

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re: Baycol Products Litigation )File No. MDL 1431  
)  
)11:30 a.m. o'clock  
)October 17, 2002  
)Minneapolis, MN  
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BEFORE THE HONORABLE MICHAEL J. DAVIS  
UNITED STATES DISTRICT COURT JUDGE  
(MOTION)

APPEARANCES:

ON BEHALF OF THE PLAINTIFF: WENDY FLEISHMAN, ESQ.

ON BEHALF OF THE DEFENDANT: SUSAN WEBER, ESQ.  
ELIZABETH WRIGHT, ESQ.  
JACQUELINE MOEN, ESQ.

COURT REPORTER:

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1 THE CLERK: Multi-District Litigation No. 1431,  
2 In re: Baycol Products. Please state your appearances for  
3 the record.

4 WENDY FLEISHMAN: Wendy Fleishman for the  
5 plaintiffs, Your Honor.

6 THE COURT: Good morning.

7 MS. FLEISHMAN: Good morning.

8 MS. WEBER: Susan Weber for Bayer AG.

9 MS. WRIGHT: Elizabeth Wright from Dorsey on  
10 behalf of Bayer.

11 THE COURT: Good morning.

12 MS. MOEN: Jacqueline Moen of Halleland Lewis on  
13 behalf of GlaxoSmithKline.

14 THE COURT: Good morning. You may proceed.

15 MS. WEBER: Good morning, Your Honor. For months  
16 the Plaintiffs Steering Committee has been regaling you  
17 with tales about how aggressively they are pursuing  
18 discovery against defendants. Now we come to class  
19 certification, the first opportunity for defendants to  
20 really test plaintiffs' case. And what happens is that  
21 plaintiffs start playing procedural games to try and wall  
22 off evidence that they don't want us to have.

23 On the evening of the scheduled depositions of  
24 two of their named plaintiffs, their hand-picked class  
25 representatives, they suddenly announce that they are going

1 to cancel the depositions and they were going to withdraw  
2 the plaintiffs as class representatives. Obviously, what  
3 happened, Your Honor, is plaintiffs sat down to prepare the  
4 witnesses, realized they didn't like the testimony that  
5 their witnesses were going to give, and decided they were  
6 going to have to play a procedural game to try and keep us  
7 and Your Honor from having access to that evidence in  
8 dealing with class certification.

9 We submit, Your Honor, that plaintiffs should not  
10 be allowed to distort the evidentiary record on this very  
11 important issue that's coming up, and you should,  
12 therefore, compel them to present plaintiffs Prem Gupta and  
13 Mark Hall for depositions. And to understand the  
14 procedural games that are being played here, I'm going to  
15 go back briefly to the history of the claims of these two  
16 plaintiffs.

17 Prem Gupta filed her own case one week after  
18 Baycol was withdrawn from the market. So, this goes back  
19 to August, more than a year ago. She has been very active  
20 in this litigation. Her counsel is Ken Moll, and he had  
21 actually relied on her case in arguing that this MDL  
22 litigation should go to Chicago. So, this was one of the  
23 leading cases from the get go.

24 Mark Hall also filed a putative class action back  
25 in November. So both of these plaintiffs were in this

1 litigation before there even was an MDL.

2           The PSC picked these two people to serve as  
3 representatives in the master class action complaint from  
4 all of the plaintiffs out there in the MDL who had filed at  
5 that time, and also who plaintiffs knew they had in their  
6 stockpile of cases that they were preparing to file over  
7 the summer months. When the PSC made that decision, there  
8 is no doubt that they explained to Gupta and Hall what they  
9 were getting into by becoming plaintiffs in the master  
10 class action complaint. You are definitely going to be  
11 called for a deposition. Some beady-eyed defense lawyer is  
12 going to sit across the table from you and ask hard  
13 questions, and Gupta and Hall said fine --

14           THE COURT: You don't look beady eyed. (Laughter)

15           MS. WEBER: I don't do the depositions.  
16 (Laughter). Plaintiffs' characterization of my colleagues,  
17 my assumption about them.

18           So Gupta and Hall show up in the master class  
19 action complaint which is filed in May. Over the summer,  
20 plaintiffs amend that complaint to change one of the class  
21 representatives, but Gupta and Hall are still in the  
22 complaint, but they submitted to the Court the amended  
23 version at the end of August.

24           We proceed to set up depositions scheduled for  
25 them. We gathered their plaintiff fact sheet, their

1 medical records. We have nurses do detailed chronology on  
2 medical records. We ship them out to our experts. The  
3 lawyers do all the work to prepare for the depositions.  
4 Two business days before they are scheduled to go,  
5 plaintiffs suddenly decide that they do not want to appear  
6 and want to withdraw.

7 I think there is only one logical conclusion you  
8 can draw based on this fact pattern. The plaintiffs'  
9 counsel sat down and prepared their witnesses, decided they  
10 weren't going to like the testimony that they were going to  
11 give, and is now trying to play procedural games. You know  
12 what would happen if we decided we weren't going to present  
13 a witness because we didn't like the testimony that that  
14 witness was going to give.

15 Now, plaintiffs argue in opposing our motion to  
16 compel, we've got ten class representatives, what do you  
17 need to talk to these other two for. The reason we need to  
18 talk to them is that their evidence is probative of  
19 specific problems with plaintiffs' motion for class  
20 certification.

21 Prem Gupta is a representative of plaintiffs'  
22 injury class. As you know, Your Honor, that class is not  
23 confined and just limited to just those cases, it covers a  
24 wide range of injuries. Prem Gupta is a muscle aches  
25 plaintiff, and we think she is sort of the poster child for

1 why muscle ache cases can't be tried on a class-wide basis.  
2 Plaintiffs, they figured this out, too, when they sat down  
3 to prepare for the deposition, and, so, they are trying to  
4 keep the evidence out of the record or to limit it as much  
5 as we can, the evidence on that point. If they are going  
6 to ask you to certify a class that encompasses muscle ache  
7 cases, then you should have evidence before you relating to  
8 the problems that would arise with that class. And that's  
9 why we think it's very important to take Prem Gupta's  
10 deposition.

11 The other plaintiff, Mark Hall, is a putative  
12 representative of the medical monitoring class. Now, that  
13 class is defined as including persons who are asymptomatic  
14 for any injury at this point and time but want monitoring  
15 because they think they may have a problem down the line.  
16 The catch is that Mark Hall submitted a plaintiff fact  
17 sheet that says he has a present injury. He, by  
18 definition, is not a member of the class that he purports  
19 to represent.

20 This is very important because one of the things  
21 that plaintiffs have to prove in order to get class  
22 certification is ascertainability of class membership.  
23 It's easy to pigeonhole who goes into each of their  
24 proposed classes. If you can't figure out who belongs in  
25 what class, they can't establish ascertainability, which is

1 one of the considerations that goes into manageability  
2 under Rule 23(b)(3) and (b)(2). Inability to ascertain  
3 class members was one of the grounds on which class  
4 certification was denied by the Rezulin court very  
5 recently.

6 Mark Hall demonstrates that plaintiffs themselves  
7 couldn't figure out with their own hand-picked class  
8 representatives who was going to fall into what class, that  
9 if the court were to certify a class, we would have an  
10 enormous manageability problem down the line.

11 We are entitled to develop that evidence so that  
12 Your Honor has it in considering whether plaintiffs have  
13 carried their burden of proof on class certification. What  
14 plaintiffs want to do is try to make the evidence disappear  
15 so Your Honor isn't working from the full record in ruling  
16 on their motion, and we think that's improper.

17 Now, plaintiffs' justification for doing that,  
18 they say, we can withdraw whenever we want. They filed a  
19 one-page perfunctory motion at the close of business  
20 yesterday seeking to withdraw not only from the master  
21 class action complaint but from the two cases that Gupta  
22 and Hall had previously filed. But the law is that they  
23 can't just walk away from this litigation. Rather, under  
24 the Eighth Circuit decision in Hamm, there are specific  
25 force you look at in deciding whether they should be

1 allowed to dismiss. One of them is what's their  
2 explanation. They don't have one. There is absolutely  
3 nothing in their motion to dismiss. And even in their  
4 opposition to our motion to compel, the closest they come  
5 to an explanation is saying plaintiffs are not willing to  
6 proceed as class representatives. That is not a sufficient  
7 explanation. And what Hamm says is when plaintiffs don't  
8 give you a good reason, you are allowed to use your common  
9 sense in figuring out what's really going on. And I would  
10 submit that the record here demonstrates what's going on is  
11 plaintiffs are trying to hide the evidence, and that's why  
12 they decided not to proceed. Evading discovery is not a  
13 legitimate reason for dismissing a case.

14         One of the other factors that Hamm says the court  
15 should look at is prejudice to defendants. And I think we  
16 also have a factor of prejudice to the court. As I  
17 demonstrated earlier, the testimony that we expect to  
18 elicit from these two plaintiffs is specific relevant to  
19 key issues in the motion for class certification. We are  
20 entitled to develop that as part of our defense. You are  
21 entitled to consider it in ruling upon plaintiffs' motion.

22         There are also two other issues of prejudice that  
23 are lurking here. One is plaintiffs seek dismissal without  
24 prejudice saying they are going to be absent class members.  
25 That, of course, presumes that a class is going to be



1 certified. If a class is not certified, and we think it  
2 should not be, we are going to have these plaintiffs back  
3 down the line filing new cases and wanting to proceed. We  
4 should take the other depositions now while everyone is  
5 ready to go with them.

6 Of course, the final form of prejudice is the  
7 practical burden that we've had in preparing for these  
8 depositions. I explained a few minutes ago -- the  
9 plaintiffs said all we have done is get fact sheets and  
10 medical records together. Obviously a great deal more work  
11 goes into that in preparing to take a deposition of a class  
12 representative in litigation of this scope, including  
13 contact with experts, including detailed preparation of  
14 chronologies and the basic work of getting ready to do the  
15 deposition. And, so, that's a prejudice that's inured to  
16 defendants.

17 Plaintiffs -- even if plaintiffs were allowed to  
18 withdraw as class representatives and dismiss their cases,  
19 we should be allowed to go forward with the depositions  
20 that are scheduled for next week. Plaintiffs contend if  
21 they are allowed to dismiss, they should be treated as  
22 absent class representatives and not subject to the burden  
23 of discovery. And they cite cases that deal with true  
24 absent class representatives, people who haven't been part  
25 of the proceedings of litigation.

1 Well, the general rule that you can't depose  
2 absent class representatives is based on the fact that  
3 people may not know they are part of the litigation. They  
4 may not have an interest in being part of the litigation.  
5 They don't have opportunity to weigh in on that issue until  
6 they get notice if a class is certified. So, defendants  
7 aren't allowed to routinely pull people off the streets for  
8 depositions. But here we haven't pulled strangers off the  
9 streets and say, did you take Baycol, here's the court  
10 reporter. These are people who have been as present as you  
11 possibly could be as plaintiff in this litigation, from  
12 very early stages of filing their own cases, first master  
13 class complaint, the amended complaint. So to treat them  
14 as absent class members is fiction. Rather, we would  
15 suggest that if Your Honor is inclined to dismiss, and we  
16 don't think they have met the burden for that, but if you  
17 nevertheless conclude that they can get out as class reps,  
18 a precondition for that dismissal should be requiring them  
19 to appear for their depositions next week. That would cure  
20 the prejudice to defendants and yet develop the evidence  
21 that we need for the record. It will give the evidence  
22 that you need, Your Honor, and it's consistent with the  
23 approach that's been taken by a number of other courts when  
24 plaintiffs were trying to dismiss to evade discovery.  
25 We specifically cited the Mashek case where the

1 court held that it's bad policy to let plaintiffs evade  
2 depositions, and they must testify as a precondition to  
3 dismissal. The Vitamins case where the fight there was  
4 over written discovery where the court said, you got to  
5 comply with your written discovery if you're going to get  
6 out. This is a parallel situation where they are trying to  
7 get out of the case to avoid specific discovery obligation  
8 that they should be required to comply with as a  
9 precondition. And that's consistent with the language of  
10 Rule 41 which governs dismissals because it provides that  
11 those dismissals should be upon terms and conditions as the  
12 court deems proper.

13 Here, it plainly would not be proper for  
14 plaintiffs to be allowed to use procedural machinations to  
15 limit the evidence that's before the court on class  
16 certification. So, we would submit, Your Honor, the  
17 plaintiffs should not be dismissed as class  
18 representatives, but if they are -- even if they are, you  
19 should grant our motion to compel.

20 THE COURT: Thank you.

21 MS. FLEISHMAN: Wendy Fleishman for the  
22 plaintiffs, Your Honor.

23 THE COURT: Good morning.

24 MS. FLEISHMAN: We offered a compromise as late  
25 as last evening. We specifically had told Ms. Weber, when

1 I say we, I'm not using the word we, Your Honor, Rob  
2 Shelquist of the Lockridge office called Ms. Weber last  
3 evening and said, we offered both Prem Gupta and Mark Hall  
4 for depositions, but that we would still withdraw them as  
5 class representatives. Would you get back to us so that I  
6 didn't have to fly here to Minnesota this morning, that  
7 Your Honor didn't have to sit and bring everyone to the  
8 courthouse, and that Ms. Weber didn't have to fly here from  
9 Chicago.

10 She never called us back. Today she comes into  
11 this court and asks Your Honor to order exactly the same  
12 thing, essentially, as we offered last night as part of  
13 that compromise.

14 If the Court please, Prem Gupta and Mark Hall are  
15 not adequate class representatives, which is the reason why  
16 plaintiffs seek to withdraw their cases and seek to  
17 withdraw them as class representatives. Class  
18 representation is a voluntary act. This Court has not  
19 certified a class, Your Honor. If Your Honor pleases, the  
20 class representation is one that is a matter of  
21 voluntariness on their part --

22 THE COURT: Did I hear you right that you are  
23 willing to have --

24 MS. FLEISHMAN: Be deposed. The issue was that  
25 we still want to withdraw them as class reps because they

1 are not adequate.

2 THE COURT: I'm glad to have all of you here.

3 MS. WEBER: Your Honor, the offer I understood  
4 from Rob Shelquist would be that they could be deposed but  
5 not on a timely basis for the class certification motion.  
6 Rob gave me one-half hour to call him back. They filed  
7 pleadings in the meantime with notice, but we didn't get  
8 the motion in response to it.

9 If their position is that they are going to put  
10 their witnesses up next week and they want to withdraw them  
11 as class representatives nevertheless, but we can take  
12 their deposition and use the evidence, we can do it and the  
13 problem is solved. That's not what I understood Rob to  
14 offer last night.

15 THE COURT: Well, that's what I'm going to order.  
16 My order will be come out today or tomorrow at the latest.  
17 They will be able to withdraw, and they will be put up for  
18 the depositions as scheduled for -- what's the date for the  
19 depositions? Do you have the dates?

20 MS. WEBER: We have some tentative dates.

21 MS. FLEISHMAN: We'll work on the dates.

22 THE COURT: And get them to me. Good to see you  
23 all, and it's going to snow. (Laughter)

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REPORTER'S CERTIFICATE

I, Brenda E. Anderson, Official Court Reporter,  
in the United States District Court for the District of  
Minnesota, do hereby certify that the foregoing transcript  
is a true and correct transcript of the proceedings in the  
above-entitled matter.

CERTIFIED: \_\_\_\_\_

\_\_\_\_\_  
Brenda E. Anderson, RPR