

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE NORTHERN DISTRICT OF INDIANA  
3                   SOUTH BEND DIVISION

4   IN RE:   MEDICAL INFORMATICS  
5   ENGINEERING, INC., CUSTOMER                   CAUSE NUMBER: 3:15MD2667  
6   DATA SECURITY BREACH LITIGATION

7                   TRANSCRIPT OF PROCEEDINGS  
8                   BEFORE THE HONORABLE ROBERT L. MILLER, JR.  
9                   JANUARY 20, 2015

10   ATTORNEYS PRESENT IN COURT:

11   For Plaintiffs:                   MR. IRWIN B. LEVIN  
12                                       MS. LYNN A. TOOPS  
13                                       MR. RICHARD E. SHEVITZ  
14                                       MR. VESS A. MILLER  
15                                       MR. JAMES M. LEWIS  
16                                       MS. CARI LAUFENBERG  
17                                       MR. WILLIAM B. FEDERMAN  
18                                       MR. BENJAMIN F. JOHNS  
19                                       MR. JON LABIRAS  
20                                       MR. SAMUEL WARD  
21                                       MR. MARK GOLDMAN  
22                                       MR. BRIAN CUSTY  
23                                       MR. JAMES PIATT  
24                                       (see docket for addresses/appearances)

25   For the Defendant:               MS. CLAUDIA D. McCARRON  
                                     MR. JOHN LaDUE  
                                     (see docket for addresses)

                                     DEBRA J. BONK  
                                     *Federal Certified Realtime and Registered Merit Reporter*  
                                     *United States District Court*  
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                                     Proceedings reported in machine shorthand. Transcript  
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1           **THE COURT:** Good morning.

2           This is Cause Number 3:15MD2667, also MDL2667 in the  
3 Panel's numbering, **In Re: Medical Informatics Engineering,**  
4 **Inc., Customer Data Security Breach Litigation,** and we are  
5 gathered for the first, sort of, organizational status  
6 conference to get us underway.

7           We have a lot of people here. If I could begin by  
8 asking you to state your appearances for the record, and I'm  
9 talking about only the people who are physically here in court.  
10 I know there are others who are listening to the feed, but I  
11 have to hold them, just because of the way this courtroom  
12 works, to listening, rather than speaking. We can do  
13 telephonic conferences, but not on this scale. So if I could  
14 start with this table and have you state your appearances for  
15 the record.

16           **MR. LEVIN:** Thank you.

17           Good morning, Your Honor.

18           Irwin Levin, Cohen & Malad, on behalf of the  
19 Plaintiffs.

20           **THE COURT:** Mr. Levin.

21           **MS. TOOPS:** Lynn Toops, Cohen & Malad, also for the  
22 Plaintiffs.

23           **THE COURT:** Miss Toops.

24           **MR. SHEVITZ:** Good morning, Your Honor.

25           Richard Shevitz, Cohen & Malad, also for the

1 Plaintiffs.

2 **THE COURT:** Mr. Shevitz.

3 **MR. MILLER:** Vess Miller, Cohen & Malad, for the  
4 Plaintiffs.

5 **THE COURT:** Mr. Miller.

6 **MR. LEWIS:** Good morning, Your Honor.

7 James Lewis, Tuesley, Hall & Konopa, also for  
8 Plaintiffs.

9 **THE COURT:** Mr. Lewis.

10 I know we have folks back here for Plaintiffs, so  
11 let's stay on that side.

12 **MR. FEDERMAN:** William B. Federman, Federman &  
13 Sherwood, on behalf of the Plaintiffs, Your Honor. I have the  
14 California case for Terri Greulich.

15 **THE COURT:** Okay. Mr. Federman, welcome.

16 **MR. JOHNS:** Good morning, Your Honor.

17 Ben Johns, from Chimicles & Tikellis, Haverford,  
18 Pennsylvania, on behalf of Plaintiff Michelle Moore.

19 **THE COURT:** Mr. Johns.

20 **MR. LAUFENBERG:** Good morning, Your Honor.

21 Cari Laufenberg, Keller Rohrback, on behalf of  
22 Plaintiff Moore, as well.

23 **THE COURT:** Ms. Laufenberg.

24 **MR. SLADE:** Good morning, Your Honor.

25 David Slade, from Carney, Bates & Pulliam, on behalf

1 of Plaintiff Franklin.

2 **THE COURT:** Mr. Slade.

3 **MR. GOLDMAN:** Good morning, Your Honor.

4 Mark Goldman, Goldman, Scarlato & Penny, on behalf  
5 of Plaintiff Ryan Pool.

6 **THE COURT:** Mr. Goldman.

7 **MR. WARD:** Good morning, Your Honor.

8 Sam Ward, of Barrack, Rodos & Bacine, on behalf of  
9 Kelly McGaha and Shannon Mudd.

10 **THE COURT:** Mr. Ward.

11 **MR. LAMBIAS:** Jon Lambiras, with Berger & Montague,  
12 on behalf of Plaintiffs Floyd Harris, Steve Walker, and Shicola  
13 Washington.

14 **THE COURT:** Mr. Lambiras.

15 **MR. CUSTY:** Good morning, Your Honor.

16 Brian Custy, from Custy Law Firm, on behalf of the  
17 Tjaden Plaintiffs.

18 **THE COURT:** Mr. Custy.

19 **MR. PIATT:** Good morning, Your Honor.

20 James Piatt, Riley, Williams & Piatt, Indianapolis,  
21 also on behalf of (inaudible) --

22 **THE COURT:** Is it "Piatt"?

23 **MR. PIATT:** "Piatt." P-I-A-T-T, Your Honor.

24 **THE COURT:** Mr. Piatt.

25 And on this side of the room.

1           **MS. McCARRON:** Good morning, Your Honor.

2           Claudia McCarron, on behalf of the Defendant Medical  
3 Informatics Engineering. I'm with Lewis, Brisbois, Your Honor.

4           **THE COURT:** Ms. McCarron.

5           **MR. LaDUE:** John LaDue for the Defendant, Your Honor.

6           **THE COURT:** Mr. LaDue.

7           I have never been able to sort out the acoustics of  
8 this courtroom. If you're hearing fine back there, you're  
9 welcome to stay there. If you would like, you can move on up  
10 to the jury box. Theoretically, that's where the acoustics are  
11 best. It's supposed to be designed to get the sound in to  
12 them.

13           Let me get started with just a few -- oh, let me get  
14 started with just a few opening things.

15           I found my notes from the last hearing.

16           Let me introduce to you the people in the courtroom  
17 that you will be working with as we proceed through this MDL.

18           First, seated at the center of this table is  
19 Ms. DeAndra Kirkwood. She is the courtroom deputy clerk or  
20 case management deputy for my chambers, for my courtroom, and  
21 you will probably be in touch with her many times.

22           To her right is Ms. Jennifer Darrah. She is a member  
23 of the clerk's office, and she is assigned to the MDL dockets  
24 in this Division, and so you will probably have a great deal of  
25 contact with her.

1           Seated over here are law clerks in my chambers:  
2 Mr. Nicholas Snavely, just working in order for you, Ms. Sheri  
3 Potts, and Ms. Suzanne Shead. I will tell you, up front, we  
4 don't assign MDLs to any particular law clerk. We all work on  
5 them. I thought you might want to see who they are.

6           A person that you may be dealing with in this case is  
7 not physically present -- she is on the phone -- and that's  
8 Magistrate Judge Susan Collins of this Court. She is based in  
9 Fort Wayne. She was assigned to some of the cases on this  
10 docket, the ones that were filed originally in the Fort Wayne  
11 Division of this Court, and so we're keeping her on as the MJ,  
12 having had slightly more familiarity with the cases than the  
13 others MJs in the District, and she does an exceptional job.

14           I will try to maintain the helm of the boat through  
15 most of this. It may well be that I'm unavailable at a time  
16 you need something quick. It may be that she can provide a  
17 service better than I can. For the most part, you'll be  
18 dealing with me, but you may also be dealing with Magistrate  
19 Judge Collins. She's assigned as the magistrate judge on all  
20 these cases, and I think you'll be delighted with the work she  
21 does when she's called upon to do work.

22           Seated here next to me is Ms. Debra Bonk. She's the  
23 court reporter assigned to me. There may be times, as the case  
24 moves on, particularly depending on what happens with  
25 nominations and confirmations, there may be other court

1 reporters that fill in for me periodically, but she will be the  
2 person you would primarily deal with.

3 I would tell you, for those who anticipate being on  
4 the phone, more often than not, it is my practice to post a  
5 transcript of a courtroom status conference, not hearings of  
6 all sorts, but courtroom status conferences, to post those on  
7 the website so the attorneys who are not here and could not  
8 participate by phone can find out what happened. When we get  
9 to class certification hearings or dismissal motion hearings  
10 and that sort of thing, I would not anticipate posting those.  
11 But as far as the nuts and bolts of what we do, that will be  
12 available for those who can neither make it, nor get to the  
13 phone during the conference.

14 I would tell you that I don't anticipate this being  
15 one of those black holes you hear about in the MDL process. I  
16 don't know how often you hear about them now. I know, when I  
17 was on the panel, years ago now, we'd hear about them. I took  
18 senior status nine days ago, so I should be able to get your  
19 rulings out pretty promptly. The inflow of cases has reduced.

20 I will tell you, in advance, that I think that,  
21 generally, the role of the MDL judge is to keep things moving  
22 so it can move to wherever it's going to move, whether remand  
23 or resolution or settlement by the Court, and so you won't get  
24 a lot of Law Review-type of opinions out of me, but, hopefully,  
25 quick rulings that tell you why I did it and keep you going.

1           One thing that I don't think I have to say because I  
2 put it in the original order, but it is important to me -- and  
3 knowing what I have been able to find out of lawyers in this  
4 case, I don't anticipate a problem -- but that is that civility  
5 is very important to me. I think we move things along much  
6 better if the attorneys for both sides can talk things out, not  
7 giving up what you need to argue, but at least be able to frame  
8 the argument in a civil way.

9           It may be fresh on my mind because I have a case  
10 where I may soon be entering an order forbidding an attorney to  
11 file further briefs with adjectives, so it is something that I  
12 thought I should raise.

13           That covers all the introductory things. I have  
14 reviewed your submission. Oh, I do have one quick question,  
15 before I turn it over to you folks to tell me what I need to  
16 know.

17           There was submitted what showed a stipulated  
18 protective order of confidentiality in the proposed case  
19 management order that was set to come down the pike later, so I  
20 wasn't sure whether you folks had agreed on this or whether  
21 this is just what's in circulation.

22           **MS. McCARRON:** Your Honor, we have agreed on that.

23           **THE COURT:** Okay. I haven't spent time looking it  
24 over yet because I didn't know if it was in final form, so  
25 we'll get down through it and probably enter it up or ask



1 whether there's agreement to any modifications.

2 Our Court of Appeals is pretty tough on protective  
3 orders, and so knowing that we have counsel, actually, on both  
4 sides with Mr. LaDue from this Circuit, I assume it complies,  
5 but I haven't looked at it yet.

6 With that, again, I have looked down over your stuff.  
7 It looks like your primary disagreements, as best I can tell,  
8 is how much takes place at any given time, and I know that may  
9 not be the only issues that you might disagree on now as we get  
10 up and running.

11 Mr. Levin, let me start with you as interim lead  
12 counsel for Plaintiff.

13 What do I need to know beyond what I've read?

14 **MR. LEVIN:** Good morning, Your Honor.

15 Is it all right if I stand from here or would you  
16 prefer I go to the podium?

17 **THE COURT:** Yeah, if you're there, make sure the  
18 microphone is up, because the acoustics in this courtroom make  
19 it hard for people listening on the phone.

20 **MR. LEVIN:** Sure.

21 Thank you, Your Honor.

22 Your Honor, you mentioned civility, and I will tell  
23 Your Honor that my colleague, Ms. Toops, and I have worked very  
24 hard with Ms. McCarron and her group, Mr. Fox, to be able to  
25 present to Your Honor today as little as possible. Having

1 worked in a court for a long time, I know that the Court is  
2 very busy, and we really have worked out, I think, more than  
3 most lawyers ever work out in the first hearing of an MDL, so  
4 we're very proud to come to you and tell you that.

5           This case, Your Honor, is -- I won't say it's unique,  
6 but it's a little unusual in the MDL setting, because although  
7 it's a significant case with significant damages from the  
8 Plaintiffs' point of view, we had a very stark, blunt  
9 conversation between counsel about what's available to the  
10 class, should the class prevail, should there be a class and  
11 should the class prevail.

12           Mindful of that, Ms. McCarron was very honest and  
13 said, "Why don't we try to do something that preserves the  
14 coverage that's left because the coverage is burning."

15           We put into our case management plan that we would  
16 receive, for example, the insurance policies in February.  
17 We've already gotten them --

18           **THE COURT:** Okay.

19           **MR. LEVIN:** -- and we've started looking at them.  
20 I'm not sure if we're going to agree on what the coverage is,  
21 but we'll probably be either close or on the same page.

22           To that end, Your Honor, we have done something a  
23 little different in that we have scheduled as part of the plan  
24 a mediation up front. I proposed Judge Brook as a mediator in  
25 this case, and Ms. McCarron and her clients are considering

1 that, and they should get back to us very quickly.

2           The idea here is that the Defendant is going to  
3 voluntarily provide us with a narrative of what happened, if  
4 you will, because we both acknowledge and understand that each  
5 side has to have that knowledge to be able to mediate the case  
6 properly, so we're working collectively to try to accomplish  
7 that, to get the information that we need to come to a  
8 resolution.

9           Ordinarily, we would be up here -- as a judge I used  
10 to work for used to call it, a CMP. He said it's the civilized  
11 rules of war of the courtroom. We've done that, we've both  
12 prepared for that, because no one knows whether or not the  
13 settlement efforts will be successful, but it would be in the  
14 best interest of the class if we could resolve that.

15           To lawyers who like complex cases and like complex  
16 litigation, it's a little bit of the proverbial kissing your  
17 sister, to be able to say, "Well, let's just go straight and  
18 see if we can resolve it," but sometimes circumstances demand  
19 that, and I think that's what's happened here.

20           The only disputes that we have we tried to lay out  
21 very quickly, and Your Honor has picked up on them. There is a  
22 difference of opinion, for example, as to when discovery should  
23 start. The Defendant takes the position, which is not unusual,  
24 don't start any discovery until dispositive motions have been  
25 resolved. We take the position that discovery should start

1 immediately upon the appointment of lead counsel.

2           However, acknowledging that we don't want the  
3 Defendant to spend a lot of time responding to that discovery,  
4 we recommended to the Court that that discovery not commence  
5 until -- we could send it out now, but they don't have to  
6 answer until thirty days after the first mediation session, and  
7 that would give them time to respond, but not burn up that  
8 coverage in the interim. The idea of thirty days after the  
9 first mediation date was that, if that mediation was not  
10 productive, obviously, we would move forward. If it was kind  
11 of productive but we had a sense that maybe someone on that  
12 side, certainly not Ms. McCarron but someone on that side, was  
13 trying to slow boat this, it would give them incentive to deal  
14 in good faith. So, we really think that, from our standpoint,  
15 that makes a lot of sense and recognizes the interests on both  
16 sides of the table, but it doesn't push everything down the  
17 road so that the case can commence immediately.

18           The other disagreement --

19           **THE COURT:** Let me just clarify, because this is one  
20 of the questions I was going to ask.

21           I think all of these cases have been stayed. The  
22 ones that were filed in this District were stayed much earlier,  
23 waiting to see what the panel would do.

24           As I understand it, then, what the Plaintiff would  
25 anticipate would be the voluntary disclosure of the policies

1 and the summary of what's happened, as the Defense sees it, and  
2 initial disclosures, under Rule 26(a)(1), but discovery would  
3 remain stayed, then, as far as the need to respond, until  
4 thirty days after the mediation?

5 **MR. LEVIN:** Correct.

6 And if the first mediation was very promising and we  
7 wanted to have another date, of course, we would agree, I  
8 think, to extend that response time.

9 **THE COURT:** Sure. Okay. Okay. I thought that's  
10 what it was, but I wanted to clarify.

11 **MR. LEVIN:** That's correct, Your Honor.

12 The other difference, I think, between us is that the  
13 Defendant would like to, I'll use the word -- not bifurcate but  
14 sequence discovery in a way that the Plaintiffs would not agree  
15 to. That is, we think the case should just proceed as a case,  
16 and the Defendant wants to tie some of the discovery to class  
17 certification order. Our position would be, while the Court --  
18 even if the Court takes that under advisement, the case should  
19 proceed while the class certification is under advisement. We  
20 believe that there should not be any bifurcation of the  
21 discovery process whatsoever.

22 Basically, those are the only things we could not  
23 come to an agreement on.

24 And, with respect to the Defendant, I think both of  
25 us have taken positions which are not surprising to the other.

1 In a nutshell, Your Honor, that's where we are on the case  
2 management plan.

3 **THE COURT:** Okay. Let me ask one last question.

4 From what you know, do we anticipate any new federal  
5 or, I guess, state cases? As I understand it, there aren't any  
6 state cases now.

7 **MR. LEVIN:** There are no state cases pending. I  
8 would be surprised if there were additional cases that have  
9 been filed. All the cases have been transferred here.

10 There was one pending -- all the cases were stayed,  
11 except for one particular case that was in, I think it was, the  
12 Eastern District of Kansas. Pursuant to your order, that  
13 case -- that motion practice has been terminated.

14 **THE COURT:** Right.

15 **MR. LEVIN:** And, as you'll notice, under the case  
16 management plan that we've proposed, there will be a new  
17 consolidated complaint in March that will subsume all of that.

18 **THE COURT:** So that would render moot the motion to  
19 dismiss that was filed in that case?

20 **MR. LEVIN:** Correct, Your Honor.

21 **THE COURT:** All right. Thank you, sir.

22 **MR. LEVIN:** Thank you, Your Honor.

23 **THE COURT:** Okay. This is done only in the first  
24 hearing we have. Interim lead counsel, rather than official  
25 lead counsel -- there's a lot of Plaintiffs' attorneys who are

1 here. If there's anybody who's got a disagreement with what  
2 Mr. Levin said -- I'm not looking for echos. I have to do the  
3 old panel limit here, the one- or two-minute limit so that you  
4 couldn't repeat -- did anybody wish to add anything?

5 **MR. FEDERMAN:** If I may, Your Honor.

6 Bill Federman.

7 It's our position that the case is -- first of all,  
8 we agree with nearly all the comments by the interim lead  
9 counsel. We believe the cases should be coordinated, not  
10 substantively consolidated, and I just want that position made  
11 clear on the front end.

12 As I introduced myself earlier, we represent the  
13 California case in this matter. There are specific and  
14 particular statutes in California that are not in existence in  
15 any other state, so that's why we believe the cases should be  
16 coordinated, not substantively consolidated, and I've had  
17 discussions with the interim lead counsel about that.

18 **THE COURT:** Well, let me ask you this, and it's a  
19 little premature, but at least we can put some cards on the  
20 table so we can think. Of course, getting here doesn't  
21 consolidate anything. This is just coordinated, centralized  
22 and coordinated. But given the overlap -- and I haven't looked  
23 as thoroughly at the cases that originated outside our  
24 District. But looking at the ones filed within our District,  
25 we have national classes, we have state-wide classes alleged.

1 I assume your complaint would have the same. And, again, I  
2 don't have a motion to consolidate, and I'm not ruling on it  
3 now, but just give me an idea, at the beginning. If we have a  
4 series of cases being coordinated, but the bulk of them have  
5 both national classes and state-wide classes that would cover  
6 every state, ultimately, what would be the point not to  
7 consolidate --

8 **MR. FEDERMAN:** Well --

9 **THE COURT:** -- I mean, subject to any limits, as far  
10 as my authority under 1404 and that sort of thing?

11 **MR. FEDERMAN:** Well, a lot of people forget this,  
12 but, at some point, these cases return --

13 **THE COURT:** Right.

14 **MR. FEDERMAN:** -- to the states. And if you  
15 substantively consolidate the allegations, it may make it more  
16 difficult for the cases to return back to the state. That's  
17 the only difference.

18 **THE COURT:** Okay. So that's the concern, the  
19 going-home provision?

20 **MR. FEDERMAN:** Yeah, it's the going-home provision.

21 And I know, in the **Manny Pacquiao** case that I'm very  
22 involved in, what we're developing in that case would be a  
23 master complaint of the common allegations --

24 **THE COURT:** Right.

25 **MR. FEDERMAN:** -- and then we could handle the



1 particular individual state actions.

2           You'll see, in the complaint we filed in the **Greulich**  
3 case, we specify which states do have data breach statutes.  
4 Not all fifty have them.

5           In addition to that, we have particular allegations  
6 under the California Acts which no other state has but  
7 California.

8           **THE COURT:** Okay.

9           **MR. FEDERMAN:** So that's why it would be our position  
10 that everyone work together. We could have a master complaint.  
11 That could be addressed by the Court and attacked on a motion  
12 to dismiss. After it survives, we could then go forward. If  
13 the master complaint does not survive, then there's no need for  
14 the MDL, and we go back to our home states.

15           **THE COURT:** Okay. So just to be sure I understand  
16 your position -- of course, the Supreme Court said, in **Lexecon**,  
17 that we can't transfer cases to ourselves as transferee judges  
18 and can't just absorb cases from elsewhere into our own  
19 assigned cases to try.

20           That's your principle concern about what I'll call  
21 the **Lexecon** issue, that you're a California case; if it's going  
22 to be tried, you want it to be tried in California?

23           **MR. FEDERMAN:** Yes, California resident, California  
24 Plaintiff. If there's no resolution here, we still need the  
25 ability to go back, and you do that through coordination, not

1 consolidation.

2 **THE COURT:** Okay. Thank you.

3 Anybody else on the Plaintiffs' side?

4 **(No response.)**

5 **THE COURT:** Okay. Turning to the Defendant's side.

6 **MS. McCARRON:** Good morning, Your Honor.

7 **THE COURT:** Let me ask you to drag the microphone  
8 over, again, for the benefit of those who are listening on the  
9 phone.

10 **MS. McCARRON:** I can just stand a little bit closer  
11 to it, if that helps.

12 Good morning, Your Honor.

13 I do agree with most of what you've been told by the  
14 Plaintiffs. We've developed a good working relationship, and  
15 we've achieved agreement on a number of issues.

16 It's been mentioned to Your Honor, the insurance  
17 coverage -- we've been very frank with counsel about that --  
18 and that Defense costs erode limits, so part of our desire to  
19 keep discovery stayed through a motion to dismiss and then to  
20 sequence discovery afterwards is in order to protect the limits  
21 in order that this case might be resolved.

22 I mean, I'm hopeful that we're going to go to a  
23 mediation and be successful early on. If not, the motion to  
24 dismiss, in these data privacy cases, they're very -- it's a  
25 developing area of law. There are splits in the circuits. The

1 most recent decision here in the Seventh Circuit certainly  
2 doesn't favor my clients, but the petition for cert deadline  
3 has been extended out until February 14th in that case, so that  
4 case is going before the Supreme Court.

5 We think that -- so, we think we have meritorious  
6 arguments to make, both on the standing issue, which we intend  
7 to argue and preserve, but also with respect to whether or not  
8 there are legally cognizable damages for all these Plaintiffs.

9 We've made those arguments elsewhere, with discovery  
10 stayed in those cases, prevailed. That seems to be the correct  
11 outcome, especially if some of these cases are going to go back  
12 to individual states, in the event the master complaint is  
13 dismissed. We have an additional desire to preserve limits and  
14 try -- if we wind up with a few cases that survive, being able  
15 to resolve those and not take them through a lengthy process of  
16 discovery.

17 With respect to -- we didn't ask for bifurcation,  
18 Your Honor. We asked for a sequencing of discovery where there  
19 would be an emphasis on discovery that is relevant to class  
20 certification, and I think -- if we had that direction from the  
21 Court, and given the cooperative rapport that we have already  
22 established, I don't think it's going to be a source of  
23 contention or issues for Your Honor, but it would allow us,  
24 one, to avoid the very costly expert discovery that would be  
25 needed if we were going to go and prepare the case straight

1 through for trial.

2 I, also, think that there may be individual  
3 witnesses -- it's hard to hypothesize right now, not seeing the  
4 master complaint, but there may be an individual witness that  
5 is teed up for deposition, and we look at what the topics would  
6 be, and they have nothing to do with discovery or nothing to do  
7 with class cert, and we'd like to be able to make that  
8 argument, that this is the exceptional case.

9 **THE COURT:** What might those issues be? I understand  
10 the expert, and I suppose that could be handled simply by  
11 setting a deadline for expert discovery that would be later  
12 than the class certification hearing. But what sort of  
13 discovery are you thinking of that would be more -- more  
14 heavily merits than applicable to class certification?

15 **MS. McCARRON:** I would anticipate a number of  
16 depositions both by persons at MIE and the experts that go to  
17 how the incident occurred, steps that were taken to remediate  
18 it. This is a very sophisticated hack. The company handles  
19 large volumes of electronic information. Network architecture  
20 is complex. I think we're talking about multiple witnesses,  
21 and counsel would -- even in deposing the lay witnesses, the  
22 fact-based witnesses, I think counsel on both sides would have  
23 to spend a great deal of time preparing for that with  
24 consulting forensic experts, so it's a costly process.

25 **THE COURT:** Okay. That answers that question.

1           **MS. McCARRON:** I think those are the two points on  
2 which we agreed to disagree and speak to Your Honor.

3           I don't have anything else, Your Honor.

4           **THE COURT:** Okay. Thank you, Ms. McCarron.

5           Moments ago, I had a question to return to the  
6 Plaintiffs, but it's no longer here.

7           I don't think I can go through -- I truly appreciate  
8 the detail with which you set forth your proposed case  
9 management plan and your ability to agree on so much of it. I  
10 certainly agree with what Mr. Levin said, that when you line  
11 this one up against most initial conferences in an MDL, this  
12 one stands apart.

13           Given the number of events, I don't think I should  
14 sit here and try to assign dates or anchor dates here on the  
15 record. I think I'd do better to try to get something out to  
16 you early next week.

17           Oh, I remembered.

18           What sort of discovery would -- Mr. Levin, what sort  
19 of discovery would you anticipate if I don't stay discovery  
20 until the ruling on the 12(b)(1) or 12(b)(6) motion that, I  
21 guess, we all anticipate? And from the dates that are  
22 proposed, I guess, that ruling would come sometime in July or  
23 August, in all likelihood. What sort of discovery would you  
24 anticipate doing in that interim period between the mediation,  
25 assuming the mediation is just a walk away; we're done; we

1 don't need to extend the discovery stay? What sort of  
2 discovery would you anticipate doing during that period?

3 **MR. LEVIN:** Well, Your Honor, these cases involve a  
4 similar pattern. There's a breach. The Defendant is going to  
5 claim that we have to prove either negligence or breach of  
6 contract or the various theories. We would initially take the  
7 kind of discovery that would be useful, no matter if the case  
8 was dismissed and sent back to other jurisdictions or not,  
9 because the factual underpinnings of what happened are  
10 basically the kind of discovery that we would do.

11 I wouldn't suggest that we would start taking,  
12 immediately, dozens of depositions as we started. First, we  
13 would want to get paper discovery, and we would want to get the  
14 information we need, might need a 30(b)(6) to deal with their  
15 systems and so on and so forth, so it would be that type of  
16 discovery that we would initially propound.

17 And I think -- very frankly, Your Honor, I think,  
18 once we propound our initial discovery, we could probably have  
19 some conversations that would say, "If the Court were to allow  
20 discovery, how should we track that in a meaningful way," so I  
21 think that's the way that we would approach it.

22 **THE COURT:** Okay. Well, let me try -- I'll try to  
23 sort down through these. I will tell you that ordinarily --  
24 and this is an unusual case because of the interests of both  
25 sides in trying to comply more closely with Rule 1 when it

1 comes to just, speedy, and inexpensive determination of the  
2 action. It is an unusual case.

3 Ordinarily, I'm not a big fan of discovery stays or  
4 sequenced discovery, and I understand bifurcated or sequenced  
5 discovery isn't specifically being requested here, but I do  
6 have to look at this one through a different lens, so I don't  
7 know what I'm going to do. But when I sit down and look at  
8 this, I'll try to run it both ways and see how long it would  
9 last, because I also recognize that, if there are injuries that  
10 are constitutionally cognizable and cognizable under the law,  
11 they're injuries that people are really worried about, and so I  
12 think it's in the best interest of everybody that we can get to  
13 the close of proceedings here as soon as possible, wherever it  
14 goes.

15 I will not be able to get it out to you this week. I  
16 think I should be able to by next week. I will, after this  
17 conference, more formally -- but I guess I'm doing it now over  
18 the phone -- invite Magistrate Judge Collins, who reviews the  
19 protective orders more frequently than I do, proposed  
20 protective orders, ask her to look it over, and, assuming  
21 there's no problem, will enter that up right away. And if  
22 there is a perceived problem, we'll let you know.

23 **MR. LEVIN:** Yes, Your Honor.

24 I wanted to also alert the Court -- and this is in  
25 our papers, our joint papers. We have proposed an ESI protocol

1 to the Defendant. The Defendant is reviewing those, and I'm  
2 fairly confident that we'll have something jointly to present  
3 to the Court, as well.

4 **THE COURT:** I was going to say, if you're not able to  
5 do that, if you're not able to jointly agree, let me know as  
6 soon as possible, because I would like to get that resolved.  
7 We don't have to resolve it quite as quickly, given that you've  
8 got the mediation to come in, but at least the protocol, so we  
9 know whether it's going to be predictive or keyword or  
10 whatever.

11 **MS. McCARRON:** Your Honor, I'm going to be working  
12 with a partner of mine, Tom Lidbury, who participated in the  
13 Seventh Circuit's pilot project, so I think that we won't have  
14 a problem reaching an agreement.

15 **THE COURT:** Okay. Yeah, I'm impressed with the way  
16 everybody's gotten along, so I don't say that as a when you  
17 can't agree, but, if you can't, let me know, because I would  
18 like to get everybody back together before that.

19 We do have the applications due on the lead counsel,  
20 I guess, week after next.

21 Mr. Levin, let me ask you. There was some  
22 suggestion, at some point, that support for your request when  
23 it's made was coalescing. Are you aware -- and I'm not asking  
24 for a campaign of any sort, but are you aware whether there's  
25 going to be other applicants?



1           **MR. LEVIN:** Your Honor, at this point, there may be  
2 another applicant.

3           **THE COURT:** Okay.

4           **MR. LEVIN:** I will say that all of the lawyers on  
5 this side of the V have gotten along very well. There's a lot  
6 of talent on this side, and we continue to have conversations,  
7 but I don't know that it will be unanimous. Of course, I'm  
8 hopeful that it will be, but there may be another applicant, as  
9 well.

10          **THE COURT:** Okay.

11          **MR. JOHNS:** Your Honor, may I follow up to your  
12 question?

13          **THE COURT:** Yes.

14          **MR. JOHNS:** Ben Johns, again, from Chimicles &  
15 Tikellis.

16                 First of all, I agree completely with what Mr. Levin  
17 had said as far as congeniality, and I've been impressed with  
18 the way his colleagues have treated not only Defense Counsel  
19 but also his colleagues on the Plaintiffs' bar. I appreciate  
20 that.

21                 My firm, Chimicles & Tikellis, and my colleague, Cari  
22 Laufenberg at Keller Rohrback, we intend to file a petition to  
23 be appointed either interim co-lead counsel together or with  
24 the Cohen Malad firm or, in the alternative to that, to a  
25 plaintiffs steering committee or an executive committee. And I

1 won't go through all of the reasons -- you'll see the briefs --  
2 but I will just suggest that I think there's some value to  
3 having different perspectives from different lawyers that have  
4 worked on these cases, that have settled these types of cases,  
5 particularly if --

6 **THE COURT:** Let me go ahead, because I don't want the  
7 campaign now. The reason I was asking is that, if there's only  
8 going to be one applicant, I don't have to worry about having  
9 people come in to talk to you about it or build in time to  
10 select, so this was purely a calendaring thing that I was  
11 asking about. I welcome your application.

12 **MR. JOHNS:** Certainly, Your Honor. I just wanted to  
13 address that. Thank you.

14 **THE COURT:** I appreciate it.

15 What I'm trying to figure out is when to have you  
16 folks back, because I don't want to incur the expense --  
17 obviously, if a case doesn't settle in mediation and we get  
18 going, I want to see you every four to six weeks, either  
19 telephonically or in person, depending on what the issues might  
20 be, but, by the same token, I don't see -- except the  
21 possibility of inviting applicants for lead or liaison counsel  
22 to court so that I can hear your pitches, rather than simply  
23 read them, the pitches that I think I just said I don't want to  
24 hear today, I'm trying to figure out, other than that, when  
25 would be a useful time to have you come back, perhaps, more

1 importantly, when would not be a useful time. I'm looking at  
2 this, and it seems like late April might be the next useful  
3 time to have you in, because you might be done with or in the  
4 middle of mediation by then. If the master complaint is filed  
5 March 22nd, I'm not clear on how soon you were going to -- and  
6 it shouldn't be in the case management order, anyway, so this  
7 isn't a criticism, but I'm not sure how soon after the master  
8 complaint -- I guess you're the one that has to look over the  
9 master complaint.

10 How soon do you think you would be heading into  
11 mediation? And I'm not going to put this as a timetable. I'm  
12 just trying to --

13 **MS. McCARRON:** Your Honor, what we've talked about is  
14 a mediation that takes place within thirty days following the  
15 master complaint. That's the time frame that we're shooting  
16 for.

17 **THE COURT:** Okay. So that would take us to  
18 April 22nd or 23rd at the latest, because, obviously, the  
19 master complaint could be filed before that.

20 Would there be a point in getting together before  
21 then?

22 **MR. LEVIN:** Your Honor, I don't think so.

23 **MS. McCARRON:** I don't think so either. I agree with  
24 Mr. Levin.

25 **THE COURT:** Okay. And let me say, so you folks know,

1 things come up. I understand things come up. And if you need  
2 a telephonic conference, let me know. We can set it up. The  
3 joys of senior status.

4 But, I guess, as far as any working session, we  
5 should be looking in late April or early May, so let me see  
6 what -- well, if April 21st is the end of the thirty days, the  
7 25th of April would probably be a little earlier than  
8 appropriate.

9 How about May 9th at -- does the morning work better  
10 for you? I don't know --

11 **MR. LEVIN:** The Court's pleasure is fine with us.

12 **THE COURT:** Ms. McCarron, does morning work better  
13 for you? I don't know the travel situation from where you are.

14 **MS. McCARRON:** Your Honor, I'll probably always come  
15 in the day before, so morning is fine.

16 I am attached for trial in the Philadelphia Court of  
17 Common Pleas on May 5th. That case may not proceed, though.

18 **THE COURT:** Well, let's try to get something a little  
19 more certain.

20 How about the 16th of May, the following Monday?

21 **MS. McCARRON:** That would work, Your Honor.

22 **MR. LEVIN:** Yes, Your Honor.

23 I'm sorry. I beg your pardon.

24 **THE COURT:** I didn't know if you looked at a  
25 calendar.

1           Okay. Let's go for 9:30.

2           And let me ask that, by May 9th, you folks submit an  
3 agenda. If you're agreed that there isn't anything that really  
4 requires a face-to-face, just sort of an update kind of thing  
5 and nobody has to address much, other than, obviously, let me  
6 know if you settled, we can do it by phone. I'll show it live.  
7 But if you want to save the travel and we don't have anything  
8 other than a "here's what's happening. We don't need any  
9 rulings," I'll be happy to do it by phone.

10           Anything further for Plaintiffs?

11           **MR. LEVIN:** No, Your Honor.

12           Thank you very much.

13           **THE COURT:** Or for Defense?

14           **MS. McCARRON:** No, Your Honor.

15           Thank you.

16           **THE COURT:** Thank you, folks.

17           **LAW CLERK:** All rise.

18           **(All comply; proceedings concluded.)**

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**CERTIFICATE**

I, DEBRA J. BONK, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

DATED THIS 22nd DAY OF JANUARY, 2016.

S/S DEBRA J. BONK

DEBRA J. BONK  
FEDERAL CERTIFIED REALTIME/REGISTERED MERIT REPORTER