

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re: Baycol Products)
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Litigation)
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BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
RICHARD LOCKRIDGE, ESQ.
RONALD GOLDSER, ESQ.
RANDY HOPPER, ESQ.
VICTORIA MANIATIS, ESQ.
KEN SUGGS, ESQ.

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

For Defendant FRED MAGAZINER, ESQ.
 GlaxoSmithKline:

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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1 THE COURT: Let's call this matter.

2 THE CLERK: Multidistrict Litigation No. 1431,

3 In re: Baycol Products Litigation. Please state your

4 appearances for the record.

5 MR. ZIMMERMAN: Good morning, Your Honor. I'm

6 Charles Zimmerman for the PSC.

7 THE COURT: Good morning.

8 MR. LOCKRIDGE: Your Honor, Richard Lockridge for

9 the PSC.

10 THE COURT: Good morning.

11 MR. HOPPER: Your Honor, I'm a hoarse Randy

12 Hopper for the PSC.

13 THE COURT: Good morning.

14 MR. ZIMMERMAN: We support that.

15 MR. GOLDSER: Good morning, Your Honor. I'm Ron

16 Goldser -- I am not that much better -- for the PSC.

17 THE COURT: Good morning.

18 MS. MANIATIS: Good morning, Your Honor.

19 Victoria Maniatis from Weitz & Luxenberg for the

20 plaintiffs.

21 THE COURT: Good morning.

22 MR. SUGGS: Good morning, Your Honor. I'm Ken

23 Suggs from Columbia, South Carolina, for the Praytor

24 plaintiffs.

25 THE COURT: Welcome --
LORI A. CASE, RMR-CRR
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1 MR. SUGGS: Thank you.

2 THE COURT: -- to our warm weather.

3 MR. SUGGS: Actually, I think we're having snow
4 back home.

5 MR. HOEFLICH: Good morning, Your Honor. Adam
6 Hoeflich for Bayer.

7 THE COURT: Good morning.

8 MR. SCHAERR: Gene Schaerr for Bayer, Your Honor.

9 THE COURT: Good morning.

10 MS. WEBER: Susan Weber for Bayer.

11 THE COURT: Good morning, Susan.

12 MR. SIPKINS: Good morning, Your Honor. Peter
13 Sipkins for Bayer.

14 THE COURT: Are you sure?

15 MR. SIPKINS: Or you can call me by any
16 comedian's name you'd like.

17 MR. MAGAZINER: Good morning, Your Honor. Fred
18 Magaziner for GSK.

19 THE COURT: How about Dennis Miller?

20 MR. SCHOON: Good morning, Your Honor. Eugene
21 Schoon on behalf of Bayer.

22 THE COURT: Good morning.

23 MR. MARVIN: Good morning, Your Honor. Doug
24 Marvin for Bayer.

25 THE COURT: Good morning.

1 Anyone else? All right. Mr. Zimmerman, do you
2 want to give an introduction and then we will move -- if
3 you don't mind, we have a pretrial motion that I had
4 counsel come up for, interrupting the status conference --
5 the settlement conference that he is having with Magistrate
6 Judge Lebedoff. If you just want to give a quick
7 introduction and then we will move into that motion and
8 then we'll go back to the regular calendar.

9 MR. ZIMMERMAN: Thank you, Your Honor. If it
10 please the court and counsel, a couple of matters. I don't
11 know if anybody has looked at the calendar, but this is our
12 second year anniversary, in other words, we are into our
13 third year starting next month, and I just want to comment
14 that --

15 THE COURT: I can tell you that I have lost
16 weight.

17 MR. ZIMMERMAN: You have lost weight and you look
18 younger, actually.

19 THE COURT: That's what everyone says.

20 MR. ZIMMERMAN: So that's a good thing. But we
21 have accomplished a lot. I am not going to go into it, but
22 I think all litigants in this courtroom and counsel are
23 proud of how far we have come and the amount of ground we
24 have covered and the work product that has come through
25 these proceedings to date.

1 We started out, as you know, with a lot of issues
2 having to do with coordination, state and federal
3 litigation; having to do with new ways of going about
4 filings, with electronic filings; we had a lot of issues
5 with electronic databasing of document production; things
6 that are important as we progress in our litigation and as
7 we serve the interest of justice and we serve our
8 respective clients.

9 And I think we have done a remarkable job and I
10 stand before you very proud of where we have come in two
11 years. We are not done, there's a lot to go. I would like
12 to hope that we will have this litigation perhaps concluded
13 at the end of the third year. That would be my goal. I
14 don't know where the court and counsel sit on that, but I
15 know that we are trying very, very hard to have the
16 conclusion to this Baycol litigation in the third year.

17 And I think if we can accomplish that, this being
18 one of the largest MDLs in history, as I think the court
19 has indicated --

20 THE COURT: Third largest.

21 MR. ZIMMERMAN: -- third largest, that that would
22 be a real credit to everyone involved, notwithstanding
23 where your point of view may be on how the outcome should
24 be or what the outcome should be.

25 So I just make that point of historical

1 reference. We have all worked very hard. I know the court
2 has worked extremely hard. The special masters have worked
3 hard. Counsel for defense have worked hard. And we are
4 here before you with a lot having come down the road and a
5 lot being accomplished. And I just want to make that noted
6 as we are into our third -- the end of our second year,
7 beginning our third.

8 THE COURT: Thank you. Let's --

9 MR. ZIMMERMAN: One more thing and then I will
10 go. Ron Meshbesh was supposed to be here today, but he
11 was called to a mediation in front of Special -- or Brian
12 Short. I guess he used to be a magistrate. I don't know.
13 He is probably acting in some kind of a mediator capacity.
14 But he can't be here because of that.

15 And Stan Chesley was going to be here, but his
16 wife is having some fairly serious surgery coming up having
17 to do with back and neck issues. I met with him on
18 Thursday, last Thursday, and he told me to extend to the
19 court that he would be here and he would want to be here in
20 attendance, but his wife is having some rather serious
21 surgeries.

22 THE COURT: Send my regards to Stan and to his
23 wife.

24 MR. ZIMMERMAN: Yes. Thank you.

25 THE COURT: I hadn't heard about her surgery,

1 but --

2 MR. ZIMMERMAN: Jeanne is here and she was
3 telling me about it last night. Apparently she's got to
4 have like 16 hours of back surgery.

5 THE COURT: Is it from an accident?

6 MS. GOEPPINGER: It's not an accident. It's a
7 continuing situation that she's had. In addition to that,
8 she has been sick in the last year. They believe that the
9 steroid medication she's been taking may have affected it.

10 THE COURT: I'm sorry to hear that and make sure
11 that Mr. Chesley understands that my hope is that the
12 surgery goes well and she becomes whole again.

13 MR. ZIMMERMAN: Thank you. Now you want us to
14 adjourn to report on the mediation?

15 THE COURT: Right.

16 MR. SUGGS: May it please the court.

17 THE COURT: Good morning.

18 MR. SUGGS: Again, Your Honor, I'm Ken Suggs from
19 Columbia, South Carolina. Rob Jenner from Baltimore,
20 Maryland, my co-counsel in this case, is with me this
21 morning.

22 THE COURT: Good morning.

23 MR. JENNER: Good morning, Your Honor.

24 MR. SUGGS: And Jackie Praytor and his sister,
25 Kay Donovan (phonetic), are downstairs in Judge Lebedoff's

1 office where we just recently started a settlement
2 conference that we expect to continue after we argue the
3 motion here this morning.

4 I guess it's worth noting that for my clients,
5 who are in their late 50s, this is the furthest they have
6 ever been from home, the first time they have ever flown on
7 an airplane, and it appeared to us when we came in the
8 courthouse this morning perhaps the first time they have
9 seen a revolving door because one of them was somewhat
10 confused about how to get in.

11 THE COURT: We have those magical things up north
12 here.

13 MR. SUGGS: Your Honor, I'm here to ask the court
14 for a suggestion of remand so that we can get a trial date
15 for our case, and I understand that what I am asking for is
16 absolutely within the court's discretion at this point in
17 time.

18 Ultimately, of course, under the Lexecon case the
19 court is obligated to return cases that are not disposed of
20 in the MDL to their transferor courts, but I understand at
21 this time the court could easily rule that pretrial
22 proceedings have not concluded and ask us to stay here.

23 We just want a trial date. The MDL has done a
24 magnificent job of getting this case ready for trial and we
25 believe that that job is so substantially complete that we

1 can try our case now.

2 In fact, Mr. Jenner and I prepared a case for
3 trial in state court in West Virginia last year, were
4 headed toward trial when that case settled, another death
5 case.

6 We have, in fact, resolved a number of cases with
7 Bayer, but we believe that the most important thing we can
8 have for our clients right now is a trial date somewhere
9 sometime.

10 THE COURT: Rumor has it that Bayer doesn't want
11 to go back to West Virginia.

12 MR. SUGGS: I heard that Your Honor, but it
13 wasn't because of us. It was because of, apparently, an
14 employment discrimination case they lost up there. They
15 had a video of somebody keying cars in the parking lot and
16 they still got hit for \$750,000. So they have sealed off
17 West Virginia.

18 They probably would like to go back to Western
19 North Carolina, which is a fairly conservative district in
20 terms of jury awards and that kind of thing.

21 I am here to tell the court that we are -- all
22 that remains to be done in this case is a small amount of
23 case specific discovery. Bayer will want to depose our
24 clients and their treating physicians. Bayer has already
25 deposed in the other litigation our principal expert

1 witness. We will have a limited number of experts and this
2 will be a fairly short trial, two to three weeks at the
3 most. We can be ready to go, we believe, within 90 days if
4 Bayer can be ready to go.

5 I would suggest to the court, by the way, that we
6 are -- to get a trial date we are willing to do almost
7 anything, including if Bayer would agree -- we understand
8 that your trial that was set for June is no longer on and
9 we would be glad to take that slot, Your Honor, or we would
10 be glad to have you come to North Carolina and try our
11 case.

12 I mean, we are just anxious to get on with this.
13 We are ready to go. We don't believe there's any more
14 reason for delay. As good of job as they have done, I
15 don't -- you know, the last few licks at this problem are
16 not going to add, we believe, much more to what can be
17 done.

18 Our case has been filed for two years and we ask
19 the court to either -- well, what we ask the court to do is
20 suggest to the multidistrict litigation panel that our case
21 be remanded for trial.

22 THE COURT: Thank you.

23 MR. SUGGS: Thank you.

24 THE COURT: Good morning.

25 MR. SCHAERR: Good morning, Your Honor. Reduced

1 to essentials, it seems to me that Mr. Suggs' argument is
2 that even though pretrial proceedings are concededly not
3 complete in this MDL proceeding, that his client should be
4 allowed in essence to opt out of these proceedings and to
5 go back to the U.S. District Court in North Carolina. As
6 the court is aware, this is not a request for a remand to
7 state court, but simply a suggestion of remand back to the
8 federal district court in North Carolina.

9 But the pertinent rules and the case law
10 governing MDLs don't allow opt-outs from MDL proceedings.
11 And even if they did, allowing an opt-out here would
12 undoubtedly unleash an avalanche of similar requests
13 addressed to this court and would create a precedent that
14 would make it very difficult to deny those other requests
15 once they came.

16 THE COURT: And that's something I don't want to
17 happen.

18 MR. SCHAERR: I understand. So, first of all, as
19 far as the law is concerned, Your Honor, Mr. Suggs is --

20 THE COURT: I know what the law is, and it's my
21 discretion. And since I don't want an avalanche of cases
22 coming in wanting to be remanded, it's clear what I am
23 going to do on this matter.

24 But I am intrigued. I think in the last flurry
25 of paper that's been coming my way, or electronic e-mails

1 and whatever it may be, counsel has put forth that I try
2 this case in North Carolina. I think Mr. Zimmerman may
3 have mentioned that in one of his documents that he's put
4 forth. What is your position on that?

5 MR. SCHAERR: I think at this point, Your Honor,
6 we would have to oppose that, but frankly, it's something
7 we just heard for the first time this morning and have not
8 had an opportunity to give much thought to.

9 THE COURT: Well, it's something that I am very
10 interested in doing. I have blocked out -- how many times
11 have I blocked out time for trials and we haven't had any?
12 I know this is a death case and more than likely, with the
13 able assistance of Chief Magistrate Judge Lebedoff, this
14 matter will probably be settled today.

15 But in any event, put it in the back of your mind
16 or thoughts and think about that the court is really
17 inclined to try this case. And so not only will we have a
18 trial date, which helps in everyone getting on board to try
19 to settle the matter, but you will have a judge so we don't
20 have to worry about -- what judges are down in your
21 district?

22 MR. SUGGS: Actually, it's not my district, Your
23 Honor, so I can't name off the judges. I am really not
24 personally familiar with those judges. We were associated
25 by a Nashville firm to help with the case.

1 THE COURT: But North Carolina has a wonderful
2 bench and -- but I know that they are overworked like
3 everyone else. And so I'm familiar with these cases and so
4 certainly it's something that could be scheduled if we're
5 talking about, what, two and a half weeks? You know, the
6 way I try cases, it will be a week and a half.

7 And so in any event, it's something to put in the
8 back of your mind, but we have, I think, the best
9 magistrate judge in the country working on this case today
10 and so --

11 MR. SCHAERR: We would agree with that, Your
12 Honor.

13 THE COURT: He will do his magic, as I have seen
14 for the last 21 years.

15 MAGISTRATE JUDGE LEBEDOFF: I don't want to leave
16 this courtroom. I don't hear this at home.

17 MR. SCHAERR: Now that the bar has been set, Your
18 Honor, we will certainly give more thought --

19 THE COURT: He has always set the bar, so there's
20 no problem with that.

21 MR. SCHAERR: It may be useful for us to have
22 briefing on the issue, whether it would be appropriate to
23 try the case --

24 THE COURT: I am just throwing it out. It's not
25 there at this point. I have high hopes that all the

1 parties will walk out with a smile on their face this
2 afternoon and know how to use the revolving door. All
3 right. Thank you.

4 MR. SCHAERR: Thank you, Your Honor.

5 MR. SUGGS: Thank you, Your Honor.

6 MR. SIPKINS: Your Honor, if I could take -- ask
7 leave of the court to go down for the settlement
8 conference?

9 THE COURT: Yes, you may.

10 Thank you, John.

11 MR. ZIMMERMAN: I had such an eloquent argument
12 planned on that motion, Your honor, but I will save it for
13 another day.

14 Your Honor, the order of business is contained in
15 the parties' status report and proposed agenda filed late
16 yesterday afternoon with the court. It's an agreed agenda.
17 There are probably some issues on here where the parties
18 want to make comment or editorialize, which is great, we
19 look forward to that, but the basic agenda is agreed to and
20 we will go through it with the court and then do our
21 comments as we see fit.

22 The first is pending cases, Your Honor. As of
23 the close of business on February 17th defendant had been
24 served with 9,691 cases that remain active. Of this
25 amount, 6,219 cases were pending in federal court and 3,470

1 are pending in state court.

2 At last count, which we have not done on a
3 regular basis, but at last count the claimants contained in
4 those cases, excluding spouses, were approximately -- or
5 exceeded 22,000. So we have some idea of the people that
6 are watching, listening, and touched by this litigation.

7 Filed but unserved cases are not included in
8 these totals and they never have been, so at least we are
9 using statistics that are consistent. The totals do not
10 include, also, 657 cases where dismissals are pending.

11 Interestingly enough, this is the first month
12 where actually the number of cases because of dismissals
13 has gone down. We were here last time with 9,943 cases in
14 state and federal. We are now at 9,691. So that's a net
15 decrease of approximately 250, if my quick math is correct,
16 of the total. There's also a small -- but there's a small
17 increase -- excuse me -- small decrease in federal cases,
18 but only by about six cases.

19 So we are seeing kind of a leveling off, Your
20 Honor. Every other month the numbers had been rising.
21 This is the first month, on the second year anniversary at
22 the end of our second year, where we are actually seeing
23 the numbers starting to decline. I don't know what to make
24 of that, but I think it's interesting to note.

25 So what we have, Your Honor, is about 6,200 cases

1 pending in federal court, probably in the area of 10 to 15
2 thousand people whose cases are represented in those
3 claims.

4 And the third item on the list, Your Honor, is
5 that the list of plaintiffs' counsel has been provided
6 through electronic -- the magic of electronics to
7 plaintiffs and we appreciate that we now do receive those
8 lists on a regular basis.

9 MR. HOEFLICH: One point that I would add, Judge
10 Davis, is that the number of cases --

11 THE COURT: Good morning.

12 MR. HOEFLICH: Good morning. One point that I
13 would add is that the number of cases has declined in
14 part --

15 THE COURT: Before you get started, Adam, where
16 is Phil?

17 MR. HOEFLICH: Phil is in Philadelphia at the
18 pretrial conference for the Rushton case, where they are
19 picking a jury this week.

20 THE COURT: That's a rhabdo case.

21 MR. HOEFLICH: It is a rhabdo case. And there is
22 another trial scheduled to start in Philadelphia in two
23 weeks, the Galdi case.

24 THE COURT: Will you give me updates on that?

25 MR. HOEFLICH: Absolutely.

1 THE COURT: Thank you. I'm sorry. Continue.

2 MR. HOEFLICH: Mr. Zimmerman noted that the
3 number of cases has declined since the last conference. In
4 fact, as I understand it, the number of cases had declined
5 at the last status conference as well.

6 One of the reasons the number of cases has
7 declined is because in some of the jurisdictions, notably
8 Philadelphia, we have a requirement that plaintiffs come
9 forward with case specific expert reports and roughly
10 80 percent of the cases that have been subject to that
11 order have gone away because there's no support for them
12 and the plaintiffs have not filed those case specific
13 expert reports.

14 THE COURT: Do you want to go over the trial
15 status across the country? You've given me the Rushton and
16 the Galdi case. Are they death cases or just rhabdo cases?

17 MR. HOEFLICH: They are just rhabdo cases, Judge.

18 THE COURT: I shouldn't just say "just rhabdo
19 cases," but they are rhabdo cases.

20 MR. HOEFLICH: They are both rhabdo cases, both
21 involved hospitalizations.

22 THE COURT: And the process in Philadelphia, was
23 there a settlement conference set up for those or was that
24 just informal?

25 MR. HOEFLICH: There have been informal

1 settlement discussions in the Rushton case. I had those
2 with Mr. Balefsky as well as with Mr. Specter and Klein
3 from his firm. They did not resolve the case.

4 With the Galdi case we had a mediation last week
5 in front of Judge Ackerman, which also was unsuccessful.

6 THE COURT: Then we have next May the Harris
7 County matters?

8 MR. HOEFLICH: Yes, although I am not familiar
9 with the Harris County matters. Mr. Marvin can address the
10 entire trial schedule, Judge.

11 MR. MARVIN: Those are both muscle pain cases.

12 THE COURT: Good morning.

13 MR. MARVIN: Good morning, Your Honor. Both of
14 the cases set for Harris County, they are stacked, so only
15 one would go; and both of those are muscle pain cases.

16 THE COURT: And we have a Mississippi case in May
17 too?

18 MR. MARVIN: Yes. That was actually a case where
19 there were, I believe it was, four plaintiffs originally.

20 There was a motion for severance. That motion was
21 considered, but I believe that plaintiff voluntarily agreed
22 to dismiss the other three plaintiffs. So we only have one
23 plaintiff in that case now. And that, too, is a muscle
24 pain case.

25 And then, as you will see, in June there are

1 trial settings in Mississippi in the Dearman case, a muscle
2 pain case, and then two -- both cases are stacked -- in
3 Texas. They are both rhabdo cases. And then it goes on
4 into July.

5 The other thing to mention, Your Honor, is that
6 what this schedule does not reflect is that there were a
7 number of trials set in Philadelphia beginning June 14th;
8 three trials set on that day, June 14th, in Philadelphia,
9 an additional three set in July, and then on and on
10 through -- I guess for the next ten months.

11 THE COURT: All right. Is Judge Ackerman
12 handling all those cases or does he have help?

13 MR. MARVIN: He has help. He is the coordinating
14 judge. We are not quite certain whether he is actually
15 going to be trying any of the cases.

16 MR. HOEFLICH: I believe Judge Ackerman plans to
17 try the Rushton case, but to refer out at least the Galdi
18 case two weeks later, Judge.

19 THE COURT: Good morning, Fred.

20 MR. MAGAZINER: I was going to say what Adam
21 said. Judge Ackerman is trying the Rushton case and he, I
22 believe, said he will not be trying the Galdi case; and
23 that makes sense because they may likely overlap. I don't
24 think he has said what he intends to do with the other
25 cases.

1 THE COURT: The Philadelphia case, how long is it
2 estimated the trial is going to take?

3 MR. MAGAZINER: The Rushton? I am trial counsel
4 for GSK in Rushton and so I can speak to that. It is a
5 moving target, Your Honor. There's a pretrial conference
6 going on right now, but as of a few days ago the plaintiffs
7 have designated something like 85 hours of Bayer deposition
8 testimony, not including counterdesignations or live
9 witnesses.

10 THE COURT: Let's see. How many jurors will be
11 awake after that?

12 MR. MAGAZINER: I anticipate that what's
13 happening even as we speak is that the case is being
14 changed in one regard or another under Judge Ackerman's
15 leadership or guidance. By the end of the day today we may
16 know something more about how long the case will be, but at
17 this point we don't know.

18 THE COURT: This is dicta for this court, there
19 won't be 85 hours of depositions in any case that I try.

20 MR. MAGAZINER: I would hope not.

21 THE COURT: Thank you.

22 MR. ZIMMERMAN: Where are the Nevada cases?
23 Because I was told that the Nevada cases are pretty soon.

24 MR. MARVIN: Those cases haven't been set for
25 trial. We've heard --

1 MR. ZIMMERMAN: In May is what I --

2 MR. MARVIN: -- that they are seeking a trial in
3 May or June, but no trial has been set.

4 MR. ZIMMERMAN: Okay. My understanding is that
5 they have set it quite recently for some setting in May,
6 but you probably know better than I. That was my
7 information from --

8 MR. MARVIN: They are seeking to, but it hasn't
9 happened.

10 MR. ZIMMERMAN: I think the court should know and
11 everyone probably in the courtroom should know that we have
12 been approached by the Pennsylvania attorneys in these
13 cases that are set in Pennsylvania to cooperate with them
14 and provide MDL work product, and we will be doing that.

15 We have worked out -- we are working out, we
16 haven't got the final dot on the line, but we are working
17 out a coordinating and cooperating agreement so that the
18 MDL work product will be available in those Pennsylvania
19 trials. And I think that's an important development from
20 the plaintiffs' side.

21 THE COURT: It is.

22 MR. ZIMMERMAN: Because we've put a lot behind us
23 and we are now in the same boat rowing.

24 THE COURT: Is Mr. Weiss involved in --

25 MR. ZIMMERMAN: He is not really involved. It's

1 Lee Balefsky, it's Eric Weinberg, it's Dan Gallucci and
2 people of the Beasley firm. I forget the name of the
3 counsel at the Beasley firm. It isn't Mr. Beasley.

4 MR. HOEFLICH: It's Mr. Levenstam and Mr. McCugh.

5 MR. ZIMMERMAN: Right. We have been talking at
6 some length, at great length, and we have reached an accord
7 on coming together with the work product. So what we will
8 see in part in Pennsylvania is going to be some of the MDL
9 work product and experts.

10 THE COURT: If you can send the message back that
11 the court appreciates the state court lawyers cooperating
12 with the PSC on these matters. It's been a long road. The
13 court certainly is happy to hear that there is possibly
14 some coordination, cooperation, or however Philadelphia
15 wishes to classify it.

16 MR. ZIMMERMAN: I will do that, Your Honor.

17 Moving, then, on to settlement on the next page.
18 To date the defendants have settled 2,179 cases with a
19 total settlement value of \$826,799,707. Of this amount,
20 596 cases have been determined to be subject to MDL
21 assessments and a total settlement value of those cases is
22 211,707,847. That is a statistic that I think is probably
23 as of the middle of February. I don't know what the exact
24 cutoff date was. We will assume it's the middle of
25 February.

1 As of the January status conference, Your Honor,
2 there were 2,059 cases settled, so we've got another 120
3 cases that settled in the last month. The total settlement
4 value at that time was 782 million, so it's another 44
5 million, I think, if my quick math is correct, in
6 settlements for those cases.

7 Again, the MDL total went up from 484 cases
8 settled to 596 cases settled, with the dollar value going
9 from 175 million to 211 million.

10 Those statistics speak for themselves. There's a
11 lot of editorial comment we could make on them, but I don't
12 think it would be appropriate at this time but to say that
13 it's always important to see cases resolved and people
14 resolve their litigation and we are very pleased that the
15 litigation has resulted in these kinds of settlements to
16 date.

17 THE COURT: Let me ask this question. Of the
18 2,179 cases that have been settled, is that worldwide or is
19 that just United States?

20 MR. ZIMMERMAN: It's my understanding that it is
21 only United States.

22 MR. HOEFLICH: Those are United States cases,
23 Judge.

24 MR. ZIMMERMAN: I guess the question is, are
25 there cases being resolved worldwide? I don't know.

1 THE COURT: Of the remaining cases, a guesstimate
2 of how many rhabdo cases that would fall under the defense
3 definition are left? So we are looking probably at, if it
4 were to end at that, it would be over a billion dollars'
5 worth of settlements in the United States; would that be --

6 MR. HOEFLICH: I don't know the numbers, Judge.
7 I believe there are a few hundred cases left that involve
8 rhabdomyolysis, but I don't know the exact number.

9 THE COURT: Thank you.

10 MR. HOEFLICH: You're welcome.

11 THE COURT: Let's go to C.

12 MR. ZIMMERMAN: Yes, Your Honor. Approximately
13 95 cases have been submitted to the MDL mediation program
14 or process. Each of the parties, I believe, have now
15 provided letters to the court regarding certain cases
16 referred to mediation that have not settled.

17 We have asked for some adjustments in the
18 program, some refocus of the program. I think defendants
19 have also provided their view of the mediation program. I
20 don't know that it's necessary to discuss it now, although
21 we would certainly like to at some point.

22 I think the defendants say they have not received
23 any proposal from the PSC. I think that's in error. I
24 think you have received it. It was sent several weeks ago,
25 but maybe you haven't seen it. I will send it again.

1 MS. WEBER: For clarification, is it the proposal
2 that you have contained in your letter that went to Judge
3 Davis in December or was there some separate proposal?

4 MR. ZIMMERMAN: No, that was -- it was in
5 December or January. I can't remember.

6 MS. WEBER: We haven't received a separate
7 proposal, but if it was what was in the letter to Judge
8 Davis --

9 MR. ZIMMERMAN: Right.

10 MS. WEBER: -- obviously we got it.

11 MR. ZIMMERMAN: We were just making some
12 suggestions as to how we could ramp up the program, put
13 more into it. I guess all we are really saying is that we
14 want to create more impetus to use the program and more
15 teeth into the program and obviously more cases coming
16 through the program; and that, I think in time, as we get
17 through narrowing and we get through all the other things,
18 will probably happen.

19 Our suggestions were simply those of our
20 observations about the mediation program and how we think
21 it could be tweaked going forward to perhaps allow some
22 consequences if mediation wasn't successful.

23 THE COURT: I wish to thank my special masters in
24 dealing with PTO 102 and dealing with the narrowing issue.
25 We will get to that later, but certainly this is an area

1 that should be encompassed in possibly 102 in setting up
2 some type of procedure and that we start moving these cases
3 through in a court ordered fashion.

4 Because if we -- and the court will at some point
5 issue an order. Whether or not it encompasses everything
6 that the plaintiff and defense wants, but there will be a
7 narrowing. And once the narrowing starts, then we will
8 have to get into -- quickly get into mediation and
9 settlements.

10 We've got the history of X number of cases are
11 going to disappear, a percentage of cases are going to
12 disappear and we are going to end up with a set of cases
13 that are worth looking at and worth having both sides come
14 to the table and try to resolve them.

15 And so I hope the special masters will keep that
16 in mind in drafting, whether or not it's in the narrowing
17 process, but continuing to think about this issue and maybe
18 we can come up with a mechanism that will be helpful to the
19 court.

20 MR. ZIMMERMAN: Thank you, Your Honor. And we
21 will continue to provide our ideas on this so that everyone
22 at least knows our thinking. Certainly at the appropriate
23 time we support very much the incorporation of 102
24 narrowing with the mediation program.

25 THE COURT: I can't imagine -- if I was a

1 plaintiff's attorney, if I was going to do work,
2 substantial work, in putting a case together to make sure
3 that I met the criteria of the court, that a response of
4 the court to say, hey, let's bring that case immediately to
5 some type of mediation, early mediation, would be wonderful
6 because instead of letting it get cold again and -- that
7 everyone has worked on the case, they know the case, they
8 are ready to go and they are ready to sit down and try to
9 resolve the matter. It would be, I think, an incentive
10 that would help the PSC.

11 MR. ZIMMERMAN: Open arms, we welcome it with
12 open arms, Your Honor, which brings us then to the -- well,
13 additional cases are continuing to be negotiated and
14 probably will come into the mediation program under the
15 original protocols, but that really brings us to Special
16 Master Lew Remele's report.

17 THE COURT: Before we get there, let me ask you
18 this. Are we finished getting any more cases? Have we
19 seen the last onslaught of these cases?

20 MR. ZIMMERMAN: I think we're probably at that
21 point where we are not going to see an onslaught, Your
22 Honor.

23 We're now talking a lot with the people who have
24 large inventories and for the most part people have been
25 told they need to, A, focus on their cases; B, file their

1 cases, make their choice if it's state or federal court,
2 and get them out of inventory and into the docket.

3 You know, there will be stragglers and there will
4 be jurisdictions where that has not occurred, but I think
5 for the most part we are seeing the critical mass having
6 come to rest in the courts where they are going to be
7 resolved.

8 We certainly have tried to send that message out,
9 Your Honor, in communications we've had to lawyers, saying,
10 you know, if you have a case, file your case; if you have a
11 good case, focus on why it's a good case; if you have a
12 case that can't withstand, be prepared to walk away from it
13 or dismiss it.

14 THE COURT: All right. Let me throw this out,
15 and I know that defense will want to give a quick response
16 to it and then have time to think about it. This goes back
17 to the bundling issue.

18 If there's inventories that are out there and
19 we're getting to 102 or getting to a nice narrowing
20 process -- correct me if I am wrong -- it would seem like
21 the defense would want to know what's out there and let's
22 get those in the court; and if they don't fit the criteria,
23 get them dismissed so we don't have to be worried about
24 them.

25 And if that's the case, maybe the court can

1 modify its prior order dealing with bundling, get those
2 cases here, have them go through the criteria. If they
3 don't meet the criteria, they are gone and then we know
4 what the set universe is.

5 MR. ZIMMERMAN: Your Honor, that's precisely
6 where I think the PSC has stood. We want to get the cases
7 identified. Whether there are master complaints with lots
8 of plaintiffs or a singular complaint, it really makes no
9 difference; you have to look at your case, decide if it
10 meets the criteria and stand behind it.

11 As long as it has a case file number associated
12 with it, whether it's part of a multiparty complaint or a
13 single party complaint, the defendants are not at all
14 disadvantaged because they are going to get the criteria
15 that make the case a justifiable case.

16 And so I agree with Your Honor, if that's what
17 you are saying, that the bundling issue somewhat becomes
18 mooted by the narrowing. A lot actually is becoming mooted
19 by the narrowing because it is really taking a new approach
20 to the question of what's out there, what's the quality of
21 it, what are the categories of it and how are we going to
22 deal with it, which is why I stood before Your Honor and
23 took kind of a difficult position with --

24 THE COURT: Not kind of. You took a very
25 difficult position. You know, I've told you that. And you

1 saw very respectful responses and I think we are moving
2 forward on these issues, but without your direction we
3 would still be floundering around for another year or so
4 trying to figure out what we're going to do with this.
5 Your direction in this matter was welcomed and appreciated
6 by the court.

7 MR. ZIMMERMAN: And so in answer to the question
8 of bundling, I think it does moot that question. I don't
9 know what defendants' response will be and they will stand
10 up and tell you, but in terms of the plaintiffs' response,
11 I think we could spend a lot of time on the law of multiple
12 party complaints and a lot of time on the law having to do
13 with whether you can or you can't or you should or you
14 shouldn't --

15 THE COURT: I am not even there.

16 MR. ZIMMERMAN: -- but I think it --

17 THE COURT: I have seen what they're allowed to
18 do. Once we get to this point, number one, that there's a
19 criteria that they have to meet, that is so helpful, that
20 people aren't going to be filing just junk cases.

21 MR. ZIMMERMAN: Right.

22 THE COURT: They're not going to take the time.

23 MR. ZIMMERMAN: And we see no purpose in doing it
24 and we are asking people not to do it and becoming
25 proactive and telling them to get their eyeballs on their

1 cases and tell us what are the ones that are supportable
2 and walk away from the ones that aren't.

3 THE COURT: If we get a good program going, we
4 can help the defense know what their bottom line is on
5 these cases.

6 MR. HOEFLICH: Your Honor, in late 2003
7 Mr. Zimmerman and I sat down and he talked to me about his
8 desire at that point to distinguish between the sea of what
9 he called aches and pains cases and what the defendants had
10 called aches and pains cases and a narrow class of what he
11 called severe muscle injury cases.

12 And he talked about people who had severe pain
13 and then were discontinued from Baycol because of that pain
14 and he said that he understood defendants' position on
15 those cases because they were short of rhabdo, but that
16 that's what he wanted to narrow the MDL to and go forward
17 with.

18 From there we proceeded to spend countless hours
19 working on a narrowing protocol, with the help of
20 Mr. Zimmerman and the leadership of Mr. Zimmerman, to get
21 it down to what the parties agreed on and we presented that
22 to the court at the last status conference and it was
23 something all of us favored.

24 Since then the court has received innumerable
25 objections, including from the Plaintiffs' Steering

1 Committee, that would take away the requirement of
2 discontinuation of the medicine, that would take away the
3 requirement of acute pain, that would take away the
4 requirement of sudden onset.

5 And where we are at now is in a world -- and we
6 can understand the pressure that Mr. Zimmerman faces --
7 where the plaintiffs are not supporting the narrowing
8 protocol as it came forward and I don't believe we are
9 going to end up with a uniform group of cases that would
10 meet some set of objective criteria. We may end up with
11 expert reports, but --

12 THE COURT: One of the things that -- let me stop
13 you here. You have to understand this judge. I told you
14 from the beginning I wanted to be fair to both sides and
15 that's why I've asked for input from both sides. Now we're
16 getting into the time period where I really am going to get
17 really involved because it's talking about trials, sending
18 it back to different jurisdictions.

19 You all may never agree. And let me tell you --
20 read my lips -- I don't care. Because I will set down the
21 protocols. The question that you have to answer is whether
22 or not you want to have input to the court about what those
23 are. Understand just because you submit something to me,
24 that does not mean an automatic signature by this court.

25 And so this -- if you didn't understand what I

1 said to Mr. Zimmerman, that he has taken a huge leap on
2 this matter and is willing to submit things to the court.
3 And I want the defense to be involved. I want you to sit
4 down with the special master. I want you to see whether or
5 not you can come up with something that you can propose to
6 me.

7 But rest assured, if all the time that you spend
8 and it goes up in ashes, that doesn't mean the court is not
9 going to come up with something; and it may be something
10 that you don't like and that sometime down the line you'll
11 wish I had given the court input on X, Y, and Z because
12 that would have saved me a number of headaches.

13 So rest assured, there will be something coming
14 from the court. The question is whether or not you want to
15 have input on that. That goes for both sides.

16 MR. HOEFLICH: We understand and we appreciate
17 that, Judge. We would like the opportunity to give input.
18 I don't believe we are prepared to agree on bundling or
19 believe it's appropriate at this point, but we would
20 appreciate the opportunity to give input.

21 THE COURT: All right. Mr. Zimmerman.

22 MR. ZIMMERMAN: Your Honor, I think that brings
23 us now to the special master's report.

24 SPECIAL MASTER REMELE: Thank you.

25 THE COURT: Good morning.

1 SPECIAL MASTER REMELE: Good morning, Your Honor.

2 I will be very brief. The report, Mr. Zimmerman has
3 already covered a great deal of it.

4 There are approximately 95 cases that have been
5 submitted to the mediation program. Of those 95,
6 approximately -- or actually 35 have either been closed or
7 withdrawn, 32 have settled either as a result of
8 negotiations directly between the parties or as a result
9 through the mediation program, and there are approximately
10 now pending 18 cases where we're waiting for additional
11 information from the parties so that the parties can
12 determine whether or not they will be able to negotiate
13 directly or whether they will decline to negotiate, in
14 which case we will have to mediate those.

15 In some of those 18 cases we are also waiting for
16 some additional information so that I can make a
17 determination as to whether or not the cases fit under the
18 pretrial order governing submission to mediation.

19 I do agree with the court and with Mr. Zimmerman
20 and with the Bayer lawyers as well that as we get through
21 the narrowing protocol I think that it will have an impact
22 and an effect on the volume that we see in the mediation
23 program, and I do think that we are gradually working our
24 way towards that and I think that it will have a big
25 impact. And I do think the court is right, that we should

1 keep that in mind as we go through that process.

2 THE COURT: And so you understand where I am
3 coming from, it's just not -- it's essentially a voluntary
4 program at this point. Once the narrowing process starts,
5 then it will become mandatory. So work those details out.

6 SPECIAL MASTER REMELE: I will, Your Honor.
7 Thank you very much.

8 THE COURT: Thank you.

9 MR. ZIMMERMAN: Discovery, Your Honor, is the
10 next topic.

11 THE COURT: Just so you understand where I am
12 coming from, when you said just one more year of Baycol,
13 not that I don't love you all, I want to make sure everyone
14 understands I still have a full caseload that I am
15 carrying, both civil and criminal. And my colleagues may
16 smile at me, but it's still on my back to handle.

17 So I have other work to do and, you know, I have
18 other assignments throughout the country that I am
19 handling. So when you say a year, we are going to meet
20 that or come close to meeting that.

21 MR. ZIMMERMAN: Thank you, Your Honor, and we
22 will cooperate all we can in that regard.

23 Your Honor, on discovery, Bayer has made a
24 suggestion that document production be brought to a
25 conclusion. I believe they submitted a letter or a

1 proposal to us in that regard. We have not had the
2 opportunity to respond.

3 However, there are some problems that have
4 occurred within the discovery protocols and within the
5 discovery program that I think just the court needs to be
6 aware of, not that we need to resolve it today because I
7 think, frankly, most of this does get resolved between us,
8 but just so you know that although we do want to bring it
9 to an end, everything must have a beginning and a middle
10 and an end and everything in discovery has to come to an
11 end.

12 But there are some problems with the quality of
13 production, which is being corrected, but a lot of the
14 documents that have been produced aren't readable and we've
15 sent a letter requesting reburning of CDs and recopying of
16 documents.

17 So we are having a little problem with that
18 because as we get into preparations for trials and you
19 start looking at the documents that you need, if they are
20 not readable and they are not -- the objects don't appear
21 to be able to be printed, you know, it causes major
22 concern. So that's one problem. We are trying to work it
23 through.

24 On February 20th, Your Honor, Bayer produced 32
25 new CDs of materials. This one is a little more

1 problematic, Your Honor. These CDs of materials, when we
2 reviewed them, had documents that were attributable to a
3 number of people who were deposed in Europe, Ebsworth,
4 Plischke, Von Keutz, Weidmann, Sprenger, and others. These
5 new materials may just require that we re-depose or
6 resubmit information to these witnesses now that we have
7 additional documents that have just recently been produced.

8 We are evaluating this. We are going to
9 communicate and have been communicating this with
10 defendants. I ask nothing from the court about it at this
11 time, but I alert the court to these are some of the things
12 that occur in litigation and we may have to do some
13 re-depositions of people now that some additional and large
14 amounts of documents have been provided.

15 So those are two problems with closing down
16 deposition -- excuse me -- document production, is that
17 recently documents have been produced, they are
18 attributable to witnesses whose depositions have been
19 concluded.

20 They are important depositions that we all
21 remember we took over in Amsterdam and in London and we
22 just may have to do some limited deposition -- re-deposing
23 on a limited basis of these witnesses should we determine
24 that the documents now produced are relevant to those
25 inquiries.

1 I don't know if you want to comment on that now
2 or not. It may not need any comment. It's up to you.

3 MR. HOEFLICH: Susan will address that.

4 MS. WEBER: Your Honor, with respect to this
5 document production issue, you know, we will deal with the
6 deposition question in due course once plaintiffs come up
7 with what their position is, which they don't have at this
8 stage.

9 The legibility issue I understand was already
10 well underway to being resolved. It is a very limited
11 number of documents and I just understand it's fuzzy
12 images, so we just have to reproduce them.

13 Our proposal to plaintiffs on terminating
14 document production, you know, we anticipate that by the
15 time we finish producing the stuff that's already in the
16 pipe, we are going to be in the 8 million page range and
17 what would be produced going forward from that stage would
18 be largely duplicative.

19 So our letter asks plaintiffs to designate any
20 categories of documents, any specific issues they have on
21 documents so that we can talk with them about those issues;
22 and that once we've gotten through that process, then we
23 shut it down because we think we are way beyond the point
24 of diminishing returns on document production and it will
25 be unduly burdensome. So that's what our proposal is on

1 the table for plaintiffs.

2 THE COURT: On another issue dealing with the
3 re-designation of some of the secret documents and the New
4 York Times issue, I suppose, how is that coming along?

5 MS. WEBER: Rolling along very nicely. I think
6 we are going to have our first batch of re-designation
7 disks out this week, Your Honor, and the folks who are
8 handling it tell me they have every expectation of meeting
9 the timetables set forth, which I think is the end of
10 April.

11 THE COURT: Great. Thank you very much for that.

12 MR. ZIMMERMAN: I believe that was actually B on
13 the agenda, Your Honor, the overdesignating of confidential
14 documents and the re-designation, so I won't comment any
15 further on that.

16 All I can say is we haven't received the first
17 wave yet, so we can't comment, but it is underway. If
18 Bayer tells us they are going to meet the April 30th
19 deadline for that, we expect that they will and hopefully
20 that will not be a subject of further discussion.

21 Next, Your Honor, is the discovery proceeding in
22 cases prepared under PTO 89 and 96.

23 THE COURT: Let me go back to B. I guess I am
24 going to charge the PSC to make sure that that's
25 appropriately done, the re-designation, because you have

1 received the documents.

2 And really you didn't have a dog in that fight
3 with the New York Times or the newspapers having access to
4 that, but to ensure that the court's order is fulfilled,
5 you are going to have to really look at those documents to
6 make sure that that's accomplished so the court order is
7 followed.

8 MR. ZIMMERMAN: We will do that, Your Honor. We
9 do feel strongly about this one, Your Honor, because I
10 think we will recall that this courtroom got filled up with
11 a lot of things about the New York Times and what should
12 have gone and should not have gone and what was put into
13 the record that we felt was public documents and what
14 weren't, and this does all dovetail with that. And I think
15 the court admonished counsel for things and we think maybe
16 this re-designation will clear up a lot of that concern.

17 So we are taking a very strong look at this. We
18 feel very strongly about it. The public -- dissemination
19 of public information I feel strongly about from a
20 constitutional and a freedom of the press point of view as
21 well as simply the fact that we have a right to know what
22 is, in fact, proprietary and what isn't.

23 And when you overdesignate, it causes an extreme
24 burden and burden of cost on litigation to keep things that
25 are confidential that shouldn't otherwise be so.

1 THE COURT: I think Special Master Haydock is the
2 arbiter on that, so let's make sure that if there are any
3 issues, that they get to him quickly so he can make a
4 ruling on those.

5 MR. ZIMMERMAN: Thank you, Your Honor.

6 Now we are moving on to what we would call the
7 discovery is proceeding in specific cases being prepared
8 under PTOs 89 and 96. We provided a status report to the
9 court at the last conference. Excuse me. We provided two,
10 one at the last conference with regard to the Minnesota
11 cases, what the history of those were, and recently with
12 regard to the other program cases. I believe that was an
13 exhibit to this agenda. If not, it was a separate document
14 that was also an exhibit to my letter to the court.

15 But the basic upshot is it gives the court a
16 status of the program cases divided into the Minnesota
17 cases, for which we now believe after -- we will be pulling
18 Pierce back because it would simply not be an appropriate
19 case for the court to try in its first case. And the
20 Weitz & Luxenberg cases and the other program cases, we
21 believe there are approximately 26 or 27 that will merit --

22 THE COURT: 26.

23 MR. ZIMMERMAN: -- 26 that will merit further
24 discovery. And we tried to provide the court with an
25 analysis, as best we had it, of where those original 200

1 cases were.

2 There are discussions going on with Weitz &
3 Luxenberg with regard to negotiating stipulations of
4 dismissal to dismiss a number of their cases and I think
5 that is going to be discussed in a motion practice -- or on
6 the motion schedule later today.

7 But the important thing to make from this in
8 terms of our point of view, Your Honor, is we understand
9 that the trial of cases in this MDL, however they are going
10 to occur, whether they be coming off this random case
11 selection process or through designation or re-designation
12 by the Chief Justice of the United States for Your Honor to
13 hear cases in other jurisdictions, it's important that we
14 have the appropriate cases brought forward.

15 And when I say "appropriate," I mean cases that
16 aren't so difficult to get the issues tried that the facts
17 drive too much controversy. And we are trying to find the
18 cases where the issues are clear, the case is clean enough
19 that a good case can get tried from both sides.

20 And I know there's a lot that gets flying around
21 this courtroom about, you know, what to make of all these
22 cases going away and how the cases are being demeaned in
23 one way, shape, or form because we haven't been able to
24 select the appropriate cases for trial.

25 For that reason, Your Honor, I sent the letter to

1 the court. I think it got into your court yesterday
2 afternoon late. I provided a copy to counsel. They have
3 not had a chance to respond to it. But it's the PSC
4 thinking of how we can use what we know, use the narrowing
5 process that we know, use the cases that we know are coming
6 out in other places, use the cooperative work product that
7 we have worked so hard to achieve, be it in Pennsylvania,
8 be it in South Carolina, be it in Nevada, be it anywhere,
9 so that we can have the right cases tried by counsel of
10 record.

11 And I think this is something that I have
12 actually lost sight of, but as we get closer to trial the
13 court has to understand that when you are not -- if you are
14 PSC and you are not counsel of record, you are not privy to
15 the client, you are not privy to the issues surrounding the
16 client. You are really not even privy to the medical
17 records in the way that you would be if you are counsel of
18 record.

19 So we have been struggling a little bit trying to
20 find cases where the PSC was not counsel of record where
21 the PSC would have to try the case and want to try the
22 case, and we have been finding ourselves with some false
23 starts.

24 And so we have suggested to the court ways around
25 this and ideas for creatively managing to have good cases

1 come before Your Honor so that the real cases can get tried
2 with the real evidence.

3 THE COURT: Well, let me stop you there. When we
4 talk about the real cases, that's where the narrowing
5 process gets you to the real cases.

6 MR. ZIMMERMAN: Correct, Your Honor. So we are
7 kind of in parallel universes.

8 THE COURT: Oh, yes, and so let's not go in
9 circles on this.

10 MR. ZIMMERMAN: Right.

11 THE COURT: That's why it is so important. And I
12 am going to charge the special masters to really bear down
13 on this narrowing process because that's the court's next
14 major ruling in this matter, whether or not you all want to
15 get involved in it or not.

16 It's so important so we can have those real cases
17 so we can do the analysis of what kind of case should be
18 tried and pick that case or cases and get those tried to
19 see whether or not they have any worth. That's so
20 important.

21 And we know that a certain percentage are going
22 to disappear, whatever that number is, it doesn't really
23 matter to me, but we are going to end up with a core group
24 of cases that are in dispute and we'll put those in
25 categories and go from there; and I want to do that as

1 quickly as possible.

2 MR. ZIMMERMAN: And, Your Honor, we support that
3 100 percent. And the fact of the matter is that we tried
4 to do this from different approaches and I think we are
5 now, with the narrowing ideas, coming to the approach that
6 I think is going to in a practical way get us to where we
7 are trying to get.

8 And I make no apologies to what we tried to do
9 through the random wheels and through the other ideas we've
10 come up with. It is what it is. We have done our best and
11 the results are where the results are. We have 27 cases
12 that we think are going to be viable coming out of that
13 original Minnesota 36 or whatever it was and the original
14 200.

15 But the fact of the matter is that if we
16 categorize through the narrowing and we do a really good
17 job at the narrowing, this idea of selecting appropriate
18 cases for trials in certain categories where we want to
19 find how juries respond to these cases will be a much
20 easier and much more efficient task than trying to do it
21 the way we've done it.

22 I make no apology for the false starts that we
23 have had. It's what has to happen when you are managing
24 massive amounts of litigation where you don't have direct
25 communication with the clients or with the cases. And so

1 that's the whole point of this, is I think we are now on
2 the right track to finding it and doing it and getting it
3 done.

4 And once again -- I didn't get a chance to speak
5 when Rob Jenner and Ken Suggs were before you on the case
6 that they think should be remanded, but I do think the
7 court sitting by designation is a terrific idea that can
8 help, where we have the court that has the most knowledge
9 and the most experience in dealing with this case for
10 two-plus years being able to perhaps sit by designation and
11 help the parties to try the case the way it needs to be
12 tried with experienced counsel, with people who are
13 familiar with the case and have justifiable cases to try.

14 THE COURT: Adam.

15 MR. HOEFLICH: Thank you, Judge. On the status
16 report the Plaintiffs' Steering Committee has stated that
17 the Pierce case is not prepared to be the first trial and
18 Mr. Zimmerman has explained the reasons from the
19 Plaintiffs' Steering Committee's point of view why it does
20 not want Pierce to be the first trial.

21 Our understanding was that the Pierce case was
22 being dismissed. I was not aware there was a mechanism
23 where one side or the other could unilaterally decide that
24 something was not the first trial while the case was still
25 out there and being prepared pursuant to schedule.

1 So I'm not sure exactly where that stands at this
2 point except that we'll continue to talk with
3 Mr. Zimmerman.

4 THE COURT: I just assumed -- my interpretation
5 of what was said was it was going to be dismissed.

6 MR. ZIMMERMAN: I can't make that representation.

7 THE COURT: You can't make it because you
8 still -- I think your papers said that you have to meet
9 with the client, but it's moving towards that end.

10 MR. HOEFLICH: Thank you, Judge. We agree with
11 the court, we agree completely with Mr. Zimmerman --

12 THE COURT: Otherwise, it is going to be tried.
13 It is not going to slip onto some back burner somewhere to
14 sit for a while, no. It's been named for a trial date and
15 so it's either going to go to trial or going to be
16 dismissed.

17 MR. HOEFLICH: That was our understanding as
18 well, Judge. We knew that depositions had been taken off
19 because we thought the case was dismissed. So we
20 appreciate that.

21 We do agree that a narrowing order of the court's
22 choosing is very important and we believe it's important
23 that it has requirements that would, in fact, narrow the
24 cases to the cases that the Plaintiffs' Steering Committee
25 believes are appropriate for trials in this court.

1 MR. MAGAZINER: Your Honor, because so many of us
2 are being pulled in so many different ways right now
3 because there is a lot of activity, I would appreciate the
4 court giving us some clarification on the status of Pierce
5 and what -- when are we going to learn that it's dismissed
6 or, if not, we would like to continue with the schedule
7 that the court laid out for Pierce, leading up to a trial
8 in June.

9 What I think we can't deal with is Mr. Zimmerman
10 saying it's not going to be presented to the court but he's
11 not dismissing it and then we find that there are deadlines
12 that Your Honor established which we don't know whether we
13 are supposed to meet or not meet because we don't know what
14 the status of the case is.

15 MR. ZIMMERMAN: Your Honor, I can only tell you
16 what I have said, is that I -- it's not my client. We have
17 recommended, the PSC has recommended to Mr. Pierce that his
18 case be pulled back and the consequence of pulling it back
19 is dismissal.

20 But Mr. Rick -- Shawn Raiter, that's his client.
21 He is not a member of the PSC, he is liaison counsel. We
22 have communicated this with him. He has to take this up
23 with his client and his client's family. They know the
24 consequences.

25 I am sure in a very short period of time, in a

1 matter of hours, if not days, this will be properly
2 communicated to the court.

3 But I cannot stand up here without the consent of
4 the client and the understanding that the client knows what
5 I am saying on his behalf and say, you know, I'm dismissing
6 the case. I don't have that power. It's not my client. I
7 understand that Mr. Raiter knows the consequences and knows
8 exactly what the court just said.

9 THE COURT: March 1st we have to have an answer
10 by 12:00 noon, otherwise the deadlines continue.

11 MR. MAGAZINER: Thank you, Your Honor. I
12 appreciate the clarification.

13 MS. WEBER: Your Honor, if I can briefly address
14 one other matter on this front. I think Bucky indicated we
15 were going to have argument on the Weitz motion. We
16 aren't. We've got the matter largely resolved, Your Honor.

17 We have signed stipulations from Weitz that just
18 came in this morning, if I can hand them up. It provides
19 for the dismissal with prejudice most of the Weitz cases
20 that have been in dispute.

21 There are a small number, I think about four of
22 them, that Ms. Maniatis has not been able to give us
23 stipulations on. We have an agreement that she will
24 resolve that within 20 days and let us know one way or
25 another.

1 There's also one other case that had a peculiar
2 problem attached to it, the Carpenter case. Mr. Carpenter
3 was a plaintiff in a multiplaintiff complaint, and actually
4 this highlights some of our concerns about the
5 multiplaintiff complaints, which continue.

6 We were told last fall that Weitz would not be
7 pursuing that case, but Weitz got its signals crossed,
8 apparently, because other plaintiffs in that case were
9 dismissed but Mr. Carpenter was not.

10 They recently advised us of their position on
11 that. Because we thought the case was dismissed -- or
12 going to be dismissed and out of the system for all these
13 months, we haven't been collecting medical records on it.

14 So we have an agreement that the Carpenter case
15 will not be dismissed, but that it will go out of the pool
16 for the deadline on Pretrial Order 89, that is, it will not
17 have an end of April discovery cutoff, if this is agreeable
18 to Your Honor.

19 THE COURT: It's agreeable.

20 MS. WEBER: Okay. Thank you.

21 THE COURT: Is that agreeable?

22 MS. MANIATIS: Yes. Everything that Susan has
23 said is correct. Thank you. That's agreeable with us.

24 THE COURT: Do I have to do an order on that or
25 is that fine?

1 MS. MANIATIS: I don't think so. We were
2 discussing it this morning and I think we came to adequate
3 terms with all that we needed to do. We just needed your
4 stamp of approval on that, if it was acceptable to the
5 court.

6 MS. WEBER: Your Honor, I will send Ms. Maniatis
7 a confirming letter tomorrow so we've got written
8 documentation.

9 MS. MANIATIS: That will be fine. Thank you.

10 THE COURT: Are you going to be setting new
11 deadlines for Carpenter? How are you going to be doing
12 that? Because otherwise then it just --

13 MS. WEBER: We really weren't quite sure what to
14 do with it, to tell the truth, Your Honor, because we
15 didn't know if there was going to be another wave of
16 discovery, what the deadline was going to be.

17 I think our inclination was to leave it in limbo
18 for the time being until we see what happens with the
19 narrowing order and how that impacts on it and then we can
20 go forward with it. It is going to be treated like any
21 other case in the MDL.

22 THE COURT: Let's put a tickler on this one so it
23 just doesn't limbo forever.

24 MS. MANIATIS: I think what we had done is we had
25 done as much as we could do to meet the PTO 89

1 requirements, but we understand that we put the defendants
2 in a backed-up position.

3 So my point was anything we could do to assist
4 them, we would. And anything we can do to work with a
5 deadline we would agree to because of the mistake we made.
6 Again, we're willing to do what you suggest for us to make
7 that happen because I understand it's an unusual situation.

8 MS. WEBER: For Your Honor's information, Vicky
9 and I were trying to go over the facts of the case. It
10 does not look like one that would be a prime early trial
11 candidate because it was filed in EDPA, so it raises the
12 Lexecon issues, but it was a California plaintiff, so
13 defendants would contend that EDPA was not the correct
14 venue for that case in any instance. So if the case would
15 actually get over the narrowing criteria, there would be
16 motion practice in conjunction with it.

17 THE COURT: Okay.

18 MR. ZIMMERMAN: Your Honor, I neglected to just
19 advise the court, as I normally do, of the number of
20 depositions taken and the number that are scheduled for the
21 record.

22 To date there have been 84 depositions completed
23 in the MDL: 50 of Bayer witnesses, 12 of Bayer AG
24 witnesses, 15 of GSK witnesses, and seven nonparty other
25 depositions.

1 There are eight expert -- defendant expert
2 depositions scheduled for deposition sittings between
3 February 24th and March 31st, and these are essentially the
4 GSK experts and the Bayer experts. So there are eight
5 expert depositions of defendants that are scheduled for the
6 approximately next 30 odd days.

7 That's just so you have an order of magnitude
8 idea.

9 THE COURT: Thank you.

10 MR. HOEFLICH: Your Honor, I believe those expert
11 depositions were scheduled in the context of PTO 96, which
12 dealt with the schedule for expert discovery in the Pierce
13 case. I don't believe we set forth a schedule or that the
14 court set forth a schedule for here's all generic discovery
15 for the MDL. We think it's a good opportunity to do that.

16 With the court's permission we would like to meet
17 and confer with the Plaintiffs' Steering Committee, discuss
18 setting forth a complete generic expert or case specific
19 expert schedule. We would like to meet and confer on that
20 and then present what the parties either agree or don't
21 agree on to the court in a more formalized fashion.

22 THE COURT: All right.

23 MR. HOPPER: Your Honor, may I --

24 MR. ZIMMERMAN: Randy has been handling the
25 experts.

1 THE COURT: Good morning, Mr. Hopper.

2 MR. HOPPER: Good morning, Your Honor. I will
3 definitely have to use the microphone.

4 We definitely do want to meet and confer, and
5 there is an issue over designation by defendants of certain
6 experts as having designated them pursuant to your order as
7 generic experts. There's an issue of them, as I have been
8 advised at least, of them wanting to pull those experts
9 back.

10 I think we can work it out, but if not we may
11 have to go to Magistrate Judge Lebedoff or a special
12 master, whomever Your Honor would designate for us, but it
13 is an issue, a point of contention at the moment.

14 THE COURT: Thank you.

15 MR. ZIMMERMAN: That brings us to D on the status
16 under "Discovery," Roman numeral III-D.

17 THE COURT: If that goes to motions, then it
18 should go to Chief Magistrate Judge Lebedoff for
19 resolution.

20 MR. HOEFLICH: Thank you, Judge.

21 MR. ZIMMERMAN: Recently the PSC has received
22 copies of proposals for settlement reached with certain
23 third party payers. These are insurance companies.

24 What we did, Your Honor, is that we advised
25 plaintiffs' counsel in a letter and through e-mails and

1 through our website that certain third party payers have
2 entered into settlements and so if certain individual
3 plaintiffs have settled and that insurance company is
4 involved, they may be entitled to a refund of that portion
5 of the holdback that has now been settled, that is, the
6 subrogation claim, or in the future if there's a settlement
7 involving that third party payer, that there need not be a
8 holdback because that third party payer and insurance
9 company is resolved and there's no further need for
10 withholding.

11 This is just information that I think is
12 important to people as they begin to look at these third
13 party payer settlements, that the names and the settlements
14 that have been reached are public information.

15 So I bring that out to Your Honor as information
16 as to what we are doing so that people who also read this
17 record understand that they need to watch the website of
18 the PSC and watch for the list of insurance companies that
19 have settled so there are no double recoveries or withholds
20 that don't need to occur.

21 We have more to talk about on third party payer
22 later in the agenda. I am not going to raise it now. This
23 is just on the discovery point of view.

24 Next is generic expert reports.

25 MR. HOEFLICH: I think we just addressed that.

1 MR. ZIMMERMAN: And I think we did just address
2 that, so we will move on. Would that also apply to F as
3 well?

4 MR. HOEFLICH: It would apply to F, but it would
5 not apply to G.

6 MR. ZIMMERMAN: All right. G is a matter of some
7 concern to the PSC. G is -- at the last conference or it
8 may have been at the conference before this we had
9 indicated to the court that we felt it was very important
10 for what we call a science and medicine tutorial, which
11 isn't the best of words, but that's what we have been
12 calling it, a presentation to the court of what the science
13 and medicine is saying on one side and what the science and
14 medicine is saying on another, be provided to the court so
15 we are not talking about this in abstractions and that the
16 court and all parties really understand a little bit about
17 the medicine when we are talking about what Bayer does --
18 what Baycol does in the system, what a muscle injury is,
19 what it looks like, et cetera, et cetera.

20 And we have begun to prepare for that and
21 recently we had a conference where the experts were brought
22 together to start preparing for that and we did some
23 videotaping of their presentations to the court, for the
24 court.

25 Defendants through some -- during depositions saw

1 a document that one of the experts had, which was the
2 instructions on where this was taking place and, you know,
3 where the expert was supposed to be for his -- for this
4 meeting with the other experts and with counsel, and now
5 defendants are making a motion that they want copies of all
6 the videotapes or all of the -- all of the taping that was
7 done at this conference.

8 We object to that and we want the court to know
9 that this is bubbling up into a concern that's going to be
10 brought before the court probably with some -- for some
11 motion practice. We have yet to respond formally to this
12 request. It just occurred. The conference was just last
13 week in Miami.

14 But it's not the kind of thing that we expect to
15 be the subject of discovery, when we are preparing
16 something for the court pursuant to a disclosure that we
17 made to the court, I think, about 30 or 60 days ago.

18 But it is going to become the subject of some
19 disagreement and dispute, whether or not this is the type
20 of thing that has to be exchanged between counsel. We
21 consider it work product. We consider it confidential
22 information. They somehow think it's important for them to
23 review.

24 And so this issue isn't joined at this point.
25 It's bubbled up into a concern that I wanted to tell the

1 court about because it's part and parcel of what I told the
2 court last time and I believe the court supported
3 wholeheartedly, which was a presentation of both sides'
4 science so that we could have a better understanding of the
5 mechanisms of injury, if you will, that were brought about
6 by Baycol.

7 MR. HOEFLICH: Your Honor, when a plaintiff's
8 lawyer has a conversation of any sort with a testifying
9 expert whom they've paid and retained to give testimony at
10 trial, the opposing counsel is entitled to discovery of
11 those communications. That's textbook law that all
12 practicing counsel know.

13 We are now in a situation where the plaintiffs
14 have taken the position that conversations they have with
15 experts in hallways, during breaks over lunch, that
16 conferences that they're having where they videotape their
17 experts are work product.

18 Well, once you put your expert up to testify,
19 that's not a consulting expert and the other side is
20 entitled to discovery on what communications you have with
21 them. The PSC is taking a different position, and we
22 disagree.

23 And we are going to -- if they tell us, as
24 Mr. Zimmerman is suggesting, that we are not entitled to
25 that discovery or they take the position that the work of

1 their experts is their work product or that there's a
2 privilege that applies, as I guess they have taken the
3 position in depositions, we will be filing a motion to
4 compel on that.

5 THE COURT: Okay.

6 MR. MAGAZINER: Your Honor, just because we have
7 gone to the end of the agenda, before we get to motions I
8 thought I would come back to the question Your Honor asked
9 earlier, because I have received information from
10 Philadelphia in the conference on the Rushton case, which
11 is due to start Monday. The court has said it expects it
12 to be a four week trial.

13 THE COURT: This tutorial to the court is
14 becoming more complicated than I expected it to be. I
15 thought you all would just meet and have the appropriate
16 exchange of whatever it is that I am supposed to see.
17 That's usually how it's done.

18 MR. HOEFLICH: We did too, Judge.

19 THE COURT: In patent cases it's just a basic
20 outline. I don't know where you are going with this. I
21 just don't want it to be -- get too complicated and that I
22 end up having a couple dozen motions dealing with this
23 issue, because it's just easier for me to try the case. I
24 can listen to the testimony at that point. I thought you
25 were just going to put something together quickly and it

1 would be --

2 MR. ZIMMERMAN: That's precisely what we wanted
3 to do. All we did was we got the experts to tell us what
4 they are going to say so we know what they are going to
5 say, and we are happy to provide what they are going to say
6 to defense counsel. There's no mystery to it. It's just
7 all of a sudden it's been elevated into some you must turn
8 this over kind of stuff. We will talk it through.

9 THE COURT: Yeah, talk about it. Are we going to
10 move into motions at this time?

11 MR. ZIMMERMAN: Yes, Your Honor.

12 THE COURT: All right. Let's take a short
13 recess. Which motion do we want to take up first?

14 MR. ZIMMERMAN: Well, I suspect the one that's
15 probably the most -- perhaps the jurisdiction over the --
16 well, the jurisdiction over Medicare liens. Let me think
17 if -- well, I don't know. I don't know that there's any
18 proper way to do it. Maybe the Italian motion because we
19 have counsel here from out of town. Maybe just in the
20 order that we've got it.

21 THE COURT: But we have counsel from out of town
22 for the Medicare lien too, I believe.

23 MR. ZIMMERMAN: Oh, I didn't know that. I'm
24 sorry. I thought we just had --

25 MS. BURDETTE: Yes, Your Honor.

1 THE COURT: Let's get set up for the Medicare
2 lien and then we will do the Italian prosecutor matter
3 right after that.

4 MR. ZIMMERMAN: Because now 4 is -- we have
5 heard argument on 4.

6 THE COURT: 4 we took care of.

7 MR. ZIMMERMAN: And 3 has been taken care of.

8 THE COURT: 3 has been taken care of. And the
9 other two have been briefed, but you didn't seek arguments
10 on those --

11 MR. ZIMMERMAN: Right.

12 THE COURT: -- except there's the motion to quash
13 the third party payer attorney's lien.

14 MR. SCHOON: I wonder if we could hear that at
15 about the same time as we do the Medicare lien because they
16 are somewhat related because it relates to healthcare.

17 THE COURT: All right. And then we can end up
18 with 102 and Lone Pine. How does that sound? Let's take a
19 15-minute break, 15 minutes.

20 (Recess.)

21 THE COURT: Let's deal with the Medicare.

22 MR. GOLDSER: Good morning, Your Honor. Ron
23 Goldser for the PSC.

24 THE COURT: Good morning.

25 MR. GOLDSER: I will present the PSC's

1 perspective on this and then I would like to defer to
2 Mr. Stanley on behalf of the Medalie action, and with the
3 court's permission we will both present first before any of
4 the other parties present.

5 The position I would like to have on this issue
6 right now is that of Yente, the matchmaker in Fiddler on
7 the Roof. I would like to bring Bayer and GSK on the one
8 hand and the United States Government and Medicare on the
9 other hand together so that they can solve a problem that
10 exists for all of the plaintiffs in this litigation.

11 And that problem has surfaced over and over
12 again, we have raised it many times, about how difficult it
13 is to get cases resolved. We can agree on a settlement
14 number with Bayer, but we have to deal with the set-aside
15 for Medicare.

16 Indeed, complete relief cannot happen on any
17 settlement in the absence of the United States Government,
18 and it's funny that those words should come to my lips
19 because those are the words that appear in Rule 19(a),
20 which talks about joinder of parties. Without the United
21 States Government involved, complete relief cannot happen.
22 Our proposed method of bringing the United States before
23 this court is Rule 19, joinder.

24 The goal, Your Honor, is to get Bayer and
25 Medicare to talk to each other to resolve the amount of

1 money that Bayer is obligated, if any, to pay to Medicare
2 and to do it directly between themselves.

3 There's a model for this already because Bayer
4 has entered into a settlement with some of the third party
5 payer private insurance carriers. There's no reason why a
6 similar negotiation and result cannot be achieved with
7 Medicare.

8 We've had some very preliminary discussions.
9 Special Master Haydock has convened the group. The United
10 States Attorney was present, Mr. Stanley on behalf of
11 Medalie, Bayer, GSK, PSC. We have talked, but we are not
12 anywhere close to even starting to figure out a way to get
13 something to happen and it would be very helpful from
14 plaintiffs' point of view if the court were to have the
15 authority to move this process along more swiftly.

16 The United States Government has taken a position
17 that they get to sit back and watch and wait and have
18 everybody come to them and make us exhaust the
19 administrative remedy process. That's the veil behind
20 which they hide at this point in time.

21 But the reality is it's the government's claim.
22 The government needs to come forward and assert their
23 claim. It is the obligation of each and every plaintiff to
24 protect that claim, and the Medalie case has brought forth
25 the action on behalf of the United States Government.

1 The government has been brought kicking and
2 screaming to the table, where they are the ones who are
3 going to get paid. That doesn't make a whole lot of sense
4 and that position has created a vast impediment in 2,179
5 lawsuits or something less than that because Medicare
6 hasn't been in every case. So our desire is to get the
7 United States into this litigation as a party.

8 When we first filed this motion the state of the
9 law was a little different then than now. Our belief was
10 that, under the holding in Thompson vs. Goetzmann out of
11 the Fifth Circuit, that the United States was not entitled
12 to a lien under the Medicare Secondary Payers Act.

13 That's now been clarified by an amendment of
14 Congress. The United States Government is entitled to
15 assert their rights. And what we want to be able to do is
16 to make them assert their rights so that it doesn't fall on
17 the shoulders of each and every plaintiff to go to the
18 United States to do that.

19 We think joinder under Rule 19(a) is one way of
20 doing it. The Medalie action is the other way of doing it.
21 And the United States says, well, you can't do that because
22 we've got to exhaust the administrative process first.

23 Well, we don't need -- we are not in contention
24 with the United States over any of these lien questions.
25 It's not a battle between any given plaintiff and the

1 United States about how much is owed. It's the United
2 States coming forward and staking their claim and asserting
3 how much is owed. They need to be a plaintiff.

4 They are not a defendant. They don't need to be
5 a defendant. We don't want to make them a defendant. And
6 as such the whole question of sovereign immunity, which
7 they raise, is really not germane to this question because
8 we're not suing the United States. Bayer is not suing the
9 United States. Nobody is suing the United States. The
10 U.S. is a plaintiff.

11 Along the very same lines, the question of
12 exhaustion of administrative remedies is a red herring on
13 this argument. All the United States has to do is come
14 forward and assert the full value of the claim that they've
15 got. It will then be up to the litigation between the
16 United States and Bayer and GSK to determine how much is
17 the reasonable value of that claim.

18 But there is no requirement to go through an
19 exhaustion of administrative remedies for the United States
20 to assert the full value of its claim, and that's all we
21 ask them to do.

22 Ultimately what I would like to see is over in
23 that corner Bayer and the U.S. talking about how to resolve
24 the case while the individual plaintiffs can settle their
25 cases, sign a release that will go from five pages down to

1 probably two, get their cases resolved, get their
2 settlements paid and not have to worry about dealing with
3 how much is the Medicare lien, how do you withhold it, what
4 happens if you don't withhold the right amount, what
5 happens if the U.S. comes back five years from now and
6 reasserts a claim, which they continue to reserve in their
7 letters telling us how much they'll settle their claims
8 for, and so that we plaintiffs can go on our way, settle
9 our cases.

10 I believe that the sovereign immunity issue that
11 the United States hides behind is inappropriate not only
12 because they are not a defendant but rather they are a
13 plaintiff, but all the more particularly because both MSP
14 and MCRA give permission for the United States to act as a
15 plaintiff. I believe the legislation itself suggests that
16 sovereign immunity is waived when the United States is
17 acting as a plaintiff under MCRA and MSP.

18 And finally, the one case that I found that
19 really talked about this issue under Rule 19 at all, Caprio
20 vs. Wilson out of the Ninth Circuit, talks about
21 Rule 19 joining an involuntary plaintiff when the party
22 sought to be joined has a duty to allow plaintiff to use
23 his name in the action.

24 Indeed, not only is it that circumstance, the
25 plaintiffs and plaintiffs' lawyers and Bayer and everybody

1 else who is a party to this action not only has a duty,
2 they are penalized if we don't protect the United States'
3 interest. There is a two times penalty that we pay if we
4 don't do it and do it right.

5 There is a duty to protect the United States
6 under Rule 19 and that makes it all the stronger a reason
7 for them to be joined as a party in all of the individual
8 lawsuits.

9 Now, Rule 19 is the vehicle that the PSC is
10 suggesting as the mechanism to get the United States into
11 this case. Mr. Stanley on behalf of the Medalie action has
12 another vehicle. I will let him speak to that.

13 This court can act on either one or both of those
14 prongs, but at the end of the day we'd like the United
15 States in this courtroom so that we can talk to them and
16 get them to talk to Bayer and figure out how to resolve the
17 problem. That's what we would like.

18 THE COURT: A question of -- the government is
19 probably going to say, well, we never know what the -- we
20 will never know what to assert as the full value of the
21 claim because there may be other medical bills coming
22 through. So how do you respond to that?

23 MR. GOLDSER: I think I am going to defer to
24 Mr. Stanley on that because I know that as part of the
25 Medalie action they have talked about various methods of

1 modeling to figure out how that kind of question can be
2 answered.

3 I know that such models exist. I'm not an expert
4 on them. I have seen them done in third party payer
5 litigation or I have heard about them being done in third
6 party payer litigation before and I believe that's the
7 mechanism that gets used, but I don't know how to do that.

8 THE COURT: Thank you very much.

9 MR. GOLDSER: Thanks.

10 THE COURT: Good afternoon.

11 MR. STANLEY: Good afternoon, Your Honor. Dave
12 Stanley. I represent Rick Medalie.

13 THE COURT: Thank you for coming the distance.

14 MR. STANLEY: Always happy to come here. It's
15 warmer than I expected, very pleasant.

16 THE COURT: In the skyway anyway.

17 MR. STANLEY: Your Honor, our position is the
18 government is really already before the court because Rick
19 Medalie stands in the shoes of Medicare.

20 But we agree with the PSC that it would be nice
21 if the Department of Justice, representing the government,
22 were also here. I think it would make things a lot
23 cleaner, clearer, and more certain if that were to happen.
24 And I think the Rule 19 idea is a creative one to deal with
25 that and we agree with the PSC on that and we commend that

1 to Your Honor.

2 But having said that, if the court doesn't feel
3 that that's the way to go, we're still here. We still
4 maintain that we represent Medicare's interest. I don't
5 think Bayer and GSK are willing to talk to us about that
6 now, but there may come a time when they will be and we
7 don't plan to go away.

8 Your Honor raised the question of how a certain
9 amount could be arrived at. Obviously it's going to
10 require some sort of modeling. The government itself has
11 suggested that they would be willing to enter into a global
12 settlement outside of the court which would -- if not a
13 similar process, would at least be an analogous process.

14 I mean, there's going to have to be a way of
15 estimating what the total amount is; and whether it's done
16 by the government and us or simply by us, we think it can
17 be done. I don't know that now is the time to do it and I
18 am certainly not prepared to tell you in great detail how
19 we would do that, but we think it can be done. So I --

20 THE COURT: Can you opine on why the government
21 talks about outside of the court for a global settlement
22 and not wanting to come in and be a party here?

23 MR. STANLEY: Why they don't want to come in?

24 THE COURT: Yeah.

25 MR. STANLEY: I wouldn't want to speculate on the

1 government's --

2 THE COURT: I am giving you a chance to opine on
3 this issue.

4 MR. STANLEY: I wouldn't want to speculate on
5 their motives. I am sure they think it's easier that way
6 and they can deal without having to deal with the court,
7 but I think they run a risk by doing that because we're
8 here and we think the law allows us to represent Medicare.

9 Now, I certainly concede that Congress has
10 written better and clearer laws than the MSP, but we think
11 it does grant us the right to represent Medicare.

12 This may be clarified, I should add, if the court
13 accepts certiorari in the Mason case from the Second
14 Circuit, but I am not a Supreme Court litigator. I can't
15 speculate on whether they will and if they do when we would
16 get a decision out of them, but that certainly has the
17 potential for clarifying this private right of action under
18 the MSP.

19 THE COURT: Thank you very much.

20 MR. SCHOON: Good afternoon, Your Honor. Gene
21 Schoon. Again, I am going to presume that I can speak
22 next, but I don't want to take away the government's
23 position here.

24 THE COURT: You may.

25 MR. SCHOON: And I appreciate Ron Goldser would

1 like to make -- would like to play the matchmaker here
2 between Bayer and the government.

3 The problem is that we -- I have been talking to
4 the government, Bayer has been talking to the government
5 about Medicare issues for some time. We first learned of
6 this issue probably a little less than a year ago and at
7 that time we began talking to the plaintiffs and eventually
8 reached out and spoke to the government about this as well.

9 What we're running into, however, is that in
10 speaking to the government, it doesn't look like we have a
11 problem with the government. What we're doing in the
12 settlement program seems to be working and seems to be
13 satisfying what the government's concerns are, and I will
14 let them speak for themselves on this.

15 But the goal here is to make sure that we can
16 settle cases and that Bayer is not exposed to any
17 additional liability once we do settle a case. So, yes,
18 we, in fact, do require the plaintiffs who are covered by
19 Medicare to set aside a sum of money to cover any claims
20 that Medicare may have and then to go out and resolve their
21 claims with the government so that that issue gets
22 resolved.

23 It seems to be working in that you heard the
24 report earlier today of 2,179 cases being settled. Now,
25 obviously they are not all Medicare. I don't even know if

1 it's a majority. But I also heard that there may be a
2 couple hundred, a few hundred left of rhabdo.

3 Now, if you look at this just purely from a
4 practical, pragmatic standpoint, if you've got a few
5 hundred rhabdo cases left and you listen to what the
6 government would have to do in order to try to reach a
7 global resolution as the PSC proposes it here, we would
8 undertake some kind of modeling exercise, we would
9 undertake some massive review of records, we would be
10 spending a whole lot of energy in trying to come up with
11 some estimation of future claims.

12 So you have that solution over here on the one
13 hand. On the other hand, you have a few hundred cases,
14 maybe some of which are in this court, some of which are in
15 other courts and elsewhere.

16 Their other solution is, well, why don't we join
17 the government as a party plaintiff in those cases. That
18 doesn't seem to us to be a practical solution either. In
19 effect you only have the government at the table because
20 Bayer is making sure that when these cases are settled,
21 where there are medical claims, that its interests are
22 being taken care of.

23 So I guess our bottom line is that while we think
24 it might be nice if we had a global resolution and the
25 plaintiffs have a vision for that, we don't have it, but we

1 do have a working understanding with the government as to
2 how its claims are going to be resolved.

3 And, again, I will let them speak to it, but I
4 know we have been on conference calls with Special Master
5 Haydock in which the government has explained and put this
6 in writing as well, how plaintiffs are to go about
7 resolving any Medicare claims they may have with the
8 government; and there's a specific procedure.

9 Mary Tripler from the U.S. Attorney's Office here
10 has indicated several times that she is available if
11 plaintiffs have followed that procedure and the claim
12 cannot be resolved. To my knowledge, I haven't heard --

13 THE COURT: No one has gone to her.

14 MR. SCHOON: To my knowledge, no, Your Honor. So
15 what it is is we've got a solution that's being proposed
16 here that's really in search of a problem that we haven't
17 yet found.

18 So for that reason, Your Honor, alone we believe
19 that the motion should be granted. With regard to
20 everything else, we will rest on our papers.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Good afternoon.

24 MS. TRIPLER: Good afternoon, Your Honor. Mary
25 Tripler from the U.S. Attorney's Office.

1 THE COURT: I appreciate you coming.

2 MS. TRIPLER: Thank you. And I am here to
3 introduce Cathy Burdette. She is from the Department of
4 Justice, the civil division commercial litigation branch.
5 Cathy routinely works with Medicare issues and so she's
6 coming in this morning or this afternoon to address the
7 motions. Thank you, Your Honor.

8 THE COURT: Welcome and thank you for appearing.

9 MR. BURDETTE: Thank you for having us. Cathy
10 Burdette for the United States. We are glad to be here.

11 We were glad to submit our brief to you because
12 we think any time we can try to provide some enlightenment
13 on these statutes, which are, I'm sure as everyone
14 believes, complex and a pain to have to try to go through
15 to figure out how the regulations affect particular
16 statutory provisions, it's good to have people who -- you
17 know, for instance, it's our job to enforce these statutes.
18 We are familiar with them. We work with our client CMS,
19 the Center for Medicare and Medicaid Services. And we
20 think it's helpful to have that viewpoint provided to the
21 court and to the parties.

22 I think as counsel for Bayer indicated, we have
23 been involved in this case. We are not a party, but we
24 have been involved. We were invited to participate with
25 the special master. We have done that. We are offering

1 what we believe are very constructive solutions on a global
2 scale if that wants to be pursued, if the parties want to
3 pursue that.

4 Also, I think it should be kept in mind, because
5 it is the procedure provided in the statute, there is an
6 elaborate, elaborately set forth administrative process
7 that provides any plaintiff that wants to challenge their
8 Medicare overpayment, as it's called, all they need to do
9 is to follow that process.

10 As far as we know -- I don't know if some have or
11 not, but I do know that Ms. Tripler made the offer at the
12 settlement conference, If any of you are having problems,
13 unnecessary delays, problems getting contractors to get
14 back to you, let me know and I will talk to CMS and we will
15 try and get those moving. She was contacted by one
16 attorney. When she asked them to fax her the materials
17 that they had provided, they never did it.

18 So, I mean, it is odd to me that parties are
19 standing here telling you we need to be made a party when
20 there's a statutory scheme out there which they are
21 complied -- they need to comply with and the solution is
22 right there for them, but they don't seem to want to make
23 the effort to resolve the claims.

24 I mean, evidently some of these claims have been
25 resolved as much as two years ago. These people could have

1 been out of the administrative process by now, know what
2 their claim is, have all their money. Instead what I hear
3 is, you know, well, please help us, let us do it the easy
4 way, make the United States a party even though, you know,
5 they shouldn't be here.

6 I mean, it seems to me they are asking for the
7 easy solution instead of the correct solution, and I would
8 like to obviously talk about why we don't think joining us
9 is a correct solution.

10 THE COURT: All right.

11 MR. BURDETTE: I did want to address one other
12 thing. You had asked how you would account for injuries in
13 the future. I wanted to respond to that.

14 Medicare does -- if they enter into a global
15 settlement or even if they enter into a settlement with a
16 person who has some, for instance, claims now, let's say
17 they have already settled, okay, but in the future they
18 have continuing problems from, let's say, the drug that
19 they settled for, Medicare would pay those future medicals
20 if they had already settled individually through the
21 administrative process with those people is my
22 understanding.

23 However, when they enter into a global settlement
24 they try to take into account the future medicals, they try
25 to assess some value to it, and then for each person some

1 value is given to the possibility of future medicals. So
2 that is addressed.

3 You know, we have invited the parties to help us
4 think of a way to do this, to participate in any sampling
5 that we do, to verify the sampling of our -- of determining
6 what constitutes our Medicare overpayment.

7 And the other point I would like to respond to
8 just before I get started is, you know, when the plaintiffs
9 stand up here and say why doesn't Medicare come in and
10 assert their claim, we can't.

11 We do not know of these people who are
12 settling -- first of all, we don't know anyone who is
13 settling. I mean, maybe individual people have contacted a
14 contractor here and there, but we do not know the names of
15 the people in the settlement who have settled. We do not
16 know the names of the people who are even in this case, who
17 have asserted claims in this MDL.

18 There's a very simple way to solve that, however.
19 And this is a situation we are in in every litigation. We
20 never know going in who our beneficiaries are. They have
21 to identify themselves. That's incumbent upon them under
22 the statute.

23 When they get the Medicare benefits they realize
24 they have to -- I mean, they are supposed to know this,
25 that they are under an obligation to let us know if they

1 get paid again, you know, by the insurance company that
2 should have paid ideally right away, but we pay right away
3 to accommodate our beneficiaries.

4 So we are always in need of the names of the
5 people so that we can do a quick run and tell you right
6 away how many beneficiaries are even at issue. Before we
7 would even start to identify the amount of the claims we
8 could tell you right away, okay, you have, what, 9,000
9 people here, you know, typical ratio is that 10 percent of
10 that population may be Medicare.

11 Now, it depends on some claims. That 10 percent
12 is usually people over 62. If you have a class that
13 involves an unusually high amount of disabled people, that
14 will, you know, raise that level because disabled people
15 obviously are considered to be -- they receive Medicare, so
16 that might raise the level a little bit. So we can't
17 predict it and we have no way of knowing until we can get
18 that information.

19 All right. Obviously we submitted our brief to
20 you and we have a fundamental disagreement here with the
21 plaintiffs on whether we should be made a party.

22 I'm sure you're familiar with the statutes that
23 provide that the Attorney General makes the decision as to
24 what suits the United States will get involved in. It's
25 discretionary for the Attorney General and -- even though,

1 you know, they say the Attorney General, obviously in the
2 Justice Department we operate under the direction of the
3 Attorney General.

4 For all intents and purposes here the Attorney
5 General has made a decision that at least as of this time
6 that we are not going to initiate suit in this matter, and
7 that is in his discretion and that is something that has to
8 be respected under federal statute.

9 We have sovereign immunity. We cannot be made a
10 defendant. To back door this and try to make us an
11 involuntary plaintiff is in essence saying, well, we don't
12 care -- in essence what it is is giving a federal civil
13 procedure rule precedence over statute, because the statute
14 says only the Attorney General shall determine whether we
15 initiate suit.

16 And if you are going to say, well, no, under
17 Rule 19(a) any court can decide whether you are going to be
18 made a plaintiff, then you are completely end running that
19 statutory provision and it might as well not even be in the
20 U.S. Code.

21 In this instance what the United States is trying
22 to do is resolve this claim -- these claims, individual
23 claims, and we've chosen to do that without being a party.

24 And while that might come -- you know, while
25 these plaintiffs might think, my gosh, how can you do that,

1 my response to that is if the United States had to sue or
2 sued every single time it was trying to recover Medicare
3 overpayments, we would have to devote the jobs of the
4 entire Justice Department to just that job because that's
5 how huge the Medicare program is.

6 We cannot go in and sue in every instance. It
7 would just be a tremendous administrative burden. There's
8 no way we could do that.

9 We are hoping to try to resolve this because both
10 sides have admitted they have known about these Medicare
11 claims since long ago, like a year ago perhaps, or they
12 should know. Even as plaintiffs' lawyers, any time you get
13 a settlement you deal with the third party insurers and if
14 there's Medicare you have to deal with that. There's not a
15 lot of difference except we're a federal agency.

16 But I find it interesting that they accept so
17 calmly the fact that Bayer is talking to the third party
18 insurers and that's fine, they don't have to be brought in,
19 but, oh, Medicare has to be brought in. That doesn't make
20 a whole lot of sense.

21 In both instances things have to be held back
22 from the settlements because they are owed to someone who
23 already paid the money on behalf of these beneficiaries.
24 It just so happens that ours is written down in a statute
25 obviously and has a rather elaborate and complex scheme to

1 it.

2 So in response to, for instance, the PSC's
3 memorandum where they said that they thought that we were
4 not -- we did not have a voice on these issues, I would
5 submit to you that we do have a voice on these issues. I
6 think the special master has been pleased with our
7 cooperation. We have attempted to do everything we can.

8 The only reason we are not addressing settlement
9 directly with Medicare right now is at the parties' request
10 because they are focusing on the third party insurers right
11 now. They want to try to get that done first, that's what
12 they told us, and then they were going to turn to try to
13 negotiate with Medicare.

14 So we are waiting. We are not saying we won't
15 help. We are just waiting to get, you know -- until the
16 issue can be brought to us. So we are not on the sidelines
17 ignoring what's going on. We are absolutely trying to
18 resolve this.

19 If it's possible to do a global settlement, we
20 would welcome that. It's not always possible. There's a
21 lot of things individual plaintiffs give up in a global
22 settlement that they may not be willing to give up and, you
23 know, the defendant might have to give something up and
24 sometimes you can't reach agreement on a global settlement.

25 And in that case, then the administrative process has to

1 just run its course with each claim. That's what the law
2 is set up to do.

3 That's what every Medicare beneficiary in this
4 country has to do when their insurance company doesn't pay,
5 Medicare pays, and then they get reimbursed again from
6 their insurance company.

7 They are supposed to, you know, then go to
8 Medicare and they are supposed to figure out exactly what
9 the overpayment was and that money is returned to the
10 Medicare Trust Fund. That's the whole purpose of the
11 Medicare Secondary Payer statute.

12 I mean, the government is losing billions of
13 dollars every year because of these overpayments that are
14 never given back to the Medicare Trust Fund.

15 Okay. I thought I might just try to address some
16 points in our thing and then address the PSC's motion. The
17 first thing I would like to clarify is that we do not have
18 a lien. That is an incorrect term. It is not called a
19 lien. It is a claim for overpayment of Medicare payments,
20 I guess. It's not a lien in any way. It's never referred
21 to that way in the statutes at all. So it would be good if
22 we don't refer to it that way, because it has a certain
23 meaning, as I am sure you know, when you say the word
24 "lien."

25 We have outlined in our brief what we believe the

1 law is. We don't believe, obviously, that there's personal
2 jurisdiction here because of sovereign immunity and we
3 don't believe there's subject matter jurisdiction because
4 of the statute, which provides very clearly that there can
5 be no action in federal court until the administrative
6 process is exhausted.

7 And I did want to add that we didn't have a lot
8 of Eighth Circuit law in our brief and I just wanted to
9 apprise the court that the Eighth Circuit does follow this
10 widely-held doctrine, which obviously is backed up by
11 several Supreme Court decisions in most circuits around the
12 country, as far as jurisdiction goes. I mean, that's what
13 we are talking about right now.

14 But the Eighth Circuit has found certain
15 exceptions as well to the requirement that you have to
16 exhaust your administrative remedies. However, those
17 exceptions go to situations where, in effect, there is no
18 review.

19 For instance, suppose you're not a beneficiary
20 but you're a, I don't know, third party payer. And there
21 is no administrative process, for instance, for a third
22 party payer. It's really just set up for the beneficiary.

23 So they would argue, well, we don't think it's
24 right what Medicare -- you know, they have collected too
25 much money from us or whatever the problem would be between

1 Medicare and a third party beneficiary -- I mean a third
2 party payer. In that situation the court might see that
3 there is no review available.

4 That's the kind of situation that there are
5 exceptions found in the Eighth Circuit and probably in
6 other circuits as well, but certainly not when the dispute
7 involves the payment of benefits.

8 And that's exactly squarely what this dispute
9 involves. It involves payment of Medicare benefits and
10 this overpayment of Medicare benefits and whether -- and
11 how that's going to be resolved. That's what this dispute
12 is.

13 Let's see. I think as Bayer counsel mentioned, I
14 don't know if I said this, but we are -- the United States
15 is very encouraged and pleased, in fact, that Bayer is
16 withholding amounts in each settlement because that is a
17 recognition obviously by Bayer that Medicare is owed money.
18 Obviously the plaintiffs had to agree to that or there
19 wouldn't have been a settlement, that the money would be
20 withheld.

21 And that's a great way to do it because the money
22 is there and it's going to spare these plaintiffs from
23 having to -- you know, they don't have it, so they are not
24 going to have to find it again to give it back, which can
25 be very, very hard for these plaintiffs because many of

1 them are not flush in money, obviously, and it can be very
2 much of a burden to them.

3 I also would disagree with the PSC's view that we
4 don't have a voice. I mentioned that before. But they
5 seem to think that there is no difference between having a
6 voice and being a party, and we would disagree with that.
7 We think that we do have a voice here in trying to resolve
8 this, but we are not a party.

9 And I don't think that means we are trying to end
10 run the court. I don't think that means that we are not
11 sincere. It simply means that the Attorney General has
12 made the decision in this case that we are not going to
13 initiate suit and that we are choosing to resolve this
14 conflict through other means, and that is certainly the
15 United States' right to do that.

16 And I think I did mention before obviously we
17 don't initiate suit every time we do this, every time the
18 United States tries to recover these monies.

19 You know, it is -- I am always struck by when I
20 come into court on these cases how the parties act so
21 surprised and upset that Medicare is seeking its money that
22 it's owed under the federal statute. And I think, well,
23 you know, the IRS doesn't have to come to you and tell you
24 you have to pay taxes.

25 I mean, there are a lot of federal statutes every

1 day that citizens of the United States have to abide by and
2 we don't have to come initiate suit every time we want
3 someone to comply with that.

4 And so I don't understand, really, why this is
5 such a -- looked at as such a pained thing, as such a --
6 almost like a terrible entity that we are coming in and
7 asking for the money that should be returned to the trust
8 fund.

9 As a taxpayer I am proud to be here asking for
10 that money to be returned so that my children can have
11 Medicare when they get older, or else we are not going to
12 have a Medicare Trust Fund.

13 So I also -- the United States takes great issue
14 with the statements by the PSC that somehow this court has
15 jurisdiction over the United States because of the Medalie
16 complaint in this action.

17 I don't want to leave any doubt with this court
18 on this issue. The United States is represented by the
19 Justice Department and Medicare is represented by the
20 Justice Department. They are not represented by a private
21 party pursuing a private party action on behalf of one
22 plaintiff in this case. The private cause of action does
23 not give them the banner to carry the name of the United
24 States in their case, and I just think that should be made
25 plain.

1 Also, even if the court should find that they
2 could somehow make the United States a party in this
3 action, it would not solve the subject matter jurisdiction
4 problem in this case. And while I think the personal
5 jurisdiction problem is a huge problem, I just thought I
6 would mention that because that is, obviously, very
7 serious.

8 Just because we are a party to this case doesn't
9 mean that you have, you know, as an Article III court,
10 jurisdiction over the subject matter here that's been very,
11 very, I want to say, exactly specified by a statute that is
12 pretty clear and has been interpreted by a lot of circuits
13 and the Supreme Court and really offers not very much
14 wiggle room, if any at all, as to subject matter
15 jurisdiction.

16 I just want to make sure I cover my points here.
17 I also noted -- obviously I have been sitting here during
18 this hearing and I noted that the PSC hopes to have this
19 case resolved in a year. And quite frankly, that's
20 ridiculous if they were going to try to join the United
21 States as a party in every single underlying action. I
22 don't understand how those two things can be on the same
23 track.

24 I mean, not that -- I am just offering that as a
25 point of view. Because if Your Honor is intent on trying

1 to resolve this case, there could be nothing that would
2 streamline this case about joining the United States.

3 You know, we're here to resolve this case and
4 joining us isn't going to make us settle the case. We are
5 either going to settle it because we think it's a good
6 settlement for all parties and we are going to agree or we
7 are not going to settle and they are going to have to
8 pursue their administrative process.

9 Even if we were a party, we would be under no
10 obligation to settle this case. So it would not speed up
11 any kind of resolution, that's for sure, and I think it
12 would just, obviously, unnecessarily complicate it.

13 Okay. I will just mention this. I don't want to
14 necessarily go into a lot of detail about this today
15 because I know it's not really on the agenda, but these
16 Medicare overpayments, this is a very, very complex issue.

17 We agree very often to file briefs in courts on
18 this issue because we think it's useful because not very
19 many people are going to sit there and dig through the
20 statutes, the regulations, and the legislative history to
21 figure out exactly what is going on. It's a difficult
22 process.

23 We have been involved in this case. I know Mary
24 Tripler has been involved since at least May as far as
25 talking to the parties. As, I think, by the own parties'

1 admission, they were aware of Medicare claims in this case
2 early on.

3 Therefore, it draws into serious question whether
4 the Medalie complaint has any validity here at all because
5 there is not going to be a -- there is no argument by which
6 they could assert, they somehow can assert the United
7 States' rights without the United States' permission,
8 obviously.

9 And I think it's kind of a twisted use of the
10 private party litigant provision, which ideally would be
11 suited to revealing a situation -- for instance, let's say
12 a Medicare beneficiary had had a serious surgery or
13 something and Medicare paid for it and then their insurance
14 company paid again for it and Medicare had no idea about
15 that payment. That's the situation where a private
16 litigant action can bring to light that Medicare
17 overpayment and really help out the Medicare Trust Fund.

18 The United States in this case does not need a
19 private litigant to bring to light the overpayments made.
20 We are well aware of them. We have been involved here.
21 This is not the situation that is contemplated with that
22 cause of action.

23 Having said that, I know that's not an issue that
24 obviously you are going to resolve today, but I just wanted
25 to let you be aware of the United States' view on that.

1 Do you have any questions that you wanted to --

2 THE COURT: I think you have been very clear on
3 the government's position.

4 MR. BURDETTE: All right. Thank you.

5 THE COURT: Mr. Goldser.

6 MR. GOLDSER: Your Honor, two status conferences
7 ago we were advised that there were 22,280 individual
8 claimants in lawsuits filed throughout the United States.

9 I don't know if that number remains accurate, but it's
10 probably pretty close.

11 I don't know how many of those people have
12 Medicare, but in the population that I have seen, many of
13 them do, half, even 25 percent, probably closer to
14 75 percent. That's a lot of Medicare claims.

15 We know exactly who they are, at least Bayer can
16 tell us exactly who they are. They have been served with a
17 lawsuit in every one of them. Databasing being what it is,
18 I would imagine that it wouldn't be all that terribly
19 difficult, despite Bayer's protestations to the contrary,
20 to run a list of every one of those people and their Social
21 Security numbers.

22 We can probably run a list, from the PSC's
23 perspective at least, of those people who have filed fact
24 sheets. I can give you a list of a lot of people who have
25 filed cases and I can probably even do a sort by age so

1 that I can identify lots of the Medicare claimants.

2 So I'm puzzled by the United States' comments we
3 are losing billions of dollars that Medicare has owed to
4 it, yet the Attorney General in his infinite wisdom chooses
5 not to file a lawsuit over this. I don't understand that.

6 What I do understand at least from the Medalie --
7 I'm going to get it right one of these days. Medalie, did
8 I get it right? -- perspective is that if the Attorney
9 General doesn't act, the private attorney general may act.

10 And so this court is going to adjudicate
11 Medicare's rights one way or another and the United States,
12 as the big elephant in the room and has been the big
13 elephant in the room from the beginning of the settlement
14 program, can either choose to play ball with us or not.

15 If they want to play ball, we are here. We want
16 to participate. We are participating. We want our money.
17 We are not trying to end run the court, I believe was
18 Ms. Burdette's comment, and yet they won't play by the
19 court's rules.

20 I don't know how to get my arms around that. I
21 feel like I am pushing water up hill with that kind of
22 perspective. Either they are in this ball game or they're
23 not.

24 If I have a client who says I'm owed money but my
25 client says I don't want to file a lawsuit over that money,

1 guess what happens, they don't get the money, they lose the
2 money. They have to act, they can't sleep on their rights.
3 So if the United States doesn't want to participate in
4 this, this court will adjudicate those rights.

5 In an individual lawsuit this court, a jury is
6 going to determine the reasonable value of medical
7 services. Does the United States want to participate in
8 that and make that claim with us, on behalf of us? They
9 are welcome to do it. If not, it is going to be
10 adjudicated.

11 Collateral source rule issues are out there under
12 Minnesota state statutory law. I am sure that rule exists
13 in many other states. The issue is going to be
14 adjudicated. They want to be a part of that, they don't
15 want to be a part of that? They want to have a global
16 settlement under the auspices of this court or not?

17 I think they should. I think it is going to make
18 life an awful lot easier to get to the end of the game in a
19 year. Because if we don't have them here, the game is
20 never going to end, never.

21 THE COURT: All right. The court will take it
22 under advisement. Thank you for your arguments.

23 MS. TRIPLER: Your Honor, may we be excused?

24 THE COURT: Yes. Thank you very much for
25 appearing and have a safe flight home.

1 MR. BURDETTE: Thank you.

2 THE COURT: The next matter is the Italian
3 prosecutor matter.

4 MR. SCHOON: I wonder, Your Honor, if we --
5 Eugene Schoon again.

6 THE COURT: I'm sorry.

7 MR. SCHOON: Could we address the lien?

8 THE COURT: You should.

9 MR. SCHOON: I will be very brief, Your Honor. I
10 asked that this be considered together because it's
11 somewhat related, although the legal issues are quite a bit
12 different.

13 We've filed a motion to quash the attorney's lien
14 that was served on us last week, I believe, in this
15 litigation. The lien purports to extend to any settlements
16 that we may enter with third party payers under an
17 agreement that I've provided to the PSC.

18 I think it might be useful, because it really
19 kind of goes in the category of a status report, just so
20 the court is aware of what Bayer is doing with regard to
21 private third party payers.

22 This situation really is a little bit different
23 than the government because with the private carriers, very
24 many of them include a drug benefit; whereas, Medicare, of
25 course, does not pay for drugs .And so that provides us

1 with a couple of opportunities and also an additional
2 claim.

3 To the extent the healthcare plans or the third
4 party payers have paid for Baycol, they have a claim and
5 asserted a claim against us for the amount that they paid
6 for the Baycol that was unused as of the date of the
7 product withdrawal, August 8, 2001.

8 We actually can do a calculation and come up
9 pretty closely with what the value of all those
10 prescriptions would be and then we can match it up with the
11 third party payers. So we know within some realm of
12 reasonableness, in a rough justice sense, what the value
13 was of that unused Baycol. So that's one claim.

14 The healthcare plans also assert another claim
15 and that's for what they call switching costs. When you
16 stop using Baycol and you -- because it's been withdrawn
17 from the market and they put a patient on another drug,
18 they are claiming, well, you have to -- you should go see
19 your doctor and maybe have a liver function test and a
20 cholesterol test. So there is some cost involved in that.
21 They are claiming that we owe them that.

22 And then, of course, they have something like
23 Medicare is asserting, which is the cost of healthcare
24 benefits for those patients who have had rhabdo.

25 Now, in late 2001 we started talking to a number

1 of the private healthcare plans who approached us, through
2 their lawyers, with a proposal for settlement. It took us
3 a while to get there, but this fall, this past fall, we did
4 reach an agreement with a large number of the healthcare
5 plans.

6 And the reason I mention the drug benefit is that
7 that really formed a foundation for how we were going to
8 settle the cases. Rather than try to figure out how much
9 did these healthcare plans actually spend on medical costs
10 related to Baycol, how much did they pay for a rhabdo case
11 and figure it out for each different plan, one of the
12 driving ideas behind our settlement was we could use the
13 amount that they spent for Baycol in the last 45 days or so
14 that it was on the market, which is when it had the highest
15 market share and everybody agreed would be a good number to
16 use, we could use that number as a kind of surrogate from
17 which we could reach a negotiated settlement.

18 So we did, we took that number and we offered
19 this to the healthcare plans. We said we would pay them
20 55 percent of the value of all the prescriptions that were
21 filled that they paid for in that window of time, roughly
22 45 days, and 10 percent attorney's fees to their lawyers.

23 And that's really the settlement that's at issue
24 in our present motion here, but I wanted you to have the
25 background so you understand why it is we are doing

1 something different with the private healthcare plans than
2 we are with Medicare.

3 Now, as part of this settlement Bayer gets a
4 release not only for the so-called throw-out costs and
5 switching costs, but also for any medical care costs that
6 may have been incurred by those plans for their
7 beneficiaries.

8 As an added benefit we negotiated on behalf of
9 Bayer a release of any claims to reimbursement that those
10 plans might assert against the individual plaintiffs or
11 other beneficiaries, whether or not they are plaintiffs,
12 reimbursements for their healthcare costs if they settled
13 their case with us, and we did that effective from
14 October 1, 2003.

15 So if you settled your case after October 1, 2003
16 and your healthcare plan was a part of this settlement, you
17 as a plaintiff would not have to pay back your healthcare
18 plan for your medical care that, you know, presumably
19 you've recovered in your settlement. That was kind of an
20 add-on, but I think a real benefit to the plaintiffs.

21 That, unfortunately, seems to be where the PSC,
22 now that they have finally gotten their motion -- or their
23 lien and briefed it, this seems to be what -- they've
24 suddenly said, well, we ought to get a 6 percent tax on
25 this settlement.

1 So we were before you in December and argued
2 whether they could intervene in our settlement talks and
3 argued this question of whether the tax applied. Last week
4 they filed a lien claiming that they were entitled to this
5 reimbursement, apparently on the theory that some increment
6 of the settlement that we pay to the third party payers is
7 somehow part of the individual plaintiff's claim, but the
8 lien that they want to assert, of course, goes to the
9 entire settlement.

10 So if I pay, say, \$500,000 to Aetna to settle all
11 of their claims, they want a 6 percent tax on the entire
12 \$500,000, not just on that whatever little component they
13 may be able to trace back to an individual plaintiff, which
14 I submit, Your Honor, would be probably impossible to do
15 anyway.

16 We move to quash their lien and there are
17 basically two reasons why we have done so. First of all,
18 the plaintiffs -- the lawyers who are representing those
19 healthcare plans don't have any cases in the MDL. In fact,
20 they don't have any cases anywhere.

21 They are not subject to Pretrial Order -- the
22 pretrial orders that set forth the 6 percent tax and the
23 cases or claims don't otherwise qualify in any way under
24 Your Honor's pretrial orders.

25 We noticed in Pretrial Order 106, which Your

1 Honor entered about a week ago or so, that almost the same
2 issue is presented. That happened to involve cases that
3 were filed in federal court but were never transferred to
4 this MDL. And Your Honor held in that case that the
5 6 percent tax did not apply to cases that never ended up
6 here in the MDL even if they were originally filed in
7 federal court.

8 Well, it seems to us that it's a fortiori if the
9 6 percent tax doesn't apply to those cases, it can't
10 possibly apply to claims that were never filed in this
11 court by lawyers who aren't before this court. So that's
12 reason number one why we move to quash.

13 Reason number two is that under the lien statute
14 that they invoke, which is Minnesota Statute 481.13, you
15 have to have an attorney-client relationship with the party
16 against whom you are asserting the claim or you have to
17 have some attorney-client relationship here with the party
18 that's being paid; and one doesn't exist.

19 So for both of those reasons, Your Honor, we are
20 moving to quash the lien here. The plaintiffs' arguments
21 are creative for asserting it, but we simply don't believe
22 that they apply in this situation.

23 We have cited Showa Denko, which I know Your
24 Honor is familiar with from the prior case, Johnson vs.
25 Blue Cross Blue Shield of Minnesota, which is a Minnesota

1 Supreme Court case, in support of our position.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. GOLDSER: Good afternoon, Your Honor. I have
5 this one too.

6 THE COURT: All right.

7 MR. GOLDSER: The lien issue becomes a moot issue
8 when the court decides the original motion, which was the
9 right -- or the request for the PSC to have a right to
10 participate in these negotiations and to either clarify,
11 interpret, or extend Pretrial Orders 25 and 53. You have
12 that under advisement. I know the court will rule at the
13 appropriate time.

14 What prompted the lien, of course, was the fact
15 that money is now being paid while the motion to
16 participate or to modify or interpret 25 and 53 was
17 pending.

18 Indeed, the time frames are quite curious. We
19 filed our motion in July of '03. Apparently negotiations
20 were ongoing at that very time. The settlement was dated
21 October 3rd of '03. Bayer filed a response October 30th of
22 '03 and did not alert the court to the fact there was a
23 settlement that was done.

24 So we have been briefing and arguing the motion
25 about the right to participate even as not only

1 negotiations were ongoing, but they were being concluded.

2 Then no one knew.

3 The motion has been under advisement. Now that
4 money is starting to flow, we felt it incumbent upon us to
5 file the lien on the settlement proceeds to ensure that at
6 least until this court rules on the underlying motion a
7 portion of the proceeds are tied up.

8 The orders under 25 and 53 deal with a withhold
9 and there have been a number of decisions now challenging
10 the withhold in some of the settlement circumstances, where
11 Special Master Haydock has ruled and he has made very clear
12 that it is a withhold and that people later will have the
13 right at the time that there is a fee petition filed,
14 assuming that we get to that point, to argue about whether
15 the amount withheld is proper and whether any or all of it
16 should be repaid.

17 So we're talking about a set-aside or a withhold
18 or an escrow. We are not talking about that money being
19 paid over and paid out at this stage of the game.

20 If there is an amount less than 6 percent that's
21 appropriate because some portion of the clients are not
22 before this court, then that's an argument that's to be
23 saved and made for another day, consistent with what
24 Special Master Haydock has ruled in a number of his
25 rulings.

1 But the reality of the matter is that every
2 lawyer who comes into this courtroom with a plaintiff's
3 case is representing that health insurer because there is a
4 subrogation obligation by that plaintiff's lawyer to that
5 health insurer. It's true under ERISA. It's true under
6 health plans. It's true under the contracts. It's true
7 every which way you turn.

8 When I walk into this court and I put a jury in
9 that box along with defense counsel and we argue about a
10 personal injury case and I get an award, I've got to deal
11 with the subrogation interests and I am representing that
12 insurance company.

13 And I think the case law, as Mr. Shelquist when
14 he filed a responsive brief, indicates that's clear, that
15 we do have that kind of relationship, that there is a lien
16 right under those circumstances.

17 But, again, the lien question becomes moot as
18 soon as this court decides whether 25 and 53 do extend that
19 far. We think it should. We have argued that once
20 already. I am not sure it's necessary to go beyond that
21 and argue it again. We look forward to your ruling on the
22 underlying motion.

23 THE COURT: Thank you.

24 MR. SCHOON: I don't have so much a reply as just
25 I wanted to also make the court aware, as well as the PSC,

1 of another detail of the settlement because it may be
2 important.

3 Our official claims period ended on February
4 13th. I sent a letter to Mr. Zimmerman, which you should
5 receive today, with an updated list. We've actually agreed
6 to extend our claim period for another -- I think until the
7 end of this month, this coming month, because we are aware
8 of some other healthcare plans that are willing to sign on
9 but had some difficulty getting all of their data to us.

10 So we are very hopeful that we'll be able to
11 conclude settlement with a majority of the third party
12 payers -- and I think that's to everybody's benefit,
13 Bayer's benefit as well as the plaintiff's benefit -- and
14 we will do everything we can to make sure everybody is
15 involved.

16 Thank you, Your Honor.

17 THE COURT: Thank you. I'll take this matter
18 under advisement. Let's move on to the next matter, the
19 Italian prosecutor sanctions motion.

20 Do you have good news for me?

21 MR. SIPKINS: No news, Your Honor.

22 THE COURT: That's better than bad news.

23 MR. SIPKINS: It is better than bad news.

24 MR. ZIMMERMAN: No news is good news.

25 MR. HOEFLICH: Your Honor, is your screen

1 working?

2 THE COURT: There it is.

3 MR. HOEFLICH: I may turn to it a few times
4 during my presentation, if it would please the court.

5 Your Honor, on June 12th of last year the
6 Kenneth B. Moll law firm made filings and represented to
7 the court that the prosecutor from a foreign sovereignty
8 wanted to intervene in these proceedings. A motion was
9 filed, a memorandum in support of that motion was filed,
10 and affidavits were filed, all allegedly with signature on
11 file, before the court.

12 We now know that the foreign prosecutor never
13 agreed to be represented by the Moll law firm, that the
14 foreign prosecutor never asked for or agreed to be
15 represented by the Moll law firm, that the foreign
16 prosecutor never asked or agreed to intervene in these
17 proceedings.

18 And we are here today to take the serious step of
19 asking the court to bar Mr. Moll from proceeding further in
20 this MDL and to impose a monetary sanction on his law firm.

21 I would like first to deal with the background of
22 the motion. The Plaintiffs' Steering Committee learned in
23 the summer of 2002 that a foreign prosecutor in Italy, in
24 Turin, was investigating certain Bayer managers with
25 respect to the sale of the medicine Lipobay in Italy on

1 behalf of that government. That's how that system works.

2 And the PSC put an international committee in
3 charge led by Mr. Moll, who is fluent in Italian. Mr. Moll
4 reached out to Mr. Guariniello and had meetings with him
5 that fall.

6 During those meetings Mr. Moll explained what was
7 happening in the litigation here and I think it's fair to
8 say tried to get Mr. Guariniello on board that there
9 were -- whatever the plaintiffs' view of the litigation was
10 and that they could work cooperatively.

11 We now know that during that meeting Mr. Goldser
12 sent Mr. Moll an e-mail, and he also sent it on to
13 Mr. Guariniello's computer server because Mr. Moll was with
14 Mr. Guariniello, saying that "Pursuant to Ken Moll's
15 request, I attach some materials acquired in the Baycol
16 litigation in the U.S. Please show these to Ken before
17 reviewing them yourself. I wish to ensure that Ken have a
18 chance to see them for issues of confidentiality before he
19 provides them to you. Thank you for your help and
20 cooperation in this case."

21 Well, the attachments to this e-mail included
22 both, as you will see, the Hot Documents PowerPoint, which
23 included all sorts of confidential information that was
24 provided to Mr. Moll under an agreement that those
25 documents would only be used for this litigation, as well

1 as the PSC master memo document, which also contained an
2 enormous amount of highly confidential information.

3 It is without dispute, I think, that no steps
4 were taken by Mr. Moll in Italy to protect the
5 confidentiality of that material.

6 Come June Mr. Moll had decided that he was going
7 to, and I believe in agreement with the Plaintiffs'
8 Steering Committee, that they were going to take steps to
9 try to obtain the documents -- the remainder of the
10 documents that were confidential in this proceeding.

11 And on June 5th the Moll law firm sent a draft
12 affidavit to Mr. Guariniello. Between June 6th and
13 June 12th Mr. Moll's law firm attempted to contact
14 Mr. Guariniello to see if he would sign that affidavit and
15 he never did.

16 We have documents --

17 THE COURT: That first letter, when was the
18 e-mail sent?

19 MR. HOEFLICH: October of 2003 (sic). I'm sorry.
20 October of 2002. I apologize, Your Honor.

21 We have here an e-mail sent from K. Amy Lemon --
22 and Ms. Lemon was or is Mr. Moll's associate -- telling
23 him, "I continue to be unsuccessful in my attempts to
24 contact Patrizia." And Patrizia is one of
25 Mr. Guariniello's assistants. "Will you call Raffaele,"

1 meaning Mr. Guariniello, "directly and request his
2 signature?"

3 So as of June 11th the entire Moll law firm knows
4 that Mr. Guariniello has not signed the affidavit and has
5 not agreed to intervene in the litigation. Nevertheless,
6 on June 12th, without those agreements ever having been
7 made, there is an affidavit, a memorandum, and a motion
8 filed with the court.

9 And we knew that, from Bayer's perspective, when
10 we saw those materials that there was something wrong.
11 First, the materials said that there was an investigation
12 of Bayer AG and Bayer SPA, which is Bayer Italy. There was
13 no investigation of Bayer SPA or Bayer AG. It also stated
14 that Bayer AG had failed to respond to document requests
15 from Italian authorities. That was false. It stated that
16 Mr. Guariniello represented private Italian citizens. We
17 knew that was false.

18 We also saw that in Mr. Moll's affidavit that he
19 stated, "I understand that Applicant Guariniello will
20 execute and abide by the endorsement of stipulation and
21 protective order. I also understand that Applicant
22 Guariniello is prepared to produce all documents he has
23 discovered during the course of his criminal investigation
24 of Bayer AG and Bayer SPA to the parties in this MDL
25 litigation."

1 Well, we knew from our Italian counsel that that
2 wasn't possible, that Mr. Guariniello would not have signed
3 such a protective order and would not have agreed to
4 provide documents that he obtained through a private
5 investigation to the lawyers in the MDL. So we came to the
6 court on June 20th and asked to see what had happened
7 because we didn't believe that any of these filings were
8 true.

9 And what we found out was that on June 16th
10 Mr. Guariniello had sent an e-mail to the Moll law firm
11 stating that he would not agree to sign the affidavit. And
12 that was, as we now know, of great concern to the Moll
13 firm.

14 And what they did, instead of coming to Bayer or
15 coming to the court and stating that they had made filings
16 that falsely represented that an Italian prosecutor wanted
17 to intervene in these proceedings, was to go back to the
18 Italian prosecutor and see if they could get it signed.

19 Here's an e-mail from Amy Lemon to Mr. Moll
20 saying, "What do we do about this," with five question
21 marks, about not getting the signed affidavit.

22 And then we see that Mr. Moll called
23 Mr. Guariniello's office. And when they were unable to get
24 him on the telephone, as late as June 20th they are sending
25 e-mails to Mr. Guariniello asking him to sign the affidavit

1 and fax it to their offices so that they could attach it to
2 the motion.

3 We have an affidavit dated June 12th and eight
4 days later the plaintiffs are trying to get an Italian
5 prosecutor to sign it, and we know that he did not do that.

6 At the June 20th hearing, when we raised this
7 issue with the court, we asked the Plaintiffs' Steering
8 Committee, which we believe was unaware that the materials
9 had not been signed, and we were told that they would
10 provide them to us. Susan Weber then followed up with
11 Mr. Moll and asked for the materials from him.

12 It was not until June 26th, weeks after the
13 initial filing, that the Plaintiffs' Steering Committee
14 withdrew the motion; and then when it was withdrawn, there
15 was no explanation at all to the court.

16 The court was left with the impression that there
17 had been a filing to intervene on behalf of an Italian
18 prosecutor, with absolutely no attempt made to eliminate
19 the misperception that the court or anybody else would have
20 from these filings.

21 We believe that this is a very serious matter.
22 We did not raise it lightly. We would ask that, based on
23 the representations that were made, that based both on
24 Minnesota rules and the court's inherent discretion under
25 Section 1927, that Mr. Moll be barred from participating

1 further in these proceedings and that the court levy a
2 sanction on Mr. Moll's firm.

3 THE COURT: Thank you.

4 MR. LUPEL: Good afternoon, Your Honor. I
5 haven't had a chance to introduce myself to the court. My
6 name is Warren Lupel and I represent the respondent to this
7 motion for sanctions.

8 THE COURT: Good afternoon.

9 MR. LUPEL: Thank you, sir. I appreciate the
10 privilege of being allowed to appear before you this
11 afternoon.

12 Your Honor, it is true that in August of 2002 the
13 Plaintiffs' Steering Committee learned that a prosecutor in
14 Italy had undertaken a criminal investigation of what was
15 essentially a parallel to what the civil action is before
16 you, and obviously that created a great deal of interest
17 because they were going the criminal line and here was the
18 civil line about the drug manufacturer distributing a
19 potentially harmful drug.

20 So the Plaintiffs' Steering Committee, I think in
21 the appropriate pursuit of their duties to their clients,
22 caused the committee to be made to investigate exactly what
23 was going on there and Mr. Moll was a part of that
24 committee because of his fluency in Italian.

25 In fact, ten months before the motion that's at

1 issue before the court today was filed was the first
2 communication with that Italian prosecutor, Senoir
3 Guariniello. That was in August of 2002.

4 Mr. Guariniello responded promptly and both sides
5 realized that they had a potentially common enemy for which
6 they ought to at least talk, and talk they did. The talks
7 began, as I say, in August of '02.

8 Originally there was a personal meeting scheduled
9 for September of '02 and then put off until October of '02,
10 when Ken Moll traveled to Italy and met not only with the
11 public prosecutor in Turin, Italy, but also another
12 official who's called a police justice -- I frankly don't
13 know what that's analogous to, but he is called a police
14 justice -- and they discussed what each of them could do
15 for the other.

16 Ken Moll brought with him to that meeting a
17 computer disk which contained all nonprivileged
18 information, effectively filings of FDA and other kinds of
19 things that were not covered by any pretrial order, and
20 explained that there was a limitation to what could be done
21 without this court's imprimatur.

22 The Italian prosecutor in turn shared his views
23 with respect to the documents that he had tried to obtain
24 and the documents that he did obtain in what he referred to
25 as a raid on Bayer headquarters -- I don't, frankly, know

1 exactly what that is; I think it might be something akin to
2 a search warrant in our instance -- after he was unable to
3 obtain documents that he sought.

4 During that visit in October the Italian
5 prosecutor and the police justice, very hungry for details,
6 said, Well, in addition to this disk, is there anything
7 else that can be given at this point in time? Ken didn't
8 know what could be given, but in a call to PSC members had
9 an e-mail delivered to the public prosecutor.

10 And as described in Mr. Hoeflich's demonstration,
11 Ron Goldser in delivering that said to the Italian
12 prosecutor, Let Ken see this first. In fact, he didn't. I
13 mean, I'm not sure what Ken could have done; pull the
14 prosecutor away from his e-mail or put a blindfold on him.
15 But what it was was simply some work product of the PSC and
16 a summary of certain documents.

17 And it's my understanding -- although I am a late
18 entrance into this, it's my understanding that there was a
19 dispute between the parties as to whether excerpts were
20 part of the court's confidentiality order and that this
21 court had not yet entered an order dealing with that.

22 But in any event, that's what occurred at that
23 moment in October of 2002. Following October, between
24 October of '02 and the filing of the motion in June of '03,
25 there was a constant exchange of information between the

1 Italian prosecutor and primarily, although not exclusively,
2 Ken Moll's office.

3 The difficulties that they had with their
4 dealings was that the Italian prosecutor needed some
5 information from German authorities who were also
6 conducting some sort of an investigation related to this.

7 They had experts, pharmacological experts, and
8 others reviewing documents and they were organizing the
9 documents that they had obtained in what, once again, was
10 described as a raid by the Italian prosecutor. Those are
11 not my words. I'm not sure, again, exactly what that
12 means.

13 And Ken on behalf of the PSC was saying, Well,
14 we're going to have to file a motion before the court
15 because we can't -- we are not allowed to give you this
16 information, so let's see what we can get together for this
17 sharing of the information.

18 During this period of time the Italian prosecutor
19 was, you know, a virtual cheerleader for getting this
20 motion on file and every time that -- so that he could get
21 his hands on the information that had become available to
22 the PSC.

23 He sent, at Ken's request, his personal biography
24 to him for -- to be inserted in the motion. He sent him
25 the penal statutes which were involved in the investigation

1 related to Bayer's conduct.

2 And when I say "Bayer's conduct," I think I
3 should step back for a minute and say that one of the
4 issues that is claimed by Bayer's counsel in this, the
5 movant in this motion, is that there's -- it's a
6 misstatement, even a lie, to talk about an investigation of
7 Bayer when Bayer wasn't being investigated. Well, I think
8 that's disingenuous at best.

9 Five managers were under investigation because
10 that's the way they do things in Italy. They don't have
11 corporate criminal procedures. The managers are something
12 akin to members of the board. Maybe the five were the
13 total members. That I don't know.

14 And in the e-mails, which you will see in the
15 exhibits that we attached to our response to the motion,
16 when we received e-mails from the public prosecutor in
17 Turin, Italy, the subject line was "Re: Bayer
18 Investigation." We don't even know the names of the
19 managers, or at least we didn't get those from him.

20 So when it's claimed that, oh, this wasn't really
21 an investigation of Bayer, this was an investigation of a
22 couple of managers, that's just simply a misdirection at
23 best.

24 He, the prosecutor, sent to us the nature of the
25 facts being investigated by them, all an indication of what

1 he was doing and the reasons why he was slow in sharing
2 information with us and once again urging that the motion
3 be filed before this court.

4 There were a number of reasons why the motion was
5 delayed before this court, in part having to do with action
6 that was taking place in Canada as well and their attempts
7 to secure intervention as well to get the documents. There
8 were other foreign nationals who were interested in what
9 was going on.

10 As early as December of 2002 -- and once again
11 that's in the exhibits that we have attached that are
12 included with our response delivered to Your Honor -- as
13 early as December of '02 Ken Moll is writing about, and I
14 quote, "filing a motion before the judge for the remaining
15 documents you requested."

16 There is no doubt, there can be no doubt that the
17 prosecutor is urging the filing of the motion for his
18 benefit. These are for documents that the Plaintiffs'
19 Steering Committee has and only he wants them. There is no
20 other reason for it being done. We're acting in response
21 to Guariniello's, the Italian prosecutor's urging and
22 request.

23 Bayer seeks sanctions against Ken Moll in part
24 because the prosecutor never said -- there is not a letter
25 or an e-mail or any other communication that says you are

1 hereby given authority to file this motion as my counsel.

2 Well, that's true, but that's form and not substance. How
3 else is it going to be done? The motion says as counsel
4 for the purpose of this motion.

5 There had been nearly ten months of discussions,
6 conversations, and documents between the two of them.
7 Information passed so that the motion could, in fact, be
8 filed. And now we don't have, they say, we don't have the
9 authority, we wrongfully called ourself counsel for him
10 when we wrongly put in this motion that it was being done
11 on his behalf.

12 As late as February of 2002 Mr. Guariniello is
13 asking for a progress report on the motion that is being
14 prepared for his benefit. He does that again in March.
15 And I say to the court that that is also a part of the
16 exhibits that we have presented to the court.

17 All of this activity during all this time and all
18 this deliberateness on behalf of the -- Ken on behalf of
19 the PSC is as a result of the certainty that this be done
20 in the proper way and that this court be appropriately
21 advised and that what's turned over is only as a result of
22 the Italian prosecutor's participation as an intervener for
23 these discovery purposes.

24 Now, that's the background at the time that the
25 motion is finally filed. There's no doubt, too -- and we

1 wouldn't say otherwise -- that the PSC isn't anxious to get
2 it done because, after all, when they get it done they've
3 been promised information from the Italian prosecutor as
4 well, which may aid them in the prosecution of their
5 clients' cases.

6 So it gets done and a full week before it's
7 filed, a full week before it's filed it is sent to the
8 Italian prosecutor to review, to check to see if it's
9 accurate, and to sign and to send back his signature both
10 by e-mail or fax as well as by ordinary mail so that the
11 original will be done.

12 During most of this week Ken is out of town,
13 although he does return, I believe, on the 10th or 11th of
14 June. The filing is done on the 12th.

15 Now, Ms. Lemon, who was a brand spanking new
16 lawyer, Your Honor, she had been a lawyer for less than a
17 year while this was going on, I forget the exact, was a
18 little bit, I guess, flustered by what was going on because
19 she had -- not only had she not gotten back the document
20 that she had sent several days before, but she wasn't
21 getting a response to e-mails which had previously been
22 promptly done.

23 So there is some sort of confusion or mix-up or
24 call it what you will, but in those couple of days it does,
25 in fact, get filed, the motion, without the signature,

1 there is no doubt. But it's not bad faith, it's not
2 malicious, it is not intended to hurt.

3 After all, this is primarily, if not exclusively,
4 to assist the Italian prosecutor in what he has been urging
5 for ten months to help us give him -- not to help us, but
6 to allow us to give him the documents.

7 No one in Ken Moll's office benefits from
8 obtaining an order of intervention that the intervener
9 doesn't want. I mean, there's no suggestion of motive
10 here.

11 It is really kind of silly. Why would somebody
12 file a motion for someone to intervene for the purpose of
13 discovery if the proponent of the motion isn't interested
14 in the intervention? It just really makes no sense.

15 I mean, they already had these documents, so they
16 are not asking Bayer or anybody else for documents. They
17 are just giving -- or asking the court to allow them to
18 give them the documents and doing that through the
19 intervention process.

20 THE COURT: Why are we skipping what happened?

21 MR. LUPEL: Well, because there's --

22 THE COURT: Let's talk about that.

23 MR. LUPEL: Okay, Your Honor.

24 THE COURT: Whether or not it's an Italian
25 prosecutor or it's a client that's in Chicago, you have

1 cultivated this person, you've talked to this person a
2 number of times. They want to go after Enron and they want
3 to file this big lawsuit and they've got this thing and
4 they've got this explosive news about the CEO stealing
5 millions and billions of dollars. And you've got the
6 affidavit, you've got it all typed up, and all of a sudden
7 you are ready to file it and that person disappears for a
8 couple of days and you know that you've got to file it, you
9 think that -- you have a deadline to file it. Now, are you
10 going to go ahead and file that?

11 MR. LUPEL: If you are asking me that question --

12 THE COURT: Yeah, I am asking you that question.

13 MR. LUPEL: If you are asking me that question,
14 the answer is absolutely not.

15 THE COURT: And why is that?

16 MR. LUPEL: Well, because it's inappropriate to
17 do so.

18 THE COURT: And why is it inappropriate to do
19 that?

20 MR. LUPEL: Well, for all the reasons that Your
21 Honor knows as well as I know, that one doesn't --

22 THE COURT: I would like to hear it.

23 MR. LUPEL: It's inappropriate to file a document
24 that purports to be an affidavit when, in fact, it has not
25 been signed by the affiant.

1 THE COURT: Okay.

2 MR. LUPEL: What I'm saying --

3 THE COURT: Let's stop there.

4 MR. LUPEL: I'm sorry.

5 THE COURT: Let's stop there.

6 MR. LUPEL: Okay.

7 THE COURT: Now that we have that established,
8 that's basic ethics 101, isn't it?

9 MR. LUPEL: Yes, Your Honor, it is.

10 THE COURT: It doesn't matter if the lawyer is
11 just out of law school or been practicing for 30 years.

12 MR. LUPEL: Once again we agree.

13 THE COURT: The ramifications -- what should the
14 ramifications of filing a nonsigned affidavit to the court
15 be?

16 MR. LUPEL: It should be withdrawn once you
17 learn, as Ken did after the fact, that it was unsigned.

18 First what he did -- and this is the fact, I'm
19 not in any way suggesting this is the way to proceed --
20 first what he did was assume that there was something wrong
21 and sought to get the affidavit signed so that it could
22 then -- the motion could then be amended with the signed
23 affidavit. When that didn't occur, he withdrew it.

24 Something did happen, Your Honor. It's
25 inexplicable. There is no reason, at least in the records

1 that I have reviewed. Something happened. The prosecutor,
2 as I say, was the lead in this. He supplied the
3 information for the motion and suddenly, as you put it,
4 disappeared.

5 That's not justification for filing it. I'm not
6 suggesting that. This is not -- my argument is not an
7 argument of justification. My argument before Your Honor
8 is the absence of bad faith. That's all I'm saying. I
9 can't argue to you and I wouldn't argue to you that this
10 affidavit should have been filed in the form that it was.

11 And my only mention about Ms. Lemon's lack of
12 breadth of experience was because this is extraordinary,
13 for a lawyer to be involved in multidistrict litigation
14 with Verilaw filing and having documents with the signature
15 on file notation and relying on others and possibly not
16 understanding fully their instructions and what can and
17 can't be done.

18 This is not, again, justification. This is
19 simply an attempt by me to demonstrate the absence of bad
20 faith, nothing more. When I talked about motive, when I
21 talked about the confusion that was about that, when I
22 talked about the sudden -- the lack of communication from
23 Italy, these are things that I'm talking about to this
24 court only to demonstrate the absence of bad faith.

25 THE COURT: Are you saying that the only -- the

1 court can only sanction if there's bad faith?

2 MR. LUPEL: I would think that the absence of bad
3 faith would weigh heavily on the court's decision about, A,
4 whether to enter sanctions or, B, the extent of those
5 sanctions. That's my hope. I would not presume --

6 THE COURT: Then you are saying that bad faith
7 has nothing to do with whether or not I can sanction or
8 not?

9 MR. LUPEL: Oh, gosh, no. I am saying quite the
10 opposite. I am saying that bad faith is -- I believe the
11 key element in whether or not sanctions, particularly the
12 sanctions as Draconian as those suggested here, something
13 that will follow Mr. Moll for the balance of his
14 professional life -- this isn't going to just damage him
15 for this case.

16 And not only will it destroy the work product of
17 two or three years of his, they are asking that he be
18 dismissed from the PSC, that a substantial financial
19 penalty be against him, that he not be allowed to represent
20 any plaintiffs. This is something that -- if, god wills,
21 he practices another 30 years, this will follow him, such
22 an order like that would follow him forever.

23 And I am saying to the court, my goodness, if you
24 believe that this was negligence, that this was
25 inappropriate conduct but was not malicious or bad faith,

1 you won't do that. That's my hope. I don't presume to
2 tell the court. That's simply my hope and that's why I am
3 putting the bad faith argument before you, or the
4 importance of it at least.

5 THE COURT: Well, let's talk about the
6 negligence.

7 MR. LUPEL: All right, Your Honor. I think that
8 he did not properly supervise the filing of that affidavit.
9 He was gone for a couple of days before. He was back on
10 that day. He told her to -- he told Ms. Lemon to deal with
11 the law committee at the PSC and never saw it prior to
12 filing a document that said "signature on file" on it.
13 When it was filed, he learned later -- I believe it was
14 filed on a Friday. He learned on the Monday or the Tuesday
15 that it had been filed in that format.

16 THE COURT: What is your position dealing with
17 the Lockridge firm and Mr. Shelquist? After reviewing
18 their phone records, do you agree with their
19 interpretations of what the phone calls were?

20 MR. LUPEL: No, sir. It's not a question, I
21 don't believe, of my agreeing or disagreeing with them.
22 Ms. Lemon said that she had spoken to Mr. Shelquist on
23 multiple times during the day of the filing.

24 THE COURT: Well, the court is going to have to
25 make a finding dealing with that because I'm the -- once I

1 saw the papers that were filed by Bayer and the footnote or
2 the paragraph dealing with co-lead counsel of the PSC,
3 which I appointed, that's why I broadened the investigation
4 and asked them to submit their affidavits dealing with what
5 they did because it was very important for the court to
6 find out whether or not co-lead counsel was involved in
7 this matter.

8 MR. LUPEL: Yes, Your Honor.

9 THE COURT: And so it's not something that the
10 court is going to let drop. We have the phone records and
11 I just want to know what your position is dealing with
12 those phone records dealing with Mr. Shelquist.

13 MR. LUPEL: Ms. Lemon's testimony is different
14 than Mr. Shelquist's testimony.

15 The phone records were initially requested before
16 Magistrate Judge Lebedoff to be able to establish which of
17 the two of those were being truthful about conversations
18 between the two of them on that day.

19 Ms. Lemon is suggesting -- not suggesting,
20 Ms. Lemon testified under oath that she was told that it
21 was okay to file it signature on file because the signature
22 was forthcoming; Mr. Shelquist saying that that
23 conversation didn't take place. That was the reason for
24 the request before Magistrate Judge Lebedoff.

25 When the phone records --

1 THE COURT: Don't we have the phone records that
2 show that the connection between Mr. Shelquist and
3 Ms. Lemon occurred after the documents were filed?

4 MR. LUPEL: Your Honor, the records don't show
5 that. The records show that there were conversations --
6 excuse me -- that there were telephone calls earlier that
7 day between the two offices. It is the testimony and
8 affidavit formed by the Lockridge firm that those were
9 attempts to reach that were unsuccessful. You asked me
10 what my position is. I'm not able --

11 THE COURT: I'm asking you to review the
12 documents with me.

13 MR. LUPEL: Yes, sir.

14 THE COURT: All right.

15 MR. LUPEL: Yes, sir.

16 THE COURT: Mr. Lockridge, what's the time of
17 that phone call that went to Mr. Shelquist?

18 MR. LOCKRIDGE: The one that Mr. Shelquist had a
19 conversation I believe was at 4:54 in the afternoon.

20 THE COURT: 4:54.

21 MR. LUPEL: There are two conversations I
22 think -- again, I say "conversations." I don't want to
23 say --

24 THE COURT: 3:18, 3:10.

25 MR. LUPEL: They are in the morning.

1 THE COURT: There are two phone calls in the
2 morning, one at 11:30.

3 MR. LUPEL: Yes, sir. And I think two in the
4 afternoon. I forget how many --

5 THE COURT: 10:30 and 11:30, is it?

6 MR. LOCKRIDGE: Your Honor, there was initially a
7 call at 10:37 a.m. that lasted one minute or less. There
8 was -- that went to our receptionist. There was another
9 one at 10:43, which was a mistake, it did not go through,
10 there was no charge for it. There was another one at 10:48
11 to the KBM general number where Mr. Shelquist said he was
12 on hold. That took two minutes. He hung up because he
13 took another call. Then there was a return call at 10:57
14 from someone at Ken Moll & Associates to the Lockridge
15 general number. By the way, I might note, of course, as I
16 will eventually, that we have direct dial numbers, but none
17 of these calls were to Mr. Shelquist directly. That call
18 lasted for four minutes. We have submitted an affidavit
19 from our secretary, Barb Gilles, where she says that she
20 spoke to --

21 THE COURT: I understand that. We'll get to
22 that. You'll be able to argue. I'm talking about the
23 times.

24 The worst-case scenario for Ms. Lemon is that she
25 talked to Mr. Shelquist at 4:57.

1 MR. LUPEL: That would be the worst-case
2 scenario, that's correct, that she didn't talk to him at
3 any of those other calls, that she only talked to him after
4 it was submitted for filing. And the best-case scenario,
5 of course, would be the opposite.

6 THE COURT: 10:37.

7 MR. LUPEL: Right. So I can't make the judgment
8 about it. It would be conjecture on my part as to what
9 actually occurred.

10 I do know that I strongly believe the testimony
11 and the forthrightness of Ken Moll in his deposition that
12 he simply asked her to secure from the law committee of the
13 PSC how to -- whether or not this should be filed then and
14 under what circumstances that --

15 THE COURT: Why didn't he sign his affidavit?

16 MR. LUPEL: He testified under oath --

17 THE COURT: I'm asking you. Tell me.

18 MR. LUPEL: Because he testified under -- why
19 didn't he sign his affidavit?

20 THE COURT: Right.

21 MR. LUPEL: I don't know. Maybe because his
22 signature was, in fact, on file. I don't know the answer
23 to that, Your Honor. It wasn't any more than what was --
24 it wasn't any knowing attempt to avoid signing anything.
25 This was in the hands of another attorney.

1 And as I say, I accept on behalf of my client, he
2 has authorized me to accept blame for negligent supervision
3 of this motion, but I think that's where it begins and
4 that's where it ends, that it was not properly supervised.
5 There should have been more thoroughly and more hands-on
6 supervision.

7 As a matter of fact, he testified at his
8 deposition that he's taken remedial measures in his office
9 that no filings can occur in any case at any time without
10 his direct sign-off, which was not the case before this.

11 THE COURT: Well, let me be the devil's advocate.
12 Here Bayer is standing up and saying, well, wait a minute,
13 this is just not plain negligence. This is -- you've got
14 an allegation here of a criminal prosecution that is in an
15 affidavit that is going to be public record, it's not under
16 seal, that will be known to the whole world and will have a
17 devastating effect upon the defendant because it's an
18 allegation of criminal activity that's being investigated.

19 MR. LUPEL: That was public. That was
20 international news.

21 THE COURT: Before the affidavit?

22 MR. LUPEL: Oh, yes, sir. I mean, that's how
23 back in August of '02 the PSC learned about it, was through
24 an article in a publication -- I'm not sure in which
25 publication -- about the investigation and I believe about

1 the raid on the Bayer facility in Milan. So a criminal
2 investigation was not something that was under seal or
3 confidential or not known. It was widely known.

4 THE COURT: You may continue.

5 MR. LUPEL: Thank you, Your Honor. Just a couple
6 of other points about this. There was, I thought, a pretty
7 harsh view of calling the attempt after learning between
8 July -- excuse me -- between June 16th and June 23rd -- I
9 mean, between June 12th and June 16th, I'm sorry, to try to
10 get the prosecutor's signature because of the surprise of
11 the lack of communication and this was called a cover-up.
12 I don't see that as a cover-up. I mean, it's a realization
13 of, oh, my god, look what's happened.

14 THE COURT: Isn't the normal response to call
15 your opposing party and say, oh, my goodness, I made --

16 MR. LUPEL: I think --

17 THE COURT: -- I thought it was coming and it's a
18 boo-boo and --

19 MR. LUPEL: I think that at first that it would
20 be human nature to try to correct the mistake before
21 acknowledging it and then calling your adversary and
22 saying, you know, when we filed this we didn't have the
23 signature, but we've got it now, we're going to seek to do
24 an amended filing. I think that that's the kind of thing
25 that lawyers frequently do if they make mistakes and those

1 mistakes are capable of being rectified. I certainly don't
2 view it as a cover-up. I think that kind of terminology is
3 just really trying to prejudice the court's view of it.

4 THE COURT: Let's not use the word cover-up.
5 Let's just use the word giving information to the PSC
6 that -- whether or not it goes to Bayer or not, at least
7 giving to PSC that the signatures aren't there.

8 MR. LUPEL: Again, we can talk about what was the
9 best way to proceed given -- based upon what's happened,
10 but in that four-day period, until they got an indication
11 that he was going to do this some other way -- I'm speaking
12 not only as an advocate, but as a lawyer of 35 years --
13 that you do -- in the short run you try to correct the
14 mistake and then notify people because of the embarrassment
15 and the humiliation of having made the mistake and it's
16 only when you discover in a short period of time that you
17 have -- that the mistake is not capable of being corrected
18 that you come forth, and I think that's what he did.

19 Remember that the Italian prosecutor never said
20 what Bayer is saying. The Italian prosecutor never said
21 you didn't have my authority to do this, I wouldn't have
22 allowed it, I wouldn't sign that affidavit. They didn't
23 say it then and they haven't said it to this date.

24 What he said was Guariniello has decided to send
25 a formal request of international assistance to the U.S.

1 authorities to obtain documents through interrogatory so he
2 will not send back your affidavit. That's what they said,
3 that they decided to do this in some other way. And, in
4 fact, to the best of our knowledge, he hasn't done that.

5 So that this information that there is a --

6 THE COURT: Isn't that the nice Italian way of
7 telling you to go to hell?

8 MR. LUPEL: Well, I hope not. I think that it's
9 evidence, I think that it's evidence of what I earlier
10 spoke about, that something dramatic happened that changed
11 this cheerleader's viewpoint from being go, go, go, go, go,
12 get this for me, here, take this, take this, I will give
13 you this information, I will give you that information to
14 suddenly saying, well, you know, I think we're going to do
15 it through interrogatory. And Ken's answer to that was,
16 well, you know, you could do it both ways; and to that
17 there was no response.

18 If you will allow me just two or three more
19 minutes, Your Honor, I wanted to make one other point if I
20 may. May I?

21 THE COURT: Oh, most definitely.

22 MR. LUPEL: We talked in our papers about
23 Rule 11 and we spoke about Rule 11 not because, as Bayer
24 suggested, that's the only rule under which such motions
25 can be brought, but rather because we thought that there

1 was some analogies that was appropriate to bring to the
2 attention of the court.

3 I think the most significant or important one is
4 that that rule, which is designed to prevent serious
5 misconduct, allows 21 days to withdraw an offending
6 pleading, an improperly filed one, a false pleading. And,
7 in fact, this pleading was withdrawn within 14 days of
8 filing and within seven days of knowing that the signature
9 was not coming.

10 And I think that, once again, in the court's
11 determination of whether or not sanctions are appropriate
12 or if appropriate the nature of the sanction, that it seems
13 to us that consideration of the drafters of Rule 11 is
14 reasonable.

15 I mean, if a litigant like Bayer can avoid the
16 dictates of --

17 THE COURT: You can make a strong argument that
18 it's negligence and that there might be mitigating
19 circumstances under Rule 11 or analogous thinking dealing
20 with the 21-day withdrawing, I understand all that.

21 I guess I do have still sticking with me and
22 that's that Ms. Lemon is trying to put Mr. Shelquist in
23 this matter. Unfortunately documents have been filed by
24 Bayer that has cast aspersions on the Lockridge firm and I
25 have gone over these phone calls a number of times and

1 tried to be the devil's advocate both ways and I just have
2 problems with not only the supervision, but it seems like
3 the -- I don't know how to phrase it, but trying to cast
4 aspersions upon Mr. Shelquist and the Lockridge firm where
5 there's documentation that shows that they weren't
6 involved.

7 MR. LUPEL: Of course, Bayer is not seeking
8 relief against the Lockridge firm in --

9 THE COURT: But you understand my supervisory
10 power --

11 MR. LUPEL: Oh, sure.

12 THE COURT: -- here is I've appointed the
13 Lockridge firm as co-lead counsel just as I appointed
14 Mr. Moll to be on the PSC. I don't know if you have
15 learned that I have taken people off the PSC.

16 MR. LUPEL: Oh, yes, Your Honor, I understand not
17 only your power, but your willingness to exercise that. I
18 don't have any difficulty in understanding that.

19 THE COURT: And I enjoy you being here and I
20 don't mean to put you on the spot, but this is so serious,
21 so serious. I guess I take it more serious because the
22 only thing that I have ever had -- I have never had money.
23 The only thing that I have had was my word.

24 MR. LUPEL: I have lived my whole life on the
25 value of that.

1 One of the reasons that we brought up Rule 11 as
2 well was because if this had been brought pursuant to
3 Rule 11 and the withdrawal in 14 days, I think that Bayer
4 would have been hard-pressed to file their motion a month
5 later and seek sanctions. And at the same time, does a
6 litigant have that right? Do they say, well, we're not
7 bringing it pursuant to Rule 11 and therefore --

8 THE COURT: I hope you heard me. I think you've
9 made a good case that this is not bad faith. I would like
10 to hear the Lockridge firm and also back what Bayer has to
11 say and then I will give you the last word on this because
12 I have grilled you the longest and I want to make sure --

13 MR. LUPEL: I understand the grilling, Your
14 Honor.

15 THE COURT: -- that you have an opportunity to
16 respond because it's your client's --

17 MR. LUPEL: Reputation is at stake.

18 THE COURT: Reputations are at stake here. So
19 let's take a ten-minute break, I need a ten-minute break,
20 and we will come back.

21 MR. LUPEL: Thank you, Your Honor.

22 (Recess.)

23 THE COURT: Mr. Lockridge.

24 MR. LOCKRIDGE: Thank you, Your Honor. I am here
25 on behalf of the PSC as well as my law firm.

1 At the outset let me say I would like to address
2 something that's a little bit tangential that was raised.
3 Another item was raised in one of the footnotes that the
4 defendants put in their initial brief and I will be very
5 brief on that, but I do want to make sure that this is
6 clear.

7 In their brief at footnote 3 the defendants said
8 that they had contacted Mr. Shelquist several times by
9 phone and by e-mail asking for an explanation of the
10 June 12th calls and that such calls and e-mails were not
11 ever returned.

12 Mr. Shelquist submitted an affidavit saying that
13 to the best of his knowledge he has always returned all of
14 his e-mails and all of his telephone calls and that, in
15 fact, most discussions involving this matter went through
16 Randy Hopper.

17 And they have not -- in their reply brief did not
18 address that, so I think that they either simply made a
19 mistake or acknowledge that I think they've -- at least
20 they acknowledge that, in fact, we have always returned
21 calls and e-mails.

22 MR. HOEFLICH: Your Honor, that's fair. We went
23 through Mr. Hopper because he was representing
24 Mr. Lockridge and that is what was meant by that footnote.

25 THE COURT: All right.

1 MR. LOCKRIDGE: Thank you. Moving on to the core
2 issue that's been discussed today, Your Honor, and let me
3 say I do appreciate that Your Honor is giving us the
4 opportunity to file a response to the comments made and to
5 make presentations or argument to the argument that the
6 defendants made and in particular to Ms. Lemon's comments
7 in her deposition.

8 Ms. Lemon testified she spoke to Mr. Shelquist on
9 the 12th of June for about ten minutes and that
10 Mr. Shelquist told her that it was all right to go ahead
11 and file the papers and affidavits even though they were
12 unsigned.

13 Now, I actually sort of think I can help the
14 court and I believe to an extent, to an extent I have an
15 answer to what happened here. The answer really is
16 Ms. Lemon's testimony is false, it is a lie. She lied in
17 her deposition and I think, quite frankly, she lied to Ken
18 Moll too. And I am not 100 percent certain why she did it,
19 but I think the record is pretty clear that that's what
20 happened here.

21 Now, can I prove that? I cannot prove it to
22 100 percent certainty, but I think that, as with many
23 things, you know, the court or sometimes juries have to
24 examine the evidence; and I think it's pretty clear.

25 There are a number of reasons why I think the

1 evidence is quite clear. First, Mr. Shelquist gave an
2 affidavit and deposition testimony where he flatly
3 contradicts Ms. Lemon's testimony and flatly denies ever
4 telling her any such thing whatsoever.

5 Now, Mr. Shelquist is here today if Your Honor at
6 any time would like to hear from him. And in Ken Moll's
7 response they did not submit a supplemental affidavit of
8 Ms. Lemon in response to the Shelquist affidavit as, of
9 course, they could have and it's my understanding that
10 Ms. Lemon is not in court today.

11 Second, when the brief and affidavits were
12 actually sent to Barb Gilles, our long-time secretary who
13 does all of the filing on Verilaw, she probably knows more
14 about Verilaw than any other human being in the country,
15 and when I looked at those documents and before I told
16 Ms. Gilles they could be filed, both affidavits had the
17 phrase "signature on file."

18 I am going to get to this a little bit more a
19 little bit later, but there was certainly nothing in those
20 documents to alert either me or Ms. Gilles that there was
21 any problem whatsoever.

22 There is nothing in any document to suggest that,
23 notwithstanding the express statements in these two
24 affidavits that there's a signature on file, for some
25 totally unexplained reason Mr. Shelquist would have told

1 Ms. Lemon that it was okay to file when that really was not
2 the case.

3 Third, now in her deposition Ms. Lemon said that
4 on June 23rd, some ten days after the filing, or eleven
5 days, Ken Moll told her to send --

6 THE COURT: Let me stop you there. I am still
7 trying to get the picture of June 12th. Yes, that was the
8 deadline for the July status conference.

9 MR. LOCKRIDGE: Correct.

10 THE COURT: But this was not something that was
11 going to break the PSC if it was not filed on time.

12 MR. LOCKRIDGE: Not at all, Your Honor, not at
13 all. I think we were anxious to bring closure to the issue
14 at some point one way or another, but we felt -- I
15 certainly felt no pressure to have this matter on file at
16 all. I am --

17 THE COURT: It wasn't something that I had
18 ordered to be filed that you had to -- you know, that I
19 specifically had an order out saying this had to be filed
20 on such and such time that would cause chaos, confusion and
21 chaos in the law firm to make sure that was filed on time,
22 but this was -- I am trying to get into the mind of why
23 this had to be filed on the 12th other than to meet the
24 deadline.

25 MR. LOCKRIDGE: Certainly from our perspective

1 and PSC's perspective, there was not a rush to get it filed
2 at all, Your Honor. And I am going to come back -- if I
3 may, Your Honor, I am going to come back to June 12th. If
4 I may, I would like to --

5 THE COURT: I'm sorry to interrupt you. Go
6 ahead.

7 MR. LOCKRIDGE: It's quite all right.

8 Ms. Lemon in her deposition said that on
9 June 23rd that Mr. Moll had told her to send an e-mail to
10 Mr. Shelquist reminding him that he had said it was okay to
11 file without signatures.

12 Now, Ms. Lemon never sent that e-mail even though
13 Ken Moll directed her to do that because Ken Moll had been
14 told by Amy Lemon, apparently, that Shelquist had said this
15 was okay.

16 I submit that the reason Ms. Lemon did not send
17 that e-mail is because she knew that it was false and she
18 knew that if she sent that e-mail Mr. Shelquist would hit
19 the ceiling and call up Ken Moll and her and say, What in
20 the heck is this? You know that I never authorized such a
21 filing.

22 Now, she says that she didn't do it because she
23 did not want to be a jerk, she actually uses another word,
24 but I submit it's because she was afraid to have everything
25 come to hit the fan at that point and at that point then

1 Ken Moll would have learned that she had actually lied to
2 him and that she did not want that to happen because, as we
3 have already learned, she was a very young attorney.

4 Next, the only two people who actually knew that
5 the affidavits had been filed without signatures were
6 Ms. Lemon and Mr. Moll. As I understand it, and Bayer has
7 put some of these e-mails up, they immediately began a
8 campaign to get Mr. Guariniello to sign his affidavit.
9 This is after the June 12th filing.

10 Well, if you look at those e-mails, and there are
11 three or four of them, not a single one is copied to me or
12 to Mr. Zimmerman, Mr. Shelquist, or anyone else on the PSC.
13 Now, Mr. Zimmerman and I, Mr. Zimmerman in particular, we
14 get copied on everything in this entire litigation. That's
15 the way it should be.

16 So I submit it's very unusual that Ms. Lemon and
17 Ken Moll & Associates did not copy us. And I think it's
18 pretty clear it's because they did not want to let us know,
19 in fact, there was nothing -- that these affidavits had not
20 been signed.

21 Fifth, when Ms. Lemon did send us an e-mail
22 finally telling us that the motion should be withdrawn, she
23 gave us a false reason. She said that Mr. Guariniello had
24 decided to use the interrogatory process. And as I
25 understand it, that is not correct. So even at that time

1 when we went ahead and withdrew the motion, they did not
2 tell us that there were no signatures on file.

3 Now let me get to the phone records, Your Honor.
4 Ms. Lemon testified that she spoke for about ten minutes in
5 the morning of June 12th to Mr. Shelquist and that that's
6 when he supposedly told her to go ahead and file. Now, the
7 phone records in and of themselves only can show so much,
8 but I think on balance they overwhelmingly establish that
9 her testimony is false.

10 The first call in question was from the Ken B. --
11 Ken Moll's firm, the general number. Apparently they don't
12 have direct dials. As I indicated, at Lockridge Grindal we
13 do have direct dials, but still a lot of people call into
14 our general number. That's just the way it is. In any
15 event, there was a call at 10:37 to the Lockridge Grindal
16 general number.

17 THE COURT: Now, let me ask you this dealing with
18 the direct number. Many times you will call a direct
19 number but it's routed through the general number and that
20 the only thing that will show up on the bill or the notice
21 is the direct number. Like if people call me, it would
22 be -- my telephone number here is 664-5070, but, in fact,
23 they may have had my private number and it wouldn't show up
24 on that.

25 MR. LOCKRIDGE: I actually don't know what

1 happens in our phone system if that occurs, which number
2 shows up, Your Honor. I just flatly don't know. I am sure
3 it happens a lot.

4 THE COURT: Isn't that what happens with our
5 system?

6 MR. SELDON: It can be traced either way.

7 THE COURT: But on the billing it would show --
8 like when you call me, my information at wherever I am at,
9 whether my cell phone or at home, it shows -- it doesn't
10 show her number, it shows the 5070 number.

11 THE CLERK: Right.

12 MR. SELDON: It depends upon where you are
13 getting your call records from. If it's from -- if you are
14 a large firm and you have your own phone switch, you get
15 those records from that; or if it's from the phone company,
16 through Qwest. There's two separate records there.

17 MR. LOCKRIDGE: Well, if a call comes in, say,
18 directly to me, to my direct dial number, I believe that it
19 shows on the records that it comes in to me. What I don't
20 know is that if, say, I'm on the phone and it rolls over to
21 the switchboard, I don't know. It may very well show the
22 switchboard, but I simply don't know, Your Honor.

23 In any event, there's the very first call at
24 10:37 in the morning. Now, Mr. Shelquist in his affidavit
25 has said -- says that he got a message from the

1 receptionist, our receptionist, saying that someone from
2 Ken Moll's office had called and he didn't get that call at
3 that time. The phone records show that the call lasted for
4 one minute. And I don't know. Some phone records show
5 like 30 seconds to one minute, but what we do know is it
6 was certainly one minute or less.

7 So I think that's consistent with his testimony
8 that there was no conversation and it's also consistent
9 with his testimony that the receptionist told him he had
10 gotten a call and that he should return it.

11 At 10:43, six minutes later, he returned the
12 call, but for some reason it was -- a digit got changed, a
13 5 to an 8 and so forth, and our phone records show that it
14 was to an incorrect number and that there was no connection
15 made.

16 He looked up the phone number of Ken Moll &
17 Associates and at 10:48 called the Ken Moll & Associates
18 general number. Now, in an affidavit Mr. Shelquist says
19 that he was put on hold and ultimately had to hang up to
20 take another call. Once again, that was a short call. It
21 shows that it was for 2.6 minutes. I would emphasize again
22 that there's no affidavit from Ms. Lemon here saying that
23 that is not correct.

24 And indeed, consistent there, about seven or
25 eight minutes later at 10:57 someone from Ken Moll &

1 Associates called again the LGN general number and that
2 that call lasted for about four minutes.

3 Now, we have submitted an affidavit from Barb
4 Gilles indicating that she spoke to Ms. Lemon sometime in
5 the late morning, she obviously didn't know exactly when,
6 and saying that Ms. Lemon asked her about a number of
7 mechanics involving a filing and so forth and that Barb
8 Gilles gave them to her since Ms. Gilles knew this
9 information very well. Once again I would note that that
10 affidavit stands unrebutted.

11 Those are all the morning calls. There's no
12 ten-minute call, no call with Mr. Shelquist. I guess
13 there's an old adage that --

14 THE COURT: How long was the call with
15 Ms. Gilles?

16 MR. LOCKRIDGE: Four minutes at 10:57. And she's
17 got an affidavit that says in some detail about what was
18 discussed with Ms. Lemon. In fact, that may be one of the
19 calls where Ms. Lemon commented on the fact that she had
20 not been able to get ahold of Shelquist at all that day.

21 I guess in the old adage that no good deed goes
22 unpunished, Ms. Gilles, being the responsible secretary
23 that she is, called Ms. Lemon up at 2:30 to see if
24 Ms. Lemon still had an intention to file anything that day.
25 That call lasted 9/10ths of a minute.

1 Ms. Lemon apparently wanted to ask her some more
2 questions about the mechanics of the filing. Ms. Gilles
3 was busy on other projects and asked if she could call
4 back. She did. She called back at 3:10, spoke to -- and
5 this is from Barb Gilles' direct number, so the phone
6 records show that that call again is directly from Barb
7 Gilles. The 3:10 call lasted for four minutes.

8 She called, Ms. Gilles called Lemon again at 3:18
9 because Ms. Lemon had asked whether or not Lockridge or
10 Shelquist would be around to authorize the filing and she
11 called -- Ms. Gilles talked to Ms. Lemon and said, yes,
12 they would be there at some point.

13 There is a call from --

14 THE COURT: Let's back up. Was there a 3:10
15 call?

16 MR. LOCKRIDGE: Pardon?

17 THE COURT: Was there a 3:10 call?

18 MR. LOCKRIDGE: Yes, Your Honor. Ms. Gilles
19 called at 3:10 and the phone records, I believe, show that
20 that is from Ms. Gilles' phone number and she answered some
21 more of Ms. Lemon's questions.

22 THE COURT: And then there was another call at
23 3:18?

24 MR. LOCKRIDGE: At 3:18, because one of the
25 questions which Ms. Lemon had asked Ms. Gilles was whether

1 or not Lockridge or Shelquist would be around to actually
2 approve the filing. And she didn't know at that time and
3 she either checked with me or Rob, I flatly don't know
4 which one, but she called Ms. Gilles -- Ms. Lemon back at
5 3:18 and told her that one of us would be in the office to
6 approve the filing. So that's the 3:18 call.

7 Now, there's another call at 3:55 from Ms. Gilles
8 to Ken Moll & Associates that for some reason, which I
9 simply don't know, didn't go through. The records show
10 that there was no connection made.

11 Now, at that time, at about 3:55, the documents
12 were e-mailed to Ms. Gilles and it was somewhere in that
13 point between 3:55 and about 4:15 that I recall telling
14 Ms. Gilles that it was okay to go ahead and file the
15 documents.

16 Now, as I sit here today I wish I could tell Your
17 Honor that I have a distinct recollection of all of that,
18 of at that time reading the documents, but I can't.

19 I do remember reading the brief a day or two
20 before and having a very short e-mail or conversation with
21 Michael Nast from the briefing committee, but that's all I
22 really recollect.

23 My practice certainly is to look at the
24 documents. If it's something I haven't read before, I will
25 read it very carefully and to sign my name on the brief and

1 to tell the secretary to send it out.

2 I will concede, quite candidly, that this
3 particular motion was not high on my own radar screen. We
4 weren't under any pressure to file it. I thought that
5 there were -- I remember thinking that there were certainly
6 other things that were far more important. I believe at
7 this time we were in the process of filing some
8 supplemental documents on the class motion.

9 But in any event, at some point between 3:55 and
10 4:15 or 4:20 I told Barb Gilles to go ahead and to file it.
11 Let me just as an adjunct note that Amy Lemon's records say
12 that the documents were mailed at 5:55 p.m. I can't figure
13 that out. It simply has to be 3:55. The only thing we can
14 think of is that she was working off of two computers.

15 But in any event, when we filed the documents
16 there was nothing to alert us to any problem whatsoever.
17 The brief had been vetted by our law and briefing committee
18 and, most significantly, both of the affidavits said
19 "signature on file." It certainly looked to us like
20 everything was 100 percent in order. It would not have
21 occurred to me --

22 THE COURT: When did Verilaw docket it?

23 MR. LOCKRIDGE: Yes. These are Verilaw
24 documents, that's right. Yes, that's another side point.

25 Obviously normally when I am sitting there as an

1 attorney, and we obviously do a lot of filings in a lot of
2 cases, you have the affidavits in front of you and you can
3 actually see that there's a signature and a notary. Here
4 all we have is the signature on file.

5 But it would not have occurred to me that anyone
6 from the PSC or the executive committee would have sent
7 anything to us that said the signature -- that signatures
8 were on file and that affidavits had been signed when that
9 was not the case. So, as I say, there was nothing to alert
10 us, period. In any event, the documents were filed.

11 The next call was at 4:50 from Ken Moll &
12 Associates' general number to Lockridge Grindal. That was
13 for two minutes. We cannot account for that call. I don't
14 think it's of any pertinence, but I simply can't account
15 for it. I didn't talk to anybody at that time. Shelquist
16 and Barb Gilles did not either.

17 In any event, four minutes later Rob Shelquist
18 called Amy Lemon. So my guess is at 4:50 Ms. Lemon must
19 have called our front desk and Shelquist must have been on
20 the phone. I don't know.

21 But in any event, at the end of the day, 4:54 is
22 the first time there was any conversation that day between
23 Rob Shelquist and Amy Lemon and there was certainly nothing
24 there to suggest any problem whatsoever and she said that
25 they were holding the originals, and that testimony also is

1 unrebutted.

2 Now, as I've indicated, Your Honor, after this
3 extremely bothersome incident we have altered our practice
4 some. In fact, now it's not good enough for a filing firm
5 to say that they are holding it. We now -- before we will
6 file anything for anybody in this litigation we require
7 that we actually hold the original documents in our office.
8 I don't think that's what is required under the court's
9 order, but certainly having been burned in this matter,
10 that is what we are doing.

11 In summary, Your Honor, I certainly feel like our
12 law firm and the PSC are blameless here. I will leave it
13 at that.

14 THE COURT: All right. Thank you.

15 MR. LOCKRIDGE: Thank you.

16 MR. HOEFLICH: May I, Your Honor?

17 THE COURT: You may.

18 MR. HOEFLICH: Thank you. Your Honor, Mr. Lupel
19 suggested that Mr. Moll had no motive for filing this
20 motion. Well, I would respectfully disagree. The motion
21 and the supporting declarations were intended to put
22 enormous pressure on Bayer and to step up the litigation.

23 To state publicly that a foreign prosecutor is
24 intervening in U.S. civil litigation itself is a very
25 significant means to put pressure on a defendant.

1 To state to the court that a foreign prosecutor
2 wants to intervene in the proceeding is a significant step
3 to put pressure on the defendants.

4 To tell the PSC that, when one has been charged
5 with obtaining documents from a foreign prosecutor, that
6 one has taken steps and obtained cooperation is a
7 significant step.

8 So we believe there was a motive for Mr. Moll to
9 file this brief and we think that it was done with his
10 knowledge.

11 Mr. Lupel suggested, I believe, that Mr. Moll
12 didn't know that the filing had been done for several days.
13 I think he talked about the following Monday or Tuesday.

14 We've received through the discovery that the
15 court ordered the e-mails -- and here is one from
16 Ms. Gilles at Mr. Lockridge's firm to KBM, which is
17 Kenneth B. Moll, saying it's filed on Verilaw and below it
18 references the motion, the memorandum in support, and
19 Exhibits A to D.

20 So we think it is clear that Mr. Moll knew that
21 day that the motion and all of the supporting materials had
22 been filed with the court.

23 We talked in detail about Ms. Lemon's testimony.
24 And our sanctions motion is against the Kenneth B. Moll
25 firm. Ms. Lemon was very clear in her testimony that

1 Mr. Moll knew about the filing before it was done.

2 Now, she said that Mr. Shelquist also knew and
3 there's some disputed testimony on that, but she was very
4 clear and the documents support that the firm knew that the
5 filing was done without any of the signatures and Ms. Lemon
6 was clear that Mr. Moll had that knowledge.

7 Mr. Lupel also suggested that the Italian
8 prosecutor's office has never said that they didn't support
9 the filing of the motion. I think you had some discussion
10 of what the message actually was intended and whether the
11 Italian prosecutor's office has ever been clear on that.

12 Well, as the court knows from our supplemental
13 filing, which included a letter from the Italian
14 prosecutor's office, "The aforementioned declaration was
15 never written or signed by Dr. Guariniello."

16 They also say that on June 16, 2003 the attorneys
17 were informed that Dr. Guariniello had no intention of
18 signing the declaration.

19 So the facts show that the Italian prosecutor's
20 office has been very clear that they never intended to
21 intervene in their case.

22 Contrary to some of the suggestions today, I
23 would suggest that there's a very significant difference
24 between suggesting that one would want documents or even,
25 in Mr. Lupel's term, cheerleading to say you'd like

1 documents than it is for a foreign prosecutor to intervene
2 in U.S. litigation.

3 There was a suggestion that something had
4 changed. As the court may know from our filings and from
5 the affidavit of Mr. Flora, no one from Bayer spoke to the
6 Italian prosecutor's office about this until after the
7 June 16th e-mail to Mr. Moll's firm and until after we had
8 found out at least part of what happened.

9 There was a discussion about motive and intent
10 and about Rule 11 and how long a party has to withdraw a
11 pleading and a suggestion that what we had here is
12 negligence.

13 Well, respectfully to the court, here what
14 happened is a filing was made on June 12th, on June 16th a
15 foreign prosecutor said he had no intention of being part
16 of that filing, and then between that date and the date the
17 motion is withdrawn Bayer twice has to go to the PSC or to
18 Mr. Moll -- and we are not attributing any blame to the
19 PSC -- and state we don't think this was ever filed, we
20 want a copy of that motion.

21 We think there's a significant difference between
22 what someone may do at the beginning of litigation or
23 somebody negligently may, not that we condone it, submit a
24 pleading as opposed to someone who has the privilege of
25 being a court-appointed member of the PSC and more than a

1 year after joining this litigation representing to the
2 court that a foreign sovereignty and its prosecutor want to
3 intervene and then after finding out that that foreign
4 prosecutor doesn't want any part of it, to then keep trying
5 to get some sort of signature until it's conclusive, A,
6 that you can't get it and, B, that the defendants are
7 demanding it.

8 It was only after all of those steps had taken
9 place that the motion was withdrawn, and then it was
10 withdrawn without any statement as to why it was being
11 withdrawn.

12 And we do view that as very significant and we do
13 think it warrants the significant sanctions that we've
14 asked for.

15 THE COURT: Thank you.

16 MR. HOEFLICH: Thank you, Judge.

17 THE COURT: Mr. Lupel.

18 MR. LUPEL: Thank you for this last word, Your
19 Honor. Just a couple of things that I would like to say.

20 You asked me while I was before you a moment ago
21 why didn't Ken sign his affidavit, and because of the break
22 I had the opportunity to ask him and he said it wasn't
23 finalized. He said it was being sent for approval, so I
24 wouldn't have signed it at that point; I didn't learn that
25 it was filed until after it had been filed. So an answer

1 to your question.

2 There is in the difficult questions that you
3 asked and my stammering with respect to the events of June
4 the 12th some testimony that I would like to bring to your
5 attention not as blame, but to advance my argument that
6 there was miscommunication or misunderstanding as to what
7 was said.

8 In the exhibits filed by the movant defendant
9 there is a couple of excerpts from the testimony of
10 Mr. Shelquist, one at page 16, line 18. I believe
11 Mr. Hoeflich was the questioner, and the question asks:

12 And what practice did you personally
13 follow in the instances prior to the Italian
14 motion?

15 Answer: I believe that we either
16 scanned the signature in or in a couple of
17 instances, when we were pushing up against
18 the 5:00 p.m. deadline, we e-mailed the
19 affidavit to Verilaw and then faxed the
20 signature page when it came in.

21 In another question and answer on page 18,

22 Question: What is your understanding
23 of -- what is your understanding as to
24 whether or not attorneys who file pleadings
25 signature on file in the MDL have to have

1 an original signature with them at the time
2 of filing?

3 Witness: It is our preference to have
4 the signature on file and the documents that
5 I have been responsible for filing have had
6 the signature.

7 Question: What is your understanding
8 of the court's rule with respect to filing
9 documents signature on file? Do you have to
10 have a signature, original signature, with
11 you at the time of filing?

12 Answer: That's my understanding.

13 Question: You described it as a
14 preference earlier. Can you explain that
15 word choice in your answer?

16 Answer: With regard to MDL filings on
17 both sides there have been instances where
18 documents have been filed, affidavits that say
19 "signature on file." I believe there has been
20 discovery responses served by defendants that
21 have "signature on file." I don't know if
22 technically that's what's supposed to have
23 been done, but nobody has complained or tried
24 to kick out those filings on either side
25 until this motion.

1 Now, I don't know what was said in the
2 conversations that Amy Lemon testified to. I do know that
3 Ms. Lemon, notwithstanding her obligations as an attorney
4 and not ever having experienced Verilaw before -- and what
5 questions and answers and how she received them, I wish I
6 knew.

7 I do know that Ms. Lemon is no longer with the
8 Ken Moll firm, didn't know about this hearing. A lot has
9 been said about her. I don't know if Your Honor needs to
10 hear from her or anyone else from the stand.

11 But I'm telling you these things because I don't
12 think it's all that clear or as to how this confusion could
13 have occurred that Amy sent this on and that Mr. Shelquist
14 and the Lockridge firm believed that the signature was on
15 file based upon whatever conversations may have occurred
16 with either Mr. Shelquist or others at the office.

17 But again I urge the court to consider the fact
18 this was not an intentional evil done. This was foolishly
19 and mistakenly done and corrected, I believe, within a
20 reasonable time. Yes, it could have been done earlier. It
21 could have been done with a greater dispensing of
22 information, but it was done. No one was hurt by it. The
23 evil was in the filing, not in any impact that occurred.

24 I thank you very much for listening, Your Honor.

25 THE COURT: Thank you. There's one -- you might

1 as well stay there. There's one matter that I do want to
2 bring to your attention and you bring it to your client's
3 attention.

4 There was a transcript ordered of the last status
5 conference when we set up this hearing. Telephone calls
6 were made to my court reporter asking for an expedited
7 transcript. She worked and did that. She has not received
8 payment for that transcript.

9 It was pointed to her because it was a transcript
10 that was put on my website and that is paid for by PSC and
11 by defense she did not -- she was not going to get paid.
12 Understand that I'm sure there's a mistake.

13 MR. LUPEL: I don't know anything --

14 THE COURT: You don't have to respond or
15 anything. You listen to what I have to say.

16 MR. LUPEL: Yes, sir, I'm listening.

17 THE COURT: This court has put on the website the
18 transcript of every status conference so every litigant or
19 any interested party can read what was happening in this
20 litigation. When a lawyer asks for expedited, even faster
21 than what the court puts on the website, they have to pay
22 for it.

23 There is -- this is none of your business, none
24 of the lawyers' business, but if there's a picture down in
25 the court reporter's room with darts going through it, it's

1 me because I've put this transcript on and it's cost the
2 court reporters a significant amount of money because
3 anyone can download that transcript.

4 I've made that decision because I think it's
5 important that the public know what's happening in this
6 courtroom. But when my court reporter has to work extra
7 and at a faster clip because something is needed by a
8 lawyer, of course it's incumbent on the lawyer to pay that
9 bill.

10 MR. LUPEL: I agree. I will see to it that it's
11 done.

12 THE COURT: Thank you.

13 MR. LUPEL: Thank you, Your Honor.

14 THE COURT: Mr. Zimmerman, anything else that you
15 had?

16 MR. ZIMMERMAN: On this issue, Your Honor?

17 THE COURT: Not on this issue. I will take this
18 matter under advisement.

19 MR. ZIMMERMAN: Your Honor, I believe that
20 concludes the motions that are actually set for argument.
21 There are several motions that are fully briefed that are
22 simply time sensitive. The one that is -- we've talked
23 about the third party payer assessment amending 56, I
24 believe it's PTO 56. Is that right, Ron?

25 MR. GOLDSER: 53.

1 MR. ZIMMERMAN: 53, I'm sorry, which I am not
2 going to belabor, but there is one having to do with
3 dissemination of expert reports, Your Honor, and I think --
4 I want defendants to understand and perhaps everyone to
5 understand why I feel strongly that we need to get this
6 information out.

7 We are out there telling people they have to take
8 hard looks at their file. We are out there telling people
9 there is going to be consequences of having filed cases
10 that you don't believe you can support, i.e., dismissal.
11 To help with that equation people have to know what the
12 experts, at least the plaintiff's view of -- the
13 plaintiff's experts, are saying.

14 And for a while I have been hamstrung being able
15 to disseminate that information because the defendants feel
16 they have a dog in that fight and they wanted to be heard
17 on the question of how these expert reports could and
18 should be disseminated.

19 I don't believe they do have a dog in that fight,
20 but the court allowed them to make a response and the
21 response, I think, was something to the extent that they
22 didn't quite like the idea that summaries of these reports
23 could be available on the court's website, somehow that
24 would provide court imprimatur to the validity or
25 credibility of these reports. I didn't see it as such, any

1 more than the transcript.

2 These are just filed reports. We wanted to put a
3 summary out so people could just log on and take a look at
4 what the plaintiffs' experts -- the summary and their CV,
5 what it was and so that they could, if they wanted to,
6 request the actual copies.

7 We are several weeks out now and I really do want
8 to get that information into the hands of people, and so
9 all I say to the court is it is a time sensitive matter.

10 The suggestion now that we have to go through the
11 LAC and go through all the rigmarole and let everybody in
12 the world respond who might have a state case respond about
13 what we are going to do with this work product, I think, is
14 overindulgent and unnecessary. I don't think this is an
15 LAC issue. The LAC isn't contributing one penny to this
16 product.

17 I just want to get it -- make it available, Your
18 Honor. In a sense the lawyers in the MDL have bought and
19 paid for this work product. The information is critical to
20 what they're doing in analyzing their cases and it's time
21 to at least bring this to fruition.

22 And so with all due respect, Your Honor, I simply
23 ask that we be able to move on some decision on that so I
24 can get this information out.

25 THE COURT: Adam or Susan.

1 MR. HOEFLICH: Would you like to address this,
2 Susan?

3 MS. WEBER: Your Honor, we are not disputing that
4 plaintiffs are entitled to get paid for the work that
5 they've done.

6 Their summaries of their expert reports are
7 already up on the PSC's website. We think that's the
8 appropriate place for them. They wanted to post documents
9 on Verilaw that might lead to fights over confidentiality
10 designations with respect to the experts. We think that
11 rather than putting it on Verilaw, relying on their website
12 is a simpler way to do that.

13 And the reason we suggested referral to the LAC
14 was not to create a big bureaucratic obstacle for
15 plaintiffs, but because their proposed order would bar any
16 other plaintiff's attorney from contacting the experts in
17 question except through the PSC, which could create
18 potential issues about assessment. And since there are
19 state court lawyers who might have an interest in that, we
20 thought that's what the LAC is there for.

21 So that's what -- simply what we have said in our
22 papers.

23 MR. ZIMMERMAN: May I just briefly respond, Your
24 Honor?

25 THE COURT: Quickly.

1 MR. ZIMMERMAN: I think we have the right to
2 limit contact by a field of lawyers to experts that have
3 come forward and been retained by the PSC. I don't think
4 that's an extraordinary demand. In fact, many of the
5 experts don't want to be contacted directly and have asked
6 that any contact come through the PSC. That doesn't seem
7 like an extraordinary request.

8 And so I do take strong issue with anybody from
9 the defense side telling me how I can -- how my side of the
10 case can communicate or should communicate.

11 THE COURT: All right. The court will take this
12 under advisement and have an order out in the next couple
13 days. It will not go to the LAC; there's no need. I will
14 rule on this quickly.

15 MR. ZIMMERMAN: Thank you, Your Honor. We've
16 talked about the motion to participate in third party
17 payers. So the last item -- well, not the last item. The
18 next item on the agenda is PTO 102 and Lone Pine. It's
19 my -- well, we did meet this morning, we met last night.
20 There's another draft that's been circulated. None of us,
21 I don't think, have had the time to totally digest it. My
22 sense is --

23 THE COURT: I don't think we should talk about
24 this. I am going to shift you over to the special masters
25 to talk about that afterwards, after we adjourn here.

1 MR. HOEFLICH: Thank you, Judge.

2 THE COURT: Again, you are making great progress.

3 This is a very difficult issue, very difficult issue.

4 Again, I want your input. I hope you don't crash
5 and burn and think that you are going to give up and not
6 give the court input because, rest assured, the court is
7 going to make a decision on this issue because I have to to
8 move these cases along.

9 And so it's very important that you spend the
10 time and go through the thoughtful objections that have
11 been made and make some recommendations to the court within
12 a timely fashion.

13 MR. ZIMMERMAN: We just might need a little lunch
14 before we do that.

15 THE COURT: I had my Slim Fast bar, so I am fine.

16 MR. ZIMMERMAN: I didn't bring mine.

17 MR. HOEFLICH: Some of us have greater storage
18 than others.

19 MR. ZIMMERMAN: I don't have a lot to spare.

20 THE COURT: All right. Let's move on. Anything
21 else?

22 MR. ZIMMERMAN: I think we have talked about --
23 well, our motion for sanctions with regard to detail people
24 is, I believe, fully briefed. I don't know that --

25 THE COURT: That's before Magistrate Judge

1 Lebedoff.

2 MR. ZIMMERMAN: Yes. Next is trial settings,
3 Your Honor, and I don't think there's anything other
4 than -- that we haven't discussed except my letter to the
5 court, which I am not asking for any comment on.

6 I'd just let the court know that I tried my best
7 to give our views of how we can look at trials and present
8 trials in a way we haven't focused on in the past and --

9 THE COURT: I am assuming I will get a response
10 from --

11 MR. ZIMMERMAN: I would be shocked if I didn't
12 get a response.

13 MR. HOEFLICH: If you would allow us the
14 opportunity, yes, we will.

15 THE COURT: All right. How soon?

16 MR. HOEFLICH: Could we have ten days?

17 THE COURT: Certainly. I'll give you two weeks.

18 MR. ZIMMERMAN: That concludes the agenda, as I
19 understand it, except for the special master's report on
20 LAC.

21 THE COURT: Well, we need to set the next status
22 conference. What about the 22nd or 23rd of March?

23 MR. ZIMMERMAN: I believe actually I'm speaking
24 at a seminar that day.

25 MR. MAGAZINER: Your Honor --

1 THE COURT: We're moving --

2 MR. MAGAZINER: -- if the Rushton case in
3 Philadelphia proceeds as scheduled, both Mr. Beck and I
4 will be in trial on Rushton at that time. I don't know if
5 that should make a difference.

6 THE COURT: Do you want to push it to April 29th,
7 then, and skip next March?

8 MR. MAGAZINER: I don't know what -- I don't have
9 a preference. I just wanted to make sure Your Honor
10 understood that if the conference is in the third week of
11 March, likely both Mr. Beck and I will be absent.

12 THE COURT: We've accomplished a lot at this
13 status conference. Do we really need one for next month
14 since we're not going to have a trial set for June?

15 MR. HOEFLICH: Your Honor, Mr. Zimmerman and I,
16 I'm sure, will continue to work hard on the narrowing
17 protocol with the special master and we will work through
18 the special masters on any other issues that arise. So I
19 think we can wait until April.

20 MR. ZIMMERMAN: And maybe if we find something
21 bubbles up fast to the top, we will contact the court.

22 MR. HOEFLICH: Of course.

23 THE COURT: Certainly. What about April 29th?
24 Maybe we can do it sooner.

25 MR. ZIMMERMAN: Maybe the middle of April.

1 THE COURT: Mid April I'm gone. What about the
2 first week in -- second week in April?

3 THE CLERK: You're on vacation.

4 MR. HOEFLICH: It's Easter break for many schools
5 that week, Judge.

6 THE COURT: Yes. I will be visiting colleges.

7 THE CLERK: We could do it the week after,
8 anytime the week of the 12th of April.

9 THE COURT: The week of the 12th. Well, let's
10 not -- the 12th is the day after Easter, so we don't want
11 to do that. Let's move it towards like Thursday.

12 SPECIAL MASTER HAYDOCK: There's the ADR
13 conference that Thursday and Friday.

14 MR. LOCKRIDGE: Wednesday, the 14th?

15 THE CLERK: We have civil motions.

16 THE COURT: When is that meeting? Is that
17 the Orlando --

18 SPECIAL MASTER HAYDOCK: It's ADR. I am
19 scheduled to give a speech.

20 THE COURT: What days are you going to be gone?

21 SPECIAL MASTER HAYDOCK: That Thursday and
22 Friday, the 15th and 16th I'm out.

23 THE COURT: What about Wednesday, would that be
24 fine?

25 SPECIAL MASTER HAYDOCK: Wednesday is fine with

1 me.

2 MR. ZIMMERMAN: You said you had something on the
3 14th?

4 THE CLERK: We have civil motions scheduled that
5 morning.

6 THE COURT: How many?

7 THE CLERK: Three.

8 THE COURT: Let's see. How about Tuesday?

9 THE CLERK: The 13th is wide open.

10 THE COURT: Let's do it the 13th, then.

11 MR. HOEFLICH: Thank you, Judge.

12 THE COURT: Tuesday, the 13th of April at 10:00.

13 MR. ZIMMERMAN: Thank you, Your Honor.

14 MR. LUPEL: May I address the court, Your Honor?

15 THE COURT: Yes.

16 MR. LUPEL: I did that investigation since then
17 and there's only one transcript that was ever record --
18 that was ever ordered, and that was the transcript of Judge
19 Lebedoff on November 12th and a check was sent January 30th
20 to Neil K. Johnson for \$350.75. The check number is 83275.
21 There has been no other transcript ever ordered, no bill
22 outstanding that we're aware of.

23 THE COURT: Lori?

24 COURT REPORTER: I have e-mails that --

25 THE COURT: We've got e-mails.

1 MR. LUPEL: Okay. Thank you, Your Honor.

2 THE COURT: All right. Anything further? We

3 will adjourn. Thank you.

4 (Court adjourned.)

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* * *

8 I, Lori A. Case, certify that the foregoing is a

9 correct transcript from the record of proceedings in the

10 above-entitled matter.

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Certified by:

Lori A. Case, RMR-CRR

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Dated: March 8, 2004

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