UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Baycol Products Litigation	)	File No. MDL 1431 (MJD/JGL)
	)	Minneapolis, Minnesota
	)	February 9, 2005
	)	1:00 p.m.

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE
(EMERGENCY HEARING)

APPEARANCES

For the Plaintiffs:	CHARLES ZIMMERMAN, ESQ. ELIZABETH CABRASER, ESQ. RANDY HOPPER, ESQ. TURNER BRANCH, ESQ. MARGARET BRANCH, ESQ. JEAN GEOPPINGER, ESQ. ROB SHELQUIST, ESQ.
For Defendant Bayer:	ADAM HOEFLICH, ESQ. PETER SIPKINS, ESQ. SUSAN WEBER, ESQ. DOUGLAS MARVIN, ESQ.
For Defendant GlaxoSmithKline:	FRED MAGAZINER, ESQ.
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Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Let's call this matter.

THE CLERK: In re: Baycol Products, Number 1431. Please state your appearances for the record.

MR. ZIMMERMAN: Good morning [sic], Your Honor. Bucky -- Charles Zimmerman for the PSC.

THE COURT: Good afternoon.

MR. HOPPER: Good afternoon, Your Honor. Randy Hopper for the PSC.

MS. CABRASER: Good afternoon, Your Honor. Elizabeth Cabraser for the PSC.

MR. BRANCH: Turner Branch for the PSC, Your Honor.

MR. SHELQUIST: Rob Shelquist for the PSC, Your Honor.

MS. BRANCH: Margaret Branch for the PSC.

MS. GEOPPINGER: Jean Geoppinger for the PSC.

MR. HOEFLICH: Good afternoon, Judge. Adam Hoeflich for the Bayer defendants.

MS. WEBER: Good afternoon. Susan Weber for Bayer.

MR. SIPKINS: Good afternoon, Your Honor. Peter Sipkins for Bayer.

MR. MARVIN: Good afternoon, Your Honor. Douglas

Marvin for Bayer.

MR. MAGAZINER: Good afternoon, Your Honor. Fred Magaziner for GSK.

THE COURT: Good afternoon to all of you. I do have time limitations. I have a jury coming back. I am in trial.

MR. ZIMMERMAN: How long do we have, Your Honor, approximately?

THE COURT: I want you out of here by 2:00.

MR. ZIMMERMAN: Your Honor, may it please the court. This is our first appearance before the court since the impasse in Miami.

The PSC was disappointed with what came out of Miami because we put a lot of effort into it and we thought the court had obviously put a lot of resources and everyone put a lot of time into trying to get to some better place within this litigation to resolve what's left. We didn't do that.

The time has come, I think, in this litigation, Your Honor, to look at and propose to the court some new alternatives or some alternatives to getting us through the process and getting us to the end.

We did that in our proposed case management proposal. It was called a comprehensive case management proposal, which we put before the court immediately after

Miami.

Step one of that process was to look at the data we had, the data that's already in place, the data we shared with each other in Miami and to see what we can do with that data to try and advance the ball. That's our view of the world.

Rather than looking for perfection and getting through the entire categorization process at the cost and expense of what we have already been doing, we thought -- we think we can take the 1,200 cases we have now and take a look at them and see what we can do, employ what mechanisms we can employ to try and see if that will form a template for how to resolve litigation going forward.

In the meantime we submit we should hold 114, 127, and 131 in abeyance to see what we can accomplish with the 1,200 cases that have already been fully vetted by both sides.

If we can do something, great. We really will then accomplish something and we will have a template to go forward with perhaps more pace and more deliberate speed.

And if we can't do something, if it just won't work, nothing we can employ will get us there, then we don't -- we should take another look at the 114, 127, and 131 process to see if it's really going to advance the cause of this MDL.

I'm not saying it will, I'm not saying it won't, but at least we should look at what we have before we continue the process going forward and that's the gravamen of what we seek. What I really ask the defendants to tell me in their argument today is why that isn't the right thing to do.

Defendants have declared that they want to settle serious injury cases. They have said it in their briefs in these proceedings today. They have said it many times, that we are off this question that we only want to settle rhabdo, but we want to settle serious injury cases. Their previous position was only rhabdo. Now we are on to serious injury.

But we haven't made any progress, Your Honor, in trying to resolve serious injury cases, trying to decide what is a serious injury case, trying to decide what the compensation levels for serious injury cases may be.

The PSC concludes from that that it's hard to rely on that representation being true or that representation being the desire when there's nothing to support it other than coming back to us and saying, We need more information, the information you have is not very good, the information you have is not reliable, the information needs to be supplemented. Even though Special Master Remele says these reports are adequate, they don't feel they're adequate and they want to take that up on appeal.

We believe that the cases could be and should be resolved, but under the mechanisms that we currently have in place, time is just simply working against us. Recall, Your Honor, the purpose of these orders was to help the court -- and it was a courageous step; everyone says this is a big courageous step that we took -- it was to help the court categorize cases for resolution and/or trial.

There's a lot of ways we've said it. There are four subparagraphs and there's all kinds of language in the order, but the basic bottom line was to categorize cases, understand what we have left in the MDL and come up with mechanisms, ADR, trial, summary jury trial, mediations, discussions, anything at all, to try and get us to resolve those cases that we haven't at this point been able to resolve any of.

We believe, the PSC believes we stepped up, took the hard step and did what we were supposed to do at least through today. The defendants have stepped up and said, Nothing you do, PSC, is enough.

In fact, the serious injury cases that we know about, because this chart was provided to us in Miami, those cases still remain unresolved and there's no movement forward to try and resolve them. In our view, Your Honor, this puts the MDL at a standstill. We're captive in the MDL. The cases are not moving.

We've got the defendants squeezing the pile down by asking for more and more and more information and never being satisfied with the information that's provided, and you have the plaintiffs being knocked off one after another after another each time they can't comply with some requirement that we've put before them.

Now, some of them should be legitimately dismissed and I'm the first to admit it. I'm the first to admit that we have a system whereby lots of filings get made and they have to be narrowed down to the bulk of what is important.

But it seems to me, Your Honor, before we have the perfection within what's left, we should try and resolve what we know is in there to prove to ourselves that we can get resolution of what's left.

Because if all we're going to do is squeeze this pile down to what is causally related and what meets the test of adequate disclosure and adequate causation and then send it back to the district of its origin, we haven't accomplished a whole heck of a lot.

Because when you go back to the district of origin, all that case specific stuff has to be redone. All that case specific stuff will be done closer to trial in a trial context where the Rule 26 reports that are being filed here will be of no value. Your Honor, I submit the situation is manifestly unfair and really counterproductive

to what we were trying to set up before this court.

My belief was we would have a large group of cases for which we could discuss various ways to get us answers as to how to resolve them, and at the end of that process in good faith we would sit down and do just that. The impasse in Miami taught me that we're not there and we're not going to get there with just the data that the 114, 127, and 131 process is going to provide.

We have heard the defendants' rejoinder. It's not good enough. It's not strong enough. We don't buy it. We don't think the categories are right. There's something wrong with everything that we've done. If that's the case, Your Honor, and it's clearly what they've said, why continue? Why not deal with what we have and see if that creates movement?

The PSC has set out a series of ideas, Your Honor, in its case management proposal. We have talked about class trials of issues. We've talked about group trials. We've talked about summary jury trials. We have talked about mediation. We have talked about focus groups. We have talked about class issues being resolved. We've talked about face-to-face settlement negotiations.

Each and every one of those, Your Honor, has been dealt with with the same response, no, no, no, no, no. It's always rejected. Completion of this process beyond where we

are today is not going to change that answer in our opinion.

The manual states -- the manual for complex litigation states that these ADR procedures, test cases and et cetera may be scheduled and conducted while holding other cases or claims in abeyance.

Why not do that now? Why not shift gears a little bit, take the 1,200 that we have, see what we can do with them and see if that changes the mix, changes the dynamic, gets the ball rolling?

Defendants have spent a lot of time attacking the plaintiffs' lawyers. Remember those class action lawyers, those lawyers that advertise, all that finger pointing about the integrity of what we do as lawyers.

They've attacked the rulings of Special Master Remele, saying that the reports of Danny Becnel and I forget the name of the doctor were inadequate. They have attacked the credibility of the reports and they have attacked the plaintiffs themselves; these people are malingers, these people are phonies, these people don't have injuries related to Baycol, whatever.

I submit, Your Honor, we've got it all wrong. Bayer made the bad drug. Bayer is the one that lied to the people. Bayer is the one that's paid $1.2 billion and moving forward. Bayer is the one that bears the responsibility. The plaintiffs simply have come forward and

made a claim for which they're entitled to make.

We don't know when a claim comes to our office, because of the system that we have in place in American justice, how good that case is. Bayer didn't go out and say, Ladies and gentlemen, if you've got a prescription for Baycol, you should see your lawyer or you should see your doctor. The plaintiffs have to pick up -- have to jump into that abyss and say, Folks, there's a bad product out here called Baycol. It's hurt a lot of people. If you're one of them, you may have a claim. Come forward. And that's what they did.

But in the process the plaintiffs' lawyers get demeaned for that. The plaintiffs' lawyers become the ones that are trying to fill this court with bad cases; and that's not what's happening.

We have 1,200 very good cases that we should start taking a look at and not demeaning the process or the cases that have gone away, because when those people brought those cases to their lawyers they didn't know that much about them and they had to protect the client and protect the statute and file a claim in an ongoing train that was going to leave the station potentially without them.

We've got injured people here, Your Honor, that deserve justice. Bayer cannot stand back and call the kettle black. They hurt the people. They are responsible

for compensating the ones that are seriously injured. And other than rhabdo, not one seriously injured person has been compensated.

The process of 114, 127, and 131 has worked well. It has given us 1,200 cases for which we can wrap our arms around and try and resolve. It is a burden. It's inappropriate now, it's not necessary to get through that entire process before we resolve or attempt to resolve the cases we have.

And if we can't resolve them and if the Bayer mantra is the same, we will not pay for anything further, fine. Let the cases go where they need to go for ultimate resolution.

So in conclusion, Your Honor, categorization was a good idea. It will aid the process of resolution, but only if the people want to resolve them. If not, it isn't going to aid in the process of resolution, we need to change it.

ADR was to be utilized to help us get to the end. It hasn't been utilized. It should be utilized. Bayer opposes all kinds of ADR. They like the status quo. Why? Because the process is working for them. The status quo is comfortable. The status quo is a victory. The status quo creates attrition.

We are locked in. We can't go anywhere. We need to be able to go somewhere. And to make us continue the

categorization process when there's no reason to believe it's going to get us where we need to get is wrong, Your Honor, and we should be able to let these cases go back to the jurisdictions where they came from to be resolved.

If the categorization will work and will help us resolve cases, I will spend day and night and night and day to try and do that. That's not what's happening, Your Honor.

We need to move, change, and be creative to get this MDL moving again; and that's what I am here to ask the court to do and take another look at the purpose of these PTOs, whether it's getting us where we want to go, and because it isn't to change it.

Thank you.

THE COURT: Let me ask you a question dealing with that last aspect.

Certainly I understand, number one, the categorization process that we put in place in this matter, in this MDL, was remarkable and was serving the purpose of categorizing the cases that were in the MDL and hopefully moving to see whether or not there were any serious cases that the defendants were to be interested in resolving.

The information that is being tendered to the court by plaintiffs is that the process has gotten out of hand and is very expensive; and even if the categorization

process is completed and no money is placed on the table, these cases are going to be transferred back to their original jurisdiction and they will have to go through the whole process again and that's double -- a double whammy for the plaintiffs. Is that my understanding of what you are saying?

MR. ZIMMERMAN: Yes. I would add a few things to that, but that's exactly what I am saying, Your Honor.

THE COURT: All right. And if I am adding cost to the plaintiffs in the sense that if I do send these back to -- at some point, at a later point after the categorization process has gone through, those cases still would have to jump through another hurdle back at their jurisdiction dealing with Rule 26s and other expenses and so this MDL and what I have done will have penalized the plaintiffs. Is that what you are saying?

MR. ZIMMERMAN: Yeah. They have to repeat that process in the transferor court because that report that's going to connect the Bayer product, Baycol, to the injury is not the report that's going to be relied on at trial to get that case to a jury. It's going to be too old. It's too summary. It's not based on all the things you would want to do if you were putting your case up for trial.

THE COURT: Then the next aspect of it. Again I commend the defendants for resolving the vast majority of

the rhabdomyolysis cases and the death cases for over $1.2 billion. However, if I have heard them correctly, they're not going to pay a penny for anything else, other than rhabdo cases.

MR. ZIMMERMAN: Well --

THE COURT: And if that's the case, going through the briefing schedule of class certification, would you just make a motion to send all these cases back?

MR. ZIMMERMAN: Sure. You have one chance to send them back. I mean, once you start sending them back and you break this thing up, every opportunity for an MDL end game is lost. I mean, we all know that. We're not -- so it's a last resort.

We would like to keep it together to resolve cases, but you're right, Your Honor, if under no circumstances will even serious cases that aren't rhabdo going to be resolved, then why prolong this process, which isn't going to be the ultimate trier of all those facts, it's going to be the transferor court?

Let's get them back there. Maybe that will change Bayer's mind. Maybe they will look at jurisdictions and say, you know, maybe we should resolve these or maybe we will fight them tooth and nail. Right now we are just captive. We can't do anything.

THE COURT: Whether or not they resolve them or go

to trial, that would not be my concern. It would be that jurisdiction. But if I have accomplished everything that I can accomplish here, why shouldn't I send them back?

MR. ZIMMERMAN: I think you should, Your Honor. I mean, I think you should and I think -- unfortunately that's the bottom line if you've done everything you can here to get them resolved.

We're not here to prepare those cases for trial, which has somehow become the mantra of the defense, that we have to get through so much more to prepare them for trial. We're not here to prepare them for trial.

We're here to do the common discovery, resolve common issues, do the expert discovery, which we have done, so that the plaintiffs have a general causation blueprint and a trial notebook of the evidence.

And if they don't want to resolve them here, they don't want to enter into that negotiation here, that's their right. We think they're wrong, but that's their right. But it's our responsibility at that point to let those cases go and let the lawyers that have been retained by the clients resolve them and deal with them on a -- in their local federal court.

THE COURT: Thank you.

MR. HOEFLICH: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. HOEFLICH: We disagree and we disagree strongly with Mr. Zimmerman's categorization of what's taken place in this litigation to date.

It's true that in April of 2002 Bayer announced to the court and then spoke at a conference with the court where we said that we wanted to resolve all of the serious injury cases.

It's true that Bayer went out and met not only with the PSC and lawyers working with the PSC, but lawyers throughout the country to resolve every serious injury case, every rhabdomyolysis case that we could find and did so for more than a billion dollars.

However, it's not true that plaintiffs have had no chances in this court or elsewhere to put their aches and pains or what Mr. Zimmerman calls the serious muscle injury cases to the test.

This court had before it the Long case and five subsequent muscle injury or nonrhabdo cases before it and each time the plaintiffs had the opportunity to make their statement, to put that case forth and put Bayer to the test, the plaintiffs dropped the ball and dropped their case.

The court put in place, after significant negotiations between the plaintiffs and defendants and the special masters, Pretrial Order 89. More than 200 cases were prepared for trial, not just by Bayer, but by the

plaintiffs. All but two of those cases went away because the plaintiffs dropped them.

The process there was more significant than asking a plaintiff's lawyer to analyze their case and put forward what has become a form report. The plaintiff had every opportunity and the PSC had every opportunity to put forth what they claimed were muscle injury cases and under the examination of not only discovery, but the self examination of a looming trial. In each instance the plaintiffs dropped those cases.

That's not just the story in the MDL. In Philadelphia thousands of cases have come forth not only through the expert report requirement, but up to trial and each time, with the exception of one, an aches and pains or a muscle injury case has come to trial the plaintiff has dropped it. That would include four recent cases that the PSC had set for trial in March and they dropped all of those, Judge.

THE COURT: The difference between the Pennsylvania cases and the MDL cases is that at least they're in their home jurisdictions and under their -- the law of that state those matters could be dismissed without prejudice; whereas, the cases here are being dismissed with prejudice. That's a big difference.

MR. HOEFLICH: That's a fair point to make, Judge.

The cases in Philadelphia have been dismissed without prejudice. I would note, though --

THE COURT: So the MDL participants are being penalized differently than if they were in their home jurisdiction.

I don't mean to stop you. I have read your papers and I certainly know the position of Bayer, but my question -- and tell me if I am reading you wrong. My understanding is nothing less than a rhabdo case, no cases that are less than a rhabdo case will be settled, they will be tried by Bayer. And so if that's the case, why shouldn't I send these cases back, allowing them to be worked up in their transferor jurisdiction, and be done with this?

Because I have accomplished -- because this is a new way of running an MDL, I think the end game was incorporated in the settlement process. You settled the major, major cases and so what is left are cases that Bayer has looked at, you have done your evaluation, and you feel that plaintiffs are going to have to come forth and make their proof.

And if that's the case, I should not be a filter, a higher filter than how a state court would handle it in their own jurisdiction where these cases originally should be. And so the question is, why should I be the penalizer to the plaintiffs?

If that's the case, there is not going to be a, quote, unquote, another end game. I see the dynamic of you have made your end game by settling at premium prices the rhabdo cases and the death cases. That's the end game as far as I am concerned.

MR. HOEFLICH: If --

THE COURT: Let me finish. And there's not going to be the other type of end game that has been in other MDLs where all of a sudden everything comes together and money is paid out, because the strategy that you have laid out that has -- would fall apart if there was some type of money end game here in the MDL. And so if that's the case, these cases should just go back.

MR. HOEFLICH: Judge, I believe that the court articulated a broader approach than that that involved considerations of fairness not only to the plaintiffs, but to the defendants and the judicial system as well.

First I'd note that these cases would not go back to state courts. These cases were brought -- were removed to federal court under the St. Paul Mercury case. Once a case has been brought to federal court, if the allegations placed it there appropriately, it can't be sent back to state court, not by averment or affidavit or any other method. So these are federal court cases.

When the court established the procedures to the

MDL, there were two schools of cases and both parties and the court embarked on a two-pronged approach. The first half involved Bayer reaching out and resolving all of the rhabdomyolysis cases, and I believe we have settled more than 2,900 out of approximately 3,000 cases. The second --

THE COURT: And again I compliment you. I compliment your companies on taking a forward approach and getting those cases resolved so those plaintiffs could have their cases resolved in a timely manner, and I compliment you on that.

MR. HOEFLICH: The second prong involved the PSC reaching out for a broad variety of cases. They settled the good ones, but they also reached out a broad net to reach a host of other cases from across the country.

And at the same time that the defendants and the court were resolving, in part through this court's program, the rhabdomyolysis cases, we put forth a system that would give the defendants the opportunity to engage in discovery and other mechanisms to test cases that were in federal court.

And the court articulated a policy early on that it wasn't going to take thousands of cases or ten thousand cases or ten thousand plaintiffs that were brought here and then send them back to district courts throughout the country before the cases were in trial ready shape.

We are now in a position where the Plaintiffs' Steering Committee has been paid many, many millions of dollars in fees in the rhabdomyolysis cases and it's time to do what we originally agreed to do in March of 2002, take that position -- uncover what is behind those cases.

I have read -- as the court knows, I have looked at the Category B cases. We have more than 11,000 cases which, from what Mr. Zimmerman said earlier, they don't know what the merits are of those. They haven't looked at the files. That's certainly what it sounds like, and we know that from other plaintiffs' lawyers as well.

In fairness not only to the defendants, but to the other courts throughout the country, before these cases leave the MDL the plaintiffs should have to unwrap the binders, look at the documents, and announce whether these are cases that involve what Mr. Zimmerman say they involve, serious muscle injury cases.

When we came before the court in February -- in December and then in February of last year, Mr. Zimmerman said he wanted to separate the wheat from the chaff; and the court embraced that concept not just because that helped Bayer, but because that helped the court and that helped the transferor courts.

These cases shouldn't go back to transferor courts on the hope that one of a host of different procedures can

be embraced that would deprive Bayer of its rights. We know from the --

THE COURT: I know of no state that would try to -- has procedures in place that would deprive defendants of their rights.

MR. HOEFLICH: Well, Mr. Zimmerman has said that he would like to send it back to, I believe one of the jurisdictions he mentioned -- well, it doesn't matter which jurisdiction, but he said he would want to propose group trials, other summary jury trials in different jurisdictions.

THE COURT: What other jurisdictions do to handle the cases, that doesn't mean that that's a violation of defendants' rights. It's just like I could have group trials here if I wanted to. They have been in federal court too.

So I'm not sending them to Iran. I am sending them back to the transferor jurisdictions who have policies and procedures and due process for both the plaintiffs and defendants.

MR. HOEFLICH: The burden on that court, Judge, would be enormous. For example, there would be more than 1,100 plaintiffs that would go back to Louisiana and those cases would be completely unvetted.

Now, the court set a process in place more than a

year ago, in fact, more than two years ago where the cases would be vetted here and then when they went back the Daubert motions would take place. Under PTO 114 and PTO 131 and PTO 127 the cases would be narrowed, Daubert motions would take place, the cases would be ready for trial.

The way the process would work if the MDL were to end now, the cases would be going back without Daubert motions, without fact discovery, without plaintiffs having even looked at the case to see if they had any merit.

And the district courts, which haven't been set up to handle an MDL, could conceivably have a thousand-plus plaintiffs where they would have to engage in all of those procedures that appropriately were set forth to be done here. We think that's the more appropriate course.

Mr. Zimmerman stood before the court more than a year ago and said that as the leader of the Plaintiffs' Steering Committee he wanted to endeavor and his colleagues wanted to endeavor to separate the sea of aches and pains cases, which by all accounts still exist, from what he believes are the serious muscle injury cases.

PTO 114 is in place to allow the plaintiffs' lawyers to examine their file -- without burdens on all the district courts throughout the country -- to have plaintiffs examine their cases, decide what cases they want to file reports on, to file reports on those cases for the parties,

including the defendants, who have spent millions of dollars on categorizing those cases into different categories.

And while there's enormous variations within the categories, it does give us information to work with the special masters to break the cases into categories, to see what the plaintiffs will claim are the serious muscle injury cases, to subject that to Daubert hearings, and then to test the cases to see whether, in fact, the cases have any value.

I think by all accounts the majority of the filed cases don't have value and they are going to go away, and there's no reason that there are districts in 50 different states that should deal with that.

The court set forth an appropriate procedure and we have efficient mechanisms in place. We're not talking about taking several years doing this. The first wave of PTO 131 reports was due on January 28th.

I think of not only we, but think about the plaintiffs who have already submitted these reports, think of the plaintiffs who are in front of the court and made decisions based on the court's prior orders.

I think that this litigation has been set up to allow the narrowing order and the categorization process, as well as the court's other orders, to take their course, to see if there are cases that need to be tested, to have this court look at those cases and apply Daubert rulings to them.

And then once that process has been done, either engage in discussions here or send cases back to the transferor courts for remand.

I think that mechanism, which was set up by the court, is the appropriate and the efficient way not only for the defendants, but for the courts throughout the country and, in fact, for the plaintiffs' lawyers to handle the remainder of these cases.

THE COURT: Mr. Magaziner.

MR. MAGAZINER: Thank you, Your Honor. I will speak very briefly.

My vision of the end game is a three-part end game. The first part is Bayer settles almost 3,000 cases for $1.2 billion, an unprecedented voluntary program by a defendant in a case like this.

The second part of the end game is through fair requirements that the court has imposed on plaintiffs' lawyers, requirements that courts routinely impose on plaintiffs in individual cases, many, most, almost all of the remaining cases go away because when the plaintiffs' lawyers are required to take a good hard look at the cases, they see most of these cases have no merit and have no value.

And the third part of the end game is the small number of cases that might then be left that Bayer was not

willing to settle as rhabdo cases and that plaintiffs still think have merit or value.

That small number, if no resolution can be reached here, get remanded to the district courts in the 50 states where those cases came from and the district courts then put in place whatever procedures they think appropriate to resolve those cases, probably by trial, maybe by summary judgment, whatever.

But there are three parts to this, the settlement of the most serious injury cases; the separation of wheat and chaff in all the other cases; and then the remand of the wheat, if you will, to the district court.

But the remand that I am envisioning is of a very small number of cases which plaintiffs' lawyers still think have merit and value and that Bayer thinks ought not to be compensated, rather than the remand that Mr. Zimmerman is envisioning, which is all of the cases not separated into wheat and chaff, most of which we all know have no value and no merit.

I would hope the court will keep in place the narrowing orders because they have worked so well to date. I am sure Susan or Adam can provide the numbers, but the number of cases that have disappeared from your court's docket as a result of these simple requirements imposed on plaintiffs' lawyers are staggeringly large numbers.

This MDL is making more progress than any other MDL I have ever heard of in getting rid of cases that have no merit and no value; and it would be a shame, I think, to abandon these tried and true and effective protocols that Your Honor has put in place before they have accomplished all that they can accomplish.

Thank you, Your Honor.

MR. ZIMMERMAN: Your Honor, if you are going to define success by creating barriers to the courthouse and making people jump through hoops and if they can't jump through hoops their cases go away, yeah, you have had success with that. If you define success as $1.2 billion, you can define success --

THE COURT: Let me stop you. The process that we have was a process that you stepped up and put forth to the court, and part of that was to see what was left and also to see if those cases would be settled.

Mr. Magaziner has stood up and it's clear from Bayer's position that even when we get the core cases, they're not interested in settling those cases. So whether or not all these other things, why should I not send these cases back?

MR. ZIMMERMAN: You should. Simple answer, you should. If their position is as stated, that they will not settle them now, they will not settle them later, we are in

an exercise in absolute futility and we should send them back now. It's not fair. It's not right. We are holding them hostage and they're not going to change their mind.

If they would change their mind, they could show it with the 1,200 cases that we've got out there right now. Tell us how we can resolve those 1,200 or a piece of those 1,200. But they ain't going to do it, Your Honor.

So getting them from 1,200 to 3,000 or whatever the number is, it is going to be the same answer, let them go now. Let the courts deal with them as they must and let Bayer deal with them wherever they came from. But it's not fair to hold them hostage here, Your Honor.

THE COURT: Okay. I am ready to rule. The court will stay in abeyance Pretrial Orders 114, 127, and 131. One month from today's date I want briefs from both sides --

THE CLERK: March 11th.

THE COURT: -- March 11th, on the reasons why these cases should or should not go back to the transferor court.

MR. ZIMMERMAN: Simultaneous briefs, Your Honor?

THE COURT: Simultaneous.

MR. ZIMMERMAN: On March 11th?

THE COURT: March 11th.

MR. ZIMMERMAN: Thank you, Your Honor.

THE COURT: Thank you.

(Court adjourned at 1:45 p.m.)

* * *

I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: _____
Lori A. Simpson, RMR-CRR

Dated: February 14, 2005