

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: Baycol Products Litigation) File No. MDL 1431
)
) 2:00 p.m. o'clock
) June 13, 2002
) Minneapolis, MN
)
)

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

APPEARANCES:

ON BEHALF OF THE PLAINTIFF: CHARLES ZIMMERMAN, ESQ.
RICHARD LOCKRIDGE, ESQ.
ROBERT SHELUQUIST, ESQ.
RONALD GOLDSER, ESQ.

ON BEHALF OF THE DEFENDANT: PETER SIPKINS, ESQ.
KRISTINE BOYLAN, ESQ.

(BY TELEPHONE): ASA GROVES, JOHN CLIMACO, ALAN JONES,
SUSAN WEBER, FRED MAGAZINER, ADAM HOEFLICH, BILL AUDET,
ELIZABETH CABRASER, RICHARD ARSENAULT, JEAN GOEPPINGER,
DIANNE NAST, KENNETH MOLL, SONJA KINRA, FRANK O'HERA,
JACKIE MOEN, WILL KEMP

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1 (Court Reporter's note: Because of the telephone
2 conferencing of a number of the attorneys, hearing what was
3 said by attorneys on the telephone became difficult in many
4 instances.)

5 THE CLERK: Multi-District Litigation File No.
6 1431. Please state your appearances for the record.

7 MR. ZIMMERMAN: Charles Zimmerman, Your Honor,
8 for the Plaintiffs Steering Committee.

9 MR. LOCKRIDGE: Richard Lockridge for the
10 Plaintiffs.

11 MR. SHELQUIST Rob Shelquist for the Plaintiffs.

12 MR. GOLDSER: Ron Goldser for the Plaintiffs.

13 MR. SIPKINS: Peter Sipkins for the Bayer
14 defendants, Your Honor.

15 MS. BOYLAN: Kristine Boylan for the Eckerd
16 Corporation, Your Honor.

17 THE COURT: Welcome. Mr. Zimmerman. Could we
18 have an announcement of the people that are on the phone.

19 MR. ZIMMERMAN: We have a list or do you want
20 them to go around themselves. We have a list.

21 THE COURT: Let's read the list and make sure
22 that they are on the line and not disconnected.

23 THE CLERK: On the line we should have Alan
24 Jones, Mr. Jones; Susan Weber, Susan Weber.

25 MS. WEBER: Yes, this is Susan Weber.

1 THE CLERK: Alan Jones.

2 MR. JONES: Yes.

3 THE CLERK: Fred Magaziner

4 MR. MAGAZINER: Yes.

5 THE CLERK: Adam Hoeflich.

6 MR. HOEFLICH: Here.

7 THE CLERK: Bill Audet. Elizabeth Cabraser.

8 MS. CABRASER: Yes, here.

9 THE CLERK: Richard Arsenault. Dianne Nast.

10 MS. NAST: Here.

11 THE CLERK: Ken Moll.

12 MR. MOLL: Here.

13 THE CLERK: Sonja Kinra.

14 MS. KENRA: Here.

15 THE CLERK: Frank O'Hera; Nancy Moen.

16 MS. MOEN: Jackie Moen, yes.

17 THE CLERK: Will Kemp.

18 MR. KEMP: Here.

19 MR. ZIMMERMAN: Try Richard Arsenault. See if

20 he's there.

21 THE CLERK: Richard Arsenault.

22 THE COURT: What about Jean Goeppinger.

23 MS. GOEPPINGER: Here.

24 THE COURT: Is Asa Groves on the phone? Asa

25 Groves. Was he hooked up?

1 THE CLERK: He was supposed to be.

2 THE COURT: John Climaco.

3 MR. ZIMMERMAN: I believe, Your Honor, he's in a
4 hearing in Cleveland, and he was going to try to get on the
5 line as this hearing ended.

6 THE COURT: Let's proceed.

7 MR. ZIMMERMAN: Thank you, Your Honor. Charles
8 Zimmerman for the Plaintiffs Steering Committee. First
9 off, I want to thank the Court for allowing this conference
10 to take place by telephone conference call and in your
11 presence in the courtroom today. I'd ask the Executive
12 Committee of the Plaintiffs Steering Committee if they
13 could to be present by conference call and not come to
14 Minneapolis. And I believe they are present now by
15 conference call, and also true for most of the defense
16 counsel except local defense counsel. Correct?

17 MR. SIPKINS: That is correct.

18 MR. ZIMMERMAN: So, thank you, Your Honor, for
19 that. And I also want to thank everyone on the court staff
20 and the Court for the New Orleans conference. Just being
21 present and being part of it I think was exciting and very
22 positive, and I just publicly want to thank the Court for
23 sponsoring it and also for all the court personnel that was
24 so helpful in taking a lot of time and effort to put that
25 together. And I really mean that and thank you very much

1 for that effort. I know it was a lot.

2 We are here today with a joint report to the
3 Court. This is Joint Report No. 1 of the Plaintiffs'
4 co-lead counsel and Defendants' liaison counsel. I believe
5 it was provided to the Court approximately a day ago.
6 There really aren't any changes to it. We can go through
7 it and answer any questions.

8 There are a couple of matters, though, however, I
9 would like to comment on with regard to it, and then there
10 has been one issue that's come up just recently today that
11 has to do with PTO 25 that I would like to raise with the
12 Court and see if we could make some progress on trying to
13 resolve where the differences of beliefs and opinions are
14 with regard to interpretation the of PTO 25 and some of the
15 developments in Texas.

16 So, if that's okay with defense counsel, defense
17 liaison counsel, I think we can say on the No. 1, the
18 update on the rolling document production, that that is
19 actually going quite smoothly under the circumstances.
20 That is a lot to do, but it seems to be going along
21 according to schedule and according to plan. So, we're
22 very happy with that and we have a very up and running and
23 very organized and very committed document production from
24 both sides going on, and I don't see any particular
25 problems at this time with that end of the -- with that

1 phase of the litigation.

2 With regard -- any comments?

3 MR. SIPKINS: If I have any objections or
4 comments, I will simply state them, Your Honor.

5 MR. ZIMMERMAN: With regard to medical records,
6 PTO 11, the joint report, is correct. There is work going
7 on in that regard under the direction and control of
8 Special Master Haydock who continues to preside over the
9 construction of the wall as envisioned by PTO 11. I
10 believe that is proceeding as it should and according to
11 plan. I believe there will be some discovery that either
12 has gone out or will go out with respect to some issues
13 pertaining to issues that were raised with regard to the
14 arguments in PTO 11 that gave rise to PTO 11, and that will
15 go on according to schedule and I don't believe there is
16 anything we need to discuss at this time with the Court.

17 With regard to No. 3 --

18 THE COURT: Let's hear from defense.

19 MR. SIPKINS: Again, Your Honor, I have nothing.
20 Susan Weber, do you have anything with respect to PTO 11?

21 MS. WEBER: No, I don't. Thank you.

22 MR. ZIMMERMAN: With regard to class
23 certification briefing, I think Mr. Shelquist and Mr.
24 Lockridge told me this morning that we have some issue with
25 regard to whether or not we can have the additional time we

1 needed or wanted and there is some negotiations going on.
2 I would like to have Mr. Lockridge briefly comment on that
3 because this is an area that he's taken control of.

4 MR. LOCKRIDGE: Very briefly, Your Honor. As
5 Your Honor is aware, we had planned to file some
6 supplemental papers on the 15th of June. We had entered
7 into an understanding with the Defendants that we could
8 have a 90-day extension subject to the approval of the
9 Court. There was a small snafu with that yesterday and
10 this morning and Defendants have -- we have agreed to a
11 30-day extension for further filing, moving all the
12 deadlines out 30 days.

13 There are a number of reasons for this, not the
14 least of which -- we are reexamining some of our briefing
15 based on a couple of decisions, including Judge Fallon's
16 decision in Propulsid that he issued just a few days before
17 the federal/state conference. So, if I may, Your Honor, I
18 have a stipulated order, and I would like to hand it up to
19 the Court.

20 THE COURT: You may.

21 MR. SIPKINS: Your Honor will recognize my
22 signature is on that stipulation and Defendants do agree to
23 the 30-day filing of all the dates that are reflected in
24 that stipulation.

25 THE COURT: Mr. Lockridge, when did you sign this

1 so I can put your date in?

2 MR. LOCKRIDGE: Today, Your Honor. Thank you.

3 MR. ZIMMERMAN: The 30(b)(6) deposition regarding
4 corporate -- excuse me, and other depositions -- regarding
5 corporation and other depositions, as the report indicates,
6 Your Honor, we do have a bit of a problem with what
7 occurred at the June 4th and 5th 30(b)(6) deposition. And,
8 frankly, I believe that John Climaco and/or Richard
9 Arsenault were going to be commenting on that. But we are
10 attempting to negotiate a resolution with regard to the
11 issue of the person who is put up by the Defendants in this
12 30(b)(6) context. We are really not knowledgeable at all
13 of the information requested. So, there was a disconnect
14 with regard to what we could achieve and what we had hoped
15 to achieve with regard to that deposition.

16 I was not in attendance. As you know the dates
17 coincided with the beginning of our conference in New
18 Orleans, and, so, I was hoping that Richard Arsenault and
19 John Climaco, who were both present and took those
20 depositions perhaps could comment, but I think the report
21 indicates we can work that out.

22 MR. ARSENAULT: Bucky, I'm here and I'm prepared
23 to visit about that briefly if the Judge allows that.

24 THE COURT: Please.

25 MR. ZIMMERMAN: Okay, go ahead, Richard.

1 MR. ARSENAULT: Your Honor, this is Richard
2 Arsenault and John Climaco and I participated in that
3 30(b)(6) deposition. This was in a group of 30(b)(6). The
4 first 30(b)(6) addressed essentially information technology
5 issues, and that took place over a two-day period and was
6 completed. This 30(b)(6) dealt with corporate structure
7 issues that we were interested in and had notice. And the
8 deponent designated by Bayer to respond to our 30(b)(6)
9 inquiries, the second tier human relations person, and
10 while I think she was as cooperative as she could be, she
11 in her testimony indicated to us that there were other
12 people that were obviously more knowledgeable about this
13 than her. And our position is that she probably wasn't the
14 right designee for corporate structure issues.

15 Having said all of that, she has now identified,
16 or she identified during her deposition people that we
17 should be able to depose and should be designated as
18 corporate representatives.

19 The statements Mr. Zimmerman made are correct.
20 We are currently in negotiations with defense counsel in an
21 attempt to have someone else designated for these corporate
22 structure issues. Hopefully, we'll be able to work that
23 out shortly and not bother Your Honor with the details
24 associated with that.

25 MR. SIPKINS: Your Honor –

1 MR. HOEFLICH: Your Honor, this is Adam Hoeflich.
2 We are trying to work this out. It's my understanding that
3 Bayer put forward somebody who was knowledgeable to testify
4 about the corporate organization of the company where the
5 Plaintiffs tried to get into the particulars of departments
6 to a level that 30(b)(6) representative would be expected
7 to know. And, of course, there are people in each of those
8 departments who would have more particularized knowledge.
9 Many of those people's depositions have been noticed.

10 We want to cooperate with the Plaintiffs and get
11 the discovery. We believe there were appropriate ways to
12 do that and we are hoping to have a compromise that will
13 allow them to get the information they need in a way that's
14 fair to Bayer so we can try to prove this --

15 THE COURT: Continue on with your efforts to
16 resolve those issues.

17 MR. HOEFLICH: I'm sorry, Your Honor, I could not
18 hear you.

19 THE COURT: I said continue on with your efforts
20 to resolve those issues. If not, we will have to come
21 back. Mr. Zimmerman.

22 MR. ZIMMERMAN: Your Honor, this may be a good
23 time to move into one of the issues that have arisen in the
24 last few hours with regard to cross noticing, PTO 25 and
25 the Texas Judge Davis Texas order. Otherwise, I can put it

1 at the end because I know there will be a lot of
2 conversation around it by Mr. Arsenault and myself, and I
3 believe Susan Weber and others. So, either we dovetail
4 into that now because it does have to do with depositions
5 and MDL coordination, or we can go through the other issues
6 on the agenda and come back to it, whatever the Court
7 decides.

8 THE COURT: Let's finish up with the easy issues
9 and then we can deal with that at the end.

10 MR. ZIMMERMAN: There are several pending remand
11 motions and I think those are being dealt with, as I
12 understand it, on the briefs by the Court, and I don't
13 believe anything further needs to occur at this time, but I
14 know they are pending, and my understanding is they are
15 being dealt with on the briefs or if the Court wants
16 argument, you are notifying us.

17 THE COURT: That is correct.

18 MR. ZIMMERMAN: Number 6 on the Joint Report,
19 Your Honor, is the motion of Plaintiffs to allow 50
20 plaintiffs on one complaint. We advised the Court, I
21 believe in the April conference, Mr. Becnel, that we were
22 going to file that motion. We filed it in May, and I
23 believe the Defendants oppose it in whole or in part. That
24 is, they may agree to a complaint with more than one, but
25 they may not agree with it all the way to 50. We highly

1 support 50. We believe it's appropriate under the
2 circumstances for all the reasons we could articulate it
3 when we hear it on argument. My understanding is that the
4 Defendants want to brief it and then it will be ripe for
5 argument at the next status conference in July.

6 So, rather than go into it now, I think we just
7 agree that a brief will be filed and then we will hear
8 argument on it at the July conference.

9 I might add, however, Your Honor, that I do
10 believe certain complaints are being filed with multiple
11 plaintiffs attached to it, and I guess the Court will then
12 rule on it and then relate back as it might need to with
13 regard to those complaints that are already on file.

14 MR. HOEFLICH: Judge, the only thing I would add
15 is that the complaint filed in the Philadelphia court and
16 according to the regular practice in federal court. We are
17 going to address the brief. We are going to do everything
18 we can to make adjustments and ease the burden on the Court
19 and work with the Plaintiffs to work out something that
20 would be acceptable.

21 MR. ZIMMERMAN: Adam, do I understand that we
22 should be talking about this between us in the next few
23 days or weeks before the July conference there may be some
24 room for agreement?

25 MR. HOEFLICH: Why don't we talk as soon as you

1 see our brief.

2 MR. ZIMMERMAN: Okay. Very good. When might
3 that be?

4 UNIDENTIFIED SPEAKER: (By telephone) Our
5 response brief is due next week.

6 MR. ZIMMERMAN: Okay. So, your brief will be
7 filed sometime next week.

8 UNIDENTIFIED SPEAKER: (By telephone) Yes.

9 MR. ZIMMERMAN: Okay. And then we'll talk after
10 that?

11 UNIDENTIFIED SPEAKER: (By telephone) Yeah.

12 MR. ZIMMERMAN: Next, Your Honor, No. 7, No. 7
13 is the Plaintiffs' motion for administrative closure. I
14 believe that is a similar posture, and, again, without
15 going into any specifics which I don't think are required
16 right now, Defendants oppose. They want to brief, and I
17 believe it will be heard at the next status or the one
18 after that.

19 UNIDENTIFIED SPEAKER: (By telephone) Our
20 responsive brief is due next week. It will be ripe for
21 consideration at the --

22 MR. LOCKRIDGE: Susan, this is Dick Lockridge.
23 Your Honor, we at one time talked about trying to get a
24 special date from the Court.

25 THE COURT: You will be able to get a special

1 date for that.

2 MR. LOCKRIDGE: Thank you. Susan, you and I can
3 talk about that after this conference once you get your
4 brief in, okay.

5 MS. WEBER: That would be fine.

6 MR. ZIMMERMAN: I'm sorry, Your Honor, that was
7 in the report. I missed that. It was going to be set for
8 a special hearing and I apologize.

9 Third-party payor lawsuit which is No. 8. Just
10 as a matter of background, Your Honor, I had been contacted
11 by two groups of what we call third-party payor counsel.
12 One group I'll say is the Chimeclies (phonetic) group, for
13 lack of a better word, Nick Chimeclies (phonetic) law firm
14 is heading that group along with Bernie Persky of the Good
15 Kind firm and a couple of other east coast lawyers who have
16 third-party payor claims.

17 They have filed their case in the state courts in
18 Pennsylvania. We had a meeting in Chicago where we
19 discussed coordination and cooperation with the MDL or the
20 possibility that they might file a case or cases on behalf
21 of insurance companies and pension funds in the MDL. Those
22 discussions have not been concluded, but they have been
23 very friendly and cooperative. And I think we can report
24 to the Court that they do want to coordinate and cooperate
25 their discovery in the state court with this MDL.

1 However, at the same time as those discussions
2 were taking place, a Mr. Joe Warshawsky and Mr. Sadin, I
3 believe his name is Sadin, S-a-d-i-n, of an Albuquerque,
4 New Mexico firm, had contacted me about filing a
5 third-party complaint in the MDL, or in the federal court
6 and transferred to the MDL. I believe it was actually
7 filed in this court. And they did, in fact, file in this
8 court, and I believe that may have hit your docket. So
9 there is this third-party claim by the Warshawsky firm.
10 It's entitled Allied Services Division Welfare Fund versus
11 Bayer AG, et al., which is now formally in the MDL, which
12 has a similar third-party payor claim.

13 I've been in touch with Mr. Warshawsky this
14 morning. He's asked if he can be appointed as lead counsel
15 for the third-party payor class. I have told him that the
16 PSC does not have a position on that yet, we are going to
17 have to form a position. I told him I was going to advise
18 the Court that we would ask the Court to defer ruling on
19 that until we could take a position with regard to that
20 appointment and until we could evaluate where the
21 third-party payor claims should or should not be with
22 regard to the MDL, and talk more with the Chimeclies
23 (phonetic) group about how we might coordinate all the
24 third-party claims, whether they be in state or federal
25 court or both.

1 I'm happy, however, to report that there does
2 appear to be a high degree of interest in cooperation and
3 coordination.

4 There is an issue with regard to assessments
5 which we have not been able to reach agreement on which we
6 will continue to discuss. So, I would ask that if we can
7 kick the appointment of lead counsel at least over to the
8 July conference, I would then ask Mr. Warshawsky or anyone
9 else who has an interest in that to be present and we can
10 take it up at a time and I expect we will have additional
11 discussions with the third-party payor people before that
12 conference so the PSC can take a position with regard to
13 that claim. I don't know what the position of defense
14 counsel is at this time because this really hit the docket
15 within the last few days.

16 MR. HOEFLICH: Your Honor, this is Adam Hoeflich.
17 I have worked with Mr. Warshawsky before. I was involved
18 in a case where both he and Mr. Persky worked together and
19 there were different plaintiffs' groups. We don't have a
20 position at this time with respect to the liaison counsel
21 for the third-party payor action. Under 182 I would note
22 we take real issue as to whether third-party payors have
23 standing. (Unintelligible).

24 THE COURT: All right. The Court will defer this
25 until the July status conference.

1 MR. ZIMMERMAN: That brings to us the end of the
2 written agenda and status report.

3 THE COURT: Let's move to the expansion of the
4 Plaintiffs Steering Committee.

5 MR. ZIMMERMAN: Okay. With regard to that issue,
6 Your Honor, I've been contacted by a number of people who
7 have indicated to me a willingness to participate in the
8 MDL, and a willingness to bring large groups of cases into
9 the MDL, and the desire on their part to have a position on
10 the MDL, and in some cases on the MDL, Plaintiffs Steering
11 Committee and the Executive Committee.

12 I have committed to them that I wanted to meet
13 and talk to them myself. And notwithstanding whatever the
14 Court wants or chooses to do, but in terms of making a
15 recommendation from the Plaintiffs Steering Committee that
16 I would talk to them. And these are groups of some fairly
17 major players in New York, in Alabama, in Texas and in
18 California. I have not been able to do that yet, although
19 I have had conversations of length with a group in
20 California -- excuse me, a group in New York who have
21 indicated to me a desire to learn more about what we might
22 have in mind and try and negotiation some kind of an
23 agreement.

24 They, quite frankly, were very interested in the
25 outcome of the 50-plaintiff complaint which I said I

1 thought would not be heard until the July conference, but
2 that I thought there was some room for agreement by
3 Plaintiffs and Defendants so that may not even have to be
4 heard in July and we may have an agreement on the
5 multi-party complaint. It was important to that group that
6 there be a multi-party complaint because of the nature of
7 the claims they had and the numbers. They purported to
8 have many -- several hundred Rhabdo cases in their -- in
9 their office and many more that they were -- many more
10 potential serious cases that they were looking at.

11 This is a firm that I have worked with before on
12 well, I guess, on Plaintiffs Steering Committee but who I
13 have known from other litigation, and I have a great deal
14 of respect for. I don't know if it would be appropriate,
15 if you want I can disclose it, but I don't think it would
16 be appropriate at this time given the fact that it's very
17 preliminary.

18 I know some other people have had conversations
19 with some major players, major plaintiffs' attorneys in
20 Texas. I have had some further discussions with a major,
21 major plaintiffs' attorney in Alabama, and I know that I
22 have some meetings set up in California.

23 So, all I can report to Your Honor is, although
24 I'm very much in favor of expanding the Plaintiffs Steering
25 Committee, and I'm very much in favor of reaching out for a

1 state and federal liaison committee that takes into
2 consideration the reality of where the cases are and who
3 controls them, I would like to have a full airing and a
4 full discussion of that strategically with the Court or
5 anyone who wants to participate so we make sure that
6 whatever additions we make are done with the best interest
7 of the litigation in mind.

8 THE COURT: All right. Anything further?

9 MR. HOEFLICH: We are well in favor of your
10 referring people to join the MDL and coordinate with you
11 with respect to all the issues of the parties in the
12 complaint is an issue of ease of burden on the federal
13 court. And that is something we definitely want to do. We
14 don't know that a third-party complaint is necessary to
15 burden the Court, and I think that would be in line here.

16 THE COURT: All right. We will move to the next
17 issue that's dealing with the --

18 MR. CLIMACO: Judge Davis, this is John Climaco.
19 I had been on for a few minute. I'm sorry I didn't get on
20 earlier. In accordance, as my letter stated, I was in
21 another conference.

22 THE COURT: Well, welcome. We'll move on to the
23 next issue.

24 MR. ZIMMERMAN: I believe the next issue -- well,
25 there is one reporting issue, Your Honor, that I don't know

1 -- it's the Canadian report, and all I just want to say to
2 Your Honor is that that report was filed recently with Your
3 Honor. It's called the Plaintiffs Report on request of
4 Canadian class action for coordination with the MDL
5 proceedings. This document was filed with the court in --
6 and it states in it that there is a desire of the MDL --
7 excuse me, of the Canadian class action to coordinate
8 discovery with the MDL.

9 I believe the Defendants, at the time it was
10 filed, issued an objection to that coordination. It has
11 not been -- there is no motion pending. There was only the
12 desire of the Plaintiffs in Canada that it be filed and
13 that we can certainly discuss it with defense counsel and
14 see if there is any room for coordination. Or if not, then
15 it could be appropriately argued before the Court and taken
16 up at the appropriate time.

17 There is nothing pending at this time other than
18 the report as a matter of record, and I know that the
19 Defendants had an objection at the time it was filed.

20 MS. WEBER: Your Honor, we are preparing a letter
21 that responds to the report of the Steering Committee and
22 we expect to have that to you next week.

23 THE COURT: And if this matter cannot be resolved
24 between the parties, you can have a special date before me
25 to have this matter heard.

1 MR. ZIMMERMAN: Would you like this before or
2 after the July conference, or does it not really matter?

3 THE COURT: It really doesn't matter.

4 MR. ZIMMERMAN: Thank you.

5 THE COURT: I think we have accomplished a lot in
6 the last couple of weeks, and we have the holidays coming
7 up and I know that I will be --

8 MS. WEBER: Excuse me, Your Honor, I'm not able
9 to hear what you're saying.

10 THE COURT: Dealing with the hearing we are going
11 to have in July and any other special hearings that we
12 would have, I would suspect that they would be after the
13 July 9th hearing.

14 MR. ZIMMERMAN: Very good, thank you. By the
15 way, is that date --

16 THE COURT: Did you hear that, July, whatever it
17 is, July 11th.

18 MR. ZIMMERMAN: Do I understand that Your Honor
19 maybe in a different state, the July 11th hearing?

20 THE COURT: I'm trying to coordinate it to be in
21 California.

22 MR. ZIMMERMAN: So, tentatively, we can be of the
23 belief that it will be in the state of California unless we
24 otherwise hear?

25 THE COURT: That's correct.

1 MR. ZIMMERMAN: It's a big state. Are you
2 thinking of any particular --

3 THE COURT: Los Angeles.

4 MR. ZIMMERMAN: Your Honor, now I do want to
5 bring up a matter that Susan Weber and I have had brief
6 discussion on this morning. I believe I also talked to Mr.
7 Sipkins, but it's of tremendous concern to those on our
8 Committee that are faced with the assessment issue, the
9 coordination issue, the deposition protocol issue, and the
10 cooperation issue.

11 And this started with PTO 25 -- starts with PTO
12 25. And PTO 25 raised some questions, and legitimately so.
13 It raised the question, do people who are cross noticed
14 into the MDL, say by the Defendants, who cross notice a
15 deposition of a state proceeding, and they cross noticed it
16 with an MDL deposition -- excuse me, with an MDL
17 deposition, do they then become subject ipso facto to the
18 coordination and assessment order. And Susan Weber and I
19 have discussed this at length, and we felt that it would
20 not be necessary and would not be necessarily an absolute
21 condition that by simply cross noticing by the Defendants
22 that it would be a touchstone to the automatic attachment
23 of the assessment order.

24 And we made that compromise, not because it
25 hasn't been done so in many other MDL's, but because of the

1 state of the coordination landscape as we saw it. We felt
2 it was not an issue that we needed to make a have a make or
3 break issue on. We felt that other matters could be of
4 benefit to state court lawyers and state court claimants;
5 they would voluntarily want to come into the MDL by signing
6 a joint prosecution agreement, or we would go to that state
7 court and present the court with a coordination order so
8 that that state court could make an affirmative decision
9 that, yes, they wanted to coordinate and cooperate with the
10 federal Court and that would bring those proceedings before
11 that judge within the cooperation order and, therefore, the
12 assessment.

13 Well, that was a good theory, Your Honor, but as
14 we all know, sometimes theory and practice don't work. And
15 what happened is while we were trying to clarify that
16 order, and we came up with the amendment to PTO 25, two
17 orders got entered in California -- excuse me, in Texas in
18 what they called the Eighth Region. And John Climaco
19 brought this to my attention this morning when I got to the
20 office. I was actually out of town yesterday in Los
21 Angeles on another matter. As hard as that is to believe,
22 I did have another matter. And I got in this morning and I
23 got a series of phone calls about what the heck is going on
24 in Texas and how could I possibly agree not to cross -- not
25 to have assessments attached to cross notices. Once I read

1 this order I understood where they were coming from because
2 this order provides, the Texas order, provides that the
3 Court hereby orders, this is Paragraph C on Page 7, that
4 the Court hereby orders that Plaintiffs' access, that's the
5 Texas plaintiffs, access to use of or participation in any
6 MDL discovery will not result in the deduction of fees
7 earned from any settlement or judgment.

8 No MDL deposition will be cross noticed by Eighth
9 Region counsel unless there is a showing of good cause and
10 an order of this Court to that effect.

11 And it goes on to explain and amplify on that
12 issue, and it led to great problems that my people, when I
13 say my people, I mean the Plaintiffs Steering Committee
14 people who are out there in the field doing these
15 depositions were going to encounter. And it drew to my
16 attention perhaps the fallacy of my thinking, because if an
17 order like this can be issued by a state judge saying you
18 can use the MDL work product, you certainly don't have to
19 pay for the MDL work product. You don't have to
20 participate -- the MDL parties cannot participate in your
21 proceedings, but you can participate in them, and that kind
22 of order got legs in other jurisdictions, we would find
23 ourselves in a very difficult position where essentially
24 you will have the state courts trumping the federal courts
25 and the PSC and the MDL.

1 I called Susan, and Susan and I have gotten along
2 very well, and I have great respect for her as well as
3 everybody on the defense side. I wasn't able to reach her,
4 but I left her an e-mail saying, you know, PTO amendment
5 No. 25 is off the board. I got to bring this up to the
6 Court because if you wanted me to negotiate amendment to
7 25, you knew about this, this June 3rd and June 10th order,
8 we got a disconnect here that is making me very upset
9 because now what you are going to use as cross noticing
10 isn't necessarily the hook becomes a real gun to our head
11 by virtue of what other courts are doing with that notion
12 that cross noticing doesn't require participation.

13 Now, that sort of where it sits, and I have both
14 John Climaco and Richard Arsenault on the phone because
15 they -- I would like them to have the opportunity to tell
16 you the practical effect of this as they go out because
17 they have now tried to participate in the state of Texas
18 depositions in the Eighth Region and have been told they
19 can't come, they can't show up, they can't participate, and
20 they have been told that they can't even be there to
21 listen.

22 Now, that's untenable from the standpoint of the
23 MDL because now we have created the situation where the MDL
24 is having its tail wagged, if you will, by the state of
25 Texas Eighth Region. And if this becomes the order of the

1 day, it becomes a situation that we simply can't agree to.

2 And Richard or John.

3 MR. CLIMACO: Your Honor, this is John Climaco.

4 A lot of our position is set forth in the letter that I

5 faxed to you and I also faxed to you the two orders, the

6 June 3rd and June 10th.

7 Susan and I have talked over the last couple of

8 weeks about the issue of our cross noticing these four

9 depositions that are going to commence on Monday. Two

10 weeks ago today or possibly two weeks ago yesterday, she

11 asked me if I would accept her assurance that we would be

12 able to sit at the deposition as observers and when that

13 two-day deposition was completed, follow up with a one-day

14 deposition, she would assure us that could happen, but she

15 asked us if we would withdraw the cross notice so that when

16 her local counsel had to take that up with Judge Frank

17 Davis on June 3rd, they could avoid that issue. And I

18 agreed to that. And, now, we have been struggling to

19 obtain a copy of the June 3rd and the June 10th order.

20 Yesterday, I finally reached Ricky Brantley who

21 is, as my letter explains, one of the three liaison counsel

22 in the Eighth Region, and he is going to be the lead

23 questioner starting Monday in the deposition that Mr.

24 Arsenault will be attending and actually all of them. My

25 office will be handling Mr. Charn's (phonetic) deposition

1 that begins on Wednesday.

2 The issue then boils down to this. Brantley
3 starts out very irate saying, look, I don't know if I
4 should cooperate with you or even talk to you because you
5 are trying to get your hands in my client's pocket. Your
6 Honor, we are not trying to do anything or get any kind of
7 fee to which we aren't entitled to. He then referenced PTO
8 25. After we went back and forth a while he calmed down
9 and then we talked and he agreed that, okay, you are going
10 to be there on Monday or someone is going to be there and
11 we will see if we can work this out, et cetera, et cetera.

12 And he then agreed to fax me the two orders.

13 When I saw those orders, the June 3rd order
14 didn't surprise me as much as the June 10th order because
15 the June 3rd order was very close to what Susan indicated
16 to me was going to occur. The June 10th order, as I set
17 forth in my letter, was very disturbing. I did talk to Ed
18 Wizard (phonetic), who I have a long and a good
19 relationship with as a result of Salzer case, as many of us
20 do who are on the Baycol MDL.

21 We talked at length yesterday about working, more
22 cooperation. He wanted to know about the conference you
23 held last week, and we sort of honed up with this
24 understanding.

25 Number one, he said our concern, John, is number

1 one, we don't want to have to share fees; and, number two,
2 there is a good work product out. He said that now I
3 understand that you, Richard Arsenault and Turner Branch
4 are co-captains or co-lead counsel on the Discovery
5 Committee, I can represent to Brantley and others that I
6 have a comfort level that there will be a good work product
7 that experienced lawyers will be taking depositions, et
8 cetera, and we signed off with an agreement that we'll talk
9 further about this next Thursday in Philadelphia.

10 Shortly thereafter, I received a call from
11 Richard Arsenault, and I will just briefly touch on that
12 and he can touch on it, telling me that one of the other
13 lawyers who is going to be present in Philadelphia, and
14 that one called him, in essence, threatened him, that he is
15 a member of the Texas Bar, if he shows up on Monday, they
16 are going to call Judge Frank Davis and have him held in
17 contempt. Well, obviously, it was getting out of control
18 and we then had some meetings with Mr. Goldser and others,
19 and this morning we had the meeting that Bucky referred to.

20 After we brought Bucky up to date, he then sent
21 Susan the e-mail that he basically outlined to you. Susan
22 then contacted me, and we had a conversation, and she said
23 the June 3rd order was about along the lines, John, what I
24 had been telling you. I said, yes, what about June 10th,
25 and she said what was wrong with that? I read her the two

1 cited paragraphs in my letter to you, and I would have to I
2 definitely believe that she was surprised to hear that
3 language was included and also hear that a threat was made
4 and she said she was going to get ahold of her local
5 counsel and go to work on it. And that's all I know as of
6 this time.

7 And, Richard, I think you can be of help by
8 telling the Judge of your conversation with Lunde.

9 MR. ARSENAULT: Your Honor, I was on the phone
10 for a status conference yesterday, and I've been involved
11 in the activities last week in New Orleans with Your
12 Honor's conference there. I had not yet been made privy to
13 Pretrial Order No. 25. On my way home in transit in my
14 vehicle from New Orleans to Alexandria, I received a call
15 from Matt Lunde who apparently, as Mr. Climaco has
16 indicated, is working with that Texas crew. Matt inquired
17 as to what if anything I knew about Pretrial Order No. 25
18 and his assessments and so forth, and I said, Matt, I've
19 been out of the office for several days and I am unaware of
20 what that is. Whatever it is, we'll be allowed further
21 discussions about it.

22 What's going on with these depositions coming up
23 Monday and Tuesday, well, on May 23rd, we cross noticed --
24 pursuant to agreement we cross noticed four depositions,
25 Cheryl Kramer, (unintelligible) and we plan to monitor the

1 first two days, which we understand we have been allotted
2 to you, and then we plan to proceed with our own questions
3 for at least one day thereafter, which pursuant to
4 agreement will not be in -- will not be in any way
5 duplicative.

6 There was no immediate threat, and the discussion
7 with regard to contempt, I was concerned about being in
8 contempt when he brought to my attention that, you know,
9 this is going to be in violation of the court's order, and
10 I said what order would that be? Well, he said our state
11 court judge maintained that the MDL is prohibited from
12 cross noting these depositions. I said, Matt, I don't
13 understand how a state court Judge would have jurisdiction
14 to make any ruling that would have any effect on MDL
15 lawyers, and that smacks of all sorts of federal level
16 problems and could result in imposition of actions based on
17 (unintelligible) Act. We cross noticed these depositions
18 and I think we should be allowed to do so and I don't know
19 if any state court Judge has standing to order us not to
20 cross notice the deposition.

21 But having said all of that, I will pass this on
22 to our leadership and see what we can work out. I was not
23 directly threatened, but I was distinctly left with the
24 impression they were not anxious to have us participate in
25 their deposition. So they were certainly not interested in

1 participating in our depositions. I think, in fact, John
2 was told that we would need to make arrangements for our
3 own court reporter on the third day if that materialized
4 because as soon as they were done they were leaving and
5 they were leaving with their court reporter. John is that
6 correct?

7 MR. CLIMACO: That is absolutely correct.

8 MR. HOEFLICH: Judge, this is Adam Hoeflich. May
9 I share Bayer's perspective?

10 THE COURT: Go ahead.

11 MR. HOEFLICH: Thank you. (Unintelligible)
12 involved that's been set up either by lawyers or the by the
13 Court in Texas. We told the MDL lawyers Steering Committee
14 several weeks ago about the position taken in Texas and
15 Judge Davis about Texas's position as well. We don't --
16 we would prefer to put our witnesses up once rather than
17 three days we have set aside to give both the state lawyers
18 and the federal lawyers their day.

19 Regardless of our views or our preference, Bayer
20 would respectfully suggest that this is the wrong time for
21 the Court to intercede or impose the will of the Plaintiffs
22 or the Defendants in the MDL. We also think that in posing
23 a (unintelligible) which is inconsistent with PTO 25 or our
24 prior discussions with the PSC would work to our detriment
25 and in the long run be grievously harmful for our efforts

1 at coordination.

2 First, as the Court knows, we try very hard to
3 work this out. We spoke to Mr. Brantley two weeks ago and
4 spoke to him again today. Mr. Brantley has suggested to
5 the Defendants that he has no problem with Mr. Arsenault or
6 Mr. Climaco could go on the depositions. We are hopeful
7 that that is what happened and that raises no issue in
8 fact.

9 Mr. Lunde, Matt Lunde, is working with Dawn
10 Barrios. Dawn is the lawyer in charge of state and federal
11 coordination in the Propulsid and who has taken the exact
12 opposite approach here. She came to me at our conference
13 last week and told me she would like to coordinate with
14 Texas and not the MDL and wanted us to agree to that. She
15 is in front of Judge Gill Jefferson in a case right now and
16 it's Bayer's position she will not coordinate with the MDL
17 and she will not coordinate and what Mr. Lunde said is
18 consistent with the approach Bayer remembers and the
19 members of her team are pursuing. Mr. Lunde might move for
20 a contempt citation, but it strikes me as a real stretch
21 for any Judge to sanction a lawyer just for sitting in a
22 room.

23 I would note that the first Bayer deposition in
24 April I believe there was no lawyer. Mr. Lunde and I know
25 that.

1 Judge, while we would prefer that the MDL lawyers
2 attend the depositions, we don't think it's critical and we
3 certainly don't believe this would be a strategically wise
4 place to invoke or impose a (unintelligible). The MDL
5 lawyers can have the transcript at the end of the day. We
6 can certainly give that to them. They have their own day
7 of depositions which they are entitled to pursuant to the
8 orders we entered in this case early on. We have no
9 objections. They can do that, but, frankly, there is no
10 prejudice to the MDL .

11 We would suggest that the best course would be
12 the Court try to maintain the (unintelligible) position
13 that's allowing us to work with Judge (unintelligible) from
14 Philadelphia and some of the other folks so that they don't
15 have (unintelligible) on the MDL (unintelligible) and
16 Plaintiffs help us work at coordination. We think it would
17 be helpful if the Court spoke with Judge Gill Jefferson in
18 Louisiana at the appropriate (unintelligible) and the
19 lawyers in her court as to what Ms. Barrios and Mr. Lunde
20 are trying to do to in her coordination. We think it's an
21 appropriate topic of discussion (unintelligible) who came
22 to the conference last week.

23 We think that sort of tempered approach would be
24 more beneficial to all of us now, and if we are going to
25 try to treat it as an unfortunate bump in the road and try

1 to work it out.

2 We from the defense standpoint will do everything
3 we can to try to allow the members of the MDL to have any
4 depositions that take place to the extent they can.
5 Obviously, we are going to make witnesses available --

6 THE COURT: Well, this is Judge Davis. Adam, if
7 if your position is taken, certainly you can tear up the
8 agreement you have with the MDL Plaintiffs' lawyers because
9 I would want them to have as much time with those
10 deposition witnesses down in Texas as the Texas lawyers.
11 So, you tack on another three days because it's just not
12 going to end up with one day.

13 MR. HOEFLICH: I'm sorry, Judge Davis, I'm having
14 great difficulty hearing you.

15 MR. MAGAZINER: Your Honor, this is Fred
16 Magaziner. I also can't hear you.

17 THE COURT: Can you hear me with this microphone?
18 My immediate response to what Adam has said is that if it's
19 just a bump in the road down in Texas, that you are not
20 going to hold the PSC, Plaintiffs' lawyers, to one day of
21 depositions down in Texas. They are going to have to have
22 their time period with those witnesses expanded to at least
23 three days or a similar or more amount than Texas lawyers.
24 Mr. Zimmerman, I understand some of the issues --

25 MR. HOEFLICH: One of the lawyers is breathing

1 heavily into their phone and that is all that we're
2 hearing.

3 MR. ZIMMERMAN: Adam, I didn't get that order.
4 What did you say?

5 MR. HOEFLICH: One of the lawyers participating
6 by telephone is breathing heavily in the phone and that's
7 all we are able to hear.

8 MR. ZIMMERMAN: I think Judge Davis addressed the
9 question to me which was if we can't work this out, then
10 would it be acceptable or is it appropriate for the PSC to
11 have the same amount of time, if not more than the lawyers
12 in Texas. And we would take the position, consistent with
13 that, that we would send our own notice and we would take
14 these depositions either then or at another time, and that
15 clearly we need the opportunity as much as lawyers in the
16 state of Texas to do a complete and thorough job in the
17 deposition.

18 What is concerning to me is that perhaps this
19 order was issued in -- in the blind and people didn't know
20 -- didn't see it coming. But what's concerning to me is
21 that I had to find out about it from alternative sources.
22 I had to deal with it in reaction while I was presenting
23 the Court with what I thought was an agreed amendment that
24 I then had to pull back because of orders that been entered
25 in proceedings that I was not aware of with parties that

1 I'm in negotiations with that.

2 Now, I understand, Susan, that could have been an
3 oversight and mistake and I certainly accept that. But
4 maybe what we should consider doing here is trying to get
5 relief from this kind of an order or the Bayer -- the
6 Plaintiffs should intervene or Bayer or Bayer, as I now
7 understand AG is called, could and should take this on a
8 mandamus up to a higher court, because for the state of
9 Texas District Judge to put restrictions on their ability
10 to participate in -- our ability to participate or their
11 ability to use the MDL work product to me is hideous and
12 very difficult to work with, but if we don't go there,
13 certainly we've got to start from scratch and a clean slate
14 and we've got to have our right to depose, and that's going
15 to create some real inconvenience for the Bayer or the
16 Bayer witnesses.

17 MR. HOEFLICH: I think we have a
18 miscommunications, Bucky. First, I know that I told you
19 sitting in your office a few weeks ago that Judge Davis
20 said that depositions could be (unintelligible) on the MDL.
21 If there was any miscommunication, I apologize.

22 Second, Your Honor, you asked whether we needed
23 to prep our witnesses for three days (unintelligible). I
24 don't believe that would be appropriate. As the schedule
25 now stands and as we discussed it at the conference, we

1 were putting witnesses up for two days where the lawyers
2 from the states were coordinating in the MDL. We had no
3 objections for the lawyers of the Steering Committee
4 handling those.

5 At the end of two days, the lawyers from the MDL
6 would have their own one-day deposition. According to the
7 pre-trial orders in this case, the deposition pursuant to
8 federal rules which is seven hours, I don't think there is
9 going to be any problem with the MDL lawyers sitting
10 through the depositions. I don't think we can prevent that
11 or go before the court to prevent that. If for some reason
12 that would happen, the Plaintiffs' lawyers here would still
13 have the transcripts from the first few days and videotapes
14 from the first two days, and they will have an opportunity
15 to review those before they had their day in question. The
16 only difference would be whether the lawyers of the PSC
17 were in the room or out of the room.

18 We strongly favor their ability to be in the
19 room. We think that it shouldn't come down to politics of
20 the different groups of Plaintiffs' lawyers who sits in the
21 room. (Unintelligible) --

22 THE COURT: (Interrupting) Adam, this is Judge
23 Davis; Adam, this is Judge Davis; Adam, this is Judge
24 Davis. You have a difficult time understanding me. The
25 MDL PSC will lead and will have as much time as they want

1 dealing with these depositions, period. So, now the
2 question is how are you going to deal with the Texas Judge.

3 MR. ZIMMERMAN: John, I think the question is
4 addressed to Adam.

5 MR. HOEFLICH: I don't know the answer to that,
6 Your Honor. I know Judge Davis' order is we can't cross
7 notice with the MDL or force the Texas lawyers to
8 coordinate with the MDL. The obvious would be to try the
9 mandamus or give up on coordination. And we certainly want
10 to do everything we can to coordinate. I fear that if that
11 were to happen right now with the situation where the
12 lawyers in Texas agreed to coordinate with all the other
13 state lawyers, we would be in a position where --

14 THE COURT: I think it behooves the Defendants to
15 think through their position, understanding that this Court
16 will make sure that the Plaintiffs have all the time they
17 need to take the depositions they need to take regardless
18 of what happens in the state court.

19 MR. HOEFLICH: I understand that and appreciate
20 it --

21 THE COURT: And make sure that you understand
22 that this Court, when talking about coordination and
23 cooperation will only go so far. And this order by Judge
24 Davis, if known by the Defendants, should have been
25 transmitted to the Plaintiffs and also to the Court before

1 this hearing this afternoon.

2 MS. WEBER: Your Honor, if I may speak to one of
3 the issues here. Bucky has expressed concern that this
4 order has the effect of giving the Texas Plaintiffs access
5 to the MDL work product, and I don't think that that's an
6 accurate interpretation. I think that it simply provides
7 that there would not be an MDL assessment that would be
8 applicable to the Texas state court proceedings. I think a
9 lot of the skirmishing we had in the last twenty-four hours
10 is the function of the ambiguity in Pretrial Order No. 25
11 as originally entered because our local counsel had
12 communications with Ricky Brantley who is the one that
13 noticed the Texas deposition, and he said that he thought
14 that the reason that Richard was getting that from Matt
15 Lunde was that they were concerned that the presence of the
16 MDL lawyers at the deposition would make that deposition
17 subject to the MDL assessment.

18 So, I think that a lot of confusion that they are
19 deriving in the coordination would simply be resolved by
20 entering the amendment to Pretrial Order No. 25 which says
21 very clearly that work product between the MDL and state
22 court Plaintiffs would not subject the state court
23 Plaintiffs to the MDL assessment. And I think that's --
24 that is a lot about what the problem is here.

25 The language of the specific order that was

1 entered here on Monday, which we did see for the first time
2 today, this is the standard that Judge Davis entered in all
3 mandatory cases. The Plaintiff or who coordinated
4 discovery here and Plaintiffs Steering Committee has been
5 agreeable to this approach is that if the Texas deposition
6 gets scheduled on day one and day two, the MDL Steering
7 Committee would then be able to attend to that and Ricky
8 Brantley assured us, and this is with the previous
9 agreement with both me and our local counsel in Texas, that
10 the Steering Committee would be able to attend. And the
11 Steering Committee would then have a subsequent day to take
12 their deposition --

13 MR. ZIMMERMAN: Susan, I think the problem you
14 have is just what you stated. We get the privilege of
15 attending a Texas state court's deposition, and then we
16 have the right to ask cleanup questions for the last day of
17 that deposition. Now you think about that and tell me if
18 that is what is consistent with what Judge Davis -- the
19 Honorable Judge Davis of this Court said, which is the MDL
20 PSC will lead and have as much time as they need.

21 MR. HOEFLICH: I do not believe --

22 MR. ZIMMERMAN: Excuse me, Adam, that is not
23 going to fly because now you have put us in the back of the
24 train, and nobody can lead this litigation, and no one can
25 do the kinds of things this Court is trying to do and this

1 PSC is trying to do from the back of the train, and that's
2 where you are seeing us --

3 MR. HOEFLICH: I believe in many of the
4 depositions the MDL will go first. I believe in our
5 meeting Mr. Chesley told us he wanted to go second in many
6 of the depositions. And, Your Honor, I apologize, but I
7 thought in our letter to the Court in advance of the
8 conference we had told that you that Judge Davis and his
9 staff had entered an order as far as cross noticing
10 depositions in the MDL. I apologize we didn't make that
11 note to you. I thought we put that in our letter. There
12 is no intention to put the MDL at the back of the pack. We
13 have broken our back trying to place it in the front.

14 UNIDENTIFIED SPEAKER: Why has it taken the MDL
15 co-chairmanship on the Discovery Committee this long to
16 even get a response as to the deposition that Douglas
17 (unintelligible) racked up in his power point a week ago
18 tomorrow as to which one, are we going first on, which one
19 you're talking about, the state goes the first time. So,
20 it hasn't been that cooperative. And I only agreed on
21 behalf of the PSC that with these four depositions we would
22 do it this way as an accommodation. And that's why I
23 became so upset yesterday.

24 What I wanted to add, Your Honor, is this. Arnie
25 (unintelligible) told Dianne Nast, a member of the PSC, a

1 few days ago we have taken care of the PTO 25 because we
2 have been assured by defense counsel that they will
3 accommodate us. And I believe if the amendment to PTO 25
4 is signed by you today, the plan of the state lawyers is to
5 attempt to have Judge Ackerman do some language in an order
6 similar to the June 10th Texas order, and they are going to
7 move that around the country because they look at that as
8 an effort and an ability to move ahead of the MDL. And
9 that's why I used the language in my order that if the
10 amendment goes into effect, the MDL is going to be
11 jeopardized. And for this Judge to issue that order on the
12 Monday after your conference is astonishing. And then for
13 the Defendants not to put us on notice that it was entered.

14 MS. WEBER: That order contains specific terms on
15 discovery with the prohibition of cross noticing that we
16 believe that Judge Davis of Texas was going to enter --
17 that he would enter it from the Bench.

18 UNIDENTIFIED SPEAKER: The June 10th order was
19 much broader than June 3rd.

20 MS. WEBER: With respect to cross noticing of
21 depositions, the June 10th provides that they would not be
22 cross noticed with the MDL or the state court
23 (unintelligible) agreement with the Plaintiffs' liaison.
24 So, the difference between this order with respect to
25 notice of deposition and the June 3rd order concerns the

1 state court cross notice.

2 The other provision is that it does seem to be
3 avoiding MDL (unintelligible) their counterpart of the
4 protective provision which I believe is in third paragraph
5 of Proposed Amendment of Pretrial Order No. 25 which would
6 provide that no one gets their hands on MDL work product
7 unless they officially (unintelligible) with the MDL.

8 MR. MAGAZINER: Your Honor, this is Fred
9 Magaziner. I represent GSK (unintelligible). May I make
10 an observation.

11 THE COURT: You may.

12 MR. MAGAZINER: Thank you, Your Honor. As I
13 understand the situation, the Steering Committee, I
14 believe, with the four depositions to be taken, four Bayer
15 witnesses could be handled by having the Texas two days of
16 questions while the MDL PSC lawyers were present at the
17 depositions. Afterwards, the MDL PSC lawyers would be
18 entitled to the third day of depositions. The Steering
19 Committee agreed to that. There then became some issue
20 about whether the Steering Committee would, in fact, be
21 permitted to attend the first two days, and we have
22 assurances today that the Steering Committee will, in fact,
23 be permitted to attend those first two days. If, In fact,
24 a Steering Committee representative did attend those first
25 two days of depositions and they were then permitted to

1 conduct a third day of depositions, what will happen will
2 be exactly what happened when the Steering Committee had
3 agreed to with respect to the (unintelligible).

4 That being so, I don't think it an appropriate
5 time to consider (unintelligible) as agreed to and there
6 would be no problem with respect to these four and perhaps
7 the parties could go back (unintelligible) and figure out
8 what the true issues are (unintelligible) and present to
9 Your Honor the reason why what their positions are and what
10 their position needs to be.

11 MR. ARSENAULT: Your Honor, this is Richard
12 Arsenault. May I briefly respond?

13 THE COURT: You may.

14 MR. ARSENAULT: Thank you, Judge. The problem
15 is a little more serious than that. Apparently, we have
16 noticed pursuant to agreement, and more particularly, cross
17 noticed the four deposition and everything was moving along
18 pursuant to agreement until yesterday when for the first
19 time I'm looking at an order from a Judge, albeit a state
20 court Judge, prohibiting what we did. We cross noticed a
21 deposition, and I'm looking now at a court order from a
22 state court Judge prohibiting that.

23 Now, the fact that Adam or some other counsel for
24 Bayer is saying we don't need to comply with that or it's
25 okay for us to be there, notwithstanding a Judge's order,

1 that's not terribly comforting. I think Your Honor is
2 talking jurisdiction here which, quite frankly, it makes me
3 uncomfortable to have a cross notice of a deposition when
4 any Judge prohibits that and some lawyer in a different
5 proceeding is saying, that's fine, you can still go. It's
6 very troubling to me, Your Honor.

7 MS. WEBER: Your Honor, I specifically discussed
8 when the cross notices came out from the MDL of these
9 depositions, and I had a conversation with John Climaco
10 that the notices of the depositions were inconsistent with
11 what I think at that time was a bench ruling of Judge Davis
12 in Texas. And John agreed that they would not formally
13 proceed on a cross notice basis to avoid a confrontation in
14 the Texas state court at that time if they could attend the
15 deposition, which they can do.

16 I would also, you know, address --

17 UNIDENTIFIED SPEAKER: Let's deal with that. I
18 did that as an accommodation to you because you did not
19 want to have to face that issue on June 3rd before Judge
20 Frank Davis. That's why I did it. It was only for these
21 four. It was based on your assurance that, number one, I
22 would see eventually an order issued by him which I did not
23 other than getting it from Brantley yesterday, and there
24 was true assurance (unintelligible). We want to be
25 assured. With all due respect to him and due respect to

1 you and Adam, you don't have the authority any longer to
2 give us that assurance. The only person on this call that
3 has this authority is Judge Michael Davis. And somebody
4 ought to tell Judge Frank Davis that simply because F comes
5 before M in the alphabet, he doesn't run the MDL.

6 MS. WEBER: Your Honor, if I can continue. We
7 also negotiated Pretrial Order No. 22, and I don't know if
8 there is a copy of that handy to the Court. This was an
9 order entered by agreement with the Steering Committee
10 which specifically provided we would notify the MDL
11 Plaintiffs of any state court depositions because they
12 specifically stated they wanted to observe it and attend
13 depositions they would not be participating in which we
14 thought was an unusual procedure. But we agreed to that in
15 order to facilitate coordination. We agreed that the
16 testimony in the state court depositions would be taken in
17 the MDL proceedings. That -- you can cross notice any
18 state court deposition in the MDL except, if it was
19 prohibited in a state court order or rule --

20 UNIDENTIFIED SPEAKER: State court ruling,
21 because I have the language, specifically directed to the
22 PSC because I didn't want -- because I said from the
23 beginning that Judge Frank W. Davis's order is an order
24 against you. The PSC, part of the MDL, was not before
25 Judge Frank Davis, and that's why I added the qualifying

1 language which you instructed that we can't cross notice if
2 there is a specific order against us. That is an
3 enforceable order. And the order by Frank W. Davis may be
4 enforceable against you, it's not enforceable against us.

5 But I'm not going let Richard Arsenault, a Texas lawyer, be
6 held in contempt starting Monday. I don't trust the state
7 lawyers because their objective is to destroy the federal
8 MDL.

9 MR. HOEFLICH: John, how do you expect us to keep
10 coordination together if we mandamus the Texas Judge. I
11 think there is a (unintelligible). And I don't think that
12 would be the effect of the approach here. I think we have
13 to work through the channels that have been set up.

14 We told you weeks ago that Judge Davis entered
15 that order. There is no secret --

16 UNIDENTIFIED SPEAKER: That's all I was told was
17 that it was something he commented on from the bench, and I
18 would be given a copy of the order when it was ordered. It
19 came out on June 3rd. This is June 13th, ten days later.
20 All of you knew about it a week ago today. A week ago
21 tomorrow when we were in New Orleans and none of you
22 brought it to my attention or to Bucky's attention or to
23 Judge Michael Davis's attention that was an order of the
24 court, otherwise we would have done something.

25 MR. HOEFLICH: The Plaintiffs specifically said

1 (unintelligible) Judge Davis cross noticing of depositions
2 of the MDL. I have said it on several occasions. That was
3 one of the reasons we set up (unintelligible), and I don't
4 think we could have made that much clearer. I agree this
5 is unfortunate. The question from my perspective is how do
6 we continue to pursue coordination.

7 MR. ZIMMERMAN: Here's my suggestion, that we
8 take the subpoenas and subpoena these witnesses for two
9 days of depositions, either immediately before or
10 immediately following these two days that are going on in
11 Texas, and that our depositions are not back door, you
12 know, sitting in the back of the room with tape over our
13 mouths, but we take those depositions just like the Texas
14 lawyers have seemed to be given permission to take their
15 depositions. And we will issue appropriate subpoenas. We
16 will take those depositions and we will proceed to work
17 this stuff through in the coming days --

18 UNIDENTIFIED SPEAKER: We don't understand that,
19 Bucky, if you don't want to coordinate --

20 MR. ZIMMERMAN: How can I coordinate when a Judge
21 in Texas and lawyers before that Judge in Texas are being
22 prohibited from doing exactly what I'm being asked to do.
23 I can't do that.

24 UNIDENTIFIED SPEAKER: It was going to be three
25 days of questioning for all the state and a day of

1 questioning by the MDL. On another occasion, there was
2 questioning by the MDL lawyers first and then by the state.

3 MR. ZIMMERMAN: I understand that.

4 UNIDENTIFIED SPEAKER: It was a procedure we
5 worked out and agreed on.

6 MS. WEBER: I should also note that this is going
7 back to Pretrial Order No. 22, which, again, was negotiated
8 and entered here. It specifically provides in Paragraph 4
9 that when -- if there is a state court deposition that
10 precedes the MDL deposition, and the MDL takes depositions
11 which it is entitled to do if it's not covered by cross
12 notice, it was specifically agreed that you would not ask
13 duplicative questions, but it provided for follow-up
14 questions. John and I had negotiated that language. You
15 can't then repeat the same information and questions in the
16 state court depositions, but you can clarify, you can
17 follow up, you know, and you can certainly ask any
18 questions about subsequent produced documents.

19 MR. ZIMMERMAN: But we've been trying to get
20 these depositions for some time and they seem to be okay if
21 we agree to do them in Texas, but we can't seem to get
22 dates from you on ours. We have been trying since the
23 conference in Pasadena to get our deposition program going,
24 and all we get is back seat to third -- you know, to states
25 and it doesn't make any sense. That's why I came up with

1 --

2 MR. HOEFLICH: We have been forthcoming with
3 dates on a regular basis, and we've been discussing with
4 you almost daily.

5 UNIDENTIFIED SPEAKER: Well, Adam, we are talking
6 about before May 1st with the meeting conference. If you
7 push me off to this person (unintelligible).

8 MR. HOEFLICH: I returned every one of your phone
9 calls (unintelligible).

10 MR. ZIMMERMAN: You're all talking and the court
11 reporter can't get it down. Let me suggest something. I
12 would like to suggest that we submit to Judge Davis a list
13 of witnesses with some proposed dates and he orders those
14 depositions be taken. And we will proceed that way until
15 such time as we work out these coordinated processes.

16 But at this point, we are being thrown out of the
17 boat and asked to swim up stream against a group of Texas
18 lawyers that seem to be having the attention of the
19 witnesses and are being deposed, and that is untenable to
20 me, and I think it is untenable to my committee, and I hope
21 it is untenable to anybody who's relying on the MDL.

22 Let us put forward who we need to take in the
23 next few days or weeks and have those orders issued by the
24 Judge in this court and they are going to be taken at such
25 and such place and such and such a time and stop with this

1 Mickey Mouse, he said and she said, and this date and that
2 date. It's not working, folks, and we have to get it
3 straight. I don't care what protocols -- I don't care
4 about all of these protocols. The tradition of proceeding
5 from protocol was not that we were going to have these
6 prohibitions and not fighting orders that we didn't know
7 about when we make agreements in the dark and there's
8 orders we don't know about.

9 So, let's get back on the right page. Let's do
10 the right thing. Let's get these depositions taken. Let
11 the MDL tell you who we want to take and let's get those
12 witnesses going and deal with Texas as you must.

13 UNIDENTIFIED SPEAKER: I support that and we can
14 have that list. Richard Arsenault and I will have that
15 list to Susan Weber and to the Court by noon tomorrow.
16 Right, Richard.

17 MR. ARSENAULT: Absolutely.

18 MS. WEBER: The situation we have is the MDL is
19 getting four depositions in the next two weeks --

20 (UNIDENTIFIED SPEAKERS: Unintelligible).

21 THE COURT: Susan, this is Judge Davis --

22 MS. WEBER: And you also have --

23 THE COURT: Susan --

24 MS. WEBER: Texas lawyers --

25 THE COURT: Hold on. This is Judge Davis. I'm

1 going to incorporate Mr. Zimmerman's suggestion. I want
2 that list on my desk by twelve noon tomorrow, and from now
3 on, we will not have phone conferences in this MDL
4 proceedings. If you're going to be here -- if you're going
5 to speak, you are going to be present in front of me. It's
6 impossible to carry on a sensible court proceeding with the
7 number of lawyers on the phone.

8 Again, I will state it clearly, the MDL will lead
9 this matter. I have gone the extra mile working with any
10 Judge, state court Judge that's involved in the Baycol
11 litigation, but I will not have this MDL destroyed by any
12 order put in effect by any state court Judge that may
13 spread across the nation to other states. I'm just not
14 going to let that occur.

15 And, so, the Defendants are going to have to deal
16 with that issue. The Plaintiffs are going to have to deal
17 with that issue, but I will assert my powers now, and I
18 want that list of who the depositions -- who will be
19 deposed in the coming weeks on my desk by twelve noon
20 tomorrow.

21 Anything further on this status conference? If
22 not, I will adjourn.

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

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REPORTER'S CERTIFICATE

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

CERTIFIED: _____

Brenda E. Anderson, RPR

