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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: St. Jude Medical, Inc. 01-MD-1396 JRT/FLN
Silzone Heart Valves Products
Liability Litigation.

Minneapolis, Minnesota
September 24, 2002
2:12 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
(Status Conference)

BEFORE THE HONORABLE JOHN R. TUNHEIM,
UNITED STATES DISTRICT COURT JUDGE.

APPEARANCES (via telephone):

On behalf of plaintiffs: Michael Bosco
 Steven E. Angstreich
 Carolyn Lindheim
 Michael Coren
 J. Gordon Rudd, Jr.
 Joe D. Jacobson

On behalf of defendant: Steven M. Kohn
 David E. Stanley
 Tracy J. Van Steenburgh
 Liz Porter

Court Reporter: Karen J. Grufman
 U.S. Courthouse, Suite 1005
 Minneapolis, MN 55415
 612-664-5105.

1 THE COURT: Good afternoon. Thank you for joining
2 us by telephone here. In a moment, I'll have all of counsel
3 note their appearances.

4 Just for the record -- and Ms. Grufman is here -- this is
5 civil case number 01-1396. The Multidistrict Litigation
6 matter involving St. Jude Medical Silzone Heart Valves
7 Products Liability Litigation.

8 Counsel, note appearances, first for the plaintiffs.

9 MR. ANGSTREICH: Steven Angstreich. And I have you
10 on the -- we have this on the speaker. Mr. Coren and Ms.
11 Lindheim are with me. I will be the only one speaking though.

12 MR. RUDD: And Gordon Rudd in Minneapolis for
13 plaintiffs.

14 MR. JACOBSON: And Your Honor, Joe Jacobson in St.
15 Louis for plaintiffs.

16 MR. BOSCO: And Your Honor, this is Michael Bosco in
17 Mr. Capretz's office in California for plaintiffs.

18 THE COURT: Mr. Capretz is traveling. Is that
19 correct?

20 MR. BOSCO: That's correct. He apparently is trying
21 to dial in from a cellphone from a moving train in Europe.
22 And anticipating he might have difficulty, he asked me to fill
23 in on his behalf, with the Court's permission.

24 THE COURT: That's fine.

25 For the defendants.

1 MR. KOHN: This is Steven Kohn in Oakland,
2 California, for St. Jude Medical.

3 MR. STANLEY: David Stanley for St. Jude Medical.

4 MS. VAN STEENBURGH: Tracy Van Steenburgh in
5 Minneapolis for St. Jude Medical.

6 MS. PORTER: And Liz Porter for St. Jude Medical in
7 St. Paul.

8 THE COURT: Very well. Mr. Angstreich, do you want
9 to lead us through the agenda?

10 MR. ANGSTREICH: Yes, Your Honor.

11 The first item on the agenda is the status of the class
12 certification motion. We have the status report. I'm going
13 to see if I have the agenda. Yes, that's the first item on
14 the agenda.

15 Your Honor, Mr. Rudd had delivered yesterday an objection
16 to what purports to be a surreply, together with a 20-some-odd
17 page supplemental objection which carries forward the same
18 objections that we moved to strike once before, and the
19 apparent request for a Daubert hearing.

20 In response to Mr. Rudd's letter, we got Mr. Kohn's
21 six-page response which again not only addresses, although it
22 really doesn't address the position we've advanced, takes a
23 further shot at the class certification. So I guess this
24 might be a sur-sur-surreply with respect to class
25 certification.

1 We are most troubled by the surreply and what appears to
2 be an attempt by defendant to effectively get the last written
3 word on the subject.

4 We have a week before the argument. We do not want to
5 delay next Wednesday. We do not want and cannot, within the
6 time frame provided, further respond to this. But we do need
7 some guidance from the Court.

8 When they filed the first effective motion for a Daubert
9 hearing, Your Honor indicated that you would not hold a
10 Daubert hearing. And when I inquired as to whether we had to
11 respond to those objections, Your Honor indicated that we did
12 not have to respond.

13 Although Your Honor so ruled, we've been taken to task by
14 Mr. Kohn in his letter for not having responded to the
15 original objections, and now we have the subject of the
16 supplemental objections.

17 Am I correct, Your Honor, that we are not required to
18 address the supplemental objections?

19 THE COURT: Well, that was my understanding before.
20 But before I discuss that, perhaps I should hear from Mr.
21 Kohn.

22 MR. KOHN: Yes, thank you, Your Honor.

23 First let me start with an apology that we faxed you my
24 letter a few hours ago. But I didn't receive Mr. Rudd's
25 letter until late yesterday afternoon. And we responded to it

1 as quickly as we could.

2 Having said that, as for the reasons that are set out I
3 think in my letter, we disagree with Mr. Angstreich's position
4 on both scores. We firmly believe that our surreply was not
5 only appropriate but necessary. And we firmly believe that
6 our objections to evidence were appropriate and necessary for
7 all the reasons that are in my letter which I am certainly not
8 intending to repeat here.

9 We are not asking for a Daubert hearing, but we are
10 following the guidance we thought the Court issued in June,
11 was that the objections to evidence would be considered along
12 with everything else. Not in the context of a Daubert
13 hearing, but as objections to evidence. And that was what we
14 were intending to do.

15 So I think what we've done is appropriate and I would
16 simply stand by what we've written to the Court and counsel.

17 MR. ANGSTREICH: Your Honor, one brief response. It
18 is not my recollection nor my recollection from just having
19 read the transcript that the issue of objections was going to
20 be addressed at any time. Because if that were in fact the
21 case, we would have expected to respond. And we would have
22 expected Your Honor to so instruct us.

23 The problem that we face is that not only -- well, first
24 Your Honor gave the defendant an opportunity for a limited
25 response. Thirty-one pages is beyond what Your Honor

1 directed. But in addition, the 23 pages is a further attack
2 on our experts, which makes their surreply, in effect, 54
3 pages.

4 So there are two aspects to it. The first is, are we
5 going to address objections to evidence at the time of the
6 class certification argument? And if so, we would then have
7 to respond. That certainly was not on the table at the June
8 conference.

9 MR. KOHN: I have the transcript from the June
10 conference in front of me. At page 30, it clearly states that
11 the Court is going to take the objections to evidence into
12 account in deciding and scrutinizing whether the expert
13 testimony in fact supports certification.

14 And it was always our understanding that the objections
15 to evidence were submitted with that in mind. Not for
16 purposes of having a Daubert hearing.

17 It was up to the plaintiffs whether they wished to
18 respond to those objections or not. And they chose not to.
19 That's their option. It's not for us to decide whether they
20 should or shouldn't.

21 But we certainly, I believe, have every right to object
22 to evidence that we feel is either unreliable or inadmissible
23 under the rules. And we believe the Court should and must
24 take that into account.

25 THE COURT: Anything else, Mr. Angstreich?

1 MR. ANGSTREICH: No, Your Honor. That's clearly not
2 where it was. But, okay.

3 THE COURT: Well, I don't find the surreply to be
4 inappropriate at all, except it is three pages longer than
5 what the Court permitted. Although I'm not going to quibble
6 about three pages at this point in time.

7 As to the objections, the supplemental objections, it's
8 my intent to take a brief look at them. If I feel that they
9 raise any issue that I would like or feel the plaintiffs need
10 to respond to, I will give the plaintiffs an opportunity to
11 respond and let you know at the hearing.

12 I'm not sure whether there will be. I'm not going to
13 spend a lot of time with it, because I have a lot of pages of
14 briefs to read over the next few days in order to prepare for
15 the hearing.

16 But I will take a brief look at it. And if I feel there
17 is a response that's necessary, I will alert the plaintiffs to
18 that response.

19 MR. ANGSTREICH: Thank you, Your Honor.

20 MR. KOHN: Thank you, Your Honor.

21 THE COURT: What's the next issue, Mr. Angstreich?

22 MR. ANGSTREICH: Well, staying on the certification
23 motion and hearing. Your Honor had indicated at the last
24 conference that we would discuss the protocol and any specific
25 areas that Your Honor may want to have special attention to.

1 The last time we met, we talked about 45 minutes
2 approximately for each side. And the first question I guess
3 is, is that still Your Honor's goal?

4 THE COURT: Well, that would be preferred. And I
5 thought we could talk for a moment today about whether each
6 side believes that that is an appropriate period of time.
7 Because I want to make sure that we don't overdo things here,
8 but I want to make sure that you get your arguments in.

9 I have not had sufficient opportunity to really read
10 everything, because I think the last brief just arrived. And
11 I would like to read them through. I don't really have any
12 guidance as to which issues I really feel need further
13 elaboration, although that likely will develop at the time of
14 the hearing.

15 Mr. Angstreich, do you believe that 45 minutes is enough
16 for your argument?

17 MR. ANGSTREICH: Well, there's a difference of
18 opinion in the plaintiffs' camp. I don't think that there's a
19 significant problem with respect to how much over -- I think
20 that one hour would be the max. So we're really talking only
21 about a potential 15 minutes more.

22 THE COURT: Mr. Kohn, what about you?

23 MR. KOHN: We're comfortable with the 45 minutes. I
24 certainly believe we can conclude in less than an hour.

25 THE COURT: Let's set it for up to an hour. If you

1 don't need the full hour, that's certainly fine. But I would
2 like to make sure that neither side goes over an hour.

3 If you plan for 45 minutes, and I'm likely to have some
4 questions that will perhaps disrupt the argument a bit and
5 take you over 45 minutes. But if we plan for an hour for each
6 side, I think that would be appropriate.

7 MR. ANGSTREICH: That's fine, Your Honor. So at
8 least at this point, the Court hasn't focused in on any
9 specific topics. But you might do that as part of the
10 presentation?

11 THE COURT: That's correct. I just started reading
12 the briefs. I think it's appropriate for me to read through
13 all of them before I start making, focusing in on what I would
14 like to hear more of. So I think we can address that through
15 questions.

16 MR. ANGSTREICH: Then we have the discovery matters.
17 And we have the issue with respect to the Court's noticing of
18 deposition which are outlined in Mr. Kohn's letter and my --
19 yeah, it's Gordon's letter on behalf of me.

20 With respect to the deposition noticing and the problems,
21 the defendants request that we be compelled to participate in
22 these cross notice depositions. Maybe Mr. Kohn should go
23 first.

24 MR. KOHN: Well, I'm happy to go first. I don't
25 know how much more I can add beyond what's in the letter.

1 But I think one thing that's important to stress here
2 that's occurred since the letters were written is, Your Honor,
3 we have advised counsel that we last week concluded all of our
4 document discovery to plaintiffs in the MDL, so that they now
5 have over 70 CD's, more than 136,000 pages of the documents.
6 There are no more documents that we'll be producing that are
7 responsive to their written discovery.

8 So on a go forward basis, we don't see why there's any
9 reason that they can't participate during the month of October
10 in these depositions that have been requested by the Robins
11 Kaplan firm. They have the documents. There simply is no
12 good reason why they can't participate.

13 And for all the reasons that are stated in my
14 correspondence, we think it's unfair to the witnesses to be
15 subjected to multiple depositions on the same topics. They
16 should be put on one time. We'll make the witnesses available
17 for two days, so all the questioning can be concluded and it's
18 over and done with.

19 And I reserve on the depositions that have occurred where
20 counsel refused to participate. I think we can discuss that
21 as a separate issue.

22 But on a go forward basis, we feel very strongly that the
23 MDL counsel, in the spirit of the Court's pretrial orders,
24 should be participating in these depositions.

25 MR. ANGSTREICH: Your Honor, if I might respond.

1 The notification came today, September 24, via an e-mail
2 letter, which is going to be I guess mailed to me as well as
3 e-mailed to me, advising me that as of today, all of the
4 merits documents have been produced.

5 That's along with CD-ROM number 72, which we have now
6 received. And with the exception of three specific CD's that
7 Mr. Coren just e-mailed Mr. Stanley about, we have the coding,
8 who are all of those CD's. That's as of today.

9 So the question is with respect to cross noticing of
10 depositions previously provided, it's clear that we certainly
11 were never in a position to have all the documents. If the
12 desire is not to inconvenience people, it makes no sense to
13 have somebody show up and find that now that you've gone
14 through the rest of the CD's, that there's more to ask the
15 person about. That's the first point.

16 The second point is that there are -- there may be
17 136,000 documents. There are potentially ten times the number
18 of pages to be reviewed with respect to that, if not more than
19 ten. That's the first issue.

20 The second issue, Your Honor, is that we have a plan, at
21 least we've tried to establish a plan of whose deposition to
22 take, which ones are to be taken both on merits and on
23 preemption. And I identified these three to Your Honor. Your
24 Honor said at least those three we could get two days.

25 We're not looking to inconvenience anybody. In fact,

1 when I took Flory's deposition, Mr. Flory's deposition, I used
2 and referenced the Texas deposition, and tried the best I
3 could to avoid duplicating any questions.

4 But it increases the time for counsel. It requires us to
5 set aside more days than we would otherwise have to to attend
6 depositions, to sit through a deposition. And it really does
7 not do anything but inconvenience plaintiffs' counsel at this
8 point in time.

9 It, one, it makes us respond to Robins Kaplan's order of
10 discovery, and not our order of what we view as the important
11 people to take and at what time frame. And it requires us to
12 sit there and let Robins Kaplan ask the questions, and then
13 hopefully be given sufficient time in that one day to complete
14 it or be required to stay over a second day.

15 And that really doesn't, at least it doesn't achieve any
16 economy, especially when you don't have the deposition
17 transcript with you from the day before to make certain that
18 you're not duplicating questions, or have the advantages of
19 having a transcript so you can ask follow-up questions based
20 upon the answer given in the earlier deposition.

21 I don't see that it impacts upon any of the witnesses.
22 In every MDL that has gone forward, the states have gone off
23 on their own. The MDL plaintiffs take the depositions. They
24 try to coordinate if they can. If they can't, you try not to
25 duplicate the questions. And that's what we've indicated,

1 that's the procedure we indicated we would follow.

2 I really think it would be inappropriate for us to be
3 required to meet the dates and places that Robins Kaplan
4 wants, especially when we've identified amongst ourselves
5 who's taking what depositions of the particular participants.

6 That's our position, Your Honor. We'll try. But with
7 all due respect, we need to coordinate our discovery in the
8 manner and method that's appropriate for us to move this
9 forward.

10 MR. JACOBSON: Your Honor, this is Joe Jacobson. If
11 I may add one item?

12 THE COURT: Surely.

13 MR. JACOBSON: These CD-ROMS are very deceptive.
14 Each one is a small disk, but the number of documents on them
15 are amazing.

16 I just received three of them that I'm trying to review.
17 Everybody in our group has been receiving and reviewing them.
18 The last time I reviewed some earlier, in the first wave
19 production, they took an average of three to four days to go
20 through and look at each of the images.

21 Sometimes they're separated out. Sometimes it's
22 documents that are hundreds of pages, to go through and see
23 what it is, what's the significance, who it might be
24 significant in, and then prepare an entry in a database that
25 plaintiffs' counsel is doing so we can organize some

1 unbelievably immense amount of documents.

2 And to suggest that we now have the last CD, and they're
3 miraculously available to use and have each document for
4 deposition, it just takes time to prepare for it.

5 MR. KOHN: Your Honor, this is Steve Kohn. I would
6 like to respond.

7 THE COURT: Go ahead.

8 MR. KOHN: Of the 136,000 pages -- and by the way,
9 that's the total number of pages, that's far less documents --
10 90 percent of those pages have been in the plaintiffs' hands
11 since August. So it's de minimis in relation to the total.
12 That's point number one.

13 Point number two: It sounds, from everything that Mr.
14 Angstreich said, there really is no intent to try and
15 cooperate with Robins Kaplan or any other state court
16 plaintiff to try and coordinate anything. They want to sit
17 back, wait until Robins Kaplan takes all these depositions on
18 exactly the same issues, and then get a second bite at the
19 apple.

20 And that just isn't fair. And it's greatly prejudicial
21 to St. Jude. Not because of the inconvenience of these busy
22 witnesses, many of whom are high-placed executives in the
23 company, but it's terribly expensive to counsel. And there's
24 no reason to do it.

25 The same motion is pending in Ramsey County as the MDL.

1 The same issues are going to be covered. There's no reason
2 why in two days all the questions that could be asked
3 conceivably of these witnesses can't be accomplished jointly
4 by the MDL and Robins lawyers, and it will all be done.

5 THE COURT: What are the current depositions that
6 are scheduled that have been cross-noticed?

7 MR. KOHN: None of them, Your Honor, have been
8 cross-noticed, because we've been awaiting the outcome of this
9 hearing before we send notices out.

10 There are approximately four or five depositions
11 scheduled throughout October that we have tentative dates set
12 for, subject to getting this Court's approval for the cross
13 noticing. And I think Tracy Van Steenburgh may be able to
14 give you the exact date. I know Healy is set to go October 7.

15 MR. ANGSTREICH: Your Honor, this is a major issue.

16 They talked to Robins Kaplan. And for the people they're
17 going to produce -- and nobody ever says to us: These are the
18 dates that we're asking for these particular witnesses. Are
19 they convenient for you?

20 So that we could say -- okay, for example, Jim Capretz
21 took Steven Healy during the class cert phase. Jim Capretz
22 would be taking Steve Healy at this point. I'm taking Al
23 Flory. I took him in the merits. Dave Butsch, or Mario Silva
24 took Guzik and Carpenter. Mike Coren takes Laxmi Perry.

25 These are the people it would make sense would tend to

1 take these alleged cross notice depositions. But they never
2 called us and said: These are the depositions that we're
3 talking about. These are the dates.

4 Why is it that with the MDL, being responsible for all of
5 the 10,500 implantees who we say should get Medical
6 Monitoring, the 31 or more, and I forget we just got the
7 updated list of the tagalong individual cases, and the over 80
8 cases in the different states, Ramsey County not representing
9 all of them, that they get to be the ones to select the dates,
10 times, and places and the order of witnesses.

11 MR. KOHN: My response to that is simple. If it
12 turns out that a date is inconvenient for MDL counsel, which
13 it turned out a couple times in the past, we'll gladly call
14 Robins Kaplan and get new dates. We've done that several
15 times.

16 There's nothing stopping us, if counsel will tell us what
17 dates are available. But we've been stonewalled on getting
18 dates --

19 MR. ANGSTREICH: It's not true, Steve. You have
20 never asked us for dates with respect to any of these
21 depositions. You have not asked us what the order of
22 discovery is.

23 We were waiting until all of the documents were produced
24 so that we could be in a position to give you the order of
25 witnesses that we want, starting with Billingsworth and Tweden

1 and Flory and Diane Johnson. And those are the people that we
2 want to start with, because those are the people that deal
3 with both merits and the preemption. And we want to start in
4 that, in that order.

5 So we've not been asked for, nor have we refused to give
6 you dates.

7 MR. KOHN: Well, you know, I respectfully disagree.
8 I'm sure you recall we moved the Holmberg and the Healy
9 depositions from September dates, at your request, into
10 October.

11 THE COURT: Well --

12 MR. ANGSTREICH: You moved them when I told you we
13 weren't going to them.

14 THE COURT: Here's what I think we should do.
15 Several things.

16 One is, I think it's appropriate to do cross noticing of
17 these individuals so that we don't have a series of
18 depositions. There may well be more depositions because of
19 the other cases that exist in other parts of the country. And
20 I do think that it would be appropriate to try to limit the
21 amount of time these individuals have to sit for depositions.

22 However, I don't think at this point, given the fact that
23 the final production has just occurred, that there should be
24 any cross noticing before October 15, before the middle part
25 of the month. After that time, I think there should be. But

1 it should be after consultation with the plaintiffs about
2 dates.

3 I will mention in my next telephone conference with Judge
4 Gearin that I would ask if she would encourage the Robins firm
5 to include the MDL plaintiffs in discussions on timing, so
6 that we can all work together on this and get these
7 depositions done.

8 But I don't want the cross noticing to begin until
9 October 15, so that the plaintiffs have had a complete
10 opportunity to get through this last document production.

11 MR. KOHN: That's fine, Your Honor. And we're happy
12 to contact the Robins firm and see if we can't get dates after
13 October 15 for all these witnesses and advise MDL counsel what
14 we learn in that regard.

15 MR. ANGSTREICH: Well, Steve, I, we want
16 Billingsworth, Tweden, Flory, and Diane Johnson. So that if
17 Robins Kaplan wants them, we would like to know what dates
18 they want to take them. In addition to which it's our
19 understanding that with respect to Flory, Billingsworth, and
20 Tweden, we have two dates for them.

21 MR. STANLEY: Steve, are you saying you can take
22 those at any time, or at any time after October 15?

23 MR. ANGSTREICH: After the path slides have been
24 provided and reviewed.

25 THE COURT: Why don't the two sides confer and try

1 to work this out.

2 MR. ANGSTREICH: We will try, Your Honor.

3 With respect to the discovery, if Your Honor will recall,
4 we had an issue concerning the pathology slides. It's been
5 agreed that we will have a courier pick them up. I'm just
6 waiting for Mr. Stanley to tell me when.

7 MR. STANLEY: I'm just putting together -- I wanted
8 to make sure we had the information you wanted to identify
9 them. We should either have them ready the end of this week
10 or the first part of next week.

11 MR. ANGSTREICH: Doctor Wilson, he's indicated it
12 shouldn't take more than 30 days for him to review them. If
13 we can get them back sooner, we will. But that's the
14 procedure that we're going to follow, Your Honor.

15 Billingsworth and Tweden both relate to the need to
16 review those path slides. And with respect to Flory and Diane
17 Johnson, we don't need to wait for the path slides for them.
18 They can be on the top of the list.

19 THE COURT: Sounds fair.

20 MR. ANGSTREICH: The status of third-party
21 discovery, Your Honor, we have an issue with respect to Sulzer
22 Carbomedics.

23 We went through the Texas process, and we were
24 effectively told that they were going to provide the
25 documents. That nobody was there who could find them or know

1 about them, notwithstanding the certification of the
2 president, who seemed to be familiar with the entire issue.
3 And that they wanted us to pay to bring an employee in to go
4 through their records to find these documents.

5 The question that we have, Your Honor, is whether or not
6 Your Honor wants us to pursue these objections that have been
7 lodged with the court in Texas, or whether we can have this
8 matter brought before Your Honor to get a ruling on this.

9 THE COURT: Mr. Kohn or Mr. Stanley, do you have any
10 comment on this?

11 MR. STANLEY: This is Dave Stanley, Your Honor.

12 I talked with the lawyer for Sulzer, and he told me that
13 the two main issues were protecting the confidentiality of
14 Sulzer's trade secrets, and also who is going to pay for the
15 expense of locating, assembling, and copying the documents.
16 And that I think if those two issues were resolved, then I
17 think that the production could go forward.

18 MR. ANGSTREICH: Your Honor, of course we never got
19 that response from Sulzer's counsel when we were speaking with
20 him.

21 We had the same issue with Spire about confidentiality.
22 We worked that out by way of a stipulation. We would work
23 that out with Sulzer's counsel as well.

24 With respect to paying somebody to look for the documents
25 and find them, that really is not our obligation. The

1 subpoena power says they're supposed to do that.

2 With respect to the cost of copying, we would pay for the
3 cost of copying, obviously, if they're going to supply us with
4 the documents, we would have no problem with that.

5 My recollection is that we took care of the cost with
6 Spire. And I think that they had them imaged, so that we got
7 CD-ROMS of them as well as paper. In fact, I think that's how
8 we worked it out, that we would pay for the imaging rather
9 than the cost of copying paper.

10 We would do the same thing with Sulzer. So if, David,
11 apparently, you have a much better rapport with them than we
12 do -- Ms. Lindheim tells me we did not pay for the copying,
13 the imaging CD. We only paid for the copying of the CD-ROM.
14 But if you would be so kind, David, as to tell Sulzer they can
15 have the same protective order by way of a stipulation that we
16 gave to Spire.

17 MR. STANLEY: Do we have that, Steve?

18 MR. ANGSTREICH: You have that stipulation. I have
19 it as well.

20 MR. STANLEY: Could you e-mail it for me?

21 MR. ANGSTREICH: Yes, I'll e-mail you that
22 stipulation.

23 My only question, I guess, is Spire -- Sulzer
24 Carbomedics, are they concerned about your client seeing their
25 records?

1 MR. STANLEY: I called the guy and asked him what
2 his objections were, and he told me what they were. That was
3 the extent of our conversation. That he wanted something in
4 place to protect their trade secrets. And that someone to,
5 you know, he said it was a huge expense for them to assemble
6 and do everything needed with these documents. That was the
7 extent of the conversation when I called.

8 MR. ANGSTREICH: Your Honor, Spire really had no
9 problem with St. Jude seeing their records, because they were
10 involved in this process together. I'm not sure that the
11 position is the same with respect to Sulzer Carbomedics.

12 We will undertake to try to work that out, rather than
13 put the onus on David, and see, based upon what David has
14 said, we'll see if we can address their concerns. But we
15 don't think that it's our burden to pay an employee of theirs
16 to find their records.

17 THE COURT: Well, I think that the agreement that
18 was worked out with Spire provides a good protocol for working
19 with Sulzer as well on what are very similar issues. And I
20 would encourage the parties to try to work that out.

21 I agree with you, Mr. Angstreich, that paying their
22 employees to go through their records does not seem fair nor
23 an appropriate cost.

24 If there is a continuing disagreement on that issue, I
25 think it is my obligation as the MDL judge to resolve that

1 here, rather than in the Western District of Texas. And I
2 would do that in an appropriate order.

3 But if you could confer with Sulzer's counsel about these
4 matters first, and then alert the Court as to whether there
5 are any continuing issues.

6 MR. ANGSTREICH: We will do that, Your Honor.

7 Your Honor, the next item is the declassification of
8 class certification motion package. It's on the list.

9 The status report indicates that we were going to, we had
10 hoped to get you the briefs before today. It's my
11 understanding we have not sent them in yet, and that St. Jude
12 was going to be filing its motion for protective order on
13 October 3.

14 Effectively, it involves whether or not certain of the
15 submissions should remain under seal. I think we can address
16 that either after the argument on class certification, because
17 all of the submissions should be before Your Honor at that
18 point. If it's necessary.

19 However, there is one aspect, as articulated, somehow,
20 Mealey's reporting on some emerging drugs and medical devices
21 printed some of the information, or has access to it. And
22 we've been, we were requested by defense counsel to write a
23 joint letter asking Mealey's not to further publish it or make
24 it available to people. We thought we might have direction
25 from Your Honor today, even though we have not briefed and

1 addressed the issue fully.

2 I guess the easiest thing, Your Honor, rather than ask
3 you to make a decision in a vacuum, is for the parties to send
4 a joint letter to Mealey's telling them the documents are
5 under seal at this time, that the issue will be addressed at a
6 later date, and if the seal is removed, the documents will be
7 made available to them.

8 David, do you have any problem with that?

9 MR. STANLEY: No. As long as we get the joint
10 letter out as soon as possible.

11 Obviously, our client was very concerned about the fact
12 that documents that were filed under seal made their way to
13 the Internet. We're almost in a "cat's out of the bag"
14 situation.

15 But we would like to get this off until we've had an
16 opportunity to discuss with the Court the whole sealing
17 procedure and what it means. Our client thought it meant once
18 it's under seal, it's not supposed to go out to anyone except
19 for counsel.

20 Hopefully, they don't have any of the confidential
21 documents attached to the briefing. It looks as though they
22 only had the briefing. We don't know exactly what they have,
23 nor was Mealey's willing to give me any information about how
24 they got the documents or what they have.

25 MR. RUDD: Your Honor, this is Gordon Rudd, liaison

1 counsel, and I can represent that every bit of paper was filed
2 under seal in taped envelopes.

3 MR. ANGSTREICH: And we can represent, on behalf of
4 all counsel in the MDL, that we did not voluntarily,
5 unintentionally or intentionally provide copies to Mealey's.

6 Your Honor, with the Web site, was there any posting of
7 the brief?

8 MR. STANLEY: I checked the Court's Web site, and
9 there didn't appear to be. It's clear from the docket it was
10 filed under seal.

11 MR. ANGSTREICH: David, rather than take the time
12 with His Honor, if you want to draft that letter and e-mail it
13 to me, I have no problem.

14 MR. STANLEY: I will do that.

15 THE COURT: Why don't you get the letter out as
16 quickly as possible. I don't think any of these documents,
17 they surely didn't make their way to the Court's Web site, as
18 far as I know. There's a lot of parties involved, and who
19 knows how it happened.

20 But I think the most appropriate response is to send a
21 joint letter to them right away. Obviously, this is something
22 that we should resolve quickly so that we can appropriately
23 declassify what can be declassified for publication.

24 MR. STANLEY: Your Honor, is it okay if I reference
25 in the letter the order or the wish of the Court?

1 THE COURT: Yes.

2 MR. STANLEY: Thank you.

3 THE COURT: And I haven't gotten my September 5 copy
4 of Mealey's yet.

5 (Laughter.)

6 What's the next issue?

7 MR. ANGSTREICH: The next issue is the next status
8 conference. Do we need to set that now, in light of the fact
9 that we're going to see you next Wednesday and we can set it
10 then?

11 THE COURT: Let's set it then, because we'll have
12 more counsel present, I imagine, and we can assess the dates
13 better.

14 MR. ANGSTREICH: Fine.

15 Your Honor, in order to make certain that computers at
16 this time work properly, would we have access to the courtroom
17 at any time on Monday?

18 THE COURT: Let's see. Let me just check the
19 schedule. Hang on one second. Ms. Gleason is away. So we're
20 scrambling for schedules when she's not here.

21 The courtroom is available at any time on Monday, the
22 30th. So you can come in. Just call Ms. Gleason, and just
23 indicate what time you're coming and she'll make sure it's
24 open for you.

25 MR. ANGSTREICH: Terrific. Your Honor, if

1 necessary, I assume we can get hold of the IT person. We'll
2 notify Mr. Seldon of the time that we'll be there.

3 THE COURT: That's fine.

4 MR. ANGSTREICH: And I don't think there are any
5 urgent matters or last-minute items that we're aware of.

6 THE COURT: Have we heard from Mr. Capretz yet on
7 the train?

8 MR. ANGSTREICH: That may be a last-minute item. I
9 don't think so, no.

10 THE COURT: Okay. Very well. Thank you, counsel.
11 We'll see everyone next week for the hearing.

12 MR. STANLEY: Thank you, Your Honor.

13 MR. ANGSTREICH: Thank you, Your Honor.

14 (Telephone conference concluded at 2:52.)

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20 CERTIFIED:

21 Karen J. Grufman
22 Official Court Reporter

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