

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

3 MDL No. 1431(MJD/)

4

5

6 -----
IN RE BAYCOL PRODUCTS Motions Hearing
7 June 27, 2002

8

9

10 TRANSCRIPT OF PROCEEDINGS

11 HAD BEFORE THE HONORABLE MICHAEL J. DAVIS

12 Minneapolis, Minnesota

13

14

15 APPEARANCES

16 Plaintiffs Co-Counsel Attorneys

Charles Zimmerman

17 Richard Lockridge

Robert Shelquist

18

19 Defendants Attorneys

Adam Hoeflich

20 Susan Weber

Elizabeth Wright

21 Tracy Van Steenberg

Gary McConnell

22

23 Official Court Reporter
Dawn M. H. Hansen, RMR, CRR
24 1005 U. S. District Courthouse
300 South Fourth Street
25 Minneapolis, Minnesota 55415
(612)664-5107

1 PROCEEDINGS

2 THE COURT: Let's call this matter.

3 THE CLERK: Multidistrict Litigation Number 1431,
4 IN RE Baycol Products. Please state your appearances for
5 the record.

6 MR. ZIMMERMAN: Charles Zimmerman, Your Honor,
7 for the plaintiffs. Good afternoon.

8 THE COURT: Good afternoon.

9 MR. LOCKRIDGE: Richard Lockridge for the
10 plaintiffs, Your Honor.

11 THE COURT: Afternoon.

12 MR. SHELQUIST: Rob Shelquist for the plaintiffs,
13 Your Honor.

14 THE COURT: Good afternoon.

15 MR. HOEFLICH: Adam Hoeflich for Bayer, Judge,
16 good afternoon.

17 THE COURT: Good afternoon.

18 MS. WEBER: Susan Weber for Bayer, Your Honor,
19 good afternoon.

20 THE COURT: Good afternoon.

21 MR. MCCONNELL: And I'm Gary McConnell, and I
22 work for Bayer.

23 THE COURT: Good afternoon.

24 MS. WRIGHT: Elizabeth Wright from Dorsey and
25 Whitney for Bayer.

1 THE COURT: Good afternoon.

2 MS. VAN STEENBERG: Tracy Van Steenberg for GSK.

3 Hello.

4 THE COURT: Good afternoon. There's two motions
5 on. Mr. Lockridge, who's going to -- I believe you are
6 going to argue?

7 MR. LOCKRIDGE: I have the honors today, Your
8 Honor.

9 THE COURT: All right. Want to do the bundling
10 first?

11 MR. LOCKRIDGE: Umm, it doesn't make any
12 difference. If you like I'll start with the 50-plaintiff
13 motion.

14 THE COURT: Yes.

15 MR. LOCKRIDGE: Thank you, Your Honor. The
16 plaintiffs are seeking an order allowing consolidation of
17 up to 50 plaintiffs from any one jurisdiction in a single
18 complaint, and I want to emphasize it's from any one
19 jurisdiction. So it would be, say, from 50 plaintiffs in
20 the District of Arizona or the Southern District of
21 California. We are not trying to amalgamate people from
22 different districts.

23 The reason for this is severalfold. First of all, it
24 allows people to participate in the MDL process without
25 full-blown litigation, at least until the case is remanded.

1 It saves plaintiffs filing fees, quite frankly. It's
2 easier for the plaintiffs to administer, umm, and frankly,
3 we think it's easier for the clerk's office also to handle.
4 But it makes the MDL a user-friendly venue, if you will.
5 And we need this in part because, ah, there is a checkoff
6 complaint in Pennsylvania, apparently, now, and we want to
7 make it very easy and simple for people to file cases in
8 the MDL.

9 Now, in our papers, we stated that we believe that the
10 judge had, that Your Honor had the right to do this and
11 could do this under Rule 42(a). Which indicates that when
12 actions are pending involving a common question of law or
13 fact, it can make such orders concerning the proceedings.
14 And we believe that Rule 42(a) in your, not unfettered
15 discretion, but certainly very broad discretion, allowed
16 that. Umm, as Your Honor knows, of course, the defendants
17 have come back and said that Rule 20, ah, should be
18 applied. Umm, first place, I will say that that's the
19 joinder rule. We're not asking that these people actually
20 be joined for trial, just that they be put together in the
21 same proceeding for pretrial proceedings. But in any
22 event, even Rule 20, ah, which provides that it has to
23 arise out of the same transaction, occurrence, or series of
24 transactions and occurrences, and if any question of law or
25 fact is common, then the Court can order joinder. As I'll

1 get to in a moment, obviously we believe there are numerous
2 common questions of law or fact here.

3 In part, Your Honor, I would note that our view is that
4 the MDL panel has, at least in part, already, ah, to an
5 extent resolved this issue by ordering these cases, ah,
6 sent here to Minnesota for coordinated or consolidated
7 pretrial proceedings. And the MDL order itself says that
8 this litigation involves common questions of fact, and it
9 goes on and lists one or two of those, umm, common
10 questions of fact. And in a sense, I'll admit I'm a shade
11 puzzled in a sense by the defendants' opposition, because
12 when a number of cases are filed, wherever in the country,
13 they are con -- they come to the MDL panel under
14 conditional transfer order and are automatically sent out
15 here anyway for coordinated and consolidated pretrial
16 proceedings. So in a sense, it's already happening with
17 the MDL panel.

18 Now, while we believe 42(a) is the applicable rule, I
19 would note, Your Honor, that under Rule 20 --

20 THE COURT: But they're being individually filed,
21 and the question arises that, whatever, if you got me to
22 agree to what you're proposing, umm, someone filing 50
23 cases in, umm, in Arizona, the district court in Arizona
24 might not follow, and would not have to follow, anything
25 that I, ah, have ordered on that. And more than likely

1 they would, ah, tell that lawyer to unbundle the cases and
2 file them separately. And then they would be transferred
3 to me.

4 MR. LOCKRIDGE: That's -- I don't know if that's
5 possible or not, Your Honor. To the extent that that's
6 happened, it's only happened in the Eastern District of
7 Pennsylvania. And there the, there have been 17, umm,
8 so-called misjoined orders. It's my understanding that the
9 way the process normally works, with the exception of the
10 Eastern District of Pennsylvania, and I should say that's
11 the only district that I know of where these misjoinder
12 orders have been filed, is that a petition -- or a
13 plaintiff would file, say, 50 cases in, just for an
14 example, in the Eastern District of Louisiana, it would aut
15 -- the MDL panel will automatically issue a conditional
16 transfer order and it will be sent up here to Minnesota for
17 pretrial proceedings. If there comes a time when those
18 cases are remanded or sent back to the jurisdiction from
19 whence they came, in this case Louisiana, that one
20 complaint with the 50 plaintiffs would go back to
21 Louisiana, and at that point it would be our position that
22 the Court, if it wanted to, could, umm, rule that there was
23 misjoinder. But I don't think in the normal course of
24 events that would happen. As I said, we are only aware of
25 it happening in the Eastern District of Pennsylvania. All

1 right.

2 Umm, in any event, I was emphasizing, Your Honor is
3 under Rule 20 joinder of claims and parties is strongly
4 encouraged. And I wanted to give you, it's the United Mine
5 Workers v. Gibbs case at 86 Supreme Court 1130 from 1966
6 which we, which I did fail to cite in our brief. Umm, but
7 even if we are to apply Rule 20, Your Honor, I don't think
8 most courts would ever rule that there was misjoinder.
9 Because here we meet the criteria for Rule 20. Here there
10 are numerous common questions of law and fact. And that is
11 really the test here. We will, ah, we obviously at some
12 point be arguing to you that common questions of law and
13 fact predominate in this litigation, that we should be
14 entitled to a class. But here we don't have to, we do not
15 have to meet that standard, we just have to meet at least
16 some common questions of law or fact. Here virtually all
17 of the cases, and certainly the master class complaint,
18 umm, discusses and addresses in the allegations the
19 approval process by the Food and Drug Administration, the
20 complaints, ah, address and make allegations concerning
21 that Bayer knew Baycol was less effective than other
22 statins. The plaintiffs allege that Bayer knew of serious
23 adverse side effects, this is across the board, that, umm,
24 they concealed evidence regarding adverse events, that
25 there were inadequate warnings, and obviously one of the

1 central points in all of the cases is the fact of the
2 withdrawal of Baycol from the market on August 8th, 2001.

3 And then with all of these common questions of fact,
4 obviously, umm, most of the common, they're common
5 questions of law too, because most of the complaints have
6 same or similar legal allegations, and, ah, the injuries
7 are based on the same legal theories. And as I said a
8 moment ago, ultimately we believe that we will succeed in
9 getting a class certified in this case, which obviously
10 requires findings from this Court that common questions of
11 law or fact predominate.

12 I wanted to address just a couple of the points that
13 the defendants have mentioned in their brief, Your Honor.
14 Umm, I did address the point of the 17 cases from the
15 Eastern District of Pennsylvania. I must say those were to
16 me somewhat curious in that they all, all of the opinions
17 were almost verbatim identical, word for word. It was like
18 it was just a cookie cutter. And like I've said earlier,
19 they certainly do not address 42(a), and it's the only
20 district in the United States in the event that we are
21 aware of where the court apparently, even without briefing
22 and without allowing the plaintiffs to make a determination
23 as to whether or not it was appropriate, they determined
24 that those cases were misjoined.

25 Umm, I find it doubly curious, of course, in the

1 context of class actions, because, umm, ah, it seems to me
2 clear that in the context of a class action it's
3 appropriate to join multiple plaintiffs together, as we are
4 seeking to do here, because our whole basis is that common
5 questions of law and fact will predominate.

6 Umm, the defendants rely on a couple of cases, which I
7 will address just very briefly. One is *Insolia v. Phillip*
8 *Morris*. I would note that that was a smokers suit against
9 all of the -- all of the big tobacco companies, and it
10 alleged a multiple conspiracy over many decades, and it was
11 not an MDL action, as this one is.

12 *Rezulin*, it was in the context of Rule 20, but it was
13 in the context of a remand motion where there was a large
14 group of plaintiffs were joined where one had a claim
15 against a, just one had a claim against a home healthcare
16 provider which allegedly destroyed complete diversity. So
17 in the *Rezulin* case, there the plaintiffs were desperately
18 trying to get out of federal court and in to state court,
19 and that's obviously, ah, not the case here.

20 And, umm, in *Diet Drugs*, there the plaintiffs in that
21 case also were trying to get out of federal court and were
22 trying to destroy diversity jurisdiction. And in that case
23 they brought in plaintiffs from seven different states onto
24 one complaint. And as I said, that's not what we are doing
25 here. And in that case, *Diet Drugs*, the judge emphasized

1 that in the context of the remand motions he was concerned
2 about the vast geographic diversity of the plaintiffs. And
3 I should note also at the end of that case the court in
4 Diet Drugs indicated that he was not addressing most of the
5 joinder issues, but only one or two of the most egregious
6 ones where it appeared as though the defendants were --
7 excuse me -- the plaintiffs were desperately trying to get
8 out of federal court.

9 Umm, the defendants also rely on the Norplant
10 Contraceptive Products Liability Litigation, Your Honor.
11 Umm, and it is correct that in that case the court relied
12 on Rule 20. But of course in that case the court said
13 that, ah, the plaintiffs met the standard for joinder and
14 the relevant parts of that are quoted at page 6 of our
15 reply brief.

16 I think the real crux, ah, and obviously we'll hear
17 from defendants' counsel, but it sounds to me like the real
18 crux of their obligation -- their opposition is the claim
19 that the plaintiffs are going to be bringing too many
20 lawsuits into the federal court. They're going to be
21 uninvestigated claims, and I believe their words are that
22 we're going to try to cash in on the Baycol, ah,
23 litigation. Well, first of all, let me say that Mr.
24 Zimmerman and I and all the plaintiffs' counsel and the PCS
25 and elsewhere take our Rule 11 obligations very seriously.

1 So when we bring a case, it is one, or one of our cohorts
2 brings a case, it is ones that we believe have merit.

3 I would also note that there obviously is a dispute
4 with the defendants that we have over what a so-called
5 serious injury is, because we certainly believe that any
6 plaintiff that has chronic pain, ah, or muscle degeneration
7 would have an injury-type of claim. Plus I would note that
8 we are also seeking restitution damages. And one of our
9 classes we are seeking is simply for restitution for the
10 amount of money that people spent over the months and years
11 for Baycol.

12 The fact of the matter is, that, ah, this, umm, this
13 motion will allow the plaintiffs to, it'll ease the
14 administrative burden on the plaintiffs, and it will allow
15 the MDL to be continued to be the focus. One way or
16 another, we expect that these cases will be filed, but we
17 want to make the MDL, if you will, user friendly, and we
18 would rather have these cases filed in the MDL rather than
19 in a state court. Thank you, Your Honor.

20 THE COURT: Well, what about the issue that's
21 raised by defendants dealing with, umm, it's going to
22 circumvent the -- the discovery process if we bundle these
23 cases?

24 MR. LOCKRIDGE: Well, this particular motion does
25 not necessarily circumvent the discovery process, and I

1 don't think the other motion does either, although I can
2 get to that. Umm, but if there were 50 plaintiffs on a
3 complaint, presumably if, ah, the defendants want to, they
4 can take 50 depositions of all those people, and that the
5 plaintiffs will have to respond to discovery and so forth.
6 So I don't think that that is at the core of this
7 particular motion, Your Honor.

8 THE COURT: What about filing the facts sheets?

9 MR. LOCKRIDGE: Well, I think that plaintiffs
10 here would have to file a fact sheet, Your Honor, although
11 I'm getting to that in the other motion, umm, because we
12 would prefer, as I'll get to in the other motion, to be
13 able to administratively close individual cases during the
14 pendency of the class proceedings. On the theory that it
15 makes no sense whatsoever to engage in ongoing, extensive,
16 and expensive discovery for the hundreds and hundreds of
17 plaintiffs who have filed in court while class action
18 proceedings are going forward, because if the class is
19 certified, then clearly we'll all be bundled in together.

20 THE COURT: Okay.

21 MR. LOCKRIDGE: All right. Thank you, Your
22 Honor.

23 THE COURT: Thank you. Counsel.

24 MR. HOEFLICH: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 MR. HOEFLICH: Plaintiffs' motion should be
2 denied, because it would turn this court and this district
3 into a magnet for insubstantial cases that do not meet the
4 jurisdictional requirements of the federal courts in an
5 effort to make things easier for plaintiffs who do not want
6 to make themselves willing to go through discovery, and
7 whose attorneys do not want to put in the work that is
8 required of them by the federal rules. If I will, I will
9 address the plaintiffs' coordination and consolidation
10 motion first.

11 First, Your Honor, there are tremendous practical
12 problems involved with what plaintiffs seek. The
13 plaintiffs would bring this Court a 50-party complaint that
14 does not give us the information on why this Court has
15 jurisdiction over each plaintiff. That does not tell us
16 why venue is appropriate for each plaintiff and does not
17 tell us the nature of the injuries for each plaintiff. In
18 the first instance, things may look easier for this Court
19 and for the clerk's office. Because they don't get 50
20 pieces of paper, or 50 complaints at once, as they come in
21 from the transferor courts. But in reality, as the Court
22 acknowledged, this Court does not have from the MDL rules
23 the authority to tell the Eastern District of Pennsylvania
24 what sort of complaints it should allow in the first
25 instance, before transfer to this Court. So in reality is

1 what happens is, lawyers who claim to have 5,000 or 7,000
2 or 10,000 claims will bring them here in the first
3 instance, regardless of jurisdiction, including whether the
4 \$75,000 threshold is met, without regard to venue, and then
5 the hope, as we'll discuss later, if the discovery will be
6 closed down in an effort to go through other portions of
7 the case first. So this Court will get a slough of
8 50-plaintiff complaints that otherwise may not be filed.
9 And certainly wouldn't be filed in the District of
10 Minnesota.

11 After the complaints are filed, there would be enormous
12 problems for the clerk's office. There would be battles
13 over jurisdiction. There would be battles over venue.
14 There would be battles over severance for trial. Let's
15 take the motions for jurisdiction, for example. If we are
16 able to obtain discovery on jurisdiction, and we challenge,
17 for example, plaintiffs 1, 3, 5, 7, and 22 in a
18 50-plaintiff complaint, what happens to the file
19 afterwards? Same things for venue.

20 And then let's say we have a 50-plaintiff complaint
21 that's not filed here. Let's say it's an unusual example
22 is it comes here from, say, Arizona. If the Court has made
23 rulings for some plaintiffs on some issues and other
24 plaintiffs on other issues, some people don't really go
25 back to Arizona, what happens to that file with the 50

1 plaintiffs in it? Where does it go? We think that in the
2 long run the burden on the clerk's office and on this Court
3 would be enormous.

4 As we point out in our papers, we also think there
5 would be a, ah, a prejudice to this Court when budgeting
6 time comes, because this Court would get credit for one
7 complaint, not 50, for each 50-party complaint. And each
8 50-party complaint would create an enormous burden on this
9 Court that exceeds the one complaint. Come trial time,
10 what we'd be in fact stuck with is an effort to try to make
11 heads or tails of what to do with the 50-party complaint,
12 and it would be an enormous burden for this Court to try to
13 figure out what to do with 50 complaints by people who were
14 treated by different physicians at different times, who
15 claimed different injuries.

16 There are rules for class action. And plaintiffs, as
17 the Court knows, have asked to delay the hearing on their
18 class action papers, umm, and I won't go into the reasons
19 for that, but if plaintiffs want a class action, Rule 23
20 provides the vehicle and gives us the opportunity for
21 discovery and to oppose it. The method for a class action
22 is not to ask the Court to consolidate 50 plaintiffs at a
23 time into complaints, without our having the ability to
24 challenge whether the requirements that Congress set up in
25 Rule 23 are met. That, we believe, is why the courts

1 created rules to govern when consolidation should take
2 place.

3 We also believe that that is why the rules to which
4 plaintiffs point don't take effect here. If the Court
5 takes a look at Rule 42, it says that consolidation can
6 take place when common questions of law or fact are pending
7 before the court. The plaintiffs do not have a complaint
8 with 50 people pending. They have not filed one that has
9 come to this Court. They're asking for an advisory ruling.
10 If we had 50 plaintiffs here, we could point to the
11 problems with jurisdiction, the problems with venue, all of
12 the other problems, and explain why that complaint
13 shouldn't be coordinated or consolidated. Instead, what
14 we're told is, we should have an advisory opinion both for
15 this district and for other districts. We believe that
16 exceeds the Court's authority both as an MDL court and as a
17 court operating under the federal rules.

18 We also believe that if we turn to the rule that does
19 apply, Rule 20, it does not give the Court the authority
20 for joinder. The Eastern District of Pennsylvania on 17
21 occasions, many of which involve different judges, have
22 looked at complaints like this and sua sponte severed them.
23 The clerk's office there doesn't like getting multiparty
24 complaints, because it's been tried there, and it doesn't
25 work. Judge Bechtel in the bone screw litigation issued a

1 decision explaining why it doesn't work and why it's not
2 authorized by Rule 20. The issue also came up in the
3 Factor Concentrate litigation, that Judge Grady handled in
4 Chicago. May I approach, Judge?

5 THE COURT: You may.

6 MR. HOEFLICH: In the Factor Concentrate case,
7 Judge, after explaining how the plaintiffs alleged
8 different exposure, different treating physicians,
9 different potential injuries, on page 5, Judge Grady
10 states: The joinder requirements of Rule 20 are clear.
11 Allowing an amendment that violates the rule for whatever
12 reason is a violation of the rule. And he also talks about
13 the impossibility of a trial and the potential problems for
14 a transferor court. Now, the problems for a transferor
15 court may not hit home now, but the problems that would
16 take place in this district, when it's flooded with these
17 complaints, are very real.

18 Your Honor, we favor a creative solution, or any
19 solution that would aid the clerk's office while protecting
20 our rights. We have spoken to the clerk of the Eighth
21 Circuit and to other administrative offices throughout the
22 country, in an effort to find out what the best solution
23 is. We have been advised that the best solution is to
24 obtain additional funding for the clerk's office, and we
25 are more than willing to do whatever it takes to help that

1 happen. We also remain open to other creative solutions.
2 I've spoken to Mr. Zimmerman, we've called other clerks,
3 we're open to ideas of using third-party vendors to do some
4 of the work. We're open to ideas involving funding of
5 third-party vendors to do the work. We're open to looking
6 at different sources to lodge the complaints. But we do
7 believe that we're entitled to individual complaints. We
8 think that we're entitled to know who is suing us, why
9 they're suing us, and what they're suing us for.

10 Discovery and litigation in general involves a balance,
11 and if plaintiffs were allowed to join complaints in one
12 place without regard to our rights, then we don't think
13 that balance exists. And we don't believe that it would be
14 within the rules set forth by Congress, set forth in the
15 federal rules for this to take place. Thank you, Judge.

16 THE COURT: Dealing with the, I think early on in
17 this litigation, I gave some indication, umm, about the
18 problem in the clerk's office. I allowed a telephone
19 conference between counsel to talk to the clerk's office,
20 umm, that was I believe helpful to both sides. I've spoken
21 to, umm, the clerk's office, and, ah, rest assured that the
22 clerk's office can handle the problem no matter how large
23 it gets. So I would, ah, umm, ask that you not make any
24 further inquiries on, ah, alternative plans dealing with
25 the clerk's office, because we can handle it. I've been

1 assured by my clerk that, ah, that we can, and, ah, that
2 will be taken care of.

3 MR. HOEFLICH: We respect that --

4 THE COURT: Early on in the proceedings I was
5 given other information which, umm, umm, early on this
6 morning I found out was incorrect. And, umm, I apologize
7 for giving you the idea that we were going to be swamped
8 and not be able to do it. Umm, with Verilaw and everything
9 else that's been put in place in this litigation, we've
10 dedicated one clerk to handle the filings, and I went down
11 there yesterday to thank her, to see how she was doing, and
12 she's handling everything appropriately, and I met with the
13 Deputy and the Clerk of Court today, and they've assured me
14 that, umm, they will not have any problems, and if the
15 appropriate numbers get to us, umm, we can ask the AO's
16 office for further funding. The AO's office will not do
17 anything based on speculation, rightfully so.

18 MR. HOEFLICH: Thank you, Judge, we respect that,
19 and we will honor your request.

20 THE COURT: Thank you.

21 MR. LOCKRIDGE: Could I have a brief response,
22 Your Honor?

23 THE COURT: You may.

24 MR. LOCKRIDGE: Thank you. Well, Your Honor, we
25 learned, at least I did just for the first time a few

1 moments ago, the reason why there are these decisions from
2 the Eastern District of Pennsylvania, and it's not
3 necessarily because the judges, ah, ah, wanted to do
4 necessarily what they did, but apparently it's the policy
5 of the clerk's office that they absolutely do not like
6 multiparty complaints, and that may explain why all of
7 those cases have come out of the Eastern District of
8 Pennsylvania, and there are none anyplace else. Umm, I was
9 just, ah, I have not read the, ah, the Armour
10 Pharmaceutical case that came out five years ago from Judge
11 Grady, but I would note that a much more recent case is one
12 called Hall versus Babcock & Wilcox, which is cited in our
13 brief, which is a, from Pennsylvania, umm, albeit the
14 Western District of Pennsylvania, in 1999, where the court
15 there did address the consolidation order, and I believe it
16 is under Rule 42(a), and did allow it in a mass-tort-type
17 of a context.

18 The parade of horrors, basically, that he provides
19 here is one for the clerk's office, and Your Honor has
20 indicated and I certainly, it's certainly been our
21 perception that the clerk's office is totally on top of
22 this and is handling this in exceptionally good and
23 excellent manner.

24 Umm, secondly, Rule 23, ah, of course they will get
25 their opportunity to oppose it. They're going to be able

1 to depose the I believe it's 14 named plaintiffs in the
2 master class complaint. They certainly will be filing
3 briefs against the class motion, I assume that they will be
4 filing expert affidavits, ah, in response to our experts
5 and so forth. So that's really a separate issue, I think.
6 And the one thing I think we can agree on, there are going
7 to be a lot more cases. The question is, are they going to
8 be filed in federal court, or are they going to be filed in
9 50 state courts around the country? They're going to get
10 filed, and we would like them filed, and we believe they
11 should be filed in this, ah, in federal court, and
12 ultimately sent here. Ah, Mr. Zimmerman has been having
13 many conversations with various state lawyers around the
14 country, and I think he's making very, very good progress,
15 and that's really the basis for this motion to try to, umm,
16 encourage people to use the federal process. Thank you,
17 Your Honor. If I --

18 THE COURT: You've hit the question, ah, that I
19 want answered. Umm, if they're filing in the state court,
20 are they filing, are they bundling them in state court or
21 are they filing them individually? What difference does it
22 make if they're filing in state court? That hasn't, ah, I
23 don't quite understand the issue there.

24 MR. LOCKRIDGE: I appreciate that, Your Honor.
25 Actually I, I, I believe that they are filing them in

1 groups in state court, but I cannot tell you that for
2 certain. But I think it was simply one of the things is it
3 would simply be an added benefit, an added quiver in the
4 MDL's arrow, if you will, to encourage people to file them
5 in the federal venue rather than various states. There are
6 many attorneys, ah, you know, particularly in Texas and
7 some of the southern states, umm, that more or less feel
8 more comfortable, if you will, in the state courts, and so
9 we're trying to do everything humanly possible to encourage
10 them to, ah, participate in the MDL and get in the federal
11 system, and we simply want to make it easier for them to do
12 that. And that's one of the reasons we brought this
13 motion.

14 THE COURT: Well, are we looking at most of --
15 many of these cases not meeting the jurisdictional
16 requirement and they're going to be filed in state court
17 anyway, so why bundle 'em here and I have to deal with all
18 those issues, ah --

19 MR. LOCKRIDGE: First of all, I really think it's
20 the parade of horrors which you certainly are going to
21 hear, ah, much more of when we get to the class
22 certification hearing, but I don't think it is a parade of
23 horrors at all. Umm, certainly any, anyone that has an
24 injury, I expect, would allege damages of more than
25 \$75,000, and, umm --

1 THE COURT: Well, you know that's not occurred,
2 and have a number of remand issues already dealing with not
3 only jurisdiction but dealing with dollar amount.

4 MR. LOCKRIDGE: I'm sorry, people who file in
5 federal court will make allegations for more than \$75,000.
6 No, I appreciate the people who want to stay in state court
7 can be, ah, remarkably creative about how they stay in
8 state court, without question. But, ah, could I move on to
9 the other motion, Your Honor?

10 THE COURT: Well, let me --

11 MR. LOCKRIDGE: Okay.

12 THE COURT: I've reached out, and I'm going to
13 have a conference call this afternoon with more plaintiffs'
14 attorneys, umm, and reaching out and showing that this
15 Court is being, umm, being fair to both sides in how the,
16 ah, litigation is being handled. Umm, isn't that enough?
17 Umm, this bundling issue is, umm, although I know that
18 you're calling them a parade of horrors, but I have to
19 look down the line, and if I have to deal with them, umm,
20 it, ah --

21 MR. LOCKRIDGE: Well --

22 THE COURT: -- it just seems that if a lawyer has
23 a case and wants to file in federal court, they will do
24 that. Umm --

25 MR. LOCKRIDGE: I think many times that's

1 correct, Your Honor. I think what we're dealing with here
2 is, umm, some of the people who have, umm, many thousands
3 of cases who may in the normal course of events, ah,
4 normally would file them, try to file them anyway, perhaps,
5 in state court, and we're trying to give them a venue, an
6 easy venue to file them in state court. And I don't think
7 there's any question that the Court at least has the power
8 to do this.

9 THE COURT: I understand, but I --

10 MR. LOCKRIDGE: Okay.

11 THE COURT: -- I'm talking out loud.

12 MR. LOCKRIDGE: Sure.

13 THE COURT: I'm trying to make sure that both
14 plaintiffs and defendants feel that this courtroom is
15 receptive to their arguments and that I will rule fairly on
16 'em. That I can't imagine someone wanting to file a
17 thousand cases in some small county in Mississippi, where
18 there's only two or three judges.

19 MR. LOCKRIDGE: Well, I think they might, Your
20 Honor. There's some cases, there's some courts down in
21 Mississippi and other places too, that I think plaintiffs'
22 lawyers -- I know plaintiffs' lawyers, ah, typically do
23 like to go to, and if you will, we are in a sense having to
24 compete with that, and that history, a little bit here, and
25 we're simply trying to make the MDL a, ah, as I said, a

1 more user-friendly forum for these people, rather than
2 having them have to prepare a separate complaint for every,
3 ah, single individual. It's administratively easier for
4 the plaintiffs, and, umm, you know --

5 THE COURT: If they file a thousand cases in
6 Mississippi and 750 belong, have diversity and meet the
7 dollar amount for federal court, Bayer is going to bring
8 them to federal court.

9 MR. LOCKRIDGE: I hope they do. I hope you're
10 right.

11 THE COURT: I see a lot of heads bobbing over
12 there.

13 MR. LOCKRIDGE: Yeah. On that we can all agree
14 that we hope they would.

15 THE COURT: So I guess it behooves me to continue
16 reaching out to plaintiffs' attorneys and rest assuring
17 them that they're going to have a fair hearing here in
18 federal court, because no matter where they file the case
19 it's going to be coming here. And why -- why, ah, umm,
20 take that extra step.

21 MR. ZIMMERMAN: Could I take a shot at it?

22 MR. LOCKRIDGE: Sure, go ahead.

23 THE COURT: Sure.

24 MR. ZIMMERMAN: If we're talking pragmatics, ah,
25 which I think is what the Court is sort of addressing, the

1 why issue, not that you don't have the power or the
2 discretion, but the why issue, the why issue becomes one
3 of, sure, they can file in state court and Bayer can
4 remove. That's not what happens. What, to stay in state
5 court, you name a local defendant. And you name a local
6 defendant, not because really you have necessarily the
7 belief that that local defendant is the place where the
8 ultimate relief is going to come, the doctor or the
9 pharmacy or whatever, it's because you prefer to stay in
10 state court, and that's just the way you do it. If you
11 prefer to come to federal court, you file a removable case,
12 and you know that Bayer will remove. They've made that
13 very clear. That has nothing really to do with this
14 question of administrative ease today. The question of --
15 the question of 50 has to do with the ability of lawyers
16 who have large groups of cases to bring to the court, and
17 to this Court, their cases easily, so that one complaint
18 can comprise 50, and another complaint another 50, so we
19 get in this MDL the understanding of who's really out
20 there. And they choose the federal court, and the critical
21 mass comes to the federal court, and the ease of filing is
22 in the federal court. So we have the ability, as the
23 federal court, to look out and see what is before us.

24 Now, there will always be cases in state court, and
25 they will be dispersed, and they will be around, and Bayer

1 will have to deal with them, and there's not much I can do
2 with them as lead counsel other than what I am doing, which
3 is try and get those state court lawyers to coordinate with
4 us. But to the extent we can bring the cases to the
5 federal court by easing the administrative filing burden of
6 a plaintiff's lawyer, without doing disgrace to the
7 defenses of the defendant, we get our arms around the
8 cases. And we understand what's out there.

9 Bayer will then say, well there are serious cases
10 within this group, and there are nonserious cases. There
11 are cases that we want to deal with perhaps in a mediation
12 program, if we ever get there, or if we don't, in a
13 settlement, if we ever get there, or if we don't, or defend
14 vigorously. But we will be able to make those cuts. And
15 as we make those cuts, we do justice.

16 And the reason I'm pro -- advocating this 50 complaint
17 is because then I reach out into the community of lawyers
18 and say there is another advantage to coming into federal
19 court. At no real expense to the defendants, because if
20 they ever do get remanded they can peel them back and look
21 at them one by one, no one saying they're prejudicing their
22 right, we're only trying common issues here, if we try them
23 we'll resolve common discovery issues here in the MDL. But
24 it will allow the defendants who are sitting -- plaintiffs
25 who are sitting on the fence to say there are more

1 advantages coming here, I can do it easier, and I trust
2 Zimmerman and his crew of plaintiffs and Lockridge and his
3 crew of plaintiffs' lawyers to do the good discovery, the
4 cases get resolved. They get resolved.

5 If they go back, the 50 will probably get un, you know,
6 unbundled in some fashion, maybe they'll do them in groups
7 of ten. I had a case in front of Judge Greenburg in the
8 district court where we filed multiparty complaints and he
9 peeled them back to ten. He said we'll try ten at a time.
10 We're not going to try 40 at a time. He called ten for
11 trial. Well, they settled, then he called the next ten.
12 That was his way of dealing with it. Another judge may say
13 five, another judge might say one, another judge might say
14 20. But that can be done at the local level. I think it
15 eases the burden on the court, I think it eases the burden
16 on the clerk's office, and I can submit to you it
17 definitely eases the burden on those of us that are
18 carrying large inventories of cases that are trying to
19 decide where to file them.

20 THE COURT: Okay. Anything further?

21 MR. HOEFLICH: May I respond, Your Honor?

22 First, Judge, I believe that the authority is strongly
23 against the consolidation of claims like this. I'd urge
24 the Court to take a look at the *Insolia* opinion at 186
25 F.R.D. 551, which refuses to allow joinder and criticizes

1 for want of analysis the one case it knows of that did it.
2 I would urge the Court to look at the Simmons case at 1996
3 West Law 617492 at star 4, quote: Notwithstanding the view
4 expressed by Judge Schnell in Norplant, I believe that
5 Judge Bechtel's analysis in bone screw cases is the better
6 view and requires a finding of the plaintiffs here not
7 showing claims that arise out of the same transaction,
8 occurrence, or series of transactions or occurrences.
9 Plaintiffs talk about parade of horrors and say we're
10 imagining things. Yet they're asking for consolidation of
11 claims that haven't even been filed yet. There's nothing
12 pending to consolidate. We don't even get a glimpse of
13 what they're seeking to do. That's beyond what the federal
14 rules allow. There's nothing in Rule 42 that permits this.
15 What plaintiffs seek --

16 THE COURT: I don't need another argument. I've
17 read your papers. I've read the cases, so --

18 MR. HOEFLICH: Thank you, Judge.

19 THE COURT: Anything else on this?

20 MR. HOEFLICH: I did, Judge, and I wanted to
21 address square on the marketing point. We have done,
22 honestly, everything we believe appropriate to move the MDL
23 out front, and I think the Court is aware of all of our
24 efforts. We are at a point here where the marketing device
25 plaintiff seeks contravenes our due process rights. And we

1 believe that this would be a clearly inappropriate thing to
2 do in federal court.

3 THE COURT: All right.

4 MR. HOEFLICH: Thank you, Judge.

5 THE COURT: Thank you. Let's move to the next
6 issue. I'll take this one under advisement.

7 MR. LOCKRIDGE: Thank you, Your Honor. The
8 second motion we're bringing before the Court today is the
9 motion to administratively close individual federal cases
10 pending a final resolution of the consolidated pretrial
11 proceedings, and there's a couple of reasons for doing
12 this.

13 First and, frankly, foremost, is that we have been
14 unable to, umm, negotiate a global tolling agreement with
15 the defendants. And first of all I should back up very
16 briefly and say that I don't think a tolling agreement
17 actually is necessary, because it's our view that the
18 filing of a national class action, an injury class as well
19 as a restitution or medical monitoring class effectively
20 tolls all statute of limitations under the American Pipe
21 and Crown Cork and Seal cases. But nevertheless, in the
22 exercise of, umm, our duties to the class, we are aware of
23 the fact that at least five states have one-year statutes
24 of limitations. They are California, Kentucky, Louisiana,
25 Tennessee, and I believe also Alabama. I believe I'm

1 correct that those are the only five, Your Honor. And
2 there is an argument that the class action tolling aside,
3 that on August 8th, the one year will run. So we do
4 believe it's very important to be able to allow people to
5 simply take their entire inventory of cases, and if they
6 wish to go ahead and file them in court, and then, frankly,
7 not litigate them, do it strictly for the purposes of
8 tolling the statute of limitations, and then to have the
9 cases administrative close -- administratively closed
10 pending the, umm, period of time during which common issues
11 are tried in this case, and in particular, pending the time
12 of a class determination. It's my understanding that that
13 will be teed up before Your Honor sometime early next year.

14 Umm, I did note, Your Honor, that Judge Falon did this
15 in the Propulsid case, and for the state of Louisiana,
16 which as I stated does have a one-year statute of
17 limitations, I believe that's Exhibit 9 to our brief.

18 Ah, the defendants, umm, raise some of the similar
19 arguments that they did in the last motion. I think they,
20 ah, they make, particularly enjoyed one comment, they said
21 where that, ah, they believe that this motion will allow
22 the MDL to become a dumping ground for meritless claims by
23 plaintiffs with no injuries seeking to hop aboard the
24 Baycol litigation express. Well, umm, first of all, Your
25 Honor, as I said earlier, we take our Rule 11 viol -- Rule

1 11 obligations very seriously. These will be bona fide
2 claims, and I don't know about the Baycol litigation
3 express, but, umm, this is another tool that we are trying
4 to use to encourage plaintiffs to go ahead and file the
5 cases. These cases, ah, these cases once again, I think
6 particularly in these five states, will be filed, and once
7 again it's a question of where they're going to be filed,
8 and we are simply attempting to make it easier for them to
9 file here in this district. Thank you.

10 THE COURT: Thank you.

11 MR. HOEFLICH: Your Honor, we believe that
12 plaintiffs' motion to bar discovery of them should be
13 denied because it contravenes the judicial system and the
14 federal rules that are set up to create fairness and
15 balance, both for plaintiffs and for defendants.
16 Essentially what plaintiffs say is, we get discovery, and
17 we get it fast. You don't. Both sides are supposed to
18 have obligations during discovery. There are costs on both
19 defendants and plaintiffs, and we believe that that
20 encourages the resolution of some claims and discourages
21 others. We believe that's an appropriate balance. Without
22 discovery, we cannot assess liability. We cannot know
23 which claims we'd like to resolve and which claims we don't
24 want to resolve. We can't know how much money to allocate
25 to different types of issues in this litigation, if we

1 can't clear away the underbrush. And this would
2 effectively deter our ability to resolve cases we want to
3 resolve.

4 There is another fundamental issue here, umm, apart
5 from our ability to assess cases and work on resolution of
6 those cases. And that is the fundamental nature of
7 negotiations that has allowed this MDL to move forward much
8 more quickly than other MDLs. We have had extensive
9 negotiations with the plaintiffs' lawyers for several
10 months. Pretrial order number 4, pretrial order number 10
11 set forth discovery obligations, set forth obligations for
12 fact sheets. And we gave up lots of things in negotiations
13 to reach what we thought was a fair balance to present to
14 the Court. And now that we've given things up and moved
15 everything forward at what we view at light speed, at
16 enormous expense, we're told, wait a second, the bargain
17 we've reached doesn't give us quite the marketing device
18 that we would like, and so we're not entitled to get
19 discovery. We think that's just wrong. There's nothing in
20 the federal rules to support it, and we think we are
21 entitled to discovery.

22 We also think that this would create delay. Our goal
23 as a defendant is to move these cases forward quickly, ah,
24 have plaintiffs' lawyers quite frankly assess them, and try
25 the cases we need to try and resolve the others. And if

1 boat loads of cases are put on hold, it slows that ship,
2 and we don't think that's fair to us.

3 Judge, Mr. Lockridge made a point that there are class
4 actions pending. These people have filed individual
5 complaints. There is no rule that an individual plaintiff
6 is shielded from discovery because there's a different
7 class action someplace else. That's just not the way
8 things work. If that were true, nobody would get discovery
9 while the class action was pending, or we'd have a
10 bifurcated discovery schedule. None of that is in place
11 here. None of it was negotiated. According to the rules
12 and the orders in this case, we're entitled to discovery of
13 plaintiffs, and we think that's fair.

14 In reality, Judge, what this is set forth to do is to
15 place cases in this district that don't meet the
16 jurisdictional requirements of this Court. That are not
17 properly venued here. And it is designed to allow
18 plaintiffs to inventory massive amounts of cases and avoid
19 statute of limitations without a tolling limit.

20 Mr. Lockridge mentioned different litigation and Judge
21 Falon. That was an agreed order. We have not agreed to
22 waive the statute of limitations. We don't think we
23 should, and we don't think we should have to based on a
24 motion designed to help plaintiffs market their cases. We
25 would ask the Court to deny this motion, to allow these

1 cases to move forward quickly and to, ah, ah, to move these
2 cases forward. Thank you, Your Honor.

3 THE COURT: Anything further?

4 MR. LOCKRIDGE: Yeah, could I say just a few
5 words, Your Honor?

6 THE COURT: You may.

7 MR. LOCKRIDGE: First of all, in most class
8 actions there may be many, many, there may be hundreds of
9 cases filed, but what happens is during the pendency of the
10 class motion, you have named plaintiffs, representative
11 plaintiffs come forward. Those few representative
12 plaintiffs engage in discovery. Those few representative
13 plaintiffs have the depositions taken, and so forth. And
14 that's the way this case in a sense is styled with the
15 master class complaint, I believe, the 14 named plaintiffs.
16 Ah, so what we are proposing is consistent with the way
17 most class actions work. Normally we don't have to put on
18 a motion in most class actions to administratively close
19 the files, because, umm, quite frankly the plaintiffs and
20 defendants simply recognize that that's the way it's done,
21 and during the pendency of the class motion, there is not
22 discovery against the myriad other plaintiffs, umm, who,
23 ah, may have filed cases. They want to clear out the
24 underbrush. What they really want to do is they want to
25 cut off these people in these five states who are going to

1 lose their rights, arguably, and I emphasize arguably, on
2 August 8th, and Mr. Zimmerman and I have an obligation to
3 come to this Court and present this motion to try and do as
4 we -- to take care of those people if we possibly can.

5 Finally, Your Honor, these defendants have got to make
6 a decision. Do they want to go forward with the MDL or
7 not? I hear the word quickly out of defendants' mouths
8 repeatedly. We love the MDL, we're moving quickly. Do you
9 know what? When the rubber hits the road, they're not
10 really doing that. They're doing, they call it the
11 marketing, our marketing of this MDL. You're darn right.
12 We are marketing this MDL, because we want the cases filed
13 in the federal court system, and it's pretty obvious to me
14 that these defendants do not. Thank you.

15 THE COURT: All right. Anything else to be heard
16 today? If not, umm, we'll recess until 3:25, and then
17 you'll come back to, umm, chambers for this conference
18 call?

19 (Recess.)

20

21

22

23

24

25

