UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Baycol Product Litigation) MDL No. 1431 MJD
) 9:30 a.m. o'clock
) February 7, 2003
) Minneapolis, MN
) VOLUME II

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

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS: CHARLES ZIMMERMAN, ESQ.
ARTHUR MILLER, ESQ.
ELIZABETH CABRASER, ESQ.
STANLEY CHESLEY, ESQ.
RICHARD ARSENAULT, ESQ.
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ON BEHALF OF THE DEFENDANTS: PHILIP BECK, ESQ.
PETER SIPKINS, ESQ.
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09:05:28

THE COURT: Mr. Zimmerman. 09:05:28

MR. ZIMMERMAN: Good morning, Your Honor. 09:05:36

THE COURT: Good morning. 09:05:37

MR. ZIMMERMAN: May it please the Court, Counsel, 09:05:38
I'm going to give part of the rebuttal argument and then 09:05:40
we'll have some more comments. I will be relatively brief. 09:05:45
The Court gave us three questions yesterday. And we want 09:05:51
to provide the Court today with clean, crisp and 09:05:55
straightforward answers and we will. 09:06:01

Yesterday, we felt it was important that the 09:06:04
Court understand from our point of view what the options 09:06:06
were, the tool box. We thought it was important for the 09:06:11
Court to understand in our view active management was a 09:06:15
necessity to keep control. We felt it was important for 09:06:23
the Court to understand that from our view that without 09:06:28
management, active management, without a class, we will 09:06:31
have chaos. It seems chaos is what the Defendants really 09:06:35
seek. 09:06:43

I listened very closely to Mr. Beck. My mother 09:06:43
told me many years ago, stop talking and to listen, and I 09:06:49
listened. And what did I hear? Honestly, Judge, the first 09:06:53
thing I heard and probably the overwhelmingly thing I 09:06:59
heard, with all due respect, was Mr. Beck mock the PSC. I 09:07:03
don't know if it was twenty times or a hundred times he 09:07:09
referred to us as those class action lawyers. I think 09:07:12

there is more trial experience on our side of the room than you can shake a stick at. I know Turner Branch himself has 250 jury trials under his belt. Stan Chesley tried the Albuterol case, a class action. Other people in this room, John Climaco just finished trial, I think, on Tuesday. And I've tried many jury cases and I tried a full-blown class action to verdict. 09:07:17 09:07:21 09:07:27 09:07:30 09:07:33 09:07:37 09:07:41

The next thing Mr. Beck says is all we want is fees, mocked our clients, called them fat old ladies. 09:07:43 09:07:47

MR. BECK: Your Honor, I really do object to that. 09:07:52 09:07:55

MR. ZIMMERMAN: May I continue? We are proud of what we do. We are proud we represent, old ladies, young ladies, skinny ladies, fat ladies. We represent real people who were injured by Mr. Beck's clients. I'm proud to be a lawyer, and I'm proud to be a class action lawyer. I'm proud that I tried to find complex answers to -- complex solutions to complex problems. 09:07:56 09:07:57 09:08:04 09:08:10 09:08:12 09:08:17 09:08:22

We believe, as I said yesterday, that justice is not a static thing. It must be revised to suit our times, and here we are with thousands of case and what are we going to do. 09:08:26 09:08:28 09:08:33 09:08:38

I do not represent a large German conglomerate. I represent people injured by this large German conglomerate and we do it vigorously, and Mr. Beck is wrong 09:08:39 09:08:45 09:08:50

to disparage that. 09:08:57

Mr. Beck was wrong about a couple of other 09:09:03
things. Piecemeal justice, Your Honor, will not work. If 09:09:03
he is correct that one percent of 900,000 people who took 09:09:05
the pill have Rhabdo, that's 9,000 Rhabdo cases, Your 09:09:08
Honor. In ten months, through the efforts of the entire 09:09:14
PSC, we have settled 400 cases. My calculation say at that 09:09:17
rate twenty years just to settle Rhabdo. That won't work, 09:09:23
Your Honor. That's not justice. 09:09:27

He's wrong when he says the MDL will blow up if 09:09:29
we certify a class. Not true. I think the Court has 09:09:33
witnessed and Bayer has witnessed throughout that the 09:09:36
states and the PSC coming together. Mr. Ramon Lopez is in 09:09:39
the courtroom. Hi, Ramon. Mark Robinson is in the 09:09:44
courtroom. Sol Weiss has been in this courtroom. Other 09:09:48
people different who have had different points of view -- 09:09:51
Ted Lyons from the PSC in Texas, he's joined the forces. 09:09:53
We have come together. And why have we come together? 09:09:58
Because we are doing good work and we're doing good work 09:10:02
under the management of a very committed court. And we 09:10:06
will continue to do that. And the class will aid in that 09:10:10
process and not detract from it. 09:10:13

Mr. Beck didn't answer the tough question that 09:10:18
you asked him. What about that Ford Firestone problem. 09:10:21
You want a class, you don't want a class and then when the 09:10:26

class is decertified, you want the court to use its All-Writ Act to keep it back together. He didn't answer that question. Be careful what you ask for. 09:10:30 09:10:34 09:10:37

Remand is thousands of cases, Your Honor, back to the districts where they reside is not an answer. That will not work. 09:10:43 09:10:46 09:10:52

Mr. Beck is an able trial lawyer, but he can't try thousands of case simultaneously. No one can, and no one will and no one should. 09:10:53 09:10:58 09:11:02

Mr. Beck said the refund case is just class action lawyers nonsense. People looking for fees. Simply put, Your Honor, if people knew the drug was 10 to 80 times more dangerous than any other statin on the market, they wouldn't have bought it. They would have bought something else. They are entitled to their money back because they bought a drug that didn't work, and not only didn't work, it caused harm, and if it didn't cause them harm, it was a lot more likely to cause harm and they wouldn't have bought the darn thing if they knew it was 10 to 80 times more likely to hurt them. The refund case is not bunk. The refund case is the right thing to do. 09:11:04 09:11:07 09:11:13 09:11:17 09:11:21 09:11:25 09:11:28 09:11:28 09:11:31 09:11:34 09:11:37 09:11:42

The big one, Your Honor, the big one that Mr. Beck is wrong about is it has never been done before. You can't try a class action. You want to know something, Judge, you can and we have. Mr. Chesley tried for 48 days 09:11:46 09:11:49 09:11:52 09:11:54

in front of Chief Judge Brimmer, along with Jerry Spence, I understand, against Sheila Bombon, of Stan Knox along with the Covington and Berlin from of Washington, D.C. the Albuterol cases. They had a trial plan. They had jury instructions. They tried the case. It's not dissimilar to this case. It can be done, and we're going to show the Court today how that was done and how we can do it here.

And Mr. Chesley is here and prepared to answer any questions you have about that trial in that courtroom. Remember Chief Judge Brimmer of Wyoming was also on the panel for Multi-District litigation for ten or twelve years. He knows what he's doing when it comes to class actions and complex litigation.

Mr. Beck was wrong again when he talked about the end game. We seek justice, Your Honor, but only for those who justly deserve it. I'm not here for any other reasons. That's not how I make my living, and that's not how anybody in this courtroom makes their living. We try to do the right thing and get try and get to the end and get people the right result, and if we do, then we are justly compensated. And if we don't, we won't.

Now, let's put these questions up and let's answer them. Number one, what do you want me to do? Number two, how do you want me to do it? And Number three, how do we try this case?

I'm going to ask Elizabeth Cabraser to come up and answer directly those questions, but I'm going to hand to this Court our proposed trial plan. Tab 1 of the fourth binder is our proposed trial plan, Your Honor. I'm going to ask Elizabeth Cabraser to explain it to you in detail.

But before I sit down, one more quote if I can indulge the Court. Again from Justice Thurgood Marshall. "The individual effort is not enough to secure justice. Today, even more than in the past, only organized action can hope to ensure that the concept of justice remains meaningful to all of our people." That is what we seek, Your Honor. That is what we can try. And that is what we can do. And I'm good to turn this over to Elizabeth Cabraser.

THE COURT: Thank you. Good morning.

MS. CABRASER: Good morning, Your Honor. I'd hope I had gotten taller overnight so I wouldn't have to do this. It seems to go the other way.

Well, another day, another bench book, Your Honor. We gathered together for the Court and counsel the materials that I mentioned yesterday in my presentation, mainly the jury instructions and the verdict forms for the various class action trials that I discussed in passing.

But we also, in response to the Court's inquiry, put in pleading form in Plaintiffs' proposed trial plan for

this case, which is Tab 1 of the Volume IV Bench book, today's submission. We also have tabbed some of the slides I might use today just to illustrate what the courts do about generic and specific or individual causation and how they phase trials to address that sequence. 09:15:37 09:15:47 09:15:47 09:15:51 09:15:56

We provide at Tab 4 the published version of Judge Brimmer's Copley Albuterol class certification order and trial plan. We also will show you on the screen the version of that trial plan as it came from and was signed by Judge Brimmer in April of 1995. 09:16:00 09:16:05 09:16:11 09:16:16 09:16:20

Tab 5 are the Plaintiffs' submitted jury instructions and jury interrogatory forms for the Copley trial. As you know, Your Honor, the Copley trial was tried for approximately 40 days. Near the end of that trial, before the jury was instructed and charged, the case settled. Those instructions were not actually given to the jury, but the parties were asked to prepare them. 09:16:26 09:16:29 09:16:34 09:16:39 09:16:43 09:16:46 09:16:51

Tab 6 is the special verdict forms for Phases 1, 2, and 3 of the Exxon Valdez class trial which I discussed yesterday, including the Phase 2(a) compensatory phase verdict form which has approximately 140 questions, very complex fact case. Far more complex than this one will be. 09:16:52 09:16:56 09:17:02 09:17:07 09:17:12

Tab 7, another class action trial case prepared for trial, revised submission of the Plaintiffs' jury instructions in Fernald. Fernald was a medical monitoring 09:17:17 09:17:21 09:17:28

case. It was also an emotional distress class action by victims of long-term toxic contamination at the Fernald plant.

Tab 8 are the Telectronics jury instructions which were used by Judge Spiegel in the post-class certification summary jury trial in the Telectronics MDL.

Tab 9 are Avery jury verdict and court judgments from the Avery v. State Farm, a nationwide consumer class action trial.

And Tab 10 are the jury instructions and special verdict form from Naef v. Masonite. That was a nationwide class Phase 1 defect issue trial in which the jury was succinctly instructed to answer and did answer the question of defectiveness under the applicable laws of all states.

So, you have there a panoply of instances in which courts and counsel have tried and succeeded in organizing and structuring for trial and conducting trials in nationwide class actions, in class actions involving personal injury and wrongful death, in class actions involving consumer claims such as we have here, and in class actions calling for medical monitoring, typically the bench part of any such trial.

What I would like to do now is to put on the screen the trial plan from the Copley Albuterol case. And the reason I'm doing this and spending some time on it,

Your Honor, is that when we considered what would be an appropriate trial plan for Your Honor to look at in this case, it occurred to us that no two class actions are precisely alike, this one had very strong similarities to the current situation. It's a single product. It's a single manufacturer. Yesterday the Defendants characterized it as a bad batch case, but it was actually brought and tried as a common cause conduct case because the Copley Albuterol was a generic product that was a cheaper version of alternatives on the market. And the bad batch was really the tip of the iceberg that revealed long-term design and manufacturing problems, and that's really what Copley Albuterol was all about. Similar to this case where at the outset all the problems were known to the Defendants, the problems were concealed, and we say an inferior and unnecessary statin drug was introduced into a market that neither needed it nor was helped by it. So, there are common themes, common factual backdrops between the two cases.

In Copley, as you will see from the trial plan when we put it up, the Copley court had to cope with multiple state laws. Judge Brimmer, Your Honor, had to cope with multiple state laws. Did not make a choice of law. Did what the courts and commentators can be done, which is he grouped the laws to develop a relatively simple

and straightforward set of jury instructions and jury interrogatories. That case was involved in the trial of negligence product defect warnings, the same claims we have in this case. There was a medical monitoring component which Judge Brimmer elected to try as a Bench trial simultaneously sitting with the jury so that -- since there was so much evidence overlap, both Judge and jury were hearing and some of the same evidence for different purposes, rather like the Avery State Farm I described yesterday where the Judge sat as equity Judge on the bench for the consumer fraud component while the jury sat on the breach of contract damages phase. 09:21:10 09:21:15 09:21:23 09:21:25 09:21:30 09:21:35 09:21:37 09:21:39 09:21:43 09:21:48 09:21:52 09:21:57

All right, I think, Your Honor, if we don't overcome our technical difficulties, the best thing to do is to look at what -- here we go. Now, some people have it. 09:22:04 09:22:07 09:22:12 09:22:19

THE COURT: Continue. 09:23:18

MS. CABRASER: Thank you, Your Honor. We'll try to overcome the snafu here. That's fine. 09:23:24 09:23:24

When Margaret Meade made her landmark anthropological studies of class action lawyers, one of the things she noted is the cultural trait was the inability to manage high technology, and I would cite from that report but I can't find it, so. 09:23:32 09:23:37 09:23:38 09:23:43

Our proposed trial plan for this case closely 09:23:46

tracks what Judge Brimmer did in Albuterol. Again, not because we believe there is any virtue in copying, that's not it. To copy Copley is a recognition that was a case very similar. That was a case was brought to trial. That was a case that was tried. And that was a case that accomplished what the Court and parties set out to do, which was to enable the parties to make a fully informed determination to resolve the matter in fair way before consigning it to the jury, which would have been the equally and proper and viable alternative. 09:23:49 09:23:55 09:24:01 09:24:09 09:24:14 09:24:20 09:24:20 09:24:24 09:24:28 09:24:30

We mentioned the Copley trial plan in our supplemental and reply brief. We mentioned it in a passing paragraph, and I think it probably went unnoticed. We should have spent more time with it to develop it. We are doing that now. 09:24:34 09:24:38 09:24:43 09:24:46 09:24:49

But, basically, it was a straightforward plan. 09:24:51

What it means is that the class representative claims are tried front to back by ability, compensatory damages, punitive damages. The jury hears all of that evidence. 09:24:55 09:24:57 09:25:05

So, you have a completed trial for the class representatives on the refund claim, on the personal injury claims. And those can be the representatives listed in the complaint. They can be representative plaintiffs selected by the Plaintiffs. They can be representative plaintiffs selected by both sides, depending on the number and nature 09:25:11 09:25:14 09:25:22 09:25:26 09:25:29 09:25:33

of the claims that the Court feels will best provide a relevant sample, not only for those claims but to extrapolate other claims. 09:25:39 09:25:43 09:25:49

In addition to deciding individual cases of the representatives from front to back, the jury will deliberate on the following factual issues, and those are the common factual issues, Your Honor, that we set out on Page 2 of our Plaintiffs' Proposed Trial Plan which is in Tab 1 of your book, and they are very straightforward. 09:25:52 09:25:55 09:25:59 09:26:02 09:26:05 09:26:08

These are to some extent paraphrased from the Copley plan to the extent they apply directly. They are designed specifically with respect to this case. This is Judge Brimmer's version of the trial plan. I'll ask you just to flip through that briefly. There are the common factual questions from Copley. They deal with common or generic liability. They deal with generic causation. This is Judge Brimmer addressing multiple state law issues. He recognizes there are a few idiosyncratic jurisdictions. Those jurisdiction become important because of -- 09:26:13 09:26:19 09:26:24 09:26:36 09:26:41 09:26:45 09:26:50 09:26:54 09:27:01 09:27:01

THE COURT: Go back. 09:27:03

MS. CABRASER: -- you see him saying he's going to consider the relevant laws for all necessary jurisdictions. If there are idiosyncratic laws, he can excise those persons from the class. He can deal with them through special interrogatories, and what he's basically 09:27:19 09:27:20 09:27:26 09:27:33 09:27:39

recognizing is there is not an equal geographic dispersion of class members throughout the country. 09:27:42 09:27:47

Same thing true in this case, Your Honor. You saw the class census yesterday. You look and see where the cases were filed. You'll see a lot of states where one or two or maybe zero cases that are MDLed here from those states. So, if it turns out that Vermont or Hawaii, for example, is a state that has the idiosyncratic -- truly idiosyncratic law on negligence or strict product liability such that it would require an additional jury instruction or additional jury interrogatory, the Court can decide either to do that, or if it's at the tipping point of potentially confusing the jury or making it difficult, the Court can simply excise those claims from the class because on a cost benefit analysis, it's not cost effective to make that extra effort. 09:27:50 09:27:51 09:27:55 09:27:59 09:28:05 09:28:10 09:28:17 09:28:19 09:28:23 09:28:27 09:28:32 09:28:33 09:28:39 09:28:46

What really happened, of course, is that this did not happen and did not become a problem as the trial went on, but it was the answer to we just can do it, Your Honor. 09:28:49 09:28:51 09:28:55

When I used tell my mother I couldn't do something, she said you mean won't. There is a big difference between can't and won't. These things can be done. This was the plan to do them and, of course, it was done. 09:28:59 09:29:03 09:29:07 09:29:09 09:29:13

So, to go -- as Judge Brimmer, wrote, even if 09:29:14

states, even if half of the states were excised from the class because the defendants demonstrated true idiosyncracity that could not be dealt with through jury instructions or special verdict form, the class trial would nonetheless produce its benefit for the participants. That's the half a loaf is better than none. The defendant's alternative is don't do it at all. Judge Brimmer's alternative is at worst, you would have half a loaf and probably the whole thing.

If we can scroll to Section B which is the common -- the is the phasing of the trial. The phasing of the trial is very simple. The class trial tries common factual issues. It tries the representative Plaintiffs' claims front to back. It deals with multiple states laws.

Phase 2, individuals suits. Yes, there will be individual suits on remand or on this Court when we get to the second phase of the case, and those are the claims of compensatory and punitive damages for the individuals. These are individual causation. This is where any defenses such as comparative fault, blaming other products, blaming the victim, etc., come to the fore after the common issues have been adjudicated. I will show you in a moment what other courts have done to reinforce the view, which is the prevailing view that consistent with the Seventh Amendment, one can carve at the joint between the common questions on

the one hand and the individual questions on the other. 09:31:01

In our proposed trial plan under common factual 09:31:05

issues to be adjudicated in the class trial, we track 09:31:08

Copley Albuterol very closely to the extent appropriate to 09:31:13

this product, and we have a list of common factual issues. 09:31:17

Now, the Defendants may choose to add to those issues. 09:31:21

They may argue that they should be rephrased, and some more 09:31:23

than others may be emphasized in terms of the evidence at 09:31:28

trial. But these are programmatically the common issues in 09:31:31

the same format and style as they represent as the trial 09:31:38

plan and used as the blueprint for trial in Copley 09:31:41

Albuterol. 09:31:45

For purposes of our proposed class trial, they 09:31:47

include the following common issues. Was Baycol 09:31:49

unreasonably dangerous? Did Defendants negligently develop 09:31:52

tests and market Baycol? Did Defendants conceal, omit 09:31:56

suppress or misrepresent material information about the 09:31:58

risks and safety of Baycol? Did Defendants feel that it 09:31:59

adequately warned consumers about the dangers of Baycol? 09:32:02

Did the Defendants recklessly expose class members to a 09:32:07

product not reasonably fit for its intended use, that's 09:32:11

implied warranty? Did the Defendants breach warranties in 09:32:15

the marketing and sale of Baycol? Did Defendants actions 09:32:17

and omissions warrant the imposition of punitive damages? 09:32:22

And at some point there in our trial plan, if so, what's 09:32:23

the just ratio or aggregate amount? And, finally, should Defendants be required to pay back to class members for money paid for Baycol because class members did not receive a safe or efficacious drug? 09:32:28 09:32:32 09:32:36 09:32:41

And as was done in Copley, our trial plan notes that during the course of trial, the Court will also consider the evidence relevant to our request for the equitable remedies of medical monitoring and restitution and disgorgement for unjust enrichment. Medical monitoring, as Judge Brimmer characterized it, would relate to the need for such monitoring and also to the scope and duration of monitoring program. And because of the equitable nature of these two remedies, medical monitoring and unjust enrichment, the issues would not be submitted to the jury, would make the jury trial demand we don't believe that a jury is necessary or appropriate for those determinations on a class-wide basis. 09:32:43 09:32:44 09:32:45 09:32:50 09:32:54 09:33:02 09:33:03 09:33:04 09:33:07 09:33:11 09:33:15 09:33:19 09:33:22

We go farther in only one respect than Judge Brimmer went in Copley Albuterol with respect to our proposed trial plan, and that is to present the option to the Court as we discussed yesterday for the jury to decide not only the punitive conduct of the Defendants toward the class and whether their conduct warrants the imposition of punitive damages under the Supreme Court's controlling BMW factors. But if the jury answers yes to those questions, 09:33:27 09:33:31 09:33:32 09:33:35 09:33:38 09:33:43 09:33:48 09:33:55

this Court could ask the jury to determine a just ratio of punitive to compensatory damages to be utilized in the fall one Phase 2 of the individual trials so that all class members everywhere who proved their right to compensatory damages would have the same ratio apply to punitive damages, or if this Court decides that this case warrants the unitary determination of an aggregate amount of punitive damages, a cap on punitive damages for the entire class because the Defendants know their exposure and Defendants need to defend themselves under Cooper against total excessive amount, and because the Plaintiffs also have the right to seek as much in punitive damages as the Defendants' conduct warrants and the law allows, this Court can ask the jury to set an aggregate amount of class-wide punitive damages.

That last technique was recently utilized in Louisiana in the Louisiana train car leakage litigation. That case was tried to verdict on the front-to-back trial of the name representatives and on an aggregate punitive damages award to the class. That trial design went up on appeal to the Louisiana Court of Appeals. The Louisiana Court of Appeals decided that appeal shortly after the Supreme Court had rendered its Cooper decision. The Louisiana Court of Appeals affirmed the propriety and the constitutionality of that plan and the case is proceeding

to subsequent phases. I don't have the cite to that case in my head, Your Honor, but we did cite it in our supplemental reply briefs, and that is an example of this type of trial plan being used in a real class action in a real court and being affirmed on appeal. 09:35:41 09:35:46 09:35:48 09:35:53 09:35:58

Again, we're giving Your Honor the option with respect to punitive damages, but we are not asking this court to do anything that other courts have not done before in comparable circumstances. This is a trial-tested proposed trial plan. 09:35:59 09:36:03 09:36:06 09:36:10 09:36:16

It is also not we recognize the only possible trial plan. Professor Miller talked about alternatives that are open to this Court yesterday and will talk a little further about that. But you wanted a plan for action. You've gotten a lot of talk from a lot of people about a lot of alternatives, and you have seen and heard and considered what many of the courts have done in the class action context. What you do in this case is completely up to you. But we would have shirked our responsibility if we hadn't done the best we could to come up with a plan that you could consider, add to or subtract from, that we believe is a viable and practical and fair plan for this case. 09:36:18 09:36:23 09:36:26 09:36:30 09:36:35 09:36:41 09:36:44 09:36:48 09:36:52 09:36:57 09:37:00 09:37:05 09:37:08

We note that for the most part the jury instructions, the verdict forms, and even the trial plans 09:37:12 09:37:16

which we have provided to you in our materials were designed and considered and approved, usually with substantial modification by the court after class certification was decided in each of those cases. 09:37:20 09:37:25 09:37:28 09:37:35

And we recognize that it's rather a chicken and egg proposition the Defendants would say make them come up with a trial plan or don't certify the class. This Court was concerned that Plaintiffs might be saying certify the class and don't worry about the trial plan, things will all work out. 09:37:41 09:37:44 09:37:48 09:37:54 09:38:00 09:38:02

There is a balance to be struck between those views. Other courts have stricken that -- or struck that balance post-class certification as the trial date neared and as the evidence became complete and as the parties have narrowed issues or perhaps raised new ones. 09:38:03 09:38:05 09:38:11 09:38:16 09:38:20

We are facing June 6, 2003 trial date in this case, and we would very much like to keep it, and that is why we have come to court today with a trial plan that the Court can consider, the parties can argue about in pretrial conferences. It can be amended; it can be revised. But it's a basic blueprint, at least, for a real trial that can really commence in this court this year. 09:38:24 09:38:30 09:38:33 09:38:35 09:38:37 09:38:41 09:38:45

We wanted to be brief this morning, Your Honor. We know there are other items of business on the agenda, and, first, I would like to just briefly go through to 09:38:48 09:38:53 09:38:56

reply to a few of the points Counsel made yesterday in a very thorough presentation. And I know that I can't be as thorough today or we'd be here in real time all day. Suffice it to say, we have a lot to say and a lot we can say about the presentation, and there is much about it with which we don't agree. I'm going to just give you some highlights, and, Your Honor, if there are questions that I have not answered in my presentation and Professor Miller does not answer in his, we are here to answer your questions. 09:38:59 09:39:05 09:39:10 09:39:14 09:39:16 09:39:20 09:39:22 09:39:25 09:39:29 09:39:32

Your Honor, you saw a time line yesterday which had seven labeling periods, rather like the seven great ages of human civilization. And the suggestion was that because there were seven labels over a period of time, there were individual issues arising from those labels and arising from individual Plaintiffs who took the drug at different times that could thwart what we say the common conduct issues in this case. 09:39:39 09:39:50 09:39:55 09:40:00 09:40:03 09:40:07 09:40:10 09:40:15

Our point and our case theory and what we believe are factual presentation showed you yesterday about our allegations is that the point of tortious and punitive conduct occurred before the launch date, occurred before the first of the seven labels appeared on the market. 09:40:18 09:40:21 09:40:25 09:40:31 09:40:36

We allege that both Defendants knew from the start they should never have developed or launched Baycol, 09:40:44 09:40:49

and yet they did. We allege that both Defendants knew from the start that they would have to increase the dose, and that that would in turn create increasingly unreasonable dangers, but they went ahead. We allege that both Defendants knew from the start that they would need to stretch the data, that they would run into problems between marketing and science in attempting to market it effectively and truthfully. And we allege that the truth lost out in the battle for the marketplace.

They knew they shouldn't have developed and commercialized Baycol in the U.S. You saw the colloquy between the worldwide head of Regulatory Affairs, the Senior VP of Sales and Marketing. They were opposed and recommended against marketing Baycol in the U.S., but, yet, it was marketed and the labels didn't help. The Defendants make a strange argument that perhaps their conduct got worse with time, but the labels got better and that raises different issues. But the punitive and neglect conduct occurred and was well in place before the launch date. It continued throughout the marketing phase and it culminated in the withdrawal, because regardless of multiple labels, the labels we allege never fully disclosed the material facts about the risk of Baycol. Not just the risks of any statin drug, but the peculiar and unique risk of Baycol many times more likely to cause rhabdomyolysis.

Labeling couldn't fix the problem. Labeling did not disclose the truth. And when it became clear that labeling was never going to be able -- truthful and complete labeling, was never going to be able to co-exist with the drug on the market because no one would buy it if they knew the drug was withdrawn.

Any course of conduct there are points and times that may be pivotal. There are tipping points. In any class action based on an underlying scheme and a common course of conduct that develop over time, and those are the classic class action scenarios, there may be critical dates. If any of those dates matter with respect to liability to the class as a whole or to a particular definable group within a class, people who took Baycol after X date, then the way to resolve that common question, did that date matter, what was that date, does it affect recovery, does it affect liability is to ask the jury. Those are common questions. Those were the common questions that were packaged for the Phase 1 trial in Jenkins that was affirmed in the Fifth Circuit.

Did the Defendants know the dangers of asbestos? When did they know? That might have been made a difference with respect to degree of liability, the imposition of punitive damages or even the recovery of compensatory damages to some group, perhaps, with that very broad

asbestos class. And the way to get the answers is to ask the jury. It's a common question of fact. 09:44:45 09:44:48

When we look at the common questions of liability and causation, we're asking this Court to do what other courts have done about when they engaged in carving at the joint and separating the issues of common causation and generic. We'll put up a slide that shows the court's definition of common causation and generic causation. And that's our -- okay. 09:44:51 09:44:54 09:44:58 09:45:05 09:45:11 09:45:16 09:45:20

Defendants tell you the generic causation is meaningless because that's just -- Baycol can cause Rhabdo and all statins can cause Rhabdo, and so what. They have admitted it because it doesn't matter, they say, to their liability. 09:45:20 09:45:23 09:45:26 09:45:30 09:45:33

But there is a lot more to generic causation than that. We're looking here at a slide which is also in your bench book at Tab 3. From the Hanford Nuclear Reservation litigation case, that's the Ninth Circuit in which Chief Judge Schroeder did a survey of what generic causation and individual causation meant in a toxic -- long-term toxic exposure, a class action case. And, basically, generic causation has two elements in it. That defendant was responsible for a tort which had the capacity to cause the harm alleged. That's common causation, and that is distinct from individual proximate cause and individual 09:45:35 09:45:38 09:45:42 09:45:53 09:45:59 09:46:02 09:46:02 09:46:06 09:46:10 09:46:13 09:46:18

damage. So, it's not just a drug or a substance that caused a harm, it's whether exposure to a substance to which the Defendant is responsible, is that capable of causing a particular injury or condition. 09:46:23 09:46:26 09:46:29 09:46:33

So, common causation, common conduct, common liability, that is the package of common issues that is sometimes referred to under the shorthand of common or generic causation, and that is the package of issues that is teed up for class-wide trial in cases such as Hanford. 09:46:38 09:46:42 09:46:47 09:46:49 09:46:55

And if we can go to the next slide, this is what the Hanford court recommended to the trial court in that MDL. 09:46:59 09:47:05

"Resolve the motions for class certification and certify generic causation, which includes responsibility and capacity to cause harm to the plaintiffs who suffered from the same or same type of disease." That's what we are asking the Court to certify for class treatment in Phase 1 of the trial in this case. 09:47:08 09:47:09 09:47:14 09:47:19 09:47:24 09:47:29

Now, let's go on and look at a common issue generic causation trial that actually occurred in an MDL class action context and that is the Bendectin generic causation trial. 844 plaintiffs involved in that trial. 09:47:31 09:47:33 09:47:39 09:47:44

Phase 1 causation -- the jury was asked a two-part interrogatory. After 22 trial days about Bendectin, the jury was asked whether the plaintiffs had proved whether the ingestion of Bendectin was the proximate cause of human 09:47:50 09:47:55 09:47:57 09:48:01

birth defects. They answered no. The case over. Not quite over. There was an appeal by plaintiffs who lost, we lost, and on appeal the Sixth Circuit upheld that structure on Constitutional grounds. Seventh Amendment, okay. Due process, okay. The verdict was affirmed on appeal. Those cases were resolved in a way that vastly satisfied the defendant. Did not satisfy the plaintiffs, but if anyone tries to tell you, Your Honor, that a common causation trial doesn't accomplish anything, it does, it can, it has. 09:48:07 09:48:11 09:48:15 09:48:19 09:48:24 09:48:24 09:48:30 09:48:35 09:48:41

If the jury had answered yes to the first Interrogatory, they would have then gone on to deal with particular disease categories, and these were a range of diseases that were attributed to Bendectin, and there were types of birth defects, and they were very wide ranging, respiratory and you can just put the rest on the screen. 09:48:45 09:48:49 09:48:52 09:48:57 09:48:59 09:49:04

Suddenly, the Defendants' lists of the many diseases that Plaintiffs listed their Plaintiffs' fact sheets as being related to Baycol does not seem so diffuse or disorganized or even silly. And the ability of this Court to obtain a factfinding on generic causation to the range of diseases in addition to the signature disease Rhabdo and associated muscle problems is very real and very practical. And, by the way, all of those diseases that you saw on the screen yesterday afternoon from the Plaintiffs' fact sheet, as you know, Your Honor, you approved the 09:49:06 09:49:09 09:49:13 09:49:21 09:49:24 09:49:29 09:49:32 09:49:38 09:49:41 09:49:45

Plaintiffs' fact sheet as an alternative to interrogatories in this case. Ten thousands of people have filled them out. And usually people fill them out directly. And if people are asked what's bothering them and what they're claiming and what they're diseases, it's not surprising that they answer that question as lay people, using a variety of terms and descriptors. At the trial in this case, Your Honor, those diseases would be narrowed and Your Honor will be asked to instruct the jury to determine causation with respect to a specific list of diseases. And as you know, Rhabdo tops the list. 09:49:49 09:49:50 09:49:53 09:49:57 09:50:00 09:50:02 09:50:05 09:50:11 09:50:14 09:50:17 09:50:21

We are asking the Court to try in a Bench trial our medical monitoring claim. And we recognize that this is not the type of medical monitoring claim where a new defendant is tagged with responsibility for an old substance like asbestos with lots of epidemiology around it and years and years of studies and broad-based medical consensus as to what happens to people when they are exposed to asbestos and what to do about it. That's more like the Redwood that the defense counsel talked about yesterday as the sine qua non of medical monitoring, and, indeed, that's a widely cited case and those are elements of medical monitoring, but they're elements of medical monitoring that were specific to the issues in that case. 09:50:28 09:50:33 09:50:37 09:50:41 09:50:45 09:50:52 09:50:57 09:51:00 09:51:05 09:51:06 09:51:08 09:51:11 09:51:16

Here, we have a different situation. Our expert, 09:51:22

our so-called paid expert, is the Chief of Internal Medicine at UC-Davis. He's a noted nephrologist, as is the defense expert on this same point. And the problem with Baycol more than any other statin, because remember, a hundred times risk of Rhabdo, is that Baycol is injuring people who go undiagnosed with Rhabdo. The silent and progressive disease is a kidney disease which accompanies ingestion of Baycol. It's a by-product of Rhabdo, and the studies, and there are multiple studies on this point, show that Rhabdo is a disease that can and does occur without having been diagnosed. There is a classic paper from the early '80's. It's a 1981 paper. It's attached to the declaration of Donald C. Arbitblit which you have in Volume I of your bench book. Indeed, that classic study qualifies as an ancient document now under the federal rules. The point is up to 50 percent of Rhabdo can go undiagnosed.

09:51:25 09:51:31 09:51:37 09:51:39 09:51:42 09:51:52 09:51:57 09:52:02 09:52:06 09:52:09 09:52:15 09:52:20 09:52:26 09:52:31 09:52:34 09:52:39

So, what you saw yesterday with respect to medical monitoring claimants and others was they had a creatinine test. They had a creatinine test in the context typically of a Rhabdo diagnosis. But you could not have been diagnosed if those muscle aches and pains, remember those aches and pains so many people talked about yesterday, if nobody tells you, I think that might be Rhabdo, let's get you tested, let's find out, you don't get tested, you don't get diagnosed with Rhabdo, but you've

09:52:45 09:52:48 09:52:49 09:52:55 09:52:59 09:53:02 09:53:05 09:53:10

been exposed and you are at risk. 09:53:14
That's why the gateway to the medical monitoring 09:53:16
plan that Dr. Kaysen developed as a nephrologist, concerned 09:53:20
with kidney disease and renal function and renal failure 09:53:27
which is his field of specialty, which is the problem here 09:53:30
that goes undetected is that if you have the test, which is 09:53:30
the gateway to the medical monitoring program, then there 09:53:33
was a protocol which is a widely recognized protocol which 09:53:38
is described quite tersely in Dr. Kaysen's affidavit, more 09:53:44
fulsomely in the Arbitblit declaration, but is the course 09:53:50
of treatment and surveillance that is called for for people 09:53:55
who have kidney problems, particularly older people. And 09:53:57
their point is many people may have had the test that is 09:54:02
the gateway to the medical monitoring program, but no one 09:54:05
has had that program and follow up, and that program and 09:54:09
follow up can't be guaranteed unless there is a program in 09:54:12
place, a place to get it. And by the way, a place to 09:54:16
gather and coordinate and utilize the resulting data and 09:54:20
research. So one test that many people may have gotten and 09:54:24
many more did not, does not obviate the need for medical 09:54:30
monitoring. In this case we submit and is also not the 09:54:33
beginning and end of our proposed medical monitoring. 09:54:36
The random creatinine testing that some of our 09:54:41
named Plaintiffs and some people in the class got, did not 09:54:45
result in a common body of knowledge or research and did 09:54:46

not advance the field with respect to dealing this phenomenon of thousands of people who have silent, undiagnosed Rhabdo. And if there are 9,000 Rhabdo cases diagnosed, and that's just a figure various people have utilized, then you can consider that there are another 9,000 undiagnosed Rhabdo cases, maybe more in the class. And why is it important to find out what's happened to people who may be asymptomatic in a particular way. It was important in Diet Drugs because what they don't know won't hurt them. But if they do know, they can cope with it, they can deal with and they can treat it. That's all we're trying to do. 09:54:51 09:54:57 09:55:00 09:55:04 09:55:08 09:55:11 09:55:16 09:55:20 09:55:26 09:55:32 09:55:35 09:55:38

It's a relatively inexpensive test, the protocol is well recognized and well known. We are talking about a situation where doctor, the expert who has come in and testified for Plaintiffs on medical monitoring in this case, if the first person is saying,hey, look, look at this problem. It's in the literature, it's there. I know about it. I'm a nephrologist and we can do something about it in this case. 09:55:38 09:55:43 09:55:44 09:55:46 09:55:51 09:55:54 09:55:55

Now, we don't have a medical monitoring program for Baycol or statins to take off the shelf and use here as you have in asbestos. This Court will need to consider weighing all the evidence, the experts from both sides, the literature, the statistics, whether or not it makes sense, 09:55:55 09:56:02 09:56:04 09:56:07 09:56:12

and whether or not it's equitable and fair to develop a medical monitoring program to help those who took Baycol to specifically define that group, to specifically define the parameters of medical monitoring and to determine whether or not Defendants should pay for all or part of it. 09:56:15 09:56:18 09:56:20 09:56:23 09:56:29

Now, medical monitoring was a claim, is recognized and utilized in Minnesota. Despite the Defendants' arguments to the contrary, a medical monitoring case was certified in the District of Minnesota. It's the Werlein case. Medical monitoring is recognized essentially as a remedy, and the injury that is the standing element or claim element for medical monitoring is the cost of the treatment. In other words, some of our class representatives had the test that is the gateway to the medical monitoring program in this case. And the Defendants suggest that those people may not be adequate or typical representatives for medical monitoring because, hey, they had the tests. Well, they had the test, they paid for it, the question is who should pay, and one test does not a medical monitoring program make. 09:56:33 09:56:34 09:56:38 09:56:41 09:56:46 09:56:51 09:56:57 09:57:04 09:57:07 09:57:10 09:57:13 09:57:17 09:57:22 09:57:26 09:57:30

So, if we want to de-confuse the issue on medical monitoring as to whether or not an injury is required for standing or not, some states do, some states don't, some states called medical monitoring a cause of action. Other states recognize it as a remedy or damage. The point is 09:57:34 09:57:39 09:57:42 09:57:47 09:57:52

that in a vast majority of states, it is recognized that if defendant negligently caused exposure to a substance that increases the risk of a particular harm above and beyond that of the general population, that defendant may be held to pay as damages the costs of obtaining diagnosis and possibly treatment for persons who were exposed to that risk by defendants' negligence. Big difference between proving a personal injury, which, ultimately, Phase 2 of our trial plan, and proving entitlement to medical monitoring because the harm caused by the negligence is the increased risk, not the injury. Indeed, you hope that through medical monitoring you will find out that most people don't have the undiagnosed Rhabdo, and most people aren't somewhere along the course of progressive kidney disease or failure. That would be the good news from the medical monitoring program. The bad news can be dealt with.

The quintessential case on the essential elements, the universal elements of medical monitoring is the Friends For All Children decision, a federal appellate decision which was written when I went back and looked at it to my surprise by Judge Starr. Kenneth Starr was the author of Friends For All Children v. Lockheed. And it gives the classic example of the difference between a negligence injury claim and a negligence medical monitoring

claim which is when someone is exposed to a harm that it turns out they don't have. They are still entitled to medical monitoring. The good news is they don't have the harm and the Defendants are held to pay for it. Friends for All Children, at 746 F.2d 186. The example appears at Page 825, and this is the classic example, Jones is knocked down by a motor bike, which Smith is riding through a red light. Joe lands on his head, he enters the hospital, and the doctor says take some tests to determine whether he has some head injuries. The tests proved negative. He doesn't have injuries, but he sues Smith for the substantial cost of the diagnostic examinations. The injury is the exposure to the risk. The injury is the examinations. The remedy the defendant's payment of the costs.

In Friends For All Children, this was a medical monitoring program for children who had been injured. They were refugee children. Their plane crashed coming into the U.S. They had concussive head injuries. They were treated and diagnosed. The defendant was held liable, essentially, in negligence for that.

So, we are not saying medical monitoring is a no-fault claim. And that's why medical monitoring shows up in Phase One of our trial, our common issues trial, because, indeed, there would be a negligence determination, and that negligence determination would be made by this

Court. Was Baycol responsible for exposing people to a statin drug that created up to one hundred times the risk of Rhabdo, half of which goes undetected and untreated without a medical monitoring program. 10:01:12 10:01:18 10:01:21 10:01:25

So, in short, our medical monitoring class reps are appropriate class reps for the medical monitoring claim. We could also spend hours rehabilitating the other class representatives who were attacked yesterday or disparaged by counsel. Some facts about them were brought out, other facts were not. 10:01:29 10:01:34 10:01:39 10:01:44 10:01:47 10:01:52

We believe Defendants did submit the entirety of their depositions to the Court so that, for example, our client, Katherine Swearengin, who was .8 was put on .8 when she was in the hospital in October of 2000, only two months after .8 was launched and before there was dissemination, if indeed is there ever was, of any particular risks of .8. It appears that she -- her physicians would have had no opportunity to see any label change if indeed that was significant. She also did not attribute what the Defendants call her ridiculous claim of dizziness to Baycol. You have to differentiate between what they say is happening to them and how they feel when they are asked -- have a claim that they are actually going to bring to trial and prove is attribute to Baycol. When you do that, what the Defendants have presented as a litany of diverse, 10:01:54 10:01:57 10:02:05 10:02:15 10:02:20 10:02:28 10:02:32 10:02:40 10:02:46 10:02:49 10:02:57 10:03:03 10:03:03 10:03:03 10:03:08

bizarre, inconsequential claims for injuries really does narrow down to the key claims that would tried in this case, myopathy, myalgia, rhabdomyolysis, renal disease, renal failure. These are the key diseases like the specific diseases you saw in the Bendectin example that Baycol should really go on trial for in a common issues trial. 10:03:11 10:03:17 10:03:23 10:03:27 10:03:33 10:03:38 10:03:41

If Your Honor has concerns about the Plaintiffs to appear in amended complaint with respect to whether they are individually or collectively adequate or typical, or that they should be augmented, that is something this Court has the right to do by asking us to do, and it should not affect the Court's class certification decision in anyway. 10:03:42 10:03:47 10:03:53 10:03:56 10:03:57 10:04:02

And, indeed, in Volume III of the bench book which we submitted yesterday, there is a list of 175 Plaintiffs from 46 or 47 states, we regret we have no one from Rhode Island. I don't think there is a Rhode Island in this court who are willing, ready and able to serve as additional named Plaintiffs class representatives for trial in this case. They have Plaintiffs' fact sheets in. Both sides know the basics about them. They can be readily deposed before June 6, and to the extent this Court believes it could matter, they took Baycol at every stage along the time line of marketing, during every one of the labeled phases. And they have personal injury claims and 10:04:06 10:04:11 10:04:16 10:04:23 10:04:28 10:04:33 10:04:33 10:04:36 10:04:39 10:04:42 10:04:47 10:04:51

they have medical monitoring claims and they have refund claims. This class is and can be and will be amply represented by a broad spectrum of people who have brought claims against Baycol and who are in this court. 10:04:55 10:05:00 10:05:05 10:05:08

We could spend, again, hours defending the righteousness of the refund claim, the appropriateness of implied warranty, and the equity of unjust enrichment. We are not barred from asserting those claims in this case because not everyone who took the drug has today a diagnosed personal injury. The injury, the only injury required is economic. We've cited in our briefs to Your Honor the Cheminova case. It involves a skin cream with a hidden steroid. That's a prescription drug and it's dangerous drug and people didn't know they were getting it. Some people were injured personally and others weren't. But no one paid for and got what they thought they were getting, and there was a capacity for harm. And that class was certified for breach of implied warranty for all purchasers. 10:05:19 10:05:23 10:05:28 10:05:35 10:05:39 10:05:43 10:05:47 10:05:53 10:05:58 10:06:03 10:06:04 10:06:09 10:06:12 10:06:16 10:06:20

We cited to Your Honor the Tesauro case, the Cold-Eeze, zinc over-the-counter cold remedy in Pennsylvania where a nationwide class was certified on breach of implied warranty for economic loss. And defendants say, but as Plaintiffs submit, they may not be able to have an implied warranty claim under Pennsylvania 10:06:21 10:06:26 10:06:30 10:06:38 10:06:38 10:06:41

law for a prescription drug. And they cited a case from 1998, the Makripodis case. We cited it, too. But that case was a case against a pharmacist, and that case involved decisions to prescribe or not prescribe a particular drug. 10:06:43 10:06:46 10:06:52 10:06:55 10:07:00

Since 1998, the distinction between over-the-counter and prescription has blurred. We don't think that distinction makes a difference any long under Pennsylvania law or anywhere else. That can be a matter for summary judgment if the Court elected to choose Pennsylvania law. We believe our implied warranty claim survives because now we have direct marketing to the public of prescription drugs. We have prescription drugs becoming over-the-counter drugs. That's been happening lot lately. We have combinations of prescription and non-prescription drugs. We have hidden prescription medications in the over-the-counter remedy. In all the situations implied warranty is an appropriate claim if the proof is, and this is a matter for trial, that that is a drug that is worth less than was charged for it. That was the claim for unjust enrichment in Cardizem, a good drug, save drug, too expensive. Or, if the drug did not perform as warranted, or if the drug exposed people to an unwarranted and excessive risk. 10:07:00 10:07:03 10:07:08 10:07:11 10:07:16 10:07:19 10:07:23 10:07:25 10:07:30 10:07:33 10:07:35 10:07:39 10:07:45 10:07:49 10:07:51 10:07:57 10:08:01 10:08:04

Again, if this Court keeps jurisdiction over the 10:08:06

refund class for its refund and restitution claims of implied warranty and unjust enrichment, Your Honor will make the decisions of law and equity, and the jury will find the appropriate facts to determine whether and to what extent economic remedies to those as yet undiagnosed are appropriate in addition the right to recover compensatories and punitives for those who have definitively been injured as a result of ingestion of Baycol. 10:08:10 10:08:16 10:08:21 10:08:24 10:08:29 10:08:33 10:08:37 10:08:41

We begin and end with the concept of durability. And Professor Miller can answer and will address some of the procedural concerns, the due process concerns, the real base concerns that the Defendants have raised, and, indeed, this Court may have with whether a trial plan we have shown is doable and has been done, and, nonetheless, remains appropriate and proper today and whether it will advance, significantly advance the ball in this court and through this court for everyone who has claimed injury or damage or risk arising from Baycol. Thank you. 10:08:51 10:08:59 10:09:07 10:09:12 10:09:15 10:09:19 10:09:22 10:09:27 10:09:31 10:09:35

THE COURT: Thank you. Professor Miller, I would ask that you give us about two or three inches on that microphone so you are not right on it. It does cause some problems with hearing. 10:10:03 10:10:05 10:10:09 10:10:17

MR. MILLER: Good morning, Your Honor. As you can see I'm technologically impaired. 10:10:29 10:10:33

THE COURT: I can push the button and I have 10:10:38

someone that comes and solves it. (Laughter). 10:10:41

MR. MILLER: I thought you could push the button 10:10:51 and make us all go away. I am technologically impaired. I 10:10:54 have never gotten pass the paper age. I don't travel with 10:11:06 a PC. I travel with a certain treatise that I find 10:11:06 helpful. So, I have no slides. 10:11:10

Mr. Zimmerman me what I was going to do when I 10:11:14 got up, and I said odds and end, odds and ends. I, too, 10:11:18 listened carefully yesterday. I listened carefully in 10:11:21 part, I suppose, because as I indicated yesterday, and I 10:11:27 mean from the bottom of my heart, I have unbelievable 10:11:32 regard for Phil Beck. I think he's one of the great 10:11:35 lawyers of the United States. I don't say that simply for 10:11:38 purposes of this hearing. I said it on national television 10:11:42 when he represented President Bush. 10:11:47

But what did I hear? What did I hear? I heard 10:11:49 two words. Do nothing. Do nothing. Do nothing. It can't 10:11:54 be done. Do nothing. It's overwhelming. Do nothing. 10:12:01 It's too complicated. Do nothing. There's no advantage to 10:12:08 it. Do nothing. Doctors are told, do no harm. The 10:12:13 Defendants say do nothing. 10:12:18

Was I surprised? No. In spite of the fact that 10:12:21 maybe I admitted against interest yesterday that I'm 10:12:29 basically an academic. I've been kicking around in this 10:12:34 class action ballpark for 40 years since the drafting of 10:12:38

the 66th revision. Throughout a series of fortuities, I've been involved, I would say, in at least fifty, I would say, class certification hearings, both sides. Though, I was not surprised. I have yet to be at a class action certification hearing which the Defendants didn't say, in effect, do nothing. It can't be done. You don't have to believe me about that.

Yesterday, I quoted Judge Rosenbaum. I'll quote him again. This is from an ERISA case he had in '01. And he says, "Now, I'll get on to the predominance question, the class, the necessity of certifying a class or subclasses or the requirement which somehow this Court always hears in every single large case. The Court will be forced to have 20,000 individual trials. The universe is a complex place, but in 16 years I have never had more than nine. And that was enough to handle the case of a class of 13,000. The reality is that competent lawyers can handle these problems." Voice of judicial experience.

Ms. Cabraser said when people say you can't do it, there is some truth to the notion that what they're really saying is I won't do it or I don't want to do it.

One of the problems with doing nothing is that as cliche goes, doing nothing is doing something. Doing nothing is doing something. It obviously is impacting the future course of events.

So what happens if you do nothing. Well, nothing is adjudicated. Nothing retards duplication, inefficiency. Nobody gets any form of adjudication of fact. But go beyond that. Doing nothing means dispersion. That's what Judge Barker is ironically commenting about in Bridgestone Firestone. Do nothing meant dispersion.

Mr. Beck says let's do it the old-fashion way, one by one by one by one by one, we can go up to 980,000 with all those ones. We can do it time and time again. Now, the reality of that is it's going to produce massive inconsistency of results. The fair administration of justice which you referred to at least twice yesterday, Your Honor, does not call for inconsistency of results. When I say inconsistency of result, I mean several different things. One, some people will win, some people will lose. Maybe they were peas in a pod and should have been given the same results. Some people will get a hundred thousand dollars, other people will get $10,000. But most pernicious of all is that many people, I can't quantify it, I can't quantify it, many people will never, never, never be heard at all. That is true in inconsistency. That is the ultimate unfairness. They'll just never be heard.

Why wouldn't they be heard? They will never know about it. Without some form of centralized, aggravated

treatment, there is no transparency. There is no visibility. There is no notice as there would be in a class action. They will never know about it. 10:16:51 10:16:54 10:16:57

Without medical monitoring, they won't know that they are on that signature disease line moving to oblivion. 10:17:03 10:17:06

Those who know about it, do they have the economic resources to do it one by one by one by one? Is there a lawyer in their community who will pick up the cudgels and do it for them? 10:17:17 10:17:21 10:17:26 10:17:33

The truth is without aggregated treatments, there can be no medical monitoring. Economically, it's not possible for an individual to say, let's medically monitor a hundred thousand, 200,000, 500,000 people. Judge Spiegel realized that in the Telectronics case. He said you've got to do that on a centralized basis. Indeed, that's why he classified, not under 23(b)(2), he classified it under 23(b)(1)(a), mandatory. Not only do you have to have a group-wide medical monitoring programming, Your Honor, but you can't have a hundred different programs. It's got to be one program, and that's what Judge Spiegel sought in Telectronics, and that's why he put in 23(b)(1)(a). 10:17:38 10:17:40 10:17:48 10:17:53 10:17:58 10:18:05 10:18:11 10:18:17 10:18:22 10:18:29 10:18:33 10:18:41

Yesterday, Ms. Cabraser gave you the description where we are on punitive damages and the unique problems that are created by the Supreme Court's jurisprudence with regard to the due process limitations on punitive damages. 10:18:45 10:18:48 10:18:52 10:18:57

The Campbell case is sitting in the United States Supreme Court as we sit here this morning. It's been argued. It will be decided perhaps on June 5th and shed some more light. 10:19:01 10:19:05 10:19:09 10:19:13

One thing should be perfectly clear, the chaos that the Court is trying to avoid or limit, the draconian consequences that the Supreme Court is trying to minimize, simply cannot be accomplished doing it one by one by one by one. That's something like medical monitoring, that's just got to be centralized. 10:19:15 10:19:18 10:19:27 10:19:32 10:19:39 10:19:46

Dispersion, doing nothing, minimalism, wonderful certain art forms, I'm not sure it's good for justice. Dispersion effectively prevents any judicial oversight on what's happening in this universe. It takes out the due process protections the Supreme Court of the United States imposed in shots notice, assurance of adequacy of counsel, assurance of judicial oversight on settlement and fees. 10:19:50 10:19:58 10:20:03 10:20:09 10:20:12 10:20:16 10:20:23

Yes, let's do it one by one by one so someone in Texas will settle with Mr. Beck for a hundred thousand dollars. Maybe it's a fair settlement, maybe it's a great settlement for the individual. I'm not questioning that possibility. 10:20:30 10:20:34 10:20:38 10:20:41

Now, and I'm guessing, my guess is that when the check for a hundred thousand dollars is written, whoever the lawyer for that individual is will take off forty to $45,000. Maybe it will be as low as $33,000. Contingent 10:20:43 10:20:48 10:20:51 10:20:57

fee representation. 10:21:06

In a curious way aggregation limits the fees. 10:21:08

Puts more money into the individual's pocket. So, I think 10:21:13

doing nothing is doing something, and I just don't like 10:21:21

what it does. 10:21:23

The second thing I heard yesterday from Mr. Beck, 10:21:30

he said, hey, hey, let's not be creative, the innovative 10:21:35

whacko. Let's just read the rules and apply. I thought I 10:21:41

was listening to the strict constructionists like Justice 10:21:50

Scalia or Robert Bork. 10:21:55

But the pride and joy of the federal rules is as 10:21:57

I said yesterday is their elasticity. And I've always 10:22:00

believed that one of the overriding capacity and 10:22:04

brilliances of Article III Judges is that they do innovate, 10:22:08

they do create to meet, as Mr. Zimmerman had said, the 10:22:14

exigencies of the times in which we live. 10:22:20

Great old friend of mine, Bernie Ward of the 10:22:24

Texas faculty used to say, Article III Judges are the thin, 10:22:32

black robed line between civilization and the jungle. One 10:22:37

on one is the jungle. 10:22:42

In Jenkins out of the Fifth Circuit, Ms. Cabraser 10:22:49

has described Jenkins as one of the innovative and creative 10:22:58

cases in this field. Judge Reevely, I think a very 10:23:02

distinguished Judge, he simply pens the line, necessity, 10:23:08

necessity moves us to change and invent and they affirm 10:23:12

what at that time was an innovative and creative trial panel by Judge Parker now on the Fifth Circuit. Innovation creativity is what you do to meet the conditions of the times in which we live. 10:23:19 10:23:26 10:23:32 10:23:36

All right. Let's read the rules. Let's read the rules. Yesterday we read Rule 1. Yesterday we looked at a strange little rule that people pay no attention to, but it's there. I was on the committee that put it there, 16(c)(13). It says one of the things you should think about is separate trials like the one proposed in the trial plan. Therefore, that certainly isn't outside the rule. It's hardly innovative or creative. It's there. 10:23:38 10:23:42 10:23:50 10:23:54 10:23:57 10:24:01 10:24:09 10:24:18

Then we come to 23(c)(4). Remember is that some of our alternatives which back up that trial plan, this 23(b)(3)(c)(4)(a) combination, (c)(4)(a) is in the rules. It must mean something. It says, when appropriate, an action may be brought, notice the word "brought", or maintained, as a class action with respect to particular issues. Or a class may be divided into subclasses, etc., etc. 10:24:21 10:24:26 10:24:31 10:24:38 10:24:47 10:24:52 10:24:57 10:25:05

Now, yesterday, Mr. Beck quoted Castano. Castano is a favorite case for the Defendants. The deadly duo Cabraser and Miller argued Castano and lost. We do that from time to time. It is true that Castano does say as he said it says, that you can't have (c)(4)(a) as nimble 10:25:10 10:25:14 10:25:23 10:25:25 10:25:29

circumvention of (b)(3). What he didn't tell you was that 10:25:35
there is some other jurisprudence in Valentino v. 10:25:43
Carter-Wallace. The Ninth Circuit said even if the common 10:25:52
questions do not predominate over the individual questions 10:25:56
so that class certification of the entire action is 10:26:00
warranted, Rule 23 authorizes the district court in 10:26:02
appropriate cases to isolate the common issues under Rule 10:26:07
23(c)(4)(a) and proceed with class treatment of these 10:26:12
particular issues. 10:26:18

Castano and Valentino about the same time. They 10:26:24
cite Dalkon Shield. You find statements like this in the 10:26:32
Fourth Circuit jurisprudence. Castano is exactly as 10:26:40
represented by Mr. Beck. Mr. Beck didn't tell you about 10:26:42
Valentino and Dalkon Shield. In other words, Your Honor, 10:26:44
who knows, who knows. Maybe you can do it, but that's 10:26:49
almost beside the point because Ms. Cabraser's 10:26:53
demonstration this morning shows there's is predominance. 10:26:56
You've got to be free. You had takes womb to tomb, 10:27:01
Defendants' conduct regarding Baycol, and that's 10:27:08
predominance. That's predominance. It is in the words of
many of the cases a set of issues that would significantly 10:27:13
advance the resolution of disputes. So, I'm not asking you 10:27:17
to stick your head out and go with Valentino rather than 10:27:23
Castano. You've got(b)(3), and you can tack it on with the 10:27:29
(c)(4)(a). 10:27:35

Then as you may recall, I mentioned Rule 42 yesterday. I said, gee, if you want to avoid the baggage of 23, the emotionality of (b)(3) and (c)(4)(a), do consolidation. The trial plan offers you a consolidation base. You can pick the 805 Minnesota cases. I sort hinted at consolidating other groups. And Mr. Beck reacted to that in a line or two. He said it only changes 42. You can't use 42. 42 requires you to meet 23. 10:27:35 10:27:40 10:27:44 10:27:52 10:27:58 10:28:07 10:28:17 10:28:20

Let's read 42. He told us to read the rules. 42 says that when actions involving a common question of law or fact appending before the court, it may order joint hearing, joint trial, on any or all the matters at issue, any or all the matters at issue. In other words, all I see is this simple common question standard. And you can consolidate, if you bunk, bunk to 42(b), it's exactly the same. Tells you to preserve jury trial in case you forgot you are supposed to preserve jury trial. But the point is the only thing you need for consolidation under 42 is the common question of law or fact. 10:28:29 10:28:34 10:28:40 10:28:43 10:28:52 10:28:54 10:29:01 10:29:09 10:29:15 10:29:17 10:29:23

I have read this. I have consulted a treatise. I have looked at every page of this treatise under Rule 42. Maybe I'm supposed to read it over a candle or something, but there is no reference to Rule 23. There is no Rule 23 standard. There is none of the baggage of 23. The district court is given broad discretion to decide whether 10:29:26 10:29:30 10:29:38 10:29:41 10:29:47 10:29:51

consolidation would be desirable and the decision 10:29:58
inevitably is contextual. Fairness, rationality, progress. 10:30:04
Ms. Cabraser talked about Bendectin. Bendectin 10:30:14
is funny. They tried for a class action in Bendectin. The 10:30:20
Sixth Circuit won't give it to them, so they consolidated 10:30:24
844 cases producing the proceeding that Ms. Cabraser 10:30:28
described. 10:30:35
So, when I read the rules, it seems to me 10:30:44
everything that you are being asked to consider in the tool 10:30:44
box or on the menu is within the rules. It's within the 10:30:47
rules. 10:30:51
Another thing Mr. Beck said yesterday is -- oh, 10:31:04
oh, oh, can't do it, can't do it. There's a Seventh 10:31:06
Amendment problem. And, again, he read Castano. He read 10:31:09
Castano. What he didn't read to you, however, is Mullen v. 10:31:18
Treasure Chest. 10:31:36
Now, Castano is '96, Mullen is '99, Fifth 10:31:36
Circuit, again. There was a contained class of people 10:31:45
injured on a casino boat because allegedly the ventilation 10:31:51
system didn't work and people got sick. It's a Jones Act 10:31:57
negligence case. So, the base issues that were set up 10:32:01
propped up for common trial were unseaworthiness. There 10:32:06
were a few other technical Jones Act issues that are 10:32:13
irrelevant. Was the vessel unseaworthy? Was Treasure 10:32:16
Chest negligent in relation to the casino's ventilation 10:32:22

system. 10:32:27

Phase 1, that was Phase 1, common. In a second 10:32:27
phase, in waves of approximately five at a time, sounds 10:32:31
like our trial plan. The individual issues would be heard. 10:32:41
Goes up to the Fifth Circuit, Fifth Circuit looks at it and 10:32:52
says, you can do that, you can do that. Castano is 10:32:55
different. We were worried about the mixture. 10:33:01

Here, the Phase 2 jury would not be reconsidering 10:33:04
the first jury's findings of whether Treasure Chest's 10:33:15
conduct was negligent. 10:33:21

There were some issues in that case as to whether 10:33:23
the smokers shouldn't be treated as favorably as the 10:33:26
non-smokers. That's very analogical to some of the things 10:33:33
Mr. Beck had up on the board yesterday about the 10:33:39
co-prescription and a variety of other co-conditions. In 10:33:43
other words, there is absolutely no reason to revisit the 10:33:46
conduct of the Defendants in Phase 2 when you are looking 10:33:52
at the individual issues of did Baycol cause this 10:33:58
individual's injuries, and if so, what are her damages. 10:34:06
So, there is Mullen and Mullenis not unique. If anything, 10:34:10
Castano is unique. 10:34:14

In Copley, Judge Brimmer surveys the area. He 10:34:17
says just as Mullen says, we can carve at the joints, carve 10:34:24
at the joints. That line from Judge Esterbrook. We can 10:34:29
carve at the joints. We can deal with that on the common 10:34:34

side and we can deal with this on the individual side without having a re-examination that might get us into trouble under the Seventh Amendment. And Judge Brimmer cites a fair number of cases for that. 10:34:35 10:34:39 10:34:43 10:34:48

Now, yesterday, Your Honor, I said to you that the class action history has been on a pendulum, back and forth, back and forth. One of the sad deleterious side effects of class action litigation is that it has produced rhetoric. It has produced aspersions. It has produced finger pointing. I believe yesterday I called it sort of a religious commitment to the left or to the right. 10:34:53 10:34:58 10:35:04 10:35:09 10:35:15 10:35:22 10:35:26

One of the things I have heard Mr. Beck, I'll used the word insinuate or suggest or intimate. I'm not trying to be loaded in picking a word to describe it. What you have here is a bunch of ache and pain people. Maybe they are trying to freeload or free boot. Maybe they've got a few aches and pains. Maybe they are motivated by these class action lawyers. In less polite company, but it's appeared in print a couple of times, the suggestion really is one of extortion. And in his closing remarks to the Court yesterday, Mr. Beck through down the gauntlet. We will not be extortionists. We'll fight them on the beaches. We'll fight them in the streets, that stuff. 10:35:35 10:35:41 10:35:46 10:35:52 10:35:59 10:36:02 10:36:09 10:36:18 10:36:20 10:36:28 10:36:34 10:36:41

I find it sad that the profession, both sides engage in that sort of discussion. But there is another 10:36:45 10:36:50

side to this concept of lawyer cases, class action lawyers, ache and pain complainers, extortion and all of that. 10:36:59 10:37:07

Yesterday, Mr. Beck tried to present a summary judgment argument on a certification hearing. He made a summary judgment argument against medical monitoring and the refund class. A bunch of subjects that are fit for December 6th or December 7th -- strike that, June 6th or June 7th. That's what he did. And he got me to thinking, what's the point, what's the point? What is it? If the class action lawyers had their game, what's the hourly billing lawyers' game. 10:37:15 10:37:20 10:37:25 10:37:29 10:37:34 10:37:38 10:37:44 10:37:48 10:37:57

Of course, they would like to knock out the medical monitoring, of course, they would like to knock out the refund. Basic defense policy is limit your perimeter of defense. If we can get rid of medical monitoring, you know there are 280,000 people who have never been tested, and we'll never hear from them. Let's shorten our line of defense. Get rid of that refund class because these thousands and thousands of ache and painers, and I've met some of them, and one of them happens to be law school roommate, they'll go away. 10:38:03 10:38:05 10:38:10 10:38:22 10:38:27 10:38:34 10:38:40 10:38:43 10:38:48 10:38:53

Why? Why? Your colleague, Judge Magnuson, tells you why. This is in a truth and lending class action of last March. He writes, "in the absence of a class action, an individual owner or operator," they were truck owners, 10:38:55 10:38:59 10:39:06 10:39:09

"wishing to file a claim against defendants would face the formidable, if not insuperable, hurdle of marshalling the time and resources needed to pursue an adjudication which might result in only a few thousand dollars of recovery." In other words, in polite terms, it's a negative value case.

"The likelihood in the absence of a class action many or most potential class members would be left without a remedy. The Court will grant Plaintiffs' motion to certify."

Without a refund class we have unjust enrichment. We have in a curious sense revitalized the notion that the best way to make money in our society is stick your hand in somebody else's pocket, take out a buck or two, just do it up a hundred thousand, two hundred thousand times. They'll never know. They'll never come after you.

Again, without an injury class, there is no notice. There is no notice. There is no ready availability of counsel. And if you do nothing, if you allow these cases to disperse into the woodwork, a lot of these folks will go away. These folks represent more aggregated litigation experience than any comparable group in the United States. These are the people who can take on Dorsey and Whitney; Bartlitt, Beck; Sidley, Austin; Dechert, Price; Halliland and Lewis.

And if we do it one by one with nobody watching, and we're big and they're small, assuming they show up, we got the muscle. And if they take us to trial, we're repeat players. Repeat players have all sorts of advantages in the litigation environment. All sorts of strategic and tactical resource advantages. They go away. They might be skilled lawyers. Of course, there are skilled lawyers here, there, and everywhere. They'll take 40 percent. Nobody will be watching. The hourly fee lawyers will bill by the hour. So, you will have a discontinuity of the great what firms, and they are great law firms, against people who don't know, unaware, are underresourced, under experiences, perhaps, without engaging in group liable, less competent than people who have been living the aggravated litigation world for 30-odd years, many of them. You won't be there to help. Nobody will be watching the fees. Nobody will be watching due process. No one will be watching the sweetheart deals. No one will be watching the settlements.

I've been somewhat nasty in my intimations. I just wanted to level the rhetoric playing field between Mr. Beck's closing remarks and today.

In that vein, Mr. Beck, in a loose sense, pleaded mercy for his client. He held out the threatening image of bankruptcy. He described Diet Drugs, totally misdescribed

drugs. There is a whole school of thought that says AHP was saved from bankrupty by corralling the liability and settling it out. Dow Chemical couldn't do that and they died. So, those, these images, this parade of horribles. 10:44:32 10:44:37 10:44:43 10:44:49

These Defendants marketed a drug, apparently the drug was taken by close to a million people. We know there have been many, many, adverse reactions and results to the tragic point. Let's have a common trial about their conduct, as Ms. Cabraser says, not from labeling time, let's go back to Genesis. Let's going about to conception. Let's go back to why in the heck did they ever put this thing out in the first place. Let's have a common trial. 10:44:58 10:45:01 10:45:08 10:45:13 10:45:22 10:45:27 10:45:34 10:45:38

The story of Baycol, womb to tomb. And if that common trial says there are some bad acts here, why should we be impressed by the fact that those bad acts should be compensated or that those bad acts should be minimized through medical monitoring, or that they should be forced to disgorge, what in the old equity world used to ill-gotten gains. 10:45:41 10:45:51 10:46:01 10:46:11 10:46:16 10:46:21 10:46:26

If it proves out that from a legal perspective, the Defendants are blameless, from a legal perspective, they're finished, they're done. And we've done it efficiently, comparatively speedily, and justly. 10:46:31 10:46:38 10:46:45 10:46:52

I think that's what Rule 1 is all about. I think that's what the concept of aggregation is all about. I 10:47:02 10:47:07

think that's what 23 is about. I think that's what 42 is about. I think about Judge Reevely in Jenkins and Brimmer in Copley, Spiegel in Telectronics, Bectal in Diet Drugs. That's the black robe thin line I admire. 10:47:11 10:47:16 10:47:22 10:47:31

Now, have they come up with Nirvana, Elysium utopia can't? Is it perfect? Of course not. Nothing is. Nothing is. Is it good? I think so. Is it better than doing nothing? I think so. I'm reminded, it's in our brief, a line of Voltaire. I won't try it in French, which is worse than my English. The best should not be the enemy of good. We should not allow the infeasible perfect to oust the feasible good. You let go and you and Judge Barker should have lunch together. You hold on, do something, follow the trial plan, make your own modifications. Then I'm not saying you should use it, but you got the All Writs Act. 10:47:38 10:47:46 10:47:54 10:48:04 10:48:09 10:48:14 10:48:22 10:48:30 10:48:43 10:48:48 10:48:52 10:48:59

One of the things about the argument of Mr. Beck, at the front end of the argument he says everybody is going to opt-out, everybody is going to opt-out. Well, maybe, that's Judge Barker's problem, possibly restrainable under the All-Writs Act. And then at the end of the argument he said, we're going to go bankrupt. And I said to myself, uh, everybody is going to opt-out. How are they going to go bankrupt. And I'm still puzzling that one, Your Honor. Thank you. 10:49:04 10:49:10 10:49:13 10:49:19 10:49:24 10:49:28 10:49:36 10:49:39 10:49:44

THE COURT: Thank you. 10:49:45

MS. CABRASER: Your Honor, I've been told more than once I need to clean up my act, and I'm going to do that right now and it's just going to take a second. I threw out some numbers and I threw out some case names, and I'd like to be more specific. 10:49:58 10:49:58 10:50:02 10:50:09 10:50:09

I used the number ten times -- Baycol was ten times more dangerous than other statins, maybe as much as a hundred times more dangerous. That's not inaccurate, but it's not complete and it's not specific. 10:50:13 10:50:15 10:50:19 10:50:22

Yesterday in our presentation of our factual allegations, we showed you slide. I think it was slide 19 or so in the sequence which you have as Tab A in Volume III of the bench book. And what that actually said was that Rhabdo was 5 to 10 times more dangerous with monotherapy than other statins, and 100 to 200 more times more dangerous with concomitant use, and the source of that data, specifically was Dr. Tim Shannon's presentation. He's the on Bayer VP of Global Affairs in the UK in 2001 toward the end of the marketing period. But it's also noted in Bayer's memo in early May and October, 1999, and those documents are referenced on the slide. You also have the underlying documents themselves in the bench book. 10:50:23 10:50:26 10:50:30 10:50:34 10:50:37 10:50:42 10:50:45 10:50:49 10:50:52 10:50:58 10:51:00 10:51:06 10:51:10

I talked about the Minnesota medical monitoring case at 746 F.Supp. 887. More recently Judge Magnuson 10:51:15 10:51:19

found medical monitoring not only exists but constitutes an equitable remedy, and that cite is Thompson, 189 FRD 544. Jack Hartman, our first named plaintiff in the medical monitoring complaint is a Minnesota resident who is serving as lead class rep on the medical monitoring claim. If he were to bring that claim in a Minnesota court in any other context, he would be able to assert it. He does have standing. He is an adequate representative.

But you also heard yesterday from defense counsel about Pearl Dardar, the Louisiana medical monitoring rep, and we are told that Louisiana has no la medical monitoring claim. I didn't tell you before, I should tell you now it's a very recent decision from the Louisiana Supreme Court called Scott v. American Tobacco, and that is a certification designating a trial plan for a two-phase class action trial of a medical monitoring claim. Scott v. American Tobacco, 800 So.2d 294 from December 2002, and more to the point with respect to our trial plan.

The Louisiana Supreme Court wrote the trial plan for Scott. The parties disagreed. There was some disarray below and said, Phase 1 determine the Defendants liability for establishing a court-supervised medical monitoring and/or cessation program, common issues of fault and causation to be tried on a class-wide basis.

Phase 2, if Plaintiffs prevail is for the court

to formulate a phase of subclasses or individual determinations of individual issues such as comparative fault. Comparative fault, if it's present in this case with respect to any of the underlying individual claims can constitutionally be addressed in Phase 2 following Phase 1 trials. 10:53:06 10:53:10 10:53:14 10:53:18 10:53:21 10:53:28

I threw out the Cheminova America case, that's the skin cap case, the skin remedy where the prescription drug working inside, the implied warranty claim upheld on a class-wide basis. The cite for that is 779 So.2d 1157. 10:53:29 10:53:33 10:53:36 10:53:40

And, finally, I spoke a lot about the Cardizem case. There were two decisions we cited in our briefs. The first was denying the motion to dismiss the ten states unjust enrichment claims. And that discussion, the survey of unjust enrichment law, its uniformity, its similarity, and its actionability in economic context is contained at Cardizem 105 F.Supp. 618. The discussion, I believe, starts at Page 670. That claim was later certified in Cardizem, 200 FRD 326 with the discussion of the inherently class-wise nature of the unjust enrichment remedy starting at Page 352. Thank you for your patience, Your Honor. 10:53:44 10:53:51 10:53:53 10:53:56 10:54:01 10:54:05 10:54:09 10:54:15 10:54:21 10:54:27 10:54:32

THE COURT: We need to take a break. 10:54:43

MR. ZIMMERMAN: I'm done, Your Honor. We are going to close right now if you want to take a break. I'm thirty seconds away. What do you want to do? 10:54:46 10:54:46 10:54:48

THE COURT: You can. I do want to, again, remind everyone that the Court, from the beginning of this case, has talked about the fair administration of justice, and in no way have I disparaged any group of lawyers that have been involved in this case or allowed disparaging remarks about other lawyers. You are a fine set of lawyers. I want you to be advocates for your side, and the Court will certainly make its decision. I do not want to go down the road of personal attacks. It's not -- it's just not appropriate in this setting. You are litigating a very serious case on both sides, and I recognize that, and both sides have asked the Court to rise to that challenge of being able to handle this case. The Court will rise to that challenge and will handle this case as it sees fit. The Court is well aware of its discretion.

Both sides have given me, I believe, the necessary information that I need to make my decision, and I just don't want to go down the road of having this fall apart in name calling. I just don't want to go there. You may give your final summation.

MR. ZIMMERMAN: What I want to leave with the Court, Your Honor, is really back to the advice of my mother to listen. You asked us what we want to try, how are we going to do it and what do we want you to do. I believe we have given you full and complete answers as best

we can at this time. The world of experience that sits to my right, the people that tried Albuterol, the people that tried Telectronics, the people that negotiated Diet Drugs, the people that worked on and are still working Breast Implants and Dow Corning. The people that have been at the forefront of the cases that are the mirror of what we are asking this Court to do are here to answer the questions. It's not perfect yet, but it's doable, it's management, and it's the right thing to do. 10:57:53 10:58:00 10:58:08 10:58:14 10:58:19 10:58:24 10:58:28 10:58:32 10:58:39

I commend Mr. Beck for his skilled advocacy. He's put us to the test. He's made us think harder and work harder, and I commend that and all defense counsel, but we have risen and we will continue to rise to the challenge because in the final analysis, what we do, we're going to be a credit to our profession and to this Court. Thank you. 10:58:42 10:58:48 10:58:53 10:58:57 10:59:01 10:59:06 10:59:10

THE COURT: We'll take a fifteen-minute break. 10:59:12

(Recess taken.)

THE COURT: Mr. Beck, good morning. 11:20:47

MR. BECK: Good morning, Your Honor. Normally, I wouldn't ask for surrebuttal time or surrebuttal argument, but since we, like the Court received the Plaintiffs' proposed trial plan for the first time this morning, I would beg the Court's indulgence and allow me some time to respond. 11:20:51 11:20:57 11:21:01 11:21:03 11:21:06 11:21:11

THE COURT: You may. 11:21:11

MR. BECK: First, I want to respond to some of 11:21:16
the observations that Professor Miller made, and let me say 11:21:19
preliminarily that I hold Professor Miller in the highest 11:21:24
regard as I do the entire Plaintiffs' team. And I did not 11:21:28
certainly mean to cast aspersions on anyone by referring to 11:21:31
them as class action lawyers. That's what they are asking 11:21:34
to become this week. They are asking this Court to certify 11:21:38
a class and they'll represent them. 11:21:48

THE COURT: Please, Counsel. I hope you heard my 11:21:48
comments and you do not have to respond to that. 11:21:53

MR. BECK: Thank you. So, let me get to the 11:21:55
substance of what was said. One concern that Professor 11:21:59
Miller addressed towards the end of his remarks is the 11:22:02
notion that if there is no class that all these injured 11:22:05
people will go unrepresented and their claims won't be 11:22:12
asserted. 11:22:17

We have over 7,000 individual cases that have 11:22:19
been filed, many of them in state court, many of them in 11:22:21
federal court. Indeed, the very reason why we are here and 11:22:28
that there is an MDL is that so many people have sought 11:22:33
representation, signed up lawyers and filed cases, and 11:22:38
these cases deal not just with Rhabdo, but also with aches 11:22:42
and pains. In fact, as we went over one of the slides 11:22:46
yesterday, the vast, vast majority of the people who have 11:22:51

filed lawsuits are aches and pains lawsuit. So, people are not going unrepresented if they feel like they have been injured because of their taking of Baycol. 11:22:56 11:23:04 11:23:09

The -- I also think, Your Honor, that there is no danger of a mismatch if you allow individual trial lawyers, and I use that phrase with enormous respect as well, to try their own cases in their own courts. I leave almost directly from here to Corpus Christi where I will be trying a case against Michael Watts. We're going to have lawyers there from all of these big firms as well as from my little firm. Michael Watts is not afraid of Sidley and Austin and Bartlit and Beck, and sooner or later, unless we are able to agree on the value of all of his claims, I'm sure I'll end up trying a case against Ramon Lopez. And Ramon Lopez is not worried about a mismatch between him and Bartlit Beck and Dechert Price and the other representatives of the Defendants. 11:23:12 11:23:20 11:23:29 11:23:35 11:23:38 11:23:43 11:23:48 11:23:52 11:23:58 11:24:01 11:24:08 11:24:14 11:24:19 11:24:23

What we have here, Your Honor, are individual claimants who are claiming substantial dollars and whose causes of action are significant enough in their mind that they have hired the best lawyers in America who are in that line of work to represent them, and they are ably and, in fact, spectacularly represented in these individuals cases. 11:24:25 11:24:27 11:24:34 11:24:39 11:24:44 11:24:50

Another subject that Professor Miller touched on was Rule 42, and I'd simply repeat one thing I said 11:24:56 11:24:58

yesterday and then expand on it a little bit. Under Rule 42, the jurisprudence is clear that the issues -- that this would be a common issue severance. The issues must, in fact, be clearly separable, or there are serious Seventh Amendment concerns. 11:25:04 11:25:09 11:25:14 11:25:20 11:25:29

Yesterday I pointed out, and I guess Ms. Cabraser did respond in part to it, but I pointed out that there are serious issues with many class members, and, in fact, some of the class representatives concerning comparative fault. 11:25:29 11:25:32 11:25:35 11:25:41

And the Seventh Amendment bars a sort of Rule 42 consolidation that Professor Miller was hypothesizing when you've got issues such as comparative fault. The Rink case, which I think was a Rule 23 case, but it said that comparative fault practically guarantees a Seventh Amendment violation if you try to sever the Defendants' fault from the issue of comparative fault. The Christian case from the District of Minnesota was a Rule 42 case and said the mere specter of a Seventh Amendment violation bars consolidation under Rule 42. 11:25:44 11:25:49 11:25:56 11:26:00 11:26:05 11:26:10 11:26:16 11:26:18 11:26:22 11:26:27

The -- another case that was referred to in this regard by Professor Miller was the Mullen case, and just to review the bidding, we talked about what Castano had to say on this issue, and Professor Miller said, but Mr. Beck didn't tell you about a later case from the same circuit, the Mullen case, which applied a different approach. 11:26:31 11:26:36 11:26:42 11:26:48 11:26:52 11:26:57

So, let me expand a little bit on the Mullen case. In fact, it was -- first of all, it was a Jones Act case as Professor Miller noted. That, of course, means that it is governed by federal law, and we don't have this specter of 51 state laws having to be applied.

And, then, let me just read from the actual Mullen decision, and this is at, I believe, 186 F.3d, the opinion is at 620 and then this language appears at 628 or within a page of 628. I can never read the asterisks on the Westlaw printout. But here's what the Court said, speaking about the Seventh Amendment issues in this Jones Act case, "In any case we would not find the risk of infringing upon the parties' Seventh Amendment rights significant in this case." And then they go on to talk about how things can be divided, and then they refer back to Castano. And they say, "In Castano, we were concerned that allowing a second jury to consider the Plaintiffs' comparative negligence would invite that jury to reconsider the first jury's findings concerning the Defendants' conduct. We believe that such a risk has been avoided here by leaving all issues of causation for the phase of the jury."

So, what they did is they recognized in the Mullen case that splitting up causation as the Plaintiffs propose to do here when you have issues of comparative

fault for some of the class members would, in fact, raise Seventh Amendment issues, and, so, they try to avoid that problem. Of course, as I said, they were not faced with the issue of 59 state laws because it was a Jones Act case. 11:28:48 11:28:52 11:28:56 11:29:01

Another approach Professor Miller suggested was using Rule (c)(4)(a), the so-called issues trial. Again, he noted that we referred to Castano which says that you still have to have in a (c)(4)(a) trial, you still have to have common issues that predominate. And he said that what Mr. Beck left out was there were some other cases that take a more -- I don't think he used this phrase, but a more liberal approach, a lesser standard. But those cases, the Valentino and Tetracycline cases they still require for certification that there not be individual issues that are inextricably intertwined with the common issues. And that's a phrase I used several times yesterday because, in fact, I was trying to address that standard, and if I didn't make that clear to the Court, I apologize. 11:29:06 11:29:09 11:29:15 11:29:19 11:29:25 11:29:28 11:29:31 11:29:36 11:29:41 11:29:46 11:29:54 11:29:57 11:30:03 11:30:05

But under those two cases certification is improper if the individual issues are inextricably intertwined with the common issues, and is also improper if certification would not significantly advance the ball towards ultimate resolution of the cases. And those are issues I don't mean to repeat, but I did yesterday, but those are the fact issues that I spent a lot of time 11:30:08 11:30:11 11:30:15 11:30:19 11:30:24 11:30:28 11:30:33

talking about. 11:30:35

We believe that these issues both predominate, 11:30:37
and under the liberal standard, are inextricably 11:30:41
intertwined with any common issues that they are able to 11:30:45
identify. That is true both on the fault side as well as 11:30:49
the causation and injury side. 11:30:53

And because of that, and because a general 11:30:56
causation finding is not going to tell us anything 11:30:59
whatsoever about the strength of an individual person's 11:31:02
case, this kind of proceeding that they are suggesting 11:31:05
would not significantly advance the ball towards ultimately 11:31:10
resolution. So, fails that part of the more liberal 11:31:16
approach as well. Incidentally, Your Honor, simply 11:31:18
invoking the more liberal approach doesn't mean let's 11:31:23
certify a class, because otherwise we would be doing 11:31:26
nothing because the two cases that they site in the 11:31:30
Valentino case, in fact, the court decertified a class that 11:31:35
had been certified by the district court. And the 11:31:40
Tetracycline case, class certification was denied. So 11:31:43
applying that more relaxed standard does not guarantee 11:31:48
class certification. To the contrary, in those two cases 11:31:53
it ultimately was denied, and denial does not mean doing 11:31:56
nothing, something I'll come back to a little later. 11:32:02

Moving now to the trial plan. I'm a great 11:32:05
admirer of visual aids and using objects in the courtroom. 11:32:08

And I, in the theatrics of it all, I think it's terrific. 11:32:15
And I really do want to commend them for their thick trial 11:32:25
plan. I hope the Court has an opportunity to look through 11:32:30
the thick trial plan because I think what you'll find in 11:32:31
this binder that was handed up that what actually comprises 11:32:36
their trial plan is four pages, and everything else is an 11:32:42
attachment about other cases. And I would encourage the 11:32:51
Court to look closely at what they now call their trial 11:32:53
plan. 11:32:56
And if the Court permits, I would like to spend a 11:32:57
few minutes just walking through some of the information 11:33:02
that's in their trial plan. I can put it up on this device 11:33:06
over here. I was told by one of the court personnel that I 11:33:08
should press a special button, but then Your Honor walked 11:33:17
into the room and I never did find out what button that was 11:33:21
that I was supposed to press. So, I'm just going to have 11:33:25
to put it up here and do my best. There's a button -- I'm 11:33:33
about to annoy the Court because I'm not pressing the fixed 11:33:33
button or something. Have you done it for me? 11:33:40
THE COURT: The freeze button. It's on the Elmo 11:33:44
itself. 11:33:49
MR. BECK: The Elmo and it's called the freeze. 11:33:56
THE COURT: Press the button. Now you can move 11:34:01
the paper around and we won't get dizzy. 11:34:01
MR. ZIMMERMAN: Mr. Miller has got to leave to 11:34:05

catch a plane and I don't want to be rude. I think this might be a good time for him to say goodbye because he's got to catch a 1:30 plane. 11:34:08 11:34:15

MR. MILLER: Thank you, Your Honor. 11:34:18

THE COURT: Thank you. Do you need further assistance with that. 11:34:19 11:34:21

MR. BECK: Freeze means you can't zoom in and out, right? And I'm going to unfreeze it for a minute and everybody close their eyes. 11:34:26 11:34:32 11:34:35

So, I want to spend a few moments and take a look at the proposed trial plan. I call it four pages. It's actually, if you eliminate the caption and the signature block, we have a three-page trial plan. Page 2 is the heart of the trial plan, and it begins by saying, "In addition to the individual cases of the designated representatives," so, just stopping on the introductory clause, we don't know who those people are. Of course, they want this trial to take place in June, but their trial plan doesn't say whose cases are going to be tried. Ms. Cabraser said it might be the class reps, but it might not be. It might be people that we pick, being the Plaintiffs, but it might not. It might be people the Defendants pick, or it might be somebody the Court picks. So we don't even know whose cases they are proposing to try. And, of course, whose cases they are proposing to try would end up 11:34:47 11:34:51 11:34:58 11:35:04 11:35:28 11:35:35 11:35:38 11:35:46 11:35:52 11:35:56 11:36:03 11:36:10 11:36:11 11:36:15 11:36:16 11:36:19

dictating what individual issues get tried. 11:36:26

But then they say that the jury is going to be 11:36:28
asked to deliberate on the following factual issues which 11:36:30
they consider to be common issues. And one of the 11:36:32
things -- maybe I'm just missing it. It may be that I'm 11:36:43
just plain old missing it. And it may be that they 11:36:47
inadvertently left it out because they wrote the trial plan 11:36:51
last night. But in any event, I don't see anything here in 11:36:57
their common issues that talk about generic causation. And 11:37:03
I thought we spent like most of yesterday talking about 11:37:09
whether it made sense to have a class trial on whether 11:37:09
Baycol causes certain types of injuries, whether that's 11:37:12
Rhabdo or aches and pains or cardiac myopathy or any of the 11:37:18
other ailments people identify. Looks to me like it's left 11:37:26
out. Again, maybe I'm missing it when I'm reading it, 11:37:29
maybe they forgot to put it in. But it seems to me that 11:37:35
the Court ought to be concerned about workability of an 11:37:46
eleventh hour trial plan when it on its face doesn't even 11:37:48
include the big issues that they have been talking about in 11:37:52
their briefs and in their argument. 11:37:57

So, I don't know what their story is on that. 11:37:59
But looking at the issues -- and everybody is leafing 11:38:02
through, so maybe somebody will find where I overlooked 11:38:06
generic causation. 11:38:15

MR. CHESLEY: It's exactly like the -- 11:38:18

MR. ZIMMERMAN: Stan, Stan, Stan.

MR. CHESLEY: I'm sorry.

MR. BECK: Looking at the issues that they do list, if you look at the first several, Baycol, unreasonably dangerous, the Defendants negligently developed tests that marketed Baycol. The ones that are -- the first -- 1, 2, 3, 4, 5, 6 bullets, I would say, look like they have to do with generic liability issues, I guess they would call them. Bayer's -- what they say Bayer's fault was. And what they have not done is make any sort of coherent proposal that addresses what I thought the Court's concerns were about, okay, was Baycol unreasonably dangerous, how are we going to have a jury trial under 51 different state laws where there can be wide variations in how unreasonably dangerous is defined, whether or not it's a risk benefit, from whose point of view is it, how, in a practical sense are jurors going to be instructed on that, what's the verdict form going to look like. So, this trial plan isn't a plan. It doesn't explain how that's going to happen. If does explain what the Court is going to do about the situation where we have some states that evidence is simply inadmissible to prove some of these elements on some of these issues, and it's reversible error to allow the jury to hear about it. And we have other states where it's reversible error for the jury to hear any instructions

on the meaning of these phrases, whereas, you have to instruct the same jury on the meaning of the phrases in other jurisdictions. So, these are real hard problems that are not addressed in this three or four-page trial plan. 11:40:10 11:40:12 11:40:16 11:40:21

Other things that are not addressed or are simply, I would guess in these first six bullets, basically ignored, are that to call something Baycol ignores the different doses and would do a grave disservice to individual Plaintiffs who might have a stronger case because they took, I think they were talking about -- and I was listening and writing at the same time, so I might get this wrong. I apologize if I do, but I think it was Ms. Swearengin who took .8. Ms. Cabraser is nodding. Ms. Swearengin took .8. 11:40:30 11:40:30 11:40:35 11:40:43 11:40:48 11:40:52 11:40:58 11:41:02 11:41:08 11:41:13

Now, in Ms. Swearengin's case about unreasonably dangerous is different from somebody's case that took .2. And Ms. Cabraser pointed out that Ms. Swearengin took .8 as soon after .8 came on the market, so, there was a one-warning label about not starting on .8. But before the other warning labels came out there were other stronger labels about the effects of .8. So, Ms. Swearengin's case is not only on all of these theories, is not only substantially different from people's cases who have lower doses, but it's also different from a .8 plaintiff who started taking .8 after the real strong warnings had come 11:41:14 11:41:18 11:41:23 11:41:33 11:41:34 11:41:40 11:41:44 11:41:48 11:41:53 11:41:56 11:42:00

out, because Ms. Swearengin had come up with a theory about you should have had stronger warnings earlier, whereas, the other person doesn't have that theory. 11:42:04 11:42:10 11:42:13

So, those kind of individual questions, and I don't mean to rehearse them all from yesterday, but they simply are not addressed. How those are going to be dealt with, how the individual legal issues are going to be dealt with are not addressed in this three or four-page trial plan. 11:42:16 11:42:19 11:42:24 11:42:26 11:42:32 11:42:34

The last three bullets on this list deal with punitive damages. So the jury is going to be asked to answer, did Defendants' actions and omissions warrant the imposition of punitive damages? And we talked yesterday. This plan doesn't address the problem that there are disparate state laws on what kind of conduct does or does not warrant punitive damages. There are disparate standards that Plaintiffs would have to meet, grossly negligent, outrageous. There are different burdens of proof they have to meet on punitive damages. There is no plan here. There is just a list of things that they would like to have answers to, but no plan on how to get the answers. 11:42:35 11:42:39 11:42:43 11:42:47 11:42:52 11:42:56 11:43:03 11:43:09 11:43:13 11:43:16 11:43:19 11:43:27 11:43:29

The second punitive damages bullet, which is the second to the last bullet on the list, if so, what is the just ratio or aggregate amount? Again, this ignores the 11:43:31 11:43:36 11:43:40

concerns that the courts have talked about, the ratio, for example, if it's three times whatever the damages are, that results in an uncapped potential for punitive damages which yesterday they were telling the Court is unconstitutional. If they ask instead for an aggregate amount, it results in a dollar punitive damages award that doesn't bear any relationship to the actual harm caused Plaintiffs which also raises constitutional issues and there is no plan on how to address those concerns.

The last bullet is the refund, and here, again, there is no plan or explanation for how such a question could be put to the jury independent of the individual proof as to whether somebody benefitted or didn't benefit from the drug, and the cases that we went over yesterday, the Rezulin case I think was the one I put up on the screen that talked about some people benefitted from the drug, and one of the doctors of one of the class representatives explained that he had hundreds of patients that he put on Baycol. All of them benefitted from the drugs. None of them got Rhabdo, and they all paid less than they would have paid if they had been using Lipitor. And, so, there is no mechanism, no plan for how to deal with those facts in this trial plan.

Moving down into the textural paragraph at the bottom of Page 2, they say the Court will try the equitable

remedies of medical monitoring, etc. Excuse me for one moment, Your Honor. I want to pause just briefly on medical monitoring. The -- I was accused of giving a summary judgment argument yesterday. I think at one point I might actually have admitted to that, that I was getting to the point where I was giving an opening statement responding largely to the summary judgment argument that the Plaintiffs had made. 11:45:46 11:45:53 11:46:01 11:46:09 11:46:16 11:46:19 11:46:21 11:46:25

But my real point when talking about the facts, well, I do get carried away in talking about we are right and they are wrong, but the legitimate point for this week's proceeding was that I was trying to explain even in the medical monitoring context, individual questions predominate, including the question of whether class members have any need for monitoring. And what I pointed out was that every single one of their class representatives had already received a test that they say make up the medical monitoring regime. 11:46:27 11:46:31 11:46:37 11:46:42 11:46:46 11:46:49 11:46:53 11:46:56 11:46:59 11:47:04

I also pointed out that their expert had said people only needed to be tested once for this, once they have been off Baycol. They only need to be tested once. And I pointed out that every single representative that they have come up for every class, including the medical monitoring class, every one of them has received those tests. And now what we have heard and what I think is a 11:47:10 11:47:13 11:47:18 11:47:21 11:47:25 11:47:29 11:47:32

desperate attempt to come up with a class are lawyers standing up here and suggesting to the Court maybe we'll change the medical monitoring regime. Maybe it wouldn't just be one test. The Court will decide on a whole series tests will be required. That's not what their expert said. Their expert said one time is enough. And because most of these people have gotten this test already, routinely as part of their medical care for other reasons, now the lawyers want to rewrite the medical monitoring test. And I think it was in that context that I might have made an uncalled for remark yesterday about the effect of such a class would be not to produce any medical diagnostic test that would be useful, but to generate legal fees. And I apologize for allowing myself to make that observation.

What was very important today on medical monitoring was Ms. Cabraser's remarks, and I think they might have slipped by, and I want to make sure that the Court focused on them. She said that medical monitoring will be decided by the Court, and, therefore, the Court will decide the negligence in questions. Because, remember, when we looked at the footnote that had the elements of medical monitoring, at least from Pennsylvania, one of them was exposure to a hazardous substance caused by defendants' negligence. And she said since medical monitoring is an equitable cause of action, the Court will

decide whether there was negligence. 11:49:26

But, of course, under the Seventh Amendment, if 11:49:29
you combine an equitable cause of action with a legal cause 11:49:31
of action for negligence, it will be the jury traditionally 11:49:34
that most courts would look to decide those issues, and 11:49:43
that comes back to all the problems we have with how that 11:49:46
jury is going to be charged under all the different state 11:49:49
laws. 11:49:52

Now, moving on to Page 3, and I only want to talk 11:49:58
about one sentence on Page 3, the top sentence, because 11:50:03
there is an issue about who's going to be bound. Somebody 11:50:26
this morning, and I apologize, I didn't write down which of 11:50:32
the Plaintiffs' lawyers said it, but one of the lawyers 11:50:39
talked about -- it was Professor Miller. He said if the 11:50:46
Defendants win on one of these questions, while that's 11:50:54
fabulous for them because they could go back to the trial 11:50:57
courts and people would be foreclosed from re-litigating 11:51:04
these questions. As I said yesterday, anybody can plead 11:51:07
around one of these questions, but let's take a look at 11:51:12
what their trial plan actually says on that. 11:51:16

On the top of Page 3, they say the answer to the 11:51:20
above questions will be binding on Defendants -- so, of 11:51:25
course, we'll be bound -- and on those who can carry their 11:51:27
burden of proof in Phase 2 of the trial plan. I can't even 11:51:31
find, again, I may be missing it in here, maybe it was 11:51:43

delivered orally, I can't find a Phase 2, and I don't know how someone would carry their burden, but my bigger concern is we are not going to know whose in these classes. For example, when we have an injury class that is defined as anybody who's injured by Baycol, if we end up winning on issues, people can just define themselves out of the class and then re-litigate against us, and that issue hasn't been adequately addressed.

Lastly, on Page 4, maybe this is Phase 2. Yes, I'm sorry. I apologize. I was confused. I'm doing the best I can reading it on the fly, Judge, but here's Phase 2 and here's where we talk about the effect of the proposed trial. I'm sorry, I directed the Court's attention to the wrong page. It was Professor Miller, I wrote down on my notes here. He said if the Defendants win, we're done. Let's takes a look at what happens under their trial plan if we win, okay, we win some of these issues. Then we go back to the transferor court. And according to their plan, and this language in the second full paragraph, upon return, the transferor courts may then hold trials where Plaintiffs will prove their membership in the class. But there are all of these Plaintiffs who basically are going to be given the opportunity not to prove their memberships in the class. They don't want to be members of the class, and even if they haven't opted out, according to this trial

plan, they have to prove that they are in the class. 11:54:03

What that means if we win on questions that are 11:54:06
important to a particular plaintiff, then he doesn't or she 11:54:09
doesn't even claim to have been a member of the class who 11:54:12
is entitled to the benefit of some of the answers but bound 11:54:16
by others. So, it would be a self-defining class where 11:54:19
people would get to decide after the fact whether they are 11:54:26
in it or not based on how the answers came out to the 11:54:28
questions. So that raises big issues as well. 11:54:34

Now, Your Honor, I want to briefly go through the 11:54:37
attachments to the trial plan. We have the three or 11:54:45
four-page trial plan that we got today, and then we have 11:54:48
these attachments. And I just want to comment on some of 11:54:53
the cases that they discussed where they said these are 11:54:58
models based on the cases for what this Court can do. 11:55:01

The Albuterol case, the court never got to the 11:55:06
point of having to grapple with the real tough issues of 11:55:12
slicing people out of the class in the middle of the trial 11:55:17
because it appears that the law imposes -- their state 11:55:20
imposes different standards and the evidence is coming in 11:55:24
differently on those standards, so, people who started out 11:55:28
as part of the trial aren't going to stay part of the 11:55:32
trial. As far as I know, Mr. Chesley was there and he can 11:55:37
correct me if I'm wrong. I don't think the Court ever got 11:55:40
to that. 11:55:43

Similarly, while there was a -- what you saw here on Tab 5 for Albuterol, I just want to point out these are Plaintiffs' First Amended Jury Instructions and Jury Interrogatories. My understanding, again, Mr. Chesley will correct me if I'm wrong, my understanding is that the trial got underway about 40 or 42 days into the trial. The parties settled. I certainly didn't represent the Defendants, so I can't tell you what they were thinking at the time or what drove their decision. But in any event the court never actually had to charge the jury, and the court never had to come up with a verdict form. What we have here are the Plaintiffs' Amended Jury Instructions and Jury Interrogatories. And even just the Plaintiffs' version is quite a substantial piece.

Yesterday, Professor Miller, as I mentioned, when talking about the complexity of the case such as ours, he said if you got -- it may very well be that the instructions and verdict form could be several pages. Well, in just the Plaintiffs' proposed version in Albuterol, the table of contents to the instructions and jury form were several pages, eight to be exact. And then the rest of it was 143 pages. And while I'm sure they did the best job they possibly could in putting these materials together and representing their clients, I'm sure the Defendants were going to try as hard as they could, and

Judge Brimmer was, too, the fact that they started that trial and settled doesn't tell us that, in fact, a jury would have ever been able to comprehend hundreds and hundreds -- hundreds of pages of instructions and complex jury forms if, in fact, the parties had decided to submit the issues to the jury. 11:58:00 11:58:03 11:58:09 11:58:12 11:58:16 11:58:25

The next tab, Tab 6, is the Valdez case, Exxon Valdez case where there was a class trial on fault and liability. As I noted yesterday, Your Honor, the ship sank and there was an event, the drunken captain ran the ship aground and the jury was asked whether the captain and Exxon were reckless. And they were asked that under Alaska law, and, so, on the verdict form on fault was, I think, three or four questions, maybe five questions. 11:58:28 11:58:36 11:58:40 11:58:47 11:58:53 11:58:58 11:59:03 11:59:08

Here we don't have a ship that went down. We have a course of conduct over several years with Plaintiffs whose causes of action relate to different segments of that course of conduct, and we have 51 jurisdictions instead of one. 11:59:12 11:59:15 11:59:17 11:59:22 11:59:27

Similarly, in the Valdez case, the damages were determined under the law of Alaska and only the law of Alaska. And as we heard yesterday, it was basically an economic calculation where the experts explained that, well, the shop that was in the fishing village, their average revenue over the prior was four years was X. And 11:59:28 11:59:33 11:59:37 11:59:42 11:59:45 11:59:50

then after the ship sank and the oil spilled and everybody stopped coming to the village, their average revenue was three-quarters of X, and, so, their damages are one quarter X. And those kinds of damages are susceptible to that kind of expert calculation based on economics and statistics. That's not the kind of damages that we had in the cases that they wanted to certify. 11:59:57 12:00:01 12:00:06 12:00:10 12:00:15 12:00:20 12:00:23

In the one that I'm going down to try next week, Hollis Haltom of Nueces County is going to take the stand and he's going to explain that since he got Rhabdo, that he's unable to participate in some of the family activities. He used to like to go out and go dancing with Eleanor, his wife, but he can't go dancing with Eleanor anymore. I'm not belittling this at all. I don't look forward to hearing that testimony, and I don't look forward to discussing it with the jury, but it sure is not the kind of thing that you can hire somebody from Lexicon to come in and do an economic analysis of it, coming from a group of lawyers who spoke passionately yesterday about the limits of economics that applies with special force to their damages claim. It's not going to be economic analysis. It's going to be individual, heartrending stories that are not susceptible to class treatment and will predominate over any common questions on damages. 12:00:26 12:00:29 12:00:35 12:00:40 12:00:43 12:00:47 12:00:52 12:00:57 12:00:59 12:01:03 12:01:08 12:01:14 12:01:19 12:01:25 12:01:30 12:01:35 12:01:40

The Fernald case at Tab 7, once again, what is 12:01:42

appended here are the Plaintiffs' proposed jury instructions. This is a case that, I guess, Mr. Chesley can also enlighten us on. He submitted these. It's a case that I'll just admit up front I'm not familiar with. I assume that it's settled because he didn't put in the final instructions. What I found interesting was Mr. Chesley said down here on the bottom of this first page, that accordingly -- the court had told the parties to get together and see if they could agree on some of these instructions. And then Mr. Chesley said, "the Plaintiffs are submitting herewith copies of our proposed jury instructions. Where the parties agreed on the form of any instruction, an asterisk has been placed beside the heading of that instruction." 12:01:48 12:01:51 12:02:20 12:02:27 12:02:30 12:02:36 12:02:42 12:02:49 12:02:52 12:02:55 12:02:58 12:03:01 12:03:06 12:03:12

Your Honor, if you take a few minutes and look through, what you will find is that the parties agreed on the form instructions about burden of proof and listening to the witnesses carefully and things like that. And then when it got into the actual instructions, the different causes of action, there was zero agreement, which I think reflects the reality of how difficult this job would be. 12:03:15 12:03:18 12:03:23 12:03:26 12:03:28 12:03:33 12:03:37

It also does not appear from this tab, again, I'm not familiar with the case myself, but there certainly was no effort to charge the jury or to have a verdict form reflecting the laws of 51 different jurisdictions. 12:03:42 12:03:45 12:03:49 12:03:53

Tab 8 is the Telectronics materials that they 12:03:59
have appended. There, I think, this one appeared that it 12:04:03
was the final jury instructions and jury interrogatories. 12:04:08
At least -- I assume that it was. This case, again, like 12:04:19
the Albuterol case, the fact that somebody managed to draft 12:04:28
jury instructions and an interrogatory doesn't answer the 12:04:36
question that is the most important one, and that is do you 12:04:42
really think that a jury can comprehend conflicting, 12:04:47
inconsistent, incompatible instructions under 51 different 12:04:55
state laws and then fill out a jury verdict in a sensible 12:05:00
way. 12:05:06

The fact that the Court determined to -- that 12:05:08
that's the course it was going to try doesn't give us a lot 12:05:13
of comfort that it would work because like in Albuterol the 12:05:17
case settled. In this instance, my understanding is the 12:05:23
case settled before the trial began. The first settlement 12:05:25
was reversed, and there was a second settlement that was 12:05:30
affirmed. Let me share with you what the Paxil court said 12:05:33
concerning the Telectronics case. And now I need to put 12:05:39
two pages up. And, now, I'm sorry Professor Miller left. 12:05:59
He would be pretty impressed with this. Okay, I think I 12:06:16
got most of it on the page. 12:06:39

Here's what the Paxil court said about 12:06:48
Telectronics. "In re Telectronics extensively relied on by 12:06:48
Plaintiffs is not an alternative view that supports such 12:06:52

bifurcation. Rather, it is an exceptional case in which the general rule and precautions against bifurcation of generic and proximate causation did not apply. As the Telectronics court itself noted, the controversy there appeared to be the exception to the general rule that medical products liability actions require extensive proof of individualized issues. This is so because the product at issue was implanted medical device that allegedly fractured and caused physical damage to a patient's heart." 12:06:55 12:06:58 12:07:02 12:07:07 12:07:13 12:07:14 12:07:18 12:07:22 12:07:29

I'm now quoting from Telectronics. Whether a fractured lead an injured individual implantee is a much simpler inquiry than many medical products liability actions because it involves a direct and immediate wound to the body versus a latent, difficult to diagnose disease. For example, general resolution to question whether a certain drug causes cancer from birth defects does little to determine if an individual's cancer was caused by the drug. This individual causation question tends to be the overarching issue in these cases and it overshadows other complex issues and precludes the common issues from predominating. The court -- that was Telectronics, as I said, explaining its approach. 12:07:34 12:07:34 12:07:40 12:07:41 12:07:43 12:07:49 12:07:52 12:07:57 12:07:59 12:08:03 12:08:10 12:08:16 12:08:19

Back to the Paxil court. Thus, the Telectronics is an instance in which a medical mass tort class certification was granted. The court there specifically 12:08:23 12:08:26 12:08:29

recognized that the causation issues in that case were particularly black and white as opposed to those encountered in a medical mass tort case such as the one here. 12:08:32 12:08:36 12:08:39 12:08:44

And, of course, we could substitute Bayer and Baycol for the other ailments here. We heard today about how this was a disease lurking that people didn't know about and that had manifested itself years later. It falls squarely within the language according to Plaintiffs' theory -- it falls squarely within the language that the Telectronics court said would be inappropriate for class or issue determination because in cases like ours, the individual issues predominate. 12:08:44 12:08:47 12:08:52 12:08:55 12:09:02 12:09:04 12:09:08 12:09:10 12:09:15

Your Honor, so, this was a Telectronics, particularly black and white, straightforward causation case. And there the instructions and verdict form were 92 pages long. And here we're talking about something that is not simple and that is not straightforward and that has enormous variations, both in the fact patterns that would be relevant to liability and the law that would be applied to determine liability. 12:09:20 12:09:24 12:09:28 12:09:37 12:09:42 12:09:47 12:09:52 12:09:57

The next tab in their book is Tab 9, and that is the Avery case. The Avery case -- the Avery case is a case from Illinois. It's a breach of contract case. It sought economic damages. We don't have the instructions included 12:09:59 12:10:08 12:10:28 12:10:35

in the tab, so, we don't really know whether the jury was instructed on the laws of 51 states under breach of contract. We do know that the Court applied the law of Illinois on the cause of action that was in front of it, and applied the law of Illinois to the causes of action of people from all across the country which we think was a clear violation of Ari v. Tonkins, and in that case is on appeal right now in the Illinois Supreme Court. 12:10:38 12:10:42 12:10:47 12:10:55 12:10:57 12:11:02 12:11:07 12:11:15

The next tab is the Naef case and is the last tab, I think. That would be Tab 10. Everything I know in the world about the Naef case I learned this morning when I was reading over Tab 10. It appears to be a 1996 case from Alabama -- from an Alabama state trial judge, Judge Robert Kendall. It's a nationwide class. There are 16 pages of transcripts of instructions, and if Your Honor looks at those 16 pages, you'll find that 12 of them are preliminary instructions, and Judge Kendall voted four pages to instructing that Alabama state court jury on the law to apply and the national -- nationwide class, and then submitted five questions for the jury to answer in that nationwide class action. And I wonder, Your Honor, whether the Plaintiffs' lawyers from this case seriously contend that this is a model that Your Honor ought to be following in this litigation. 12:11:18 12:11:22 12:11:30 12:11:34 12:11:42 12:11:48 12:11:53 12:11:59 12:12:03 12:12:08 12:12:13 12:12:20 12:12:26 12:12:29 12:12:33 12:12:36

Finally, Your Honor, I want to address Professor 12:12:40

Miller's remarks saying, not by way of personal attack, but by way of comment on my argument yesterday that the sum and substance of what Mr. Beck had to say was do nothing. With all respect, I disagree with the professor. What we have suggested is that the Court do its job as the MDL judge appointed by the panel. That the Court get these cases ready to be tried. That the Court coordinate discovery so that we don't have needless duplication in federal courts around the country. That the Court go above and beyond the normal approach by MDL judges and secure the coordination and cooperation of state court judges and state trial lawyers throughout the country so as to avoid duplication, so as to get these cases ready to be tried efficiently and inexpensively. We suggest that the Court do deal with dispositive motions when the time is right for those. We suggest that the Court do rule on Dalbert motions once experts have been identified, write reports and have been deposed. And another thing that the Court should do is try the cases that were filed in the federal court in Minnesota once all the cases are ready to be tried and remanded to the transferor courts.

Most importantly, what we say the Court should do is to follow the law when ruling on the motion for class certification. Denying class certification is not doing nothing. Denying class certification is making a judicial

decision based on the law and the facts that are pertinent to that issue that this case is not suitable for class treatment. Deciding that matter correctly, even if it means that there would be class counsel do not get what they ask for is not doing nothing. Denying class certification when class certification should be denied is doing something and it's called judging. Thank you, Your Honor.

THE COURT: Thank you. Let's -- we have finished with this phase of the arguments dealing with class certification. Let's move on to the status conference. Mr. Beck, can we have a side bar?

(Whereas, a conference was had at the Bench and off the record.)

THE COURT: We'll take a one-hour lunch break. We will start up at 1:15.

(Noon recess taken.)

THE COURT: Mr. Zimmerman.

MR. ZIMMERMAN: That was fun. The status report and agenda has been filed with the court. We have prepared it jointly and I think we've put a vanilla summary of all the positions or all of the facts into the report. I will go through them briefly, and if there are any questions, we can certainly discuss them. And if there are any disputes with regard to things, we will bring them up and the Court

will schedule how you want to hear that if that's appropriate. 13:31:29 13:31:32

First off, under Settlement, update of serious case settlements. The good news is there are 433 cases of Rhabdo settled to date. The PSC has directly settled 125 of them which is included within that number. This is not PSC cases necessarily, but these are PSC cases in which we have worked with PSC counsel and non-PSC counsel to settle cases. There are 63 cases under discussions. That means they have been submitted to settlement counsel and they are still in play. That's the good news. 13:31:34 13:31:38 13:31:45 13:31:50 13:31:54 13:31:58 13:32:04 13:32:10 13:32:14

I think the bad news is that we are not seeing a lot of additional cases coming in with any particular -- at any particular speed at this time. So, in terms of cases coming into that program, at least through the PSC, it seems to be rather -- has slowed down quite a bit. 13:32:19 13:32:24 13:32:28 13:32:33 13:32:42

The other question that we are having is we're having a little more problems with some nips and naps of this program. The major one is this, Your Honor. It's whether or not discovery needs to continue while the cases are in settlement discussion. That is the presenting of the Plaintiff Fact Sheet and other requirements of discovery, and also whether or not there will be tolling of statutes if it's an unfiled case. 13:32:44 13:32:49 13:32:51 13:32:55 13:33:01 13:33:06 13:33:08 13:33:14

We talked about this at the meet and confer, and, 13:33:18

frankly, my understanding is different than I think the current position of the defense counsel is. And the reason it's important is we've gone out and told people, one, if they are in serious negotiation, Plaintiff Fact Sheets can be suspended during that period of time. And, two, if they are in serious negotiations, the Defendants will enter into tolling during that period of time so they don't have to file their case or be concerned. There seems to some misunderstanding or dispute about that question. So, maybe we can straighten it out now or maybe we need to discuss it further or maybe we're not in disagreement or maybe everything is as I thought it was going to be. And, Adam, you can tell me what your position is. 13:33:24 13:33:28 13:33:33 13:33:37 13:33:43 13:33:47 13:33:50 13:33:54 13:33:59 13:34:04 13:34:08 13:34:11 13:34:17

MR. HOEFLICH: I have not discussed this with Mr. Zimmerman, Judge. If there are people who suffered rhabdomyolysis while taking Baycol and we are in serious settlement discussions with Mr. Zimmerman, we're happy to work with him on tolling of fact sheets if we have the medical records and on tolling of the case if that's an issue. I'm unaware of the issue. I'll certainly work with Mr. Zimmerman on this. 13:34:18 13:34:23 13:34:27 13:34:32 13:34:35 13:34:39 13:34:40 13:34:43

THE COURT: Thank you. 13:34:46

MR. ZIMMERMAN: Thanks, Adam.

MR. HOEFLICH: You're welcome.

MR. ZIMMERMAN: The next issue, Your Honor, is 13:34:48

the update on mediation and Pretrial Order 51 and 59. We have after some time submitted to the Court a proposal for distribution of Pretrial Order 51 and 59 by the Court. I believe that's under advisement at this time by the Court. We have not received, at least as of yesterday, the list of Counsel. 13:34:59 13:35:08 13:35:14 13:35:17 13:35:24 13:35:29

THE COURT: It came in this morning. 13:35:30

MR. ZIMMERMAN: Okay. I just haven't been in the office. I trust you e-mailed it. 13:35:34 13:35:34

THE COURT: Yes, six something this morning. 13:35:38

MS. WEBER: It was early. 13:35:44

MR. ZIMMERMAN: I was up, then, Your Honor, but I was doing something else. All right, so, that apparently has been resolved. We'll review and see if there are any problems with it. I trust there probably aren't, and that's terrific. 13:35:45 13:35:50 13:35:53 13:35:56 13:35:59

The meeting of the mediators. Unfortunately, Your Honor, I wasn't able to participate in the meeting of the mediators that took place on January 24th under the direction of Special Master Haydock and Special Master Remele and, of course, Your Honor. I don't know if anything needs to be reported on that. I was not there. I believe Mr. Goldser was there from my office. He has given me information on it, but in terms of announcing to the public through this forum the status conference, the 13:36:02 13:36:07 13:36:09 13:36:18 13:36:18 13:36:22 13:36:25 13:36:32 13:36:37

results of that or where that is, I don't know if there is anything that needs to be put on the record with regard to it. My understanding is the Court has selected mediators and we are going to be meeting and discussing it further. 13:36:41 13:36:44 13:36:47 13:36:51

THE COURT: That's correct, and the Court will be issuing an order early next week dealing with mediation and we'll be sending -- you will be meeting with Mr. Remele this afternoon, and I would like the letter to go out early next week under my signature, so, we are going to have to work out the logistics of that. 13:36:56 13:36:58 13:37:03 13:37:07 13:37:12 13:37:15

MR. ZIMMERMAN: Very good. How many people would the letter go to? Do you remember the number? 13:37:19 13:37:25

MS. WEBER: I haven't received the entire list. I have just seen the electronic -- 13:37:30 13:37:33

MR. ZIMMERMAN: Thank you. Your Honor, the next issue is the common benefit fund which, of course, is what we call the hold back or the 6 percent fund, and you'll see the number that is included in the status report. 13:37:39 13:37:40 13:37:43 13:37:47

THE COURT: Before Mr. Robinson leaves, I would like to introduce him. He's going off to a meeting. 13:37:52 13:37:55

MR. ZIMMERMAN: It's my dubious honor and pleasure to introduce Mark Robinson from Newport Beach, California. Mark and I are working out the details of his position with the PSC. I know that he has spoken with the Special Master. Mark is also chairman, I believe, 13:38:03 13:38:05 13:38:11 13:38:15 13:38:19

Co-chairman or Chairman of the California coordinated proceedings. Mark and many members of this PSC know each other very well. We worked together on a number of cases. I have a tremendous respect of Mr. Robinson and we look forward to working very closely with him on matters of the PSC. I think it's a really significant show of how things are working that disparate groups come together, and Mark represents a real step forward in bringing that to the Court and to this MDL and to all of us. And he will be a great addition to the PSC once we work out all the details. 13:38:23 13:38:26 13:38:32 13:38:35 13:38:41 13:38:43 13:38:47 13:38:54 13:38:56 13:39:00

MR. ROBINSON: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Robinson. Welcome to the Baycol family, and I hope that there is nothing that you have seen in the running of this operation by this Court that may scare you away, scare you back to California. 13:39:07 13:39:10 13:39:13 13:39:18 13:39:22

MR. ROBINSON: No, Your Honor. Including the weather, it's been nice, a nice change from California. It's been wonderful watching this Court in action for the last two days, and I'm going to report back to our judge in California. This has been fun. Like Mr. Beck and some of these other people here, looks like it's going to be a good fight and I always like a good fight. 13:39:25 13:39:26 13:39:31 13:39:35 13:39:41 13:39:46 13:39:50

MR. ZIMMERMAN: It's a love fest, Your Honor. 13:39:56

MR. CHESLEY: I'm sorry, Your Honor. 13:40:00

THE COURT: I didn't see Mr. Remele in the back. 13:40:04
Mr. Remele, why don't you step forward. This is Lewis 13:40:07
Remele who is Special Master handling the mediation 13:40:14
program. Mr. Remele, do you have anything you wanted to 13:40:20
add to what's going to be happening in the mediation? You 13:40:24
are going to be meeting with the subgroup this afternoon, 13:40:27
is that correct? 13:40:30
MR. REMELE: We are, Your Honor, and we've got a 13:40:32
few issues, but we'll get those ironed out. 13:40:34
THE COURT: All right. Thank you.
MR. ZIMMERMAN: Your Honor, then, I was talking 13:40:42
about the common benefit account. I guess the newest 13:40:43
development in that regard is the Court has selected the 13:40:48
accounting firm of Schechter, Dokken & Kanter to be the 13:40:54
accountants and/or auditors for the Common Benefit Fund. 13:40:59
Currently, there is about 2.2 million dollars in that fund 13:41:03
under the direction of the Court, and, certainly, money is 13:41:08
growing and then being deposited in there regularly as 13:41:11
cases are settled within the MDL. I don't think there is 13:41:16
anything further I need to comment with regard to that, 13:41:20
although I did see the accountant, I believe. 13:41:24
THE COURT: Yes, he's here, and I believe he's 13:41:30
going to be with the subgroup going over the number of 13:41:33
questions I asked about the trust account. 13:41:38
MR. ZIMMERMAN: Your Honor, the next issue is 13:41:42

motions. There are four motions pending in some way -- in different fashions before the Court. And I believe the first one is the newest one which is an application for a stay of PTO 61. I believe there is a letter before the Court asking that that be reheard or reheard again, and I believe that's where that sits. Our motion for stay, I think, need your permission at some point if you're going to grant our ability to re-argue that.

Then there is the motion to amend to add a count of punitive damages under Minnesota law. That was filed, I believe, on Tuesday or Wednesday with the Court. We had, I think Defendants will take -- or want the opportunity to brief that. We have not established a briefing schedule. We did meet and confer on it in the sense we were asking if they might be interested in a stipulation and we're not able to reach a stipulation. So, I think we probably just need to have it briefed in accordance with the rules and have it submitted after that.

MR. BECK: I agree with that, Your Honor.

THE COURT: Dealing with the first item, staying PTO 61, I'll have an order out by Wednesday of next week.

MR. ZIMMERMAN: On the Canadian coordination issue, I believe that's fully briefed. I don't know if anyone wants to make any further comment on it, but I believe it's just under advisement on the Canadian

coordination.

THE COURT: No oral argument is necessary. It's under advisement.

MR. ZIMMERMAN: Thank you. Dismissal for lack of Plaintiff's fact sheet. I don't know if Vicki is in the courtroom from Weitz and Luxenberg. She was here earlier. She may have had to leave.

MR. LOCKRIDGE: She just walked out.

MR. ZIMMERMAN: I believe this issue now, it was somewhat contentious for a while, but I believe Wendy Fleishman has just told me that they are going to meet again to work out some problems and, hopefully, we'll have something worked out or resolved with regard to dismissals and Plaintiffs' fact sheets. Is that accurate.

MS. FLEISHMAN: We just need an updated list.

MS. WEBER: We're working on a cooperative basis on this, Your Honor.

MR. ZIMMERMAN: Then moving on, Your Honor, to the trial status. You will see attach to the status report is a trial calendar that was recently provided to me by defense counsel. Actually, I think it was provided contemporaneous with the filing of this report, and it shows, I believe, 36 cases set for trial in various venues around the country and state court.

I don't have any further comment on that, Your

Honor, other than we know that the most recent one is the Michael Watts trial that has been referred to a couple of times in Texas that Mr. Beck will be trying in a week or so. I think that is the first one up. 13:45:17 13:45:21 13:45:26 13:45:29

The problem, we have, Your Honor, and it's not a huge problem, but we get rumors all the time there is this trial set, do you know about that trial. We got an alarming call from someone saying there is a trial in Kansas City starting on March 1st, and I called Susan or Adam and asked what did they know about it, and they didn't really know too much about it and they dug around and sure enough there was one but it got kicked off is what I understand or in the process of getting kicked off. 13:45:35 13:45:40 13:45:45 13:45:52 13:45:54 13:45:59 13:46:03 13:46:04 13:46:07

The reason it's important to us, Your Honor, is because number one, a number of Plaintiffs' lawyers will call us and ask us for something and they will tell us about this trial, and we like to know what's going on out there so we can at least be in the know, and say we are aware of your trial and we can or can't help you, but we don't like to be bushwhacked bit it if we can at all help it because we'll look stupid if we don't know what's going on in the Baycol litigation in state court. 13:46:12 13:46:12 13:46:14 13:46:16 13:46:20 13:46:23 13:46:28 13:46:32 13:46:35

This trial calendar is very helpful, and, so, we thank the defense counsel for providing it to us and we just ask that they continue to keep it updated to us so 13:46:40 13:46:46 13:46:48

that we don't have problems in the future. 13:46:52

MR. BECK: We will do so, Your Honor. 13:46:56

THE COURT: Okay. Will you provide copies to the 13:47:01
Court, also? 13:47:01

MR. ZIMMERMAN: Third-party Payer and Lien 13:47:02
Negotiation. Joe Arshawsky is here. He has been appointed 13:47:06
by the Subcommittee -- by the PSC to be the heading of 13:47:12
Subcommittee on third-party payers. I would like him to 13:47:14
give a brief status report to the Court because, frankly, 13:47:19
I'm out of this and not been able to give very good 13:47:22
information from defense counsel on third-party payers. 13:47:26

MR. ARSHAWSKY: Good afternoon, Your Honor. It's 13:47:29
indeed a pleasure to be here in Minnesota despite the 13:47:32
weather, coming up from New Mexico. I would continue to 13:47:37
extend invitation. I prefer the winter hearings -- it's a 13:47:41
brand new courthouse, the William Jefferson Clinton 13:47:43
Courthouse Building in Albuquerque or Sante Fe, and we 13:47:46
would welcome the Court to conduct a road show in the 13:47:52
winter, should Your Honor choose to do so. 13:47:55

THE COURT: If I had known it was going to be 14 13:47:57
below this morning, I would have taken you up on your 13:48:00
invitation. (Laughter). 13:48:03

MR. ARSHAWSKY: I've enjoyed it nonetheless. The 13:48:05
the warmth and spirit of the people of Minnesota definitely 13:48:09
comes through despite the cold weather outside. 13:48:15

Earlier at the hearing, and I apologize that he had to catch his plane. I understand the security code was elevated today, and, thus, people had to get to the airport earlier than anticipated. Mr. Art Sadin, who up until the end of last year, has been my partner for eight years is also co-liaison with me in the MDL for Union Benefit Funds, and he apologizes that he had to leave to catch his flight but has enjoyed thoroughly participating in the class certification hearing. 13:48:19 13:48:21 13:48:23 13:48:27 13:48:32 13:48:37 13:48:42 13:48:49 13:48:51

We have been working cooperatively with the PSC. Last night I had the pleasure of sharing in the brainstorming session, as did my partner Art Sadin with luminary minds as Professor Miller, Ms. Cabraser, Mr. Zimmerman, Mr. Lockridge and all the counsel at that table in participating and joining them in the trial plan because our view as third-party payers is that we share a commonality of interests with the consumer Plaintiffs in terms of seeking their class certification and prosecuting the liability case against Bayer AG and SmithKlineBeecham. So, to the extent that we may have some differing interests, it is only in the allocation of settlements or subrogation issues that we are attempting work cooperatively in that regard. 13:48:52 13:48:56 13:49:00 13:49:06 13:49:13 13:49:15 13:49:19 13:49:22 13:49:25 13:49:31 13:49:37 13:49:43 13:49:47 13:49:50

I am pleased to say that the Defendants have been keeping us abreast as to what is going on and we have been 13:49:53 13:49:55

in touch with those who represent third-party payers with an interest in the Baycol litigation, both at the state and federal and the unfiled level. As we understand what is going on right now with regard to settlement discussions, Mr. Schwartz was, I don't believe he's in the courtroom anymore, Mr. Steven Schwartz who is appointed as the liaison counsel for the state court proceedings in Pennsylvania and I have been in close contact. He and his group have filed a motion for class certification in the Pennsylvania state court proceedings for a third-party payer class. 13:50:00 13:50:04 13:50:09 13:50:13 13:50:18 13:50:21 13:50:31 13:50:31 13:50:35 13:50:40 13:50:43

The motion itself, I understand, is -- has been set for a briefing schedule. It's a rather prolonged briefing schedule, and the reply brief is not due to be filed until approximately August or September of this year. There has been no hearing date set for that motion for class certification. We have been keenly aware of the proceedings both here on class certification and in the state court. We are considering bringing on a third-party payer class certification motion. It's limited, of course, to the economic loss issue. And, therefore, we are keenly observing what this Court will do with regard to that issue before proceeding on litigation front. 13:50:46 13:50:51 13:50:55 13:50:59 13:51:03 13:51:06 13:51:10 13:51:13 13:51:17 13:51:21 13:51:27 13:51:32

On the settlement front, we have been in close contact and Ms. Weber can contact me if I'm wrong, but I 13:51:36 13:51:38

broke with Gene Skoon at her firm, Sidley, Austin, Brown, Wood, earlier this week with Mr. Schwartz, and we are advised that there is a group of two lawyers who I know very well who represent third party payers of the conventional health insurance variety, and they are in advanced stages of negotiations with Bayer on individual settlements for their clients who are rather large HMO's and health insurance companies. They are looking to individually settle and release their subrogation claims which we believe would facilitate the settlement program of the individual Plaintiffs.

We have not yet been privy to the precise dollar amount involved or the precise terms of the settlement. However, I am informed that in a matter of days we should be receiving from Mr. Skoon the latest proposal from the Plaintiffs' counsel they are dealing with as well as Bayer's reaction which they have under consideration. At which point we will convey that offer which I understand will be extended to us and to yet another lawyer who hasn't filed any suit yet, but who represents several Blue Cross entities in the South and several other insurers, and that we are all going to consider what the offer is.

I understand that the Blue Cross lawyer has also made a proposal to the defense counsel, but it's fairly far apart, early stages of negotiations, should we say. We are

keenly aware of that. We would intend, should these same terms be offered to us to present those to our client and see if they are interested in so pursuing them. 13:53:31 13:53:34 13:53:38

The same is true with Mr. Schwartz. Any state court litigation that he would be offered the same terms and will present them to his client as well. 13:53:42 13:53:46 13:53:49

So, we have been involved in negotiations. We have been involved with the PSC. We appreciate the spirit of cooperation and have enjoyed participating in the proceedings thus far. Unless Your Honor has any questions. 13:53:52 13:53:54 13:53:57 13:54:03

THE COURT: Thank you very much. 13:54:07

MR. HOEFLICH: We have nothing to add, Your Honor. 13:54:09 13:54:12

MR. ZIMMERMAN: Your Honor, I've just been asked by John Climaco if I could do discovery status before we do privilege because he's supposed to be at another meeting. 13:54:13 13:54:15 13:54:23

MR. CLIMACO: Good afternoon, Your Honor. May it please the Court, John Climaco. Your Honor, I am pleased to report that as of today, we have completed 52 depositions in the MDL, 45 Bayer depos and 7 GSK. We have completed one of our third party, Dr. Gerald Faish. We currently have 6 depositions scheduled. GSK depositions, the next one commences on February 19th, and they run through March 27th. 13:54:27 13:54:29 13:54:36 13:54:40 13:54:46 13:54:52 13:54:57 13:54:59

We have two additional third-party depositions 13:55:01

scheduled, one on February 13th and 14th of Dr. Anthony Gatto, and that will be a cooperative deposition between the MDL and the state, between myself and Mr. Sol Weiss. 13:55:07 13:55:13 13:55:15

On February 19, 20, and 21, Your Honor, we will be deposing three representatives of Pacific Health Care Systems, probably the largest HMO that had -- and used Baycol. 13:55:20 13:55:24 13:55:31 13:55:37

I'm also pleased to report, Your Honor, that the Bayer AG depos are now in place. They're noticed. They are two-phased depos, Your Honor. The first phase of three witnesses go for nine days between February 24th and March 5th. The second phase, Your Honor, begin on March 24th going through April 6th. That's eleven days, Your Honor, and those will be dual-tracked depos. 13:55:39 13:55:42 13:55:47 13:55:52 13:55:57 13:56:02 13:56:06

Your Honor, we have received over the last couple of weeks millions of pages of Bayer AG documents. Fortunately, through some of the creative work of Mr. Zimmerman's partner, Randy Hopper and Mr. Arsenault, we have been able to locate a software program which will probably save an interpretation of the 40 percent of those documents. We probably will be able to save approximately a million dollars in translation costs by the use of this software program. 13:56:13 13:56:18 13:56:23 13:56:33 13:56:35 13:56:39 13:56:44 13:56:49 13:56:55

Your Honor, I believe that to date I am pleased to report to the Court that we have ongoing cooperation on 13:56:58 13:57:02

a weekly basis with Bayer and GSK. We have a meet and confer weekly by telephone. Bayer is represented by Mr. Marvin and Adam Hoeflich, GSK by Joe O'Connor and Fred Magaziner, and that seems to be working extremely well, Your Honor. 13:57:06 13:57:12 13:57:19 13:57:28

As we speak, the LAC is meeting with the Bayer counsel in an effort to finalized the terms and conditions of a written protocol for the Bayer AG depositions. We thought we could eliminate potential conflicts and whatever. This has been ongoing. One of the reasons I was late coming back from lunch is Mr. Marvin, before we left, gave us a new copy and we spent some time with the MDL lawyers and the state attorneys trying to see what parts we could agree and what we could disagree. 13:57:33 13:57:38 13:57:44 13:57:48 13:57:53 13:57:56 13:58:00 13:58:05 13:58:09

Your Honor, as of this moment, I'm also happy to say that as part of the discovery team and along with the Co-Lead counsel, the MDL has appointed a trial team, and the trial team is already working and we will be prepared to go to trial on June 6th. 13:58:10 13:58:14 13:58:19 13:58:25 13:58:28

If you have any questions, Your Honor, I will be pleased to answer. I would be remissed in saying, Your Honor, that this cooperative attitude and direction has been helped immensely by your Special Master, Mr. Haydock. He's on the phone with us. He makes suggestion, and when necessary he scolds either side privately. 13:58:31 13:58:33 13:58:36 13:58:40 13:58:44 13:58:48

THE COURT: Who is your trial team? 13:58:53

MR. CLIMACO: The trial team, Your Honor, is 13:58:54
comprised of Mr. Shelquist from the Lockridge firm, Mr. 13:58:57
Plunkett from the Lockridge firm, Mr. Arsenault, myself, 13:59:05
Mr. Audet, Mr. Chesley, I'm sure Mr. Robinson will be part 13:59:10
of that trial team, Ms. Nast, and Ms. Cabraser are also 13:59:17
part of it, Your Honor. I'm sorry, Your Honor, there is 13:59:23
Ron Mesh --

MR. ZIMMERMAN: Meshbesher. 13:59:33

MR. CLIMACO: Attorney from Minneapolis has been 13:59:35
added, Your Honor, and he's been working with us over the 13:59:37
last couple of months, and Wendy Fleishman, I apologize, 13:59:41
Your Honor. 13:59:45

THE COURT: Thank you. 13:59:48

MR. MAGAZINER: Nothing to add, Your Honor. 13:59:58

MR. ZIMMERMAN: Your Honor, I would be remiss if 14:00:04
I didn't thank John Climaco and Turner Branch, co-leads of 14:00:05
discovery, for really working very, very hard and really 14:00:12
doing the job on behalf of the PSC. They have been 14:00:15
marvelous to work with and they really are pushing the 14:00:18
envelope, and we appreciate it very much. That goes for 14:00:21
defense counsel as well. There has been tremendous 14:00:23
cooperation in this endeavor and a lot of hard work and a 14:00:24
lot of conference calls and lot of work getting done. 14:00:28

The next item on the agenda is the Privilege Log 14:00:34

Issue, and you will see there is a big blank in that spot because at the time of this writing, we knew there was an issue. We didn't know how far it was going to be resolved or not resolved, so Rob Shelquist will bring the Court up to date on that issue. 14:00:38 14:00:43 14:00:48 14:00:53 14:00:56

MR. SHELQUIST: Good afternoon, Your Honor. Yesterday counsel mentioned that with regard to the Bayer AG depositions there had been cooperation on who was going to be taken, when they would be taken, and where they were going to be taken. In order to facilitate that process, a number of documents have been produced and obviously privilege issues have come to the fore. We have reached two other significant agreements which I would like to tell the Court about. 14:00:58 14:00:59 14:01:03 14:01:06 14:01:09 14:01:17 14:01:17 14:01:19 14:01:22

First, with regard to the defense counsel, they have agreed to produce privilege logs for the witness documents -- the witnesses who are going to be deposed, their documents will be on a privilege log on an expedited basis so that we can raise privilege issues before the deposition goes forward. Equally significant, the state lawyers as well as the MDL lawyers on the Plaintiffs' side have agreed that all privilege issues will be decided in a single courtroom, Magistrate Lebedoff's courtroom, and that no other ancillary fights will take place with regard to those documents. 14:01:25 14:01:27 14:01:30 14:01:35 14:01:38 14:01:42 14:01:46 14:01:50 14:01:53 14:01:57 14:02:03

We're going to be meeting later this afternoon with Special Master Haydock to work through details on expedited briefing, on translation issues and the like. 14:02:03 14:02:04 14:02:10

As to the balance of the documents that may be challenged on the privilege logs, we are in various stages of meet and confer with Bayer, Bayer AG, and GSK and wei will bring any motion on an non-expedited basis before the Magistrate. Thank you. 14:02:14 14:02:16 14:02:19 14:02:25 14:02:31

THE COURT: Thank you. 14:02:32

MR. HOEFLICH: Your Honor, Mr. Marvin is dealing with the privilege issues for Bayer. I have no doubt that what Mr. Shelquist says is true, but I actually can't confirm it. I'm sure that Mr. Marvin will work with Mr. Shelquist to formalize any agreements that we have and work with Special Master Haydock to make sure things are done smoothly for the depositions. 14:02:32 14:02:37 14:02:40 14:02:44 14:02:48 14:02:51 14:02:56

THE COURT: Thank you. 14:03:00

MR. ZIMMERMAN: Your Honor, my manners slipped. Mark Robinson has a representative in the courtroom that I forgot to introduce, Gail Pearson who I have known for years, and she is right now behind the bar, but she should come forward and introduce herself to the Court. She works very closely with, I believe, and has a counsel relationship -- of counsel relationship with Mark Robinson is a local lawyer that has been before these courts in our 14:03:00 14:03:04 14:03:08 14:03:13 14:03:18 14:03:23 14:03:27 14:03:30

state for a long time, not that long, and a woman that I have known and worked with for a long time. 14:03:32 14:03:37

MS. PEARSON: Thank you, Your Honor. My name is Gail Pearson, and it's a pleasure to be here in front of you. And I have worked with Mr. Robinson and Mr. Zimmerman for several years, and it's a pleasure to be a part of this team. Thank you so much. 14:03:42 14:03:43 14:03:47 14:03:50 14:03:53

THE COURT: Welcome. 14:03:55

MR. ZIMMERMAN: I feel better. Your Honor, we are down to the Special Master report, and I don't know if the Special Master is in the courtroom. 14:04:00 14:04:08 14:04:13

THE COURT: He's working. 14:04:15

MR. ZIMMERMAN: He's working, so we can remove those for the time being. We'll then proceed to the expert discovery schedule. First off, Your Honor, I believe that a new proposal or a different proposal from the Plaintiffs Steering Committee side than the one that was attached has now been provided to counsel. 14:04:20 14:04:22 14:04:31 14:04:31 14:04:36 14:04:38

MR. BECK: Yes. We received it a couple of hours ago. We understand it. 14:04:41 14:04:42

MR. ZIMMERMAN: At this time, Your Honor, I don't think we are prepared to be arguing it. I think what we're really prepared to do, or what I suppose we could, what we really wanted to do was let you know that we each had proposals. And these proposals don't match. And I think 14:04:57 14:05:00 14:05:03 14:05:06 14:05:12

that at an appropriate time, and probably sooner rather than later, perhaps after the Court has had a time -- a chance to look at them, we come back, either by conference call or directly, and either work this out with your help or submit the plans for you to make the cut. 14:05:17 14:05:20 14:05:23 14:05:31 14:05:35

These expert discovery schedules drive lots of things. The one we have provided to the Court, the PSC's version is consistent with Rule 26, and is also trying very hard to make something happen on a reasonably tight and svelte time schedule. But I think I believe it would best serve the interest if the Court would have a chance to look at them and then come before you and argue them rather than putting dates and times in abstraction before the Court when our minds really aren't focused around them. 14:05:39 14:05:44 14:05:50 14:05:56 14:06:06 14:06:12 14:06:16 14:06:18 14:06:21

MR. BECK: I agree. 14:06:25

MR. ZIMMERMAN: Does that meet the Court's approval? 14:06:33 14:06:34

THE COURT: It does. Keep talking. 14:06:36

MR. ZIMMERMAN: Thank you, Your Honor. The next issue, Your Honor, is insurance coverage, and I guess the best information I have now on that is that Peter Sipkins and Rob Shelquist are getting together to work through this issue. We have felt there has been a vacuum in our discovery with regard to limits and coverages and policies, and Rob and Peter are working this through and their 14:06:53 14:06:53 14:06:57 14:07:01 14:07:08 14:07:14 14:07:18

discussions are continuing. So, I think we'll probably have this worked out by the next status, if not before, and I don't think there is anything further to say on this point other than we want them and we hope we get them. 14:07:22 14:07:26 14:07:30 14:07:35

Rob, do you have anything? Peter? 14:07:40

Your Honor, I have brought the last item on the agenda, the motion for admission of Mark Robinson to the PSC before the Court. That we have already handled. 14:07:47 14:07:53 14:07:58

And, I believe -- the only other item on the agenda, Your Honor, is the matter of announcement that the PSC will be having another one of our seminars for counsel with Plaintiff cases, whether they're in the MDL or not in the MDL, in April. I believe it's April 10th in southern California. As you know, the last one was in Miami. We decided to go to the other end of the world or earth or country for the next one, and we'll have notice out on that very soon. I'd like to run the notice by the Court and by counsel just so we make sure that we don't have any people feeling that the notice is somehow misleading. 14:08:05 14:08:12 14:08:15 14:08:21 14:08:29 14:08:32 14:08:36 14:08:43 14:08:46 14:08:49 14:08:53

THE COURT: What's the date? 14:08:59

MR. ZIMMERMAN: April 10th. And Mr. Hopper of my office has been in charge of that. I don't know if there is anything further that you want to say about it. We are talking about the Los Angeles Plaintiffs' counsel conference. 14:09:02 14:09:06 14:09:10 14:09:16 14:09:20

MR. HOPPER: That's scheduled, Your Honor, and we're at the planning stages and we expect to have the seminar. 14:09:22 14:09:27

THE COURT: While we are on the topic, California, I would like to thank Ramon Lopez for being here the last several days. 14:09:27 14:09:30 14:09:36

MR. ZIMMERMAN: Take your coat off. 14:09:40

MR. LOPEZ: I'm getting ready to leave. I did hear April 10th. I need to say that that will conflict with the California Trial Lawyers convention in Monterey. So, if you want to not conflict with that and have as many people as you can, I would suggest that you look at another date. 14:09:43 14:09:54 14:09:58 14:10:02 14:10:09 14:10:10

MR. ZIMMERMAN: Thank you, appreciate that. We'll change it. 14:10:10 14:10:12

Your Honor, I believe that concludes our agenda. 14:10:14

THE COURT: Dealing with the expert discovery schedule telephone conference on February 12th at eleven o'clock, how does that sound? 14:10:19 14:10:24 14:10:30

MR. ZIMMERMAN: February 12th at eleven o'clock sounds fine with me. 14:10:36 14:10:38

THE COURT: You're going to be in trial? 14:10:41

MR. BECK: I am going to be in trial, Your Honor, but more than that, I think this is going to be a pretty significant matter that we would prefer to argue in person, 14:10:43 14:10:45 14:10:49

and it's probably not going to be me because I'm going to be in trial. I would like to be able to argue it, but that's life. I do think this is something we need to be heard on and focus on, and I don't really feel comfortable trying to handle that over the telephone. 14:10:52 14:10:56 14:10:59 14:11:03 14:11:07

THE COURT: Eleven o'clock on the 28th. 14:12:04

MR. BECK: Yes, Your Honor. Someone will be here on the 28th. 14:12:11 14:12:15

THE COURT: That's Friday. 14:12:15

MR. HOEFLICH: The disadvantage is that Phil heads to Nueces County, Texas and I head to London, England for the President of Bayer and former President of Bayer, and somehow I got the tough assignment here, and Mr. Magaziner will be with us in Europe as well. 14:12:18 14:12:22 14:12:26 14:12:29

MR. MAGAZINER: As well as many of the Plaintiffs' lawyers. 14:12:34 14:12:38

MR. ZIMMERMAN: We could definitely find someone. 14:12:42

THE COURT: When are you going to London? 14:12:45

MR. HOEFLICH: We return on March 6th, and by then I believe Mr. Beck's trial is likely going to be over as well. 14:12:48 14:12:51

MR. ZIMMERMAN: We don't want to give up a month between now and then just to argue about a schedule. So, I would ask for sooner rather than later if we can be in person on the 12th. Would you be available -- 14:13:00 14:13:01 14:13:06 14:13:10

MR. HOEFLICH: Judge, as you know, we have been asking for proposals on this for several months. 14:13:11 14:13:13

MR. ZIMMERMAN: We had proposals. 14:13:18

MR. HOEFLICH: It's a piece of critical importance to the case. If you can't hold until the next conference, yes I would like to do it in person. 14:13:19 14:13:21 14:13:30

MR. ZIMMERMAN: Here's the issue, Your Honor. If we wait 30 days we agree on a schedule, we lose 30 days we can never recapture, and then we are off 30 more days. So, if the Court can accommodate us earlier, if we want to be in person, we can be in person. I just don't want to wait 30 days and then, you know, have that under advisement and we lose all that time. 14:13:30 14:13:34 14:13:34 14:13:39 14:13:43 14:13:47 14:13:50

MR. BECK: Your Honor, we are not trying to delay anything. It's okay with me if we take five minutes and Your Honor reads over. There are only couple of pages, one each of the proposals, and we'll argue this afternoon. I mean this is very important to us, and we want to have somebody here who can argue this matter. We are happy to argue it now. We are not asking for a delay for technical reasons. But neither do we want to handle it on a telephone basis when all of the principal lawyers are out of town. 14:13:53 14:13:56 14:14:02 14:14:05 14:14:08 14:14:11 14:14:14 14:14:17 14:14:20 14:14:24

THE COURT: You are about finish, right? 14:14:27

MR. ZIMMERMAN: I think we have Special Master 14:14:30

Haydock's report, but, yeah, I'm basically finished. 14:14:32
THE COURT: We'll argue it at three o'clock, 14:14:40
then, because I have something to go to at 2:30. Special 14:14:42
Master Haydock. 14:14:48
MR. HAYDOCK: Your Honor, several reports. First 14:15:00
on the WALL. The WALL continues to operate as fairly 14:15:03
smoothly as it has been in the past. Barry Harkins has 14:15:09
continued to review files to secure records and maintain a 14:15:14
log. An issue may arise, and I may learn of that next 14:15:17
week, and I will talk with the lawyers to resolve that 14:15:21
issue. Otherwise, things seem to be going well there. 14:15:25
Secondly, Your Honor, the LAC Committee met, and 14:15:29
I apologize for not being here earlier, but we were back in 14:15:33
the room, and they are close to a final agreement on the 14:15:36
protocol for the Bayer AG depositions in London, and I will 14:15:40
be in consultation with them on Monday to finalize that. 14:15:45
The second issue that we addressed was the 14:15:50
privilege log issue, and Bayer plans to have the privilege 14:15:52
log available to the Plaintiffs a week from today, and if 14:15:56
there are any challenges, we'll be alerted to that 14:15:59
immediately upon their review by the Plaintiffs' lawyer of 14:16:03
that privilege log in anticipation of the initial London 14:16:07
depositions beginning at the end of February. Those are 14:16:11
the two issues that the LAC Committee discussed today. 14:16:16
THE COURT: Dealing with the privilege log, I -- 14:16:18

there was some indication that if there was a problem with the privilege logs, Magistrate Judge Lebedoff was going to be the designated person to go over that. That's the first I heard of that. Have you heard of that? 14:16:24 14:16:29 14:16:34 14:16:38

MR. HAYDOCK: No, Your Honor. We left open -- the parties agreed today to -- actually, one of the drafts have that. I participated in that process. I'll with them on Monday. 14:16:42 14:16:44 14:16:48 14:16:53

THE COURT: You make sure that Subcommittee understand that they don't designate where things go. 14:16:53 14:17:05

MR. HAYDOCK: Yes, Your Honor. Actually, in deference to the draft they did not have Judge Lebedoff's name in that, and they didn't presume that they would tell the Court what to do. They were asking for some suggestions from us. 14:17:05 14:17:05 14:17:10 14:17:14 14:17:16

THE COURT: I hope not. 14:17:17

MR. HAYDOCK: Yes, Your Honor. A series of other meetings, Your Honor, going on today regarding the Court's independent responsibility for? 14:17:19 14:17:21 14:17:26

THE COURT: Before you go on, do you know how many privilege logs there are going to be, what the universe is and how much time that's going to take. 14:17:29 14:17:31 14:17:34

MR. HAYDOCK: The privilege logs that we're releasing a week from Friday are the ones for the first three depositions of the Bayer AG deponents in London. 14:17:42 14:17:45 14:17:48

Doug, do you have -- do you want to speak to that? 14:17:52

MR. MARVIN: We are accelerating the process so 14:17:57 that the privilege logs can be produced in advance of the 14:18:00 depositions, and we'll be producing that log on Friday, a 14:18:04 week from today. It's likely to be a fairly detailed and 14:18:07 will be over a hundred pages in the log itself. And, so, 14:18:12 it's up to the Plaintiffs to take a look at it to see 14:18:15 whether there is any challenge there. 14:18:18

THE COURT: Thank you. 14:18:22

MR. HAYDOCK: Anything else on the privilege log, 14:18:29 Your Honor? 14:18:31

THE COURT: No, thank you,. 14:18:34

MR. HAYDOCK: The other meeting is going on 14:18:34 regarding the trust account issue and Pretrial Order 52. 14:18:36 Joe Kenyon, the court-appointed accountant, is meeting with 14:18:42 the Bayer folks at this moment to obtain some information 14:18:47 regarding that. 14:18:50

After this status conference, Special Master Lew 14:18:52 Remele, and I'm not sure everyone has been introduced to 14:18:58 Special Master Lew Remele, but I did see him in the back -- 14:19:01 oh, you were earlier. Sorry about that, he's meetings with 14:19:03 some lawyers on settlement mediation program for Bayer and 14:19:05 the Plaintiffs and other defense lawyers. And, then, we 14:19:10 also have a meeting regarding the implementation of Pretrial Order 59 regarding the submission of attorneys'

fees by Plaintiffs' lawyers. I hope by next week we'll have some reports to the Court on those various results of those meetings that we are having today on Monday. Any questions? 14:19:13 14:19:33 14:19:34

THE COURT: Thank you. 14:19:34

MR. HAYDOCK: Thank you, Judge.

THE COURT: Anything further, Mr. Zimmerman? 14:19:36

MR. ZIMMERMAN: May I, a matter of personal privilege, Your Honor? 14:19:41 14:19:42

THE COURT: You may. 14:19:43

MR. ZIMMERMAN: Stan Chesley has been here for two days, and he has not been able to talk (laughter), and I've done my best to keep that as an order of the day, but he would like to stand up and say hello and talk. 14:19:48 14:19:50 14:19:54 14:19:59

MR. CHESLEY: Your Honor, I've had the best time of anyone, but I really call for a moment of good and welfare. I arrived in Minneapolis to show what a congenial, wonderful town it is. I arrived Wednesday evening at seven o'clock with one tooth missing. It fell out on the plane, the crown. I called Randy Hopper and I was in a dentist chair from eight until ten o'clock with a wonderful dentist, and I said that I was going to publicly announce on the record and buy the transcript. Her name is Shauna Novak. (Laughter). I had a root canal and also replaced the tooth. I just wanted to thank the good 14:20:03 14:20:04 14:20:09 14:20:12 14:20:17 14:20:21 14:20:23 14:20:27 14:20:29 14:20:37 14:20:37

citizens of Minnesota. 14:20:40

THE COURT: Thank you, Mr. Chesley. 14:20:49

MR. HOEFLICH: Your Honor, I would like to order an extra copy of the transcript for my personal enjoyment. 14:20:51 14:20:53

(Laughter) Just the last few pages.

MR. ZIMMERMAN: Your Honor, I must admit, I did not know that was coming. We have nothing further. 14:21:00 14:21:04

Again, Plaintiffs Steering Committee very much appreciate the patience of listening through these two days and keeping us on our toes. And we, again, extend our congratulations to a well-argued case by the defense on the class certification. And I publicly want to thank the PSC for doing a lot of hard work and getting a lot of good legal briefs and argument to the Court. 14:21:06 14:21:11 14:21:12 14:21:19 14:21:25 14:21:29 14:21:32

THE COURT: We'll adjourn until three o'clock. 14:21:37

(Recess taken.)

THE COURT: Mr. Zimmerman or Mr. Goldser. 15:05:48

MR. GOLDSER: Good afternoon. 15:05:56

THE COURT: Good afternoon. 15:05:59

MR. GOLDSER: Your Honor, I've been wanting say this for the last twenty-four hours, aloha. 15:06:00 15:06:01

I had the opportunity since I returned to lay out side by side the two proposed experts' schedules, and what I noticed is that I did that there are really three issues that are raised by the experts' schedules. One is the 15:06:06 15:06:10 15:06:13 15:06:17

start date for the Plaintiffs' first disclosure. The 15:06:20
second is whether or not disclosure should be simultaneous. 15:06:23
And the third is the duration of the schedule. 15:06:27
And I started a we analysis of this issue with 15:06:29
the trial date because if the trial date is June 6th, then 15:06:36
that drives everything. And, then, second thing I did is I 15:06:39
learned from listening yesterday with my eyes closed that I 15:06:42
should go back and consult the rule. The rule is Rule 15:06:46
26(a)(2), and then Subpart C under that drives the answer 15:06:49
for me. And that is these disclosures, the experts' 15:06:54
disclosures, shall be made at the time and sequence 15:06:58
directed by the court. In absence of other directions from 15:07:01
the Court or stipulation by the parties, the disclosure 15:07:04
should be made at least ninety days before the trial date. 15:07:07
Well, setting aside the words "at least" and I 15:07:11
understand that may be an issue, ninety days before the 15:07:13
trial date. What is ninety days before June 6th? March 15:07:16
6th. March 6th happens to fall kind of in between the 15:07:20
opening date that both Plaintiff and Defendant proposed for 15:07:23
the initial disclosures by Plaintiff. Plaintiff had 15:07:27
initially proposed March 31st, and Defendant had initially 15:07:30
proposed February 28th, and March 6th kind of in between. 15:07:33
March 6th as an opening date gets you to where 15:07:39
you need to go to keep a June 6th trial date. And 15:07:41
everything else seems to follow pretty generally from 15:07:45

there. You go on in Rule 26(a)(2)(c), and then it says 15:07:49
that if the evidence is intended solely to contradict or 15:08:00
rebut evidence on the same subject matter within 30 days 15:08:00
after disclosure made by the other party, you get a 30-day 15:08:03
period after the initial disclosure to submit rebuttal 15:08:05
evidence. 15:08:10

Now, Defendants' concern is they wanted to have 15:08:11
nine simultaneous -- serial disclosures which is done 15:08:14
sometimes, and they wanted Plaintiffs to go first, and they 15:08:19
would go second did because they feel they want to rebut 15:08:22
things and that's fine. But the rule allows for that. The 15:08:25
rule allows that you start with your 90-day disclosure 15:08:31
first and then you have rebuttal thereafter. But why not 15:08:34
do that. So, the proposed schedule and the revised 15:08:37
schedule that we submitted today does precisely that. 15:08:41
March 6th on opening day, 90 days prior to trial, April 15:08:42
6th, 30 days thereafter for rebuttals, and you then the 15:08:47
period from April 6th or shortly thereafter through 15:08:51
sometime before the trial date to undertake your 15:08:55
depositions, and get Dalbert motions in limine filed, and 15:08:58
you're off and running. 15:09:02

I don't see any reason why we can't adhere to 15:09:03
that schedule. At this stage of the game, we're not going 15:09:07
to be the first trial up. I didn't see the current trial 15:09:08
schedule, but certainly we know there are several trials 15:09:12

that are already pending in February and March by Plaintiffs and with Bayer around the country. If Bayer does not have their experts in hand at this point, I would be shocked. In fact, we know that they do because in the Mississippi case, there has already been a summary judgment motion heard and decided with a battle of expert affidavits. The experts are there. We filed a complaint, Bayer has filed an answer, the issues are joint, and it's not very hard from there to be able to create your opening expert reports subject to rebuttal if something unusual is raised by the opposing party. You have the opportunity to rebut that 30 days hence.

Sometimes Dalbert issues need evidentiary testimony, sometimes not. But if a Dalbert motion is filed under this proposed schedule, May 27th, that would give the opposing party the opportunity to at least marshall the evidence, if not actually file the brief, in time for the opening of the trial on June 6th. If the Court decides that a Dalbert hearing requires evidentiary testimony, and probably so because the best thing I've ever seen in Dalbert hearings is get the witness on the stand and to examine the methodology the witness used undertake the expert opinion to see whether it is scientifically credible. You can do that at the very opening of the trial and move directly into the trial, everybody in place, all

the evidence, all the witnesses, all the lawyers in place ready to rock and roll. 15:10:42 15:10:44

This doesn't feel like a hard issue. I'm very eager to here the depth of Mr. Beck's argument on this point to see if it is a hard issue, but it just doesn't feel that hard to me. Thank you very much. 15:10:47 15:10:51 15:11:00 15:11:00

MR. BECK: Thank you, Your Honor. Thank you for hearing us this afternoon. I would ask the Court to step back momentarily, both from a subject we have been discussing for the last couple of days which is class certification and also to step back from the date of June 6th which we heard over and over again. 15:11:10 15:11:12 15:11:15 15:11:20 15:11:26 15:11:28

Mr. Goldser said that the June 6th date drives everything, and I agree with him that in terms of the Plaintiffs' proposals, the June 6th date does indeed drive everything. But I ask the Court to step back because I think that what ought to be driving the Court's conduct of expert discovery above all other things in this MDL is not a date of June 6th, but the Court's role as an MDL judge, and that's what ought to be the driver. 15:11:32 15:11:36 15:11:41 15:11:46 15:11:50 15:11:56 15:12:00 15:12:06

And the Court's role as an MDL judge is to conduct and coordinate discovery that can be used throughout the country in trials on remand so that we avoid unnecessary duplication and expense. And that discovery obviously is on a global and generic issues that are going 15:12:09 15:12:13 15:12:17 15:12:23 15:12:30

to be basically common no matter where the trials are held. 15:12:36
We have already had expedited, I would say 15:12:40
greatly expedited, and yet orderly fact discovery in this 15:12:44
case. It began almost a year ago with the first production 15:12:48
of documents. I think that depositions began in May of 15:12:51
last year. As Your Honor heard today and has heard in all 15:12:57
of the report, depositions have been ongoing since May. 15:13:00
There are still key depositions from the Plaintiffs' point 15:13:05
of view that have yet to be taken that have been scheduled. 15:13:08
We heard a report from Mr. Climaco talking about how we had 15:13:12
depositions of key German executives that were going on 15:13:17
double tracks through February and March and into the 15:13:22
middle of April. And there are documents that have been 15:13:26
produced but haven't been translated yet, and they've got 15:13:32
computers that are translating the documents. There maybe 15:13:38
privilege issues that arise. We have a right, obviously, 15:13:42
to withhold privilege documents. We're producing a log. 15:13:45
The may challenge that. The privilege issues are going to 15:13:51
have to be resolved. 15:13:53
And I say all that, Judge, I guess the backdrop 15:13:54
where everybody who was in this courtroom for the last two 15:13:58
days would agree that this program of fact discovery has 15:14:01
been a tremendous success. And we've pat each other on the 15:14:06
back every time we come into court. And then we 15:14:09
congratulate each other for our cooperation rather than 15:14:12

foot dragging, and it's taken a year, and that's quite an accomplishment in a case this complicated that we have gone that quickly in a year. 15:14:16 15:14:24 15:14:26

But now the Plaintiffs want to take a fundamentally different approach when it comes to expert discovery, and they want to do it because in their minds for their own purposes, the date of June 6th drives everything. 15:14:27 15:14:31 15:14:33 15:14:38 15:14:41

They want to exchange reports. I guess it doesn't make any difference whether it's March 6th or March 13th, whatever. They want to exchange reports of discovery -- of experts before we have completed the expedited fact discovery that forms the basis or some of the bases on which the experts will be opining. They have been talking for the last couple of days about how the people in Germany made horrible decisions, and their experts, no doubt, will opine on that. And we are going to end up having to exchange reports, including our own reports, before the people who made those decisions have given their testimony, and before the facts are in on which the opinions are going to be based. 15:14:41 15:14:46 15:14:50 15:14:54 15:14:58 15:15:05 15:15:09 15:15:12 15:15:17 15:15:22 15:15:26 15:15:31 15:15:35

And if we do that because we are in a break neck schedule because June 6th drives everything, what's going to happen is maybe this Court will feel comfortable trying a case based on that record. Maybe a case can be selected 15:15:36 15:15:42 15:15:44 15:15:48

by them that could be tried notwithstanding those deficiencies. But you will not, Your Honor, with all respect, have done your job as the MDL Judge, which is create a usable and complete record that can be given to other Judges to try cases. We're going to end up with expert reports and expert depositions that are hastily done without a complete record, and people are going to be back in the transferor courts when all is said and done saying we need to reduce some of this because it wasn't done properly. We don't want to redo all of that. 15:15:52 15:15:59 15:16:01 15:16:08 15:16:11 15:16:16 15:16:19 15:16:23 15:16:26 15:16:30

They also want to abandon the normal sequence that's followed. It's more than just occasionally that courts say plaintiffs should file their expert reports and then defendants will have an opportunity to look at those and designate counter experts and file their reports. 15:16:35 15:16:38 15:16:42 15:16:46 15:16:46

That's not just the occasional method. That's the normal method. It's especially important here where we genuinely don't know all the areas in which they're going to be filing expert reports. And we genuinely don't know all of the theories they're going to be pursuing and the nuances of those theories. So, we would be required under their approach, to file expert reports guessing what they're going to be pursuing. 15:16:50 15:16:54 15:16:58 15:17:02 15:17:06 15:17:09 15:17:13 15:17:17

Now, obviously, on some issues we're not going to be guessing, we know. But on an awful lot of issues, we 15:17:18 15:17:22

are not going to know what they're filing expert reports on, and we're certainly not going to know what their theories are. I heard their theory today for medical monitoring, for example, changed dramatically simply because their original theory didn't fit well for class action purposes, so we had the lawyers changing their medical monitoring theory. And, yet, we are supposed to be filing expert reports before we get them from their experts responding to whatever their medical monitoring theory maybe. 15:17:30 15:17:30 15:17:35 15:17:38 15:17:41 15:17:43 15:17:45 15:17:50 15:17:53 15:17:57

I'm concerned, Your Honor, that if we abandon the normal sequence, we are going to have a ships passing in the night problem and, once again, focusing not on June 6th, but instead on the Court's obligation as the MDL Judge, we are going to end up with a record of expert discovery that is not complete and not usable for the remand courts. 15:17:58 15:18:03 15:18:07 15:18:12 15:18:16 15:18:20 15:18:23

The schedule that they have proposed is too compressed. The truth is, Judge, I think the schedule that we have proposed is too compressed. But we have proposed it and we will do our best to live with it. 15:18:24 15:18:28 15:18:31 15:18:35

Listening to the Plaintiffs over the last couple of days, it's clear there are going to be lots and lots of experts. And, in fact, because the MDL Steering Committee has obligations to the -- under the MDL as well, they are 15:18:40 15:18:42 15:18:47 15:18:51

obligated during this phase of generic expert discovery, they're obligated to cover all the bases so that there is a complete record usable when people go back on remand. 15:18:54 15:19:03 15:19:06

I wrote down a few minutes ago some examples of the kinds of experts that I think will likely be designated by the other side, and this was off the top of my head. 15:19:10 15:19:14 15:19:17

There'll be some sort of experts concerning FDA regulatory affairs. There will be pharmacologists. There will be a variety of medical experts, cardiologists, nephrologists, neurologists, rehabilitative medical experts. They'll probably have some kind of experts talking about our marketing Baycol since they say that was bad. It sounds like they're going to have economists. They want a refund class. They're certainly going to -- we listened to counsel explain the kind of economic analysis that would be involved in that. There may have to be economists under some state laws talking about Bayer's financial condition since they're pursuing punitive damages. There'll be treating physicians of various types. There'll be somebody I don't know exactly what discipline that we are talking about, co-prescription and whether that was acceptable for doctors to do in their for comparative fault is not an issue or whether our warnings were strong enough against it. The same with titration. There'll be statistical experts talking about the -- 15:19:22 15:19:27 15:19:32 15:19:36 15:19:42 15:19:46 15:19:51 15:19:56 15:19:58 15:20:03 15:20:08 15:20:12 15:20:13 15:20:17 15:20:20 15:20:22 15:20:29 15:20:33 15:20:36

comparing the incidents of Rhabdo from Baycol with Rhabdo from other statins and other drugs. Probably the same statisticians will be opining on other side effects. Just because Baycol may have a higher incidence of Rhabdo doesn't mean it has a higher incidence of aches and pains or warned against side effects. So, we'll have statisticians on that. Epidemiologists, we'll have people talking about the sufficiency of our clinical trials. And all of those were issues that were raised by the Plaintiffs over the last day and a half. 15:20:42 15:20:45 15:20:50 15:20:55 15:21:00 15:21:04 15:21:06 15:21:07 15:21:12 15:21:14

As I said, I think that everyone is going to be very, very hard pressed, and it's going to be a job, at least on a level with what we have done together on fact discovery to try to do all of that on our time schedule under a traditional sequence. I think it is literally impossible, literally impossible to do under their truncated sequence. It's going to be especially -- well, I don't know how you can be worse than literally impossible. One of the reasons it's going to be a bad idea even to try is because it has all the key activities in terms of the expert discovery being conducted at a time when the key lawyers for both sides are going to be overseas taking the key fact depositions that still need to be completed. 15:21:16 15:21:19 15:21:26 15:21:30 15:21:33 15:21:38 15:21:44 15:21:49 15:21:53 15:21:59 15:22:02 15:22:06 15:22:10

So, the end result I am concerned if we follow their approach is that we're going to end up, once again, 15:22:15 15:22:18

with a record that is not going to be complete and is not going to be usable by trial lawyers and trial judges around the country once these cases are remanded. 15:22:23 15:22:28 15:22:32

Now, what's the core reason for our different approaches? They are driven by June 6th. As counsel said, everything in their schedule derives from June 6th because Your Honor mentioned June 6th as a date that we might have a trial, and they seized on that date, and they want some kind of trial, any kind of trial, on June 6th. It strikes me that the main purpose of seizing on June 6th has to do more with their relationship as lawyers with other lawyers around the country than it does with getting these cases ready and in an expedited and orderly way to be remanded to the transferor courts. 15:22:37 15:22:39 15:22:46 15:22:51 15:22:54 15:22:57 15:23:04 15:23:10 15:23:16 15:23:21 15:23:26

This Court, with all respect, was not selected by the Multi-District Panel in order to put together a case pell-mell for June 6, 2003. This Court was selected because of the confidence the Panel had that it could coordinate discovery, coordinate pretrial proceedings so that a complete, usable package could be put together for the courts on remand. 15:23:28 15:23:34 15:23:39 15:23:44 15:23:49 15:23:54 15:24:00

So, with all respect, Your Honor, I know that the June 6th date came from Your Honor, but we do not believe it should dictate the way that expert discovery is conducted in this case. We think it would be a big 15:24:02 15:24:09 15:24:12 15:24:16

mistake. It's especially so since, as I stand here right 15:24:18
now, I don't have any idea what kind of trial we would be 15:24:23
having on June 6th. We just had thorough arguments on 15:24:28
class certification, and the trial plan submitted by the 15:24:31
Plaintiffs' lawyers this morning has June 6th as both a 15:24:39
class action trial on all sorts of common issues, plus a 15:24:45
bellwether trial at the same time concerning the individual 15:24:53
cases of fill in the blank, we don't know who. So, we 15:24:57
would not only, under their proposal for June 6th, have to 15:25:02
complete all of the common expert discovery -- I'm sorry, 15:25:07
all of the expert discovery on the issues that would be 15:25:14
involved under their view of a class action or Rule 42 15:25:17
trial, but then we would also have to complete all the 15:25:22
expert discovery, and it would be substantial, that would 15:25:25
be involved in whatever individual cases are being tried 15:25:29
because Mrs. Withers may have aches and pains, but we're 15:25:33
going to have to explore where they came from. And there 15:25:37
may be issues of comparative fault, and there may be 15:25:40
co-prescription issues, etc. 15:25:45

So, it is a big, big job, and I'm just concerned, 15:25:46
frankly, that merely because so much has been accomplished 15:25:50
so quickly in this MDL, the Court may be under what I think 15:25:56
is the misimpression that we are almost to the end. And I 15:26:02
think we have a ways to go before we get to the end. 15:26:09

And then I want to raise -- so I urge the Court 15:26:14

to look at these schedules, and whatever the Court decides to do so with your MDL hat on rather than with the thought of a June 6th trial in mind. 15:26:19 15:26:21 15:26:27

And I want to raise one last point that I raised the last time I was here. And and I haven't thought a lot more about it, and I haven't come up with any solutions, and I haven't heard of anyone else who has either. And it has to do with why it would be especially inappropriate in my mind to let everything be driven by June 6th. And that is, I still don't understand how this Court and the Steering Committee and us, for that matter, could be in a position where we say the expert discovery, the common issues on generic issues is sufficiently complete and thorough that we can try the cases of six people from Minnesota. But it's not sufficiently complete and thorough that we can remand these matters to the District Court of the Southern District of California so that Mr. Lopez can try his cases. And I get the very firm impression that the Steering Committee believes that there is a lot more to do by this Court in its role as MDL Judge before these cases are ever to be remanded for trial around the country. And, yet, before the completion of that, they are proposing to have this trial. 15:26:32 15:26:36 15:26:41 15:26:45 15:26:48 15:26:53 15:26:57 15:27:04 15:27:08 15:27:13 15:27:23 15:27:26 15:27:30 15:27:36 15:27:44 15:27:44 15:27:48 15:27:56 15:27:59 15:28:05

Now, that's a question that I posed before saying that if somebody had a solution, I sure would like to hear 15:28:07 15:28:09

it because it's fine with me if we have a trial here on June 6th. As Your Honor saw from the list of trials, I'm going to be a busy guy anyway, and, frankly, June 6th in Minneapolis is a lot more attractive than some of the other places I can end up in June. But, I think it poses a very, very serious problem in terms of the legitimacy of holding onto these cases past May or June if, in fact, the MDL Steering Committee says that we are ready for trial on these six Minnesota plaintiffs, and not only that, but if they have persuaded Your Honor on common issues under a class, and, yet, we are not ready to remand the cases so that other people can try their cases where they want to try them. 15:28:14 15:28:20 15:28:24 15:28:28 15:28:32 15:28:39 15:28:42 15:28:49 15:28:52 15:29:00 15:29:03 15:29:09 15:29:13

So, I think that's a practical problem that ought to be considered, but mainly whatever the Court decides to do on June 6th, I think that the expert discovery here is intended for use by trial judges and trial lawyers throughout America, not just for the people who want to have a trial this June here. And it ought to be coordinated and done in a way that it's going to be genuinely complete and useful by those others. 15:29:13 15:29:16 15:29:19 15:29:24 15:29:28 15:29:31 15:29:36 15:29:40

MR. MAGAZINER: Good afternoon, Your Honor. The many Bayer lawyers that surround me have tried to keep me quiet, the way certain Plaintiffs' lawyers have tried to keep certain members of the PSC quiet according to Mr. 15:29:48 15:29:52 15:29:54 15:29:59

Zimmerman.

But all kidding aside, this issue is one in which GSK has a peculiar and particular point of view that is important for me to share with the Court. 15:29:59 15:30:02 15:30:07

You haven't heard much from the GSK lawyers because on many, many issues we are more than adequately represented by the Bayer lawyers who so capably conducted these hearings. But we are a defendant in 99.9 percent of all of the state and federal Baycol cases. There are, perhaps, a hundred or 150 cases that were filed early on just after the drug was withdrawn that did not name us. And then after that first hundred or 150 cases were filed in August or September of 2001, from that date to today every single case that has been filed against Bayer has also named GlaxoSmithKline as a Defendant. 15:30:13 15:30:16 15:30:20 15:30:29 15:30:31 15:30:37 15:30:40 15:30:43 15:30:47 15:30:53 15:30:59

I would be delighted if the Steering Committee would tell us they are going to dismiss us from the master complaint which they have filed against us as well as against Bayer, and if we are not going to be party to the trial, whatever trial it is they think they would like to hold, I haven't heard them say that. To the contrary, as I understand it, they are planning to try a case not only against Bayer Corporation and Bayer AG, but also against GlaxoSmithKline. And it is a case they will not only seek compensatory damages, but punitive damages. 15:31:01 15:31:04 15:31:08 15:31:11 15:31:15 15:31:18 15:31:23 15:31:25 15:31:29 15:31:34

Now, if this were a one-on-one case, an individual single case filed against GlaxoSmithKline and Bayer related to an individual use of Baycol, and if this were in some of the other federal courts I have appeared, I would expect what would happen is that the Court would lay out a schedule for fact discovery at the completion of which there would be a time set aside for designation of experts and expert discovery after which there would perhaps be a time set aside for Dalbert motions and other dispositive motions, after which there would be a trial date. And if the Court, in a case filed in, let's say, February of 2002, had said that all of this would be completed and a trial were held -- were to be held in August or September of 2003, I would think that was about as efficient and quick as one could expect any Court to act. And that would be a schedule that I would find pretty commonplace for an individual case involving one plaintiff suing my client, GSK.

The fact that we have accomplished all this discovery, fact discovery in the last year is remarkable, as Mr. Beck said. The fact that it is not yet completed, the fact discovery is not yet completed is also not surprising because this is not an individual case. This is a case of tremendous importance to, not only the two Defendants, but obviously to all the people on whose behalf

the PSC is litigating this Multi-District litigation. And the idea that they are going to bring some case to trial faster than one would expect, even in individual case to come to trial, the courts that I practiced in previously, would be remarkable. But more to the point, they say --

THE COURT: Except the Eastern District of Virginia.

MR. MAGAZINER: Fortunately, the rocket docket is something I have only heard about and never yet experienced. I have heard horror stories, but I have never yet experienced it, Your Honor.

Mr. Goldser said something about we know who the experts are, we know what these things are going to say, we have our experts in place. I believe, and I would be happy to have the Plaintiffs correct me, I believe it is true that there has not yet been submitted in any federal court case that is in this MDL or in any state court case a single report that explains what it was that GSK did that was tortious or so tortious or so outrageous that it warrants the imposition of punitive damages against us. I haven't seen one report from one Plaintiff's lawyer in one case in this litigation that addresses what GSK did. And for Mr. Goldser to say we pretty much know what the expert landscape is, I don't think it's true for Bayer, but I'll let Mr. Beck address the Bayer situation. I have no idea

what the theory is against us other than reading the complaint. And as Your Honor knows, complaints are not very informative, and they are not what a lawyer needs to prepare for trial. 15:34:36 15:34:39 15:34:42 15:34:44

Our role in Baycol was quite different from Bayer's, quite different. We did not develop the drug. We did not apply for a license to sell the drug. We did not obtain such a license. And we did not have any role as Bayer, and we completely agree, any role interacting with the FDA with respect to the drug. Our goal was to co-promote the drug. Our goal was to attend meetings with Bayer and discuss issues of mutual concern. Whether our conduct was tortious or not, I'm not going to argue that, but I am saying to Your Honor, I have not seen a single report anywhere that tells me or any of my colleagues what it was we did wrong. And the idea that before fact discovery of GSK has been completed, and you heard Mr. Climaco say there's still ongoing discovery directed at us, and that is correct, the idea that before fact discovery is completed, we have to submit expert reports explaining or setting forth the opinions that we will offer at a trial the bounds of which we don't understand where we don't even know what the fact evidence is that the Plaintiffs are trying to develop against us is quite in my view preposterous. And the fact that we will do this all in a 15:34:47 15:34:51 15:34:55 15:34:58 15:35:03 15:35:09 15:35:13 15:35:18 15:35:20 15:35:25 15:35:27 15:35:31 15:35:35 15:35:40 15:35:43 15:35:47 15:35:49 15:35:52 15:35:56 15:36:00 15:36:04

case of this significance, litigation of this significance on a schedule that's faster than what one would expect in an individual case of one plaintiff suing my client goes from the preposterous, I think, to the absurd. 15:36:09 15:36:10 15:36:14 15:36:19

I do suggest that in the -- that we take a step back and at least try to think about putting this MDL expert discovery program in the same context as would be typical in an individual case. That is, completion of fact discovery followed by expert reports, expert depositions, whatever motions need to be held, and then we will have assembled the expert package that will allow these cases to be remanded. 15:36:23 15:36:28 15:36:32 15:36:37 15:36:41 15:36:47 15:36:52 15:36:57

By all means, we expect, Your Honor, to conduct a trial. But I can't -- I have to agree completely with Mr. Beck that the expert part of the MDL function that Your Honor is performing cannot be governed by the Plaintiffs' desire to conduct some trial of some case against me on June 6th when I don't even have a clue what the theories are that they are pursuing. Thank you, Your Honor. 15:36:57 15:37:00 15:37:04 15:37:08 15:37:12 15:37:17 15:37:21

THE COURT: Thank you. 15:37:26

MR. GOLDSER: Thank you, Your Honor. I obviously won't repeat my earlier arguments. I think they stand on their own merit, but I do have some reply. 15:37:35 15:37:35 15:37:38

First, when you set June 6th as a trial date, we took you very seriously. I remember very clearly being in 15:37:40 15:37:44

Philadelphia before Judge Bectal on the Pedicle Screw litigation where I think it was Plaintiffs who were complaining about the trial date and Judge Bectal leaned forward from the Bench and he said, "I set a trial date, saddle up boys, get on your horses and ride. This is the trial date, it's time to go to trial." When you I heard Your Honor say June 6th, I thought Your Honor meant June 6th and we took June 6th as the date. 15:37:48 15:37:53 15:37:56 15:37:59 15:38:03 15:38:07 15:38:09 15:38:12

Then the question becomes how do I do that. The question Your Honor asked for the last two days, how do I do that, and we have given you a way to do that. That's our plan. 15:38:13 15:38:16 15:38:19 15:38:23

I think Mr. Beck is as smart as advertised when he listed off a list of potential experts. He was pretty right on. And I think he was pretty right on because (a) he's seen this list of experts in other cases that were ready for trial, and (b) because he knows what it's going to take to try this case. If there are rebuttal reports required because there is something that comes up in our reports, he has the opportunity to do that. 15:38:24 15:38:27 15:38:30 15:38:33 15:38:37 15:38:39 15:38:43 15:38:46

I do think there is some potential for nuance depending on what Your Honor decides on the class certification and the trial plan. But suppose, for example, you take the (b)(3), (c)(4) common issues trial, and suppose you take the three or four personal injury 15:38:49 15:38:54 15:38:57 15:39:00 15:39:01

plaintiffs as the class representatives whose cases are tried front to back. You know what the list of common issues is going to be. It's on one-page on the trial plan. There were not eight or nine of them. Those are pretty straightforward issues. You know what it takes. We all know what it takes in the way of expert witnesses to get those cases prepared and tried. 15:39:05 15:39:08 15:39:11 15:39:16 15:39:17 15:39:19 15:39:22

FDA regulatory people will talk about the role of FDA is of critical importance. We are going to say that the FDA has certain functions, and they don't have other functions, and that's how it played out in the development and approval of Baycol. And this is what Bayer told the FDA, and this is why Bayer withheld information from the FDA. It's obvious that that's going to be evidence, and the FDA's role in that is obvious. I think we could all probably write that report ourselves. And the rest of the reports that Mr. Beck suggested are probably going to be right on. 15:39:27 15:39:30 15:39:30 15:39:34 15:39:38 15:39:41 15:39:44 15:39:46 15:39:50 15:39:52 15:39:56

If we have a front to back with four personal injury Plaintiffs, we'll need individual causation reports for those. So, Your Honor's ruling on class certification and trial plan motion would be very helpful to try and finalize some of the last experts, but it won't be vast majority by a long shot. 15:39:57 15:40:00 15:40:05 15:40:07 15:40:10 15:40:15

As to GSK, I look at the trial calendar that was 15:40:18

given to us, and I know the number one trial, the Corpus Christi case is Hollis and Eleanor Holtum, Plaintiffs v. Bayer, Bayer Corporation Pharmaceutical Division and GSK. 15:40:22 15:40:28 15:40:28

MR. MAGAZINER: Your Honor, we have been dismissed from that case. 15:40:30 15:40:31

MR. GOLDSER: I note the second trial in Mississippi Vergie Hardy v. Bayer Corporation, Bayer AG, and GSK. Were you dismissed from that one, too? 15:40:42 15:40:42 15:40:42

MR. MAGAZINER: Mr. Goldser, are you suggesting that we received reports that deal with our conduct. I'm not aware of that. I think if anyone was aware of that, it would be me. So, I don't know what you are suggesting, but we have not ever received reports dealing with our conduct. 15:40:47 15:40:47 15:40:51 15:40:53 15:40:55

MR. GOLDSER: That's fine. Those cases are going to trial in March, and GSK still hasn't received reports, and I don't hear that that case is going to be continued at this stage of the game. In the absence of those reports, why should ours. I'm almost done. 15:41:01 15:41:02 15:41:06 15:41:11 15:41:15

Finally, the trial plan model this morning was Albuterol. And as my partner, Mr. Zimmerman, tells me that from the time that the MDL assigned that case to Judge Brimmer to the time of trial was 18 months. In June it will be 18 months. You told us to be ready, we'll be ready. 15:41:20 15:41:22 15:41:28 15:41:33 15:41:37 15:41:41

MR. BECK: Your Honor, the case that Judge 15:41:42

Brimmer presided over in Wyoming has been widely criticized by courts and commentators as being exactly what should not happen in these kind of situations. But the only point I want to make is if they get their way on the class, we are not having a trial on June 6th. And it doesn't make any difference, frankly, what Your Honor's preference is there. If you certify a class, there is going to be notice requirements, and then people are going to have an opportunity to opt out, and that is going to take us well beyond June 6th all by itself. It is not going to happen under the Plaintiffs' dream world. When they dream of things that never were, one of them is going to be a class action trial on June 6th.

THE COURT: Anything further.

MR. ZIMMERMAN: I do, Your Honor, but I won't say it.

THE COURT: I'll take a look at it, your proposed schedule, and I will issue an order as quickly as possible so we can have a trial at some point. Anything else? I'm winding down.

MR. BECK: We want to thank Your Honor very for your patience. We really do appreciate your attention and patience to some pretty occasionally tedious matters.

MS. WEBER: One question, Your Honor.

THE COURT: My pleasure.

MS. WEBER: Do we have our next MDL schedule? 15:43:34

MR. MAGAZINER: Susan was asking when is the date 15:43:41 of the next status conference. 15:43:45

THE CLERK: The 20th of March. 15:43:48

THE COURT: It should be on the website. 15:43:51

MS. WEBER: Thank you, Your Honor. 15:43:56

THE COURT: Anything else for Plaintiffs or 15:43:56 Special Masters? 15:44:02

MR. HAYDOCK: No, Your Honor. 15:44:03

THE COURT: Thank you. 15:44:05

REPORTER'S CERTIFICATE

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

CERTIFIED: _____

_____
Brenda E. Anderson, RPR