

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

)
In re: Baycol Products) File No. MDL 1431
Litigation) (MJD/JGL)
)
) Minneapolis, Minnesota
) January 15, 2004
) 10:00 a.m.

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

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
RICHARD LOCKRIDGE, ESQ.
RONALD GOLDSER, ESQ.
DANIEL BECNEL, ESQ.
VICTORIA MANIATIS, ESQ.

For Defendant Bayer: PHILIP BECK, ESQ.
ADAM HOEFLICH, ESQ.
PETER SIPKINS, ESQ.
SUSAN WEBER, ESQ.
DOUGLAS MARVIN, ESQ.
EUGENE SCHOON, ESQ.

For Defendant FRED MAGAZINER, ESQ.
GlaxoSmithKline:

Court Reporter: LORI A. CASE, RMR-CRR
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1 THE COURT: Let's call this matter, please.

2 THE CLERK: Multidistrict Litigation No. 1431,

3 In re: Baycol Products. Please state your appearances for
4 the record.

5 MR. ZIMMERMAN: Good morning, Your Honor. Happy
6 new year. Charles Zimmerman for the PSC.

7 THE COURT: Happy new year.

8 MR. LOCKRIDGE: Good morning, Your Honor.
9 Richard Lockridge for the Plaintiffs.

10 THE COURT: Good morning.

11 MR. GOLDSER: Good morning, Your Honor. Ron
12 Goldser for Plaintiffs.

13 THE COURT: Good morning.

14 MR. HOPPER: Good morning, Your Honor. Randy
15 Hopper for the Plaintiffs.

16 THE COURT: Good morning.

17 MS. MANIATIS: Good morning. Victoria Maniatis
18 from Weitz & Luxenberg for the Plaintiffs.

19 THE COURT: Good morning.

20 MR. BECNEL: Good morning. Daniel Becnel for the
21 Plaintiffs.

22 THE COURT: Good morning.

23 MR. BECK: Good morning, Your Honor. Phillip
24 Beck for Bayer.

25 THE COURT: Good morning.

1 MR. HOEFLICH: Good morning, Your Honor. Adam
2 Hoeflich for Bayer.

3 THE COURT: Good morning.

4 MS. WEBER: Good morning, Your Honor. Susan
5 Weber for Bayer.

6 THE COURT: Good morning.

7 MR. SIPKINS: Good morning, Your Honor. Peter
8 Sipkins for Bayer.

9 THE COURT: Good morning.

10 MR. MAGAZINER: Good morning, Your Honor. Fred
11 Magaziner for GlaxoSmithKline.

12 THE COURT: Good morning.

13 MR. MARVIN: Good morning, Your Honor. Douglas
14 Marvin for Bayer.

15 THE COURT: Good morning.

16 MR. SCHOON: Good morning. Eugene Schoon on
17 behalf of Bayer.

18 THE COURT: Good morning.

19 Mr. Zimmerman.

20 MR. ZIMMERMAN: The parties have provided the
21 Court with a proposed agenda and status report for today's
22 hearing. I will go through the items and those that I
23 would like to explain further I will attempt to do so, but
24 I think the agenda is fairly self-explanatory.

25 I do not believe there are any matters on the

1 agenda for today that require argument, so I think it's
2 more of an update status report of matters that have
3 transpired since the last status report.

4 First, Your Honor, paragraph Roman numeral I,
5 Pending Cases. As of the close of business on
6 January 9th Defendants have been served with 9,943 cases
7 that remain active. Of that amount, 6,225 cases are
8 pending in federal court with 3,718 cases pending in state
9 court.

10 Filed but unserved cases are not included in
11 these totals. I do not know if we have a number for the
12 filed but unserved. I think historically we have not.

13 MR. BECK: No, we don't.

14 MR. ZIMMERMAN: Okay. This total also excludes
15 551 cases that have been settled but not yet fully --
16 formally dismissed. So there's 551 additional filings that
17 are not included in these totals because basically they
18 have been settled but not formally dismissed.

19 I think what probably comes from that are two
20 conclusions, which aren't very dramatic at all. There have
21 been -- if you look at the paragraph -- the next one, the
22 number of cases pending, last month versus this month,
23 there's approximately 300 additional federal cases and
24 approximately 200 less cases in state court. I don't know
25 that that means anything at all. I guess it's just an

1 observation that we take from these statistics.

2 As of last month -- and we do not have a count
3 for this month because I have been told it's just a very
4 difficult task -- there were 22,820 individual plaintiffs,
5 excluding spouses, consortium claims, contained within
6 these approximately 10,000 cases.

7 Is that correct, Phil?

8 MR. BECK: Yes. And, Your Honor, it was a
9 time-consuming and expensive task to do that counting and
10 comparison. We did it at the Court's direction because
11 Mr. Zimmerman said that having a ballpark figure, even if
12 it's not exact, would be important to them in terms of
13 their coordination with state court lawyers, et cetera.

14 And I simply wanted to say that we went through
15 that process and supplied the best number we can. We do
16 not intend to do that every month because it would be a
17 full-time job and I think that we have a ballpark number
18 that is -- you know, gives us enough information for
19 whatever the information is worth.

20 THE COURT: Is that agreeable, Mr. Zimmerman?

21 MR. ZIMMERMAN: Yes. I don't see the need to
22 spend the resources doing those countings, certainly not
23 every month. I suspect if these numbers change
24 dramatically we might want to take another look at it, but
25 I agree with Mr. Beck that there's no sense in doing that

1 on a regularized basis.

2 It appears that we are kind of in that ratio of 2
3 to 1, between approximately 10,000 filed cases and
4 approximately 20,000 claimants, and I expect that gives us
5 the kind of ballpark we're looking for about the number of
6 people being affected in state and federal court who have
7 claims, exclusive of consortium claims. And we can kind of
8 work with that.

9 I suspect at a point in time down the road, maybe
10 every six months, we should do it or maybe not, but we can
11 take that up with the Court and we will use the Court's
12 discretion --

13 THE COURT: All right. Thank you.

14 MR. ZIMMERMAN: -- with regard to that.

15 An updated list of plaintiffs' counsel -- this is
16 on page 2, number C. An updated list of plaintiffs'
17 counsel in pending cases have been provided to the PSC. We
18 do now get that on a monthly basis and we appreciate it.

19 According to my best guess or best count, which
20 is part guess, there's about 1,500 lawyers contained in
21 these lists of lawyers who have pending Baycol cases.

22 I think it's important that we get those updated
23 because, frankly, with developments that are occurring that
24 we will be discussing later in the agenda, it's going to
25 become very important to communicate with these people

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1 because of the protocol that we are negotiating and have
2 negotiated with regard to narrowing the field of cases.

3 And so we expect questions and we expect to
4 communicate to these people on kind of as best we can basis
5 through direct mail and through the Internet and through
6 the websites about what's coming and what is going to be
7 the tasks ahead as we start to narrow our focus and move
8 towards trials and other alternative dispute resolution
9 mechanisms.

10 Settlement, Your Honor, that's the next topic
11 unless there's any questions about the filed case
12 statistics and the lists of counsel.

13 THE COURT: Anything you wish to add, Mr. Beck?

14 MR. BECK: No, Your Honor. We'll continue to
15 give them updated counsel lists off of the same database
16 that we do each month.

17 MR. ZIMMERMAN: Next, Your Honor, is settlement.
18 To date Defendants have settled 2,059 cases for a total
19 value of the settlements of \$782,056,734. So we are at
20 approximately 2,000 -- a little over 2,000 cases and
21 approximately \$780 million in settlement value.

22 Of these 2,000 cases, approximately -- well, 484
23 or approximately 500 have been determined to be subject to
24 the MDL assessment, with a total value of \$175,403,033.

25 As of the December conference there were 1,957
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1 cases settled globally -- not globally, but in the United
2 States. So we're up approximately 100 cases from last
3 month, if my math is correct, yes, 102 cases, and we've
4 gone from 746 million to 782 million in total settlement
5 values.

6 444 cases were MDL cases in December and we're at
7 484 cases, up about 40 cases since December with regard to
8 MDL settlements.

9 Approximately 90 cases, Your Honor, have been
10 submitted to the MDL mediation process. Of these cases, 31
11 have settled. Of the 31 settlements, 30 were voluntary
12 settlements and one occurred after Special Master Remele
13 required mandatory mediation.

14 Special Master Remele ordered seven additional
15 cases to mediation over the objections of Bayer and none of
16 those cases settled. Eleven cases were removed from the
17 program after mandatory mediations were denied by the
18 Special Master.

19 The remaining cases between 90 and those
20 dismissed and those settled remain pending in the mediation
21 program.

22 In addition to the mediation program, individual
23 settlements are still being negotiated directly with Bayer
24 by the PSC, by MDL lawyers, and by state lawyers. And we
25 expect that process will continue for some time as cases

1 that meet the current settlement criteria of Bayer come
2 forward.

3 Some of them are also being held -- are being
4 tried, Your Honor, and not all the rhabdo cases at this
5 point are within the settlement program. As I look at the
6 trial list, which we will talk about later, the trial
7 dates, many of these are rhabdo cases that are in and ready
8 for trial.

9 So it's not completely correct to say that every
10 rhabdo case is being resolved through the settlement --
11 either through the mediation program or through individual
12 direct settlement. Some of them, at least at this point,
13 are set for trial. Whether they will actually be tried or
14 not, no one knows at this point.

15 Unless there are any questions about the
16 settlement program with regard to numbers A through D, I
17 would then leave it to -- turn it over to Special Master
18 Lew Remele for the mediator's formal report.

19 THE COURT: I did receive your letter of
20 December 22, 2003 inviting your thoughts dealing with the
21 mediation program. I don't know. Did Defense receive a
22 copy of that?

23 MS. WEBER: We did receive a copy, Your Honor.
24 We expect to have a response to you addressing Bucky's
25 concerns next week.

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1 MR. ZIMMERMAN: Next week, did you say?

2 MS. WEBER: Next week.

3 MR. ZIMMERMAN: Fine. Sure.

4 THE COURT: All right. Mr. Remele, good morning.

5 SPECIAL MASTER REMELE: Good morning, Your Honor.

6 Actually there's a slight inaccuracy of the agenda -- or
7 the report that Mr. Zimmerman gave. There's actually been
8 two cases that have settled that were ordered into
9 mediation. The other case is the Talbot case, which
10 actually was settled last month. And actually the status
11 report doesn't quite show that either and needs to be
12 corrected.

13 So there have been -- otherwise, the numbers that
14 Mr. Zimmerman just gave you are accurate. There are
15 approximately 90 cases that have been submitted into the
16 mediation program, and out of those there have been 32
17 settlements and two of them have been as a result of cases
18 that were ordered into mediation.

19 There is a -- we are continuing to look at cases,
20 Your Honor, that are being submitted and there is a
21 mediation pending, I think, in North Carolina this
22 coming -- in a couple of weeks.

23 There's also a couple of cases that have been in
24 mediation that are still continuing. The mediators are
25 continuing to talk to the parties to see if, in fact, they

1 can settle those cases.

2 There are a couple of cases that are still sort
3 of hanging fire and I expect that we will know whether
4 those are going to settle or not within, oh, probably the
5 next few weeks.

6 But generally speaking the program is sort of
7 inching along, as I have indicated in prior reports. And I
8 think as we get down through the process of narrowing some
9 of the cases, as you will discuss later on in the agenda,
10 and we have some trials, that it will probably cause the
11 program to be energized somewhat in terms of additional
12 cases.

13 Once people can sort of figure out what the
14 proper categories of the cases ought to be, I think that
15 will probably cause the mediation program to have a little
16 more business.

17 But at the present time we're continuing to get
18 cases, we are reviewing them. I have developed a process
19 to try and streamline looking at those cases in terms of
20 cases that should go to mediation under your prior order
21 and hopefully have made more sense of that.

22 Unless there's any questions, that's about all
23 for my report.

24 THE COURT: Thank you.

25 SPECIAL MASTER REMELE: Thank you, Your Honor.
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1 THE COURT: Anything to add, Mr. Beck?

2 MR. BECK: No, Your Honor.

3 MR. ZIMMERMAN: Discovery, Your Honor, is the
4 next topic. Discovery is --

5 THE COURT: Excuse me. Mr. Remele, the case in
6 North Carolina, which case is that; do you know? Do you
7 have the title of that one?

8 SPECIAL MASTER REMELE: It's the McCracking case,
9 I believe is the name of it. I can get it for you. It is
10 M-c-C-r-a-c-k-i-n-g.

11 THE COURT: Thank you.

12 MR. ZIMMERMAN: As everyone knows, Your Honor,
13 there has been one glitch in the discovery process, which
14 has to do with the re-designation of confidentiality that's
15 been ordered by the Court due to the overclassification of
16 confidentiality by Bayer.

17 That process is beginning and, as I understand,
18 Defendants have begun reviewing documents previously marked
19 as confidential to determine whether such documents shall
20 and must retain the confidentiality designation; and this
21 is pursuant to Pretrial Order 99.

22 The deadline for re-designation of documents is
23 April 30, 2004, but production will occur on a rolling
24 basis. So that will be the end date.

25 The parties expect -- it says, "The parties
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1 expect to provide the Court a proposed stipulated order on
2 the protocol for this re-designation." Have we done that?

3 THE COURT: Yes. I received it this morning.

4 MR. ZIMMERMAN: Very good.

5 THE COURT: Do you wish the Court to sign this?

6 MS. WEBER: Yes, Your Honor. It's been agreed by
7 both parties.

8 THE COURT: Have you reviewed it?

9 MR. GOLDSER: Your Honor, I have been involved in
10 the process and it's acceptable to PSC.

11 THE COURT: All right. The Court will sign that.

12 MR. ZIMMERMAN: Thank you, Your Honor.

13 Depositions of Bayer Corp. and GSK fact witnesses
14 continue. Several witnesses were scheduled to be deposed
15 from Bayer AG in London and Amsterdam, but those have been
16 postponed.

17 Actually, they were cross-noticed with the
18 Pennsylvania -- certain of them were cross-noticed with the
19 Pennsylvania/California coordinated proceedings and as of,
20 I believe, late last week or early the -- late last week or
21 late the week before it was agreed to continue them for
22 some time in April, if they are to proceed at all.

23 We are working closely with and in cooperation
24 with Bayer, Bayer AG, GSK, and the Pennsylvania and
25 California coordinated plaintiffs' lawyers to determine if

1 they are to go forward; and if so, on what date.

2 There are depositions, however, that do not
3 involve Bayer AG that I believe are also under notice right
4 now. I don't think we need to take the time with the Court
5 to go over each and every one.

6 We have a very efficient program with Doug Marvin
7 from Defendants and others to move that process along and
8 identify witnesses that we still want to depose and
9 arranging times and dates.

10 And, frankly, I think it's working quite well to
11 get that part of the program worked through and so I don't
12 see any reason to make any further comment about it other
13 than to say we have deposed 82 witnesses to date: 49 of
14 Bayer, 12 of Bayer AG, 15 of GSK, and 6 pertaining to
15 nonparties.

16 There was an order recently issued by Magistrate
17 Judge Lebedoff with regard to certain PacifiCare witnesses
18 and depositions that were taken and adjourned. That is
19 self-explanatory. I don't know that we need to go into it
20 in greater detail, but there will be some supplementation
21 of those depositions and that discovery -- that was a
22 discovery dispute that had to be resolved by Magistrate
23 Judge Lebedoff and it was done so.

24 And I am sure the parties, unless there's an
25 appeal, will be complying with that. I haven't heard

1 notice of any appeals, so I believe that will be complied
2 with.

3 Discovery is proceeding in cases under PTO 89 and
4 96. With regard to this, Your Honor -- I don't know if
5 this is the time to do it or not. I guess I would like to
6 maybe do it a little bit later as we talk about trials, but
7 I wanted to give the Court how we got from the number of
8 cases down to where we are today with essentially a case or
9 two now ready to be tried.

10 I think it would be important for people in the
11 court as well as the Court to understand how we got there
12 and what cases were eliminated and why. I think we've all
13 been interested in that.

14 But at least I'd like to -- I have provided a
15 copy of this to defense counsel, so this is nothing that
16 they haven't seen before. I was going to do it in a
17 PowerPoint, but I forgot my computer.

18 THE COURT: Do you wish to do it now or later?

19 MR. ZIMMERMAN: I think I will do it later, if
20 you don't mind. It was just handed to me and I just want
21 to refresh my recollection on it.

22 THE COURT: All right.

23 MR. BECK: Your Honor, just in connection with
24 the Pierce case, I would like to note that the status
25 report contains an inadvertent misstatement. In Pierce not

1 all case specific fact depositions have been taken, there's
2 a couple that still need to be taken.

3 And I think there's not going to be any problem
4 getting those scheduled and we've been working together in
5 an efficient way from the Plaintiffs' side as well. And so
6 while that statement in here is inaccurate, there's not any
7 problems that I'm aware of.

8 THE COURT: All right. Thank you.

9 MR. ZIMMERMAN: Which then would take me, if we
10 kind of skip the Pretrial 89 and 96 summary for the moment
11 and we'll come back to it and go to the next, which is E,
12 to third party payer settlements.

13 As you know, Your Honor, we have asked -- and
14 only recently, but we have received copies of the
15 settlements that Bayer has entered into with certain
16 insurance companies, third party payers.

17 It is our plan to let all plaintiffs' counsel
18 know of these settlements so that if they have an occasion
19 where there may have been a double payment, because now
20 these insurance companies have been paid and are out and
21 yet they may have in an individual settlement also paid for
22 an individual's lien claim or medical subrogation claim, we
23 want to give people the opportunity to say -- you know, to
24 go to those companies and say, hey, you've settled, you've
25 been double paid, and my client is entitled to money back,

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1 if that exists factually. My guess is it probably does.

2 It will be kind of a daunting task if you think
3 about it because there's 2,000 settlements, 2,059
4 settlements, so there are 2,059 potential claims affected
5 by this and then they have to match up the insurance
6 company with their company that they may have settled with.

7 Each individual lawyer will have to then go back
8 and take a look to see if their claim may have been double
9 paid, but at least now we know the names of the insurance
10 companies involved.

11 We have a motion before the Court that is pending
12 to be more directly involved in these negotiations. I am
13 not going to argue that at all here at this time, but it
14 just sort of dovetails with what we perceive as our need to
15 be more directly involved.

16 But just so everyone knows, I will be entering --
17 having a communication with all the plaintiffs' lawyers who
18 have cases and are a part of this list, letting them know
19 of these settlements and letting them know that they need
20 to take a look at their files and their settlements to see
21 if there has been any kind of a double payment.

22 Generic expert reports. Your Honor, these
23 (indicating) are the generic expert reports of the
24 Plaintiff. I schlepped them over here, if you will, just
25 to let you know that they are fairly hefty and they involve

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1 several, many disciplines.

2 Defendants have now served theirs on us with the
3 exception of, I believe, two witnesses of GSK, which we
4 were -- we have stipulated with Mr. Magaziner that they may
5 have an extension of time to the end of the month, I
6 believe, to get their two --

7 MR. MAGAZINER: To the 26th. Your Honor, we will
8 be submitting that stipulation to Your Honor for Your
9 Honor's approval.

10 THE COURT: All right.

11 MR. ZIMMERMAN: They needed some more time for
12 two witnesses and we were happy to give them that extra
13 time as needed.

14 But what's interesting now is that now that the
15 Defendants' reports are also now in, there have begun the
16 deposition process of these many witnesses.

17 And we've got the cross-notice issue, which
18 we've negotiated -- which we anticipated and negotiated in
19 PTO 97, wherein Witness A may be designated by the
20 Defendants in the MDL, may also be designated in a case in
21 state court; and rather than having those depositions taken
22 many, many times, we would cross-notice and coordinate and
23 take it once.

24 We had some depositions scheduled for earlier in
25 this month under that protocol. Because of the timing of

1 the deposition -- of the receipt of the reports and the
2 noticing of the depositions, it got a little close in time,
3 so we worked it out and moved these depositions to the
4 later part of the month. I believe they are now set for
5 the 28th and 30th, two of the cross-noticed expert
6 witnesses of the Defendants.

7 And now we are prepared and the PSC is prepared
8 to be part of that cross-notice process because we now
9 received -- have received their reports and we have been
10 able to prepare for that one deposition of the expert
11 that's been cross-noticed in both state and MDL
12 proceedings.

13 And we hope that will run smoothly. We
14 anticipate it will run smoothly as we go forward. We are
15 beginning that process and the first depositions under this
16 protocol will begin on the 28th of January in Washington,
17 D.C.

18 With regard to this work product, that is, the
19 Plaintiffs' designated generic experts, it's time we also
20 now disclose these experts and provide the information
21 contained to the field of lawyers who are within the MDL
22 and are bound by -- are participating through the various
23 PTOs.

24 We want to give them this work product. I have
25 proposed that we do it in a number of ways and if I could

1 just briefly tell the Court what my plan is. I have also
2 given this plan over to the Defendants just because I
3 wanted to not -- I guess I just wanted to be up front with
4 it. I don't know that they have a dog in that fight.

5 Frankly, it's our work product being given to
6 plaintiffs' lawyers. But for the purposes of just
7 understanding where we're going with it, I think it was
8 important to at least give them an idea.

9 First off, Your Honor, what I thought we would do
10 is this: On the Court's website or the PSC website give a
11 summary of each witness, what their speciality is, and
12 essentially what they are going to be testifying about.

13 The reason I say on the website is because I
14 think it should be easy for people to have access to what
15 are the MDL experts, in what areas are their expertise, and
16 essentially what are they going to say without giving
17 anybody who can log on to either our website, the PSC
18 website, or the Court's website access to the full report
19 that they could then use or designate or in any way have in
20 their hot little hand.

21 So anybody in the world with a -- or anybody in
22 the United States, I guess we should limit it to, with a
23 case can see what the area of expertise the PSC is
24 proffering in terms of experts and a basic summary of what
25 their opinions are. That would be step one.

1 Step two then would be, now, if you are a member
2 of the PSC, if you are a member of the PSC subcommittee
3 and/or if you are bound by the PTOs, that is, you have
4 agreed to be bound by the confidentiality as well as the
5 assessment orders and all of the other PTOs of the case,
6 you are an MDL -- you have MDL cases and you agree to be
7 bound, then you can get a copy of the expert reports by
8 simply saying -- by simply requesting them.

9 And we would provide them to them in a disk or in
10 hard copy for a nominal cost. I mean, to reproduce
11 something like this isn't for free; and if a thousand
12 people or a hundred people ask for it, we've got to charge
13 something nominally for reproducing it or for burning it
14 onto a disk.

15 But it would not be the cost that would really be
16 associated with these reports. It would just be the cost
17 of reproduction, if you will, that we would then charge to
18 get the complete CD, if you will, of all the reports,
19 including the CVs of the experts.

20 And that would then entitle those people to
21 designate those experts in their cases for generic
22 purposes, that is -- let's take the issue of corporate
23 responsibility, you know, that there's a corporate
24 responsibility expert that we've produced. They could --
25 anyone could designate it in their case on a generic basis

1 and then as the depositions get done pursuant to PTO I
2 think it's 99, if I'm not mistaken, then they could have
3 use of that deposition in their case or use of that
4 discovery in their case generically.

5 However, if they want to go to one of these
6 people and use them on a case specific basis, that is, they
7 really want that doctor, that medical person to be
8 providing opinions in their case based upon their
9 particularized facts -- is that Morse code coming in?

10 MR. BECK: It's objections from the field.

11 MR. ZIMMERMAN: Then if they want to use these
12 experts in some other fashion other than generically
13 through the protocols, then they would have to come through
14 the PSC and come through the office of lead counsel and
15 enter into specific retainer agreements under very specific
16 terms.

17 Because if you think about it, Doctor X may or
18 may not be available in Mr. Y's case in Wyoming and that
19 would have to be negotiated out. And if there might be a
20 fee involved for that doctor, for that expert to negotiate
21 with that lawyer, that would all have to be worked out.

22 So by designating, that doesn't mean they have
23 access to them in the case specific context, only that they
24 have access to them in the generic way.

25 And so that is essentially our plan, Your Honor.
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1 We want to get these out to people because it's important
2 work product, just like the depositions or just like the
3 documents, but they have some proprietariness to it and
4 obviously there's a tremendous cost associated with just
5 getting them produced.

6 And we're talking about individuals being used in
7 cases, so we want to guard the use and we want to protect
8 the witness from being overextended or overused in case
9 specific ways to specific negotiations that might occur
10 between lawyers who decide they want to use them in a
11 specific case.

12 But the point is, Your Honor, we're ready to go.

13 We have the --

14 THE COURT: Are you going to get an order to me?

15 MR. ZIMMERMAN: I beg your pardon.

16 THE COURT: Are you going to get an order to me?

17 MR. ZIMMERMAN: I don't know if we need one, Your
18 Honor. I suspect it might help to have one just so we can
19 protect the integrity of it.

20 MR. BECK: Your Honor, I think it would be
21 desirable to have an order. We don't want to impede
22 anything in any way, but we haven't seen a concrete
23 proposal other than a summary in an e-mail the other day
24 and we would want an opportunity to look it over and
25 comment.

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1 There are some specific concerns that I had just
2 based on a quick overview. You know, the idea of the
3 Court's website being used --

4 THE COURT: Right.

5 MR. BECK: -- versus the PSC's is one.

6 THE COURT: We can also put it on Verilaw.

7 MR. ZIMMERMAN: Sure.

8 MR. BECK: And I don't know what we would be
9 putting up there, but we would want an opportunity to look
10 at the proposed order, in short --

11 THE COURT: Right.

12 MR. BECK: -- and see if --

13 THE COURT: How soon can you get a proposed order
14 to me?

15 MR. ZIMMERMAN: I can have a proposed order to
16 the Court by Wednesday. I have put it into an e-mail, so
17 now it's just putting it into the right phraseology. So I
18 would be happy to put it in to the Court by Wednesday.

19 MR. BECK: If he could just make it in the form
20 of a motion to enter the order so that we would then have
21 an opportunity to respond if we feel the need to, because
22 there are a couple of areas where wording could be
23 important.

24 For example, when he was summarizing that the
25 people who have cases in the MDL would be entitled to use

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1 these generic experts, we think that -- we would want to
2 look at the language because we think they are bound by
3 what's in the generic expert reports and they don't have
4 the option to use some experts but then have their own
5 experts on the same generic topics.

6 So anyway, it's not quite as simple as it sounds.
7 We certainly don't want to interfere in any way with
8 Mr. Zimmerman's overall purpose here. We just want to make
9 sure that there's not language that slides in that could
10 prejudice us in some way.

11 MR. ZIMMERMAN: I don't slide in language.

12 MR. BECK: No, I don't mean --

13 MR. ZIMMERMAN: I know.

14 MR. BECK: You've got one purpose and it's not my
15 purpose.

16 THE COURT: I'll get the proposed order by next
17 Wednesday. Do you want to respond the following Wednesday?
18 So that would be the 28th. It would be the 22nd -- well,
19 the 21st is next Wednesday. Then Defense can respond by
20 the 28th.

21 MR. BECK: Yes, Your Honor. That would be enough
22 time for us.

23 Your Honor, Susan reminds me that it's
24 conceivable, I don't know how likely it is, but it's
25 conceivable that other plaintiffs' lawyers who are not

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1 members of the Plaintiffs' Steering Committee but whose
2 rights and obligations are being determined might want to
3 be heard on it or the Court may at least want to make sure
4 that they get notice of this proposed order and have an
5 opportunity to comment so that later on there's no fight
6 where somebody says, Wait a minute. How did I get bound by
7 this when I wasn't given any notice of it?

8 That's something that we really don't -- we don't
9 have a dog in that fight, but I just think it's something
10 that you might want to think about, Bucky, and the Court
11 may want to consider before actually entering something
12 that binds absent lawyers.

13 MR. ZIMMERMAN: I think that's a thought that
14 we've probably had to take into consideration all along the
15 way. I mean, we are doing things that bind lawyers without
16 giving them any more of an opportunity to be heard than
17 coming to these proceedings or looking at the transcript or
18 whatever the rules of the judicial panel of multidistrict
19 litigation provide.

20 MR. BECK: But almost never requiring them to
21 write checks, which is what this would do.

22 MR. ZIMMERMAN: But here's my point, Phil, and
23 maybe it's a good idea, that we probably need to do that,
24 then, with the narrowing protocol too because, I mean, now
25 we're talking about dismissing their cases. If we want to

1 do that, then we probably have to give notice on the
2 narrowing protocol as well so they have the opportunity to
3 comment. I think we need to give thought and consideration
4 as to how far we want to do that. So that's my concern.

5 THE COURT: Well, did we come to a consensus on
6 this or not?

7 MR. ZIMMERMAN: Why we don't we talk at the
8 break.

9 MR. BECK: And I wasn't -- all I was doing was
10 raising a flag that had been raised at our table. Whether
11 the Court feels it's necessary or Mr. Zimmerman feels it's
12 necessary, I leave it to the Court and Mr. Zimmerman.

13 THE COURT: Well, that's an issue that --
14 especially with the narrowing of the cases, it's been on
15 the top of my list whether or not there should be a general
16 notice dealing with that; and we should discuss that.

17 MR. ZIMMERMAN: Right. That's kind of what I was
18 trying to say.

19 THE COURT: Right.

20 MR. ZIMMERMAN: That's why I thought maybe off
21 the record we --

22 THE COURT: We can do that in chambers.

23 MR. ZIMMERMAN: Next, Your Honor, the following
24 motions are fully briefed and have been submitted to the
25 Court. This is under Roman numeral IV. It's the motion to

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1 vacate Special Master Recommended Order No. 15 and our
2 motion of the PSC to participate in third party payer
3 settlement negotiations. Those are pending and fully
4 briefed.

5 The following motions are briefed and the parties
6 continue to negotiate, and that has to do with -- and we
7 are asking that these be postponed at this point until a
8 later date, maybe the next status or maybe before, which is
9 our motion to modify PTO 89 and schedule summary jury
10 trials and the issues of venue for cases filed directly by
11 non-Minnesota residents. We're still somewhat conferring
12 on that issue. We think we've come really a long way.

13 What we really need to do with regard to this
14 opening of the issue of more cases to be put into the box
15 for trial, we need to look at what we are now agreeing
16 should be put into that pile to see if there will be enough
17 there or the kinds of cases there that will meet our needs.

18 And so we're kind of deferring the questions
19 raised in our motion and their response until such time as
20 we take a better look at what we have now agreed to put
21 into this basket and whether or not it will sufficiently
22 meet our needs. So we're just asking that it be deferred
23 until we advise the Court that we would like a hearing on
24 that.

25 THE COURT: It will be deferred.
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1 MR. ZIMMERMAN: And also the same with the motion
2 to extend the stay of PTO 61. What that is is that
3 bundling, unbundling question. And we have agreed
4 informally -- or not informally, but we have agreed between
5 us to defer hearing and decision by the Court on the
6 unbundling question through the narrowing protocol.

7 Rather than going through the work of unbundling,
8 it will all be contained within the narrowing protocol
9 that's being negotiated and therefore, in our view, there
10 is not a need at this time to be an unbundling occurrence
11 because each case is going to get looked at individually
12 and vetted through the narrowing process and then we'll see
13 what we have at the end of the day and what the bundled
14 complaints look like and if we have to address it at all.

15 So we would appreciate -- we appreciate Defense's
16 agreement and the Court's agreement that the stay continue
17 of the order, allowing for the cases that are bundled to
18 remain bundled through the narrowing, and then we'll be
19 able to look at it once we get into the classification
20 section of the narrowing protocol.

21 Certain motions have been referred to Magistrate
22 Judge Lebedoff and these two involve sanction motions, one
23 by the Defendants and one by the Plaintiffs. We have filed
24 a motion asking for sanctions and other relief for the
25 failure to give certain notices and save certain documents

1 of the detail people and Defendants have made a motion for
2 sanctions with regard to the filing of the motion of the
3 Italian prosecutor to intervene.

4 THE COURT: The motion for the Italian prosecutor
5 is coming to me. I will hear that and the -- Mr. Moll and
6 also the Lockridge firm and anyone else should respond to
7 that motion within the 21-day period. Defendants will have
8 seven days after that and we will argue that at our next
9 status conference, which will be February 19th. That will
10 be argued after the status conference.

11 MR. ZIMMERMAN: Your Honor, just so you know, Ken
12 Moll's wife is expecting a baby actually today. He called
13 me and wanted to know if he needed to be here today and
14 I --

15 THE COURT: I want the order sent out. I will
16 send an order out today with those dates on it. So whether
17 or not he's -- I am happy for him having a new child, but
18 that doesn't defer the --

19 MR. ZIMMERMAN: No, I understand. I'm just
20 saying that's why he is not here today. I just didn't want
21 the Court to appear by his absence he is not taking these
22 matters seriously. As I understand it, the sanction motion
23 does not apply -- the focus of that is not the Lockridge
24 firm, as I have been told.

25 THE COURT: I've expanded it.
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1 MR. ZIMMERMAN: Okay.

2 MR. BECK: Your Honor, I will be here to argue
3 that unless I am on trial in Philadelphia in one of the
4 Baycol cases.

5 THE COURT: What happened to your case out East?

6 MR. BECK: I won half, the most important half,
7 and lost the other part.

8 MR. ZIMMERMAN: The half that you lost was
9 unimportant?

10 MR. BECK: That's the unimportant half.

11 MR. ZIMMERMAN: That's good. I describe my nines
12 like that. The nine where I shot in the 30s was the
13 important half and the one that I shot in the 50s was very
14 unimportant. My partners don't believe that, though.

15 The following motions have been filed and are in
16 briefing. The first one is the motion for the Court's
17 jurisdiction over the United States with regard to the
18 Medicare lien and the PSC's motion to join the U.S., the
19 United States. I believe now there's going to be a --
20 there are going to be replies, one filed by the Defendants.

21 MR. SCHOON: We intend to file a reply to the
22 recent filings, especially --

23 THE COURT: I'm sorry. Where are we?

24 MR. ZIMMERMAN: This is on Medicare liens, D.
25 This just has to do with the continuing issue having to do
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1 with Medicare. The Government filed a motion to dismiss
2 for jurisdiction. Medalie and the PSC have filed motions
3 in response -- or briefs in response and now, I believe,
4 Bayer is going to be filing a response and brief as well.
5 Do we have a deadline for that or is it just under the
6 normal rules?

7 MR. SCHOON: There's no -- I don't think there's
8 a schedule currently set.

9 MR. ZIMMERMAN: Just to decide if we are going to
10 argue this at the February one or the March one. I don't
11 think time is of the absolute essence as to when we argue
12 it, but just so everyone is alerted to it. When do you
13 think you will --

14 MR. SCHOON: If we can have two weeks, Your
15 Honor, to file a response to all the filings, I guess that
16 would be fine with us.

17 THE COURT: That's fine, two weeks. From today?

18 MR. SCHOON: From today, Your Honor.

19 THE COURT: That will be the 29th of January,
20 2004. Put it on the calendar for argument on
21 February 19th.

22 MR. ZIMMERMAN: Thank you. There's also a
23 suggestion of remand of a rhabdo case, the Praytor vs.
24 Bayer case, that is also filed and I believe briefing is
25 due on that. That is an individual case, so I suspect when

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1 that is set for argument we need to notify that particular
2 lawyer to make sure that he or she is available. I don't
3 know the actual schedule on that one.

4 MS. WEBER: We filed our opposition to remand
5 sometime this week, so Plaintiff would have a couple of
6 weeks to respond. I don't even remember clearly whether
7 the parties were pushing for argument on this or not. I'd
8 have to check with my colleagues who are working on this.

9 THE COURT: I've looked over the papers. It's a
10 rhabdo case. Have you all had discussions on this or not?

11 MS. WEBER: I would have to double-check that
12 with settlement counsel, but I believe that it is something
13 that's on their radar.

14 THE COURT: All right.

15 MS. WEBER: Ron, do you know anything more about
16 it?

17 MR. ZIMMERMAN: Ron knows something about it, I
18 think.

19 MR. GOLDSER: Your Honor, this is Rob Jenner's
20 case. I have had some brief conversations with Mr. Jenner.
21 Yes, it has been through the settlement process. It
22 doesn't sound from Mr. Jenner's perspective like the offers
23 are going to be sufficiently close to result in a
24 settlement. Mr. Jenner would be happy to come to court and
25 argue that if the Court wants to have oral argument. If

1 it's going to be set for February 19th, I would be happy to
2 alert him to that fact and he'll be here.

3 THE COURT: Well, it will be the 19th. And we
4 will also have a settlement conference on that before
5 Magistrate Judge Lebedoff, so be prepared to have everyone
6 there. We will put it on for settlement conference before
7 Magistrate Judge Lebedoff and also argument before me on
8 the remand issue.

9 MR. ZIMMERMAN: Your Honor, I've just been
10 advised that there is a -- if we could move that
11 February 19th date. There is something else that's
12 conflicting.

13 THE COURT: What date do you want? It will have
14 to be later.

15 MR. ZIMMERMAN: Later would be fine. That next
16 week is wide open. Maybe the next Thursday.

17 THE COURT: February 26th?

18 MR. BECK: Your Honor, if we could have it
19 earlier in the week, that would be helpful for me. Because
20 if the first case doesn't go to trial in Philadelphia, the
21 second one almost certainly will and that starts on
22 March 1st. So if we could have it --

23 THE COURT: The 23rd or 24th?

24 MR. BECK: Either one of those days.

25 THE COURT: Is Monday a good day for you all
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1 traveling?

2 MR. ZIMMERMAN: No. That's the worst day.

3 MR. BECK: No, it isn't. Tuesday is better.

4 MR. ZIMMERMAN: Tuesday is fine.

5 THE COURT: The 24th then.

6 MR. ZIMMERMAN: That's fine. Thank you, Your
7 Honor. I appreciate it. Is that at 9:00 or 10:00?

8 THE COURT: 10:00. Any reference to any hearings
9 or arguments -- the Ken Moll matter will be on the 24th.
10 So any hearings that I have set for the 19th I move to the
11 24th --

12 MR. ZIMMERMAN: Thank you, Your Honor.

13 THE COURT: -- so there's no confusion on that.

14 MR. ZIMMERMAN: Thank you. The next motion, Your
15 Honor, is Abramovits -- I don't know how it is
16 pronounced -- vs. Bayer. It is Bayer's motion to dismiss
17 with prejudice certain Weitz & Luxenberg cases. I do not
18 know when the briefing is due on that. Would it make sense
19 to have that set for argument also on the 23rd [sic]? I
20 know both parties are here.

21 MR. BECK: The 24th, Bucky.

22 MR. ZIMMERMAN: I beg your pardon. The 24th.

23 MS. MANIATIS: It sounds like it will probably
24 fit into the schedule.

25 MS. WEBER: I believe we filed our brief on the
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1 8th. Weitz hasn't responded yet. It sounds like it will
2 be ripe for the next status.

3 MS. MANIATIS: I think so.

4 THE COURT: The 24th.

5 MR. ZIMMERMAN: Thank you, Your Honor. The next
6 item, Your Honor, is a significant item and it talks about
7 narrowing the list of cases that have been filed in the --

8 THE COURT: Before we move on, on the Praytor
9 case, if we can get that on the radar screen for your
10 program before we have to bring everybody to Magistrate
11 Judge Lebedoff, I would like that done with your settlement
12 team.

13 MR. BECK: We will. I think it's been done
14 already, Your Honor, but if it hasn't been, it will be.

15 THE COURT: Okay. If it has been, if you can
16 send an e-mail to my law clerk just telling me that it's
17 been -- it's gone through your program already so I can
18 alert Magistrate Judge Lebedoff that it's ready for our
19 program.

20 MR. BECK: Okay. We'll do that, Your Honor.

21 MS. WEBER: Your Honor, Mr. McConnell has
22 confirmed that there have been discussions with respect to
23 this case and his impression is that they're ongoing, but
24 we will light a fire under people --

25 THE COURT: Thank you.
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1 MS. WEBER: -- so we can get resolution.

2 THE COURT: Sorry for the interruption.

3 MR. ZIMMERMAN: Your Honor, the next item on the
4 agenda is something we have referred to as subject to meet
5 and confer process with regard to a proposed order that is
6 under discussion.

7 I'm happy to report that due to the astounding
8 leadership and direction of the special master, he's been
9 able to help us reach agreement on a proposed order that I
10 believe we are about ready, if not already submitted to the
11 Court for its review and approval.

12 I would like to comment at some point in these
13 proceedings about what -- how we got here and why, but I
14 don't know if now is the time or you want us to wait and do
15 this at the foot of the calendar when we've gotten done
16 with or completed the ordinary course of business, because
17 I think it's a significant issue and I think it's probably
18 been the focus of a lot -- of all of our attention over the
19 last six weeks.

20 THE COURT: It has been. And I appreciate the
21 efforts on the PSC's side of the table and the Defense
22 side, the attorneys that have been involved in this matter.
23 I have been updated, as you can imagine, on the progress of
24 what's going on through the course of this. What can I
25 say? I am just happy that you were able to sit down and

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1 meet and confer and come to an agreement on some of these
2 issues.

3 MR. ZIMMERMAN: And I think it underscores --

4 THE COURT: For the record and so it's in the
5 transcript, your leadership in this area has been
6 tremendous, Mr. Zimmerman. Without you taking that first
7 step, we could not have had any types of conversations.
8 And I said it, I think, at the last hearing and again I
9 commend you on your leadership in this matter.

10 MR. ZIMMERMAN: Thank you, Your Honor. I
11 appreciate that very much. So maybe that's a great
12 introduction to where we are and what we're proposing to
13 the Court. Do you want me to go into it a little bit?

14 THE COURT: Yes.

15 MR. ZIMMERMAN: Without going into details, Your
16 Honor, the philosophy is this --

17 THE COURT: I lost my new copy. Did you give me
18 a new copy? The one with the changes, did you hand me one?

19 THE CLERK: No. I was going to wait until they
20 were done.

21 THE COURT: Go ahead.

22 MR. ZIMMERMAN: The philosophy is this, Your
23 Honor, that we all believe from the PSC and the leadership
24 of the PSC and I think every trial lawyer and every lawyer
25 who has a Baycol case believes that we need to focus on the
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1 cases that are meritorious and we need to abandon and not
2 focus and not have be the focus of court time and effort
3 cases that are not of merit.

4 Now, what is of merit, of course, is very much a
5 moving target, very much a matter of debate and discussion,
6 but we know what cases are not of merit and those are cases
7 that couldn't sustain a motion for a directed verdict or
8 couldn't -- are cases where people didn't take Baycol and
9 are making a claim of injury or cases where their claim of
10 injury is something that couldn't have been caused by
11 Baycol.

12 And so it's time with these 22,000 cases in the
13 world -- in the United States and the 10,000 cases that are
14 filed and the six plus thousand cases that are in the MDL
15 to call upon every plaintiff's lawyer who has a case or
16 cases to take a look at their cases and tell us are these
17 the kinds of cases that can sustain further scrutiny or are
18 these cases just there because they thought they were
19 meritorious when first filed or believed that the case may
20 develop as they reviewed the medical records more
21 thoroughly but had to file them to protect statute of
22 limitations or for whatever reason; get people to look at
23 the cases and make the decisions.

24 And so we've come up with what we call a
25 protocol, we have called it a narrowing protocol, that has
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1 been a hard-fought sort of negotiated order to get people
2 to look at their cases and fill out a form.

3 And it's a very simple form. It's a two-page
4 form, actually one-and-a-half-page form, which basically
5 says whether or not they have evidence that the case --
6 that their client took Baycol, a prescription record or a
7 record in the medical record of taking a sample, a
8 prescription, a medical record saying that Baycol was
9 prescribed; and that they suffered a severe muscle injury
10 and that that injury is documented somewhere in a medical
11 record.

12 Obviously I am not trying to say everything
13 that's going to be contained, but, I mean, that's the
14 general gist of what we're making people look at in their
15 cases and tell us.

16 And if they meet the tests of they took the
17 Baycol that was prescribed, they have the record that it
18 was prescribed, they have documentation of a severe muscle
19 injury of some kind, they show that they discontinued
20 Baycol or that the prescription ran out, they didn't
21 continue to take it after that point in time or close to
22 that point in time, then they will -- the case will remain
23 within these cases that are before the Court and they will
24 be then classified; and I will come back to that later.

25 But the cases that don't have that, they didn't
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1 have a Baycol prescription record, they didn't take Baycol,
2 they don't make a claim of severe onset of muscle injury,
3 they make a claim for something else, their fingernail fell
4 off or their hair went gray or something -- and I am being
5 facetious, but I do it for effect -- then that case will
6 not sustain and it's time to remove that case from the
7 docket and have that case dismissed and with prejudice.

8 Then we get down to what we really have here,
9 what are the real claims and what are the severity of these
10 claims.

11 And then we'll get into a classification process
12 and we'll sit down with Defendants and classify these
13 claims; what ones are severe, what ones are more severe,
14 what ones are -- we are going to find rhabdo cases as we do
15 this review -- which ones are rhabdo and immediately take
16 them into the settlement process and the meet and confer
17 process and the mediation process that we've set up so we
18 can get those cases resolved if they're resolvable.

19 And then we'll have the rhabdos moved out, which
20 are in the settlement mode. We will have the severe onset
21 of muscle injury that are documented, classified by
22 severity and types of injuries and types of prescriptions
23 and length of time; and we can work with those. And then
24 we'll have the other cases dismissed.

25 And I think at two years into it, two and a half
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1 years into the MDL it's a good thing to do. I supported it
2 from day one and I am up here supporting it today.

3 It is the right thing to do because we have
4 limited time and we have limited resources and we must
5 focus on what we believe needs to be tried or what we
6 believe needs to be focused on for ultimate resolution,
7 whether it be through alternative dispute resolution or
8 through other mechanisms as ordered by the Court.

9 It allows us to look at cases and no longer be
10 subjected to the criticism that there are a lot of cases
11 here that have no merit because they don't have even the
12 minimum requirements of a case that could get to a jury.
13 We will have the cases that could get to a jury. We will
14 have cases that do show the relationship between the intake
15 of the medicine and the onset of muscle injury.

16 And we want to see what we have at the end of the
17 day and how we're going to classify them and how we're
18 going to work cooperatively and maybe not so cooperatively
19 to try the cases and/or otherwise try and find out ways to
20 help us resolve those cases.

21 That's my goal and I believe that's the
22 Defendants' goal. We might vary in our goals in terms of
23 how we're going to get there, what methods we're going to
24 take up that mountain, what equipment we're going to take
25 with us as we go up that mountain, but we know we have to

1 face the task of what are we taking with us up that
2 mountain and we only want to take the cases that are really
3 truly cases and we want to discard the baggage that are
4 really truly not deserving of being in this court.

5 That's the purpose; and we've sat down and we've
6 spent a lot of time trying to do it and, frankly, Your
7 Honor, I think we've come up with something that's fair to
8 both sides.

9 And it's our job as the PSC to communicate this
10 responsibility to all the plaintiffs' lawyers in America
11 who have these cases that it's now time to take a hard look
12 and do their homework and tell us what they have.

13 And it's time for Defendants, in my humble
14 opinion, to start facing the reality that they can label
15 these cases however they want and they can throw whatever
16 names on them, but these are cases that are ultimately
17 going to get to trial and they're going to have to put a
18 reality check on what they're going to do about this
19 exposure and this cache of what we believe are meritorious
20 cases.

21 And I believe that's where we're headed and
22 that's what my goals are in structuring this what we call
23 narrowing protocol.

24 I see out of my periphery vision that Phil is
25 poised to leap to his feet. I turn the podium over to Phil

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1 to comment on how he views the narrowing protocol process.

2 MR. BECK: Thanks, Bucky.

3 Your Honor, I too would like to join in the
4 Court's thanks to Mr. Zimmerman for his leadership on this
5 issue. I think it has been essential. And we also thank
6 Special Masters Haydock and Remele for their leadership.

7 Bayer believes that the narrowing process that we
8 now have a framework to work under is an important and
9 constructive one.

10 We have not agreed, as Your Honor might well
11 imagine, that whatever cases survive the process therefore
12 have merit.

13 We have not agreed at this stage to change our
14 settlement approach, but we do think that it is
15 constructive and important to separate those cases out that
16 under anybody's sensible approach would have no merit and
17 would not survive and are basically clogging up the MDL and
18 making the ultimate resolution of the other cases more
19 difficult.

20 And then we want to cooperate in every way we can
21 with the process and to help it along, and then at the end
22 of the narrowing process we'll be in a position to look at
23 what we have and consider all the different alternatives
24 for how we ought to resolve them.

25 As Mr. Zimmerman said, we don't have agreement on
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1 that right now. I don't think it would be productive for
2 us to try to reach agreement on that before we know the
3 universe of the cases that we're going to be dealing with.

4 It may be that the resolution is going to require
5 trials, it may be that there are other means to dispose of
6 them, but at this point we think that the most important
7 task is the one that is now underway, thanks largely to
8 Mr. Zimmerman's leadership, and that is the winnowing down
9 so that we have a more meaningful universe of cases to
10 address.

11 THE COURT: Thank you.

12 MR. ZIMMERMAN: When the nasty cards and letters
13 start coming in, I guess I will save this transcript, but
14 be that as it may.

15 Ron tells me --

16 THE COURT: Make sure you have a good virus
17 protection program.

18 MR. ZIMMERMAN: Ron tells me there's a couple of
19 more wordsmithing issues, but we should have it
20 momentarily.

21 MR. BECK: Then I take it all back.

22 MR. ZIMMERMAN: And Adam knows what I mean by
23 that. He thinks I am always changing the game every time I
24 want to change a word, and maybe he's right.

25 MR. HOEFLICH: Bucky during this process asked us
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1 on several occasions not to pull in his prior inconsistent
2 statements.

3 MR. ZIMMERMAN: I don't think that's too much to
4 ask, Your Honor.

5 I would like to talk to the Court -- unless the
6 Court has any further discussion on this --

7 THE COURT: No.

8 MR. ZIMMERMAN: -- I would like to move to the
9 question of trial --

10 THE COURT: Before we do that, yes, I do. I
11 handed out to the parties -- dealing with section 2, the
12 deadline for compliance of the orders, what I initially had
13 my IT, my computer people look into was how many cases were
14 in each category and what law firms had the cases in those
15 categories. So if there has to be some type of changing so
16 one law firm is not inundated with discovery requests, we
17 can work around that. That's why I had that done. So you
18 can have a look at that.

19 MR. SIPKINS: Your Honor, if I can address that
20 just very briefly. I just quickly perused it and I noticed
21 that my firm appears to have two plaintiffs' filings and
22 Sidley Austin has one. So I think that before we use
23 this --

24 THE COURT: I called my staff yesterday and it
25 was a quick run. This is not the final document.

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1 Certainly there's going to be errors. That just shows that
2 in our docketing process there were some errors done. That
3 can be corrected. But you never know. How many lawyers
4 have you got in that firm?

5 MR. SIPKINS: We're going back to check our --

6 MR. MAGAZINER: I wish to note for the record
7 that my law firm is not listed as having filed any claims.

8 UNIDENTIFIED SPEAKER: I just want to know if
9 we've settled any of them yet.

10 THE COURT: And you can understand why I did
11 this, just so logistically we can -- because when we start
12 pulling up those numbers it looks nice, but if it is going
13 to logjam the process, then we are going to have problems.
14 So we can work around that. I just wanted to give you an
15 idea of what it looked like.

16 We can move on. I'm sorry.

17 MR. ZIMMERMAN: That's okay. Your Honor, at this
18 point in the program I was going to give, as I say, a
19 PowerPoint presentation in color on this big screen, sort
20 of like Phil has been able to do, but I didn't bring my
21 computer.

22 MR. BECK: I didn't bring mine either.

23 MR. ZIMMERMAN: I was really kind of hoping I
24 could, but I can't. But I would like to tell the Court
25 about PTO 89 program cases.

1 THE COURT: Ron, where were you?

2 MR. GOLDSER: I was on the narrowing order,
3 Judge.

4 MR. ZIMMERMAN: As we all can recall, the trial
5 program, the random selection program contemplated
6 selecting cases from two sources, the Minnesota residents
7 with Minnesota -- with cases filed in the Minnesota United
8 States District Court of Minnesota and then 200 cases
9 selected at random from the MDL.

10 And the Court identified 56 cases that were
11 Minnesota cases and we'll start with that group first. So
12 this is just the Minnesota filed -- excuse me -- Minnesota
13 resident cases filed in Minnesota United States District
14 Court. 56 were identified.

15 Immediately 38 were removed from that list. One
16 was a Florida resident, not a Minnesota resident. 14 were
17 not really filed in Minnesota District Court, they were
18 filed in the Eastern District of Pennsylvania. 15 had
19 previously been dismissed or settled. One was a PPA case,
20 interestingly enough, another case that I'm involved in,
21 not a Baycol case. And seven had been filed as class
22 actions.

23 So of that 56, I think it's important to
24 recognize that 18 of them were really set for the
25 evaluative process and 18 cases were evaluated for this

1 program.

2 Three of these 18, Your Honor, have suffered from
3 rhabdo and entered the settlement program. One was
4 identified as being a class rep. Eight were deemed to have
5 no merit, not be appropriate for the next step. Six were
6 identified to the Court as cases potentially available for
7 trials of a muscle damage case.

8 So we started with 56 and we really get down to
9 six. The reason this is important to me, Your Honor, is
10 that we can say -- when you start with 56 and only six were
11 identified as possible trial cases, you want to draw all
12 kinds of conclusions, negatively or positively, from that.
13 But I think you need the facts to understand where they
14 went and why they went there before you can draw anything
15 from it, and I think what you need to draw you can draw.

16 But essentially we really had 56, but 18 went
17 through the process, three were rhabdos, eight were deemed
18 to not have merit, and six were then put in for further
19 evaluation. That's the bottom line on the 56.

20 Now, of these six cases that are identified,
21 Soliman was settled because that was subsequently
22 identified to be a rhabdo.

23 MR. GOLDSER: Elevated CK.

24 MR. ZIMMERMAN: Had an elevated CK. So that was
25 settled as if a rhabdo, call it rhabdo-like or call it

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1 rhabdo. Goulet was settled as a rhabdo or rhabdo-like.
2 Lee was dismissed, nonmeritorious. Anderson is awaiting a
3 specific expert report, but we believe now that is going to
4 be dismissed and I think we have told the Defendants that.
5 So Anderson went through the drill. We sent it out for
6 evaluation by an expert to see if the connection is viable,
7 and it was not and we are dismissing. Schmit was dismissed
8 for similar reasons.

9 MR. GOLDSER: No merit.

10 MR. ZIMMERMAN: No merit. And Pierce has gotten
11 through and we believe has merit and discovery is underway
12 and we believe that case will be in the docket available
13 for trial in June 2004.

14 Important here is that of the six that went
15 through from the 18 from the 56, two are settled as rhabdo,
16 three were dismissed because they weren't meritorious, and
17 one goes to trial. Does that add up to six? Yes. So
18 that's what you can draw from that however you want to draw
19 it. From the 56, from the 18 and from the six, these are
20 where they went in the real world.

21 It's important because one of the things we
22 wanted to learn from all of this is what does it mean for
23 the overall litigation. And I'm not going to draw
24 conclusions here today. I don't think it's important for
25 anybody to necessarily draw conclusions, but at least you

1 know factually what happened and then we can start looking
2 at what conclusions could we, should we, might we, can we
3 draw from the process.

4 Turning now to the random selected list, which is
5 the 200 that just came off the wheel, if you will. Of the
6 200, 38 were taken off immediately. One was a third party
7 payer case, six had been remanded or motions for remand
8 were pending, 24 of the 38 were settled or dismissed, and
9 seven were filed as class actions.

10 I guess then what happened was 38 cases,
11 replacement cases, were identified from the Court and 19 --
12 in other words, we put 38 back in after this 38 were taken
13 off. 19 were removed for similar reasons that I just said
14 and 19 more replacements came in.

15 So now we have 195 random cases evaluated because
16 we had to go through this sort of gyration. 83 of the 195
17 were submitted to the Court or will be submitted to the
18 Court as possible trial cases.

19 In other words, you said to us the other day or
20 at the last status, If you've got more cases you want to
21 put in the docket, show me what they are. We have now got
22 this field of 83 that we're honing down one more time to
23 get -- at least be able to suggest here are additional
24 cases, as the Court has invited.

25 Will all those 83 be suggested? I suppose not,

1 but we have that list that now comes from this 195 of 83
2 that we're going through a final cut on to say, hey, here's
3 another group of this number that we can at least
4 potentially put in the docket for review and trial.

5 Nine of these 195, the second round of random,
6 were rhabdo or are rhabdo cases. So nine of 195. I guess
7 that's about 5 percent were rhabdo and are being dealt with
8 as rhabdo. And with the rest depositions and discovery are
9 ongoing.

10 What does this mean, Your Honor? Again, I am not
11 going to venture a guess. I think the time will come for
12 all of us to sit down and --

13 THE COURT: Let's back up. You mean nine of the
14 195 cases or nine of the 83 cases are left?

15 MR. ZIMMERMAN: I guess it would be nine of the
16 195, but --

17 THE COURT: They would still be left to --

18 MR. ZIMMERMAN: Right. Again, I am not here to
19 draw conclusions from it, Your Honor. I am here to give
20 everyone the facts so then we can deal with them when we
21 need to deal with them as we need to deal with them. But
22 it does show us some information, both positive and
23 negative, both fodder for one side or the other.

24 But it's important information and I think it's
25 very useful for everyone to know what we're talking about

1 when we say we started with 250 cases and we're down to
2 one. You know, what happened? Well, here's why and here's
3 what.

4 We've got 83 still in the box ready to come
5 before Your Honor if and when we need them. We've got the
6 Pierce case ready to go to trial.

7 And many of these cases were dismissed because
8 they were rhabdo -- some of these cases were settled
9 because they are rhabdo, many of them were dismissed
10 because they were not meritorious, and many were removed
11 for reasons that had nothing to do with either.

12 That's my report to the Court. I think it's
13 useful to keep it in mind as we move forward into the
14 narrowing protocol process.

15 THE COURT: Mr. Beck.

16 MR. BECK: Your Honor, I think the process has
17 been helpful in identifying candidates for trials on
18 nonrhabdo cases. It's also had the not incidental benefit
19 of identifying a few rhabdo cases that people hadn't
20 focused on that got into the settlement process. I think
21 that's good for everybody.

22 Like Mr. Zimmerman, I don't draw any great
23 overall conclusions from how these numbers have worked out.
24 I think it would be pointless for us to try to take these
25 data points and argue about how many of their cases are

1 worthwhile and how many are not worthwhile.

2 I think we have a constructive process that's
3 underway that's going to winnow the universe down to those
4 that the plaintiffs' lawyers and the plaintiffs themselves
5 feel are worth pursuing.

6 And so I am going to -- I am not even tempted,
7 but if I were, I would resist the temptation to draw any
8 conclusions from these numbers. I think that it's been --
9 we need to identify cases for Your Honor to try, and we've
10 got one for June and so the process has worked.

11 And to draw any broader conclusions from that, I
12 think, would be counterproductive when we have a parallel
13 procedure underway that's designed to narrow the cases down
14 to those that the plaintiffs' lawyers believe are worth
15 pursuing.

16 THE COURT: Thank you.

17 MR. ZIMMERMAN: Without further comment on this,
18 Your Honor, I think we can go to D on the agenda, Roman
19 numeral VI, and that is the list of state court trial
20 settings. I believe a list has been provided to the Court
21 and one has been provided to me.

22 MR. BECK: Can I interrupt?

23 MR. ZIMMERMAN: Sure.

24 MR. BECK: I'm sorry, Your Honor. Mr. Magaziner
25 has reminded me that we've identified Pierce as a trial

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1 candidate. That does not mean that we're waiving any
2 rights we would have to file summary judgment or other
3 dispositive motions concerning Pierce. We're evaluating
4 whether to do that.

5 THE COURT: I didn't assume that you did.

6 MR. ZIMMERMAN: Thanks, Fred.

7 MR. BECK: We're sensitive to waiver arguments.

8 MR. ZIMMERMAN: Apparently. So am I. It's that
9 inconsistent statement I don't want to be bound by.

10 Anyway, the trial dates are before the Court as
11 of the 13th of January, '04, although it says '03 on it,
12 Susan. Unusual for you to ever make a typographical error.

13 MS. WEBER: I apologize.

14 MR. ZIMMERMAN: Don't worry. It's not a problem.

15 As you can see, it's hard to tell what of these
16 are going to be rhabdos and what are going to be muscle
17 damages cases because many of them are labeled rhabdo and
18 muscle weakness at the same time, but I think it does tell
19 us the cases that are at least in the docket and coming up
20 through May of 2005.

21 I'm sure the Defense knows more what is coming
22 up. It looks like it's going to be the Court of Common
23 Pleas in Pennsylvania sometime in February or March.

24 MR. BECK: Yes, Your Honor. The three that are
25 scheduled first are all in the Court of Common Pleas in

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1 Philadelphia.

2 The first case, the Frank case, is a Weitz &
3 Luxenberg case. That one is actually subject to a forum
4 non conveniens transfer motion once they drop GSK. It's a
5 plaintiff from somewhere other than Pennsylvania. We
6 should hear, I'm told, in a week or so whether that case is
7 going to be transferred or not.

8 And then the next two are cases from plaintiffs'
9 lawyers who I don't think have been involved in the MDL,
10 and we are expecting that both of those cases are going to
11 go to trial. We've had settlement discussions in fits and
12 starts, but the value that we put on the cases and the
13 value that they put on the cases are pretty far apart, so
14 we are assembling our teams and renting hotel space and
15 getting ready to try a couple of cases out in Philadelphia.

16 MR. ZIMMERMAN: I understand the weather has been
17 cold in Philadelphia recently. I hope it stays that way.

18 THE COURT: The whole East Coast, I understand.

19 MR. ZIMMERMAN: Right. Liaison Advisory
20 Committee and special master's report, that would be under
21 the direction of Special Master Haydock, so I guess it's
22 his time to make his report.

23 THE COURT: Good morning, Mr. Haydock.

24 SPECIAL MASTER HAYDOCK: Good morning, Judge.

25 Regarding the proposed order to be submitted to
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1 you shortly, I understand the parties are within moments of
2 reaching an agreement on that and at the end of the status
3 conference we'll fine-tune that document.

4 It is, agreeing with the attorneys who spoke
5 earlier, not only a significant pretrial order, but I think
6 as we look back in the future it will be a historic
7 document that the parties have entered into that will shape
8 the direction of this MDL for the future.

9 And I did want to publicly thank the attorneys
10 who spent inordinate amounts of time negotiating and
11 drafting that agreement, Bucky and Ron specifically and
12 Susan, Adam, and Fred, who gave more than their fair share
13 of time focusing on the issues.

14 And as a law professor I must say that after the
15 MDL I would think that they do have a second career choice
16 as a legal drafting instructor, so that there's hope --

17 MR. ZIMMERMAN: For first-year students.

18 SPECIAL MASTER HAYDOCK: There is hope for that
19 as well.

20 A few reports, Your Honor, regarding the Medicare
21 lien situation. There's a LAC subcommittee. We had a
22 conference call early January, which I have reported to the
23 Court on. We have another one scheduled for early February
24 continuing discussions on what, if anything, we can do
25 regarding the Medicare lien situation applicable to

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1 specific cases as well as whether or not there's any global
2 resolution of that issue. And so we will be continuing
3 that discussion.

4 Secondly, with regard to the LAC Committee
5 generally, there are no issues presently before the
6 committee, so we have no meeting scheduled. As parties
7 submit issues we'll address those by conference call before
8 the next status conference.

9 Thirdly, regarding the wall, Marie Harkins will
10 be visiting the Bayer facilities in the next week or so and
11 reviewing cases and files there for that continuing
12 process, which is going well.

13 And then lastly, not as exotic as Las Vegas or
14 other venues, I will be attending a meeting of claims
15 administrators regarding MDL cases and special masters at
16 Duke University next weekend and hopefully become even
17 smarter about this process as we go forward.

18 Thank you, Judge.

19 MR. ZIMMERMAN: Is that going to coincide with
20 the Blue Devils basketball game by any chance?

21 SPECIAL MASTER HAYDOCK: I would hope so.

22 MR. ZIMMERMAN: I would too.

23 Without getting, you know, inordinately soupy
24 over this, I have to thank Roger Haydock as well for really
25 keeping us to the task. It's what it required. He made us

1 stay on task and it's very helpful in these kinds of things
2 and I appreciate it very much, although I certainly didn't
3 like all of it, but I endured it.

4 Other matters, Your Honor. Just talking about --
5 this is just a pick-up item. We are still working on
6 scheduling some kind of science tutorial before the trials
7 in June.

8 The specifics of this are very much in play and I
9 don't really have anything to report on it other than we do
10 think it's an excellent opportunity to give the Court and
11 everybody really an understanding of where the experts are
12 coming from.

13 We will spend some time, now that we are off of
14 narrowing, into this issue and come up with something that
15 both parties can live with and we think will be productive.

16 There's no attempt here to try and do anything
17 that gives either side an advantage. We are trying to
18 do -- you know, present the Court with good balanced
19 science so they can see where the issues are and be
20 prepared for what they're going to hear.

21 And this is not, in my view, something to try to
22 take advantage of one side and blindside the other or, you
23 know, do something that anybody is going to be fearful of.
24 We want it to be a learning experience for everyone, and I
25 think with that spirit we'll go that route.

1 We haven't done anything about it except start to
2 prepare our side a little bit for what's coming, but we
3 have to work it through with defense counsel.

4 Your Honor, the last item says "Respectfully
5 submitted" and it is so respectfully submitted and --

6 THE COURT: I have one matter that I have to
7 bring to the parties' attention. I don't know what day it
8 was, but I got a piece of mail sent to my home. Normally
9 junk mail is shredded, but I for some odd reason opened
10 this piece of mail and all of a sudden I see that I am part
11 of a class action with Larson King and Lockridge and
12 Zimmerman Reed and another firm.

13 And so I'm alerting both sides that I do have
14 State Farm Insurance and one of my law clerks has State
15 Farm Insurance. We will do a little research, but more
16 than likely we will have to opt out of that class, whatever
17 it is. So I won't get my coupon or my 25 cents.

18 MR. ZIMMERMAN: Now, now. Your Honor, if you
19 would like to have a personal consultation in our offices,
20 that is available for you and your wife and children.

21 THE COURT: I don't think that will happen.

22 MR. ZIMMERMAN: Phil, have you checked your mail
23 recently?

24 MR. BECK: We're representing opt-outs.

25 MR. ZIMMERMAN: Because that's where the money

1 is.

2 MR. HOPPER: Does that mean we can call you one
3 of those plaintiffs' trial lawyers?

4 MR. BECK: Not one of those class action lawyers.

5 THE COURT: Okay. Well, that's all I have.
6 Anything else?

7 MR. ZIMMERMAN: I do have to say something, Your
8 Honor.

9 THE COURT: Yes.

10 MR. ZIMMERMAN: This may come as some
11 embarrassment to the Court, but you might be advised that
12 Judge Tunheim in the St. Jude's MDL has scheduled his
13 status conference for Las Vegas, Nevada --

14 THE COURT: Right.

15 MR. ZIMMERMAN: -- coming up on Friday at 1:30
16 and so many of us in this courtroom are going to have to be
17 leaving to catch our planes for that.

18 I want to leave the suggestion with Your Honor
19 that perhaps a location in Miami, Florida, or Scottsdale,
20 Arizona, or Cabo San Lucas would be a possibility and that
21 we could entertain those thoughts perhaps come February and
22 March for a location change.

23 I have no idea why Judge Tunheim picked
24 Las Vegas, Nevada, although I do know that justice is
25 served well there in the federal court and they have been

1 making accommodations for us there. And so I can look into
2 that and report back to the Court at the next status how
3 the accommodations were in Las Vegas. So I'm just planting
4 that seed.

5 THE COURT: At Miami Beach you have the --

6 MR. HOPPER: We'd be happy to put it together.

7 There is precedent now.

8 MR. ZIMMERMAN: I think, Tracy, you and I have to
9 catch a plane, don't we?

10 MS. VAN STEENBURGH: All I have to say is that
11 Mr. Zimmerman, who has never graced our presence maybe but
12 once in the St. Jude Medical case --

13 MR. ZIMMERMAN: It's my time to do the hard work.
14 Somebody has got to do it.

15 THE COURT: Mr. Beck, anything further?

16 MR. BECK: No, Your Honor. Thank you very much.

17 THE COURT: Thank you all. You will be meeting
18 with Special Master Haydock and Special Master Remele and
19 my law clerks back in the jury room. And, again, happy new
20 year to everyone. If I don't see you here on
21 February 24th, I will see you in Miami Beach.

22 (Court adjourned.)

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* * *

1 I, Lori A. Case, certify that the foregoing is a
2 correct transcript from the record of proceedings in the
3 above-entitled matter.

4

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6 Certified by:
Lori A. Case, RMR-CRR

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8 Dated: January 21, 2004

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