UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE: STRYKER REJUVENATE AND ABG II HIP IMPLANT PRODUCTS LIABILITY LITIGATION	Case No. 13-MD-2441(DWF/FLN)
This Document Relates to All Actions	St. Paul, Minnesota June 12, 2014 9:30 a.m.

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

APPEARANCES:

FOR THE PLAINTIFFS:

Plaintiffs' Lead Counsel Committee Chairperson:
Meyers & Flowers
PETER J. FLOWERS, ESQ.
225 West Wacker Drive, Suite 1515
Chicago, Illinois 60606

Plaintiffs' Lead Counsel Committee Members:
Zimmerman Reed, PLLP
GENEVIEVE M. ZIMMERMAN, ESQ.
1100 IDS Center
80 S. 8th Street
Minneapolis, Minnesota 55402-2015

Official Court Reporter:
JEANNE M. ANDERSON, RMR-RPR
Suite 146 U.S. Courthouse
316 North Robert Street
St. Paul, Minnesota 55101

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APPEARANCES (Continued):

For the Plaintiffs:

Plaintiffs' Lead Counsel
Committee Members (Continued):

Levin Papantonio Thomas Mitchell
Rafferty & Proctor, P.A.
BEN GORDON, ESQ.
316 S. Baylen Street, Suite 600
P.O. Box 12308
Pensacola, Florida 32591

Cory Watson Crowder & DeGaris, PC
ANNESLEY H. DeGARIS, ESQ.
(By Telephone)
2131 Magnolia Avenue South
Birmingham, Alabama 35205

Leiff, Cabraser,
Heimann & Bernstein, LLP
WENDY R. FLEISHMAN, ESQ.
250 Hudson Street, Eighth Floor
New York, New York 10013

Weisman, Kennedy & Berris Co., LPA
ERIC KENNEDY, ESQ.
1600 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115

Plaintiffs' Liaison Counsel:

Liaison Counsel to the
District of Minnesota: Meshbesher & Spence, Ltd.
ANTHONY J. NEMO, ESQ.
1616 Park Avenue South
Minneapolis, Minnesota 55404

Liaison Counsel to
The State Courts: Kelly Bernheim & Dolinsky, LLC
JESSE BERNHEIM, ESQ.
8151 Peters Road, Suite 3200
Plantation, Florida 33324

APPEARANCES (Continued):

FOR THE DEFENDANTS:

Defendants' Lead Counsel:

Sedgwick Law LLP
KAREN E. WOODWARD, ESQ.
RAFAEL A. CAMPILLO, ESQ.
801 S. Figueroa Street, 19th Floor
Los Angeles, California 90017-5556

Defendants' Liaison Counsel:

Stinson Leonard Street LLP
TIMOTHY P. GRIFFIN, ESQ.
150 S. 5th Street, Suite 2300
Minneapolis, Minnesota 55402

P R O C E E D I N G S

IN OPEN COURT

THE HONORABLE JUDGE FRANK: You may all be seated, thank you.

Why don't we have counsel for the, just for the record, for both Plaintiffs and Defense, and I will leave it up to each respective counsel whether there is anyone else they want to acknowledge in the courtroom. We will start with Plaintiffs.

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

THE HONORABLE JUDGE FRANK: And again, for the benefit of the people listening by phone from around the country, as you've heard her say before, unless we each speak into the microphones, no one can hear that is listening. So, I guess we will have to do our job to do that, too.

MR. GORDON: Good morning, Your Honors, Ben Gordon for the Plaintiffs.

MR. FLOWERS: Good morning, Your Honors, Pete Flowers for the Plaintiffs.

MS. FLEISHMAN: Good morning, Your Honors, Wendy Fleishman from Leiff, Cabraser for the Plaintiffs.

MR. KENNEDY: Eric Kennedy for Plaintiffs.

MR. NEMO: Good morning, Your Honors. Tony Nemo

for the Plaintiffs.

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

THE HONORABLE JUDGE FRANK: For Defense counsel?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: All right.

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

THE HONORABLE JUDGE FRANK: It is, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BERNHEIM: Thank you.

THE HONORABLE JUDGE FRANK: Counsel?

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

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

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

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

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

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

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

MS. WOODWARD: Yes.

MR. BERNHEIM: The trial is September 2015.

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

MR. BERNHEIM: No, this is --

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

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

yet. All right.

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

MR. BERNHEIM: Thank you, Judge.

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

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

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

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

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

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

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

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

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

situated. The numbers are incredible.

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

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

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

and that will play itself out.

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

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

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

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

MS. WOODWARD: So, with regard to production of

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

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

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

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

Plaintiffs in the two jurisdictions should be encouraged.

Depositions, Mr. Campillo?

MR. CAMPILLO: Can I do it from here?

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

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

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

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

MR. FLOWERS: Your Honor, from the Plaintiffs'

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

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

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

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

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

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

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

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

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

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

MR. FLOWERS: Yes. Yes, Your Honor.

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

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

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

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

THE HONORABLE JUDGE FRANK: All right.

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

THE HONORABLE JUDGE FRANK: Can we move on?

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

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

MS. WOODWARD: So true. So true.

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

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

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

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

MR. FLOWERS: Thank you.

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

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

THE HONORABLE JUDGE FRANK: All right.

MS. WOODWARD: That would be fine.

THE HONORABLE JUDGE FRANK: So ordered.

MR. FLOWERS: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: One thing I

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: Okay, thank you.

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

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

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

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

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

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

MS. WOODWARD: That's easy.

MR. FLOWERS: Thank you.

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

THE HONORABLE JUDGE FRANK: All right, shall we?

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

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

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

THE HONORABLE JUDGE FRANK: Thank you.

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

THE HONORABLE JUDGE FRANK: We are.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: All right.

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

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

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

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

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

THE HONORABLE JUDGE FRANK: All right, thank you.

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: All right.

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

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

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

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

(Discussion off the record.)

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

THE HONORABLE JUDGE FRANK: How about for Defense counsel?

MS. ZIMMERMAN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Was it revised? Did the plaintiff undergo surgical revision?

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

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

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

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

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

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

The Plaintiffs around this country, we spent the

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

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

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

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

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

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

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

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

these records have come in.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GORDON: Should I put that up there?

MR. NEMO: Yes.

MR. GORDON: What page?

MR. NEMO: It is 111.

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

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

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

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

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

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

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

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

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

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: Okay, thank you.

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

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

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

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

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

MR. GORDON: Precisely.

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

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

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

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

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

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

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

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: Okay.

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

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

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

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

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

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

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

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

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

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

MR. GRIFFIN: It was incomplete. It has been

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

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

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

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: Okay, thank you.

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

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

THE HONORABLE JUDGE FRANK: All right.

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

motion.

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

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

MR. NEMO: That is correct.

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

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

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

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

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

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

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

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: Thank you.

THE HONORABLE JUDGE FRANK: All right.

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

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

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

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

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

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

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

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

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

MR. GRIFFIN: Nothing further, Your Honor.

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

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

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

in and finish up. All right?

ALL COUNSEL: Thank you.

(Recess.)

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

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: There was.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: And the settlement,

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

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

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

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: No, thank you.

THE HONORABLE JUDGE FRANK: We're good.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This is one of the reasons we propose that there

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

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

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

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

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

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

That is not defined.

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

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

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

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: All right.

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

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

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

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

THE HONORABLE JUDGE FRANK: June 12th.

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

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

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

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

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

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

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

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

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

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

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

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

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

What is most important in fairness to your firm

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

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

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

MS. WOODWARD: Absolutely, Your Honor.

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

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

that.

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

MS. WOODWARD: No thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: In camera?

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

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

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

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

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

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

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

THE HONORABLE MAGISTRATE JUDGE NOEL: Thank you.

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

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

MS. ZIMMERMAN: Thank you.

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

MS. ZIMMERMAN: No.

MR. GRIFFIN: It is still good morning.

THE HONORABLE JUDGE FRANK: Not for long.

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

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

ABG II, any comparison, that information is included.

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

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

MR. GRIFFIN: Yes.

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

MR. GRIFFIN: No, Your Honor.

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

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

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

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

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

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

particular.

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

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

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

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

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

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

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

MR. GRIFFIN: Thank you, Your Honor.

THE HONORABLE JUDGE FRANK: Any rebuttal by counsel?

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

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

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

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

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

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

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

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

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

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

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

The Minnesota cases didn't involve mass torts.

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

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

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

THE HONORABLE JUDGE FRANK: Thank you.

MS. ZIMMERMAN: Nothing, Your Honor.

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

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

MS. FLEISHMAN: That is correct, Your Honor.

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

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

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

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

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

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

THE HONORABLE JUDGE FRANK: The big conference room.

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

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

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

THE HONORABLE JUDGE FRANK: Oh, all right.

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

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

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

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

THE HONORABLE JUDGE FRANK: So, we are adjourned?

MS. FLEISHMAN: Your Honor?

THE HONORABLE JUDGE FRANK: Oh, yes, sorry.

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

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

MS. WOODWARD: I believe that is correct.

THE HONORABLE JUDGE FRANK: All right. We will

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