

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

)
In re: Baycol Products)
Litigation) File No. MDL 1431
) (MJD/JGL)
)
) Minneapolis, Minnesota
) December 9, 2003
) 10:00 a.m.

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

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
RONALD GOLDSER, ESQ.
RANDY HOPPER, ESQ.
JOHN CLIMACO, ESQ.
MARGARET BRANCH, ESQ.
JAMES DUGAN, ESQ.

For Defendant Bayer: ADAM HOEFLICH, ESQ.
PETER SIPKINS, ESQ.
KIMBERLY KOERNER, ESQ.
EUGENE SCHOON, ESQ.

For Defendant FRED MAGAZINER, ESQ.
GlaxoSmithKline:

For Blue Cross Blue KIMBERLY WEST, ESQ.
Shield of Minnesota:

For Richard Medalie: DAVID STANLEY, ESQ.
ROBERT CYNKAR, ESQ.

For Weitz & Luxenberg VICTORIA MANIATIS, ESQ.

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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

4 MR. ZIMMERMAN: Good morning, Your Honor.
5 Charles Zimmerman for the Plaintiffs.

6 THE COURT: Good morning.

7 MR. CLIMACO: John Climaco for the Plaintiffs.

8 THE COURT: Good morning.

9 MR. BRANCH: Turner Branch, Your Honor, for the
10 Plaintiffs; and Margaret Branch is also here.

11 THE COURT: Good morning.

12 MS. BRANCH: Good morning, Judge.

13 MR. GOLDSER: Good morning, Your Honor. Ron
14 Goldser for Plaintiffs.

15 THE COURT: Good morning.

16 MS. MANIATIS: Good morning, Your Honor.
17 Victoria Maniatis for Weitz & Luxenberg.

18 THE COURT: Good morning.

19 MR. HOPPER: Good morning, Your Honor. Randy
20 Hopper for the Plaintiffs.

21 THE COURT: Good morning.

22 MR. DUGAN: Good morning, Your Honor. James
23 Dugan for the Plaintiffs.

24 THE COURT: Good morning.

25 MS. WEST: Good morning, Your Honor. Kim West

1 for Blue Cross Blue Shield of Minnesota in the class
2 subrogation claims.

3 THE COURT: Good morning.

4 MR. STANLEY: David Stanley for Richard Medalie.

5 And this is my co-counsel, Robert Cynkar.

6 MR. CYNKAR: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. HOEFLICH: Good morning, Judge. Adam

9 Hoeflich for Bayer.

10 THE COURT: Good morning.

11 MR. HOEFLICH: With me today are two new faces,
12 Kim Koerner from Bayer Corporation in Pittsburgh and Gene
13 Schoon, who is Susan Weber's partner at Sidley Austin who
14 has been handling the Medicare issues for Bayer.

15 THE COURT: Good morning.

16 MR. SCHOON: Good morning, Your Honor.

17 MS. WEBER: Good morning, Your Honor. Susan
18 Weber for Bayer.

19 THE COURT: Good morning.

20 MR. SIPKINS: Your Honor, Al Franken for the
21 Defendant.

22 THE COURT: Good morning.

23 MR. MAGAZINER: Good morning, Your Honor. Fred
24 Magaziner for GSK.

25 THE COURT: Good morning.

1 MR. ZIMMERMAN: And I am Rush Limbaugh and I am a
2 big fat liar (indicating). Isn't that what he said? Good
3 morning, Your Honor.

4 THE COURT: You looked like a tennis pro when
5 you --

6 MR. ZIMMERMAN: I used to. I don't know anymore.

7 A couple of introductory statements about the
8 status report. There was some -- it was really not
9 confusion. There was just some time crunches we had with
10 regard to getting a joint report to the Court.

11 Because my firm was involved in weekend meetings,
12 year-end meetings, out of the office on Thursday, Friday,
13 and part of -- no, Friday, Saturday, and part of Sunday and
14 then we had Baycol meetings following that also out of
15 the -- in Santa Fe, New Mexico, Sunday and Monday, it
16 became very difficult for us to be able to edit out the
17 drafts of the status report.

18 And I have no particular problems with it, but it
19 was for that reason we couldn't make it joint, because we
20 hadn't been able to review it. Susan and I did talk on the
21 phone, but we just weren't able to exchange drafts because
22 we were in airplanes and we just didn't have the ability to
23 do it.

24 So I don't think there's anything wrong with it
25 in any way, but perhaps there's some ways we may have said

1 things differently or maybe added a few little things here
2 and there; and we will do it as we go, if that's okay. I
3 don't think there's anything controversial at all.

4 THE COURT: All right.

5 MR. ZIMMERMAN: And if it is, I'm sure I'll hear
6 about it.

7 Second point, Your Honor, and it may be more of a
8 structural question. As we reach into next spring and the
9 summer and we look towards trials and the preparation of
10 trials and all this random selection stuff and the lists of
11 what's going to be tried and what's going to fall, I'm
12 finding that we're going to be needing informal discussions
13 between counsel and with the Court.

14 Because, for instance, one of the things we're
15 talking about is expansion of the random list; and we began
16 this process in October, the end of October, to try and get
17 some more meat on that bone because of things that
18 happened.

19 I am not here to argue it and I'm not going to
20 argue it, but it seems to me because of the way we've
21 briefed it and the way we're working through it, it's now
22 not going to be ripe for argument under our current way of
23 doing business until the January status, which means that
24 from October, when we kind of raised the flag about having
25 to expand the list and do some more things, as outlined in

1 my letter and in our brief and outlined by Phil Beck in his
2 letter to the Court and in the subsequent brief they're
3 going to file -- my guess is we will be worlds apart.

4 And it won't be January until we resolve it and
5 we've kind of used up three months of time when we should
6 be really working on whatever might be an expansion of the
7 list. And we lost that time because we have no ability to
8 kind of, like, cut to it and have -- if we don't agree,
9 have the judge come in and say here's what I want you guys
10 to do.

11 It's not a legal question. It's a question of
12 what the procedure of these courts -- of this court is
13 going to be about how to get the right cases in the box and
14 do what we all know our intention of doing from this
15 process is, which is to figure out what these muscle injury
16 cases -- how juries may respond to appropriate muscle
17 injury cases.

18 And I'm very, very concerned that we're just not
19 able to cut to the chase on this and that we're going to
20 really lose that opportunity. We might have -- you know,
21 we'll have a case to try, that's for sure, but we won't
22 have anything behind it. We haven't looked at summary
23 juries. And as Phil said when we were here last time, one
24 verdict or two verdicts isn't going to make anybody's
25 thinking change and we are still facing a lot of trials.

1 And I want to talk more about that at some point
2 in time. I told the other side I'm not going to sit here
3 and argue it because they want to respond to it. All I'm
4 saying is we need a way to do it on a more expedited basis
5 so we're not raising an issue in October, resolving it in
6 January when we are looking at a June date to start
7 unfolding what we want to unfold and really missing all
8 that time and then coming in and saying, well, we can't do
9 the discovery in time and therefore we're late.

10 So I would like to bring some more informality to
11 the process as we all fly in here to get together so we can
12 talk this stuff through, but as you know, that hasn't
13 really resonated much with the other side.

14 Adam.

15 MR. HOEFLICH: May I respond, Judge?

16 THE COURT: Good morning.

17 MR. HOEFLICH: Good morning. We've had several
18 informal discussions with the PSC.

19 In November the PSC came to the Court and said
20 that it wanted to amend the carefully planned and
21 negotiated pretrial order, which was Pretrial Order 89.

22 We sent letters to the Court. We told the PSC
23 that if they wanted to amend something this significant,
24 which from our view was a way to determine the makeup of at
25 least a random sample of cases plus a nonrandom sample of

1 the Minnesota cases, we should work through that group.

2 PSC wanted to change it. They filed a brief.

3 On Friday the PSC came to us and said: Well,

4 that brief we filed, we've got some amendments to it.

5 Here's some other things we want to try. We want to try to

6 work it out with you. And Bucky sent me an e-mail saying

7 this would be an amendment to what we filed.

8 Our view is we don't want to deal with a moving

9 target. We had a carefully thought-out plan. We entered

10 into it. If things need to be changed, we don't think it

11 takes that long for the PSC to file a motion. We'll

12 respond to it. We'll come in front of the Court.

13 But we think it's unfair to change the mechanism

14 that we think due process entitles us to, which is if the

15 PSC wants to change an order of the Court, they are

16 entitled to come to us with something formal and give us a

17 chance to respond.

18 We don't think this is the sort of thing that

19 should be changed by a phone call on Friday, a few

20 discussions, and then some ad hoc argument the following

21 Tuesday. We don't think that's fair to us. We don't think

22 it's fair to the Court. We think it will engender changes

23 that don't last.

24 So to the extent the PSC thinks there are changes

25 to be made, I am happy to sit down with Mr. Zimmerman. I

1 know Mr. Beck is too. We will work with him.

2 But we think that the process that the Court has
3 set up is the appropriate one and we don't think this is
4 the sort of thing that can be changed by informal
5 discussions, unless there's an agreement.

6 We think that the party should file a motion. If
7 an expedited briefing schedule is appropriate, the party
8 can ask for it and we are entitled to be heard.

9 Thank you, Judge.

10 MR. ZIMMERMAN: I think that kind of underscores
11 the problem. I think the Court understands it. When we
12 get to those issues in the agenda, we'll argue them perhaps
13 more fully or the Court will decide how you want us to
14 handle it.

15 But we are in this situation where things are a
16 moving target because you're talking about people who we
17 don't have -- we are talking about a process that none of
18 us have ever gone through before, random lists, screening
19 lists, trying to set things on a going-forward basis,
20 depositions all across the country.

21 There are just bumps and grinds that occur, and I
22 think we need a more expeditious way to resolve them and
23 not go through the formalized process.

24 I recognize their right to due process and nobody
25 wants to trample on that at all. I'm just asking for a way

1 to ramp it up and expedite it a little bit better because,
2 like I said, I started this process in October and we are
3 not going to get anything resolved under this mechanism
4 until sometime in January.

5 Your Honor, then heading into the agenda. As of
6 the close of business on December 5th Defendants have been
7 served with 9,937 cases that remain active. Of that total,
8 5,938 cases are pending in federal court and 3,999 cases
9 are pending in state court.

10 Filed but unserved cases are not included in
11 these totals, as we've talked about each time we've given
12 these statistics. This total excludes, also excludes 441
13 cases that have been settled but yet not formally
14 dismissed.

15 Defendants will provide the Court with a report
16 of the number of plaintiffs reflected in these filings and
17 so I guess they should do that -- do you want to do that
18 now?

19 MR. HOEFLICH: Sure. Judge, during the last
20 several weeks Bayer has endeavored to determine for the
21 Court how many plaintiffs are in the active cases.

22 As best we can tell -- as you know, we don't
23 believe these are very important or necessarily pinpoint
24 accurate numbers -- the active cases include approximately
25 22,820 plaintiffs; and that excludes relatives and others

1 who do not claim to have taken Baycol.

2 I would also point out that, because I think it's
3 important for the Court to know, we don't read into this
4 number a whole lot for a host of reasons. It certainly
5 doesn't represent the number of people who took Baycol and
6 had serious side effects. The number does not equate to
7 the number of rhabdo cases. In fact, the vast, vast
8 majority of these people did not suffer serious side
9 effects.

10 The cases would include persons, for example, who
11 never even took Baycol or people who took Baycol for whom
12 Baycol worked fine. It would include people who claimed
13 Baycol caused things like blindness or other such ailments
14 that are unrelated in any way to Baycol. But that's the
15 number, for what it's worth.

16 There's also something that I believe
17 Mr. Zimmerman and I have agreed we would say that I think
18 is the result of informal talks between the sides.
19 Mr. Zimmerman came to us last week to discuss narrowing the
20 MDL caseload.

21 The MDL has personal injury cases of all shapes
22 and sizes. Some of these cases have been brought by those
23 who claimed while they were taking Baycol that they had
24 what Mr. Zimmerman calls muscle injuries, and we have used
25 different terms for that.

1 As we all know, this MDL also includes cases
2 brought by other individuals against Bayer, including
3 alleged personal injury cases brought by persons who are
4 not injured or did not even take Baycol.

5 Mr. Zimmerman has suggested that he wants to
6 focus the personal injury cases in this MDL on what he and
7 the other plaintiffs' lawyers believe are compensable, in
8 his words, muscle injury cases and to eliminate the
9 noninjury cases from the mix perhaps by requiring
10 plaintiffs to come forward with contemporaneous evidence
11 that they complained of muscle injuries or aches and pains,
12 in our language, while taking Baycol in order to avoid
13 dismissal with prejudice of their cases.

14 Defendants disagree that these nonrhabdo cases
15 have value and we do not intend to settle those cases.
16 However, we believe that the MDL should be narrowed to
17 those cases that the PSC actually would be willing to try.

18 We believe that this narrowing would greatly
19 reduce the burden on the parties as well as on the Court
20 and on its staff and on the transfer to courts when and if
21 it comes time for cases to be remanded for trial.

22 We will be working with the Plaintiffs during the
23 next months to see if there's a mechanism on which we can
24 agree to present to the Court as a means of narrowing the
25 cases that are in this MDL. We'll try to present that at

1 the next status.

2 THE COURT: All right. Thank you.

3 MR. ZIMMERMAN: I guess if you look at that in
4 the big picture, we have expanded the MDL to 22,900 cases
5 and we will try to work to narrow it to what's really going
6 to be at issue, and that is what we determine to be
7 compensable muscle injury cases.

8 And I think that's just our responsibility to
9 everybody and to the Court, that we have what is really
10 appropriate to be before the Court in terms of
11 compensatable cases, what we consider to be compensatable,
12 recognizing that the Defendants have no interest right now
13 or maybe ever in resolving them short of trials. Right?

14 MR. HOEFLICH: I just want to correct you on -- I
15 think you misspoke, what was the number of plaintiffs; and
16 it's 22,800, not 22,900.

17 MR. ZIMMERMAN: I stand corrected.

18 MR. HOEFLICH: And you are correct that we do not
19 believe those cases are compensable and we do intend to try
20 them.

21 MR. ZIMMERMAN: Now that the posturing is done,
22 we can move -- oh, Fred is here.

23 MR. MAGAZINER: Bucky misspoke in another way as
24 well, Your Honor. He said 22,000 and some cases in the --
25 plaintiffs in the MDL. That is total, both in the MDL and

1 in the state court.

2 MR. ZIMMERMAN: Do we have that broken down by
3 MDL and state?

4 MR. MAGAZINER: No, we don't, but I'm
5 saying these figures are not just the MDL.

6 MR. ZIMMERMAN: I stand corrected, Your Honor.
7 This is a work in process. I think Adam and I have come a
8 long way through our meeting at Starbucks in Glencoe,
9 Illinois. And we don't know if this will ever come
10 together or not, but we're talking and that's a good sign.

11 As of the November status, Defendants have been
12 served with -- what is that? As of the November status,
13 Defendants have been served with 10,922 cases that remain
14 active. Of that total, 5,835 cases were pending in federal
15 court and 4,754 cases were pending in state court.

16 An updated list of plaintiffs' counsel has been
17 provided to us and is being provided to us on a regular
18 basis, monthly basis, by Defendants. And we appreciate
19 that and that has been very helpful to us, to know who's
20 out there that are plaintiffs, in ease of communication and
21 has eased communication.

22 Settlement, Your Honor.

23 THE COURT: If we can back up. Do we know the
24 breakdown -- I think we did get a breakdown of the
25 different -- of the MDL cases, where the major ones are

1 coming from?

2 MR. ZIMMERMAN: You mean the trials?

3 THE COURT: No. The 5,938 cases that you have
4 listed. On our docket we have 5,096, but I suppose another
5 900 cases are going to come our way -- or 800 and some
6 cases are going to come our way fairly soon.

7 Philadelphia, Pennsylvania, is a major depository
8 of most of these cases. What about Texas and California?
9 Do we know what the numbers are?

10 MR. ZIMMERMAN: Are you talking about where in
11 the federal system --

12 THE COURT: Right.

13 MR. ZIMMERMAN: No, we have done no analysis of
14 it. I don't know if you have at all. So I can't really
15 comment on that.

16 MS. WEBER: Your Honor, I know that California is
17 a big state. I don't think Texas is that large in terms of
18 plaintiff volume at this point in time. I know there are a
19 couple of cases that have been filed in the deep south that
20 were multiplaintiff cases that had a large volume of
21 plaintiffs involved, but there's been significant attrition
22 on those cases for failure to file plaintiff fact sheets.
23 We can get you an updated spreadsheet showing the
24 distribution of where the cases are filed, if that would be
25 helpful.

1 MR. ZIMMERMAN: Do you want that spreadsheet?

2 THE COURT: Yes, I do.

3 MR. ZIMMERMAN: And if you do, could we get it,
4 could we get copies?

5 THE COURT: If I get a copy, you get a copy.

6 MR. ZIMMERMAN: Very good. Thank you.

7 Settlement, Your Honor. Defendants have settled
8 1,957 cases with a total value of 746,023,436 or
9 approximately, rounding, 746 million dollars. Of this
10 total, 444 cases have been determined to be subject to the
11 MDL assessment with a total settlement value of the MDL
12 cases of 159,267,850, rounded to 159 million.

13 As of last month's status or the November status,
14 the number settled was 1,739. So there's been an increase
15 in total settlements of approximately 220 cases and the
16 aggregate number has gone from 630 million to 746 million
17 for an aggregate increase of 110 -- 116 million.

18 429 of these settlements valued at approximately
19 136 million -- this is from the November conference -- were
20 MDL. So the MDL settlements that occurred last month were
21 an increase of -- help me out -- 15 cases, is that right,
22 or approximately 23 million, if I've got that right.

23 And then I -- okay.

24 MR. HOEFLICH: If I can just add one point to
25 that, Judge. I think you would be interested or would want

1 to know that since the last status conference Bayer has
2 settled 123 cases with Mark Robinson and Ramon Lopez that
3 are included in these numbers.

4 THE COURT: Thank you.

5 MR. ZIMMERMAN: Your Honor, I have just been
6 informed by my partner that we had not received the
7 settlement chart that we were supposed to have gotten of
8 the breakdown for over two months. We didn't receive it
9 last month, which they said we were going to receive, and
10 we haven't received it this month. So we would like that.

11 MS. WEBER: Plaintiffs advised me of this problem
12 on Friday. I have already been in communication with the
13 people who are handling that and they have said they are
14 addressing it this week.

15 THE COURT: All right.

16 MR. ZIMMERMAN: Approximately 88 cases have been
17 submitted to the MDL mediation process. I notice Lew
18 Remele is not here, unless he has been transformed.

19 THE COURT: He is in a mediation right now and
20 Special Master Haydock will handle his report.

21 MR. ZIMMERMAN: I would like to discuss with the
22 Court some of our concerns about that mediation process.

23 THE COURT: All right.

24 MR. ZIMMERMAN: I would like to do it in open
25 court if we could, but --

1 THE COURT: Now is the time.

2 MR. ZIMMERMAN: A mediation process that I
3 thought we envisioned resulted in people who can't settle
4 their cases legitimately can ask for a mediation. It's a
5 great idea. It normally helps people when you have a third
6 party in the room to get each side to focus and be
7 reasonable with one another.

8 I think to a certain extent if it's a rhabdo or
9 rhabdo-like or something that Bayer decides is rhabdo or
10 rhabdo-like, it probably can work.

11 The problem becomes if Bayer doesn't say it's
12 rhabdo or close enough to rhabdo, it gets submitted to the
13 special master, to Special Master Remele, who then can
14 determine that it should be mediated; and he has been given
15 some discretion by the Court to determine it should be
16 mediated.

17 The problem is it doesn't get mediated. What
18 happens really at that point is Bayer puts their foot down
19 and says, hey, we told you this isn't rhabdo or
20 rhabdo-like, I don't really care what -- let me just
21 finish -- I don't really care what has been said by a third
22 party, we're not going to make an offer, so you can show up
23 for your mediation, but we're not going to make an offer.

24 Now, this has been reported to me on a number of
25 occasions. I get concerned about that because that doesn't

1 seem to be within the spirit of mediation.

2 On the other hand, you can't force people to
3 mediate or settle what they don't want to settle, and I
4 understand that. If somebody doesn't want to make an
5 offer, no mediation or mediator can make them make an
6 offer. And if someone thinks it isn't a case that should
7 be -- if one party doesn't want to settle or the other
8 party doesn't want to settle, you are not going to get a
9 settlement. So I understand that.

10 I guess what I am concerned about is creating
11 some mechanism around the mediation program where some
12 value can come from the position taken that I'm not going
13 to make an offer.

14 We got a letter yesterday, Zimmerman Reed, on a
15 case that we had set for mediation at the end of the month
16 where our client said, who is ill, I forget the illness --

17 MR. GOLDSER: Congestive heart failure.

18 MR. ZIMMERMAN: -- congestive heart failure, said
19 it would be very difficult for them to come to this
20 mediation at this time, could they move it or something
21 like that. And the other side was very nice and said,
22 sure, we can do that, but there's not going to be an offer
23 anyway, so why bother.

24 That doesn't seem to be the spirit of a mediation
25 program; or if it is appropriate for a mediation in the

1 Court's opinion, it seems to me something else should then
2 attach to the mediation, like some way of letting -- giving
3 us input on that case so either party could maybe adjust
4 their thinking.

5 Maybe at that point it's immediately set for a
6 summary jury trial or maybe it's set for some other
7 procedure whereby thinking could start to change around the
8 positions that are very hardened.

9 I offer that as a comment to the mediation
10 program because for the most part unless you have something
11 where there has been an offer and exchange, offer and
12 exchange but you just have an impasse on the amount,
13 nothing is going to come of these mediations where Bayer
14 has said we ain't going to pay now and we ain't going to
15 pay later, why bother.

16 THE COURT: Adam.

17 MR. HOEFLICH: If I may, Judge. Mr. Murray on
18 behalf of the Plaintiffs, Professor Haydock, Leeanne
19 Deshong, and I sat in Chicago many months ago now and sat
20 and hammered out a mediation program that was agreeable to
21 Bayer and to the Plaintiffs. One of the requirements of
22 that program was the Plaintiffs only present for mediation,
23 I believe the language was, documented rhabdo cases.

24 If Plaintiffs have presented documented rhabdo
25 cases, we've been happy to mediate them on the Plaintiffs'

1 terms in Plaintiffs' locations to do everything we could to
2 resolve those cases.

3 I know I spoke to a plaintiff's lawyer just
4 yesterday who had a client and I said, If you need us to
5 have a Bayer representative go any place the client is to
6 let her know that we sincerely regret anyone who has
7 suffered a side effect and to let her know that we are
8 willing to make -- to let her know that we are willing to
9 do right, tell me the place.

10 Mr. Zimmerman now comes up and raises an issue I
11 have never heard before. It didn't come up at the meet and
12 confer. It didn't come up in a conversation we had last
13 night.

14 No, we don't plan to mediate the cases that
15 aren't called for in the mediation program. If someone
16 wants to mediate a nonrhabdo case, we don't plan to
17 mediate. That wasn't what was negotiated. It's not what
18 is embodied in the court order and, frankly, I'm surprised
19 that it's been raised here.

20 If Mr. Zimmerman believes there's some other
21 mechanism he wants that would change the Court's order,
22 first I think he should come to us and discuss it with us.
23 We'll tell him our position.

24 But, again, I don't see a reason to mediate the
25 nonrhabdo cases. If Mr. Zimmerman wants to pick those

1 cases for trial, we're ready to try those cases and we have
2 been; and we have seen that those cases are going away.
3 But to stand up in court and announce to change the
4 mediation program that was long negotiated and implemented
5 in a court order, I think, is inappropriate at this point.

6 MR. ZIMMERMAN: Your Honor, notwithstanding the
7 claim of inappropriateness, I'm not talking about what you
8 are focused on. I'm talking about when Special Master
9 Remele orders mediation.

10 I'm not talking about a case we want to mediate
11 that they don't want to mediate. That's not going to get
12 mediated. Even though I would like to have it mediated,
13 they are not going to mediate it.

14 I'm talking about a case where it's been
15 submitted through the protocol to the special master for
16 mediation and then they say we're not going to offer
17 anything, so why mediate. That's the cases --

18 MR. HOEFLICH: If there's any issue like that --

19 THE COURT: Excuse me. If I can speak on this
20 issue and some of the issues that are going to come up.

21 Number one, I think it's important that I hear
22 about what's going on. It's difficult for me to judge
23 whether or not something is being effective if I don't know
24 what -- if there are problems.

25 Now, if the Defense is hearing this for the first

1 time, I suspect that my special master, who has not
2 reported any problems to me regarding this issue, is
3 hearing it for the first time.

4 If there's a series of cases -- and I can't deal
5 with rumors. If there are specific cases that are a
6 problem to the PSC, a letter certainly can be filed, a
7 response will be gotten from Defense, and then I can meet
8 with my special master and see how we're going to handle
9 the matter.

10 It's hard for me to respond to anything at this
11 point. You've heard from a couple of people that certain
12 things were going to happen. Well, I just have not heard
13 that. And so I need specifics so when I sit down with my
14 special master who is handling the mediation, then we can
15 go over each and every one of those problems that you've
16 said that there is a problem; and certainly we'll have the
17 response from the Defendants on those issues.

18 But it is safe to say we knew the mediation
19 process was going to be slow, that it was not going to have
20 hundreds or thousands of cases involved in mediation until
21 we get to the point where there are some of these muscle
22 injury, muscle ache cases that are being tried and we see
23 what the values are.

24 Certainly if the PSC says, well, this is a way
25 that we can use summary jury trials, again, put it in

1 writing so Defense can respond to it instead of, you know,
2 flying in here -- you are flying in here and two minutes
3 before the hearing we're hearing something for the first
4 time.

5 The normal response would be, well, we're against
6 it. That's just going to be the normal response. But give
7 them time to see what -- the issues that you are talking
8 about so they can review those files, and they may have a
9 different response to the Court.

10 MR. ZIMMERMAN: And, Your Honor, that's all I was
11 really trying to do is alert the Court to the problem. I
12 wasn't suggesting we do anything. I'm alerting the problem
13 to --

14 THE COURT: And I think I did say that --

15 MR. ZIMMERMAN: You did.

16 THE COURT: -- that you are alerting me to any
17 problems so I can deal with it --

18 MR. ZIMMERMAN: Okay.

19 THE COURT: -- deal with those issues. So how
20 soon will I get a letter from you?

21 MR. ZIMMERMAN: Sometime this week, let's say by
22 Friday, about the specific problems of these specific
23 mediations.

24 THE COURT: And then I will have a letter from --
25 this Friday is --

1 THE CLERK: December 12th.

2 THE COURT: -- the 12th and then I'll hear from
3 the Defense by the 19th.

4 MR. HOEFLICH: Thank you, Judge.

5 MR. ZIMMERMAN: Okay. And that brings us to the
6 mediator's report. Quite an introduction.

7 THE COURT: Good morning.

8 SPECIAL MASTER HAYDOCK: Good morning, Your
9 Honor. As the Court noted, Special Master Remele is in
10 mediation this morning in a case that's conducted here. It
11 was originally scheduled for Michigan and the parties
12 agreed to conduct the mediation here.

13 Currently we have 86 cases that are in -- that
14 have been or are in the mediation process. Of those, 25
15 are in various stages of the mediation process. The rest
16 have either been settled or resolved or dismissed.

17 There are three cases scheduled for mediation in
18 December; one is going on today and there's one scheduled
19 for Texas and there's one scheduled on December 29th in
20 Arizona.

21 THE COURT: Okay. Thank you.

22 MR. ZIMMERMAN: For that one in Arizona,
23 everybody is welcome to come. It will be a nice sun break.

24 Discovery. The report, I believe, speaks for
25 itself on a couple of things. Document production is

1 continuing. Depositions of fact witnesses are continuing.

2 A couple of little nuances in the depositions of
3 fact witnesses. There is going -- there are going to be --
4 we are cross-noticing with Pennsylvania two Bayer AG
5 witnesses, Dr. --

6 MR. CLIMACO: Manfred Schneider and Werner
7 Wenning.

8 MR. ZIMMERMAN: -- Werner Wenning and --

9 MR. CLIMACO: Excuse me. Doug, did I get it
10 right that time?

11 MR. MARVIN: Yes, you did.

12 MR. ZIMMERMAN: -- and Mr. Schneider.
13 Pennsylvania, I believe, has noticed them. We are going to
14 cross-notice. They are going to occur sometime at the end
15 of, I believe -- Doug, you have the dates -- the 26th and
16 29th or something like that of February in Amsterdam.

17 We're going to bring a very small group. We're
18 not going to overload it from the PSC side. And we're
19 going to coordinate it with Doug Marvin and with the
20 Pennsylvania group that's going to be taking them and we
21 will --

22 THE COURT: How many depositions in Europe?

23 MR. ZIMMERMAN: Two.

24 MR. CLIMACO: Your Honor, if I may say,
25 Mr. Branch and I, along with Mr. Arsenault, are at the meet

1 and confer meetings regularly with Mr. Marvin, Doug Marvin,
2 as well as Mr. Jay O'Connor on behalf of GSK; and we have a
3 total cooperative attitude and it's working very well. I
4 just thought it was important to let the Court know that.

5 THE COURT: Thank you.

6 MR. ZIMMERMAN: In addition, I don't know if --
7 this was part of the meet and confer, the two Japanese
8 witnesses.

9 MR. CLIMACO: We had earlier raised during a meet
10 and confer that we might want to consider taking some
11 Bayer AG employees who were part of what's called the
12 Japanese study. A few days ago I did alert to Mr. Marvin
13 that we are going to want to discuss that with him at our
14 next scheduled meet and confer, which is Monday.

15 MR. ZIMMERMAN: So that seems to be where the
16 deposition questions -- the deposition continuing of fact
17 witness protocols and depositions will be. It looks like
18 there are these four that are out there in foreign
19 countries.

20 Then number C, discovery is proceeding in cases
21 being prepared under PTO 89 and 96. This is the trial
22 protocols. Bayer will provide a report. And I believe
23 Vicky, who has got the bulk of these cases from Weitz &
24 Luxenberg, may have a comment on how it's going from their
25 perspective and Ron Goldser from our office may have a

1 comment after we hear the Bayer report. So that's Roman
2 numeral III-C.

3 MR. HOEFLICH: Judge, discovery has been
4 proceeding. We have been providing -- my partner, Tarek
5 Ismail, has been providing reports to Special Master
6 Haydock. I think discovery is proceeding cooperatively and
7 we have lots of depositions scheduled. We are moving
8 forward.

9 The number of cases in the pilot program has
10 diminished precipitously. I don't have the exact number
11 today, but a number of the cases have gone away. And the
12 cases that do exist in Minnesota, depositions are moving
13 forward.

14 Thank you.

15 MR. GOLDSER: I believe that's accurate, Your
16 Honor.

17 MS. MANIATIS: Correct.

18 MR. ZIMMERMAN: That moves us -- unless there are
19 any questions, Your Honor, on discovery, it moves us to
20 motions.

21 THE COURT: So I am hearing you correctly
22 everything is moving smoothly on the Minnesota cases that
23 we've got set for June 7th?

24 MR. ZIMMERMAN: Yes, subject, of course, to our
25 desire to expand the list a little bit, yes. But we filed

1 our motion and they are responding to what I thought I
2 talked to earlier, yes.

3 The following motions are fully briefed and are
4 set to be argued, and it's really just the motion to
5 participate in third party payer settlement negotiations.

6 Frankly, I think maybe we should put that at the
7 foot of the calendar if we are going to really argue it.
8 It may be appropriate to submit it on the briefs. I know
9 Gene is here and probably wants to argue. I will probably
10 be worn out by then and still be able to argue, but he will
11 probably have something to say and I will probably be --
12 have something to say on that, but I would rather go
13 through kind of the statusy stuff first, if we could.

14 THE COURT: Let's do that because it's not that
15 long.

16 MR. ZIMMERMAN: Okay. Then the next of the
17 following motions are being briefed, and the first one is
18 the PTO 89 and the summary jury schedule that I have
19 alluded to a number of times in my opening comments. That
20 is not subject to be argued today and I have agreed with
21 Adam that we will not argue it today.

22 I guess what I would like is some ability to have
23 that heard expeditiously under the circumstances because of
24 what I consider to be the time we started this thing in
25 October and the short lease we have with the June trials

1 and the need, in our judgment, to expand the list.

2 I don't think it's fair right now to get into the
3 argument because I told him we would not, so I shall not.

4 But all I guess I am saying at this point is, given the
5 factual way this thing has come up through the letters and
6 through the briefs and through the need for the briefs to
7 be coming in after this status and it being scheduled under
8 our normal protocol for the next status, I would like to
9 have an ability to have that heard on a more expeditious
10 basis, if at all possible.

11 Because if we are going to modify the lists and
12 include other cases, et cetera, et cetera, we should start
13 on that journey sooner rather than later.

14 MR. HOEFLICH: Judge, if I may. Mr. Zimmerman
15 keeps referring to October. I'm not sure what that refers
16 to. I know we got his brief a few weeks ago. Our brief is
17 due next week. I assume they are going to want to reply to
18 it.

19 In addition to that, I think it was on Saturday
20 Mr. Zimmerman sent me amendments to some of the things he
21 suggested or requested in his brief, by e-mail. So we'll
22 respond to whatever their current position is.

23 But for a whole host of practical reasons, given
24 that, for example, today is December 9th and I know Phil
25 Beck is in trial through Christmas, I think it would be

1 impractical for us to come in and argue this before the
2 first of the year.

3 After that, if we have an early January status,
4 that's fine by us, but I think it would be very difficult
5 for us to respond and be prepared to argue this before
6 then. I know that I'm headed, unfortunately, to Germany
7 next week and so I'm not sure how we would have time to do
8 this in due course before the holidays.

9 So to the extent we are willing to move it
10 forward, of course we'll get our brief and respond to
11 whatever Mr. Zimmerman's current positions are forthwith,
12 but I think that the most practical time to argue this
13 would be at an early January status.

14 MR. ZIMMERMAN: Just for the record, the letter I
15 speak about is the October 26th letter --

16 MR. HOEFLICH: Your brief was filed in November.

17 MR. ZIMMERMAN: Right. -- and then Phil's or
18 your October 30th letter, those are the letters I am
19 referring to where I said this is the problem and how can
20 we work it through. And then at the November status you
21 said, well, you guys file a brief, which we did. So that's
22 where I am going back to October.

23 MR. HOEFLICH: Okay.

24 MR. ZIMMERMAN: Oh, I do want to report on PTO 89
25 issues. There appears to be is it six cases that have kind

1 of gotten through the system of Minnesota getting teed up
2 and getting discovered.

3 The Court should be aware that two of those cases
4 we have now received offers of settlement on and so --
5 again, that goes to that scenario of Bayer has identified
6 those as cases they are willing to settle because it meets
7 their criteria for being settleable as rhabdo or
8 rhabdo-like -- now we are down to four.

9 There are a couple of problems with two of those
10 four, as I understand it, or one of those four.

11 THE COURT: I'm sorry. What was that? Just
12 one --

13 MR. ZIMMERMAN: One of those four appears to have
14 a problem that means it may not be viable in our judgment.

15 So I think that's just important for the Court to
16 know. I don't know if those two that have offers will
17 settle, but given my crystal ball reading, it's likely that
18 there will be further negotiations and we're going to reach
19 that precipice where it is going to be probably called
20 rhabdo by them and probably not meet -- who knows. If they
21 made an offer, it must at least to them appear to be
22 something that is meeting their current settlement
23 criteria.

24 MR. HOEFLICH: The two cases on which we made
25 offers are by all criteria, which have been the same since

1 the beginning of the litigation, rhabdo cases. I'm hopeful
2 that we will be able to resolve them.

3 There's four other cases remaining. I don't know
4 if the Plaintiffs are going to drop some or all of those.
5 But from what I understand from them, there's at least a
6 few that they believe could proceed to trial.

7 MR. ZIMMERMAN: Next, Your Honor, under motions
8 that are being briefed is the motion to extend the stay of
9 PTO 61. And I believe we have a reply -- is that what it
10 is? -- that's due.

11 So that will probably be ripe for argument at the
12 January status. I think in that one there is no time of
13 the essence. I mean, these cases are bundled, some are,
14 some aren't appropriately bundled, and we have to complete
15 that loop and will be prepared to argue that in January.

16 THE COURT: Okay.

17 MR. ZIMMERMAN: The PSC motion regarding Medicare
18 liens, which motion is that? Is that the class motion or
19 is that the motion to intervene in the negotiations or is
20 that the motion to have the Medicare validity determined?

21 MS. WEBER: I think what would be characterized
22 as the Medicare validity. Plaintiffs have a response to
23 the Government's brief on Medicare due in early January and
24 that's what this refers to.

25 MR. ZIMMERMAN: Okay. Thank you. So that will

1 be coming up.

2 There are a number of people in the courtroom, I
3 believe -- no. It's just Kim that's here on that issue of
4 liens. But I don't think her issue is Medicare liens.
5 Hers is Blue Cross and the interventions in the trial -- in
6 the cases that are set for trial.

7 There has been a motion made by Ms. West on
8 behalf of Blue Cross of Minnesota -- is it Minnesota? --
9 Minnesota to intervene in some of the cases that are in the
10 block of six because Blue Cross was the insurer. And that
11 motion, although it is not ripe for hearing at this time,
12 it is out there, there's a motion to intervene which will
13 be duly responded to.

14 But it sort of does beg this whole lien question.
15 I'm not clear in my mind how we are all going to muddle
16 through it. I mean, all the things about liens are
17 starting to percolate and we are going to have to figure it
18 out as time goes on.

19 THE COURT: Ms. West, do you want to step
20 forward?

21 MS. WEST: Yes, sir.

22 THE COURT: Good morning.

23 MS. WEST: Good morning. Simply to set the
24 record straight, that motion has not yet been formally
25 filed. In keeping with the collegiality and procedures

1 here, I have submitted it to the Plaintiffs. My client has
2 identified two of the bellwether cases that they believe
3 they have paid for Baycol and Baycol-related injuries as
4 alleged by the Plaintiffs, but it has not yet been formally
5 filed nor has it yet been presented to the Defendants for
6 their review as well. Obviously the hope would be that it
7 would be an unopposed motion.

8 THE COURT: Thank you.

9 MR. ZIMMERMAN: And as the Court knows, on the
10 lien and Medicare issues representatives of the -- is it
11 Medalie?

12 MR. STANLEY: Medalie.

13 MR. ZIMMERMAN: -- Medalie case are here. I
14 don't know if there's anything that needs to be presented,
15 but that issue is clearly before the Court under a transfer
16 order.

17 There's also a motion to compel discovery with
18 regard to PacifiCare; and that motion is not ripe, is not
19 fully briefed, but it is out there. I believe it's been
20 filed and the responses are coming due. There's no
21 particular -- I don't know if we have an absolute schedule
22 on it, but we should probably set one up informally, if not
23 formally.

24 MS. WEBER: Your Honor, under the ordinary
25 schedule PacifiCare's response would have been due three

1 weeks from the date of filing, which I don't know off the
2 top of my head. I think they have probably got about ten
3 days to go. This would be going to Judge Lebedoff, I
4 presume, since it's a discovery issue.

5 THE COURT: More than likely I will send it to
6 him, Judge Lebedoff.

7 MR. ZIMMERMAN: On the PacifiCare issue. Thank
8 you.

9 Next item on the agenda, Your Honor, as we move
10 forward is C on page 3. The following motions are fully
11 briefed and submitted to the Court, which is the PSC's and
12 New York Times' motion to modify PTO 24, which has to do
13 with the confidentiality and the overdesignation of
14 confidentiality. I believe the New York Times --

15 THE COURT: I signed that this morning. So
16 there's an order out and it will be on Verilaw this
17 afternoon.

18 MR. ZIMMERMAN: So that has been resolved.

19 And then there was a motion to vacate Special
20 Master Recommended Order No. 15; and, frankly, I do not
21 know the status of that. It was an individual case who
22 felt --

23 THE COURT: It's under advisement.

24 MR. ZIMMERMAN: Next, Your Honor --

25 THE COURT: So it's clear, PTO -- dealing with

1 the New York Times matter, I have signed that this morning.
2 You will be receiving -- there's no surprises, so don't
3 worry about it. So you don't have to rush to your
4 computers and download it.

5 MR. ZIMMERMAN: And they are on them as we speak.

6 The next item, Your Honor, has to do with an
7 issue that was raised and explored at the last status,
8 which has to do with compliance with the supplemental order
9 for preservation of detail persons' sales records.

10 THE COURT: Let's back up. In my order I still
11 didn't deal -- I am alerting you that I did not deal with
12 the Canadian plaintiffs on that issue because neither side
13 submitted anything dealing with the Canadian plaintiffs,
14 and so I'm alerting you that I did not do anything on that.
15 And so if you want something done, you are going to have to
16 submit something.

17 MR. ZIMMERMAN: Okay. Understood.

18 The next item, Your Honor, is the compliance with
19 the supplemental order requiring preservation of detail
20 persons' sales records. I think suffice it to say we've
21 had an attempt to meet and confer that hasn't occurred
22 because of some miscommunications. I don't want to get
23 into --

24 THE COURT: Hold on for one second. I want to
25 make some notes to myself.

1 All right. Go ahead.

2 MR. ZIMMERMAN: I don't want to get into it, I am
3 not casting any stones, but I think we've attempted to have
4 a meet and confer and it just hasn't occurred for reasons
5 which, I guess, will ultimately be discussed when this gets
6 heard by the Court.

7 But what we ask here, Your Honor, is this: We
8 need to make sure that there has been compliance. We are
9 meeting and conferring on it. We've given them our
10 proposed motion that we want to file. And all I'm saying
11 is if we're right about the motion, we need to have this
12 done on a somewhat expedited basis. Probably the next
13 status will be fine if it isn't too far down the road.

14 But what we are talking about is records of
15 detail people that, if they have not been preserved, could
16 impact these coming trials. I don't know that that's
17 occurred. It appears there may have been something that
18 didn't occur that should have occurred.

19 I don't want to argue it today, but I just want
20 to say that this issue probably has some immediate impact
21 and we should keep it close on our radar screen to expedite
22 as quickly as we possibly can given all rights of meet and
23 confer and the appropriate briefing, which is why we gave
24 them a copy of our brief ahead of time, so it would be very
25 clearly joined in our meet and confer, but we just haven't

1 had since Thanksgiving the opportunity to meet and confer.

2 MR. HOEFLICH: Judge, I have called Mr. Zimmerman
3 a few times to discuss this, and he is correct. I guess
4 Mr. Raiter is handling it and for some reason
5 correspondence that apparently was sent to me or Susan
6 didn't reach either one of us. But we offered to meet and
7 confer. I guess they offered to meet and confer. It just
8 hasn't happened.

9 But so there's no question as to what we did or
10 didn't do, when Bayer was sued in the first Baycol cases in
11 August of 2001 we took immediate steps to preserve our
12 documents and sent out document retention memos.

13 If persons left the company after that point,
14 after litigation began, and that's the former employees we
15 believe that Mr. Zimmerman is speaking about, we took steps
16 to preserve all of their documents.

17 What we didn't do -- and I am not sure this was
18 understood from what I said at the last conference -- we
19 didn't reach back after litigation was initiated to contact
20 people who were already former employees and were beyond
21 our control at the time the litigation began.

22 I'm not aware of any precedent for that being
23 done and I don't believe that was what you intended from
24 your court order. There was certainly nothing to suggest
25 that in the earlier court orders; it never mentioned former

1 employees.

2 If Mr. Zimmerman and Mr. Raiter have any concerns
3 about what we've done, we want to sit down and work with
4 them to make sure that any evidence they believe needs to
5 be preserved that we have the power to preserve, that we
6 take appropriate steps.

7 We want to be aboveboard with this and make sure
8 it gets done as quickly and easily as possible. If they
9 still have any issues with this, we're happy if you want to
10 refer it to a special master and take it up at the next
11 hearing. We don't want any undue delays. We want to find
12 out exactly what the Court thinks are our appropriate
13 responsibilities and make sure we do them.

14 Mr. Zimmerman gave us but didn't file a motion
15 for sanctions. We certainly don't think we've done
16 anything sanctionable. We think we have done everything
17 appropriate. And if there's any unclarity on what we're
18 supposed to do, we want to take care of this immediately
19 and make sure we're doing the right thing.

20 Thank you, Judge.

21 THE COURT: Thank you.

22 MR. ZIMMERMAN: I have a funny comment about
23 that, but I think I am going to hold it.

24 THE COURT: Funny-funny? We all need a good
25 laugh.

1 MR. ZIMMERMAN: It's not that kind of funny.

2 THE COURT: All right. Let's move on, then.

3 MR. ZIMMERMAN: I didn't want to get into bona
4 fides here and I guess I will just stay away from it and
5 let it ride for a moment, but we take a little bit of issue
6 with some of it, but let's just leave it lie for now and
7 we'll litigate it or meet and confer on it if we have to.
8 I think the difference is, Adam, that I thought we agreed
9 not to argue the merits and you kind of got in there and
10 argued it.

11 MR. HOEFLICH: I just wanted to make sure the
12 Court knows we've done what we think is appropriate. If
13 you think what we haven't done is appropriate, we'll
14 litigate it and we'll bring it before the Court or the
15 Special Master, but I wanted the Court to know that we
16 think what we have done is appropriate and in accordance
17 with the Court's orders. Without arguing our brief, that
18 is what I wanted to make sure the Court understood.

19 THE COURT: Thank you.

20 MR. MAGAZINER: May I just address this point
21 briefly, Your Honor? The Plaintiffs have raised questions
22 about the document preservation methods that both Bayer and
23 GSK used, so I would like to respond on behalf of GSK.

24 From reading the Plaintiffs' written submission,
25 it appears to me that the Plaintiffs did not understand our

1 written submission to the Court about what we had done. It
2 appeared to me that if the Plaintiffs did understand what
3 we have actually done, the Plaintiffs would not have a
4 problem with what we've actually done.

5 If we have a meet and confer, GSK will
6 participate and we will discover whether there is indeed
7 any disagreement about the propriety of what GSK actually
8 has done to preserve documents relating to the Baycol
9 litigation.

10 If there is a disagreement, and I don't
11 anticipate there will be, but if there is and we can't
12 resolve it, then, of course, the matter would have to be
13 the subject of a motion, then the opposition, and be
14 subject to Your Honor's ruling. But at the moment we don't
15 even know if there's a disagreement.

16 MR. HOEFLICH: Bayer agrees with everything
17 Mr. Magaziner said, Judge. If I intimated otherwise, I
18 misspoke.

19 THE COURT: So my question is: When are you
20 going to meet and confer?

21 MR. ZIMMERMAN: Well, let's pick a date right now
22 because, frankly, that's been the problem. So why don't we
23 agree to meet and confer on Thursday. Does that work for
24 you? I know you have a test tomorrow.

25 MR. HOEFLICH: To me it just depends on a medical

1 test Bucky knows I have tomorrow and potentially Thursday
2 morning.

3 MR. ZIMMERMAN: I didn't know it was Thursday
4 also.

5 MR. HOEFLICH: If it would be Friday, I would
6 appreciate it.

7 MR. MAGAZINER: Friday would be better.

8 MR. ZIMMERMAN: Friday is fine. I will -- why
9 don't we tentatively agree 11:00 Friday Central Standard
10 Time. And if there's a change in that date -- that time --
11 it won't be a change in the date because I need Shawn
12 Raiter available -- we will let you know. But we will
13 tentatively set it -- we will set it for 11:00 Friday
14 unless there's a change in the time, then I will notify
15 you.

16 THE COURT: 11:00 Central, 12:00 Eastern, 10:00
17 Mountain.

18 MR. ZIMMERMAN: 9:00 Pacific. There we go. Make
19 a note of that.

20 MR. GOLDSER: Got it.

21 MR. ZIMMERMAN: I think you kind of won that one.
22 You got your argument in and I didn't, but that's okay,
23 I'll forgive you.

24 Trial settings. The Slaughter case is currently
25 underway in Jones County, Mississippi.

1 THE COURT: What type of case is that? Is that
2 an aches and pains or --

3 MR. ZIMMERMAN: I don't know. I believe it's a
4 rhabdo case, from the e-mail I have received from some
5 group of people around that case, but I don't have any
6 personal knowledge of it.

7 MR. HOEFLICH: It is a case of a person who took
8 Baycol and then claims that Baycol caused both aches and
9 pains and rhabdo 13 months after they stopped taking
10 Baycol.

11 THE COURT: And when did it start, Monday?

12 MR. HOEFLICH: The case started last Monday. I
13 believe it went to the jury -- potentially went to the jury
14 today.

15 THE COURT: Oh, all right.

16 MR. HOEFLICH: So we don't think there is any
17 relation of the injuries to Baycol and so we tried it.

18 THE COURT: If I can say that it would not be an
19 ex parte communication, would someone e-mail me and let me
20 know what the verdict is?

21 MR. HOEFLICH: We, of course, will and we will
22 copy Mr. Zimmerman on it.

23 MR. ZIMMERMAN: I think the protocol has been if
24 they win, you get it from them; and if they lose, you get
25 it from us.

1 MR. HOEFLICH: That would mean only we have been
2 sending you e-mails, Judge.

3 MR. ZIMMERMAN: Except this e-mail that I should
4 have sent you that the Oklahoma Supreme Court -- great
5 lead-in -- the Oklahoma Supreme Court has denied certiorari
6 on the state court Baycol class certification.

7 MR. HOEFLICH: See, that's the difference between
8 a plaintiff's lawyer and a defense lawyer. We celebrate
9 when the jury comes in and they celebrate over procedural
10 rules. We'll see what happens when that case goes to
11 trial.

12 MR. CLIMACO: We do both.

13 MR. ZIMMERMAN: We do both. And I believe the
14 same is true in Canada.

15 THE COURT: Do we know who the lawyers are down
16 there in this lawsuit?

17 MR. ZIMMERMAN: Yes. The plaintiff's side, it's
18 Terry and Brad West, a father and son, who are lead counsel
19 along with a couple of other people in Oklahoma, and it's
20 the West law firm.

21 THE COURT: In Oklahoma or Mississippi?

22 MR. ZIMMERMAN: Shawnee, Oklahoma.

23 THE COURT: The Slaughter case I'm --

24 MR. ZIMMERMAN: I beg your pardon. No, I don't
25 know. Is it Bob Wilkins?

1 MR. HOEFLICH: It's Rocky Wilkins is the
2 plaintiff's lawyer. The lawyers for Bayer are Robert
3 Johnson from Mississippi and Will Goodfrey -- excuse me --
4 Will Goodman from Mississippi as well.

5 THE COURT: Do the Plaintiffs have a number of
6 cases that they are holding onto or is this their only
7 case; do you know?

8 MR. HOEFLICH: I believe they have other cases,
9 but this was not a -- as I understand it, this was not a
10 situation like Mr. Watts's case where he had a plaintiff
11 that we wanted to settle but not without the others. This
12 was not a case we were prepared to settle, Judge.

13 MR. MAGAZINER: I should note for the record,
14 Your Honor, that Plaintiffs dismissed GSK from that case
15 voluntarily, which we encourage Plaintiffs to do for all
16 cases.

17 THE COURT: Mr. Zimmerman, you have not been in
18 contact with the plaintiffs' lawyers down in Mississippi?

19 MR. ZIMMERMAN: Have not. The judge in that
20 case, Your Honor, is Billy Joe Landrum. And then there are
21 other cases set on January 26th in Texas, Orange County.
22 And then there's a case also set in Mississippi, in Forrest
23 County in Mississippi, also on the 26th. I cannot tell if
24 the one in Mississippi is a rhabdo case or not. It just
25 says on your list compensable injury, which could be not

1 rhabdo because the other ones are marked rhabdo or state
2 rhabdo.

3 MR. HOEFLICH: If Mr. Zimmerman could convince
4 the plaintiffs' bar to try more cases in places like
5 Virginia or Chicago or Minnesota, we would be appreciative,
6 but as it stands, our trials are all set in Mississippi and
7 Texas and Philadelphia.

8 MR. MAGAZINER: Can I object on the record, Your
9 Honor, to Mr. Hoeflich putting in one group Mississippi,
10 Texas, and Philadelphia? I think that is totally
11 inappropriate.

12 MR. HOEFLICH: Fair enough.

13 MR. ZIMMERMAN: He's right. You missed Madison
14 County, Illinois. That should also be in that group.

15 Okay. The list of other trial settings we have
16 been provided and we appreciate it, and I know it's
17 difficult to really determine from these lists what are
18 muscle injury cases as distinguished from rhabdo cases.

19 You must understand, Your Honor, we don't see a
20 distinction. We see rhabdo on a continuum -- at one end of
21 a continuum and muscle injury being just part of that
22 continuum.

23 So I don't want to on the record state in any way
24 that rhabdo is a destination or rhabdo is something that
25 separates anything from anything else. We think it's a

1 continuum, muscle injury up to a disease that has been
2 labeled rhabdo, but the rest is just as debilitating and
3 important.

4 So this distinction that we have tried to make
5 with one another we just take a different view of in terms
6 of the spectrum of injuries.

7 THE COURT: Let's move on.

8 MR. ZIMMERMAN: The next matter, Your Honor, is
9 the Liaison Advisory Committee, the LAC, and the Special
10 Master's report having to do with LAC matters.

11 THE COURT: Special Master Haydock.

12 SPECIAL MASTER HAYDOCK: Judge, regarding the
13 LAC, we have a LAC meeting scheduled immediately after the
14 status conference to discuss the Government's proposal
15 regarding the Medicare lien situation. We'll have more to
16 report to the LAC and to the Court after that meeting.

17 It's my understanding we may also consider at
18 that meeting a discussion of the expert witness protocol
19 that Your Honor signed some weeks ago. There's some state
20 court lawyers that may not be as cooperative as first they
21 told us, but we're exploring that and we'll be advising the
22 Court and the parties regarding the status of that as well.

23 The second issue, just a report on the wall that
24 Your Honor created some years ago. That continues. Bayer
25 files continue to be reviewed by Marie Harkins and

1 occasionally seals -- she seals medical records as ordered
2 by the Court. That process continues to go according to
3 plan.

4 Third and last, Your Honor, are comments
5 regarding the status of the trust fund for the holdbacks is
6 now approximately \$6,800,000. I understand there's a
7 stipulated order in the process of being submitted to the
8 Court. Approximately \$975,000 will be added to that trust
9 account through settlements by the Lopez/Robinson group,
10 the combined group, California and Nevada. So that's soon
11 to be on its way.

12 That's all I have, Your Honor.

13 THE COURT: All right. Any questions?

14 MR. ZIMMERMAN: When is that check coming? No
15 questions.

16 THE COURT: Any questions?

17 MR. HOEFLICH: No, because I know when that check
18 is coming.

19 MR. ZIMMERMAN: One thing I may have missed in --
20 well, no, I didn't miss it. I didn't know if -- we have
21 now, as a matter of information, provided to the Defendants
22 a comprehensive list of, I believe, 15 experts that are
23 going to be MDL designated experts along with reports that
24 are fairly thick.

25 I did not know if the Court or the Special Master

1 or anyone associated with the Court wanted those to be
2 provided to the Court or provided to the Special Master. I
3 don't believe we have done so, but I wasn't sure what we
4 should do; and until I knew, we just didn't provide them to
5 the Court.

6 Without getting into how grandiose we believe
7 them to be, I'd just really ask if the Court wants us to
8 deliver them to the Court at this time or if the Defendants
9 have a position on that at all.

10 MR. HOEFLICH: Judge, normally expert reports are
11 not something that's provided to the court. The plaintiffs
12 serve theirs, we serve ours, then a deposition takes place,
13 and what the court gets are either pretrial briefings or at
14 trial potentially any Daubert motions that come before the
15 court. This is discovery material, not appellate material
16 that normally go to the courts. Personally, I would save
17 the trees. I just don't see any value in getting one
18 side's expert reports at this point.

19 MR. ZIMMERMAN: I wasn't excluding one side. I
20 was saying ours are filed and yours would be filed, you
21 have both sides. I'm not saying --

22 MR. HOEFLICH: I don't see a need for that at
23 this point either. If either side thinks there's Daubert
24 motions to file, then file motions with the Court.

25 THE COURT: And certainly you can bring this up

1 later on. I wouldn't mind seeing both sides' experts.
2 That would help the Court in evaluating where it is going
3 to go on certainly these -- not on the cases, but how we
4 should deal with some of these issues on how we are going
5 to screen out cases. That would be very helpful for me.

6 MR. ZIMMERMAN: And that was the offer, because I
7 think it is very useful. At least you know where each side
8 is coming from with regard to how we define what is and
9 what isn't. And so it was in that spirit that I wanted to
10 offer them.

11 THE COURT: It would be helpful. So if you can
12 meet and confer and figure out a schedule that you can get
13 them to me, that would be great.

14 Because, again, I don't want to be the odd man
15 out when we start having discussions about -- at some point
16 you all are going to discuss what cases should be dismissed
17 out and what cases are going to be cases that are going to
18 be tried. And so it would be nice for the Court to know
19 how you're making that evaluation and who you relied on in
20 making those decisions.

21 MR. ZIMMERMAN: One of the things we can also
22 discuss, Your Honor, as has happened in other courts in
23 these complex MDLs, is the courts have asked for -- not
24 tutorials, that may not be the right word, but a
25 presentation of summaries by the experts or by counsel so

1 that the court does get a good snapshot of what it is and
2 what divides them.

3 We would welcome the opportunity to explore that
4 and provide that to the Court, because I think it's going
5 to be helpful. I mean, this is important medicine and --

6 THE COURT: It would be helpful to the Court and
7 so whether or not -- it doesn't have to be in a motion
8 form, but I would want both of you to meet and confer and
9 put that on your agenda and figure out when you are going
10 to do it and how you are going to do it. So we can do that
11 within the next couple months.

12 MR. ZIMMERMAN: John, you wanted to say --

13 MR. CLIMACO: Your Honor, if I may, in another
14 MDL --

15 MR. ZIMMERMAN: Why don't you go to the mike,
16 John.

17 MR. CLIMACO: In another MDL I am involved in
18 before Judge O'Malley in Cleveland dealing with welding rod
19 litigation, there will be a CMO coming out today and one of
20 the provisions will be that both sides will be presenting a
21 video tutorial to Judge O'Malley explaining our respective
22 cases both from a factual and a medical standpoint. And
23 this was discussed between counsel, discussed at length
24 with the court. That is something that I had advised
25 Mr. Zimmerman on and --

1 THE COURT: I think that's what I just agreed to.

2 MR. CLIMACO: Yes. I just wanted to explain

3 that's --

4 THE COURT: Say hi to Judge O'Malley for me.

5 MR. CLIMACO: I will. That's where the tutorial

6 came from and you may also want something, Your Honor, from

7 a video standpoint.

8 THE COURT: Well, that's where both sides are

9 going to meet and confer and educate the judge.

10 MR. ZIMMERMAN: Understood.

11 THE COURT: Thank you.

12 MR. ZIMMERMAN: I think that leaves us with the

13 argument on the third party payer issues. Frankly, Your

14 Honor, I think it's totally well briefed and out there. I

15 don't know that there's much that I could or should really

16 add to that, but I know that Gene probably has a lot and I

17 might have something to respond.

18 But the bottom line is this: These third party

19 payers would not be -- there would be no case for them to

20 be making any claims for anything if it weren't for the

21 claims of the victims or the claims of the people who are

22 before this court in this MDL. They are totally and wholly

23 contingent upon those claims and this litigation. And when

24 I say "this litigation," obviously I include the state

25 court litigation.

1 But this court, this MDL brought the issue to the
2 scene of -- to the courtrooms of America and to the U.S.
3 district courts that are now consolidated here based upon
4 their claims against Bayer. These third party payers',
5 whoever they may be, insurance companies, health and
6 welfare funds, total claim is contingent upon this body of
7 work.

8 And all we say to the Court, in whatever voice we
9 can make it, is that these claims that are brought on the
10 backs of the people we represent, because there are
11 subrogation claims through them and through their injury
12 claim, we should have a role on their behalf in those
13 claims and this MDL should -- if there is a result at the
14 end of the day from Bayer or GSK to these third party
15 claimants, that is, a payment, that that should be subject
16 to an assessment.

17 This is extremely important to us because it is
18 through the foundation of these cases and the foundations
19 of these clients that all of the third party payer claims
20 arise.

21 And we have been playing a little bit of cat and
22 mouse with this for a long, long time and I can't give you
23 any eloquent speech about it. I believe it's under the
24 jurisdiction of this Court and it's in the discretion of
25 this Court to allow the PSC, through its appropriate

1 representatives who are experienced in third party
2 claims -- third party payer claims, to be involved in the
3 process to protect the interests of their clients and
4 protect the integrity and the interests of the MDL.

5 And the rest is submitted, I believe, Your Honor,
6 in the briefs.

7 THE COURT: All right.

8 MR. SCHOON: Your Honor, Gene Schoon on behalf of
9 Bayer.

10 THE COURT: Good morning. You can raise that
11 podium if you want. The button is on the left-hand side.

12 MR. SCHOON: Thank you. Before I respond to
13 Mr. Zimmerman's argument, I think it would probably be a
14 good idea if I just sort of gave you an overview of what we
15 have actually been doing and what we've accomplished so
16 far, because I think it helps to put this into context.

17 Negotiations with third party payers are ongoing.
18 In fact, those negotiations started at least as early as
19 November of 2001, before this MDL was ever formed, in the
20 very early stages of the litigation.

21 Over that period of time I have been personally
22 involved in -- back and forth in negotiation and drafting
23 of agreements with one group of plaintiffs' lawyers in
24 particular. They have no cases filed in this court. They
25 have no cases filed.

1 In addition, Ms. West, as you know, is here and
2 she and I have been engaged in discussions. She now has a
3 case pending in this court, but for many months when we
4 were talking about possible resolution she did not.

5 As of this summer we reached an agreement in
6 principle with a significant group of third party payers.
7 That was finally documented as of last month.

8 And as of today we have agreements from several
9 of the largest healthcare plans, including Aetna, CIGNA,
10 WellPoint, Blue Cross Blue Shield Association -- that's not
11 Kim West's client -- Blue Cross of Tennessee, Health Net.
12 And I'm expecting more as time goes on.

13 As I indicated, these negotiations, Your Honor,
14 and these agreements are with attorneys representing these
15 individual companies, none of whom are parties in this
16 litigation or in any of the litigation with the sole
17 exception of Kim West and her claim on behalf of Blue Cross
18 Blue Shield Minnesota.

19 Now to kind of go to the substance of this, the
20 Plaintiffs' brief, and I agree, this is pretty well spelled
21 out in the briefs, so I am just going to hit the high
22 points, but they focus a lot of their argument on your
23 jurisdiction over the parties and they talk about the fact
24 that there's diversity jurisdiction, that there's class
25 action jurisdiction, that there's supplemental

1 jurisdiction.

2 I think what they miss in all of their argument
3 is that what Your Honor has is jurisdiction over cases and
4 the fact that we have other claims being made against us
5 does not confer onto this court or any other court
6 jurisdiction until a case has actually been filed.

7 As a kind of practical matter, you need to look
8 at what the PSC is asking you to do and what we're trying
9 to do. Settlement, as you know, is ongoing. We'd like to
10 get the third party payer claims resolved. We would like
11 to get the private healthcare plans claims resolved. We
12 would like to get the Medicare claims resolved. And we're
13 working on that.

14 What the PSC wants you to do is say that every
15 time I get in touch with one of these plans to discuss how
16 I might resolve it or what ideas they have -- and there are
17 some differences of opinion and approaches -- that I have
18 to invite them; that they have to participate; and that
19 they, I suppose, ultimately would have some say-so, one way
20 or the other, or could bring to you whether I can on behalf
21 of my client enter those settlements.

22 It's not practical for the Court to do it nor is
23 it a very good idea because what it will do is simply bog
24 down the whole settlement process. So not only is it, I
25 think, beyond the Court's jurisdiction for those parties

1 who are not before you, it also just as a prudential matter
2 doesn't make sense to grant what the PSC is asking for.

3 Now let me get to sort of the heart of what I
4 think the PSC is really asking you to do, and that's tax
5 each one of those settlements for the 6 percent.

6 I start with Pretrial Order 25 and Pretrial Order
7 53 to go to what cases are subject to the withholding, and
8 it's very clear that those orders are directed toward cases
9 and not to things that have not been filed.

10 It's also directed to lawyers who are members of
11 the PSC or otherwise properly before this Court, have
12 submitted themselves in some way under those orders.

13 If by chance we reach an agreement with someone
14 like Kim West, who has submitted herself to this Court on
15 behalf of her client, then I think we need to look at those
16 orders more carefully. But for the entities I identified
17 and others I'm negotiating on, Pretrial Orders 25 and 53
18 are simply not applicable.

19 And as Mr. Zimmerman said, his argument is all,
20 well, you wouldn't be there, you wouldn't be in
21 negotiations with these parties unless -- but for all the
22 work of the PSC, so they should somehow get paid for it.

23 At least he was honest enough to say, well, it's
24 not just what happened here. You also have to give credit
25 to the state court plaintiffs, the Pennsylvania plaintiffs,

1 the California plaintiffs, and others.

2 How can this Court allocate that? That doesn't
3 make sense either. Do we pay a 3 percent withhold,
4 1 percent?

5 The fact of the matter is, as I indicated, we
6 started these discussions over two years ago. We worked
7 hard and the plaintiffs who represented those healthcare
8 plans have had absolutely -- they haven't used a bit of the
9 work product, to my knowledge. If they did, then they've
10 got an obligation to go to the PSC and get access to it.

11 So I think that's the bottom line. We've made
12 good progress. We've settled effectively with third party
13 payers. We think that the PSC's motion would potentially
14 interfere with and derail that whole process. I mean,
15 clearly parties who have nothing to do with this Court do
16 not want to be taxed 6 percent nor do they want the PSC to
17 interfere with those discussions.

18 Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. ZIMMERMAN: Very briefly, Your Honor. The
21 first issue or question is: Well, how would you allocate
22 it? Gee, we can't do 6 percent; and then, what, maybe it
23 should be 3, maybe it should be 2.

24 Your Honor, that's going to be your task at the
25 end of this day anyway. You are going to have all those

1 conflicting arguments to reach when we start talking about
2 respective people who think they should be taxed less or
3 people who are going to be awarded fees.

4 What did you do, where did it come from, what was
5 the impetus, all of those issues are all going to be heard
6 and you might as well hear them with regard to third party
7 payers as well.

8 They are going to be complex, but they're the
9 same argument you're going to hear around the -- at the end
10 of this case, which is you are going to have a pot of money
11 created by the 6 percent and there are going to be a lot of
12 conflicting views as to how it should be allocated and
13 where it came from and who's entitled to what and who
14 should be rebated because they didn't this or they didn't
15 that, issues that the Special Master has been wrestling
16 with but are all subject to be reviewed by you at the
17 appropriate time.

18 We are going to have that issue. It's not going
19 to be any more difficult when we add the third party payer
20 piece to it.

21 THE COURT: In other MDLs how has it been
22 handled?

23 MR. ZIMMERMAN: Here's how it has been handled in
24 other MDLs that I have been involved with. And I don't
25 know if James Dugan is here. Kim, you can respond to this

1 as well. But let me tell you from my experience.

2 The way it's been done in the past is that the
3 third party payer came into the settlement after the
4 settlement was negotiated on a global basis and said, you
5 know, part of that settlement that you just negotiated on
6 behalf of all of these people belongs as a subrogation
7 claim to the third party payer and we want to come in and
8 get our fair share, and we negotiate with them then.

9 Here, Your Honor, knowing that has been the modus
10 operandi and understanding this is what I have been telling
11 the Court from day one, we wanted to do it differently. We
12 wanted to bring that whole third party payer in early so
13 that we could deal with it not at the end as it holds up a
14 settlement -- and god knows it holds up the settlement --
15 but deal with it at the front end so that that issue of
16 third party payer and whatever they are required to get
17 from defendants' money is done in advance or while we are
18 moving forward so it doesn't hold us up at the end.

19 In every other case that I have been involved in
20 it's happened at the end when there was money to divide
21 based upon some kind of a global settlement. I know there
22 have been some changes in that. I think Sulzer was a
23 little bit different on that, if I'm not mistaken.

24 MR. CLIMACO: Or very close to that.

25 MR. ZIMMERMAN: Kim, you may know a little bit

1 more about it because you have been doing third party
2 payer work for forever --

3 THE COURT: Please step forward.

4 MR. ZIMMERMAN: -- in your short young life.

5 MS. WEST: Much better, Mr. Zimmerman.

6 Thank you, Your Honor, and I appreciate you
7 hearing from me since I am really not a part of this motion
8 nor is it directed to me nor my clients.

9 Mr. Zimmerman is correct, as is Mr. Schoon, I
10 have a filed case here in the District of Minnesota. I
11 represent Blue Cross and Blue Shield of Minnesota. It is
12 on behalf of a punitive class, but we are here and we will
13 cross that bridge when we get to it.

14 As to what's occurred in other MDLs, beginning
15 with breast implant I believe what Mr. Climaco and
16 Mr. Zimmerman is saying is accurate. There has been a
17 global settlement. The TPP community, often represented by
18 myself, has come in and worked with the plaintiffs, with
19 their PSC and their management committee in working out a
20 global settlement with the defendants.

21 That occurred -- Judge Pointer did it informally
22 without a management structure. We were set up as a
23 private health insurer program. And in the revised
24 settlement program, there we negotiated separately with the
25 defendants.

1 There was no -- you know, every time I wanted to
2 talk to the defendant's lawyer I did not call their PSC
3 equivalent, but at the end of the day the plaintiffs were
4 made aware of our agreement, as was Judge Pointer. So it
5 was a consensual situation.

6 The same was true in Fen, although that was a
7 separate track negotiation as well. At the end the
8 plaintiffs were informed of the terms of it, they were in
9 agreement with it, but it wasn't -- Mr. Schoon is right
10 about the practicalities, there wasn't a blow-by-blow
11 calling on the phone throughout.

12 In Sulzer my recollection is the same way. These
13 were all settlements where -- I think in Sulzer, and
14 Mr. Climaco could correct me if I am wrong, after the
15 original settlement was not approved we did go on a
16 separate track, the TPPs, in negotiation. But, again, it
17 was the same model I described in the other cases. It was
18 with --

19 MR. CLIMACO: But the PSC was involved in those
20 discussions ongoing to a certain extent.

21 MS. WEST: To an extent, yes.

22 MR. CLIMACO: And then at the end, as
23 Mr. Zimmerman described, when there was the overall global
24 resolution, all of that was taken into consideration and
25 Sulzer agreed to pay direct.

1 MS. WEST: That's correct, although we were
2 not -- I would negotiate with Sulzer's attorneys without
3 the presence of a member of the PSC. They were, however,
4 informed in a meet and confer status.

5 And at the end of the day in all of the
6 settlements both the court and certainly the plaintiffs
7 were informed of -- it wouldn't make sense to get a
8 completely global resolution and then have, you know, a
9 fight with the plaintiffs. We worked together in those
10 cases.

11 If I could briefly --

12 THE COURT: You may.

13 MS. WEST: There were three points I would just
14 like to kind of in principle address, although, as we say,
15 I don't really have a dog in the fight.

16 As to Mr. Zimmerman's representations that TPPs
17 do not have direct claims, our complaint does assert direct
18 claims against Bayer that are in our view not derivative of
19 that of our insureds. The subrogation claims, of course,
20 are, as Your Honor is very well aware.

21 In response to Mr. Schoon's representations that
22 a deal has been reached with the TPP universe, I beg to
23 differ. It has been reached -- it's my understanding, I'm
24 not privy to the details or the negotiations, but it's my
25 understanding it is with a group of TPPs. By no means, I

1 believe, the majority or a deal, as I apprehend it, that
2 would be acceptable to the majority of TPPs, particularly
3 those that have a fiduciary relationship to a union plan or
4 an ERISA plan.

5 But at any rate, with that, thank you for letting
6 me be heard.

7 THE COURT: Thank you.

8 MR. ZIMMERMAN: I had a couple of things I
9 wanted --

10 THE COURT: Yes. Everyone will have their
11 opportunity to speak.

12 MR. ZIMMERMAN: I wasn't finished. He asked me a
13 question -- I believe you asked me a question about what's
14 been done in other cases.

15 THE COURT: Right.

16 MR. ZIMMERMAN: I gave you mine. Kim gave you
17 hers. I have a couple of comments and then --

18 MR. SCHOON: Then it's my turn.

19 MR. ZIMMERMAN: Then it's your turn.

20 MS. WEST: Am I done?

21 MR. ZIMMERMAN: You're done.

22 THE COURT: Thank you very much, Ms. West.

23 MS. WEST: Thank you.

24 MR. ZIMMERMAN: The second point made by
25 Mr. Schoon was we would bog down the process. Well,

1 bogging down the process is, I guess, a possibility of --
2 you know, if you are present and you are knowing what's
3 going on, you can be heard to bog down the process. On the
4 other hand, what we've allowed to occur by fiat is they
5 have done it without us.

6 And I got a report today that a large portion of
7 this TPP community has been resolved. Well, that's
8 expeditious, I guess, but it is kind of wrong that I have
9 to learn from the outside what I have been trying to learn
10 from the inside, like what's going on with these cases.

11 I think it's wrong to be excluded from the
12 process and then have it reported to us sometime during the
13 course of the litigation that a substantial portion of the
14 TPP community has been resolved. I guess you are too late,
15 the check has been written; that's not right.

16 Normally they come in at the end of the case.
17 I've wanted them to come in at the beginning of the case so
18 we wouldn't bog down at the end of the case.

19 If they come in at the beginning of the case and
20 cut their deal and have run away saying we didn't use any
21 of the work product, none of this work in the MDL really
22 affected us, we didn't have to rely on their depositions,
23 what are they relying on, where did their claim come from?

24 Their claim came from a claim against Bayer by an
25 individual, and a lot of these claims by individuals are

1 here in court, 22,000 of them -- excuse me -- 10,000 of
2 them around America and about 6,000 of them here. So, I
3 mean, the whole critical mass of what they're doing is a
4 result of this litigation.

5 The next point, which I think is very
6 interesting, very interesting, is they said they resolved
7 all these cases. Now, what are these cases about? It's
8 for the cost of the medicine, right, the prescription, the
9 cost of the care. Was it only for rhabdo? I doubt it.
10 It's probably for everything. I don't think they
11 distinguished out rhabdo.

12 You've got a medical bill. The settlement that
13 went to Aetna I don't believe was separated by rhabdo,
14 we'll pay those; nonrhabdos, no way, no how. Maybe that's
15 what happened, Your Honor, but I see no evidence of that.
16 I think they globalized it. I want to know that. I think
17 we are entitled to know that. I think we are entitled to
18 participate for a lot of those reasons.

19 The best argument they made, I thought, was,
20 well, we started before the MDL started. Well, but they
21 didn't start before the litigation started. The MDL
22 started after we had a motion before a panel after I don't
23 know how many cases, 33 cases were filed. I forget the
24 first number of cases that were filed. It goes to a panel.
25 The panel is heard quarterly and decided in December, I

1 believe, that it comes here. But that argument, I think,
2 was in September and 33 cases were filed way before
3 September to even get it to the MDL. So to say that it
4 started before this MDL is formed is disingenuous, perhaps
5 disingenuous.

6 Thank you.

7 MR. SCHOON: Just a couple of things quickly,
8 Your Honor. I've been involved in these kinds of
9 negotiations too and I think it's impossible in other MDLs
10 to generalize about whether it's the beginning or the end
11 or what have you.

12 But the whole discussion that you heard about
13 this coming in at the end and resolving is really in the
14 context of something that isn't happening here. It's in
15 the context of global settlements or class action
16 settlements. We're not there. I don't know, you know,
17 that that has any relevance whatsoever.

18 To get back to sort of the base problem here of
19 what the PSC is asking you to do, though, it really goes to
20 the jurisdiction of the Court and the jurisdiction of the
21 Court over nonparties.

22 This was addressed, for example, in the case we
23 cite and rely on in our brief, the Showa Denko litigation
24 from the Fourth Circuit. And the holding of that case was
25 very clear, that the court -- the MDL court could not

1 assess nonparties for the work of the MDL. That's it.

2 That's really, I think, the beginning and end of the story.

3 As for the other matters here, they go to the
4 effectiveness of being able to negotiate with parties and
5 to bring about resolution.

6 If Your Honor thinks that I represented that we
7 had reached a global resolution with all third party
8 payers, I don't want to mislead you.

9 THE COURT: No.

10 MR. SCHOON: We are doing this on an individual,
11 company-by-company basis and there are distinctions because
12 there are self-funded plans and numerous variations. It
13 can be enormously complex.

14 THE COURT: Well, let me ask you this question
15 that was on my mind and Mr. Zimmerman has raised it, the
16 issue dealing with: Are these global settlements that you
17 are settling with these third party payers or are you just
18 dealing with rhabdo cases as pronounced by the trial team
19 here or are you dealing with all sorts of issues, including
20 those that would not be classified as rhabdo?

21 MR. SCHOON: Sure. This requires me to talk to
22 you a little bit about the nature of the agreement and the
23 structure and how these are done.

24 This isn't like we're dealing with an individual
25 plaintiff. Obviously Aetna, which is, I think, the largest

1 health insurer or healthcare plan in the country, has tens
2 or hundreds of thousands of individuals, some of whom may
3 have claims for medical care related to rhabdo. We're
4 obviously going to settle with Aetna any claims that they
5 now have or may think they have or dream that they have in
6 the future, and that's the basis.

7 So if that's what Your Honor means by "global,"
8 yes, on a company-by-company basis the intent is that there
9 will be a release of any subrogation claims.

10 And in addition to that, on a going-forward basis
11 and for the plaintiff's benefit we also negotiated a
12 release of any rights that those companies have to seek
13 reimbursement from the individual plaintiff.

14 That's on a going-forward basis. Obviously cases
15 that have already been settled as of a date would not be
16 given that benefit because presumably consideration was
17 given as part of the settlement to resolve any medical
18 claims that those individuals would have.

19 Does that answer Your Honor's question?

20 THE COURT: It does. Thank you.

21 Anything further?

22 MR. ZIMMERMAN: Just briefly, Your Honor.

23 Understand how this all weaves together. In the settlement
24 program I have a rhabdo case. I settle it for X thousand
25 dollars today with Blue -- with a company that has not

1 settled now with Defendants.

2 They require I hold, what, two times the medicals
3 in trust until I personally resolve that lien with whoever
4 I have that lien -- whoever asserts that lien, say the XYZ
5 Insurance Company that they haven't settled with.

6 So this is very connected to everything we are
7 doing because if they settle -- if it's Aetna that they
8 just settled with and Aetna has the lien, I don't have to
9 hold two times back theoretically because that claim has
10 now been resolved, but I don't know that.

11 I settle. My client is going to get a check for
12 X hundred thousand dollars. They are with Aetna. I'm
13 supposed to withhold two and a half times or two times, but
14 they have already settled the claim.

15 It's all interconnected, Your Honor. It's on the
16 backs of these people, and these people are entitled to be
17 vigorously and appropriately represented and that includes
18 their subrogation claim, which becomes our problem as soon
19 as they settle unless they settled over here with us not
20 knowing.

21 It's all got to be on the aboveboard, Your Honor,
22 it's all got to be fair for us; and this isn't fair when
23 we're in the dark.

24 And the second point, Your Honor, is that --

25 THE COURT: Paint the picture for me. If they've

1 settled with, let's say, ABC Insurance Company and you
2 settle your case and your client had ABC Insurance, you
3 wouldn't have to hold back.

4 MR. ZIMMERMAN: Let's assume yesterday they
5 settled with ABC Insurance.

6 THE COURT: All right.

7 MR. ZIMMERMAN: They've got an agreement with
8 ABC. Let's assume the day before yesterday I settled
9 Mr. Smith's claim and he has ABC. The day before yesterday
10 I have to withhold two times his amount because they don't
11 have a deal.

12 THE COURT: Right.

13 MR. ZIMMERMAN: Are they telling us that they
14 have a settlement with ABC so that we don't have to resolve
15 that claim? How are we getting that claim resolved? I
16 mean, there's a whole bunch of practical issues for all of
17 us lawyers out there who don't know if a settlement has
18 occurred.

19 THE COURT: Walk me through it. Let me put it
20 this way: If they have an agreement with ABC Insurance and
21 you withhold two times the amount, certainly when you go to
22 ABC they will tell you that we have an agreement, therefore
23 they are not going to --

24 MR. ZIMMERMAN: We would hope --

25 THE COURT: -- take that money.

1 MR. ZIMMERMAN: Absolutely, we hope it works that
2 way. But knowing the way big, big, big insurance companies
3 work, they may not know in the claims department for a
4 long, long time if that settlement is done at one level and
5 the claims department is working on resolving this lien
6 with me on another level. Those things don't happen in a
7 heartbeat.

8 THE COURT: Let me --

9 MR. ZIMMERMAN: I am raising a theoretical
10 problem.

11 THE COURT: Let me ask you this, then. If it's a
12 question of knowledge -- I'll throw the question out to
13 Bayer and they can answer it. If they have settlements
14 with a number of third party payers and you receive a list
15 of those payers and you can distribute that to your -- to
16 the lawyers within the PSC, isn't that going to solve the
17 problem, isn't --

18 MR. ZIMMERMAN: That would solve --

19 THE COURT: -- that --

20 MR. ZIMMERMAN: -- that problem, Your Honor.

21 THE COURT: At least I think in my courtroom this
22 is the place I can talk.

23 MR. ZIMMERMAN: I beg your pardon.

24 THE COURT: If I am at home, my wife can
25 interrupt me and I can't say a word. All right? But this

1 is the only place that I can --

2 MR. ZIMMERMAN: I beg your pardon.

3 THE COURT: And I know I am slow as I get my
4 words out and I take a while, but let me finish. Give me
5 that.

6 Isn't that what you are looking for, part of what
7 you are looking for, is that information; that would solve
8 part of the problem?

9 MR. ZIMMERMAN: Yes, part of the problem.

10 THE COURT: Part of the problem. The other part
11 of the problem I understand you are saying it's our work
12 product that's brought these companies into the loop, that
13 now they are getting X number of dollars and they are
14 getting a free ride. So we're on the same wavelength,
15 right, on understanding what you think the issue is?

16 MR. ZIMMERMAN: Yes. And the other problem is
17 this whole rhabdo, nonrhabdo, which is very intriguing to
18 me.

19 THE COURT: That's part of the global.

20 MR. SCHOON: I don't want to reargue this unless
21 you had a question, but just so we are clear, it's
22 obviously our intent to inform plaintiffs' counsel when
23 we've reached agreements with their insurers because that
24 should help expedite settlement with the underlying case.
25 That's part of our thinking behind all of this.

1 There's no point in our reaching some secret deal
2 where we have a waiver of liens and subrogation rights. We
3 want the benefit of that. We definitely want the benefit
4 of that.

5 THE COURT: Anything else on this issue?

6 MR. ZIMMERMAN: No.

7 THE COURT: I will take it under advisement.

8 MR. ZIMMERMAN: Gene, there's another question.
9 Can I ask you a question?

10 MR. SCHOON: Sure.

11 MR. ZIMMERMAN: What would happen if --

12 THE COURT: Please stand up.

13 MR. ZIMMERMAN: What would happen --

14 THE COURT: Address the question to me and
15 then -- that's the way we should do it.

16 MR. ZIMMERMAN: I'm sorry.

17 THE COURT: Your Honor, I have this question.

18 MR. ZIMMERMAN: Your Honor, I have this question.

19 Some people have already settled with, say, Aetna. That's
20 now recently settled and they have reimbursed Aetna for
21 their subrogation claim, right? In other words, let's say
22 they settled early on with Aetna. They had a \$50,000 lien
23 and they settled it for 30 and they paid the money out of
24 their settlement to Aetna. What happens with that 30,000
25 that this person paid to Aetna now that Aetna has been

1 settled out for X million from Bayer? Do they get that 30
2 back or does Aetna get to keep that 30? Is it -- you know,
3 whose money did they just settle with the scenario being a
4 settlement today with Aetna for X should be worth -- a
5 settlement yesterday with X should be worth more because
6 the individual has to pay the subrogation, a settlement
7 with --

8 THE COURT: Let me ask you this question. That
9 would have occurred in any MDL. That would have occurred
10 in bone screws where people have settled. Oh, you --

11 MR. ZIMMERMAN: I didn't say anything. I just
12 shook my head.

13 THE COURT: People settle before the global, you
14 know that that happens. So what happened there, what
15 happened in those cases?

16 MR. ZIMMERMAN: Because the --

17 THE COURT: Have you answered your own question?

18 MR. ZIMMERMAN: Because the third party payer
19 claim was not settled until the end. So those that
20 settled -- if you settle it at the end, you've got a pot
21 and then a piece of that pot goes off to settle it. The
22 rest of the pot is divided amongst the claimants, so they
23 are all net of subro. Some of these people are getting --

24 THE COURT: I understand.

25 MR. SCHOON: I'm not sure I understand the

1 question, I apologize.

2 THE COURT: The question is that someone
3 settles -- let's say that Lawyer F. Lee Bailey settles
4 three cases for \$3 million and pays Aetna \$150,000 and now
5 six months later you have an agreement with Aetna for a
6 global settlement. Does your global include or exclude the
7 amount that they've dealt with with clients that have
8 settled prior to your agreement?

9 MR. SCHOON: The settlement would exclude that.
10 Obviously in settling that case with Mr. Bailey, his three
11 cases, presumably he took into account the fact that he
12 would have to resolve whatever medical liens were out
13 there. That's been the consistent plan of settlement, that
14 it's the plaintiff's responsibility to resolve any and all
15 Medicare -- medical liens, health insurer liens and so
16 forth.

17 Going forward with a company that we've settled
18 with -- and really to be perfectly honest with you, the
19 agreement date I believe is October 1, 2003. For those
20 cases -- if the case was settled, say, between October 1st
21 and today with Aetna and it was a plan that was covered by
22 the settlement because Aetna administers a lot of plans and
23 they had withheld the money to pay the medical lien, they
24 wouldn't have to pay that to Aetna because we would have a
25 settlement with them. If they paid it to Aetna, presumably

1 Aetna would give it back if they weren't entitled to it.

2 Now, I can't come up with every scenario in which
3 that would work, but Aetna only gets paid once, just as the
4 plaintiff only gets compensated once in these cases.

5 So, you know, I can spend time discussing this
6 with Plaintiffs. I don't think there's a problem here and
7 I don't want to create one.

8 THE COURT: I'll take it under advisement and you
9 all can have other conversations if that's necessary.

10 MR. SCHOON: Thank you, Judge.

11 THE COURT: I appreciate your time, both sides.

12 Anything else?

13 MR. ZIMMERMAN: No, Your Honor, I believe that
14 concludes the agenda.

15 THE COURT: Well, I know we got a little into
16 some other -- some caucusing. I do want to say some things
17 dealing with the Plaintiffs' motion that I will be hearing
18 in January dealing with the modification of PTO 89 and
19 possibly the setting of summary jury trials.

20 I understand that both sides are looking for
21 direction from the Court on how the Court wants to proceed
22 on these matters. However, the Court has always been
23 reluctant to force any issues that either side weren't
24 ready to deal with.

25 And when we're talking about having other cases

1 teed up for trial, I would hope finally after two years of
2 litigation that if -- maybe in January you will have names
3 of cases that are bellwether cases that you feel should be
4 tried, whether or not they're here in Minnesota or across
5 the country, listed and sent over to the Defense so they
6 will be aware of those so we can move on on some of these
7 issues.

8 I have been reluctant to -- well, every time I've
9 asked for a case or cases, I've either gotten one or two
10 and then we had to go through the process of distilling
11 them down to, I don't know, a couple hundred to get six
12 cases.

13 Certainly if the PSC has ideas, they should meet
14 and confer with the Defendants. And the Defendants are
15 willing to try any muscle ache cases anywhere. And so if
16 you've got some cases that you want this Court to use as
17 bellwether cases, put them forth, put 20, 30 cases, put
18 them across the country. That's why I keep on asking,
19 Where are these cases located? I can certainly find judges
20 in most jurisdictions to try them for us.

21 But I just -- I'm not going to at this point
22 rush. Because it seems like every time I rush, no one is
23 ready. And it sounds like we're not going to be ready for
24 anything in June, which I suspected in the first place, so
25 we'll have some more cases that will percolate.

1 But if somebody is in a rush, they better rush
2 some cases in front of me and rush them to the other side
3 so they can be vetted and move along and so you can move
4 the train a little faster than it's going now.

5 The speed of this train is at a good clip. If
6 you want to go faster, you are going to have to put
7 something to the Court so I can get other judges throughout
8 the country involved and get those cases tried or get
9 myself, through the chief justice, to hear those cases in
10 those jurisdictions.

11 I'll wait until the response, but if you are
12 worried about something, you've got time. You said since
13 October 26th that you put this before the Court and it's
14 like the Court has dillydallied on these issues. I take
15 offense to that.

16 There are certain mechanisms that the PSC knows
17 that we have. Just because you get up and announce
18 something or put something in a letter, the Court is not
19 going to rule on that immediately because Defense has a
20 right to respond to it.

21 And certainly if you all want -- it's the holiday
22 season. I just don't see anything occurring between now
23 and our next status conference of any meaningful completion
24 of what we're going to be doing in June or July.

25 But the Plaintiff has got to come forward. You

1 finally put forth -- after I got extremely angry at the
2 July conference you finally put forth a solid proposal that
3 I can look at and really think about the different aspects
4 of what I should be doing with this MDL.

5 And I am waiting for the response from the
6 Defense, and I don't think that it will be too far off from
7 what you're asking for. They want resolution of these
8 cases as quickly as possible.

9 And so if we're going to glean out those cases
10 that should not be in the MDL, I think the Defense is going
11 to jump at that. They've asked for that early on in one of
12 their earlier motions, was to glean out these cases. So
13 that's not going to be something they're going to oppose.

14 But that is an important aspect of the MDL. When
15 you say that you're going to glean out those cases that
16 should not be here, that's a tremendous and revolutionary
17 step in an MDL; and that's going to take time and
18 thoughtfulness so parties aren't left behind that should
19 not be left behind. But that's going to take a lot of
20 time. It is just not going to happen overnight.

21 I think, Mr. Zimmerman, you have taken a
22 tremendous leap forward when you have put that in writing.
23 I compliment you on that. It has serious consequences for
24 you as being the leader of this PSC because you're going to
25 have to tell people they don't have a case. And that's

1 what this MDL is all about, is not having cases that
2 shouldn't be here. And I compliment you for that, but
3 that's going to take time and it's going to take much
4 effort between both sides.

5 And I appoint Special Master Haydock. If you all
6 need to get together and have those informal conversations
7 that you need to try to come up with something that you can
8 propose to the Court, Mr. Haydock is available and ready
9 for you to deal with these issues.

10 But that's the first issue. I think once we get
11 that issue of culling out what cases should be left in the
12 MDL, I think that is a good step forward for the PSC to the
13 Defense that you really mean business in this case.

14 And therefore, then we'll get to those meaty
15 issues, the ones that we have been talking about for two
16 years that is going to cause problems, cause trials, and
17 where are we going to hear those trials.

18 I can tell you that I'm not just going to send
19 all these cases back to their districts. It is just not
20 going to occur. It's going to happen in a methodical
21 fashion.

22 If we have two or three that we want to send to
23 Philadelphia, I can call Chief Judge Giles out there and we
24 can work on getting a judge to try those. If it's
25 California, if it's Texas, we can do it. If it's

1 Louisiana, anywhere else, I've got friends in the judiciary
2 that will help me out and understand the problems with
3 major MDLs. And so we can do that so we can get bellwether
4 juries.

5 And then we can also think about summary jury
6 trials. I have to be convinced on that. Early on you gave
7 me -- over two years ago or close to two years ago you gave
8 me quite a bit of information on summary jury trials. I
9 think the Defense was not at all enamored by the process,
10 but I don't know what their thoughts are now. I'll wait
11 for that.

12 But there are a number of ways that we can deal
13 with these issues and move forward. It just takes time and
14 it takes time for you all to meet and confer and to talk.

15 Okay, you meet and confer and you're not going to
16 agree. That's where Special Master Haydock comes in to
17 help you understand what the issues are, how the Court
18 feels about certain issues. And then in January and
19 February we'll be on the right track on where this MDL
20 should be going for the next year.

21 You're working hard; and when you work hard, you
22 know, you get hot under the collar. If you don't get
23 everything that you want, you get hot under the collar.
24 But I compliment both sides. You're doing a fabulous job
25 in a difficult situation.

1 And I think you've handled the PSC in a marvelous
2 fashion. You have not had -- you have had difficulties.
3 Of course, you knew you were going to have difficulties
4 when you asked to be selected.

5 Mr. Beck and the defense crew have done a
6 marvelous job with stating their position. They have not
7 wavered and so we know where the battle is going to be.
8 It's coming up soon. It's happening down in Mississippi
9 right now. It's going to happen in Texas.

10 And so those are the cases I would like to hear
11 what are the facts behind them, is there something that
12 would be of interest to the MDL. Because we're looking for
13 a common ground here.

14 You know, if something is happening in
15 Mississippi, just the verdict doesn't -- it has a lot to
16 say, but if there's some experts that are testifying that
17 are going to be helpful to one side or the other, that
18 would be helpful for the Court to know. Are they going to
19 be the ones coming up here to testify, I would like to know
20 that.

21 But I think we're working hard. We've got the
22 next status conference to talk about. I would like it to
23 be the week of January 12th. I don't know what day would
24 be good. The whole week is free for me, so --

25 THE CLERK: Not Friday.

1 THE COURT: Not Friday, so Monday through
2 Thursday.

3 MR. HOEFLICH: Thursday.

4 THE CLERK: January 15th.

5 MR. ZIMMERMAN: That's fine.

6 THE COURT: How does that look on your calendar?

7 MR. ZIMMERMAN: Good.

8 THE COURT: Do you want it in Minneapolis or do
9 you want to go down to Dallas?

10 MR. HOEFLICH: We would prefer Minneapolis,
11 Judge, if that's possible.

12 MR. ZIMMERMAN: Prefer Minneapolis.

13 THE COURT: Minneapolis it will be at 10:00.

14 Any questions on what I have said? Do you
15 understand where -- you have put forth very good ideas.
16 The Defense has got to respond to it. But just don't wait
17 for the response, that's what I'm saying.

18 MR. ZIMMERMAN: Don't what?

19 THE COURT: Don't wait for the response. If
20 you've got some cases that you think that you want, send
21 them over to the other side and say: Hey, these are --
22 Judge Davis is too slow. These are the cases that we're
23 thinking about. They're muscle ache cases, they're muscle
24 injury cases, wherever you find them, they're here, they
25 are in another state. We've done an analysis that we are

1 ready to get up and rolling on these.

2 You're taking depositions on some of the people
3 already, so it's not going to be a problem. Let's move
4 that so we just don't sit and wait.

5 You're saying that you are sitting and waiting
6 for the Court to do something. Well, I will do something,
7 but you have to do quite a bit behind the scenes. And I'm
8 giving you official notice that you can use Professor
9 Haydock in working out any kind of agreements that are
10 necessary or working through some problems.

11 MR. HOEFLICH: Thank you, Judge.

12 THE COURT: Anything else? And I don't know what
13 tests that you are having, but I hope everything goes well.

14 MR. HOEFLICH: Thank you.

15 THE COURT: And I hope everyone's holiday season
16 is -- yes, Ms. West.

17 MS. WEST: Judge, might I be included in that
18 process? I'm sorry to interrupt.

19 THE COURT: Oh, most definitely.

20 MS. WEST: I appreciate it.

21 THE COURT: I think a new voice is always -- and
22 a calm voice -- is always helpful in this process.

23 MS. WEST: I appreciate it. Thank you.

24 THE COURT: I hope you are staying for the
25 meeting --

1 MS. WEST: Yes, sir.

2 THE COURT: -- afterwards. All right.

3 MR. ZIMMERMAN: Your Honor, I appreciate hearing
4 the comments. It was very helpful to us and to our group.
5 So we will make very heavy -- we will make very special
6 note of what was said and proceed in that way. I didn't
7 mean to be critical of the timing of this Court. That
8 wasn't my message.

9 THE COURT: I can only move so fast. Once the
10 Defense got the proposal, they have a right to respond.
11 And I don't want them to rush in their response. I want
12 them to be thoughtful in their response, and they have been
13 in the past.

14 Because we are getting to some very critical
15 issues. I think Defense has caught on to what I have said.
16 What you've done, you've stepped forward dealing with the
17 issues of what cases should be here; and that, I must say,
18 is so important to the Court and it's revolutionary.

19 Usually everyone wants to keep every case
20 possible and muddle up the issues, but you want to make it
21 clear what this MDL is about, which is something I said
22 long ago. Those people that are injured, that's what
23 they're here for, but those that have no injuries, just
24 like the Defense says, they should not be compensated.

25 MR. HOEFLICH: Thank you, Judge.

1 THE COURT: Adam, again, I hope your tests go
2 well --

3 MR. HOEFLICH: Thank you very much.

4 THE COURT: -- and your trip to Europe as well.
5 And everyone -- and Al --

6 MR. SIPKINS: Thanks, Judge.

7 THE COURT: -- don't write any books. You know,
8 if you have too many best sellers, then you won't be at the
9 defense table much longer.

10 MR. HOEFLICH: We wish the Court and its staff a
11 very happy holiday, Judge.

12 THE COURT: Thank you very much.

13 MR. ZIMMERMAN: Thank you.

14 (Court adjourned.) 15

16

17 * * *

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

21

22

23 Certified by:
24 Lori A. Case, RMR-CRR

25

Dated: December 23, 2003

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