

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

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4 In Re: St. Jude Medical, Inc. 01-MD-1396 JRT/FLN
5 Silzone Heart Valves Products
6 Liability Litigation.

7 Minneapolis, Minnesota
8 June 25, 2002
9 12:38 p.m.
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12 PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S
13 OBJECTIONS TO PLAINTIFFS' EXPERTS AND
14 THE DECLARATION OF DR. JUDITH K.JONES

15
16 BEFORE THE HONORABLE JOHN R. TUNHEIM,
17 UNITED STATES DISTRICT COURT JUDGE.
18

19 APPEARANCES:

20 On behalf of plaintiffs: James T. Capretz
21 Steven E. Angstreich
22 J. Gordon Rudd, Jr.
23 Patrick J. Murphy
24 On behalf of defendants: David E. Stanley
25 Susan R. Zwaschka
Liz Porter

On behalf of Spire: Susan Fieber

Court Reporter: Karen J. Grufman
U.S. Courthouse, Suite 1005
Minneapolis, MN 55415
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1 THE COURT: Good afternoon. This is civil case
2 number 01-1396, In Re: St. Jude Medical Silzone Heart Valves
3 Products Liability Litigation.

4 Would counsel note their appearances, please?

5 MR. CAPRETZ: James Capretz for the class.

6 MR. ANGSTREICH: Steven Angstreich for the class.

7 MR. RUDD: Gordon Rudd for the class.

8 MR. MURPHY: Pat Murphy, state liaison counsel.

9 THE COURT: Good afternoon to all of you.

10 MR. STANLEY: Good afternoon, Your Honor. David
11 Stanley for St. Jude Medical.

12 MS. ZWASCHKA: Susan Zwaschka for St. Jude Medical.

13 MS. PORTER: Liz Porter, in-house counsel for St.
14 Jude Medical.

15 MS. FIEBER: Susan Fieber for Spire.

16 THE COURT: Good afternoon to all of you.

17 We have, let's see, a number of matters on our agenda
18 today.

19 Mr. Capretz, is that correct?

20 MR. CAPRETZ: Yes, Your Honor, we do.

21 We were hopeful that this would be an early summer
22 telephonic meeting, but as it turned out, we have a
23 substantive matter which we're very concerned about, the class
24 is very concerned about.

25 Mr. Angstreich will address the motions before the Court.

1 And we'll do this in the preference of whatever the Court's
2 pleasure may be.

3 We want to discuss coordination with the state court. We
4 know that you have spoken with the local state court judge.
5 Update on case filings. Update on the PTO's. Web site
6 status. Discovery report. And setting future conferences.

7 Would you prefer that we get into the fire fight to
8 start?

9 THE COURT: We can start with the fire fight, if you
10 wish.

11 MR. ANGSTREICH: Throw me into the fire.

12 THE COURT: Mr. Angstreich, are you the firefighter
13 here?

14 MR. ANGSTREICH: I am the firefighter.

15 Your Honor, when we began the process for discovery and
16 consented to bifurcate discovery between class and merits,
17 there was a plan. The plan was to try to get as early a class
18 certification hearing as we could.

19 It was first set for June. Then we put it off until July
20 25. When we were last here on May 14, we set today to be a
21 telephone conference, and July 10 to be a protocol conference
22 for the July 25th hearing.

23 Unbeknownst to us, we now face two new issues.

24 One issue is what purports to be an objection to our
25 experts, which was a method or an approach that was never

1 addressed to the Court or to us, where somehow, Your Honor is
2 being asked to review our experts' analyses.

3 I don't know, there was never any timing provided for us
4 to respond to this. We do have a response time for our reply
5 brief. But certainly it was never contemplated or directed
6 that we would now be facing some issue with respect to the
7 qualifications of our experts.

8 More importantly, no time frame has ever been set to have
9 a Daubert hearing on whether or not these experts should be
10 permitted to have their affidavits considered by Your Honor.

11 Equally, simply because St. Jude's experts say our
12 experts are wrong doesn't make it so. And quite frankly, our
13 experts believe that their methodology is appropriate for this
14 case.

15 And whether you dispute the ultimate conclusions of them,
16 that goes to the merits, and not to class certification
17 issues.

18 But clearly what's going to have to happen now is that
19 anybody who objects or challenges our experts' methodology has
20 to come before this Court to be cross-examined. And
21 certainly, we would have the right to take depositions before
22 such a Daubert hearing would be presented.

23 So from our perspective, Your Honor, the process
24 shouldn't be allowed in the first place. We didn't discuss
25 it. We didn't establish it. And now we're faced with --

1 today is the 25th -- we have 30 days, approximately, for our
2 class certification hearing. And we're now faced with issues
3 of whether or not we're going to have a Daubert hearing.

4 So the first aspect of this is this is not a procedure
5 that was permitted, discussed, or addressed.

6 And equally important, Your Honor, from a substantive
7 standpoint. This all goes to merits. And we go back to
8 Eisen versus Carlisle & Jacquelin, for the premise that you
9 don't get into merits. That's 40-year-old class action law.

10 And while Mr. Stanley acknowledges in his brief that you
11 don't get into merits, you don't get into merits, their
12 opposition to our motion says we lose. Doctor Jones says
13 there's no need for anything. You lose, we win. I think
14 that's a merits argument.

15 So we have a two-prong attack with respect to the
16 objection. One is procedural, and the other is substantive.
17 That there is no right to deal with Daubert on the basis of a
18 merits inquiry on a class certification issue.

19 Turning to the attack on Doctor Jones.

20 I have to give Mr. Stanley incredible credit. He knew,
21 on March 8, 2002, that he was going to rely on data that
22 nobody had analyzed, nobody had reviewed, and nobody
23 considered in opposition to class certification. That's what
24 the March 8 response, supplemental response to answers to
25 interrogatories say. They're going to rely on the AVERT data.

1 But miraculously, they don't identify an expert who is
2 going to talk about it. They identified two experts in their
3 supplemental answers to interrogatories, Doctor Frater, who's
4 been withdrawn, who is not an epidemiologist; and Doctor
5 Cheitlin, who's a cardiologist. I think I pronounced his name
6 correctly. Neither of those two are the people dealing with
7 the AVERT data.

8 So how, I would ask Mr. Stanley, how do you know you're
9 going to use data that an epidemiologist must review if you
10 don't call an epidemiologist to ask them: How do you use this
11 document, or these documents, or this data? We don't buy it.
12 It's just not possible.

13 What's also not possible, when we asked them: Are there
14 any studies that you commissioned? Their answer was there
15 were no studies.

16 We said, no, not completed studies, any studies? Have
17 you asked anybody to do anything? No.

18 Now, it's miraculous that on May 28, they first
19 identified Doctor Jones. So from March 8 to May 28, they have
20 not a clue they're going to use an epidemiologist, and not a
21 clue that the epidemiologist is Doctor Jones.

22 Two days later, they tell us that the epidemiologist is
23 going to do a review of the data. And miraculously, 17 days
24 later, she's reviewed the morass of information, done all of
25 these magnificent charts that are part of her declaration,

1 reviewed all of the literature that she's attached to her
2 declaration, and come to these conclusions in 17 days.

3 We don't buy it. The certification that she provided in
4 support of their opposition to our motion here, there's no
5 mention of the date she was first retained. There's no
6 mention of the date she first got the materials.

7 Conspicuously absent from Mr. Stanley's certification is
8 when St. Jude first retained or spoke to any epidemiologist.
9 Not there. That's a sandbag of major proportions.

10 Now, we said, what about discovery depositions? St. Jude
11 said we want to depose your, the experts. We said we don't
12 think there should be any depositions.

13 This is early May. The only two experts that St. Jude
14 has identified are Frater and Cheitlin. There's no need to
15 depose any experts, when those are the only two people that
16 you're going to deal with.

17 Now, interestingly, we identified Doctor Tyers, Doctor
18 Abramson, and Doctor Sackett before May 3. They knew who our
19 experts were.

20 Not only did they know who our experts were on April 18,
21 they knew what Tyers and Sackett were going to say. How did
22 they know that? Because they submitted declarations in the
23 Canadian action long before they submitted declarations in
24 this action.

25 So they knew, well before May 3, well before this

1 analysis was required of all of our documentation, where Tyers
2 and Sackett were coming from. They didn't know Doctor
3 Abramson's conclusions about Medical Monitoring. But Doctor
4 Jones really addresses and attacks Sackett's conclusions about
5 the Schaff study, the AVERT report. And it's this attempt to
6 undo what Schaff in his report says the study shows.

7 In the context of all of that, it is clear discovery
8 abuse. This did not, the light bulb didn't go on on May 28,
9 when they said we now need an epidemiologist. Let's call
10 Doctor Jones, and we'll give her all the materials.

11 So the first aspect of this is that there was discovery
12 abuse. There was an attempt at sandbag. Twenty-five days
13 after our brief is filed, we get four additional experts.
14 Another day later, we get another additional expert
15 identified. That's gamesmanship of the highest order.

16 And then they say, well, you know, you didn't ask, when
17 we were talking about depositions. Why would we ask? If we
18 said to them: Who else are you going to use so we could
19 discuss depositions, we would have gotten the same answer. We
20 don't know, allegedly, based on what's been submitted here.

21 So what good would depositions have done us?

22 We would then have faced the same issues on June 17, when
23 their submissions are received, and we actually see what all
24 these new experts say, now suddenly we should say now we want
25 depositions. It just doesn't play. It doesn't play well at

1 all.

2 Let's get the Jones and this dispute between what is and
3 isn't raw data.

4 If I give a paralegal materials for my clients, and say
5 to that paralegal: Go through the material and make a
6 listing, every client that has had a paravalvular leak, put a
7 stroke in the column, paravalvular leak, and every client that
8 doesn't have one in the materials, put it in column B.

9 The paralegal finishes the assignment. Gives me the
10 report. I now say here is the raw data. That's not raw data.

11 The minute a human being reviews the actual documents
12 themselves, and uses the brain to conclude what that raw data
13 says or doesn't say, and puts it on a spreadsheet, it becomes
14 a summary.

15 Now, you could argue until you're blue in the face and
16 tell me that's not a summary, that's raw data. Under 1006,
17 anytime you make a spreadsheet based on some other pieces of
18 paper, you have created a summary. And those other pieces of
19 paper have to be presented in order for the summary to be
20 accepted.

21 Now, what's interestingly missing from this entire
22 submission from St. Jude:

23 1. Doctor Jones never states that she did anything to
24 validate the data that's been given to her.

25 2. There's no certification from anybody that the data

1 is in fact data from AVERT. Now, we know that Mr. Stanley
2 says this is what I believe is the fact. Well, with all due
3 respect to Mr. Stanley, that declaration is of no moment.

4 Where is the AVERT certification? Where's Doctor
5 Schaff's certification? Where's anybody's certification from
6 the independent group that was doing this analysis at the
7 request of St. Jude to say, yes, this data from November 30,
8 2000, through December 5, 2001, was in fact entered in
9 accordance with the protocol? We don't know that. Doctor
10 Jones doesn't know that. Mr. Stanley doesn't know that.

11 When they keep saying to us, this is the identical data
12 that Schaff used in his published report, it's not. Chaff's
13 published report closed November 30, 2000.

14 There's a throw-away addendum which is very interesting.
15 Schaff's report, the published piece of paper, says, according
16 to our experts, as the AVERT initial report sounded the
17 warning, there is a statistically significant increased risk
18 of paravalvular leakage. In fact, Sackett says that the
19 Schaff study shows, I think it's an eleven-fold risk. There's
20 an addendum in that report that says as of December 5, 2001,
21 we haven't seen any additional paravalvular leaks.

22 But they didn't analyze it. In other words, nobody
23 followed the same methodology and protocol to analyze the data
24 from November 30, 2000, to December 5, 2001, as they did with
25 respect to that which they submitted in their study.

1 There's no peer review of Doctor Jones' conclusions. Or
2 the methodology that she used. Or the fact that the summary,
3 or the review is in fact the actual data.

4 We asked for the data in live form. Native form. We got
5 an e-mail that we submitted to Your Honor, we got an e-mail
6 from their, from Crosby Heafey's attorney who is most
7 knowledgeable about dealing with this. She didn't understand
8 what my partner, Michael Coren, was asking for. Never got the
9 live data. Although Mr. Stanley says that if Doctor Sackett
10 had asked for the live data, they would have given it to him.
11 Well, we asked for it, and never got it.

12 So we have here again a two-prong attack on Doctor Jones.

13 The first is the discovery abuse, which is highlighted by
14 the fact that from March 8 to May 28, we are never provided
15 with the identification of an epidemiologist.

16 Two: We're never given the raw data. We subpoenaed
17 AVERT, and got objections from their counsel to producing
18 documents. We've asked for the live data, and didn't get it
19 from St. Jude.

20 We were given two names of experts, neither of whom was
21 an epidemiologist, clearly leading us to conclude, as we say
22 in the papers, that the only AVERT data that they're going to
23 be using is the published study of Schaff. Because nobody
24 else has been identified as being a person who's going to
25 interpret that data.

1 And then followed by the fact that the Jones affidavit,
2 despite everything that she would like us to believe, and Mr.
3 Stanley would like us to believe, we have no certification to
4 substantiate the fact that the protocol, the AVERT protocol
5 was followed with respect to these documents. That she did
6 any statistical checking to determine the accuracy of the
7 nonpeer reviewed information that was sent to her.

8 We don't have any of that information to deal with it.
9 We don't have the date she was first retained. We don't have
10 the date she was first commissioned to do her analysis.

11 Especially since we asked for incomplete studies, as well
12 as complete studies. Anything you commission. That was
13 request number eight, I believe, Your Honor. And those have
14 been provided to the Court.

15 Under all of that, we submit that even if there weren't
16 discovery abuse, Jones can't be considered. Because we have
17 never been given the underlying raw data, as any other summary
18 review or chart requires.

19 And I think that any analogy to a financial statement, or
20 a damage chart that an expert provides, for somebody to sit up
21 there and say, well, I don't have to tell you, I don't have to
22 give you what I used to create the chart, the actual raw data,
23 the actual books and records of the client's business, you
24 have to accept my interpretation of those books and records,
25 that makes the chart inadmissible.

1 Thank you, Your Honor.

2 THE COURT: Thank you, Mr. Angstreich.

3 Mr. Stanley.

4 MR. STANLEY: The strong and forceful argument on
5 the motion to strike the Jones affidavit I think proves the
6 point on the first motion, which is he's sitting here
7 attacking what our expert relied upon. He says, you know, on
8 the one hand, you can't do that for his experts, yet we want
9 to do it for our experts.

10 I think anytime, with respect to the first motion, that
11 you submit an expert declaration to the Court, and ask the
12 Court to consider expert opinions, it's the Court's duty and
13 responsibility to look and see the foundation for that
14 testimony. And see whether the expert is qualified to give
15 that testimony. Because if not, you could pull any Joe Schmo
16 off the street and have him sign a declaration. And under Mr.
17 Angstreich's analysis, you never get to attack it.

18 So I think -- I just don't understand the first argument.

19 Now, the second motion --

20 THE COURT: Well, with respect to the first one, for
21 a moment, Mr. Stanley. There's quite a bit of case law out
22 there, including from this district, which suggests at least
23 the formality of a Daubert examination is not appropriate at
24 class certification stage, isn't there?

25 MR. STANLEY: Sir, I think the two cases considered

1 objections to the experts, the two cases that are referred to
2 in the motion, did consider the defendant's objections to
3 plaintiff's expert testimony. And those objections were
4 overruled. But they were certainly considered.

5 I think in one case, the court said, well, we're not in a
6 position to examine the expert's methodology, because you
7 didn't have your experts go and attack them.

8 And I think from a foundational aspect, I think the Court
9 is required to look at the foundation, and to see if it's so
10 fundamentally flawed that it can't be accepted. I think the
11 Court has to look at that. And there are cases we cite in our
12 papers that do say that, Your Honor.

13 THE COURT: I might agree it's appropriate to
14 consider that. But isn't it appropriate to consider that as
15 part of the class certification motion itself?

16 MR. STANLEY: Absolutely, Your Honor.

17 THE COURT: And not part of any separate earlier
18 proceeding?

19 MR. STANLEY: Like a separate Daubert proceeding?
20 Probably not.

21 But I think the Court does need to look at our
22 objections, and look at the foundation for their expert's
23 testimony. I think the Court is required to do that. And
24 that's what we're asking for. And Daubert provides a good
25 guideline for it.

1 As far as the second motion, the second motion has been
2 somewhat of a moving target since we were notified of the
3 issue last week.

4 Mr. Angstreich sent me an e-mail that said they never had
5 received the data from November 30 to December 5, 2001. They
6 never received that data. He asked me, you know: Mr.
7 Stanley, we haven't received this data. Why has it been
8 withheld from us? And I sent an e-mail back and said: Well,
9 we gave that to you on CD-ROM 14 on February 28, 2001.

10 And then I didn't hear anything. And then we got this
11 motion.

12 So now, I think we can acknowledge now that they did
13 receive the information. They said, well, we didn't know you
14 were going to be relying on it.

15 Well, okay, on March 8, we sent a supplemental response
16 to interrogatories --

17 THE COURT: Can you describe probably more precisely
18 for me exactly what information was on the CD-ROM number 14?
19 There seems to be a dispute as to whether it was sent over in
20 some kind of summary form, or if it was truly raw, or, as Mr.
21 Angstreich describes it, native data.

22 MR. STANLEY: Well, basically, we sent them what we
23 were provided by the University of Pittsburgh.

24 What he's saying is that the spreadsheet of raw data was
25 prepared by someone's review of individual patient forms,

1 which St. Jude Medical doesn't have. The University of
2 Pittsburgh has those.

3 We were provided by the University of Pittsburgh with a
4 spreadsheet of that data in the form that I think is attached
5 in the motion, Your Honor. (Indicates). This is what we were
6 provided by the University of Pittsburgh. This is what we
7 provided to the plaintiffs. This is what we provided to our
8 expert. This is what Doctor Schaff reviewed.

9 I understand that there's a subpoena that the plaintiffs,
10 you know, have sent to the University of Pittsburgh.
11 Presumably, we'll get that information. But that's what we
12 provided to them. That's what we had. We gave them
13 everything that we had.

14 THE COURT: So what was on CD-ROM number 14 was all
15 of the information, at least for purposes of this inquiry,
16 that your expert used?

17 MR. STANLEY: That's correct.

18 And on March 8, Your Honor, we told them that it was
19 among the information that we intended to rely upon to oppose
20 the class brief.

21 Now, in terms of all this sandbagging, we told -- they
22 had the information for a long time. We told them we were
23 going to use it.

24 Your Honor, when we had this battle about, you know, this
25 discovery motion they brought earlier, you know, our position

1 all along is, you know, we really are not in a position to
2 make final decisions about what evidence we're going to use,
3 what experts we're going to use, until we have an opportunity
4 to read their brief.

5 And on March 8, pursuant to this Court's order, we made a
6 good-faith disclosure of what we were going to use, which
7 included that data. And then after we read their brief and
8 digested it, and figured out who we were going to use, we
9 disclosed the experts. They already had the evidence. We
10 already told them we were going to rely upon it. Okay.

11 So for them to say that they had no idea we're going to
12 rely upon evidence that we told them on March 8 we're going to
13 rely upon, I don't understand that argument.

14 THE COURT: Now, the expert -- is it Ms. Jones;
15 correct?

16 MR. STANLEY: Yes.

17 THE COURT: Is it Judith Jones?

18 MR. STANLEY: Yes.

19 THE COURT: So she was first disclosed on May 28?
20 Is that correct?

21 MR. STANLEY: That is correct.

22 THE COURT: And your position is that you hired her
23 at an earlier time, but you were not certain whether you would
24 use her at all to do any analysis for purposes of responding
25 to the class certification motion until you saw the position

1 that the plaintiffs were taking on class certification?

2 MR. STANLEY: That is correct. And that's a
3 position that we've maintained in the discovery motion, in our
4 supplemental responses. We said that, you know, there could
5 be additional experts that we might identify. And we would
6 disclose them on a rolling basis. And that's what pretrial
7 order ten obligates us to do. And we did that.

8 You know, we did it at the time that we felt was
9 appropriate, when we made the final decision we were going to
10 use her, to review this data and give us a declaration.

11 Now, to say that somehow, even if we had asked her to do
12 a declaration months and months ago, that somehow was
13 encompassed in their discovery request for all commissioned
14 studies, I mean, it's ridiculous, Your Honor. That doesn't
15 encompass work product by an expert for purposes of opposing a
16 motion in a proceeding.

17 And as far as, you know, in terms of the depositions that
18 they wanted to take, you know, as soon as we got their motion,
19 I sent an e-mail saying we want to take the depositions.

20 Okay. You know, we want to take your depositions.

21 And Mr. Capretz wrote me an e-mail back and said that
22 class discovery is closed. It's improper to take depositions.
23 There's no reason to take any depositions.

24 And those e-mails are in our brief.

25 And I said: Just so I'm clear on this, does that mean

1 that you don't intend to take any of our depositions? Yes.

2 And that was it.

3 So the decision was made, based upon their opinion and
4 their position that class discovery was closed and it was
5 improper to take these depositions, we decided not to take
6 depositions.

7 THE COURT: So whose expert depositions were taken
8 as part of the class certification discovery process?

9 MR. STANLEY: None.

10 THE COURT: On either side?

11 MR. STANLEY: None on either side. It was agreed by
12 both sides that that wasn't going to happen.

13 So I think that covers most of the points, Your Honor.

14 I mean our position, boiled down to it, is we gave them
15 the information, and we told them we were going to use it. So
16 how can they claim surprise now?

17 THE COURT: Have you asked the University of
18 Pittsburgh for this raw data yourself or not?

19 MR. STANLEY: No, Your Honor.

20 THE COURT: That's not something that you intend to
21 do at this point in time?

22 MR. STANLEY: I believe probably with a subpoena.

23 The University of Pittsburgh is represented by counsel for
24 purposes of that subpoena, Your Honor.

25 And again, one more thing I want to make clear is they

1 claim they requested the native data. But that's not really
2 true, Your Honor. We don't have any. There's no e-mail or
3 correspondence that says, you know, Mr. Stanley, on CD-ROM 14,
4 we want the native data for CD-ROM 14 and the AVERT data.

5 The e-mails that he's referring to is a generalized
6 request to produce native data. And we are in the process of
7 negotiating a protocol for the production of that data in
8 conjunction with merits discovery.

9 But there isn't an e-mail that says this data that you
10 have provided to us is not in the format that we can use, and
11 go get us some sort of different data, or present it to us in
12 some different form. That was never done.

13 THE COURT: Thank you, Mr. Stanley.

14 MR. ANGSTREICH: Your Honor, if I could briefly
15 respond?

16 THE COURT: You may, Mr. Angstreich.

17 MR. ANGSTREICH: I don't think that Mr. Stanley's
18 gone out and gotten any Joe Schmo, and we certainly have not
19 gone out and gotten any Joe Schmo to be an expert here.

20 We have not attacked the methodology. What we have said
21 is that the information being presented is inadmissible in the
22 context of this proceeding because it's a summary, and the
23 backup information has not been made available to us.

24 What I'm troubled by, Your Honor, is that Doctor Tyers
25 and Doctor Sackett both submitted not only original

1 certification declarations in Canada, but they submitted
2 supplemental declarations, and were both deposed in Canada.

3 The fact is that St. Jude full well knew the positions of
4 Sackett and Tyers as of the date that they were identified,
5 which was three weeks before our brief was submitted.
6 Certainly more than a month before Doctor Jones is identified.

7 I still haven't heard when Doctor Jones was retained, or
8 when she was given this morass of materials from which she was
9 able to write her dissertation, her conclusions. But it's
10 still a 17-day window between it.

11 Also on this issue of taking depositions, as of May 3,
12 when the e-mails were exchanged, they knew all of our experts.
13 We knew what we thought were two of their experts. Nobody
14 else was identified.

15 For us to be chastised for not having agreed to take
16 depositions of people who were never identified to us until
17 the end of May, in the beginning of May, would be for us to be
18 clairvoyant. While I think that Mr. Stanley knew on March 8,
19 when he identified the AVERT data, that they intended to use
20 an epidemiologist, because that data was not usable or
21 presentable to this Court without the use of an
22 epidemiologist, not identifying the fact that an
23 epidemiologist was going to be retained, and certainly not
24 having the work done early on, it does not redound to our
25 detriment, or should not redound to our detriment.

1 The final point, Your Honor, is that AVERT is a study
2 that was commissioned by St. Jude as part of the attempt to
3 establish the efficacy of Silzone to fight endocarditis.

4 It is inconceivable that St. Jude could not obtain the
5 raw data at any time they wanted by simply asking for it.

6 And it is disingenuous to say that when we asked for all
7 native information, all raw data, that that wasn't sufficient
8 enough, we should have said we mean including CD-ROM 14.

9 THE COURT: What is the status of the subpoena?

10 MR. ANGSTREICH: We've gotten a litany of
11 objections. And we're trying to meet and confer to resolve
12 it.

13 But everybody that we have subpoenaed -- with the
14 exception of Spire right now, although I have not gotten
15 objections to the documents, but I probably will at some
16 point -- has opposed the subpoena. Even, we subpoenaed Doctor
17 Schoen, one of the expert's files that was identified. And
18 when Mr. Stanley was handling it, Mr. Stanley had no problem
19 in producing all of the documents we asked for, wanted
20 clarification with respect to one, and then Doctor Schoen
21 found counsel, who objected to everything and has produced
22 nothing.

23 So the status of all of this is that we don't have the
24 background information. We don't have the data.

25 And it is not sufficient to say that Doctor Jones has all

1 that St. Jude has. That doesn't make it right. That doesn't
2 make it appropriate. Especially when we are missing the
3 certifications of the very people who could authenticate the
4 documents that were provided to St. Jude, and to say that they
5 were compiled in accordance with the protocol. Doctor Jones
6 can't say that. She just simply can't. She doesn't know.

7 So we have, we have a major gap in the underlying support
8 for her conclusions.

9 I'm not saying that it's wrong for an expert to rely upon
10 peer reviewed, other materials presented by other experts. It
11 happens all the time; 703 allows it. But when you personally
12 don't know, and there's no proof that it comes within that
13 grouping that is regularly relied upon, then it meets the
14 test.

15 THE COURT: Would receipt of the raw data solve all
16 these questions for you, Mr. Angstreich?

17 MR. ANGSTREICH: Well, Your Honor, it might. The
18 question becomes one of, as it relates to Jones, what do I do
19 with her conclusions at the time of the hearing?

20 In other words, if we were dealing with merits at the
21 time of trial, clearly, we would be asking either for the raw
22 data, an opportunity to depose Doctor Jones, something to
23 address how you challenge it.

24 But in the context of a class certification motion, where
25 merits is not supposed to be at the underlying basis for Your

1 Honor's ruling, if we get the raw data, as an example, and
2 give it to our expert, we're going to fall into the trap that
3 St. Jude would love us to. And that's to give you two
4 conflicting experts, and ask Your Honor to decide whether or
5 not that conflict gets resolved on a merits basis.

6 And from the standpoint of what has to be decided on July
7 25, the answer is, did we present a sufficient basis for Your
8 Honor to allow a jury to decide which expert is correct.

9 So, yes, it would help, obviously, when I want to cross
10 examine Doctor Jones, if she were still in the case, it would
11 clearly help. Because I could then establish that if in fact
12 the summary, the review document is incorrect, the wrong
13 strike marks were placed in the wrong columns, she would have
14 to recant her conclusions.

15 That really goes to the time at the trial of this case,
16 unless Your Honor believes that we should present some
17 conflicting response to that at the class certification. And
18 then the answer is, absolutely we would need that, so that our
19 experts can review it, and then review what Doctor Jones
20 concluded.

21 THE COURT: Let me ask right now, given where we are
22 at, and you received the notification concerning Doctor Jones
23 less than a month ago, is it your position that in order to
24 adequately respond to the report of Doctor Jones, that you
25 need additional time for your experts to review her report, or

1 not?

2 MR. ANGSTREICH: Your Honor, reviewing her report
3 without the data will not achieve anything.

4 THE COURT: Okay. And how about with the data?

5 MR. ANGSTREICH: We would be in a position then to
6 comment on whether or not her conclusions are accurate, or
7 inaccurate, or skewed. But clearly, we would have, we would
8 be in a position to so respond.

9 THE COURT: So the question is, can we do, can we
10 give you additional time, try to obtain the raw data, and
11 still stick to our schedule?

12 MR. ANGSTREICH: Not July 25, Your Honor. That just
13 wouldn't be possible.

14 THE COURT: I think your response is due, is it the
15 eighth?

16 MR. ANGSTREICH: Our response is due the eighth.

17 There is no way, even if they got us the raw data
18 tomorrow, that one could take the raw data, plus that which
19 Doctor Jones says she used, and just review it, let alone
20 prepare a response. I don't even see that as being feasible
21 by July 25 if they got us the information tomorrow. And I
22 don't think we'll get the information tomorrow.

23 MR. CAPRETZ: Your Honor, may I supplement --
24 justify my expense in coming out here? My name was used in
25 vain by Mr. Stanley.

1 THE COURT: That's fine, Mr. Capretz.

2 MR. CAPRETZ: I think for point of clarification, if
3 I may. I think what Mr. Angstreich is suggesting, and we're
4 in whole-hearted agreement on this, is that first the Court
5 should look at whether or not the Jones affidavit should be
6 considered at this stage of the proceeding.

7 Now, that is the first thing we would ask that the Court
8 consider, striking affidavit, not considering its merits or
9 demerits. But for class certification purposes.

10 And we have to go to the old Law 101 here, Your Honor.

11 And that is, if you don't have the law in your favor, you
12 argue the facts; if you don't have the facts in your favor,
13 you argue the law. If you don't have either, you hire Yogi
14 Berra.

15 Because is a situation where we're talking only on the
16 issues of class certification. And what we're suggesting, and
17 what the class is suggesting is St. Jude has no real solid
18 defense to the procedure of certifying a class for monitoring
19 purposes. Whether they have a merits defense to the class
20 monitoring request is totally a separate issue.

21 And they're looking for a silver bullet here, Your Honor,
22 we suggest. And this is just reporting from a corporate
23 responsibility and accountability situation. Because they're
24 saying, first of all, we should have no liability for any
25 wrongs we've committed, because the FDA, their action should

1 preempt any claims for injuries.

2 And secondly, your monitoring claim, as the brief simply
3 put, said has no merits whatsoever, because we're presenting
4 an expert at the last minute who is offering an opinion, where
5 you've had no opportunity to have the data to look at or to
6 offer any experts, no opportunity to cross examine this
7 witness.

8 This witness is well known in tort circles as
9 representing Corporate America, offering her so-called sage
10 advice for corporations in various medical products
11 litigation. And we've had none of this opportunity that
12 would, fair play would require, as well as the federal rules
13 require.

14 So we're asking basically that you either strike this as
15 premature and untimely, and weigh the merits if they want to
16 do a Daubert hearing after the Court hears the class
17 certification hearing. Let's go forward with the class
18 certification hearing on July 25.

19 If the Court, however, thinks that it needs or it's
20 appropriate, then we certainly would need time to get the
21 data, as Your Honor has suggested, to have our experts
22 evaluate it. We would probably needs 60 days, and have to
23 have the hearing sometime in September, realistically, to work
24 with summer schedules and what's going on in the outside real
25 world here.

1 So that's how our requests line up. That we either
2 change the lay of the land, as suggested by St. Jude, we get
3 into a merits argument, but we have to do everything we need
4 to do for a Daubert preparation. We have the opportunity to
5 respond to this last-minute brief.

6 Which I would suggest to the Court it's most striking
7 that none of the AVERT clinical investigators, scientists for
8 whom all have offered nothing but praise have mentioned
9 anything like this in any of their studies. And they're all
10 respected scientists.

11 Why in the world would we not have had any review --
12 they're saying basically that even if we had a problem -- and
13 St. Jude originally said we don't have a problem, even though
14 they were told by people in Britain, medical authorities,
15 people in Australia, people in Canada -- you've got a problem,
16 they stuck their head in the sand and refused to acknowledge
17 it until things got out of hand, and they did a voluntary
18 recall.

19 Now they're saying, well, you don't have any monitoring
20 claim, because our expert, retained at the last minute,
21 offering her opinion at the last minute, says there's no need
22 for monitoring after two years.

23 It's a problem, Your Honor. And it's a merits argument.

24 So we ask respectfully that the Court either strike her
25 motion and hear the class certification on the date that it's

1 set, and not consider the merits as the law requires, or we
2 get into the opportunity of having information and the
3 opportunity to fully investigate and offer our own
4 declaration.

5 THE COURT: Thank you, Mr. Capretz.

6 Mr. Stanley.

7 MR. STANLEY: Your Honor, as you can probably tell
8 from our papers, we feel this is critical evidence that needs
9 to be considered by the Court. Directly relevant to factual
10 diversity underlying all of the plaintiffs' claims, addressing
11 the claims that are being made by their own expert, Doctor
12 Sackett.

13 The Court is required to undergo a rigorous analysis when
14 it makes a decision for class certification. This is critical
15 evidence. It needs to be considered. If we need to spend a
16 little bit more time getting them whatever they need, then we
17 should do that.

18 But we've given them everything that we have. We told
19 them that we were going to use it. And we, you know, we
20 disclosed our experts at the appropriate time. And, you know,
21 this is critical evidence that really needs to be considered.

22 THE COURT: Well, with respect to the two motions
23 that are currently before the Court, this is what the Court is
24 going to do. And then we'll, after I go through this, let's
25 talk about what we need to do next here by virtue of our

1 schedule.

2 I am going to deny the plaintiffs' motions to strike the
3 objections that the defendant has raised to plaintiffs'
4 experts. However, the Court finds that a Daubert inquiry is
5 not warranted at this stage of the proceedings.

6 My review of the applicable case law, there are a number
7 of different ways to go. But my plan is to follow the
8 direction that suggests that the Court can carefully
9 scrutinize expert testimony to determine whether it does in
10 fact support certification of the class in this case.

11 However, that does not rise to the necessity at this stage of
12 a Daubert inquiry. It simply is part of the response to the
13 motion for class certification.

14 It certainly would not preclude the defendant from later
15 making a motion to exclude the evidence at trial. But for
16 purposes of the class certification motion, the Court will
17 consider all this.

18 Now, with respect to the motion to strike the declaration
19 of Doctor Jones, I'm going to deny that motion. I can't find
20 any clear violation of the Court's scheduling order, although
21 perhaps the orders may have been somewhat deficient. And I am
22 sympathetic to the plaintiffs' concern about not having a
23 sufficient basis or a sufficient time to allow their experts
24 to adequately challenge Doctor Jones' affidavit.

25 In light of that, I certainly am willing to give the

1 plaintiffs additional time, if they feel that is necessary.

2 We could proceed along our current schedule. And if you find
3 that you need some additional time, you can request additional
4 time, or we can set additional time now.

5 That undoubtedly would require putting the class
6 certification hearing off until probably the first week of
7 September, I would imagine, if we go that route.

8 MR. ANGSTREICH: Your Honor, obviously, if we're
9 going to get the underlying data -- and I would hope that Mr.
10 Stanley's good offices could twist the AVERT people's arms to
11 speed the process up and get that to us -- I don't see how we
12 can meet a July 8 response date, as it relates to all aspects
13 of this. And if we leave this dangling there, especially, as
14 Mr. Stanley says, she is the linchpin of their opposition. If
15 she fails, their opposition to class certification, we
16 respectfully submit, has to fail.

17 So I think that it would be short-sighted to say that we
18 could meet the deadlines.

19 I think it would make more sense to set the class
20 certification hearing for sometime after Labor Day. And
21 hopefully get the documents to us within the next two weeks,
22 so that we can then do a turnaround and get the information to
23 our experts.

24 If we did that, it would be the first week -- we have the
25 holiday week. It would probably be, probably around July 8 to

1 10 that we would be in possession, if everything moved
2 smoothly, in possession of those records, and we would get
3 them to our experts.

4 We would hope that we could then get that completed
5 within 30 days, and then have our turnaround -- that would be
6 the middle of August -- no, that would be -- get it the 10th
7 of July, it would be around the 10th of August we should be
8 able to get something from our expert, we would then like to
9 shoot for somewhere around the 15th to get our submission in.

10 We can be working on the rest of the submission as it
11 relates to all of the other aspects in the interim. That's
12 why we would only need a short turnaround after the expert had
13 the opportunity to review the native data.

14 THE COURT: Mr. Stanley, I think this, especially if
15 this evidence is as critical as you state, I have no
16 disagreement with that, although I haven't reviewed it in any
17 detail yet. I do think that submission of the raw data is
18 fair to the plaintiffs.

19 MR. STANLEY: Your Honor, first, I never said it was
20 the linchpin of our position. I'll have people yelling at me
21 back in my office.

22 THE COURT: I'm sorry, I guess I'm quoting your
23 worthy opponents here. You did say it was important.

24 MR. STANLEY: I did say it was important, and
25 acknowledge that it's important. But we would maintain that

1 regardless, we have a strong position.

2 And I don't think we have a problem with the time frame.

3 We will do our best to facilitate getting that information.

4 THE COURT: I'm not sure under the circumstances if
5 it would be helpful for the Court to order you to do it or
6 not. Sometimes that's helpful. Do you have a view on that
7 point?

8 MR. STANLEY: I don't think it's necessary for you
9 to order me to do it, Your Honor.

10 THE COURT: Okay.

11 MR. STANLEY: I'll represent here that I'll do it.

12 MR. ANGSTREICH: If it should be a problem, if
13 counsel for AVERT suddenly says that they need something, I
14 would hope that we could simply make a call and we could get
15 an order from Your Honor.

16 THE COURT: You certainly can. Because I think it
17 is important that the plaintiffs have access to this.

18 And I would prefer, although I like to keep to the
19 calendar carefully, I would prefer to be more complete, if
20 this will enable us to be more complete. And I think that we
21 can work this schedule out.

22 So perhaps we could have the class certification hearing
23 then in that second week of September, the week that, I guess
24 begins with the 9th. I think that week looks good from the
25 Court's calendar.

1 MR. CAPRETZ: What week is that, Your Honor?

2 THE COURT: September 9, 10, 11, right around in
3 there. That would be a week after the Labor Day week.

4 MR. CAPRETZ: Your Honor, that would be fine.
5 Preferably in the middle somewhere, Tuesday, Wednesday,
6 Thursday.

7 THE COURT: Does Tuesday the 10th pose any
8 difficulties for anyone?

9 MR. ANGSTREICH: It shouldn't, Your Honor.

10 THE COURT: Okay. Let's plan on it by the 10th.
11 And in terms of the plaintiffs' response memorandum,
12 August 15?

13 MR. ANGSTREICH: That would be a good day. Is that
14 a weekday?

15 MR. STANLEY: Thursday.

16 MR. CAPRETZ: Can we just make it that Friday then?

17 THE COURT: August 16th? Okay, we'll make it the
18 16th. And if there's any difficulty in obtaining the raw
19 data, then I'll expect that someone will get in touch with me.

20 MR. ANGSTREICH: We're going to shoot for two weeks
21 to get the raw data?

22 MR. STANLEY: I will represent that when I get back
23 tomorrow, I will start working on it. And I will report to
24 Mr. Angstreich. If I can get it, I'll speak with the
25 Pittsburgh lawyers and see what their position is. And I'll

1 tell you that right away.

2 MR. ANGSTREICH: Your Honor, there's one matter.
3 Your Honor said you weren't going to strike the objection,
4 although you weren't going to have a Daubert hearing. Is it
5 your expectation that we are going to respond to that 40-page
6 submission?

7 THE COURT: Well, I will take into account the
8 materials that have been submitted by your experts, obviously.
9 And then I'm not going to strike the -- I don't know whether
10 there's any response at this point that really is necessary.
11 I mean I'm going to take into account the materials that the
12 plaintiffs' experts have submitted.

13 I'm also going to take into account Ms. Jones' affidavit
14 and any kind of response to that that you wish. And the
15 defendants have responded to your experts. I don't think
16 there's any additional memoranda that's necessary there, is
17 there?

18 MR. ANGSTREICH: Well, Your Honor, I'm troubled by
19 leaving hanging out all of the objections that are articulated
20 in a separate 40-page brief after an 80-page opposition, or
21 what was our original -- the original opposition was 80 pages?
22 So while we asked for an extension, an enlargement of the
23 brief, and they asked for an enlargement of 80 pages, we
24 didn't expect another 40 set in by way of a document called
25 objections, too.

1 MR. STANLEY: Twenty-eight.

2 MR. ANGSTREICH: I apologize, it's 28 pages plus.

3 MR. STANLEY: Exhibits count?

4 MR. ANGSTREICH: Yeah, I counted the exhibits.

5 Twenty-eight pages. So it's 108 combined instead of the 80.

6 But I'm a little troubled by, if Your Honor is going to review

7 this at some point in time, we should at least respond to it,

8 I think.

9 THE COURT: I have reviewed it in preparation for

10 this hearing, and I also have reviewed, obviously, your motion

11 and memorandum to strike their objections. So I think I know

12 what the positions are relative to the experts, the

13 plaintiffs' experts.

14 If you think that there's anything additional that's

15 necessary to file, anything that's left unanswered, I

16 certainly would accept another submission from you in that

17 regard. I'm not sure there is. But I'll leave that judgment

18 to you.

19 MR. ANGSTREICH: No, Your Honor. If Your Honor says

20 you don't think there's anything further that we should be

21 submitting, there will be nothing else submitted on that

22 issue. Thank you.

23 THE COURT: Mr. Capretz?

24 Let's keep the July date for our next status conference.

25 Is that okay?

1 MR. CAPRETZ: July the 10th or 25th?

2 THE COURT: Let's keep the 25th. The 10th week is a
3 little bit difficult for me. We talked about moving that, I
4 think to the 8th, because of someone's inability to attend.
5 I'm not going to be here on the 8th because of some, something
6 I have in Washington at that time.

7 So let's strike that date from the calendar right now.
8 We can add a hearing in here or a telephone conference, if we
9 need one. But otherwise, let's keep the date of the 25th,
10 which we had set aside for the class certification hearing for
11 our next status conference.

12 Does that sound okay?

13 MR. CAPRETZ: It does.

14 Your Honor, if we could, if we might set a time in
15 August, we're going to actually advocate that monthly
16 conferences, whether they're telephonic or in person, are
17 definitely valuable. And as many times as we try to be so
18 efficient they're not needed, it just does not seem realistic.

19 THE COURT: If we could set one perhaps the last
20 week in August. If we're meeting on the 25th, we'll set a
21 time --

22 MR. CAPRETZ: Wednesday, Labor Day weekend.

23 THE COURT: Labor Day is the week after that. The
24 last week in August would start on the 26th. We could do the
25 week of the 19th, too.

1 MR. CAPRETZ: Well, the 26th is all right, if that's
2 the week before Labor Day.

3 THE COURT: That is the week before Labor Day.

4 MR. RUDD: We could use that for the class
5 certification protocol.

6 MR. CAPRETZ: What is the 25th, what day?

7 THE COURT: The 25th would be a Sunday. We could do
8 Tuesday the 27th.

9 MR. CAPRETZ: That would be fine. Is that okay with
10 you?

11 MR. STANLEY: Yes, it is.

12 MR. CAPRETZ: I might also mention to the Court that
13 we had suggested to the Court in Ramsey County, and Judge
14 Bjorkman was kind enough to try to coordinate her monthly, she
15 wants monthly status conferences with these, so that we can
16 work together, given those dates.

17 Okay, that leads us, Your Honor, to the coordination
18 issue. I know the Court was considering sending letters out.
19 And also dovetails with an update on the case filings and case
20 list. I think the last count we had were 85 state court cases
21 based on what Mr. Stanley and his client submitted, and 36
22 pending cases in the federal district litigation. I think
23 Judge Bjorkman has 27 cases at this moment, or close to that.

24 THE COURT: Judge Bjorkman does?

25 MR. CAPRETZ: Yes. Well, it may have increased.

1 There were four additional filings that were, the last time we
2 spoke with her, the attorneys, a couple of weeks ago, or ten
3 days or so, and about four additional filings expected. So
4 she should have slightly over 30 with her case.

5 And a balance, I suggest by far, in the great state of
6 Texas. I think a few scattered ones.

7 Other than that, there was pending litigation which was
8 settled, I think there were two cases in South Carolina. So
9 those are no longer in the mix. But there are still 85 claims
10 to be resolved.

11 But as far as the coordination is concerned, Your Honor,
12 yesterday, Judge Bjorkman requested a letter from the
13 responsible parties, all of whom did respond, working out
14 terms of a protective order that was consistent with the MDL
15 order. We have worked that out. We're in the process of
16 implementing that. She suggested we give her monthly dates.
17 And this is helpful, I suggested in our letter that we would
18 be here today and we would know more.

19 I did say July 26, so I guess we got lucky there.

20 Because we'll do the 25th and then tell her about August.

21 Maybe if the Court would consider it, if we could have
22 dates through the end of the year at a time convenient to the
23 Court, that would be appreciated.

24 THE COURT: Surely.

25 MR. CAPRETZ: Also, the Court asked for a trial

1 schedule, or proposed trial schedule. We each had our version
2 of how the Court should handle setting trials.

3 But just for the Court's edification, I know you spoke
4 with the judge, but I'm not sure in what detail. We were
5 suggesting the first quarter of 2003. Robins Kaplan had
6 suggested that date. And I don't know, of course, what the
7 Court is going to do.

8 Just for your own backdrop, a discovery cutoff sometime
9 in the fall was being considered, either October or November,
10 on the merits of those particular cases.

11 THE COURT: She has some cases that have been filed
12 for some time. Is that correct?

13 MR. CAPRETZ: I don't think any of them are too old.
14 One was right after we filed this litigation, Robins Kaplan
15 filed a case, a personal injury claim. That case came close
16 to the assigned trial date and was settled. But I think the
17 other ones are newer filings. There was an agreement between
18 St. Jude and Robins Kaplan, somewhat a stand-down agreement,
19 which I think has been abrogated at this point, so they're
20 filing their cases. But they did not have them on file.

21 MR. STANLEY: I think -- and I don't have the
22 benefit of having the case list in front of me -- but the
23 Harris case I believe is the oldest case. I think it's fairly
24 recent.

25 MR. CAPRETZ: Within a year, or something like that.

1 MR. STANLEY: Certainly within a year.

2 MR. CAPRETZ: Part of that is Robins Kaplan had in
3 inventory that they didn't have in the file that they were
4 told to file.

5 Also, St. Jude Medical represented that they would be
6 filing, I thought last week, I could be mistaken about that, a
7 preemption brief, I assume similar to what the motion is here.
8 And there's been no further action on that taken.

9 Has that been filed?

10 MR. STANLEY: We expect it will be filed by the end
11 of this week.

12 THE COURT: We'll get the firefighters back.

13 MR. CAPRETZ: It makes for an interesting scenario.
14 I must say, I've never had a dispositive motion, similar in
15 both federal and state court about the same time, to be heard
16 about the same time. So that will be interesting.

17 THE COURT: Well, I haven't sent the letter out to
18 all of the judges yet. I wanted to have the opportunity to
19 contact in person the Texas judge, who has the vast majority
20 of the cases down there, like I've had conversation with Judge
21 Bjorkman. So I expect we'll get the letter out relatively
22 quickly. I believe we can coordinate as best as possible.
23 It's always a bit of a delicate matter.

24 MR. STANLEY: There's a preemption motion in the
25 Texas cases that are on file.

1 THE COURT: That have been filed?

2 MR. STANLEY: Yes.

3 MR. CAPRETZ: St. Jude is in a unique position from
4 our perspective in Texas, because Texas has some state court
5 decisions which are not friendly to consumers.

6 But that's about it, as far as I can tell.

7 We are trying to -- we are going to run into a slight
8 problem. I might make the Court aware of this. I'm not sure
9 what the Court might do, or maybe in consultation with Judge
10 Bjorkman handle it:

11 Robins Kaplan is not used to and does not like to be
12 involved in group activities, shall we say, lawsuits. They
13 want to do it like Frank Sinatra, "Their Way."

14 So it really is a question, they're fighting, friendly
15 fighting, but fighting any coordination, they want to be able
16 to set their depositions, and move forward, and not have to
17 wait for the MDL. Be able to close out the record when they
18 depose someone before the MDL lawyers go, and of course want
19 to go first.

20 So that's going to be an issue, I can tell the Court now.
21 Because we would like to have an equal opportunity with the
22 witnesses. And while they're most capable, we think we have
23 some lawyers that can do pretty well in depositions.

24 THE COURT: Have you expressed your concern on that
25 to Judge Bjorkman?

1 MR. CAPRETZ: Oh, yes. I mean, it's somewhat of an
2 enigma. She wants to move things along.

3 I might say, like this Court, is a very gracious and
4 personable individual who is trying to get the cooperation of
5 all concerned. But there was no simple answer to that.

6 One of the questions that came up, for example, was
7 Robins Kaplan has said, let's get the depositions going. I
8 don't think the MDL has the documentation that you have in the
9 state court actions. And we're saying we don't want the
10 action coordinated in the way of merits discovery unless we
11 have the documents, so we can properly question the witness.

12 There are certain, we have an involvement in a state
13 court litigation, and with the work out of the protective
14 order, we should be getting certain documents that are needed
15 momentarily, hopefully. And we'll be in a position to have
16 those depositions scheduled in the near term.

17 We're anxious, too, to get the merits discovery under
18 way. But we need to have the documents, as the Court can
19 appreciate, in order to do that.

20 So I don't know if there is a simple solution or answer.
21 But that is an issue that exists, at least with the Minnesota
22 state cases.

23 The pretrial orders, this Court signed pretrial order 17
24 on Monday, about the valve retrieval and inspection. The
25 wording was worked out.

1 What I believe will be pretrial order number 18 is a
2 Common Benefit Fund. St. Jude simply doesn't want us to get
3 paid, just giving us all the trouble in the world to get that
4 done. But we are pretty close to tweaking that.

5 Mr. Stanley says there's one provision that he needs to
6 talk with his cohorts on, and hopefully we'll get that ironed
7 down and submitted to the Court momentarily as well.

8 Those are the only two that I know of currently.

9 THE COURT: Mr. Murphy, did you have anything else
10 on the coordination issue?

11 MR. MURPHY: Your Honor, Mr. Capretz stole all my
12 thunder. I wasn't sure I was going to make it here. So.

13 The only thing I will say is other than the Texas and
14 Minnesota actions, I have contacted a few of the other state
15 court actions, and they're actually moving ahead rather
16 quickly.

17 And while I don't disagree with my colleagues from the
18 standpoint of making sure we have adequate time on the
19 motions, from that standpoint, but from the standpoint of
20 coordinating with the states, I'm somewhat like a salesman
21 without a product to sell.

22 So I would like the Common Benefit Fund order -- Mr.
23 Stanley said he couldn't find it. I provided a copy of it.
24 This was all about a month ago. And we would like to get that
25 done.

1 THE COURT: It would be good to get that done.

2 And it would be helpful, if we can, as soon as possible,
3 sketch out at least a tentative scheduling for the rest of
4 these proceedings as well. Beyond where we are at right now
5 in the form of a scheduling order.

6 I'm not interested in going into any specifics today. I
7 don't think we have time to do that. But I would ask the
8 parties to start conferring about an appropriate scheduling
9 order throughout the case, considering all possibilities and
10 options as we go forward.

11 I think for my discussions with the state court judges,
12 that would be particularly helpful, to have an idea about
13 precisely what we expect at this stage. Obviously, things can
14 change, and likely will.

15 But if you could start talking about that, and let's put
16 it on July's agenda to talk about in more detail. Okay?

17 MR. STANLEY: Your Honor, if I could say something
18 on that.

19 THE COURT: Sure.

20 MR. STANLEY: The defense has been wrestling with
21 their own discovery in these individual cases.

22 THE COURT: I'm sure you have.

23 MR. STANLEY: And in terms of what we're going to
24 ultimately recommend in that regard, we were interested in how
25 the Court views its role. Whether or not you view your role

1 as having an entire case worked up here in the MDL and
2 packaged so when it goes back to its home jurisdiction it's
3 ready for trial; or if you just want to work up sort of the
4 generic corporate company witnesses, you know, generic issues.
5 And once we get back to our home court jurisdiction, we can do
6 the sort of the specific discovery at that time.

7 So we were wondering, you know, some judges feel they
8 want to do the whole case here and send it back. Others only
9 want to deal with generic. It would be useful to have to
10 your --

11 THE COURT: Well, my preference would be to do the
12 whole thing here, and send it back trial ready. I think
13 that's the most efficient way of proceeding.

14 As a transferor judge in other cases, it's helpful to
15 have a case that comes back that's ready for trial. And that
16 would be my goal here.

17 MR. STANLEY: Thank you, Your Honor.

18 MR. CAPRETZ: And we will -- I think that is an
19 excellent idea, Your Honor. We totally agree, a scheduling
20 order is appropriate at this point. And I do believe that is
21 the intent of the rules on complex litigation for the, to work
22 up everything and send it back trial ready.

23 THE COURT: Mr. Murphy?

24 MR. MURPHY: No, that's it.

25 MR. CAPRETZ: I think just update on a few items.

1 Web site.

2 THE COURT: Can we talk just one second, the Common
3 Benefit Fund order. Mr. Stanley, what do you think in terms
4 of when that can be ready?

5 MR. STANLEY: Your Honor, we had made our position
6 to Mr. Angstreich, and told him our primary concern was, which
7 he doesn't think is legitimate. But in any event, we don't
8 want an order where they can figure out what the settlements
9 are. So we borrowed some language from Baycol and the
10 Propulsid Common Benefit Fund, and proposed some language.
11 And most of which was fine. And they came back, there was
12 another statement, a sentence about bimonthly reports about
13 the escrow account to the liaison counsel.

14 And honestly, I just haven't sat down and thought about
15 whether or not that adequately protects the confidentiality.
16 If it does, we're not going to have a problem. So I don't see
17 this dragging more than a week or so. But that's the primary.

18 THE COURT: Perhaps we can try to get this done by
19 the end of next week. I think it's a holiday week. But
20 perhaps by the 5th of July, maybe we can get this resolved.

21 MR. STANLEY: I think so, Your Honor.

22 MR. CAPRETZ: Really, there should be no issue --
23 I'll take the blame on those last two. He's just aware you're
24 over here.

25 MR. ANGSTREICH: I'm just a firefighter.

1 MR. CAPRETZ: I think probably this will be worked
2 out.

3 But I think Mr. Stanley, on review and consultation with
4 others, will find it's pretty common the plaintiffs' liaison
5 counsel knows what's in the fund.

6 As far as the escrow agent, it's a good question.
7 Someone you might consider it's not fair to ask for a
8 decision. But the one used in the Baycol litigation.

9 MR. STANLEY: I'm sure we'll be able to work it out.

10 MR. CAPRETZ: That would be the only remaining one.

11 I might mention on the status conferences, the
12 flexibility of the Court, Judge Davis, your colleague, has
13 scheduled, as you may know, the July status conference in
14 California. So I would just love --

15 THE COURT: I think he's been to Louisiana, too.

16 MR. CAPRETZ: That's right. He enjoyed the food.
17 It was a very productive meeting, just for the record. We had
18 a lot of -- I'm not sure what the Court's background is with
19 multidistrict litigation. But there are many firefighters
20 even amongst the plaintiffs' groups. Maybe even doesn't
21 apply.

22 But certainly amongst them, as to involvement, what court
23 is going to have power and jurisdiction, authority, and rule,
24 so to speak, the center of gravity. But they had an overall
25 meeting -- which I have to give credit to Judge Davis. I

1 think he was the spark to that. It was very productive.

2 There were quite a few state court judges.

3 THE COURT: Is that the one in New Orleans?

4 MR. CAPRETZ: In New Orleans. Just a few weeks ago.

5 Judge Fallon, who is doing the Propulsid litigation, a Federal

6 District Court Judge down there, and Judge Davis and the

7 magistrate went down and did the summary. But it was a very

8 productive exercise. It seemed to open up the lines of

9 communications even with defendants.

10 THE COURT: It is a good idea if it can be

11 logistically arranged.

12 MR. CAPRETZ: It was a much broader litigation, as

13 you know. It's a little different scenario.

14 But I think we're on the Web site. Are we waiting on

15 that? Is that under consideration, shall we say?

16 THE COURT: What do we have? Oh, the description.

17 Okay. I have to get that done.

18 (Laughter.)

19 MR. STANLEY: Should I order you?

20 THE CLERK: I tried.

21 MR. CAPRETZ: And I'll rule.

22 THE COURT: Ms. Gleason ordered me to do it, without

23 a deadline though.

24 THE CLERK: Sorry.

25 MR. CAPRETZ: We've all been there, done that.

1 The discovery status, it is moving along, Your Honor. We
2 have depositions scheduled of four of the Spire deponents.

3 The lady representing Spire is here, as she was the last
4 time. And I think that's another issue as to their
5 involvement in this litigation. I think there was some sort
6 of a state court hearing on that this week?

7 MR. MURPHY: Yes, Your Honor. In the great state of
8 Nevada. If you wanted to have a hearing there, we could
9 arrange for a parade for Your Honor and for Lou Jean. Come to
10 Nevada.

11 But yes, there was a motion to dismiss brought for lack
12 of jurisdiction in Nevada yesterday. And plaintiffs' attorney
13 was successful in defeating that motion.

14 MR. CAPRETZ: They're named in that, obviously, in
15 the state court litigation.

16 And then I think there's an issue -- we're still bouncing
17 around on the confidentiality matter. But Mr. Angstreich, you
18 have a report?

19 MR. ANGSTREICH: Your Honor, Mr. Stanley sent us a
20 listing of a number of documents that were declassified. And
21 then we got in a listing of additional subject matters to be
22 declassified, as well as a listing of what they viewed to
23 still be within the ambit of confidential.

24 I told Mr. Stanley this morning, I was not able to send
25 him our position as yet because it has not been confirmed.

1 But it looks like our position is that there are, there's one
2 aspect of the grouping that is no longer deemed confidential,
3 except for certain drafts. The drafts they want to keep
4 confidential. And we have an issue with that.

5 And then there's the designation of what's known as
6 commercially sensitive. Not competitively sensitive, but
7 commercially sensitive. And I asked Mr. Stanley if he would
8 give me examples of the documents that would come within that
9 classification. Because we really didn't see that as being
10 confidential.

11 But if in fact it's synonymous with competitively
12 sensitive, then we're really dealing with semantics and not
13 substantive issues.

14 I hope we'll get that resolved if not before the July 4
15 break, right after that.

16 MR. STANLEY: I think we've significantly narrowed
17 all issues, Your Honor.

18 THE COURT: Very well.

19 MR. CAPRETZ: Other than to ask where in the world
20 is Mr. Kohn, I think that's the agenda for the day.

21 THE COURT: Anyone else?

22 Mr. Stanley, do you have anything else --

23 MR. STANLEY: No, Your Honor.

24 THE COURT: -- for today?

25 MR. ANGSTREICH: Thank you very much, Your Honor.

1 THE COURT: Anything from you?

2 MS. FIEBER: No. Only to mention Spire had meetings
3 in Las Vegas, and that's why they defeated permanent
4 jurisdiction. Apparently, nobody wanted to visit Nebraska.

5 MR. MURPHY: Actually, the meeting issue didn't come
6 up.

7 THE COURT: Okay. Thank you. We'll be in recess.
8 And we'll see everyone on the 25th.

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20 CERTIFIED:

Karen J. Grufman
Official Court Reporter

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