

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MINNESOTA

3 -----  
4 In re: Baycol Products Litigation  
5 ) MDL No. 1431 MJD  
6 )  
7 ) 1:30 p.m.  
8 ) April 15, 2003  
9 ) Minneapolis, Mn.  
10 )  
11 )

12 -----  
13 BEFORE THE HONORABLE MICHAEL J. DAVIS  
14 UNITED STATES DISTRICT COURT JUDGE  
15 (STATUS CONFERENCE)

16 APPEARANCES:

17 ON BEHALF OF THE PLAINTIFFS:

18 Charles Zimmerman, Esq.  
19 Richard Lockridge, Esq.  
20 Ronald Meshbesh, Esq.  
21 Randy Hopper, Esq.  
22 John Climaco, Esq.  
23 Wendy Fleischman, Esq.  
24 Dianne Nast, Esq.  
25 Mark Robinson, Esq.  
Stanley Chesley, Esq.

ON BEHALF OF THE DEFENDANTS:

Philip Beck, Esq.  
Adam Hoeflich, Esq.  
Susan Weber, Esq.  
Peter Sipkins, Esq.  
Fred Magaziner, Esq.  
Tracy Van Steenburgh, Esq.

ON BEHALF OF NEW YORK TIMES:

Mark Anfinson, Esq.

COURT REPORTER:

Patrick J. Mahon, RMR, CRR  
Apartment 221  
10551 Greenbrier Road  
Minnetonka, Minnesota  
952.545.2750

Patrick J. Mahon, RMR, CRR  
952.545.2750

1 THE COURT: All right, let's call this 13:41:10  
2 matter. 13:41:11  
3 THE CLERK: Multi-District Litigation 13:41:12  
4 Number 1431. In re: Baycol Products. 13:41:13  
5 Please state your appearances for the record. 13:41:17  
6 MR. ZIMMERMAN: Good afternoon, Your Honor. 13:41:20  
7 Charles Zimmerman for the plaintiffs. 13:41:21  
8 THE COURT: Good afternoon. 13:41:23  
9 MR. LOCKRIDGE: Richard Lockridge for the 13:41:25  
10 plaintiffs, Your Honor. 13:41:27  
11 THE COURT: Good afternoon. 13:41:28  
12 MS. NAST: Dianne Nast for the plaintiffs. 13:41:30  
13 THE COURT: Good afternoon. 13:41:30  
14 MR. ROBINSON: Good afternoon, Your Honor. 13:41:31  
15 Mark Robinson for the plaintiffs. 13:41:32  
16 THE COURT: Good afternoon. 13:41:34  
17 MR. CHESLEY: Stanley Chesley for the 13:41:34  
18 plaintiffs, Your Honor. 13:41:36  
19 THE COURT: Good afternoon.  
20 MR. MESHBESHER: Ron Meshbesh for the 13:41:38  
21 plaintiffs, Your Honor. 13:41:39  
22 THE COURT: Good afternoon.  
23 MR. CLIMACO: John Climaco for the  
24 plaintiffs, Your Honor.  
25 THE COURT: Good afternoon.

1 MS. FLEISCHMAN: Wendy Fleischman for the 13:41:42  
2 plaintiffs, Your Honor. 13:41:43  
3 THE COURT: Good afternoon.  
4 MR. HOPPER: Randy Hopper for the 13:41:44  
5 plaintiffs, Your Honor. 13:41:47  
6 THE COURT: Good afternoon. 13:41:47  
7 MR. ANFINSON: Your Honor, Mark Anfinson 13:41:47  
8 for the New York Times. 13:41:49  
9 THE COURT: Good afternoon. 13:41:51  
10 MR. BECK: Good morning, Your Honor. Phil 13:41:51  
11 Beck for the Bayer defendants. 13:41:55  
12 May I introduce two of my colleagues who 13:41:57  
13 haven't appeared before Your Honor before. They'll 13:41:59  
14 be part of the trial team in June. Those are my 13:42:01  
15 partners, Tarek Ismail and Rebecca Bacon Weinstein. 13:42:04  
16 THE COURT: Welcome. 13:42:09  
17 MR. HOEFLICH: Good afternoon, Judge. Adam 13:42:12  
18 Hoeflich for Bayer. 13:42:15  
19 THE COURT: Good afternoon.  
20 MR. MAGAZINER: Good afternoon, Your Honor. 13:42:16  
21 Fred Magaziner for GSK. 13:42:17  
22 THE COURT: Good afternoon. 13:42:20  
23 MR. SIPKINS: Good afternoon. Peter 13:42:20  
24 Sipkins for Bayer. 13:42:21  
25 THE COURT: Good afternoon. 13:42:22

1 MS. WEBER: Good afternoon, Your Honor. 13:42:23  
2 Susan Weber for Bayer. 13:42:25  
3 THE COURT: Good afternoon.  
4 MS. STEENBURGH: Tracy Van Steenburgh for 13:42:26  
5 GSK, Your Honor. 13:42:27  
6 THE COURT: Good afternoon. 13:42:28  
7 Anyone else? 13:42:30  
8 All right. Mr. Zimmerman? 13:42:31  
9 MR. ZIMMERMAN: Your Honor, we filed with 13:42:45  
10 the Court the Joint Status Report and Agenda, as we 13:42:48  
11 have done for all of the pretrials in the past, and 13:42:52  
12 the Joint Agenda and Report is a joint report for 13:42:58  
13 both the Plaintiffs' Steering Committee and the 13:43:02  
14 defendants. There are a number of matters on the 13:43:06  
15 calendar, on the agenda. Some of them are stating 13:43:10  
16 that we are going to provide an oral update because 13:43:16  
17 we didn't have the information at the time, and we 13:43:18  
18 will do that. 13:43:21  
19 I do want to state, Your Honor, before we 13:43:24  
20 begin, that many of us were in Amsterdam for the 13:43:27  
21 depositions of Bayer AG, and it was an interesting 13:43:34  
22 time because our country was at war. We were all 13:43:37  
23 taken from our families at a difficult time, and it 13:43:42  
24 was an interesting and difficult process for 13:43:47  
25 everyone, but we endured, as our country did, and 13:43:51

1 we're back here, and everyone is safe and sound, and 13:43:55  
2 I think we did an admirable job on both sides 13:43:58  
3 representing our interests. But it was a unique 13:44:02  
4 moment in history, certainly, as we all embarked for 13:44:05  
5 Amsterdam, and thank God, we all returned safely, as 13:44:09  
6 we all are here today. I just wanted to say that. 13:44:14  
7 Your Honor, the first matter is "Pending 13:44:19  
8 Cases." The defendants will provide an oral update 13:44:22  
9 of pending Baycol cases, which is basically the 13:44:27  
10 census that we've been giving the Court as to the 13:44:31  
11 number of cases in federal court and in state court 13:44:33  
12 that relate to the Baycol issues. 13:44:36  
13 MR. BECK: Your Honor, there are 13:44:41  
14 approximately 8,200 cases currently pending. By 13:44:43  
15 last count, 4,863 were in federal court, the balance 13:44:53  
16 in state court. The total number is down somewhat, 13:44:57  
17 I believe, since our last report. That reflects, 13:45:03  
18 number one, some activity on the settlement front, 13:45:07  
19 which we'll report on shortly, and number 2, I 13:45:11  
20 believe about 300 cases, most of them from the Weitz 13:45:16  
21 & Luxenberg firm, have been dismissed because the 13:45:23  
22 individual plaintiffs would not provide the fact 13:45:25  
23 sheets that were required. So the total number of 13:45:29  
24 cases is going down, I think, as a result 13:45:31  
25 principally of those two factors. 13:45:36

1 THE COURT: All right. Thank you. 13:45:38  
2 MR. ZIMMERMAN: The second item, Your 13:45:48  
3 Honor, is the settlement of cases. Again, Bayer 13:45:49  
4 will provide the Court with an oral update on the 13:45:54  
5 Baycol settlements. There will also be a mediator's 13:45:55  
6 report on the matters that are in mediation. 13:46:00  
7 However, as the report provides, we believe there 13:46:04  
8 are approximately -- there are 37 cases submitted 13:46:08  
9 for settlement or mediation through the MDL process 13:46:11  
10 of mediation and settlement. Some of those cases 13:46:16  
11 have settled. I'm not sure of the exact number. 13:46:20  
12 But I believe either Special Master Haydock or 13:46:23  
13 Special Master Remele will be reporting on the 13:46:29  
14 status of those. With regard to the individual 13:46:32  
15 settlements, I believe Mr. Beck will be providing 13:46:34  
16 those numbers to the Court. 13:46:37  
17 MR. BECK: Your Honor, our most recent 13:46:40  
18 information is that we have settled 713 cases. As 13:46:42  
19 Your Honor knows, our approach has been to reach out 13:46:50  
20 and settle rhabdo cases wherever we can. All of 13:46:54  
21 those are rhabdo cases. None of them are what we 13:46:59  
22 call noninjury cases. That's a substantial increase 13:47:02  
23 from when we last reported. I think the number that 13:47:07  
24 I gave Your Honor last time I was here, about a 13:47:10  
25 month ago, was 535 cases. So we've made some 13:47:13

1 significant progress. I think that -- we also have 13:47:17  
2 a lot of cases under discussion, we're pleased to 13:47:24  
3 report. I don't have the exact number, but larger 13:47:27  
4 numbers are under discussion. Just as encouraging 13:47:29  
5 to us is the -- who is bringing these cases to us to 13:47:33  
6 discuss. Some plaintiffs' lawyers who previously 13:47:41  
7 were kind of sitting on the sidelines during the 13:47:46  
8 settlement process are now engaged in discussions 13:47:48  
9 with us, as well as what types of cases; people are 13:47:52  
10 bringing cases that they believe involve more 13:47:56  
11 serious side effects. So we're encouraged that 13:48:00  
12 large numbers of cases are working their way through 13:48:05  
13 the settlement process, which was always our goal 13:48:08  
14 with the rhabdo cases. 13:48:12  
15 I am told that of the 713 settled cases, 13:48:14  
16 approximately 220 of those are, in one way or 13:48:20  
17 another, subject to the MDL assessment process. In 13:48:25  
18 other words, they were MDL cases or they were 13:48:30  
19 settled through the -- through some process where 13:48:35  
20 the -- involving the MDL or the Plaintiffs' Steering 13:48:40  
21 Committee. So approximately 500 of the 713 have 13:48:44  
22 been outside of that process. That kind of reflects 13:48:49  
23 the -- where we are today, as well. 13:48:53  
24 Most of the settlement discussions that we're 13:48:56  
25 having, there are people -- there are plaintiffs' 13:48:58

1 lawyers coming directly to us, mainly those who have 13:49:02  
2 large numbers of cases in state courts, and we're 13:49:06  
3 having discussions with them directly rather than 13:49:10  
4 going through any set procedure, and we're able to 13:49:13  
5 resolve a lot of claims that way. 13:49:18

6 THE COURT: All right. Special Master 13:49:20

7 Remele? Good afternoon. 13:49:25

8 SPECIAL MASTER REMELE: Good afternoon, 13:49:36

9 Your Honor. 13:49:36

10 Your Honor, we so far have had -- we have 35 13:49:37

11 active requests for the mediation program, and out 13:49:40

12 of that, nine of those cases have been settled 13:49:44

13 directly by Bayer through direct negotiations. Four 13:49:46

14 of the cases have actually been withdrawn. Three of 13:49:50

15 them were cases that apparently had been settled and 13:49:52

16 for some reason there was a miscommunication on 13:49:57

17 that, and then another case was withdrawn because 13:49:58

18 they were going to negotiate directly with Bayer. 13:50:02

19 Four of the 35 cases are in the process of 13:50:08

20 negotiations, direct negotiations, with Bayer at the 13:50:11

21 present time. Six of those cases, there's 13:50:14

22 additional information that's needed for Bayer to be 13:50:16

23 able to evaluate whether they will negotiate, 13:50:18

24 mediate or decline to do either. And in 10 of those 13:50:22

25 35 cases, there's -- we're awaiting a response from 13:50:26

1 Bayer under the guidelines and time frames that have 13:50:30  
2 been set up. And one of the cases is scheduled for 13:50:33  
3 mediation out in Oregon on April 28th. Catherine 13:50:38  
4 Yanni is going to mediate that case. There have 13:50:42  
5 been two requests that where Bayer has declined to 13:50:44  
6 either negotiate or mediate. One of those cases, 13:50:48  
7 the Talbot case, I ordered into mediation, and that 13:50:52  
8 is probably going to be scheduled sometime in May 13:50:56  
9 here in Minneapolis, and the other case that Bayer 13:51:00  
10 declined to either negotiate or mediate, I agreed 13:51:04  
11 with their decision in that case under the 13:51:08  
12 guidelines that we've set up. 13:51:09  
13 THE COURT: All right. 13:51:11  
14 SPECIAL MASTER REMELE: Thank you, Your 13:51:12  
15 Honor. 13:51:13  
16 THE COURT: Thank you. 13:51:13  
17 MR. ZIMMERMAN: I believe that the cases 13:51:21  
18 that have settled, the 713 cases, Your Honor, are 13:51:24  
19 not all actually rhabdo-diagnosed cases, I think we 13:51:28  
20 used that term, and I think Mr. Beck is generally 13:51:34  
21 correct that most of them, if not a vast majority, 13:51:37  
22 have been diagnosed rhabdo, but some are what we 13:51:40  
23 call rhabdo-like. I just want to make sure the 13:51:42  
24 record is clear on that, that it isn't only 13:51:45  
25 diagnosed in the medical records as rhabdomyolysis 13:51:50

1 that have resulted in the 713 settlements, or at 13:51:53

2 least for sure I know of the 220 settlements in 13:51:57

3 federal court, federal cases. 13:52:00

4 MR. BECK: I think that's right, Your 13:52:03

5 Honor. What I was referring to was cases that we 13:52:03

6 consider to involve rhabdo, whether they were 13:52:05

7 formally diagnosed or just it's ascertainable from 13:52:08

8 looking at medical records and other indications. 13:52:13

9 THE COURT: All right. 13:52:15

10 MR. ZIMMERMAN: I don't want to quibble 13:52:17

11 about that. I just wanted to make sure that we 13:52:18

12 understood one another, that it wasn't just a 13:52:20

13 diagnosed -- 13:52:24

14 MR. BECK: Sure. 13:52:25

15 MR. ZIMMERMAN: We also understand, and I 13:52:26

16 don't know if these are included in the figures, 13:52:27

17 that there were, I believe, four cases set for trial 13:52:29

18 in Texas. One, two, I believe, were set for -- to 13:52:34

19 begin this next week coming up and two for, I 13:52:41

20 believe, early in May. And I believe all those 13:52:47

21 cases, of those four cases that were set, have 13:52:51

22 settled. We also understand, and I believe the 13:52:57

23 Court will be provided with that information, 13:52:59

24 although we will not in the MDL, that they were 13:53:01

25 settled for substantially different figures than had 13:53:04

1 been settled in cases that weren't set for trial or 13:53:07  
2 immediately on the trial docket. We want to 13:53:12  
3 investigate that further. I don't have firsthand 13:53:15  
4 information on that. But I believe it's important 13:53:19  
5 for the integrity of the settlement program that we 13:53:22  
6 understand, and we've made this clear from the 13:53:25  
7 beginning, we understand the values of settlements. 13:53:28  
8 We know that a case that's going to be tried may 13:53:31  
9 have an increased value from a case that doesn't 13:53:34  
10 have a trial setting. That's the real marketplace. 13:53:37  
11 That's the real world. But we do understand that 13:53:39  
12 these may have been substantially different values 13:53:42  
13 than had been previously negotiated in the past, and 13:53:45  
14 we simply want to find out what that is and make 13:53:49  
15 sure that settlements going forward take those 13:53:53  
16 increased values, if that's true, into 13:53:57  
17 consideration. 13:54:00  
18 I don't know if you have any comments on 13:54:02  
19 that. 13:54:03  
20 MR. BECK: We did settle four cases in 13:54:04  
21 Texas, and we're not going to -- these are not MDL 13:54:05  
22 cases. We're not going to comment on amounts. We 13:54:09  
23 treat each case individually. Some cases have 13:54:12  
24 special circumstances, and they -- and settlement 13:54:15  
25 amounts reflect special circumstances. And there 13:54:20

1 can be a host of those that we take into account 13:54:23  
2 when we negotiate our settlements. And I'm sure 13:54:26  
3 that in the plaintiff's grapevine, they've heard 13:54:30  
4 reports and they can take into account whatever 13:54:34  
5 they've heard when negotiating future settlements. 13:54:36  
6 MR. ZIMMERMAN: Well, that's not exactly 13:54:41  
7 how this program was set up. And we can talk about 13:54:42  
8 this more in chambers, which may be a more 13:54:48  
9 appropriate time to discuss it. I don't know that 13:54:50  
10 it's necessary in open court. But I think there was 13:54:52  
11 a proposition early on that settlements would be 13:54:55  
12 within ranges and that special circumstances clearly 13:54:59  
13 were going to be taken into consideration. But if 13:55:03  
14 something occurs, and I'm not sure that it has, but 13:55:07  
15 my information tells me it has, that very much skews 13:55:09  
16 the values or shows that there is a different value 13:55:14  
17 now being negotiated for similar cases, I think it's 13:55:17  
18 important information for the integrity of not only 13:55:20  
19 the MDL but the MDL settlement program and for 13:55:23  
20 everybody's understanding of what is driving value 13:55:27  
21 and what is creating settlements that may be 13:55:32  
22 disparate and different than previously negotiated 13:55:35  
23 settlements. 13:55:39  
24 THE COURT: Well, the Court will receive 13:55:40  
25 those amounts, so I will take a look at them. 13:55:42

1 MR. ZIMMERMAN: Okay. 13:55:46  
2 Moving on, Your Honor, then, to discovery. 13:55:47  
3 There are several items on the discovery agenda. I 13:55:51  
4 will go over them one by one, and then if there's 13:55:55  
5 any response, we can have a discussion about it. 13:55:58  
6 First one is document production by Bayer Corp., 13:56:02  
7 Bayer AG, and GSK. The parties are in 13:56:07  
8 meet-and-confer mode or process with regard to 13:56:13  
9 certain privilege issues. The rest of that 13:56:17  
10 discovery seems to be going quite well. There was a 13:56:21  
11 hitch recently that I just learned about that has to 13:56:27  
12 do with Pacific Care and documents having to do with 13:56:30  
13 Pacific Care, which is not discovery by Bayer or 13:56:36  
14 Bayer AG or GSK. I believe -- and I will have to 13:56:40  
15 find out for sure -- that that is now before 13:56:43  
16 Magistrate Lebedoff. But there is some serious 13:56:46  
17 issue having to do with a deposition schedule and a 13:56:50  
18 production schedule having to do with a third party, 13:56:55  
19 Pacific Care, and they had some change in counsel 13:56:59  
20 right before the time of a deposition. 13:57:03  
21 THE COURT: Actually, Judge Lebedoff took 13:57:07  
22 care of that last night. There was a conference 13:57:09  
23 call yesterday evening, and -- 13:57:10  
24 MR. HOPPER: Your Honor, very quickly? 13:57:16  
25 THE COURT: At least it was continued and 13:57:17

1 that the defendants have to -- or the counsel for 13:57:18

2 third party has to provide the Court with some 13:57:25

3 information, if I remember correctly. 13:57:28

4 MR. HOPPER: Yes, Your Honor. Good 13:57:31

5 afternoon. Randy Hopper for the MDL plaintiffs. 13:57:33

6 Magistrate Judge Lebedoff is also hearing in-camera 13:57:36

7 from those third-party counsel this afternoon, and I 13:57:38

8 assume sometime later today will have his order in 13:57:42

9 how he plans to deal with the matter. 13:57:45

10 THE COURT: All right. 13:57:47

11 MR. BECK: Your Honor, on the issue of 13:57:50

12 document productions, there are meet-and-confers 13:57:51

13 going on concerning privilege issues. To the extent 13:57:55

14 that there are ongoing productions of documents, how 13:57:59

15 that proceeds will be affected somewhat -- well, 13:58:05

16 will be affected greatly by -- on the Court's 13:58:11

17 resolution of some of the motions that are pending 13:58:17

18 today concerning the plaintiffs' desire to abrogate 13:58:19

19 the protective order and the New York Times motion 13:58:25

20 to have access to all documents that are produced. 13:58:28

21 So I simply alert the Court -- 13:58:33

22 THE COURT: Well, well done, Mr. Beck. 13:58:36

23 Your first shot over the bow. (Laughter.) 13:58:37

24 MR. BECK: That will be affected by how the 13:58:41

25 Court rules on -- 13:58:45

1 MR. ZIMMERMAN: We would have expected 13:58:45  
2 nothing less, Mr. Beck. 13:58:47  
3 You're not seeking the withdrawal of that 13:58:53  
4 motion, are you, Mr. Beck? 13:58:54  
5 The depositions of Bayer Corp. and GSK fact 13:58:58  
6 witnesses continue. I think the program is working 13:59:02  
7 effectively. There are always minor inconveniences 13:59:06  
8 and glitches, but for the most part, I believe 13:59:10  
9 everybody's quite satisfied that that process is 13:59:12  
10 unfolding in a manner that is professional and 13:59:17  
11 appropriate. 13:59:21  
12 The Bayer -- anything on that? 13:59:23  
13 MR. BECK: No, Your Honor. 13:59:26  
14 MR. ZIMMERMAN: The Bayer AG employees have 13:59:27  
15 been completed, the Amsterdam portion has been 13:59:32  
16 completed. Additional depositions of Bayer AG 13:59:35  
17 people are scheduled, I believe, to take place in 13:59:40  
18 May, in London. I think that Special Master Haydock 13:59:45  
19 and Special Master Borg have the same view as 13:59:52  
20 everyone who was there, that the process was 13:59:57  
21 professional and the process was thorough and the 14:00:01  
22 process was well-attended. There were a number of 14:00:04  
23 people there who were interested from the states, 14:00:12  
24 from the defendant doctors, from the defendant 14:00:16  
25 doctors, from the pharmacies, and, of course, from 14:00:21

1 the MDL and states. We all cooperated well. There 14:00:24  
2 were no problems with the coordination to speak of. 14:00:31  
3 I think the biggest problem that occurred had to do 14:00:36  
4 with translation issues and numbers of translators 14:00:39  
5 and whether translators were doing things the way 14:00:43  
6 people, the parties could understand them, but after 14:00:46  
7 a few minor, minor hitches, it worked out extremely 14:00:50  
8 well. I think credit has to go to the people who 14:00:55  
9 organized those. I believe it was Doug Marvin from 14:00:59  
10 the Williams & Connolly firm and Randy Hopper of my 14:01:09  
11 firm. They worked very hard with the Special Master 14:01:14  
12 to develop a protocol that worked. Nobody was 14:01:17  
13 completely satisfied with certain interpretations of 14:01:21  
14 the protocol as we went forward, but I think from 14:01:25  
15 the standpoint of fairness, we completed the 14:01:27  
16 program, and we completed it timely, and we 14:01:29  
17 completed it professionally. 14:01:32  
18 I don't know, Randy, if you have anything 14:01:33  
19 further you wanted to add? 14:01:35  
20 MR. HOPPER: Thank you, Your Honor. I 14:01:39  
21 think, as Your Honor knows, the devil's in the 14:01:42  
22 detail, and I think that the protocol stood the 14:01:45  
23 test, as the Special Masters no doubt will report on 14:01:47  
24 later to you. 14:01:51  
25 I think it's also worth noting, because I 14:01:52

1 know how important it is for this Court on the 14:01:55  
2 plaintiffs' side to continue to seek cooperation and 14:01:58  
3 communication and collaboration with respect to 14:02:04  
4 state and federal coordination in this matter, and 14:02:09  
5 I'm happy to report to the Court that plaintiffs' 14:02:12  
6 counsel, in both the MDL and the state courts, I 14:02:15  
7 think worked very, very well together from the 14:02:21  
8 plaintiffs' side, and I'm also happy to say there 14:02:23  
9 were very, very few instances of disputes at all 14:02:26  
10 with the defense side. And I wanted to also 14:02:30  
11 publicly thank Doug Marvin for all of his effort on 14:02:32  
12 the defense side. I continue to work hand in hand 14:02:36  
13 with Mr. Marvin, and I find that a very effective 14:02:39  
14 way to accomplish things in this MDL on these kinds 14:02:43  
15 of matters. Thank you, Your Honor. 14:02:47  
16 THE COURT: Well, I hope I had some effect, 14:02:49  
17 too. (Laughter.) 14:02:50  
18 MR. HOPPER: And I was about to say, Your 14:02:52  
19 Honor, for the time that you were there, certainly 14:02:56  
20 it helped us move along, and when Your Honor told me 14:03:00  
21 that I might be sanctioned if certain things didn't 14:03:03  
22 fall into place, I certainly paid attention. It was 14:03:06  
23 a great help. And I want to thank both the Special 14:03:09  
24 Masters, as well. You didn't tell me that, right? 14:03:13  
25 (Laughter.)

1 Thank you, Your Honor. 14:03:18

2 MR. BECK: Your Honor, concerning the 14:03:20

3 additional depositions that are scheduled next month 14:03:21

4 in London, some of those involve former employees of 14:03:24

5 one or the other Bayer defendants who are not 14:03:32

6 residents of the United States and whom we persuaded 14:03:36

7 to appear voluntarily, in part, based on our 14:03:40

8 explanation of the uses that the depositions could 14:03:44

9 be put to under the protective order. Once Your 14:03:48

10 Honor rules on the pending motions that relate to 14:03:52

11 that, we'll advise them and their counsel and we 14:03:55

12 will encourage them to participate and they'll make 14:03:58

13 their own decisions whether they're going to. 14:04:04

14 MR. ZIMMERMAN: I think that was a second 14:04:10

15 shot over the bow, Your Honor. (Laughter.) 14:04:11

16 MR. BECK: I don't want anybody to feel 14:04:14

17 like they were surprised down the road if the rules 14:04:16

18 change on the protective order, Your Honor. And 14:04:19

19 these people are not under our control, and we moved 14:04:21

20 heaven and earth to get them to agree, and we -- and 14:04:24

21 we used our powers of persuasion and gave them 14:04:28

22 assurances, and if I have to tell them that the 14:04:32

23 assurances that we gave them no longer hold. We're 14:04:35

24 again going to use all the powers of persuasion we 14:04:39

25 can, but we can't guarantee that they're going to 14:04:41

1 decide to show up. 14:04:44

2 THE COURT: Okay. 14:04:51

3 MR. ZIMMERMAN: Your Honor, defendants and 14:04:59

4 the PSC have provided the Court with a proposed 14:05:01

5 order addressing the scheduling of generic expert 14:05:05

6 discovery. I don't need to reiterate where we are 14:05:09

7 with that, except to say where it is before the -- 14:05:14

8 that it is before the Court. I don't want to take 14:05:19

9 this opportunity, unless the Court wants us to, to 14:05:22

10 address that in argument. 14:05:25

11 THE COURT: No. 14:05:26

12 MR. ZIMMERMAN: Okay. So I won't, and I 14:05:28

13 believe it's just before the Court on the generic 14:05:31

14 discovery question. 14:05:33

15 MR. BECK: Does that mean, Your Honor, that 14:05:35

16 you're just going to decide it on the papers? We're 14:05:36

17 prepared to address it right now briefly on what the 14:05:39

18 schedule ought to be for the generic experts. We 14:05:42

19 wanted this to be heard last time, and it wasn't, 14:05:45

20 and we'd like it to be heard this time. 14:05:48

21 THE COURT: Certainly. I'm willing to 14:05:50

22 hear. I didn't know if plaintiffs were ready to 14:05:52

23 argue it or -- 14:05:55

24 MR. ZIMMERMAN: We thought we'd just submit 14:05:57

25 it on the record, Your Honor, or we could -- or we 14:05:58

1 could discuss it in chambers. But if you want to 14:06:01  
2 argue it, we certainly -- we certainly can. I 14:06:04  
3 didn't -- I didn't recognize from the agenda that it 14:06:07  
4 was going to be argued. It wasn't down there as 14:06:10  
5 being something subject to argument. 14:06:13

6 MR. BECK: Well, Your Honor -- 14:06:16

7 THE COURT: Why don't we proceed briefly. 14:06:16

8 If you want to put forth the PSC's position, then 14:06:22

9 Mr. Beck can put forth his position, and I'll take 14:06:28

10 it under advisement. 14:06:31

11 MR. ZIMMERMAN: Well, our view, Your Honor, 14:06:33

12 is that the expert discovery for the specific cases 14:06:37

13 has been made. It is a process that we focused on 14:06:44

14 for a ramped-up trial date of June 6th. We put that 14:06:52

15 disclosure together and made the disclosures of the 14:07:01

16 names and the specialties on April 7th, and the 14:07:04

17 actual reports on April 14th. 14:07:09

18 We believe that generic discovery need not 14:07:14

19 take place, disclosure need not take place, until 14:07:19

20 October. The reason is, we are now focusing on 14:07:23

21 specific trials with specific experts at specific -- 14:07:27

22 for a specific trial. To dual track that is cost 14:07:33

23 ineffective, it is repetitious in part, and is 14:07:39

24 simply not necessary, because the generic experts 14:07:45

25 are what is going to be required when cases go to be 14:07:49

1 back to their transfer or court for remand. Or if 14:07:54  
2 these other cases are set for trial in this Court, 14:08:00  
3 we will have case-specific expert designated and 14:08:05  
4 reported upon. 14:08:08

5 The PSC sees no reason why we should dual 14:08:11  
6 track expert reports. After all, it's expensive, 14:08:14  
7 it's time-consuming, and the fact of the matter is 14:08:21  
8 that expert reports have to be close in time to 14:08:25  
9 trial, or as close in time to trial as they possibly 14:08:30  
10 can be, otherwise they are not ripe. And if you 14:08:34  
11 pick that too fast and you try and make those 14:08:39  
12 disclosures too early, they lose relevancy, not so 14:08:42  
13 much for the defendants, because, actually, the 14:08:47  
14 defendants are picking holes in the plaintiffs' 14:08:50  
15 pro-offered experts, but for the plaintiffs, who are 14:08:52  
16 trying to have the most relevant information and the  
17 most relevant experts and the most relevant reports 14:08:58  
18 in time to the offer of evidence. 14:09:03

19 So for that reason, Your Honor, we do not 14:09:08  
20 think it makes any sense until after the trials that 14:09:10  
21 are set before this Court are concluded that we go 14:09:14  
22 to the process and the extraordinary amount of work 14:09:17  
23 and expense to designate generic experts. 14:09:21

24 MR. BECK: Your Honor, when we were before 14:09:28  
25 the Court on arguments concerning class 14:09:30

1 certification, the plaintiffs were taking the 14:09:35  
2 position that not only could they do dual tracks on 14:09:38  
3 case specific, whatever was going to be tried in 14:09:46  
4 June, as well as generic, but that the whole 14:09:48  
5 process, theirs and ours, could be completed, 14:09:53  
6 finished by June 6th. And now that they have 14:09:56  
7 secured trial dates for a couple of individual cases 14:10:02  
8 in June, they're proposing to delay even the 14:10:06  
9 commencement of generic expert discovery until 14:10:10  
10 October. That's nine months after they said that it 14:10:14  
11 should begin and about six months after they said it 14:10:20  
12 should be finished. They said it should be finished 14:10:24  
13 at the beginning of June, and now they're saying it 14:10:27  
14 shouldn't start until October. 14:10:30  
15 And, Your Honor, we believe that this would 14:10:32  
16 be a grossly undue delay in doing the job that this 14:10:35  
17 Court was appointed to do. The Court's made 14:10:43  
18 tremendous progress in terms of generic fact 14:10:49  
19 discovery, which, of course, by its nature is all 14:10:53  
20 one-way discovery from us, but also a part of this 14:10:56  
21 Court's job is to complete the generic discovery so 14:11:01  
22 that the cases can be remanded to the trial courts 14:11:06  
23 around the country so that the case-specific 14:11:10  
24 discovery can be done in the Central District of 14:11:12  
25 California and the Northern District of Illinois and 14:11:15

1 these cases can be tried. And what the Plaintiffs' 14:11:18  
2 Steering Committee is doing, for reasons that I 14:11:22  
3 can't understand could have anything to do with 14:11:27  
4 management of the litigation, may have something to 14:11:29  
5 do with the intramural competition among groups of 14:11:32  
6 plaintiffs' lawyers, but they're proposing not to 14:11:38  
7 even start that process until -- until nine months 14:11:39  
8 after they said it should begin and four to five 14:11:44  
9 months after they said it should be finished. It 14:11:48  
10 just makes no sense to us at all, Your Honor. 14:11:50  
11 We think that the Court's, that one of the 14:11:52  
12 Court's principal responsibilities, and we would 14:11:56  
13 suggest in an MDL the Court's principal 14:11:59  
14 responsibility, is to get the generic discovery done 14:12:03  
15 so that the cases can be remanded to the trial 14:12:06  
16 courts around the country, and this is simply a 14:12:10  
17 three-quarters-of-a-year delay in that process for 14:12:14  
18 no reason. 14:12:18  
19 In terms of dual tracking, they've done their 14:12:18  
20 case-specific expert reports. I think those were 14:12:24  
21 all turned in this last week or being turned in 14:12:26  
22 right now. There's nothing in the world that would 14:12:29  
23 stop them from going forward and designating their 14:12:32  
24 other generic experts in June and getting this 14:12:37  
25 process underway. When they were here in February, 14:12:40

1 they represented to the Court that they already knew 14:12:43  
2 all of the areas they were going to have generic 14:12:46  
3 experts in. They must have them lined up, because 14:12:48  
4 they said that they were ready to designate, give 14:12:51  
5 reports, have depositions of their experts, all of 14:12:54  
6 that would be done by June. So it's not like they 14:12:59  
7 need to go out and find somebody. 14:13:01

8 So, Your Honor, we've got -- I don't know how 14:13:06  
9 many lawyers introduced themselves today on the 14:13:07  
10 plaintiffs' side, but that's just a fraction of the 14:13:10  
11 members of the Plaintiffs' Steering Committee. 14:13:13  
12 There are plenty of lawyers here to do dual-track 14:13:15  
13 work. We've been doing dual-track work throughout 14:13:19  
14 this litigation. On our side, we've been doing it 14:13:21  
15 as we defend state court cases and do the MDL work. 14:13:25  
16 The MDL Steering Committee's been doing it, taking 14:13:30  
17 two, three depositions at a time when we're talking 14:13:33  
18 about fact discovery. It's not a hard job to tell 14:13:35  
19 your expert it's time to write your report. And 14:13:39  
20 that's all we're talking about. 14:13:43

21 We think that this process ought to get 14:13:44  
22 underway right away. We think it ought to begin in 14:13:46  
23 June. We laid out our -- I won't argue the specific 14:13:50  
24 sequence. But we think it ought to get underway 14:13:56  
25 sooner rather than later. We believe that there is 14:13:58

1 no warrant whatsoever for putting the job of this 14:14:02  
2 Court, in terms of the MDL work, on hold because 14:14:07  
3 they have persuaded Your Honor to have a couple of 14:14:11  
4 individual trials. We don't even know if those 14:14:14  
5 trials are going to take place -- we'll talk about 14:14:17  
6 that in a few minutes, as well -- and we certainly 14:14:19  
7 don't know that both of them are going to take 14:14:22  
8 place. So we ought to get on with the job of the 14:14:25  
9 MDL in getting these cases prepared. 14:14:29  
10 THE COURT: All right. 14:14:31  
11 MR. ZIMMERMAN: May I have a response? 14:14:33  
12 THE COURT: Thirty seconds. 14:14:34  
13 MR. ZIMMERMAN: Our job is to do it and do 14:14:38  
14 it well, Your Honor. There are 14 depositions and 14:14:40  
15 several European depositions that must take place. 14:14:43  
16 That information must be digested by the experts. 14:14:48  
17 It must be taken into consideration. It must be 14:14:51  
18 part of what we do to protect the interests of all 14:14:54  
19 people who are relying upon the work product. And 14:14:57  
20 to say that we should just do it quickly because we 14:15:00  
21 thought we could complete the process on X date and 14:15:02  
22 we're really completing it on Y date really doesn't  
23 resonate. Defendants thought they would have their 14:15:08  
24 documents produced by the end of March. They're not 14:15:10  
25 all produced. There's still more to produce. We 14:15:12

1 have 14 more depositions to take. We'd like to have 14:15:15

2 that information, or at least the majority of that 14:15:17

3 information, before we designate the generic 14:15:19

4 experts, and that is the conclusion of my response. 14:15:22

5 THE COURT: All right. Thank you. 14:15:26

6 MR. BECK: May I have 10 seconds, Your 14:15:28

7 Honor? 14:15:29

8 THE COURT: Ten. 14:15:30

9 MR. BECK: Just to quote Ron Goldser when 14:15:30

10 we addressed this last time, quote, "I think we 14:15:32

11 could all probably write that report ourselves," 14:15:34

12 end quote. 14:15:38

13 MR. ZIMMERMAN: And he was wrong. 14:15:39

14 (Laughter.) We couldn't. 14:15:43

15 "Status of procedures used to effectuate PTO 14:15:47

16 54." I believe this matter has now been referred to 14:15:51

17 Magistrate Judge Lebedoff. Jeanne Geoppinger has 14:15:57

18 been quarterbacking this issue for the PSC. And I 14:16:05

19 believe, Susan, have you been quarterbacking this on 14:16:08

20 the defense? 14:16:10

21 MS. WEBER: Yes. 14:16:12

22 MR. ZIMMERMAN: And am I correct that it's 14:16:14

23 been referred to Magistrate Judge Lebedoff? 14:16:14

24 MS. WEBER: No.

25 MR. ZIMMERMAN: It has not been. Okay. 14:16:18

1 MS. JEANNE GEOPPINGER: Not yet. 14:16:21  
2 MR. ZIMMERMAN: Okay, but that's what we  
3 intend to do.  
4 MS. JEANNE GEOPPINGER: We only had a 14:16:24  
5 couple more discussions, but we decided that it 14:16:25  
6 might require a referral to the magistrate to 14:16:27  
7 resolve the issue. 14:16:30  
8 THE COURT: All right. When that time 14:16:31  
9 comes, I'll take a look at it. 14:16:34  
10 MR. ZIMMERMAN: Okay. Thank you, Your 14:16:37  
11 Honor. 14:16:38  
12 There are several motions, Your Honor, set 14:16:39  
13 for argument. I believe Mr. Beck has made his 14:16:43  
14 argument, and I'll make ours. I'm just teasing. 14:16:47  
15 The motions that are set are going to be 14:16:51  
16 argued by the plaintiff -- for the Plaintiffs' 14:16:54  
17 Steering Committee by Dick Lockridge. There's also 14:16:57  
18 the New York Times motion, which is going to be 14:17:01  
19 argued by the attorney for the New York Times. 14:17:03  
20 There's a noncontested motion that is not on 14:17:08  
21 this calendar that we can probably put -- take up at 14:17:11  
22 the foot of the calendar. It has to do with the 14:17:15  
23 petition for release of funds for the Darsie 14:17:17  
24 plaintiff settlement. It's a very perfunctory 14:17:22  
25 matter, but because it's a death and a trustee, we 14:17:28

1 need to get a court order signed. The papers have 14:17:30  
2 been filed. I don't know what order the Court wants 14:17:32  
3 to hear it, but it is in that category of motions. 14:17:36

4 THE COURT: We've received the order. I 14:17:38  
5 haven't signed off on it yet. I haven't looked at 14:17:41  
6 it. 14:17:43

7 MR. ZIMMERMAN: I don't know if you want 14:17:44  
8 any argument or -- 14:17:45

9 THE COURT: Well, we can talk about it at 14:17:46  
10 the foot of the calendar. 14:17:47

11 MR. ZIMMERMAN: Okay. Thank you, Your 14:17:48  
12 Honor. 14:17:49

13 THE COURT: All right, let's deal with the 14:17:50  
14 motions. The first one is "Bayer's Motion to 14:17:51  
15 Enforce PTO 18 and 24"? 14:17:56

16 MR. BECK: Yes, Your Honor. And I'm just 14:17:59  
17 going to assume, unless you tell me otherwise, Your 14:18:01  
18 Honor, that you're familiar with the papers that the 14:18:03  
19 parties have filed, so I won't repeat what's in 14:18:08  
20 there, unless it's been some time since Your Honor 14:18:10  
21 read them and needs me to refresh your recollection. 14:18:13

22 But basically, the situation that we're in 14:18:18  
23 here has boiled down to a relatively focused one. 14:18:21  
24 There are certain horses that left the barn, and 14:18:28  
25 we're not going to get them back in the barn in 14:18:30

1 terms of documents that the Plaintiffs' Steering 14:18:33  
2 Committee has released to the media and briefs that 14:18:36  
3 they filed that we say should have been filed under 14:18:39  
4 seal and weren't. But I'm much more interested in 14:18:42  
5 what I understand to be the principal remaining 14:18:48  
6 disagreement, and that is that, as I understand it, 14:18:53  
7 the Plaintiffs' Steering Committee has refused to 14:18:59  
8 agree that if they file papers with this Court that 14:19:03  
9 refer to or summarize information that's been 14:19:11  
10 designated as confidential under the protective 14:19:15  
11 order, that those briefs or papers should be filed 14:19:18  
12 under seal. Instead, they're taking the position, 14:19:22  
13 as I understand it, that as long as they summarize 14:19:27  
14 it, paraphrase it or quote it outright in a brief, 14:19:31  
15 that they -- that they don't have to file that under 14:19:34  
16 seal and that the protective order does not apply. 14:19:37  
17 I think they agree that the documents themselves, at 14:19:42  
18 least unless they're able to abrogate the protective 14:19:46  
19 order, have to be treated as confidential. 14:19:49  
20 I think also, if Your Honor reads the papers, 14:19:52  
21 which quote the applicable provisions of the 14:19:56  
22 pretrial orders, you will see that the language in 14:20:00  
23 the pretrial order specifically prohibits public 14:20:04  
24 filings that reference, paraphrase or quote 14:20:12  
25 confidential information, and I'm not sure they even 14:20:16

1 disagree with that, but they say they don't like 14:20:19  
2 that and they want to continue to be able to do what 14:20:21  
3 they have done before, we think in violation of the 14:20:24  
4 pretrial orders, and that is, to take information 14:20:28  
5 that's been designated as confidential under the 14:20:32  
6 protective order and then file a brief that 14:20:35  
7 paraphrases or quotes from or references that 14:20:39  
8 confidential information and then send it to the New 14:20:43  
9 York Times or post it on their Web site and engage 14:20:47  
10 in their public relations battle. They negotiated a 14:20:52  
11 set of pretrial orders that forbids that, and we 14:20:59  
12 think they ought to be held to that. 14:21:03  
13 All we're asking at this point -- I 14:21:05  
14 understand that they did what they did when arguing 14:21:07  
15 for class certification and flashed up documents 14:21:11  
16 that were subject to the protective order and then 14:21:16  
17 passed them out to the media. They did what they 14:21:18  
18 did when filing a motion for leave to file a 14:21:21  
19 punitive damages claim referencing confidential 14:21:27  
20 information and then told the media how they could 14:21:32  
21 go about getting copies of that. So those things 14:21:36  
22 are over and done with. 14:21:38  
23 THE COURT: Dealing with the first item, 14:21:41  
24 dealing with the documents that were flashed in 14:21:44  
25 court. Whether or not they were handed to the media 14:21:48

1 is not a concern at this point. But what documents 14:21:51  
2 are you talking about? Because nowhere -- you talk 14:21:55  
3 about these documents being -- there's a whole bunch 14:21:59  
4 of documents that were given to me. Do you know 14:22:03  
5 what specific ones that you're referencing dealing 14:22:05  
6 with that were flashed on the screen during the 14:22:08  
7 argument? 14:22:11

8 MR. BECK: Well, there was the bench book, 14:22:13  
9 Your Honor. 14:22:14

10 THE COURT: The bench book, as far as I can 14:22:15  
11 remember, was not flashed to anyone. 14:22:18

12 MR. BECK: Well, there were -- there were 14:22:20  
13 documents, there were Bayer documents, e-mails or 14:22:21  
14 internal memoranda, that were put up on the screen, 14:22:26  
15 and I spent the next two weeks talking to a woman 14:22:29  
16 named Melody from the New York Times, where she 14:22:32  
17 said, "Here are the documents that were sent to me 14:22:35  
18 by the plaintiffs' lawyers in Minnesota. What do 14:22:37  
19 you have to say about page 2?" So there were a 14:22:40  
20 whole bunch of documents that were sent to the New 14:22:44  
21 York Times, according to the New York Times, by the 14:22:49  
22 plaintiffs' lawyers in the federal action, and they 14:22:54  
23 were internal memoranda, e-mails, other documents 14:22:59  
24 that were subject to the protective order. 14:23:03  
25 As I said, that's water under the bridge. A 14:23:08

1 lot of those documents ended up being exhibits in 14:23:11  
2 the Haltom case or in the case down in Mississippi. 14:23:15

3 So they've been made public in that way. 14:23:18

4 And so to the extent that our motion, which 14:23:20

5 had been filed some time ago, asked for specific 14:23:23

6 relief in terms of trying to unring bells, you know, 14:23:26

7 I'm not asking for that. But what we do need 14:23:31

8 guidance on is whether or not they're going to be 14:23:35

9 bound by the terms of the pretrial order or whether 14:23:37

10 they're going to be able, through interpretation, to 14:23:41

11 simply read out of the pretrial order the provisions 14:23:45

12 that say that if you're going to refer to or quote 14:23:48

13 from confidential information, you have to make your 14:23:51

14 filings under seal. And they refuse to do that. 14:23:56

15 And all we've asked them to do is to agree to live 14:23:58

16 up to the pretrial order, and they now say that the 14:24:01

17 order they negotiated, they interpret it in a way 14:24:03

18 that does not require them to file such matters 14:24:07

19 under seal. So that is the focus of our concern. 14:24:11

20 THE COURT: All right. Mr. Lockridge, 14:24:15

21 would you like to respond? 14:24:20

22 MR. LOCKRIDGE: Well, first of all, we did 14:24:26

23 not, in our view, violate the protective order at 14:24:27

24 all. There were documents ultimately, of course, 14:24:31

25 that were submitted to the Court and that there were 14:24:36

1 flashed up, and I believe there's now no dispute on 14:24:38  
2 any of that. As I understand it, the only claim is 14:24:42  
3 to deal with the punitive damages memo. I think 14:24:44  
4 it's clear, also, that we did not violate the 14:24:47  
5 protective order there. We obviously understand 14:24:50  
6 that we're bound by the protective order. Mr. 14:24:52  
7 Zimmerman advised the defendants that we were going 14:24:55  
8 to be filing that, going to be making that brief a 14:24:58  
9 matter of public record, and they did not dispute or 14:25:01  
10 they did not argue with us about that at that time. 14:25:05  
11 Indeed, they waited three full weeks before they 14:25:08  
12 even brought it to our attention, which suggests to 14:25:12  
13 me that they interpreted the protective order the 14:25:15  
14 same way we did. So I'm not quite sure what the 14:25:17  
15 issue is. Obviously, we can read the protective 14:25:22  
16 order and are bound by it, and we understand that if 14:25:26  
17 it develops that we cannot come to an agreement that 14:25:30  
18 briefs that quote from confidential documents will 14:25:34  
19 have to be filed under seal, unless the protective 14:25:38  
20 order is ultimately lifted, but that's -- 14:25:41  
21 THE COURT: Well, let's back up. Let's get 14:25:44  
22 this straight, that even with the defendants waiting 14:25:46  
23 three weeks or whether or not it was three hours or 14:25:53  
24 three minutes, you agreed with their interpretation 14:25:55  
25 that the punitive damages memorandum should not have 14:25:58

1 been filed. So we were -- let's get to the gist of 14:26:02  
2 it and what the protective order means and that 14:26:08  
3 everyone follows it. Just because defendants waited 14:26:13  
4 three weeks, it doesn't matter to me; if it was 14:26:19  
5 three minutes, it doesn't matter. Understanding 14:26:22  
6 what the protective order says and that you follow 14:26:25  
7 it. 14:26:28

8 MR. LOCKRIDGE: Certainly. I understand 14:26:29  
9 that, Your Honor. If Your Honor directs us to, of 14:26:30  
10 course we will file that brief now under seal. We 14:26:32  
11 took it off Verilaw some time ago. 14:26:35

12 THE COURT: All right. It has to be filed 14:26:38  
13 under seal. 14:26:40

14 MR. LOCKRIDGE: All right. Thank you, Your 14:26:41  
15 Honor. 14:26:42

16 MR. BECK: Your Honor, am I correct in 14:26:48  
17 assuming that we now all understand the ground rules 14:26:51  
18 and that other filings, briefs, motions that refer 14:26:55  
19 to confidential information, unless the protective 14:27:02  
20 order is changed, will be filed under seal pursuant 14:27:05  
21 to paragraphs 9 and 18 of the pretrial order, or do 14:27:09  
22 they still have some interpretation that allows them 14:27:14  
23 to say whatever they want in the public filings? 14:27:17

24 MR. ZIMMERMAN: Your Honor, I think we're 14:27:22  
25 using -- I think we're a little confused about 14:27:24

1 things. Let me see if I can straighten it out as 14:27:27  
2 best I can. There was no question that confidential 14:27:29  
3 documents, be they in the bench book, be they filed 14:27:35  
4 as part of an exhibit to the brief -- 14:27:40

5 THE COURT: Or referred to in the brief. 14:27:44

6 MR. ZIMMERMAN: Or referred to in the 14:27:47

7 brief, exactly, are confidential and must remain so. 14:27:47

8 The only thing that we -- the only position we take 14:27:53

9 with regard to not being confidential are the 14:27:57

10 following: One, a filed document but not the 14:28:01

11 exhibits, in other words, the briefs. Once that is 14:28:07

12 filed in court -- forget about Verilaw, because I'll 14:28:11

13 get to Verilaw. But once it is filed in the clerk's 14:28:16

14 office, the clerk's file, as I understand it and in 14:28:18

15 accordance with the -- is the Procter & Gamble case? 14:28:24

16 The Procter & Gamble case of the 6th Circuit, says a 14:28:27

17 filing is a document that is open. The documents 14:28:30

18 referred to remain confidential. 14:28:34

19 So I told Mr. Hoeflich before the hearing on 14:28:39

20 punitive damages, or before we were going to have 14:28:46

21 the hearing on punitive damages, that the filed 14:28:47

22 memorandum is open, is not a sealed document. The 14:28:51

23 underlying documents are. Now -- 14:28:59

24 THE COURT: Well, the defense is not 14:29:04

25 arguing that the document should be -- that the 14:29:04

1 memorandum should be sealed. They're talking about 14:29:07  
2 what's in that memorandum and what you're referring 14:29:10  
3 to in that memorandum, which would follow the 14:29:13  
4 protective order. 14:29:17

5 MR. ZIMMERMAN: And that's -- then lies the 14:29:20  
6 question. I'm saying that if we refer to a 14:29:22  
7 document, standing for the proposition that Bayer 14:29:25  
8 did wrong, cite A, B, C, D document, the document is 14:29:28  
9 sealed, the allegation or the argument that it is a 14:29:33  
10 -- it is the wrong thing to do or it is an 14:29:39  
11 inappropriate document, inappropriate conduct, that 14:29:42  
12 argument is not sealed because that's part of what's 14:29:46  
13 in open court, i.e. the memorandum. 14:29:50

14 Now, but then we get to the Verilaw question. 14:29:54  
15 So I took the position, and I believe they agreed, 14:29:59  
16 that the actual memorandum of points and authorities 14:30:01  
17 is an open book. Anybody in the world can look at 14:30:05  
18 it because that's filed in open court. The 14:30:08  
19 underlying documents cannot. Now, I said, "However, 14:30:11  
20 we are going to be discussing certain documents," 14:30:15  
21 and I think it was on a screen or on a computer, we 14:30:18  
22 flashed up and talked about certain documents. This 14:30:22  
23 was in class certification. 14:30:25

24 THE COURT: Correct. 14:30:27

25 MR. ZIMMERMAN: It was my understanding, 14:30:28

1 according to my reading of the Procter & Gamble 14:30:29  
2 case, and other people who I have discussed, that 14:30:33  
3 once you talk about those documents in open court, 14:30:36  
4 in a courtroom where the press is available to take 14:30:40  
5 notes and/or view, that only those documents that 14:30:43  
6 are discussed in open court and shown in open court, 14:30:49  
7 just like an exhibit in a trial, that becomes no 14:30:54  
8 longer under seal, and those documents were then 14:30:59  
9 provided to others because it was now in open court. 14:31:07  
10 Excuse me? 14:31:11  
11 MR. BECK: What?  
12 MR. ZIMMERMAN: Oh, I thought I heard 14:31:14  
13 somebody slam something down. 14:31:16  
14 MR. BECK: You did. I'm sorry. 14:31:17  
15 THE COURT: Continue. 14:31:19  
16 MR. ZIMMERMAN: Those documents that were 14:31:21  
17 discussed in open court were then no longer 14:31:23  
18 privileged. That was my position. 14:31:28  
19 Then we have the third question, and that's 14:31:31  
20 Verilaw. Peter Sipkins called me when I was out of 14:31:34  
21 town and said, "But these documents and perhaps the 14:31:38  
22 exhibits, that is, all the filed exhibits, are on 14:31:43  
23 Verilaw. Verilaw is not under seal." I said, 14:31:48  
24 "That's news to me." I checked it out. It was not 14:31:51  
25 properly filed with Verilaw under seal. It was 14:31:56

1 filed with the Court properly under seal, but it was 14:32:00  
2 not filed with by Verilaw under seal. We 14:32:04  
3 immediately wrote Verilaw, contacted Verilaw, and 14:32:08  
4 they pulled it back. We never directed anyone or 14:32:11  
5 gave anyone access who did not otherwise have access 14:32:16  
6 to Verilaw to access Verilaw and go after the 14:32:19  
7 mistaken filing in Verilaw which was not done under 14:32:25  
8 seal. 14:32:28  
9 In summary, the brief, memorandum, reports 14:32:31  
10 and authority always took the position that's an 14:32:34  
11 open book. The documents used in open court, just 14:32:36  
12 like Mr. Beck used the medical records of our client 14:32:40  
13 to discuss the problems with the class reps, those 14:32:43  
14 are medical records that were under seal, those are 14:32:47  
15 private documents, but once you use them in open 14:32:50  
16 court, they become open. We took the position, as I 14:32:52  
17 think Mr. Beck did, that that became open fodder in 14:32:56  
18 a courtroom, as the press could look at it or anyone 14:33:01  
19 else could look at it. Those documents were open. 14:33:03  
20 But the underlying documents were never released, 14:33:06  
21 and we have never taken the position that any of the 14:33:10  
22 underlying documents that are confidential do not 14:33:12  
23 remain confidential. That was our position. 14:33:16  
24 MR. BECK: First of all, Your Honor, the 14:33:23  
25 underlying documents were provided to the New York 14:33:24

1 Times by members of the Plaintiffs' Steering 14:33:28  
2 Committee, according to the author from the New York 14:33:31  
3 Times. Of course, we can't tell which of the 14:33:34  
4 various members of the Plaintiffs' Steering 14:33:39  
5 Committee sent the documents, although maybe 14:33:41  
6 somebody was quoted in the articles. 14:33:44  
7 But let me address the other issues, leaving 14:33:48  
8 Verilaw aside. I don't care anything -- they did 14:33:50  
9 what they said they did as to Verilaw. What Mr. 14:33:54  
10 Zimmerman talked about other than that is simply not 14:33:57  
11 true. Mr. Hoeflich will summarize the conversations 14:34:00  
12 as they actually took place. But I don't think Your 14:34:04  
13 Honor should be put in a position of having to 14:34:08  
14 decide these issues based on what one lawyer says 14:34:10  
15 versus what another lawyer says about a 14:34:14  
16 conversation. Instead, I think that these matters 14:34:16  
17 ought to be decided based on the content of the 14:34:21  
18 orders that this Court has entered in this case. 14:34:24  
19 As I listened to Mr. Zimmerman, he was saying 14:34:28  
20 that he had an undisclosed interpretation of a 14:34:31  
21 judicial opinion which led him to conclude all along 14:34:37  
22 that he was not bound by the terms of the protective 14:34:41  
23 order that this Court entered and that he agreed to. 14:34:44  
24 First of all, he said that briefs that summarized 14:34:47  
25 confidential information are public and they don't 14:34:52

1 have to be filed under seal. Your Honor entered a 14:34:53  
2 protective order that was agreed to by Mr. Zimmerman 14:34:57  
3 on June 4th, 2002. And paragraph 9 of that 14:35:00  
4 protective order says as follows: Any confidential 14:35:06  
5 discovery material that is filed with the Court and 14:35:12  
6 any pleading, motion or other paper filed with the 14:35:16  
7 Court containing or disclosing any such confidential 14:35:19  
8 discovery material shall be filed under seal and 14:35:23  
9 shall bear the legend, and then it has the surgeon 14:35:27  
10 general's warning about how it's under seal. 14:35:31  
11 So the order can't be any clearer that briefs 14:35:34  
12 are covered, otherwise the protective order can be 14:35:37  
13 circumvented through Mr. Zimmerman's interpretation, 14:35:41  
14 that as long as he summarizes or quotes from it, 14:35:46  
15 he's not bound by the protective order. 14:35:49  
16 Secondly, Mr. Zimmerman said: And certainly 14:35:51  
17 any documents shown in open court, all bets are off. 14:35:53  
18 Paragraph 18 of the same order says: This order 14:35:58  
19 does not restrict or limit the use of confidential 14:36:02  
20 discovery material at any hearing or trial which is 14:36:04  
21 expected to be the subject of a further protective 14:36:08  
22 order and/or appropriate court orders. Prior to any 14:36:10  
23 hearing or trial at which the use of confidential 14:36:14  
24 discovery material is anticipated, the parties shall 14:36:17  
25 meet and confer regarding the use of the 14:36:20

1 confidential discovery material. If the parties 14:36:22  
2 cannot agree, the parties shall request the Court to 14:36:25  
3 rule on such procedures. 14:36:26  
4 So we were entitled to advance notice if they 14:36:28  
5 were going to put up confidential information. If 14:36:31  
6 we put up information that was covered, we apologize 14:36:35  
7 and we won't ever do it again. 14:36:42  
8 What we're asking for here, Your Honor, is 14:36:44  
9 direction to the parties to take this Court's order 14:36:48  
10 seriously and to abide by it. We frankly didn't 14:36:52  
11 anticipate they'd have a problem, but we should have 14:36:55  
12 raised it with them in terms of the information 14:36:59  
13 concerning their sample plaintiffs, and for that I 14:37:02  
14 apologize. That's because we didn't focus on the 14:37:05  
15 issue. Now we focused on the issue, and we ask the 14:37:09  
16 Court to focus on the issue and to instruct the 14:37:12  
17 Plaintiffs' Steering Committee to abide by the terms 14:37:17  
18 of the protective order that they agreed to and that 14:37:21  
19 Your Honor ordered rather than their interpretation 14:37:26  
20 of decision of law. 14:37:29  
21 THE COURT: Anything further, Mr. 14:37:33  
22 Zimmerman? 14:37:34  
23 MR. ZIMMERMAN: Yes. 14:37:35  
24 MR. BECK: I'd like Mr. Hoeflich, 14:37:36  
25 incidentally, to talk about these. As I said, Mr. 14:37:38

1 Hoeflich will address these conversations that Mr. 14:37:40  
2 Zimmerman purported to summarize. 14:37:42  
3 MR. HOEFLICH: Judge, here's what happened. 14:37:45  
4 At the class certification hearing, Mr. Arsenault 14:37:47  
5 had the bench book, and the Court had a copy, we saw 14:37:51  
6 a copy as they began their argument, and there were 14:37:53  
7 a few in the courtroom. But we noticed that the 14:37:56  
8 reporter's here. And at the very first break, I 14:37:59  
9 approached Mr. Zimmerman and said, "You're 14:38:01  
10 displaying confidential information. Under the 14:38:04  
11 protective order, we should get an opportunity to 14:38:06  
12 take a look at the documents and talk about this." 14:38:09  
13 He said, "Let me check. I don't think Mr. Brasier 14:38:12  
14 (ph) is using any more confidential information. 14:38:16  
15 It's been shown in court. It's now public record 14:38:19  
16 under Minnesota law. We won't do it again." I 14:38:21  
17 turned to Mr. Zimmerman and said, "You know, I've 14:38:24  
18 got a real concern. This reporter's here. You 14:38:27  
19 can't flash documents on the screen and then use 14:38:29  
20 that as an excuse to give it to the media." Mr. 14:38:31  
21 Zimmerman looked at me and said, "I haven't given 14:38:34  
22 anything to reporters. That's not what this is 14:38:37  
23 about." 14:38:39  
24 I turned to Peter, because I was helping 14:38:39  
25 prepare for the class certification arguments, and 14:38:42

1 asked Peter to work it out with Bucky. There was an 14:38:44  
2 agreement. I believe they approached Special Master 14:38:47  
3 Haydock, either that day or shortly the next 14:38:49  
4 morning, and said that documents had been shown in 14:38:52  
5 open court, they were public, but otherwise 14:38:54  
6 everything confidential would remain confidential 14:38:55  
7 and be placed back under seal to resolve the issue. 14:38:58  
8 I took Mr. Zimmerman at his word. 14:39:02  
9 That Friday night, I got a phone call from 14:39:04  
10 Mr. Beck, who just had been told by a lawyer from 14:39:07  
11 the New York Times -- 14:39:09  
12 MR. BECK: A reporter. 14:39:11  
13 MR. HOEFLICH: A reporter from the New York 14:39:12  
14 Times that they had been given documents from the 14:39:14  
15 Minnesota class action lawyers. I was floored. I 14:39:16  
16 called Mr. Sipkins and said, "Peter, we need to get 14:39:18  
17 Bucky on the phone and ask him what happened, 14:39:22  
18 because this is the exact opposite of what I had 14:39:23  
19 been told." We told Mr. Zimmerman our understanding 14:39:26  
20 of what had happened. He said, "We haven't given 14:39:30  
21 any documents. We've just given them briefs." I 14:39:33  
22 said, "Under the protective order, you're not 14:39:35  
23 allowed to give them briefs. You can't do that. 14:39:37  
24 That's not our understanding. Are you telling me 14:39:40  
25 that that's what you've done?" He said, "That's 14:39:42

1 what we've done, and that's what I've told members 14:39:44  
2 of the PSC that it's okay to do." I said, "We 14:39:46  
3 disagree with that. And we also understand the 14:39:49  
4 documents have been filed under Verilaw." Mr. 14:39:52  
5 Zimmerman said, "If there's a problem, I'll work it 14:39:54  
6 out with you. We can talk this weekend. We'll do 14:39:56  
7 whatever it takes." I said, "You can't release 14:39:59  
8 information that's in briefs. You can't just quote 14:40:01  
9 something and say it's no longer confidential. 14:40:04  
10 That's not right." 14:40:06  
11 As I understand it, there were several 14:40:09  
12 conversations over the next couple of weeks, and our 14:40:10  
13 brief then was filed after we couldn't work it out. 14:40:12  
14 Not for one moment did we say it's okay to release 14:40:15  
15 briefs. Not for one moment did we say you can quote 14:40:18  
16 things to the New York Times. We dealt with this 14:40:21  
17 issue immediately and said, "In our mind, we 14:40:23  
18 carefully negotiated a protective order, we gave you 14:40:26  
19 documents at rapid pace and reliance on it and that 14:40:29  
20 we thought it was unfair to then try to give those 14:40:33  
21 documents to the media when that was the exact 14:40:35  
22 opposite of what we had agreed and what we had been 14:40:38  
23 told." 14:40:40  
24 MR. BECK: Your Honor, I need to make one 14:40:42  
25 correction. When I said we may have inadvertently 14:40:44

1 disclosed information, I guess I was deferring to 14:40:47  
2 Mr. Zimmerman mistakenly, because my colleagues, who 14:40:51  
3 actually prepared the information that we showed on 14:40:54  
4 the screen, pointed out to me that the order 14:40:56  
5 concerning the plaintiffs' fact sheet, which is what 14:41:02  
6 this information came from, specifically states that 14:41:05  
7 medical records relating to the injuries alleged by 14:41:08  
8 the plaintiffs are not confidential. So I'm happy 14:41:11  
9 to report that, so far as we know, we did not step 14:41:15  
10 on our toes and disclose any information that would 14:41:19  
11 be covered by the protective order. 14:41:23  
12 But as I said, as to the water that's under 14:41:27  
13 the bridge, it's under the bridge. We've all read 14:41:30  
14 the New York Times already, and the articles have 14:41:32  
15 been discussed, and the New York Times, good old 14:41:35  
16 Melody is not going to give me those documents back. 14:41:36  
17 So what I'm talking about is looking forward, we do 14:41:39  
18 need an understanding of whether or not this Court's 14:41:42  
19 order is going to be followed by the plaintiffs, 14:41:46  
20 because they have said the way they read the law 14:41:50  
21 they don't have to follow it. 14:41:52  
22 THE COURT: Well, both sides are going to 14:41:56  
23 follow PTO number 24, paragraph 9. I will have an 14:41:57  
24 order out dealing with that. And I think the order 14:42:05  
25 is the -- PTO 24, paragraph 9 is clear, but 14:42:12

1 unfortunately, there has been some violations of 14:42:19

2 that, and that I will spell that out, and, of 14:42:24

3 course, it won't happen again, or sanctions will be 14:42:30

4 meted out. So let's move on. 14:42:37

5 MR. LOCKRIDGE: First of all, Your Honor, 14:42:51

6 we did not give documents to the New York Times. I 14:42:52

7 want to make that clear. We can read the protective 14:42:56

8 order, Your Honor. 14:42:59

9 THE COURT: Well, Mr. Beck is relaying his 14:43:00

10 conversation with the reporter, and that's his 14:43:03

11 understanding, and in no way did I take that to be 14:43:07

12 true, unless the reporter is going to come in and 14:43:13

13 say that he or she received the documents, and, of 14:43:16

14 course, they're not going to come in here and 14:43:18

15 testify that anyone gave them any documents. 14:43:20

16 Let's move on on that. 14:43:24

17 MR. LOCKRIDGE: Right. I appreciate that, 14:43:26

18 Your Honor. I think what this whole argument does 14:43:27

19 show, however, is the, frankly, impossibility of 14:43:29

20 dealing with pretrial order number 24, and that's 14:43:32

21 one of the reasons why we have brought in a motion 14:43:36

22 to seek an alteration in this order. 14:43:38

23 THE COURT: And maybe you can help me on 14:43:42

24 this. In none of the documents that have been filed 14:43:44

25 do I have any indication of what percentage of the 14:43:49

1 documents have been stamped confidential. 14:43:56

2 MR. LOCKRIDGE: It's my understanding it's 14:44:00

3 stamped, virtually everything, confidential, Your 14:44:01

4 Honor. 14:44:03

5 THE COURT: I mean, you've used the term 14:44:03

6 "virtually," and that the defendants can stand up 14:44:06

7 and say "virtually" means 10 percent, and you could 14:44:09

8 say 90 percent. I need to know what the figures 14:44:12

9 are. Does anyone know? 14:44:14

10 MR. HOPPER: We referred to and cited it in 14:44:22

11 our papers, Your Honor. 14:44:25

12 THE COURT: That's right, I understand 14:44:25

13 that. 14:44:26

14 MR. LOCKRIDGE: I don't know the 14:44:27

15 percentage, Your Honor. I know that it is very 14:44:27

16 high. Is it 90 percent or 80 percent or 70 percent? 14:44:29

17 I don't know. I know that, for example -- 14:44:33

18 THE COURT: Well, let me find out, for 14:44:35

19 informational purposes, before you proceed. Can the 14:44:36

20 defendant tell me what the percentage is and/or the 14:44:39

21 procedure that you're using to stamp documents 14:44:43

22 confidential? 14:44:47

23 MR. BECK: I don't know the percentage, 14:44:48

24 Your Honor, and I haven't been involved in the 14:44:49

25 review, so I can't make any kind of accurate 14:44:53

1 representation as to the procedure that's being 14:44:56  
2 used. 14:44:59  
3 THE COURT: And what type of -- you don't 14:45:00  
4 know what the procedure is for stamping them 14:45:01  
5 confidential? 14:45:05  
6 MR. BECK: I don't. I'd be guessing, and I 14:45:06  
7 don't want to guess. And I don't know if anybody 14:45:07  
8 here -- we don't have anybody here who was an 14:45:11  
9 important part of that process. I will say, 14:45:16  
10 however, Your Honor, that we designated as 14:45:19  
11 confidential a lot of documents that are not 14:45:24  
12 confidential, I agree with that, and -- but I don't 14:45:27  
13 know any numbers. And I'll explain my understanding 14:45:31  
14 of why that happened when it's my turn. But I don't 14:45:35  
15 have any quarrel -- actually, I don't even have any 14:45:38  
16 quarrel with the idea that virtually everything was 14:45:40  
17 stamped as confidential, whatever "virtually" means. 14:45:42  
18 An awful lot was stamped as confidential, including 14:45:45  
19 some things that should not have been stamped 14:45:48  
20 confidential. 14:45:52  
21 MR. LOCKRIDGE: Okay. Well, I think we, at 14:45:56  
22 least, can start from that premise, that they have 14:45:57  
23 grossly overstamped the documents. That's one, but 14:45:59  
24 only one of several reasons why we feel it's 14:46:04  
25 necessary to have this order lifted. 14:46:07

1 We certainly do not believe that even with 14:46:11  
2 good cause or there was a reasonable basis initially 14:46:13  
3 for the entry of this order, that it no longer 14:46:16  
4 exists. And what we are asking for is basically 14:46:20  
5 that the provisions of Rule 26(c) be put into 14:46:25  
6 effect. And 26(c), as Your Honor knows, provides 14:46:29  
7 that if the defendants believe that a particular 14:46:32  
8 document should be confidential, they have to come 14:46:35  
9 in and show, and the rules states, for good cause 14:46:39  
10 shown. And in one of the comments earlier, in one 14:46:43  
11 of the several shots over the bow, I believe Mr. 14:46:46  
12 Beck commented about some of the third party or 14:46:51  
13 nonparty witnesses -- former employees, excuse me. 14:46:53  
14 This order also provides that in the event 14:46:58  
15 documents or a deposition is going to cause 14:47:02  
16 annoyance, embarrassment, oppression or undue 14:47:05  
17 burden, that they can also come in to the Court and 14:47:09  
18 ask that that document or a particular portion of 14:47:12  
19 the deposition be deemed confidential. So I think 14:47:15  
20 that that is something that would certainly protect 14:47:19  
21 them on that point. 14:47:25  
22 THE COURT: Shouldn't we just start all 14:47:26  
23 over and have the defendants go through the 14:47:27  
24 documents, re-redo the ones that they're -- of all 14:47:31  
25 the cases that have been cited, there's been a 14:47:38

1 finite number of documents that would fall under the 14:47:42  
2 protective order that the Court has allowed it to 14:47:47  
3 continue to be sealed under the protective order. 14:47:51  
4 Here, we've got millions of documents. If I hear 14:47:55  
5 Mr. Beck correctly, they're admitting that they 14:47:58  
6 misstamped and abused the PTO order 24 by stamping 14:48:02  
7 things that should not have been stamped 14:48:10  
8 confidential, and that it is incumbent upon the 14:48:16  
9 defendants to come forth and at this point start all 14:48:21  
10 over and literally set up a protocol approved by the 14:48:26  
11 Court that would show that these matters are 14:48:33  
12 confidential under the appropriate PTO order. 14:48:37  
13 MR. LOCKRIDGE: Well, I think essentially, 14:48:42  
14 yes, Your Honor, that is exactly what we're asking 14:48:43  
15 for. I would say that they, of course, indicate 14:48:45  
16 that it's going to take them I don't know how many 14:48:48  
17 hundreds or thousands of man-hours to do this, and 14:48:50  
18 the reality is -- 14:48:52  
19 THE COURT: Well, that may be the case, and 14:48:52  
20 I'm not worried about that at this point. If 14:48:53  
21 they've misstamped documents -- it's like the 14:48:56  
22 government stamping everything top secret from how 14:49:00  
23 to chew gum to how to make an atomic bomb; it just 14:49:04  
24 doesn't make any sense. 14:49:09  
25 I'm sorry, go ahead. I'll let you finish. 14:49:13

1 MR. LOCKRIDGE: Well, I'll be very brief, 14:49:15  
2 Your Honor, because essentially I think that is 14:49:16  
3 exactly what we are after. I think that there are a 14:49:19  
4 very, very tiny number of documents that they could 14:49:22  
5 remotely claim should be given confidential status. 14:49:25  
6 This is not like the Boston Scientific case, the 14:49:29  
7 Medtronic case, for example, which was a patent 14:49:33  
8 litigation. Most of these documents are old 14:49:35  
9 documents. They don't involve trade secrets, 14:49:38  
10 anywhere from two to 10 years old. 14:49:41  
11 And, Your Honor, I did want to point out 14:49:43  
12 that, in a sense, what they have done here, what 14:49:45  
13 they were trying to do is trying to have it both 14:49:48  
14 ways, because of course, they want to go out and 14:49:51  
15 tell the public in Corpus Christi, which I'll get to 14:49:53  
16 in the next motion, about what a wonderful company 14:49:58  
17 they are. 14:50:00  
18 There's this -- also this press release of 14:50:01  
19 February 26th, where they -- where they indicated 14:50:03  
20 that they provided all pertinent safety information 14:50:09  
21 to the FDA, kept the FDA fully apprised and so 14:50:12  
22 forth. They make another numerous comments about 14:50:15  
23 how safe the drug is, but yet, of course, they want 14:50:17  
24 to make these public statements, but yet they want 14:50:19  
25 to keep the documents confidential, which, of 14:50:22

1 course, would show just the opposite. 14:50:25

2 So, in any event, Your Honor, we certainly 14:50:28

3 would like to have Rule 26(c) followed, kind of like 14:50:31

4 to flip the tables, if you will, and put the burden 14:50:34

5 on them in the event there are any documents that 14:50:36

6 should be confidential and then we could argue out 14:50:39

7 those particular documents in court. 14:50:42

8 THE COURT: All right. 14:50:44

9 MR. LOCKRIDGE: Thank you. 14:50:46

10 THE COURT: Mr. Beck? 14:50:46

11 MR. BECK: Well, Your Honor, just to step 14:50:48

12 back, I'm quoting from an Associated Press article 14:50:51

13 dated February 22nd, 2003, when it talked about our 14:51:00

14 documents that showed up in the New York Times, 14:51:06

15 said: Randy Hopper, an attorney for the plaintiffs, 14:51:09

16 said Saturday that the documents were used during a 14:51:13

17 court hearing February 7, 8 in U.S. District Court 14:51:16

18 in Minneapolis, and copies were provided to the 14:51:20

19 newspaper. So we've heard from Mr. Zimmerman and 14:51:23

20 we've heard from Mr. Lockridge, but we haven't heard 14:51:26

21 from Mr. Hopper on that subject. 14:51:29

22 Under the protective order, Your Honor, the 14:51:31

23 -- when we started on the document discovery, we all 14:51:38

24 knew that we had millions and millions and millions 14:51:42

25 of documents to produce. The plaintiffs wanted that 14:51:44

1 production to begin as soon as humanly possible. We 14:51:49  
2 -- and the Court wanted it to begin as soon as 14:51:56  
3 humanly possible, and we agreed that we would start 14:51:59  
4 as soon as humanly possible. We were concerned that 14:52:03  
5 the documents that were responsive to their request, 14:52:07  
6 that many of those documents would contain 14:52:11  
7 confidential information, and there can be all kinds 14:52:14  
8 of confidential information in documents that have 14:52:18  
9 to do with a drug that's already been withdrawn from 14:52:21  
10 the market. If that were not the case, then nobody 14:52:24  
11 would have agreed to a protective order in the first 14:52:28  
12 place. But there can be all kinds of information 14:52:29  
13 that is confidential in those documents. 14:52:32  
14 And what we did, in order to get the 14:52:36  
15 production moving quickly, is the people who were 14:52:40  
16 reviewing the documents and producing them 14:52:43  
17 overdesignated, and that happens all the time, and 14:52:46  
18 that -- and Your Honor used the word "abused." I 14:52:50  
19 submit, Your Honor, that there was no abuse there. 14:52:54  
20 There was an effort to get the documents to the 14:52:56  
21 plaintiffs' lawyers, because what we're talking 14:53:00  
22 about is giving them information they wanted sooner 14:53:01  
23 than they would otherwise get it if we went through 14:53:05  
24 a document-by-document review on confidentiality. 14:53:07  
25 That would have taken months and months and months 14:53:11

1 if we had done that kind of searching review, and we 14:53:14  
2 would have gotten all kinds of complaints from it. 14:53:17  
3 So instead, what we did is what everybody does in a 14:53:20  
4 big case like this, our people overdesignated, but 14:53:23  
5 we produced the documents in a timely way. I think 14:53:26  
6 every month that we came in here we were 14:53:29  
7 complimented for producing them in a timely way, for 14:53:33  
8 cooperating with the plaintiffs' lawyers. And now 14:53:37  
9 that all the documents have been produced in a 14:53:40  
10 timely way, and they've gotten all the benefits of 14:53:42  
11 the timely production in terms of the legitimate use 14:53:46  
12 of those documents in the litigation, now they want 14:53:49  
13 to rewrite the protective order and say: Now we can 14:53:53  
14 go out and give them all to the Los Angeles Times, 14:53:55  
15 since the New York Times has them already. 14:53:59  
16 And, Your Honor, to the extent that they have 14:54:04  
17 any complaints about that, about the designation 14:54:05  
18 process, I think -- I think it's a little late in 14:54:09  
19 the game after we've already produced the documents. 14:54:14  
20 But if Your Honor thinks that redesignation -- 14:54:16  
21 THE COURT: Well, let's back up. Let me 14:54:20  
22 tell you where I'm starting from, and I can quote 14:54:22  
23 from the -- I believe it's the Bristol-Myers case. 14:54:24  
24 The District Court cannot advocate its 14:54:29  
25 responsibility overseeing the discovery process and 14:54:32

1 then determine whether filing should be made 14:54:35  
2 available to the public. It certainly should not 14:54:37  
3 turn this function over to the parties, allowing 14:54:40  
4 them to modify the terms of the court order without 14:54:42  
5 even seeking the consent. 14:54:47  
6 And that's not the case here. Here, we have 14:54:47  
7 in place an order that I signed, although it was 14:54:50  
8 agreed upon by the parties, that set out that 14:54:58  
9 certain things will be confidential. And I 14:55:01  
10 compliment the defense, and I will always compliment 14:55:05  
11 the defense, on the rapid pace of the turning over 14:55:09  
12 of the discovery. However, I was not aware that 14:55:14  
13 everything was being stamped confidential. And if 14:55:17  
14 that was the case, then I would have said, "Wait a 14:55:22  
15 minute." This has been on the docket for some 14:55:27  
16 period of time, and you don't have the answers of 14:55:31  
17 what procedures were used to say things were 14:55:36  
18 confidential or how many of those documents were 14:55:40  
19 stamped confidential. The plaintiffs have given 14:55:45  
20 three or four examples. It was never disputed by 14:55:49  
21 the defense that those were stamped. I would have 14:55:55  
22 liked to have heard from the defense dealing with 14:56:00  
23 the procedures that if something was wrong, that you 14:56:05  
24 would modify those procedures and that those 14:56:12  
25 documents that were not clearly following the 14:56:15

1 parameter of PTO 24 would be taken care of. That's 14:56:20

2 not what I heard. 14:56:27

3 MR. BECK: I think I can respond in part, 14:56:29

4 Your Honor. First of all, the -- someone's going to 14:56:31

5 hand this to me in a second here. But what the 14:56:35

6 parties agreed to, the Plaintiffs' Steering 14:56:37

7 Committee agreed to, we agreed to and we submitted 14:56:41

8 to the Court, was a definition of "confidential," 14:56:43

9 which itself was a broad one and which was 14:56:48

10 intentionally broad and consistent with the practice 14:56:51

11 that's advocated in the -- 14:56:54

12 THE COURT: Exactly. The Court agrees with 14:56:57

13 that. 14:57:00

14 MR. BECK: Yes. And so what we did -- what 14:57:01

15 happened is, you know, low-level people who are 14:57:03

16 trying to get the documents produced stamped some 14:57:05

17 documents that are just silly to stamp as 14:57:10

18 confidential, such as, you know, an annual report or 14:57:13

19 something like that. But what the plaintiffs are 14:57:15

20 asking for is not that public documents such as that 14:57:18

21 be unstamped. What they're asking for is that the 14:57:24

22 order be vacated or that the definition of 14:57:30

23 "confidential" be changed. And, Your Honor, we -- 14:57:33

24 we entered into the protective order agreement with 14:57:40

25 the plaintiffs and with the blessing of the Court 14:57:44

1 with an intentionally broad definition -- 14:57:47

2 THE COURT: Don't you see where I'm coming 14:57:50

3 from? If the order was complied with, we wouldn't 14:57:51

4 be here talking about -- 14:57:55

5 MR. BECK: Well, we would be here, because 14:57:58

6 they're saying that the order as written, not that 14:57:59

7 it should be complied with, but that it should be 14:58:02

8 vacated because they don't like the definition of 14:58:04

9 "confidential." Their brief says that the 14:58:06

10 definition they agreed to is a bad one. Now, what 14:58:09

11 I'm talking about -- now, Your Honor, as a practical 14:58:13

12 matter -- 14:58:15

13 THE COURT: Let me tell you, I don't agree 14:58:16

14 with that. 14:58:16

15 MR. BECK: Fine. Okay. Well, then I won't 14:58:18

16 need to worry about that. 14:58:19

17 Then we're talking about logistics. We have 14:58:20

18 produced literally millions of pages. To say go 14:58:23

19 back to square one and to review each one in order 14:58:29

20 to see whether it was an annual report or a press 14:58:34

21 release or, you know, a journal article that anybody 14:58:38

22 can see should not have been designated as 14:58:44

23 confidential in contrast to an e-mail concerning the 14:58:46

24 marketing of Baycol, which by definition under the 14:58:51

25 pretrial order is confidential, that is going to 14:58:55

1 cost millions and millions of dollars and take 14:58:58  
2 months and months and months, and it's not going to 14:59:01  
3 get what they want, which is the documents that Your 14:59:04  
4 Honor agrees are confidential to be unsealed. The 14:59:07  
5 -- but if Your Honor orders us to do that, we'll do 14:59:14  
6 it. It is going to take a long, long time. It's 14:59:16  
7 going to --  
8 THE COURT: And it gets to what the New 14:59:21  
9 York Times wants. 14:59:22  
10 MR. BECK: No, the New York Times doesn't 14:59:23  
11 want our annual reports and our press releases. The 14:59:25  
12 New York Times wants documents that Your Honor has 14:59:27  
13 ordered are confidential, and the New York Times 14:59:30  
14 wants that definition thrown out and they want 14:59:35  
15 access to everything and to apply some different 14:59:39  
16 standard. 14:59:45  
17 THE COURT: Well, maybe we should talk 14:59:46  
18 about that definition, then. 14:59:47  
19 MR. BECK: Well, if we do that, as I say, 14:59:49  
20 Your Honor, if we were to apply the definition as it 14:59:50  
21 exists and go back to square one, we'll do it. It 14:59:55  
22 will cost us millions of dollars. This whole thing 14:59:59  
23 is costing us millions of dollars. It will take a 15:00:02  
24 long time, and we can't promise it's going to be 15:00:04  
25 done in a month or two months or three months. We 15:00:06

1 have to look at every page and make a judgment. 15:00:09  
2 That's a long-term process. We can do it on a 15:00:11  
3 rolling basis. 15:00:14  
4 We think what would make more sense, if 15:00:16  
5 that's what Your Honor wants, is for us to take the 15:00:19  
6 deposition exhibits that they've used and to say 15:00:23  
7 we'll go through -- because those are the documents 15:00:28  
8 that they have -- you know, apparently feel are 15:00:29  
9 important. We'll take the deposition exhibits that 15:00:32  
10 they've used and all the exhibits and we'll take a 15:00:35  
11 look and see whether any of those deposition 15:00:37  
12 exhibits fall outside of the definition of 15:00:40  
13 "confidential," and if they do, we'll tell them 15:00:44  
14 that, and if we disagree on one, we can bring it to 15:00:48  
15 the Court's attention, because that will be 15:00:52  
16 thousands of documents, and it will be the documents 15:00:54  
17 that they deem most important. And that, frankly, 15:00:56  
18 makes a lot more sense to me than to start from 15:00:59  
19 square one with Bates stamped number 1 and make a 15:01:02  
20 judgment as to every document that's been produced 15:01:06  
21 in the litigation. Or if there are other documents, 15:01:10  
22 specific documents other than the deposition 15:01:17  
23 exhibits that they want us to look at and to make -- 15:01:20  
24 to take a fresh look to see whether it falls within 15:01:24  
25 the definition of "confidential," we'll be happy to 15:01:26

1 do that, too. 15:01:29

2 So I'm just saying that from the point of 15:01:31

3 view of being sensible and getting them what they 15:01:33

4 want within a reasonable time period, we're better 15:01:39

5 off focusing our inquiry on deposition exhibits or 15:01:42

6 any other document that they specifically identify 15:01:46

7 and then making that judgment whether it does or 15:01:51

8 does not fall within the definition of 15:01:54

9 "confidential," we'll tell them that promptly. If 15:01:58

10 we have disputes, we'll bring it to the Court or 15:02:01

11 Your Honor will refer it off to someone else to 15:02:05

12 resolve. Otherwise, we start from square one and, 15:02:07

13 you know, we'll go through the first million 15:02:13

14 documents and report to the plaintiffs and the Court 15:02:15

15 and then we'll go through the second million and 15:02:19

16 then we'll go through the third million. So I think 15:02:21

17 that's what makes more sense. 15:02:23

18 Or something that would actually, in my view, 15:02:26

19 make even better sense is, if they apply the 15:02:29

20 definition of "confidential" that they agreed to in 15:02:33

21 the Court order, and they've pointed out a few 15:02:39

22 examples where obviously we designated something we 15:02:43

23 should not have, it -- you know, if they have 15:02:45

24 specific documents in mind already other than those 15:02:49

25 that they quoted that they think we incorrectly 15:02:53

1 designated, we can look at those right away, and we 15:02:57  
2 can probably just agree with them, as I can agree on 15:03:00  
3 annual reports and press releases and things like 15:03:02  
4 that. But the fact that we followed up on a few 15:03:04  
5 documents like that or even a whole class of 15:03:08  
6 documents like that, I don't think should cause us 15:03:10  
7 to start from square one and spend literally 15:03:13  
8 millions of dollars and months and months and 15:03:17  
9 months. If Your Honor tells us to do it, we'll do 15:03:18  
10 it. 15:03:21  
11 There's another point that needs to be made, 15:03:22  
12 Your Honor, concerning the documents from Bayer AG. 15:03:24  
13 And I have to apologize to the Court, there are 15:03:31  
14 serious questions implicated here under German law 15:03:35  
15 that I did not find out about until over the 15:03:40  
16 weekend. What happened is that those in charge of 15:03:44  
17 our response to the New York Times motion, in 15:03:48  
18 particular, and then also to these, we were focusing 15:03:54  
19 on U.S. law, and we failed to alert our German 15:03:57  
20 colleagues about the particulars of this dispute. 15:04:05  
21 And when we gave them copies of all the materials on 15:04:09  
22 the motions that were going to be argued today, they 15:04:15  
23 said, "Wait a minute, we've got serious issues under 15:04:17  
24 German law that you guys haven't addressed yet." 15:04:20  
25 And so I'm going to ask the Court as to the 15:04:23

1 German -- the AG documents. We need about three 15:04:25  
2 weeks to file a brief that does justice to the 15:04:29  
3 German law issues. It's our -- I'll take 15:04:32  
4 responsibility myself that we didn't deal with them 15:04:35  
5 already, but we didn't. 15:04:40  
6 And to just summarize kind of the scope of 15:04:41  
7 the problem, there's a German data privacy law that 15:04:45  
8 is very broad, much broader than the typical thing 15:04:50  
9 about personnel files. It would involve any e-mail 15:04:55  
10 generated by an employee, for a company to disclose 15:04:59  
11 that voluntarily raises very serious questions under 15:05:04  
12 German law. 15:05:09  
13 When our colleagues in Germany were wrestling 15:05:10  
14 with the discovery requests and whether to 15:05:14  
15 voluntarily comply with the discovery requests, they 15:05:19  
16 had to engage in a fairly thorough and delicate 15:05:23  
17 analysis under German law of what is required under 15:05:27  
18 the German statute and then obligations to -- or at 15:05:31  
19 least the desirability of responding voluntarily to 15:05:38  
20 requests from judicial officers from another 15:05:42  
21 country, and it is, I'm told, a balancing process 15:05:45  
22 which was heavily influenced by the existence of a 15:05:48  
23 protective order. And therefore, the existence of a 15:05:52  
24 protective order, with a broad definition of 15:05:59  
25 confidentiality and therefore reasonably broad 15:06:03

1 protection of the documents that would be produced 15:06:08  
2 out of individual's files at Bayer AG, was an 15:06:12  
3 important factor in their analysis, which led them 15:06:16  
4 to conclude that they could comply with these 15:06:19  
5 requests and still be in compliance with German law. 15:06:22  
6 If the protective order is going to be 15:06:31  
7 vacated, or if all the documents are going to be 15:06:33  
8 turned over to the media, then the analysis may 15:06:37  
9 change under German law and there will be serious 15:06:42  
10 issues about having to go through all the documents 15:06:47  
11 that have been produced from Bayer AG files and make 15:06:50  
12 a judgment, you know, separate arguments, document 15:06:55  
13 by document, as to whether those should be released 15:06:59  
14 to anybody other than plaintiffs' lawyers because of 15:07:04  
15 the implications under German law and issues that -- 15:07:08  
16 THE COURT: Have you alerted the PSC to 15:07:13  
17 this issue? 15:07:14  
18 MR. BECK: No, I just learned about it, and 15:07:15  
19 what I'm saying to the Court is, as to the Bayer AG 15:07:17  
20 side of things, we need to file another brief to 15:07:21  
21 explain this issue to the Court and to the PSC and 15:07:27  
22 to the New York Times, and I don't know enough about 15:07:29  
23 it other than to outline that it is a very serious 15:07:33  
24 one. So we ask Your Honor's forbearance that if we 15:07:37  
25 could have three weeks to file a brief on this, we 15:07:41

1 will so that Your Honor has that in front of you 15:07:44

2 when you ultimately resolve this issue. 15:07:47

3 THE COURT: Mr. Lockridge or Mr. Zimmerman? 15:07:52

4 Or both of you? 15:07:55

5 MR. ZIMMERMAN: Can I say something? 15:07:59

6 THE COURT: Go ahead.

7 MR. ZIMMERMAN: It's called, it's a 15:08:05

8 privilege, and it's a privilege of confidentiality 15:08:07

9 that's not to be abused. There's no question but 15:08:12

10 virtually every document has been marked 15:08:15

11 confidential, and that's an abuse of the privilege. 15:08:18

12 I have asked many people today if they've seen any 15:08:22

13 documents that haven't been marked confidential, and 15:08:26

14 the biggest number I came up with was five of every 15:08:30

15 document that we have -- that people in this room 15:08:34

16 have reviewed. I've heard a veiled threat that it 15:08:37

17 might slow down the process if they do it right. 15:08:42

18 I've heard blame on low-level employees for doing it 15:08:46

19 wrong, and I've heard that German law could throw a 15:08:50

20 monkey wrench into everything. 15:08:56

21 The fact of the matter is, Your Honor, it's a 15:08:57

22 privilege. It's a privilege to mark documents that 15:08:59

23 you genuinely believe are confidential, 15:09:01

24 confidential. And it doesn't take that long, 15:09:06

25 because they have redacted every document that they 15:09:09

1 had something to redact from. Millions of documents 15:09:11  
2 -- not millions, I overstate. Many documents have 15:09:17  
3 redaction in them. You cannot redact a document 15:09:20  
4 without looking at it. And if you look at it, you 15:09:23  
5 have to make a judgment about its confidentiality. 15:09:27  
6 Plain and simply, this privilege has been abused. I 15:09:32  
7 don't think it's going to stop the process to make 15:09:35  
8 them do it right. But to put the burden on us, to 15:09:39  
9 say, "Well, we've got a document. Do you think this 15:09:42  
10 is really privileged? And here's the document, and 15:09:44  
11 you tell me that it shouldn't be privileged --" 15:09:46  
12 THE COURT: You don't have to go there. 15:09:48  
13 MR. ZIMMERMAN: -- that's insane. 15:09:50  
14 THE COURT: I've stated my position. You 15:09:50  
15 don't have to -- they've abused the privilege, and 15:09:52  
16 so let's figure out a way of how we're going to 15:09:56  
17 handle it. That's what I'm asking. You're asking 15:09:59  
18 for me to vacate PTO 24, and there's some serious 15:10:01  
19 things that have to be protected, so -- 15:10:06  
20 MR. ZIMMERMAN: Let's protect the serious 15:10:11  
21 things that need to be protected only, and let's 15:10:12  
22 vacate the rest and stop playing games with blame 15:10:14  
23 and threats and German law. 15:10:18  
24 MR. BECK: Your Honor, it's not a game to 15:10:21  
25 talk about German law when we voluntarily produced 15:10:22

1 documents -- 15:10:25

2 THE COURT: You don't have to respond to 15:10:26

3 that. 15:10:27

4 MR. BECK: Okay. All right. 15:10:27

5 I will say, Your Honor, the definition of -- 15:10:29

6 THE COURT: And, in fact, let's put the 15:10:32

7 blame on me, instead of both sides. I read you a 15:10:33

8 quote from Bristol-Myers. It's the Court's 15:10:37

9 responsibility to supervise this. I was not aware 15:10:41

10 of the stamping of a vast majority of the documents 15:10:48

11 until it came to my attention through these motions. 15:10:56

12 Now it's my responsibility to make sure that PTO 24 15:11:00

13 is followed. And so let's not blame anyone. That's 15:11:04

14 too much heat. Let's blame me, because I'm going to 15:11:14

15 be here for a while. I don't mind taking the blame 15:11:16

16 for not making sure that the proper procedures 15:11:20

17 weren't in place to make sure that my orders were 15:11:24

18 carried out. 15:11:27

19 MR. BECK: Your Honor, what we will do in 15:11:29

20 all further production is, we will make sure that 15:11:31

21 every document before it is produced, someone makes 15:11:35

22 a judgment whether it falls within the definition of 15:11:39

23 confidential contained in the amended protective 15:11:42

24 order paragraph 2, and that definition is "discovery 15:11:46

25 material containing trade secrets or other 15:11:51

1 confidential or proprietary research development, 15:11:54  
2 manufacturing or commercial or business information 15:11:57  
3 may be designated as confidential." And that we 15:12:00  
4 consider to be -- that's the language that we 15:12:05  
5 negotiated and agreed upon with the plaintiffs and 15:12:08  
6 that the Court ordered, so we will restrict our 15:12:11  
7 designations to that. 15:12:14  
8 I will point out, Your Honor -- and whatever 15:12:16  
9 mechanism the Court orders for re-review, that's the 15:12:19  
10 definition we will look at for every single 15:12:22  
11 document. My suggestion is -- well, frankly, I 15:12:25  
12 don't care. If Mr. Zimmerman says, "Let's start 15:12:30  
13 with Bates stamp number 1," that's what we'll do. 15:12:33  
14 The -- 15:12:36  
15 THE COURT: Well, to facilitate everything, 15:12:38  
16 at some point, I will be getting an order out, but I 15:12:41  
17 can alert you now that Special Master John Borg will 15:12:44  
18 be in charge of this whole issue dealing with the 15:12:50  
19 discovery. And so if that's all right, John? 15:12:53  
20 SPECIAL MASTER BORG: (Nods in 15:13:00  
21 affirmative.) 15:13:01  
22 THE COURT: Let's move on to the New York 15:13:01  
23 Times. 15:13:03  
24 MR. BECK: Okay. Well, I just wanted to 15:13:04  
25 make one other point, Your Honor, and that is that 15:13:05

1 the protective order also provided that if any party 15:13:07  
2 had any reason to dispute the designation 15:13:12  
3 "confidential information," they were supposed to 15:13:15  
4 raise that on a document-by-document basis. Had 15:13:17  
5 that been done, we may have been able to head this 15:13:21  
6 all off, as well. 15:13:24

7 THE COURT: All right. Again -- I guess 15:13:25  
8 you didn't hear me -- the blame is on me because I 15:13:27  
9 did not make sure that there was in place the 15:13:31  
10 appropriate standards for stamping things. If that 15:13:35  
11 had been done, we wouldn't be here today. I didn't 15:13:39  
12 expect the other side -- as the Bristol-Myers Court 15:13:43  
13 said: When private parties are involved, it doesn't 15:13:47  
14 behoove them at the early stages to object to the 15:13:51  
15 documents coming in. If they want the flow of 15:13:57  
16 documents, it's upon the Court to make sure that the 15:13:59  
17 flow of documents is happening and that it's done 15:14:03  
18 correctly. 15:14:05

19 MR. BECK: So on a going-forward basis, we 15:14:07  
20 will focus on that carefully on a 15:14:10  
21 document-by-document basis. Whether Your Honor 15:14:13  
22 tells us to start with the deposition exhibits or 15:14:16  
23 Bates stamp number 1, we'll do the same thing with 15:14:19  
24 documents that have been produced, and we'll do it 15:14:22  
25 on whatever schedule Your Honor or the Special 15:14:26

1 Master tells us to. 15:14:29

2 THE COURT: Before we roll into the New 15:14:30  
3 York Times, does anyone want to be heard on the 15:14:32  
4 definition of "confidentiality"? 15:14:34

5 MR. BECK: Your Honor, may I say before we 15:14:37  
6 move off this, I hope Your Honor will wait on the 15:14:38  
7 Bayer AG side until we've have an opportunity to 15:14:42  
8 address that. 15:14:44

9 THE COURT: Yes, I've got it marked here to 15:14:45  
10 talk about that after we have all the arguments, 15:14:47  
11 and, of course, I've always given you time to brief 15:14:49  
12 it, and it's important. 15:14:51

13 MR. BECK: And I appreciate that. 15:14:53

14 THE COURT: And so we'll talk about the 15:14:54  
15 time, whether or not three weeks is too long or not. 15:14:55  
16 I'm sure all sides has -- other sides have a 15:14:57  
17 position on that. 15:15:01

18 Mr. Lockridge, dealing with the -- 15:15:02  
19 specifically dealing with the definition of 15:15:05  
20 confidentiality, you raised the issue of whether or 15:15:07  
21 not it was too broad or -- 15:15:13

22 MR. LOCKRIDGE: Yes, Your Honor, although 15:15:15  
23 we didn't focus on this extensively in our brief, 15:15:15  
24 because it's our position that virtually everything 15:15:18  
25 should not be confidential. What was agreed to and 15:15:20

1 entered by the Court is grossly too broad. It talks 15:15:24  
2 about confidential information, proprietary 15:15:27  
3 resource, development, manufacturing, commercial, 15:15:31  
4 business information, clinical studies, production 15:15:34  
5 information, et cetera, et cetera, et cetera. It 15:15:39  
6 goes on and on and on. These are historical 15:15:42  
7 documents. We are looking at history now, Your 15:15:46  
8 Honor. The reality is, times have changed from the 15:15:49  
9 time that we entered into this confidential -- into 15:15:52  
10 this agreement, and any order of the Court, we 15:15:57  
11 submit, should reflect this. And I just want to 15:16:01  
12 make it clear that we certainly did not agree with 15:16:03  
13 defendants, that all they have to do is now going 15:16:06  
14 forward is to say: Okay, yes, X, Y, Z, that's 15:16:08  
15 confidential, we'll mark it confidential because we 15:16:13  
16 believe it's a different situation. 15:16:14  
17 I would also point out that, of course, as to 15:16:16  
18 the Bayer AG matter, Your Honor, Bayer AG chose to 15:16:19  
19 enter the United States and chose to market Baycol 15:16:22  
20 in this country, and they are subject to the laws of 15:16:26  
21 the United States, and that's what we should be 15:16:28  
22 concerned about. Thank you. 15:16:30  
23 MR. MAGAZINER: Very briefly, Your Honor? 15:16:33  
24 THE COURT: Yes. Good afternoon. 15:16:35  
25 MR. MAGAZINER: Good afternoon, sir. 15:16:36

1 I have no reason to believe that Your Honor's 15:16:38  
2 order will not apply equally to GSK, but I would 15:16:40  
3 like a clarification of what we are to do between 15:16:43  
4 today and the date of Your Honor's order, because if 15:16:46  
5 we -- if I go back and tell my colleagues and the 15:16:48  
6 many contract lawyers we have hired to start 15:16:51  
7 reviewing documents more carefully for 15:16:54  
8 confidentiality, they need to know what definition 15:16:57  
9 they're applying. Mr. Beck has suggested that we 15:16:58  
10 apply the definition now contained in PTO 24. Mr. 15:17:02  
11 Lockridge is arguing that that definition is far too 15:17:06  
12 broad. So I would suggest until that issue is 15:17:08  
13 resolved that it would be impossible for us to 15:17:12  
14 produce documents because we don't know what it is 15:17:15  
15 we're supposed to be -- what definition we are to 15:17:17  
16 apply, either the present one or a different one 15:17:19  
17 that the Court might adopt and agrees with Mr. 15:17:21  
18 Lockridge. 15:17:24  
19 So I would say in the interim, between today 15:17:26  
20 and the date of Your Honor's order and whenever the 15:17:28  
21 resolution of the definition is reached, we need 15:17:31  
22 some guidance. I don't know what we can do at this 15:17:38  
23 point. But I would propose to follow Mr. Beck's 15:17:41  
24 suggestion, that we review every document we're 15:17:44  
25 producing and apply PTO 24, but Mr. Lockridge has 15:17:46

1 said that will produce -- that will result in our 15:17:49

2 overdesignating documents because the definition is 15:17:51

3 too broad. Whatever Your Honor -- 15:17:54

4 THE COURT: I can't imagine why this would 15:18:01

5 stop things, because you've been stamping everything 15:18:04

6 confidential in the first place, so -- 15:18:09

7 MR. MAGAZINER: Well, I would agree with 15:18:12

8 Mr. Beck. We have overdesignated as confidential. 15:18:12

9 But what the plaintiffs have requested, and as Your 15:18:15

10 Honor has indicated from the bench, you would like 15:18:18

11 us now to start looking at the documents more 15:18:20

12 carefully, even if that -- 15:18:22

13 THE COURT: And my order will spell that 15:18:25

14 out, and I want to hear from the New York Times so I 15:18:28

15 can get all these orders out closely at the same 15:18:30

16 time. I want to hear from the New York Times 15:18:34

17 dealing with what they have to say. I would suggest 15:18:36

18 that you continue producing the documents. If you 15:18:40

19 want to continue placing stamps of confidentiality, 15:18:44

20 fine. If you want to adopt Mr. Beck's definition 15:18:49

21 and limit it, I would suggest that you -- that would 15:18:55

22 be -- 15:18:55

23 MR. MAGAZINER: That's fine. 15:18:56

24 THE COURT: -- a good starting point, 15:18:58

25 because that's following PTO 24. 15:18:59

1 MR. MAGAZINER: Well, that's what I would 15:19:02

2 like to do, Your Honor. 15:19:02

3 THE COURT: Whether or not I adopt Mr. 15:19:03

4 Lockridge's definition of confidentiality, well, 15:19:06

5 we'll have to see on that. 15:19:10

6 MR. MAGAZINER: Well, then we'll apply PTO 15:19:11

7 24. 15:19:13

8 Thank you, Your Honor. 15:19:13

9 MR. LOCKRIDGE: Can I have 10 seconds, Your 15:19:15

10 Honor? 15:19:16

11 THE COURT: No. Let's move on to the New 15:19:16

12 York Times. 15:19:18

13 MR. ANFINSON: Good afternoon, Your Honor. 15:19:25

14 Mark Anfinson again representing the New York Times. 15:19:25

15 Today, I will not seek to guild what is a very 15:19:27

16 golden lily already presented in terms of much of 15:19:30

17 the argument I would make, I will be brief. I think 15:19:33

18 there are three straightforward issues that I want 15:19:35

19 to address should the Times be allowed to intervene 15:19:38

20 in the first instance, of course, separate from 15:19:41

21 anything that's been argued so far in this context. 15:19:43

22 If so, and nonetheless should PTO 24 be 15:19:46

23 modified in some respects, and if the Court's 15:19:52

24 decision is yes, how should the modification occur, 15:19:54

25 which is the most devilish of the three issues, I 15:19:57

1 suspect. There's much delectable case law in this 15:20:01  
2 country on all these issues, and I'm not going to 15:20:04  
3 repeat them. Most of it's in our memos. The 15:20:06  
4 Court --  
5 THE COURT: Dealing with the first issue -- 15:20:08  
6 MR. ANFINSON: Pardon me, Your Honor?  
7 THE COURT: Well, dealing with the first 15:20:13  
8 issue, you don't have to spend much time with 15:20:13  
9 whether or not you should be able to intervene. 15:20:16  
10 Let's move on to -- 15:20:18  
11 MR. ANFINSON: In other words, you agree 15:20:20  
12 with the defendants that conclusive Eighth Circuit 15:20:20  
13 authority bars our motions; is that fair to say? 15:20:22  
14 THE COURT: No, I don't think that. So 15:20:25  
15 move on. 15:20:28  
16 MR. ANFINSON: Yeah, I appreciate that, 15:20:28  
17 Your Honor, and I will. 15:20:29  
18 I would note in passing through that issue 15:20:31  
19 that our motion, in other words, our ability to get 15:20:33  
20 to the table here and look at some of this, pertains 15:20:37  
21 not just to discovery but to also court filings, 15:20:40  
22 which will be coming in and have come, and the 15:20:44  
23 pretrial order does allow broad party discretion and 15:20:47  
24 latitude in designating even court file documents as 15:20:52  
25 being under seal and confidential. And, of course, 15:20:55

1 as the Court knows, there are even stronger 15:20:58

2 standards protecting the public right of access to 15:21:00

3 that type of documentation. We'd like to be at the 15:21:02

4 table. 15:21:05

5 MR. REPORTER: Can I change my tape just 15:22:09

6 for a second?

7 THE COURT: Let's take a stretch break.

8 (Stretch break.)

9 THE COURT: All right, let's get started 15:23:17

10 again. 15:23:21

11 MR. ANFINSON: Thank you, Your Honor. 15:23:30

12 In terms of the modification issue -- I think 15:23:31

13 again you've covered that pretty thoroughly 15:23:33

14 already -- the Times obviously was not, in any 15:23:35

15 event, a party to the initial protective order, and 15:23:39

16 particularly was not a party to the definitions and 15:23:42

17 some of the other procedures that are at the core of 15:23:45

18 that order, and I think it caused the problem. 15:23:47

19 But while we understand the importance of 15:23:49

20 these orders, in terms of complex case management, I 15:23:51

21 think that Mr. Beck's concession, and he's to be 15:23:55

22 commended for his candor today, shows that whatever 15:23:58

23 standard for modification might apply to this sort 15:24:01

24 of request, the grounds for modification have been 15:24:04

25 demonstrated and demonstrated conclusively. And so 15:24:07

1 some modification is called for. Now we get to what 15:24:11  
2 I think we all understand is the tough issue. 15:24:15  
3 I don't have a complete solution for the 15:24:17  
4 Court today. I think certainly more rigor is 15:24:19  
5 required within the protective order. Obviously, 15:24:24  
6 even if you look literally at the terms of the 15:24:28  
7 existing PTO 24, you could make an argument that 15:24:30  
8 everything is already there, that all the standards 15:24:33  
9 and definitions and things are sort of there. And 15:24:37  
10 that's why not -- not that I frequently disagree 15:24:41  
11 with the Court, but I think you take too much blame 15:24:44  
12 on yourself. However, something went wrong anyway 15:24:46  
13 under the existing order, and so I think that a 15:24:53  
14 better structure is what is called for. 15:24:55  
15 Now, what structure is that? I just beg the 15:24:59  
16 question so far is all I've done. I guess our 15:25:04  
17 proposal today, Your Honor, is rather than take the 15:25:08  
18 time to engage in what would be, I think, a futile 15:25:09  
19 effort to try and suggest to you orally what we 15:25:14  
20 think specifically should be changed, that everyone 15:25:18  
21 be given a brief period of time to submit to the 15:25:20  
22 Court specific language for modification. The 15:25:23  
23 defendants would have that opportunity, the 15:25:29  
24 plaintiffs' bar, we would, assuming the intervention 15:25:30  
25 is granted, and the Court could look at those and 15:25:34

1 choose. And, of course, in terms of the New York 15:25:37  
2 Times position, we wouldn't be inventing stuff. 15:25:40  
3 We'd be drawing on experience in other cases of this 15:25:43  
4 type. 15:25:47  
5 The Times, then, would also, assuming again 15:25:48  
6 the motion is granted to intervene, we would then 15:25:50  
7 have the opportunity to be at the table and to 15:25:53  
8 negotiate with the parties about what the language 15:25:56  
9 should be, about what the specific procedures and 15:25:58  
10 protocol should be, and we would do that in absolute 15:26:01  
11 good faith. 15:26:06  
12 I do believe, Your Honor, having looked at 15:26:06  
13 this, and I've been involved in a fair number of 15:26:08  
14 these interventions, although there are millions of 15:26:09  
15 documents, and I don't for a minute minimize the 15:26:13  
16 potential disruption and burden on the defendants, 15:26:15  
17 in particular, of trying to sort through all of 15:26:18  
18 those documents, not only in the past but going 15:26:22  
19 forward, I suspect again we are talking 15:26:25  
20 pragmatically about discovery materials, the Times 15:26:30  
21 nor any other member of the public has no right of 15:26:32  
22 access to all those documents. We are inevitably 15:26:36  
23 dependent on the plaintiffs, I think. Frankly, the 15:26:40  
24 defendants could give us all this stuff, too, if 15:26:44  
25 they want to, depending on the motion. But 15:26:46

1 pragmatically, we understand it's going to be more 15:26:48  
2 the plaintiffs. And not everything here is going to 15:26:51  
3 be important, newsworthy, valuable or in the 15:26:54  
4 slightest bit material to anything of public 15:26:57  
5 interest. So if the proper order is crafted, the 15:26:59  
6 proper procedure is set up, I think this concern, 15:27:04  
7 again legitimate concern, of Mr. Beck's that we at 15:27:07  
8 least are asking for all of these documents will 15:27:10  
9 fall by the wayside, because most of them will never 15:27:13  
10 come into issue. 15:27:16  
11 I had anticipated suggesting use of a Special 15:27:18  
12 Master by the Court in this context. The Court has 15:27:22  
13 anticipated that. It's something that's commonly 15:27:25  
14 done. We certainly support and encourage that. I 15:27:27  
15 think the Court has other options in terms of 15:27:31  
16 possibly giving the Special Master of the Court some 15:27:35  
17 power of what might be called incentive, so that if 15:27:38  
18 a pattern develops of excessive classification or 15:27:42  
19 excessive contest in terms of these classification 15:27:48  
20 decisions that don't turn out to be particularly 15:27:52  
21 warranted -- I'm not talking about an isolated case, 15:27:55  
22 I'm talking about a pattern of repetitive 15:27:57  
23 practice -- some sanction can be imposed that gives 15:27:59  
24 an incentive for continued good-faith classification 15:28:03  
25 decisions. We accept that. We accept that this is 15:28:06

1 imperfect, but we understand you can't do this 15:28:10  
2 surgically or precisely, but a lot of progress can 15:28:13  
3 be made. 15:28:16  
4 So in sum, Your Honor, we understand this is 15:28:17  
5 permissive. We also emphasize that there is a big 15:28:20  
6 public interest and a public stake in this 15:28:23  
7 litigation, and that that warrants better access in 15:28:25  
8 terms of the public to this case. 15:28:30  
9 Thank you, Your Honor. 15:28:33  
10 THE COURT: Mr. Beck? 15:28:34  
11 MR. BECK: Your Honor, I assume you don't 15:28:37  
12 want me to spend a lot of time on the intervention 15:28:38  
13 question, either. We'll rest on what we put in our 15:28:41  
14 papers. 15:28:45  
15 Assuming that Your Honor is going to grant 15:28:51  
16 the New York Times intervention, which I'm loath to 15:28:55  
17 do, but just for purposes of argument, I think 15:28:58  
18 actually the suggestion that they've made, I find 15:29:02  
19 myself in the unusual position of agreeing with 15:29:06  
20 something said by the New York Times, I guess, that 15:29:09  
21 is that the sensible thing to do, if we're going to 15:29:12  
22 be focusing on whether the definition of 15:29:16  
23 "confidential" ought to be changed and if so how, I 15:29:19  
24 don't think we should be trying to do that on the 15:29:23  
25 fly here this afternoon. And -- 15:29:25

1 THE COURT: And you see that I have not. 15:29:29  
2 MR. BECK: Yes, and I appreciate that. And 15:29:30  
3 I think that -- I think there were good reasons for 15:29:33  
4 the parties' agreement and the Court's entry of the 15:29:37  
5 order concerning the definition that we had. If 15:29:39  
6 somebody wants a different definition, whether it be 15:29:43  
7 the Plaintiffs' Steering Committee or the New York 15:29:47  
8 Times, I think that they should submit their 15:29:53  
9 proposal and a memorandum in support of their 15:29:56  
10 proposal for a specific amendment. I guess the 15:29:59  
11 Plaintiffs' Steering Committee has said, "Let's 15:30:04  
12 throw out the protective order." I don't think 15:30:06  
13 that's in the works, either. So if we can focus on 15:30:07  
14 whether it should be modified and if so how, we're 15:30:11  
15 going to end up arguing that the definition that's 15:30:15  
16 in there is just fine, and what we need to do is 15:30:19  
17 abide by it. But we want an opportunity to look at 15:30:24  
18 what the plaintiffs or the New York Times think is a 15:30:28  
19 better standard and to see their arguments of why 15:30:33  
20 it's a better standard and then respond to those 15:30:36  
21 arguments rather than coming up with a different 15:30:39  
22 standard ourselves. We think we already came up 15:30:40  
23 with the right standard. 15:30:43  
24 So I think I join in the suggestion that the 15:30:44  
25 right way to do this is for any party or soon-to-be 15:30:50

1 party who has a suggestion about a specific 15:30:55  
2 modification to the definition come forward with a 15:30:59  
3 motion that contains that definition and an argument 15:31:03  
4 in favor of it and then we can respond to that and 15:31:06  
5 we can address it, once we've all had a chance to 15:31:09  
6 really reflect on specific suggestions and the 15:31:13  
7 merits of those. 15:31:18

8 THE COURT: Mr. Lockridge? 15:31:23

9 MR. LOCKRIDGE: I'm a little surprised, 15:31:30  
10 Your Honor, Mr. Beck doesn't like the New York 15:31:31  
11 Times. They had a very nice mug shot of him in 15:31:33  
12 there a couple, three weeks ago, so I wouldn't want 15:31:36  
13 you to think that the defendants are not talking 15:31:38  
14 also to the New York Times. 15:31:40

15 I concur that it's a good idea that we submit 15:31:41  
16 a proposal to Your Honor in, say, seven days, if 15:31:43  
17 that works for the defendants or the New York Times. 15:31:50

18 THE COURT: And also we have the issue -- 15:31:53  
19 we also have the issue of German law that the 15:31:55  
20 defense wishes to brief, and I suspect that the PSC 15:32:03  
21 will need the three-plus weeks, too, to figure out 15:32:08  
22 what the German law is, too. 15:32:11

23 MR. LOCKRIDGE: Well, actually, I think 15:32:14  
24 three weeks is a little bit long, Your Honor, to 15:32:14  
25 give to the defendants to file a brief. Not having 15:32:16

1 seen it, I guess, if we can, I'd like to try to 15:32:19

2 compact that time a little bit, anyway. 15:32:22

3 MR. BECK: Your Honor, here's our practical 15:32:25

4 problem. We've got -- a bunch of our German 15:32:27

5 colleagues had cancelled vacations and went to 15:32:32

6 Amsterdam, and they're off on vacations, and I would 15:32:36

7 -- and I would -- I just don't think that this thing 15:32:41

8 is so urgent that we should be asking these people 15:32:44

9 to cancel those so that they can get the brief in 15:32:46

10 one week earlier. I mean, that's as simple as it 15:32:49

11 is. We need a couple weeks for the Germans to do 15:32:54

12 their research and then for us to figure out what in 15:32:56

13 the world they're talking about and to put it into 15:32:58

14 English. 15:33:01

15 THE COURT: Well, I don't have any problem 15:33:02

16 with three weeks. 15:33:02

17 MR. BECK: Okay. 15:33:04

18 THE COURT: How much time does the 15:33:05

19 plaintiffs wish to have their response? 15:33:05

20 MR. LOCKRIDGE: Two weeks, Your Honor, 14 15:33:09

21 days. 15:33:10

22 THE COURT: Is that enough time for the New 15:33:10

23 York Times? 15:33:12

24 MR. ANFINSON: Yes, it is, Your Honor. I 15:33:13

25 would just add, is there something the Court would 15:33:14

1 like to direct us to do in terms of submitting ideas 15:33:17  
2 about the definition of -- 15:33:21  
3 THE COURT: Yes, and -- right. Let's get a 15:33:22  
4 timetable for the submission to the Court for 15:33:26  
5 modification of PTO 24 and definitions. How much 15:33:30  
6 time, Mr. Lockridge? 15:33:36  
7 MR. LOCKRIDGE: I'm told we can do it by 15:33:38  
8 Monday, Your Honor. 15:33:39  
9 THE COURT: You can do it by Monday? 15:33:45  
10 MR. LOCKRIDGE: Yes. 15:33:46  
11 THE COURT: All right. How much time? 15:33:47  
12 MR. ANFINSON: Of which week? (Laughter.) 15:33:51  
13 That's fine with us, too, Your Honor. 15:33:55  
14 THE COURT: All right. And your submission 15:33:56  
15 will be one sentence; is that correct? 15:34:01  
16 MR. BECK: No, no, Your Honor. (Laughter.) 15:34:05  
17 You know, we'll -- if they give it to us on Monday, 15:34:06  
18 we will -- we will respond -- can we file our 15:34:09  
19 response when we file our German -- can we have two 15:34:13  
20 weeks and file everything at once, the German AG 15:34:15  
21 thing, as well as the -- our response on the 15:34:18  
22 confidentiality? 15:34:20  
23 THE COURT: Let's get this portion done. 15:34:22  
24 Can you have it on -- let's see, they're going to 15:34:24  
25 have it on Monday, which is the 21st? Is that 15:34:28

1 correct, Mr. Lockridge? Then -- 15:34:33

2 MR. LOCKRIDGE: I thought, I guess, Your 15:34:38

3 Honor, we would all do them contemporaneously, am I 15:34:39

4 not correct, the New York Times and the defendants 15:34:43

5 will do them? 15:34:44

6 MR. BECK: Well, no, we want to respond to 15:34:45

7 their motion to modify the protective order rather 15:34:46

8 than to guess at what they're going to say and 15:34:48

9 anticipate. 15:34:52

10 MR. ZIMMERMAN: Right. It's my 15:34:53

11 understanding you were going to stand on your 15:34:53

12 definition -- 15:34:55

13 THE COURT: Right. 15:34:55

14 MR. ZIMMERMAN: -- we're going to submit 15:34:56

15 proposed definitions, and you respond. 15:34:57

16 THE COURT: Correct. 15:34:59

17 MR. ZIMMERMAN: Is that right, Phil? 15:34:59

18 MR. BECK: Yeah, we're going to file a 15:35:01

19 brief that says we think the current definition is a 15:35:02

20 good one. 15:35:05

21 THE COURT: That's why I said it would be 15:35:06

22 one sentence -- 15:35:08

23 MR. BECK: Right.

24 THE COURT: -- kiddingly, you understand. 15:35:10

25 MR. BECK: Yeah. I think Bucky's right. 15:35:12

1 We're going to respond. 15:35:13

2 THE COURT: Respond. And I -- and you have 15:35:14

3 -- and you certainly understand where the Court is 15:35:20

4 coming from. Hopefully, you understand a little bit 15:35:22

5 where the Court is coming from. Even taking a look 15:35:24

6 at PTO 24, there may be some modifications that 15:35:27

7 defense wishes to have and it would be helpful to 15:35:31

8 the Court. 15:35:35

9 And, again, let me put it on the record: I 15:35:37

10 can't say how wonderful a job Bayer has done in 15:35:40

11 producing these documents. And I hope counsel 15:35:49

12 understands, I want to take the heat from you guys 15:35:53

13 bickering back and forth. Put the heat on me on 15:35:58

14 this issue. Now that it's before me, I want to make 15:36:01

15 sure that we have the proper standards and so we 15:36:06

16 don't have these -- because we're going to have 15:36:10

17 ongoing issues dealing with this, and so we might as 15:36:13

18 well get it straightened around this time. And so 15:36:19

19 in no way do I want either party feeling that they 15:36:22

20 failed. Blame me. 15:36:26

21 MR. BECK: Your Honor, just to be clear, 15:36:30

22 I'm not saying that our response is going to be one 15:36:32

23 sentence. 15:36:35

24 THE COURT: No, I was only teasing you. 15:36:36

25 MR. BECK: We're going to comment, and if 15:36:38

1 we think that some of -- that while we object, 15:36:40  
2 here's how it ought to be tinkered with, if the 15:36:42  
3 Court's going to entertain it. 15:36:45  
4 Also, Your Honor -- just a thought here -- I 15:36:47  
5 haven't been tracking all of this, but my 15:36:51  
6 understanding is that there have been lots and lots 15:36:54  
7 of third parties who -- or "lots and lots." There 15:36:58  
8 have been third parties who have produced documents 15:37:02  
9 that are subject to the protective order, and they 15:37:05  
10 have produced documents in reliance on the 15:37:09  
11 protective order. That, of course, is an argument 15:37:11  
12 for not changing it, but it's also -- it's also just 15:37:13  
13 sort of a heads-up that if the protective order is 15:37:18  
14 going to be changed, then I think that the 15:37:21  
15 plaintiffs and the New York Times have to serve all 15:37:24  
16 these third parties who have rights under the 15:37:28  
17 protective order so that they can come in and be 15:37:30  
18 heard about what standard ought to be applied to 15:37:33  
19 documents that they produced and whether it's fair 15:37:37  
20 to them, having produced these documents under one 15:37:40  
21 understanding, to now have the rules changed. 15:37:44  
22 So I don't know how many third parties there 15:37:48  
23 are involved. 15:37:51  
24 THE COURT: Well, the Court can always 15:37:52  
25 modify its orders. It doesn't have to hear from 15:37:53

1 anyone on those issues. 15:37:56

2 MR. BECK: Oh. Well -- 15:38:00

3 THE COURT: So I'm asking the major parties 15:38:00

4 to submit to the Court. And we haven't set a date 15:38:02

5 for you. So if you can respond by the 28th? 15:38:07

6 MR. BECK: Okay, Your Honor. 15:38:13

7 THE COURT: That's the week after. 15:38:13

8 MR. BECK: Right.

9 THE COURT: All right. 15:38:16

10 MR. BECK: So the third party -- well, 15:38:18

11 okay, third parties are not going to have an 15:38:20

12 opportunity to be heard on this? 15:38:21

13 MR. LOCKRIDGE: Could I comment, Your 15:38:23

14 Honor? I can clarify it, I believe. 15:38:24

15 THE COURT: Go ahead. 15:38:26

16 MR. LOCKRIDGE: Our motion very explicitly 15:38:28

17 in the papers only goes to Bayer and GSK and not to 15:38:29

18 the third parties. 15:38:32

19 MR. BECK: I don't think that's what the 15:38:33

20 New York Times has in mind, though. I think the New 15:38:34

21 York Times has in mind access to everything, 15:38:36

22 including documents produced by third parties, and 15:38:38

23 it seems to me -- well, I don't care whether they 15:38:41

24 get notice or not. Having flagged the issue, it -- 15:38:45

25 I feel like I've done my job. 15:38:49

1 THE COURT: All right. 15:38:51

2 MR. ANFINSON: Your Honor, if I can -- I 15:38:52

3 think what's happening here, I think our request, 15:38:54

4 and it's broader, Mr. Beck is right, but we're 15:38:57

5 simply asking that the new order, the modified 15:39:00

6 order, track more precisely existing established law 15:39:02

7 on this area. Thus, third parties will have an 15:39:06

8 opportunity, certainly, even under the modified 15:39:11

9 order, to come in here once they are informed of it, 15:39:13

10 which they will be, and defend their own -- 15:39:16

11 THE COURT: Documents. 15:39:19

12 MR. ANFINSON: -- documents. And so since 15:39:20

13 that's simply existing law, there's no prejudice 15:39:22

14 that I can see. 15:39:23

15 MR. BECK: Well, Your Honor, I'll note, and 15:39:25

16 then stop talking on behalf of third parties, the 15:39:27

17 prejudice is in having a standard changed that 15:39:30

18 applies to your documents without having had an 15:39:34

19 opportunity to be heard on it or notice, and I think 15:39:37

20 it's a fundamental due process issue. Having said 15:39:39

21 that, if nobody wants to give them notice, then they 15:39:43

22 won't get it. 15:39:48

23 THE COURT: All right. Let's give them 15:39:49

24 notice. Mr. Lockridge? 15:39:53

25 MR. LOCKRIDGE: Then we will give them 15:39:59

1 notice, Your Honor. 15:39:59

2 THE COURT: All right. And then will have 15:40:00

3 an opportunity to respond by the 28th, same time 15:40:04

4 that the defendants have to respond? Does that meet 15:40:07

5 rudimentary due process, Mr. Beck? 15:40:17

6 MR. BECK: Your Honor, I have no views on 15:40:21

7 it. All I want to do is make sure that I flagged an 15:40:22

8 issue for the Court that I think is significant 15:40:24

9 enough to be addressed. 15:40:26

10 THE COURT: All right, let's move on. 15:40:31

11 MR. ZIMMERMAN: We have one more motion, 15:40:39

12 Your Honor. 15:40:40

13 MR. ANFINSON: Your Honor, I am going to 15:40:46

14 leave. Thank you for your time today. I appreciate 15:40:47

15 it. I think our time here is -- 15:40:49

16 THE COURT: Thank you. 15:40:52

17 MR. ANFINSON: Thanks very much. 15:40:53

18 THE COURT: Mr. Lockridge? 15:40:56

19 MR. LOCKRIDGE: Thank you, Your Honor. We 15:40:59

20 do have one more motion, which I'll be brief on, as 15:40:59

21 to the motion for protective veniremen, which I -- 15:41:02

22 actually, I thought we'd be able to get an agreement 15:41:04

23 from the defendants on, but we were not able to, 15:41:07

24 because what we're asking for is the -- essentially 15:41:11

25 the identical order, it's my understanding, that was 15:41:14

1 entered down in Corpus Christi pursuant to the 15:41:17  
2 agreement of Mr. Beck. 15:41:20  
3 The genesis of this, Your Honor, very 15:41:21  
4 briefly, as Your Honor knows, is a letter was sent 15:41:23  
5 out by Bayer Corporation to some 2,000-plus 15:41:26  
6 individuals in the Corpus Christi area, including a 15:41:30  
7 couple of the veniremen, saying basically what a 15:41:34  
8 great company they were and they provided jobs and 15:41:39  
9 millions of dollars to the economy and so forth and 15:41:43  
10 that Baycol was an excellent product and that they 15:41:46  
11 had done everything right. And as Your Honor knows, 15:41:49  
12 the judge down there was obviously very unhappy 15:41:53  
13 about this and, as a consequence, there was an 15:41:56  
14 agreed order that the parties themselves, not the 15:42:00  
15 lawyers, but the parties themselves, could not have 15:42:06  
16 any release, press releases like that, have any 15:42:09  
17 communications like that with the media unless it 15:42:12  
18 was cleared by the lead counsel. And all we are 15:42:16  
19 asking for here is that the parties be required -- 15:42:18  
20 applies to both Ms. Olander and Bayer, the parties 15:42:24  
21 here be required to clear any statements to the news 15:42:28  
22 media with their general counsel and Mr. Beck. 15:42:31  
23 It's our view that this is really an attempt 15:42:36  
24 to put some protocol on local Rule 83.2, Your Honor. 15:42:39  
25 And in particular, I would note two provisions, 15:42:44

1 83.2(a) relating to the duty of counsel not to 15:42:48  
2 authorize release of information and so forth which 15:42:53  
3 would have a reasonable likelihood with interfering 15:42:56  
4 with a fair trial, and the other provision, Your 15:42:59  
5 Honor, that we have noted in our memorandum is 15:43:02  
6 83.2(c), which speaks of a widely publicized case, 15:43:05  
7 which I think clearly we have here, having had 15:43:11  
8 several articles in the New York Times, USA Today, 15:43:14  
9 and so forth and so forth, that the Court may of its 15:43:17  
10 own volition, actually, as well as motion, make 15:43:21  
11 orders that apply to parties and their comments to 15:43:25  
12 the news media. 15:43:29  
13 And so that's all we're asking here for, Your 15:43:31  
14 Honor. This is not a gag order like the defendants 15:43:35  
15 claim. It's not going to be allowing plaintiffs' 15:43:39  
16 attorneys to talk to the news media but not Mr. 15:43:42  
17 Beck. This refers to the parties, Your Honor, not 15:43:45  
18 the attorneys. And I submit that clearly because of 15:43:49  
19 what happened down in Corpus Christi, and I was 15:43:53  
20 actually told that there another incident down in 15:43:56  
21 Mississippi, although I don't have a copy of any 15:44:02  
22 transcript on that, that this Court should enter 15:44:04  
23 such an order. 15:44:07  
24 THE COURT: Well, I'm assuming Mr. Beck is 15:44:08  
25 going to say you're saying parties, and since Mr. 15:44:10

1 Zimmerman is counsel for both cases, that it would 15:44:15

2 only be him and then there would be someone else 15:44:22

3 from the PSC or from the plaintiffs' bar speaking. 15:44:25

4 MR. BECK: Randy Hopper, for example, Your 15:44:30

5 Honor. 15:44:31

6 THE COURT: And how is that going to be 15:44:32

7 handled? 15:44:36

8 MR. LOCKRIDGE: Frankly, Your Honor, I'm 15:44:39

9 sorry, I didn't quite understand, I think, part of 15:44:40

10 your question or hear part of it. 15:44:43

11 THE COURT: Well, I'm sorry. 15:44:46

12 MR. LOCKRIDGE: I apologize.

13 THE COURT: I thought this thing was loud 15:44:47

14 enough now. The issue, I am assuming, I'm guessing 15:44:48

15 what Mr. Beck is going to be arguing is that Mr. 15:44:53

16 Zimmerman is counsel of record and your proposed 15:44:58

17 order would only stop him from making any statements 15:45:05

18 and that there may be other plaintiffs' attorneys 15:45:10

19 that have cases that certainly would be covered and, 15:45:13

20 therefore, the defendants would be the only one 15:45:18

21 effectively estopped from saying anything. 15:45:22

22 MR. LOCKRIDGE: I'm not talking about the 15:45:25

23 attorneys, Your Honor. This order goes to the 15:45:26

24 parties, the parties only. The attorneys for the 15:45:29

25 defendant, just like the attorneys for the 15:45:33

1 plaintiffs, can talk to anyone, and that's what the 15:45:35  
2 order was, as I understand it, down in Corpus 15:45:38  
3 Christi. Here, we're talking about an order that 15:45:41  
4 simply goes to Bayer, and in this case I guess it 15:45:43  
5 would be Ms. Olander and Long. We're not talking 15:45:47  
6 about the attorneys, Your Honor. I appreciate that 15:45:51  
7 that would not be appropriate. 15:45:53

8 THE COURT: Well, okay, I'd like to hear 15:45:56  
9 from Mr. Beck. 15:45:59

10 MR. BECK: Your Honor, I think this is a 15:46:01  
11 completely different motion from what was actually 15:46:02  
12 filed. My understanding of what was filed was, in 15:46:05  
13 fact, a gag order having to do with all the 15:46:09  
14 litigation, because I don't think that Ms. Olander 15:46:12  
15 had even been selected yet as the -- as the party 15:46:15  
16 for the June trial. And sure enough, I'm right. If 15:46:20  
17 you look at their proposed order, it doesn't have 15:46:26  
18 anything to do with Mrs. Olander. It says: Bayer 15:46:33  
19 Corporation and GlaxoSmithKline shall not make any 15:46:40  
20 public communications about Baycol litigation 15:46:42  
21 pending in this MDL unless those communications have 15:46:46  
22 first been approved by the chief legal officer for 15:46:49  
23 each corporation and their respective lead attorneys 15:46:51  
24 in this MDL. And we have to, of course, have 15:46:53  
25 written protocols on that. 15:46:59

1 So the order that they asked for has nothing 15:47:01  
2 to do with the Olander case, and the Olander -- it 15:47:05  
3 was a gag order where they were piling on after our 15:47:09  
4 snafu down in Texas. 15:47:15  
5 And since they raised that and characterized 15:47:16  
6 what happened in Texas, let me tell the Court what 15:47:20  
7 happened. What happened there is that there was a 15:47:22  
8 failure of communication between the PR people and 15:47:27  
9 the law department about what was being said to 15:47:30  
10 whom. The law department had understood that they 15:47:32  
11 were going to send some letters out to a small group 15:47:37  
12 of business leaders. The thinking was that they'd 15:47:41  
13 be reading a lot of plaintiff-generated publicity, 15:47:45  
14 and Bayer wanted the business leaders to hear 15:47:49  
15 Bayer's side of the story. I didn't know anything 15:47:52  
16 about it at all. I wouldn't have allowed even that, 15:47:55  
17 because on the one out of a million chance that one 15:47:58  
18 of those business leaders might be a potential 15:48:01  
19 juror, I wouldn't want him disqualified because he 15:48:03  
20 got or she got this letter. 15:48:06  
21 But in any event, there was a 15:48:08  
22 miscommunication, and the letter went out to more 15:48:09  
23 people than had been understood by the law 15:48:11  
24 department when they gave the okay. 15:48:14  
25 When this arose, there was a big brouhaha on 15:48:17

1 the first day of trial, and in order to make sure 15:48:21  
2 that the trial could proceed without this sideshow 15:48:23  
3 derailing it, I agreed that for the period of that 15:48:27  
4 trial, nobody from Bayer would say anything about 15:48:32  
5 the litigation except me, and that way we could move 15:48:34  
6 forward and call our first witness. And the 15:48:39  
7 plaintiffs' lawyer, it was his suggestion, which 15:48:42  
8 incidentally, of course, also said nobody could 15:48:46  
9 speak for the plaintiffs except him, so he got to be 15:48:48  
10 the sole spokesman for the plaintiffs, which he 15:48:52  
11 thought was nice at the time. So that lasted for 15:48:54  
12 the duration of that trial. The judge, when he 15:48:58  
13 first heard about it, was understandably concerned, 15:49:03  
14 asked the district attorney to look at it. The 15:49:07  
15 district attorney concluded that there was no 15:49:09  
16 grounds for further investigation. The judge 15:49:11  
17 himself recently announced that there would be no 15:49:15  
18 sanctions hearing. And I think everybody down there 15:49:18  
19 understood that it was, in fact, a snafu that was 15:49:21  
20 embarrassing to us, but that's all it was. 15:49:27  
21 In the meantime, while our letter went out, 15:49:29  
22 and nobody on the jury saw it, somebody from the 15:49:33  
23 plaintiffs' side was -- in the several days before I 15:49:38  
24 was picking a jury in Texas, was sending what the 15:49:43  
25 plaintiffs' lawyers feel are their best documents to 15:49:47

1 the New York Times, and the New York Times was 15:49:50  
2 publishing front-page articles about the plaintiffs' 15:49:53  
3 side of the case. And I was spending a great deal 15:49:56  
4 of my time having to respond to the New York Times, 15:49:59  
5 being the only person who was authorized to do so, 15:50:04  
6 because plaintiffs' lawyers, who were not involved 15:50:07  
7 in that case, thought it was in their interest to 15:50:10  
8 weigh in in the public media on the merits of that 15:50:16  
9 case while we were picking a jury and trying that 15:50:19  
10 case. 15:50:26  
11 Now, we didn't come in here and whine about 15:50:26  
12 that. I'm a grown-up, and I understand that that's 15:50:28  
13 what's going to happen. But now the order that they 15:50:33  
14 would impose is that Bayer can't say anything and 15:50:37  
15 only Phil Beck can speak on Bayer's behalf. Let me 15:50:42  
16 tell you, that's a horrible burden on me as the lead 15:50:45  
17 plaintiffs' lawyer. When I was down in Corpus 15:50:47  
18 Christi because of that snafu, I spent an hour to an 15:50:51  
19 hour and a half a night having to respond to press 15:50:54  
20 inquiries, many of which were generated, according 15:50:57  
21 to the media, by plaintiffs' lawyers in the 15:50:59  
22 Minnesota case, instead of getting ready to 15:51:02  
23 cross-examine witnesses the next day. I shouldn't 15:51:04  
24 have to do that. In the meantime, it would be 15:51:07  
25 completely one-sided. Poor old Miss Olander 15:51:10

1 wouldn't be able to comment, either, but of course, 15:51:14  
2 Mr. Hopper would and every single plaintiffs' lawyer 15:51:16  
3 in America who's got a Baycol case would be allowed 15:51:20  
4 to comment, and they'd all be allowed to comment not 15:51:23  
5 for attribution, so that we'd never know who did 15:51:27  
6 comment. Whereas, if any comment came out of the 15:51:31  
7 Bayer side, the Court would lower the boom on Bayer. 15:51:33  
8 But on the plaintiffs' side, we'd never know who 15:51:36  
9 said what, because the New York Times reporter's not 15:51:39  
10 going to be required to divulge her source, and none 15:51:42  
11 of the lawyers who actually gave the documents are 15:51:45  
12 going to walk up to the lectern and say whether they 15:51:48  
13 did or they did not. 15:51:51  
14 It would be completely one-sided and 15:51:53  
15 completely unfair. It would also be a severe 15:51:55  
16 violation of Bayer's First Amendment rights, and 15:51:59  
17 GlaxoSmithKline's, although I don't presume to speak 15:52:04  
18 for them. 15:52:07  
19 MR. MAGAZINER: I will speak for them. 15:52:09  
20 MR. BECK: If this is a matter of public 15:52:12  
21 concern that warrants intervention by the New York 15:52:15  
22 Times and warrants access by the New York Times to 15:52:19  
23 documents that would otherwise be privately 15:52:22  
24 exchanged in litigation and warrants ongoing press 15:52:25  
25 efforts by the plaintiffs' bar, then we're entitled 15:52:31

1 to respond, Bayer's entitled to respond, and not 15:52:34  
2 just through me. So this kind of a restriction 15:52:39  
3 would be a gross violation of our First Amendment 15:52:41  
4 rights. 15:52:46  
5 Now, Your Honor, there are rules about what 15:52:46  
6 lawyers can do and can't do when litigation is 15:52:48  
7 imminent and pending in terms of efforts to 15:52:53  
8 influence jurors, and you can be sure that we're 15:52:56  
9 going to follow those. And we hope that the 15:52:58  
10 plaintiffs will, too. Of course, we don't have any 15:53:01  
11 way of knowing who it is from the plaintiffs' side 15:53:03  
12 who talks to the media, but I am confident that Mr. 15:53:07  
13 Robinson and his team will abide by the rules, as 15:53:10  
14 well. Whether the folks from Mississippi or Texas 15:53:13  
15 or others from California or Florida or Georgia or 15:53:17  
16 Oklahoma will feel like it will help the general 15:53:22  
17 cause to weigh in on the eve of the MDL trials, I 15:53:25  
18 don't know. Maybe they will. 15:53:30  
19 But, Your Honor, because somebody makes a 15:53:32  
20 mistake in Corpus Christi and sends out an 15:53:34  
21 ill-advised letter, which was nothing but a colossal 15:53:38  
22 headache for us and for me personally, does not mean 15:53:45  
23 that we should rewrite the rules as to who can say 15:53:48  
24 what in litigation up here. 15:53:51  
25 And especially, again, I shouldn't have to 15:53:55

1 respond to a motion that's made on the fly. Their 15:53:57  
2 motion had nothing to do with the Olander case. It 15:54:00  
3 was a gag order having everything to do with MDL. 15:54:03  
4 That's what they filed, and that's what they asked 15:54:07  
5 for. And perhaps realizing how preposterous that 15:54:10  
6 is, they now pretend they asked for something 15:54:13  
7 different than that. But whatever it is they're 15:54:16  
8 asking for, whether it's that only Phil Beck be 15:54:19  
9 allowed to comment on the MDL litigation or only 15:54:22  
10 Phil Beck be allowed to respond to statements during 15:54:26  
11 the Olander case, either way, it's out of bounds, 15:54:29  
12 Your Honor. 15:54:33  
13 MR. MAGAZINER: May I be heard very 15:54:35  
14 briefly, Your Honor? 15:54:36  
15 THE COURT: You may. 15:54:37  
16 MR. MAGAZINER: As Your Honor may remember, 15:54:39  
17 GSK was voluntarily dismissed from the trial in 15:54:41  
18 Corpus Christi, from the case in Corpus Christi a 15:54:44  
19 number of weeks before trial, so I will not presume 15:54:46  
20 to speak about what happened in Corpus Christi. 15:54:48  
21 But the order that the plaintiffs have asked 15:54:51  
22 not only -- the proposed order not only applies to 15:54:54  
23 Bayer, it also applies to GSK, and what they have 15:54:58  
24 asked is Your Honor order that no one from GSK may 15:55:01  
25 make any statement to the media without the chief 15:55:05

1 legal officer of GSK approving it and without my 15:55:09  
2 approving it as a lead counsel for GSK. 15:55:12  
3 It's a shame the New York Times counsel has 15:55:15  
4 left the courtroom. If Your Honor would look at 15:55:17  
5 exhibit A of defendant's memorandum in opposition to 15:55:20  
6 plaintiffs' motion to vacate PTO 24, you will see 15:55:23  
7 the first -- a reprint of the first article that 15:55:26  
8 appeared in the New York Times, and I believe it was 15:55:30  
9 the first one, on February 22nd, 2003. And in that, 15:55:32  
10 you will see that not only is Mr. Beck quoted at 15:55:37  
11 length, and not only am I quoted in one paragraph, 15:55:39  
12 but there are several quotes from a GSK 15:55:41  
13 spokesperson, Patricia Seif. And I believe if 15:55:44  
14 counsel for the New York Times were here, he would 15:55:49  
15 be justifiably outraged at the suggestion that the 15:55:50  
16 New York Times is not entitled to talk to a 15:55:54  
17 spokesperson of GSK without that spokesperson first 15:55:58  
18 having me approve every comment she makes. But that 15:56:02  
19 is indeed the order that the plaintiffs have asked 15:56:07  
20 be entered against GSK. 15:56:10  
21 Thank you, Your Honor. 15:56:12  
22 THE COURT: All right. Anything further on 15:56:13  
23 that? 15:56:14  
24 MR. LOCKRIDGE: First of all, Your Honor, 15:56:23  
25 we should have submitted a new order, but it's clear 15:56:24

1 in our reply brief that it was to apply to both the 15:56:26  
2 actual plaintiffs and the actual defendants. 15:56:29  
3 Secondly, I'm not here saying that only Mr. 15:56:32  
4 Beck can talk to the news media. Anybody on his 15:56:34  
5 team can talk to the news media. I don't care. 15:56:36  
6 Frankly, Bayer can release a statement to the news 15:56:40  
7 media. All we're asking for is that that statement 15:56:42  
8 be cleared by their general counsel and their lead 15:56:45  
9 counsel here. And I think that's an extremely 15:56:50  
10 minimal thing to ask given what happened down in 15:56:53  
11 Corpus Christi. They come in here today trying to 15:56:57  
12 minimize that. This was not -- this was a letter. 15:57:00  
13 This was for wide dissemination. At the bottom of 15:57:03  
14 the letter, for example, they indicated that if you 15:57:08  
15 want this in Spanish, you could have this letter in 15:57:09  
16 Spanish. They meant this letter to go, if not to 15:57:11  
17 the world, to a very large number of people in 15:57:14  
18 Corpus Christi, and the only possible reason is to 15:57:17  
19 try to taint the panel, Your Honor. And we simply 15:57:20  
20 don't want that to happen here. 15:57:24  
21 MR. BECK: Your Honor, you know, there's a 15:57:27  
22 judge down in Corpus Christi who looked into whether 15:57:27  
23 that was the only possible reason, and there was a 15:57:32  
24 district attorney who looked at that, and the 15:57:35  
25 district attorney said there's nothing to base any 15:57:37

1 sort of criminal investigation on, and the judge 15:57:40  
2 said there's no basis for civil sanctions, because 15:57:43  
3 they understood that it was a screw-up. And they're 15:57:46  
4 pretending that it was an intentional effort to 15:57:51  
5 taint a jury pool. It's just wrong, Your Honor. 15:57:53  
6 And then to say that nobody from our company can 15:57:56  
7 speak unless the general counsel of the company, who 15:58:00  
8 does, in fact, have some other duties other than 15:58:04  
9 overseeing Baycol litigation and me, both agree on 15:58:06  
10 the content of that communication is an absurd and 15:58:12  
11 unwarranted and, I think, unconstitutional 15:58:16  
12 restriction on Bayer's right to speak out on an 15:58:18  
13 issue of public concern. 15:58:22  
14 THE COURT: All right. Plaintiffs' motion 15:58:24  
15 is denied. 15:58:31  
16 I must admit that I can't wait for this trial 15:58:36  
17 to start. This is going to be fun. 15:58:38  
18 MR. ZIMMERMAN: Well, Your Honor, the next 15:58:48  
19 item on the agenda is just a update of the pending 15:58:49  
20 motions. I believe the agenda is self-explanatory. 15:58:55  
21 They're pending before the Court. I don't think any 15:59:00  
22 further comment is needed under Roman numeral IV, 15:59:02  
23 sub B. 15:59:06  
24 MR. BECK: I agree. 15:59:09  
25 MR. ZIMMERMAN: Good. 15:59:11

1       There is a pending motion for leave by       15:59:15  
2 defendants to file a supplemental memorandum in   15:59:20  
3 opposition to class certification. I guess that's   15:59:23  
4 just a matter of information. I don't know that the 15:59:30  
5 Court has ruled on that.                           15:59:31  
6       THE COURT: No, I have not. I will       15:59:33  
7 shortly.   15:59:37  
8       MR. ZIMMERMAN: Okay. And then "The       15:59:38  
9 following motions are pending before Magistrate   15:59:41  
10 Judge Lebedoff," and that has to do with overdue 15:59:46  
11 plaintiff fact sheets. He has issued some orders  15:59:49  
12 recently. There was some correspondence exchanged 15:59:53  
13 with regard to those, and I believe they are subject 15:59:57  
14 to meet-and-confers and negotiations and motions  16:00:00  
15 that are going to be heard before the magistrate  16:00:05  
16 judge.   16:00:06  
17       MS. WEBER: Those matters are pending       16:00:10  
18 before Judge Lebedoff, Your Honor.               16:00:11  
19       MR. ZIMMERMAN: Phil, did you have anything 16:00:16  
20 further on that?                                 16:00:17  
21       MR. BECK: No, Your Honor. "No, Your       16:00:19  
22 Honor." (Laughter.)                             16:00:21  
23       MR. ZIMMERMAN: I'm going to get a copy of  16:00:27  
24 this record for my wife. (Laughter.)           16:00:28  
25       Olander and Long trials --               16:00:32

1 THE COURT: Let me tell you, it doesn't do 16:00:34  
2 any good. (Laughter.) 16:00:36  
3 MR. ZIMMERMAN: I know that. 16:00:40  
4 We have the Olander and Long cases set for 16:00:42  
5 consecutive trials. The magistrate judge has issued 16:00:47  
6 a scheduling order at which -- which we have 16:00:51  
7 requested certain modifications. One of the 16:00:56  
8 modifications was negotiated and worked out. I 16:00:58  
9 don't know that we have to spend much time with it. 16:01:01  
10 It has to do with -- 16:01:03  
11 THE COURT: No. 16:01:04  
12 MR. ZIMMERMAN: -- expert disclosures, and 16:01:05  
13 that was worked out. We may seek additional 16:01:06  
14 modifications, which I suspect we don't have to air 16:01:09  
15 at this moment in front of Your Honor. But one of 16:01:14  
16 the concerns we have, and I'll just put it out 16:01:17  
17 there, is responding to motions in limine. We think 16:01:19  
18 the time frame may be too small given what we 16:01:23  
19 understand may be the numbers of motions in limine 16:01:26  
20 that we anticipate defendants making. I just alert 16:01:29  
21 everyone to the fact that that may be something 16:01:34  
22 where I think we only have four or five days for 16:01:37  
23 responses, and that may just be physically 16:01:39  
24 impossible, and it's just a matter of housekeeping 16:01:43  
25 to tell the -- that that may be something to 16:01:45

1 modification. 16:01:50

2 THE COURT: Well, that modification comes 16:01:51

3 to me because I'm the one that will have to do all 16:01:52

4 that, so we can have a phone conference if that 16:01:55

5 occurs and so you don't have to travel any distance 16:01:57

6 for that. 16:02:04

7 MR. ZIMMERMAN: All right. Thank you, Your 16:02:05

8 Honor. 16:02:05

9 The PSC has designated plaintiffs' expert. 16:02:05

10 We did not produce a case-specific expert report in 16:02:10

11 Long, which was due on April 7th, as required under 16:02:16

12 the scheduling order. We have produced to our 16:02:20

13 client, Mr. Long, what we have from -- 16:02:24

14 MR. BECK: It's actually Mrs. Long. 16:02:32

15 MR. ZIMMERMAN: I beg your pardon. It's 16:02:33

16 not my client. 16:02:35

17 MR. BECK: Yeah. 16:02:36

18 MR. ZIMMERMAN: And we have produced that, 16:02:39

19 and we have to have some discussions that are 16:02:42

20 pending on that matter with the client, and once 16:02:45

21 those are completed, we will advise counsel and the 16:02:50

22 Court about the status of that matter. 16:02:53

23 THE COURT: Thank you. 16:02:57

24 MR. BECK: Your Honor, we have a real 16:02:59

25 concern about what appears to be going on with the 16:03:05

1 Long case and what went on with the Newville case. 16:03:12  
2 They've got in this MDL some -- I forget the 16:03:16  
3 number -- 4,863 federal cases, not virtually all of 16:03:21  
4 which, but the vast, vast majority of which are 16:03:29  
5 non-rhabdo cases, what we've been calling noninjury 16:03:34  
6 or aches-and-pains cases. And we had one teed up 16:03:37  
7 for trial, the Newville case, and they were able to 16:03:45  
8 dismiss that because we hadn't yet filed an answer. 16:03:51  
9 And then Your Honor solicited suggestions on what 16:03:55  
10 other case should be tried, and we said there ought 16:04:00  
11 to be another aches-and-pains case since those are 16:04:03  
12 the driver here, you know, those 713 cases that we 16:04:07  
13 settled are rhabdo cases, and we're not settling 16:04:10  
14 these other cases, and we think they're without 16:04:13  
15 merit. And we said let's try one of those and put 16:04:16  
16 them to the test, and Your Honor picked the Long 16:04:19  
17 case and also, of course, picked the Olander case. 16:04:22  
18 So that we had -- we had one with rhabdo, one 16:04:26  
19 without. Last time I was here, Your Honor talked 16:04:30  
20 about how important it was that we get a trial in 16:04:32  
21 the MDL on a non-rhabdo case, or an aches-and-pains 16:04:34  
22 case. 16:04:40  
23 There's a expression in boxing when people 16:04:42  
24 take a dive. I'm concerned here that every time 16:04:46  
25 they're going to be put to the test and an 16:04:50

1 aches-and-pains case is going to be scheduled for 16:04:53  
2 trial, they're going to take a dive like they did in 16:04:55  
3 Newville and like they apparently are about to do in 16:04:57  
4 Long. By saying that they have no expert who's 16:05:00  
5 going to -- or anyone who's going to give opinion 16:05:04  
6 testimony, I assume that includes the treating 16:05:07  
7 physician, on causation, what they're saying is that 16:05:09  
8 they have no case and that the Long case is not 16:05:14  
9 going to go to trial. And what they're saying is 16:05:17  
10 that notwithstanding what this Court said, that 16:05:23  
11 you're going to pick two cases for trial, and 16:05:26  
12 notwithstanding the Court's determination displayed 16:05:29  
13 twice now to have one of those cases be an 16:05:33  
14 aches-and-pains case, whichever case gets picked, 16:05:35  
15 they're going to take a dive on that case and not 16:05:40  
16 have a trial on it. 16:05:44  
17 Unless I'm really missing something here, 16:05:49  
18 they're telling us that there is going to be no Long 16:05:50  
19 trial, because no matter what kind of conversation 16:05:53  
20 they have with their client, if they don't file any 16:05:56  
21 expert opinion saying that there was causation and 16:06:00  
22 they stipulate that there won't be any testimony on 16:06:05  
23 causation, then what they've told the Court and us 16:06:09  
24 is that they're not going to put in a prima facie 16:06:13  
25 case, and Long is going to go by the wayside just 16:06:17

1 like Newville did. And then that leaves us by 16:06:21  
2 default with the proposal that the plaintiffs made 16:06:24  
3 and which Your Honor rejected, which was let's just 16:06:29  
4 have a case, of a rhabdo case, and let's not have an 16:06:32  
5 aches-and-pains case, we only want to try a rhabdo 16:06:36  
6 case, we don't want to try one of those other cases. 16:06:39  
7 And I think that the will of the Court here 16:06:42  
8 is being thwarted first in the dismissal of 16:06:45  
9 Newville, which we had no right, the Court 16:06:49  
10 determined, to stop because we hadn't yet filed a 16:06:54  
11 complaint and now the pending dive on Long by virtue 16:06:57  
12 of having no causation expert. 16:07:02  
13 Your Honor, we're very concerned that this -- 16:07:05  
14 as I've said before, I'm very concerned that the MDL 16:07:09  
15 part of this MDL is taking a back seat to the 16:07:12  
16 individual cases that the plaintiffs want to focus 16:07:17  
17 on now, and now the rules, as the Court laid them 16:07:20  
18 out, that we're going to have one of each, is being 16:07:24  
19 thwarted, because no matter who gets put up as an 16:07:27  
20 aches-and-pains plaintiff, they disappear. I don't 16:07:32  
21 know exactly what to do about it. 16:07:36  
22 If I'm right, that Long is going by the 16:07:39  
23 wayside, that they're not going to put on a case 16:07:41  
24 because they have no causation evidence, then I 16:07:45  
25 think, Your Honor, perhaps what the Court ought to 16:07:47

1 do is say that in any case where a member of the 16:07:50  
2 Plaintiffs' Steering Committee is counsel of record 16:07:55  
3 involving anything other than a rhabdo case, that 16:08:00  
4 they come forward in the next 90 days with some 16:08:04  
5 opinion, some expert opinion, as to causation, or 16:08:09  
6 else we'll dismiss those cases, because we've got 16:08:13  
7 literally thousands of aches-and-pains cases that we 16:08:17  
8 say are frivolous and that they say are the economic 16:08:21  
9 drivers of this MDL, and we can't get one to trial, 16:08:25  
10 because every time it's scheduled -- well, the two 16:08:29  
11 times it's been scheduled -- they come forth and 16:08:33  
12 admit that they can't find an expert who says that 16:08:35  
13 the aches and pains were caused by Baycol. 16:08:37  
14 We think that they've had two opportunities 16:08:40  
15 on cases that this Court selected, and they've 16:08:43  
16 walked away from both of them. They ought to be 16:08:47  
17 told to come forward with expert opinions on 16:08:50  
18 causation on the aches-and-pains cases that the 16:08:54  
19 Plaintiffs' Steering Committee's involved in, set 16:08:58  
20 aside all the other ones, just the Plaintiffs' 16:09:01  
21 Steering Committee, and if they can't come forward 16:09:03  
22 with expert testimony on causation, those cases 16:09:05  
23 ought to be dismissed, and then we'll start to make 16:09:08  
24 progress on how we're going to deal -- and maybe 16:09:12  
25 they'll come forward with causation and we can 16:09:16

1 schedule a real trial -- then we'll start making 16:09:18  
2 some progress on how we're going to get rid of the 16:09:21  
3 thousands of cases that make up the vast bulk of 16:09:25  
4 this MDL. 16:09:28  
5 Are they going to dismiss them because they 16:09:30  
6 admit that they can't show causation? Are they 16:09:32  
7 going to find somebody willing to say there is 16:09:35  
8 causation? Are they going to try them on the other 16:09:37  
9 theories that they've proposed? Are we going to win 16:09:40  
10 them? Are we going to lose them? But that's what's 16:09:42  
11 going to determine the ultimate outcome here. What 16:09:44  
12 happens with these noninjury cases? And that's the 16:09:47  
13 big issue that I think is now being avoided by the 16:09:50  
14 serial abandonment of the aches-and-pains cases that 16:09:57  
15 are set for trial. 16:10:01  
16 THE COURT: All right. If I could -- 16:10:03  
17 before you -- okay, go ahead. 16:10:08  
18 MR. ZIMMERMAN: Do you want me to defer? 16:10:11  
19 THE COURT: First I would like the report 16:10:14  
20 from Mr. Robinson on the Olander case and then you 16:10:15  
21 can report on your case. 16:10:19  
22 MR. ZIMMERMAN: I do want to respond to 16:10:20  
23 that argument. 16:10:21  
24 THE COURT: Yes, you may respond. 16:10:22  
25 MR. ZIMMERMAN: It was quite lengthy. 16:10:25

1 MR. ROBINSON: Thank you, Your Honor. It's 16:10:26  
2 very hard for a trial lawyer to sit, especially 16:10:26  
3 after three weeks in Amsterdam, to sit quietly, as 16:10:29  
4 the judge understands. So I get to talk. I'm happy 16:10:33  
5 I'm getting to talk here. 16:10:37  
6 One thing I might say is this: One problem 16:10:39  
7 that I'm seeing here with this situation is that 16:10:43  
8 these aches-and-pains cases -- this isn't 16:10:45  
9 necessarily about Olander, but it might be something 16:10:48  
10 that the Court might consider and Mr. Beck might 16:10:50  
11 consider -- is that a lot of the aches-and-pains 16:10:53  
12 cases were not necessarily cases that were in that 16:10:55  
13 first group, with the Long group. That was filed 16:10:58  
14 apparently in a different setting. And there's a 16:11:01  
15 lot of cases set throughout the country that are 16:11:04  
16 aches-and-pain cases -- maybe they're actually filed 16:11:06  
17 in other district courts, not necessarily in 16:11:09  
18 Minnesota -- but that they could be really put up as 16:11:12  
19 representative cases if the defense would agree that 16:11:16  
20 we could -- or that the MDL could try one or more of 16:11:19  
21 those cases. Just a thought. 16:11:24  
22 Going to the Olander case, Your Honor. I 16:11:26  
23 think we're moving along pretty well. We put up the 16:11:30  
24 expert reports when we got back from Europe. And 16:11:34  
25 there's one report I told Mr. Ismail about that is a 16:11:40

1 report of one of the Pennsylvania lawyers' experts 16:11:46  
2 that we were negotiating and try and get into this 16:11:50  
3 case, and we gave him the name, and they know the 16:11:54  
4 report, because the report is a published article, 16:11:58  
5 and -- but we're hoping that maybe we could through 16:12:01  
6 negotiations get that report agreed to to be in this 16:12:06  
7 MDL trial. But if it's not, it's not. That's 16:12:10  
8 something that we're still working on today, in 16:12:13  
9 fact. Mr. Lopez is back trying to work on that with 16:12:16  
10 people in Pennsylvania. 16:12:19  
11 In terms of the discovery, I understand that 16:12:22  
12 Mr. Ismail is -- actually got one of the treating 16:12:25  
13 expert -- treating doctors to be deposed on Friday, 16:12:31  
14 and we have, I think, another one, the other doctor 16:12:35  
15 on the 29th, and we're setting up the plaintiff's 16:12:38  
16 deposition. One concern I've had is that she's been 16:12:41  
17 deposed before, and we wanted to limit it to two 16:12:44  
18 hours, and I think that Mr. Ismail's agreed to that. 16:12:46  
19 And I think that basically at that point, then we'll 16:12:51  
20 take the expert depositions, and I think we're 16:12:53  
21 really on course with the Olander case. We do have 16:12:57  
22 some discussions and things like that going on, but 16:13:02  
23 we'll do that, as well. And -- but I think that the 16:13:05  
24 case is moving forward. 16:13:08  
25 MR. BECK: Well, Your Honor, on the 16:13:13

1 Olander, just on the Olander case, Mr. Ismail agreed 16:13:15  
2 to work on time. He didn't agree to two hours, but 16:13:20  
3 they'll figure that out. Mr. Robinson and Tarek 16:13:24  
4 will work that out. 16:13:27

5 The one potential problem we have in the 16:13:28  
6 Olander case is scheduling her deposition. We've 16:13:30  
7 been told by the -- not really by Mr. Robinson so 16:13:38  
8 much as by the Plaintiffs' Steering Committee that 16:13:41  
9 they refused to agree that she will be deposed any 16:13:45  
10 time before the end of the month when there's the 16:13:49  
11 court-ordered settlement slash mediation process, 16:13:55  
12 because she might want to settle. 16:14:00

13 MR. ROBINSON: I think we've worked it out 16:14:02  
14 with Mr. -- before we spoke here today, with Mr. 16:14:03  
15 Ismail. I told him we'd probably produce her 16:14:07  
16 hopefully later next week. 16:14:10

17 MR. BECK: Oh, fine. Okay. 16:14:15

18 THE COURT: All right, Mr. Zimmerman? 16:14:15

19 MR. ZIMMERMAN: Your Honor, frankly, I 16:14:20  
20 think the question of Long and its potential 16:14:21  
21 dismissal might be better resolved with the Court 16:14:26  
22 through informal discussion, but I'm happy to make 16:14:31  
23 the argument. 16:14:33

24 THE COURT: Argument on what? 16:14:36

25 MR. ZIMMERMAN: Well, the point that Mr. 16:14:38

1 Beck is making is that aches-and-pains cases must 16:14:39  
2 not be valid because there are two aches-and-pains 16:14:42  
3 cases that were picked by the defendant, well, I 16:14:45  
4 guess one by the Court and one by the defendant, 16:14:48  
5 that we might not -- we don't believe we can sustain 16:14:50  
6 the burden of proof and get to a jury on. Well, 16:14:53  
7 that happens. But there are aches-and-pains cases 16:14:55  
8 that we could nominate, and should nominate, that 16:14:58  
9 could be very exemplary of an appropriate 16:15:01  
10 aches-and-pains case where a doctor's report will be 16:15:04  
11 provided that will show the relationship between the 16:15:08  
12 injury and Baycol that would be perfectly 16:15:11  
13 appropriate to be tried in this Court. But to try 16:15:14  
14 and make something out of the fact that these two 16:15:18  
15 cases represent the invalidity of every 16:15:21  
16 aches-and-pains cases of the 8300 cases that are 16:15:25  
17 filed throughout the country is totally 16:15:28  
18 inappropriate. 16:15:31  
19 Now, I'm here to say that I don't like the 16:15:32  
20 fact that I have to stand up before the Court and 16:15:35  
21 say that the two cases that have been before the 16:15:38  
22 Court as the backup case to Olander have problems 16:15:41  
23 and probably cannot sustain the burden of proof. 16:15:47  
24 But that's the fact. Is it better to go empanel a 16:15:51  
25 jury and prepare for trial and have the case 16:15:56

1 directed verdict out? Does that prove anything? 16:15:59  
2 Does that give us the opportunity to know where this 16:16:02  
3 case is going in terms of aches and pains? No. But 16:16:05  
4 what will give us that opportunity is to have an 16:16:10  
5 appropriate case, not a slam-dunk loser, not a 16:16:13  
6 slam-dunk winner, an appropriate case that is 16:16:16  
7 justable, that is to be tried and have it tried well 16:16:21  
8 and see what it tells both the plaintiffs and the 16:16:23  
9 defendants. 16:16:25  
10 But to sit here and point at me and say 16:16:26  
11 because the Plaintiffs' Steering Committee have 16:16:28  
12 cases that shouldn't be tried and need to be 16:16:31  
13 dismissed, somehow that taints the 8300 other cases 16:16:34  
14 that are filed throughout the country, is simply 16:16:38  
15 inappropriate. Or to say, well, each one of them in 16:16:41  
16 90 days have to come up with a doctor's report, 16:16:45  
17 which isn't provided for in the Federal Rules of 16:16:46  
18 Civil Procedure, and put that burden on people who 16:16:50  
19 have statutes of limitations that are about to run 16:16:55  
20 in August because there's a two-year statute in many 16:16:57  
21 states and many clients are waiting to determine if 16:17:00  
22 their lawyers are going to file cases or not is just 16:17:03  
23 not the right thing to do. 16:17:05  
24 So like I said, Your Honor, I think the 16:17:07  
25 question of which cases should be tried, we've got 16:17:08

1 Olander. We've got Olander. 16:17:11  
2 Now, there's a distinction between what he 16:17:13  
3 calls a dive. We're not taking a dive, but is it 16:17:15  
4 appropriate if they offer a large settlement to Mr. 16:17:19  
5 Robinson and Miss Pearson to settle a case? Is that 16:17:23  
6 a bribe? No. Neither a dive nor a bribe. It's the 16:17:27  
7 marketplace. It's the legal system. It's the way 16:17:31  
8 it works. 16:17:33  
9 So Mrs. Olander is going to have to decide if 16:17:35  
10 the amount of money that is offered is sufficient 16:17:37  
11 for her to settle her case, and Mr. Long -- or is it 16:17:39  
12 Miss Long -- is going to have to decide if she can't 16:17:43  
13 go forward with her case, and that's the system 16:17:47  
14 we're in. And I think we should just abide by it 16:17:49  
15 and pick the next case. If Mrs. Olander's case 16:17:51  
16 settles, it settles, and if Mr. and Mrs. Long's case 16:17:55  
17 goes away, it goes away. And that's the best we can 16:17:58  
18 do, Your Honor, and we just want to be honest. And 16:18:02  
19 I didn't want to file a report that wasn't 16:18:04  
20 appropriate, and I'm not going to do that. 16:18:06  
21 THE COURT: Thank you. I appreciate that. 16:18:08  
22 MR. CHESLEY: Your Honor, may I add one 16:18:10  
23 comment? 16:18:12  
24 THE COURT: Stan, I haven't seen you in a 16:18:13  
25 long time. (Laughter.) 16:18:14

1 MR. CHESLEY: I had an excused absence last 16:18:20  
2 time, and I sat here and have been well-behaved. 16:18:22  
3 There's a basic problem that we're about 16:18:27  
4 ready to face. You said it best, Your Honor, when 16:18:30  
5 you said, "I'm looking forward to a trial on June 16:18:33  
6 6th." In my heart of hearts, we are looking for a 16:18:36  
7 trial on June 6th. But what the defendants are 16:18:40  
8 going to do, and they've done in every case in the 16:18:43  
9 United States of America, when there is one case set 16:18:45  
10 for trial, they settle that case, particularly when 16:18:49  
11 it's a case that goes to the jury. My prediction 16:18:53  
12 will be that Olander will be settled because, just 16:18:56  
13 as the case that was supposed to go to trial last 16:18:59  
14 week or two weeks ago, those two settled, they 16:19:03  
15 settled for substantial money. That was discussed 16:19:06  
16 before, and I believe the Court's going to look at 16:19:08  
17 that. 16:19:10  
18 The problem is, Your Honor, that it is an 16:19:11  
19 ethical duty to a plaintiff counsel to give the 16:19:13  
20 opportunity to the plaintiff to settle the case if 16:19:19  
21 the amount is correct. There is a way around the 16:19:23  
22 problem, and it is the defendants that are blocking 16:19:26  
23 that way around the problem. If the Court had 16:19:29  
24 certified a class, we wouldn't have that problem 16:19:33  
25 because, therefore, anybody who was in the class 16:19:35

1 could have their case tried and you wouldn't have 16:19:38  
2 what they are now bending on is the Lexicon problem. 16:19:40  
3 And so what they have done is, they have challenged 16:19:45  
4 us to find appropriate aches-and-pains cases that 16:19:48  
5 will pass the muster of a directed verdict that have 16:19:52  
6 been filed in -- within Minnesota, because what 16:19:56  
7 they're suggesting is, Your Honor, even though it's 16:19:59  
8 a national MDL case, and this case is going to be -- 16:20:03  
9 this first case in the MDL, whether it be Olander or 16:20:06  
10 whoever, is going to be the single most deciding 16:20:10  
11 factor in, I believe, this litigation. But the 16:20:14  
12 defendants, now, most defendants waive that in an 16:20:17  
13 MDL so they can move the process and move the 16:20:21  
14 litigation, and they waive the venue issue on the 16:20:24  
15 issue of original jurisdiction. Before the Lexicon 16:20:28  
16 decision in the Supreme Court of the United States 16:20:32  
17 we didn't have it. 16:20:35  
18 What Judge Spiegel did in Teletronics was 16:20:36  
19 very significant. He said, "I don't care about 16:20:39  
20 Lexicon. I want to try --" and when we started as a 16:20:41  
21 summary jury trial and then we're going to go to a 16:20:47  
22 real trial. "I'm going to try five cases. You pick 16:20:48  
23 them. I don't care from whence they are. If you 16:20:50  
24 want to object, go up to the Sixth Circuit. I want 16:20:53  
25 to see what these cases are about." That was one 16:20:55

1 view. Judge Rubin did the same thing before 16:20:58  
2 Lexicon. 16:21:02  
3 The point is, the impendent lies here, over 16:21:03  
4 here, Your Honor, and to suggest that we have a 16:21:05  
5 burden to show cause why people with aches and pains 16:21:07  
6 throughout the United States of America can't have a 16:21:10  
7 case tried. 16:21:13  
8 What I would suggest, which makes the most 16:21:14  
9 sense, is that the plaintiffs give to the defendants 16:21:16  
10 five or six plaintiffs and all their medical records 16:21:21  
11 and everything, and these defendants, who have a 16:21:26  
12 school and an Army of lawyers, can take whatever 16:21:29  
13 depositions they want of those five or six people, 16:21:31  
14 so that in the event that Olander settles and Long 16:21:35  
15 does not meet the criteria of getting past a Rule 42 16:21:38  
16 -- directed verdict is 42, I think. No, 41? 41. 16:21:44  
17 Doesn't get past, we are set to tee up another case. 16:21:48  
18 So there is meaning. And it will be an 16:21:54  
19 aches-and-pains case. But candidly, there is not an 16:21:55  
20 aches-and-pains case that was filed in Minnesota. 16:21:59  
21 And I believe Mr. Robinson's point is right 16:22:03  
22 on target. The way around this problem is simple. 16:22:05  
23 We have to be able to give to the defendants five or 16:22:10  
24 six other cases that we will be able to submit to 16:22:14  
25 them. If the case was a class certification or even 16:22:20

1 an interim class certification or a conditional 16:22:25  
2 class certification, Lexicon is out of the picture 16:22:28  
3 and they no longer can claim the Lexicon problem, 16:22:31  
4 because the Court has jurisdiction on trials that 16:22:34  
5 are within their jurisdiction, if it's a national 16:22:38  
6 class, even on a conditional basis that may be 16:22:40  
7 de-certified later. This Court has the power to try 16:22:44  
8 any case it wants in the federal courts anywhere in 16:22:46  
9 the United States of America. 16:22:50  
10 So it's a sort of a gimmick kind of thing to 16:22:51  
11 say we don't have a case and they are -- and here we 16:22:56  
12 are twice, Newville and now Long. We are being 16:22:59  
13 forthright with the Court in putting the problem 16:23:03  
14 there, because I guarantee you -- wrong word -- I am 16:23:05  
15 confident that Olander will be settled because they 16:23:09  
16 broke the secret million-dollar block on rhabdo 16:23:13  
17 cases last week, and once they broke that, they 16:23:18  
18 opened the marketplace, and they opened the 16:23:20  
19 marketplace, and Olander will get settled, and when 16:23:23  
20 or how I don't know, but then we will be set in a 16:23:27  
21 position on June 4th to report, because most cases 16:23:31  
22 get settled on the courthouse steps, to report to 16:23:33  
23 the Court just what the defendants would like, that 16:23:38  
24 we can't go to trial and we have no trial on June 16:23:39  
25 the 6th. 16:23:43

1 Your Honor, thank you very much for letting 16:23:45

2 me speak. 16:23:47

3 MR. BECK: Mr. Chesley says that we always 16:23:52

4 settle on the courthouse steps and there's never 16:23:53

5 been a trial of a Baycol case because the defendants 16:23:56

6 are afraid to try a Baycol case -- 16:24:00

7 MR. CHESLEY: I didn't say that.

8 MR. BECK: -- and so there's never been 16:24:03

9 one. Well, of course, there's been two, and we won 16:24:04

10 both of them. And we'd like to try, and we wanted 16:24:08

11 to try the Newville case. We didn't buy out the 16:24:11

12 Newville case. They dismissed it. We wanted to try 16:24:15

13 the Long case, and they're telling us that they 16:24:20

14 can't prove the Long case. 16:24:23

15 Mr. Chesley made some kind of a statement 16:24:24

16 that I -- I think he was suggesting that it's all 16:24:26

17 our fault because we won't agree to let them 16:24:30

18 designate an aches-and-pains case from outside of 16:24:32

19 Minnesota because there aren't any aches-and-pains 16:24:35

20 cases in Minnesota. That's not actually their 16:24:38

21 problem. Their problem is, they only have a couple 16:24:40

22 of the rhabdo cases in Minnesota. They have over 30 16:24:42

23 aches-and-pains cases in Minnesota. Maybe what they 16:24:45

24 could do is, in the next 90 days, come forward and 16:24:49

25 say: Of the Minnesota aches-and-pains cases, we can 16:24:54

1 come forward with expert reports that establish 16:24:57  
2 causation on these aches-and-pains cases and we 16:25:01  
3 can't do it on those, and then we'd have some 16:25:03  
4 candidates for trial. That's what I'm talking 16:25:06  
5 about, getting candidates for trial. Our problem 16:25:07  
6 now is whenever we come up with an aches-and-pains 16:25:10  
7 case, it's the plaintiffs who don't want to try it, 16:25:13  
8 and they tell us they can't have causation. 16:25:15  
9 And if they think that we're running away 16:25:17  
10 from the Olander case and that tomorrow or on April 16:25:19  
11 30th we're going to settle it for a million bucks, I 16:25:23  
12 hope that they're not ignoring their trial 16:25:26  
13 preparation, Your Honor, because that's not going to 16:25:28  
14 happen. We have some cases that we've settled for 16:25:31  
15 substantial dollars because of special 16:25:35  
16 circumstances. And frankly, it's not my job to tell 16:25:37  
17 Mr. Zimmerman or Mr. Chesley or Mr. Robinson the 16:25:41  
18 factors that we take into account when deciding when 16:25:44  
19 we're going to pay substantial dollars. And then 16:25:47  
20 we've got 710 or 12 or 13 cases that all settle 16:25:51  
21 within a certain pattern, and that's what we're 16:25:58  
22 proceeding on. 16:26:01  
23 If they think that we're going to break the 16:26:02  
24 bank to avoid a trial on June 6th, they're greatly 16:26:05  
25 mistaken. We've got our hotel reservations ready, 16:26:10

1 Your Honor, and we're going to try that case, unless 16:26:12  
2 we settle it, just like we've been settling the 16:26:15  
3 others. And if we're going to be criticized for -- 16:26:17  
4 the whole idea, I thought, that we've been following 16:26:21  
5 is that when people have actually suffered side 16:26:25  
6 effects from taking our medicine, we want to 16:26:27  
7 compensate them in an amount that we and their 16:26:31  
8 lawyers agree is fair, and if that means that the 16:26:34  
9 Plaintiffs' Steering Committee doesn't get to try a 16:26:39  
10 case, that's tough. We're going to continue to do 16:26:41  
11 that, because that's what we think the right thing 16:26:45  
12 to do is. 16:26:48

13 Now, we're not going to -- let me guarantee 16:26:50  
14 you that you are not going to find us paying a whole 16:26:52  
15 bunch of money to get rid of Olander so that we can 16:26:58  
16 avoid trying a case against Mr. Chesley on June 6th. 16:27:01  
17 I look forward to that opportunity. 16:27:05

18 THE COURT: Well, my understanding is that 16:27:08  
19 Mr. Robinson and Mr. Meshbesh -- and I know Mr. 16:27:13  
20 Meshbesh, and I know that he's not going to forgo 16:27:15  
21 his trial preparation and his reservations are 16:27:18  
22 ready. 16:27:22

23 MR. MESHBESHER: I don't have a hotel room. 16:27:23

24 THE COURT: You are ready to go. I know 16:27:25  
25 that there will be a trial, and whether or not you 16:27:27

1 guys settle, that's part of the business of 16:27:29

2 litigation. If you settle you settle; if you don't, 16:27:37

3 we'll have a trial. 16:27:40

4 Let's move on. 16:27:41

5 MR. ZIMMERMAN: Your Honor, I think that 16:27:43

6 concludes the discussion of -- 16:27:44

7 THE COURT: Well, there's one other thing 16:27:47

8 that we should talk about dealing with the Olander 16:27:48

9 case is the jury questionnaire? 16:27:51

10 MR. ZIMMERMAN: Oh, yes. 16:27:54

11 THE COURT: I think you received an e-mail 16:27:56

12 from me dealing with the problem with the expense if 16:27:58

13 we have to have a jury here and have them fill out 16:28:03

14 the jury questionnaire. Have you all thought about 16:28:09

15 whether you can meet the time limits of -- 16:28:12

16 MR. ZIMMERMAN: I know Mr. Beck responded 16:28:15

17 that he felt he could. We have not actually 16:28:16

18 specifically discussed it. I've never really 16:28:18

19 specifically discussed it with the trial team, and 16:28:21

20 it slipped my mind, frankly, because I got the 16:28:24

21 e-mail when I was coming back from Amsterdam. But I 16:28:26

22 think we will have no problem getting an early 16:28:30

23 questionnaire out so it can go out, I think you 16:28:32

24 said, three weeks or so ahead of the trial date, and 16:28:35

25 I think that shouldn't be a problem. 16:28:38

1 MR. BECK: And, Your Honor, we haven't -- I 16:28:40  
2 mean, we've got what we used down in Corpus Christi, 16:28:42  
3 and we can work on that, and this is not the sort of 16:28:46  
4 thing that ought to be hard to agree to, but -- 16:28:49  
5 THE COURT: No, it shouldn't be. 16:28:52  
6 (Laughter.) Let's not make it difficult. So that 16:28:53  
7 will be taken care of today? 16:29:00  
8 MR. ZIMMERMAN: Yes. 16:29:02  
9 THE COURT: Can I have your agreement on 16:29:03  
10 that? 16:29:03  
11 MR. BECK: Yes, Your Honor. 16:29:04  
12 THE COURT: Thank you. 16:29:05  
13 MR. ROBINSON: We will certainly agree, 16:29:06  
14 Your Honor. And, in fact, if they have one that 16:29:08  
15 they want to show us ahead of time, we could maybe 16:29:09  
16 work on that. 16:29:12  
17 MR. BECK: Yeah. 16:29:13  
18 THE COURT: Mr. Beck, if you would give 16:29:14  
19 that over to the plaintiffs as quickly as possible 16:29:16  
20 so they can look at it? 16:29:20  
21 MR. BECK: Yes. 16:29:22  
22 THE COURT: The amount of money is enormous 16:29:23  
23 for the Court to bring in jurors, because we bring 16:29:25  
24 them in from all parts of the state, and it's very 16:29:29  
25 expensive putting them up in hotels for a day that 16:29:32

1 they're not doing anything. 16:29:36

2 MR. BECK: Right. We'll get you one, Mark. 16:29:37

3 You know, we negotiated with the other side, so not 16:29:40

4 everything in there is something that we would 16:29:42

5 propose, but we will get you one as a working draft. 16:29:44

6 MR. ROBINSON: It will be the Texas form; 16:29:47

7 is that what you're telling me? 16:29:48

8 MR. BECK: Yeah, yeah. I don't know if we 16:29:49

9 -- if we had one in Mississippi, we'll get you that, 16:29:50

10 too. I don't know if we had one there. 16:29:52

11 MR. ROBINSON: Thank you. 16:29:54

12 THE COURT: Okay. All right. 16:29:55

13 MR. ZIMMERMAN: The next item, Your Honor, 16:30:18

14 is item VII, "Other Trials." Bayer was not able to 16:30:19

15 get to us the list that we normally attach, but I 16:30:24

16 think they say they will provide a list of trial 16:30:27

17 settings in other jurisdictions to us and to the 16:30:30

18 Court. 16:30:33

19 MR. BECK: No, Your Honor. Actually, I did 16:30:35

20 send to counsel a letter, copy of a letter, which I 16:30:36

21 sent to the Court. The Court -- we attached the 16:30:40

22 trial settings. We did not provide that to the 16:30:44

23 plaintiffs for the reasons that we set forth in the 16:30:47

24 letter that we sent to the plaintiffs and to the 16:30:50

25 Court. 16:30:52

1 THE COURT: Okay. 16:30:53

2 MR. ZIMMERMAN: What is that? You mean the 16:30:55

3 explanations in the letter? 16:30:56

4 MR. BECK: Yes. 16:30:58

5 MR. ZIMMERMAN: Oh, okay. I have not seen 16:30:59

6 that. Did you send it recently? Today? Yesterday? 16:31:00

7 MR. HOEFLICH: Yesterday. 16:31:10

8 THE COURT: "Other Issues"? 16:31:12

9 MR. ZIMMERMAN: I beg your pardon?

10 THE COURT: "Other Issues"?

11 MR. ZIMMERMAN: "Other Issues," Your Honor. 16:31:13

12 We still have a question about the status of 16:31:14

13 third-party payer discussions. I don't know, is 16:31:17

14 Gene Schaerr -- Gene is not here? I was going to 16:31:24

15 ask him to report. I know that our third -- one of 16:31:27

16 our third-party payer people, Art Sadin, is not here 16:31:31

17 today. I see that we don't have much to report in 16:31:35

18 terms of the status, because I believe Art and Gene 16:31:42

19 were trying to get together and talk about it, but 16:31:46

20 Gene was over in Amsterdam, and I don't know that 16:31:49

21 they've had the opportunity yet. So I think will 16:31:52

22 probably report in greater detail at the next status 16:31:54

23 on the status of the third-party discussions. 16:31:57

24 THE COURT: All right. Professor Haydock? 16:31:59

25 SPECIAL MASTER HAYDOCK: Your Honor, at the 16:32:07

1 end of the day, two-minute report on four topics. 16:32:16  
2 Amsterdam. Special Master Borg and I came back with 16:32:18  
3 T-shirts saying "We Survived Amsterdam," in large 16:32:21  
4 part thanks to your being there to set the ground 16:32:23  
5 rules for the parties. So we all appreciate that. 16:32:25  
6 Secondly, the London depositions, discussions 16:32:28  
7 with Special Master Remele and I will be with 16:32:30  
8 underway with the plaintiffs and the defense to 16:32:34  
9 revise some of the protocols for that. 16:32:35  
10 Thirdly, the trust account settlement report. 16:32:37  
11 Your court-appointed accountants are reviewing the 16:32:39  
12 information submitted by Bayer, and they have some 16:32:41  
13 questions I'll be submitting to them in the near 16:32:44  
14 future. 16:32:46  
15 And then lastly, the plaintiffs' attorneys' 16:32:47  
16 fee submissions. May 9th is the date that the MDL 16:32:50  
17 -- PSC will submit the MDL attorneys' fees for 16:32:54  
18 review for me and the accountants. That also will 16:32:57  
19 be the deadline for -- extended deadline for 16:33:00  
20 submission by plaintiffs' state court lawyers, and 16:33:02  
21 then we'll spend the week of May 12th reviewing 16:33:06  
22 those documents for a report to the Court on May 16:33:08  
23 15th. 16:33:11  
24 That's all. 16:33:12  
25 THE COURT: Thank you. Any other PSC 16:33:12

1 reports? 16:33:17

2 MR. ZIMMERMAN: The question is how do you 16:33:20

3 want us to proceed with the Darsie petition, Your 16:33:21

4 Honor? That was the motion that we were going to 16:33:24

5 put on the foot of the calendar. I think it's 16:33:26

6 probably submitted on the record. If you want any 16:33:28

7 outline on the -- 16:33:36

8 THE COURT: Why don't you put a brief 16:33:38

9 outline on the record. 16:33:40

10 MR. ZIMMERMAN: Okay. The Darsie -- the 16:33:41

11 Darsie case, Your Honor, was filed in the name of 16:33:43

12 Elizabeth Darsie, for herself and trustee of the 16:33:45

13 heirs of Ronald Darsie, the decedent. Before the 16:33:50

14 Court is a notice of motion and motion for 16:33:55

15 distribution of funds. There was a settlement 16:33:57

16 negotiated at -- in the last several weeks for a 16:34:02

17 settlement to the estate in the amount of 16:34:08

18 \$1,250,000. In accordance with our local rules, I 16:34:12

19 believe the rules of court, it is necessary that 16:34:20

20 there be a petition for final distribution. That 16:34:24

21 petition, along with various affidavits, were filed 16:34:27

22 with the Court, I believe, on April 2nd, and it 16:34:31

23 allows for a distribution of funds in accordance 16:34:35

24 with an agreement of the heirs. The agreement is 16:34:39

25 set out in the petition less attorney's fees and 16:34:44

1 costs, and each of the heirs have been agreed -- 16:34:48  
2 have agreed to a certain amount with Elizabeth 16:34:53  
3 Darsie, the surviving spouse obviously getting the 16:34:56  
4 greatest amount. And that we ask that the petition 16:35:00  
5 be approved and that there be the -- that the 16:35:04  
6 trustee be instructed to distribute the funds in 16:35:10  
7 accordance with the order. 16:35:13  
8 THE COURT: All right. I'll review that 16:35:14  
9 and hopefully I'll -- well, not "hopefully," I will 16:35:16  
10 have that signed no later than Thursday of this 16:35:20  
11 week. 16:35:21  
12 MR. ZIMMERMAN: Thank you, Your Honor. 16:35:22  
13 THE COURT: Any other reports? 16:35:24  
14 MR. ZIMMERMAN: The only other report, Your 16:35:25  
15 Honor, are two very brief ones. There will be a PSC 16:35:26  
16 informational seminar April 24th in Los Angeles, 16:35:33  
17 California, similar to the one that was done -- that 16:35:39  
18 was done in Miami in, I think, in December or 16:35:43  
19 January, and we're seeing pretty good attendance for 16:35:47  
20 that one. It's going to be a one-day program as 16:35:51  
21 opposed to a two-day program, which was done in 16:35:55  
22 Miami. 16:35:59  
23 Also, meetings have been taking place with 16:36:01  
24 state court lawyers around the country, appropriate 16:36:04  
25 lawyers around the country, who have large groups of 16:36:09

1 cases. And I'm here to report we've made a lot of 16:36:13  
2 progress in reaching meetings of the minds and 16:36:16  
3 matters of mutual interest. We have not -- I have 16:36:20  
4 nothing further to report on that, Your Honor, other 16:36:24  
5 than we are going out and exchanging information and 16:36:27  
6 working -- trying to work together and making 16:36:32  
7 progress towards working together so that what 16:36:35  
8 occurred or existed at the beginning of the case is 16:36:42  
9 really not occurring at the same level of heat or 16:36:45  
10 the same level that it was occurring weeks and 16:36:48  
11 months ago. So I'm here to report good progress 16:36:51  
12 without giving the specifics of what we discussed or 16:36:55  
13 the specific people to whom I discussed it with. 16:36:57  
14 With that, Your Honor, I have nothing 16:37:01  
15 further. 16:37:03  
16 THE COURT: Mr. Beck? 16:37:04  
17 MR. BECK: Nothing further, Your Honor. 16:37:05  
18 THE COURT: Mr. Magaziner? 16:37:09  
19 MR. MAGAZINER: Nothing further. 16:37:10  
20 THE COURT: All right. The next status 16:37:11  
21 conference is May 15th at 9:30. And one in June is 16:37:12  
22 -- what date did you want? 16:37:19  
23 SPECIAL MASTER HAYDOCK: Was it June 16th? 16:37:28  
24 Is that a Friday? 16:37:31  
25 THE CLERK: The 20th. 20th is a Friday. 16:37:33

1 THE COURT: June 20th? June 20th. 16:37:38  
2 SPECIAL MASTER HAYDOCK: That's a Friday? 16:37:41  
3 THE COURT: Yes, at 9:30. 16:37:42  
4 MR. BECK: Is May 15th a Thursday, Your 16:37:44  
5 Honor? 16:37:46  
6 THE COURT: Yes, it is. 16:37:47  
7 MR. BECK: I can't be here on that day. 16:37:49  
8 That doesn't mean that it shouldn't go. I just want 16:37:52  
9 to alert the Court that I could be here Monday, 16:37:54  
10 Tuesday, Wednesday of that week, but not Thursday or 16:37:57  
11 Friday. 16:37:59  
12 MR. ZIMMERMAN: Your Honor, that would be 16:38:02  
13 fine, because I have a conflict with another 16:38:04  
14 pretrial in the St. Jude's matter on the 15th. So 16:38:07  
15 either side of that. Would the 14th work? 16:38:10  
16 MR. BECK: The 14th works for me, but the 16:38:14  
17 16th does not work for me. 16:38:16  
18 MR. ZIMMERMAN: Okay, 14th is fine. 16:38:19  
19 MR. ROBINSON: I think I'm in a court 16:38:21  
20 hearing on the 12th and 13th, but I think I'll get 16:38:23  
21 out the night of the 13th. I'd like to be here. 16:38:26  
22 THE COURT: So the 14th is good? 16:38:28  
23 MR. ROBINSON: Yes, Your Honor. 16:38:30  
24 THE COURT: All right, we'll change it to 16:38:30  
25 the 14th. 16:38:31

1 MR. BECK: Thank you, Your Honor. I 16:38:32

2 appreciate the accommodation. 16:38:33

3 THE COURT: All right. Well, do you still 16:38:36

4 wish to meet with me in chambers? 16:38:37

5 MR. ZIMMERMAN: (Nods in affirmative.) 16:38:39

6 THE COURT: All right, let's take a -- this 16:38:40

7 status conference is adjourned. Let's meet in five 16:38:43

8 minutes in chambers. 16:38:46

9 (Hearing concluded at 4:40 p.m.)

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1 REPORTER'S CERTIFICATE

2 I, Patrick J. Mahon, Court Reporter, do  
3 hereby certify that the foregoing transcript is a  
4 true and correct transcript of the proceedings in  
5 the above-entitled matter.

6

7

8

9 REPORTER'S CERTIFICATE: \_\_\_\_\_

Patrick J. Mahon

10 Court Reporter

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