record here that whatever each
14 respective counsel believes is important to put on the
15 record, and then I agreed to make a decision with respect to
16 where we go from here, whether that is with or without
17 additional briefing, or with or without agreement of the
18 parties, in part because there's at least two issues, if not
19 more. And these aren't unique to just this case. They come
20 up in other MDLs. But, one is timing of an order; and of
21 course, two is content of the order, itself, regardless of
22 when it would be entered either by Court decision or
23 agreement of the parties, and rather than repeat what I
24 think a couple of counsel may say now, we will just let
25 Plaintiff go forward with what you feel you would like to

1 put on the record.

2 And Ms. Zimmerman, if you are going to take that,
3 and then I will hear from defense counsel, as well?

4 MS. ZIMMERMAN: Yes. Thank you, Your Honor. We
5 are here to talk about the Common Benefit Order. And there
6 was an agreed upon briefing schedule.

7 THE HONORABLE JUDGE DONOVAN FRANK: True.

8 MS. ZIMMERMAN: Letter briefing schedule where we
9 exchanged simultaneous briefs early last week and then reply
10 briefs this week.

11 THE HONORABLE JUDGE DONOVAN FRANK: And I will
12 just indicate for the record, it's in chambers. And I have
13 had a chance to read those.

14 MS. ZIMMERMAN: Perfect. Well, and then yesterday
15 we submitted a slightly modified common benefit order
16 representing agreement between the leadership in the MDL and
17 consent with leadership in New Jersey, and that is the
18 reason for the changes there. And we have provided a
19 revised copy both to the Court and Defense counsel outlining
20 what the changes are as between the two documents.

21 But, the Plaintiffs would request that the Court
22 enter the Proposed Pretrial Order No. 11 to provide for the
23 fair and equitable sharing among Plaintiffs of the costs of
24 special services performed and expenses incurred by the
25 Court-Appointed Plaintiff Leadership for the benefit of all

1 of the Plaintiffs in this complex MDL litigation.

2 Principally, the order provides two things. It
3 provides that the Plaintiffs receive -- create accounts and
4 receive funds to make payments for these shared costs. And
5 then, of course, it directs Defendants to hold back or set
6 aside and deposit 4 percent of any settlement funds, 3
7 percent towards fees, 1 percent towards costs.

8 So, as the Court is certainly aware from prior
9 litigation before Your Honor, and also in this District, the
10 common benefit doctrine goes back over 100 years. And it is
11 certainly not something that is unfamiliar to this District,
12 whether it be in the *Guidant Litigation* or in the *Levaquin*
13 *Litigation* very recently.

14 So, the Court has the authority to enter the
15 proposed order as a matter of equity jurisdiction to prevent
16 unjust enrichment by attorneys who are going to benefit from
17 the risk investment and effort currently being made, and
18 what will be made on an ongoing basis by the Court-appointed
19 leadership in this case.

20 Thus far in this MDL, the Plaintiffs' leadership
21 have appeared at depositions. We have retained, met with
22 and vetted experts. We have hired companies for both
23 hosting and review of documents in an electronic manner. We
24 have paid for and built custom websites capable of receiving
25 and providing discovery requests. And we have dedicated

1 substantial time and resources to answering questions by the
2 many attorneys across the country that have questions about
3 the status of the MDL.

4 So, at this point the proposed order really places
5 on the Defendants just two obligations, and both are
6 minimal. First, they have to certify that any assessments
7 are going to be directed to the funds as outlined in the
8 order. This is something that is routinely ordered in MDLs
9 particularly of recent, in the last 10 years or so.

10 We directed the Court more specifically to a
11 number of MDLs on point, but I would point out --

12 THE HONORABLE JUDGE DONOVAN FRANK: I would just
13 note for the record it is not unusual to see that provision
14 if people kind of do a little inventory of cases. It is not
15 the only way, but it is quite common in a number of MDLs.

16 MS. ZIMMERMAN: Absolutely. I know that Judge
17 Tunheim has done that recently in the *Levaquin Litigation*
18 across the river, and also in *Yaz* and *Pradaxa* and the *ASR*
19 litigation. And then the second obligation is a quarterly
20 report to lead counsel by Defendants that includes case name
21 and docket number.

22 So, the Defendants' response is outlined to the
23 Court and I will allow Mr. Griffin to make his argument to
24 the Court about the common benefit order. But, we do
25 believe that the order is timely. Common benefit orders are

1 routinely entered towards the beginning of an MDL.

2 Frequently, if you go back and look at Levaquin, I
3 think it is Pretrial Order No. 3. So, you know, we are a
4 ways into this. We think now is an appropriate time to
5 enter into an order like this.

6 And we believe, also, that it is not overly broad.
7 And indeed, the fact that the Court has not received any
8 objections to the common benefit order speaks to exactly
9 that. The Defendants are objecting, but there are not
10 additional Plaintiffs that have offered specific comment.

11 And in fact, given the revisions that we have now
12 provided in the agreement that we have with New Jersey, we
13 really think that to the extent that there was a perception
14 by Defense counsel that there would be some sort of inviting
15 among Plaintiffs' attorneys, that that is really not our
16 expectation in this matter. So, we would request that the
17 Court enter Pretrial Order No. 11.

18 THE HONORABLE JUDGE DONOVAN FRANK: I have a
19 couple of questions, but let me sit tight and hear from Mr.
20 Griffin or Ms. Woodward first.

21 MR. GRIFFIN: Your Honor, I would like to address
22 the threshold issue --

23 THE HONORABLE JUDGE DONOVAN FRANK: All right.

24 MR. GRIFFIN: -- of the submission yesterday of a
25 revised pretrial order.

1 To be frank, we haven't had a chance to consider
2 the changes. We haven't had a chance to discuss them with
3 our client. We would request an opportunity to submit a
4 very short letter brief to the Court addressing the impact
5 those changes have on our position.

6 So, our immediate request is that we table
7 argument on this issue until we have had a chance to digest
8 the suggested changes, and we have a chance to advise the
9 Court of our position, and that we schedule a telephonic
10 conference to discuss them.

11 THE HONORABLE JUDGE DONOVAN FRANK: Without
12 implying that there is any agreement with Plaintiffs'
13 counsel, when you -- and you mentioned this letter brief
14 issue back in chambers, with reference to the -- in the
15 afternoon yesterday when the agreement came in -- and I
16 think it was characterized by Plaintiffs in chambers, to the
17 extent it is relevant that, well, there really weren't any
18 substantial changes other than the New Jersey -- that the
19 Order making clear that unless it is a case here, and then
20 there was another provision. Again, most of the provisions
21 in there now you will see in many, many common benefit
22 orders. Whether they are considered significant or not, how
23 much time were you thinking? I didn't ask that back in
24 chambers, of submitting a letter brief, with or without
25 objection?

1 MS. WOODWARD: I think we could submit a letter
2 brief by Tuesday the 25th, Your Honor.

3 THE HONORABLE JUDGE DONOVAN FRANK: Before I hear
4 a response from the Plaintiff, is there anything else you
5 want to say about the common benefit issue at this time, Mr.
6 Griffin?

7 MR. GRIFFIN: Without delving into the content of
8 the parties' arguments, the brief extension we are
9 requesting to address the new terms shouldn't impact the
10 timing of the overall entry of the order. We are talking
11 about a week delay.

12 THE HONORABLE JUDGE DONOVAN FRANK: Of course in
13 fairness, sorry to interrupt you; but, in fairness to your
14 briefing in the case, with or without that new -- the new
15 CBO proposed order that came in -- I shouldn't use synonyms
16 like that, common benefit order, because some people will
17 think I am talking in tongues. What is the Judge talking
18 about, CBO?

19 Without -- I mean, in fairness to your earlier
20 briefing, you had suggested, and I suspect you are going to
21 continue to suggest whether a brief comes in or not that,
22 one, an order isn't necessary at this time. And one
23 reason -- there may be others -- is apart from its content,
24 it's premature.

25 MR. GRIFFIN: That is correct, Your Honor. It is

1 premature for at least two reasons. One, this very issue is
2 very much before the Eighth Circuit. It has been fully
3 briefed and argued. It is the central point of that appeal.
4 There is no harm in waiting a brief amount of time for the
5 Eighth Circuit to resolve whether in fact common benefit
6 orders are appropriate in the MDL context.

7 I recognize that this Court has already concluded
8 in prior litigation that it is and that other courts have,
9 as well. But, the fact of the matter is there's only two
10 other Circuits who have adopted the common benefit doctrine
11 in the context of the MDL. There is Supreme Court case law
12 that Judge -- I believe it was -- Loken during the appeal
13 argument was troubled by that may not permit it. There are
14 other arguments being raised before the Eighth Circuit.

15 So, our point is that New Jersey has more cases,
16 has progressed just fine without one. We have the Eighth
17 Circuit about to chime in. There is no harm in waiting for
18 that decision to guide the Court.

19 THE HONORABLE JUDGE DONOVAN FRANK: Ms. Zimmerman,
20 whether it is on that issue or the briefing issue or
21 whatever else you want to put on the record, then I will
22 have a couple of questions, but I will sit tight for the
23 time being.

24 MS. ZIMMERMAN: Thank you, Your Honor. Well, the
25 issue with respect to the forthcoming decision from the

1 Eighth Circuit is briefed in both --

2 THE HONORABLE JUDGE DONOVAN FRANK: It is.

3 MS. ZIMMERMAN: -- letter briefs.

4 THE HONORABLE JUDGE DONOVAN FRANK: Yes, it is.

5 MS. ZIMMERMAN: So, I think that that has been
6 presented to the Court adequately. It is appropriate in the
7 Eighth Circuit, as the law currently stands, to allow common
8 benefit orders in the MDL context. And we would request
9 that it be entered here.

10 The new draft common benefit order that was
11 presented yesterday does not actually provide any additional
12 obligations on Defendants, rather it clarifies how the
13 Plaintiffs, particularly as between the MDL and any State
14 Court litigation, principally New Jersey, we anticipate,
15 will cooperate and collaborate amongst each other to
16 determine this kind of third prong of who might be subject
17 to an MDL assessment in the event of a resolution down the
18 road.

19 But, it does not place any new obligations on the
20 Defendants. So, to the extent that the Defendants are
21 interested in providing a short letter brief early next
22 week, we are not going to object to that. But, there is no
23 new obligations on Defendants placed by the new order.

24 So --

25 THE HONORABLE JUDGE DONOVAN FRANK: Well, let me

1 set the briefing schedule, with or without objection. And
2 then I will set up what happens after that. And the 25th
3 seems more than reasonable, so end of business day on the
4 25th. And then what -- I will leave it with the Plaintiff
5 for a letter brief. And what I will indicate is that I will
6 actually have -- to just alleviate any uncertainty, I will
7 have Brenda Schaffer, my deputy courtroom clerk contact
8 Plaintiff.

9 I will let one day go by and say, much like I said
10 in chambers, do you make a request to submit any surreply or
11 supplemental brief? And if there is a request, I will
12 either agree to it or I won't. And unrelated to that, I
13 will wait until I get that, with or without any surreply,
14 and then respond immediately with: Yes, I would like an
15 on-the-record -- and I would suggest to the Defendant, and
16 maybe you have already made the formal request now; that you
17 just end the letter brief with saying, yes, we would request
18 a short oral argument by way of an on-the-record telephone
19 conference. And then I will reserve the right to either set
20 that up or contact you and say, I am going to decide it on
21 the papers.

22 I will indicate to you that the timing issue
23 raised by the Defense, I interpret it in two ways. To err
24 on the side of the Defense saying: One, is the Eighth
25 Circuit; and two, I think separate from the Eighth Circuit,

1 I kind of interpreted the arguments to be, there is no need
2 at this moment to enter the order in the case.

3 So, it's likely, that with or without argument, I
4 will be going ahead and issuing -- either agreeing to issue
5 an order -- separate from the Eighth Circuit, agreeing that
6 the time is now to enter an order. And then if the Eighth
7 Circuit does something that would require me to stay
8 something I have done. Or, I will say, with or without the
9 Eighth Circuit case, I decline to enter an order at this
10 time. But, I will do an order either way so it will take
11 this out of limbo.

12 I do have just a couple of questions that really
13 don't relate at all to the objections that the Defense
14 raised. Do I interpret the order, the proposed order -- and
15 this part of it didn't change from the earlier draft that
16 came in, that in a number of cases, including *Guidant*, not
17 to keep repeating it, but it is fairly common in a number of
18 orders that whether the percentage breakdown on cost and
19 fees is 3 percent versus 1, or 2 and 2, or 1 1/2 and 1 1/2,
20 there is usually a declaration in there that the attorney
21 fee percentage of 3 percent will be -- that will come from
22 the attorney fees, with a contingency fee agreement, and
23 that is what it is. And the one percent will come from the
24 clients' share of it.

25 I didn't see that provision in this order, and I

1 just wanted to make sure I understand the proposed order.
2 What then how from -- maybe you are going to say, well, it
3 is clearcut right there, Judge. I will soon find out here
4 on if that is allocated the same way.

5 MS. ZIMMERMAN: Your Honor, I think that is my
6 understanding that the 3 percent would come from the
7 attorneys fees and the 1 percent from the client's portion.

8 THE HONORABLE JUDGE DONOVAN FRANK: All right.
9 With that in mind, unless there is something else on the
10 common benefit order, so then we will proceed in that
11 fashion. And in the highly unlikely event that one of you,
12 say: Well, 24 hours has now gone by since we got the brief
13 from the Defense, and we said we don't need to submit one.
14 And we haven't heard whether the Judge is going to go ahead
15 and enter an order, or have oral argument.

16 And I predict you will have Brenda Schaffer
17 calling each of you saying the Judge is going to go ahead
18 and enter an order. Or yes, we will get you on the phone at
19 a mutually agreeable time in the next couple of days and
20 hear you out. We will do all of that this next week so
21 everybody will know exactly what I am going to do. Unless
22 there is something else on that, we can go to the discussion
23 on the treating physicians.

24 I would just indicate as we leave the common
25 benefit order, as most of the experienced lawyers in the

1 room know and those of you on the phone, it is a fairly
2 common issue to come up in most MDL settings.

3 Actually, I do, with apologies, whether it is
4 necessary to apologize or not, I do have the same question
5 for both of you that I meant to ask on the common benefit
6 order. Obviously, you both cited cases and both given
7 examples, both by cites, including cases within this
8 District, including mine, and elsewhere around the country
9 and Circuit and other cases about the common benefit,
10 itself.

11 From the Plaintiffs' point of view, is it your
12 position that: Well, Judge, really, whether it is an
13 objection to the obligation it places on the Defense or not,
14 our proposal reads like the large majority of proposals in a
15 variety of MDLs across the country.

16 Or, are you saying: No, we don't claim it is
17 similar in all respects to those, but here is why this is so
18 different, or this is different than what you will see --
19 and I will ask the same question of the Defense. That
20 doesn't mean I will have to blindly or otherwise say: Well,
21 one size fits all. We are going to do the same thing in
22 every case. That is not what I am suggesting. But, what is
23 the Plaintiffs' view of --

24 MS. ZIMMERMAN: Thank you, Your Honor. It is our
25 position that the proposed common benefit order follows very

1 closely with most of the recent common benefit orders.
2 There is certainly some variation here and there; but
3 actually, in candor, the draft was based almost exactly on
4 the Common Benefit Order entered in the *ASR Hip Litigation*
5 in front of Judge Katz for a variety of reasons. One of
6 which is that there's a lot of overlap between the lawyers
7 involved in the *ASR Litigation*, and then involved here in
8 Stryker, both between the MDL and New Jersey.

9 And we thought that it would make a lot of sense
10 to use language that both sets of Plaintiffs' attorneys have
11 found agreeable in past litigations and have worked well.

12 MR. GRIFFIN: Your Honor, it is our position that
13 the proposed order is an outlier. I think we set forth in
14 our papers a number of examples where the orders that the
15 Plaintiffs attach to their papers differ meaningfully from
16 the terms of the order that they are proposing. It is our
17 understanding that, yes, the proposal is largely based on
18 *ASR*; but, that is where the analogous examples end.

19 So, as we set forth in our papers, if the Court
20 believes that a common benefit order is appropriate at this
21 point, we provide a redline --

22 THE HONORABLE JUDGE DONOVAN FRANK: Sorry to
23 interrupt you. But, it is likely that I probably will be
24 entering an order of some kind, with or without objection.
25 So, I might as well say it. I think it is not likely that

1 you will say: Well, apart from the Eighth Circuit, I would
2 delay -- I will probably enter some type of order so people
3 know where they stand. But, I interrupted your argument,
4 though, Mr. Griffin. And you did submit a redlined version,
5 too.

6 MR. GRIFFIN: I am trying to digest the Court's
7 comments. I apologize. So, correct, the redline is
8 essentially very close to the Order in *Guidant*. And the
9 obligations on the Defendant to administer the common
10 benefit fund for the Plaintiffs are minimized.

11 And that is our fallback position if the Court
12 decides that it is time to do it.

13 THE HONORABLE JUDGE DONOVAN FRANK: Anything else,
14 Ms. Zimmerman?

15 MS. ZIMMERMAN: No, Your Honor.

16 THE HONORABLE JUDGE DONOVAN FRANK: Thank you,
17 both. So, I guess we have got a plan in place. And the
18 only thing we know for certain is you will be hearing from
19 me next week sometime once that comes in. And we will go
20 from there. So, all right?

21 Retention of Treating Physicians. And I
22 acknowledge that we discussed this in chambers and the
23 discussion is going on, and not a complete agreement on the
24 pace of things, but on how we are going to handle it at this
25 stage. Who would like to --

1 MR. FLOWERS: I will start, Your Honor. In the
2 agenda for today was the first time that we actually saw the
3 proposed briefing schedule. We had talked several months
4 ago about this issue -- hadn't reached agreement, but kind
5 of left it lingering. Our suggestion, I think jointly, is
6 we are going to try and see if we can work something out
7 here very soon. And if it doesn't work out, then we will
8 figure out some briefing schedule. We understand that the
9 Defendants consider this an important issue, as do we. So,
10 we will work it out, assuming -- if we can't work it out, we
11 will set a letter briefing.

12 MR. GRIFFIN: Your Honor, this issue has been
13 discussed over several months. I understand Mr. Flowers is
14 going to get a proposal to us next week. And having a firm
15 date for that would be helpful. And based upon our ability
16 to discuss that position, we are hopeful that we can reach
17 agreement. But, if we can't, we would like to have it
18 briefed and argued within 30 days.

19 MR. FLOWERS: Understandable.

20 THE HONORABLE JUDGE DONOVAN FRANK: And the Court
21 can make sure we can abide by that. Time schedule, as I may
22 have said briefly, or commented on briefly in chambers, this
23 issue of treating physicians -- and that doesn't make it any
24 less important to either side; but, it's not unique to this
25 case, that comes up. And so, I think the important thing is

1 if you reach an agreement, fine. If you don't, we will hear
2 it and decide it so we can move on down the road.

3 Other issues, whether we discussed them in
4 chambers or not? For the Plaintiff?

5 MR. FLOWERS: No, Your Honor.

6 MS. WOODWARD: No, Your Honor, thank you.

7 THE HONORABLE JUDGE DONOVAN FRANK: Then the next
8 conference is set for March 20th, 2014.

9 And obviously, one thing that is not on here, but
10 you couldn't have known that because obviously we discussed
11 it in chambers was that between now and then, you will be
12 hearing this next week from Judge Noel or myself or Judge
13 Noel on setting up a briefing schedule and a get-together on
14 discovery/ADR issues, just to kind of generally categorize
15 it. And so that is going to be happening; But, a conference
16 like this. We will be setting it up. And then with the
17 other issues here, whether we are going to get together
18 online or not is quite separate, but this is the next
19 scheduled conference.

20 Anybody, either side, have anything to say about
21 that, other than what we already said, our next time in the
22 door is March 20th?

23 MR. FLOWERS: That is fine from the Plaintiffs'
24 perspective.

25 THE HONORABLE JUDGE DONOVAN FRANK: Hopefully

1 there won't be a snowstorm or something coming, but who
2 knows.

3 Anything further at this time on behalf of the
4 Plaintiffs?

5 MR. FLOWERS: No, Your Honor.

6 THE HONORABLE JUDGE DONOVAN FRANK: For the
7 Defendants?

8 MR. GRIFFIN: No, Your Honor.

9 THE HONORABLE JUDGE DONOVAN FRANK: And I hope
10 that those of you on the phone could listen. I will, if I
11 owe an apology to anyone, primarily it might be to
12 Magistrate Judge Noel, because I knew in advance and we
13 tried to -- and he and I work things out just fine, as a
14 team; but, I knew he couldn't be here on the date. And we
15 just kind of decided and hoped that rather than change the
16 schedule for all of the lawyers, we moved it and he was
17 gracious enough to appear by telephone. So, that is kind of
18 the explanation for that.

19 And so, we will then, absent something further,
20 stand in recess. And I will just hope safe travels to
21 everyone. And since I did half-serious, half-joking say at
22 the beginning, if you want to come back here and sleep
23 tonight -- I doubt that anybody would want to do that,
24 although I won't name names in the building, but some staff
25 came today with supplies in case they got stranded here.

1 But, hopefully they are working for Judges who are saying:
2 Go home early today before it hits.

3 So, we will stand in recess. Thank you all for
4 coming. I'm sorry we don't have more accommodating weather,
5 and we stand in recess. Thank you.

6 ALL COUNSEL: Thank you, Your Honor
7 (Adjournment.)

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

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

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