

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

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

6 MR. LOCKRIDGE: Good morning, Your Honor, Richard
7 Lockridge for the plaintiffs.

8 THE COURT: Good morning.

9 MS. CABRASER: Good morning, Your Honor,
10 Elizabeth Cabraser for the plaintiffs.

11 THE COURT: Good morning.

12 MS. NAST: Good morning, Your Honor, Dianne Nast
13 for the plaintiffs.

14 THE COURT: Good morning.

15 MR. CHESLEY: Good morning, Your Honor, Stanley
16 Chesley for the plaintiffs.

17 THE COURT: Good morning.

18 MR. MOLL: Good morning, Your Honor, Kenneth Moll
19 for the plaintiff.

20 THE COURT: Good morning.

21 MR. AUDET: Good morning, Your Honor, Bill Audet
22 for the plaintiffs.

23 THE COURT: Good morning.

24 MR. PLUNKETT: Good morning, Your Honor, Hugh
25 Plunkett for the plaintiffs.

1 THE COURT: Good morning.

2 MR. DUMAS: Good morning, Your Honor, Walter
3 Dumas for the plaintiffs.

4 THE COURT: Good morning.

5 MR. LIMBACHER: Good morning, Your Honor, Robert
6 Limbacher for the defendant, GlaxoSmithKline.

7 MS. FREIWALD: Good morning, Your Honor, Hope
8 Freiwald for the defendant GlaxoSmithKline.

9 MS. VAN STEENBURGH: Good morning, Tracy Van
10 Steenburgh for defendant GlaxoSmithKline.

11 MR. SIPKINS: Good morning, Your Honor, Peter
12 Sipkins for the defendant Bayer.

13 THE COURT: Good morning.

14 MR. HOEFLICH: Good morning, Judge, Adam Hoeflich
15 for Bayer Corporation and Bayer AG.

16 MR. MC CONNELL: Good morning, Your Honor, Gary
17 McConnell, and I'm employed by Bayer Corporation.

18 THE COURT: Good morning.

19 MS. WEBER: Good morning, Your Honor, Susan Weber
20 from Bayer Corporation.

21 THE COURT: Anybody else who wants to be
22 identified?

23 MR. ZIMMERMAN: Your Honor, I'm going to just
24 briefly introduce the PSC to you.

25 THE COURT: Please.

1 MR. ZIMMERMAN: I guess what I would like to do
2 is, if it pleases the Court, Your Honor, is to have the
3 PSC, which I have asked to sit in the front row, which the
4 Court has appointed, to simply rise and introduce
5 themselves to the Court. So, I would ask them to do that
6 in whatever order you would like.

7 MR. SINGLETON: Your Honor, if the Court pleases,
8 my name is William Singleton from Shreveport, Louisiana.

9 THE COURT: Welcome to our warm weather.

10 MR. SINGLETON: Thank you, sir.

11 MR. FOX: Good morning, Your Honor, Frederic Fox,
12 Kaplan, Fox and Kolsheimer, New York.

13 MR. CLIMACO: Good morning, Your Honor, John
14 Climaco, Cleveland, Ohio.

15 MR. BRANCH: Good morning, Your Honor, Turner
16 Branch from Albuquerque, New Mexico.

17 THE COURT: Good morning.

18 MR. KEMP: Good morning, Your Honor, Will Kemp of
19 Harrison, Kemp and Jones, Las Vegas, Nevada.

20 THE COURT: Good morning.

21 MR. HILDRE: Good morning, Your Honor, Don Hildre
22 from San Diego, California.

23 THE COURT: Good morning.

24 MR. CAULEY: Gene Cauley, Cauley, Geller, Bowman
25 and Coates.

1 THE COURT: Good morning.

2 MR. DUGAN: Good morning, Your Honor, James Dugan
3 with the Gauthier, Downing lawfirm of Metairie, Louisiana.

4 THE COURT: Good morning.

5 MR. BARRETT: Good morning, Your Honor, Don
6 Barrett from Lexington, Mississippi.

7 MR. BECNEL: Daniel Becnel, Your Honor, from
8 Reserve, Louisiana.

9 THE COURT: Welcome.

10 THE COURT: I was down in your state last week,
11 down in New Orleans. It was cold, but the food was good.
12 Mr. Zimmerman.

13 MR. ZIMMERMAN: Thank you, Your Honor. If I
14 could, just briefly, I would like to introduce a couple of
15 my partners that are here from my firm. I believe Tina
16 Olson, a paralegal, is also here. One of my partners,
17 Robert Hopper --

18 MR. HOPPER: Good morning.

19 MR. ZIMMERMAN: And Ron Goldser.

20 MR. GOLDSER: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. LOCKRIDGE: I would like to do the same, Your
23 Honor. Robert Shelquist is here from Lockridge, Grindal --

24 MR. SHELQUIST: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. LOCKRIDGE: And Hugh Plunkett.

2 THE COURT: Good morning, Hugh.

3 MR. LOCKRIDGE: And Yvonne Flaherty is also here,
4 Your Honor.

5 THE COURT: Good morning.

6 MR. ZIMMERMAN: On a cold day we have a warm
7 courtroom.

8 THE COURT: Yes. Next time I'll reserve Judge
9 Rosenbaum's courtroom.

10 MR. ZIMMERMAN: That's the 15th Floor ceremonial
11 courtroom.

12 Your Honor, it's a privilege to be in front of
13 you on this matter, and we have a number of items to go
14 over. I don't think many of them are controversial. There
15 are a couple that will need some airing, but for the most
16 part I would like to report to you what we have been doing
17 and where we've been and what we've submitted to the Court
18 and why and what issues we would like the Court to be aware
19 of and how we're going to deal with them down -- next -- in
20 either today's hearing or down the road apiece.

21 First off, Your Honor, after the Court's
22 appointment of a Plaintiffs' Steering Committee, as I had
23 represented to the Court the last time, we went about the
24 task on the plaintiffs' side of developing a committee
25 structure. The Plaintiffs' Steering Committee then broke

1 down into subcommittees or committees of the PSC for the
2 various topics and various areas in which we are going to
3 be litigating or researching or providing services to the
4 MDL.

5 The reason the courtroom is full is I've asked
6 many, if not all, of the committee people who are not
7 members of the PSC directly but have been asked by the PSC
8 to serve on committees to be in attendance -- one, simply
9 for the Court to see their faces because you are going to
10 hear from them at various times during the litigation, but
11 also we are having a series of meetings back in our
12 offices, and we had a meeting last night and back in our
13 offices today to begin the work, the substantive work of
14 the MDL within the committees.

15 Each committee has a chair or co-chair, and each
16 committee has a defined role and agenda, all of it
17 filtering through the PSC and the Executive Committee and
18 lead counsel.

19 In court we will try to be very orderly. We're
20 not going to ask people to run up to the mike willy-nilly
21 with reports or anything. They will all try and come
22 through members that will be designated in advance, and,
23 so, we hope it will all be orderly. I just wanted the
24 Court and court personnel and defense counsel, for that
25 matter, to understand who it is that's working in this MDL

1 and what their various responsibilities are.

2 Your Honor, I'm not going to go and introduce
3 everyone individually. I guess it's with some regret that
4 I don't do that, but I just think in the interest of time
5 it wouldn't be appropriate at this time, but I would ask
6 members of the subcommittee to stand and just be recognized
7 by the Court. We will have a lot of work to do, so members
8 of the committees of the PSC, please rise. We appreciate
9 you coming and thank you very much.

10 Your Honor, we have worked very hard with the
11 defense counsel for the past three weeks, I believe, and
12 before that to file a series of reports, preliminary
13 reports with the court, an agenda for today's status
14 conference, and various proposed orders on case management,
15 preservation of documents and orders regarding
16 confidentiality. We have asked the Court to review those
17 orders and to enter those orders if they meet the approval
18 of the Court. The reason we asked that those be entered
19 promptly is because (a) they agreed to it, and we think
20 they are in the -- they are appropriate and they have been
21 hammered out at some length, in fact, at great length in a
22 series of meetings and conference calls in the small groups
23 of the PSC. But discovery really can't begin until we get
24 these orders entered.

25 I've been told that we have now begun the

1 document -- turn over of the document production. I've
2 been told that, is it 30 CD's, CD roms of documents are on
3 their are way and will land today in our office and in our
4 depository. It is subject to, obviously, these orders
5 being entered. I believe that the confidentiality orders
6 and the preservation orders and the case management orders,
7 the review of those will then begin forthwith for all the
8 courts and all the litigants to share.

9 I'm going to report to you briefly on where we
10 have been with the depository and what's going to happen,
11 but just as a matter of form, the first thing that we are
12 probably wanting to address is the case management order,
13 the order for preservation of documents and the order
14 regarding confidential information.

15 There is another item, Your Honor, that will be
16 brought up today, and it's in the nature of an emergency
17 motion. And it's an emergency motion for protective
18 notice. And it's an emergency motion that's going to, we
19 hope, be at least briefly presented to the Court today
20 because it involves a very serious issue of communication
21 outside of the purview of class counsel and outside the
22 purview and review of the Court, and it's something that's
23 ongoing that we think needs to come to the Court's
24 attention now. I don't want to argue it now. I would like
25 Mr. Chesley, when I'm done with I present to the Court in

1 preliminary matters, to be able to at least present it to
2 the Court. And I know defense counsel will want to present
3 a point of view or maybe an idea for how to properly
4 prepare for final argument where it's very important to us
5 that this come to the attention of the Court.

6 It only came to my attention on Wednesday or
7 Thursday of this week when I got an e-mail that this was
8 happening. I immediately brought it to the PSC, and we
9 immediately prepared this emergency motion. So, I don't
10 mean to surprise it on anyone. As soon as I found out
11 about it, we took immediate action. We thought because
12 we're here today, it's important for the Court to know
13 about it and to set out guidelines for how to deal with it
14 and perhaps deal with it today if we possibly can.

15 Let me go to a couple of issues within these
16 documents that we have still some -- I don't want to use
17 the word disagreement, but I think we have not come to a
18 final resolution or there are still at least active
19 disagreements between the parties with regard to the four
20 corners of these agreements.

21 We've put language in that we have agreed to.
22 We've put language in these documents that we have agreed
23 to so the documents can be entered. But with regard to
24 plaintiffs' position and defendants' position on certain
25 subtopics within these documents, we have a little more

1 work to do.
2 We met at eight o'clock this morning with defense
3 counsel. We have agreed to revisit, and I believe this
4 week if I'm not mistaken or next week at the latest, to
5 revisit these issues together to see if we can come to a
6 harder agreement on the subtopics or subpoints, and that's
7 good. That's very good. So, we're not asking necessarily
8 the Court to make a resolution of those today, but I
9 thought it was important for the Court to know about them
10 because if we can't come to a resolution within the next
11 few days, we will want to come back on an expedited basis,
12 if possible, with a smaller group to have us resolve these
13 issues.

14 I'm going to tell you what these issues are. The
15 first issue, in no particular order of importance
16 necessarily, is a deadline, drop dead deadline subject to
17 supplementation for the finishing of the production of
18 documents by all defendants.

19 We have agreed in the order to sort of a good
20 faith efforts, but what plaintiffs believe we need and we
21 believe it strongly, that we need a date, an absolute date
22 for the production and for the privilege log to be produced
23 so that, obviously, it can be supplemented, but there is a
24 target date for the production of documents because for the
25 most part it's very hard to begin your deposition program

1 until your documents are produced, although there certainly
2 are 30(b)(6) exceptions and a lot of exceptions to that and
3 some depositions will take place, but you can't really do
4 your complete deposition program without your documents
5 being reviewed and coded and available for the
6 depositions.

7 Our position is we need a drop dead date for the
8 production, subject to some supplementation if things come
9 up, but a basic drop dead date. Everybody in litigation
10 knows that those are the things that make the world work --
11 deadlines make stuff happen. We want a deadline. And the
12 defendants and we cannot agree on that at this point. I'm
13 letting the Court know it. And I'm sure the defendants
14 will have a point of view they want to express and they
15 will express it. So, the deadline for the privilege log
16 and the end of production.

17 The second issue, Your Honor, is a trial date.
18 It's extraordinarily important in any litigation that we
19 have a point and time in which we know we are going to have
20 our claims resolved by trial. Not all the claims, but some
21 claims. Perhaps in this jurisdiction -- I know we will
22 have a Minnesota case that we will want to try, and it will
23 be important to try that case and it will be important to
24 have a trial date. We think that trial date should be in
25 the year 2003. We can't agree on that. We have put best

1 efforts. We have put some language in the document that
2 says we will apply for an early trial date, which we will,
3 but we hope to come to an agreement for an absolute trial
4 date where we all know if the cases do not resolve, there
5 will be a trial so that the world will know and we know
6 what the trial issues become, what the difficult issues
7 become, and we can submit a case or a series of cases to a
8 jury here in front of Your Honor.

9 THE COURT: Some of the papers that have been
10 submitted to the Court, there have been state court cases
11 that have been set for trial in 2003?

12 MR. ZIMMERMAN: I don't know the answer to that.
13 I know many of the state courts are really deferring in
14 some respects to Your Honor to this first status. I think
15 the defendants would know better what the actual trial
16 dates. We hear so much, and I can't state for sure. I
17 know that the state courts are out there sort of watching
18 the lead of this Court. And that's another important point
19 that we want to set the agenda so that the people that are
20 out there waiting to see what will happen know -- hopefully
21 will happen from this Court, and they will set their
22 timetables based upon what happens in this Court, which is,
23 of course, why we want a drop dead date for discovery
24 production. We want a drop dead date for trial. We want
25 to set these parameters so we can have an efficient

1 schedule that works to these dates. So a trial date is the
2 other thing we are are going to meet on one more time to
3 try and come to an agreement on.

4 The third issue for which we are going to meet
5 and confer again --

6 THE COURT: Let me say something on the trial
7 date. I will move my calendar around to accommodate a
8 trial as quickly as possible in 2003. So, you have that,
9 so, you don't have to be worrying about my calendar. If
10 you come to an agreement on that date, we will go on that
11 date.

12 MR. ZIMMERMAN: I appreciate that. Thank you
13 very much, Your Honor.

14 The third issue, Your Honor, which we still have
15 some work on is the service through the Hague issue. I'm
16 not going to take too much of the Court's time on it, but
17 it's a very difficult process because we have a German
18 entity for service and translation, and really it's kind of
19 an issue that we need to work a little bit on because I
20 think we can obtain some agreements on to how to remove
21 that problem from this process.

22 I can't say we have come to an agreement on it,
23 we have not. It's my hope we will so that the people that
24 are out there with process to serve don't have to go
25 through that process. I think the MDL court could and

1 should be a leader in that, and we should be able to
2 negotiate something where we don't have to take that extra
3 step because we all know these cases are there. We all
4 know they are coming. We all know who is going to be
5 served and if we can find an appropriate way to do it
6 without having to go through all the machinations of the
7 Hague convention.

8 Again, we don't have agreement on, and I'm not
9 going to represent we do. We're going to try to have a
10 little bit more time to do it. I think it will be
11 important in creating leadership in the MDL that we do that
12 so we can have an easy process for service of the foreign
13 corporations.

14 Lastly, Your Honor, we want to talk a little bit
15 to you about a state and federal coordination, generally,
16 and some issues specifically. We are all in agreement, at
17 least from the plaintiffs' and the defendants' side, of the
18 important leadership role of this Court in the litigation
19 and what things we can do to obtain federal and state
20 coordination so the state courts understand what we're
21 doing and we understand what they're doing and how we can
22 reach mutually agreeable time frames and orders that can
23 aid the orderly process of this case. It's a complicated
24 issue in one way, but in another way it's quite simple. We
25 want this Court to be out there with all the information

1 and making choices that it needs to make in the first
2 instance whenever possible. And, so, we want to talk to
3 the Court a little bit, perhaps even informally if we
4 could, about some ideas and share some of the thoughts
5 we've had and some of the experiences we've had on the
6 plaintiffs' side and the defendants' side with regard to
7 how to effectuate state and federal coordination. Although
8 the manual speaks to it, and there are certainly a lot of
9 articles by Francis McGovern and others on that topic,
10 there is a lot of creative procedure out there, and there
11 are a lot of ideas that we would like to share with the
12 Court about how to achieve an orderly and equitable state
13 and federal coordination.

14 These are important issues to everyone and there,
15 I think, perhaps it's important to the plaintiffs, but even
16 more important to the defendants because they don't want to
17 be whipsawed around the country, and to a certain extent,
18 we understand that.

19 THE COURT: Well, let's set that up as quickly as
20 possible.

21 MR. ZIMMERMAN: Yes, sir.

22 THE COURT: Informally in my chambers.

23 MR. ZIMMERMAN: Can we do some of that today,
24 perhaps?

25 THE COURT: Certainly.

1 MR. ZIMMERMAN: I would like -- the last issue is
2 we want to run by you, and I think probably the best place
3 to do that is in chambers with all the parties present, is
4 a publication that's going out and we want the Court to
5 approve some copy that is publishing some information about
6 the MDL process, and we don't want to do that until the
7 Court sees it and makes sure it's okay.

8 We believe our duty as MDL counsel is to let
9 everyone know what is going on and there are many ways to
10 do it, but we don't want to do that without the consent of
11 the Court with what we do, so we want to talk about some of
12 those procedures with you to make sure that we are all on
13 the same page. We want to give information. We want to do
14 it in a public mechanism. We want to do it in an open way,
15 but on the other hand, I don't want to go out there to a
16 place where the Court may not want us to go and in any way
17 appear solicitous because that's not what we're trying to
18 do. We want to give information and do it in a way that
19 meets with the Court's blessings, if you will.

20 Those are the topics, I believe. I would like to
21 have Mr. Chesley, unless we want to go back and forth
22 between the defendants, I would like to have Mr. Chesley
23 brief the Court -- I would like to have Mr. Chesley brief
24 the Court on this emergency motion issue and at least
25 advise the Court as to where we are with it, and perhaps

1 the Court will then give us guidance on how to proceed.

2 THE COURT: There is one issue I would like to
3 address now so my court personnel can get back to work, and
4 that's dealing with your pretrial order that you put before
5 me dealing with electronic filing.

6 We had a question dealing with service of
7 documents on Page 2, Section 2 of the -- dealing with the
8 service of documents, Paragraph A. It says orders -- a
9 copy of each order will be provided electronically and in
10 hard copy to plaintiffs' liaison counsel and defendants'
11 liaison counsel. What do you mean by that because the
12 court does not have capability of dealing with electronic
13 -- distributing it electronically?

14 MR. ZIMMERMAN: I thought that your orders were
15 going to be posted on a website.

16 THE COURT: Correct.

17 MR. ZIMMERMAN: I guess that's how we believed,
18 electronically. And then you advised us that they are
19 posted, and that it is our job, it is the liaison counsel's
20 job -- you'll give us a hard copy as well, which is always
21 the case. You will post it on the website and it would be
22 our job to make sure that the PSC and appropriate people
23 like it's an individual case get the order through liaison
24 counsel.

25 THE COURT: Let me introduce Cindy Francis who

1 will be the main person dealing with the docketing
2 downstairs in the clerk's office. Ms. Francis, do you have
3 any input dealing with the fax?

4 MR. ZIMMERMAN: Maybe the best way is to fax it,
5 post it --

6 MS. FRANCIS: What we would do is fax it to you.

7 MR. ZIMMERMAN: -- and post it and we take
8 responsibility for the distribution through each liaison
9 office. That's really what we were saying.

10 MR. SIPKINS: Correct, Your Honor. I think what
11 was envisioned by this, and perhaps Mr. Goldser and others
12 can correct me if I'm wrong, is that we would receive from
13 the clerk's office a fax which is then easily converted by
14 our office into an electronic format that we can then
15 distribute to the rest of the plaintiffs' and defense
16 counsel in this. That is sufficient, Your Honor.

17 THE COURT: I don't think we have any problems
18 with that. We wanted to make sure we were on the same
19 page. Anything else?

20 MR. ZIMMERMAN: Mr. Chesley.

21 MR. HOEFLICH: Your Honor, before we move into
22 Mr. Chesley's injunction -- I'm sorry, motion, not an
23 injunction, perhaps we can make our statements on the case
24 management orders as well as on the other points Mr.
25 Zimmerman raised.

1 THE COURT: That would be appropriate.

2 MR. HOEFLICH: Good morning, Judge, I'm Adam
3 Hoeflich.

4 THE COURT: Good morning.

5 MR. HOEFLICH: From Bayer's perspective, the
6 chief objective of the orders presented to the Court today
7 is to create a protocol to move these cases forward and a
8 mechanism to coordinate with the states. We believe that
9 we have gone a long way toward doing that.

10 This morning, because the plaintiffs' steering
11 committee had been pushing the cases forward, we have
12 produced hundreds of thousands of pages to the plaintiffs,
13 even in advance of a formal document request. Mr.
14 Zimmerman stated that we don't yet have a set deadline for
15 ending document production. We suggested one that we
16 believe is the most efficient and quick date on which we
17 can produce the documents subject to supplementation, but
18 we're going to work with Mr. Zimmerman this week to see if
19 we can make more progress on that and reach an agreement.
20 We are united, though, that we want the MDL to be the
21 vehicle for coordination and efficient administration of
22 these cases. And I just wanted to make that clear to the
23 Court. We are doing everything in our effort and ability
24 possible to do that.

25 Concerning trial dates, at present all but one of

1 the cases as I understand it in the District of Minnesota
2 is a class action. We need to resolve the class action
3 issues before we can determine when, if ever, a trial on
4 one of those cases is appropriate.

5 With respect to the one case that is here, we
6 need to see what else is here and work with the plaintiffs
7 to establish a trial date at the farther reasonable date
8 and we will work with them to do that.

9 Mr. Zimmerman raised a number of other issues.
10 We're hopeful that we are going to work together this week
11 and present agreeable orders to the Court that will work
12 with you and then work with the state courts to move the
13 MDL and this litigation forward as quickly as possible.

14 THE COURT: You don't have any opposition with
15 meeting with me in chambers dealing with informally to talk
16 about the state and federal coordination?

17 MR. HOEFLICH: We would appreciate that, Judge.
18 Thank you.

19 MR. CHESLEY: May it please the Court, Stanley
20 Chesley for the record. Your Honor, I'm very honored to be
21 here in your court, and also this is my first visit to the
22 new courthouse here in Minneapolis. It's quite beautiful
23 and we're looking forward to working in this court.

24 Your Honor, I want to be complimentary to both
25 sides. I, as you can see by my white hair, have been doing

1 this almost too long. And there is a thing that's a lot
2 more important than civility in these cases and that's the
3 issue of moving the case.

4 For whatever reason there is, Your Honor, I think
5 it's for good reason and good experience an Article III
6 Judge, particularly one who has been assigned the MDL, is
7 the leader.

8 What has happened in the past, candidly, is that
9 the MDL court appoints a group of lawyers who work at your
10 discretion. They work under you. We're sort of your
11 surrogate. The bottom line is, Your Honor, we look at
12 ourselves as sort of a fiduciary for the Court and the MDL
13 process and also acting as a fiduciary for all other cases
14 whether they be federal or state, and I don't mean to get
15 on the issue of comity or to go into any state court's
16 problems or issues. But it's very important to coordinate
17 and we have had good experiences and bad.

18 I want to bring something to the Court's
19 attention, and an example of the good faith that we both
20 worked on, and I know this Court has probably had this in
21 non-MDL situations where there is a huge battle going on on
22 confidentiality order, protective order where they finally
23 fight for weeks and months over wordsmithing and the end up
24 is the plaintiffs file one version and the defendants file
25 one version and it's up to the Court. We have been able to

1 reach that issue. That's just a symbol of the fact that we
2 want to work together.

3 Something has come up, Your Honor, that's very
4 troubling to the plaintiffs. We discussed it with the
5 defendants' counsel this morning, and I want to say that in
6 my humble opinion I don't think this is an issue relative
7 to the defense counsel, relative to the defense counsel
8 having control over it. It's a client issue. I was
9 somewhat surprised that the defense counsel said they were
10 unaware of it.

11 I have this morning, Your Honor, given a copy to
12 the defendants, so I'm not walking back and forth to the
13 Court, I put a copy of two documents with your law clerk
14 this morning, and I think you have them on your desk -- do
15 you or did she give them to you, I don't know?

16 Your Honor, the first one that I wanted to
17 discuss is the shorter version. One is a letter and the
18 other is a patient consent form.

19 Your Honor, we were apprised that the Bayer
20 Company, and there are two companies, there's Bayer Company
21 and Bayer AG, and one of the reasons I hope we can work out
22 Hague is that they are both represented by the same
23 counsel.

24 Unbeknownst to us, a number of plaintiffs,
25 including those plaintiffs who are represented by counsel,

1 and the database as to who is getting them is in
2 controversy. But the problem is the defendant is sending
3 direct mail requesting a medical authorization. Now, their
4 position is that, I, the undersigned, do hereby give
5 permission for Bayer Corporation to contact my physician to
6 collect further information about the adverse events I
7 experienced during the use of Baycol.

8 Your Honor, having been at the Bar forty years, I
9 will tell you that a blanket medical authorization is a
10 Pandora's box for an unwilling, unknown plaintiff because
11 that doctor will send in all records, including the fact
12 that this person has been under psychiatric care, has had a
13 hysterectomy, has had emotional problems, has a disturbed
14 child, all the things that a defendant would like to know
15 as a defense, and there is no protection.

16 So, I stand here, Your Honor, I'm not asking for
17 an injunction. I'm not asking for a TRO. I'm not asking
18 to trade a bunch of briefing papers, and that's the
19 advantage of the MDL court. I stand here in front of Your
20 Honor saying that is a chilling effect to a group of
21 people.

22 As we sit here today, Your Honor, there is no
23 certified class, but I state to the Court that there are
24 punitive classes pending in many, many jurisdictions in the
25 United States of America, including here in Minnesota. And

1 the powers of Rule 23, under punitive class, give this
2 Court authority to have -- I asked this morning if they
3 could stop it, and then whether or not we send out a
4 corrective letter. The position of the defense counsel,
5 and I respect it is (a) they did not know anything about
6 it, and (b) they have no authority.

7 My problem, Your Honor, is that's an invasion of
8 privacy. That is an inappropriate way. They know they
9 have been in litigation for six months. They took the drug
10 off the market August 8th of 2001. They've known they've
11 been in litigation, and they are taking advantage of
12 unrepresented people to get medical records that will
13 somewhere down the line be used against them.

14 The second letter, Your Honor, is not in my
15 opinion as egregious, but I need to bring it to the Court's
16 attention.

17 There's apparently a refund policy. We do not
18 have the card. It says there is an enclosed card. I'm the
19 first to suggest that I don't believe even this company
20 would ever take the stand that they are accepting or
21 attempting to get releases for this refund policy. It's a
22 refund policy, dear sir or madam, if you don't like the
23 drug send it back, we'll send you money. That is a carrot,
24 Your Honor, that has been used by various defendants. It
25 is not appropriate, also, under Rule 23 for this to

1 continue to go out because they are attempting to put
2 together a comfort zone.

3 Also, there are pending in California 17,200
4 cases and consumer fraud cases where people have not been
5 injured, and we are interfering with those cases in which
6 they are going to claim some setoff or whatever.

7 Additionally, Your Honor, we are contemplating a
8 massive complaint which we have done in all other mass tort
9 cases so that we have all the issues in front of one
10 court.

11 My concern, Your Honor, is I don't believe that
12 as to the letter, dear sir or madam, that that needs to
13 have a corrective letter. I don't know who it went to. I
14 would ask, Your Honor, that I think the defendants'
15 position, well, it only went to people who complained. I
16 know better. We have people sitting here in this room
17 whose clients received that letter, both of these letters.

18 Your Honor, I would ask the Court to see if we
19 can work out among ourselves, and I would certainly have no
20 problem with defendants' counsel having a day or two to
21 work it out, but if not I would ask this Court, because my
22 concern about briefing it, and we can file a motion, is
23 that's a twenty to sixty-day delay by the time we file the
24 motion and they answer it and so forth. It's not an
25 injunction issue Your Honor. It's an equitable issue that

1 I think the Court can either by urging and requesting the
2 defendants, ask them to send a message to their client to
3 withdraw both of these. And, then, as to whether or not we
4 need a corrective letter we will try to work with them.

5 I did not want to in any way be derogatory
6 because I think the defense counsel I used as a symbol in
7 coming together with confidentiality.

8 The other thing we have is an ability to meet
9 Your Honor informally because if we can get the state and
10 federal coordinated like I've seen in certain cases, and we
11 have seen in certain cases, we will be really ahead and I
12 think it will inure to the benefit of the defendants rather
13 than defending thirty depositions of their present, and
14 it's the same issue with AG, we ought to be able to
15 coordinate.

16 Anyway, Your Honor, I think I've said more than
17 enough on these two issues, and I would ask that if it's
18 necessary that we have to file the injunction and the TRO,
19 that sounds like that's tough business, we will do it. I
20 would prefer if we can work it out. Maybe I'm off base.
21 Maybe the Court feels there is essentially nothing
22 inappropriate about it. If I get that direction from the
23 Court, we won't file a TRO.

24 What I'm bringing to the Court's attention as
25 soon as we heard about it, Your Honor, is the chilling

1 aspect and what they can do with it. There is no reason
2 that they need this, particularly when they know they are in
3 litigation, particularly when they know there are class
4 cases pending and the litigation has been moved.

5 While we are here new in your court, Your Honor,
6 this litigation has been pending around the country for six
7 to seven months. Thank you, Your Honor.

8 MR. HOEFLICH: Your Honor, may I approach and
9 give you a copy of the letter in which Mr. Chesley
10 referred? Do you have copies of both?

11 THE COURT: I have copies of both.

12 MR. HOEFLICH: Okay, terrific. Your Honor, we
13 believe that an exercise of the Court's equitable power
14 would be inappropriate based on the statements made by Mr.
15 Chesley. There is no evidentiary basis for any sort of
16 injunction or other equitable relief that is sought. There
17 is a clear line here between what we know and what we don't
18 know.

19 What we know is that there is an FDC-governed
20 scheme to set standards for what a company should do when
21 it hears from a patient or a doctor or a salesperson or
22 lawyers or from any other source that a person taking the
23 medicine it manufactured and distributed was temporally
24 associated with an adverse event. And what the FDA
25 regulations say is that we must submit it to the FDA and

1 that we must promptly investigate all adverse experiences.

2 Bayer's procedure, when it investigates an
3 adverse event is to request from the person whose medical
4 files that are at issue the right to speak to their
5 physician. That is the normal process and we send them a
6 letter asking that we are able to get medical information
7 regarding the adverse event. It's a narrow request.

8 Here's what we don't know. We don't know how
9 many reports there are like this. We have seen that an
10 e-mail was circulated among plaintiffs' counsel throughout
11 the country circulating this one. We don't know how many
12 there are. We're not told where they come from. In other
13 words, we don't know if Bayer was called about this event
14 from a physician, a salesperson, a patient. We don't know
15 if Bayer knew that this person had a lawyer or had filed a
16 lawsuit. We still don't know that.

17 We can't tell if this document came because the
18 plaintiffs' lawyer was reviewing files that a patient who
19 came to them already had. This letter might be six months
20 old. We just don't know. We can't tell if there was more
21 than one reporter here and that's why Bayer did the follow
22 up.

23 There is a great deal of information that we
24 asked the plaintiffs for when we first heard about this
25 last night. We take allegations that we did something

1 inappropriate seriously. We have already called our client
2 this morning to find out what happened and to find out if
3 something happened whether there is a need for us to do
4 something.

5 We believe it was premature to come to the Court
6 with this, and we will continue to work with the plaintiffs
7 and try to get answers to this immediately. There is no
8 delay on our part here, but we don't believe it would be
9 appropriate that there be an equitable order telling Bayer
10 to stop doing what it believes it is required to do by FDA
11 guidelines. That's where we stand on the first issue.

12 The second letter to which Mr. Chesley refers is
13 a letter that was sent out in August. In August when Bayer
14 withdrew Baycol from the market, it received a number of
15 requests from plaintiffs or from patients at that point who
16 said we bought Baycol, it's now been withdrawn from the
17 market, and we would like our money back. And this is the
18 letter that we sent out to people who called in telling
19 them that we would reimburse them for unused Baycol
20 tablet.

21 I'm unaware of any precedent saying that a
22 company cannot institute a refund program when it initiates
23 withdrawal. My understanding is that that's absolutely
24 appropriate and that there are plaintiffs' lawyers who ask
25 companies to do the very same thing and then ask for a fee

1 based on it. So, I'm not sure why, six months later and
2 six months after plaintiffs' lawyers have received this
3 letter we are hearing about it in court today.

4 Again, we don't believe any basis has been made
5 for an invitation of the Court's equitable powers. We will
6 find out when this went out, who it went to and whether the
7 plaintiffs had any legitimate grievances, and we are happy
8 to work with them, but we think today's hearing is
9 premature for any exercise of any equitable relief.

10 THE COURT: Brief response.

11 MR. CHESLEY: Very brief. Your Honor, there is
12 no such FDA regulations, and the proof of that is that in
13 the letter it doesn't say that we are requesting this
14 pursuant to FDA rule or regulation.

15 The FDA policy is very simple, and I've litigated
16 a lot of drug cases, and there is a thing called an adverse
17 reaction report. A drug company is required to file with
18 the FDA all copies of -- any and all the copies of any
19 reports that they receive in the way of caller adverse
20 reaction. There is no encumbrance by the FDA to suggest
21 that a manufacturer of drug will be adversary to a
22 potential plaintiff is required to have people send in a
23 blanket authorization. It doesn't say will you send us
24 your medical records. It doesn't say do you mind getting
25 your doctor to send medical records to us of your

1 complaint. It doesn't say that. This is a blanket
2 authorization which is the most chilling thing you can
3 have.

4 Your Honor, on the second letter, I don't know
5 the date of it. However, if there was a refund policy and
6 they are no longer using it, and it's six months old,
7 then the answer is they should agree that they will no
8 longer send out this letter offering a refund. I do
9 believe -- there is nobody standing here today in the mass
10 of people here that are representing people to get fees on
11 refunds. That's a perjorative statement.

12 We are here to represent our clients and to get
13 fairness and we are standing in the role as a fiduciary the
14 first day in front of Your Honor. We are not chasing money
15 for fees based on how much we get from them on a refund.
16 That is a cause of action and it also sets up a
17 relationship. If the answer is they are not doing it
18 anymore, fine. Let them say so. Let them say they have
19 stopped. Let them advise this Court tomorrow after they
20 talk to their client and advise us that they have stopped
21 and I'm satisfied.

22 On the other issue I think the least we can do,
23 Your Honor, until they get this authority or until they
24 find out the whos and whats is that there be a standstill
25 and that there be no additional letters such as this and go

1 forward from this day forward until they give a
2 satisfactory explanation to the Court. Maybe they've got
3 something satisfactory. Maybe I'm overstating it. Maybe
4 I'm over concerned. I'm reporting it to Your Honor without
5 filing papers because I think that's the appropriate thing
6 for us to do. It came to our attention. We think it's
7 wrong. We think it's the wrong thing to do. We think it
8 sets a wrong precedent at this juncture, and I can't see
9 how they are hurt or harmed by ceasing and desisting from
10 this day forward and advise their client in order to go
11 on. And then they can come back and give all the reasons
12 they want and they can bring their FDA regulation person in
13 and I can bring my FDA regulation person in. I don't think
14 you'll see anybody from the FDA, Your Honor, or FDA
15 regulation.

16 I sort of resent wrapping themselves in the
17 American flag and saying, Judge, you don't understand how
18 the FDA works. That's an administrative agency and you
19 really shouldn't be involved in that. You've got to be
20 involved in it, Your Honor, because there are an awful lot
21 of things that go on relative to what the FDA does nor does
22 not do. We may come to you in the future to review. Thank
23 you, Your Honor.

24 THE COURT: I will suggest that plaintiffs and
25 defendants meet on this issue, on these two documents and

1 report to the Court by Friday whether or not this matter is
2 resolved. The patient consent form does alert the Court.
3 It is sending signals to the Court that maybe I will -- if
4 it has not been resolved by Friday, that the plaintiffs
5 would bring a motion for a temporary restraining order on
6 this matter.

7 Dealing with the second document, the letter that
8 was sent out August 8th of last year, find out what the
9 answer is for the plaintiffs for the their questions. I
10 think that will resolve that issue quickly.

11 MR. ZIMMERMAN: We will meet and so advise the
12 Court by Friday. Could we have some understanding that if
13 it isn't resolved we have an expedited hearing on the issue
14 if we cannot resolve the matter?

15 THE COURT: I'm sorry?

16 MR. ZIMMERMAN: Mr. Chesley is saying that on a
17 TRO that is expedited.

18 THE COURT: Don't remind me, I just had one.

19 MR. HOEFLICH: Okay, terrific, thank you, Judge.

20 THE COURT: Thank you. Mr. Zimmerman.

21 MR. ZIMMERMAN: Yes. There are a couple of
22 agenda items that are -- probably most of them are resolved
23 within the four corners of the orders that we have
24 provided. We are going to discuss coordination further.

25 But there is a jurisdictional issue on the agenda

1 No. 3, the proposed agenda. We talked about earlier
2 resolution of jurisdictional issues. I believe there is a
3 jurisdictional issue that has been raised, and, perhaps, we
4 should discuss when that issue is to be resolved. Isn't
5 there a Rule 12 on the foreign and do we want to set a
6 time? It's the Glaxo PLC case, perhaps just alerting the
7 Court that it will be coming.

8 MS. FREIWALD: Hope Freiwald, F-r-e-i-w-a-l-d for
9 GlaxoSmithKline, and GlaxoSmithKline PLC. Your Honor,
10 there is an issue of personal jurisdiction over
11 GlaxoSmithKline PLC which is a U.K. holding company, the
12 ultimate parent of GSK. Our position is there is no
13 personal jurisdiction over PLC for a variety of reasons,
14 including the fact they were not a signatory, just a
15 contract that provided for marketing of Baycol. We think
16 we can probably brief this issue by the end of the month
17 and that would resolve the issue going forward.

18 MR. ZIMMERMAN: It goes to when we can get
19 discovery. If they are out of the case, they are out of
20 the case. If they are in the case, we want to get
21 discovery from them. So, the quicker we can tee that up,
22 by the end of the month would be appropriate.

23 MS. FREIWALD: Frankly, Your Honor, I raised this
24 issue with the PSC on several occasions, and I was hoping
25 we can deal with this informally if there were certain

1 pieces of information they wanted. Perhaps we can have an
2 agreement that would give them the comfort they need. I
3 think PLC is in a very different position than Bayer AG,
4 and it may be that the waters got muddy because you have
5 two European companies. If they can tell me they will get
6 back to me on a certain date, that might save everybody a
7 lot of time and money and briefing something we don't
8 really need to brief. If they tell me they don't want to
9 do it, then we will file our brief by the end of the month.

10 THE COURT: A week, two weeks to deal with this
11 issue. It would seem like you would be able to deal with it.
12 Mr. Zimmerman.

13 MR. ZIMMERMAN: We may need some discovery on the
14 issue. That's the problem I think what Hope is telling us
15 is that they are willing to give us an affidavit or some
16 verified information, and if we can get the discovery and
17 the information, we can help make the call. We can't make
18 it in a vacuum.

19 THE COURT: April 11th will be your date for your
20 hearing if it's not disposed of before then, April 11th.

21 MS. FREIWALD: For hearing or for briefing
22 submission, I'm sorry, Your Honor?

23 THE COURT: For hearing, expedited briefing on
24 this issue. Let's get it taken care of.

25 MS. FREIWALD: Okay, thank you, Your Honor.

1 THE COURT: April 11th at one o'clock.

2 MR. ZIMMERMAN: Your Honor, the fifth item on the
3 agenda is report of co-lead counsel regarding committee
4 appointments, time records, and the like. I believe I've
5 done what I should to the Court on the reporting of
6 committees. Unless the Court wants more information on
7 exactly our structure, I can submit the structure in
8 writing to the Court --

9 THE COURT: Please.

10 MR. ZIMMERMAN: And the court will see it at that
11 point.

12 THE COURT: Would you submit that?

13 MR. ZIMMERMAN: Yes, and I'll also submit to the
14 Court the protocol we're going to use for time billing and
15 reporting. But very briefly we are using the Manual for
16 Complex Litigation and the ABA guidelines and we're having
17 monthly reporting internally to a clearing person who will
18 make monthly reports to co-lead counsel as to who's billing
19 the time and what the billing time is. We do not plan on
20 submitting that to the Court on a regular basis. We think
21 that that would not be necessary and it burdens the Court,
22 but we are doing it internally, and we'll provide the Court
23 with ABA guidelines and the record keeping system, and if
24 the Court has any comment it wants to see anything, we will
25 be happy to provide it to you.

1 THE COURT: That would be appropriate.

2 MR. ZIMMERMAN: Next, is exemption from or
3 modification of local rules and standing orders. I believe
4 our CMO does speak to that topic. This is right out of the
5 manual as part of the agenda items, but one of the things
6 that is of concern -- not of concern, but what happens in
7 the MDL's is the Court waives the requirement of pro hac
8 vice admissions and the people who file the cases are
9 admitted pro hac without the necessity for the formal pro
10 hac and all of that. So, I believe that would be the only
11 local rule waiver other than the disclosure rules and
12 things like that which we are doing slightly different as
13 provided in the CMO. But the pro hac vice thing is
14 important. There are many counsel in this room who don't
15 normally practice, obviously, in our district.

16 THE COURT: Correct.

17 MR. ZIMMERMAN: A prompt plan for determination
18 of class action questions including schedule for discovery
19 and briefing on class issues. I don't believe we need to
20 go there yet, other than the date we have in the CMO which
21 is May 15th for the hearing or the filing -- for the filing
22 of the class certification. With that, of course, is the
23 schedule of discovery that we will work out between now and
24 then. If we have any problems with that we will certainly
25 be before the Court on a regular basis and resolve that.

1 But just so the Court and the community of lawyers know,
2 May 15th is our date for the plaintiffs filing of class
3 certification and definition of the class.

4 The next item on the agenda is 8, management of
5 disclosure and discovery, including such matters as
6 preservation of evidence. We have that resolved.

7 Use of document depositories and computerized
8 storage, we have been working very hard on that, and we
9 have that resolved for the most part. We have a document
10 depository. We have a computerized system. We have
11 documents coming in on CD rom. I think we are in really,
12 really good shape and we're going to have a very high
13 efficiency, high-tech document depository that takes into
14 due consideration the ease and expense considerations, and
15 I think we have really come a long way. I really want to
16 commend our committee which has been the Technology
17 Committee and defense counsel and their committee on
18 technology for working hard to resolve it. We've really
19 done a good job.

20 THE COURT: While we are on technology, I've got
21 my guru here, Andy Seldon. Any issues that we should deal
22 with technology -- court's technology.

23 MR. ZIMMERMAN: Ron Goldser of my office and
24 Peter Sipkins of Dorsey perhaps will know more about this.

25 THE COURT: Andy stand up so the lawyers can see

1 who you are.

2 MR. SIPKINS: Your Honor, this can be a very
3 brief issue. Mr. Goldser and I have been working hard on
4 this issue for the last two or three weeks. We did send
5 out RFP's to six or eight potential vendors last week. We
6 expect to hear back from those vendors by Friday of this
7 week which is the deadline we have created. I have copies
8 for Andy which I will give him at the conclusion of today's
9 hearing. And as soon as we narrow the list down to a
10 workable number, we have in mind the Court's admonition
11 during the conference call that you would like to have the
12 court's personnel involved in final selection or approve
13 the final selection. What we will do is we will get Andy
14 involved in that and the other individual that you named.
15 We should have this done within the next two or three
16 weeks.

17 MR. GOLDSER: Good morning, Your Honor. On a
18 particular note, we did get the Court's particularized
19 instructions and parameters that you wanted us to include
20 in the RFP tech and they are specific parts of the RFP's.
21 The vendors will be aware.

22 THE COURT: Thank you.

23 MR. ZIMMERMAN: Procedures for management of
24 expert testimony. I believe that the CMO's are silent on
25 that. I think that's down the road apiece, frankly, Your

1 Honor. I don't think we have to deal with that today.
2 Schedule and deadlines for completion of various
3 pretrial phases of the case, other than the things we have
4 discussed regarding the trial dates and deadline for
5 document production, I think those are -- we are working
6 towards those in class certification dates. We will
7 continue to bring forward deadline dates as we see them
8 relevant, but the first one, obviously, is the completion
9 of document discovery and class certification, and then
10 next will be the completion of deposition discovery and
11 then expert discovery.

12 I don't think we are at a position now where we
13 need to make dates for those other things at this point.
14 That would be the recommendation of the plaintiffs.

15 I believe that completes the agenda as we planned
16 it and agreed to it ahead of time.

17 I would like to, again, publicly thank defense
18 counsel for working very hard to get where we are, and all
19 of the lawyers in this room have contributed mightily to
20 that. This is not any kind of easy effort or singular
21 effort, but there has been a very high sense of cooperation
22 and a spirited dialogue that has occurred to get us where
23 we are. As Stan Chesley said, sometimes we spend months on
24 confidentiality or months on some of the things that we
25 have come together on. So, it's with great optimism that

1 we see this case moving in -- at a rapid speed. And we
2 will commit to our colleagues that we will move rapidly
3 because we want justice to be a rapid -- as rapid as we can
4 possibly achieve it.

5 I again commend defense counsel for being very
6 cooperative thus far in this effort, and we've had an
7 excellent and respected relationship.

8 I would like then to see if we could make some
9 time today, perhaps even this morning, to discuss some
10 things with the Court in chambers. The only reason I'm
11 asking for it now is a lot of lawyers are going back to our
12 office for some meetings in the afternoon, so, if we can
13 have a chat with --

14 THE COURT: Let me hear from the defense if they
15 have any issues you wish to raise?

16 MR. HOEFLICH: Your Honor, we are appreciative of
17 the Court's hearing us this morning and looking forward to
18 our meeting in chambers.

19 MR. ZIMMERMAN: Daniel Becnel reminds me that if
20 we would like to discuss, and we do have it in the pretrial
21 order, regularly scheduled status conferences, and if we
22 can regularly schedule them it helps everybody for their
23 scheduling and for getting flight accommodations and hotel
24 accommodations and for us setting meetings and the like.

25 THE COURT: As you can tell, the next one is

1 April 11th at one o'clock, and I will adjust my calendar
2 for the May meeting. The May 9th date is questionable
3 right now because I have a Judge's conference. June 13th
4 at one o'clock; July 11th at one o'clock; the August date
5 is going to be negotiable. I have to check with my
6 calendar further on that. September 12th at one o'clock.
7 That's six months out.

8 MR. ZIMMERMAN: So, May, you will advise us if
9 the 9th -- if the 9th will not hold, but you will advise us
10 on a May date?

11 THE COURT: I will let you know by the end of
12 today's date. I just have to find out what the -- we are
13 having Judge's conference for the district and I have to
14 see what's on the agenda at that time. I may miss that.
15 Why don't we go ahead and put it down.

16 MR. ZIMMERMAN: The 9th?

17 THE COURT: May 9th at one o'clock.

18 MR. ZIMMERMAN: Just so I understand, April 11th
19 at one, May 9th at one, which is slightly tentative.

20 THE COURT: These are set dates, April 11th at
21 one o'clock; May 9th at one o'clock, June 13th at one
22 o'clock, July 11th at one o'clock. The August date is open
23 yet, and September 12th.

24 MR. ZIMMERMAN: Very good. Thank you very much
25 Your Honor. If we can then adjourn, I believe that

1 concludes our business in open court. I will ask a small
2 group to join us in chambers, and the defense will do the
3 same, and I expect we will just have a few minutes with the
4 Court.

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REPORTER'S CERTIFICATE

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

CERTIFIED: _____

Brenda E. Anderson, RPR