

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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IN RE:	)	
MEDTRONIC, INC.,	)	Multidistrict
SPRINT FIDELIS LEADS	)	Litigation
PRODUCTS LIABILITY LITIGATION	)	File No. 08-1905
	)	(RHK/JSM)
	)	
THIS DOCUMENT RELATES	)	
TO ALL CASES	)	Minneapolis, Minnesota
	)	May 28, 2008
	)	9:30 a.m.
	)	

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BEFORE THE HONORABLE RICHARD H. KYLE  
 UNITED STATES DISTRICT COURT JUDGE  
 BEFORE THE HONORABLE JANIE S. MAYERON  
 UNITED STATES MAGISTRATE JUDGE  
**(SCHEDULING CONFERENCE)**

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## P R O C E E D I N G S

## IN OPEN COURT

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4 DISTRICT JUDGE KYLE: Good morning, everyone.  
5 Please be seated.

6 Okay. We're here on In re: Medtronic, Inc.  
7 Product Liability Litigation, which is multi-district  
8 litigation file number 08-1905. Let me start by -- we were  
9 both introduced coming in; and if there's any doubt about  
10 it, I'm the Richard Kyle and this is the Janie Mayeron, and  
11 we're both going to preside over the proceedings here this  
12 morning and we'll both have questions for the various folks  
13 who are here.

14 I don't normally get a crowd quite this large but  
15 it's nice to get everybody here. At least we have a decent  
16 day. The tornadoes that have gone through the Twin Cities,  
17 I think, are gone.

18 We've handed out an agenda and hopefully each one  
19 of you has one. I just want to introduce some of the people  
20 who are on my staff. Marc Betinsky, the gentleman down  
21 here, is my career court law clerk. Deb Siebrecht is the  
22 calendar clerk. I know many of you from the Twin Cities  
23 have had a chance to speak with Deb in the past. And Carla  
24 Bebault is the court reporter, and she will be the court  
25 reporter for all of these proceedings. And I'll let Judge

1 Mayeron introduce whoever she wishes to introduce.

2 MAGISTRATE JUDGE MAYERON: All right. I'm  
3 Magistrate Judge Mayeron. With my today is Steve Katras,  
4 who is my career law clerk. In addition in our chambers you  
5 will have contact with Katie Haagenson, who is my judicial  
6 assistant, who is back at the office manning what is going  
7 on over there.

8 DISTRICT JUDGE KYLE: On the conference agenda  
9 that we've got in front of you, the first items 2 and 3 are  
10 really there just for your information. I think you've  
11 already received copies of those but just in case you  
12 didn't, they are there and any questions you have about  
13 those we can take those up sometime today.

14 I've decided, unless someone has any objection to  
15 it, that we will not note the appearances of the -- all  
16 counsel here today. I think we've passed around a yellow  
17 pad and hopefully everyone has signed in. If you haven't,  
18 we'll have you do that at the end of it. And when we get  
19 out a transcript of these proceedings the appearances of  
20 everyone who is on that sheet will appear in the transcript.  
21 Obviously if we hear from individual counsel, for purposes  
22 of the court reporter and the record, we would ask you to  
23 identify yourselves and the law firm or the city where  
24 you're from. And so that aspect of the transcript will be  
25 complete.

1 I think the first item that we would like to  
2 discuss is the issue of counsel, lead counsel and liaison,  
3 steering committee, and the like. We have obviously  
4 received some proposals from individuals. I think one  
5 group. And we would like to have anybody who would like to  
6 be heard on that process or the pros and cons of any of the  
7 proposals which are now in front of us, we would like to  
8 hear you. In no particular order. If you just stand up  
9 we'll recognize you and get your views on this and we'll  
10 probably have some questions.

11 Yes, sir.

12 MR. GUSTAFSON: Good morning, your Honors. Dan  
13 Gustafson, Gustafson & Gluek. Welcome over to this side of  
14 the river.

15 DISTRICT JUDGE KYLE: Nice to be here.

16 MR. GUSTAFSON: I'm hoping by the time we get  
17 going on this case we will be able to see the new St. Paul  
18 courthouse in its remodeled state.

19 DISTRICT JUDGE KYLE: September 15th.

20 MR. GUSTAFSON: About time for the Motion to  
21 Dismiss hearing.

22 Your Honor, as you know from our papers, I am  
23 honored to be designated or nominated, I should say perhaps,  
24 to be lead counsel in this case and I have the support of  
25 many fine lawyers. I just want to make a couple of quick

1 points. Our papers, I think, set out our position.

2 I think that it's important for the Court to  
3 understand that the process of negotiating the slate that we  
4 proposed was one that took into account a lot of things. It  
5 took into account diversity, it took into account  
6 experience, it took into account the ability to play nice  
7 with others.

8 And I think it's important that the temptation, I  
9 think, to sort of satisfy the people who also want to be  
10 lead counsel and also want to be on the PSC, to simply add  
11 those to the group. Many of the people who are not on the  
12 slate that we proposed stood back in order to make the slate  
13 be one that people can agree to. And there are some fine  
14 lawyers who stood back and they are on I believe it's  
15 Exhibit B to my affidavit. There's a long list of folks who  
16 wanted to be on the PSC or wanted to be lead counsel and  
17 stepped back in order to make the situation work out. And I  
18 think that to sort of selectively pick and choose those that  
19 are objectors to make peace is a mistake and I would urge  
20 you to resist that.

21 I think that, as an example of this, you know,  
22 there are people who are on the PSC who would otherwise have  
23 moved to be lead counsel if they didn't have some sort of  
24 negotiated resolution. The process that we took to come to  
25 the slate was open to everybody. We had a meeting in

1 Minneapolis that was attended by 70 or 80 firms. Everyone  
2 had an opportunity to apply. We had lots of discussions.  
3 And I don't think anyone can fairly say that they were  
4 excluded from the process.

5 Secondly, I think that the slate that we propose  
6 is a balanced slate. It's got young and old, people of  
7 color, men and women, people from all over the country.  
8 Particularly you'll see that the cases from Puerto Rico are  
9 represented. And so I think it represents a widely diverse  
10 group of folks.

11 And finally I would just say that there's a  
12 suggestion been made that certain folks have, you know, 80  
13 percent of the cases or 60 percent of the cases. And I  
14 think that while that argument has some surface appeal, it  
15 really is inaccurate because there are thousands and  
16 thousands of these cases. Only a small percentage of the  
17 cases have been filed. That's the nature of MDL mass tort  
18 litigation.

19 In the Medtronic case, in which I was one of the  
20 co-lead counsel, you know, we had something in the  
21 neighborhood of a few hundred cases filed. When we reached  
22 resolution it ultimately turned out to be almost 3,000  
23 people participated in the settlement. So while the  
24 argument on the surface has appeal, the truth is is that the  
25 slate has nominated what they call the Gustafson Group,

1 interesting title, is really supported by I think the  
2 overwhelming majority of cases and a significant number of  
3 folks who represent clients.

4 With that, your Honor, I don't have anything else.  
5 If you don't have any questions I'll let others speak.

6 DISTRICT JUDGE KYLE: Well, maybe just one  
7 question and there may be others, too, but in your proposal  
8 you have one individual as lead counsel. Obviously  
9 yourself. And it seems to me, at least from my familiarity  
10 with other litigation of this nature, there usually has been  
11 two or three individuals who have shared that title. Is  
12 there some reason why it's set up this way in your proposal?

13 MR. GUSTAFSON: I think there's two reasons,  
14 Judge. One, I think in my experience, I've found that the  
15 trend is back towards less lead counsel. You know, as I've  
16 sort of done this over the years, when I first started  
17 practicing it was sole lead counsel with an executive  
18 committee or PSC. As a matter of sort of practice, it got  
19 to be two co-leads, three co-leads, four. I've seen cases  
20 that have five and cases that have a committee. I think  
21 it's inefficient. I mean, I think this negotiation is -- if  
22 you have two or three lead counsel, you have two or three  
23 lawyers on every single phone call. You have two or three  
24 lawyers running their hands over everything.

25 And the truth is you really only need, you know,

1 one general, so to speak. There's fine lawyers on this case  
2 both on the PSC and not on the PSC. And there's plenty of  
3 horses to do the work. We don't need plenty of generals, so  
4 to speak. I think that's the answer.

5 DISTRICT JUDGE KYLE: All right.

6 MAGISTRATE JUDGE MAYERON: You in your proposal  
7 have for the PSC proposed a chair of Plaintiffs' Steering  
8 Committee. Again, looking at others MDLs and also at the  
9 manual, they don't talk about a chair. Others who have  
10 submitted applications question the need for a chair of the  
11 steering committee. And given, I would presume, whoever is  
12 lead counsel or whether it's co-lead or lead counsel is  
13 going to be -- basically participate in the steering  
14 committee, if not heading up the steering committee, what's  
15 the reason for the chair of the steering committee?

16 MR. GUSTAFSON: I think that the steering  
17 committee in this case is a diverse group of folks and I  
18 think it takes someone to sort of keep them in line, for not  
19 a better way to say it. I think that having one lead  
20 counsel makes the decision-making process easier. I think  
21 having a chair of the steering committee makes the  
22 delegation of work to that steering committee easier because  
23 lead counsel can work with a chair who can then disseminate  
24 to the rest of the steering committee.

25 MAGISTRATE JUDGE MAYERON: And in your proposal

1 you just talked about the fact that the Puerto Rico  
2 litigation was represented on the steering committee. When  
3 I looked at the names for that committee, I don't see any  
4 counsel from Puerto Rico. So when you talk about those  
5 cases are indeed represented, how are they represented on  
6 your proposed slate for the steering committee?

7 MR. GUSTAFSON: Mr. Camilo Salas is counsel of  
8 record on I think almost all of the Puerto Rico cases.  
9 Eric -- Eric, help me with your last name. I can't  
10 pronounce it, I'm sorry.

11 MR. QUETGLAS: Quetglas.

12 MR. GUSTAFSON: Eric Quetglas is also counsel of  
13 record in the Puerto Rico cases. He supports this  
14 organization. He had originally filed an application for  
15 co-lead counsel; now supports our group. And John Nevares,  
16 who is counsel in the Puerto Rico cases, I believe filed  
17 something yesterday. I haven't seen it, but I saw it come  
18 across ECF, that he now supports our proposed slate.

19 So there's quite good representation on the folks  
20 that were counsel of record in the Puerto Rican cases. I  
21 believe all of the cases that have been filed in Puerto Rico  
22 either have Eric or Camilo as counsel of record, and most  
23 often both.

24 MAGISTRATE JUDGE MAYERON: Those are the only  
25 questions I have.

1 MR. GUSTAFSON: Judge, do you want me to talk  
2 about attorney fees now or come back to that issue?

3 DISTRICT JUDGE KYLE: Why don't we come back to  
4 that issue. Let's deal with the makeup of these committees,  
5 at least getting the views of folks, and then come back to  
6 that.

7 MR. GUSTAFSON: Thank you, your Honor.

8 DISTRICT JUDGE KYLE: Yes, sir.

9 MR. BECNEL: May it please the Court, my name is  
10 Daniel Becnel. I think in this room, other than yourself,  
11 I'm probably the oldest lawyer here and probably the guy  
12 that has been doing MDLs probably longer than anyone.

13 I come from a very small town outside of the City  
14 of New Orleans. I had the opportunity to have 244 cases  
15 initially filed in Puerto Rico. In order to file a case in  
16 Puerto Rico you need a lawyer from Puerto Rico to file it.  
17 You cannot go pro hoc into that court because of their  
18 peculiar rules in that jurisdiction.

19 So Mr. Camilo Salas, whom I have worked with on  
20 numerous cases, and whom I asked a Court just recently to  
21 appoint as a special master to divide up a large settlement  
22 as a special master in a case that I tried to verdict for a  
23 class. I called him -- and by the way, this is Judge Eldon  
24 Fallon's son-in-law. And Judge Fallon and I probably were  
25 on numerous committees together and worked together for

1 years before his ascension to the bench.

2 In addition to that we took on trying to  
3 negotiate, when we filed in Puerto Rico, a Preservation  
4 Order. Ms. Wendy Fleishman, whose firm I worked with for 30  
5 years or more from California, Lief Cabraser, worked on  
6 putting together that Preservation Order. Immediately when  
7 we were trying to organize this case I had to go to Puerto  
8 Rico on three separate occasions to deal with that.

9 Simultaneously, Mr. Gustafson and Hunter Shkolnik  
10 and others filed a case simultaneously. They both hit the  
11 courthouse the same day. I immediately said, Guys, ladies,  
12 let's try to organize the case and move the case forward  
13 because most of the discovery, it's not going to take place  
14 in Minnesota. Most of the discovery is going to deal with  
15 the exception to Riegel, which is a manufacturing defect,  
16 almost similar identical to the Telectronics pacemaker case  
17 which I was intimately involved with by Judge Spiegel.

18 That resolved after a unique situation. The  
19 unique situation was we recommended to Judge Spiegel the  
20 trial of the case by a jury called the summary jury trial.  
21 We sat there for five days, tried the case, and one of the  
22 big issues in that case was a problem related to piercing  
23 the corporate veil. That was the issue because they only  
24 had \$100 million worth of insurance and probably the case  
25 was worth ten times that amount, but that was a major issue.

1 And if we had pierced the corporate veil, then we would have  
2 gone forward.

3 I was very friendly with Ken Starr and invited him  
4 to speak at numerous occasions before judges in Louisiana,  
5 etcetera; and he recommended an expert for piercing but we  
6 weren't successful. Immediately after that summary trial  
7 the judge had us talk to the jury for half a day and the  
8 case settled the next day.

9 So I've had a lot of experience in the issue of  
10 trials. Unlike many of the people here, and I'm not saying  
11 all of them are not good trial lawyers, I live in the  
12 courtroom. Taking depositions. And the last five years I  
13 have never been in the courtroom less than three months in  
14 trial. I was in trial in Louisiana in the tobacco  
15 litigation for three months picking a jury and nine months  
16 in trial. It was successful and it was just affirmed by the  
17 Supreme Court of the State of Louisiana.

18 I've been picked to try cases and in fact on  
19 Friday I will argue the Mother's Day Bus Cash which killed  
20 22 people and injured 18. I tried it on behalf of all the  
21 lawyers in the case single-handedly.

22 So I'm a trial lawyer. I'm a deposition taker.  
23 In Breast Implant I took the deposition of the CEO of Dow  
24 Corning Corporation, which ultimately settled. I took the  
25 deposition of the inventor of the breast implants. So I'm a

1 courtroom lawyer by trade. I have worked with virtually  
2 every lawyer in this room in one case or another.

3 When we were in Puerto Rico I invited Hunter  
4 Shkolnik, who Paul Rheingold, his partner and I were  
5 involved in the Swine Flu case. Organized it before Judge  
6 Gerhard Gesell years ago. I think Gerald Ford was President  
7 at the time, and that was the first major civil mass tort in  
8 this country on an MDL basis. We wound up working in that  
9 case for the whole group of people who had Guillain-Barre  
10 Syndrome for \$95 an hour.

11 And my difference with this group is only one. I  
12 support each and every one of them that Mr. Gustafson has  
13 asked to be appointed to the steering committee, each and  
14 every one. I thought that it was appropriate to have more  
15 than one person dealing with this case.

16 Of the first 300 cases filed in Puerto Rico, I had  
17 over 244 of those cases. Now, that takes a lot of work.  
18 You have to fill out a fact sheet immediately on each and  
19 every case. You got to use those cases to pick  
20 representative plaintiff trials from to get here because  
21 every MDL judge now wants a series of trials before them.  
22 90 percent or 95 percent of these cases now settle before  
23 the MDL judge. Very rarely are they remanded back for  
24 trials.

25 I have worked outside of Plaintiffs' committees.

1 For example, in Breast Implant, I wasn't even a member of  
2 the Plaintiffs' committee. They ran out of money. I  
3 invested millions and millions of dollars and 35 lawyers of  
4 my firm's people to do documents for two years, and was  
5 ultimately successful in getting that case resolved.

6 But my real reason for being here, when I spoke  
7 to -- when we were dealing in Puerto Rico I said, Dan, you  
8 want to be lead counsel? I said, Hunter, do you want to be  
9 lead counsel? Does anybody want to be lead counsel? I  
10 don't care if there's ten lead counsels. It doesn't matter.  
11 You're dealing with individual people's cases. And that is  
12 a personal responsibility that those lawyers who we're  
13 referred to and those people who hired me individually, they  
14 expect me to handle their case. They expect me to invest  
15 the money necessary to be successful. And they expect me to  
16 file the necessary paperwork to beat preemption in this  
17 case, to do the necessary discovery and everything that a  
18 lawyer needs to do.

19 Your order asked for one simple thing in addition  
20 to an application, and it asks for what do you charge as  
21 common benefit fee. I've gotten into serious trouble over  
22 that issue because I believe lawyers -- and many times  
23 Mr. Rheingold and I have said, Judge, we'll do this case for  
24 whatever fee our clients pay us if we're successful. We're  
25 not looking to take money out of other lawyers' pockets, and

1 their clients' pockets, and their referral lawyers' pockets.  
2 We'll do it, and that's why you asked for a number. I gave  
3 a number: 3 percent.

4 In Fen-Phen, the committee, which ultimately  
5 resulted in a \$22 billion settlement, the committee took 9  
6 percent. I had a disagreement with that. I was  
7 state-federal liaison counsel appointed by Judge Bechtle in  
8 that case. That's not right, Guys, 9 percent. You got all  
9 these state courts, you got the federal courts. It's just  
10 too much. Because you can imagine what 9 percent is on \$22  
11 billion.

12 And I took it to the Appellate Court and Judge  
13 Bartle, who succeeded Judge Bechtle, said, Yeah, that is too  
14 much, Mr. Becnel. It should be 6 percent. I didn't even  
15 put in a common benefit fee application in that case.

16 So I think you ought to get your fees from cases  
17 and I think with the group I have no problem working with  
18 each and every one of them. Mr. Rheingold with Hunter  
19 Shkolnik who in the previous Medtronic case had the most  
20 cases of anybody in that case.

21 My only issue is when I submitted an application,  
22 your first order hadn't even -- had just come out and I  
23 immediately submitted an application. I was asked to  
24 withdraw it. We'll put people on a committee. Well, maybe  
25 that's proper negotiations. I don't know. I just didn't

1 think it appropriate to withdraw an application once I filed  
2 it.

3 So I've asked this Court to appoint me co-lead  
4 counsel. Mr. Eric Quetglas is the only Puerto Rican lawyer  
5 who is admitted to practice in Puerto Rico. Camilo is  
6 really a Louisiana lawyer who got pro hac status there. And  
7 I got pro hoc status there after. If you see from my moving  
8 papers, I asked for each and every one of the people there  
9 to be appointed. Mr. Zimmerman, who I've worked with here  
10 for at least 10 to 15 years in numerous chemical explosions,  
11 in numerous MDLs and numerous other cases, I just believe  
12 more is better. You never have enough people in one of  
13 these mass torts.

14 You have the best team of defense lawyers you have  
15 ever seen. I have watched Mr. Beck trying the Vioxx cases.  
16 That's another case. I moved for the appointment of Judge  
17 Fallon in that case. I was the only lawyer who argued for  
18 New Orleans. He got it. Judge Fallon didn't appoint me on  
19 the committee on that case, but I had seven of my lawyers  
20 full time working on that case doing documents, doing  
21 depositions. And on the only trial in federal court, one of  
22 my lawyers participated with Mr. Mark Robinson, which was  
23 the only successful trial in the federal court system in  
24 Vioxx. Rebecca Todd spent three months preparing for that  
25 and then tried the case in about 12 days before Judge

1 Fallon.

2 So we're trial lawyers. We do what people ask us  
3 to do. My entire family has been lawyers. My father was  
4 one of the war crimes prosecutors in the Second World War.  
5 I didn't see him until 1947. My brother's a lawyer. His  
6 wife is a lawyer. My first wife is a lawyer. Still works  
7 for me. My wife is a judge. My three sons are lawyers.  
8 Two of their wives are lawyers. So we have a lot of people.

9 I went out in this case, and I think pro bono  
10 service is probably the most important things a lawyer can  
11 do. I represent 60,000 people in the City of New Orleans  
12 for the levee failures.

13 In addition to that, I probably lost \$2 million of  
14 my money out-of-pocket trying to represent those people pro  
15 bono. I've hired some of the best lawyers that I could get  
16 my hands on. I proposed in this case a young lady who has  
17 just worked for my wife as a law clerk. She is a Ph.D.  
18 English professor, African-American. I promote diversity.  
19 An African-American we just hired to work not only on this  
20 case but on the FEMA formaldehyde cases.

21 If you look in this morning's New York Times in  
22 the first section you will see the nature of the homeless  
23 people in New Orleans because there's no housing and there's  
24 nowhere for them to go. And somebody's got to represent  
25 them.

1           Greenberg, in the previous case, was involved in  
2           that Medtronic case. Candice Sirmon worked for Greenberg  
3           pro bono. They paid her salary in New Orleans. She's here  
4           with us. I have just hired her because of that. Previous  
5           to that she worked for Jones Day in New York for three  
6           years. So we have Hispanics, African-Americans, and  
7           complete diversity.

8           I'd ask this Court to appoint me as co-lead  
9           counsel. And I can assure you that Mr. Gustafson and I --  
10          he stayed at my home when the place he was to be using in  
11          Aspen, Colorado burned for vacation. Bucky has stayed at my  
12          home. Randy has stayed at my home. We are all friends. We  
13          have a disagreement. And the disagreement is should I  
14          withdraw and just be on the Plaintiffs' committee and should  
15          I not be responsible for those 200 plus people that I've  
16          already filed cases for; and should somebody else be  
17          responsible for them? Or should -- and I have hundreds more  
18          to file, but we are waiting for the direct filing which  
19          usually MDLs allow you to file. I came here the day of the  
20          thing and filed one more here in Minnesota.

21          It's a big expense to file these cases. Those are  
22          individual Plaintiffs. And if the Court would allow me to  
23          represent them, that's fine. But Mr. Gustafson's argument  
24          about, Hey, look, we only need one general, that hasn't  
25          occurred. In Breast Implant there were four. In Guidant

1 there were four. In Medtronic there were two. In Vioxx I  
2 called the organizational meeting and nominated two people  
3 who aren't even from New Orleans to be co-lead counsel and  
4 Judge Fallon agreed and appointed them, Mr. Chris Seeger and  
5 Mr. Andy Birchfield. One was from Alabama and one was from  
6 New York.

7 I'm interested in the clients' rights in this  
8 case. Their rights to be heard. And if you rule for them  
9 in preemption or against them in preemption, who is going to  
10 take the appeal? I'm going to have to take the appeal on  
11 those clients. It's my responsibility. It's not me to just  
12 gather the cases and say, Hey, committee, here is 3 percent.  
13 I do the work and I just sit on the sidelines. That's not  
14 how it works.

15 And I urge this Court to appoint me as a co-lead  
16 counsel. Alternatively, on the steering committee. But I  
17 put my money and my time and my effort where my mouth is by  
18 filing the cases. It's very easy, as Mr. Gustafson knows in  
19 the Medtronic case and Mr. Zimmerman and all of us on this  
20 committee that worked on those two cases on the Plaintiffs'  
21 committee, it's very easy to sit back, not file your cases;  
22 when a settlement is negotiated then you fill out one form.  
23 It puts lawyers at a disadvantage when they are talking  
24 settlement if settlement is ever an issue in this case  
25 because you're negotiating for 2,000 people and then when

1 you finish the settlement negotiation all of a sudden when  
2 you got to give notice you got 8,000 people that show up and  
3 then you have to ratchet down the money and you have  
4 problems.

5 So my issue only with this is not one of  
6 disagreement. Bucky and I are personal friends. We're  
7 still friends. Dan and I are. Virtually everybody here I  
8 will work very cooperatively with. But if the Court tells  
9 me to withdraw my application to be lead counsel, I'll do  
10 that in a New York second. It's your call. If the Court  
11 thinks one is the way it should go, that's okay.

12 Matt Moreland in my office, who was a former  
13 federal court law clerk for years and has worked for me for  
14 over ten years, sits on the board, he was past president of  
15 the New Orleans Chapter of the Federal Bar Association.  
16 It's the largest in the United States. He sits on the  
17 board. Actually he was sitting on the board with Judge  
18 Gelpi in Puerto Rico who is the federal judge. And all he  
19 does is work half the time working on that.

20 I have to support that. When he's gone, he gets  
21 paid whether he's there or not. Those are important things  
22 for lawyers to do is to support unheralded pro-bono type of  
23 projects. I helped write the first Head Start Project in  
24 the south. My father was the only legislator in Louisiana  
25 who voted against every Jim Crow Law that they were passing

1 in the late 50s and early 60s. The only one. I had Ku Klux  
2 Klan crosses burned in my yard. And it's very difficult  
3 following in those footsteps, and I ask for your support.

4 DISTRICT JUDGE KYLE: Before you sit down, let me  
5 just -- it would seem to me that one issue we have to  
6 address here is, whether we have a single lead counsel or  
7 co-lead counsel, is that group's got to get along with each  
8 other. And you're telling me you get along and yet you're  
9 not on the list.

10 MR. BECNEL: I was asked to be on the list if I  
11 would withdraw my name to be co-lead counsel. In fact, I  
12 was told I could have two spots on the list.

13 Now, if that's appropriate, scratch me off of that  
14 and do whatever. But once I filed that application, two  
15 days before the meeting was even called, and when I came  
16 here I was told, Well, this is the leadership, without  
17 anybody participating at that time. Withdraw and you got  
18 two spots. Is that appropriate? I don't know. That's not  
19 the way I would have done it.

20 The way we did it in the past many times is, for  
21 example, when Judge Fallon and I did the Luling Ferry case,  
22 which killed 78 people, Judge Rubin, who was one of my  
23 mentors, said, Gentlemen, we're going to try this case one  
24 year from today. And he says each person who has a client  
25 who was killed in this accident will have one vote. I had

1 the most clients by far, five times more than almost anybody  
2 else. And as a result of that, each person had a vote and  
3 you voted by the number of cases you had filed. And that  
4 was your responsibility. We all got along very well.

5 I have never had a disagreement on litigation  
6 strategy in a case, on settlement strategy in a case, on who  
7 was to do what in a case in my life. And I have lived in  
8 the courtroom.

9 My only disagreement is I think you ought to have  
10 a commitment here today, what are you going to charge people  
11 because you have state court actions. A lot of people want  
12 to go there. Mr. Gustafson, the three times we met in  
13 Puerto Rico at the insistence of the federal judge there,  
14 didn't make the trip. Most people didn't make the trip.  
15 Some did, but most people didn't that are on this slate.  
16 That's no reflection on their ability or their commitment to  
17 the case.

18 I think Mr. Gustafson in the preemption argument I  
19 heard, and he'll tell you that to this day, was the most  
20 brilliant argument in the courtroom that I had ever seen.  
21 And he's not a product liability lawyer. He is primarily a  
22 securities lawyer. It was fabulous. And Bucky did a  
23 magnificent job in settlement. Ron Shelquist and I do grunt  
24 work. We do the cases where nobody else wants to do  
25 documents. I have two state court judges that are retired

1 that work for me and they do whatever is required of them.

2 You know, it's unique to do the type of work I do.  
3 I'm leaving here -- I have to get out of here for one  
4 o'clock to catch a flight to argue the Heparin case.

5 DISTRICT JUDGE KYLE: We better let somebody else  
6 talk then.

7 MR. BECNEL: Thank you, Judge. I appreciate your  
8 time.

9 DISTRICT JUDGE KYLE: Thank you, counsel.  
10 Yes, sir.

11 MR. QUETGLAS: Good morning. My name is Eric  
12 Quetglas from the District of Puerto Rico. I have filed an  
13 application to be a part of the Plaintiffs' Steering  
14 Committee or co-lead. At this time my intentions are just  
15 to be a part of the committee. We have 160 Plaintiffs in  
16 Puerto Rico that we represent the specific cases. In one of  
17 the cases we join, as I said, to -- we filed our separate  
18 action for one and then a class action for the other.

19 And I believe it's very important, and like your  
20 Honor asked, to have someone from Puerto Rico in the group.  
21 Now, although it's true that I'm willing to work and  
22 participate with the group as such, I do support them. I  
23 believe these are great attorneys. I also believe it would  
24 be better to have someone participate directly and not  
25 indirectly. In other words, I could work through Camilo

1 Salas. I could work through another firm in the group with  
2 whom I have done work before, the Whatley firm. But I do  
3 believe it's important in this case to have someone from  
4 Puerto Rico in the room and maybe assigned directly to the  
5 group or assigned liaison counsel from Puerto Rico. And  
6 there are various reasons.

7 First, we have the fact of the language. We have  
8 a Spanish-speaking population. All Plaintiffs are Spanish  
9 speaking. Most of the Court or part of it should be in  
10 Puerto Rico. The plants, the manufacturing plants, are in  
11 Puerto Rico. The people there, not all of them speak  
12 English. And even those who do like me, they do understand,  
13 but they will communicate better with people in Spanish.  
14 And also most of them don't. So we can assist the group.  
15 We just want to work together and be able to assist the  
16 group and providing our help in these matters.

17 Also there are issues of law like tolling and  
18 damages that are different from most of the laws of the  
19 United States. We apply the civil law that comes from  
20 Spanish civil court. Tolling issues might be different.  
21 Damage issues might be different.

22 And take into consideration the large group of  
23 people that we represent, and the large group of people that  
24 are in Puerto Rico that we do not represent but we have been  
25 working together through Mr. Becnel and John Nevares, I

1 believe it's fair to have someone from Puerto Rico in the  
2 group.

3 And I'm willing to work together. I believe we  
4 will provide direction to the group. I believe we can be of  
5 great assistance to the group in matters dealing with  
6 Spanish; in matters conducting discovery in Puerto Rico, we  
7 can arrange it there; matters dealing with Plaintiffs who  
8 need to respond to issues that aren't in English and maybe  
9 need assistance in translations to Spanish.

10 So basically we do support the Gustafson Group.  
11 We also support Mr. Becnel's position, and we just are  
12 willing to work together with all of them. We do believe  
13 that we should be allowed at least one position on the  
14 Plaintiffs' Steering Committee. It could be like a liaison  
15 position. Any questions?

16 MAGISTRATE JUDGE MAYERON: No. Thank you,  
17 counsel.

18 DISTRICT JUDGE KYLE: Yes, sir.

19 MR. SALAS: May it please the Court, I don't want  
20 to belabor the point. My name is Camilo Salas. I'm based  
21 in Louisiana but I do a lot of work in Puerto Rico and for  
22 several years I have been doing that. I have worked with  
23 John Nevares who is a lawyer based in Puerto Rico. He also  
24 was also a former Louisiana lawyer.

25 In this case originally we filed a great number of

1 cases in Puerto Rico because of the simple reason that the  
2 devices at issue are manufactured in Puerto Rico, and we  
3 felt that a lot of discovery is probably going to take place  
4 down in Puerto Rico. The case got transferred here,  
5 nonetheless, but the issues of Puerto Rico remain up front  
6 in this litigation.

7 Because of that, John Nevares and myself have  
8 agreed to continue to work in these cases. Because of that,  
9 my name has been included in the potential steering  
10 committee as being a lawyer who speaks both English and  
11 Spanish and who has the expertise of having litigated large  
12 cases in Puerto Rico, and is the reason why my name is in  
13 there.

14 So I feel that my inclusion in the steering -- in  
15 the potential Plaintiffs' Steering Committee should satisfy  
16 the concerns of having at least one person who speaks both  
17 English and Spanish and has the experience in Puerto Rico to  
18 be able to address those issues and coordinate work done in  
19 Puerto Rico.

20 We're not saying that I will do all the work.  
21 What I think the proposed PSC's position is that I will act  
22 as a coordinator and then assign the work to Mr. Nevares  
23 down there, Mr. Quetglas and other lawyers who may want to  
24 work there. I just wanted to clarify that for the Court and  
25 I feel that the issue for Puerto Rico is adequately covered.

1 Thank you.

2 DISTRICT JUDGE KYLE: Thank you.

3 Mr. Zimmerman --

4 MR. WEINSTEIN: May it please the Court, my name  
5 is Scott Weinstein from Morgan & Morgan in Florida. We're  
6 the largest Plaintiffs' firm in the State of Florida,  
7 probably in Florida and Georgia, with offices in both of  
8 those states. We do not object to the Gustafson Group  
9 proposal.

10 Here is the problem, your Honors. We complied  
11 with the time limitations set forth by this Court. We have  
12 probably more cases in Florida than any other firm just  
13 because of our sheer size. And we filed two cases in this  
14 Court two weeks ago, I believe, and then complied with the  
15 deadlines proposed by this Court to apply for a leadership  
16 position. Nobody reached out to us from any of these other  
17 groups.

18 And the problem is that we don't want to create  
19 this adversary situation that I think that's palpable that  
20 the Court can feel. We're not going to do that. The  
21 problem is that the deal was done before the Court imposed  
22 deadlines for firms such as ours to submit our applications,  
23 and we did timely submit our application.

24 The problem for us now is to fight for the rights  
25 of our clients to be represented here. I believe there is

1 one other Florida firm on the proposed leadership structure  
2 from the Panhandle, which the rest of us Floridians don't  
3 consider the Panhandle Florida. That's not really fair.  
4 They are in a different time zone. But there are some major  
5 Florida issues raised by the Plaintiffs in this case. One  
6 of them is medical monitoring. Florida is a medical  
7 monitoring state, for instance.

8 But I'm in an untenable situation because I don't  
9 want to upset the apple cart. But at the same time our  
10 application was timely filed. Nobody contacted us. Nobody  
11 even asked us to withdraw our application as they did with  
12 Mr. Becnel. Just completely ignored, although I must say  
13 that I did reach out to try to make some -- you know, but  
14 people are busy. They are all preparing for this.

15 So I think, your Honors, that there's a  
16 fundamental flaw unintended by everybody that the group  
17 forms and closes. Sort of a game of musical chairs.  
18 Everybody negotiates their side deals and whatever happens.  
19 But the Court says come apply. And then we're in the  
20 situation of being outriders or upsetting a group that's  
21 qualified and having them say, Hey, look, you applied now.  
22 You upset the apple cart. We're not going to include you in  
23 any decisions or committees or anything like that.

24 And because of that, and because we filed the  
25 application, I felt remiss if I didn't address this Court.

1 We have not withdrawn the application because, frankly,  
2 nobody has asked us to. And I think our firm is eminently  
3 qualified. I don't think anybody on the Gustafson Group  
4 would deny that our firm is qualified to be in this  
5 structure. But I would hope that the structure would  
6 include my firm, what we have to bring to the table and the  
7 sheer size and resources that our firm has that are set  
8 forth in our application. Thank you.

9 DISTRICT JUDGE KYLE: Thank you.

10 MAGISTRATE JUDGE MAYERON: Just so I'm clear, your  
11 application is to be on the Plaintiffs' Steering Committee?

12 MR. WEINSTEIN: Yes, your Honor.

13 MAGISTRATE JUDGE MAYERON: All right.

14 DISTRICT JUDGE KYLE: Counsel.

15 MR. ZIMMERMAN: May it please the Court, I'm Bucky  
16 Zimmerman, your Honor. I have a unique point of view based  
17 upon the fact that I have been appointed several times by  
18 this Court, by the US District Court in Minnesota, to be a  
19 lead counsel in many of the recent MDLs. Just for  
20 perspective, it started when Judge Magnuson appointed me to  
21 the lead counsel in the TMJ Litigation. Then Judge Davis  
22 appointed me co-lead counsel in the Baycol Litigation.  
23 Judge Frank appointed me to the co-lead counsel in the  
24 Guidant Litigation. Judge Rosenbaum appointed me co-lead  
25 counsel in the Medtronic Litigation. And Judge Tunheim, a

1 liaison counsel in the St. Jude's Litigation. And in the  
2 Viagra Litigation, Judge Magnuson appointed me as liaison  
3 counsel.

4 So I come to this Court with a certain degree of  
5 experience being appointed by this Court as co-lead -- as  
6 lead counsel, as co-lead counsel, and liaison counsel. And  
7 you can tell from today I'm not asking to be appointed lead  
8 counsel, although I must say that I was desirous at first of  
9 being a co-lead counsel in this case.

10 And I stepped back from that position in the  
11 interests of deference to what was becoming a very delicate  
12 balance. And the delicate balance becomes created as  
13 Plaintiffs lawyers come together to try and figure out how  
14 we're going to be a team to take on law firms that are  
15 teams. They work together. They are together. They are  
16 teams of lawyers coming from fine law firms all over the  
17 country.

18 I've worked with Mr. Beck. He was lead counsel in  
19 the Baycol Litigation on the defense side and we worked, I  
20 wouldn't say closely together, but we worked very strongly  
21 advocating our points of view. And I can tell you when  
22 you're on the Plaintiffs' side and you got a cobbled  
23 together law firm versus a law firm that is directed by the  
24 hierarchy of a law firm, you have to be very careful with  
25 your mix. You have to be able to work together and trust

1 one another and be able to come together and do the things  
2 that need to be done as a law firm taking on the other side.

3 For lots of reasons, none of which are  
4 particularly appropriate to be brought out in open court  
5 when both sides are present, this group was put together to  
6 do just that. To find the greatest strengths and the  
7 greatest pyramid of organization to do the tasks that need  
8 to be done. It's not personal. Danny Becnel and I go back  
9 a long way and he's correct, I have been a guest in his  
10 home. He has been a guest in my home. We have a  
11 disagreement in this particular case. The body of lawyers  
12 working here today, for whatever reason, and I don't think  
13 it's necessarily appropriate to share with the Court, feel  
14 that this is the right group for this case at this time.

15 With Bucky Zimmerman, who has played a role as  
16 lead counsel in many of the cases before this Court,  
17 stepping back a little bit to be chair of a Plaintiffs'  
18 Steering Committee -- and maybe that title is not  
19 appropriate and I'm happy to talk about it -- but to take a  
20 slightly different role in this case to allow the chemistry  
21 of this case to work properly, to do what we have to do for  
22 clients against a well-respected, well-armed, and  
23 well-organized defense. Those are the things we have to do  
24 in every case and we learn in every case.

25 Without citing names, your Honor, we had a problem

1 in Baycol. We had a slate. We had a competing slate. We  
2 had what we call a beauty contest in front of Judge Davis.  
3 Judge Davis picked my slate to be the lead counsel. There  
4 was another slate that he didn't pick to be lead counsel and  
5 we went forward. But Judge Davis then put onto that  
6 committee people that we did not have on the slate because  
7 he felt it might be a good compromise. What difference does  
8 it make? You go from 14 to 15 or 17 to 18.

9 It became a huge problem, your Honor. And I don't  
10 say it's going to happen in this case but it became a huge  
11 problem because that 17th lawyer got us into a lot of  
12 problems. And I don't want to cite what they are. Phil  
13 knows, I know. It wouldn't happen with Danny and I'm not  
14 saying it would happen with Danny or the lawyer from Morgan  
15 & Morgan. But we have to be careful because we vouch for  
16 the 16 people we put forward, your Honor. We've said to  
17 you, We come together, we work together, we're going to work  
18 together, we're going to police ourselves. We're going to  
19 be there for you.

20 But if you start changing the mix considerably it  
21 becomes a difficult problem for us because then we don't  
22 have the same commitments that were made at the front end,  
23 the same organizations, the same compromises that we made  
24 like Bucky Zimmerman stepping back a little bit in this  
25 particular case. Otherwise I would be before your Honor

1 saying I deserve to be co-lead as well. My resume', my  
2 history, my experience, would indicate to the Court that I  
3 should be a co-lead.

4 But because of some things that are going on in  
5 other litigation, because of other commitments or other  
6 reasons, I've said to the leadership I'm willing to step  
7 back a little bit. I want a role. I want a large role.  
8 But I'm willing to step back a little bit. But not to allow  
9 somebody else to come in front of me. I don't think that  
10 would be fair. But because in the interests of order and in  
11 the interests of doing it right, in the interests of keeping  
12 this delicate balance delicate, together, that's my  
13 commitment to the group. And many, many, many other people,  
14 some in this courtroom and some not in this courtroom, have  
15 done the same thing.

16 So I submit to your Honors, this slate comes to  
17 you not because it's just kind of been ordained from space,  
18 but because a lot of people have spent a lot of time trying  
19 to make the appropriate compromises to do what we have to do  
20 to take on the battle and join the fight in a way that the  
21 Plaintiffs' lawyers or 90 percent of the Plaintiffs' lawyers  
22 in the case believe is the right thing to do. And there  
23 will be some that don't agree.

24 With regard to chairing the Plaintiffs' Steering  
25 Committee, your Honor, and Magistrate Judge Mayeron, you

1 asked that question, we tried to find a way where there was  
2 going to be three people kind of in charge without there  
3 being three co-leads. The Lockridge firm, Rob Shelquist,  
4 Dan Gustafson as the general, and Bucky Zimmerman as  
5 whatever to be kind of a three-person executive committee  
6 without necessarily calling it such. We came up with  
7 somewhat new titles so we could keep this one leadership  
8 idea together.

9 Because I'm going to tell you, honestly, in  
10 Guidant four lead counsel was inefficient. It created too  
11 much work at the top. Dan and I were co-lead in Medtronic  
12 and I think it worked well. But for certain reasons I  
13 wanted to step back and let there be one in this particular  
14 case.

15 And it's a little bit of an experiment, your  
16 Honor, but I think it's the right thing to do and I'm here  
17 to say. But if the Court wants to have lots of other leads,  
18 I would like the Court to consider me. But I think in  
19 honesty and fairness, this is the way we should go. And to  
20 tinker with it unfortunately creates some balance problems  
21 that it's hard to explain in an open courtroom but I can  
22 submit to you will change people's views and other people  
23 then will want to step forward and say, Well, what about me?  
24 What about me? I stepped back. What about me?

25 DISTRICT JUDGE KYLE: I can understand somebody

1 stepping back. I can understand the Gustafson Group making  
2 some decisions that they made. But what about the issue  
3 that's just been brought up by counsel from Morgan & Morgan?  
4 Not basically in the mix at all, getting in either late or  
5 you folks getting in early, there's somebody who was not  
6 even considered. Should we just adopt the Gustafson  
7 proposal and exclude not only those who probably were under  
8 consideration and not selected, but also others who were  
9 not?

10 MR. ZIMMERMAN: Yes, your Honor, we would like to  
11 talk to them. We would like to figure out if we can figure  
12 out something that would be appropriate under the  
13 circumstances. There's lot of committee work. There's  
14 state liaison work. There's a lot of thing going on in  
15 state court. There are other things in a PSC that have to  
16 do with committees, chairs of committee, discovery  
17 committees. We have an open tent and we want to accommodate  
18 the good players.

19 And they make a persuasive argument on some, Well,  
20 gee, I came late. Why wasn't I included? And, frankly, I  
21 haven't been able to talk to Dan or others about those  
22 factual circumstances. But I think what Dan would say --  
23 and he is a big boy and he can come right up behind me and  
24 tell me -- but I think what he would say is we would like to  
25 talk to them and see what would be appropriate under the

1 circumstances of this case. Because by adding one, what  
2 about the other people that had been there at the beginning  
3 but we asked please step back in this case. Your turn will  
4 come maybe in the next case.

5 We don't want to have 30 people on a committee  
6 because it gets unwieldy and it gets expensive and everybody  
7 wants to be paid for their time and it becomes a problem at  
8 the back end of the case when there's a finite amount of  
9 money to distribute for the appropriate compensation and  
10 common benefit.

11 Which goes to one of Danny's points, which is why  
12 I think with all due respect he is being naive when he says  
13 I'll do it for 3 percent. Well, Judge, I can't tell you if  
14 3 percent is right. If the case settles tomorrow for \$100  
15 million, 3 percent might make sense. But if it's five years  
16 down the road and we've all worked for and we've got  
17 lodestars approaching \$50 million, 3 percent doesn't make  
18 sense.

19 So we can't tell you at the front end, nor should  
20 we be asked to predict at the front end how we're going to  
21 do fees. And to kind of throw it out there as sort of a  
22 loss leader isn't good for the practice of law, isn't good  
23 for the Plaintiffs' bar, and really doesn't serve the  
24 interests of justice to do that. We want to do it right.  
25 We want to have a task force come forward, look at this

1 issue, look at what's going on in the environment of MDLs,  
2 come together, report to us, let us report to you, have  
3 dialogue on how fees should be set and common benefits  
4 should be set. Learn from the lessons that we've had in the  
5 past and do it right.

6 But to just throw out a number, I'll do it for 3  
7 percent when someone else will do it for 2 percent, while  
8 I'll do it for 1.5 percent, we don't get anywhere with that,  
9 your Honor. That's just loss leaders and in today's  
10 environment Plaintiffs' side can't be losing money while the  
11 Defense side is making money. That's not going to create  
12 justice.

13 Thank you.

14 DISTRICT JUDGE KYLE: Thank you.

15 Yes, ma'am.

16 MS. OLIVER: Good morning.

17 DISTRICT JUDGE KYLE: Good morning.

18 MS. OLIVER: May it please the Court, my name is  
19 Alyson Oliver from the Michigan Eastern District. We are  
20 new to MDL mass tort litigation. We didn't know anything  
21 about the meeting that apparently took place prior to the  
22 Court's deadline, much like the Florida attorneys here.

23 We did get our case in. We got it transferred,  
24 and we got our application in prior to the May 19th  
25 deadline; but apparently before that time the groups have

1       come together and they've had their opposite views in  
2       regards to many different things.

3               I'm amazed and awed by the talent in this room.  
4       There's a lot to be learned. But I think what we could  
5       provide is a common ground. I think that the attorneys who  
6       are lead in this case, and have been in many others, have a  
7       long history in regards to divergent ideas, and that comes  
8       through very clear in regards to the attorney fee issue  
9       that's before the Court.

10              I have a client who expects me, much like  
11       Mr. Becnel told the Court, he expects me to represent him.  
12       I've committed to him what I expect to be paid for my  
13       representation. I want to do the work. My colleague wants  
14       to do the work. We want to participate in this case. We  
15       don't want to be represented by attorneys who apparently,  
16       prior to any deadline set by this Court, came together and  
17       formed a group to represent our clients.

18              So we agree with that concept. We would like to  
19       move forward in regards to a steering committee or any  
20       liaison committee appointments and be able to do that.

21              Thank you.

22              DISTRICT JUDGE KYLE: Thank you.

23              Anybody else like to be heard? Mr. Gustafson, you  
24       look like you're about to stand up.

25              MR. GUSTAFSON: I would never resist the urge to

1 speak again, Judge, if you want.

2 DISTRICT JUDGE KYLE: It's up to you.

3 MR. GUSTAFSON: Let me just say one thing because  
4 I think there's a bit of suggestion somehow that if you're  
5 not on the PSC you're going to be excluded. That's just not  
6 the way I practice in this area and it's not the way we did  
7 it in Medtronic. Many people who were not on the PSC did a  
8 significant amount of work. And I have told -- I've told  
9 everyone who has asked me that, you know, we can't have an  
10 unlimited number of people on the PSC, but that doesn't mean  
11 that you can't participate and represent your clients, do  
12 good work for the common benefit of all.

13 I do think, though, to sort of pick and choose  
14 based on who objects is unfair to the people who stood back,  
15 the very qualified people who stood back and supported the  
16 group. Thank you, your Honor.

17 MR. BECNEL: May it please the Court, may I  
18 respond to both comments?

19 I was good enough to have two spots on the PSC if  
20 I withdrew my application. So there's no disagreement. The  
21 issue is if I have already filed it, why should I withdraw?  
22 If this Court chooses not to put me on, that's this Court's  
23 responsibility. But remember when you file those cases,  
24 this Court is going to look to the cases that are filed from  
25 the first pool. As Judge Fallon did and almost every MDL

1 judge that I know of, you get the first filed cases. You  
2 fill out those fact sheets. Those are going to come due  
3 probably 30 days after you issue the appropriate orders.  
4 And that's the pool you pick from.

5 And so here you would have, remember, the first  
6 300 cases filed, I had 244. 244. Mr. Nevares had two  
7 Plaintiffs. I had to use him to get it filed. He doesn't  
8 represent those people. He sent a letter this morning, and  
9 I think this Court gave instructions you have to get all  
10 your paperwork in by the 19th -- and this morning is not the  
11 19th -- when I got it early this morning that he had said,  
12 Well, I'm -- you know, you can make all kind of deals. This  
13 is a deal-making business among Plaintiff lawyers, and I  
14 don't have any problem with that.

15 And as I told this Court, I support each and every  
16 one of these fine lawyers. Not one do I not support. Judge  
17 Fallon in a recent case, the Murphy Oil spill which we  
18 settled within one year for \$330 million, appointed five of  
19 us to be leads in that. And we worked it out. He gave us a  
20 10 percent fee total, and the clients only paid 10 percent,  
21 period, end of story. And the committee got that 10 percent  
22 to be divided between the committee.

23 For example, before Judge Magnuson, nobody wanted  
24 to be lead counsel in the Viagra case. Not one person.  
25 I've taken almost all of the depositions, travelled to

1 London on a 24-hour turnaround to take depositions in  
2 London. Did the motion practice before. Other people chose  
3 not to do that. I thought I owed a responsibility to those  
4 people who contacted us and others, and they sat on the  
5 sidelines. Judge Fallon, for example, in Murphy Oil  
6 appointed 21 people to the Plaintiffs' committee.  
7 Appointing people to the committee you will find some step  
8 forward and do the work, some get the appointment and set on  
9 the sidelines and watch.

10 And, you know, I don't want you to think that I'm  
11 being disagreeable in any way, shape, or form in this case.  
12 I put in my paperwork that Eric, as a Puerto Rican lawyer,  
13 we need that. Absolutely need it. I brought in Camilo on  
14 all of my cases to help if we have to go to Puerto Rico  
15 because he speaks fluent Spanish and fluent English. He and  
16 I are co-counsel on probably three or four major pieces of  
17 litigation involving tens of thousands of people.

18 And the issue is if you don't withdraw -- if you  
19 want me to withdraw that application, Judge, I'll withdraw  
20 it.

21 DISTRICT JUDGE KYLE: I don't want you to do  
22 anything.

23 MR. BECNEL: You know, I just followed your rules.

24 DISTRICT JUDGE KYLE: I don't quite understand  
25 this issue about you don't want to withdraw it. You have an

1 application in. Either you get appointed or you don't get  
2 appointed. You don't have to withdraw it. You're either  
3 going to be in or out. It's not going to be Mr. Gustafson  
4 who makes that decision. The Court is going to make that  
5 decision.

6 MR. BECNEL: That's what I thought the MDL process  
7 is about; that the Court makes the decision.

8 DISTRICT JUDGE KYLE: We do. I don't think  
9 there's any doubt about it.

10 MR. BECNEL: All I'm saying is, you know, I didn't  
11 try to put a group together. I filed my application singly.  
12 I said I would work with each and every person. I said I  
13 would charge this fee not because I wanted to charge the  
14 fee. You asked us to put in your papers what would you  
15 think appropriate to charge as common benefit fee. If you  
16 say 5 percent, 10 percent, 3 percent. In Vioxx, Judge  
17 Fallon said 2 percent if you sign by this date, 3 percent if  
18 you sign by that date, 5 percent if you sign by that date.  
19 And people could come in early, late, or stay in state court  
20 or whatever.

21 You know, there's no secret rule. As you know,  
22 recently Judge Pointer just died and he wrote basically the  
23 first manual for complex litigation and was instrumental in  
24 doing that. And Judge Pointer would say there are no fast  
25 set rules in MDLs. We fly by the seat of our pants and what

1 makes common sense to move these cases forward.

2 For example, nobody had ever heard of a tolling  
3 agreement in a case. I brought it up in the proposed case  
4 before Judge Fallon. He thought it was a great way to  
5 manage lots of litigations; that you sign up on tolling  
6 agreement. That the Defendants then get the fact sheet that  
7 you have to do. Nobody ever thought of having direct  
8 filings into an MDL when you could file all of the cases for  
9 administrative purposes and then you would remand them back  
10 if the thing didn't settle.

11 Judge Schell in the Norplant case did that at my  
12 suggestion. Put 50 in a single filing, and on and on and  
13 on. So judges make the decision of what is more efficient,  
14 what is more practical, and what is the best way to do it.  
15 But I'm just the oldest guy here.

16 DISTRICT JUDGE KYLE: I thought I was.

17 MR. BECNEL: You probably may be a little bit  
18 ahead of me, but not much. Not much.

19 DISTRICT JUDGE KYLE: Thank you.

20 MR. BECNEL: But, you know, I'm not looking to  
21 cause controversy. As I said, I've worked with each almost  
22 every one of these people in this room in one case or  
23 another. And my sincere desire is to represent the client  
24 successfully. All lose as a group. And that's all I ask  
25 for to be considered either as lead, co-lead counsel, or if

1 the Court chooses, to be on the Plaintiffs' Steering  
2 Committee. Either/or. Thank you, your Honor.

3 DISTRICT JUDGE KYLE: Thank you.

4 MR. BECNEL: And Mr. Zimmerman would make an  
5 excellent co-lead counsel.

6 DISTRICT JUDGE KYLE: Thank you.

7 Anyone else? Going, going, gone.

8 Okay. Anything from the defense? Probably not.

9 MAGISTRATE JUDGE MAYERON: I put on there on the  
10 agenda do we need to address the issue of lead counsel for  
11 the Defendants? I am assuming not, but if that's not the  
12 case, obviously there are three law firms here, two or three  
13 law firms represented. I am assuming you are all working  
14 together and we don't need to address the issue of lead  
15 counsel given you are all basically one Defendant. Is that  
16 correct?

17 MR. BECK: Yes, your Honor. My name is Phil Beck  
18 and we will all be working together and we don't need any  
19 special designation.

20 MAGISTRATE JUDGE MAYERON: All right. And do the  
21 parties have any or Plaintiffs at this point any thought  
22 about whether we need at this point to address the issue of  
23 a state liaison counsel, or is that something that could be  
24 addressed once we get the lead counsel in place and the  
25 steering committee in place; then address at that point the

1 need for state liaison counsel?

2 MR. GUSTAFSON: I believe we should defer that  
3 issue, your Honor, until we have a leadership structure in  
4 place.

5 MR. BECNEL: I would join in that. I would only  
6 ask that the persons considered have state cases filed as  
7 well as federal cases. I think this order only said federal  
8 cases, your Honor, in order to be even able to apply. So I  
9 think with the joint, because they have to interface with  
10 that state court judge.

11 MAGISTRATE JUDGE MAYERON: Does anybody disagree  
12 with that; that the issue of state liaison counsel is not  
13 something that needs to be appointed right now but rather  
14 should be something we take up after the major leadership  
15 structure on the Plaintiffs' side is put in place?

16 With all these people in the courtroom, I am  
17 assuming somebody needs a break.

18 DISTRICT JUDGE KYLE: I am assuming you can find  
19 facilities out there. There's probably not enough to  
20 accommodate everybody. There are ones above and below, too.  
21 Let's break for ten minutes.

22 (Recess taken from 10:39 to 10:52 a.m.)

23 DISTRICT JUDGE KYLE: Okay. The next item on the  
24 agenda is the issue of a master complaint.

25 MAGISTRATE JUDGE MAYERON: Judge Kyle and I were

1 talking about whether there was a need to discuss prior  
2 relationships that we may have had with attorneys here in  
3 the room. For myself, I have encountered a number of  
4 attorneys in the Minnesota Bar in my professional career  
5 when I was in private practice. I don't socialize with any  
6 of them, but I did want to make sure that people knew that  
7 at one point Mr. Shelquist and I were both attorneys. I was  
8 a shareholder, I don't know if Mr. Shelquist was an  
9 associate or a shareholder at that time, at the law firm of  
10 Popham Haik, which imploded in 1997. Mr. Shelquist left in  
11 1995. I left in 1997.

12 So we were associated with each other as attorneys  
13 more than a decade ago. But I at least wanted to make sure  
14 that all of the parties were aware of that. I certainly  
15 don't feel that my former relationship with Mr. Shelquist  
16 would have any impact on my impartiality in this case, but I  
17 wanted to make sure I disclosed that to all attorneys  
18 present.

19 DISTRICT JUDGE KYLE: My disclosure, if you want  
20 to call it that, I guess I'm familiar with Minnesota  
21 counsel, not well and I don't socialize with any of them but  
22 I have them before me from time to time as a lawyer in some  
23 of the other litigation that's going on in St. Paul  
24 involving Medtronic, just because I am a neighbor of Judge  
25 Magnuson and Judge Frank over there, so some of these items

1 get discussed.

2 One of my former law clerks, Tom Schumacher, he  
3 was a law clerk 10 or 12 years ago, recently, must be the  
4 last 6 months, has gone out to Medtronic in some kind of  
5 compliance capacity. I see Tom about once a year when I  
6 have all the law clerks back for a social event at our  
7 house. That's about the only contact there.

8 Jan Symchych, who I know as a former lawyer at  
9 Dorsey, was a Magistrate Judge of this Court, but I don't  
10 think I have seen Jan for three or four years since then.  
11 So I don't have any ongoing contact with her.

12 I have no stock in Medtronic. I am a -- I do have  
13 some stock in a mutual fund, Mairs & Power. They have a  
14 number of Minnesota companies in their portfolio including  
15 Medtronic. But at least as I read the rules, that is not  
16 disqualifying and isn't going to impact me at all. But I  
17 just thought, again, everybody should know it for whatever  
18 it may be worth.

19 Other than that, I lead a pretty dull life.

20 Okay. Now, we will -- let's go to the master  
21 complaint. There's been some suggestions, I think in maybe  
22 all the papers, that a master complaint should be put  
23 together in the near future, and I guess prior probably to  
24 any motions to dismiss which are also contemplated. But I  
25 would like to hear any views that counsel have on that

1 topic.

2 Anybody want to be heard? Mr. Gustafson, do you  
3 want to start on this one?

4 MR. GUSTAFSON: I would be happy to, your Honor.  
5 I think that we think that a master consolidated complaint  
6 is a good idea. In the Medtronic and I believe in the  
7 Guidant case, although I was not in it, we had a master  
8 consolidated complaint which we used to be the operative  
9 document for discovery and motion practice. I think it's a  
10 good idea here. I think in our papers we suggested 30 days  
11 to file that complaint after the leadership issues are  
12 decided, and I think that gives ample time.

13 MAGISTRATE JUDGE MAYERON: What is your  
14 position -- I believe in Mr. Becnel's proposal he talked  
15 about the need for doing some discovery prior to the filing  
16 of the master complaint. He also talks about it in relation  
17 prior to the filing of the Motion to Dismiss based on  
18 preemption. If you could comment on the need for discovery  
19 in connection with either of those pleadings.

20 MR. GUSTAFSON: I think if the Motion to Dismiss,  
21 12(b)(6) motions are going to be filed on the pleadings,  
22 that discovery is not necessary. If it's going to be some  
23 sort of a broader motion that pulls in information outside  
24 of the pleadings, there is a need for discovery.

25 In the Medtronic case we had an abbreviated

1 discovery period and then it was a Summary Judgment Motion  
2 on preemption. But I understand from my limited  
3 conversations with with defense counsel here they intend to  
4 make a 12(b)(6) and not a Summary Judgment Motion. And I  
5 think for purposes of a 12(b)(6) motion, no discovery is  
6 necessary.

7 DISTRICT JUDGE KYLE: Do you think that  
8 consolidated complaint could be put together within 30 days?

9 MR. GUSTAFSON: I do, your Honor.

10 DISTRICT JUDGE KYLE: Anyone else?

11 MR. BECNEL: Your Honor, the major reason why I  
12 brought those two issues up before the Court is preemption  
13 is the elephant in this room. Since the Supreme Court  
14 decided Riegel, and there's one more case, you know, the  
15 major preemption decisions now have -- one was a 4-4 tie,  
16 the other one was pretty lopsided one way with Medtronic,  
17 there are some exceptions in Riegel. One is a manufacturing  
18 defect.

19 We allege that there is a manufacturing defect in  
20 these leads just as there was in the Telectronics pacemaker  
21 leads. There are a number of experts that seem to concur  
22 with me. And everything I know is because I tend to try to  
23 hire some of the best experts, and I think I put in my  
24 papers some of the various firms I had contacted with  
25 biomechanical engineers and so on and so forth, heart

1 specialists and the whole nine yards.

2 If indeed there is a manufacturing defect and if  
3 there is indeed a violation of good manufacturing practices  
4 by the FDA, then there's an exception to the Riegel  
5 decision.

6 Now, I don't want to get into the law at this time  
7 because I think that that's for another day and another  
8 time. But if you don't do discovery on those two issues,  
9 whether it's a 30(b)(6) deposition immediately of the  
10 manufacturing personnel in Puerto Rico, or you don't do  
11 immediate 30(b)(6) discovery of whether indeed there was --  
12 and in every case under the Good Manufacturing Practices  
13 Act, when there's something like this on a recall, the  
14 company immediately appoints a committee usually of outside  
15 consultants, usually of internal people, and then they write  
16 a report. And that report usually says, Well, this, this  
17 and this happened. It was this person's lack of following  
18 the procedure of the company or something else, and we're  
19 going to do this so it never happens again. That's whether  
20 it's a plane crash, a ship collision, a train derailment and  
21 the like.

22 And so as a result of that, if we don't do that  
23 discovery right off the bat, I think I could be sued by my  
24 clients for legal malpractice. Or at least I don't have the  
25 request made to this Court to be able to do that

1 preliminary -- just like if you do before class  
2 certification, a lot of times you do a lot of class  
3 certification discovery and then you may brief it, and then  
4 the Court decides it, and then it goes on up.

5 But if we just say we're going to file a master  
6 complaint and nobody knows, under oath, whether good  
7 manufacturing was complied with or not, whether inspections  
8 took place or not, whether there were defects related to the  
9 leads or not, whether the metallurgy was mis-manufactured or  
10 not the right size or all of those various issues that  
11 metallurgists -- and I put an example of that, as you saw  
12 with the expert I had Felich (phonetically spelled)  
13 Engineering from Rhode Island in the previous Telectronics  
14 case. Those are a myriad of issues that need to be  
15 discovered by all of these fine lawyers here to be able to  
16 tell you, Hey, this is indeed an exception. And it's an  
17 exception because of A, B, C and D. And if we just do it on  
18 a master complaint and they file, then the only issue we  
19 have left, if you decide in favor of preemption, is an  
20 appeal to the Appellate Court.

21 That's the only reason I mention those things.  
22 And I don't say unlimited discovery. I say necessary  
23 30(b)(6) type discovery on the manufacturing defect, major  
24 30(b)(6) discovery on whether they complied with Puerto  
25 Rican FDA requirements.

1           As this Court knows, probably three-fourths of all  
2           of the drugs now manufactured in this country, including  
3           Digitek which just got a big recall, are manufactured in  
4           Puerto Rico because of tax reasons. That's why all of these  
5           companies go down there for tax reasons and they manufacture  
6           most medical products there, most drugs there, etcetera. So  
7           that was the reason I put that in there and that's this  
8           Court's call.

9           DISTRICT JUDGE KYLE: Okay.

10          MR. BECK: Thank you, your Honor. We agree with  
11          Mr. Gustafson's approach. We had suggested 14 days for a  
12          master complaint; but if they feel like they need 30 days,  
13          we defer to them on that.

14          We also agree that it would be inappropriate to  
15          engage in discovery in connection with what will be a  
16          12(b)(6) motion for failure to state a claim.

17          Mr. Becnel talks about whether there are  
18          exceptions to the preemption doctrine here. They are going  
19          to have -- they pleaded facts in the complaints that are on  
20          file now. They'll have facts in the master complaint. And  
21          they will either plead facts that establish a cause of  
22          action or they won't. But it's not a proper purpose of  
23          discovery to find out whether you have a cause of action.

24          So we think that discovery ought to follow the  
25          ruling on the Motion to Dismiss. If there's anything left

1 of the case, then the scope of discovery will be determined  
2 by what causes of action remain.

3 And we also believe strongly, your Honor, that  
4 piecemeal discovery inevitably leads to a lot of what I  
5 think of as metalitigation where we're arguing about the  
6 scope of preliminary discovery instead of getting to the  
7 merits of whether preemption applies and what, if anything,  
8 is going to remain in the case. There's always a problem if  
9 you take what Mr. Becnel referred to as limited discovery,  
10 then you're going to take that discovery all over again when  
11 there are, assuming there are, remaining causes of action.

12 So we believe that we ought to get a master  
13 complaint on file. We'll file a 12(b)(6) motion. If we go  
14 outside the pleadings, they can tell us so and the Court can  
15 tell us so and deny our motion. But if we've got a  
16 well-founded Motion to Dismiss, we ought to have that heard  
17 and resolved, and we'll win or we'll lose. And then  
18 whatever remains, if anything, we'll go forward with the  
19 discovery at that point.

20 In the meantime there's lots that we can do with  
21 whatever leadership group the Court appoints from the  
22 Plaintiffs' side in terms of agreeing on protective orders  
23 and protocols. So time will not be wasted.

24 Plus we believe, and I believe that certainly  
25 Mr. Gustafson's group believes, that we can brief the

1       preemption issues and whatever other 12(b)(6) issues there  
2       may be in a very expeditious way. We've got an aggressive  
3       schedule. Their schedule is a little bit different from  
4       ours. But we both, I think, take the approach that once we  
5       get a master complaint on file, we can turn to the 12(b)(6)  
6       issues and not waste a lot of time but instead get those  
7       things resolved, see what's left, if anything, and then  
8       agree on a discovery protocol.

9                 DISTRICT JUDGE KYLE: What's your time frame for  
10       filing a motion once the master complaint has been filed?

11                MR. BECK: Our whole time frame would have the  
12       whole thing briefed in 75 days so that the last brief would  
13       be in August. That -- I don't have --

14                DISTRICT JUDGE KYLE: Is that 30, 30 and 15 or  
15       something like that?

16                MR. BECK: It was -- we were talking about --  
17       well, it all sort of comes off of when the master complaint  
18       gets filed. But we would be talking about -- we talked  
19       about 30, 25 and 14, and theirs was a little longer than  
20       that. But, frankly, I think that if we get whomever you  
21       decide is the leadership group from the Plaintiffs' side, my  
22       guess is it's a five-minute conversation to agree on a  
23       briefing schedule, unless we're talking about a lot of  
24       discovery in the middle of it. But if we don't have  
25       discovery, I am 100 percent confident that any lawyer in

1 this room can sit down with us and reach an agreement on a  
2 briefing schedule and it will be one that's expeditious.

3 MAGISTRATE JUDGE MAYERON: Do you anticipate --  
4 and I'm not going to hold you to this because you haven't  
5 seen the master complaint -- but in light of the complaints  
6 that you have seen to date, other than the preemption issue,  
7 do you anticipate your Motion to Dismiss raising other  
8 issues?

9 MR. BECK: It could. Another issue that's lurking  
10 out there in some of them, for example, is a suggestion of  
11 fraud on the FDA which also is, I guess, broadly speaking  
12 that's preemption as well.

13 So there could be claims, for example, for medical  
14 monitoring under -- in states where there's no cause of  
15 action, for medical monitoring. So there could be some  
16 things like that, but the focus will be preemption.

17 MR. BECNEL: May I respond to --

18 DISTRICT JUDGE KYLE: Well, let's see if there's  
19 anybody else who wants to be heard. Anybody else on this  
20 topic, Plaintiffs or Defendants?

21 MR. BECNEL: Mr. Zimmerman and I lost with our  
22 colleagues the famous Buckman case before the Supreme Court.  
23 It was argued by Mike Fishbein on our behalf. We were  
24 involved before Judge Bechtle in that case. So I pretty  
25 well would agree with counsel that Buckman probably is very

1 controlling. That was a fraud on the FDA. That is not what  
2 we're looking at. I think that's well-settled law now.

3 What we're looking at is whether or not they  
4 complied with good manufacturing practices. Whether they  
5 complied not with design, but with the metallurgy and  
6 manufacturing, and that it became a manufacturing defect.

7 And I agree with Mr. Gustafson. He and I have  
8 worked together with the Defendants to come up with  
9 everything we have agreed on together and everything we  
10 didn't agree on together. We both came to the same  
11 conclusion.

12 That's the only difference between, you know, I'm  
13 a products liability lawyer who deals with product  
14 liability. I never go try to try a case or do something big  
15 time without doing at least an initial oversight.

16 I didn't have access to their plant facilities. I  
17 didn't have access -- I know they had a failure. That's why  
18 they had the recall. I know the Heart Rhythm Society, and I  
19 think I put a copy of that in my papers, the Heart Rhythm  
20 Society says there is a big time medical monitoring issue  
21 now. Big time. This Court has issued an order saying, you  
22 know, all of these people that are dying, we got to remove  
23 and preserve those pieces of evidence. We have to know what  
24 is the defect and why. We know there's a recall.

25 DISTRICT JUDGE KYLE: Anyone else? Other

1 scheduling issues?

2 MAGISTRATE JUDGE MAYERON: Under item 6 c, Other  
3 Scheduling Issues. The first one was stay of discovery.  
4 Medtronic in their papers talk about that they believe while  
5 the Motion to Dismiss is pending all discovery should be  
6 stayed. Other than the issue of whether to permit any  
7 discovery in connection with that Motion to Dismiss, does  
8 anybody believe that discovery should or should not be  
9 stayed on the balance of the case until that Motion to  
10 Dismiss is decided?

11 MR. GUSTAFSON: Your Honors, I'm not going to  
12 respond to any sort of legal arguments that other folks are  
13 making. I take it that's not really what you want.

14 But on the stay issue, it's my view -- and at  
15 least for the people that support me and not everybody --  
16 it's my view that counsel on the other side are well aware  
17 of their obligations to preserve the evidence. Your Honor  
18 has issued an order. I don't see any reason why we need to  
19 push forward with discovery before the motion is heard. I  
20 agree with Mr. Beck that we can agree on a schedule on the  
21 Motions to Dismiss and it can be relatively expedited. And  
22 we'll get that out of the way and then we'll proceed with  
23 respect to that.

24 MAGISTRATE JUDGE MAYERON: Does anybody on the  
25 Plaintiffs' side disagree with the comments by Mr. Gustafson

1 in terms of whether this Court should entertain a stay of  
2 all discovery other than the issue that we need to address  
3 with respect to the Motion to Dismiss?

4 It seems to me the balance of these issues then as  
5 well, which I was -- we're just listing what's to come, are  
6 items that the Court would be addressing with the parties  
7 once we see what the outcome of the Motion to Dismiss is.  
8 At least that's what our thinking was.

9 Does anybody have any comments on that one way or  
10 the other, disagree with the idea of holding off setting a  
11 schedule that would address class certification, fact  
12 discovery, expert discovery, those sorts of things, to wait  
13 to address those issues until after the Motion to Dismiss is  
14 decided?

15 MR. GUSTAFSON: I think that --

16 MAGISTRATE JUDGE MAYERON: Again, we're looking  
17 for a sense of what this group thinks.

18 MR. GUSTAFSON: I think that's appropriate, your  
19 Honor. I think counsel will get many of those issues sorted  
20 out without the Court's intervention.

21 MR. BECK: We agree, your Honor.

22 MR. BECNEL: So do I.

23 MAGISTRATE JUDGE MAYERON: Anybody else?

24 DISTRICT JUDGE KYLE: We're obviously going to get  
25 out an order on this, on some of these issues here shortly.

1 I'm just looking ahead. Does anybody have a reasonably good  
2 idea how many more cases are going to come in here, just by  
3 numbers?

4 MR. BECNEL: I can tell you ours are in the  
5 hundreds and they are coming in all the time. And those are  
6 from both referral lawyers and cases we get on our own. So  
7 I would think that Dan has a pretty good idea of how many.

8 A lot of people we -- a lot of times Plaintiffs'  
9 lawyers overestimate what they really have as cases and  
10 until you fill out a fact sheet you don't know whether you  
11 really have a case or not. And that's one of the reasons I  
12 tend to file a lot of my cases early. Because if they don't  
13 meet all of the requirements of the recall, that's when you  
14 find out. They say I have this; and until you get that  
15 piece of paper out of their hip pocket with the device  
16 number and so on and the model number, etcetera, you don't  
17 know whether they have a real case or not.

18 And so it's kind of -- we kind of thought in two  
19 of the previous lead cases what we had was the number; and  
20 we were so far off it wasn't funny. So it's hard to  
21 estimate.

22 MR. GUSTAFSON: Judge, I think that's right. I  
23 think it depends in part on how things go with defense  
24 counsel. If there's a tolling agreement, there will be less  
25 cases filed because people won't have to protect the statute

1 of limitations. If there's not a tolling agreement, which  
2 sometimes is put into place in these cases and sometimes  
3 not, if there's not a tolling agreement you'll see cases  
4 filed on the anniversary of the recall as the one, two,  
5 three-year statutes run. It's very hard to predict how many  
6 cases there will be. I know from talking to folks that  
7 there are thousands of cases potentially. But I don't think  
8 you're going to see a significant influx of cases being  
9 filed.

10 MR. BECNEL: If I will, let me give the Court a  
11 example of just in Vioxx. In Vioxx, Phil thought there was  
12 about initially 25,000 cases or so. And the last status  
13 conference when we finished, 67,000 people had registered  
14 through the first gate in the Vioxx case. And whether they  
15 will all get through the second gate and the third gate and  
16 get compensated, we don't know.

17 But that's why it's so hard. And that's why if  
18 you have what Dan just said, this tolling agreement, you get  
19 two things. Number one, you get to know how many cases do I  
20 realistically have to handle in this MDL? Because you got  
21 to put up or shut up.

22 The Defendants get a Plaintiff fact sheet which  
23 how many people are going to fill out that 10-page, 20-page  
24 fact sheet that is negotiated between Plaintiffs and the  
25 Defendants to give them the information to be able to

1 determine should this be some case we might settle based  
2 upon the number of claimants we have. Should we defend each  
3 and every case as they were doing in Vioxx until a  
4 settlement was reached. There's a bunch of issues.

5 And that's why this tolling agreement that Dan  
6 talked about, and that's been put in place by most MDL  
7 judges of the last two or three years, is good. Because how  
8 can they evaluate to their client what is our exposure.  
9 What can we get rid of these cases by compromise or  
10 alternative dispute resolution, or how many are we going to  
11 have to sit here and try?

12 So, you know, the estimates are guesstimates and  
13 it's real hard and I've never seen anything like it. In  
14 Breast Implant when we were involved in that case, we  
15 negotiated for what we thought was 60,000 cases. When that  
16 settlement was agreed to, we had 440,000 women that applied.  
17 And so you have this giant ratchet down. And that's why I'm  
18 telling you, it's a guessing game at best.

19 DISTRICT JUDGE KYLE: So when Judge Hansen from  
20 the Eighth Circuit told me there really weren't going to be  
21 too many, I should have accepted that at face value.

22 MR. BECK: We all make wrong decisions, Judge.

23 DISTRICT JUDGE KYLE: I should have known better.

24 MAGISTRATE JUDGE MAYERON: You may be on  
25 senior-senior status.

1           DISTRICT JUDGE KYLE: That's right. What else do  
2 we have?

3           MAGISTRATE JUDGE MAYERON: I listed on page 2 of  
4 the agenda a number of items that I believe will flow once  
5 we put in place the organizational structure on the  
6 Plaintiffs' side, including on Attachment D you'll see what  
7 we listed as the potential responsibilities of the lead  
8 counsel, steering committee, liaison counsel; but also  
9 addressing the issue of tagalong cases, the protective  
10 order, the Preservation Order, and then I've got a catch-all  
11 for other items. And it seems to me tolling agreement,  
12 that's probably another item that we're going to want to  
13 address or have the leadership for both sides address as  
14 soon as the Plaintiffs' leadership is put in place.

15           Are there other items that come to mind here that  
16 either side would suggest need to be addressed as soon as  
17 the leadership on the Plaintiffs' side is put in place that  
18 we need to be thinking about?

19           MR. BECNEL: Yes, your Honor, direct filing.  
20 Direct filing for administrative purposes only. And also  
21 multiple filings for administrative purposes only. We just  
22 had Mr. Moreland, because I was in trial, met with the judge  
23 in Trazonil, which is in West Palm Beach, Florida, and he  
24 allowed that direct filing.

25           You can file for two reasons directly, because you

1 can order it. And when those cases either settled here or  
2 not, you can get rid of them. The one thing your fellow  
3 judges don't want is they expect you to get rid of this case  
4 by some sort of decision or by settlement. If you get all  
5 these cases and have to send them back to all of your  
6 judicial districts around this country, they don't consider  
7 that a successful MDL.

8 And so the direct filing is a good way for  
9 administrative purposes. Which would mean thereafter you  
10 could file them here and let's say the things blows apart,  
11 you can't get it settled and you still have cases alive and  
12 you have to do what the manual says and remand those cases  
13 back to the district from whence they came, and I will dare  
14 say that most of them will go back to Puerto Rico, then you  
15 would individually file them case-by-case because they are  
16 not going to try them in a group.

17 I haven't seen -- Judge Fallon toyed with the idea  
18 of filing or trying multiple cases together, but that  
19 becomes very difficult. We've done it in a lot of chemical  
20 cases in the past, train derailments in the past. But doing  
21 it on an individual product-by-product case is sort of iffy.  
22 And Mr. Beck will try each and every one until he wears out  
23 or we wear up or until he throws his hands up or we throw  
24 our hands up.

25 The other thing that I think is important that you

1 should address at the outset is having a limitation on the  
2 number of days in trial. And the reason why, and it's the  
3 old stopwatch routine, if you, you know, most good Plaintiff  
4 lawyers and most good Defense lawyers, after a two or three  
5 week trial, they lose the jury. The jury gets bored.

6 MAGISTRATE JUDGE MAYERON: Why do we need to  
7 address that at this point given I think that the parties  
8 seem to agree the first thing to address is the issue of the  
9 Motion to Dismiss?

10 MR. BECNEL: Well, I'm just putting things on the  
11 agenda that you might consider down the road. Everybody  
12 seems to be doing that now for a time limit on trials.

13 MAGISTRATE JUDGE MAYERON: Okay.

14 DISTRICT JUDGE KYLE: Mr. Gustafson.

15 MR. GUSTAFSON: I was waiting to go onto the last  
16 item on the agenda and then I was going to comment on that  
17 and then maybe we can bring this to a conclusion.

18 I think the status conferences that you have on  
19 number 8 are a great idea. They were really helpful in  
20 Medtronic. We met -- I think the Court scheduled them for  
21 like the third Thursday or something like that of the month  
22 so everybody could plan ahead. It was very helpful. We had  
23 an informal letter that we sent in each time for each side.  
24 And I would urge the Court to adopt that. It's really a  
25 good way to sort of force everybody to keep focused on the

1 issues.

2 And the last thing I want to say, and I really  
3 don't have anything else, is that I'm confident with counsel  
4 for Medtronic that we can work out, if not all of these, 99  
5 percent of these issues, the Preservation Order, the  
6 protective order, these things, they will just be worked out  
7 between counsel on both sides and we won't need court  
8 involvement.

9 So I agree with Mr. Beck that those kinds of  
10 issues can be taken up while the Motion to Dismiss briefing  
11 is being done and we can get all of that sort of procedural  
12 stuff in place.

13 Thank you.

14 MR. BECNEL: One last issue, Judge, if I may. The  
15 airlines are shrinking by about 20 percent over the next 90  
16 days because of fuel costs. And if you don't -- right now  
17 every flight coming into this city is packed. If you don't  
18 give people -- if you could possibly schedule things -- and  
19 you got lawyers from everywhere -- enough in advance, not  
20 just 30 days because they are even packed at 30 days and  
21 lawyers are getting bumped and Eric got in at 2 o'clock this  
22 morning because of those problems. You know, if you're from  
23 Minnesota it's a no brainer, you drive to the courthouse.  
24 But for a number of us that are outside of the city, if you  
25 could give us at least 60 or 90 days on your schedule when

1 we're going to have these, and you can change it, but it is  
2 very, very difficult to fly around this country now.

3 MR. RING: Briefly, your Honors. Dan Ring, Mayer  
4 Brown, for Medtronic.

5 I agree with Mr. Gustafson that we can work out  
6 many of the items on the agenda, on the second page of the  
7 Court's agenda. One of those items we hope to resolve very  
8 quickly is the Preservation Order and get a final one in  
9 place to balance some of the hardships and burdens that are  
10 being imposed right now. And we look forward to working  
11 that out very quickly. If we can't, we'll bring those and  
12 any issues of dispute to the Court very promptly.

13 MAGISTRATE JUDGE MAYERON: I put on there under 8  
14 b and c, as we begin issuing orders, you'll see that I will  
15 be putting in place a process for what I call informal  
16 dispute resolution that will allow those matters that the  
17 parties agree to be resolved informally without a motion or  
18 a hearing, a process by which to present them to me when  
19 these are matters that would normally come to the Magistrate  
20 Judge as opposed to Judge Kyle. That will be covered in a  
21 future pretrial order.

22 But I did want to give the parties a heads up. At  
23 least up until now there's been some letter writing both to  
24 Judge Kyle and to myself to address certain issues and we  
25 understand that that's probably a function of the fact that

1 this meeting had yet to occur and the parties and the  
2 attorneys just weren't clear on how to communicate with the  
3 Court.

4           Until we get that informal resolution process in  
5 place, we would ask that you not be sending letters to Judge  
6 Kyle or myself. We expect to make the decision with respect  
7 to the organizational structure very quickly; and once  
8 that's in place, we will be able to put in a place for the  
9 parties to communicate both formally and informally with the  
10 Court. But our experience with the letter writing is it  
11 kind of goes on ad nauseam and we just don't know how and  
12 when to stop it. So we're just going to put a hold on that  
13 for right now.

14           DISTRICT JUDGE KYLE: I join in those comments.  
15 It's nothing to do with this case. Any case, when lawyers  
16 start writing letters, they say a lot of things that they  
17 wouldn't put in a brief, a comment about the other side;  
18 then they copy everybody in the world and then everybody in  
19 the world has to respond. And at least when we have a  
20 briefing schedule, you get an opening brief and a response  
21 and a reply and there's some finality to it. With all the  
22 lawyers here it's going to be difficult.

23           And another thing, communications with chambers.  
24 If you've got scheduling issues, those should go to  
25 Ms. Siebrecht if there are scheduling issues that I'm

1 involved in. And Katie Haagenson, Judge Mayeron in her  
2 chambers. I would -- I am going to say I would prefer -- I  
3 guess I'll say I do not want any direct communications  
4 between counsel and my law clerk. I was a lawyer once  
5 myself and everybody likes to talk to law clerks on  
6 scheduling issues and then it sort of opens up from there.  
7 So I would like to keep it at a minimum.

8 I think what we're going to do is -- well, that's  
9 our agenda. I think we've gotten through it. While we're  
10 all here, if there are other issues or matters that should  
11 be raised, should be discussed, we're here obviously to  
12 listen to them. So feel free to. Mr. Gustafson?

13 MR. GUSTAFSON: Nothing else from me.

14 DISTRICT JUDGE KYLE: Anybody else?

15 MR. BECK: Nothing else for Medtronic, your Honor.

16 DISTRICT JUDGE KYLE: And someplace along the  
17 line, I say we don't need a lead counsel amongst the  
18 Defendants but I think we're going to have to have some sort  
19 of a decision. George? Okay.

20 MR. BECK: Let me introduce him, your Honor.

21 DISTRICT JUDGE KYLE: I know Mr. Soule from way  
22 back when, a long time. So okay.

23 Anybody else have anything else you would like to  
24 discuss or bring up?

25 I think our intention is to in the next few days

1 make a decision with respect to at least the lead counsel  
2 issue, and whether that's a single individual or a group.  
3 And what we propose to do is to, when that decision is made,  
4 we will communicate directly with those who we have decided  
5 to put in that position and get some input from them with  
6 respect to the steering committee and the others. I know  
7 we've got a proposal from Mr. Gustafson with one group, but  
8 we've obviously had other applications at this time that  
9 have come in after that. And we would like to at least get  
10 the input of the leadership with respect to those groups.  
11 And unless I hear any objections from that, that's the way  
12 we're going to deal with it.

13 This is still our decision. This is not going to  
14 be a decision of leadership, whatever that consists of,  
15 whether it's a single person or more than that, we recognize  
16 that the responsibility ultimately belongs to the Court and  
17 we intend to exercise that responsibility.

18 Yes, sir?

19 MR. BECNEL: May it please the Court, I think  
20 there's no objection from any source, of anybody that I know  
21 of, to have Mr. Shelquist as the liaison counsel.

22 DISTRICT JUDGE KYLE: That's my understanding. I  
23 think there's some --

24 MR. BECNEL: So I would urge the Court to issue  
25 that order either orally today, so at least we have a point

1 person to communicate with back and forth.

2 DISTRICT JUDGE KYLE: Well, we've got liaison --  
3 we've got the lead counsel and a steering committee and then  
4 your committee that you have proposed, and apparently nobody  
5 does object to that and I don't anticipate there's going to  
6 be any change in that. But right now we're going to take up  
7 the issues between ourselves and get something out on it.

8 And as I understand on the steering committee,  
9 there's really no objection to anybody on it. There's just  
10 other individuals who would like to be on it, and the same  
11 with lead counsel. There's no objection to Mr. Gustafson.  
12 It's just the position that that should be shared with one  
13 or more individuals.

14 Okay. Anything else?

15 Thank you all for coming in. We look forward to  
16 working with you, and we'll get out an order on these  
17 matters very promptly. So we are in recess.

18 MR. GUSTAFSON: Thank you, your Honor.

19 (Court adjourned at 11:30 a.m.)

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22 I, Carla R. Bebault, certify that the foregoing is  
23 a correct transcript from the record of proceedings in the  
24 above-entitled matter.

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Certified by: s/ Carla R. Bebault  
Carla R. Bebault, RPR, CSR