

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MINNESOTA

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4 )  
5 )  
6 In Re: Baycol Products Litigation  
7 ) MDL 1431  
8 ) July 15, 2003  
9 ) Minneapolis, MN  
10 )  
11 )  
12 -----

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

16 APPEARANCES:

17 ON BEHALF OF THE PLAINTIFF: CHARLES ZIMMERMAN, ESQ.  
18 RICHARD LOCKRIDGE, ESQ.  
19 RONALD MESHBESHER, ESQ.  
20 WENDY FLEISHMAN, ESQ.  
21 TURNER BRANCH, ESQ.  
22 VICTORIA MANIATIS, ESQ.  
23 RONALD GOLDSER, ESQ.  
24 RICHARD ARSENAULT, ESQ.  
25 RANDY HOPPER, ESQ.

ON BEHALF OF THE DEFENDANT: PHILIP BECK, ESQ.  
ADAM HOEFLICH, ESQ.  
SUSAN WEBER, ESQ.  
GENE SCHAERR, ESQ.  
FRED MAGAZINER, ESQ.  
ELIZABETH WRIGHT, ESQ.  
SCOTT SMITH, ESQ.

ON BEHALF OF THE NEW YORK TIMES: MARK ANFINSON, ESQ.

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1 THE COURT: Good morning. Let's have this case 10:13:10

2 called. 10:13:13

3 THE CLERK: Multi-district Litigation Case No. 10:13:16

4 1431, In re: Baycol Products. Please state your 10:13:17

5 appearances for the record. 10:13:21

6 MR. ZIMMERMAN: Good morning, Your Honor, I'm 10:13:23

7 Charles Zimmerman for the Plaintiffs Steering Committee. 10:13:23

8 THE COURT: Good morning.

9 MR. LOCKRIDGE: Good morning, Your Honor, Richard 10:13:30

10 Lockridge for the PSC. 10:13:32

11 THE COURT: Good morning

12 MS. FLEISHMAN: Good morning, Your Honor, Wendy 10:13:34

13 Fleishman for the PSC. 10:13:36

14 THE COURT: Good morning.

15 MR. MESHBESHER: Good morning, Your Honor, Ronald 10:13:39

16 Meshbeshher for the PSC. 10:13:41

17 THE COURT: Good morning.

18 MR. BRANCH: Turner Branch for the PSC, Your 10:13:42

19 Honor.

20 THE COURT: Good morning.

21 MR. GOLDSER: Ron Goldser for the PSC. 10:13:45

22 THE COURT: Good morning.

23 MS. MANIATIS: Good morning, Your Honor, Victoria 10:13:47

24 Maniatis for Weitz and Luxenberg.

25 THE COURT: Good morning.

1 MR. HOPPER: Randy Hopper for the PSC, Your 10:13:49

2 Honor. 10:13:52

3 THE COURT: Good morning.

4 MR. ARSENAULT: Richard Arsenault, PSC.

5 THE COURT: Good morning.

6 MR. ANFINSON: Your Honor, Mark Anfinson, New 10:13:54

7 York Times. 10:13:58

8 THE COURT: Good morning. 10:13:58

9 MR. BECK: Good morning, Your Honor, Phil Beck 10:14:00

10 for Bayer and Bayer AG. And may I say that Peter Sipkins 10:14:02

11 was delayed by weather and his plane was cancelled so he 10:14:05

12 couldn't be here today and sends his regrets, Your Honor. 10:14:10

13 MR. HOEFLICH: Good morning, Your Honor, Adam 10:14:15

14 Hoeflich for Bayer and Bayer AG. 10:14:16

15 THE COURT: Good morning.

16 MS. WEBER: Good morning, Your Honor, Susan Weber 10:14:21

17 for Bayer and Bayer AG. 10:14:22

18 THE COURT: Good morning.

19 MR. SCHAERR: Good morning, Your Honor, Gene 10:14:26

20 Schaerr for the same Defendants. 10:14:30

21 THE COURT: Good morning.

22 MR. MAGAZINER: Good morning, Your Honor, Fred 10:14:30

23 Magaziner for GlaxoSmithKline. 10:14:32

24 THE COURT: Good morning.

25 MS. WRIGHT: Good morning, Your Honor, Elizabeth

1 Wright, and I'm substituting for Mr. Sipkins today.

2 THE COURT: Good morning.

3 MR. SMITH: Scott Smith for GSK, Your Honor. 10:14:35

4 THE COURT: Good morning. Let's move into the 10:14:39

5 status report and proposed agenda. We have before us -- 10:14:47

6 let's move into the first two matters, the pending cases 10:14:51

7 and the settlement, and then we'll move into the motion 10:15:00

8 regarding Mr. Fischer. Mr. Fischer, are you there? 10:15:03

9 MR. FISCHER: Yes, Your Honor, and also my wife 10:15:10

10 is here. She has permission to also be in the proceeding? 10:15:11

11 THE COURT: Yes, she can be on-line. Can you 10:15:16

12 hear us? Mr. Fischer, can you hear us? 10:15:20

13 MRS. FISCHER: Good morning, Your Honor, Marilyn 10:15:26

14 Fischer. 10:15:28

15 THE COURT: Can you hear what's going on in the 10:15:28

16 courtroom? 10:15:31

17 MR. FISCHER: Yes, it's a little faint, but yes. 10:15:34

18 THE COURT: We'll use the microphone so you can 10:15:35

19 hear us.

20 MR. FISCHER: Okay.

21 THE COURT: Mr. Zimmerman. 10:15:37

22 MR. ZIMMERMAN: May it please the Court, we're 10:15:38

23 here on the status conference and agenda report that has 10:15:41

24 been provided to the Court, I believe -- I believe on the 10:15:46

25 11th is what it's dated. I don't know if it was actually 10:15:49

1 the one 11th, I'm not positive. But at any rate, the 10:15:53  
2 report is before the Court. And it's a mutual report 10:15:56  
3 prepared by both sides pursuant to a meet and confer. 10:16:12

4 As usual, Your Honor, we'll go through the items 10:16:16  
5 that are matters of report as you instructed, and then I 10:16:20  
6 believe you'll hear a motion and then we'll kind of go back 10:16:25  
7 to the agenda until we get to our motion calendar down at 10:16:29  
8 the foot of the calendar. 10:16:33

9 THE COURT: That's correct. 10:16:34

10 MR. ZIMMERMAN: First off, Your Honor, Pending 10:16:35  
11 Cases. The Defendants have been served with 9,811 cases 10:16:37  
12 that remain active as of July 11, 2003. I trust what that 10:16:44  
13 means is they have 9,811 pending matters, and that takes 10:16:50  
14 into consideration any matters that have been dismissed for 10:16:58  
15 whatever reason, either settlement or voluntary dismissal. 10:17:01  
16 I guess that we don't know how many plaintiffs that 10:17:07  
17 includes because many of them or some of them have multiple 10:17:12  
18 parties. Of the 9,811 pending cases, 5,197 cases are 10:17:17  
19 pending in the federal court, and 3,737 are pending in 10:17:24  
20 various state courts around the country. 10:17:30

21 Just for purposes of comparison, Your Honor, and 10:17:34  
22 you may have this in front of you, last month when we were 10:17:38  
23 before Your Honor, the total number of cases was 9,177 10:17:42  
24 versus 9,811, so an uptake of approximately 630 cases have 10:17:48  
25 been filed. Of that total, there were 4,728 cases in the 10:17:59

1 MDL, and we're now at approximately 5,200, an uptake of 10:18:08  
2 approximately 480, perhaps, if my quick math is correct. 10:18:15  
3 And then in state court the number last month was 3,687, 10:18:18  
4 and there is now 3,737, so an uptake of approximately 50 10:18:22  
5 cases. 10:18:31

6 The remaining cases have not been categorized. 10:18:35  
7 What that means is the difference between 9,800 and the sum 10:18:43  
8 of 5,800 and 3,800, the state and federal does not add up 10:18:44  
9 to 9,800 so some of those have not been allocated as 10:18:53  
10 between state and federal matters. 10:18:56

11 I don't know exactly when they -- we say filed, 10:18:59  
12 but unserved cases are not included in these total. I 10:19:02  
13 trust that means the totals of the state and the federal 10:19:05  
14 cases as opposed to the grand total of 9,800. 10:19:08

15 MR. BECK: It means all three of those totals. 10:19:12  
16 We often have, as I reported last month, a several month 10:19:15  
17 lag, especially with Weitz and Luxenberg. They will filed 10:19:18  
18 lots of cases but won't serve them on us. So, the -- this 10:19:26  
19 last sentence refers to unserved cases, and we don't know 10:19:35  
20 how many cases Weitz and Luxenberg and others have filed in 10:19:40  
21 various courts, but have yet to serve us with. Until they 10:19:46  
22 serve us, we can't plug them into our numbers for the 10:19:50  
23 Court.

24 THE COURT: We just received an eight-page 10:19:54  
25 listing of what, 400 -- 10:20:00

1 THE CLERK: 35, 435. 10:20:03

2 THE COURT: 435 cases from Philadelphia that the 10:20:08

3 Panel has transferred to me. Is that included in this list 10:20:10

4 or are you aware of that? 10:20:16

5 MS. WEBER: If you just got it today, Your Honor, 10:20:19

6 it's not included. Those numbers were put together as of 10:20:23

7 the end of last week. 10:20:25

8 MR. ZIMMERMAN: I guess the numbers speak for 10:20:30

9 themselves, Your Honor. There is no need to further 10:20:31

10 comment on those numbers except that the Court may have any 10:20:35

11 additional questions. Obviously, there is a lag time and 10:20:38

12 the numbers are only as accurate as they were provided to 10:20:43

13 us at the meet and confer. 10:20:47

14 THE COURT: That's correct. I have no questions 10:20:48

15 dealing with the pending cases. Let's move on to 10:20:53

16 settlement. 10:20:57

17 MR. ZIMMERMAN: Thank you, Your Honor. With 10:21:00

18 regard to settlement, Your Honor. As of July 10, 2003, 10:21:01

19 which is the date this was provided to us by defense 10:21:04

20 counsel, there were settled 1,095 cases. That is up from 10:21:10

21 974 cases that were settled as of a little less than 30 10:21:15

22 days ago when we were last before the Court. Of this total 10:21:23

23 of approximately 1,100 settled cases, 292 cases have been 10:21:26

24 settled in the MDL, and the remainder, I trust would have 10:21:33

25 settled in either state cases or unfiled cases. I guess we 10:21:42

1 can just say that they were settled matters. We don't know 10:21:45

2 if they were actually pending files at the time or not. 10:21:49

3 MR. BECK: Your Honor, on that point, I do have 10:21:53

4 an update since July 10th. We settled another group of 10:21:56

5 cases so that our current number of settlements, instead of 10:22:04

6 1,095, as it had been as of July 10th, is now 1,153. So, 10:22:13

7 we settled approximately 60 or so additional cases since 10:22:20

8 then, and I believe, I'm not certain, almost -- that all or 10:22:25

9 almost all of those come from the state court rather than 10:22:32

10 any from the MDL. 10:22:36

11 THE COURT: All right. 10:22:41

12 MR. ZIMMERMAN: Next item, Your Honor, is the 10:22:45

13 mediations that are in process. We have been told that 10:22:48

14 approximately 60 cases have been submitted to the MDL 10:22:53

15 settlement process. I know that Special Master Remele is 10:22:57

16 here and will be reporting perhaps in more detail on that. 10:23:02

17 My only comment is that that is up from 49, that we are in 10:23:07

18 the process as of last time we were before the court. And 10:23:11

19 I can say because we do come into our office that there is 10:23:15

20 a considerable more number of cases -- considerable greater 10:23:21

21 number of cases coming in with the pace of cases coming in 10:23:35

22 for either the settlement program or the mediation program 10:23:39

23 seems to have quicken a little bit over the last 30 days, 10:23:42

24 for reasons, obviously, we don't know. 10:23:46

25 But that is the conclusion of my report on things 10:23:50



1 that we have with regard to pending cases and settlement. 10:23:54

2 I believe the next item will be the report of the Special 10:23:58

3 Master. 10:24:02

4 MR. BECK: Your Honor, while the Special Master 10:24:02

5 is walking up, if I can simply add. As I think Your Honor 10:24:05

6 got a feel for it from the letter that was sent by Sol 10:24:09

7 Weiss, we are in active discussion with Mr. Weiss, a number 10:24:14

8 of cases Mr. Weiss and colleagues of his on a number of 10:24:19

9 cases, and then we are also having discussions with other 10:24:24

10 Plaintiffs' lawyers, Plaintiffs' lawyers around the 10:24:28

11 country. 10:24:33

12 THE COURT: All right. I believe you have a 10:24:33

13 settlement talks at the end of this month, is that correct? 10:24:36

14 MR. BECK: With Mr. Weiss and his colleagues, we 10:24:41

15 have two days set aside at the end of this month to look 10:24:44

16 over his files. 10:24:48

17 MR. REMELE: Good morning, Your Honor. I can be 10:24:51

18 very brief. Mr. Zimmerman is correct that there were 10:24:52

19 approximately 10 or 11 requests this month, an increase 10:24:56

20 from the request that we had under consideration and 10:25:00

21 settlement program as of last month. And we are still -- 10:25:04

22 there is one mediation that is in the process of being 10:25:07

23 scheduled in San Diego, and of the new requests this month, 10:25:11

24 all of those are either were waiting for some additional 10:25:16

25 information, or a number of those requests Bayer has agreed 10:25:18

1 to negotiate. So, we're waiting to determine whether or 10:25:23  
2 not those will settle. 10:25:26

3 But I think Mr. Zimmerman is correct that we are 10:25:28  
4 seeing a quickening of the pace of cases that are being 10:25:30  
5 submitted to the settlement program, at least in the last 10:25:34  
6 month. 10:25:38

7 THE COURT: Thank you. We'll move into the 10:25:38  
8 defense motion dealing with the default that was filed by 10:25:46  
9 Michael and Marilyn Fischer. Mr. Fischer, can you hear us? 10:25:52  
10 We are now into your motion. 10:26:05

11 MR. FISCHER: I can hear you. We are here now. 10:26:09

12 MR. WRIGHT: I'm Elizabeth Wright from Dorsey and 10:26:13  
13 Whitney, and I'm here asking the Court to set aside the 10:26:16  
14 Clerk's entry of default. Because default judgments are 10:26:20  
15 disfavored, and strongly disfavored at that this Court has 10:26:25  
16 wide latitude to set aside a Clerk's entry of default. 10:26:29

17 If there were ever circumstances that warranted 10:26:34  
18 setting aside the entry of default, these are such 10:26:35  
19 circumstances. Perhaps most importantly because the facts 10:26:39  
20 make clear that this was tactical and not a willful 10:26:41  
21 default, Your Honor, Bayer has consistently demonstrated 10:26:45  
22 its intent to defend this action. From the time that it 10:26:49  
23 received the complaint, which was improperly served, it 10:26:53  
24 didn't have a waiver of service form with it, we 10:26:57  
25 nevertheless, as a courtesy to the plaintiff, sent an 10:27:02

1 executed copy of that to him with a letter indicating our 10:27:06  
2 intent to defend. We prepared an answer before the answer 10:27:10  
3 was due. 10:27:13

4 Unfortunately, due an oversight, it wasn't 10:27:15  
5 actually served by Verilaw, but we promptly filed that 10:27:21  
6 answer within seven days, the deadline for business days, 10:27:26  
7 Your Honor. And, then, once we learned that a date after 10:27:30  
8 the answer was due, Mr. Fischer had prepared and sent in 10:27:32  
9 the papers to secure a default. We promptly moved to set 10:27:36  
10 aside that Clerk's entry of default. 10:27:40

11 Where the default's merely technical, the courts 10:27:43  
12 typically do set aside the default, and in doing so, they 10:27:50  
13 often consider three factors. The first is whether the 10:27:56  
14 defendant in this case, Bayer, acted in a blameworthy or 10:27:58  
15 culpable manner. And what's meant by that is more than 10:28:03  
16 that Bayer made a mistake or was even negligent in serving 10:28:06  
17 the answer in an untimely manner, but that it had engaged 10:28:09  
18 in a strategy of delay, or was trying to obtain some sort 10:28:14  
19 of superior advantage by not filing the Answer. That 10:28:19  
20 certainly isn't the case. The minute this was called to 10:28:25  
21 our attention, we promptly filed the answer. 10:28:28

22 Bayer has filed thousands of answers. You heard 10:28:33  
23 the statistics from Mr. Zimmerman this morning, and timely 10:28:37  
24 filed thousands of answers in this cases. I know at Dorsey 10:28:43  
25 we have prepared hundreds and hundreds of them, and to my 10:28:46

1 knowledge, they have been timely. So, this is really the 10:28:50  
2 first instance where there has been a late answer, and in 10:28:53  
3 this case, it was a mere four business days, Your Honor. 10:28:57

4 The next factor -- I should add, too, that this 10:29:02  
5 was an oversight and that we've instituted some more 10:29:06  
6 procedures to ensure that this doesn't happen again. The 10:29:10  
7 second factor is whether there is a meritorious defense. 10:29:13  
8 And, undoubtedly, in this case there is a meritorious 10:29:17  
9 defense. Bayer has demonstrated in the Holtum and Hardy 10:29:22  
10 cases with it's successes there. It's demonstrated it in 10:29:25  
11 this particular case with it's Answer and the defenses 10:29:29  
12 asserted in there. 10:29:33

13 Moreover, as to the specific case, this is a case 10:29:35  
14 where the plaintiff alleges in his complaint he took .3 10:29:38  
15 milligrams. There is no allegations that any doctor has 10:29:43  
16 ever diagnosed him with Rhabdo or any other condition 10:29:47  
17 associated with Baycol. 10:29:52

18 MR. FISCHER: I object now. 10:29:54

19 MS. WRIGHT: Mr. Fischer has not been prejudiced 10:29:56  
20 by this, at most, one-week delay. In terms of what 10:29:59  
21 constitutes a prejudice to plaintiff that would warrant not 10:30:02  
22 setting aside the default, it has to be more than simply 10:30:06  
23 the delay itself. It has to be a delay that causes him to 10:30:10  
24 lose discovery, lose evidence or some other problem that 10:30:13  
25 can't be remedied. None of that is present in this case, 10:30:17

1 and there isn't any allegation of that type of prejudice. 10:30:22

2 Moreover, there isn't any delay here. Bayer AG 10:30:27

3 Answer is not due until August, and, so, really this case 10:30:30

4 isn't fully ready -- 10:30:35

5 MR. FISCHER: Object to that. 10:30:37

6 MR. WRIGHT: Mr. Fischer, contrary to his 10:30:39

7 assertions, has not submitted a fully, completed plaintiff 10:30:40

8 fact sheet. There are numerous omissions in that fact 10:30:43

9 sheet, and he has received, I believe, a letter detailing 10:30:47

10 the problems with the fact sheet. 10:30:50

11 It's clear -- moreover, the evidence is still 10:30:53

12 available. Discovery has been going on as a result of the 10:30:57

13 PSC's efforts for a long time. That discovery is still 10:31:01

14 available to him. There is absolutely no way he has been 10:31:04

15 prejudiced in this case. 10:31:08

16 It's clear really what's going on, especially 10:31:09

17 given the timing of the filing of the papers one day after 10:31:11

18 the answer was due. This really is a plaintiff with some 10:31:15

19 legal experience that is attempting to obtaining a 10:31:21

20 windfall, and in this case that shouldn't be permitted, 10:31:22

21 Your Honor.

22 Given that this is at most only a technical 10:31:30

23 default, we have said the Court affirm the long and strong 10:31:30

24 preference for resolving cases on the merits and set aside 10:31:35

25 the entry of default. 10:31:38

1 THE COURT: Thank you, Mr. Fischer. 10:31:40

2 MR. FISCHER: First of all, the only reason why 10:31:42

3 they filed their Answer is because the Glaxo tipped them 10:31:44

4 off. The most important thing that we need to know about 10:31:50

5 this is that in the complaint and the pleadings and the 10:31:52

6 proof far before the complaint was filed, I notified Bayer 10:31:56

7 about the problems I had. I was diagnosed with 45 percent 10:32:05

8 heart function, which made it pretty big. And I spoke not 10:32:08

9 only with Bayer and Bob Harrison, but they got very 10:32:17

10 concerned, and they also had another Bayer registered nurse 10:32:22

11 talk to me, and they diagnosed from what they were saying, 10:32:27

12 as a Rhabdo situation. 10:32:32

13 I never wanted even to come into this courtroom 10:32:36

14 with a suit. I came to them because I wanted help for my 10:32:38

15 condition. I wanted Bayer to guide me to the proper 10:32:42

16 testing facilities, to the proper hematologist to help me 10:32:47

17 in my health. That was the most important thing that I 10:32:55

18 wanted to have done. I kept getting ignored. I got 10:32:58

19 ignored over and over. 10:33:02

20 In fact, Bob Harrison said, well, what we're 10:33:03

21 going to do, we're going to call the FDA on these doctors. 10:33:05

22 That troubled me tremendously. We're going to get the FDA 10:33:09

23 to investigate this. What bothered me more than anything 10:33:14

24 was the fact that Bayer -- here's a person coming to them 10:33:16

25 with proof, with proof of pills, and the only answer that 10:33:18

1 they can give you is we're going to reimburse you for your 10:33:24  
2 pills. 10:33:28

3 Now, after the suit and during the suit, their 10:33:29  
4 behavior is like, well, you know, we deny these 10:33:32  
5 allegations. We deny those allegations. The point is that 10:33:37  
6 you are dealing with a person that is ill. You're dealing 10:33:40  
7 with a company that recognizes you have these symptoms. 10:33:46  
8 They didn't want this information brought before this 10:33:49  
9 court, but, of course, it's come. 10:33:51

10 In my pleadings, and I'm saying it's hard for me, 10:33:54  
11 but there has to be a showing of prejudice for entry of 10:34:01  
12 default. And they're certainly prejudiced in this case. 10:34:06  
13 There's somebody that doesn't have a lot of time. They 10:34:11  
14 can't play games with Bayer. We're not trying to play 10:34:15  
15 games with Bayer on this. We were asking for help, that's 10:34:17  
16 all. We dismissed case against Glaxo because we didn't 10:34:21  
17 think Glaxo had anything to do with it. Bayer AG doesn't 10:34:26  
18 have anything to do with it. It's just Bayer USA. This is 10:34:28  
19 the American version. Forget about they can teach about 10:34:33  
20 the biological science, just pleadings to Bayer for help 10:34:37  
21 and Bayer doesn't answer. That's all I got to say about 10:34:38  
22 this. 10:34:44

23 There's a showing of prejudice. They defaulted, 10:34:44  
24 okay, and this isn't a one-day delay, this is a long-term 10:34:46  
25 delay, and had Glaxo not tipped them off they, this thing 10:34:50

1 would have gone on and on. A person put under the file, 10:34:58

2 and the Court needs to take a very good look at this. 10:35:02

3 THE COURT: Thank you, Mr. Fischer. Anything 10:35:09

4 further for Bayer? 10:35:10

5 . 10:35:14

6 MS. WRIGHT: Just very briefly, Your Honor. What 10:35:14

7 I note is there is absolutely no evidence that Bayer or 10:35:17

8 anyone else diagnosed Mr. Fischer with Rhabdo or any other 10:35:21

9 symptoms. These are merely allegations and these are 10:35:26

10 allegations that should be tested by discovery and 10:35:30

11 litigation. 10:35:34

12 Regarding this notion that had Glaxo somehow not 10:35:36

13 tipped us off to the default, I think that speaks monuments 10:35:44

14 as to the type gamesmanship we have here rather than 10:35:47

15 prejudice. And I would note that all they did was they 10:35:49

16 noted that we had engaged in this mere oversight of not 10:35:54

17 filed it Verilaw. 10:35:57

18 Finally, I haven't heard any discussion of kind 10:36:01

19 of prejudice, but I will note that this heart condition was 10:36:03

20 diagnosed over a year ago and that it was diagnosed almost 10:36:06

21 a year before he actually filed his complaint. So, I don't 10:36:09

22 understand any urgency or prejudice. Thank you, Your 10:36:14

23 Honor.

24 THE COURT: Anything further, Mr. Fischer? 10:36:17

25 MR. FISCHER: Consider the fact I submitted 10:36:23



1 evidence that I had been diagnosed with a 45 percent 10:36:25  
2 functioning heart. I don't have that much time, and my 10:36:30  
3 wife is here, so she might want to say some things. 10:36:34

4 MRS. FISCHER: He's not well. I've been with 10:36:38  
5 this man for 30 years, and I can't be with him the way I 10:36:41  
6 want to be him. He's weak, and he's not the same man. 10:36:45  
7 He's wearing sweat pants and sweat shirts, and we're in 10:36:51  
8 Florida. He's not well. 10:36:54

9 THE COURT: All right. I'll take this matter 10:36:57  
10 under advisement. I will have an order out as quickly as 10:36:59  
11 possible, and I'll rule on this matter, hopefully, within 10:37:03  
12 this weeks' time. Thank you, Mr. Fischer. 10:37:09

13 MR. FISCHER: Thank you very much. 10:37:19

14 THE COURT: Let's move on. 10:37:19

15 MR. ZIMMERMAN: The next item, Your Honor, is the 10:37:27  
16 Discovery. The report speaks for itself with regard to 10:37:29  
17 discovery, but I would ask that Richard Arsenault, who 10:37:34  
18 normally delivers the discovery report for the PSC, come 10:37:41  
19 forward and give us an little bit of detail, not just where 10:37:47  
20 we have been and numbers we completed, but an overview of 10:37:52  
21 what we believe is left. I think it might be helpful to 10:37:57  
22 the Court. 10:38:01

23 MR. ARSENAULT: Good morning, Your Honor. 10:38:02

24 THE COURT: Good morning. 10:38:03

25 MR. ARSENAULT: To date we have taken 80 10:38:06

1 depositions, 48 of those have been Bayer employees, 12 have 10:38:08  
2 been Bayer AG employees, 14 GSK, and is 6 non-party 10:38:12  
3 depositions. 10:38:18

4 We currently have three depositions scheduled of 10:38:18  
5 GSK people, two in July and one in August. We have 10:38:22  
6 regularly scheduled meetings with both GSK and Bayer to 10:38:27  
7 discuss additional depositions that need to be taken. 10:38:30  
8 Currently, we're in the process of attempting to schedule 10:38:33  
9 three Bayer depositions. A number of GSK depositions have 10:38:37  
10 been brought to the attention of GSK's counsel, and those 10:38:40  
11 are primarily people in the sales and marketing and managed 10:38:44  
12 care division and the medical and clinical and research and 10:38:46  
13 development and finance areas. 10:38:49

14 We also have four Bayer AG depositions that we 10:38:51  
15 think we may need to take as a result of the depositions 10:38:54  
16 that we have taken in Europe before. However, there are 10:38:56  
17 three other depositions, Bayer depositions domestically 10:38:59  
18 that were begun that have not yet been concluded. And 10:39:04  
19 depending on how those go, they may obviate the need for 10:39:07  
20 the Bayer AG depositions. That's where we stand right now. 10:39:12

21 We're getting good cooperation. We meet almost 10:39:15  
22 weekly to discuss the status of these depositions and 10:39:18  
23 setting them up, and we've encountered no problems 10:39:21  
24 recently. 10:39:25

25 THE COURT: Anything from the defense? 10:39:25

1 MR. BECK: Should I still be using the 10:39:31

2 microphone, Your Honor. 10:39:32

3 THE COURT: Can everyone hear Mr. Beck? 10:39:33

4 MR. BECK: Nothing to add in terms of the 10:39:37

5 discovery that's been taken from us. In terms of our 10:39:39

6 efforts to take discovery from plaintiffs, we have been 10:39:41

7 largely stymied, and that's the subject of one of the 10:39:45

8 motions that will be argued later. 10:39:49

9 Your Honor, on the discovery, do you have 10:39:53

10 anything else on discovery? 10:39:56

11 MR. ZIMMERMAN: I do. 10:39:58

12 MR. BECK: I'll wait until Mr. Zimmerman is done 10:39:58

13 on discovery. 10:40:03

14 MR. ZIMMERMAN: As the report indicates, however, 10:40:03

15 Your Honor, there are some matters related to privilege 10:40:05

16 that we are going to have probably some motion practice on. 10:40:09

17 I think it's in the second sentence of Paragraph A. We 10:40:14

18 won't be discussing them at this time, Your Honor, but 10:40:16

19 there are some privilege log and privilege issues that I 10:40:19

20 expect to be the subject of some upcoming motion practice 10:40:22

21 if we can't get it resolved. As the defendant said, they 10:40:26

22 will respond if such motions are, in fact, filed. 10:40:35

23 THE COURT: In dealing with any privilege issues, 10:40:41

24 they are directed to Magistrate Judge Lebedoff. 10:40:41

25 MR. ZIMMERMAN: We understand that, Your Honor. 10:40:48

1 I believe he has probably ruled on some already, if I'm not 10:40:50  
2 mistaken. 10:40:54

3 Your Honor, that does conclude my report on 10:41:02  
4 Discovery, although I am aware of a letter I received this 10:41:06  
5 morning regarding some discovery having to do with the 10:41:09  
6 Italian intervention motion. I don't know if that's the 10:41:13  
7 subject of what you want to discuss it now, but I think we 10:41:18  
8 should decide where on the calendar we want to discuss it. 10:41:21

9 MR. BECK: I thought I would raise it now. Your 10:41:24  
10 Honor, we filed a motion yesterday concerning the conduct 10:41:27  
11 of, at least some members of the Plaintiffs Steering 10:41:32  
12 Committee in connection with their purported 10:41:39  
13 representations. 10:41:42

14 THE COURT: Mr. Zimmerman, allow Mr. Beck to have 10:41:43  
15 the podium. 10:41:46

16 MR. BECK: Your Honor, we filed a motion 10:41:48  
17 concerning the conduct of Mr. Lockridge, Mr. Moll, and we 10:41:50  
18 don't know how many, if any, other members of the 10:41:58  
19 Plaintiffs Steering Committee in connection with their 10:42:02  
20 purported representation of the Italian prosecutor and 10:42:05  
21 their filing of an affidavit, a supposed affidavit by the 10:42:09  
22 prosecutor when, in fact, the prosecutor had informed them 10:42:14  
23 that he would never sign that affidavit. And so far as we 10:42:17  
24 can tell from the recent communications from the Italian 10:42:21  
25 authorities, in fact, the Italian authorities never 10:42:25

1 authorized Mr. Moll or Mr. Lockridge or any members of the 10:42:29  
2 Plaintiffs Steering Committee to appear before them on 10:42:33  
3 their behalf in this litigation. 10:42:36

4 We think this is a serious matter. We're 10:42:38  
5 obviously not asking for the Court to grant any permanent 10:42:41  
6 relief or impose any sanctions based on a memorandum that 10:42:46  
7 we filed yesterday, but what we did ask for and what we do 10:42:51  
8 think is ripe for consideration, especially given that 10:42:54  
9 we're not going to be getting together again until 10:42:59  
10 September, are two things. 10:43:02

11 One is a direction from the Court that no member 10:43:04  
12 of the Plaintiffs Steering Committee or their law firms 10:43:09  
13 destroy or dispose of any documents or other evidence 10:43:15  
14 concerning communications with the Italian authorities 10:43:23  
15 because I'm afraid, Your Honor, that would not be covered 10:43:28  
16 by any sort of preservation order, and we don't want that 10:43:31  
17 evidence to disappear on us before we have a chance to 10:43:36  
18 engage in discovery. So, the first would be a direction 10:43:40  
19 that they preserve those documents, e-mails -- in 10:43:45  
20 electronic form as well as written form. 10:43:49

21 And, secondly, leave to begin taking discovery 10:43:51  
22 from Mr. Moll and Mr. Lockridge, and if we needs it from 10:43:55  
23 others, then we can take that up with Mr. Zimmerman. We 10:44:00  
24 think that there is firm indication of serious misconduct. 10:44:03  
25 We are going to need to take some discovery in order to 10:44:13

1 explore the true ramifications of it, and we would ask for 10:44:18  
2 permission to begin that immediately. 10:44:24

3 THE COURT: These are some serious allegations. 10:44:29

4 MR. BECK: Yes, they're very serious, Your Honor. 10:44:32  
5 The last time that we were in front of the Court we had 10:44:35  
6 just been served with a pleading signed by Mr. Lockridge 10:44:38  
7 that included an affidavit signed by Mr. Moll talking about 10:44:42  
8 how they represented the Italian prosecutor, and how the 10:44:46  
9 Italian prosecutor sought to intervene in this action, and 10:44:51  
10 made factual -- then it had an affidavit purportedly from 10:44:55  
11 the Italian prosecutor containing many factual statements 10:45:00  
12 which we knew to be untrue. 10:45:05

13 I stood up in front of the Court last month and I 10:45:06  
14 said that this affidavit contains all kinds of false 10:45:10  
15 information, and that if, in fact, the Italian prosecutor 10:45:13  
16 drafted this affidavit, we're going to want to take his 10:45:16  
17 deposition because if he's going to seek to intervene in 10:45:20  
18 this action and file sworn statements, he's got to tell the 10:45:24  
19 truth. We were assured that we would be given a copy of 10:45:27  
20 the signed affidavit. 10:45:31

21 In fairness to Mr. Zimmerman, who I think made 10:45:32  
22 that comment, I'm highly confident that Mr. Zimmerman had 10:45:36  
23 no idea that there was no such signed affidavit, but Mr. 10:45:42  
24 Moll sure knew there was no signed affidavit. Whether Mr. 10:45:47  
25 Lockridge knew is a subject that we need to look into. 10:45:53

1           When we followed up with a further request, when 10:45:57  
2 Susan Weber followed up when we didn't receive the signed 10:46:00  
3 affidavit as we had been promised, then she was told that 10:46:05  
4 the Italian prosecutor has decided not to pursue this 10:46:09  
5 motion, but to pursue his right to discovery through other 10:46:13  
6 means. She asked for that in writing, and instead she got 10:46:19  
7 a piece of paper saying the PSC is withdrawing the motion. 10:46:22  
8 And then we got a filing that, interestingly, was not a 10:46:26  
9 filing on behalf of the Italian prosecutor saying, I've 10:46:32  
10 changed my mind and I don't want to intervene, but instead 10:46:37  
11 was on behalf of the Plaintiff Steering Committee saying 10:46:41  
12 that we are withdrawing the motion that was filed in the 10:46:44  
13 name of the Italian prosecutor. 10:46:48  
14           We filed our brief -- memorandum yesterday 10:46:52  
15 morning detailing our concerns after we filed our 10:46:56  
16 memorandum. We got a letter from the Italian prosecutor's 10:47:01  
17 office which had additional information in there including 10:47:07  
18 that the Italian prosecutor's office had told the 10:47:09  
19 Plaintiffs Steering Committee members that they would not 10:47:13  
20 sign that affidavit that had been sent to them, point 10:47:17  
21 number one. 10:47:20  
22           Point number two, and to me more important, is 10:47:22  
23 that is the Italian prosecutor's office says that they 10:47:25  
24 never authorized Mr. Moll, Mr. Lockridge or any member of 10:47:28  
25 the Plaintiffs Steering Committee to appear on their behalf 10:47:34

1 in any litigation, civil or criminal, in Italy or the 10:47:37  
2 United States or anywhere else. Somebody was off on a 10:47:43  
3 frolic of their own pretending to represent a foreign 10:47:47  
4 government official and asking for discovery on behalf of a 10:47:51  
5 foreign government official when the foreign government 10:47:55  
6 official said they never authorized it. And they filed 10:47:59  
7 affidavit on that official's behalf that did contain false 10:48:02  
8 statements. And that may very well be why the Italian 10:48:08  
9 prosecutor refused to file that affidavit. 10:48:13

10 Mr. Moll himself filed a false affidavit. Mr. 10:48:17  
11 Moll's affidavit reports that he represents the Italian 10:48:20  
12 prosecutor in the motion to intervene, when the Italian 10:48:25  
13 prosecutor's office says that he never -- they never 10:48:28  
14 authorized anybody to appear on their behalf. 10:48:30

15 There is also indications, Your Honor, that in 10:48:35  
16 the dealings with the Italian prosecutors, Mr. Moll, at 10:48:37  
17 least, and perhaps some of his compatriots were either 10:48:40  
18 violating the protective order or really skirting the edges 10:48:48  
19 of it. We need to get the facts. 10:48:52

20 According to the Italian prosecutor, Mr. Moll 10:48:54  
21 appeared on his doorstep unannounced and uninvited with a 10:48:58  
22 bunch of documents. And, then, as to documents that had 10:49:02  
23 been marked confidential, which as the Court knows they're 10:49:05  
24 to be used only for this litigation, what Mr. Moll 10:49:09  
25 apparently did, according the Italian prosecutor, is give 10:49:13



1 him a list of bate stamp numbers to ask for. That's not 10:49:17

2 using this information for this litigation. 10:49:21

3 So, we have very serious concerns. They are 10:49:23

4 serious allegations. As I said, we're obviously not asking 10:49:26

5 that they be resolved here on the basis of our filing, but 10:49:30

6 we need discovery, and we want to start taking discovery 10:49:35

7 right away, and there is no reason to delay taking 10:49:39

8 discovery on this. Obviously, they are going to want to 10:49:43

9 respond on the merits, but this warrants discovery. If 10:49:48

10 they are going to make privilege claims and pretend that 10:49:52

11 they did represent the Italian prosecutor, notwithstanding 10:49:56

12 what the Italian prosecutor said, they can make the 10:50:00

13 privilege assertions so we can argue about that. But we 10:50:04

14 ask to be given leave to commence discovery, which I'll 10:50:07

15 represent to the Court in the first instance, will be 10:50:14

16 directed at Mr. Moll and his law firm and Mr. Lockridge and 10:50:14

17 his law firm, since Mr. Lockridge signed the pleading. For 10:50:18

18 all I know, Mr. Lockridge will tell us that all he did was 10:50:24

19 sign the pleading that Mr. Moll drafted and that he has no 10:50:28

20 information about it and that may be the case. But we 10:50:32

21 think we're are entitled to discovery on that rather than 10:50:35

22 just a statement to that effect. 10:50:38

23 Now, we will confine ourselves in the first 10:50:43

24 instance to discovery for Mr. Moll and his firm and Mr. 10:50:45

25 Lockridge and his firm. And if it appears from the e-mails 10:50:51

1 and documents and testimony that we get in that discovery 10:50:55  
2 that there is a need to discuss this with other members of 10:50:59  
3 the PSC, we won't file any discovery requests until I have 10:51:05  
4 had a chance to confer with Mr. Zimmerman and see if we can 10:51:11  
5 reach an agreement. And if we can't reached an agreement, 10:51:16  
6 we'll present it to the Court. 10:51:21

7 THE COURT: Mr. Zimmerman. 10:51:22

8 MR. ZIMMERMAN: First and foremost, Your Honor, 10:51:24  
9 we take this extremely seriously and we want to deal with 10:51:26  
10 it appropriately and expediently as well. If something 10:51:30  
11 inappropriate was done by a member of the PSC, we want that 10:51:38  
12 appropriately investigated. 10:51:42

13 I think the first thing I want to say is that 10:51:44  
14 this is not a question of they, it's not a question of Mr. 10:51:53  
15 Lockridge, I don't believe at all. If there was a member 10:51:56  
16 of the PSC that did something inappropriate, I want to find 10:51:59  
17 that out as quickly as Mr. Beck does and as quickly as the 10:52:05  
18 Court does. I just received this yesterday afternoon, and 10:52:09  
19 I have not had a chance to discuss this with Mr. Moll. I 10:52:14  
20 have had a chance to discuss it briefly with Mr. Lockridge. 10:52:17

21 First to the question of -- I just want to make 10:52:20  
22 sure this doesn't become something where it becomes they, 10:52:25  
23 their compadres and compatriots and spill over into 10:52:29  
24 something it isn't. But, first, I want to find out what it 10:52:36  
25 is. 10:52:40

1 First, with respect to the emergency motion for 10:52:40  
2 protective order to preserve documents, we have no problem 10:52:42  
3 with that. I think that should be done. 10:52:44

4 THE COURT: So ordered. 10:52:44

5 MR. ZIMMERMAN: With regard to leave to conduct 10:52:46  
6 discovery, no problem with discovery. I think we should 10:52:49  
7 meet and confer and figure out what the discovery should be 10:52:52  
8 and how it should be conducted and -- 10:52:54

9 THE COURT: I'm going assign this to Magistrate 10:52:56  
10 Judge Lebedoff, and I want you to -- Debbie, call down 10:53:00  
11 there and see if they can meet with him over the lunch 10:53:02  
12 hour. Debbie, just need five minutes. 10:53:06

13 MR. ZIMMERMAN: Unfortunately, Mr. Moll is not 10:53:12  
14 here. We put a call into his office. 10:53:15

15 THE COURT: I understand that. But dealing with 10:53:19  
16 the discovery, I want that court ordered and set up in an 10:53:21  
17 appropriate manner so everyone knows exactly what's to be 10:53:25  
18 taken and when it is going to be taken. 10:53:29

19 MR. ZIMMERMAN: Just so the Court knows, Your 10:53:32  
20 Honor, Mr. Moll was involved and in charge of this 10:53:33  
21 international issue. He was the one we looked to, and it 10:53:43  
22 was his representations to us that we were relying on. So, 10:53:45  
23 we need to find out as much as the Court does what was 10:53:50  
24 going on. But, certainly, I know Mr. Lockridge and I know 10:53:53  
25 myself, we would never file anything with the Court or 10:53:59

1 serve anything on counsel that had not been represented to 10:54:05  
2 us to be truthful. So, it's very important for us that we, 10:54:07  
3 you know, not be painted with a broad brush on that 10:54:10  
4 allegation and that we be very circumspect on what we focus 10:54:14  
5 on and how we focus it so that it doesn't become something 10:54:20  
6 that it isn't. I think we get very concerned about that as 10:54:24  
7 officers of the court. 10:54:28

8 THE COURT: I agree with that, and I think Mr. 10:54:32  
9 Beck agrees with that, and I think his comments go to not 10:54:37  
10 to Mr. Lockridge but to Mr. Moll. 10:54:43

11 MR. ZIMMERMAN: Right, I think the record should 10:54:47  
12 reflect, and I would be remiss if I didn't say this, Mr. 10:54:49  
13 Moll was not on the slate of candidates presented to this 10:54:54  
14 Court by myself as proposed members of the PSC or the 10:54:58  
15 Executive Committee. We did not submit him to the Court 10:55:06  
16 for approval to the PSC, he made his own separate petition 10:55:14  
17 extraneous from the group that is working together to be 10:55:22  
18 appointed to the PSC. Having said that, I think we'll let 10:55:26  
19 the facts speak for themselves and the results of those 10:55:31  
20 facts and conclusions from those facts will be orderly 10:55:32  
21 discovered. 10:55:36

22 Honestly, on this one, I'm right with Mr. Beck. 10:55:37  
23 I want to get to the bottom of this and I want to see what 10:55:40  
24 comes of it, and I'll not stand for anybody filing anything 10:55:44  
25 that would have been or should have been withdrawn or was 10:55:49

1 inappropriate. 10:55:52

2 THE COURT: You and your representatives meet 10:55:54

3 with Judge Lebedoff at two o'clock this afternoon. I don't 10:55:56

4 know if we'll be finished by then, but if not, then send 10:56:01

5 one of your representatives down. 10:56:03

6 MR. BECK: We'll do so, Your Honor. I do want to 10:56:09

7 say I appreciate the cooperation of Mr. Zimmerman. 10:56:11

8 MR. LOCKRIDGE: May I say a couple of words, Your 10:56:15

9 Honor, also? 10:56:17

10 THE COURT: You may. 10:56:18

11 MR. ZIMMERMAN: Since, unfortunately, it was my 10:56:21

12 name that was listed by Mr. Moll on the Verilaw, obviously, 10:56:23

13 I'm extremely concerned about this. But I do want the 10:56:28

14 Court to know that I sent an e-mail around to Mr. Moll's 10:56:33

15 office and my own office this morning and also to another 10:56:36

16 office, indicating that I wanted them to be certain to 10:56:37

17 retrieve all correspondence, all e-mails, anything 10:56:42

18 whatsoever to do with this entire matter. I certainly have 10:56:47

19 no idea about this matter. So, we will get to the bottom 10:56:51

20 of it, Your Honor. 10:56:56

21 THE COURT: I see appreciate that, Mr. Lockridge. 10:56:56

22 MR. BECK: Your Honor, as I've tried to indicate, 10:57:00

23 I foreshadowed, I think, my expectation that while Mr. 10:57:06

24 Lockridge's name appeared on the pleading, I expect that 10:57:12

25 what we will discovery is that it was drafted by Mr. Moll 10:57:16

1 and his office, but we do need obviously to confirm that. 10:57:19

2 THE COURT: I would like to move quickly on this 10:57:26  
3 matter. So, when you meet with Magistrate Judge Lebedoff, 10:57:34  
4 make sure that he understands that. 10:57:36

5 All right, let's move on to the next matter. Are 10:57:38  
6 we finished with discovery now and dealing with that issue? 10:57:43

7 MR. ZIMMERMAN: I believe we are, Your Honor. I 10:57:46  
8 guess that wasn't the high note I was hoping to start the 10:57:49  
9 proceedings on with regard to the disputed motions, but so 10:57:54  
10 be it. I believe we have a number of motions we believe 10:57:59  
11 are ripe for argument today. I believe we have basically 10:58:13  
12 taken a number of them and we are calling them future MDL 10:58:17  
13 management, which I think we are going to hear later on 10:58:22  
14 after we hear the first three or four is my understanding. 10:58:26

15 But before we do that, and may perhaps not now, I 10:58:29  
16 want to give a little bit of an overview of my view of the 10:58:33  
17 MDL management issues, and then we will go into specific 10:58:37  
18 argument on each of the specific motions. But I don't 10:58:40  
19 believe that's appropriate now if we're going to hear the 10:58:44  
20 motion to modify 24, the interlocutory appeal and the Weitz 10:58:48  
21 motion for reconsideration. 10:58:55

22 And then with regard to the common benefit fund 10:58:56  
23 disbursement issue, I believe that should be an in-chambers 10:59:00  
24 or an in camera argument because I believe it's just a PSC 10:59:05  
25 internal issue. We discussed that at the meet and confer. 10:59:08

1 I don't know if the defense has taken a position on whether 10:59:12  
2 or not they want or believe they should have a position on 10:59:16  
3 that. I haven't heard that they do want to, but we think 10:59:17  
4 that should be heard in camera or in chambers. 10:59:22

5 With regard to the other three motions, I believe 10:59:25  
6 we are prepared to proceed at this time. And, again, when 10:59:28  
7 we get to the management issues, I believe a bit of an 10:59:34  
8 overview from my point of view, I think, would be important 10:59:37  
9 for the Court to hear, at least the PSC's point of view on 10:59:41  
10 overall MDL management. 10:59:44

11 THE COURT: I understand. I would want that. 10:59:46  
12 Let's move on to -- Mr. Beck, let's move to the motion to 10:59:50  
13 modify PTO 24. 10:59:54

14 MS. FLEISHMAN: Does the Court want to hear 11:00:11  
15 argument on that motion? When we were here last on this 11:00:13  
16 particular motion to vacate PTO 24, the Court had asked us 11:00:16  
17 to submit to the Court our varying proposals as to the way 11:00:16  
18 we would suggest to the Court that PTO 24 be modified. And 11:00:23  
19 the Plaintiffs had submitted a proposal to the Court 11:00:25  
20 adopting the New York Times proposal which was to the all 11:00:29  
21 the designations as to confidentiality be withdrawn, that 11:00:33  
22 there be a two-tier approach. The first tier would be this 11:00:37  
23 pro se destination of trade secrets, medical information 11:00:42  
24 and also personal information consistent with Magistrate 11:00:45  
25 Judge Lebedoff's decision during the Amsterdam depositions. 11:00:49

1 And, then, the second tier would be a tier of 11:00:54  
2 non-trade secret, non-proprietary information, but rather 11:00:56  
3 information that either side designated or thought that it 11:01:01  
4 was appropriate to treat as confidential for other reasons, 11:01:06  
5 and that there be a log, similar to a privilege log, that 11:01:06  
6 would accompany that second tier of designations. And that 11:01:11  
7 if, then, the parties cannot resolve any dispute as to a 11:01:14  
8 designation, if they would have an opportunity to meet and 11:01:19  
9 confer and see if they can resolve any issues. If they 11:01:22  
10 couldn't resolve this issue, the dispute would be referred 11:01:27  
11 to Special Master Borg to resolve any open disputes as to 11:01:30  
12 these confidentiality designations, and that all matters 11:01:35  
13 that had confidential designations consistent with the 11:01:41  
14 Court's earlier decision would be submitted under seal. 11:01:45

15 If there was a dispute as to a particular 11:01:49  
16 designation that that would be the subject of a meet and 11:01:52  
17 confer and referred to the Special Master if we couldn't 11:01:54  
18 resolve it in advance of filing the briefs or any 11:01:57  
19 subsequent pleadings. 11:02:01

20 THE COURT: I think I would like to hear comments 11:02:02  
21 dealing with the German law issue because that's what made 11:02:06  
22 this matter be continued a couple of times for everyone to 11:02:11  
23 digest the German law. 11:02:17

24 MS. FLEISHMAN: The German law issue, the Broziac 11:02:22  
25 (phonetic) issue, we would submit, does not change this 11:02:27



1 same proposal of framework that we have submitted to the 11:02:28  
2 Court. The German law issue actually applies to the 11:02:31  
3 personal data, and the personal data is to be treated in a 11:02:35  
4 confidential manner by definition of this first tier of a 11:02:37  
5 per se definition of personal data and the Privacy Act. 11:02:42  
6 The German Privacy Act protects that data. But once it's 11:02:45  
7 designated as confidential, it can be stored, it can be 11:02:50  
8 moved around, it can be treated as confidential within the 11:02:53  
9 parameters of that Act. That act doesn't change the way 11:02:56  
10 you treat the date, what you've already defined as 11:03:02  
11 confidential. 11:03:03  
12 So, by treating the personal data as confidential 11:03:05  
13 and in which there is a Court order in place, we have not 11:03:08  
14 in any way challenged that treats that personal data as 11:03:11  
15 confidential, then we're in compliance with the German law 11:03:13  
16 and there wouldn't be any problem. 11:03:17  
17 The second part of what the defendants are 11:03:19  
18 raising, or specifically what Bayer AG is raising, is that 11:03:22  
19 all the other data, because it's electronically stored per 11:03:25  
20 se, becomes -- should be treated as data under the German 11:03:30  
21 Privacy Act, and that's not what the German Privacy Act 11:03:33  
22 says. The German Privacy Act specifically says personal 11:03:38  
23 data. The other information that gets transferred, just 11:03:40  
24 because it's on CD rom doesn't automatically make it within 11:03:43  
25 the parameters of that Act. 11:03:47



1 are not classified as private by German law. So, we're 11:05:20  
2 back in the soup of having to decide which. I don't 11:05:25  
3 understand Bayer to be saying this. It's certainly would 11:05:31  
4 be appropriate to say simply because it's very complex 11:05:32  
5 because maybe a lot of these documents should be classified 11:05:36  
6 under German law, that we sort of throw up our hands and 11:05:39  
7 not deal with this in a fairly specific, particularized 11:05:44  
8 way. 11:05:49

9 That is why, again, we get back to the 11:05:51  
10 modifications to PTO 24. I think the German law issue just 11:05:54  
11 makes those modifications more critical maybe even that 11:06:00  
12 they were before. 11:06:04

13 The designation would seem to be axiomatic here. 11:06:06  
14 Mr. Beck candidly confessed at the last hearing I attended 11:06:12  
15 here that there had been over classification. We think the 11:06:15  
16 referral to the Special Master that has been proposed is 11:06:17  
17 the ideal way to allow a rational, sensible review of the 11:06:19  
18 different classifications. 11:06:24

19 Again, we don't pretend -- we don't come here -- 11:06:28  
20 we never said we have a right of access to these discovery 11:06:31  
21 exchanges, but we do certainly have some right to receive 11:06:36  
22 what is offered to us. 11:06:39

23 I do think it's unlikely, based on experience, 11:06:40  
24 that the Plaintiffs Steering Committee or whoever else may 11:06:43  
25 have these discovery exchanges will offer us everything, 11:06:47

1 and certainly, then, we focus on what is offered and what 11:06:54  
2 the defendants contest, and then it's to the Special 11:06:56  
3 Master. 11:06:59

4 But we do have -- and this issue of 11:07:01  
5 confidentiality or privilege log is very important to us. 11:07:07  
6 I think we now do have some standing to contest claims of 11:07:10  
7 classification and participate in their disposition. And 11:07:15  
8 since we're not privy by definition to the discovery 11:07:20  
9 materials, we need basis by which to assess whether the 11:07:23  
10 classification claims are legitimate. As much as I have 11:07:32  
11 great confidence from the folks from the PSC, we ought to 11:07:32  
12 have some ability to make our judgment about the 11:07:35  
13 classification claims. 11:07:38

14 Finally, Your Honor, that's why we have proposed 11:07:39  
15 some structure of sanctions in terms of improper 11:07:43  
16 classification claims which the Special Master would be 11:07:47  
17 endowed with or reside in the Court. So, if clearly 11:07:56  
18 improper or excessive classification claims would continue 11:07:58  
19 to be made, then a sanction may be imposed. Experience 11:08:02  
20 teaches that's a very healthy devices for encouraging 11:08:05  
21 fairly scrupulous compliance with the good cause 11:08:12  
22 requirement and deters contrary behavior. 11:08:14

23 So, Your Honor, if you would like me to talk 11:08:18  
24 further about German law, I would be happy to. But, again, 11:08:20  
25 it doesn't lend itself well to brief capsulation. Thank 11:08:24

1 you for your time. 11:08:29

2 THE COURT: Thank you. 11:08:30

3 MR. BECK: Your Honor, when a representative of 11:08:32

4 the New York Times says that he hasn't digested German law, 11:08:35

5 and like German foods, it's indigestible, it's a clever 11:08:42

6 remark, and it's a flip remark and somewhat superficial 11:08:49

7 remark, but it's not the kind of analysis that a Court can 11:08:53

8 engage in. Newspapers can say that, and they can be clever 11:08:58

9 and they can be flip and they can be superficial and that's 11:09:01

10 their right. A Court has to take into account very 11:09:05

11 seriously matters of international comity and cannot 11:09:11

12 dispense with them because they've come up with a clever 11:09:16

13 term of phrase. 11:09:18

14 I think that if the Plaintiffs want to file an 11:09:20

15 affidavit on German law, they ought to be allowed to. So 11:09:22

16 far, we have filed, maybe three, I think affidavits on 11:09:28

17 German law, and all we have received by way of contrary 11:09:33

18 argument are statements made by a lawyer who says he can't 11:09:38

19 digest German law. And, yet, he's ready to file briefs 11:09:44

20 that say that our German law experts must be misreading the 11:09:47

21 Privacy Act. 11:09:54

22 So, I think the proper thing to do is for the 11:09:55

23 Plaintiffs to file something by somebody who does know 11:09:58

24 something about German law, and we'll see what it says. And 11:10:02

25 if we need to respond to it, we'll need to respond to it. 11:10:04

1           So, I believe we have made progress, but           11:10:08  
2    apparently it's still -- additional work needs to be done   11:10:10  
3    and, so, we look forward to reading what their expert has   11:10:14  
4    to say and see if we need to respond. If we do, we'll     11:10:19  
5    endeavor to respond promptly, certainly well in advance of   11:10:24  
6    the next hearing before the Court so that this thing can be   11:10:29  
7    resolved then.   11:10:32

8           I don't think that anything else is ripe for       11:10:33  
9    today if that big issue remains hanging out there.       11:10:35

10           THE COURT: Give two weeks to Plaintiffs to get   11:10:40  
11    their affidavit to me, that's an extra week. Two-week date   11:10:45  
12    is what?   11:10:45

13           MR. MAGAZINER: The 29th.                           11:10:53

14           THE COURT: The 29th by the end of the business   11:10:56  
15    day, and you will need, what, two weeks?               11:10:58

16           MR. BECK: Yes, Your Honor.                       11:11:03

17           THE COURT: Two weeks from then, August 12th.   11:11:05

18           MR. BECK: Thank you, Your Honor.               11:11:12

19           THE COURT: Does the New York Times want to --   11:11:21  
20    you will fit in with those dead lines?                 11:11:25

21           MR. ANFINSON: Yes, Your Honor. I will simply   11:11:29  
22    say, I, again, I think that my comment was intended to    11:11:30  
23    suggest German law is complex, not that it can't be       11:11:36  
24    comprehended. The whole point of going to Special Master   11:11:40  
25    is to work through those complexities and take the burden   11:11:44

1 off the Court. 11:11:44

2 If the Court is inclined to receive affidavits 11:11:46

3 from German law experts, the Times has consulted one in 11:11:48

4 Germany in connection with our response. I will be happy 11:11:54

5 to contact my client. Would the Court be willing to accept 11:11:54

6 an affidavit from that expert as well? 11:11:57

7 THE COURT: Yes, by the 29th so the Defendants 11:12:00

8 will have time to respond to it if they need to. 11:12:02

9 MR. ANFINSON: Thank you, Your Honor. 11:12:07

10 THE COURT: Let's move on. 11:12:08

11 MR. ZIMMERMAN: Your Honor, that next motion -- 11:12:09

12 that was a motion to modify PTO 25. I guess just as a 11:12:11

13 matter of clarification, then, Your Honor, would that then, 11:12:17

14 once these affidavits are received, would the matter then 11:12:21

15 be submitted. 11:12:25

16 THE COURT: It would be submitted after 11:12:25

17 affidavit. I don't think I'll need any further arguments. 11:12:28

18 I'm sure that when you submit your affidavits, you will 11:12:31

19 have your arguments within that. It's time for the Court 11:12:33

20 to rule on this, so, I'll do that in August. 11:12:40

21 MR. ZIMMERMAN: Thank you, Your Honor. The 11:12:46

22 Defendants' request for an interlocutory appeal. I believe 11:12:52

23 that's subject to some argument or comment. 11:12:54

24 THE COURT: Good morning. 11:12:56

25 MR. SCHAERR: Good morning, Your Honor, it's good 11:12:57

1 to be here. As the Court is aware we have filed a request 11:13:01  
2 for certification of an interlocutory appeal with respect 11:13:03  
3 to PTO 77, which is as the Court will recall granted 11:13:07  
4 certain Canadian plaintiffs the right to limited discovery 11:13:14  
5 of materials that were produced in this proceeding under 28 11:13:17  
6 USC 1782. 11:13:19

7 Now, before addressing the merits of our request, 11:13:21  
8 I would like to make three preliminary point. The first is 11:13:24  
9 an apology. I want to apologize to the Court for not 11:13:27  
10 taking an opportunity to address this issue with the Court 11:13:30  
11 on February 7th when it was last on the agenda for hearing 11:13:34  
12 on that day. As the Court may well recall, the PSC 11:13:39  
13 indicated at that time that they didn't want to present 11:13:44  
14 argument on that issue and preferred to have the issue 11:13:47  
15 decided on the papers. I naively stood by and decided not 11:13:51  
16 to argue that day, and it's clear from the way PTO 77 came 11:13:55  
17 out that the Court had substantial concerns about our on 11:14:00  
18 that issue that in retrospect I should have taken the 11:14:04  
19 opportunity to address with the Court, at least attempt to 11:14:09  
20 answer the Court's concerns. So, I would like to try to do 11:14:09  
21 that today. 11:14:12

22 My second preliminary comment is there's nothing 11:14:13  
23 that prevents this Court from sua sponte reconsidering PTO 11:14:16  
24 77 if the Court is persuaded by anything I have to say 11:14:21  
25 today. 11:14:23



1 But, third, although I do want to address the 11:14:23  
2 merits, I also want to emphasize there is no need for the 11:14:27  
3 Court to rush a decision on this particular issue for two 11:14:30  
4 reasons. One is that the full impact of that decision is 11:14:33  
5 not going to be known until the Court makes a ruling on the 11:14:37  
6 separate request by the Canadian plaintiffs for relief from 11:14:43  
7 PTO 24. And, obviously, the effect of PTO 77 on us is 11:14:47  
8 going to depend to some extent, to a significant extent on 11:14:53  
9 the Court's ruling on that motion. 11:14:56

10 Secondly, as the Court may be aware, a case that 11:14:59  
11 raises the very issue presented in PTO 77 is currently 11:15:04  
12 pending before the Supreme Court on cert. The cert. 11:15:09  
13 petition was filed in January. It's a case called Intel v. 11:15:11  
14 A&B out of the Ninth Circuit. The cert. petition has been 11:15:17  
15 pending for sometime. The Supreme Court obviously 11:15:20  
16 expressed an interest in that petition by calling for the 11:15:23  
17 views of the Solicitor General. As of Friday the Solicitor 11:15:26  
18 General still had not responded. I anticipate that they 11:15:31  
19 will respond sometime over the summer so that when the 11:15:38  
20 Court reconvenes in late September or early October, 11:15:38  
21 they'll decide whether to grant cert., and it may be that 11:15:42  
22 we'll have a definitive answer to this question by the end 11:15:44  
23 of the year. 11:15:49

24 So, unless the Court is inclined to give the 11:15:50  
25 Canadian plaintiffs access to our confidential documents, 11:15:52

1 or unless the Court is inclined to grant additional 11:15:56  
2 requests for access under Section 1782, there may not be a 11:16:00  
3 need to rule on our request for certification right now. 11:16:03

4 Let me in all events address the merits of that 11:16:07  
5 request. As the Court is aware, one of the requirements 11:16:11  
6 for an interlocutory appeal is that there be a substantial 11:16:13  
7 ground for difference of opinion on the question presented. 11:16:16  
8 Now, I think there is no question that that requirement is 11:16:20  
9 satisfied here. I believe the Court is aware, and we 11:16:22  
10 explain this in our request, the First, Fourth, Fifth and 11:16:25  
11 Eleventh Circuits have ruled that materials sought under 11:16:30  
12 Section 1782 must be of the sort that would be discoverable 11:16:35  
13 in the foreign jurisdiction in similar circumstances, at 11:16:42  
14 least if that request is made by a private party, which is 11:16:43  
15 true here. And, in fact, there is an opinion written by 11:16:47  
16 Justice Ginsberg when she was a Judge on the D.C. circuit, 11:16:53  
17 which although not squarely addressing and deciding the 11:17:02  
18 question, suggests some support for that view as well. 11:17:02  
19 Yes, it's true that a couple of other circuits have gone 11:17:05  
20 the other way including, the Ninth Circuit, and that's why 11:17:08  
21 there's a decent chance that the Supreme Court will grant 11:17:13  
22 cert. in that case. 11:17:15

23 Now, we believe the majority approach is correct 11:17:17  
24 for at least two reasons. First of all, the majority 11:17:21  
25 position which is the materials have to be discoverable in 11:17:24

1 the foreign jurisdiction under the circumstances presented. 11:17:27  
2 We believe that approach is most consistent with the plain 11:17:29  
3 language of Section 1782. That provision gives the 11:17:32  
4 district courts the authority to require discovery sought 11:17:36  
5 by a foreign applicant, but only if the material is, and I 11:17:38  
6 quote, for use in a proceeding in a foreign or 11:17:44  
7 international tribunal. 11:17:50

8 So the language of the statute itself requires a 11:17:50  
9 U.S. court to ask, is this foreign applicant really seeking 11:17:56  
10 these materials for use in a foreign or international 11:18:00  
11 tribunal, or are they seeking these materials for some 11:18:03  
12 other purpose? Several other courts have recognized that 11:18:06  
13 foreign parties have all kinds of motives other than using 11:18:11  
14 the materials in their home jurisdiction in an ongoing 11:18:14  
15 proceeding to try to seek discovery from proceeding in U.S. 11:18:19  
16 courts. They might, for example, be attempting to get a 11:18:22  
17 Government agency interested in launching an investigation. 11:18:28  
18 Or they might try to create adverse publicity for their 11:18:31  
19 opponent and, thereby, create pressure to settle a claim 11:18:34  
20 before the foreign applicant expends significant effort in 11:18:39  
21 the litigation. Or as several courts have recognized, 11:18:41  
22 foreign parties might be hoping to gain competitively 11:18:45  
23 sensitive information that they can then use in competing 11:18:47  
24 with the U.S. defendants or a related company in the 11:18:50  
25 foreign jurisdiction. 11:18:53

1 Now, if a foreign tribunal, and here I think is 11:18:56  
2 the textual rationale for the discoverability rule. If the 11:18:58  
3 foreign tribunal doesn't allow discovery of a particular 11:19:03  
4 kind of information in the circumstances presented, it's a 11:19:07  
5 pretty good bet that the information cannot, in fact, be 11:19:12  
6 used in that foreign tribunal, at least at the time and 11:19:15  
7 under the circumstances in which it is sought here in the 11:19:18  
8 U.S. And, so, by denying discovery in circumstances where 11:19:23  
9 the foreign tribunal will deny discovery, the majority of 11:19:25  
10 ruling assures compliance with the statutory condition that  
11 the information that is to be truly destined for use in a 11:19:31  
12 foreign or international tribunal rather than for some 11:19:31  
13 other purposes. 11:19:41

14 This case is a good illustration of the 11:19:43  
15 importance of that principal. As the Canadian plaintiffs 11:19:45  
16 admit, there is no way that they can truly use the 11:19:49  
17 information that they would get from this proceeding at 11:19:51  
18 this stage of the litigation in Ontario. They conceded 11:19:55  
19 that that under the Ontario law, none of the stuff that 11:19:58  
20 they are seeking is pertinent to the decisions that are 11:20:03  
21 pending in that action. And, so, at the present time, 11:20:08  
22 their request fails the statutory requirement that the 11:20:10  
23 materials be shown to be for use in a proceedings in a 11:20:13  
24 foreign tribunal. 11:20:17

25 Now, aside from the text of the statute, we 11:20:25

1 believe that the majority position is most consistent with 11:20:25  
2 Congress's purpose in passing the statute. The 11:20:28  
3 congressional goal was not, as the PSC has argued, simply 11:20:29  
4 to provide liberal discovery. In fact, as the First 11:20:34  
5 Circuit concluded in analyzing the legislative history of 11:20:38  
6 Section 1782, this is in the Asta Medica case which we 11:20:41  
7 cited in our briefs, the purpose of 1782 is to liberalize 11:20:45  
8 Section 1782 procedures so as to foster greater cooperation 11:20:50  
9 in international and foreign litigation. 11:20:54

10 Now, the discovery rule promotes that objective. 11:20:57  
11 As the First Circuit put it in Asta Medica interpreting 11:21:00  
12 Section 1782 is a congressional mandate to allow discovery, 11:21:04  
13 although such discovery may not be available in the foreign 11:21:09  
14 jurisdiction, would lead some nations to conclude that 11:21:11  
15 United States courts view their laws and procedures with 11:21:14  
16 contempt. In this manner the broader goal of the statute 11:21:17  
17 stimulating cooperation in international and foreign  
18 litigation would be defeated. 11:21:23

19 Now, this case illustrates the wisdom of the 11:21:26  
20 majority approach as a policy matter. Because discovery is 11:21:29  
21 generally unavailable prior to class certification in 11:21:34  
22 Canada, allowing the Canadian plaintiffs to conduct that 11:21:36  
23 very discovery through this MDL would circumvent the policy 11:21:41  
24 choice that Ontario has made and would circumvent the 11:21:50  
25 discovery process that's provided under Ontario law, and 11:21:51

1 would, therefore, allow the Canadian plaintiffs to impose 11:21:53  
2 costs and burdens that Canadian law dictates should not be 11:21:57  
3 borne until, if at all, until sometime later in the 11:22:02  
4 proceeding. And it doesn't really matter as the PSC has 11:22:02  
5 argued whether a violation of the discovery rule would 11:22:06  
6 offend the foreign tribunal in a particular case. I know 11:22:09  
7 there were some indications from legal opinions in the 11:22:15  
8 Vitapharm case that even though the discovery that the 11:22:20  
9 Canadian plaintiffs are seeking here is not available in 11:22:20  
10 Ontario, nobody would be offended if this Court gave it to 11:22:27  
11 them. 11:22:31

12 I think that kind of analysis, case-by-case 11:22:31  
13 analysis kind of misses the point. The point of the 11:22:37  
14 statute is that as a general matter, if courts in the 11:22:38  
15 United States give foreign parties discovery that they 11:22:39  
16 couldn't get in their own home countries, there is a 11:22:43  
17 significant risk that in the aggregate those foreign 11:22:47  
18 jurisdictions, at least in some percentage of the cases, 11:22:50  
19 are going to be offended by that. 11:22:50

20 It also -- it also seems to us makes no sense to 11:22:53  
21 put a court in a position of having to decide in each 11:22:57  
22 particular case whether a particular request is going to 11:22:59  
23 offend the particular foreign tribunal at issue. There is 11:23:04  
24 really no mechanism by which courts could figure that out 11:23:08  
25 anyway typically. 11:23:12

1 Now, finally, in all event there is a substantial 11:23:15  
2 grounds for disagreement we believe with the PTO 's 11:23:20  
3 conclusion that the Canadian plaintiffs are entitled to 11:23:23  
4 discovery of the materials produced by Bayer AG. As the 11:23:28  
5 Court is probably aware, at least to my understanding, 11:23:36  
6 discovery issues between Canadian and German entities are 11:23:36  
7 governed by the Hague Convention. 11:23:40

8 So, insofar as Bayer AG is concerned, when these 11:23:42  
9 Canadian plaintiffs intervene in these proceedings seeking 11:23:45  
10 files from the German company, they're essentially evading 11:23:51  
11 the procedure that's been established between Canada and 11:23:52  
12 Germany for international litigation. So, with respect to 11:23:55  
13 Bayer AG, there is an additional problem with PTO 77, and 11:24:00  
14 we found no precedent at all supporting the use of Section 11:24:04  
15 1782 in that way. 11:24:09

16 I'll go through the other two requirements for an 11:24:11  
17 interlocutory appeal more for quickly. One of those 11:24:15  
18 requirements is that the issues presented be controlling 11:24:18  
19 questions. Contrary to the argument that we've had from 11:24:21  
20 the other side, this requirement doesn't mean that the 11:24:23  
21 issues have to be enmeshed with the merits of the 11:24:28  
22 litigation. As the Third Circuit has noted in the Katz 11:24:30  
23 case which we have cited in our briefs, controlling means 11:24:33  
24 serious to the conduct of the litigation, either 11:24:37  
25 practically or legally, and according to the Third Circuit 11:24:40

1 the key consideration is not whether the order involves the 11:24:46  
2 exercise of discretion, but whether it truly implicates the 11:24:49  
3 policies favoring interlocutory appeal, including the 11:24:53  
4 avoidance of harm to a party from a possible erroneous 11:24:54  
5 interlocutory order, and the avoidance of possible waste of 11:24:59  
6 trial time and litigation expense. 11:25:03

7 So, in this case the first issue that's presented 11:25:05  
8 by the order which is the discoverability rule, we think 11:25:07  
9 that question is a controlling question within the meaning 11:25:10  
10 of 1292(b) because if that question were decided against 11:25:12  
11 the Canadian plaintiffs, it's undisputed that their 11:25:17  
12 application should be denied and, thus, avoiding any risk 11:25:22  
13 of harm to Bayer and saving time and expense from the MDL 11:25:25  
14 litigants and from the Court. 11:25:30

15 In addition, that kind of ruling would also deter 11:25:32  
16 other requests from foreign litigants who are trying also 11:25:35  
17 to do an end run around their own domestic procedures, and, 11:25:41  
18 thereby, in that way as well avoid burdening the resources 11:25:43  
19 of the court. And in that regard we understand that Mr. 11:25:47  
20 Moll has said that he's planning to bring another request 11:25:51  
21 on behalf of Italian individuals, and, indeed, we 11:25:55  
22 understand that he's in Italy as we speak, whether for 11:25:55  
23 that purpose or for some other purpose, I don't know. In 11:26:00  
24 any event, a ruling in our favor would, of course, deter 11:26:06  
25 that kind of activity. 11:26:10



1           The second question presented by the order which 11:26:10  
2 goes to Bayer AG and has to do with whether Section 1782 11:26:13  
3 can be used to circumvent a treaty between two foreign 11:26:19  
4 countries, that issue is also controlling, we think, again, 11:26:24  
5 because if the Court rules in our favor on that issue, then 11:26:27  
6 Bayer AG will be spared the trouble and expense of 11:26:30  
7 responding to the Canadian plaintiffs' requests and that 11:26:33  
8 ruling will also have a deterrent effect on other litigants 11:26:40  
9 in foreign countries. 11:26:42

10           The final requirement for an interlocutory appeal 11:26:45  
11 is that an appeal would materially advance the litigation, 11:26:49  
12 and we think that requirements is satisfied for the same 11:26:51  
13 reasons. Given that Baycol was sold and consumed in many, 11:26:52  
14 many countries around the world, many of which have made 11:26:56  
15 policy choices to restrict discovery, the order we think 11:27:02  
16 could open the floodgates to numerous Section 1782 11:27:07  
17 applications for foreign litigants throughout the world, 11:27:12  
18 and each of those applications would inject added 11:27:13  
19 complexity and that this proceeding would require 11:27:17  
20 additional analysis of foreign law issues and affidavits by 11:27:17  
21 foreign law experts and all of that. And, so, for that 11:27:22  
22 reason as well, we think that an interlocutory appeal of 11:27:26  
23 this issue, if the Court finds it necessary to authorize 11:27:30  
24 that, would materially advance the litigation. 11:27:33

25           So, for all those reasons, we urge the Court to 11:27:37

1 grant our request for interlocutory review. Alternatively, 11:27:40  
2 as I mentioned before, if the Court isn't inclined to give 11:27:44  
3 the Canadian plaintiffs access to our confidential 11:27:46  
4 documents or grant other requests, it may make more sense 11:27:49  
5 to sit back and wait and see what, if anything, the Supreme 11:27:53  
6 Court does with this issue this Fall. Any questions from 11:27:56  
7 the Court? 11:27:59

8 THE COURT: No. Let's take our break now. How 11:28:06  
9 long is your argument going to be?

10 MS. FLEISHMAN: Very short.

11 THE COURT: Because we need to take a break for  
12 the court reporter. Let's take our break now;  
13 fifteen-minute break

14 (Recess taken.)

15 MS. FLEISHMAN: Very briefly, Your Honor. As I 11:46:12  
16 understand it, the only issue that's before the Court today 11:46:16  
17 is the certification of an interlocutory appeal from PTO 11:46:20  
18 77, not the other motion that was before the Court that has 11:46:24  
19 to do with the confidential documents which motion was made 11:46:27  
20 by the Canadian plaintiffs. 11:46:32

21 With respect to certification of an interlocutory 11:46:34  
22 appeal, it's the Plaintiffs' position that certification of 11:46:35  
23 this interlocutory appeal would be inappropriate under the 11:46:38  
24 three-prong set of tests that are set forth under the 11:46:43  
25 statute. There is no question that there is a dispute 11:46:45

1 among the circuits, however, there is no controlling 11:46:49  
2 question of law before the Court that would materially 11:46:52  
3 advance this litigation. In fact, what's occurred has 11:46:55  
4 materially not affected the litigation whatsoever. I mean 11:46:59  
5 all the Canadian plaintiffs have done is they came to this 11:47:03  
6 Court and said that in order to expedite the discovery in 11:47:08  
7 Canada and to eliminate the costs for the defendants, we'd  
8 like to get copies of the discovery that were produced here 11:47:15  
9 for our motion for class certification in Canada. 11:47:18

10 Now, the class certification is already pending 11:47:21  
11 in Canada. By the time we have resolved all of these 11:47:23  
12 issues, they'll be entitled to the discovery in Canada and 11:47:27  
13 the whole issue will be completely moot by the delay. 11:47:30

14 There is no question that certification of this 11:47:34  
15 is a question of an interlocutory appeal is absurd I 11:47:37  
16 respectfully submit to the Court because this is not going 11:47:40  
17 to materially advance the litigation that's before Your 11:47:44  
18 Honor at all. 11:47:50

19 THE COURT: I understand. Thank you. 11:47:50

20 MS. FLEISHMAN: Thank you, Your Honor

21 THE COURT: Let's move on to the next issue. 11:47:50

22 MR. ZIMMERMAN: The next issue, Your Honor, is 11:48:06  
23 the Weitz motion for reconsideration, and I believe that's 11:48:09  
24 going to be argued by Vicki and Susan Weber. 11:48:12

25 MS. MANIATIS: Good morning, Your Honor. 11:48:23

1 THE COURT: Good morning. 11:48:23

2 MS. MANIATIS: I, too, will endeavor to be very 11:48:27

3 brief. I believe all of our papers and the Defendants' 11:48:29

4 papers pretty clearly outline exactly what has happened 11:48:31

5 here and I know Your Honor is familiar with that. 11:48:36

6 I would like to start off by saying that we did 11:48:39

7 file this motion for reconsideration under the local Rule 11:48:42

8 7(1)(g) in regard to seven particular plaintiffs who did 11:48:47

9 not timely serve fact sheets but did, indeed, serve fact 11:48:50

10 sheets. Under the Haberman v. U Conn Principle, I do 11:48:56

11 believe that we satisfy our requirement for requesting a 11:49:03

12 motion for reconsideration, being granting that privilege, 11:49:06

13 and, in fact, serving the motion. 11:49:08

14 I think that I can do that best by going 11:49:11

15 immediately to the end of what are we looking to do here, 11:49:14

16 and what was required of the plaintiffs and what we did, in 11:49:17

17 fact, do was served fact sheets. I, too, could go through 11:49:20

18 a pretty long litany of just how difficult it was to serve 11:49:27

19 those fact sheets as it was very frustrating for us as well 11:49:32

20 as it was definitely for the Defendants. In fact, to get 11:49:36

21 to the point to have to have the Court involved in it just 11:49:39

22 goes to show just how lengthy a process it was. 11:49:45

23 Each one of these Plaintiffs we did outline, 11:49:47

24 particularly, in our moving papers exactly what their 11:49:50

25 circumstances were. And throughout the history of several 11:49:55

1 weeks' time, if not up to a couple of months' time, we were 11:49:59  
2 doing everything we could to get these Plaintiffs' fact 11:50:02  
3 sheets. Again, those particular issues to each individuals 11:50:08  
4 person is shown in the motion itself. 11:50:10

5 We did ask for extensions. In some cases 11:50:15  
6 extensions to serve fact sheets were granted and some they 11:50:19  
7 were not and some they were granted and still the Plaintiff 11:50:22  
8 did not get a fact sheet in on time. In fact, immediately 11:50:26  
9 after the dismissal of Judge Lebedoff's -- there's two 11:50:30  
10 orders we're talking about here -- but Judge Lebedoff's 11:50:37  
11 April 30th motion it was provided basically a drop dead 11:50:40  
12 date for the fact sheets. They were to be served by May 11:50:42  
13 12th. As you know, they were not served by May 12th. In 11:50:46  
14 fact, three of them were served one day later on May 13th. 11:50:51

15 We did file, the day after that, May 14th, a 11:50:53  
16 request for additional time to serve those fact sheets and 11:50:56  
17 relief from the dismissal. In the alternative, I 11:51:01  
18 understand it might have appeared somewhat schizophrenic to 11:51:06  
19 the defendants because we were literally seeking relief in 11:51:11  
20 four different ways. Because we were dealing with new 11:51:20  
21 system, PTO 81 replacing PTO 54. During that two-week 11:51:20  
22 span, we knew there was a different process and, yet, the 11:51:27  
23 order was not yet entered. I'm not saying that we did not 11:51:30  
24 know what the order was going to say. We did know that. 11:51:34

25 And despite that, we're basically at this point 11:51:39

1 seeking the Court's relief in that these people did face 11:51:41  
2 hardships and did eventually do what we needed to do, serve 11:51:49  
3 the fact sheet. 11:51:55

4 What I ask is is there really -- there was no 11:51:57  
5 malice here. There was no we're trying to put the screws 11:52:01  
6 to the Defendants or anything like that, believe me. It 11:52:05  
7 was nothing like that. There was neglect. There was 11:52:09  
8 excusable neglect, and the Defendants ultimately got what 11:52:12  
9 they were entitled, the fact sheets. 11:52:16

10 What, unfortunately, we sometimes may lose sight 11:52:20  
11 of here is the fact that this is a massive litigation, but 11:52:24  
12 it's a massive litigation that's built upon many, many 11:52:27  
13 individual people, people who have individual problems and 11:52:32  
14 hardships. And we are dealing with each one of those one 11:52:34  
15 step at a time. 11:52:38

16 Some of these people -- sending them letters, 11:52:40  
17 phone calls, it's coming, I promise, we have had mailing 11:52:46  
18 failures -- 11:52:50

19 THE COURT: I don't mean to stop you, but we do 11:52:51  
20 have a lengthy calendar here. And it's -- this issue is 11:52:54  
21 one that, of all the issues that we've had before me, is 11:53:01  
22 that the I do not like to see, do not. We have set up a 11:53:06  
23 schedule that is -- takes in consideration all the problems 11:53:11  
24 that you are outlining and this is the first wave, I 11:53:19  
25 believe, the first wave cases or second wave -- ? 11:53:25

1 MS. MANIATIS: Second wave. 11:53:30

2 THE COURT: Second wave cases, so, they have been 11:53:31  
3 pending for a long period of time. You set a deadline and 11:53:34  
4 I signed off on it. If I grant your relief, I will see 11:53:36  
5 more cases and more arguments and more time spent on this 11:53:47  
6 issue. There is a deadline that has been set, and, so, the 11:53:53  
7 question is how should -- it should be whether or not I 11:53:59  
8 should allow it to be followed. I don't believe this is 11:54:04  
9 excusable neglect. I just don't. They didn't file the 11:54:08  
10 fact sheets within the period of time that was given, and I 11:54:15  
11 certainly know that your office, your firm is working 11:54:21  
12 extremely hard to get the fact sheets, but sometimes that 11:54:26  
13 is not enough. That may be the case in this matter. 11:54:32

14 With that, I'll let you finish your argument and 11:54:36  
15 maybe you can convince me otherwise. At this point, unless 11:54:40  
16 there is going to be extreme sanctions, monetary sanctions 11:54:44  
17 for each individual, I don't see any reason to change 11:54:50  
18 anything. You may want to suggest a sanction, but other 11:54:56  
19 than, that's my comment. 11:55:03

20 MS. MANIATIS: Well taken, Your Honor. With 11:55:06  
21 that, I will be really brief. I don't -- I certainly 11:55:07  
22 respect the position that you just relayed that if this 11:55:15  
23 happened this time it will certainly happen again. And I 11:55:20  
24 can't assure you that it wouldn't ever happen again. I 11:55:24  
25 simply can't do that, that someone would ultimately come 11:55:28

1 through with their fact sheet obligation within days of 11:55:32  
2 when it was supposed to have finally been done. I can't do 11:55:35  
3 that. I wish I could. All I can tell you is on my behalf 11:55:39  
4 and my firm's behalf, we have put into place other 11:55:42  
5 procedures which now, I think, cure that so that we are on 11:55:48  
6 a quicker timeline, anticipating the motions and getting 11:55:55  
7 the information back quicker and serving it, in fact, 11:56:02  
8 timely. 11:56:06

9 So, for these seven people, they fell within a 11:56:11  
10 gray area. We were going from point A to point B. They're 11:56:13  
11 an A and a half, if you will. I see just ask Your Honor's 11:56:18  
12 --

13 THE COURT: You are asking me to consider it. 11:56:28

14 MS. MANIATIS: Consider, yes, that there is a 11:56:32  
15 remedy that would be more appropriate than dismissing with 11:56:33  
16 prejudice these seven people's cases. Thank you. 11:56:38

17 THE COURT: Ms. Weber. 11:56:41

18 MS. WEBER: Your Honor, I think I know better 11:56:54  
19 than to argue something that I think we have already won, 11:56:55  
20 but I have some statistic here where we stand with 11:57:00  
21 discovery on Weitz and Luxenberg, and I wanted to present 11:57:04  
22 those to you so you have a full sense of the picture and 11:57:08  
23 also understand Ms. Maniatis representations that they are 11:57:11  
24 back on track. 11:57:17

25 At this point and time, we have had more than 11:57:19



1 forty-five hundred Weitz plaintiffs whose discovery 11:57:23  
2 obligations have come due in this MDL. That includes 11:57:26  
3 plaintiffs and multi-plaintiffs' cases. It doesn't include 11:57:30  
4 about two dozen cases that were recently transferred here. 11:57:34  
5 It doesn't include the other 1,100 cases that are out there 11:57:37  
6 or as of Friday were out there in the JPL universe. And as 11:57:42  
7 I understand, another 400 may have landed this morning. 11:57:47  
8 Of those, we got 28 percent of the cases that are 11:57:52  
9 dropping out simply at the discovery stage. Either Weitz 11:57:56  
10 stipulated to dismiss with prejudice when we put the 11:57:59  
11 pressure on them to come through, or Your Honor has been 11:58:02  
12 required to dismissed them. We think that's an 11:58:03  
13 extraordinary percentage and reflects the fact that these 11:58:06  
14 cases weren't investigated before they were filed or that 11:58:08  
15 Weitz did not take the step of actually telling plaintiffs 11:58:12  
16 when they filed suit that they might have to respond to 11:58:17  
17 discovery of these people when they realized they had to 11:58:21  
18 respond to discovery, or when Phil discusses later, when  
19 they realized they had to show up for depositions, they 11:58:24  
20 decided they are not interested in pursuing the litigation. 11:58:28  
21 So, we think these are very tells numbers. 11:58:30  
22 But even looking at the cases that are still 11:58:33  
23 pending after you take out the dismissals, we are 11:58:35  
24 continuing to see egregious delays in getting written 11:58:42  
25 discovery out of Weitz. We have thirty-six hundred 11:58:44

1 plaintiffs with discovery due, 12, 15 still overdue. You 11:58:46  
2 dismissed a couple of Weitz plaintiffs just yesterday with 11:58:54  
3 prejudice because they had blown the deadline. 11:58:57

4 There are 949 on the order that Judge Lebedoff 11:59:00  
5 entered last week set, I think what Vicki called a drop 11:59:05  
6 dead deadline for later this month. If Weitz runs true to 11:59:07  
7 form, we're going to see an extraordinary number of 11:59:11  
8 stipulations to dismiss on those cases. 266 of the more 11:59:15  
9 recent cases are about a month overdue. In that group of 11:59:19  
10 cases, we probably got about 320 recent cases on that list. 11:59:22  
11 They've only gotten us about 40 or 50 fact sheets out of 11:59:26  
12 the bunch. So we are continuing to see egregious delays 11:59:29  
13 from Weitz. 11:59:32

14 It's a particular problem here, but I'll tell you 11:59:33  
15 that Judge Ackerman is seeing it as well. I could hand up 11:59:36  
16 an order from earlier this month dismissing a couple of 11:59:40  
17 Weitz plaintiffs in Philadelphia for failure to provide 11:59:46  
18 Plaintiff fact sheets. 11:59:50

19 And as you know with respect to the specific 11:59:54  
20 plaintiffs here, they haven't come forward with any 11:59:58  
21 evidence, much less newly discoverable evidence, and they 12:00:00  
22 haven't shown an error of law. So, we think your dismissal 12:00:04  
23 order was correct, and we would ask you to leave it in 12:00:08  
24 place. 12:00:10

25 THE COURT: All right, thank you. 12:00:10

1 MR. ZIMMERMAN: Can I make a comment, Your Honor? 12:00:14

2 THE COURT: You may. 12:00:14

3 MR. ZIMMERMAN: Your Honor, I can't stand up here 12:00:28

4 and apologize for Weitz and Luxenberg. They are a very 12:00:31

5 sophisticated law firm, one that I happen to respect a 12:00:37

6 great deal, and one, frankly, I've had good relationships 12:00:40

7 with in the past and have been in pretty constant 12:00:47

8 communication with. And in many ways, what Vicki is asking 12:00:52

9 this Court for is a writ of sympathy, if you will, to allow 12:01:01

10 seven people to be perhaps sanctions for not doing what 12:01:10

11 they should have done and, perhaps, sanctioned severely so 12:01:14

12 it sends a strong message, but to not lock the door to the 12:01:21

13 courthouse to them because they were deficient in something 12:01:25

14 that if you think about it in the main is a -- is something 12:01:29

15 we didn't really contemplate, or at least I didn't 12:01:33

16 contemplate at the beginning, and that is one law firm 12:01:37

17 would have so many fact sheet responsibilities that it 12:01:45

18 could, in fact, even to a sophisticated law firm, become 12:01:46

19 difficult to chase down everyone and get everyone in on 12:01:51

20 time. 12:01:55

21 Your Honor, it's probably no different than the 12:01:57

22 first argument we heard today when Bayer came into court 12:01:58

23 and say, ou know, we filed thousands of answered, and we've 12:02:03

24 done most of them on time, and we've done most of them 12:02:07

25 well, but you know, we screwed up. We missed this one with 12:02:09

1 Mr. Fischer. I think Mr. Fischer was pro se. We certainly 12:02:14  
2 all heard his travail. He's certainly is worthy of being 12:02:19  
3 listened to in terms of his cry for you not to grant Bayer 12:02:22  
4 relief. But the fact of the matter is that he Weitz and 12:02:29  
5 Luxenberg are representing similar kinds of people, who, if 12:02:33  
6 we grant the ability to just come back into court and 12:02:38  
7 demonstrate their claim, really we haven't hurt anybody 12:02:42  
8 because there is 9,877 cases out here, or there's 9,870 12:02:47  
9 cases out here. Frankly, I don't think it sends the wrong 12:02:54  
10 message. Vicki has come out two or three times to argue 12:02:58  
11 her point of view, and I think to allow the seven and then 12:03:02  
12 sanction them appropriately is the right thing to do. 12:03:05

13 I want to say one more thing, Your Honor, and I 12:03:08  
14 know I'm belaboring it and I don't mean to, but Ed Blizzard 12:03:12  
15 is here, and I invited him to come from Texas because the 12:03:14  
16 Court made a statement to me and to us the last time we 12:03:20  
17 were here when I said I didn't think many dismissals were 12:03:23  
18 occurring other than in the MDL for failure to provide fact 12:03:25  
19 sheets. And I asked Mr. Blizzard in a meeting we had down 12:03:29  
20 in New Orleans a few weeks ago with Sol Weiss and Matt 12:03:35  
21 Lunde and Dawn Barrios and a few other major state court  
22 players about that question of how -- are we getting equal 12:03:40  
23 protection here? Is the MDL court being asked to be more 12:03:42  
24 draconian than other courts. At least from Ed's 12:03:49  
25 experience, I think he can come forward and tell you what's 12:03:50

1 been going on in jurisdictions like Texas if the Court 12:03:53

2 would like to hear from him. 12:03:56

3 THE COURT: I appreciate Mr. Blizzard being here. 12:03:56

4 He's always welcomed -- 12:04:01

5 MR. BLIZZARD: Thank you, Your Honor

6 THE COURT: -- as long as you turn off your cell 12:04:02

7 phone. Certainly, I don't need to defend my own orders, 12:04:08

8 but it's safe to say that we have put cushion in our 12:04:14

9 orders, and I would not have anything that's draconian 12:04:26

10 happening to any plaintiff or any defendant in any type of 12:04:30

11 litigation before me unless the law clearly stated that. 12:04:33

12 But the discovery aspect of this matter, I think, 12:04:38

13 going along pretty well, and I understand this is a massive 12:04:46

14 undertaking for all parties involved. The question I have 12:04:49

15 in trying to resolve it, and that's in reference to counsel 12:04:53

16 in this matter, is if I allow these seven to come back in, 12:04:59

17 what will keep seven more or two hundred more from coming 12:05:04

18 back and saying, please, Judge, we have sympathetic, we 12:05:11

19 have more sympathetic issues here. We have more alleged 12:05:15

20 damages than the ones that you've allowed to come back in? 12:05:22

21 So, that's the question I'm throwing out. You 12:05:28

22 said severely sanction. I can do that, but we have spent a 12:05:33

23 lot of time on this issue and I'm not happy that I have to 12:05:39

24 deal with these types of issues because I thought we sat 12:05:46

25 down and both sides had negotiated a padding so everyone 12:05:51

1 would be able to meet these deadlines. So, that's my 12:05:57  
2 comment. 12:06:03

3 Mr. Blizzard, you can come forward and give me 12:06:03  
4 the Texas perspective. 12:06:05

5 MR. BLIZZARD: Good morning, Your Honor. I 12:06:12  
6 apologize about the cell phone. I thought it was off. Was 12:06:14  
7 warned and still thought it was off. 12:06:18

8 THE COURT: I accept your apology. 12:06:23

9 MR. BLIZZARD: Judge, I didn't realize I was 12:06:27  
10 going to be arguing this issue or offering my comment. But 12:06:30  
11 let me suggest something to the Court that just occurred to 12:06:33  
12 me. I think certainly the Court's concern about is there 12:06:36  
13 really going to be a deadline if you let these people 12:06:40  
14 escape the deadline. And I think that's certainly a 12:06:45  
15 legitimate concern. Obviously, the dismissal of somebody's 12:06:51  
16 case is the ultimate penalty or sanction. And I would just 12:06:58  
17 suggest to the Court that perhaps the person should be 12:07:01  
18 given the option of a monetary sanction or the dismissal of 12:07:04  
19 their case, an appropriate, from the Court's standpoint, 12:07:12  
20 monetary sanction to discourage people from missing the 12:07:19  
21 drop dead deadline. But in some cases where the person's 12:07:22  
22 injuries are severe, perhaps they want to pay the monetary 12:07:27  
23 sanction and avoid the dismissal of their lawsuit. 12:07:33  
24 In other cases they might opt for the dismissal 12:07:37  
25 of their lawsuit. But I think the sanction would be 12:07:41

1 disproportionate in cases where a person has severe injury. 12:07:48

2 THE COURT: Thank you. Anything further, Mr. 12:07:53

3 Beck? I'm sure that you want to end the conversation. 12:07:57

4 MR. BECK: Just briefly, Your Honor. In terms of 12:08:00

5 what's going on in Texas, my understanding is that in Fort 12:08:02

6 Worth, three cases that had been set for trial, the trial 12:08:08

7 dates have now been stricken because the plaintiffs had not 12:08:13

8 produced their plaintiff fact sheets and that the Judge has 12:08:17

9 established a schedule for presentations of motions to 12:08:21

10 compel. So, it's not like other Judges around the country 12:08:24

11 are ignoring their own orders concerning fact sheets. But 12:08:29

12 I think even if they were, this Court imposes orders that 12:08:36

13 are far from draconian and are by and large negotiated 12:08:41

14 deadlines by the Plaintiffs and the Defendants, negotiated 12:08:47

15 with recognition that the Plaintiffs -- Plaintiffs' lawyers 12:08:51

16 are going to need time to communicate with their clients. 12:08:55

17 If it's the case that Weitz and Luxenberg's 12:08:59

18 advertising campaign and marketing efforts are so 12:09:07

19 successful they are able to file hundreds and thousands of 12:09:08

20 cases, but they don't want to investigate the facts of 12:09:11

21 them, it's important that the Court -- 12:09:15

22 THE COURT: I understand that. The earlier 12:09:18

23 motion with Mr. Fischer, so you know what I'm going to be 12:09:20

24 doing with that, I'm going to be reinstating that case, 12:09:24

25 take away the default. 12:09:36

1           On the seven cases, what I'll be doing is           12:09:36  
2   sanctioning -- monetary sanction. If that's not paid to   12:09:38  
3   Bayer within seven days, the matters will be dismissed with 12:09:47  
4   prejudice. I'll tell you what the sanction is, a thousand 12:09:55  
5   dollars per case. And don't -- spread the word that -- Mr. 12:10:00  
6   Zimmerman, spread the word that it's going to be quite    12:10:06  
7   higher if someone else comes before me, because it will be 12:10:12  
8   the costs of the defendants' filing their briefs plus the 12:10:17  
9   court cost for me having to hear that matter. They will   12:10:20  
10   have seven days. I'll get the order out so that it's       12:10:29  
11   clear. But these are the first of the seven, and I'm going 12:10:32  
12   to stick to the deadline from now on. And unless there is 12:10:35  
13   case really meets the standard, it should not be brought 12:10:40  
14   because I'll sanction the lawyer for bringing that matter 12:10:52  
15   to this Court's attention.                                   12:10:56

16           MR. BECK: Your Honor, may I suggest, and perhaps 12:10:58  
17   this is what Your Honor contemplated, but I think it's    12:11:00  
18   important in a situation like this, picking up on what Mr. 12:11:03  
19   Blizzard said, that the Court be very clear that this     12:11:08  
20   monetary sanction has to be paid by the clients and not by 12:11:08  
21   the lawyers, because otherwise there is no deterrence at 12:11:14  
22   all if Weitz and Luxenberg decides to paid \$7,000 as the 12:11:18  
23   cost of doing business. That the order provides that the 12:11:24  
24   sanction be paid by the plaintiff himself or herself and 12:11:27  
25   that it not be reimbursed by the lawyers.                   12:11:30



1 THE COURT: My order will state what I just said. 12:11:34  
2 It's clear -- I want to make it clear that if these types 12:11:40  
3 of motion is are to be brought, the letter of the law is 12:11:44  
4 going to have to be met. And if they are not met, the 12:11:50  
5 lawyers will be sanctions. The clients will be sanctioned, 12:11:54  
6 not only with dismissal, but with a monetary fine for 12:11:58  
7 having brought the appeal for me signing off on a 12:12:03  
8 dismissal. Unless there is some problem with the time 12:12:08  
9 frame within the guidelines that you have set up that I 12:12:11  
10 have signed off on, that will be the law of this case. 12:12:16

11 All right, let's move it. We're into the 12:12:27  
12 management issues now. 12:12:33

13 MR. ZIMMERMAN: Correct, Your Honor. 12:12:36

14 THE COURT: How long do you think that's going to 12:12:40  
15 take? 12:12:42

16 MR. ZIMMERMAN: All of these motions, I suspect, 12:12:42  
17 are going to take, might be fair to say, an hour apiece, 12:12:45  
18 forty-five minutes a piece. 12:12:46

19 MR. BECK: I hope that's right, Your Honor, 12:12:49  
20 because on a purely personal note, if Mr. Zimmerman and I 12:12:51  
21 are able to hold to that, I'll be able to get back and take 12:12:54  
22 my son to the All Star game tonight. 12:12:56

23 MR. ZIMMERMAN: If we go longer, maybe he will 12:13:03  
24 take me to the All Star game. 12:13:06

25 MR. BECK: I'm hoping we'll be brief. I 12:13:11

1 certainly will be. I'm hoping the Court will take that 12:13:15

2 into account on deciding how long we'll break for lunch. 12:13:16

3 THE COURT: Let's see what we can do here. 12:13:22

4 MR. ZIMMERMAN: Your Honor, we have the one in 12:13:26

5 camera argument. We can put that at the foot unless you 12:13:33

6 want to participate. 12:13:35

7 THE COURT: Do you want to participate in that 12:13:36

8 matter, the Common Benefit Fund disbursement? 12:13:36

9 MR. BECK: I guess what I would like to make is 12:13:43

10 about three minutes of comments on the record, and then 12:13:45

11 I'll be done and however the Court deals with that matter. 12:13:48

12 MR. ZIMMERMAN: Do you want to do that now? 12:13:53

13 THE COURT: Yes.

14 MR. ZIMMERMAN: And then we'll go into chambers?

15 THE COURT: We'll go in chambers at the foot, the 12:13:56

16 end of the day. 12:13:59

17 MR. BECK: Your Honor, the motion has been filed 12:14:01

18 under seal, so, we do not know the contents of it. One of 12:14:03

19 the things that occurred to me is that some Plaintiffs' 12:14:13

20 layers are asking for a disbursal of funds, and I don't 12:14:18

21 have any ideas asked on the papers whether all other 12:14:25

22 potential interested Plaintiffs; lawyers received notice of 12:14:30

23 this or have had an opportunity to be heard. I don't know. 12:14:35

24 I thought I would raise it for the Court so the 12:14:38

25 Court can inquire of Mr. Zimmerman once you get in 12:14:40

1 chambers. 12:14:44

2 I don't know, also, whether there is some sort of 12:14:44

3 predicate that is necessary, or if it is necessary, where 12:14:51

4 the Court think it's been laid, whether, in fact, a common 12:14:55

5 benefit has been conferred. I understand that these funds 12:15:00

6 are supposed to be conferring a common benefit. I think so 12:15:04

7 far the benefits that have been conferred to Plaintiffs 12:15:08

8 have come from the settlement efforts of all concerned, and 12:15:13

9 I don't know whether they are seeking to be reimbursed for 12:15:18

10 that or for other things. I guess the only other thing 12:15:21

11 that kind of sticks in my craw, and I hope the Court will a 12:15:25

12 look at, and I hope Mr. Zimmerman will, is that if by 12:15:28

13 chance expenses for Mr. Moll for having traveled to Italy 12:15:34

14 snuck into this request, that somebody would take a look at 12:15:40

15 that -- 12:15:43

16 MR. ZIMMERMAN: So stipulated, Your Honor. 12:15:44

17 MR. BECK: That's all I have, Your Honor

18 THE COURT: Let's break for lunch and we'll take 12:15:48

19 an hour for lunch and start up at 1:15. 12:15:53

20 (Noon recess taken.)

21 THE COURT: Let's continue, Mr. Zimmerman. Good 13:25:38

22 afternoon. 13:25:41

23 MR. ZIMMERMAN: Good afternoon. 13:25:42

24 THE COURT: Is it warm in here or just me? 13:25:47

25 MR. ZIMMERMAN: Your Honor, we are at the portion 13:26:02

1 of the agenda relating to motions with regard to future MDL 13:26:03  
2 management, and if I could, I'd like to give somewhat of a 13:26:09  
3 PSC perspective about where we are in this litigation and 13:26:14  
4 why we should look to the -- back to the past and to the 13:26:21  
5 future and maybe it will give some context to the motion 13:26:28  
6 that we are going to argue this afternoon. 13:26:31

7 I believe the MDL 1431 is at a bit of a 13:26:35  
8 crossroads, and the motions that we argue today are really 13:26:42  
9 going to help us determine the ultimate direction of this 13:26:45  
10 MDL. And I guess the question is why do I say that, and I 13:26:48  
11 think if you look at the positions taken in the various 13:26:54  
12 motions, and you look at the PSC's point of view and you 13:26:57  
13 look at the defense point of view, you can see a wide 13:27:02  
14 divergent, and I think you can see that the Court really 13:27:05  
15 has to tell us now, giving this wide divergent, where we 13:27:12  
16 need to go from here and how we're going to get there 13:27:15  
17 because we are not seeing it the same way as I read the 13:27:18  
18 issues that are now before the court. 13:27:21

19 A lot of briefs have been written, frankly, Your 13:27:24  
20 Honor, some of them are not very pleasant. Quite honestly, 13:27:29  
21 the PSC thought we should possibly file a motion to strike 13:27:33  
22 the somewhat personal attacks contained in some of the 13:27:39  
23 briefs. We pulled that back and we figured that was just 13:27:43  
24 more of the same, and we are going to try to stay on the 13:27:46  
25 high road and look at the issues as objectively as we can 13:27:49

1 from the Plaintiffs' point of view and let the expressions 13:27:53  
2 of opinions and expresses of views speak for themselves, 13:27:59  
3 and, hopefully, they will all come out with justice. 13:28:05

4 Before we look forward to where we are going, I 13:28:13  
5 want to look back for just a moment, if we possibly could, 13:28:15  
6 where we did have common ground. Both Plaintiffs and 13:28:18  
7 Defendants wanted an MDL. Both Plaintiffs and Defendants 13:28:22  
8 believed that an MDL was in their clients' best interest. 13:28:28  
9 We believed in the precept of the manual for complex 13:28:33  
10 litigation. We told the panel that. We told Your Honor 13:28:40  
11 that. Both plaintiffs and defendants supported the New 13:28:42  
12 Orleans conference where we came together with state and 13:28:47  
13 federal people and talked about the three C's, 13:28:49  
14 communication, cooperation and coordination. 13:28:52

15 We met and conferred regularly. We spoke by 13:28:56  
16 telephone. We met informally and formally. We began a 13:29:00  
17 program of settling very early on serious cases. These 13:29:05  
18 were serious cases as they defined those cases at that 13:29:11  
19 time. That doesn't mean the cases they didn't define were 13:29:19  
20 serious at that time or were nothing at all, but were cases 13:29:22  
21 that needed to be discarded or thrown away or snuffed out. 13:29:25  
22 It simply meant that at that time they wanted to settle 13:29:29  
23 serious cases, and they asked the PSC to get behind it and 13:29:33  
24 we did. 13:29:36

25 We brought to the Court a white paper at that 13:29:37

1 time trying to devise a settlement program and a mediation 13:29:41  
2 program to support the ideas of getting settled -- getting 13:29:44  
3 serious cases settled early. It was something we all 13:29:48  
4 supported. 13:29:54

5 We began a program of coordinated discovery. One 13:29:54  
6 Bayer AG deposition was state and federal. 13:30:00

7 We wanted one plaintiff common fact sheet in the 13:30:03  
8 MDL. There had been problems with it from the Plaintiffs' 13:30:06  
9 point of view, but we stuck to it and we are not going to 13:30:11  
10 go back and talk anymore about Plaintiff fact sheets, but 13:30:13  
11 we negotiated a common Plaintiff fact sheet. 13:30:15

12 We had one document depository. We had an LAC to 13:30:21  
13 help work out problems between state and federal. And we 13:30:25  
14 brought issues with regard to coordination of things, 13:30:28  
15 scheduling of things to that LAC as problems developed so 13:30:31  
16 that we could aid in the orderly process and the orderly 13:30:35  
17 litigation of this case. 13:30:39

18 Footnote, Your Honor, we have not had that kind 13:30:41  
19 of discussion with regard to the depositions of the 13:30:43  
20 Plaintiffs by the Defendants, and we will get to that 13:30:48  
21 substantively. But I show that to the Court as when we 13:30:51  
22 wanted to cooperate, we developed a protocol. Now that we 13:30:55  
23 don't want to cooperate, it seems like everything changes a 13:30:59  
24 little bit. 13:31:03

25 The Plaintiff and the Defendants and the PSC were 13:31:04

1 active in the coordination of depositions and in the 13:31:08  
2 exchange of information. And the result of that, Your 13:31:11  
3 Honor, was almost all the Bayer AG depositions had been 13:31:14  
4 completed. Most of the Bayer depositions had been 13:31:19  
5 completed. We have, I believe, six million documents that 13:31:22  
6 have been delivered to the document depository and coded 13:31:32  
7 and reviewed. We do have this confidentiality problem. 13:31:35  
8 We're working it through. I believe that that is a glitch 13:31:39  
9 that perhaps we will work through. But for the 13:31:42  
10 confidentiality problem, the documents have been reviewed 13:31:48  
11 and transmitted in an orderly fashion. 13:31:51  
12 We have had the certification argued before this 13:31:57  
13 Court which was a very hotly contested argument, and 13:31:58  
14 although it was two days of bitter argument, I think it was 13:32:03  
15 professional, I think it was a lot of fun, if I might add, 13:32:09  
16 and I think it was well done and that matter is under 13:32:13  
17 advisement. 13:32:15  
18 And then we have had the Settlement Mediation 13:32:16  
19 Program where the PSC has been proactive in helping people 13:32:20  
20 throughout the country who had a federal case or wanted to 13:32:25  
21 come into the federal system to help them get their cases 13:32:28  
22 resolved. If you remember, back in, I believe it was 13:32:33  
23 September of last year when we were in Philadelphia, none 13:32:38  
24 of the state court attorneys at that time were interested 13:32:40  
25 in settling. Bayer came to the PSC and said, let's start 13:32:42

1 settling federal cases and see what happens. And now, of 13:32:48  
2 course, the race is on and the PSC and the federal system 13:32:51  
3 has settled 300 case there's been about 700 or more cases 13:32:55  
4 settled on the state side. 13:33:03

5 But we opened the door, Your Honor. We brought 13:33:03  
6 that together through coordination and cooperation. 13:33:03

7 Now, we have a break. Now we are at the 13:33:07  
8 crossroads and here's what it is. Now that the Rhabdo 13:33:11  
9 cases are being resolved and we'll probably find that if 13:33:17  
10 not all the Rhabdo cases in the country, close to every 13:33:21  
11 Rhabdo-like case in the country will be resolved, we have 13:33:26  
12 the question of the rest of the case. And that's when all 13:33:30  
13 of a sudden everything just starts coming unglued. 13:33:36

14 Now, the drug companies have a new strategy -- 13:33:40  
15 limited communication. I haven't had a telephone 13:33:44  
16 conversation. I haven't had an informal meeting of 13:33:49  
17 anything other than a meet and confer on an agenda issue 13:33:52  
18 for months. We have very little cooperation. Everything 13:33:58  
19 is filed by motion. Example, the transfer motion, the 13:34:03  
20 venue motion. No one ever asked us about that. The motion 13:34:08  
21 that says you can't -- the MDL court can't try cases as to 13:34:13  
22 non-Minnesota residents. That was never discussed with us. 13:34:18  
23 One day it appeared on my desk. 13:34:21

24 The other motions, there's been no 13:34:24  
25 coordination -- I mean the other thing is there has been no 13:34:26



1 coordination on is the depositions of Plaintiffs. I just 13:34:28  
2 kept looking at Verilaw and seeing deposition of plaintiff, 13:34:31  
3 deposition of plaintiff, deposition of plaintiff. And, 13:34:37  
4 finally, I think on June 15th, I wrote a letter, an e-mail 13:34:41  
5 to Susan and to Adam and to Fred and everybody that's on my 13:34:45  
6 circulation list on the Defendants' side and said, tell me 13:34:50  
7 what you're doing. When we argue that motion, I'll tell 13:34:52  
8 you what their response was. 13:34:56

9 But the point is, Your Honor, there has been no 13:34:58  
10 coordination and no cooperation going forward and 13:35:00  
11 everything is showing up in motions, and the vitriolic 13:35:03  
12 language contained in the motions shows this crossroads or 13:35:09  
13 this breaking apart. 13:35:11

14 A couple of other things, Your Honor. We want a 13:35:12  
15 list of trials. Plaintiffs seek it and Defendants are 13:35:16  
16 saying no. We want a list of counsel to communicate. We 13:35:21  
17 seek it and they say no. We want to, again, coordinate 13:35:27  
18 Plaintiffs' depositions. We seek it and they say no. We 13:35:31  
19 want to bundle complaints to make it easier for people who 13:35:31  
20 have lots of cases to file in federal court. We seek it, 13:35:37  
21 and they said no. The Court actually said no on that, but 13:35:42  
22 we are coming back to Court with another idea on how to do 13:35:45  
23 it. 13:35:49

24 We asked to be involved in the third-party payor 13:35:51  
25 issues. We seek it, they say no. Finally, we've had to 13:35:55

1 file motions, and we actually have Kim West here, I 13:36:00  
2 believe, from the Blue Crosses of the world, and she wants 13:36:03  
3 to participate in the MDL proceedings, but this whole 13:36:06  
4 third-party payor issue has been something we have sought. 13:36:11  
5 After all, this money is coming out of the Plaintiffs. 13:36:15  
6 They say no. 13:36:21  
7 Plaintiffs move to dismiss fact sheets. They 13:36:21  
8 move to dismiss -- I mean if you don't file your fact 13:36:25  
9 sheets, they move to dismiss if you don't show up for your 13:36:27  
10 deposition, although there is no coordination. They want 13:36:31  
11 to change venue away from the MDL for anyone but a 13:36:36  
12 Minnesota resident. They say you can't try anything if 13:36:38  
13 it's not a Minnesota resident, even though it's originally 13:36:43  
14 filed here. They want us to file case-specific expert 13:36:46  
15 reports, something our research shows us has been done 13:36:50  
16 times in twenty-five years, mostly in environmental cases 13:36:51  
17 where no one knows what the cause or effect or who even the 13:36:53  
18 defendant is. They want that super-imposed on the MDL. 13:36:57  
19 What's the upshot? No coordination, no 13:37:02  
20 cooperation, and, fundamentally, this MDL because at issue. 13:37:07  
21 What the MDL wants, what the Plaintiffs Steering 13:37:12  
22 Committee wants, Your Honor, is to coordinate this 13:37:15  
23 litigation in accordance with the precepts of the Manual 13:37:20  
24 for Complex Litigation. We want to settle and resolve 13:37:26  
25 through litigation or compromise issues that can be settled 13:37:30

1 and resolved -- common issues. Questions that apply to all 13:37:36  
2 cases. Resolve them here, resolve them now. Don't make 13:37:41  
3 each case stand or fall on its own and make this into the 13:37:49  
4 clearinghouse for every single individual case by making 13:37:55  
5 case specific experts doing every deposition here of every 13:38:00  
6 plaintiff and every plaintiff's spouse. Let's focus first 13:38:04  
7 on the common issues, the issues that apply to all cases. 13:38:07

8 We want to have this MDL be a clearinghouse for 13:38:16  
9 facts and information, information to be exchanged freely 13:38:20  
10 which was our pledge in New Orleans. But I can't do that 13:38:24  
11 because I can't get the list of trials. I can't get the 13:38:30  
12 list of counsel. I can't get the settlements that are 13:38:33  
13 going on in other jurisdictions that aren't federal. What 13:38:37  
14 can I do other than ask? And when I'm told I can't have 13:38:42  
15 it, my hands get more and more tied. 13:38:47

16 The goal in the end, Your Honor, is two things, 13:38:51  
17 for this MDL or any MDL. You settle and resolve the 13:38:56  
18 litigation in whole or in part, or you resolve portions of 13:39:03  
19 the litigation and send the cases back to the transferor 13:39:08  
20 court. But when you send them back to the transferor 13:39:12  
21 court, they should be in a lot better shape than they were 13:39:18  
22 before they got here. I don't think that is going to 13:39:22  
23 happen, but maybe it will. It hasn't happened in a lot of 13:39:27  
24 MDL's that I've been involved in and I've been involved in 13:39:30  
25 a lot of them. But if they do go back, they should go back 13:39:33

1 bundled so that the other court, the transfer court can 13:39:44  
2 decide if they want to unbundle or not. It should go back 13:39:44  
3 in a place where it can be tried with certain case specific 13:39:50  
4 discovery to then take place. Doesn't make a lot of sense 13:39:54  
5 for all this case specific discovery, including case 13:39:56  
6 specific medical reports and perhaps case specific 13:39:58  
7 depositions to take place in this court, but we'll talk 13:40:02  
8 about that later, and I have some ideas for that. It 13:40:05  
9 should go back so that the transferor court can consolidate 13:40:11  
10 the trial or not consolidate the trial, depending on what 13:40:14  
11 that particular transferor court wants to do. But we want 13:40:20  
12 to add value to those cases by resolving things we can 13:40:21  
13 resolve. 13:40:26  
14 Most likely we'll resolve all the Rhabdo cases. 13:40:27  
15 We should also resolve some of the common things that we 13:40:30  
16 can resolve by working together to look to see what those 13:40:35  
17 common issues are and bringing them before this court. 13:40:39  
18 That's what the Plaintiffs want. 13:40:42  
19 What the Defendants want is dismissal of cases 13:40:45  
20 because they don't comply with this. They don't comply 13:40:46  
21 with fact sheets. They don't have expert reports. They 13:40:49  
22 don't have case specific expert reports. They haven't had 13:40:55  
23 their depositions taken. They want to keep the 13:40:57  
24 communications to a limited amount with the PSC. In 13:40:57  
25 effect, Your Honor, they want to keep the PSC in the dark. 13:41:02

1           Examples -- our cases are dismissed in other   13:41:05  
2   jurisdictions if there are no plaintiff fact sheets. Up   13:41:09  
3   until recently, I have been told and Mealeys is on the   13:41:16  
4   record, Barry Hill's attorney -- partner in Mealeys is on   13:41:18  
5   the record said there has not been other cases dismissed in   13:41:25  
6   other jurisdictions when plaintiff fact sheets are not   13:41:29  
7   complied. I was told today they are now doing this in   13:41:32  
8   Texas and now maybe in Pennsylvania. But I think this is   13:41:33  
9   all happening very recently.                           13:41:37  
10           The point is not whether it is or isn't       13:41:37  
11   happening, the point is, I don't know. The Defendants   13:41:40  
12   won't -- drug companies won't tell me.               13:41:43  
13           Are our cases consolidated for trial in other   13:41:47  
14   jurisdictions or are they not? Big issue in this courtroom   13:41:50  
15   today. How many cases can we consolidate? Can we       13:41:55  
16   consolidate cases? Well, what's happening in other places.   13:42:01  
17   Are they consolidating them in Texas? Are they not? I   13:42:01  
18   don't know and I'm not told and I'm not provided with the   13:42:06  
19   information.   13:42:09  
20           Are cases settling in the federal system       13:42:10  
21   differently than they are settling in the state system?   13:42:14  
22   Are they settling cases that are not Rhabdo? Are they   13:42:17  
23   settling Rhabdo cases for more money or less money? I   13:42:22  
24   don't know. They won't tell me. How can we be the       13:42:24  
25   coordination, the communication, and the cooperation if we   13:42:28

1 don't know those very basic facts. 13:42:31

2 Your Honor, it's made this MDL somewhat 13:42:37

3 powerless. That's what we want, and that's where we are 13:42:41

4 going. 13:42:47

5 Now the dilemma. The need for the decisions. 13:42:47

6 What is the role of this MDL? What does this Court believe 13:42:50

7 the role of this MDL should be? It probably matters less 13:42:54

8 what I think. It probably matters less what Mr. Beck and 13:42:57

9 his drug company lawyers think. It matters what this Court 13:43:02

10 thinks. What should the role of this MDL be and what duty 13:43:06

11 do we have to the courts and to the clients around the 13:43:10

12 country who are looking to us for direction in their cases. 13:43:14

13 Where should the PSC spend their time and money. Should we 13:43:17

14 be spending our time and money chasing down plaintiff fact 13:43:23

15 sheets, finding plaintiffs' depositions to take? Where is 13:43:25

16 Mrs. Smith? Where is Mrs. Jones? Where is the doctor for 13:43:29

17 Mr. Smith? Where is the doctor for Mr. Jones? Or should 13:43:34

18 we be deciding the issues that apply to all the cases at 13:43:38

19 the same time? I submit the latter. They submit the 13:43:41

20 former. 13:43:44

21 PSC's view -- resolve common issues. Prepare 13:43:50

22 common discovery, allow for an end game. You can't have an 13:43:56

23 end game without cooperation from the other side. If they 13:44:04

24 don't want to have an end game, we will never have an end 13:44:09

25 game. But if they want to have an end game, this should be 13:44:11

1 the place, this should be the place where we allow that end 13:44:22  
2 game to occur by determining to exemplary trials where the 13:44:22  
3 line is going to be drawn on what's a compensatable case 13:44:28  
4 and what's not a compensatable case. It's that simple. 13:44:32  
5 It's not hard to imagine what we have to decide. It's 13:44:38  
6 going to be hard to get there, which goes to our trial 13:44:41  
7 plan. Why are we pushing trials? Why are we pushing for 13:44:44  
8 consolidated trials and a number of trials? Because the 13:44:50  
9 defendants have said that we are settling all of these 13:44:53  
10 Rhabdo cases, folks, help us out -- 13:44:56  
11 THE COURT: May I ask some questions. 13:45:00  
12 MR. ZIMMERMAN: I have a resounding conclusion, 13:45:03  
13 but your questions are more important. 13:45:05  
14 THE COURT: Go ahead. 13:45:09  
15 MR. ZIMMERMAN: I'm just teasing, Your Honor.  
16 THE COURT: Go ahead.  
17 MR. ZIMMERMAN: All I'm saying is we need to draw 13:45:11  
18 those lines and how are we going to draw those lines if we 13:45:13  
19 ever want to get to an end game, and it is to having some 13:45:18  
20 decent trials. You're not going to have decent trials by 13:45:21  
21 picking the worst case in the inventory and saying, gee,  
22 these cases are all garbage because here's two garbage 13:45:26  
23 cases, and these cases you can't win, so, all 9,000 other 13:45:27  
24 cases must be garbage. You have to pick cases that are 13:45:32  
25 legit. You got to pick cases that have justifiable issues 13:45:37

1 in them that we can argue to the Court and the Court can 13:45:41  
2 see the facts and see the evidence. The jury can decide, 13:45:42  
3 is this compensatable or isn't. 13:45:45

4 We can get up here all day long and argue why 13:45:49  
5 muscle damage occurs with Baycol and how it affects all 13:45:49  
6 these people, and they can get up here all day long and say 13:45:52  
7 muscle damage is nothing and means nothing, and everybody 13:45:54  
8 has got aches and pains, and these are garbage cases, go a 13:45:59  
9 way. The fact of the matter is nobody is going to convince 13:46:01  
10 the other. The jury's going to be convinced by the 13:46:03  
11 evidence. It's going to help the lawyers in this country 13:46:05  
12 decide where the lines are going to be drawn. It's going 13:46:07  
13 to help Bayer decide or Bayer or Bayer AG, or these drug 13:46:11  
14 companies or GSK, what and if they want to have an end 13:46:12  
15 game, plain and simple, because Rhabdo is out of this case 13:46:16  
16 between now and the next ten months, I believe, given the 13:46:21  
17 fact that we are eleven hundred cases down the road. 13:46:25

18 We got to leave the individual issues to the 13:46:33  
19 transferor court. We have to let them unbundle the cases 13:46:36  
20 if we got them bundled here. We have to let the final 13:46:41  
21 medical work-up if we have to remand the cases in the 13:46:46  
22 remanded court. It doesn't make sense to do it two years 13:46:49  
23 ahead of time. It doesn't make sense to do it twelve 13:46:52  
24 months ahead of time. You want to do the medical work-up 13:46:54  
25 near the time that case is going to get resolved. Maybe it 13:46:58



1 should be at the time of remand when we have a mediation of 13:46:58  
2 mandatory mediation. Maybe that's when the medical work-up 13:47:01  
3 should occur. But certainly to occur well before we know 13:47:06  
4 when that's going to happen makes no sense. It's wheel 13:47:10  
5 spinning. It's money spent. It doesn't advance the common 13:47:14  
6 issues. It doesn't advance the MDL agenda. 13:47:16

7 We want to prepare the cases for trial if they 13:47:20  
8 are going to be tried on an individual and/or consolidated 13:47:23  
9 basis depending on what the remanded court and transferor 13:47:27  
10 court wants. 13:47:32

11 Your Honor, I say we are at a crossroads, and we 13:47:34  
12 are at a crossroads because of this. Both sides need to 13:47:37  
13 understand their exposure and their risk. We can write all 13:47:40  
14 day long how I think the cases are muscle damage case and 13:47:47  
15 their worth lots and lots of time and money, and Mr. Beck 13:47:51  
16 can get up here all day long and say they're nothing but 13:47:54  
17 muscle aches and pains and they don't mean nothing, and the 13:47:57  
18 facts that two of them got dismissed in MDL, and 600 have 13:47:58  
19 been dismissed on Weitz and Luxenberg, mean that all 9,000 13:48:03  
20 garbage. That means absolutely nothing. 13:48:08

21 The way we seek and evaluate risk is to have 13:48:09  
22 cases set for trial, maybe even summary jury trials. It 13:48:11  
23 worked well in Telectronics. We kind of dismissed that 13:48:14  
24 early on because there are a lot of reasons why we didn't 13:48:18  
25 want to go there. Maybe it wouldn't be such a bad idea 13:48:21

1 now. We can be creative. We can be exploratory in our 13:48:24  
2 thoughts. But if we don't have a communication, Your 13:48:30  
3 Honor, if we're not going back in chambers with the Judge 13:48:32  
4 and with both sides trying to work these things out and 13:48:34  
5 everything gets argued out in open court through vitriolic 13:48:40  
6 briefs, you know where we end up, with a lot of trouble, 13:48:44  
7 with a lot of words, and we don't end up with much 13:48:47  
8 direction. And we don't end up with much common ground. 13:48:54  
9 I submit it's time to put that behind us and try 13:48:54  
10 and get to some common ground and try and determine what 13:48:58  
11 this Court believes its role should be, and we'll play 13:49:02  
12 along with it as the Court sees fit, and not as Mr. Beck or 13:49:05  
13 I see fit. 13:49:09  
14 Real trials will help us define those boundaries. 13:49:10  
15 The fact that the defendants demean the case does not mean 13:49:16  
16 the case will go a way, Your Honor. 13:49:21  
17 So, what is this case about? Final thought. Is 13:49:24  
18 this a maze to endure? Is it a group of boxes to go 13:49:28  
19 through to see if you can get -- be standing at the end? 13:49:36  
20 Or is it a place to resolve common issues so that either we 13:49:40  
21 know what is compensatable or not, and either we resolve 13:49:48  
22 the common issues here, have the end game here, or the 13:49:54  
23 cases go back and get tried because we can't agree. I 13:49:57  
24 submit the latter; they submit the former. 13:50:00  
25 Remember, Your Honor, without this MDL, without 13:50:03

1 this litigation, these eleven hundred Rhabdo cases will not 13:50:06  
2 be resolved. Mr. Fischer is a testimony to that. They 13:50:12  
3 offered him part of his pills back, and he was in 13:50:18  
4 negotiation with them for months. It took lawyers getting 13:50:22  
5 in the box, getting before the Court, holding Bayer's feet 13:50:25  
6 to the fire during discovery. Things happened. Things 13:50:29  
7 didn't happen when you got one poor soul out there trying 13:50:35  
8 to make justice for himself. MDL has made justice, Your 13:50:40  
9 Honor, and that's what we are here to do. 13:50:44  
10 The dialogue is gone and I regret it. The 13:50:47  
11 understandings we've reached through dialogue is gone, and 13:50:52  
12 I regret it. We are all smart lawyers, Your Honor. We all 13:50:56  
13 know how to argue. We have shown it with out briefs, and 13:51:01  
14 we have shown it with our advocacy, but we've forgotten how 13:51:04  
15 to talk. 13:51:09  
16 Every other MDL I've been involved in, and I've 13:51:11  
17 been involved in many MDL's, Breast Implants in 1992 13:51:15  
18 through Propulsid today and many in between. We've talked 13:51:18  
19 through issues and we found common ground. Why not here? 13:51:23  
20 The MDL Manual for Complex Litigation advises 13:51:28  
21 counsel to proceed in a civil, cooperative, and creative 13:51:35  
22 spirit to advance the determinations disputed issues on the 13:51:37  
23 merits. The PSC has endeavored to proceed in this spirit. 13:51:41  
24 The drug companies, it seems, have chosen a different path. 13:51:48  
25 Why not Baycol, Your Honor? Let's bring the 13:51:52

1 dialogue back to Baycol. That's our plan, Your Honor, and 13:51:56  
2 that's what we would like to proceed with. You got some 13:52:02  
3 questions? 13:52:08

4 THE COURT: The lawyers that are going down to 13:52:10  
5 Magistrate Judge Lebedoff, get ready to leave. 13:52:12

6 MR. ZIMMERMAN: As I understand it, and I'm sure 13:52:18  
7 Mr. Beck will have some comments to what I have said, we've 13:52:20  
8 got now several motions to be heard on the merits, and I 13:52:25  
9 believe it's going to follow in the order of the bundling 13:52:30  
10 with Ron Goldser for the Plaintiffs; proposed trial plan 13:52:34  
11 with Ron Meshbesh for the Plaintiff -- 13:52:38

12 THE COURT: I'm sorry, I want to know who's 13:52:45  
13 arguing. 13:52:47

14 MR. ZIMMERMAN: First, I believe, is the PSC's 13:52:47  
15 motion to file multi-parties' complaint. We call that 13:52:50  
16 bundling. Ron Goldser for the Plaintiffs. Then we have 13:52:55  
17 the PSC proposed trial plans. I believe that would be Ron 13:52:57  
18 Meshbesh. We have defendants' motion to transfer venue, 13:53:03  
19 which is the motion to transfer cases away from the MDL. 13:53:09  
20 That would be Dick Lockridge. And then we have the 13:53:13  
21 protective order motion, which is basically the discovery 13:53:17  
22 depositions of Plaintiffs, that would be me. And then we 13:53:22  
23 have the motion to establish a pilot program for case 13:53:24  
24 specific expert discovery. That would be me. 13:53:30

25 MR. BECK: Your Honor, I, of course, am entirely 13:53:33

1 indifferent as to who argues what. I assumed we would 13:53:36  
2 argue them in the order in which Your Honor instructed us 13:53:42  
3 to argue. 13:53:43

4 MR. ZIMMERMAN: I didn't mean to amend -- I was 13:53:44  
5 telling who was arguing. 13:53:48

6 MR. BECK: The Court sent us an e-mail saying I 13:53:50  
7 want to argue in this order. 13:53:53

8 MR. ZIMMERMAN: I thought we were arguing in the 13:53:55  
9 way we had it on the agenda. Is that not true? That's the 13:53:58  
10 order, I think. Won't we go in the order on the agenda, 13:54:06  
11 Phil?

12 MR. BECK: Well, the Court asked that they argue 13:54:15  
13 as a group. But I think it probably makes sense to do what 13:54:18  
14 Mr. Zimmerman has done, and that is give an overview. I'll 13:54:23  
15 give an overview, and let's not waste time horsing around 13:54:29  
16 which order we do it. It's whatever order you want, we'll 13:54:35  
17 do it in. 13:54:36

18 THE COURT: Mr. Beck. 13:54:39

19 MR. BECK: Thank you, Your Honor. I, too, will 13:54:41  
20 make a few opening remarks, giving the overview from 13:54:50  
21 Bayer's point of view, and I think from probably GSK as 13:54:56  
22 well. 13:54:59

23 I do think that we are at a bit of a crossroads. 13:55:00  
24 The Court did us both a service by taking these different 13:55:09  
25 motions, perceiving that they all did have to do with the 13:55:13

1 overall future of the MDL, putting them together so that we 13:55:20  
2 could deal with them in a broader context and recognizing 13:55:24  
3 that they all interrelate. And they do -- the resolution 13:55:28  
4 of them will determine, really, the nature of how the MDL 13:55:33  
5 proceeds from here on out. So, I join Mr. Zimmerman in his 13:55:41  
6 remarks concerning how this is a crossroads and how we do 13:55:47  
7 need direction because it is going to determine how we 13:55:55  
8 proceed. 13:55:57

9 I'd like to give our perspective on the factual, 13:55:57  
10 very broad factual context. Ours is a little different 13:56:04  
11 from the Plaintiffs Steering Committee's. 13:56:08

12 I think that this MDL is an unusual situation, 13:56:11  
13 principally, because we announced and implemented a 13:56:17  
14 settlement program that may be unprecedented in its level 13:56:23  
15 of success. I think that -- I'm very proud of my client 13:56:27  
16 for how it proceeded in this regard. And, frankly, we have 13:56:34  
17 gotten nothing but plaudits from everybody concerned in 13:56:39  
18 terms of the way that we've approached the cases where they 13:56:45  
19 have been -- they have been documented side effects from 13:56:50  
20 our medicine. 13:56:53

21 We have said that where someone can show a real 13:56:55  
22 side effect, and let me say, that we have worked with 13:56:58  
23 people, with Plaintiffs' lawyers to help them develop a 13:57:04  
24 case of the side effect, because if there is a side effect, 13:57:09  
25 we want to deliver compensation rather than to play 13:57:14

1 lawyers' games about whether they can prove definitively 13:57:20  
2 that there is one. So, we have been very cooperative on 13:57:24  
3 that front, and we have made huge strides in resolving 13:57:27  
4 cases where the Rhabdo actually occurred from the use of 13:57:32  
5 our product. 13:57:40

6 As I said when I stood up in New Orleans at the 13:57:40  
7 conference that Your Honor convened, we were open for 13:57:46  
8 business to settle these cases, and we were not going to be 13:57:49  
9 arguing about liability. We were not going to be arguing 13:57:52  
10 even about a potential alternative causes if we could see 13:57:56  
11 Rhabdo. That we wanted to step up to the plate, and that 13:58:02  
12 we wanted to deliver substantial settlement dollars rather 13:58:06  
13 than to have plaintiffs waste their time and money 13:58:11  
14 litigating. But if people were going to ask for money that 13:58:14  
15 we thought was outside the realm of reason, or if they were 13:58:20  
16 going to pursue claims where there were no real injuries, 13:58:25  
17 we would defend ourselves on the merits. 13:58:30

18 I don't think, frankly, that a lot of Plaintiffs' 13:58:32  
19 lawyers believed us at the time. I don't think they 13:58:35  
20 believed us when we said that we were going to be 13:58:39  
21 aggressive and cooperative in settling these cases. I 13:58:41  
22 don't think that they thought we were sincere. And I don't 13:58:45  
23 think that they believed us when we said we were going to 13:58:48  
24 defend ourselves, rather than settle case where people were 13:58:52  
25 seeking extortionate money or seeking money for claims 13:58:55

1 where there was no injury. 13:59:00

2 What's unusual, I think, is not only the success 13:59:03

3 of our settlement program, but also the fact that we have 13:59:05

4 followed through on our resolve to defend ourselves. And 13:59:08

5 we have been happy so far successful in doing so. We were 13:59:14

6 unable to settle the cases or when the cases should not be 13:59:20

7 settled because they don't involve any actual injuries. 13:59:26

8 So, we have this unusual context that it's normally not 13:59:26

9 faced in an MDL, and I think that's what drives the 13:59:31

10 different approaches that have evolved in recent months. 13:59:36

11 Because I really think that the Plaintiffs Steering 13:59:41

12 Committee's approach has fundamentally changed once the 13:59:44

13 Plaintiffs Steering Committee figured out that the Rhabdo 13:59:49

14 cases were going to go away because of our settlement 13:59:52

15 program, and that instead, this MDL was going to become, 13:59:56

16 from Mr. Zimmerman's words a mecca for the other cases, you 14:00:01

17 can fill in the adjective. We call them aches and pains 14:00:07

18 cases. They call them now -- their phrase is the muscle 14:00:14

19 injury cases. And rather than be accused of calling 14:00:17

20 somebody names or using perjorative terms, I'm going to 14:00:22

21 call them non-Rhabdo cases. 14:00:28

22 So, now this MDL, according to the Plaintiffs 14:00:31

23 Steering Committee, no longer really has anything to do 14:00:36

24 substantially with the cases where people actually suffered 14:00:39

25 significant sides effects from our medicine, whether we did 14:00:41



1 anything wrong other not. This is beside the point in 14:00:48  
2 terms of the settlement program. But, instead, it is a 14:00:50  
3 mecca for cases where people did not suffer the significant 14:00:52  
4 side effect that was the focus of this case or all of these 14:00:57  
5 cases when they were filed. 14:01:02

6 So, now the Plaintiffs Steering Committee wants 14:01:05  
7 to switch gears, and they have changed positions on many 14:01:07  
8 things because the MDL has morphed for them. And now this 14:01:12  
9 MDL in their mind is a warehouse for non-Rhabdo cases, and 14:01:23  
10 they are trying to figure out an end game. I heard that 14:01:27  
11 phrase, that word several times from Mr. Zimmerman. The 14:01:33  
12 end game, let's just drop all pretense. 14:01:35

13 The end game from the Plaintiffs Steering 14:01:38  
14 Committee's point of view is to figure out a way to extract 14:01:41  
15 a whole bunch of our money for claims where people were not 14:01:49  
16 injured but, in fact, benefited from our medicine. And to 14:01:52  
17 distribute little bits of that to how ever many thousands 14:01:56  
18 of clients they can round up, and then tens of millions or 14:02:00  
19 hundreds of millions to be divvied up among the lawyers. 14:02:04  
20 That's the hope for end game. 14:02:06

21 I'm sorry if somebody takes offense, but that's 14:02:09  
22 what everybody in this courtroom notes is the hoped for end 14:02:13  
23 game. Now, that's not the end game we are looking for. 14:02:18

24 So, what is the Plaintiffs Steering Committee now 14:02:22  
25 proposing in terms of the future of this MDL? First of 14:02:26

1 all, they continue to file large numbers of uninvestigated 14:02:29  
2 claims. And I emphasize the adjective uninvestigated 14:02:34  
3 because there is nothing wrong with filing a large number 14:02:45  
4 of claims, but by their own admission, by the admission the 14:02:49  
5 Weitz and Luxenberg people, and running thought all these 14:02:51  
6 briefs on their failure to comply with discovery, is that 14:02:54  
7 they don't have any idea whether these cases are any good 14:03:01  
8 when they file them. We've had the, frankly, preposterous 14:03:01  
9 situation where the two case that happened to get picked 14:03:06  
10 for trial, and I think one of them was by them, as 14:03:10  
11 suggested in the first instance, where they were non-Rhabdo 14:03:14  
12 cases which Mr. Zimmerman says involved these serious 14:03:16  
13 injuries. Well, the two cases that we actually put the 14:03:21  
14 spotlight on for trial, they dismissed with prejudice 14:03:25  
15 because they can't prove the case. Nobody investigated the 14:03:29  
16 claims before they were filed. That doesn't happen until 14:03:35  
17 we get a trial date. And, then, they look at the cases and 14:03:38  
18 say they are no good and dismiss them because they don't 14:03:42  
19 want to go to trial on a lot of these cases, or they 14:03:46  
20 haven't. 14:03:50  
21 So, we have large numbers, again, I emphasize of 14:03:50  
22 uninvestigated claims being filed. And they want to now be 14:03:53  
23 able to bundle those uninvestigated claims together to save 14:04:00  
24 money. 14:04:03  
25 Now, Mr. Zimmerman says these are serious claims 14:04:04

1 with serious injuries, and, yet, they are not serious 14:04:08  
2 enough that they are willing to incur the filing fee on an 14:04:12  
3 individual plaintiff by individual plaintiff basis, 14:04:15  
4 notwithstanding the fact that this Court has twice told 14:04:19  
5 them that is what they have to do. 14:04:22

6 So, they want to bundle their uninvestigated 14:04:24  
7 claims, do no investigation at all to find out whether the 14:04:27  
8 claims are any good, and bundle them all together to save 14:04:32  
9 money and to make it impossible for us to take a look at 14:04:34  
10 these claims and make any judgment about what the 14:04:39  
11 individual facts are, and to make it unbelievably 14:04:42  
12 complicated going forward for us to engage in discovery on 14:04:47  
13 the individual claims. 14:04:51

14 And, then, having filed hundreds ever thousands 14:04:53  
15 of uninvestigated claims and attempting bundle them 14:04:57  
16 together, they now, basically announced that they are 14:04:59  
17 reneging on the agreement that they entered into way back 14:05:08  
18 when that we would be allowed to take case specific 14:05:12  
19 discovery from plaintiffs. This is an agreement that we 14:05:17  
20 negotiated with them as part and parcel of our commitment 14:05:20  
21 to produce our documents in a timely way, and to produce 14:05:24  
22 our witnesses in a timely way, to cooperate with them on 14:05:29  
23 the service of process of our foreign client, to cooperate 14:05:34  
24 with them on foreign depositions which we could have made 14:05:36  
25 unbelievably complicated and cumbersome. But we cooperated 14:05:42

1 with them as part of an overall negotiation on how the 14:05:48

2 discovery would take place in this case. 14:05:48

3 When Mr. Zimmerman said we used to have a lot of 14:05:51

4 cooperation, but we don't have any cooperation anymore. 14:05:56

5 Well, we used to have a lot of cooperation when we talked 14:05:59

6 about Bayer's documents and Bayer AG's documents in 14:06:06

7 expediting production of those documents in exchange for a 14:06:10

8 protective order. 14:06:12

9 We had a lot of cooperation when we were talking 14:06:12

10 about producing Bayer witnesses. Yeah, we did have a lot 14:06:15

11 of cooperation. Where the cooperation ceased is when we 14:06:17

12 wanted to take Plaintiffs' depositions. And when we said 14:06:19

13 what about it, you committed to producing Plaintiffs' fact 14:06:23

14 sheets so that we could defend ourselves, so that we could 14:06:26

15 take a look and examine whether your cases are any good 14:06:30

16 and, of course, now they want to be relieved of their 14:06:33

17 promises that they made in exchange for the promises that 14:06:37

18 we not only made, but kept. 14:06:41

19 So, Your Honor, with all respect, when I hear 14:06:45

20 about how the cooperation ceased, it rings hollow to me 14:06:49

21 because even today's report on discovery from us, today's 14:06:57

22 report from the Plaintiffs' counsel was on how much 14:07:02

23 cooperation there is, and how there are little bumps in the 14:07:04

24 road and there are legitimate disagreements and those get 14:07:10

25 submitted, but that Bayer is cooperating. But we can't 14:07:13

1 take any depositions of their clients. We can't get their 14:07:17  
2 fact sheets. We can't get cooperation going the other way, 14:07:22  
3 and we can't get expert witnesses to opine on their cases. 14:07:26  
4 For us to ask for such things is an outrage. Mr. Zimmerman 14:07:30  
5 appears outraged that we would have the temerity to want to 14:07:37  
6 look at the facts of the case that he's filed against us. 14:07:41

7 So, they have got the large number of 14:07:45  
8 uninvestigated claims. They want to bundle them together, 14:07:53  
9 but they want to hide them from discovery. They don't want 14:07:56  
10 to let us take the discovery that we are entitled to, not 14:08:04  
11 only under the Federal Rules of Civil Procedure, but under 14:08:07  
12 agreements that they entered into and which they took the 14:08:11  
13 benefits from when it came to discovery from us, and now 14:08:15  
14 they want to renege on us when it comes to our turn to get 14:08:18  
15 the benefits and to get some discovery from them. 14:08:22

16 It's gone so far as not only do they renege on 14:08:24  
17 their agreements with us, but when the Court orders them to 14:08:29  
18 do something, then what happens is the day before the next 14:08:32  
19 hearing, they'll file a brief informing the Court that they 14:08:36  
20 have not done that yet and they have reasons why they 14:08:39  
21 shouldn't have to comply with the Court's order. And we 14:08:45  
22 see that in terms of expert discovery last month. We see 14:08:48  
23 it this month in terms of something as simple as what cases 14:08:52  
24 do you propose to trial -- to try when we get to these show 14:08:56  
25 trials of yours. 14:08:59

1           They were directed to tell us, and, of course, 14:09:01  
2 they didn't tell us, that they filed under seal whatever it 14:09:03  
3 is that they filed with the Court, a private communication 14:09:06  
4 with the Court about what cases they propose to try. I 14:09:10  
5 don't have any idea whether it's anything other than a list 14:09:12  
6 or whether make substantive arguments about why they are 14:09:16  
7 related or not related. I have no idea. But what I do 14:09:24  
8 know is they didn't do what Your Honor told them to do, 14:09:24  
9 which is to tell us what cases they propose to try in 14:09:32  
10 groups in the Fall so that we can look at those on an 14:09:32  
11 individual basis and comment on them. 14:09:33  
12           So, we don't get discovery and we don't even get 14:09:35  
13 frankly compliance with the Court's orders. And why is 14:09:39  
14 that? And the reason is that what they are hoping for here 14:09:43  
15 is to put together some kind of show trial beginning in the 14:09:49  
16 Fall where they will bundle, not only for filing complaint 14:09:53  
17 purposes, but for trial purposes, they'll throw a whole 14:10:00  
18 bunch of cases together where people took different doses 14:10:04  
19 at different times and had different injuries, and the 14:10:08  
20 evidence will be confusing. It will be from different 14:10:11  
21 states and different law that governs and different causes 14:10:16  
22 of action for each one. It'll be a case where no 14:10:19  
23 reasonable jury would be able to keep everything straight. 14:10:23  
24 And it would guarantee confusion, maximize the chance of a 14:10:29  
25 high verdict in their favor based on the confusing set of 14:10:37

1 facts that nobody can sort out from one plaintiff to 14:10:41  
2 another. 14:10:44

3 Again, Your Honor, this is after you've told them 14:10:45  
4 twice that you are not going to do that. That's what they 14:10:48  
5 wanted to do in the first instance, and you said, no, we're 14:10:53  
6 going to have individual trials. This is what they wanted 14:10:55  
7 to do the in second instance this summer, and you said, no, 14:10:57  
8 we're going to have individuals trials. And you having 14:11:03  
9 told them twice that we are going to have individuals 14:11:05  
10 trials and having told them to give us a trial plan and 14:11:07  
11 list of cases on what you propose to try on the individual 14:11:12  
12 cases, they come up once again with their collective show 14:11:13  
13 trial approach. 14:11:20

14 A collective show trial approach, remember now, 14:11:21  
15 we're talking about a mecca for the non-Rhabdo cases, this 14:11:26  
16 kind of a trial is calculated to confuse the jury and to 14:11:31  
17 maximize the prejudice to the Defendants because of all 14:11:35  
18 this evidence from other claims that has nothing to do with 14:11:40  
19 Mrs. Wilson's claim but no jury is going to be able to keep 14:11:43  
20 that separate. 14:11:48

21 Why do they want to do that? Well, because then 14:11:49  
22 if they get a big hit in their show trial, that's when they 14:11:53  
23 think they can extract from us the end game settlement to 14:12:00  
24 get rid of the rest of the cases where there is no Rhabdo 14:12:04  
25 and we say no injury. 14:12:08

1           The whole purpose of every single position they 14:12:13  
2   are taking on every single one of these motions is to tee 14:12:13  
3   up a show trial, at the same time, shielding all of their 14:12:17  
4   other cases from discovery. Because, of course, if we 14:12:21  
5   insist on Plaintiffs' fact sheets and we get to take 14:12:25  
6   depositions, then we may find out that we have summary 14:12:28  
7   judgment motions. We may find out that we have Dalbert 14:12:34  
8   motions. We may find out that the Plaintiffs who have been 14:12:37  
9   recruited to lend their names to these complaints would 14:12:40  
10   rather take a dismissal than bother to fill out a 14:12:45  
11   Plaintiffs' fact sheet. 14:12:47

12           The plaintiffs who have been recruited to lend 14:12:49  
13   their names to the complaints may rather take a dismissal 14:12:52  
14   than take half a day out of their lives to show up for a 14:12:56  
15   deposition. We may find out a lot of things about these 14:12:59  
16   complaints, but the allegations just aren't true. I expect 14:13:03  
17   we'll find that out for thousands and thousands of 14:13:06  
18   complaints since we are talking about a cookie cutter 14:13:09  
19   complaint that's word for word identical, regardless of the 14:13:13  
20   individual circumstances. 14:13:18

21           So, we want to be able to take discovery, to 14:13:22  
22   insist on at least a pilot basis, on case specific expert 14:13:27  
23   reports to put them to the test on whether they can prove 14:13:35  
24   these cases, whether there is any injury. And we don't 14:13:38  
25   want all of these thousands of cases that they are getting 14:13:41



1 filed and have filed to be put in a deep freeze where we 14:13:44  
2 are not allowed to conduct the discovery we are entitled to 14:13:49  
3 under the federal rules and under the agreement that they 14:13:53  
4 entered into and got the benefit from. We don't want those 14:13:56  
5 cases put in the deep freeze so they can come up with some 14:14:01  
6 kind of a show trial that maybe they can win and maybe they 14:14:05  
7 can then use that to extract money as their end game. We 14:14:09  
8 don't think that that is the proper function of an MDL, and 14:14:15  
9 we don't think that the Court ought to adopt a series of 14:14:21  
10 positions whose tactical purpose is to do exactly that. 14:14:24  
11 In our view, the role of an MDL Court and this 14:14:34  
12 Court's role in particular is to administer justice fairly 14:14:38  
13 and efficiently while supervising discovery on common 14:14:42  
14 issues, getting the cases ready to be tried by the 14:14:46  
15 appropriate court and making rulings on legal matters that 14:14:51  
16 may or may not end up being dispositive on some or all of 14:14:56  
17 these cases. But it is not the Court's role, with all 14:15:01  
18 respect, to adopt a series of proposals who are geared or 14:15:04  
19 which are all are geared towards maximizing the pressure on 14:15:10  
20 the Defendants to come across with a settlement for cases 14:15:15  
21 which so far haven't proved to have any value. So far, 14:15:18  
22 what we know about these is that when the case was tried in 14:15:21  
23 Mississippi, which is not historically a jurisdiction that 14:15:26  
24 Defendants are looking to try their cases in, the jury 14:15:32  
25 found for the defendants in this non-Rhabdo case. And here 14:15:36

1 in Minnesota, when we had a couple of these cases teed up 14:15:42  
2 for trial, it was the Plaintiffs Steering Committee who 14:15:44  
3 said we don't want to try that case. Basically said we 14:15:49  
4 don't want to take a loss. 14:15:52

5 So, instead they have concocted this series of 14:15:54  
6 proposals all geared toward coming up with this amalgam 14:16:00  
7 collective show trial because they think that's their best 14:16:05  
8 chance of extracting a settlement from us on all these 14:16:09  
9 cases that they are warehousing. 14:16:13

10 I was about to end here. What we want to do is 14:16:19  
11 we want, first and foremost, to go forward based on what 14:16:26  
12 the parties negotiated and what the Court ordered in terms 14:16:31  
13 of our ability to defend ourselves and to take discovery 14:16:35  
14 from their clients now that they have had the benefit of 14:16:39  
15 those agreements and discovery from our clients. We want 14:16:44  
16 the Court to enforce its orders concerning turning over 14:16:45  
17 Plaintiffs' fact sheets, concerning showing up for 14:16:50  
18 depositions. We want to be able to investigate their 14:16:55  
19 claims so that we can prepare to defend ourselves, whether 14:17:00  
20 that's in front of this Court by way of Dalbert motions or 14:17:05  
21 summary judgment motions or it may be that large, large 14:17:09  
22 numbers of these cases end up disappearing because we can 14:17:12  
23 show they are without merit or whether they end up being 14:17:17  
24 prepared so that when they're remanded they can be handled 14:17:18  
25 efficiently by a remand court. 14:17:21

1           So, that's the fundamental difference in our    14:17:22  
2    view. We genuinely believe that the end gain they keep   14:17:27  
3    talking about is a show trial where they roll the dice and   14:17:32  
4    they hit a number they hope we'll give in and have a global   14:17:37  
5    settlement of these non-meritorious claims, and we're not   14:17:45  
6    going to do that. We want to investigate those claims and   14:17:49  
7    prove they are non-meritorious.                           14:17:51

8           THE COURT: Thank you, Mr. Beck. Before we have   14:17:57  
9    the individual arguments on these motions, let me give you   14:17:57  
10   some general thoughts of the Court.                       14:18:02

11           I think both sides are talking the same language,   14:18:03  
12    even though you don't think that you are. We have for the   14:18:07  
13    longest period of time talked about resolving some of the   14:18:12  
14    issues that would result in an end game, whether or not the   14:18:18  
15    end game was a global settlement or cases going back to the   14:18:23  
16    jurisdictions where they came from. In trying to do that,   14:18:31  
17    I think this MDL has moved as quickly as any other MDL that   14:18:39  
18    has been in existence dealing with the magnitude of cases   14:18:52  
19    that we have had and the issues that we have had. I       14:18:54  
20    commend both sides for that.                           14:18:59

21           The Court quietly, I think, and unwaveringly, has   14:19:04  
22    told both sides that we are going to resolve many of the   14:19:11  
23    issues, whether or not they go back to the district they   14:19:16  
24    came from, resolve those issues for those Judges so they   14:19:27  
25    can try these cases without having them do the work that I   14:19:33

1 was supposed to do. Or if there is a conclusion of all the 14:19:38  
2 cases, the Court can handle that. 14:19:44

3 One of the ways that the PSC has told the Court 14:19:50  
4 from the beginning, and I can remember when we had our 14:19:55  
5 first meeting, and this is when they talked about wanting 14:20:00  
6 trials. The Court has tried to accommodate both sides on 14:20:05  
7 that issue and has given them wide range of allowing them 14:20:12  
8 to select cases for the Court to try. 14:20:18

9 The Court has not gone through the list and 14:20:27  
10 pulled out a case and said we're going to try these five 14:20:34  
11 cases. The Court has relied on both sides to submit 14:20:40  
12 that -- what they feel are important cases to resolve these 14:20:42  
13 issues. That you both stood up and did your dance on. 14:20:50

14 Neither side, at this point, wants those issues 14:21:00  
15 resolved. Plaintiffs submitted to the Court the Rhabdo 14:21:08  
16 cases. It was clear that Rhabdo cases were going to be 14:21:14  
17 settled because Bayer has gone the extra mile in settling 14:21:22  
18 Rhabdo cases. The fairness of those settlements cannot be 14:21:36  
19 questioned by anyone. 14:21:42

20 Mr. Beck has been true to his word since June of 14:21:50  
21 last year when I was surprised when he said that he was 14:21:54  
22 going to settle Rhabdo cases, and he has kept that word. 14:21:58  
23 And, Mr. Zimmerman, having seen that was true and that the 14:22:07  
24 settlements were fair, has been an advocate for the 14:22:13  
25 settlement of Rhabdo cases. But we have always known that 14:22:19

1 the aches and pains or the non-injury cases were still 14:22:24  
2 going to be around. Neither side has given me a set of 14:22:32  
3 cases that would go to trial that would resolve many of 14:22:42  
4 these issues, whether or not they are Dalbert issues or 14:22:48  
5 Rhabdo issues. 14:22:53

6 The Court blocked off a significant amount of its 14:22:58  
7 time to try cases. As counsel knows, I have a full case 14:23:02  
8 load as a District Court Judge in this district. But I 14:23:11  
9 have given this litigation my top priority and will 14:23:21  
10 continue to give top priority to this litigation. 14:23:27

11 What the Court has seen is similar to the file of 14:23:41  
12 Mr. Fischer. There is a complaint and there is an answer. 14:23:45  
13 The Court has relied on both sides to know their case and 14:23:52  
14 to select cases that would resolve these issues. 14:23:59

15 The PSC has failed miserably on this point. 14:24:06  
16 Failed miserably by keep telling me that they want to 14:24:12  
17 select the cases -- not selecting the cases and putting 14:24:19  
18 those cases before the Court so the Court can take a look 14:24:23  
19 at them and see whether or not the subcategories that Bayer 14:24:26  
20 has been arguing about, that would be argued about when 14:24:30  
21 they go back to their districts to be resolved. 14:24:34

22 The PSC has failed in complying with my orders in 14:24:48  
23 turning over to defendant the trial. And I must tell you, 14:24:55  
24 Mr. Beck, you are not missing anything when you see that 14:25:05  
25 trial plan. So, I'm going to have the order changed. I'm 14:25:13

1 glad that Mr. Meshbesher is here. I'm sure he's analyzed 14:25:20  
2 the issues here and understands what has to be done and 14:25:25  
3 what the Court is looking for, and the Court is interested 14:25:31  
4 and has always been interested in trying cases that will 14:25:34  
5 help resolve this case or issues in this case that will be 14:25:38  
6 helpful to their reports. 14:25:45

7 So, I would ask, first, let's hear from Mr. 14:25:52  
8 Meshbesher. He heard the PSC's proposed trial plan. Cases 14:26:01  
9 that have been submitted, given to me, are just case names. 14:26:07  
10 If I pulled those files, it would be similar to the ones 14:26:15  
11 that I have sitting on my desk, complaint and answer, no 14:26:17  
12 analysis of how they are going to resolve any issues, how 14:26:21  
13 they are Dalbert cases that should be tried, and this Court 14:26:30  
14 should take its precious time to try. So, the floor the 14:26:36  
15 yours, Mr. Meshbesher. 14:26:42

16 MR. MESHBESHER: Thank you, Your Honor. I can 14:26:47  
17 tell you that going through the medical records in these 14:26:51  
18 cases is a major problem. I personally have been up to 14:26:55  
19 two, three in the morning going through a package of cases 14:27:01  
20 to make sure that these cases that the criteria that this 14:27:05  
21 Courts want before it, and we were looking for what they 14:27:09  
22 call non-injury cases, and I don't think we ought to let 14:27:12  
23 Bayer decide who was injured and who was not injured. That 14:27:16  
24 ought to be for the Court and a jury to decide. 14:27:22

25 There are a number of cases which are called low 14:27:27

1 end cases where the injuries in and of themselves for the 14:27:30  
2 individual plaintiff would not justify the cost of going to 14:27:35  
3 trial. These are very expensive cases, not only for the 14:27:37  
4 expert witnesses, for the treating physician and the 14:27:40  
5 lawyers, but to prepare these cases for trial, investigate 14:27:45  
6 them fully is such that some of these cases qualify as a 14:27:49  
7 negative value suit. 14:27:54

8 A negative value suit, Your Honor, is a primary 14:27:59  
9 reason for finding superiority in these class action cases. 14:28:02  
10 And, perhaps, we ought to set up a class of these so-called 14:28:08  
11 negative value suits and let us settle all these other 14:28:13  
12 cases that don't fall into that category. 14:28:15

13 We have no desire to bring to the Court a case 14:28:24  
14 where we cannot prove causation. And we have filtered out 14:28:24  
15 those cases as best we could and teams of lawyers who have 14:28:26  
16 examined the cases and resulted in the cases that are put 14:28:30  
17 before this Court to constitute the proposed trial plan. 14:28:33  
18 And that may be a way to resolve it if Bayer is interested 14:28:38  
19 in settling all other cases where they find Rhabdo or some 14:28:43  
20 evidence of Rhabdo, that's fine. But let us certify a 14:28:47  
21 class of the negative value cases, and let a jury decide 14:28:52  
22 whether or not these cases have some value. 14:28:57

23 It's easy to tell somebody who -- somebody in the 14:29:01  
24 family that died Rhabdo, we're going to give you some money 14:29:09  
25 to settle the case, or somebody who's been on dialysis, or 14:29:09

1 somebody who's had a high CPK scores. But you tell 14:29:15  
2 somebody, and I talked to some of these people because we 14:29:19  
3 have a number of these cases in our office, these are real 14:29:20  
4 injuries to them. I don't think they're lying. I don't 14:29:26  
5 think they are malingering. And this is a people's court. 14:29:30  
6 This Court isn't merely for the corporations. And there 14:29:30  
7 seems to be a trend in this country to limit the people's 14:29:33  
8 right to justice in these courtroom. We're willing to 14:29:37  
9 work, I'm willing to work with Mr. Beck. I hired out as 14:29:41  
10 trial counsel. I learned a little bit more about the case 14:29:44  
11 more than I wanted to know, frankly. But now that I've 14:29:47  
12 interested in it, I have done some research on it. And I 14:29:51  
13 think these negative value cases are worth money. They're 14:29:51  
14 worth compensation to these people who are hurt and 14:29:55  
15 suffered injury. Some only lasted two or three weeks, some 14:30:00  
16 lasted longer. 14:30:04  
17 I read a report from one lady who couldn't even 14:30:06  
18 pick up a dish out of the cupboard for weeks because of the 14:30:09  
19 muscle injuries that were not worth anything. And, indeed, 14:30:12  
20 there probably are some people that filed that shouldn't be 14:30:16  
21 in this class. It is up to the lawyers to get them out and 14:30:18  
22 get them out fast. We don't want to embarrass ourselves by 14:30:20  
23 taking a case to trial where we can't establish causation. 14:30:24  
24 We want to make sure the treating physician and all the 14:30:28  
25 experts can back us up on causation. And on a case-by-case 14:30:30



1 basis that takes a lot of time and a lot of money. But we 14:30:35

2 are prepared to do it if we know where we're going. 14:30:40

3 Most of the cases that were presented to the 14:30:42

4 Court with the trial plan, as I understand it, were not 14:30:44

5 necessarily Rhabdo cases. We had a range of cases, and the 14:30:46

6 reason we had a range of cases is because as Judge Sweet 14:30:50

7 suggested in the Consorti case, that may be the best way 14:30:54

8 for a jury to determine what the value of these cases are. 14:30:58

9 He suggested that rather than complicate and 14:31:03

10 confuse things, when a jury hears a number of different 14:31:05

11 cases and listen to the injuries from death on down, that 14:31:10

12 they can put a value on it relative to the injuries in the 14:31:12

13 case. The more serious injuries will not be worth as much, 14:31:15

14 obviously, and the jury will be educated. He even 14:31:24

15 suggested that the fact that you have these so-called 14:31:24

16 confusing experts is helpful to the jury because they will 14:31:27

17 listen to the arguments from both sides of the bench and be 14:31:30

18 able to analyze them. And, in fact, the jury will be 14:31:37

19 educated at the end of the trial to what these issues are. 14:31:39

20 And that's really what we are suggesting. 14:31:42

21 I don't know if some of these cases that we put 14:31:44

22 in there are Rhabdo cases will ever go to trial because our 14:31:46

23 clients are not in a position to turn down reasonable

24 settlement offers, and we as lawyers can't stand in their

25 way simply because we want to try a case. If it's 14:31:54

1 reasonable and the client is satisfied, their case should 14:31:55  
2 be settled. 14:31:58

3 What happens in some of these cases, the 14:32:00  
4 Defendants have decided these are non-injury cases, they 14:32:02  
5 are not compensable, and we're not going to give you a 14:32:06  
6 dime. 14:32:10

7 Let's take them on, as President Bush said. 14:32:10  
8 Let's give those people their day in the court. 14:32:13

9 What happens here is that the Bayer Company, 14:32:18  
10 through putting this drug on the market, finding out that a 14:32:20  
11 lot of people got hurt and didn't get hurt by other drugs, 14:32:23  
12 is now blaming the victims. They are blaming the victims, 14:32:26  
13 Your Honor.

14 THE COURT: Dealing with the trial plan, I got a 14:32:27  
15 list of -- I don't know, I haven't counted, what are these 14:32:30  
16 cases? 14:32:35

17 MR. MESHBESHER: Well, these cases, hopefully, 14:32:37  
18 are muscle cases, muscle injury cases as opposed to Rhabdo. 14:32:40  
19 There are some Rhabdo cases in there. I know at least two 14:32:45  
20 because I looked at them myself. There is a range of 14:32:50  
21 cases. We hope that range of cases will educate the jury 14:32:51  
22 as to the relative value. That's why I put them in. 14:32:55  
23 Unfortunately, some of them may not go to trial if there is 14:32:55  
24 a good settlement offer, and then we'll just go to trial 14:33:01  
25 with the other cases, the so-called non-injury cases, which

1 are really muscle damage. All of these cases start out as 14:33:03  
2 muscle damage, and some get worse than others. And there 14:33:05  
3 is a range, a continuum of these cases and I think only a 14:33:12  
4 jury can sort them out. Juries aren't stupid. They are 14:33:15  
5 not going to be confused by these cases. We're not going 14:33:21  
6 to offer a single in this plan that we don't have 14:33:25  
7 causation, we don't have a doctor to back it up. We've 14:33:28  
8 been spending time talking to these medical doctors, the 14:33:32  
9 treaters, and finding out what they think about the case.  
10 In fact, their records indicate causation. They realized 14:33:37  
11 what it was when they first saw these people and saw the 14:33:37  
12 complaints. These people didn't make up these complaints. 14:33:40  
13 They came to doctors and the doctors decided this was 14:33:43  
14 induced by a statin, and the statin was happened to be 14:33:48  
15 Baycol more in these cases than any other statin. That's 14:33:50  
16 what the problems here. 14:33:57

17 I can tell you a few of those cases because I've 14:33:59  
18 bedded them myself. I haven't looked at all of them. We 14:34:01  
19 had to rely on teams of lawyers to go over all the medical 14:34:03  
20 records, I'm sure we can tell you in detail what each case 14:34:08  
21 involves. 14:34:11

22 THE COURT: I wish I had gotten that information 14:34:12  
23 with the trial plan. 14:34:15

24 MR. MESHBESHER: I had wish you had, Your Honor. 14:34:17  
25 I wish you I have. We have a client, and he's from 14:34:19

1 Arkansas. He's an ex-Marine. He was a Marine helicopter 14:34:26  
2 pilot. He piloted helicopters for Presidents Nixon and 14:34:29  
3 Johnson, and he's not faking it. 14:34:31

4 THE COURT: I'm not questioning that. 14:34:35  
5 Everyone -- I guess you're waiting on my ruling on the 14:34:38  
6 class certification. But even -- I tell you the truth, 14:34:40  
7 those motions were brought way too soon. I think you're 14:34:48  
8 rushing -- the PSC is rushing on some of these issues and 14:34:50  
9 you don't have the different subclasses submitting saying 14:34:54  
10 these five to eight cases can be tried. These are the 14:35:00  
11 issues. We're meeting the issues that Bayer has been 14:35:03  
12 raising. The common issues between these plaintiffs can be 14:35:06  
13 try to the jury. Here, Judge, see what we're talking 14:35:14  
14 about. Let's get the jury up here and try them. 14:35:18

15 I have not gotten any type of information. What 14:35:20  
16 I have here is a list of cases that's given me nothing to 14:35:23  
17 work with. 14:35:28

18 MR. MESHBESHER: I can share your frustration, 14:35:30  
19 Your Honor, in that I think we were remiss not to give you 14:35:32  
20 a brief synopsis of what those cases were about and to 14:35:36  
21 certify to the Court we can establish causation through 14:35:40  
22 appropriate expert witnesses. We had no idea where the 14:35:43  
23 Court was going. This is a preliminary proposal, and we 14:35:45  
24 know the Court obviously will modify it if the Court 14:35:49  
25 accepts our general idea here. And we're willing to work 14:35:53

1 with the Court, and work overtime if necessary, to give you 14:35:56  
2 a general idea what each one of those cases involves and 14:35:59  
3 the subclass case it represents. 14:36:02

4 THE COURT: I guess it's the cart before the 14:36:10  
5 horse. You're saying you don't know where the Court is 14:36:13  
6 going. The Court's given you an indication. I'm willing 14:36:16  
7 to try the cases. There is going to be issues. I've 14:36:18  
8 talked about where are the Dalbert issues. There is no 14:36:23  
9 Dalbert issues. 14:36:26

10 I have talked to my good friend, Senior Judge 14:36:27  
11 Alsop, the Latex Glove cases sat, and then he had to try 14:36:33  
12 the Dalbert issues that solves most of the issues for those 14:36:39  
13 cases, and he had to go for six to eight weeks trying the 14:36:44  
14 case, and he's told me, don't let that happen. Don't send 14:36:48  
15 something back to the trial court judge where the MDL Judge 14:36:53  
16 is supposed to managing the case and taking care of these 14:36:59  
17 issues and then send it back. Well, no one has given me 14:37:02  
18 positions. I've asked for them. 14:37:06

19 So, where am I going? That's what I'm asking 14:37:10  
20 for. It's clear that Bayer is not going to give the 14:37:13  
21 Plaintiffs a go for just filing their case. Let's give the 14:37:20  
22 Court something to work with so we can deal with these 14:37:25  
23 issues, either on an end game or that they all come 14:37:28  
24 together and Bayer changes their mind on what's happening, 14:37:35  
25 or we take care of the major issues here, and we have 14:37:37

1 several trials. 14:37:43

2 Mr. Zimmerman asked about the trials, but 14:37:49

3 everyone is run away from trials. There is no trials. We 14:37:52

4 do Google search. You can do a Google search just like I 14:37:56

5 do. We do it and the list I've gotten from the Defendants 14:38:02

6 dealing with the trials we know that you know Pennsylvania 14:38:08

7 is not going to try any cases until the month of January or 14:38:11

8 February or March of next year. 14:38:15

9 So, there is a plan is there. They have sat down 14:38:17

10 with Bayer to find some cases to try before Judge Ackerman. 14:38:21

11 That's all I'm asking. You know, bring me some cases. 14:38:28

12 I've blocked off two months of my time to try cases in June 14:38:32

13 and July, and nothing has happened. 14:38:40

14 MR. MESHBESHER: Well, I can promise you that we 14:38:46

15 can have cases that will be ready for trial. We just 14:38:48

16 really wanted some indication from the Court if they had 14:38:52

17 some sympathy for our argument in consolidating some of 14:38:56

18 these cases rather than try each -- 14:39:00

19 THE COURT: How can I have sympathy when you 14:39:03

20 don't show me that it can be done. 14:39:04

21 MR. MESHBESHER: I've already said that's our 14:39:08

22 fault. 14:39:10

23 THE COURT: Okay. So, I can't tell you, yes, I'm 14:39:11

24 going to jump at it without seeing some idea. We have 14:39:15

25 tried cases before, and I don't mean to take it out on you. 14:39:18

1 MR. MESHBESHER: Don't worry about it. 14:39:24

2 THE COURT: You know where it's supposed to be 14:39:25

3 going. It's going to Mr. Zimmerman. I'm just so upset. I 14:39:28

4 thought I was going to have a trial plan that I could look 14:39:33

5 at and Bayer could respond to it, and we can have something 14:39:36

6 to get some of these issues off the table. I just don't 14:39:41

7 have anything. It's six weeks of my time. 14:39:46

8 MR. MESHBESHER: I apologize, Your Honor, and I 14:39:50

9 think we -- at least I understand where the Court is coming 14:39:56

10 from, and I think we can remedy the situation promptly. 14:39:58

11 THE COURT: I appreciate you being involved in 14:40:01

12 this case. I think you understand how it must be organized 14:40:01

13 and how a trial should be organized. Just not talking 14:40:06

14 about a trial. We've been talking about trials for almost 14:40:13

15 a year and a half, and I can't get one to go to trial. 14:40:15

16 MR. MESHBESHER: Well, I'm comfortable in the 14:40:21

17 courtroom, Your Honor, and you are, too, and I would like 14:40:22

18 to see you in that position, me at that table with a nice 14:40:26

19 jury sitting there. Minneapolis, I read in the paper, has 14:40:30

20 the most literate population of any city in the United 14:40:32

21 States, and I don't think they're going to be confused by 14:40:37

22 hearing some different theories about different types of 14:40:42

23 cases as the Bayer Company seems to indicate. 14:40:42

24 They're smart enough to buy Bayer, but they're 14:40:44

25 dumb enough to decide the issues in this case is what 14:40:53

1 they're are telling you. 14:40:53

2 THE COURT: Well, let's -- let me have Mr. Beck 14:40:53

3 come forward and explain to me what's happening in 14:40:57

4 Philadelphia, because there's at least there is some 14:41:00

5 cooperation there or some judicial heavy-handedness to get 14:41:03

6 you all to cooperate to have some trials. I want to know 14:41:07

7 how that's occurred and how you're picking the cases 14:41:11

8 because what you have given me is Case 1, Case 2, Case 3. 14:41:13

9 They are going to be individual trials which I've been 14:41:20

10 talking about doing here. There are going to be issues, 14:41:23

11 I'm assuming that are going to solve their caseload because 14:41:28

12 Philadelphia has almost as many cases as we have in the 14:41:32

13 MDL. So, let's hear what Philadelphia has got to say. 14:41:36

14 MR. BECK: Mr. Magaziner is in a better position 14:41:43

15 than I am to respond to that, Your Honor. 14:41:46

16 MR. MAGAZINER: When Mr. Beck says that I'm in a 14:41:47

17 better position than he is, I don't think he's saying a 14:41:49

18 whole lot. I do know a little bit about it because I did 14:41:52

19 participate in some of the meetings in Philadelphia.

20 In all candor, Your Honor, I should point out the 14:41:53

21 Philadelphia mass torts program is not an MDL or a mini-MDL 14:41:58

22 program. It's mandated. It's not the same as the mandate 14:42:01

23 Your Honor has. So, what works in Philadelphia may not 14:42:06

24 work here in the MDL. 14:42:13

25 But what has been done in Philadelphia has been 14:42:13



1 done in many other large groups of cases in Philadelphia is 14:42:15  
2 very simple. There was a lot of discovery taken in common 14:42:20  
3 issues. There also have been depositions taken by 14:42:26  
4 individual plaintiffs and so forth, much the same as what 14:42:27  
5 happened on many individual cases, just multiplied many 14:42:33  
6 times over. Judge Ackerman said that he wanted the parties 14:42:33  
7 to get together and select cases for trial. And the 14:42:35  
8 selection process is a time-honored process in which the 14:42:41  
9 Plaintiffs selected the case and the Defendants selected 14:42:44  
10 the case, the Plaintiffs selected and Defendants selected. 14:42:49  
11 THE COURT: Does that sound like something that 14:42:49  
12 happened here. 14:42:51  
13 MR. MAGAZINER: It's not a novel procedure that 14:42:54  
14 Judge Ackerman came up with. 14:42:56  
15 THE COURT: Right. 14:42:58  
16 MR. MAGAZINER: The original idea had been that 14:42:59  
17 those cases would cover a range of Baycol-type injuries. 14:43:02  
18 Many of the Rhabdo cases filed in the Court of Common Pleas 14:43:07  
19 have been resolved just as cases have been resolved 14:43:13  
20 elsewhere. 14:43:15  
21 The discovery of experts that was eventually 14:43:17  
22 agreed upon is as follows. When I say eventually agreed 14:43:21  
23 upon, there has been a lot of talk about this. There has 14:43:24  
24 not been a stipulated order. The discovery of experts is 14:43:26  
25 that the Plaintiffs by a date on the phone, I don't 14:43:30

1 remember the date, are to provide to the Defendants a list 14:43:33  
2 of all of the experts who will testify in Case Number 1. 14:43:36  
3 It doesn't matter whether those experts are designated 14:43:39  
4 generic or case specific or whatever, because whatever 14:43:43  
5 experts the Plaintiffs would wish to present to establish 14:43:46  
6 their case in front of the jury in Case Number 1 have to be 14:43:50  
7 identified for the Defendants on whatever that date is in 14:43:54  
8 the Fall. Presumably, those experts will include case 14:43:59  
9 specific experts saying Plaintiff Jones was, in fact, 14:44:03  
10 injured by his use of Baycol, as well as generic experts 14:44:09  
11 who will say Baycol was defective or Bayer or GSK was 14:44:12  
12 neglect or something like that, because in order to prevail 14:44:17  
13 in the case, one would expect the Plaintiff would have to 14:44:20  
14 prove all the indicias of liability. 14:44:24  
15 Again, there is no distinction there being drawn 14:44:24  
16 between generic and case specific experts. Whatever 14:44:28  
17 experts the Plaintiffs want for their Case Number 1 has to 14:44:31  
18 be disclosed. We then get the right to depose them. We 14:44:31  
19 have to disclose our experts, and they get the right to 14:44:34  
20 depose our experts, and then schedule along with a series 14:44:38  
21 of dates. 14:44:41  
22 THE COURT: Let's go back to solving and 14:44:42  
23 resolving the issues of different subclasses of -- that 14:44:44  
24 we've talked about dealing with Baycol, the different 14:44:53  
25 dosages, the length and severity of the injuries. How are 14:44:58

1 you expecting, other than eenie, meenie, miney-mo, the 14:45:06

2 Plaintiffs must be telling you something about that case. 14:45:12

3 MR. MAGAZINER: Your Honor, now, I'm going from 14:45:16

4 what I know because I've participated in to going to what I 14:45:16

5 have heard second and third hand from my colleagues. I'll 14:45:21

6 try to answer the question as long as Your Honor 14:45:26

7 understands I really don't have firsthand knowledge of 14:45:26

8 this.

9 THE COURT: You says that's the issue we have to 14:45:30

10 deal with here. 14:45:32

11 MR. MAGAZINER: Yes. And that's why I said, Your 14:45:32

12 Honor, the Philadelphia mass tort program is not really an 14:45:35

13 MDL charged with determining a bunch of issues and then 14:45:37

14 remanding cases. There is no remand in Philadelphia. If 14:45:41

15 they're filed in Philadelphia, they are there for good. 14:45:47

16 THE COURT: They are still going to have to deal 14:45:49

17 with those common issues and then make the other cases 14:45:51

18 disappear because they are not going to try 2,000 or 4,000 14:45:54

19 case individually. 14:45:59

20 MR. MAGAZINER: What Mr. Weiss said months ago 14:46:01

21 during the meetings I attended was they would choose as 14:46:06

22 their first case a case that they thought would establish 14:46:07

23 certain principles, maybe not formally, but that these 14:46:10

24 issues had been tried and Plaintiffs had prevailed, that 14:46:14

25 would have brought out the culpability and if the 14:46:18

1 Plaintiffs won in that case would make Bayer and GSK will 14:46:19  
2 to settle a lot of other cases like that. And, of course, 14:46:27  
3 if the Defendants prevailed, it might make a lot of those 14:46:27  
4 cases go away for very little money. 14:46:29

5 But there is no formal definition of issues we're 14:46:32  
6 going to try these cases that has these issues. Mr. Weiss 14:46:33  
7 as his colleagues, as I understood, were going to designate 14:46:35  
8 cases that they thought had the greatest precedential value 14:46:40  
9 and were most like, if the Plaintiffs prevailed, most 14:46:45  
10 likely going to motivate Bayer and GSK to settle more 14:46:49  
11 groups of cases. 14:46:53

12 We were going to choose cases or Bayer was going 14:46:55  
13 to choose cases that we thought had very little value as we 14:47:00  
14 looked at the Philadelphia group of cases just as we looked 14:47:00  
15 at the MDL groups of case. There seems to us to be 14:47:05  
16 thousands of cases, not like Mr. Meshbesh described, 14:47:08  
17 cases in which the plaintiff, if he reported any aches and 14:47:12  
18 pains contemporaneous with the use of Baycol, those aches  
19 and pains reports were no different from aches and pains of 14:47:20  
20 persons who reported those over a period of years while on 14:47:22  
21 other statins and while on other drugs for other medical 14:47:25  
22 conditions that many of these people suffered from. 14:47:28

23 As far as we can tell, some of these people have 14:47:33  
24 no medical documentation whatsoever they suffered anything 14:47:36  
25 while using Baycol, not even reported a symptom. But those 14:47:37

1 who did report, many of them looked like the same kind of 14:47:37

2 symptom these people have been reporting forever. 14:47:42

3 So, we were going to maybe designate some of 14:47:45

4 those. And we are not yet at the point of choosing the 14:47:50

5 cases, as I understand it. They are coming soon. I don't 14:47:53

6 remember the deadline. Do you remember, Susan? 14:47:56

7 MS. WEBER: I understand we have received 14:48:01

8 Plaintiffs' designations. 14:48:02

9 MR. MAGAZINER: Very recently. 14:48:07

10 MS. WEBER: Very recently.

11 THE COURT: They have designated. When do you 14:48:08

12 designate yours? 14:48:11

13 MS. WEBER: We may have. I'll try to find out 14:48:13

14 more details when we take a break. 14:48:16

15 MR. MAGAZINER: As I said, I've gotten this

16 second, third, fourth hand

17 MS. MANIATIS: Would you like me to approach? 14:48:18

18 THE COURT: Yes. 14:48:21

19 MR. MAGAZINER: I hope I was able to answer some 14:48:22

20 of Your Honor's question. It's a very different -- the 14:48:24

21 program is proceeding quite, I would say, well because the 14:48:26

22 Plaintiffs are designating cases and we are designating 14:48:32

23 cases, and we are going to have some trials. 14:48:36

24 THE COURT: It's going to fail because if Mr. 14:48:38

25 Weiss settles his cases and the cases that Bayer is 14:48:43

1 fighting and still have liability issues will still be 14:48:48  
2 there, and there wouldn't be a group of lawyers handling 14:48:51  
3 those, and, so, you still have the same issues that I'm 14:48:56  
4 trying to get at. Mr. Weiss is going to settle his cases 14:48:59  
5 and be gone, and Judge Ackerman is going to have eight 14:49:03  
6 weeks of trials time -- dead time because there won't be 14:49:07  
7 anybody ready to go to trial. 14:49:13

8 MR. MAGAZINER: Mr. Weiss has cases of the type I 14:49:16  
9 was describing at the end of my presentation, cases where 14:49:20  
10 plaintiffs have symptoms while on Baycol that were no 14:49:24  
11 different from the symptoms plaintiffs experienced for  
12 years. I don't believe Bayer is going to settle those 14:49:28  
13 cases. 14:49:31

14 THE COURT: Well, I'm not saying Bayer is going 14:49:31  
15 to settle them. I'm saying that Mr. Weiss is going to be 14:49:33  
16 gone. What is the trial plan? 14:49:37

17 MS. MANIATIS: Mr. Magaziner is correct in just 14:49:44  
18 about everything he's said. The Plaintiffs -- 14:49:49

19 MR. MAGAZINER: May I leave, Your Honor. 14:49:53  
20 (Laughter). 14:49:56

21 MS. MANIATIS: My firm is involved in the 14:49:56  
22 Pennsylvania litigation, and we did recently -- the 14:49:58  
23 Plaintiffs submitted four cases, and the Defendants did 14:50:01  
24 submit four cases. Part of the problem that Your Honor has 14:50:06  
25 clarified, I don't think is necessarily addressed with 14:50:08

1 those eight cases that are selected. There was not a 14:50:14  
2 mandate of -- it was, basically, Plaintiff you pick four, 14:50:17  
3 Defendant you pick four, and those would be our first eight 14:50:24  
4 trials, two in January, two in February, and four in March. 14:50:28

5 So, the problems that you have acknowledged today 14:50:33  
6 are not necessarily focused on in that selection of cases. 14:50:38  
7 It might happen that in the trial of those cases, those 14:50:42  
8 issues might come up, but I don't think that was 14:50:45  
9 necessarily the plan what cases would go into those slots. 14:50:47

10 THE COURT: Well, again, I appreciate that. 14:50:53  
11 That's not going to work out either. That's not what I 14:51:00  
12 want. 14:51:03

13 MS. MANIATIS: It won't answer many of the 14:51:05  
14 questions. 14:51:08

15 THE COURT: It won't answer the questions that 14:51:08  
16 need to be answered in this case. Mr. Beck. 14:51:11

17 MR. BECK: May I make an effort here, Your Honor? 14:51:14

18 THE COURT: Yes. So everyone knows, this is our 14:51:20  
19 in-chambers discussion. 14:51:22

20 MR. BECK: First, and I want to take two 14:51:26  
21 different approaches to suggest to Your Honor to -- that I 14:51:31  
22 think will be responsive to the concerns that Your Honor 14:51:37  
23 has expressed. And I also along the way want to respond to 14:51:39  
24 some of the things Mr. Meshbesh said. 14:51:44

25 So, way number one is to use our pilot program to 14:51:51

1 address these issues that eventually that may very well be 14:51:57  
2 dispositive. That doesn't mean that they're common issues 14:52:04  
3 in a class action sense or that they predominate in a class 14:52:08  
4 action sense, but they may inform the judgment of the 14:52:13  
5 Plaintiff's bar or Defense bar as to the value of the these 14:52:17  
6 non-Rhabdo cases. So, to spend just a moment on that 14:52:20  
7 without arguing the details of it, but the concept of why I 14:52:25  
8 think it's an approach that Your Honor ought to consider. 14:52:29

9 First of all, from our side, we are pretty much 14:52:32  
10 powerless to put together a trial plan with a list of cases 14:52:36  
11 with an explanation of why they are similar because we are 14:52:40  
12 not allowed to find out the details of their cases. So, we 14:52:42  
13 can't do that. 14:52:47

14 What we have done instead, and, frankly, we've 14:52:47  
15 been frustrated because we haven't seen that kind of a plan 14:52:51  
16 that identifies specific cases that says, okay, we're going 14:52:54  
17 to try the Newville case, and here's the Newville case, and 14:52:58  
18 here's why it is a significant case to be tried and why it 14:53:04  
19 involves issues that once they're resolved will inform the 14:53:08  
20 judgment of the lawyers as to other cases. You know, it 14:53:12  
21 involves point three early on. There's a lot of plaintiffs 14:53:15  
22 who took low dose Baycol early on. Let's hear what a jury 14:53:19  
23 has to say about that kind of case. So, we haven't seen 14:53:23  
24 that. 14:53:26

25 Instead, what we have said is, okay, let's take 14:53:27



1 the initiative ourselves and let us start taking discovery 14:53:29  
2 on a pilot basis on a couple of hundred cases. These are 14:53:34  
3 not cases that were filed last week or last month. These 14:53:39  
4 are cases that were filed over a year ago, so, it shouldn't 14:53:43  
5 be unduly burdensome for somebody to finally fill out the 14:53:47  
6 Plaintiff fact sheet, and it shouldn't be unduly burdensome 14:53:51  
7 for the Plaintiffs' lawyers to actually look at their 14:53:56  
8 clients' cases that have been on file for a year and see 14:53:59  
9 what's what there. 14:54:01

10 What we thought we could do is we'd take the bull 14:54:04  
11 by the horn and we'd say, let's take a look at those 14:54:15  
12 Minnesota plaintiffs, the guys who actually live in 14:54:15  
13 Minnesota rather than the ones who live in Louisiana and 14:54:15  
14 Arkansas who find their way into your court. Let's take a 14:54:21  
15 look at those Minnesota plaintiffs because we know that no 14:54:21  
16 matter what my view is, this Court is going to want to have 14:54:27  
17 some bellwether trials, and it ought to be a Minnesota 14:54:30  
18 plaintiff because, frankly, the Court doesn't have any 14:54:34  
19 jurisdiction. We don't think to hold trials on others. 14:54:35  
20 We'd just as soon avoid that fight if we can get Minnesota 14:54:40  
21 bellwether plaintiffs. Otherwise, we're going to be 14:54:47  
22 arguing in other courts about the propriety of this Court 14:54:47  
23 using the MDL as a mechanism to try the cases that 14:54:52  
24 otherwise wouldn't be before it. 14:54:55

25 Setting aside that wrinkle on it, we said we'll 14:54:58

1 also take a bunch of cases from the -- that were filed in 14:55:01  
2 Pennsylvania District Court because we know that Your Honor 14:55:06  
3 is concerned about what happens to the poor Judge in 14:55:10  
4 Eastern District of Pennsylvania when remand occurs and a 14:55:13  
5 large number goes back there. 14:55:16

6 So, we'll take a couple of hundred cases, and the 14:55:20  
7 plaintiffs will actually live up to their obligations to 14:55:22  
8 give us discovery. They will show up when we notice 14:55:26  
9 depositions. And the plaintiffs will give depositions, and 14:55:32  
10 we'll get to talk to their doctors, and we'll get to talk 14:55:36  
11 to the other treaters. 14:55:38

12 THE COURT: Did you talk to Mr. Zimmerman about 14:55:41  
13 this pilot project. 14:55:44

14 MR. BECK: They rejected it, Your Honor. I don't 14:55:45  
15 know who in our meet and confers have talked about it, but 14:55:48  
16 I know that they filed briefs that said it's a horrible 14:55:52  
17 idea. So, it's not like we came up with this proposal last 14:55:56  
18 week and they haven't had a chance to consider. It's teed 14:56:00  
19 up and briefed and they opposed it, saying it's a bad idea. 14:56:05  
20 So, it's at issue here. 14:56:10

21 It's our effort, then, to say, okay, we're going 14:56:12  
22 to be focusing on a couple of hundred of these. And the 14:56:15  
23 reason we picked such a large number is not to drive them 14:56:17  
24 crazy, it's because we -- 14:56:21

25 THE COURT: Just send them down. 14:56:24

1 MR. BECK: We know from experience that there is 14:56:29  
2 a big difference between having your name appear on a 14:56:30  
3 complaint and being willing to fill out a fact sheet or 14:56:33  
4 show up for a deposition. So, if we try to pick three 14:56:36  
5 cases like we did before in Newville and I forget the name 14:56:43  
6 of the other one, then what happens is the cases just 14:56:45  
7 disappear. So, we figure, well, if we have a couple of 14:56:47  
8 hundred, a lot of them are going to go away. That's 14:56:51  
9 informative all by itself. I think that if somebody thinks 14:56:55  
10 the end game is that we are going to paid X dollars for 14:56:58  
11 every one of these cases they've rounded up when we have 14:57:02  
12 put sort of randomly the spotlight on a hundred cases, 75 14:57:06  
13 of them disappear, that tells you something about the value 14:57:11  
14 of the cases. 14:57:15  
15 So, anyway we figure, a lot of the plaintiffs 14:57:15  
16 will say, they won't use fancy words like negative value, 14:57:20  
17 but they will say to themselves, I never signed up to give 14:57:24  
18 a deposition. Somebody told me I was going to get free 14:57:28  
19 money. I don't want to have a deposition. I don't want to 14:57:31  
20 tell somebody about my medical thing. I answered the ad on 14:57:36  
21 late-night television. And I was going to get a couple 14:57:38  
22 hundred bucks or a thousand bucks. If you actually expect 14:57:43  
23 me to show up, forget it. 14:57:48  
24 So, some of those cases are going to go away,  
25 but, presumably, a couple hundred, there will be somebody 14:57:52

1 willing to go to trial. And, presumably, out of these 14:57:55  
2 somebodies who are willing to go to trial, Mr. Meshbeshier 14:57:57  
3 and others -- 14:57:59

4 THE COURT: Meshbeshier. 14:58:01

5 MR. BECK: I'm sorry. Plaintiffs Steering 14:58:04  
6 Committee will conclude -- I'm horrible at pronouncing 14:58:05  
7 names -- they're going to conclude that we're willing to go 14:58:06  
8 to trial on these. 14:58:08

9 THE COURT: You don't want him to call you Mr. 14:58:10  
10 Back. 14:58:13

11 MR. BECK: I know, I know, and I apologize. I'm 14:58:15  
12 just going to keep mispronouncing it. 14:58:17

13 THE COURT: You better get it straight because 14:58:22  
14 he's going to try cases with you. 14:58:24

15 MR. BECK: I hope so. Something can come out of 14:58:26  
16 this program. I heard that when they were sifting through 14:58:30  
17 and coming up with their cases that they told Your Honor 14:58:32  
18 and not us, they did make a judgment said these are cases 14:58:33  
19 that we think, by golly, we might be able to prove 14:58:38  
20 causation on. That tells you that there were other cases 14:58:40  
21 that they said to themselves, these cases we can't prove 14:58:44  
22 causation on or we can't prove injury on. Well, they 14:58:44  
23 didn't dismiss those cases, Judge. Those cases are in the 14:58:47  
24 warehouse now waiting to be settled later on. 14:58:51

25 We want a program where we can actually identify 14:58:54

1 the cases where the plaintiffs refuse to participate and 14:58:57  
2 invest their time, or where the Plaintiffs' lawyers say 14:59:02  
3 this case isn't just negative value in the sense that it 14:59:06  
4 has value, but not enough to warrant the expense of a 14:59:13  
5 trial. This case is just a dead bang loser because we 14:59:15  
6 can't prove anything like the cases they dropped earlier. 14:59:19  
7 We to weed those out, and then we want to focus 14:59:23  
8 on the aches and pains cases that survived that process. 14:59:27  
9 And then we want to say, okay, let's put those cases to the 14:59:32  
10 test. We may have groups of those cases that we can submit 14:59:37  
11 summary judgment motions on. And we may get resolution of 14:59:42  
12 legal issues for or against us that way. We may have 14:59:49  
13 Dalbert motions where they have a theory on these cases, 14:59:49  
14 but it can't pass Dalbert. And that will effectively be 14:59:52  
15 dispositive in these case. 14:59:59  
16 But, then, Your Honor, so we think the pilot 15:00:01  
17 program is step number one towards identifying some cases 15:00:05  
18 that can actually give us some information whether that's 15:00:10  
19 because of dispositive motions or Dalbert motions or 15:00:16  
20 trials. 15:00:21  
21 THE COURT: Let's stop there. Have a seat. Mr. 15:00:21  
22 Meshbesh, what do you think of that plan? 15:00:25  
23 MR. BECK: Can I say one last thing on the 15:00:32  
24 trials? 15:00:32  
25 THE COURT: Yes. 15:00:32

1 MR. BECK: And that is I think it's folly to try 15:00:32  
2 to group cases together for that purpose. Five of these 15:00:35  
3 cases together are still negative value. What we ought to 15:00:40  
4 be doing instead of fighting about consolidation when we're 15:00:42  
5 inevitably going to have all kinds of individual facts, and 15:00:49  
6 if they had their way, different state laws, we ought to 15:00:51  
7 just say, let's try one of these. That's what Your Honor 15:00:55  
8 said before, let's try the Long case. Let's try the 15:00:59  
9 Newville case. 15:01:05

10 THE COURT: I understand that. In dealing with 15:01:05  
11 the -- trying to get the bellwether cases and getting to 15:01:07  
12 the issues that will get the attention of both sides, both 15:01:12  
13 the plaintiffs and to the defendants, what about a 15:01:19  
14 combination of plans. You've got a list here. Who knows 15:01:26  
15 what they are. But dealing with sitting down with 15:01:31  
16 defendants figuring out a couple hundred cases, let's get 15:01:34  
17 these -- let's get them grouped, subcategories, whether or 15:01:39  
18 not they are individual trials or there is a combination of 15:01:46  
19 those trials, getting those before the Judge? 15:01:50

20 MR. MESHBESHER: Your Honor, I prefer Mr. 15:01:56  
21 Zimmerman to answer those questions because I'm not 15:02:00  
22 involved in this aspect of the case. 15:02:01

23 THE COURT: All right. 15:02:05

24 MR. ZIMMERMAN: Your Honor, I don't know. I'm 15:02:08  
25 trying my best and I guess I'm not getting through, but -- 15:02:13

1 THE COURT: I'm not getting through? 15:02:20

2 MR. ZIMMERMAN: I'm not getting through. I'm not 15:02:22

3 getting -- what I'm -- I try to listen to what's being 15:02:25

4 said. What Phil is saying is. 15:02:29

5 THE COURT: Mr. Beck. 15:02:32

6 MR. BECK: It's easier to pronounce, Phil. 15:02:37

7 MR. ZIMMERMAN: Mr. Beck is saying that we're 15:02:42

8 extorting things by not cooperating -- 15:02:45

9 THE COURT: No, no, no, I don't want to hear this 15:02:47

10 argument again. This is the in chambers -- we are trying 15:02:50

11 to figure out what kind of plan we want. This is what you 15:02:55

12 put before me. Mr. Beck has a different plan. 15:02:57

13 MR. ZIMMERMAN: Here's how I see it. And I 15:03:02

14 guess --

15 THE COURT: No, my question was, and you are 15:03:07

16 going to have to answer my question. What's wrong with 15:03:08

17 what Mr. Beck has said that we get several hundred cases, 15:03:11

18 you strung them, give them to Mr. Beck, they struggled to 15:03:21

19 do deposition and get a set of common issues and put them 15:03:29

20 before the Court in subgroups or whatever, however you want 15:03:33

21 to classify them. You may disagree, but you can at least 15:03:37

22 put them before the Court and say, we have these number of 15:03:41

23 cases to try. You block out nine weeks, twelve weeks of 15:03:45

24 your time for Baycol next year, and let's try them so we 15:03:52

25 have those issues resolved, either by trial or by motion, 15:03:58

1 summary judgment or Dalbert issues. We have those issues 15:04:04

2 solved, and, so, we will take those issues off the table 15:04:13

3 and we have them set for -- if these cases go back to the 15:04:13

4 districts, we have them set for the Judges back there. 15:04:17

5 We try them and if we win them and get the 15:04:20

6 attention of Bayer, then maybe we'll get what we want. 15:04:23

7 MR. ZIMMERMAN: Your Honor, here's the answer. 15:04:33

8 That's fine. If you start with the proper fundamental 15:04:36

9 beginning. If you start with a beginning that has a bucket 15:04:43

10 with a hole in it that are not appropriate cases to be in 15:04:48

11 this 200, all you're going to do is be chasing your tail. 15:04:52

12 Don't you see where they are coming from? They're saying 15:04:59

13 limit it only to Minnesota cases -- 15:05:03

14 THE COURT: I hear what they're saying? 15:05:05

15 MR. ZIMMERMAN: I'm responding to that. 15:05:09

16 THE COURT: You are not responding to what I'm 15:05:13

17 talking about. I'm controlling this case. I don't care 15:05:15

18 what Mr. Beck wants to do with those other cases. I may 15:05:17

19 keep them all. So, tell me what to do. 15:05:20

20 MR. ZIMMERMAN: Take cases and find cases that 15:05:22

21 categorize into what we want to try and try them. 15:05:26

22 THE COURT: I understand that. But the only way 15:05:29

23 to do that is for you to scrub them and give me something 15:05:31

24 more than a list of names which tells me nothing about the 15:05:36

25 cases so I don't have any categories to tell Mr. Beck, 15:05:39



1 here's the categories that we're going to deal with, these 15:05:44  
2 are the issues that we are going to deal with. These are 15:05:47  
3 bellwether cases. You did not do it, and we're going to 15:05:52  
4 take a recess. 15:05:55

5 (Recess taken.)

6 THE COURT: Special Master Haydock. 16:36:04

7 MR. HAYDOCK: Good afternoon, Your Honor. 16:36:05

8 THE COURT: Good afternoon.

9 MR. HAYDOCK: Reasonable minds have prevailed and 16:36:08

10 the parties, both the PSC and Bayer, have agreed upon an 16:36:11

11 outline of a trial plan. I'll outline it, and then I'll 16:36:16

12 ask Mr. Zimmerman and Mr. Beck to comment on whether or not 16:36:21

13 my rendition is accurate and their consent to it. 16:36:25

14 It basically consists of a four-part plan in 16:36:29

15 which a number of cases filed the in the MDL be selected 16:36:31

16 randomly. That exact number is unknown until we talk to 16:36:37

17 the statistician to determine some statistically accurate 16:36:42

18 number. So this will be minimally given the number 200 16:36:43

19 plus all the Minnesota cases. So, the 200 cases will be 16:36:47

20 selected randomly when they file the MDL cases, plus all 16:36:55

21 the Minnesota residents cases. Thank you. So all the 16:36:55

22 Minnesota residents file their cases in Minnesota, plus the 16:37:00

23 200 that would be the initial number. That number may 16:37:02

24 become higher if the statistician tells us we should use 10 16:37:05

25 percent of all the MDL filings or whatever. So, that's 16:37:09

1 step number one. 16:37:13

2 Step number two is by the September status 16:37:13

3 conference, the Plaintiffs will have vetted at least the 16:37:16

4 first 200, plus the Minnesota residents. Special Master 16:37:20

5 Remele and I will meet with the lawyers on the morning of 16:37:32

6 the status conference to find out what the remaining number 16:37:32

7 is of plaintiffs who filed fact sheets on those random 16:37:32

8 cases and the status of those cases. And whatever that 16:37:35

9 number is that to work out a schedule for a discovery plan 16:37:39

10 to include the medical records of the individual 16:37:43

11 plaintiffs, taking of the depositions of the individual 16:37:46

12 plaintiffs, expert reports or depositions of the treating 16:37:50

13 and prescribing physicians, and there will be a deadline 16:37:52

14 and a schedule plan submitted to the Court for discovery on 16:37:58

15 those cases. 16:38:02

16 If we need more than 200 plus the Minnesota 16:38:04

17 cases, there may be a second rounds of that, but, 16:38:07

18 initially, begin working on discovery for that. And then 16:38:11

19 when that's completed, we anticipate that taking a few 16:38:14

20 months, probably, then we'll reassess -- there will be 16:38:19

21 another meeting of the four steps and be a reassessment of 16:38:24

22 the next step which will probably include expert reports 16:38:26

23 and opinions, as well as some motions the parties may want 16:38:32

24 to bring. 16:38:34

25 The goal is to look forward to a trial date in 16:38:34

1 the spring of next year, the exact date unknown, depending 16:38:38

2 upon some of the unknowns that we don't have here. 16:38:43

3 Along with that trial plan goes -- regarding the 16:38:44

4 motions scheduled for argument today, that the PSC's 16:38:47

5 proposed trial plan motion, the Defendants' motion to 16:38:51

6 transfer venue and the PSC and Weitz's motion for 16:38:55

7 protective orders and Bayer's cross motion to compel Weitz 16:38:58

8 and Defendants' motion to establish a pilot program will 16:39:02

9 all be deferred for the future. And that the only 16:39:06

10 remaining motion that was to be argued today before you is 16:39:09

11 the bundling motion which will be taken on the record 16:39:13

12 before you with no argument. Mr. Zimmerman. 16:39:17

13 MR. ZIMMERMAN: Your Honor, that does accurately 16:39:22

14 reflect the agreements that we reached this afternoon. 16:39:23

15 I just want to make sure that we understand that 16:39:29

16 people who have notice of depositions out there right now, 16:39:33

17 they will be pulled back for now until a later date that 16:39:36

18 will be set, if at all, later after we complete this trial 16:39:43

19 plan, or at least we embark on the trial plan to the point 16:39:50

20 at which we have then agreed. We would then agree to go 16:39:55

21 back to either motions on the protective order or some 16:39:58

22 kind of discovery program with regard to Plaintiffs' 16:40:02

23 depositions. 16:40:05

24 The only reason I'm making a little speech about 16:40:05

25 it is I want the record to make sure that people know that 16:40:08

1 those depositions that are noticed will now be pulled back 16:40:12  
2 for now until a later date and subject to agreement of the 16:40:15  
3 parties. 16:40:20

4 THE COURT: All right. 16:40:20

5 MR. ZIMMERMAN: Is that reasonably accurate? 16:40:21

6 MR. BECK: Yes, Your Honor, that is accurate. 16:40:24

7 And, also, I want the record to reflect the understanding 16:40:26

8 that we reached, that the Plaintiffs will continue to be 16:40:30

9 required to produce Plaintiff fact sheets. And if they 16:40:34

10 don't, they will be subject to the Court's sanctions, 16:40:38

11 whatever they maybe. But we're pulling down all our 16:40:46

12 deposition notices, and we will focus our deposition 16:40:49

13 efforts on the plaintiffs who are randomly selected through 16:40:53

14 this agreed upon plan. But in the meantime, we still are 16:40:56

15 entitled to Plaintiff fact sheets on everybody who files a 16:41:03

16 case. 16:41:07

17 MR. ZIMMERMAN: That is correct. The Plaintiff 16:41:08

18 fact sheet requirement continues without abatement. 16:41:10

19 THE COURT: All right. Mr. Magaziner. 16:41:14

20 MR. MAGAZINER: No, Your Honor. I think what has 16:41:24

21 been said by Special Master Haydock and Mr. Zimmerman and 16:41:26

22 Mr. Beck is correct. 16:41:32

23 MR. HAYDOCK: We are pleased to report to the 16:41:35

24 Court the parties have seen the light in the future, and it 16:41:38

25 is in the future. 16:41:40

1 My last comment will be on the report on the 16:41:44  
2 Special Master. Nothing new has happened since my last 16:41:44  
3 report and that's my report today. 16:41:47

4 THE COURT: Thank you. Let's go to -- yes, 16:41:49  
5 counsel. 16:41:54

6 MR. SCHAERR: I'm sorry, I just had one 16:41:55  
7 additional housekeeping item we can take up related to the 16:41:58  
8 Italian prosecutor motion when the Court is finished with 16:42:01  
9 the other business. 16:42:05

10 THE COURT: Let's go through the listing of B, 16:42:07  
11 under 4(b). 16:42:09

12 MR. ZIMMERMAN: Your Honor, the first one under B 16:42:13  
13 is Plaintiff's -- PSC's motion to declare non-existence of 16:42:15  
14 Medicare liens. Susan Weber and I discussed that briefly 16:42:19  
15 and, although, there is nothing for the Court to decide on 16:42:26  
16 that at this time, as you know, the PSC has filed that 16:42:31  
17 motion and we have to agree on a briefing schedule. The 16:42:37  
18 important thing probably is that we need to notify, 16:42:42  
19 although we have notified, but we need to find out what the 16:42:47  
20 position of the U.S. Attorney will be on this. So, we have 16:42:49  
21 to spend sometime discussing it with the U.S. Attorney 16:42:53  
22 because it does, obviously, affect the Justice Department. 16:42:59  
23 So, Susan Weber and I agreed to meet and confer 16:43:02  
24 on this and see what we can do elicit the position of the 16:43:07  
25 U.S. Attorney and then agree on a briefing schedule. 16:43:11

1 I think the important thing is that issue is here 16:43:14  
2 before this Court. I believe the Court has seen the letter 16:43:18  
3 of Sol Weiss which was delivered recently to the Court 16:43:19  
4 saying that he would participate as amicus if required, and 16:43:23  
5 that he believes this issue is firmly now before the MDL 16:43:28  
6 court. 16:43:34

7 THE COURT: Anything? Nothing?

8 MS. WEBER: Nothing further, Your Honor. 16:43:38

9 THE COURT: All right. 16:43:39

10 MR. ZIMMERMAN: Defendants' motion for sanctions 16:43:44  
11 against Weitz. 16:43:45

12 MR. BECK: It's not ripe yet, Your Honor. We 16:43:50  
13 filed it last Wednesday. It needs to be briefed. 16:43:54

14 THE COURT: All right. 16:44:00

15 MR. ZIMMERMAN: Defendants' motion to strike. 16:44:01

16 MR. BECK: My understanding, Your Honor, is that 16:44:04  
17 the parties agreed that this should be decided without 16:44:04  
18 argument. It's been fully briefed. 16:44:08

19 UNIDENTIFIED SPEAKER: We have a response due the  
20 21st.

21 MR. BECK: When it is fully briefed

22 MR. ZIMMERMAN: On the 21st. 16:44:15

23 MR. BECK: It will be fully briefed and the 16:44:19  
24 parties agree that the Court can just decide on the papers. 16:44:25

25 MR. ZIMMERMAN: Third-party payer for class 16:44:27

1 certification. Your Honor, that is tied in some respects 16:44:32  
2 to all this third-party discussion I had earlier with the 16:44:34  
3 Court. And the Number 5 on this list, which is PSC's 16:44:38  
4 motion regarding third-party payer negotiations and 16:44:45  
5 settlements. That is not fully briefed. We'll provide -- 16:44:48  
6 we will meet and confer on a briefing schedule and have 16:44:56  
7 briefs to the Court and a schedule to the Court once we 16:45:01  
8 discuss that. These are just matters of information. 16:45:03

9 I believe -- is Kim West still here. I think I 16:45:07  
10 said before that Kim West was here. She is a lawyer from 16:45:12  
11 Birmingham, Alabama, I believe, who represents a number of 16:45:19  
12 Blue Cross carriers, third-party payers, and according to 16:45:23  
13 what she has told me and my partner, she will be 16:45:29  
14 participating in these MDL proceedings on behalf of the 16:45:32  
15 third-party payers or the Blue Cross carriers that she 16:45:37  
16 represents. They are not all the Blue Cross carriers in 16:45:42  
17 the country. It's a substantial number of Blue Cross 16:45:46  
18 carriers. But that was why she was here today. She was 16:45:49  
19 going to tell the Court that she would be participating in 16:45:53  
20 filing appropriate documents on with the court on behalf of 16:45:56  
21 third-party payer Blue Cross. 16:46:00

22 THE COURT: All right. Number 5. 16:46:04

23 MR. ZIMMERMAN: Five is we are just asking for a 16:46:09  
24 motion to be involved in the negotiations and settlements, 16:46:09  
25 and, again, that is not fully briefed, so, that will have 16:46:12

1 to be briefed and decided. 16:46:16

2 There are two matters pending before Magistrate 16:46:19

3 Judge Lebedoff. PSC's motion to compel insurance 16:46:23

4 discovery, I believe that's set for hearing later this 16:46:28

5 month. 16:46:31

6 MR. HOPPER: 24th of July. 16:46:34

7 MR. ZIMMERMAN: Yeah, it's the 24th of July 16:46:39

8 before Magistrate Lebedoff. Do you know if it's fully 16:46:41

9 briefed or not.

10 MR. HOPPER: It's fully briefed.

11 MR. ZIMMERMAN: It's fully briefed and will be 16:46:45

12 heard before Magistrate Judge Lebedoff on the 24th. 16:46:47

13 The continuing of Plaintiff fact sheet 16:46:50

14 delinquency issues are still before Judge Lebedoff on a 16:46:58

15 rolling basis. Do you have any comment on the status of 16:47:00

16 those or are where they are? 16:47:02

17 MR. BECK: I'm told that Judge Lebedoff recently 16:47:04

18 recommended a dismissal of four additional cases for 16:47:08

19 failure to provide Plaintiff fact sheets and has entered an 16:47:12

20 order giving the Weitz and Luxenberg until July 25th to get 16:47:19

21 Plaintiffs' fact sheets on another group of cases or else 16:47:25

22 he will recommend dismissal with prejudice of 949 of their 16:47:29

23 cases. So, we'll see what happens. 16:47:34

24 THE COURT: All right. 16:47:37

25 MR. ZIMMERMAN: Vicki, anything further on that? 16:47:45



1 MS. MANIATIS: Not at this time. 16:47:48

2 MR. ZIMMERMAN: Next Roman Numeral V is trials. 16:47:53

3 There are no trials presently scheduled in the MDL. We 16:47:55

4 have now had an oral presentation of what is going to be 16:47:58

5 the plan for trials in the spring. I believe A is now 16:48:02

6 covered by what we just stipulated to on the record that 16:48:13

7 Special Master Haydock put on the record. 16:48:16

8 THE COURT: Okay. 16:48:19

9 MR. ZIMMERMAN: With regard to B, again, we 16:48:23

10 believe we should have this information. I believe that's 16:48:28

11 under advisement by the Court, frankly. I don't think the 16:48:31

12 Court has ruled on that -- on our request to be provided 16:48:36

13 with a copy of that list. 16:48:42

14 THE COURT: That's correct. 16:48:44

15 MR. ZIMMERMAN: Report of the Special Master was 16:48:48

16 given and it was perfect, always is. 16:48:51

17 The last matter on the agenda, Your Honor, is 16:48:55

18 what we call "others". I have made a request of the 16:48:58

19 Defendants for a list of all Plaintiffs' counsel in the 16:49:05

20 Baycol litigation. The reason I have done this, Your 16:49:08

21 Honor, is to help in certain communications issues and to 16:49:14

22 certainly be advised of the names of counsel who have 16:49:21

23 Baycol litigation cases around the country. It isn't a 16:49:24

24 very extraordinary request. In the Propulsid litigation we 16:49:30

25 exchanged those lists -- 16:49:36

1 THE COURT: I thought you were receiving this 16:49:36  
2 already.

3 MR. ZIMMERMAN: No. 16:49:38

4 THE COURT: Because we sent out letters. 16:49:40

5 MR. ZIMMERMAN: That was February. We don't get 16:49:43  
6 updates. We don't get the elicited. I think I sent this to 16:49:45

7 both Peter, Susan and everyone except Mr. Beck by e-mail 16:49:52

8 recently, and the matter was taken up, since they declined 16:49:56

9 the request, and I needed to take it up with the Judge, and 16:50:02

10 if the Court wants me to make it the subject of a motion, 16:50:05

11 I'm be happy to do that. 16:50:09

12 I just wanted say on the record that in the 16:50:12

13 Propulsid litigation, we exchanged it on disk and hard copy 16:50:12

14 at each monthly conference, and I see no reason why it 16:50:19

15 should be any different in this MDL. 16:50:23

16 THE COURT: Mr. Beck. 16:50:27

17 MR. BECK: Mr. Zimmerman is one hundred percent 16:50:27

18 correct. I didn't read the e-mail. He said that I didn't 16:50:30

19 read it. What I suggest, Your Honor, is that we take a 16:50:35

20 look at this and talk more with Mr. Zimmerman and see if we 16:50:36

21 can reach an agreement, and if we can't, he can make a 16:50:39

22 motion and -- 16:50:41

23 THE COURT: Reach an agreement because I'm going 16:50:41

24 to order it. 16:50:44

25 MR. BECK: That takes some of my negotiating. I 16:50:46

1 predict that Mr. Zimmerman and I'll reach an agreement on 16:50:55

2 this. 16:50:59

3 THE COURT: Anything further, Counsel. 16:50:59

4 MR. SCHAERR: Yes, Your Honor. I wanted to 16:51:00

5 report on our meeting with Judge Lebedoff at two o'clock 16:51:05

6 today. 16:51:05

7 THE COURT: Use the microphone, please. 16:51:08

8 MR. SCHAERR: We did meet with Judge Lebedoff at 16:51:12

9 two o'clock today to talk about the discovery order with 16:51:17

10 respect to the Italian prosecutor issue, and I believe we 16:51:20

11 are near agreement on a stipulated order which we will work 16:51:23

12 to submit to the Court tomorrow. But I just wanted to make 16:51:28

13 clear on the record that as of this moment, the members of 16:51:32

14 the PSC and their firms and their agents are required to 16:51:35

15 retain all documents that may relate either to the Italian 16:51:38

16 prosecutor or to the motion that was filed on his behalf. 16:51:41

17 THE COURT: That's correct. 16:51:43

18 MR. SCHAERR: Thank you, Your Honor.

19 MR. HOPPER: Good afternoon. Thank you, Your 16:51:52

20 Honor, Randy Hopper for the PSC. We're looking at a 16:51:52

21 stipulation at this time and proposing some additional 16:51:57

22 language, but I doubt there will be any problems going 16:52:00

23 forward with that. We're trying to do it so we can get it 16:52:03

24 entered today which is what you want to do. 16:52:06

25 THE COURT: Anything else, Mr. Zimmerman? 16:52:11

1 MR. ZIMMERMAN: No, Your Honor. That concludes 16:52:14

2 the agenda for today. 16:52:17

3 THE COURT: Mr. Beck? 16:52:19

4 MR. BECK: I want to wish a happy weekend to Mr. 16:52:24

5 Meshbeshher. 16:52:28

6 MR. ZIMMERMAN: We do have an in camera hearing. 16:52:30

7 THE COURT: Anything else, Mr. Beck? 16:52:33

8 MR. BECK: No, Your Honor. 16:52:35

9 THE COURT: Thank you. And give me five minutes. 16:52:37

10 Who's coming back -- how many lawyers are coming back? 16:52:43

11 MR. ZIMMERMAN: Two, maybe. 16:52:48

12 MR. BECK: This does not involve us. 16:52:51

13 THE COURT: No, it does not. It just deals with 16:52:53

14 the Common Benefit Funds. 16:52:57

15 MR. BECK: Thank you, Your Honor. Do we have a 16:52:59

16 date yet for September? 16:53:01

17 THE COURT: No, we do not. What I would like to 16:53:03

18 do is to -- we don't know what the date of the Philadelphia 16:53:07

19 conference is, my understanding? It has not been set? 16:53:14

20 MR. MAGAZINER: It has not been set. 16:53:19

21 THE COURT: What we'll do is call Philadelphia 16:53:22

22 and see what dates they are interested in. I would like to 16:53:26

23 have Mr. Weiss here. I would like to get more coordination 16:53:28

24 with Philadelphia because we have the vast majority of the 16:53:30

25 cases, and there is no need for us duplicating each other's 16:53:35

1 efforts. We're are on different tracks, but some of the 16:53:41  
2 things would be helpful so they know what we're doing. I 16:53:44  
3 want to make sure that they understand what we are doing. 16:53:48  
4 I'm not trying to interfere with anything they are doing 16:53:51  
5 there. 16:53:55

6 MR. BECK: We'll await word on this. 16:53:57

7 THE COURT: We will await word and try to make it 16:54:00  
8 as late as possible. That gives the PSC as much time as 16:54:04  
9 possible to vet their 200 cases or whatever the 16:54:07  
10 statistician says. 16:54:14

11 MR. MAGAZINER: Your Honor, Special Master 16:54:14  
12 Haydock asked me to find out what was going on in 16:54:16  
13 Philadelphia. There is a conference on the 29th of July 16:54:21  
14 and it's anticipated that at that conference Judge Ackerman 16:54:23  
15 will set a September conference. 16:54:28

16 MR. BECK: Your Honor, I think everybody is on 16:54:31  
17 agreement on this, but I want to make sure I don't have a 16:54:31  
18 misunderstanding. When the 200 or so cases get selected, 16:54:35  
19 we will be provided with the names of those as well as the 16:54:40  
20 PSC. It's just that they will decide which ones, if any, 16:54:41  
21 they are not interested in pursuing.

22 THE COURT: This is a totally open process. 16:54:51

23 MR. BECK: Yes. 16:54:54

24 THE COURT: I hope you understand we have got to 16:54:55  
25 do this, and it's important that both sides have input in 16:54:56

1 whatever model that we create without me imposing 16:55:01

2 something. 16:55:06

3 MR. BECK: Thank you, Judge

4 MR. MAGAZINER: I think the PSC and Special 16:55:10

5 Master Remele and Special Master Haydock were a great help 16:55:13

6 to us in working this out. 16:55:19

7 THE COURT: I thank them, too. 16:55:19

8 MR. BECK: I think we all got a little bit of a 16:55:24

9 kick in the pants from the Bench as well, which helped. 16:55:24

10 MR. ZIMMERMAN: Especially me. 16:55:27

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1           REPORTER'S CERTIFICATE

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