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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: BAYCOL PRODUCTS LITIGATION) MDL No. 1431 (MJD)
)
) 1:00 p.m. o'clock
) April 11, 2002
) Minneapolis, MN
)
)

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

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS: CHARLES ZIMMERMAN, ESQ.
RICHARD LOCKRIDGE, ESQ.
STANLEY CHESLEY, ESQ.
WILL KEMP, ESQ.
WENDY FLEISHMAN, ESQ.
DANIEL BECNEL, ESQ.
ASA GROVES, ESQ. (by telephone)
KEVIN ROGERS, ESQ. (by telephone)

ON BEHALF OF THE DEFENDANTS: TRACY VAN STEENBURGH, ESQ.
FRED MAGAZINER, ESQ.
ADAM HOEFLICH, ESQ.
SUSAN WEBER, ESQ.

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1 THE CLERK: Multi-District Litigation Case No.
2 1431, In re: Baycol Products. Please state your
3 appearances for the record.

4 THE COURT: We have on the telephone Asa Groves,
5 is that correct?

6 MR. GROVES: Asa.

7 THE COURT: Asa Groves from Miami, and Kevin
8 Rogers from Chicago, is that correct.

9 MR. ROGERS: Yes, sir.

10 MR. ZIMMERMAN: Good morning, Your Honor, Charles
11 Zimmerman, Zimmerman Reed for the plaintiffs.

12 MR. LOCKRIDGE: Good morning, Your Honor, Richard
13 Lockridge, Lockridge Grindal for the plaintiffs.

14 THE COURT: It's afternoon.

15 MR. LOCKRIDGE: Good afternoon.

16 MR. CHESLEY: Good afternoon, Your Honor, Stanley
17 Chesley for plaintiffs.

18 MR. KEMP: Your Honor, Will Kemp from Harrison,
19 Kemp and Jones from Las Vegas for plaintiffs, also.

20 MS. VAN STEENBURGH: Good afternoon, Your Honor,
21 Tracy Van Steenburgh from Hallelund Lewis, and with me
22 today is Fred Magaziner from the Dechert law firm in
23 Philadelphia.

24 THE COURT: Good afternoon.

25 MR. HOEFLICH: Good afternoon, Your Honor, Adam

1 Hoeflich for Bayer.

2 THE COURT: Good afternoon.

3 MS. WEBER: Hello, Your Honor, Susan Weber for
4 Bayer.

5 THE COURT: I'll introduce the Special Master in
6 this matter, Roger Haydock.

7 We have a number of things to go over. Mr.
8 Zimmerman, do you want to start?

9 MR. ZIMMERMAN: Good afternoon. We have about
10 eight items, I believe, on the agenda. I expect there may
11 be some additional clerical or housekeeping items that we
12 may be addressing. But if I could probably just start with
13 some reports. There are I don't think any hotly contested
14 issues today, but some instructional questions and some
15 reporting that we would like to do, and then we'll proceed
16 with any other things that may come up that we find we're
17 not in agreement on.

18 First, there is the discovery report. I thought
19 it would be helpful, Your Honor, if we reported to the
20 Court where we are with the discovery, electronic review of
21 documents and the document depository because it is
22 important, both for the Court and for all counsel around
23 the country to understand what's going on there and what's
24 available, what we're doing and sort of where it's going.

25 We've been spending a lot of time over there.

1 We've been trying to set it up in a way that would be
2 electronically user friendly and searchable. And I'd like
3 to, if I could, ask Ron Goldser in my office, who has been
4 spending a lot of time setting this up, to briefly report
5 to the Court where we are, what we've been doing, what's
6 there, and there is a bit of an issue I think is
7 outstanding that we may want to address or at least
8 determine how we are going to address down the road.

9 THE COURT: All right.

10 MR. GOLDSER: Good afternoon, Your Honor, Ron
11 Goldser for plaintiffs. So far Bayer has produced about 68
12 CD roms worth of documents. They have scanned them in and
13 totals about a million pages so far. I believe one of
14 these CD's also includes a database of the entire
15 prescription history that Bayer has accumulated of Baycol
16 over the entire course of time.

17 They are about to produce to us on a separate CD
18 their entire internal adverse events report database.
19 That's been a hot issue up until yesterday. I think we've
20 been able to work that out. They are going to produce it
21 to us in an oracle database format whereas before they were
22 going to require the plaintiffs to spend \$25,000 for
23 Clintrace Proprietary Software. They have now agreed that
24 they will produce it in oracle database format for, I
25 believe, at no cost. We've been able to work that out.

1 So, I don't think that's an issue anymore, although I
2 anticipated it might be today.

3 We have issues about producing hard copies of
4 documents versus scanned images. We're going to be meeting
5 on that issue next Tuesday in Chicago. There is an issue
6 about OCRing and whether they can and will produce OCR
7 documents, so we're going to talk about that in Chicago.

8 There is an issue about objective coding and
9 whether Bayer can and will produce objective coding of
10 data. That's on our agenda for next week. I know that
11 issue is also a hot item in the Philadelphia state court.

12 There are issues about missing pages that we will
13 be taking up with Bayer. As you can see, none of those are
14 really hot issues yet and certainly nothing for the Court
15 to decide. I just wanted to give you a flavor of what's
16 going on.

17 GSK has produced 8 CD's of documents so far. I
18 don't have a total on the number of pages, and similar
19 issues are going to be discussed in Chicago next week about
20 GSK and their ability to produce hard copies as well as
21 scanned documents, OCR and objective coding.

22 Plaintiffs have issued some 15 to 20 third-party
23 subpoenas. Most of those are just starting to get a return
24 and most of them are asking for extensions of time.

25 We have heard from the Food and Drug

1 Administration. Mr. Arsenault is heading up that charge.
2 They have asked for significant additional time just as
3 they did in the Propulsid litigation. I know ultimately
4 Judge Fallon had the FDA appear in his court on the
5 document production and Judge Fallon managed that issue
6 very closely. I don't know whether we will reach that
7 point in this litigation or not. We are talking with the
8 FDA and we'll see what we can work out with them.

9 Finally, Bayer has produced to us about 90
10 videotapes of various seminars and marketing videos and
11 there are several of which they have claimed privilege. A
12 privilege log has not yet been produced and I don't believe
13 its due until sometime in the next several months.

14 We have served formal document requests and
15 Interrogatories. The formal service of those documents has
16 occurred so I don't believe the answers aren't due on those
17 quite yet but we certainly hope that the answer to those
18 formal document requests will be forthcoming so we know
19 whether the stuff they are producing is responsive to some
20 of the requests we have made. So far Bayer has produced
21 lots of materials for which we are grateful, so we are not
22 entirely yet sure where it fits and what it's responsive
23 to.

24 Finally, while I have thirty seconds on the
25 floor, I know the Court is very interested in the

1 electronic service of filing issue. We have met Mr. Seldon
2 from the court as the Court's representative and he has
3 joined us in that. We have reached a consensus among us
4 about who the vendor should be. I'm not prepared to make a
5 formal announcement of that because we'd like to make
6 further contact with that vendor and work out some details
7 and questions. We haven't been able to have that
8 conversation yet, but, hopefully, that will happen the
9 first part of next week.

10 THE COURT: All right.

11 MR. GOLDSER: Thank you very much.

12 MR. ZIMMERMAN: The next issue, I believe, on our
13 agenda, Your Honor, although I guess one thing I would like
14 to leave with the defendants so you can get back to me when
15 you can, when the due date is on the formal requests for
16 documents, responses and interrogatories. We had certainly
17 informally, and then re-served them, and maybe we can just
18 come to an agreement on that date. Don't do it now but so
19 we can have an agreed date in response.

20 MR. HOEFLICH: Your Honor, as a matter of
21 structure, I would think it might make sense if the
22 plaintiffs raised an issue and then defendants respond to
23 that issue. I'm concerned that if Mr. Zimmerman addresses
24 eight issues at once, we will be in a situation where the
25 Court hears merged arguments or the status of many issues

1 that may be difficult to follow.

2 MR. ZIMMERMAN: Fine. Do you want to respond on
3 the discovery?

4 MR. HOEFLICH: Your Honor, with respect to
5 discovery, all I would like to reiterate is that we
6 produced approximately a million pages at this point. We
7 have done it with light speed. We have worked closely with
8 the plaintiffs to try to resolve all issues. We have
9 certain disagreements over what may or may not be feasible,
10 but we're working with them on all of those issues and
11 we're hopeful to resolve them.

12 MR. ZIMMERMAN: The next issue, Your Honor, and
13 we put it down as the Special Master introduction because I
14 think of the letter that we received from the Court. I
15 know that we would like to determine where we are going
16 with that Special Master. I know Stan Chesley wants to
17 address it. So, perhaps, I can just turn it over to Stan
18 and the Court can do as you please with the introduction of
19 the Special Master.

20 MR. CHESLEY: Your Honor, Stanley Chesley for the
21 record. We thank the Court for appointing a Special
22 Master, and nice to meet you Mr. Haydock. This would be a
23 suggestion so as not to take the Court's time.

24 If we have an opportunity today just to meet and
25 greet and possibly, if he wishes, to give him some

1 documents and mention what our concerns are, we can do that
2 jointly with the defendants. Then I would hope that we
3 would have an opportunity by conference call, I believe
4 that Mr. Haydock is presently in San Diego, is that
5 accurate or inaccurate -- we can do it by conference call
6 and both sides can talk to him. We will have it narrowed
7 down to three people on our end dealing with this issue,
8 Ron Goldser who's here in Minneapolis, Dianne Nast and
9 myself. We think that we can work this out, Your Honor.

10 I think the Special Master is very helpful. The
11 Court order is very clear, but we have some other issues
12 that we would like the Special Master to look at and we
13 would like the Special Master to continue on this. I'm not
14 trying to make this the world's biggest project, but there
15 are certain things that I think the Special Master can get
16 on an expedited basis that will answer our questions rather
17 than waiting for formal discovery so we don't have to wait
18 until November to get the answers and then we can clear it
19 up and advise the Court through the Special Master that we
20 have resolved all issues to our satisfaction on this
21 issue.

22 THE COURT: All right.

23 MR. HOEFLICH: Your Honor, I am unaware of what
24 the issues that Mr. Chesley would like to raise with the
25 Special Master are. I'm unaware of what documents he

1 wishes to present to the Special Master today. What I
2 would suggest is that the plaintiffs speak with us and find
3 out what, if any, issues there are so when we meet with the
4 Special Master for the first time, and I very much
5 appreciate a meet and greet, we can at least know if there
6 is anything we wish to present as well.

7 I believe according to the Case Management Order
8 when something is raised at one of these hearings, there is
9 a protocol and a contract for raising those issues and a
10 meet and confer. I'm not sure that has been complied with
11 in this instance, and I would just suggest for a more
12 efficient proceeding and a more appropriate way to
13 introduce ourselves to the Special Master that might make
14 sense if we meet with Mr. Chesley first and then arrange
15 for a conference call with the Special Master.

16 MR. CHESLEY: Your Honor, may I respond? The
17 purpose of Special Master is to (a) expedite and (b) be on
18 an informal basis. I'm not asking any of them to be on the
19 record. I have a set of questions that we want the Special
20 Master to look at as to whether or not these are proper
21 inquiry. For us to have a meet and confer, for example,
22 not complaining, it was suggested that we have a meet and
23 confer today. They couldn't meet with us today. They
24 could only meet with us the week 22nd of April to do the
25 next meet and confer. We want to work with the Special

1 Master on an ongoing basis to make this matter disappear.
2 We don't want to delay it. We don't want to put it in open
3 court. We want to be able to have that kind of
4 relationship with the Special Master so that he can be
5 effective in helping the Court and helping us resolve it.
6 And for us to have to go them to make sure it's okay to
7 then talk to the Special Master doesn't make any sense.

8 I've dealt with Special Masters going on thirty
9 years. They are a wonderful, wonderful -- I don't want to
10 use the word vehicle, I don't mean that, Mr. Haydock, in
11 any disparaging manner, but they really help expedite and
12 move the process, and we've got to get this more informal,
13 Your Honor, and the defendants have got to trust us. There
14 is no sneaky business. They can see anything we give to
15 the Special Master. We are not trying to do a gotcha.
16 We're trying to get this completed.

17 We have questions, for example, how many did they
18 send out, how many did they get back, you know, that kind
19 of thing that the Special Master can work on on an ongoing
20 basis. He may not even have to report to us. He can
21 report to the Court. But this kind of tying of hands in my
22 opinion has got to stop. That's why we have a Special
23 Master, and that's why he's here.

24 I'm sorry to take so long on this, but we can't
25 make it so formalized on every issue with the defendants it

1 has to be a meet and confer. Thank you.

2 THE COURT: Thank you.

3 MR. HOEFLICH: May I, Your Honor?

4 THE COURT: You may.

5 MR. HOEFLICH: Your Honor, as far as I know, no
6 one raised the issue, at least with me or anyone I know on
7 my team that there were issues that needed to be raised
8 with the Special Master today. We were asked -- Mr.
9 Zimmerman spoke to me just before the meeting and said we
10 would like to get together. I said, sure, how about the
11 week of the 22nd. There was no special request to meet
12 about the Special Master. There was no discussion of
13 anything in your order.

14 We think it's appropriate that we get together
15 informally and discuss what we both believe is the
16 appropriate role of the Special Master. We think it's
17 terrific help in a case like this. We think it's very
18 useful to have one person get up to the speed and know the
19 case. There very well may be a very important role for the
20 Special Master here. I don't think it's formalized or part
21 of any effort to delay to suggest that the plaintiffs
22 should meet with us first before announcing in court that
23 they want to raise issues for the first time today. It
24 strikes me as the more appropriate thing would be to work
25 with us and not surprise us at hearings like this with

1 things and issues that they want to raise. There is no
2 stopping them from raising issues. This has been an
3 expedited proceeding in many, many ways so far.

4 I'm surprised to hear that we are being accused
5 of trying to be formal. We are not doing that. We've had
6 dinner with Mr. Zimmerman. We've had meetings and we think
7 the work with the Special Master should at least have
8 guidelines.

9 THE COURT: All right. We will have an informal
10 meeting in my chambers after this hearing. You will be
11 able to meet and greet Professor Haydock at that time. Any
12 issues to be addressed, you will address me on those issues
13 and then we will deal with how we are going to have the
14 Special Master work on those issues. Let's move on.

15 MR. ZIMMERMAN: The next item, Your Honor, is
16 master pleadings. I think where we are on the master --
17 this really goes to the master class action complaint and
18 to the check off kind of individual complaints. Wendy, if
19 you can just report where we are on that. I was hoping
20 we'd have it today, but we're not quite done with it.

21 MS. FLEISHMAN: Wendy Fleishman, Your Honor.
22 We're working on a master class action complaint and we
23 will hopefully have that together and ready to send to the
24 Court within the next two weeks.

25 THE COURT: All right, thank you.

1 MR. ZIMMERMAN: Your Honor, the next item is a
2 motion for assessment. I'm going to ask Will Kemp from Las
3 Vegas, Nevada to bring this issue before the Court. Will
4 is a member of the PSC and has been involved in this issue
5 and a number of MDL's around the country. I thought his
6 expertise would be helpful to the Court.

7 MR. KEMP: Good afternoon, again, Your Honor.
8 Your Honor, we filed a motion --

9 THE COURT: Excuse me, problem, Counsel?

10 MR. MAGAZINER: Yes, Your Honor, Fred Magaziner
11 for GSK. I don't know that this is a problem. This is my
12 first opportunity to appear before Your Honor. I am
13 disappointed to see plaintiffs wish to address motions
14 which have not yet ripened. They filed a motion and the
15 time for us to respond to the motion has not yet come. It
16 seems to me that the orderly procedure would be for the
17 motion to be briefed and the conference thereafter for Your
18 Honor to hear whatever argument or discussion there might
19 be of the motion.

20 The idea that plaintiffs would file a motion and
21 then wish to discuss it with the Court before we've had the
22 opportunity to respond strikes me as irregular and not very
23 productive.

24 The same thing with the master pleading. They
25 are going to file a motion to adopt the master pleading, we

1 will respond to and may be able to agree to it or not
2 depending on what it says, but we're not yet -- the issue
3 is not yet ripe. I don't think it's a very productive
4 procedure to have plaintiffs raising issues which have not
5 yet ripened just for the purpose of giving Your Honor a
6 one-sided view of a particular issue.

7 MR. ZIMMERMAN: May I speak on that issue?

8 THE COURT: Yes, you may.

9 MR. ZIMMERMAN: Your Honor, I'm kind of surprised
10 that defendants are claiming that we are sort of coming in
11 at the last minute with these things. We have had, I'm
12 going to say, at least three conversations about this
13 agenda, what's on the agenda, three requests to meet with
14 the defendants informally before today, all of them by
15 e-mail and one of them by telephone conversation. And each
16 time I was told there is no reason to meet or we don't have
17 to meet. So, I assumed, then, that the issues that we
18 agreed on this agreed agenda were appropriate. If there
19 was some problem with these or they weren't "ripe", I would
20 have expected at the time I said let's meet, let's come
21 over to your offices, let's have a meet and confer prior to
22 the hearing so we can bat out anything that's on the agenda
23 that we need to talk about, that would have occurred. I
24 got a message from Hope saying she transferred my e-mail to
25 you talking about meeting and conferring and if you had a

1 problem, you were going to get back to me.

2 MR. MAGAZINER: I have no problem with plaintiffs

3 making a report, Your Honor --

4 THE COURT: I'm sorry?

5 MR. MAGAZINER: I have no problem, Your Honor --

6 THE COURT: Stop. All right. I set up this

7 meeting. I gave everyone of you the opportunity to know

8 that we were going to meet on this date. I had my clerk

9 call to find out what the agenda was. We did not get the

10 agenda until yesterday. You were supposed to meet and

11 confer about what was going to be on this agenda so we can

12 have an orderly meeting. Now, if we are going to have this

13 type of hearing, it's going to stop right now. My patience

14 has come to an end.

15 I have this agenda in front of me. I had my law

16 clerk make sure it was a joint agenda, and now you are

17 coming before me saying it's not joint and you have

18 objections to something on this agenda.

19 MR. MAGAZINER: No, Your Honor. I fear that I

20 did not express myself very well and I apologize to the

21 Court. As we understood it, the agenda the plaintiffs

22 wished to make a report that they filed a motion, that they

23 had filed another motion and just to alert the Court to

24 what progress was being made in the litigation.

25 But I am unhappy about, and perhaps I'm the only

1 one in the courtroom unhappy about this, Your Honor, and I
2 apologize, and if I have spoken out of turn, I apologize to
3 that.

4 The fact that the plaintiffs wish to report today
5 that they filed a motion, we knew that they were going to
6 do that, that's fine. Mr. Zimmerman now wants to discuss a
7 motion that's pending. We didn't understand there was to
8 be discussion on the substance of the motions which have
9 not yet been responded to. That's what I think is
10 unfortunate. I think if they want to present to the Court
11 and for the benefit all the lawyers who are here and who
12 are interested in the progress of the case that certain
13 things have happened and certain motions have been filed,
14 that's fine and I have no objection to it, and I certainly
15 didn't mean to imply that any of this was a surprise to us
16 that they wished to make this report. What was a surprise
17 to me was the plaintiffs' wish, then, was to discuss the
18 merits of pending motions to which we have not yet had an
19 opportunity to file a responsive brief or a response.

20 If I misstated myself, I very much apologize, and
21 if Your Honor doesn't share my concern --

22 THE COURT: I don't. Please be seated.

23 MR. KEMP: May I proceed, Your Honor?

24 THE COURT: You may.

25 MR. KEMP: Your Honor, I'm going to address the

1 motion for assessment which is somewhat interrelated with
2 the state and federal coordination motion. In fact, we
3 presented the same motion.

4 We use the term assessment, really what we're
5 talking about is establishing equitable reserve funds, and
6 that fund would be assessed on all the federal cases, the
7 cases that are in the MDL, and that would also be assessed
8 on any of the state court cases that signed the
9 coordination order. I'll explain that a little more later,
10 but I want to make it clear that we're not asking this
11 Court to impose a mandatory assessment upon state court
12 cases. We are asking that you create a procedure whereby
13 we can go to the state courts and use kind of a carrot
14 approach.

15 The first issue is when should the assessment be
16 imposed. If you take a look at the Manual for Complex
17 Litigation, Section 24.21, Third Edition, the Manual
18 recommends that it be done at the outset of the case. And
19 the reason that the Manual suggests that it be done at the
20 outset of the case is so that the various attorneys
21 involved, particularly the plaintiffs Bar, can weigh the
22 various incentives for going to state court and federal
23 court. So, what we would suggest is that the Court impose
24 the 4 percent, 2 percent assessment at this point and time
25 so the various attorneys out in the field have an

1 understanding of what's in front of them. Some of those
2 attorneys are not as experienced in MDL litigation as
3 others. Some of them may fear that MDL Committee fee would
4 be up in the 12, 15 percent range. Until that is set by
5 the Court, that's something that my concern is that they
6 would file a case in state court, whereas, otherwise they
7 might seek advantage of the MDL.

8 It's a decision that some states have to make in
9 the future because a lot of states have one year -- well,
10 the defendants argue that there is a one-year statute of
11 limitations. They would argue, say, in California, Florida
12 and Louisiana that the one-year statute of limitations
13 started August 8 with the FDA recall and would end this
14 August 8. So, in theory there are cases in those three
15 states that would have to be filed within the next four
16 months. As it sits right now, those states don't know what
17 the reserve fund would be here at the MDL, and that's why
18 we suggest that this be adopted sometime in the immediate
19 future.

20 With regards to the amount of the reserve fund,
21 we've debated this internally among the PSC. As you know,
22 Mr. Chesley and I have been on dozens of PSC's, literally,
23 as well as other people. We compared the workload that we
24 project in this case and the potential recovery, and we
25 have come up with an assessment that we think is relatively

1 low.

2 Just a little bit of history. In the MGM case
3 the assessment was 5 to 7 percent, the Propulsid case was 6
4 percent. I believe Breast Implant was the same. The
5 Phen-Fen case was a little more on the high side, a 9
6 percent assessment.

7 We're suggesting 4 percent fees, 2 percent
8 costs. The way that would work is that out of the
9 attorneys' fee share of each one of the MDL cases, let's
10 say the attorney has a one-third contract, 4 percent of
11 that would be taken out and put in reserve funds and at the
12 end of the case that would be available. And if the Court
13 determines that 3 percent is appropriate for the Committee,
14 that's what gets paid, the balance goes back in fees.

15 The same thing for the costs. If the costs go
16 into the reserve fund, if the Court determines that
17 ultimately the proved costs come out to be 1.5 percent, the
18 balance goes back to the client. What would happen is that
19 each one of the cases is settled and the defendant would
20 have the obligation to withhold that amount from the
21 settlement and put it into a Court-administered fund.

22 I'd like to emphasize, and I didn't want to start
23 it, that this is an equitable reserve. We are not asking
24 for the Court to make a ruling at this point and time.
25 It's premature because this Court, number one, doesn't know

1 how much work this Committee had to do. I've been on
2 committees where we thought the case was going to settle
3 quickly and we wound up doing a 15 and a half month
4 trials. I've been in other cases where we thought the case
5 would take forever and for some reason it settled quickly.
6 Whatever work the Committee does, that will be the -- one
7 of the indicators of what their fee is.

8 So it's premature, but we think using our best
9 estimate, using a 4 and 2 percent reserve would be
10 appropriate, and we'd ask the Court to impose it at the
11 present time. If you have any questions, Your Honor.

12 MR. CHESLEY: Your Honor, can I just add one
13 point? I think Mr. Kemp has more than explained it, but
14 what happens so often in these cases is the defendant for
15 whatever reason may wish to settle certain cases early, and
16 the reason for the escrowing of it, it is escrowed only to
17 be paid at an appropriate time in the future. If it is not
18 escrowed, and this all started in aviation litigation,
19 because different cases settle at different times,
20 depending on jurisdiction, depending on the desire of the
21 defendants. And, therefore, once a case is settled, it's
22 impossible to then go to that attorney and make a claim.

23 Likewise, if a case settled today, we probably
24 wouldn't be entitled to any of that money on the basis that
25 lawyer did not get the advantage of our work product. So,

1 it's just a vehicle up front. It's prescribed by the
2 Manual with no accessibility of that fee until such time as
3 the Court approves it at the end of the case. I just
4 wanted to make it clear as to why the necessity of it at
5 this time.

6 I really don't know how the defendants are
7 actually involved in it. All they are is just the conduit
8 to hold the money or do with the money and report to the
9 Court. Thank you.

10 I'm sorry, Your Honor. I didn't mean to serial
11 argument to Mr. Kemp. I just wanted to clear that up.

12 MR. HOEFLICH: Your Honor, I've received and I've
13 reviewed the plaintiffs' motions, both for a master
14 complaint and concerning preliminary assessment. We have
15 some concerns about each. There are some issues we would
16 like to discuss with Plaintiffs' Steering Committee,
17 particularly concerning how the assessment might affect
18 state and federal coordination. Those are things I'd like
19 to talk with them before raising any issues to find out
20 whether my issues are well founded. We'll be filing
21 responses or agreement with each of those within the next
22 few weeks.

23 THE COURT: Thank you.

24 MR. ZIMMERMAN: Reporting to the Court on
25 GlaxoSmithKline's motion to dismiss for lack of personal

1 jurisdiction. It is my understanding, and Dianne Nast of
2 our committee has been working closely on this, that motion
3 that GlaxoSmithKline made to dismiss for lack of personal
4 jurisdiction is being withdrawn, is that correct?

5 MR. MAGAZINER: That's correct, Your Honor. As
6 Mr. Zimmerman knows, we are withdrawing the motion. We
7 will plead lack of personal jurisdiction as an affirmative
8 defense, and sometime down the road we may raise the motion
9 with our giving adequate warning to plaintiffs and our
10 intention to do so.

11 THE COURT: All right, thank you.

12 MR. ZIMMERMAN: I'm going to skip the state and
13 federal coordination for now, Your Honor, because I wanted
14 to perhaps discuss with the defendants privately on that
15 issue.

16 Service of process issues. There is a Michigan
17 case, and I think Ron Goldser will argue this or at least
18 present the issue to the Court, and it has to do with the
19 service of process.

20 MR. GOLDSER: Good afternoon, again, Your Honor,
21 Ron Goldser for plaintiffs. On the agenda was a motion for
22 an extension of time under Rule 4 to serve a summons on
23 Bayer AG, the German corporation, in the individual case of
24 Ionel Glazer, G-l-a-z-e-r. Plaintiffs in that case,
25 plaintiff's counsel, Jason Thompson, of Charfoos and

1 Christensen in Detroit asked us to present this motion on
2 their behalf.

3 I spoke about this motion prior to the hearing
4 today with Ms. Weber on behalf of Bayer. At that time she
5 advised me there was an identical motion filed on another
6 case that has now been transferred to this court entitled
7 Victor and Janice McGee, M-c-G-e-e v. Bayer AG. That case
8 does not on the pleadings have a District of Minnesota file
9 number yet. It was transferred from the Southern District
10 of Mississippi.

11 The same issue and the same motion, as I
12 understand it. Plaintiffs have not been able to serve
13 Bayer AG within the 120 days required by Rule 4.

14 Both arguments note the potential that an
15 extension of time for services may not be required by the
16 Rule. And in speaking with Ms. Weber that's the position
17 that Bayer AG will take, but presented correctly on their
18 behalf, this motion is not necessary because there is no
19 120-day requirement for service on a foreign corporation.

20 In an abundance of caution, both plaintiffs'
21 counsel presented the Court with this motion. But it
22 arises in the context of the fact that the parties have not
23 yet concluded their discussions on any waiver of Hague
24 service. You'll remember one of the earlier pretrial
25 orders said that that was still he being discussed but has

1 not been concluded yet, and as a result these two
2 particular individual plaintiff lawyers have felt it
3 encumbent upon them to bring these motions before the Court
4 at this time.

5 As I thought about Ms. Weber's response, I would
6 kind of like to think she is right and that service is not
7 a problem for these two individual plaintiffs. Rule 4 in
8 this area, besides the U.S. Supreme Court case, Volkswagen
9 AG v. Schlunk, it's noted in the comment the citation is
10 486 U.S. 694, it's 1988. That's 486 U.S. 694, Volkswagen
11 AG v. Schlunk.

12 As I read that case, it seemed to allow service
13 of process on a foreign corporation's American subsidiary
14 based on the service of process rules local to the
15 jurisdiction in the state in which that case was filed.
16 For example, if a case were filed against Bayer AG in
17 Minnesota, in this court, it would be possible, as I read
18 the Volkswagen case, for plaintiffs to simply serve the
19 Minnesota Secretary of State on behalf of Bayer AG, totally
20 avoiding the Hague service.

21 I understand this issue is not ripe before you in
22 that fashion, but I raise it because I'm not absolutely
23 sure that it is unnecessary for this Court to grant an
24 extension of time to serve the summons, to be sure this
25 whole issue would be wonderfully rendered moot if Bayer AG

1 would accede to waiver of the Hague service, but they have
2 not done so yet.

3 I would like the Court to enter an order
4 extending service of the summons time in the Glazer case
5 and the McGee case unless and until Bayer is willing to
6 waive the Hague issue and render this issue moot.

7 MR. HOEFLICH: Your Honor, Bayer does not agree
8 that the time limits of the federal rules do not apply to
9 Bayer AG. Nor do we agree with Mr. Goldser's
10 interpretation of the case law.

11 That being said, we have no objection to a
12 reasonable extension being granted in either of these
13 cases. If the Court believes an extension of 90 or 120
14 days is appropriate, we have no objection to that at all.

15 THE COURT: Does that include the McGee matters
16 that are before the Court now -- does that include the
17 McGee matters?

18 MR. HOEFLICH: Your Honor, it does. It includes
19 the Glazer matter and the McGee matter. We will work with
20 the plaintiffs in getting an agreed order.

21 THE COURT: I need you to submit an order for 120
22 days.

23 MR. GOLDSER: We will submit a proposed order in
24 both cases, Your Honor.

25 THE COURT: Thank you.

1 MR. ZIMMERMAN: Your Honor, there is an issue
2 with regard to, under agreed orders, plaintiffs' fact sheet
3 and the amendment to the confidentiality order.

4 On the plaintiffs' fact sheet, I believe we have
5 narrowed some very modest disagreements that we have -- I
6 shouldn't characterize them -- some disagreements we have
7 to the point where we are asking a few more days to confer
8 on them to see if we can come to a resolution. There is a
9 time issue contained therein. I don't know if it's
10 necessary for us to get into anything entered today. I
11 think the point was we wanted to bring up to the Court
12 there were some issues with regard to the fact sheet that
13 we want to try to resolve and we are close to resolving
14 them.

15 We have a proposed order making certain
16 extensions of deadlines that didn't work because of the way
17 the cases were transferred in and how PTO No. 10 would
18 work, but that there are, I believe, three issues or two
19 issues left open that we were going to try and work
20 through. But we have an agreed order that we would ask the
21 Court to sign today extending the time for the receipt of
22 the plaintiffs' fact sheet to May 3rd, is that correct,
23 2002 for the first ones to be filed with the Court. And,
24 then, we will work and have probably have it before May 3rd
25 if not within the next week or so either an agreement on

1 things that still separate us with regard to medical
2 disclosures and confidentiality of the records that are
3 going to be contained, we'll have an agreement on that or
4 we'll ask the Court for an appropriate procedure to have
5 that aired, is that correct?

6 MR. HOEFLICH: That's correct, Your Honor.

7 THE COURT: All right.

8 MR. HOEFLICH: There is one other agreed order
9 that is up as well. In early March, Judge, we entered an
10 agreed order from Pretrial Order No. 5. We subsequently
11 learned that there were a few words that are inadvertently
12 omitted in the final draft, and we would like to submit an
13 agreed substitute order.

14 THE COURT: Please.

15 MR. ZIMMERMAN: Your Honor, the other issue which
16 I skipped was No. 6, which was the state and federal
17 coordination issues. With regard to that, Your Honor, I
18 don't know if you want us to be discussing that here or we
19 would want to do that in chambers. So, I would like --

20 THE COURT: We can do that in chambers.

21 MR. ZIMMERMAN: -- instruction on that.

22 THE COURT: We can do that in chambers. There is
23 one other issue -- well, several other issues, but one
24 issue dealing with the correspondence that the Court has
25 received from Mr. Ronwin regarding service by mail. He

1 wishes to have the Court order amended to have service by
2 mail because he does not have a fax machine, does not have
3 e-mail. He does not have any of the equipment that is in
4 that order. You want to be heard on that?

5 MR. ZIMMERMAN: Your Honor, Mr. Ronwin does have
6 e-mail because I've received e-mail and sent him things by
7 e-mail. Perhaps he may not be as, I think the word is
8 facile, quick with it, but he does have it because I have
9 received e-mails and sent him e-mails, and I know Mr. Moll
10 has done the same.

11 I don't have a big problem with serving things
12 additionally on Mr. Ronwin to the extent that he needs to
13 be served with something in his individual case, but if
14 he's asking that now we have to amend the protocol to have
15 things that we have agreed to serve electronically and by
16 e-mail now served on everybody by mail, I think that's
17 probably a step backwards.

18 Like I said, I have been communicating with Mr.
19 Ronwin, and it hasn't always been real pleasant in some
20 ways, by e-mail. So, I don't know if that representation
21 was accurate. But, I hate to go backwards and reinvent how
22 we are going to serve things.

23 THE COURT: My understanding is that he wishes --
24 he wishes to serve his motions by mail.

25 MR. ZIMMERMAN: I have no problem with that.

1 THE COURT: If I allow it for him, I would have
2 to allow it for the universe, so I would have to put it in
3 the order.

4 MR. ZIMMERMAN: I thought it was as to Mr. -- if
5 you have to do it for the universe, Your Honor, then I do
6 think we do have the protocol that in today's environment
7 works for people who are normally practicing before this
8 court, and I see no reason to amend it if it has to go to
9 the universe.

10 With regard simply to Mr. Ronwin, I would be
11 willing to accept service if the Court was willing to
12 accept service and the defendants are willing to accept
13 service with Mr. Ronwin's particularized pleadings by
14 mail. I don't know if that gives him what he wants or
15 not. I'm not sure what Mr. Ronwin wants.

16 MR. HOEFLICH: Your Honor, I have not had
17 correspondence with Mr. Ronwin. I'm not sure exactly what
18 he's asking for permission to serve by mail. For example,
19 Bayer AG I don't believe would waive service of process
20 pursuant to the Hague Convention and accept service by
21 mail. If he's talking about certain types of pleadings or
22 correspondence, I want to make sure there is some mechanism
23 to make sure that the system would work.

24 I think that there could be a problem,
25 systemically, if we were to amend the order for individual

1 plaintiffs or for different types of pro se plaintiffs.
2 We're in a situation here where the plaintiffs have
3 suggested there would be an enormous number of potential
4 claimants, and if we start divergent from the Court orders,
5 I think it might be a burden on the system and on the
6 individual parties who would be taking a lead in the
7 litigation. So, I would have some concerns about this, but
8 I would be more than happy to meet and confer with the
9 plaintiffs and see what ideas they have to come up with.

10 THE COURT: All right.

11 MR. ZIMMERMAN: Mr. Goldser advised me that the
12 electronic services vendor has yet to be named, but I
13 believe has been selected to receive service by any of
14 those modalities and if they receive it by mail or if they
15 receive it by e-mail or if they receive it --

16 THE COURT: That's not in place, yet. That's the
17 problem I'm having. I'm having correspondence and telephone
18 calls from this gentleman and I would like to have his
19 questions answered and that's what I'm trying to do.
20 That's why I brought that up. All right. Also received, I
21 think I handed both sides copies of this objections to the
22 subpoena. This happened to appear on my doorstep. Would
23 you happen to know anything about that?

24 MR. ARSENAULT: Richard Arsenault. I'm on the
25 Discovery Committee of the Plaintiffs' Steering Committee.

1 We've served approximately 17 subpoenas on non-parties.
2 We've have been in communication with all of these people.
3 We've given them continuances and we're working with them
4 and some of the individuals that were subpoenaed, out of an
5 abundance of caution wanted to go ahead and file a record
6 of objections, but we are dealing with all of those
7 people.

8 THE COURT: All right.

9 MR. ZIMMERMAN: Your Honor, I think I may have
10 been remissed. There are two people on the telephone, and
11 I wasn't sure if they were pro se or they represent
12 parties, and if possibly, they could identify if they are
13 counsel and who they represent or if they're pro se.

14 THE COURT: Mr. Groves, are you still there?

15 MR. GROVES: Yes, I am.

16 THE COURT: Can you identify who you're
17 representing.

18 MR. GROVES: I represent the Eckerd Corporation
19 in the pending litigation for Ceballos v. Bayer in Florida.

20 THE COURT: Mr. Rogers.

21 MR. ROGERS: Yes, Your Honor, Kevin Rogers. I
22 represents Rizzo v. Bayer in the Northern District of the
23 MDL.

24 THE COURT: Mr. Groves and Mr. Rogers, anything
25 that you wish to add to the agenda that has not presented.

1 MR. GROVES: No, sir. Your Honor, pending
2 discussion with the attorneys the motion to remand and part
3 of the order that's self executing as to respond to reply
4 and I presume ruled on by the Court.

5 THE COURT: We have a date, May 11 -- May 9 is
6 the date for the remand.

7 THE COURT: Counsel.

8 MS. WEBER: Your Honor, as we understand it,
9 you've already calendared six motions for remand for the
10 May hearing and then Mr. Rizzo's would make it seven if you
11 decided to go forward and did it that day.

12 We wanted to talk to you a little bit about the
13 scheduling of the motions to remand because a number of
14 these motions raise the same issues. Three of the motions
15 to remand, Zawada, Smith and Keyser, those are cases out of
16 Florida and California. Our dealing with fraudulent
17 joinder issues, amount in controversy issues, they can go
18 forward on their own and be dealt with in May as you
19 intended.

20 Three of the other cases that you calendared,
21 Lester, Abrams, Jones and the Rizzo case all involve
22 removals involving medical monitoring, and this is going to
23 be a very important issue in the litigation. We've got
24 twenty-nine cases that we've removed based wholly or in
25 part on medical monitoring. There are motions to remand

1 nine of those. In addition to that, however, a number of
2 cases have been filed in federal court in the first
3 instance in which it appears that diversity is based on
4 medical monitoring. So, how you deal with this issue is
5 really going to determine the scope of the MDL.

6 We have two proposals for dealing with the
7 brief. We think going forward on a case-by-case basis
8 piecemeal could amount to a lot of duplication of efforts.
9 So, at minimum we think there should be some sort of
10 comprehensive briefing schedule that would bring in the
11 impact on the whole MDL and look at all the removals and
12 also look at the impact if there is in some of the cases
13 filed in federal court in the first instance.

14 We'd like the Court to consider deferring address
15 this issue, however, because the Supreme Court has granted
16 certiorari in a case that may impact on the rationale.
17 It's the Ford Motor Company v. City Bank case, 264 F.3d
18 952. I have a copy here I can hand off.

19 THE COURT: Please.

20 MS. WEBER: It's not a medical monitoring case,
21 but the issue before the Court is how you looked at
22 injunctive relief in determining whether you've made the
23 amount in controversy for purposes of diversity
24 jurisdiction. And, so, what the Supreme Court does with
25 that decision could well determine or have a big influence

1 on the way the medical monitoring falls out. That case is
2 likely to be argued in the October season of the Court.
3 Cert was granted more than a month ago.

4 So, we think that in terms of getting to the
5 right result with the best guidance from the Supreme Court,
6 the best thing would be to defer the briefing schedule on
7 these issues. At minimum, we would like to have a
8 comprehensive briefing schedule to deal with them.

9 THE COURT: All right. Mr. Zimmerman.

10 MR. ZIMMERMAN: If we could, Your Honor, I'd like
11 to discuss it with the PSC because it does have a scope of
12 the MDL component to it.

13 With regard to the three individual cases, we
14 have no objection for those to go forward at the next
15 scheduled conference or the May 9 hearing. But with regard
16 to the medical monitoring, certainly I would like to confer
17 on that and report to the Court our position on that by the
18 end of the day. I don't want to hold it up, but I have not
19 read that Supreme Court case and I did talk to Sue Weber
20 about this just before this hearing, and I told her that I
21 would take no position until I could confer. I think
22 that's fair. My guess is we will have a position very
23 shortly, by the end of the day if that's okay, by letter.

24 THE COURT: Thank you. Mr. Rogers, anything
25 else?

1 MR. ROGERS: No, Your Honor.

2 THE COURT: Mr. Groves, anything further.

3 MR. GROVES: No, sir.

4 THE COURT: Anyone else has any issues to be
5 raised.

6 MR. BECNEL: May it please the Court, Daniel
7 Becnel from Louisiana. I have a very large inventory of
8 these cases and I know that we agreed upon a form. And in
9 Louisiana it's rather peculiar because of the type of law,
10 Napoleon code, that we have how cases are filed. Our cases
11 all have to come to federal court. What Judge Shell has
12 done in the Norplant case and Judge Rothstein has allowed
13 in the PPA case and various judges in MDL cases, many of
14 which I've either been on the plaintiff's committee or
15 federal, state liaison in Phen-Fen.

16 I file my cases in groups of 50 with one group of
17 50, and let's say I use the Eastern District of Louisiana,
18 and another group of 50 in the Western District of
19 Louisiana depending on where those people reside, for a
20 number of reasons because if you don't do it that way we
21 have a one-year prescription statute of limitations
22 problem, and with the volume of thousands of cases that I
23 have, if I had to go and do the paperwork on each and every
24 case, it will just be a waste of judicial economy in terms
25 of just the processing of all of this paper, whereas if you

1 have them grouped in groups of 50, when they come back, if
2 they want to debundle them and try six at a time, the way
3 it works in Louisiana, the low number Judge gets all of the
4 cases. And you can try them one at a time, ten at a time
5 flights as they do in asbestos cases. And I just wanted to
6 bring that up to the Court that that was my intent unless
7 the Court prohibits me from doing that.

8 MR. HOEFLICH: Your Honor, while I certainly
9 appreciate Mr. Becnel's creativity, we are not in a
10 position to agree to the lumping of plaintiffs to an
11 agreement that these people shouldn't be severed -- the
12 cases shouldn't be severed as soon as they're filed. We
13 will see what Mr. Becnel files and respond accordingly.

14 THE COURT: All right. I don't know if you're
15 asking me for permission to do anything, but if you're
16 going --

17 MR. BECNEL: Judge Shell came up with this
18 innovative way to do things in the Norplant litigation, and
19 he issued a court order. He says you can file these groups
20 of case, they're 50, provided everyone resides in the
21 federal judicial district that we are talking about because
22 I don't want -- and he was talking about the Beaumont,
23 Texas region -- I don't want my court having to set up in
24 my case thousands of individual files. It makes no sense
25 to do that if all you're going to do is file them, and I'm

1 going to have all of these clerks working day and night,
2 they're going to be immediately transferred and you are
3 going to have to do the same thing when it comes to your
4 judicial district. Why not leave them bundled in 50 and
5 everybody has done that since. Nobody has -- and it's no
6 problem.

7 The eastern District and Judge Sears was the
8 Chief Judge there and on the MDL panel, and he's allowed
9 it. Virtually every federal judge -- Judge Rothstein has
10 allowed it. I've done the same thing with Judge Barker in
11 the Firestone case. So nobody doesn't do it. And this was
12 a creation "of the federal judicial" not of mine, but it's
13 a very efficient way to do it because if you're dealing
14 with, in my case four or five thousand individual cases,
15 it's just a lot of work for nothing, especially when all
16 they are going to do is go from there to here for a while.

17 THE COURT: Can you file a motion on that?

18 MR. BECNEL: I will. Your Honor, I just wanted
19 to alert the Court because we're dealing with four months.
20 And if I have to do them individually, then I'm going to
21 have to pull my seven lawyers from the depository and send
22 them home and start banging out papers.

23 MR. HOEFLICH: Your Honor, I would like to take
24 issue. I do believe that there are courts that have been
25 severing cases filed in groups and separating the

1 individual plaintiffs out. We do not agree with what Mr.
2 Becnel is suggesting. We are happy to see his motion when
3 it's properly filed and respond to it accordingly.

4 THE COURT: Thank you.

5 MR. ZIMMERMAN: A footnote to this, Your Honor,
6 and I was not aware that Danny was going to argue -- Mr.
7 Becnel was going to argue this today, but he did tell me
8 when I came over to talk to him.

9 The tolling of statute issues, also the meet and
10 confer issues that we are working on trying to come up with
11 a protocol to perhaps, and I can't say we'll come to an
12 agreement on it or not, to alleviate the very problem Mr.
13 Becnel is concerned with which is some kind of tolling
14 agreement or some kind mechanism so that everything that's
15 out there doesn't have to get filed now or get even bundled
16 into 50's because we can set up some mechanism.

17 Again, it happened in other MDL's. If we can
18 work it out informally great, if not, we'll bring it to the
19 Court, but it's a be on the alert issue, and I think Mr.
20 Becnel probably framed it today, so we can start thinking
21 about it and we can meet and confer on it further.

22 THE COURT: All right. Anything else? Does
23 anyone else have anything they wish to bring before the
24 Court at this time?

25 The next hearing will be on May 9 at one o'clock,

1 2002, in this courtroom. We will take a short recess. The
2 small group that usually comes back to chambers will come
3 back to chambers and discuss the matters that have to be
4 talked about dealing with the state and federal
5 coordination and be able to meet and greet the Special
6 Master in this case.

7 Anything else, Mr. Zimmerman?

8 MR. ZIMMERMAN: No, Your Honor, thank you.

9 THE COURT: Anything else?

10 MR. HOEFLICH: No, thank you, Judge.

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REPORTER'S CERTIFICATE

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

CERTIFIED: _____

Brenda E. Anderson, RPR

