

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	)	June 12, 2014
	)	9:30 a.m.
	)	

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

**STATUS CONFERENCE PROCEEDINGS**

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Proceedings recorded by mechanical stenography;  
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1 for the Plaintiffs.

2 MR. BERNHEIM: Good morning, Your Honors, Jesse  
3 Bernheim for the Plaintiffs.

4 THE HONORABLE JUDGE FRANK: For Defense counsel?

5 MS. WOODWARD: Good morning, Your Honor. Karen  
6 Woodward for Defendant.

7 MR. CAMPILLO: Good morning, everyone. Ralph  
8 Campillo, Sedgwick Law LLP, for the Defendants.

9 MR. GRIFFIN: Good morning, Your Honor, Tim  
10 Griffin for the Defendants.

11 THE HONORABLE JUDGE FRANK: Why don't we go down  
12 the agenda items and just a couple of observations, and then  
13 I will ask my colleague, Judge Noel if there is anything he  
14 would like to add before we begin.

15 I would just say for those listening and for those  
16 other counsel in the courtroom that we discussed in chambers  
17 the agenda items and discussed everything from settlement  
18 and mediation issues with respect to the status conference  
19 in New Jersey next week, and the get-together in  
20 Philadelphia in the middle of July of this year, as well as  
21 a variety of discovery and other issues.

22 And so, what we said in chambers, and we will just  
23 note for the record now, is with respect to -- and after we  
24 have been through the agenda and hear any additional oral  
25 argument on the matters that have been briefed, unless there

1 has been an agreement, then we will take those under  
2 advisement and have a ruling out in the next couple of days.  
3 And if not by the end of this week, at the early part of  
4 next week on any issue that is before us today.

5 And then it probably would be best, Judge Noel, if  
6 you want to indicate for the record whatever you wish to on  
7 the get-together, private get-together after we are done  
8 here. So...

9 THE HONORABLE MAGISTRATE JUDGE NOEL: Let me just  
10 say this. When we are done in the courtroom, if everybody,  
11 if Lead Counsel Committee and Defense attorneys would meet  
12 us back in the conference room, 7th Floor Conference Room, I  
13 will show you where it is when we all get back there. And  
14 then we will separate and visit separately in another room  
15 reserved to talk to everybody independently.

16 THE HONORABLE JUDGE FRANK: And I will just  
17 indicate one other thing that may or may not come up during  
18 the next -- in any of the presentations, as I said back in  
19 chambers to the lawyers that were there. In the last, well,  
20 actually, just this week, by itself, I had discussed it with  
21 Judge Brian Martinotti in New Jersey and Judge Henning in  
22 Florida -- and actually both judges in Florida this week,  
23 Judge Henning, and the last three weeks since the last time  
24 we were together I had a discussion, and so they all know  
25 this is happening today and we are trying to place high

1 priority on coordinating a variety of issues with the State  
2 Courts across the country.

3 And so, with that, we can proceed with the agenda  
4 items. Who would like to step off the curb or to the  
5 podium, as it were, first?

6 MS. WOODWARD: Good morning Your Honor. Karen  
7 Woodward for the Defendants. I will begin with our basic  
8 report on MDL filings and filings in other parts of the  
9 country. We did file numbers with the filing of the joint  
10 report and status conference agenda. The updated numbers  
11 that we have are that there are approximately 1,046 cases  
12 that are filed in or on their way to the MDL. There are  
13 1,178 cases filed in the New Jersey coordinated proceeding.  
14 And then we have a current State Court case count of 85.  
15 Our total count is 2,309 cases.

16 MR. FLOWERS: Pete Flowers for the Plaintiffs,  
17 Your Honors. We believe those numbers appear to be  
18 accurate.

19 THE HONORABLE JUDGE FRANK: All right.

20 MS. WOODWARD: It is a moving target, but always  
21 usually within a few here or there.

22 THE HONORABLE JUDGE FRANK: It is, yes.

23 MS. WOODWARD: On State Court filings and  
24 important developments, we have in Florida in Palm Beach  
25 County agreed to a very basic pretrial schedule that will

1 set a goal for the first trial to be heard in February of  
2 2016.

3 THE HONORABLE JUDGE FRANK: And I am sorry to  
4 interrupt, but I want to say to the credit of those Judges,  
5 both of whom I talked to both in Palm Beach, and Judge  
6 Henning, and the other presiding Judge in the District, that  
7 they were doing their best to coordinate with the trial  
8 ready dates here. So, I think it was in that context they  
9 were trying to -- so it all wouldn't conflict with one  
10 another. And so, we kind of exchanged dates in that regard.  
11 They have to do what they have to do, but we were trying to  
12 coordinate that, much like we try to do in other cases, so  
13 that we have had those communications.

14 MS. WOODWARD: So that that agreement was reached,  
15 and as part of the Pretrial Order, there is a built-in  
16 mediation program similar to what is taking place in the New  
17 Jersey proceedings.

18 In Broward County, our next status conference is  
19 on June 19th. To be heard at that status conference is a  
20 motion that was filed relating to defense contacts, ex parte  
21 contacts with treaters of Broward County Plaintiffs.

22 I will allow Mr. -- defer to Mr. Bernheim here who  
23 can give you the basics of that motion. I think it makes  
24 more sense to go in that order and then I can respond to  
25 what he says.

1 MR. BERNHEIM: Yes, good morning again, Your  
2 Honors. I provided the Court with a copy of the motion that  
3 was filed by Ray Valori in Broward County --

4 THE HONORABLE JUDGE FRANK: And I am going to  
5 interrupt you again, but just as you begin, because you  
6 provided that, I did pick up the phone and talk at some  
7 length with Judge Henning about that motion earlier in the  
8 week, as well.

9 MR. BERNHEIM: Thank you, Judge. And yes, it is  
10 Plaintiffs' Motion to Prohibit Contact with Eight Specific  
11 Treating Physicians. When the Order came out of the MDL,  
12 the Florida Committee reviewed that Order and felt that it  
13 was appropriate to file that motion to protect the Florida  
14 Plaintiffs.

15 When the briefing was done in the MDL, we didn't  
16 do a case by state-by-state analysis of the case law on  
17 that. If Your Honor has any questions about that motion, I  
18 would be happy to answer them.

19 THE HONORABLE JUDGE FRANK: Other than what I said  
20 at our conference this morning, that I tried to make a  
21 commitment to Judge Henning that she knows this is going on  
22 today. And then I said, let's strive -- as long as we can  
23 each follow our oath of office and the law, to try to figure  
24 out some way to coordinate this with the appropriate --  
25 either by agreement, court decision, or protective order, or

1 amendments to the protective order. Let's try to do this.

2 So, I said, I kind of promised her we will avoid  
3 these jurisdictional disputes where someone is saying:  
4 Well, we have got a State Judge asking a group of lawyers to  
5 ignore a Federal Judge. Or we have got a Federal Judge  
6 asking a group of lawyers to ignore a State Supreme Court  
7 case. And I know there is -- so, I think there is some  
8 responsibility on all of our parts to see if we can do that.  
9 And if we can't, then the respective courts will do what  
10 they need to do. So, I did make that commitment to Judge  
11 Henning, so --

12 MR. BERNHEIM: Thank you.

13 THE HONORABLE JUDGE FRANK: Counsel?

14 MR. BERNHEIM: And that is exactly what Counsel  
15 Valori was hoping for.

16 MS. WOODWARD: So just in response, Your Honor, we  
17 don't anticipate that there will be any type of  
18 jurisdictional conflict that arises. We don't believe that  
19 the *Hassan* case on which the Plaintiffs' motion is based is  
20 good law. We are opposing the motion and will take further  
21 steps, if necessary.

22 THE HONORABLE JUDGE FRANK: Well, and I am still  
23 hopeful, but obviously if we have to make court decisions,  
24 then we will. I know Judge Henning will do the same. But,  
25 I was hopeful, and I suspect -- and I am not speaking for

1 Judge Henning, but I think there was one option was the  
2 hope, aspirational goal or not, that there would be some --  
3 a resolution might be found in an amendment individualized  
4 to Florida with a protection order. But, I guess time will  
5 tell on that. We will see. And then I will just agree to  
6 stay in communication with them. Judge Noel?

7 THE HONORABLE MAGISTRATE JUDGE NOEL: I was just  
8 going to say to be sure that the lawyers will keep us  
9 apprised of what happens in Florida. And as Judge Frank  
10 says, he will keep in touch with the Judge there so that we  
11 are all on the same sheet.

12 MS. WOODWARD: We will absolutely do that, Your  
13 Honor. We will provide you with a copy of our opposition  
14 to the motion.

15 MR. BERNHEIM: We will do the same, Your Honor. I  
16 just want to clarify two things. I believe I heard when I  
17 was walking up here that Ms. Woodward said the trial date in  
18 Broward is November of 2016?

19 MS. WOODWARD: Yes.

20 MR. BERNHEIM: The trial is September 2015.

21 MS. WOODWARD: Is this on an order I haven't seen?

22 MR. BERNHEIM: No, this is --

23 MS. WOODWARD: Oh, I'm sorry, I was speaking of  
24 Palm Beach County.

25 MR. BERNHEIM: Oh, I'm sorry, I hadn't seen that

1 yet. All right.

2 THE HONORABLE JUDGE FRANK: And September, that  
3 squares with the discussion I had with the Judge, too. In  
4 other words -- you know, the important thing is they had a  
5 -- obviously, we know they never showed us on the TV shows  
6 about the trials and tribulations of lawyers going through  
7 back-to-back trials and the pressure on lawyers in trying to  
8 coordinate that in fairness with the Court, but she was --  
9 they were aware of our trial dates here when they set that  
10 September date, knowing when those dates were. So --

11 MR. BERNHEIM: Thank you, Judge.

12 MS. WOODWARD: Your Honor, the next item on the  
13 agenda is a report on discovery. Item 2a in the joint  
14 report discusses where we are with Plaintiffs' compliance  
15 with PTO No. 8 and production of preliminary disclosures and  
16 Plaintiffs fact sheets.

17 I am not going to go into that since I know my  
18 colleague Mr. Griffin will be addressing that in more detail  
19 when he discusses Defendants' Motion to Compel.

20 MR. FLOWERS: And from the Plaintiffs'  
21 perspective, Mr. Gordon and Mr. Nemo will be dealing with it  
22 and will present completely different numbers than what the  
23 numbers are that they claim.

24 THE HONORABLE JUDGE FRANK: And I think the record  
25 will just show as we both commented on in chambers, that it

1 has been fully briefed by both parties. And this is one of  
2 those, that absent an agreement, we will be filing an order  
3 in the next few days once we have heard people out. So --

4 MS. WOODWARD: I just wanted to update the Court  
5 that the production of the custodian files from the 26th  
6 meaningfully involving individuals who are identified from  
7 agencies' organizational charts is on track and will be  
8 completed by July 15th.

9 The Plaintiffs had requested a number of -- go  
10 ahead.

11 MR. FLOWERS: On the custodial files, Your Honor,  
12 as we pointed out in the back, I provided both of you with  
13 copies of a chart that I put together concerning the  
14 custodians that have been produced thus far, and what we  
15 believe is a large concern that is going to come to a head  
16 very shortly. The production of documents and emails in  
17 this litigation so far has been astonishing -- astonishingly  
18 low. Most of the custodians have less than a thousand  
19 documents and less than 500 emails, even though they were at  
20 the company for 5, 6, 7, 8 plus years.

21 On my chart it provides the number of emails  
22 produced and the number of documents produced thus far on  
23 each custodian. Then I went back to two separate hip  
24 litigations, that are very similar, and pulled the number of  
25 emails and documents produced for people that were similarly

1 situated. The numbers are incredible.

2 Just to give you an example, the first person on  
3 the list is Ellen Axelson, and she was the Director of  
4 Clinical Research and the Manager of Clinical Research from  
5 2006 to 2013. A total of 726 documents have been produced  
6 and only 455 emails. In a similar individual, 23,000 plus  
7 documents were produced.

8 I just wanted to flag the issue because it is  
9 going to be a big issue to us. It is obviously going to  
10 slow the case down if we are not getting a full production  
11 or if there is some sort of problem or non-existence of  
12 emails. I get, myself, more than 455 emails a day. So, in  
13 seven years we find it impossible that this person wouldn't  
14 have touched on relevant issues, as well as all of the  
15 others. It is a consistent theme. So, I would just say, it  
16 is an issue that we are going to bring up quickly. We have  
17 a 30(b)(6) that we noticed up right after we found this out.  
18 And I think it is an issue that you are probably going to  
19 hear in, hopefully, July.

20 MS. WOODWARD: And as I said to the Court when  
21 this issue had been raised previously, I can't speak to  
22 other litigations, whether they are similar to ours or not  
23 in terms of the size of those companies, how they collected  
24 documents, what processes they had in place for production,  
25 I can't speak to any of that. That is what discovery is for

1 and that will play itself out.

2 THE HONORABLE JUDGE FRANK: Well, and I guess time  
3 will tell, as Judge Noel probably knows better than I, with  
4 the exception of MDLs and appeals, in our District, anyway,  
5 we divide up the discovery issues. But, one of the large  
6 criticisms these days, not necessarily in an MDL context, of  
7 court systems and lawyers, is, all right, so now we'll see  
8 when the preservation was directed by -- to all company  
9 officials. And then there will be a dispute over, well send  
10 in an IT person to comb over all of the computers and see  
11 what has been preserved, what has been erased, and where are  
12 those computers, where are -- because we are being  
13 increasingly criticized for all of the money being spent on  
14 such things in the e-discovery context, I don't know if you  
15 have anything to add to that, but we will see where it goes  
16 and do what we need to do.

17 MR. FLOWERS: I would just very briefly add, Your  
18 Honor, we had asked early on when the litigation hold was  
19 put in place here and they were refusing to provide that  
20 information --

21 THE HONORABLE JUDGE FRANK: Well, we will find out  
22 as part of this, I'm sure.

23 MR. FLOWERS: That is what I intended, right.  
24 Thank you.

25 MS. WOODWARD: So, with regard to production of

1 exemplars, the parties had reached an agreement that a  
2 certain number of exemplar devices would be provided to the  
3 Plaintiffs. I believe the number was around 76 devices.  
4 And all of those have now been provided to the Plaintiffs.

5 The Plaintiffs asked for production of an  
6 impaction instrument, in addition to the devices. We ask  
7 that consistent with what had already been done in New  
8 Jersey, a discovery request for that device be served. We  
9 would like a clean record on that issue. And we received  
10 discovery yesterday with 75 document requests relating to a  
11 wide variety of instruments.

12 MR. FLOWERS: Just so the record is clear on that,  
13 New Jersey and the MDL put together a joint letter where we  
14 asked for a particular number of exemplars and an impaction  
15 device several months ago. We have gotten exemplars, now.  
16 But, when we asked again for the impaction device, we had a  
17 conversation about -- they were looking, they were checking,  
18 and then two days ago we were told, you need to serve a  
19 discovery request, which I have done. I immediately served  
20 the discovery request. So, I guess we are on the road. It  
21 seems to me like this is an impaction device. It is not  
22 something we should be deep in discovery on, but we  
23 certainly request it and will proceed forward.

24 MS. WOODWARD: I would also add that this is  
25 potentially another area where coordination between the

1 Plaintiffs in the two jurisdictions should be encouraged.

2 Depositions, Mr. Campillo?

3 MR. CAMPILLO: Can I do it from here?

4 THE HONORABLE JUDGE FRANK: Why don't you come up  
5 to the podium, if you don't mind. It kind of maximizes  
6 everybody hearing, I think.

7 MR. CAMPILLO: Your Honors, as we discussed in  
8 chambers this morning, we have received a number of  
9 deposition notices for two individuals. And I think it's 4  
10 to 6, I forget the exact number, of corporate  
11 representatives. And our position simply is that as soon as  
12 representatives or designees of the various jurisdictions  
13 can all get together and confer with us, we can start  
14 talking about protocols for those depositions and scheduling  
15 of those depositions.

16 In our view, it does not make sense to have  
17 piecemeal discussion with the leadership in this proceeding  
18 without inviting and incorporating into those discussions  
19 the other leadership attorneys from the other key  
20 jurisdictions, so that these company representatives will be  
21 deposed once, hopefully with some agreed upon protocol for  
22 the conduct of those depositions.

23 So, we are prepared to do that so we can get the  
24 other side to coordinate their efforts.

25 MR. FLOWERS: Your Honor, from the Plaintiffs'

1 perspective we served these notices, and this morning was  
2 the first time that I heard we needed a joint meeting  
3 amongst everyone. We had scheduled two telephone calls,  
4 which were cancelled by the Defense.

5 In those calls I was going to relate to them that  
6 I had talked to both New Jersey and Florida and were  
7 prepared to talk about protocols and dates and things like  
8 that. They have not gone forward. We understand clearly  
9 that there needs to be coordination on those depositions and these  
10 depositions won't need to be retaken over and over again.

11 What I am going to suggest to Mr. Campillo right  
12 after court today is that we set a date for next week in  
13 order to -- if he wants everyone on the phone, I will get  
14 everyone on the phone, as opposed to me relating what they  
15 told me. But, having said that, our deep concern is, now  
16 it's June 12th, and while we negotiate on protocols or bring  
17 a motion before you, we ought to set dates for these  
18 depositions before we are too far down the road. When we  
19 can negotiate protocols for where we are going, we can  
20 clearly pick up dates in August or whenever so that these  
21 depositions get on everyone's calendars so there is not a problem.

22 I am concerned about it, because I know how  
23 everything goes with the summer, et cetera. Suddenly you  
24 are through the summer, we have no dates. And if we are  
25 going back and forth on things, we should just be able to

1 pick the dates. That should be the easiest part of the  
2 whole process.

3 MR. CAMPILLO: It is not as simple as Mr. Flowers  
4 points out. We need to identify who are going to be the  
5 questioners. There's bound to be some limited number of  
6 people asking questions of these witnesses. Those details  
7 need to be worked out, the availability of those folks, as  
8 well as the witness, that all needs to be taken into  
9 account. We are prepared to talk.

10 Next week is a horrible time for me, personally,  
11 and I need to be involved in this. But within a matter of a  
12 week or two we should be able to have a conference call or  
13 whatever they want to do with the relevant people to have  
14 the process begun and, hopefully, resolve quickly.

15 THE HONORABLE MAGISTRATE JUDGE NOEL: Can I just  
16 ask a question? So, who all from the Defendants'  
17 perspective needs to be involved? Just one lawyer from each  
18 of the different litigations, Florida, New Jersey, MDL?

19 MR. CAMPILLO: Yeah, I think 3 of us will be  
20 sufficient for that, Your Honor.

21 THE HONORABLE MAGISTRATE JUDGE NOEL: And you have  
22 go people lined up that can do that, Mr. Flowers?

23 MR. FLOWERS: Yes. Yes, Your Honor.

24 THE HONORABLE JUDGE FRANK: Well, and obviously,  
25 as you all know, it's not unique, in the deposition

1 protocol, these issues come up with some regularity in the  
2 MDL context. So, I guess the sooner we do this, either by  
3 agreement or court decision, the better everybody -- the  
4 better it will be.

5 MR. CAMPILLO: Again, one other point I should  
6 make, we are being told by other Plaintiffs' counsel in  
7 other jurisdictions that they really didn't want to get to  
8 the point of scheduling these depositions until the  
9 documents have been produced, which has been scheduled, I  
10 think, through July. So, again, there is a disconnect here  
11 that we need to address. But, I think once we get everybody  
12 in the same room, we should be able to resolve that.

13 MR. FLOWERS: All I would say, Your Honor, is I am  
14 in touch with the people in Florida and New Jersey,  
15 frequently, and I think we know where we stand.

16 THE HONORABLE JUDGE FRANK: All right.

17 MR. FLOWERS: But, whatever we need to do, we will  
18 do. And I just hope to get some dates in the next two weeks  
19 so we get something on the calendar.

20 THE HONORABLE JUDGE FRANK: Can we move on?

21 MS. WOODWARD: Sorry for the ups and downs, Your  
22 Honor.

23 THE HONORABLE JUDGE FRANK: A little exercise  
24 doesn't hurt anyone, so --

25 MS. WOODWARD: So true. So true.

1           The next item on the agenda has to do with PTO No.  
2           8. An amended version that was issued -- we had some  
3           discussions -- it was issued, I think, just recently, maybe  
4           a week ago. We have had some discussions since then about  
5           needing a second amended PTO No. 8 that would set out what  
6           the deadlines for Plaintiffs fact sheets and disclosures are  
7           that would address that there is no fact sheet obligation  
8           for unrevised Plaintiffs, which is actually in the document  
9           that was filed last week. But, we also want to add a  
10          deadline for the production of disclosure and fact sheets  
11          after a Plaintiff gets revised, because that is information  
12          that the Defense -- we don't know if people get revised  
13          unless we hear about it from the Plaintiff's attorney.

14                 And it would just be good to have a single  
15          deadline for the production of that information after a  
16          revision takes place.

17                 MR. FLOWERS: We agree, Your Honor. We are going  
18          to work on an amended PTO 8.

19                 THE HONORABLE JUDGE FRANK: Well, and I think as  
20          we said in chambers, that we will assure whatever issue  
21          remains unresolved, we will include it as part of any order  
22          we do. So, whether it is the extension of a deadline, or  
23          any other issue you have raised, unless there is an  
24          agreement, we will address it immediately. So --

25                 MR. FLOWERS: Thank you.

1 MS. WOODWARD: On our agenda, which is just a  
2 little bit different from the joint report, there is the  
3 topic of the status of an identification of an escrow agent.  
4 And I don't have anything to comment on that.

5 MR. FLOWERS: In the Confidential Order, Your  
6 Honor, there was a deadline set to identify the escrow  
7 agent, which we hadn't done between the two sides. We are  
8 just asking for some more time to do that. I guess, two  
9 weeks, if we can get two weeks to get the escrow agent?

10 THE HONORABLE JUDGE FRANK: All right.

11 MS. WOODWARD: That would be fine.

12 THE HONORABLE JUDGE FRANK: So ordered.

13 MR. FLOWERS: Thank you.

14 MS. WOODWARD: The next topic is a report on ADR,  
15 and I am going to pass it over to Mr. Campillo, so we get  
16 some more exercise.

17 MR. CAMPILLO: Your Honor, I will be very brief.  
18 I think putting aside any resolutions of matters from New  
19 Jersey, at least involving counsel in this proceeding, we  
20 have resolved, I think, approximately 27 cases, 15 of which  
21 were actual lawsuits pending here in the MDL. And in a  
22 number of unfiled claims, largely with lawyers that have  
23 cases here in the MDL -- I'm not sure whether those unfiled  
24 cases have ultimately been filed. I suspect many of those  
25 would have been filed here in the MDL, as well. In any

1 event, those -- in a couple of settlements with Plaintiffs  
2 in cases filed in other states outside of New Jersey, for a  
3 total of 27, and seven or eight law firms that are here in  
4 the MDL have been involved in those resolutions.

5 They have resolved, with the help of three  
6 different Magistrates, one -- the primary one being Judge  
7 Boylan, who I think he has presided over eight successful  
8 mediations to date. I think there are a few mediations,  
9 individual mediations still pending for the next couple of  
10 weeks. I don't have the schedule in front of me. There are  
11 not a lot pending, one or two. And that is where we are, at  
12 the present time.

13 MR. FLOWERS: Your Honor, from the Plaintiffs'  
14 perspective, all I would say is that my understanding, which  
15 is limited, because of everything that is confidential, is  
16 the fact that any of these resolutions are -- is  
17 confidential. So, we don't know, you know, other than the  
18 people that resolve the cases, we don't know any of the  
19 terms, facts or anything with regard to any of these  
20 resolutions; nor do we know anybody that is scheduled to  
21 mediate.

22 THE HONORABLE JUDGE FRANK: Well, as we discussed,  
23 and Judge Noel may or may not want to add to what I say, we  
24 discussed at some length in the conference in chambers the  
25 upcoming status conference next week in New Jersey and then

1 the get-together in Philadelphia. And we have offered to go  
2 out there.

3 I have also talked to Judge -- recently retired  
4 Magistrate Judge Boylan, as well. So, obviously, he is not  
5 at liberty, other than to say the number of cases, because  
6 of their confidentiality; but, we discussed at some length  
7 that issue. And that will be coming up in the discussions  
8 following the hearing here in the courtroom today. Judge  
9 Noel, I don't know if you want to add to that?

10 THE HONORABLE MAGISTRATE JUDGE NOEL: I will add,  
11 we will certainly be discussing all of these issues after  
12 this meeting, this status conference, when I meet with  
13 counsel afterwards, and when we separate and visit  
14 independently.

15 MR. CAMPILLO: Yes. The other thing I should add  
16 just for the benefit of those who were not in chambers, Your  
17 Honor, I don't have the exact number in front of me, but in  
18 New Jersey they now have two phases of mediations that have  
19 resulted in nearly 100 percent of the cases that have  
20 actually been discussed. I don't have the exact numbers,  
21 but I think the idea, at least in part, for this June 19th  
22 get-together with Judge Martinotti in which the Committee  
23 that this Court has appointed will be in attendance is to  
24 share the experience that has been experienced in New  
25 Jersey, as well as we have experienced here, and see if that

1 helps the parties think further and maybe more broadly for  
2 the future.

3 MR. FLOWERS: I have nothing to add to that, Your  
4 Honor.

5 THE HONORABLE JUDGE FRANK: Rather than repeat  
6 something in chambers, obviously the issues have been raised  
7 about the bellwether approach and opening up the profiles of  
8 the settlements versus continuing on with the  
9 confidentiality. And those issues will be discussed both  
10 later today, and we have had those discussions with Judge  
11 Martinotti and with the two presiding Judges in Florida, as  
12 well.

13 But, rather than repeat all of that, obviously,  
14 respective counsel is free to tell other Plaintiffs' counsel  
15 and Defense counsel as much or as little as you want. So,  
16 that is up to you.

17 MR. FLOWERS: I will just add to the record then,  
18 Your Honor, that it is our position that the sharing of  
19 information is key for any of these resolutions to be  
20 reflective of any larger deal. And by information, I mean  
21 the terms of the resolutions, not just in general this is  
22 how we mediated this and how long, but what are the terms  
23 and what are the factors concerning those particular people  
24 to see if it helps in some way discuss a global resolution.

25 THE HONORABLE MAGISTRATE JUDGE NOEL: One thing I

1 should have mentioned in chambers and didn't, it might be  
2 too late to do anything about it right now, but one of the  
3 things I will be interested in learning when I meet with you  
4 folks later, if we can, of the cases that have settled, with  
5 bucket would they fall into in terms of the five categories  
6 set out in Pretrial Order No. 19, if you could identify just  
7 -- you know, I don't need the name of the case, I don't need  
8 the amount, I would just like to know, if I could, how many  
9 of the settled cases are in category one, two, three?

10 MR. CAMPILLO: I don't want to make any promises.  
11 I am not sure I have that information with me today, but I  
12 think we can address some of it.

13 THE HONORABLE MAGISTRATE JUDGE NOEL: Okay, thank  
14 you.

15 THE HONORABLE JUDGE FRANK: All right, we can move  
16 on.

17 MR. FLOWERS: Your Honor, I think the disputed  
18 issues -- maybe I will just bring up one issue before you  
19 get into the facts of that, because that is what remains.  
20 But, we discussed this briefly back in chambers, but the  
21 Defendant fact sheet -- I don't think there was an order  
22 issued in terms of the timing of that and we just wanted to  
23 bring that to the Court's attention.

24 MS. WOODWARD: And our position on that, Your  
25 Honor, is until the Plaintiffs can meet their obligations

1 under PTO 8 in full, that discussion is severely premature.

2 THE HONORABLE JUDGE FRANK: And it may or may  
3 not -- as we were careful to say in chambers, we won't mix  
4 and match in the private conversations that happened  
5 afterwards the status of a settlement, settlement approaches  
6 with any outstanding discovery disputes, but there will be  
7 no doubt, as counsel leave today, what has been resolved and  
8 what needs to be decided immediately by the Court. So, we  
9 will at least have a -- and then what -- if there is an  
10 assertion by either party: Well, this hasn't been briefed  
11 yet, or that is; but yes, it is ready for a court decision,  
12 so we will make sure that -- I think it is clear now, but we  
13 will make sure that we know what that is.

14 THE HONORABLE MAGISTRATE JUDGE NOEL: To the  
15 extent I might have dropped the ball on that, if you could,  
16 somebody send me an email? Or before we leave here today,  
17 give me -- refresh my recollection as to where I find the  
18 briefing, just the docket entries that I need to look at?

19 MS. WOODWARD: That's easy.

20 MR. FLOWERS: Thank you.

21 MS. WOODWARD: I believe the next item on the  
22 agenda is oral argument on Defendants' Motion to Compel --  
23 excuse me -- Compliance with PTO No. 8.

24 THE HONORABLE JUDGE FRANK: All right, shall we?

25 MR. GRIFFIN: May it please the Court, Your Honor?

1 THE HONORABLE JUDGE FRANK: And maybe for the  
2 benefit of -- and maybe all of the lawyers listening on the  
3 phone will say: Oh, we are experts, we are experts at voice  
4 recognition, but just note your -- since you haven't  
5 addressed the Court yet today.

6 MR. GRIFFIN: Tim Griffin on behalf of the  
7 Defendants, Your Honor.

8 THE HONORABLE JUDGE FRANK: Thank you.

9 MR. GRIFFIN: As we discussed back in chambers,  
10 the Court has read the parties' briefing and is prepared to  
11 rule relatively quickly on the Motion to Compel Compliance  
12 with PFS --

13 THE HONORABLE JUDGE FRANK: We are.

14 MR. GRIFFIN: I want to address a couple of things  
15 quickly to bring clarity to this issue. Since September  
16 when we first met, this Court has consistently asked us,  
17 what do you need to move the litigation forward? And the  
18 Defense's response has consistently been, completed fact  
19 sheets, records and authorizations. That was nine months  
20 ago.

21 In December, the Court adopted the Plaintiffs fact  
22 sheets that had previously been adopted in New Jersey.  
23 Since that time, there has been a lack of compliance that  
24 has been mentioned to counsel on the record, in  
25 conferrals -- and ultimately at the May status conference,

1 we brought to the Court's attention we needed relief.

2           Within three weeks we provided the Plaintiffs with  
3 a list of deficiencies on fact sheets, both fact sheets that  
4 had not been submitted, as well as fact sheets that were  
5 incomplete. It was roughly a 50 percent compliance rate for  
6 the 490 cases that were eligible for conclusion in the  
7 bellwether pool. Those were the cases where Plaintiffs fact  
8 sheets were due prior to May 1 or by agreement of the  
9 parties, the Plaintiff elected to file a fact sheet, even  
10 though not yet due, by May 1.

11           We exchanged the list on the 23rd, and there was  
12 an exchange between the parties to resolve inconsistencies.  
13 A couple of things I want to make sure are clear, though.  
14 In the opposition to the motion, the Plaintiffs argue there  
15 are several false assertions of deficiency, and they focus  
16 on the list that was exchanged on the 23rd. That is not the  
17 list that was filed in support of our motion. The list that  
18 was filed in support of our motion is as of the 23rd,  
19 because it necessarily takes some time to make sure it is  
20 accurate.

21           With regard to the list that was filed on the  
22 23rd, they highlight two false assertions of deficiency.  
23 Number one, they identify 19 Plaintiffs that were on the  
24 list that had not served fact sheets. The fact is, they  
25 hadn't served the fact sheets in compliance with PTO 11 at

1 the email address that Plaintiffs had requested. Those fact  
2 sheets had come into an attorney's email box. As soon as we  
3 found out about that, we corrected it.

4 So, the notion that it was a false assertion of  
5 deficiency connotes some culpability. There wasn't any.  
6 We have since identified others who have subsequently served  
7 their fact sheets. And we have taken them off the list.

8 Plaintiffs are correct that there were three  
9 Plaintiffs that were on the list that had served fact  
10 sheets, records and authorizations. And they identified  
11 that on page 7, and we took those off the list.

12 To the best of our information after conferral  
13 with the Plaintiffs, exchanged a list. The list we  
14 submitted as of May 23rd is accurate.

15 It identifies a 55 percent compliance rate. 38  
16 Plaintiffs have refused, frankly, to submit fact sheets in  
17 compliance with the Court's Order. And there was 202 who  
18 have emailed completed fact sheets.

19 Since then, we have received an avalanche of fact  
20 sheets and records. The threat of sanctions is working. We  
21 are now at a 24 percent compliance rate for those cases.  
22 So, from March 23rd to June 6th, we went from 50 percent to  
23 24 percent. We have got 7 fact sheets that are outstanding,  
24 as opposed to 38. We have a total of, I believe the number  
25 is, 115 Plaintiffs fact sheets that are either missing or

1 that are incomplete. I think that is important for everyone  
2 to understand as we are trying to craft, and we are  
3 suggesting to the Court it is appropriate to craft a  
4 sanction to compel compliance.

5 Plaintiffs in their opposition attempt to  
6 distinguish the legal authority we rely on. I am not going  
7 to go into detail on that. I think it is well briefed. I  
8 just want to make one point clear. We have PTO No. 8  
9 ordering the parties to produce the information. We are  
10 asking for another order from the Court ordering them to  
11 produce the same information. If that Order is not complied  
12 with, we believe that sanction is appropriate at that time.

13 Much of the case attempts to distinguish the case  
14 law that we relied upon. Plaintiffs are arguing this is one  
15 order, and then sanctions. And that is not accurate. What  
16 we need for relief here, Your Honors, is complete production  
17 of the medical records and the authorizations so we can  
18 figure out which categories these cases go into. We are not  
19 addressing the other deficiencies in these fact sheets in  
20 this motion. There are many of them. We are trying to  
21 identify the key information we need to categorize and  
22 select lead case trials.

23 THE HONORABLE MAGISTRATE JUDGE NOEL: Let me ask a  
24 question on that point. As I understand it, the Plaintiffs  
25 take the position that they shouldn't have to produce

1 medical records and physician reports and whatnot if they  
2 provide authorizations to you.

3 Is that an issue that is part of this motion that  
4 you are seeking to make them -- that the authorization,  
5 alone, is not enough?

6 MR. GRIFFIN: Yes, Your Honor. Very clearly, the  
7 parties agreed to the Plaintiffs fact sheet that was adopted  
8 by the Court in PTO 8. It requires both record production  
9 and authorizations.

10 Practically speaking, we need the records now in  
11 order to make selections and have any hope of complying with  
12 the schedule that the Court has set. There will be  
13 follow-up, for certain, and the authorizations are  
14 important. But, the suggestion that Plaintiffs can only  
15 partially comply with the requirements of the fact sheet by  
16 producing authorizations, and then shift the burden on to  
17 the Defendants to go locate the various health care  
18 providers, request records, wait for them to respond, follow  
19 up on their lack of response completely ignores the  
20 requirements of the fact sheets that the Plaintiffs agreed  
21 to. So, I believe that addresses Your Honor's question.

22 THE HONORABLE JUDGE FRANK: All right.

23 MR. GRIFFIN: With regard to the relief, and I  
24 want to be hopefully quick, here, we need a deadline by  
25 which folks are required to produce the information or face

1 a sanction. We need time to digest the information, to  
2 categorize and select.

3 The Plaintiffs' suggested relief is extremely  
4 problematic, and I think flies in the face of the experience  
5 that we have had thus far in having folks respond with a  
6 pending motion that they might get sanctions. Their relief,  
7 frankly, extends the Court-ordered deadlines an additional  
8 sixty days, which means that we are going to be into the  
9 fall, best case scenario, before we have complete responses  
10 for the cases potentially in the bellwether pool. I suggest  
11 that that is not a realistic solution.

12 There is also the problem, as Your Honor  
13 suggested, that they don't have to produce -- they are  
14 suggesting they should not have to produce documents under  
15 their control, which is inconsistent with Rule 34, it's  
16 inconsistent with the fact sheet, itself, and would shift  
17 the burden and cause further delay.

18 Finally, there is the ultimate sanction. We tried  
19 to be thoughtful in crafting a proposed order to the Court  
20 that will motivate people to give us the information so that  
21 we can keep things on track. We recognize that dismissal  
22 with prejudice is a severe sanction, no question about it.  
23 But, in this procedural setting, we have to come up with  
24 some mechanism that will force the parties to honor their  
25 discovery obligations. That is all I have, Your Honor.

1 THE HONORABLE JUDGE FRANK: All right, thank you.

2 MR. GRIFFIN: May I -- one more thing? I  
3 apologize. One more thing?

4 There was a suggestion -- I apologize, Your Honor.  
5 I just want to make sure the record is clear. There was a  
6 suggestion in opposition that there was 128 cases added to  
7 the list that was filed in support of our motion.

8 The list of 128 cases is at tab 7 of the Zimmerman  
9 Declaration. I went through the first 10 that were  
10 identified. 9 of those 10 were in fact on the list that we  
11 shared on March 23rd identifying the deficiencies.

12 So, the suggestion that we added or updated the  
13 list for this motion with 128 new cases is incorrect. If we  
14 look at Exhibit 7, the first entry, it appears as number 1  
15 on page 4 of Exhibit 3, which was the list that we  
16 circulated on the 23rd.

17 If we look at the second entry of Exhibit 7, that  
18 entry appeared on page 4 as number 2 of Exhibit 3, which was  
19 circulated on the 23rd.

20 The third entry is in fact new. I can go down the  
21 rest and identify that all of these were identified to the  
22 Plaintiffs on the 23rd. So, I just want the record to be  
23 clear that the suggestion that there was 128 new cases added  
24 is completely inaccurate. There were 50 cases added. And  
25 when we sent the email on the 23rd, we identified that our

1 review was ongoing and that the list would likely become  
2 longer. Thank you, Your Honor.

3 THE HONORABLE JUDGE FRANK: All right.

4 MR. NEMO: Good morning, Your Honors. Tony Nemo  
5 for the Plaintiffs. I think Mr. Gordon is going to address  
6 some more specific things, but I kind of want to go through  
7 the numbers. The Defendants attached an Exhibit C to their  
8 Motion to Compel. And what we did is actually go item by  
9 item on Exhibit C which contains 242 cases to see what the  
10 heck is going on. Are these people truly deficient? Have  
11 they truly not turned in their fact sheets? I want to go  
12 through some of the numbers.

13 THE HONORABLE JUDGE FRANK: Maybe for the benefit  
14 of some of you who can't see the flat screen, if you are  
15 going to use the big screen -- not in an attempt to create  
16 mood lighting, but I will have a preset setting here so  
17 people can see the screen.

18 MR. GORDON: I'm not sure, Your Honor -- this is  
19 Ben Gordon -- that we will, but thank you for that. We will  
20 if we need to.

21 MR. NEMO: I do like the mood lighting, Your  
22 Honor.

23 (Discussion off the record.)

24 MS. ZIMMERMAN: We have copies for the Court and  
25 counsel, as well.

1 THE HONORABLE JUDGE FRANK: How about for Defense  
2 counsel?

3 MS. ZIMMERMAN: Yes.

4 MR. NEMO: Just so we are all clear, this is their  
5 Exhibit C. It was simply reformatted so I had room for  
6 comments. Just to be clear, again, on the 242 cases  
7 identified on their Exhibit C as either being delinquent or  
8 deficient, there are 38 cases they identify where there was  
9 no Plaintiffs fact sheets served.

10 Now, I went through, because I had access to all  
11 of the services. And 24 of those 38 were actually served  
12 prior to them filing their motion. Now, that may have been  
13 between the 23rd and June 4th. But, 24 of those cases had  
14 been served before the motion was filed.

15 Since the motion was filed, 10 additional  
16 Plaintiffs fact sheets had been served. So as we stand here  
17 today, there are four missing that were identified on their  
18 Exhibit C. And we are working with Plaintiff's counsel to  
19 get those. There are various reasons, we have been told, as  
20 to why they are not in, difficulty finding the client, all  
21 sorts of things. But, there are four missing as we stand  
22 here today.

23 Now, if we take out the absent fact sheets that  
24 are claimed in their exhibit, there are 204 other cases  
25 identified where the Defendant claims that the fact sheets

1 are deficient. And when I go through the fact sheets, the  
2 deficiencies between a third and a half of those cases are,  
3 quote, "missing" post-revision and PT records. And I have  
4 contacted the lawyers who have these cases, and some of  
5 these are our cases. And in a lot of the cases, post  
6 revision and PT records were submitted. And they were  
7 current at the time that the Plaintiffs fact sheet was  
8 submitted.

9 Lawyers typically don't reorder records every day  
10 or every hour, they do it on a monthly basis, a quarterly  
11 basis. And that is what these lawyers have told me, that  
12 they are in the process of reordering records, but they  
13 provided every scrap of paper that they had at the time, and  
14 in many cases it included revision and PT records. Since  
15 filing -- actually, before filing the motion, when you look  
16 at Exhibit C, out of the 204 deficiencies, there were 51  
17 cases that actually did provide additional records that the  
18 Defendants wanted, even though they thought they were  
19 completely complete when they submitted them.

20 They did go ahead and find and submit additional  
21 records in 51 cases. Between the time of filing the motion  
22 and yesterday, an additional 73 cases have been  
23 supplemented, again, with additional records that they  
24 scurried to get because they wanted to give the Defendants  
25 what they asked for.

1           There were only 80 cases out of that 204 allegedly  
2 deficient cases that still have not supplied the additional  
3 records that weren't available in many cases at the time  
4 they submitted their fact sheets. And they are working very  
5 furiously to get those records and will be serving them.

6           And I bring up these numbers not merely to pick at  
7 what they provided by Exhibit C, but the problem that they  
8 are citing isn't as great as they are making it out. Four  
9 missing fact sheets? Granted, they all should be in; but,  
10 that isn't bad. And in the deficiency they alleged, many of  
11 them are requesting records that either don't exist or  
12 didn't exist when they did the fact sheet. So, those are my  
13 numbers.

14           THE HONORABLE MAGISTRATE JUDGE NOEL: Before you  
15 leave that point, doesn't that, though, make the Defendants'  
16 argument that the existence of this motion is what has  
17 generated all of this paper to ultimately get produced, that  
18 there needs to be some incentive?

19           MR. NEMO: Well, I, again, as liaison counsel, I  
20 am the one that gets all of the -- or most of the e-filed  
21 discovery, whether it is a disclosure form or a fact sheet.  
22 There have been ebbs and flows and massive filings well  
23 before May 23rd and well before their motion was filed. It  
24 was based on a variety of things. There has been an  
25 avalanche of people amending their fact sheets, not because

1 they thought that they were materially deficient. Frankly,  
2 they are scared to death.

3 You know, the biggest problem for me, and I speak  
4 for a lot of lawyers, is that I submit everything I got.  
5 But, if my client's PFS was sufficient and was current  
6 yesterday and he went to the doctor today, I have control  
7 over that record from today but I haven't produced it. So,  
8 they are going to say I am deficient. There has got to be a  
9 gap in time where you can request records and supply them to  
10 the Defendants. No one is saying we shouldn't do that; but,  
11 my God, I can't call my clients, every one, every day, and  
12 make record requests for three lines penned by a physical  
13 therapist, you know, about doing abductor raises. We have  
14 got to do this on some orderly basis.

15 So, granted, the fear of the lord has put many  
16 people -- they are overproducing, in my opinion. But, they  
17 are doing it because they don't want their client's case in  
18 jeopardy.

19 THE HONORABLE JUDGE FRANK: I don't want to create  
20 an issue where there isn't one, but why -- if it is the  
21 phenomenon as you have explained, what you've described is  
22 true in every case with this duty to supplement. You know,  
23 things go on with many, many cases.

24 Why do you believe -- you are implying something,  
25 I suspect, about, well, it really isn't the concern the

1 defense has suggested? Or, I mean, there is nothing unusual  
2 about the case other than it is an MDL, because the duty to  
3 supplement, and records, that goes on in many, many, many  
4 cases.

5 MR. GORDON: Your Honor, this might be a good  
6 place for me to jump in, if I may. This is Ben Gordon. I  
7 appreciate that Tony did all of the numbers and the work he  
8 and the other liaison counsel have done over the past couple  
9 of weeks to try to elucidate this complex process, but you  
10 are making the case for us, Your Honor.

11 Let me back-up for a moment, the nature of  
12 multi-district litigation, consolidated litigation for  
13 hundreds and sometimes thousands of plaintiffs. Plaintiffs'  
14 lawyers seldom order all medical records at the inception of  
15 a case for a lot of good and valid and practical reasons.  
16 You know, under our due diligence and the requirements of  
17 Rule 11 and so forth, we don't want to improvidently file  
18 cases that we don't have sufficient information about. So,  
19 what we generally do at the beginning of the case is we  
20 target core key medical records to ensure a couple of  
21 primary things.

22 In this kind of a case, a hip implant case, we  
23 essentially want two kinds of records, two sets of  
24 critically important records, for our purposes of evaluation  
25 and for Stryker's purposes of evaluation. Those are the

1 initial implant records of the orthopedic surgeon, and the  
2 follow-up or revision records where someone has a failed  
3 device.

4 So, we have to identify that we have the correct  
5 product. There are several questions we have to answer at  
6 the inception of the case. Did this Plaintiff have the  
7 correct product? You must get product identification. So,  
8 to do that requires us to request, generally speaking,  
9 surgical records from the physician, himself, his clinic,  
10 his orthopedic unit, and the hospital, itself. Because,  
11 typically, the chart stick labels, the little stickers that  
12 contain the lots and catalog numbers for the product are  
13 contained in those hospital charts.

14 If we requested everything at the inception, the  
15 patient's entire chart for the hospital, we would in many  
16 cases literally receive thousands of pages of records. And  
17 they would be delayed. Because when we request records that  
18 are that voluminous, typically they are put to the back of  
19 the stack. It takes more time to process that request. It  
20 is simply the reality of the business that was dealing with  
21 medical records.

22 So, we don't. We request an abstract of those  
23 records, so we understand the key information. Did the  
24 Plaintiff have this product? And then, was this product the  
25 correct product that we are talking about? And did it fail?

1 Was it revised? Did the plaintiff undergo surgical  
2 revision?

3 Those core key medical records are the primary  
4 basis in all of these MDLs that we worked on that make it  
5 what we, as Plaintiffs' lawyers, and the defense, use to  
6 evaluate the case, initially. It doesn't mean that we are  
7 not going to give them other records. It doesn't mean that  
8 they are not entitled to other records, and I will speak to  
9 that.

10 But to go back to Your Honor's point and to Tony's  
11 point, many of these, in fact, if you look at the numbers,  
12 virtually all of these Plaintiffs were substantially  
13 compliant with these Plaintiffs fact sheets and medical  
14 records request long ago. What we are talking about here,  
15 frankly, Your Honors, is a distinction between complete  
16 medical records and substantially complete medical records.

17 The fact is, Stryker has settled cases. They  
18 talked about that a few minutes ago, where records were not  
19 complete. Because when we say complete, under the  
20 Plaintiffs fact sheet, understand I have a copy of it here,  
21 we have a 37-page fact sheet, here. In the *DePuy Litigation*  
22 we had a 24-page fact sheet. In the *Smith & Nephew*  
23 *Litigation*, we had an 11-page fact sheet. This is an  
24 all-encompassing, burdensome, very lengthy and very detailed  
25 Plaintiffs fact sheet. I am not complaining about that,

1 Your Honors. We agreed to it because it was used in New  
2 Jersey, and we were living with it.

3 But what that means is they were entitled to any  
4 and all potentially relevant medical records, follow-up  
5 records such as Tony mentioned, physical therapy records  
6 that might consist of a couple of entries where a physical  
7 therapist talks about a person's range of motion and  
8 mobility, such as general physical records from a general  
9 practitioner or a gynecologist. Those kinds of records they  
10 are entitled to and they are getting. And that -- the  
11 add-ons, those are the things that are being supplemented  
12 over time because that is the fundamental nature, as Judge  
13 Frank said a moment ago, of the process of these personal  
14 injury lawsuits. These Plaintiffs develop problems over  
15 time. And a critically important point is that many of the  
16 Plaintiffs have only recently undergone revision. So, when  
17 we requested their medical records, all that was available,  
18 initially, was the initial implant, operative notes, some  
19 follow-up with the orthopedic surgeon in the interim, and  
20 either consultation for a potential revision, or a recent  
21 revision.

22 So, the recent revision would contain an operative  
23 note, and a discharge summary from the hospital, but very  
24 little else. They have those records.

25 The Plaintiffs around this country, we spent the

1 last week as a group calling every Plaintiff's lawyer who  
2 was on that list of 242. And I think as of this morning it  
3 was 17, now it's 16 because I got one from Wes Pittman, this  
4 Ann Silva case from Panama City, Florida. Only 16 of those  
5 people have failed to respond in a meaningful way and tell  
6 us, we have substantially complied.

7 We have given them the PFS, and we have given them  
8 these core essential medical records that they need to  
9 understand which bucket the case falls in, to know is it a  
10 complicated revision? Is it an uncomplicated revision?

11 Now, obviously, Your Honor, they are entitled to  
12 follow the medical records, such as all records inside of  
13 the PFS, but there are certain medical records that are more  
14 important than others for them to understand which bucket  
15 the cases fall in. That would be the interim medical record  
16 between the time of initial product placement and the  
17 follow-up records after revision. Did someone have an  
18 uncomplicated revision, which is one of our categories? And  
19 they haven't had any follow-up treatment? In which case  
20 there wouldn't be any follow-up records for them with the  
21 exception of a 4 or 6-week post-op follow-up with the  
22 physician, and maybe a 3 or 6-month follow-up with the  
23 physician where he just checks how they are doing.

24 Other than that, the only ones that would have  
25 follow-up records are the people who right now have

1 complicated cases and are continuing to suffer problems  
2 because of their original implants. Those records are  
3 constantly being updated. We, as Tony said, we don't  
4 request those records every day or every week, but we  
5 request it any time we have had a legitimate basis to  
6 believe -- we follow-up with our Plaintiffs at least  
7 monthly. And anytime we believe, based on feedback from the  
8 Plaintiffs that they have undergone any follow-up medical  
9 treatment, we immediately request those records.

10 Now, again, putting aside the point that the  
11 Defendants have eight medical authorizations, more medical  
12 authorizations in this case than I have ever seen in any MDL  
13 going back to MDL 926, the *Breast Implant Litigation*, they  
14 had a thorough, going ability, to independently verify that  
15 what we have given them is complete and accurate.

16 But, putting that aside, we in fact have been  
17 continuously requesting follow-up records anytime we believe  
18 the Plaintiff has any other medical treatment. And we  
19 continue to give them those on a regular basis. But, that  
20 necessarily comes, it waxes and it wanes, as patients  
21 continue to receive treatment.

22 So, in fact, many of these Plaintiffs have told us  
23 that they did already provide follow-up medical records as  
24 treatments continued over the past several months, so it  
25 wasn't just as a result of the recent activity that many of

1 these records have come in.

2 Many of them are on Tony's list and he can address  
3 them a little better actually came in before May 23rd,  
4 before the date when they identified things that they  
5 considered not complete. And again, it goes back to this  
6 definition of what is complete or substantially complete.  
7 There may be cases where there are things contemplated by  
8 the PFS, because of how lengthy it is, that are still  
9 missing for one practical reason or another.

10 Either the medical provider has dragged their feet  
11 over responses to somewhat collateral or extraneous records,  
12 or the records are so voluminous that they have slowed  
13 things down on their end or on our end in some cases, but we  
14 are continuing to supplement. Or, it is simply a case where  
15 the Plaintiff doesn't have any follow-up medical treatment.

16 Now, obviously, if the Plaintiffs fact sheet  
17 identifies treating physician and medical treatment that  
18 they are entitled to, we constantly request that information  
19 and we are acknowledging and happy to give them -- no one is  
20 here to try to conceal or obfuscate patients treatment or  
21 records. It is our endeavor to give them everything we have  
22 got and everything that we can get, to get there.

23 And I will tell you, from all of the conversations  
24 that we all had when we divided this list of 242, the  
25 constant phrase that we have heard from other lawyers was,

1 no one has told us that we're deficient. We submitted the  
2 Plaintiffs fact sheet, we submitted all of the  
3 authorizations.

4 In some cases there were a few that didn't get all  
5 of the authorizations in and we had them supplement, and  
6 that has been done, now. We submitted all of the medical  
7 records that we believed -- that all of the records that we  
8 had, first and foremost, and all of the records that we  
9 believed were necessary to give them what they needed in  
10 this case.

11 And to the extent that there were individual  
12 things that we didn't know about that they wanted or that  
13 they identified based on the PFS that they think are  
14 deficient, no one has told us that. No one has told us --  
15 you know, yes, Karen or Tim had both made the point that on  
16 May 1st, I believe, there was a mention that there were some  
17 Plaintiffs fact sheets that they thought were incomplete.  
18 But, not until May 23rd did we get this list. So, not until  
19 that date. And the list, again, had many incorrect names on  
20 it, as they conceded. And not until we got that list and  
21 where we would go over it as a group, and go over it with  
22 Plaintiffs' counsel from around the country did we have  
23 specific claims of deficiencies.

24 So, our basic position, Your Honor, is this,  
25 without belaboring this to you more, is that under these

1 circumstances where the specific deficiencies were only  
2 recently enumerated so that we could go to the individual  
3 lawyers and tell them: If you have cases, tell us what the  
4 status is. If you have not produced records, send them in  
5 to us, immediately.

6 Under these circumstances, neither exclusion from  
7 the bellwether pool, nor certainly any kind of dismissal is  
8 appropriate -- is an appropriate sanction at this time. We  
9 are fully policing this process. We are fully committed to  
10 getting them all medical records. And we contend that at  
11 this point substantial completeness has been the order of  
12 the day, and that there has been no basis for any kind of  
13 draconian sanctions.

14 If you give me one moment just to see -- let me  
15 just, in conclusion, say the timing I think of this motion  
16 is important. Stryker claims they have been pushing for  
17 this missing information; but again, it wasn't until May  
18 23rd that we got the specific deficiencies. It is  
19 interesting that this motion didn't come about until after  
20 the bellwether process was announced.

21 I will also mention anecdotally, I have two cases  
22 filed in New Jersey where Plaintiffs fact sheets, in fact,  
23 went unnoticed initially because they were unrevised cases  
24 as of several months ago. So, we had not served Plaintiffs  
25 fact sheets in those cases timely. I was alerted to that by

1 Kim Katula in New Jersey. At no time did she file a motion  
2 to dismiss the case. At no time was there any discussion  
3 that something draconian would happen. It was a question  
4 of, where is the Plaintiffs fact sheet? Where are the  
5 records? And you need to provide that to us. We did that  
6 immediately. It was handled today in an arm's length,  
7 professional manner, and there were no draconian measures at  
8 the time. That leads me to believe that given the timetable  
9 here, what they are doing is really a thinly veiled effort  
10 to try to limit the bellwether pool to cases of their  
11 choosing.

12 The fact is, in my view, Your Honors, to try to  
13 exclude from the bellwether pool cases that on their merits  
14 are representative and should be considered for that,  
15 particularly when patients are only recently being revised  
16 or re-revised and medical records coming in every month  
17 would be grossly -- it would be a miscarriage of justice.

18 We need to be able to include all bellwether  
19 Plaintiffs that have a meritorious claim, a representative  
20 claim in the bellwether pool. And if that means that  
21 certain cases have to be excluded because 16, perhaps, or  
22 some small number that have not produced fact sheets, that  
23 we don't have a good answer for, I think we may have to live  
24 with that. But, the fact is that for the overwhelming  
25 majority of these, they were substantially compliant. We

1 gave them implant records, we gave them revision records.  
2 They had the core records that they used to settle cases and  
3 that they need to evaluate these cases for purposes of  
4 bellwether selection.

5 THE HONORABLE MAGISTRATE JUDGE NOEL: Let me ask  
6 this question. So, you raised the scenario of a complicated  
7 -- strike that. You raised the scenario that an  
8 uncomplicated revision might not have any follow-up records,  
9 you know, significant physical therapy or other medical  
10 records.

11 Do the Defendants have the capacity to know which  
12 is which? In other words, can they look at what they have  
13 got and say: Okay, I know this is an uncomplicated revision  
14 because there are no follow-up records, when in fact it may  
15 be it's a complicated revision, but records haven't been  
16 produced yet? Is there a way for them to distinguish  
17 between those two things?

18 MR. GORDON: I think the answer is yes, Your  
19 Honor, as far as I know. I think Mr. Nemo would like to  
20 answer that more specifically.

21 MR. NEMO: Well, yeah, the short answer is they  
22 could use the authorizations they got 90 days ago and order  
23 the records. That would be the best way to do it. That is  
24 what all of the other defense lawyers have seemed to have  
25 done in the past 25 years. But, aside from that, I just

1 want to point out something. On their Exhibit C, 111, this  
2 is an example of the frustration we Plaintiffs' lawyers  
3 feel.

4 This happens to be one of my cases. The  
5 Defendants say this is deficient because it is lacking  
6 post-revision and PT records, okay?

7 MR. GORDON: Should I put that up there?

8 MR. NEMO: Yes.

9 MR. GORDON: What page?

10 MR. NEMO: It is 111.

11 MR. GORDON: 111, so the Court can see what they  
12 are talking about?

13 MR. NEMO: Sure, and maybe focus in on the last  
14 columns, there. The colored part with their claimed  
15 deficiencies? Yeah.

16 MR. GORDON: Can you read that, Your Honors? The  
17 one that says 3/17, I believe.

18 MR. NEMO: Well, yeah. So, they are claiming I  
19 didn't submit post-revision and PT records. And at the time  
20 we submitted the fact sheet, we gave the Defendants physical  
21 therapy records, records for Mankato Mayo dated March 25th  
22 and March 28th. We provided PT records following the  
23 initial surgery. We also provided PT and post-revision  
24 records, and I won't read all of the dates off. This was an  
25 uncomplicated revision, like Your Honor was asking about.

1 Her last visit was 10/25/13, and she tells me she hasn't  
2 been back.

3 Now, if they get their way, I can't supplement  
4 this, which means on June 21 this case will be subject to  
5 dismissal with prejudice. There is nothing more I can give  
6 them. But, if they think I am lying or pulling their leg, I  
7 gave them authorizations nearly three months ago. And they  
8 could order those records if they think I am holding back on  
9 something.

10 MR. GORDON: And there are many examples on this  
11 chart as we went through it and called all of these other  
12 attorneys who provided us this information, just like that  
13 one.

14 THE HONORABLE MAGISTRATE JUDGE NOEL: What is the  
15 significance of the yellow versus the green highlighting?

16 MR. NEMO: Sure. Well, for lack of a better  
17 reason, what I did was when I went through this last night,  
18 the yellow highlights are where there was a provision.  
19 There was a providing of the requested missing records  
20 before the June 4th motion was filed.

21 Then in that gap between June 4 and last night,  
22 where they provided what was alleged to be deficient, I  
23 highlighted in green. The ones that have no highlighting  
24 are ones -- and there is an explanation in those boxes --  
25 that is where the lawyers have said: Hey, we gave them

1 everything, we have ordered stuff, we are going to give it  
2 to them as soon as we get it, but they haven't done it yet  
3 so I haven't highlighted it.

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

6 MR. GORDON: So, I guess to conclude, Your Honor,  
7 you know, we had proposed an alternative that I think what  
8 was used in and outlined in our papers, the *Biomet*  
9 *Litigation*. It is a reasonable compromise, reasonable  
10 alternative. It certainly still causes Plaintiffs' lawyers  
11 around the country to understand they are under a tight  
12 deadline here, that there are specific requirements and that  
13 they are subject to potential dire situations if they don't  
14 comply. But, what we haven't seen here is any pattern of  
15 dilatoriness or noncompliance. These records have been  
16 coming in right along. They have in 90 plus percent of the  
17 cases substantially complete productions that give them what  
18 they need to evaluate cases for bellwether purposes.

19 And so, obviously, some of their data -- we are  
20 happy to meet with them, go over and figure out where there  
21 are glitches. I know there has been a couple of instances  
22 and they may have mentioned one where it went to the wrong  
23 email address. Some Plaintiffs' lawyers did tell us they  
24 couldn't get the portal to work. Because of high volume  
25 times, the portal sometimes causes records to not go

1 through, even if you thought they went through. There were  
2 some of those.

3 So, some people did have to FedEx records and  
4 maybe some of those didn't get fully assimilated into the  
5 system in a timely fashion. We are happy to work with them  
6 on that. But, we have not shown any gross neglect of this  
7 process. Plaintiffs' lawyers around the country, their  
8 constant refrain is: We have given them everything we have.  
9 We have given them initial implant records. We have given  
10 them explant records. And if there is anything else, we  
11 have either given it to them, or it's ordered and we have  
12 given them authorizations if they think we are dragging our  
13 feet, which we are not.

14 THE HONORABLE JUDGE FRANK: Just at the end of the  
15 day, not to oversimplify Plaintiffs' position or Defendants'  
16 position, in effect, for better, for worse, you are saying:  
17 We are in substantial compliance. And this motion is about  
18 technical noncompliance?

19 MR. GORDON: Precisely.

20 MR. NEMO: I think that is accurate, Judge. When  
21 you look at the list, there are a couple of outliers there,  
22 a couple of people who have not yet submitted a Plaintiffs'  
23 fact sheet. There isn't anything I can do about that. We  
24 badger people -- there are a couple of notes on a couple of  
25 lawyers who have had a difficult time contacting or finding

1 their client, and I don't know the story behind it. There  
2 are some valid deficiencies, and omissions. But, they are a  
3 small subset. And so, largely, yes, it is a motion about  
4 technical deficiencies that I don't think are deficiencies,  
5 but there are a couple of them.

6 MR. GORDON: If I might just add to that, I think  
7 that is very apropos what has happened here, Your Honors. I  
8 hate to harp on this, but I want to come back to it. This  
9 is the Plaintiffs fact sheet as used in this case which we  
10 have made peace with, but it is a bear. It is 37 pages  
11 long. We have had a lot of complaints from lawyers around  
12 the country because of how overbroad and how burdensome it  
13 is.

14 This is the Plaintiffs fact sheet in the Smith &  
15 Nephew Litigation. You can probably from there see the  
16 difference. It is 11 pages. This is 37 pages. It takes  
17 time. It is a time-consuming process, but no one is  
18 ignoring it.

19 We are in substantial compliance. And we are  
20 absolutely committed to giving them everything they need to  
21 fully evaluate these cases. Mr. Griffin?

22 MR. GRIFFIN: Thank you. To suggest that this is  
23 a lack of technical compliance is inconsistent with the  
24 lengthy list in Exhibit C. We had 38 people who had not  
25 submitted fact sheets as of the 23rd.

1           If you go back a couple of weeks earlier, it was  
2           85. If you go back a couple of weeks earlier, it was 150.  
3           Avalanche is the right word.

4           THE HONORABLE MAGISTRATE JUDGE NOEL: Is it  
5           correct that now there is only 4?

6           MR. GRIFFIN: My records are current as of June  
7           6th, and there are 7. If there are 3 since then, we haven't  
8           yet processed them.

9           THE HONORABLE MAGISTRATE JUDGE NOEL: Okay.

10          MR. GRIFFIN: As of June 6th we have 115. So, we  
11          are heading in the right direction. The suggestion that we  
12          created this situation, I think, is not consistent with the  
13          history in this litigation.

14          We asked the PLCC to extend the deadlines for  
15          bellwether selection in big cases and they refused. That is  
16          what precipitated this motion. We had no choice.

17          So, that is also why it is different in the MDL  
18          than in New Jersey. There is no bellwether selection, case  
19          selection process under way. There is no urgency to define  
20          the pool and collect the records in New Jersey like there is  
21          here. So, forced with an unwillingness to extend the  
22          deadline, we had to bring the motion. I think that is an  
23          important point.

24          The notion that the agreed upon fact sheet is  
25          overbearing and somehow unclear, I think, is inconsistent

1 with the record. The request for records are very clear.  
2 And if we look at Exhibit B to the Court's joint report and  
3 agenda, it lists the various law firms.

4 The vast majority of law firms have one case.  
5 They have one fact sheet to fill out. There is no reason  
6 that months and months after they were due, they haven't  
7 been provided. If you look at Exhibit C to our motion, it  
8 identifies the due date for the Plaintiffs fact sheet  
9 service. Many, many of them were due on March 17th. Half  
10 of them had not been received by May 23rd -- complete ones,  
11 I should be careful.

12 THE HONORABLE MAGISTRATE JUDGE NOEL: But, let me  
13 ask you this --

14 THE HONORABLE JUDGE FRANK: Speak into the mike,  
15 otherwise they can't hear, I don't think.

16 THE HONORABLE MAGISTRATE JUDGE NOEL: On the item  
17 number 111 that Mr. Nemo talked about, as I understood what  
18 he said is his production is complete. That everything he  
19 has has been produced, that there are no things after that  
20 October 2013 date.

21 So, what is the basis of your putting it on  
22 Exhibit C and saying it is incomplete? What is the  
23 disconnect between the parties on just, as an example, that  
24 111 entry?

25 MR. GRIFFIN: It was incomplete. It has been

1       supplemented. As I understand Mr. Nemo's color scheme,  
2       yellow identified cases where there have been  
3       supplementation. I have my chart as of June 6th. It states  
4       production has been made. So, to focus on that case  
5       demonstrates the effectiveness of the motion. It has been  
6       supplemented.

7               THE HONORABLE JUDGE FRANK: Except that all of the  
8       submissions were done prior to the motion, the way it looks.

9               THE HONORABLE MAGISTRATE JUDGE NOEL: I think  
10       March 17th is what your chart shows. That is not your date?

11              MR. GRIFFIN: That is not my date. The way I read  
12       the yellow text and the way I understood Mr. Nemo, that has  
13       since been supplemented since the May 23rd. If that is  
14       inaccurate, I don't understand his color scheme.

15              My chart today says production updated. I don't  
16       have the date of that update with me.

17              THE HONORABLE MAGISTRATE JUDGE NOEL: Okay, thank  
18       you.

19              THE HONORABLE JUDGE FRANK: Mr. Nemo, since you  
20       are standing there, just briefly?

21              MR. NEMO: Can I just -- I just want to clarify my  
22       color scheme.

23              THE HONORABLE JUDGE FRANK: All right.

24              MR. NEMO: The yellow means cases that supplied  
25       what they were asking for prior to the filing of their

1 motion.

2 Now, that could have been since the dawn of man,  
3 or it could have been on the 3rd of June of this year. The  
4 green means cases where there was a production of what they  
5 asked for that occurred after they filed a motion on June  
6 4th.

7 THE HONORABLE MAGISTRATE JUDGE NOEL: Just so I am  
8 clear, then, on item 111, you show the Plaintiff fact sheet  
9 service date as March 17th, 2014, correct?

10 MR. NEMO: That is correct.

11 THE HONORABLE MAGISTRATE JUDGE NOEL: So, is it  
12 your contention that everything that is in the yellow  
13 comments on that line item was produced by March 17th of  
14 2014?

15 MR. NEMO: That is what my records show, yes.  
16 Now, is it possible I added even -- I don't know what else I  
17 could have added. I think this one was complete. I show  
18 absolutely no supplementation. I know Tim's records do. My  
19 records show we submitted all of this on March 17th. And  
20 there's --

21 THE HONORABLE MAGISTRATE JUDGE NOEL: One more  
22 question. That service date, the March 17th date, is that  
23 in the original Exhibit C, or is that one of the additional  
24 columns you have added for purposes of this Exhibit?

25 MR. NEMO: No, that was here in the original

1 Exhibit C. The only thing that is my handiwork is the far  
2 right column with colors and writing. And I will say one  
3 more thing and then I will shut up. The number 111 was  
4 merely an example. There's many others -- a lot of them are  
5 my cases, because I know them best.

6 MR. GRIFFIN: So, with regard to 111, as I  
7 understand the color scheme, those are cases where we had to  
8 pick a cut-off date. We chose March (SIC) 23rd. And to the  
9 best of our -- excuse me, May 23rd. To the best of our  
10 understanding, our records are accurate and complete as of  
11 May 23rd.

12 The motion was filed on June 4th. So, to the  
13 extent there have been additional productions, they don't  
14 reflect post-May 23rd. Our current records show that we  
15 went from 25 to 24 percent compliant as of June 6th. That  
16 is our most current data. I heard the Plaintiffs used some  
17 numbers that are even lower, which I fully expect given the  
18 rate of supplementation that is occurring.

19 The situation we are in is we are getting better  
20 compliance. We need time to review the information,  
21 select -- the Plaintiffs have conceded that pushing the  
22 selection date in their motion is acceptable. That was in  
23 the conclusion to their motion. So, what we are asking for  
24 is time to digest this information so that we can categorize  
25 and select. And we are asking for a process with a clear

1 deadline and sanction for not supplementing. Thank you,  
2 Your Honor.

3 THE HONORABLE MAGISTRATE JUDGE NOEL: Thank you.

4 THE HONORABLE JUDGE FRANK: All right.

5 MR. GORDON: May I just make one quick point on  
6 something?

7 Ben Gordon, Your Honor. I don't want to beat a  
8 dead horse. We will stand, obviously, on our papers and  
9 what we said earlier. But, one point of small  
10 clarification, and let me try to get this right. I don't  
11 want to mis-paraphrase Mr. Griffin, but a moment ago he said  
12 his information may not have been updated, which is  
13 reflected in the motion of June 4th, may not have been  
14 updated prior to -- for information that was submitted after  
15 May 23rd. But, that doesn't mean that the information that  
16 may have been submitted between May 23rd and the time of  
17 their motion was necessarily all information, information  
18 that was encompassing about the case.

19 In fact, many, many, if not most, of their  
20 complaints here are things like missing medical  
21 authorizations, missing records from this date, missing  
22 records from that date, missing follow-up records, missing  
23 physical therapy records, probably the most frequent entry.

24 The point -- my point is, like entry number 111,  
25 the PFSs in those cases were submitted. The substantially

1 important medical records I talked about earlier, the  
2 implant records, the revision records, the core medical  
3 records that tell us what buckets these cases go in had been  
4 provided in virtually all of these cases before the May 23rd  
5 date. Anything that was supplemented after May 23rd are  
6 things that were coming in -- when we put the heat on these  
7 people, we said, look I don't care if you just have a  
8 chiropractor visit --

9 THE HONORABLE JUDGE FRANK: Can you slow it down  
10 just a little?

11 MR. GORDON: I'm sorry. I apologize, I am getting  
12 tired.

13 THE HONORABLE MAGISTRATE JUDGE NOEL: And I think  
14 you are beating a dead horse, by the way.

15 MR. GORDON: I will cease and desist. Thank you,  
16 Your Honor.

17 MR. GRIFFIN: Nothing further, Your Honor.

18 THE HONORABLE JUDGE FRANK: How much time are we  
19 going to spend on the redaction motion? I am debating  
20 whether I should have my Court Reporter take a short break,  
21 here.

22 MS. WOODWARD: Your Honor, Karen Woodward. I  
23 think a short break would be great.

24 THE HONORABLE JUDGE FRANK: All right. Why don't  
25 we take ten minutes, here. And then we will come right back

1 in and finish up. All right?

2 ALL COUNSEL: Thank you.

3 (Recess.)

4 THE HONORABLE JUDGE FRANK: You may all be seated,  
5 thank you. Shall we move on to the redaction issue, unless  
6 there was something else you were going to take up first?

7 MS. WOODWARD: Your Honor, we were wondering with  
8 your permission if we could move to the Common Benefit  
9 Order. We think it would take a little longer. We would  
10 like to get it completed first.

11 THE HONORABLE JUDGE FRANK: All right, that is  
12 fine. All right with the Plaintiff? And obviously, what  
13 the Court said to me in chambers is that, let's get it out,  
14 get it on the record what is agreed to, what is not, what  
15 the issues are, and that will be part of an order that comes  
16 out in the next few days, as well, so there is no question,  
17 so we can move on. So, whenever you are ready, Ms.  
18 Woodward?

19 MS. WOODWARD: I am ready, Your Honor, thank you.  
20 May it please the Court? When the Common Benefit Order was  
21 issued, just recently, we sat down on the Defense side to  
22 try to figure out a process to implement the Order in terms  
23 of what our obligations would be.

24 And we basically came away scratching our heads  
25 about what exactly some of our obligations are about who

1 exactly is covered by the Order, who is subject to the  
2 Order. And the more that we looked at the order, the more  
3 potential issues we saw.

4 So, we reached out to the PLCC to start a  
5 discussion along those lines. We reached somewhat of an  
6 impasse in terms of the fact that they believed that the  
7 order speaks for itself and we would appreciate some  
8 additional dialogue.

9 As Your Honor might remember, when this issue was  
10 first teed up, there was a simultaneous exchange of briefs.

11 THE HONORABLE JUDGE FRANK: There was.

12 MS. WOODWARD: Then there were simultaneous  
13 responses. We were set to discuss the Order at the February  
14 status conference. Less than 24 hours before the  
15 conference, the Plaintiffs filed a new order. And at the  
16 conference we asked for additional time to supplement what  
17 we had previously filed. And we also requested oral  
18 argument. But, we never really had a chance to deliver oral  
19 argument on the Common Benefit Order issue.

20 So, we would like the opportunity to build a  
21 little bit of record on that, and to hopefully get some  
22 clarification on these issues which are very important  
23 issues -- not only to us, but we also believe to Plaintiffs.

24 THE HONORABLE JUDGE FRANK: One issue might be,  
25 apart -- separate from how each respective side sees it is,

1 all right, so if it is the view of either party, it doesn't  
2 mean because it is done once, it may justify to do it a  
3 second time. But, one of the issues will be since CBOs are  
4 probably in almost every MDL that has ever been filed is,  
5 all right, whether it is the Defense view, this is different  
6 than anything that has ever been filed, and here is how it  
7 is different. Or, if it is the Plaintiffs' view, no, this  
8 looks exactly like X number of cases, then I think that's --  
9 because it doesn't mean -- obviously, I am bound either way,  
10 whether it is an ambiguity or what it is. But, it kind of  
11 gives rise to an explanation from one side or the other on,  
12 well, what is different about this case that justifies this?  
13 In other words, if one of you are saying, hey, this is  
14 just -- this is customary. Or no, here is why this is so  
15 different than whether it is one of my former cases or  
16 another MDL. So, that's -- I think that is both fair to  
17 both parties, but helpful to the Court, as well.

18 MS. WOODWARD: We do want to point out that we  
19 believe there is some urgency to resolving these issues  
20 because we are in ongoing settlement discussions with  
21 counsel all over the country. Counsel not only who have  
22 cases in the MDL, but counsel who have unfiled cases and  
23 counsel who have cases in State Court. So, there are  
24 potentially thousands of claimants to whom this Order might  
25 apply. So, clarification is also urgent in that regard.

1           And as you can imagine, Your Honor, that as we  
2           have settlement discussions with people, whether or not the  
3           4 percent or whether it is a higher holdback is going to  
4           apply factors into our case assessment, it is part of our  
5           negotiation strategy knowing every piece of economic  
6           information we can possibly get when we sit down at the  
7           negotiating table.

8           People that we are negotiating with have told us  
9           the same thing. They need to know whether the holdback  
10          applies to them at the outset, not whether it may be later  
11          determined that the holdback applies to them. And they have  
12          also told us that if they have to pay a holdback, then that  
13          will increase their settlement demand amount.

14          THE HONORABLE JUDGE FRANK: These must be people  
15          generally unfamiliar with how these cases are handled,  
16          because I was not a big -- probably didn't get a pat on the  
17          back from Plaintiffs' counsel in *Guidant* when I turned to  
18          the Plaintiffs' lawyers around the country and said: You  
19          are not a freestanding case. You don't get your 33 percent  
20          or 50 percent. I am reducing and capping your contingency  
21          fee and that holdback is coming out of that fee, and here is  
22          the cap. They must not be familiar with some of those, to  
23          which there was no appeals. And I would challenge somebody  
24          to go ahead and appeal those to say that the Court has no  
25          jurisdiction in the interest of justice and the integrity of

1 the process. And it was accepted, reluctantly or otherwise.  
2 But, I mean, that is an issue that is raised in every case.

3 And so, I think, actually, the concern might be  
4 attorney fees, because most of those numbers do not come out  
5 of the -- in fact, most orders will stipulate what comes out  
6 of what part of the figure, gross or net. But, the --  
7 because as you know and the lawyers here know, in some of  
8 the states you can cap out contingencies at 50 percent, some  
9 40, some 33 1/3, some 25, some with or without expenses.  
10 That is not an issue I have to decide today.

11 But I will tell you that regardless of what the  
12 issues are, I will have an order out before midweek, next  
13 week at the latest. So, there will be no mystery to it.  
14 But, it is an interesting issue, because just last week on a  
15 bunch of cases -- not these cases -- that got remanded and  
16 they were fighting over a five percent holdout that a firm  
17 here in Minnesota wanted from the gross settlement. I said  
18 that assumes I am not going to reduce that fee based upon  
19 the work done on the file from Plaintiffs' counsel. But,  
20 anyway, sorry to interrupt you, because there are different  
21 ways these issues are resolved. So --

22 MS. WOODWARD: Exactly, Your Honor. And I do  
23 think that once we are able to clarify the Order and what  
24 everybody's obligations are under it, you know, education  
25 along those lines might be called for. It is an unusual and

1 uncomfortable position for us, because we don't want to be  
2 in this fight.

3 We -- our preference is that an order would be  
4 issued that has no obligations toward Defendants,  
5 whatsoever. Such orders have been issued, by the way. In  
6 this instance, we felt that we had offered a compromised  
7 position that did provide more up front notice. And -- but  
8 even as we look at that, now, the legal issues here are  
9 difficult and more complex than I think even we had  
10 anticipated.

11 But, I do want to point out something that Your  
12 Honor may not have been aware of with regard to this  
13 particular Common Benefit Order that was entered. This  
14 order is novel in the sense that we have never seen one  
15 exactly like it. We have seen two from other litigations  
16 similar to it, similar in a couple of respects, but most  
17 specifically in the respect that we are required to report  
18 our settlement activities to the PLCC.

19 Those two litigations the *ASR Litigation* and I  
20 believe the *Pradaxa Litigation*. The way I understand it is  
21 in those cases the defendants had an entirely different  
22 settlement strategy than we have. They did not settle  
23 cases. Both of those cases have now reached global  
24 settlement. But, they were not settling individual cases  
25 all along.

1           So, defense counsel really cared less about what  
2           was in the common benefit order in terms of their  
3           obligations. Their obligations were never invoked. And  
4           they knew that going in, because it was their strategy not  
5           to settle individual cases.

6           That is a different scenario here. And as such,  
7           we can't even get insight from those defense counsel as to  
8           how that CBO, their processes for those two CBOs worked. So  
9           again, clarification is needed.

10           THE HONORABLE JUDGE FRANK: You are probably about  
11           to get to it, but what are the novel aspects of this Order  
12           as you see it?

13           MS. WOODWARD: Well, the most novel aspect of this  
14           Order under the Defendants' obligations is this conferral  
15           process that goes on between the counsel from the MDL and  
16           counsel in New Jersey, after we report our settlement  
17           obligations. But, even the fact that we have to report our  
18           settlement obligations is a novel provision in common  
19           benefit orders that we have read.

20           And in fact, I don't think -- I have not looked at  
21           this in a while, but I don't think any of the orders that  
22           Plaintiffs have attached to their motion papers, maybe say  
23           for one, had that provision, the provision that the  
24           Defendant has to in advance report settlement activities.

25           THE HONORABLE JUDGE FRANK: And the settlement,

1 maybe you should just define, so it is clear to everyone  
2 when you say report the settlement obligation. What -- so,  
3 whether you feel the Order is ambiguous or not in that  
4 regard, what specifically that novel obligation is that is  
5 --

6 MS. WOODWARD: Well, all right. So, on page 7 of  
7 24 of the Order, "(4) Defendants' obligations." It reads,  
8 "Defendants and their counsel shall not distribute any  
9 settlement proceeds subject to this Order to any Plaintiff  
10 or Plaintiff's counsel until after." So, the fact that we  
11 would have to -- and then it goes on and says "Defendants'  
12 counsel has to notify the chairperson of the LLC in writing  
13 of the existence of the settlement." That provision is a  
14 provision that we saw in *Pradaxa*, we saw in *ASR*, but we have  
15 not seen it in the majority of other common benefit orders  
16 that have been issued.

17 And it is a problematic provision, Your Honor, for  
18 a couple of reasons, which I will go ahead and get into now,  
19 Your Honor. I don't know if you have the Order in front of  
20 you.

21 THE HONORABLE JUDGE FRANK: Well, and also,  
22 because -- you know, you may want to be comparing it to  
23 *Guidant* or other provisions saying: Well, here is why it is  
24 so different than the *Guidant* Order, as well. But, yes, I  
25 have the Order here.

1 MS. WOODWARD: Would you like a copy, Magistrate  
2 Judge Noel?

3 THE HONORABLE MAGISTRATE JUDGE NOEL: No, thank  
4 you.

5 THE HONORABLE JUDGE FRANK: We're good.

6 MS. WOODWARD: So, with regard to the Order,  
7 itself, as I read, we had this initial obligation to not  
8 distribute settlement proceeds until after we have notified  
9 the chairperson of the LC in writing of the existence of the  
10 settlement.

11 THE HONORABLE JUDGE FRANK: I am sorry to  
12 interrupt. And are you suggesting the Order, in particular  
13 provisions, that that gives you the obligation, irrespective  
14 of whether the particular law firm is covered or not? So,  
15 in other words, it is all cases, period?

16 MS. WOODWARD: Well, we posed that question to  
17 Plaintiffs' counsel last week. Do we have to report any and  
18 all settlements under this Order? And answer was, the Order  
19 speaks for itself. To us, it doesn't. So, the way we read  
20 it is, we have to distribute -- we have to report for cases  
21 that are subject to the Order.

22 Well, that takes you into a whole new Pandora's  
23 box of questions. You know, which cases are actually  
24 subject to this Order?

25 So, let me just raise a couple of the issues that

1 we feel need to be clarified along those lines. First, does  
2 the CBO obligate us to subject every single settlement we  
3 reach to this procedure that is outlined in paragraph 4 on  
4 page 7? And if it does, then we have very serious concerns  
5 about whether the Order would be in excess of the Court's  
6 jurisdiction.

7 In other common benefit orders I have seen, and  
8 case law I have seen, there has to be a very clear line as  
9 to whether the Court has subject matter jurisdiction over  
10 the people who would be subject to the Order. So, we think  
11 there needs to be clarification as to -- because the Order,  
12 as I read it now, asks for reports on settlements of  
13 claimants, on filed cases, State Court cases.

14 So, in New Jersey, when we settle a case there  
15 under the Mediation Program, do I then have to notify the  
16 LCC here that that settlement has been reached?

17 THE HONORABLE JUDGE FRANK: Well, and I can say it  
18 may not be relevant today, but as I think I have said early  
19 on in this case, and some of the Plaintiffs' counsel here  
20 can verify this. And I am not saying the cases were that  
21 similar or that different. I will let counsel decide. But,  
22 for example, the first words out of my mouth, or some of the  
23 first words on the *Guidant* case when I and Judge Boylan had  
24 that case were: All right, there have been X number of  
25 cases settled in State Court that are not part of the MDL,

1 the first thing you are going to do is go into the privacy  
2 of the room with Judge Boylan and explain to him the  
3 amounts, the profiles. And I direct you to do so, because  
4 the reputation and integrity of the justice system is at  
5 stake. Because I don't want to find out, well, the same  
6 firm settled the same case for \$50,000 more in that case  
7 than this one. But, since nobody knew about it except the  
8 Judge -- that was one of the very first things, apart from  
9 the order itself that happened, and the respective counsel  
10 for both Shook Hardy and the Plaintiffs laid it all out --  
11 not to me, but to Art Boylan, then Magistrate Judge Boylan.  
12 And that may not be the issue here, but that issue is  
13 probably going to come up no matter what my ruling is on  
14 this, frankly.

15 MS. WOODWARD: Absolutely. And I think in the  
16 context of settlement discussions, that discussion is  
17 appropriate. But, in the context of a common benefit order  
18 which confers no benefit to the defendant, whatsoever, and  
19 is supposed to be an equitable order that is narrowly drawn,  
20 it should not be used in such a way that it gives  
21 information about settlement practices, settlement  
22 strategies, which I think it could Your Honor, the way it is  
23 written. For instance just having to report who we are  
24 talking to, when, at what point in the litigation we are  
25 talking to them, we believe is our work product. And it is

1 not information that we believe we should have to share with  
2 our adversaries in the litigation in this particular  
3 context.

4 Settlement discussions, that is a different track.  
5 But, the CBO, because it confers no benefit on the  
6 Defendants, should not be used as a way to gather  
7 information that could be used in other contexts in the  
8 litigation. And as written, we believe that it absolutely  
9 does that.

10 The monthly reporting requirement that is in the  
11 current CBO is problematic, because the numbers that are  
12 provided, which would have to be provided to the LLC, could  
13 be reverse engineered in order to determine specific  
14 settlement amounts.

15 We know that there is a lot of chatter among the  
16 Plaintiffs' Bar about settlement communications so far. We  
17 know that people are trying to put together different pieces  
18 of information. If we have to disclose to them numbers,  
19 then, again, the CBO will be used in such a way that they  
20 can gather information about the litigation that this  
21 particular mechanism should have nothing to do with,  
22 whatsoever.

23 All right. So, other issues with this particular  
24 Order. We wonder under the Order if we may determine if any  
25 particular settlement proceeds are not subject to the Order,

1 and therefore do not have to be submitted through the  
2 procedure. Do we have the discretion to read the Order,  
3 know exactly to whom it applies, and then not have to report  
4 to the LLC? Are there circumstance where that would be  
5 appropriate? We would like to know that.

6 We need to, in terms of our negotiations with  
7 Plaintiffs' counsel, can we rely on their representations  
8 that they are not subject to the Order? The Order, the  
9 definition about to whom the Order applies is problematic  
10 because it has a catchall provision that says: Anyone who  
11 has used the work product in the MDL might be subject to the  
12 order. Well, not only does that raise jurisdictional  
13 concerns, but that gives us no advance notice of who might  
14 be subject to the Order. That is something that has to be  
15 figured out down the line. And the Order should be  
16 constructed such that that is not the case. We should be  
17 able to sit across the table from Plaintiffs' counsel, know  
18 exactly at that time that we are negotiating whether they  
19 are subject to this particular Order and be able to  
20 culminate a settlement at that point, not have it  
21 conditioned upon a determination by Plaintiffs' counsel down  
22 the road as to whether or not an assessment applies, because  
23 that person may or may not have used the work product of the  
24 MDL.

25 This is one of the reasons we propose that there

1 might be a list of who is subject to the Order that we could  
2 rely on, and that Plaintiffs' counsel could rely on. That  
3 list idea concept was used in multiple different common  
4 benefit orders --

5 THE HONORABLE JUDGE FRANK: Including my Order in  
6 *Guidant* we used it.

7 MS. WOODWARD: Exactly, Your Honor, exactly. That  
8 brings me to the issue of what exactly constitutes use of  
9 work product under the Common Benefit Order? The way we  
10 read it, we see a section on what type of work you can get  
11 reimbursed for as a plaintiff, but we don't see a specific  
12 definition of what is use of work product. There will be  
13 overlap there, but there are a lot of gray areas.

14 For instance, if there were counsel for a claimant  
15 sitting in on this status conference, had no cases filed  
16 anywhere, and then adopted some type of pleading that we  
17 were using here in the MDL, would that claimant's counsel  
18 have used the work product of the MDL?

19 Or if they listened to information on discovery  
20 issues or document production in negotiating with us, or --  
21 would that be using the work product? We don't know.

22 We know that there are a lot of plaintiffs'  
23 conferences that go on that many attorneys attend. Is  
24 merely attending a plaintiffs' conference using the work  
25 product where we know our litigation is being discussed?

1 That is not defined.

2 I could go on and on with potential exceptions,  
3 but basically we do think there needs to be a definition, at  
4 a minimum, in this Order for what constitutes, what exactly  
5 constitutes use of MDL work product.

6 The last issue I have touched upon a bit, and that  
7 is, does the CBO apply to State Court cases? Would it apply  
8 to a State Court case where the plaintiff's attorney has no  
9 cases in the MDL, has not signed a participation agreement,  
10 but has used the work product?

11 Would the mere fact that a plaintiff's attorney  
12 had signed the participation agreement bring his or her  
13 client under the Court's jurisdiction for purposes of the  
14 CBO? That is a major issue that I think needs further  
15 consideration.

16 THE HONORABLE JUDGE FRANK: Of course, we know in  
17 many MDL cases what the answer is to that. Because where  
18 the lawyer has signed the participation agreement, in most  
19 cases the common benefit fees come out of the lawyers' fees,  
20 not the clients' recovery. That is the way it works in the  
21 large majority of cases. So, the client is unaffected by --  
22 the expense issue may be a different issue in how that is  
23 broken down, but that is not a thing unique to this case,  
24 so --

25 MS. WOODWARD: And I think, Your Honor, you were

1 trying to get at that when we had a telephone conference in  
2 early May. But, I don't think it is clear in the Order  
3 exactly where the fee comes from. And maybe just further  
4 elucidation of the Order would be helpful for everyone.

5 The other issue that -- legal issue that is  
6 potentially implicated by the Common Benefit Order is, to my  
7 understanding that it might interfere with State Court  
8 settlements, it could be violative of the anti-injunction  
9 act which is at 28 U.S.C. 2283. And there is a case,  
10 *Atlantic Coastline Railroad Company versus Brotherhood of*  
11 *Locomotive Engineers* at 398 U.S. 281, 1970, that might speak  
12 to this issue.

13 So, just in conclusion, Your Honor, thank you for  
14 this opportunity to let us build the record on this. We do  
15 urge the Court to either put the parties back to the drawing  
16 board, back to the table, to guide us further in terms of  
17 how the CBO could be clarified. We do need concrete notice  
18 as to the subject of this Order. We need limits that fall  
19 within the Court's jurisdiction. And we need an Order that  
20 does not allow interference into Defendants' confidential  
21 settlement activities. Thank you, Your Honor.

22 THE HONORABLE JUDGE FRANK: Who is going to step  
23 to the podium for Plaintiffs?

24 MR. FLOWERS: Your Honor, Pete Flowers for the  
25 Plaintiffs.

1 THE HONORABLE JUDGE FRANK: All right.

2 MR. FLOWERS: Just as an initial statement, Your  
3 Honor, this sounds not ultimately like a letter that they  
4 asked for clarification, but it sounds like a motion to  
5 reconsider. These are essentially the same things we argued  
6 about before. It is fully briefed. We had a telephone  
7 hearing about it.

8 So, I would just suggest it is a motion to  
9 reconsider and hopefully it is looked at in that light. And  
10 if we are going down this path, then we are probably going  
11 to want to brief this.

12 THE HONORABLE JUDGE FRANK: Well, not to  
13 interrupt, but regardless of how it is considered by the  
14 Court, counsel has suggested that there's numerous  
15 provisions in here that are quite novel that we can look  
16 carefully at other CBOs and we are not going to see some of  
17 these provisions. Do you agree or disagree with that?

18 MR. FLOWERS: Totally and utterly disagree. We  
19 modelled this right after the *ASR Litigation*, and in  
20 *Pradaxa*, it was in the *Biomet Litigation* and it is in  
21 several litigations. This is the common common benefit  
22 order.

23 The other part of this, our proposal, you know, we  
24 didn't just come up with that at an MDL on our own, we went  
25 and talked to New Jersey about it, got their buy in on it,

1 talked to Florida about it, got their buy in on it. This  
2 order that we put with this particular language was  
3 essentially agreed to. We heard no complaint from any  
4 Plaintiffs' counsel about any of this, by the way.

5 What the key thing here really is is, you know,  
6 the definitions of who it applies to. I mean, there are  
7 essentially three groups. There is a lawyer that has a case  
8 in the MDL now or in the future or signs a participation  
9 agreement, but then a lawyer who does use an MDL work  
10 product, and you can't define that up front.

11 I mean, if we go two years down the road or a year  
12 down the road, or whatever we have done, a bunch of depositions,  
13 gone to trial, got ready for trial, discovered all this,  
14 that is the whole point of having the common benefit fund  
15 because we have done this work in order to push the  
16 defendants into a better position to resolve the case.

17 Those issues, though, that is not their fight.  
18 Those issues are between Plaintiffs' lawyers. And if there  
19 is a problem, then it would come before the Court. Because  
20 what actually happens here is, and this is why the system is  
21 set up like this, is when we are notified, then we know when  
22 it happened, what had happened, and they bring it to us and  
23 there is a discussion -- excuse me. There is a discussion  
24 about whether or not the common benefit applies to it. And  
25 if there is a disagreement, then it comes before the Court.

1 So, they really have no dog in this fight. It is  
2 essentially amongst Plaintiffs' lawyers. It comes to you to  
3 make a decision about that. You can't -- you know, there  
4 are questions about various -- if you attend a seminar, all  
5 of that stuff. It is premature to consider whether that has  
6 any applicability here. You can't define whether it is MDL  
7 work product until essentially the end.

8 Much the same, you know, the cases they have  
9 settled thus far, you know, those are cases that came out  
10 before the Common Benefit Order. Those aren't subject to  
11 the Common Benefit Order in our opinion. So, as you go  
12 forward, the world changes. And this is the only way to do  
13 this. But, this was the big argument that we had originally  
14 with them. And it was briefed and I thought we tried to  
15 explain as best we could as to why all this made sense.

16 Just in terms of, you know, in terms of  
17 jurisdiction and things, once again, not an issue at this  
18 stage. It is only an issue if there becomes a flag about  
19 the Common Benefit Order. So, it is not something you have  
20 to deal with.

21 So, this order, this proposed order, is  
22 essentially identical to *ASR*. And in *ASR*, they are wrong.  
23 There were cases that were settled in *ASR*. And there were  
24 reporting requirements to the leadership. And it happened  
25 in *Pradaxa*. And it happened in *Biomet*. And the reasons for

1 that were, that at a certain stage, maybe the common benefit  
2 order applied to those. Maybe they don't. So, the  
3 reporting requirement is absolutely essential to make sure  
4 it happens.

5 Their whole issue isn't with the Common Benefit  
6 Order, it is once again with transparency. They shouldn't  
7 ever be making a decision whether the Common Benefit Order  
8 applies to a case. They have no idea, actually, whether it  
9 does or doesn't.

10 Their problem is they don't want anybody to know  
11 anything about any resolution at any time. It is pure  
12 transparency issues that they are trying to use through a  
13 common benefit order.

14 So, I would suggest the Order is clear. And on  
15 some of these issues where they have brought up their -- it  
16 is way too premature to deal with that. It only becomes an  
17 issue if there is a dispute which is very rare, actually.  
18 The few disputes that you see end up in some sort of  
19 litigation. But, in 98 percent of the litigations, or maybe  
20 99.5, there is no dispute amongst Plaintiffs' lawyers about  
21 the common benefit fund and the application of it.

22 THE HONORABLE JUDGE FRANK: What about the issue  
23 about -- and she related back to the phone conference. She  
24 didn't say it, but it was probably relating to the question  
25 I asked about, well, where did the 4 percent come out, the 1

1 percent, and I asked that question. And I believe you or  
2 Ms. Zimmerman said: Well, the 4 percent comes from the  
3 lawyers' contingency fee, whatever it might be, and the  
4 expenses are shared with --

5 MR. FLOWERS: Yeah, I am trying to find that  
6 really quickly in the Order. You did ask the question and  
7 Ms. Zimmerman did answer the question and direct you to it.  
8 For some reason I thought it was around page 16, but I know  
9 it is in here. What it is is the fees come out of the  
10 lawyers' fee. That does not come out of the clients' end,  
11 so it has no effect on -- the one percent of the cost does  
12 come out of the clients' end.

13 THE HONORABLE JUDGE FRANK: So, where does that  
14 leave us today as far as the Plaintiff is concerned?

15 MR. FLOWERS: As far as we are concerned, the  
16 Order is clear. Their obligation is to report to me,  
17 essentially, settlements. And then I report -- then I  
18 contact the head of New Jersey, or the head of Florida,  
19 whoever it is. If there is some dispute or if we think the  
20 Common Benefit Order applies, we talk about it. If we have  
21 a problem, then it is going to end up in a court. So, that  
22 is the process. The process to me is crystal clear. They  
23 report who it is, what it is, and then we have an internal  
24 discussion whether there is an application of the Common  
25 Benefit Order. That is why this whole meet and confer

1 process that is in here amongst the leadership in the other  
2 jurisdictions was written in here. That was part of our  
3 deal with the other jurisdictions is we will sit down and  
4 talk about it and we will figure out whether or not that  
5 applies, as to opposed to somebody just unilaterally making  
6 some decision.

7 THE HONORABLE JUDGE FRANK: All right.

8 MR. FLOWERS: I think it is clear, but no change  
9 is necessary.

10 THE HONORABLE JUDGE FRANK: I will give the last  
11 two minutes to --

12 THE HONORABLE MAGISTRATE JUDGE NOEL: What about  
13 settlements with unfiled cases? So they talked to a lawyer  
14 in Dubuque who has not filed a case and they settle it.  
15 What's --

16 MR. FLOWERS: The same process ought to apply.  
17 Because, once again, we are sitting here on June 10th, 12th  
18 --

19 THE HONORABLE JUDGE FRANK: June 12th.

20 MR. FLOWERS: I have got a birthday in a week. I  
21 can't remember it. I am trying to forget. That is one  
22 thing today, but let's say it's a year and a half down the  
23 road and all of this work has been done in the MDL, a case  
24 has been tried, and then they go and try to settle the case  
25 to someone who is unrepresented. We would probably suggest

1 at that time the Common Benefit Order may apply to that  
2 person. But we created all of this work, we got to be in a  
3 position to resolve the case. To give you an idea, that is  
4 what happened in ASR. They settled with some unfiled people  
5 down the road.

6 There was a common benefit order in place, and the  
7 common benefit order was applied, without dispute, by the  
8 way. So, just a little history there. It has been done  
9 before and will be done again, I'm sure.

10 THE HONORABLE JUDGE FRANK: I will give the last  
11 word to Ms. Woodward, if she would like it. Most lawyers  
12 don't turn it down, so --

13 MS. WOODWARD: Your Honor, I will be brief. It is  
14 not a fair characterization to say we have no dog in this  
15 fight. If the Plaintiffs are willing to delete paragraph 4  
16 on page 7 that lays out Defendants' obligations, that is an  
17 order that we can live with. Otherwise, we absolutely do  
18 have a dog in the fight.

19 THE HONORABLE JUDGE FRANK: Well, in fairness to  
20 whether it is considered a motion for reconsideration or  
21 clarification, whatever characterization, that was the focus  
22 and the strongest objection by defense counsel, that  
23 paragraph up front, too.

24 MS. WOODWARD: Absolutely. We need to be told  
25 exactly what our obligations are. And the Order should lay

1 out in specific detail to whom, exactly to whom it applies.  
2 Plaintiffs' counsel should not be the arbiters of these  
3 orders' applications later on down the line.

4 In terms of what happened in *Pradaxa* and *ASR*, I  
5 spoke to Pradaxa's national counsel who said they weren't  
6 settling cases. They didn't care about the common benefit  
7 order. It didn't matter. It didn't impact them.

8 In *ASR*, there, I think, were maybe a few late  
9 settlements right before the eve of trial type of thing.  
10 They were not -- our settlement strategy is entirely  
11 different, because we thought we would have learned from the  
12 prior hip litigations that are out there. We can do things  
13 differently to save resources. And for the benefit of the  
14 whole. And so, what it comes down to, Your Honor, is we  
15 have the right to negotiate settlements in confidence. That  
16 is our right. And this order cannot be used to force us to  
17 give up that right.

18 THE HONORABLE JUDGE FRANK: Well, a couple of  
19 questions and I will be brief. But, one is, really separate  
20 from this Order, as some -- as both Shook Hardy, who is  
21 doing some of your client's work down in Florida, even  
22 though a lead counsel who I have an extremely high opinion  
23 of, Tim Pratt, is now General Counsel at Boston Scientific  
24 and led the way, along with a few other lawyers at Shook  
25 Hardy. As he can verify, and actually it was more the

1 plaintiffs' lawyers who were concerned, was when they were  
2 looking at settlement -- and that is a phrase that was used  
3 by defense counsel, "We have no dog in this fight." And I  
4 will get to that question in a moment.

5 But, the first question out of my mouth said  
6 earlier was: You are going to explain to Magistrate Judge  
7 Boylan in this category what was paid out, because the Court  
8 is responsible to say, how could you possibly approve this  
9 when that -- so, you are suggesting that, well, when that  
10 question comes up, apart from this Order, we may have an  
11 issue there, as well? Because, for example, I can see  
12 sitting in a room, and whether it is a state, New Jersey  
13 case, Florida, or an unfiled case, where your firm and  
14 client makes an offer and the Plaintiffs' counsel -- and  
15 your firm could in theory say -- if they said: Well, look  
16 it, we have to figure out whether this applies to us,  
17 because this 4 percent that is going to come out of my  
18 contingency fee -- and I could see defense counsel saying,  
19 as many do in these cases: We have no dog in this fight.  
20 This is what we pay. Whether your contingency is 30, 40, 50  
21 percent is not our problem. This is what we will pay.  
22 Well, I would think that Plaintiffs' counsel would pick the  
23 phone up and call one of these folks and say: I can't  
24 settle my case until I find out what you are going to do.

25 What is most important in fairness to your firm

1 and your client that I should know about that -- I hate to  
2 use the phrase "we have no dog in this fight" but that is a  
3 fairly common phrase you see in this circumstance.

4 MS. WOODWARD: Well, the most important thing is  
5 that we know exactly who is subject to this Order so that we  
6 don't have to disclose our settlement strategies to our  
7 adversary. That is the most important battle.

8 THE HONORABLE JUDGE FRANK: And of course, I guess  
9 we will visit this maybe even later today, apart from the  
10 common benefit order, on this whole issue of the bellwether  
11 approach to settlements and trials on revealing profiles of  
12 settlements, as opposed to the name of an individual  
13 plaintiff. And the -- obviously, then, you would take  
14 rather serious issue with what the Plaintiffs have said  
15 about, well, this is all -- this really has more to do with  
16 the confidentiality piece. And you are saying: Well, that  
17 is our prerogative in how we settle cases.

18 MS. WOODWARD: Absolutely, Your Honor.

19 THE HONORABLE JUDGE FRANK: All right. Anything  
20 further, Mr. Flowers?

21 MR. FLOWERS: No, all I can say is it worked well  
22 in ASR and there with 100 cases that were reported to the  
23 leadership and we ended up settling that in the global. So,  
24 looking at history, that actually worked and it didn't  
25 affect the settlement negotiations, I can assure you of

1 that.

2 THE HONORABLE JUDGE FRANK: Anything further, Ms.  
3 Woodward?

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

5 THE HONORABLE JUDGE FRANK: Anything else from the  
6 Plaintiffs? All right. So what my commitment is other than  
7 hearing something before you leave town or the courthouse  
8 today, or meeting afterwards, and this isn't going to be --  
9 the CBO isn't a focus of that. But, other than getting any  
10 updates, immediately on, well, we agree to this, but not  
11 this, I will have -- I will respond to it in the order  
12 coming out this next week. So, hopefully, whether it's  
13 granted, denied, clarified, whatever you want to call it, I  
14 will do that to hopefully move this on down the road.

15 So, I guess that takes us to the redaction issue?  
16 Not to oversimplify that, but --

17 MS. ZIMMERMAN: Yes, Your Honor, thank you.  
18 Genevieve Zimmerman for the Plaintiffs. I am mindful of the  
19 time, so I will try to at least make my comments brief, and  
20 then certainly open to any questions that Court may have on  
21 this.

22 The Plaintiffs have brought a second motion to  
23 compel discovery and specifically requested that unredacted  
24 documents be reproduced. And I think that the first and  
25 foremost part of our motion is that redactions are just not

1 allowed under the Federal Rules of Civil Procedure. And  
2 indeed, if in fact the Defendants wanted to redact  
3 documents, the appropriate process for them to have followed  
4 would have been to seek a protective order from this Court  
5 asking for permission.

6 And in fact, many of the cases that Defendants  
7 cite to, specifically the *Actos* case and the *Transvaginal*  
8 *Mesh* case, that is exactly what happened there. So, to the  
9 extent that the Defendants rely on both the *Transvaginal*  
10 *Mesh* Order which was a Judge Higbee Order in the State Court  
11 of New Jersey. And also the *Actos* Order from Judge Doherty  
12 in the MDL in Louisiana. Both of those situations were  
13 inapposite in that the defendants in those cases brought the  
14 issue to the Court's attention and sought affirmative  
15 permission to redact documents. They did not produce  
16 redacted documents without leave of court for a protective  
17 order. So, those courts' decisions, I think, are  
18 inapplicable here, as in this instance the Defendant has  
19 unilaterally redacted documents on grounds of relevance,  
20 frequently citing either just irrelevance or unrelated  
21 product.

22 And their grounds for relevance, as we understand  
23 them, are do the documents, themselves, reference the  
24 Rejuvenate Modular Hip or the ABG II Modular Hip, which of  
25 course the Court is aware is the subject of this MDL.

1           We believe the standard is much more broad, but  
2 beyond relevance, really, from a procedural standpoint, the  
3 Defendants' approach here has been inappropriate.

4           THE HONORABLE JUDGE FRANK: You may get questions  
5 from both of us on this as we discussed it. But if I may  
6 ask this and maybe make a suggestion that if we would  
7 survey -- and we are not going to do a survey, I don't think  
8 either firm will, either, or the respective firms -- we  
9 would probably find many discovery disputes, whether it is  
10 an MDL setting, or freestanding case setting. The majority  
11 would fall in the middle somewhere, not on the suggested,  
12 maybe, perhaps on both ends of the spectrum.

13           But, let me ask this: What is puzzling to me is,  
14 one, very little, if any, suggestion by either party that  
15 this is trial preparation material or privileged, and  
16 actually -- or that, well, usually you would expect to see  
17 from the defense, or if it was the other way around, well  
18 the burden is on us because we have to reduce the scope of  
19 the discovery because there are 1,000 or 10,000 documents,  
20 as opposed to -- no, this is about redaction within already  
21 supplied documents.

22           So, the question is: One, why the protection  
23 order does not cover this? Because your strongest argument  
24 is, well, it is a matter of context. And if the protection  
25 order covers these things, because there is no assertion

1 that I can see about a privilege, attorney-client privilege  
2 and the protection order would seem to cover it. It seems  
3 like there is actually more time being spent redacting.  
4 But, I have no idea the number of redactions. And if either  
5 side is saying: Well, there are X number of documents where  
6 we are saying, but for this rule, there is another X number  
7 of hundred or thousand documents we would have to disclose,  
8 quite separate from the whole issue of the right to  
9 unilaterally or otherwise redact documents, because this is  
10 something that is -- it usually doesn't come up, because  
11 that is what Protection Orders are for, unless they are  
12 saying, look at all of these privilege issues. And I don't  
13 see that argument being raised here.

14 MS. ZIMMERMAN: That is my understanding, Your  
15 Honor. To my knowledge, they have not asserted that any of  
16 these redactions are for privileged issues. Instead, they  
17 are relevance issues. And as the Court may be aware from  
18 our briefing, a number of Judges in this District have  
19 considered and reported -- or issued opinions on point,  
20 including Judge Boylan in the *Bartholomew versus Avalon*  
21 case, Judge Nelson in the *Great Lakes Gas versus Esser* case,  
22 Judge Keyes in the *Federal Open Market Commission versus*  
23 *Merrill* case.

24 And in this District, anytime presented with a  
25 question like this where the issue is a redaction for

1 relevance has said that the Federal Rules permit discovery  
2 of documents, not paragraphs, and that the context is very  
3 important.

4 To Your Honor's question about how many documents  
5 are specifically involved, at this point, the numbers this  
6 morning, we have 26,776 documents produced so far. 3,414 of  
7 those have been redacted. And at least 1,932 of the  
8 redactions are marked non-relevant or non-relevant product.  
9 And we think that that is inappropriate.

10 A number of these documents, and I would point,  
11 for example, there is a document there bearing Bates  
12 number -- and the Court doesn't have a copy of this, but  
13 00102851, where literally the redaction is several hundred  
14 pages long.

15 THE HONORABLE JUDGE FRANK: But conspicuous by its  
16 absence, and maybe this is a better question by the Defense,  
17 and I will stop interrupting -- Judge Noel may have  
18 questions -- is usually the issue is not redactions, and  
19 that is why I say these cases are so fact driven, because  
20 the law is not in dispute in this area is: Well, this  
21 protection order doesn't help us because we are going to  
22 have to disclose another 50,000 pages, because the scope of  
23 discovery -- as opposed to redacting individual documents.

24 Usually it is the former argument, not this  
25 argument, that gets in front of the Judge. And that is by

1 far the most common one. Because actually, it is far more  
2 work to redact, and usually, then, the remedy is a more  
3 carefully-worded protection order to avoid this very type of  
4 dispute, unless its heavily laden with privileged issues.

5 MS. ZIMMERMAN: That is exactly right. And in  
6 fact Judge Nelson observed exactly that issue in *The Great*  
7 *Lakes Gas* case. What she pointed out there was that the  
8 protective order provided plenty of assurance to the  
9 producing party that information was not going to be shared.

10 And she also reflected that it would be a  
11 substantial burden on her Magistrate to go through and do  
12 what the producing party was requesting --

13 THE HONORABLE JUDGE FRANK: In camera?

14 MS. ZIMMERMAN: An in camera review of every  
15 single one of the documents. Right now, that is at least  
16 1,932 documents that we know are redacted -- sorry, I should  
17 slow down, for relevance, not privilege, as we know now.

18 THE HONORABLE JUDGE FRANK: Well, and the in  
19 camera review, I will just make two observations, and then  
20 stop interrupting you. I mean, separate from this case,  
21 there is a couple of issues that come up that make both  
22 sides in a case nervous. One is a criticism of Federal  
23 Courts across the country, and it hasn't happened in one of  
24 my cases, and I won't name the Court where it has happened  
25 in this District where they say: All right, you folks don't

1 know how to draft a protection order and I am hiring a  
2 special master that you are all paying for. And they are  
3 going to go through all of these documents. And when they  
4 are done, depending on how we view it, one side or the other  
5 is going to pick the whole tab up for it, because we will  
6 see how legitimate these redactions were. And so, that is  
7 one thing.

8 The more common way our District does it is we do  
9 sometimes do representative samples of redactions, and then  
10 depending on how we assess those, that determines -- since  
11 we haven't brought in a special master, that determines who  
12 pays the freight to see, well, let's take a look at this.

13 And then, of course, there is a third option which  
14 Judge Nelson talked about. And you know better than I that,  
15 well, that assumes we are going to precipitate, or somebody  
16 has met the threshold of an in camera review.

17 THE HONORABLE MAGISTRATE JUDGE NOEL: The only  
18 question I have is of the 19 -- I'm sorry of the 3,400  
19 documents that have been redacted, are the other 1,500  
20 documents redacted for privilege, and the 1,932 are  
21 relevance?

22 MS. ZIMMERMAN: That is my understanding, Your  
23 Honor. We just recently received a privilege log. We are  
24 reconciling our notes. I do know that at last 1,932 are  
25 redacted specifically for relevance claims.

1 THE HONORABLE MAGISTRATE JUDGE NOEL: Thank you.

2 MS. ZIMMERMAN: In the interest of time, I am  
3 happy to answer additional questions but reserve comment.

4 THE HONORABLE JUDGE FRANK: Why don't we see where  
5 defense counsel focuses, then we will know. All right?

6 MS. ZIMMERMAN: Thank you.

7 THE HONORABLE JUDGE FRANK: Didn't mean to cut you  
8 off, though.

9 MS. ZIMMERMAN: No.

10 MR. GRIFFIN: It is still good morning.

11 THE HONORABLE JUDGE FRANK: Not for long.

12 MR. GRIFFIN: Not for long. All right. May it  
13 please the Court, Your Honors? Tim Griffin on behalf of the  
14 Defendants. I go back to my opening line on the last  
15 motion. What do the parties need to move this litigation  
16 forward? They don't need information about other products.  
17 That is what we are talking about.

18 We are talking about an array of products that  
19 this company makes that are summarized often in charts,  
20 spreadsheets, meeting minutes. For example, product  
21 experience report summaries, lengthy spread sheets that  
22 report every instance from the field where there may be an  
23 issue. We redacted things about knees, things about other  
24 products that have nothing to do with this that are  
25 discrete. Whenever there is any connection to Rejuvenate or

1 ABG II, any comparison, that information is included.

2 Your Honor has raised the issue of a protective  
3 order. Why isn't that sufficient? The answer we have  
4 identified in our briefs is that we are talking about our  
5 entire product scope here, spectrum here. These lawyers  
6 have no right to it. The protective order certainly helps,  
7 but policing the dissemination of documents in thousands of  
8 cases to hundreds of different firms is a concern.

9 THE HONORABLE JUDGE FRANK: So are these  
10 privileged or work product --

11 MR. GRIFFIN: Yes.

12 THE HONORABLE JUDGE FRANK: -- or other issues  
13 or --

14 MR. GRIFFIN: No, Your Honor.

15 THE HONORABLE JUDGE FRANK: Some special analyses  
16 by your client or how --

17 MR. GRIFFIN: Yes, Your Honor. So, to be clear,  
18 these are not privileged or work product. There are  
19 redactions that have been made pursuant to statute to  
20 protect individual privacy in certain situations. Those are  
21 not at issue. These redactions, based on the scope of the  
22 motion, as I understand it, are for other products, what we  
23 have identified as non-relevant. We lay out in our motion  
24 papers how we only redacted information about other products  
25 when they are in discrete subsections of the document.

1 THE HONORABLE JUDGE FRANK: And that was one  
2 question I had, so like some other cases, whether we do an  
3 in camera review or not, it will become readily apparent  
4 these are clearly discrete separate sections that have -- we  
5 will be able to see it, whether it is a table of contents,  
6 or a section, or cover pages, or whatever the case, it will  
7 be clear that these are completely unrelated to the issues  
8 at hand.

9 MR. GRIFFIN: Yes, Your Honor. We, backing up a  
10 step or two, what we are talking about here are groups of  
11 documents that were originally negotiated, voluntarily  
12 produced as part of the New Jersey proceeding. We agreed to  
13 produce them here.

14 There is, as counsel has mentioned and cited in  
15 our papers, the *Pelvic Mesh Litigation* decision out of New  
16 Jersey where this practice of redacting unrelated documents  
17 was acknowledged as appropriate by Judge Higbee. There was  
18 the *Actos Litigation* that we also cited in our papers where  
19 it is the same process, employing the exact same standards  
20 that we have used was adopted by that MDL Court.

21 Even in Plaintiffs' own papers they cited to the  
22 *State Street* case that acknowledged that redaction was  
23 appropriate. The District of Minnesota decisions that they  
24 cite, two acknowledge that redaction may be appropriate,  
25 that Judge Nelson -- excuse me, Judge Keyes' decision, in

1 particular.

2 The Judge Nelson decision, I think it is more  
3 correct to say didn't address the appropriateness of  
4 redaction. It found Magistrate Judge Brisbois' conclusions  
5 not clearly erroneous. So, to suggest to the Court that  
6 there is a blanket prohibition on this practice, I don't  
7 believe is an accurate reflection of the law.

8 We also have a coordination issue here, Your  
9 Honor. We are producing documents across all jurisdictions.  
10 We have New Jersey case law recognizing that what we have  
11 done is an appropriate way to protect information that is  
12 important to the company. And we have case law, obviously,  
13 that supports that.

14 This, I would respectfully suggest, is not a  
15 motion that furthers this litigation. This is a  
16 distraction. We have been asked, the Court has asked the  
17 parties to bring the motions you need to drive this  
18 litigation forward. Fighting over how to handle products  
19 that have no connection to this litigation has nothing to do  
20 with it.

21 Just briefly, Your Honor the redactions could be  
22 assembled in representative categories for the Court to take  
23 a look at. For example, here is a product summary report.  
24 We have redacted the other products. We haven't redacted  
25 the products at issue. Here is a meeting in which the

1 development committee discussed a number of products. We  
2 redacted the meeting minutes about those products.

3 I believe I addressed some of the questions that  
4 were raised. If the Court doesn't have any other questions  
5 for me?

6 THE HONORABLE JUDGE FRANK: I don't have any.

7 MR. GRIFFIN: Thank you, Your Honor.

8 THE HONORABLE JUDGE FRANK: Any rebuttal by  
9 counsel?

10 MS. ZIMMERMAN: Only briefly, Your Honor, first of  
11 all, the Protective Order that is in place was stipulated by  
12 both sides, so certainly Defendants were aware of the issues  
13 that they needed to protect in terms of their documents.

14 And secondly, to the extent that every one of the  
15 attorneys of Plaintiffs' counsel of record are officers of  
16 this Court and have signed off on that Protective Order and  
17 said that we are not going to disseminate confidential  
18 information, candidly it is offensive to suggest that we are  
19 going to be disseminating that in violation of our sworn  
20 oath on that Protective Order.

21 Cycling back to Judge Keyes' opinion, he really  
22 points out in *Burriss, B-u-r-r-i-s, versus Versa, V-e-r-s-a,*  
23 *Products*, "Parties making redactions unilaterally decide  
24 that information within a discoverable document need not be  
25 disclosed to their opponents, thereby deprive their

1 opponents of the opportunity to see the information in its  
2 full context." And it goes on, it says that, "If the Court  
3 were to allow such a practice, it would improperly  
4 incentivize parties to hide as much as they dare."

5 That is something that we can't condone in this  
6 case. The relevance issues are really key, even if there  
7 are other hips beyond the Rejuvenate or an ABG II because  
8 there are other related products that were either  
9 predecessors or potential successors to these products. And  
10 the information that the Defendants were gathering and  
11 learning about those products is absolutely critical to us  
12 moving forward with this litigation.

13 THE HONORABLE JUDGE FRANK: What of Defense  
14 Counsel's suggestion that with or without, or perhaps with  
15 some type of representative -- without conceding that there  
16 will or will not be an in camera review, it will become  
17 readily apparent that these are very discrete sections that  
18 don't relate to the context argument that has been raised  
19 here.

20 MS. ZIMMERMAN: Well, Your Honor, respectfully, to  
21 a certain extent, there is a large number of documents that  
22 we don't know one way or the other that it is just about  
23 shoulders, although we wouldn't concede that shoulders are  
24 as a matter of law or fact irrelevant to this litigation.  
25 But, I can certainly represent to this Court that a number

1 of the redactions for irrelevant are absolutely about hips  
2 that we are interested in from litigating this case. It is  
3 not just about different products, different parts of the  
4 body, different meeting minutes. It really is information  
5 that is relevant to pushing this case forward.

6 THE HONORABLE JUDGE FRANK: All right. If counsel  
7 would like the last word? Unless you had a question, Ms.  
8 Zimmerman?

9 MR. GRIFFIN: Yes, Your Honor. This was a huge  
10 issue that was just raised, the notion that other products  
11 are relevant. The proper way to define the scope, if they  
12 want to fish about information for other products, is to  
13 have a request, have an objection and resolve it, not to try  
14 and back door through demanding production of unrelated  
15 products, and then use that to broaden the scope of  
16 discovery.

17 I think we cite in our papers the notion that  
18 mixed metal couplings have been around for decades. They  
19 are in a lot of products. And if that is going to be their  
20 scope of discovery in this case, that is incredibly  
21 unrealistic and we are going to be here for years. That  
22 can't be the way that this Court comes about to define the  
23 scope of discovery. That is a really important issue, Your  
24 Honor.

25 The Minnesota cases didn't involve mass torts.

1 They dealt with certain arguments that were made, some have  
2 been made here, some weren't. I think the most thoughtful  
3 reference for the Court are the mass tort litigations where  
4 folks are struggling with these issues.

5 How do we move the cases forward in a thoughtful  
6 way without coming to a standstill under their own weight?  
7 I submit that the *Pelvic Mesh* case, the *Actos* case provided  
8 the right path forward.

9 Counsel is offended by the suggestion that  
10 inadvertent disclosure happened. It does happen. That is  
11 something that we are trying to guard against. At the same  
12 time, I think they are implying that we are redacting  
13 something other than other products. And that is not the  
14 case. We would very much appreciate the opportunity to  
15 demonstrate that. Thank you, Your Honor.

16 THE HONORABLE JUDGE FRANK: Thank you.

17 MS. ZIMMERMAN: Nothing, Your Honor.

18 THE HONORABLE JUDGE FRANK: Thank you. Where does  
19 that leave us now that we've drifted into -- did you want to  
20 make a record at all on the -- or they were going to discuss  
21 the France entities issue?

22 THE HONORABLE MAGISTRATE JUDGE NOEL: Oh, the  
23 motion to Amend the Master -- the Motion to Amend the Master  
24 Long Form and Short Form Complaint, I understood, had been  
25 withdrawn; is that correct?

1 MS. FLEISHMAN: That is correct, Your Honor.

2 THE HONORABLE JUDGE FRANK: All right. So, I  
3 think that leaves us, other than unless counsel wants to be  
4 heard on something on either side, then we will deem  
5 everything submitted and we promise to get an Order out this  
6 week on any and all issues that are before us, one way or  
7 the other, other than the get-together with us afterwards,  
8 primarily with Judge Noel.

9 I do observe and I was going to ask counsel about  
10 it and maybe you will have to talk amongst yourselves, that  
11 our next scheduled get-together, I believe, is July 17th.  
12 And that is also the same time period for the get-together  
13 by a number of folks in beautiful downtown -- maybe it is  
14 not Downtown Philadelphia, but Philadelphia. And I don't  
15 know if that is an issue with counsel or not.

16 MR. FLOWERS: I think it is probably fine, Your  
17 Honor, but it is going to make Ralph's life shorter to get  
18 here.

19 MR. CAMPILLO: Yeah, I believe if the dates for  
20 that meeting were earlier than the 17th, we should be able  
21 to get there.

22 THE HONORABLE JUDGE FRANK: All right. And if  
23 some issue comes up, we will just make sure to promise input  
24 to all parties. So, we will -- do you have anything else  
25 other than the get-together?

1 THE HONORABLE MAGISTRATE JUDGE NOEL: No. Meet in  
2 the conference room --

3 THE HONORABLE JUDGE FRANK: The big conference  
4 room.

5 THE HONORABLE MAGISTRATE JUDGE NOEL: Buzz back  
6 through. However you get to chambers, come back in. We  
7 will get you in that conference room, and then we will  
8 separate you into different ones, if that works.

9 THE HONORABLE JUDGE FRANK: And in that context,  
10 anything further at this time for the record on behalf of  
11 the Plaintiffs?

12 MR. FLOWERS: Just one quick thing, Your Honor.  
13 The issue raised in chambers about the ECF filing of  
14 notices?

15 THE HONORABLE JUDGE FRANK: Oh, all right.

16 MR. FLOWERS: That was notices of deposition, and  
17 I think we will talk, but I think we are maybe at an impasse  
18 on that. We are asking to do that in the most efficient  
19 way. I just want to know how you want to deal with that.  
20 Do you want us to write something to you? Or do you not  
21 need that?

22 MS. WOODWARD: I think we should talk about  
23 whether or not there is a middle ground to protect privacy.  
24 If there is not, either way it turns out, we should write to  
25 Your Honor.

1 THE HONORABLE JUDGE FRANK: Then what I would  
2 suggest is Judge Noel can probably talk to you about that,  
3 and then whether we end up -- if there is no middle ground  
4 or no agreement, then we can probably come up with some --  
5 whether the parties tell us it was fair, to give us a short  
6 letter brief on that. And we can make a decision on that  
7 without waiting for the next hearing, unless one of you  
8 persuades us that that is the more fair thing to do is delay  
9 it down the road. Otherwise, we can have an immediate  
10 turnaround time on that, as well.

11 MS. WOODWARD: I think we can get it done quickly.  
12 Thank you, Your Honor.

13 THE HONORABLE JUDGE FRANK: So, we are adjourned?

14 MS. FLEISHMAN: Your Honor?

15 THE HONORABLE JUDGE FRANK: Oh, yes, sorry.

16 MS. FLEISHMAN: The Defendants had agreed as to  
17 all cases to toll, and the statute of limitations as to the  
18 two French Defendants that were the subject of the motion,  
19 and we will prepare our papers to submit as an agreed upon  
20 stipulation.

21 And they have also agreed to produce discovery  
22 from those Defendants as if they were actually a part of the  
23 litigation, correct?

24 MS. WOODWARD: I believe that is correct.

25 THE HONORABLE JUDGE FRANK: All right. We will

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stand in recess briefly and meet everybody in the conference room. All right? Thank you.

ALL COUNSEL: Thank you, Your Honor.

(Adjournment.)

\* \* \*

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

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