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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re: Baycol Products)	File No. MDL 1431
Litigation)	(MJD/JGL)
)	
)	Minneapolis, Minnesota
)	June 22, 2004
)	10:00 a.m.

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
RICHARD LOCKRIDGE, ESQ.
RONALD GOLDSER, ESQ.
RANDY HOPPER, ESQ.
DANIEL BECNEL, ESQ.
VICTORIA MANIATIS, ESQ.
WENDY FLEISHMAN, ESQ.

For Defendant Bayer: ADAM HOEFLICH, ESQ.
PETER SIPKINS, ESQ.
SUSAN WEBER, ESQ.
DOUGLAS MARVIN, ESQ.
KIMBERLY KOERNER, ESQ.
JAMES MIZGALA, ESQ.

For Defendant
GlaxoSmithKline: FRED MAGAZINER, ESQ.
SCOTT SMITH, ESQ.

For Kenneth B. Moll: ERIC MAGNUSON, ESQ.

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1 P R O C E E D I N G S
2 IN OPEN COURT
3 THE COURT: Let's call this case.
4 THE CLERK: Multidistrict Litigation 1431, In re:
5 Baycol Products. Please state your appearances for the

6 record.
7 MR. ZIMMERMAN: Good morning, Your Honor.
8 Bucky -- Charles Zimmerman for the plaintiffs.
9 THE COURT: Good morning.
10 MR. LOCKRIDGE: Good morning, Your Honor.
11 Richard Lockridge for the plaintiffs.
12 THE COURT: Good morning.
13 MR. HOPPER: Good morning, Your Honor. Randy
14 Hopper for the plaintiffs.
15 THE COURT: Good morning.
16 MR. GOLDSER: Good morning, Your Honor. Ron
17 Goldser for the plaintiffs.
18 THE COURT: Good morning.
19 MS. MANIATIS: Good morning, Your Honor.
20 Victoria Maniatis for the plaintiffs from Weitz &
21 Luxenberg.
22 THE COURT: Good morning.
23 MS. FLEISHMAN: Good morning, Your Honor. Wendy
24 Fleishman from Lief Cabraser for plaintiffs.
25 THE COURT: Good morning.
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1 MR. BECNEL: Good morning. Daniel Becnel from
2 Louisiana for plaintiffs.
3 THE COURT: Good morning.
4 MR. HOEFLICH: Good morning, Judge. Adam
5 Hoeflich for Bayer. Mr. Beck could not be here today
6 because he is in a final pretrial conference for a case
7 that will begin shortly.
8 THE COURT: Good morning.
9 MS. WEBER: Good morning, Your Honor. Susan
10 Weber for Bayer.
11 THE COURT: Good morning.
12 MR. SIPKINS: Peter Sipkins for Bayer.
13 THE COURT: Good morning.
14 MR. MAGAZINER: Good morning, Your Honor. Fred
15 Magaziner for Glaxo SmithKline.
16 THE COURT: Good morning.
17 MR. MARVIN: Good morning, Your Honor. Douglas
18 Marvin for Bayer.
19 THE COURT: Good morning.
20 MS. KOERNER: Good morning, Your Honor. Kimberly
21 Koerner for Bayer.
22 THE COURT: Good morning.
23 MR. SMITH: Your Honor, good morning. Scott
24 Smith for GSK.
25 THE COURT: Good morning.
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1 MR. MIZGALA: Good morning, Your Honor. James
2 Mizgala for Bayer.
3 THE COURT: Good morning.
4 MR. MAGNUSON: Good morning, Your Honor. Eric
5 Magnuson for Kenneth B. Moll and Kenneth B. Moll &
6 Associates.
7 THE COURT: Good morning.
8 Mr. Zimmerman -- I should note for the record a
9 Clay Morgan at area code (210) 341-7703 called yesterday to
10 be on -- to listen to the status conference. He says that

11 his firm is representing individual physicians I believe in
12 the Houston, Texas area. I don't know. But anyway, we
13 have it set up that he could call in and listen, but he
14 won't be able to speak.

15 Is that correct, Andy?

16 MR. SELDON: That's correct.

17 MR. ZIMMERMAN: He's on the phone?

18 THE COURT: He's on the -- he may be on the
19 phone, he may not be on the phone, we don't know, but we
20 set it up for him so he could -- if he wanted to listen in.

21 Did you get the number, his area code number,
22 (210) 341-7703, just in case you want to talk to him about
23 anything?

24 MR. ZIMMERMAN: We are here this morning, Your
25 Honor, for the June status. I will note that this is, I

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1 think, the first time that the Bayer and GSK lawyers
2 outnumber the plaintiffs' lawyers. So an interesting
3 twist.

4 The second interesting twist is the settlements
5 have topped a billion dollars. So we find that to be a
6 matter of some note.

7 MR. HOEFLICH: We would agree with at least the
8 latter point.

9 MR. ZIMMERMAN: You can't count, Adam.

10 Pending cases, Your Honor -- we will go through
11 the agenda as it's written and then as the court has
12 questions or comments we'll respond. I believe there's
13 only one argument, one matter set for actual argument.

14 THE COURT: There's two matters. The Ken Moll
15 matter --

16 MR. ZIMMERMAN: I beg your pardon.

17 THE COURT: -- that you didn't place on the
18 calendar.

19 MR. ZIMMERMAN: Right. When do you want to
20 hear -- how do you want to do that one?

21 THE COURT: We will just follow the --

22 MR. ZIMMERMAN: It's not on the calendar.

23 THE COURT: It will be the first one argued --

24 MR. ZIMMERMAN: Okay. All right.

25 THE COURT: -- and then the Lehmann matter will

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1 be second.

2 MR. ZIMMERMAN: All right. Thank you.

3 Starting, Your Honor, with the census of pending
4 cases. As of the close of business on June 18th defendants
5 were served with 7,642 cases that remain active. Of that
6 total, 6,046 cases are pending in the federal courts and
7 transferred into this court and 1,596 are in state courts.

8 That's a drop of about 1,200 in total, but it's
9 an decrease of about 50 in the federal courts. I don't
10 know what to make of that except we are at 6,046 cases in
11 the federal courts, which is a decrease of only 50 cases
12 from the last time we were before Your Honor in the federal
13 court -- cases in the federal courts.

14 Of course, as you know, Your Honor, that does not
15 include filed but unserved cases, which always catch up

16 later, and I'm sure lots of pending dismissals which are
17 pending as well, but these are the statistics we have
18 basically reported to the court on a consistent basis.

19 Also, it does not include claimants as numbers.
20 These are filed cases. There are many multiparty
21 complaints. So the claimant question is how many claimants
22 are out there. The only information we had was
23 approximately 22,000 several months ago. I'm sure we are
24 down from that, but in terms of number of claimants, I
25 can't say for sure. We only know number of pending cases

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1 as of this date, but obviously there are a great more
2 pending claimants than there are pending cases.

3 MR. HOEFLICH: I have nothing to add on that,
4 Judge.

5 THE COURT: Thank you.

6 MR. ZIMMERMAN: Then paragraph C of the agenda
7 talks about pending class actions and I have asked Dick
8 Lockridge, because he has been active with the class
9 actions in Oklahoma and a little bit more in Pennsylvania,
10 if he could just report on the status of the pending class
11 actions.

12 MR. LOCKRIDGE: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. LOCKRIDGE: Very briefly. Of course, as you
15 know, out in Pennsylvania the district court did earlier
16 certify the medical monitoring class and it's now our
17 understanding that that has been -- the district court has
18 certified that for interlocutory appeal to the Pennsylvania
19 Court of Appeals and so we -- to the Pennsylvania appellate
20 courts.

21 We will see what the appellate court does on
22 that. We are obviously hopeful that the appellate court
23 will see the wisdom of the district court's order. We are
24 working, I might note, some of the plaintiffs' attorneys,
25 on that case and on the briefing.

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1 In Oklahoma, as Your Honor also is aware, there
2 has been a class certified there, an injury case which is
3 primarily, we believe, going to be made up of muscle injury
4 cases since we believe most of the rhabdo cases have been
5 resolved.

6 And that has been, quite frankly, dormant for a
7 number of months, but we are working with Terry and Brad
8 West in Oklahoma and just a couple of days ago we did send
9 out a post form of notice to the defendants and we are
10 awaiting a response and we are going to be trying to move
11 that case along also with the Oklahoma attorneys.

12 THE COURT: All right.

13 MR. LOCKRIDGE: Thank you.

14 THE COURT: Adam.

15 MR. HOEFLICH: Your Honor, we received a copy of
16 the notice yesterday, or at least I did. We will respond
17 in due course and plan to proceed with those cases.

18 THE COURT: All right.

19 MR. LOCKRIDGE: There's also, of course, the
20 third party payer class action going on out in Pennsylvania

21 and I believe argument is coming up. Is that right?
22 MS. WEBER: Next week.
23 MR. LOCKRIDGE: Next week.
24 THE COURT: Thank you.
25 MR. MAGAZINER: Just to set the record straight,
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1 Your Honor, the court that Mr. Lockridge refers to that
2 certified the class is a court of common pleas, not the
3 district court, and there's now a petition pending in the
4 Pennsylvania Superior Court to review that on an
5 interlocutory basis.
6 THE COURT: Now, Fred, you just got back from a
7 wonderful vacation. I heard rumors that you were going
8 sailing, was it?
9 MR. MAGAZINER: I don't know what rumors you
10 heard. I was hiking in Peru, but it seems like an eternity
11 ago. Thank you, Your Honor.
12 THE COURT: All right.
13 MR. ZIMMERMAN: What about the sailing trip?
14 MR. MAGAZINER: No sailing.
15 MR. ZIMMERMAN: There is one other matter, Your
16 Honor, that I will report -- and it is in the agenda --
17 that has to do with third party payers. Apparently 73
18 percent of the private health insurance beneficiaries have
19 settled the third party payer claims with Bayer.
20 There is an Allied Services class action -- or an
21 Allied Services case, I believe it is a class, pending here
22 in the MDL that has not been active, been very active. I
23 have to talk to Art Sadin, who is the counsel in that case.
24 He's not here and I thought he might be and we could chat
25 about it. But that is a third party payer case that's
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1 pending here in the federal court.
2 There was also the Blue Cross case that was
3 pending here. That case has been settled.
4 THE COURT: Correct.
5 MR. ZIMMERMAN: There was a dispute, if you will,
6 with counsel for Blue Cross regarding the withhold and that
7 has been resolved, I'm happy to report. So we have a
8 resolution of that withhold question that was the subject
9 of some negotiations between our office and Kim West.
10 Then the list of counsel has been provided by
11 defense to us. I have not downloaded it from last time. I
12 forgot the number. About a thousand people on that, at
13 least as of the one before this one. Do you know the
14 number?
15 MS. WEBER: I didn't open the file before I
16 forwarded it, Bucky, so I don't know.
17 MR. ZIMMERMAN: Okay. I think the statistic on
18 that, Your Honor, is there is about 1,000 or 1,100 counsel
19 who had been on that list of counsel with cases in the MDL.
20 Settlements, Your Honor. As I reported earlier,
21 the settlements of this Baycol product have now totaled
22 over a billion dollars, \$1,043,919,200, representing 2,716
23 cases the defendants have settled which they have, I
24 believe, classified as rhabdo cases.
25 Of these 2,700 cases and a little over a billion

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1 dollars, 675 of those cases were subject to an MDL
2 assessment, with a total value of \$234,259,607.

3 Just for comparison purposes, Your Honor, the
4 settlements are up about 400 totally from last status,
5 about 60 in the MDL -- 60 in the MDL from last status, up
6 about 200 million from last status and up about 13 million
7 in the MDL.

8 I think that's just as a matter of reporting what
9 the statistics have said. We're obviously still -- this
10 was kind of a bigger uptick than last time, so I don't know
11 what to make of it other than that is where we are with
12 2,716 cases settled for a little over a billion dollars.

13 Approximately 116 cases have been subject to --
14 submitted to the MDL mediation program. As the court
15 knows, each side has provided letters regarding certain
16 things that we would like to see occurring to strengthen or
17 ramp up or tweak the process. We are not here to argue
18 them today. It's just a matter of record. They have been
19 out there for a while.

20 I think that from the defendants' point of view,
21 they object to any modification in the program. And from
22 the plaintiffs' point of view, we think the program could
23 be modified to move along these cases and also to include
24 additional cases and also to put some teeth into
25 negotiations where the defendants come in with no intent to

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1 offer and never do offer.

2 And so I think a mediation becomes somewhat
3 one-sided when one side comes in kind of closeminded.
4 That's the plaintiffs' point of view. I understand this
5 isn't before the court, we are not here to argue it. I am
6 just saying what's going on.

7 MR. HOEFLICH: Your Honor, there has been a
8 substantial uptick in the number of cases that have been
9 resolved through Bayer's settlement program. We are
10 extremely pleased about that. Mr. Zimmerman reported that
11 we have now resolved more than a billion dollars' worth of
12 cases and the number of cases remaining has shrunk
13 inprecipitously and we are very pleased about that.

14 We have a disagreement on whether the mediation
15 program has been successful or not. We think it's been
16 extremely successful. The mediations that have taken place
17 in front of Special Master Remele as well as the others, we
18 think, have gone very well and we are hopeful that we will
19 move forward with the remainder of the cases that are in
20 the MDL.

21 THE COURT: All right. Thank you.

22 MR. HOEFLICH: Thank you, Judge.

23 MR. ZIMMERMAN: In addition to the mediation
24 program, Your Honor, the PSC has continued to negotiate
25 with Bayer on a limited number of cases that continue to

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1 come in.

2 And having said that, I think we will turn it
3 over to Special Master Remele, who will report from the
4 mediator's point as to the mediation program.

5 THE COURT: Good morning.

6 SPECIAL MASTER REMELE: Good morning, Your Honor.
7 Actually, Your Honor, there's a little bit more of an
8 updated report since the agenda was printed. There's
9 actually been 125 cases that have been submitted to the
10 mediation program as of the most current statistics. And
11 of that amount, I think it's true that both sides -- in
12 terms of their comments of the program, there is some truth
13 in both of their respective positions.

14 I think the program has been successful in terms
15 of its effort and intent to identify and try to resolve the
16 so-called rhabdo cases. And as Bayer has reported, they
17 have both negotiated a number of those settlements directly
18 as a result of those being submitted to the mediation
19 program and -- both through mediation and direct
20 negotiations there's been a number of other settlements.

21 There's about five mediations, approximately,
22 that are pending right now in terms of setting dates and we
23 have another 10, 11, 12 cases that are currently under
24 consideration by Bayer. They need some additional
25 information to determine whether or not they will negotiate

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1 those directly or whether we will be required to determine
2 whether they should go into mediation if there's a dispute
3 of the parties.

4 The cases that are not being resolved necessarily
5 by this particular program are those cases that the
6 plaintiffs identified to some extent; and those are the
7 cases that sort of fall in that gray area, that category
8 that are not necessarily truly rhabdo cases as one would
9 necessarily diagnose them or identify them under some of
10 the more standard criteria that everybody has been using in
11 the case, but nevertheless those individuals have some
12 injury, some special damages and so forth. And those are
13 probably the cases that we have to move to in the next
14 level to decide what to do with those.

15 So I think that really does sort of identify that
16 issue in terms of how we might have to look at the program
17 in the future in terms of either adjusting, amending it, or
18 leaving it the same, depending on what the respective
19 positions are of the parties.

20 Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. ZIMMERMAN: You grabbed my agenda.

23 SPECIAL MASTER REMELE: Oh, I'm sorry.

24 MR. ZIMMERMAN: I hope there's nothing
25 proprietary, like Lew is a...

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1 I believe it has been reported that there are a
2 number of settlements that have occurred recently that
3 haven't made this list --

4 THE COURT: That's correct.

5 MR. ZIMMERMAN: -- that have occurred with
6 Weitz & Luxenberg. I'm not here to report on those, but I
7 think they will probably be a subject of the next report as
8 we come before Your Honor next time. But that's a large
9 block of cases, as we understand it.

10 If Vicky could stand up, we could note that she's
11 about to embark on a new stage in her life. We
12 congratulate her.

13 THE COURT: Congratulations.

14 MS. MANIATIS: Thank you.

15 THE COURT: When is the baby duty?

16 MS. MANIATIS: September.

17 THE COURT: This may be the last time I will see
18 you for a while.

19 MS. MANIATIS: I will bring a new lawyer with me
20 next time. Thank you.

21 MR. ZIMMERMAN: I must say it's exciting to see
22 Vicky so happy and to see her today. It's a delight to see
23 that she's moving on to a new stage. Congratulations.

24 MS. MANIATIS: Thanks, Bucky.

25 MR. ZIMMERMAN: She's a very lovely person and we
0016 have enjoyed working with her.

1 Discovery, Your Honor. The first deadline for
2 submitting reports under PTO 114, as we all know, occurred
3 on June 7th of this year. Cases subject to this deadline
4 had file numbers ranging from 01-1594 to 02-4433.

5 In this group, Your Honor, there are
6 approximately 1,910 plaintiffs subject to this deadline.
7 Of these plaintiffs, 1,259 were granted extensions, leaving
8 651 plaintiffs subject to the actual June 7th deadline.

9 As of June 14th defendants had received
10 submissions from 231 of these 651 plaintiffs. 116 of these
11 were letters served with medical reports pursuant to the
12 order and 115 were served with case specific expert
13 reports.

14 There is an issue, a dispute going on -- it's no
15 secret now -- that defendants don't like the form and the
16 content of some of the reports. They believe they do not
17 comply with 114. We submit that they do.

18 We have discussed this with the special master
19 and with Mr. -- Special Master Haydock and Special Master
20 Remele yesterday at some length. We did not reach any
21 consensus.

22 I don't know how much information the court wants
23 on this. I am loathe to argue it at this point because I
24 believe the pretrial order specifically provides how anyone
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1 who feels they have a problem with compliance must act and
2 there's a motion practice set out in the order.

3 I just -- I mean, I could get up here and give a
4 speech as to why we think everything is just done the way
5 it's supposed to be and they can get up here and tell you
6 why they don't think it is. I don't know if the court
7 wants that now or not. I don't want to go there if we
8 don't have to, but if --

9 THE COURT: Well, I think you informed the
10 special masters your position yesterday.

11 MR. ZIMMERMAN: In some detail and with some
12 passion as well.

13 THE COURT: And it's safe to say that I learned
14 about it right afterwards.

15 MR. ZIMMERMAN: So I guess we will probably be
16 seeing some motion practice. I think from my point of view
17 a meet and confer and talking about it may be more helpful
18 to see what we really have there, what really separates us,
19 more than trying to talk about this isn't strictly that or
20 this is strictly something else.

21 THE COURT: I would like to hear from Adam. I
22 think the special masters were talking about having you
23 back on the 19th; is that correct?

24 MR. ZIMMERMAN: Correct.

25 THE COURT: Then we would have a status

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1 conference on July 20th and so -- but I would like to hear
2 from Adam because I think they have a different position
3 they want to put forth.

4 MR. ZIMMERMAN: Again, Your Honor, I am not
5 arguing my position, so --

6 THE COURT: I understand what your position is.
7 I have been fully apprised of it.

8 MR. HOEFLICH: Judge, we were disappointed by
9 these reports. As I'm sure the court will remember and as
10 I'm sure the special masters will remember, many months ago
11 we sat here in front of the court and talked about a
12 mechanism that would allow us to separate what
13 Mr. Zimmerman said were in his view legitimate muscle
14 injury cases from the sea of aches and pains cases that we
15 thought were out there.

16 And in negotiations we talked about getting
17 Rule 26(a)(2) expert reports as opposed to no reports so we
18 could see which cases plaintiffs really wanted to pursue
19 and which cases represented these injury cases.

20 Yesterday I provided a couple of examples of what
21 the check form reports were like. Mr. Zimmerman stated
22 that he doubted those were illustrative of the rest, so I
23 asked to see some of the reports that came from
24 Mr. Zimmerman's firm. I have brought one, if I may
25 approach and bring one to the court.

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1 THE COURT: I don't need to see it.

2 MR. HOEFLICH: Some of the check boxes state that
3 they have not ruled out alternative causes. None of them
4 list what the alternative causes are. None of them
5 establish causation or describe what causation is.

6 We don't believe these reports help us find the
7 alleged muscle injury cases. For example, the one in front
8 of me says the injury is muscle pain. So I can't take
9 these cases and from them characterize the different types
10 of cases that are in the universe of aches and pains that
11 we know are out there.

12 Now, the program is very successful in that we
13 see a good many plaintiffs decide not to go forward even on
14 this basis. But if we are going to have some subsection
15 here, we think it would be extremely helpful to find out
16 what's there.

17 We're not saying that these reports should be the
18 death penalty at this stage, but we would ask that the
19 plaintiffs be given 30 days to come forward with actual

20 Rule 26(a)(2) expert reports as PTO 114 contemplated. We
21 think that could be done within 30 days. It would give us
22 the information we need to see what these cases are like.
23 We think it would create a vetting process and would allow
24 characterization of the remaining cases to go forward.

25 THE COURT: Well, I am assuming that you are
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1 going to put that in a motion to the court so plaintiffs
2 will be able to respond to what you have to say?

3 MR. HOEFLICH: Absolutely, Judge.

4 THE COURT: But in any event, July 19th will be
5 the date that you will be meeting with the special masters
6 to hone in on some of these categories and other problems
7 that may have arisen dealing with these reports and we will
8 have a status conference on the 20th.

9 MR. HOEFLICH: And we will endeavor to try to
10 work this out in any way we can.

11 MR. ZIMMERMAN: You grabbed my paper.

12 THE COURT: Make sure that Special Master Haydock
13 is in between you two when you start discussing these
14 things.

15 MR. HOEFLICH: I take it you did get a full
16 report yesterday.

17 MR. ZIMMERMAN: I'm going to move on, Your Honor,
18 in the interest of discretion.

19 We do not have and have not been really privy to
20 the progress that's been made with regard to these reports
21 in the Pennsylvania Court of Common Pleas.

22 MR. MAGAZINER: Yes, sir.

23 MR. ZIMMERMAN: We would be interested in what's
24 really happening there and what their experience has been,
25 if you know. I think maybe a report on that would be

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1 helpful just to kind of see what the lay of the land is in
2 Pennsylvania.

3 MR. HOEFLICH: As you know, Judge, the court in
4 Pennsylvania also has imposed a requirement of expert
5 reports. There were 3,700 cases that were subject to that
6 requirement. We are now down to, I believe, 470 cases from
7 that group.

8 THE COURT: And those 470 cases, they filed their
9 expert reports?

10 MR. HOEFLICH: Yes, they have. It's also my
11 understanding, Judge, that for plaintiffs who have filed
12 things -- I don't believe there are check boxes, but the
13 equivalent thereof -- those are the only reports those
14 plaintiffs are going to have and they are going to have to
15 live with them.

16 Thank you.

17 MR. ZIMMERMAN: So we have -- what was the number
18 coming out of Pennsylvania, 400?

19 THE COURT: 470.

20 MR. ZIMMERMAN: 470 that got through the gate?

21 MR. HOEFLICH: Yes.

22 MR. ZIMMERMAN: Of a total of how many?

23 THE COURT: 3,700.

24 MR. ZIMMERMAN: Thank you.

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Next, Your Honor, under discovery, Bayer and

1 Bayer AG recently produced about 60 CDs of documents,
2 including documents from people previously deposed.
3 Defendants have said to us that most of these documents are
4 duplicates of documents previously produced.

5 However, subsequent to these documents being
6 produced and it was before these new CDs were produced,
7 some of which are obviously new documents and some are
8 reproduced documents, the PSC had to re-notice, because of
9 these additional documents, three depositions and we also
10 noticed for the first time an additional deposition.

11 I have been told this morning that the parties
12 are going to meet and confer again on this issue. We are
13 engaged in discussion about this topic. I don't think --
14 there's no motion pending with regard to these
15 re-depositions and this one additional deposition that
16 comes from these additional documents being produced.
17 Randy and Doug are going to be talking this through and
18 seeing if we can come to agreement one way or the other.
19 So it's simply not ripe for discussion. I think it is ripe
20 for the court to be aware that this is out there.

21 We feel that it's an important issue for the
22 completion of this MDL, to make sure that we do everything
23 that needs to be done. So the court can be assured this
24 has nothing to do with harassing or trying to, you know,
25 take more depositions for the exercise. We just feel like

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1 when additional documents come and if it produces relevant
2 information, we need to make sure that, for the benefit of
3 all the thousands of people that have cases out there, we
4 take complete depositions and follow up on anything that
5 needs to be followed up on.

6 Again, they are going to meet and confer and
7 we'll probably be able to report at the July status.
8 Unless there's any more comment on that, I will move to the
9 next topic.

10 THE COURT: The court should say that I haven't
11 seen anything that would point otherwise by the PSC.
12 You've done a marvelous job of getting the discovery and
13 getting it categorized.

14 MR. ZIMMERMAN: Thank you.

15 THE COURT: I don't see any waste. We've combed
16 through the records.

17 MR. ZIMMERMAN: Thank you.

18 THE COURT: Continue on.

19 MR. ZIMMERMAN: There is also the noticing of the
20 depositions of Mr. Wenning and Mr. Schneider. These are
21 basically the top executives of Bayer AG. Again defendants
22 have asserted that they don't believe there's a basis for
23 taking these depositions and they are going to move for a
24 protective order. I believe this is also going to be the
25 subject of a meet and confer and a discussion.

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1 I know Adam called me the other day and said do
2 we really want them. And I said I would take another look
3 at it and I have a meeting with the executive committee

4 coming up, that I would discuss it again.

5 I believe if we do press forward, they are going
6 to make a motion to quash them. Again, it isn't ripe, but
7 it's just out there for a heads-up.

8 MR. HOEFLICH: For the court's information,
9 Mr. Wenning and Dr. Schneider are the heads of Bayer's
10 board of management and the head of the supervisory board.
11 We believe that any information they could possibly try to
12 obtain from them would be cumulative and that taking those
13 depositions would be contrary to the settled rules in
14 federal courts. And so we are hopeful we can work this
15 out, but if we can't, we will protect our rights.

16 THE COURT: All right. Thank you.

17 MR. ZIMMERMAN: Next, Your Honor, is the PTO 99
18 issue, which is the re-designation of documents previously
19 designated as confidential. As I understand it, Bayer has
20 completed that process of re-designation and GSK has not
21 completed that process of re-designation.

22 The PSC has done a sampling of these documents
23 and the re-designation -- it appears that about 80 to
24 90 percent of the documents that were at one time
25 designated confidential have been re-designated as

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1 nonconfidential.

2 Your Honor, we think that should be the subject
3 and will be the subject of a motion to recover the costs
4 associated with the PSC having to ask for the
5 re-designation, review the re-designation, and the work
6 that went into the entire process of having to monitor the
7 re-designation. Defendants tell us -- I'm feeling someone
8 coming up behind me -- that they will oppose such a motion.

9 Again, we are not hear to argue it. We will be
10 preparing the motion. It has not been filed, but we give
11 the courts a heads-up that under this process of having to
12 re-designate, having to ask them to re-designate because
13 they were overdesignated, that this is a problem that Bayer
14 must take financial responsibility for and we will seek
15 appropriate action.

16 THE COURT: All right.

17 MR. MAGAZINER: I just wanted to note for the
18 record, Your Honor, GSK has provided to the plaintiffs
19 approximately 80 CDs of re-designated documents and we have
20 about another 60 to go, which we believe we will get out by
21 the end of next week.

22 THE COURT: Thank you.

23 MR. HOEFLICH: I have nothing further.

24 MR. ZIMMERMAN: Before the court -- next, Your
25 Honor, before the court is PSC's request for letters

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1 rogatory. The court has indicated that you would be
2 discussing this with us at the status or at least wanted to
3 update us on what your position is. I think I received an
4 e-mail from Katie on this.

5 Defendants were not contemporaneously served with
6 this request. It is our position that this was third party
7 discovery, it's going to someone other than Bayer and it
8 wasn't necessary for them to have a copy. But they asked

9 for a copy. We gave them a copy I believe yesterday, so
10 they now have a copy in front of them.

11 I don't know what the court's position is, but
12 just so you understand, we are asking the Italian
13 authorities who seized the documents in Italy -- what's the
14 name of the town?

15 UNIDENTIFIED SPEAKER: Turin.

16 MR. ZIMMERMAN: -- Turin to provide us copies of
17 what they seized. This is not discovery to Bayer. It's
18 discovery to an Italian authority.

19 We had asked voluntarily from Bayer for them to
20 comply. I think back in April I wrote them a letter.
21 Before that I wrote them an e-mail. We talked about it at
22 the status conference. The easiest way is that they would
23 give us those copies. They have chosen not to. We have to
24 take the more formal route, which is the letters rogatory.
25 That's where we sit.

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1 THE COURT: All right. The reason why I put this
2 on the calendar is I saw that the defendants had not
3 received copies of this and, two, the red flag of the
4 Italian prosecutor that we had some issues on earlier in
5 this case. And so that's why I wanted to make sure that
6 there was a full hearing on this issue, if there's any
7 issues. There may not be.

8 MR. HOEFLICH: Thank you, Judge. There are
9 issues. First, we believe that a copy should have been
10 given to us by the PSC as a matter of courtesy. We learned
11 of it for the first time from the court. Second, we think
12 substantively it's important that we receive copies of this
13 for the protection of the integrity of the court.

14 The plaintiffs have asked the court to sign on to
15 a document that contains obvious misstatements. For
16 example, it talks in here about documents obtained from the
17 offices of Bayer AG Milan. Now, when the PSC came to us
18 and asked Bayer AG for these documents, we told them that
19 there is no company Bayer AG Milan. Bayer has a separate
20 subsidiary which is a wholly-owned company in Italy, but
21 it's a separate organization. And so these documents
22 reference a company that doesn't exist. And when the PSC
23 asks the court to sign on to something, we believe that
24 it's important that the defendants receive it so we can
25 comment and correct inaccuracies.

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1 We would like an opportunity to respond to these
2 papers; and if the court would allow us to do that, we
3 would appreciate it.

4 THE COURT: Yes, I will. 14 days?

5 MR. HOEFLICH: Yes, Judge. Thank you.

6 MR. HOPPER: Your Honor, may I be heard?

7 THE COURT: You may.

8 MR. HOPPER: Thank you, Your Honor. Randy Hopper
9 for the plaintiffs. I'll take responsibility on the
10 contemporaneous service, Your Honor. Our international
11 process server didn't advise me that we actually needed to
12 do that because it was a third party, but I actually took
13 steps to do it anyway. And there was a mix-up because

14 there was more than one paralegal in our office who worked
15 on this, because we've had a paralegal who has had
16 experience on international service before. So that's why
17 there was a misstep on it, and I just wanted to be sure
18 that I was fully candid with the court on that.

19 THE COURT: Okay.

20 MR. HOPPER: But they now have it and we are
21 anxious to see if there are any changes that they advise us
22 we need to make. If there are any inaccuracies, we
23 certainly will do that and respectfully request the court
24 to help us move this along.

25 THE COURT: All right. Thank you.

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1 MR. HOPPER: Thank you.

2 MR. ZIMMERMAN: Next, Your Honor, under G on
3 page 4, the plaintiffs -- the PSC has filed a motion to
4 compel defendants to produce the mailing list to whom they
5 each mailed -- to whom they mailed each a copy of PTO 6.
6 Again, that has to do with the order not to destroy records
7 of their sales representatives.

8 That matter has been briefed -- excuse me.
9 Defendants will be filing a brief in opposition. We have
10 filed our brief. The matter has been referred by this
11 court to Chief Judge Magistrate Lebedoff. I don't think
12 there's anything further on this, Your Honor, except we are
13 asking for these documents. The matter has been referred
14 to Lebedoff. I don't know if it has been scheduled.

15 MR. GOLDSER: July 27th.

16 MR. ZIMMERMAN: It has been scheduled for July
17 27th. I don't know if there are any questions or comments
18 on that one.

19 THE COURT: No, I don't.

20 MR. ZIMMERMAN: Next, Your Honor, is the generic
21 expert program. PTO 120 was recently issued by this court
22 and there was a discussion of that in our meeting yesterday
23 with the special masters.

24 The agenda says that the parties -- the special
25 masters and the parties will report to the court. We will

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1 be happy to do that. I think the bottom line is that the
2 plaintiffs have served their reports. The defendants'
3 reports I believe were due July 7th --

4 MR. HOPPER: 2nd.

5 MR. ZIMMERMAN: -- July 2nd, their reports, and
6 then the program of discovery will be occurring pursuant to
7 the order. We'll certainly work together to work out those
8 dates and to complete that discovery in accordance with the
9 court's timeline.

10 So at the present time all we're here to report
11 is that the PSC has made their designation. We will await
12 the defendants' designation and the process will then
13 unfold as it will unfold. I don't know if the special
14 masters have anything to add.

15 THE COURT: Anything to add, Adam, on that?

16 MR. HOEFLICH: Nothing to add, Judge, of
17 importance. There's one issue with respect to the
18 plaintiffs' reports and ours, and we raised it yesterday

19 with the special master and we are going to try to work it
20 out.

21 THE COURT: Anything --

22 SPECIAL MASTER HAYDOCK: In my report, Judge, I
23 will comment.

24 THE COURT: We'll defer the special master's
25 comments on this until the end of the calendar.

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1 MR. ZIMMERMAN: Very good. Thank you.

2 Randy, you have been handling the Department of
3 Defense/FDA investigation. Maybe you could report to the
4 court the status of that.

5 MR. HOPPER: Your Honor, I just wanted to be sure
6 that the court knew that the PSC has undertaken steps to
7 learn about this investigation. As Mr. Zimmerman noted to
8 the court earlier, we don't want to leave any stones
9 unturned. We feel it's our responsibility as the PSC to do
10 all our discovery completely before we close off this
11 aspect of the case and I just wanted to be candid with the
12 court that we are taking steps to fully investigate it and
13 if there's something that we need to bring to the court's
14 attention at a later date, we will.

15 And one last thing before we close off this
16 section of the agenda, Your Honor, that I failed to mention
17 or to at least ask the court if Mr. Hoeflich and I could
18 speak with regard to the letters rogatory. If there's
19 something that he finds that there's an inaccuracy, if they
20 would give us an opportunity to cure that or amend it or
21 make any revisions so that we don't turn this into a motion
22 practice or something akin to that. I think that would be
23 helpful.

24 THE COURT: That's fine with me. You guys can
25 meet and confer and see if you can rectify any issues that

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1 are outstanding. If not, then you bring a motion. There's
2 no need to bring motions if it's going to be rectified
3 by --

4 MR. HOEFLICH: If we cannot work this out, we
5 will file a response within two weeks. Thank you, Judge.

6 MR. HOPPER: Thank you, Your Honor.

7 MR. ZIMMERMAN: That's the end of the discovery,
8 Your Honor.

9 I just want to make one comment, that MDL
10 discovery is sort of like studying for finals in law
11 school, you're kind of never done, you just reach a
12 deadline that you have to finish, because there's always
13 more stones to unturn and there's always another document
14 that could lead to another document. And I think we all
15 know that as lawyers, that there is never a perfect
16 completion to the process. We are trying to do our best.
17 We are trying to leave no stone unturned in the sense of
18 reasonable stone unturned.

19 But we believe now the end is in sight. Once we
20 complete the depositions that have been scheduled, once we
21 complete the depositions that have been continued, once we
22 complete some of these investigations and documents that
23 are in third party hands, be it the Department of Defense

24 or the Italian authorities or others, we are probably near
25 the end.

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1 We came before this court in February and said we
2 hoped to have at least cases ready to be resolved through
3 remand or trial or the closing of this MDL by the end of
4 the year; and we are still shooting very, very hard for
5 that. It is the goal of the MDL.

6 I think we came before you early on and said that
7 we wanted to move this thing in a timely way and we wanted
8 to do it in a creative way and we wanted to be efficient,
9 we wanted to do it electronically and we wanted to do it
10 cooperatively. I think we have met most of those goals.

11 So far we have got work to do, but I think we are
12 seeing the end of the discovery process. We are not seeing
13 the end of the resolution process. I think there's a lot
14 of cases left to resolve one way or the other, and we are
15 going to be looking at how to do that and we are going to
16 be looking at remand if we can't.

17 I think one of the things that's on my mind is if
18 we can't resolve things, how to get expeditious remands
19 going so these cases go back and get resolved in the courts
20 where they came if we can't get them resolved here. I am
21 still hopeful we can.

22 But I have been listening for over two years to
23 just say no about cases that aren't within their box of
24 rhabdo cases, but I'm hopeful that we can now get real
25 interested and focused on the other categories of important

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1 cases and complete the discovery and have a successful MDL
2 that Your Honor has been leading through enormous efforts,
3 and we appreciate it.

4 THE COURT: Well, hear me out on this. On July
5 19th you are going to meet with the special masters, and
6 that's going to be a very important meeting. All sides are
7 going to be prepared to work through those issues because I
8 do want to see these cases in some kind of categories so we
9 can deal with those categories.

10 And so the PSC may have to do some extra work,
11 meet with Adam before then and talk about the expert
12 reports so you can have the information so when you sit
13 down with the special masters on the 19th that you're just
14 not dragging your heels.

15 I hear you say certain things, but the
16 information is going to have to be there so we can make
17 those categories so the court can move forward, whether or
18 not it is setting trials or having summary jury trials, but
19 they have got to be meaningful cases.

20 And if you don't have the appropriate categories
21 to have these cases broken into the appropriate categories,
22 we're not going to make any movement and the December,
23 January 1st deadline of finishing up this case will not be
24 met.

25 And so between now and the 19th it's incumbent on

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1 both sides, mainly on the PSC's side, to make sure that we
2 will be able to put these cases in the different categories

3 and meaningful categories so the court can take a look at
4 it and see how we can fashion summary jury trials or
5 regular trials on these issues.

6 MR. ZIMMERMAN: Your Honor, we desperately want
7 to do that and so you need to hear from me that that was my
8 goal back from November, to have the appropriate cases make
9 it through into the category of triable cases.

10 I hear what Adam is saying, that they don't think
11 the categories are meaningful and they are upset with check
12 boxes and things like that. And some of it I take a little
13 bit with -- I am not going to say a grain of salt, but some
14 of it just seems to be part of the process of never being
15 satisfied and part of it is legitimate. And I want to work
16 with them to make it legitimate. I mean, I am the person
17 that stood up here and took the risk to say it's something
18 we should do.

19 THE COURT: You took the risk and it's working
20 out quite well. Even though you may not think it is, in
21 the scheme of things it's working out quite well and we
22 just have been refining it as it goes along. It's a whole
23 new process that you brought to the court, and it's
24 innovative.

25 And it's important that we continue to tweak it
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1 as it goes along. It's not done, and you know that and I
2 know that. It's important that the 19th be a meeting that
3 is meaningful and we can have some conclusions on what
4 types of categories we have here.

5 MR. ZIMMERMAN: Thank you, Your Honor.

6 MR. HOEFLICH: Nothing further, Judge. Thank
7 you.

8 MR. ZIMMERMAN: Your Honor, that moves us into
9 the motion practice, and I think you said you wanted to
10 hear from Mr. Magnuson on the Ken Moll matter first and
11 then from Wendy Fleishman on the Lehmann and Bayer on the
12 Lehmann matter.

13 THE COURT: Do you want to move your materials?
14 Good morning.

15 MR. MAGNUSON: Good morning, Your Honor. For the
16 record, Eric Magnuson on behalf of Kenneth B. Moll and
17 Kenneth B. Moll & Associates.

18 You issued your sanction order on April 12th. On
19 April 16th you granted temporary stay of that order pending
20 this motion. On May 26th Bayer counsel and I submitted for
21 the court's consideration a written statement concerning
22 the stay. We realize that we couldn't stipulate to bind
23 you as to how you would treat your order, but Bayer has
24 agreed that it does not oppose a stay.

25 A stay preserves, to the extent possible, the
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1 rights of the parties pending appeal. The status quo now
2 is that Mr. Moll has not paid the monetary fine that you
3 levied. He stands ready to post security.

4 Your order removed him from the Plaintiffs'
5 Steering Committee. I'm a little unclear where that
6 stands, Your Honor, because a stay order in my experience
7 returns parties to the status quo ante. But Mr. Moll has

8 not been participating as a member of the Plaintiffs'
9 Steering Committee and will not do so during the pendency
10 of the appeal.

11 Finally, your order directed the clerk to refer
12 your order to the Illinois bar authorities and to the U.S.
13 Attorney's Office. And the docket doesn't reflect what the
14 clerk has done with regard to that, but I do know that the
15 Illinois authorities are aware of the order.

16 We submit that a stay as proposed would be
17 appropriate. It would balance Mr. Moll's right to full
18 appellate review against this court's obligation to see
19 that its order is enforced.

20 It is an order that we view as very serious, Your
21 Honor. It's clear that you were thoughtful and worked hard
22 on it; and the comments that you made have gotten the
23 attention of a lot of people, particularly Mr. Moll.

24 During the pendency of the appeal if a stay is
25 granted, the most practical effect will be that we will be

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1 able to present to the Illinois authorities and the federal
2 U.S. Attorney the fact of the stay. And while we can't
3 control what they do, we believe that they may defer any
4 action pending a full appellate review.

5 I stand ready to answer any questions, Your
6 Honor.

7 THE COURT: Well, as of an hour ago I was not
8 inclined to grant the stay and I want to think about it
9 some more.

10 MR. MAGNUSON: If there's anything I can do to
11 help the court, I would be happy to.

12 THE COURT: No. It's the whole argument again of
13 if the message has gotten across to individuals --

14 MR. MAGNUSON: I think I can assure you that the
15 message has gotten across beyond Mr. Moll. I think that --
16 from my service on the ECF/CM committee, I know that this
17 has been reverberating throughout the community as we move
18 into electronic filing and I know everybody in my office
19 knows about this case and acts accordingly.

20 THE COURT: That's important to me. I will
21 review it and I will have an order out by the end of the
22 day.

23 MR. MAGNUSON: Thank you, Your Honor.

24 THE COURT: Thank you.

25 Let's deal with the next matter, the Lehmann

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1 matter.

2 MS. FLEISHMAN: Wendy Fleishman. Good morning.
3 We represent Felix and Ilse Lehmann. Ilse is the victim
4 who took the Baycol and got rhabdo. We've tried to mediate
5 the case before the court's mediation program. We haven't
6 been able to resolve the case.

7 THE COURT: Did you have a hearing --

8 MS. FLEISHMAN: We had a mediation.

9 THE COURT: You did?

10 MS. FLEISHMAN: Yes, when everybody was present.

11 And we are still engaged in the process, we are still
12 talking, although we have not -- frankly, we have reached a

13 stalemate.

14 The clients are both 80 years old. The case was
15 filed in October 2001. We have now submitted case specific
16 reports from experts, from Dr. Zizic, Dr. Richman, and
17 Mr. Westbrook, who is a gerontologist, to the defense. We
18 have submitted -- we have answered all of the case specific
19 discovery. We have submitted all sorts of records,
20 frankly, through the present day. Mrs. Lehmann has
21 undergone EMG tests and through the present we've submitted
22 those EMG tests. They show toxic myopathy and ongoing
23 permanent problems.

24 And as a result we are now at a stalemate in
25 terms of negotiations and that's why we brought the motion

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1 before the court. I mean, I, frankly, filed the motion in
2 March --

3 THE COURT: Right.

4 MS. FLEISHMAN: -- hoping that between March and
5 now we would be able to resolve it by mediation, but we
6 have not been able to do that.

7 In the period from March until now I've submitted
8 all the case specific reports, I've made the clients
9 available. The clients came to the mediation. They met
10 with Bayer's counsel and a Bayer representative, but we are
11 not able to settle the case. And so we are now before the
12 court because we don't really know what else to do.

13 We understand the ramifications of our motion for
14 suggestion of remand. We understand the problems that
15 we've all encountered in the generic expert discovery
16 issues, but my 80-year-old clients still need to get their
17 case on for trial and we are now three years later.

18 THE COURT: I understand.

19 MS. FLEISHMAN: I mean, they are lucid and
20 available and ready to go.

21 THE COURT: And you would have no problems with
22 me trying the case?

23 MS. FLEISHMAN: Absolutely not, Your Honor. I
24 mean, they will come to Minnesota.

25 THE COURT: I can go to New York.

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1 MS. FLEISHMAN: They will come here, they will go
2 to New York, they will go to Philadelphia, anywhere.

3 THE COURT: All right. I would like to hear from
4 Bayer. I know they have some thoughts on this.

5 MR. HOEFLICH: Thank you, Judge. Mr. and
6 Mrs. Lehmann have, in effect, asked to opt out of the MDL
7 prior to the completion of pretrial proceedings. That is
8 not allowed or appropriate under the rules for a simple
9 reason. If one plaintiff, regardless of the circumstances,
10 is allowed to say I have what I need, I would like to go
11 back to the transferor court, then the court and the
12 court's offices will be flooded by requests from people who
13 would like to put additional pressure on Bayer by having
14 their case tried before the pretrial consolidated
15 proceedings have completed.

16 Mrs. Lehmann in her motion to the court states
17 that she is 80 years old, that she filed her case in 2001,

18 and that she would like to go to trial. With all due
19 respect, that doesn't separate Mrs. Lehmann from many of
20 the plaintiffs in this litigation.

21 There are two important points. First, expert
22 discovery is still ongoing. As Mr. Hopper made very clear,
23 fact discovery is still ongoing. As Ms. Fleishman pointed
24 out, settlement discussions are still ongoing.

25 We cited a case from the Third Circuit in our
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1 brief, the Patenaude case, that dealt with asbestos
2 plaintiffs. That case, which, in fact, ended up going up
3 on appeal in mandamus, made very clear that when there are
4 ongoing proceedings and settlement discussions continuing,
5 remand is inappropriate. It's for very practical reasons,
6 because the remand can be very disruptive to the MDL.

7 We are still involved in settlement discussions.
8 I'm hopeful that those will prove fruitful. If they are
9 not fruitful, perhaps we can come back for a second bite at
10 mediation. Maybe we can get this court directly involved
11 in mediation if that would be helpful.

12 We think we have been fair in the settlement
13 talks. We are certainly willing to continue them and to
14 make every effort, but we think it would be inappropriate
15 to break from those talks and remand the case at this
16 point.

17 THE COURT: All right. Anything further?

18 MS. FLEISHMAN: No, Your Honor.

19 MR. HOEFLICH: If I may, Judge, there's two other
20 points I would like to make.

21 First, the Lehmann case involves New York
22 plaintiffs who filed their case in the Eastern District of
23 Pennsylvania. So it would be a particularly messy remand
24 in that it would first go to the Eastern District of
25 Pennsylvania. Then we would, necessarily, be filing venue

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1 motions to send it back to New York.

2 So if this court were to want to try that case,
3 there would be all sorts of procedural machinations that we
4 all would need to go through; and I am hopeful that that
5 would be a last step, not a first step, because we would
6 like to work it out and complete this MDL first.

7 THE COURT: Counsel.

8 MS. FLEISHMAN: We would disagree that forum non
9 conveniens would mandate sending the case back to New York
10 because of all the Philadelphia connections to this case,
11 specifically all the defendants' connections to the case.
12 So that's an issue that I think we can resolve either
13 before Your Honor in the form of motion practice or before
14 Judge Joiner if we go back to the Eastern District of
15 Pennsylvania.

16 I don't think that's the issue before this court.
17 The issue before this court is that you do have these two
18 plaintiffs, who are elderly, who filed their case timely
19 and now have waited all this time for their trial and we
20 need to resolve their case. I mean, in any other
21 circumstance the case would be set down for trial two years
22 ago.

23 THE COURT: Thank you. I'll take this matter
24 under advisement.

25 MS. FLEISHMAN: Thank you, Your Honor.

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1 MR. HOEFLICH: Thank you, Judge.

2 MR. ZIMMERMAN: If I might, Your Honor, on this
3 matter of Lehmann, I do want to support the request. So I
4 am just on record as saying that in limited circumstances
5 and a circumstance where you have an elderly person with
6 important circumstances, I think after this period of time
7 remand will not create a domino effect and will not result
8 in there being all kinds of horribles happening that will
9 dissipate and destroy the MDL.

10 We are talking here about human beings, and we
11 can't let process and order necessarily always prevail over
12 the human experience. And the human experience here, I
13 think, dictates we have -- we allow these people who can't
14 resolve their case through all the means that have been set
15 up to have their day in court as quickly as possible.

16 MR. HOEFLICH: If I may, Judge. The record is
17 devoid of any human experience that would justify what
18 Mr. Zimmerman apparently would say is a small risk, I would
19 say it's a great risk, of many people seeking this same
20 exact remedy, which is an early remand. Mr. Zimmerman gave
21 a speech a few minutes ago about how he hopes to wrap up
22 the MDL this year.

23 As far as I understand it, Mrs. Lehmann is in
24 good health and still working at least under charitable
25 endeavors. I have seen nothing in the record that would

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1 require an immediate remand because of her health.

2 If the MDL proceeds accordingly and we wrap up
3 the discovery, there shouldn't be an undue burden on the
4 plaintiffs and it would avoid a great burden on all of the
5 parties as well as a distraction before the court has done
6 its work. I would suggest that we should follow the
7 procedures set forth in 1404, 1407, and in the Lexecon
8 opinion.

9 THE COURT: Thank you.

10 MR. HOEFLICH: Thank you, Judge.

11 MS. FLEISHMAN: Your Honor, Mr. and Mrs. Lehmann,
12 thank god, are okay now. I mean, she has residual
13 problems, she's got permanent problems as a result of the
14 rhabdo, but they are able -- willing and able to come to
15 court now.

16 If we keep putting this off, I think the obvious,
17 you know, outcome will win the day for the defense is that
18 she won't be able to come to court if we keep waiting,
19 which is why we waited so long to bring the motion
20 initially and it was not brought injudiciously.

21 THE COURT: Thank you.

22 MR. ZIMMERMAN: Next, Your Honor, under motions
23 is B, various plaintiffs have pending motions for relief
24 from PTO 114. I believe the court has ruled on all of
25 them, unless there are some additional ones pending.

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1 MS. WEBER: There are some additional motions,

2 Your Honor. There are several that are addressed to claims
3 that have been characterized as economic loss claims, which
4 we're bundling into one brief to deal with. I would expect
5 to have that in at the end of this week or early next.

6 THE COURT: All right.

7 MR. ZIMMERMAN: Okay. I stand corrected. I was
8 regarding the ones that had state laws associated with them
9 that had to do with the no need for expert report. These
10 are different claims, obviously, if they're economic
11 claims.

12 Again, B is just another restatement of the
13 matter that's now been referred to Magistrate Judge
14 Lebedoff, which is the motion for production, which we now
15 have a date of July 27th, I believe.

16 That brings us to remand and trial settings, Your
17 Honor. We have been provided a list of trials, it's a
18 five-pager -- I suspect the court has received it as well
19 -- showing many, many cases set for trials around the
20 country through the month of October of, what, '05, would
21 that be, Susan, October of '05?

22 MS. WEBER: Yes.

23 MR. ZIMMERMAN: I am aware of a case in
24 Mississippi that was set for trial in June, which I
25 understand has now settled, with the Shannon law firm. We

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1 spoke with -- there was a case set for trial in June in
2 state court, Colleen Welch [phonetic].

3 MR. HOEFLICH: I am not sure of that particular
4 case. I know there was a rhabdo case that was resolved
5 recently. That must be what you're --

6 MR. ZIMMERMAN: This is not a rhabdo, you know,
7 at least it wasn't characterized as such by their counsel.
8 But my understanding is it's been resolved, which was --

9 MR. MARVIN: It has been resolved. It was a
10 rhabdo case. It was called a Dearman case, which was set
11 for June in Mississippi.

12 MR. ZIMMERMAN: You're right. Never hospitalized
13 for rhabdo. Be that as it may. Anyway, that was the
14 earliest setting that we were aware of, Your Honor, and
15 that one has resolved.

16 Like I said, there's a number of additional ones
17 in Pennsylvania in August and in Nevada in October. I
18 don't think there's a need for any more comment on these.

19 There are no settings in the MDL and there are
20 numerous settings in the state court and they will proceed
21 as they proceed. I don't know if there's any further
22 discussion we want to have on those with regard to -- I
23 don't know what Phil is on pretrial now. I don't know if
24 that is a Bayer case.

25 MR. HOEFLICH: That is not a Bayer case. I

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1 believe, though, that from the MDL trial program, out of
2 the initial group of well over 200 cases, there are four
3 remaining. One of them there is a dispute over whether the
4 plaintiffs can dismiss it with or without prejudice. We
5 say with prejudice; the plaintiffs seek to dismiss it
6 without. So from that initial group, there are three cases

7 left.
8 THE COURT: Are those rhabdo cases or just muscle
9 pain?
10 MR. ZIMMERMAN: I would have to look at those,
11 Your Honor. I don't know the answer.
12 MR. HOEFLICH: Those are muscle pain cases,
13 Judge.
14 MR. ZIMMERMAN: The rhabdos have been resolved
15 from that original 200?
16 MR. HOEFLICH: Yes.
17 MR. ZIMMERMAN: Item C, Your Honor, on the agenda
18 is basically a reiteration of the discussion we have had
19 with the court about making the July 19th categorization
20 meeting meaningful, and certainly we have had that
21 discussion.
22 We understand what the impact and import of those
23 discussions are and we will do everything to make those
24 discussions meaningful and provide as much dialogue between
25 the two sides to do so as we possibly can. I don't know
0049
1 that there's anything further that I need to say about it.
2 Clearly having heard the importance of that
3 meeting and clearly understanding that information will be
4 relevant and is relevant to both sides, we will do
5 everything to make those meetings and that categorization
6 process meaningful within the limits of our ability.
7 THE COURT: Okay.
8 MR. ZIMMERMAN: Liaison Advisory --
9 THE COURT: Before you go on, Mr. Becnel would
10 like to --
11 MR. ZIMMERMAN: I'm sorry.
12 MR. BECNEL: It's my understanding --
13 THE COURT: Good morning.
14 MR. BECNEL: Good morning, Judge. It's my
15 understanding that you want for the 19th to try to
16 categorize all of the cases. And maybe I am asking for
17 some sort of an advisory opinion only because I'm trying to
18 figure out what to do.
19 I have about 400 reports that are in the process
20 of being prepared after -- of the MDL cases to comply with
21 114 and I am ready to give them up right now. I don't have
22 to give them up right now, I could delay them out.
23 But if the court is looking to see what is in
24 these inventories that people have to make some kind of
25 meaningful decision, if I am not going to get bombarded for
0050
1 being early with motion practice -- because I've been in
2 constant trial for 13 months and two jury trials and I am
3 starting another one next Monday for three months. I just
4 don't want to be inundated with motion practice while
5 trying to try a massive toxic tort case.
6 And so what I'm asking the court is: Would the
7 court rather have these early, provided we don't just then
8 try to pick apart every one that is sent early, or just
9 wait -- and I think I have sent in 100 and something of
10 them so far -- and just let them string out as they need to
11 be? And I don't know if that's something the court is even

12 interested in, but I just thought I would ask.

13 THE COURT: After we finish up with the status
14 conference, why don't you meet with Special Master Haydock
15 and Mr. Zimmerman and Mr. Hoeflich and see whether or not
16 something can be worked out with that.

17 MR. HOEFLICH: Thank you, Judge.

18 MR. BECNEL: Thank you, Your Honor.

19 MR. ZIMMERMAN: Next is the Liaison Advisory
20 Committee and the special master's report.

21 SPECIAL MASTER HAYDOCK: Good morning, Judge.

22 THE COURT: Good morning.

23 SPECIAL MASTER HAYDOCK: First of all, with
24 regard to the European Bayer AG deposition expenses, I've
25 received the final accounting from Bayer and the PSC and we

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1 hope to get those vendors finally paid sometime by the end
2 of July, if not earlier than that. I'm proceeding
3 accordingly and will keep the court advised of that.

4 Second, with regard to 114, we will meet with the
5 parties on July 19th. And Special Master Remele and I will
6 be talking with them before that, certainly by phone and
7 perhaps even in person if we need to, so that by the 19th
8 we can have something prepared to report to the court on
9 the 20th at the next status conference regarding the
10 progress made regarding categorization or proposals made to
11 the court as to how to proceed with that.

12 Third, with regard to PTO 120, the parties
13 reported accurately, they are complying with that. That
14 seems to be working well. And I'll be talking with Bucky
15 and Adam about categorizing some of the experts by name and
16 we may have a proposal to the court for the next status
17 conference to modify 120 accordingly.

18 Fourth, with regard to the wall, the reason I
19 first became involved in the case, I think last time I said
20 we were close to resolving that. And I will repeat what I
21 just said last time, we are close to resolving that. We
22 hope to have that finally resolved by the next status
23 conference, if not before.

24 Next, with regard to the LAC, I had sent some
25 e-mails out to the attorneys about any issues they may have

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1 regarding the LAC, Medicare, or third party payer liens. I
2 have not heard anything back and I have been in touch with
3 the parties and those issues seem to be being resolved by
4 the parties accordingly and I have not had any need for my
5 time spent on those issues over the past month or so.

6 And then lastly, Special Master Remele and I will
7 meet with the lawyers immediately after this status
8 conference to go over some of these issues in more detail.

9 That's all.

10 THE COURT: Thank you.

11 Mr. Zimmerman.

12 MR. ZIMMERMAN: We have nothing further, Your
13 Honor. I think all the issues have now been brought before
14 the court that exist and all the status of the litigation
15 we have brought the court up to date on. I think we know
16 what we have to do between now and the next conference,

17 which is now set for the 20th at --
18 THE COURT: 20th at 10:00.
19 MR. ZIMMERMAN: -- at 10:00. We will work
20 earnestly to the 19th. The meeting on the 19th is going to
21 be in Minneapolis?

22 SPECIAL MASTER HAYDOCK: Yes.
23 MR. ZIMMERMAN: I think the time and place for
24 that will be set by the special master. I will be working
25 with counsel for the defense to try and work out any

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1 differences that we have with regard to helping us get to
2 categorization.

3 Thank you.

4 THE COURT: All right. Anything further?

5 MR. HOEFLICH: Thank you, Judge.

6 THE COURT: Thank you, and I will see you on the
7 20th of July at 10:00.

8 (Court adjourned at 11:20 a.m.)
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11 * * *

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

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Certified by:

Lori A. Simpson, RMR-CRR

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19 Dated: July 9, 2004

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