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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re: Baycol Products)
 Litigation) File No. MDL 1431
) (MJD/JGL)
)
) Minneapolis, Minnesota
) July 20, 2004
) 10:00 a.m.

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

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
 RICHARD LOCKRIDGE, ESQ.
 RONALD GOLDSER, ESQ.
 RANDY HOPPER, ESQ.
 JEAN GEOPPINGER, ESQ.

For Defendant Bayer: ADAM HOEFLICH, ESQ.
 PETER SIPKINS, ESQ.
 SUSAN WEBER, ESQ.
 DOUGLAS MARVIN, ESQ.
 KIMBERLY KOERNER, ESQ.
 JAMES MIZGALA, ESQ.

For Defendant FRED MAGAZINER, ESQ.
GlaxoSmithKline:

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Proceedings recorded by mechanical stenography;
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1 THE CLERK: Multidistrict Litigation 1431, In re:
2 Baycol Products. Please state your appearances for the
3 record.
4 MR. ZIMMERMAN: Good morning, Your Honor.
5 Charles Zimmerman for the PSC.

6 THE COURT: Good morning.
7 MR. LOCKRIDGE: Good morning, Your Honor.
8 Richard Lockridge for the PSC.
9 THE COURT: Good morning.
10 MR. HOPPER: Good morning, Your Honor. Randy
11 Hopper for the PSC.
12 THE COURT: Good morning.
13 MR. GOLDSER: Good morning, Your Honor. Ron
14 Goldser for plaintiffs.
15 THE COURT: Good morning.
16 MS. GEOPPINGER: Good morning, Your Honor.
17 Jeanne Geoppinger for the PSC.
18 THE COURT: Good morning.
19 MR. HOEFLICH: Good morning, Your Honor. Adam
20 Hoeflich for Bayer. Mr. Beck apologizes that he is not
21 able to be here. He is still in trial.
22 THE COURT: Good morning.
23 MS. WEBER: Good morning, Your Honor. Susan
24 Weber for Bayer.
25 THE COURT: Good morning.
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1 MR. SIPKINS: Good morning, Your Honor. Peter
2 Sipkins for Bayer.
3 THE COURT: Good morning.
4 MR. MAGAZINER: Good morning, Your Honor. Fred
5 Magaziner for Glaxo SmithKline.
6 THE COURT: Good morning.
7 MR. MARVIN: Good morning, Your Honor. Douglas
8 Marvin for Bayer.
9 THE COURT: Good morning.
10 MS. KOERNER: Good morning, Your Honor. Kim
11 Koerner for Bayer.
12 THE COURT: Good morning.
13 MR. MIZGALA: Good morning, Your Honor. James
14 Mizgala for Bayer.
15 THE COURT: Good morning.
16 Mr. Zimmerman -- well, I should tell you that we
17 do have three people listening via the telephone. They are
18 Victoria --
19 THE CLERK: Maniatis.
20 THE COURT: -- and Dee Ramsey and Clay Morgan or
21 someone from Clay Morgan's office, I believe. Is that
22 correct?
23 THE CLERK: Yes.
24 THE COURT: And also on the website, the court's
25 website, sometime today there will be an audio stream of
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1 this proceeding. We have gone to audio so people can
2 listen to it.
3 MR. ZIMMERMAN: High tech.
4 THE COURT: We'll have a lot of hits, right?
5 MR. ZIMMERMAN: Anna Kournikova's website or the
6 court's website?
7 MR. HOPPER: Are you linked to Martha Stewart's
8 website?
9 MR. ZIMMERMAN: Good morning, Your Honor, and may
10 it please the court. We are here for the July 2004 Baycol

11 Products Litigation status conference.

12 The parties have submitted to the court a status
13 report and proposed agenda signed by both sides. We will,
14 as usual, go through it. If anyone has any questions or
15 comments, I trust they will be free to comment and raise
16 them. I don't see anything real controversial in today's
17 status conference, but one never knows.

18 First item, Your Honor, is pending cases.
19 Interestingly enough, I'm going to contrast -- usually I
20 contrast it to the month before, but I just happened to
21 have in my notebook the year before, the July 2003. So for
22 whatever it's worth, I will kind of comment on the contrast
23 between what we did a year ago and what we have today as
24 well as the last month, if anybody cares. I thought it was
25 kind of interesting.

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1 As of the July 15th date defendants had been
2 served with 7,259 cases that remain active. Of that total,
3 5,853 cases are pending in federal court and 1,406 are
4 pending in the state courts.

5 What is interesting about that is as of July
6 2003, a year ago, there were 9,811 cases pending in both
7 courts and 5,197 pending in federal court. In other words,
8 we are up in federal court from 5,197 to 5,853, but the
9 state court is down from 3,737 to 1,406. I don't know what
10 that means. I just raise it as a point of interest.

11 As of the -- and there's a typo in the agenda,
12 Your Honor.

13 I know you are standing for some reason.

14 MR. HOEFLICH: I do. I think I have something to
15 add to that.

16 MR. ZIMMERMAN: Wait until I am done and then
17 maybe you could add.

18 MR. HOEFLICH: Sure.

19 MR. ZIMMERMAN: I think there's a typo in the
20 April -- on paragraph B, I think that's supposed to be
21 June, isn't it, as opposed to April? It was just a typo.
22 There were 7,642 active cases last month, of which 6,046
23 were pending in federal court and 1,596 were pending in
24 state court. Again, this doesn't show the filed but
25 unserved.

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1 And I think the comment there would be that the
2 caseload has diminished slightly overall in both state and
3 federal courts from the June status to July, but they are
4 up considerably in the federal court from a year ago. What
5 that means is anybody's guess. I am not here to
6 editorialize it. I just think it's interesting to kind of
7 track.

8 MR. HOEFLICH: I think it is traditionally -- it
9 is interesting to track the traditional litigation, Judge.
10 As you know, there were roughly 10,000 cases pending a year
11 ago and over the course of this litigation we have seen
12 cases roughly 50 percent in federal court and 50 percent in
13 state court, and that calculus has changed.

14 One of the trends we can see is that the state
15 court, at least in Pennsylvania, started its narrowing

16 process earlier than we did in the federal court and there
17 has been strict adherence to many of the requirements of
18 that expert report requirement. In Pennsylvania, out of
19 3,400 cases subject to the narrowing order, the expert
20 report requirement there, we only have 271 cases.

21 I know that the PSC is now working to analyze the
22 cases that are undergoing the narrowing process in this
23 court and I am hopeful that the numbers will become more
24 even over time.

25 THE COURT: All right. Thank you.

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1 MR. ZIMMERMAN: I don't think we are at the
2 narrowing stage yet, but I will have some comments on that
3 process as well. I was just talking about filed cases.

4 An updated list of plaintiffs' counsel -- this is
5 C. An updated list of plaintiffs' counsel is pending and
6 has been provided to the PSC. I think that has occurred
7 and I do have that list, and it came via e-mail I think the
8 day before yesterday.

9 It's interesting that as I was looking over the
10 July agenda of 2003, that was a contested matter, whether
11 we would get that list in July of 2003. The PSC has
12 requested Bayer to provide a list; Bayer has declined the
13 request. So at least we've made some progress, Your Honor.
14 We are now getting that list and we are getting it
15 regularly, so we are grateful.

16 Settlement, Your Honor, unless there are any
17 questions on these filing statistics.

18 THE COURT: There's none from the court.

19 MR. ZIMMERMAN: Okay. Settlement, Your Honor.
20 To date defendants have settled 2,794 cases with a total
21 settlement value of 1,069,400,136. That's about 1 billion
22 7 -- .07, I guess would be the way you might look at it in
23 the shortened form. That is up from last month about 78
24 cases. Last month there was 2,716 cases. Now we are at
25 2,794. If my math is right, that's up about 78 cases and

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1 up about 26 million.

2 Of this amount, 685, Your Honor, were subject to
3 MDL assessments for a total of 236,439,607, up from 675
4 cases at the last status for approximately 234,259,000. In
5 other words, about ten more cases have settled in the MDL
6 proceedings over the last 30 days and it's up about
7 2,178,000, overall up about 26 million.

8 I was going to -- before you jumped in I was
9 going to give 2003, but I will wait.

10 MR. HOEFLICH: Go ahead.

11 MR. ZIMMERMAN: In 2003, Your Honor, the number
12 of settled cases in July a year ago was 1,095. I don't
13 have the gross number because it wasn't reported at that
14 time. And the number of MDL cases settled a year ago was
15 292 and we're now at 685.

16 MR. HOEFLICH: As the numbers demonstrate, Your
17 Honor, Bayer has made tremendous progress with its
18 settlements of rhabdomyolysis cases. I believe we have now
19 settled the vast majority of those cases that exist both in
20 state and in federal court.

21 We've identified a small number of them on which
22 we agree they are rhabdo cases at this point through the
23 narrowing process and we are in settlement negotiations on
24 the ones of which we have now agreed and we had been in
25 negotiations on as well.

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1 I believe we now have less than 100 rhabdo cases
2 remaining anywhere and we will continue to endeavor to
3 resolve those cases.

4 THE COURT: All right.

5 MR. ZIMMERMAN: With regard to the mediation
6 program, Your Honor, at this time there are 128 cases
7 submitted into the MDL mediation process. Special Master
8 Remele will be commenting and reporting to the court on
9 that.

10 In addition, the PSC is continuing to negotiate a
11 small number -- a limited number, I guess is the right
12 word, not small number, limited number of cases directly
13 with Bayer.

14 But the point here is there's 128 cases in the
15 MDL settlement process. That is about double from what we
16 had. A year ago we had 60 cases.

17 I don't know if Lew Remele wants to report now on
18 this or at the end.

19 THE COURT: Good morning.

20 SPECIAL MASTER REMELE: Good morning, Your Honor.
21 Mr. Zimmerman is correct that there has been an increase of
22 cases that have been submitted in the mediation program
23 since a year ago. In those cases Bayer is continuing to
24 negotiate and attempt to settle rhabdo cases directly and
25 has had some success in that. We have some mediations

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1 pending where we are attempting to set the dates.

2 And as I indicated last month in my report, the
3 narrowing process and categorization process, I think, are
4 going to be beneficial in determining what cases actually
5 are left, what categories they might fall in, and how that
6 may or may not impact the mediation program going forward.

7 So we are continuing to, as you will hear later
8 on in the agenda, to proceed forward with that
9 categorization process and I anticipate that that will be
10 helpful in terms of trying to decide how we go forward with
11 the mediation cases because, as Mr. Hoeflich indicated, a
12 number of the rhabdo cases or rhabdomyolysis cases are
13 dwindling in terms of settlement, so we will be facing how
14 we deal with these remaining cases.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. ZIMMERMAN: There's a bit of -- there's an
18 issue that's described in D which has to do with lump sum
19 settlements, Your Honor. The concern is not based upon
20 anything we know. It's just based upon a general
21 understanding of how money tends to flow.

22 When there's a lump sum settlement which is not
23 differentiated as between which client gets what and how
24 the process unfolds, the PSC and perhaps the court become
25 concerned as to whether or not it's complying with all of

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1 the appropriate ethical requirements.

2 This issue came to light to me recently when I
3 was reviewing a transcript of Judge Kaplan in the Rezulin
4 MDL where he discussed from the bench his concern, although
5 not based upon any specific knowledge of any particular
6 facts, but some ethical questions regarding how lump
7 settlements -- lump sum settlements should be disclosed and
8 he had ordered that both the plaintiffs and the defendants
9 report to the court their understanding of how lump sum
10 settlements were ultimately distributed.

11 And so I'm asking the court to take a look at
12 what Judge Kaplan did in Rezulin and I am asking the court
13 to ask itself and ask the PSC and ask the defense to look
14 into the question of whether there should be some reporting
15 of these lump sum settlements.

16 Again, I have no suspicions. I'm not here
17 raising factually any ethical problems. I'm saying to the
18 court in the interest of the integrity of the process and
19 in the interest of what other MDL courts have done with
20 regard to what I'll call sort of lump sum settlements, I
21 think it's an appropriate thing because you have all these
22 questions of assessments and you have all these questions
23 of distribution of money and you have questions of releases
24 that I think have to be at least provided sunshine or
25 provided information on so that the court can determine if

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1 there's anything that needs to be addressed.

2 If you want, this can be the subject of a motion.
3 I didn't do it that way because I wanted to raise it
4 informally. I don't know really what the defendants'
5 position is except they believe they have acted properly,
6 and I have no reason to say that they may or may not have
7 acted properly. I just want to have this information rise
8 to the top so that we can all take a look at it
9 appropriately and make sure that everything that's done
10 here is done properly.

11 THE COURT: Adam.

12 MR. HOEFLICH: Thank you, Your Honor. We do
13 believe that we have acted appropriately. We have complied
14 with all of the reporting requirements of the MDL court.
15 We have reported group settlements since early on in the
16 litigation.

17 There have been group settlements with members of
18 the PSC. In those negotiations we arrived at a settlement
19 value for a group of cases that we have gone through the
20 medical records on, we know they are rhabdomyolysis cases,
21 and the plaintiffs' counsel fulfill their ethical
22 requirements and distribute that money to their different
23 clients.

24 We are not aware of any concerns of that. Our
25 first notice of this was when we received this version of

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1 the agenda. We don't know what the issues of assessment or
2 allocation are. They haven't been presented to us.

3 But this is a long-standing practice and it's
4 something that's been known in this litigation for quite a

5 long time. I believe that if there is an issue or a
6 concern on the part of the PSC, they should meet and confer
7 with us.

8 If they don't agree with the practice, if they
9 don't agree with what they negotiated in the pretrial
10 orders, we think they should file a motion. It's the
11 appropriate mechanism for this and I think it's a due
12 process requirement for the defendants to have notice of
13 what the suspicion or accusation or whatever they believe
14 untoward is taking place, to let us know.

15 We're not -- we're told in the agenda there's an
16 increasing concern, but then we are told they saw something
17 in a transcript. So I would really like to know what this
18 is about so that we can defend ourselves.

19 THE COURT: All right. I don't think -- at this
20 point what I will do is Special Master Remele will sit down
21 with both of you and talk this issue through.

22 I think it's not pointing the fingers. I want
23 the transparency of what's going on in this MDL to be clear
24 and everyone can take a look at what the court has done and
25 what the PSC has done and what the defendants have done so

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1 there's no suspicions whatsoever on the MDL.

2 As I've told Mr. Zimmerman many times, I have
3 reviewed the figures and we have had a CPA review the
4 figures and we've not seen anything that has caught the
5 court's eye that there was something wrong. And I think I
6 have gotten reports on some of the other large settlements
7 and it's clear to this court that Bayer is not settling
8 cases that are nonrhabdo.

9 I know that that suspicion is out there and I am
10 just telling you that certainly my nose has been snooping
11 around trying to see if there were any issues because that
12 would make my life a lot easier, but at this point I see
13 there's no evidence whatsoever that Bayer has settled any
14 nonrhabdo cases and they have all been rhabdomyolysis
15 cases.

16 But I still want Special Master Remele to sit
17 down with Mr. Zimmerman and you so we can sort out some of
18 these issues. If there's some documents that can be
19 released immediately to the PSC, I want that done.

20 Let's not let something fester that shouldn't
21 fester and so let's get moving on that as quickly as
22 possible, Special Master.

23 MR. HOEFLICH: Thank you, Judge.

24 MR. ZIMMERMAN: I believe copies of the Kaplan
25 transcript were distributed at the meeting yesterday. I

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1 believe defense has it. I don't know if the court wants a
2 copy of it addressed to this issue, but I think the special
3 master has it and he can share it with you if need be.

4 MR. MAGAZINER: May I address this briefly?

5 THE COURT: You may. Good morning.

6 MR. MAGAZINER: Good morning, sir. I don't know
7 what the suspicions are that the PSC is harboring, but it
8 does seem to me if there are going to be discussions with
9 Special Master Remele about this, the counsel for the

10 plaintiffs who have entered into these settlements, lump
11 sum settlements, ought to be included.

12 Because the PSC is as much questioning what those
13 plaintiffs' counsel have done as questioning what defense
14 counsel has done, it seems to me. And to have a discussion
15 about the conduct of a plaintiff's counsel who is not
16 present seems to me only leading down a road of more
17 trouble.

18 I know some of the settling plaintiffs' counsel
19 are members of the PSC, but the PSC apparently is concerned
20 not only about its own members, but about counsel who are
21 not members of the PSC who have done these settlements. So
22 perhaps some notice could go out so that they would have an
23 opportunity to be heard on this.

24 THE COURT: Well, I appreciate your comments.
25 Special Master Remele will take this bull by the horns and

0016 handle it and I will hear about the results in September.

1 MR. HOEFLICH: Thank you, Judge.

2 MR. ZIMMERMAN: The next item, Your Honor, is
3 discovery and I think this is really just a reporting
4 function.

5
6 The first part of the discovery is the deadline
7 under 114 which passed. The first deadline for the first
8 wave passed on June 7th. Cases subject to deadline have
9 file numbers in the range of 01-1594 to 02-4433.

10 As the report indicates, the agenda report, there
11 were approximately 1,910 plaintiffs subject to this
12 deadline, 1,910. Of these, 1,259 were granted extensions,
13 which left 651 subject to the June 7th deadline. As of
14 July 14th defendants had received submissions for 261 of
15 that 651.

16 MR. HOEFLICH: As a matter of protocol, I believe
17 we both may be heading toward breaching an agreement. I
18 believe we had an agreement with the special master
19 yesterday that this issue would be addressed by
20 Ms. Geoppinger and Mr. Mizgala to avoid --

21 MR. ZIMMERMAN: I am just reading off the agenda,
22 my god. There's nothing here that is not written here.

23 MR. HOEFLICH: I just believe we promised them
24 that this was their moment on the web.

25 MR. ZIMMERMAN: I would like to introduce

0017 Ms. Geoppinger to finish this conversation. However, I
1 just wanted to say that there were 261 reports filed. And
2 now I am going to leave it to Ms. Geoppinger to tell me
3 about it, but I think I was just quoting word for word
4 here.

5
6 MS. GEOPPINGER: I will be happy to read the rest
7 of the agenda.

8 MR. HOPPER: Adam may have something to say.

9 MR. HOEFLICH: Well, in a movie I am not sure it
10 would be a defense to say, But I was just reading her
11 lines.

12 THE COURT: Good morning.

13 MS. GEOPPINGER: Good morning, Your Honor.

14 MR. ZIMMERMAN: An agreed agenda, I might

15 comment.

16 MS. GEOPPINGER: I will finish reading the agenda
17 and then we can give the part of the report that is the
18 more, perhaps, controversial part of all of this.

19 Of the 1,259 [sic] plaintiffs, there were 1,259
20 plaintiffs granted extensions, which left 651 plaintiffs
21 subject to the June 7th deadline. As of July 14th the
22 defendants had received submissions from 261 of those 651
23 plaintiffs, 136 served letters under PTO 114 with medical
24 records, and 125 served case specific expert reports.

25 There's an issue as to whether or not the form
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1 report that was developed by the PSC complies with PTO 114
2 and defendants have filed a motion to compel compliance
3 with PTO 114 relative to serving reports that have been
4 filed, but that's another issue.

5 The defendants have -- in addition to the ones
6 that I have just listed, the defendants have also received
7 an additional 109 submissions that were due later than
8 June 7th, whether by extension or by the terms of PTO 114.
9 24 of those were letters with medical records and 85 were
10 reports.

11 In accordance with Pretrial Order No. 127, we are
12 now in the process of categorizing all of the PTO 114
13 submissions that were received by the defendants on or
14 before June 28th. So it would be the June 7th deadline
15 people and anyone who submitted before the delinquency
16 deadline.

17 We did discuss these issues with Special Master
18 Haydock and Remele yesterday, and this is where I am going
19 to pick up where the more controversial type of thing or
20 issues might come up.

21 And James Mizgala and I were going to give the
22 report together, so I would invite him to join me at this
23 point.

24 MR. MIZGALA: Good morning, Your Honor.

25 THE COURT: Good morning.

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1 MS. GEOPPINGER: We are pleased to report that
2 the PSC and the defendants have been working well together
3 to categorize these cases. As Your Honor is aware, PTO 127
4 was issued on Thursday, July the 8th, and it established
5 nine categories.

6 Category A is rhabdomyolysis.

7 Category B is subdivided into 1 and 2. Those are
8 documented muscle complaints or symptoms with objective
9 evidence either while using Baycol or within 30 days after
10 discontinuation.

11 Category C, which is also subdivided into parts 1
12 and 2, is documented muscle complaints or symptoms without
13 objective evidence, again, either while using Baycol or
14 within the 30 days after discontinuance.

15 Category D is documented muscle complaints or
16 symptoms not documented while using Baycol or within 30
17 days of the discontinuation.

18 Category E is undocumented muscle complaints or
19 symptoms.

20 Category F is elevated labs other than CK or
21 liver enzymes, which were part of what was included in the
22 objective evidence in category B.

23 Category G is other for complaints that are not
24 muscle related.

25 Category H is unable to categorize because of

0020 1 inadequate or insufficient information in the submission.

2 In the approximately one week since the issuance
3 of PTO 127 the PSC and defense counsel have categorized 337
4 total cases that were -- that's the number up through June
5 28th. We have a couple of others that we are trying to
6 figure out if they actually fall into it. We may have
7 missed one or two.

8 But of those 337, the plaintiffs and defendants
9 are in agreement as to 47 percent of all of the cases on
10 the list. That's 160 of the cases. We have a disagreement
11 regarding 52 percent of the cases or 177.

12 But of those 177, 131 of them in terms of the
13 disagreement are where the PSC has categorized the cases
14 into something other than H, which is the insufficient
15 information, where the defendants have categorized it as
16 insufficient information.

17 The reason for the difference between us there is
18 the PSC, as we represented to the special masters that we
19 would do when we started the categorization, has done some
20 follow-up with the plaintiffs' counsel who did not submit
21 sufficient information or adequate information for the
22 purposes of categorization. So we were able to categorize
23 131 more cases than the defendants because we simply had
24 more information.

25 THE COURT: Has that information been turned over

0021 1 to --

2 MS. GEOPPINGER: It's being turned over today, it
3 is being sent today. It is being copied and sent to the
4 defendants. We believe that we will be in a position to
5 categorize more of the cases.

6 At this juncture, just to give you an idea of
7 where we are in terms of the agreement, we are in agreement
8 that there are nine category A rhabdo cases, which are the
9 ones I believe Adam referred to in terms of the settlement
10 agreement or the settlement negotiations going on; there
11 are 16 cases that have fallen into B-1; five cases that
12 have fallen into B-2; 69 that are in C-1; four that are in
13 C-2; four that are in D; zero that are in E; zero that are
14 in F; one in G; and then 52 in H, which is, again, that
15 category about inadequate information.

16 At the same time that we are working on the 131
17 cases where there was insufficient information, the PSC is
18 going to go back and do some more follow-up on the H cases
19 where we've agreed to see if we can obtain additional
20 information so that we can also categorize those cases.

21 MR. MIZGALA: Your Honor, good morning.

22 THE COURT: Good morning.

23 MR. MIZGALA: Yesterday at the end of our
24 conference with Special Master Remele and Haydock,

25 Ms. Geoppinger and I sat down and developed a strategy as
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1 to how we would proceed forward with this group of
2 uncategorized cases or where there's a dispute.

3 And Ms. Dailey is going to send us the
4 information on those 131 cases. The defendants will look
5 at that information and we will see if we can agree on what
6 the PSC has categorized them as.

7 On those cases where we have continuing
8 disagreement, we'll sit down and we'll go through the
9 evidence that we both used to determine our categories and
10 we'll determine whether or not we can agree on
11 categorization.

12 If not, we talked to the special masters about
13 developing a process where we would submit information to
14 them and they would make the determination of the category.

15 THE COURT: All right.

16 MR. MIZGALA: This is going to occur over the
17 next month and we are having a meeting again on August 13th
18 to discuss where we stand.

19 One thing I want to follow up about the PTO 114
20 process is that we're also -- on the cases that still
21 remain delinquent, there's about 300 people who have not
22 made any sort of submission out of phase one. We are
23 actually meeting and conferring tomorrow on those folks and
24 will be submitting proposed lists to the court for an order
25 to be generated hopefully by the end of this week.

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1 THE COURT: All right. I wish to congratulate
2 you and thank you for all the hard work and corporation
3 that you've done in this matter. It continues the
4 cooperation that I have seen from Mr. Zimmerman and
5 Mr. Hoeflich.

6 MR. ZIMMERMAN: Despite --

7 MS. GEOPPINGER: It's a lot friendlier, Your
8 Honor, it's a lot friendlier.

9 THE COURT: It's great to see that we are getting
10 some category definitions, and that will be helpful for the
11 court later on. I appreciate your work.

12 MS. GEOPPINGER: Thank you.

13 MR. MIZGALA: Thank you, Your Honor.

14 MR. HOPPER: Your Honor, you see the value of
15 emissaries.

16 MR. ZIMMERMAN: I want to admonish you, though,
17 Jeanne, you actually dropped a word. It was "a" and you
18 said "the." You didn't pick that up.

19 MR. HOEFLICH: James, I think, did a fine job.

20 MR. ZIMMERMAN: Actually, in all seriousness, I
21 want to really congratulate Jeanne for doing a fabulous job
22 and taking this bull by the horns and working closely with
23 James. It's really nice to see. It's just one of those
24 wonders of the world where these two people have really got
25 together and in the good of -- the common good have been

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1 able to come together with agreement.

2 And I want to also publicly thank Lisa Gorshe of
3 the Climaco office, who was working with Jeanne on her

4 team; Stacy Hauer, who is in the back from our office; and
5 Deanna Dailey from the Larson King office. They have
6 really done a tremendous amount of work to make this
7 happen, Your Honor. And it doesn't happen without people
8 like that going out and chasing things down, and we really
9 appreciate it.

10 And I am sure James has got a team working
11 similarly and I don't know who they are, but I congratulate
12 and thank them as well. It's a lot of work.

13 THE COURT: And the court thanks them too.

14 MR. ZIMMERMAN: Can I go on now?

15 MR. HOEFLICH: Yes.

16 MR. ZIMMERMAN: The Pennsylvania state court --
17 this is a report -- has also this case specific expert
18 report. Of the 3,400 cases subject to the deadline in
19 Pennsylvania, only 271 of those cases remain active and
20 that's about, if my math is right in my head, 8 percent;
21 whereas, it looks like we're getting a totally different
22 kind of percentage so far in the MDL. Of the 651 that were
23 subject to the June deadline, 261 made it through at least
24 preliminarily for about a 40 percent rate.

25 I don't know what that means other than that's

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1 what they say and we'll see where they are at the end of
2 the day. There's no knowledge that these rates will
3 continue or no knowledge that they will be those at the end
4 of the day, but that's where we are as of the moment.

5 Number C, Your Honor. Bayer and Bayer AG
6 recently produced 60 CDs of documents, including documents
7 for people previously deposed. We discussed this last
8 time.

9 THE COURT: Right.

10 MR. ZIMMERMAN: Defendants note that most of
11 these documents are duplicates of documents previously
12 produced, which probably is true, but "most" doesn't mean
13 "all" and in the interest of completion, when there are new
14 documents that come in after a deposition, we have taken
15 the position that we have to re-notice and take some
16 additional Bayer AG depositions of Bayer AG employees.

17 We're engaged in discussions to try and resolve
18 which ones we have to take and when they're going to be
19 taken. Randy Hopper has been working with Doug Marvin --
20 sorry, Doug -- and maybe they can report as to where they
21 are.

22 It's important from my point of view and the
23 PSC's point of view that we just get this work product done
24 so at the end of the day we can start -- if we can't get
25 cases resolved here we can have them prepared for remand,

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1 which is why we want to get these done this summer. We are
2 re-noticing and re-taking. We just want to get them done
3 and so we have a complete package at the end of the day.

4 THE COURT: Good morning.

5 MR. HOPPER: Good morning, Your Honor. Randy
6 Hopper for the plaintiffs.

7 Your Honor, I'm happy to report that the meet and
8 confers that we've engaged in with defendants have gone

9 quite well. I'm happy to report that I think we're a
10 skooch away from getting to final resolution on this.

11 I don't know if Mr. Marvin wants to add anything
12 to it, but I don't suspect ultimately that we'll have
13 anything controversial or that there will be anything that
14 we'll have to address.

15 But we do have one matter that is still remaining
16 with regard to the executives and we're working through
17 that diligently now and hope that we will be able to come
18 to some terms on that relatively soon, perhaps even this
19 week.

20 THE COURT: All right. Thank you.

21 MR. MARVIN: That's correct, Your Honor. I can't
22 add anything more. We expect resolution soon.

23 THE COURT: Why don't you come -- since we are
24 tape-recording, you're going to be on audio.

25 MR. MARVIN: Good morning, Your Honor.

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1 THE COURT: Good morning.

2 MR. MARVIN: That's correct. There's really not
3 much more that I can add. We expect to have a resolution
4 very soon. Thank you.

5 THE COURT: Thank you.

6 MR. ZIMMERMAN: What's a skooch?

7 MR. HOPPER: It's a southern phrase. Just a
8 little bit away.

9 MR. HOEFLICH: Slightly less than a tinch.

10 MR. ZIMMERMAN: Yesterday I learned about -- what
11 was it? -- a smattering versus a cluster. I never stop my
12 education, Your Honor. That's very important.

13 Next is the re-designation problem or issue.
14 Bayer has completed the production of the re-designation of
15 confidential documents. GSK is still in the process of
16 producing the last of these re-designation -- its
17 confidential documents.

18 When that process is complete we are
19 contemplating filing a motion to recover the costs for that
20 re-designation as incurred by the PSC in having to go
21 through this. Defendants will oppose that motion and it
22 will be heard at the appropriate time.

23 THE COURT: All right.

24 MR. ZIMMERMAN: I don't know that there's any
25 more comment necessary on that.

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1 Before the court is the PSC's request for letters
2 rogatory. Defendants have moved to quash. Plaintiffs will
3 oppose the motion to quash and respond in due course. I
4 believe the matter is now set to be argued at the September
5 status unless something occurs in between, but that's where
6 it sits, correct?

7 MR. HOEFLICH: We have nothing to add to that.

8 MR. ZIMMERMAN: Good. We are doing great.

9 The PSC has filed a motion to compel defendants
10 to produce a list of former salespersons to whom PTO 6 has
11 been mailed. There's a brief filed by defendants in
12 opposition and the matter is set for argument before Chief
13 Magistrate Judge Lebedoff I believe on the 27th of this

14 month.

15 The parties have served their initial
16 designations of generic experts pursuant to PTO 120.
17 Defendants have requested plaintiffs to produce videotapes,
18 including certain of plaintiff experts. We have refused to
19 produce those videotapes because our position has been and
20 is that those were prepared to produce for the court a
21 science and medical tutorial which we discussed in open
22 court several months ago. Defendants will want to move to
23 compel that.

24 I guess that will be heard if it's necessary in
25 due course, but just so the court understands what that's

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1 about, this was done in preparation for the tutorial that
2 we planned on presenting to the court at the appropriate
3 time.

4 All of that has been somewhat delayed by the PTO
5 120 negotiation that took a little longer, but I think we
6 are still on track to provide that to the court, when and
7 if the court desires it, at the appropriate time. We
8 discussed with the court this science and medical tutorial,
9 which we think is still a tremendous idea, which can help
10 shorten learning curves and get us all a little narrowed.

11 MR. HOEFLICH: Your Honor, we've raised this
12 issue before. There is no exception in the rules for
13 communications with testifying experts if it involves --
14 just because it involves a matter that's going to be argued
15 in front of the court or presented to the court. In fact,
16 that's the very sort of communication that's supposed to be
17 discoverable. So we will be filing a motion to compel and
18 we may ask for an expedited hearing on it.

19 THE COURT: All right. Motions.

20 MR. ZIMMERMAN: Motions, Your Honor. We had
21 discussed briefly the motion to quash the PSC's request for
22 letters rogatory. I don't think there's anything further
23 on that, unless the court has some issues or the defense
24 has some issues. Our response has not been filed and will
25 be filed timely, and hopefully we will be able to argue

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1 that at the September conference.

2 Number 2, Your Honor, is the motion to compel
3 production of expert reports pursuant to 114. This is
4 defendants' motion on the problems they see in the report
5 forms that have been filed and have been the subject of
6 much discussion.

7 I think we're going to need a little more time to
8 respond to that, Your Honor, because a -- well, actually,
9 Dick can talk about it because he is quarterbacking this,
10 but the problem here is we're working it through on one end
11 and we are going to argue it as a problem on another end.

12 We feel like what we're doing here is maybe
13 having to look at what's really left at the end of the day
14 as opposed to try and do it in some generic way. So I
15 think, as this process that Jeanne and James are working
16 through, we may find that this problem becomes narrower.

17 In addition to that, we are kind of faced with a
18 difficult motion. It's kind of a generic motion and we

19 have to go do a lot of field work on and we are just going
20 to need a little more time to respond to that, and I think
21 Dick is going to --

22 THE COURT: Good morning.

23 MR. LOCKRIDGE: Good morning, Your Honor. I
24 think Mr. Zimmerman just said most of what I was going to
25 say, but we would appreciate a couple of more final weeks.

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1 One final point, also, is that the same people
2 who are working on the categorization also would be working
3 on this brief. The supplemental categorization was worked
4 out, as I understand it, yesterday. The date due on that
5 supplemental categorization is August 13th, and that's what
6 we would like for a due date on our brief. It's now due
7 July 29th.

8 Now, it's my understanding -- I have talked with
9 Ms. Weber about this -- that she did not feel she could
10 give that much of an extension and I will let Adam,
11 whoever, talk about their rationale for that.

12 MR. HOEFLICH: Your Honor, we would oppose an
13 extension on the briefing of the PTO 114 motion. The
14 plaintiffs served check box reports to us. We were handed
15 and the special masters were handed a check box report by
16 Mr. Becnel that I believe had 10 plaintiffs' name on it for
17 a person, for an expert who was charging \$100 to perform
18 the report. We've taken a look at a number of reports that
19 are clearly --

20 MR. ZIMMERMAN: I think we agreed not to argue
21 this.

22 MR. HOEFLICH: No, we did not agree not to argue
23 this. We agreed not to argue the numbers of cases. Now
24 we're discussing the briefing schedule. We have a grave --

25 MR. ZIMMERMAN: You are not discussing the

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1 briefing schedule. You're discussing the substance.

2 MR. HOEFLICH: We have a grave concern that the
3 plaintiffs out there won't have any guidance on what is or
4 is not acceptable in terms of a Rule 26(a)(2) expert report
5 because they've been given contrary information by the PSC.

6 We have plaintiffs whose reports have been
7 deferred pursuant to extensions with the special masters,
8 and we think this issue needs to be resolved so that the
9 coming waves of reports comply with the rules. Otherwise,
10 we are going to get a narrowing that is not the narrowing
11 that was ordered in the original PTO. We think it's
12 important that this issue be briefed and resolved.

13 MR. LOCKRIDGE: Your Honor, first of all, I don't
14 believe that's correct, the PSC is giving attorneys
15 contrary directions. We are giving them now much more
16 specific directions than we were before and we have the
17 benefit of Pretrial Order 127 and our conversations with
18 the special masters also.

19 But in any event, it's not, as presently
20 scheduled, scheduled to be teed up until September in any
21 event and all we would like is another, I think, 14 days to
22 respond.

23 THE COURT: All right.

24 MS. WEBER: Your Honor, may I --
25 THE COURT: You may.

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1 MS. WEBER: Our briefing on this had asked for
2 expedited treatment on this. We have a deadline for PTO
3 114 reports at the end of this month. Obviously we are not
4 going to be able to dispose of this matter before then.

5 But the next deadline after that is September
6 20th. And if we can stay on the normal briefing schedule
7 on this matter -- it's not a complicated matter for
8 plaintiffs to brief in a three-week time period -- we can
9 have this fully briefed to the court by the end of the
10 first week of August.

11 And we would hope that Your Honor will be able to
12 decide it on the papers so that with respect to that third
13 wave of PTO 114 reports, plaintiffs would know what they're
14 supposed to be doing on this.

15 And what the PSC is proposing by kicking this
16 deadline back until mid August and then we would file our
17 brief after that is that we'll end up with a round of form
18 reports which, you know, we think are improper for the
19 September batch as well.

20 It's going to extend the entire process by months
21 if you would buy into the PSC's position and if you agree
22 with us that a two-page checkoff report is not a Rule
23 26(a)(2) expert report.

24 So that's why we were not amenable to an
25 extension. And if you don't want to take this on the

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1 papers, Your Honor, we would like a date to come back and
2 talk to you in August about this.

3 MR. LOCKRIDGE: Your Honor, the times that we
4 have given the defendants out of a matter of courtesy for
5 responses has been probably every time.

6 We have no problem with this matter being heard
7 on the papers if you don't want to hear oral argument in
8 September, but we would like and ask for until August 13th
9 so that the same people who are doing the categorization
10 can spend more time on that and then they can turn their
11 attention to the briefing.

12 THE COURT: All right. August 13th.

13 MR. ZIMMERMAN: Somebody grabbed my agenda.

14 MS. WEBER: I think I swiped it, Bucky.

15 MR. ZIMMERMAN: As noted previously, there are
16 several motions for relief from 114 and I believe the court
17 deals with them as they come in and come up. Normally the
18 PSC does not file a brief --

19 THE COURT: Right.

20 MR. ZIMMERMAN: -- or file a position paper in
21 that regard. I just note there are, I believe, some
22 motions pending, if I'm not mistaken.

23 As noted further, Your Honor, a motion -- another
24 motion has been -- the motion regarding the sales
25 representatives has been referred to Chief Magistrate Judge

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1 Lebedoff and that's going to be heard on the 27th. I am
2 really repeating myself, but that's where we are in the

3 agenda.

4 With regard to trial settings and remand issues,
5 there are presently no trial settings for cases in the MDL.
6 There's a hefty list of cases set for trial in state
7 courts. We were recently provided with this list.

8 You will note that there's a number of cases set
9 in September and a large number, a larger number in October
10 and even a larger number in November -- in Philadelphia for
11 the most part are where the settings are -- through
12 December.

13 There's a significant number going through the
14 Philadelphia system. They are -- some are rhabdo. Some
15 talk about elevated CK. Some talk about muscle pain.
16 Again, we never know exactly what they are until we get
17 closer to the D-Day, but there are a fairly significant
18 number of matters set for trial in state court.
19 Historically they've resolved themselves. We don't know
20 what will happen in this wave, but the list is the list.

21 For your information, I do communicate with state
22 counsel and a number of them we are doing certain
23 cooperation and a number of them they don't need the PSC's
24 cooperation. But the fact of the matter is that if anyone
25 in state court does want cooperation or access to documents

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1 or access to experts or access to the depository of
2 documents and deposition transcripts, we stand ready,
3 willing, and able to help anyone who has a Baycol case.

4 Last item, Your Honor, under trials is the PSC
5 and special masters and the defendants met about
6 categorization. And I believe the parties have reported.
7 I don't know if the special masters are going to further
8 report on the categorization process or not. I guess this
9 would be the time if you were.

10 SPECIAL MASTER HAYDOCK: Just wait until the end.

11 MR. ZIMMERMAN: Thank you.

12 Normally we talk about the class actions. I see
13 it's not on the agenda. I don't know if there's anything
14 exceptional to report. I believe the Oklahoma case -- as
15 you know, we are cooperating and we are working on a joint
16 prosecution agreement with Oklahoma and that notice is
17 still being discussed, has not gone out, the class notice.

18 The Pennsylvania class action, frankly, I don't
19 know the status of that. I believe it's up on appeal to
20 the Court of Appeals. It's probably just hanging there
21 until --

22 MR. MAGAZINER: Correct.

23 MR. ZIMMERMAN: -- that has been decided.

24 I believe there was an argument that occurred in
25 this last 30 days on a third party payer class action in

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1 Pennsylvania and I don't know if a decision has been
2 rendered on that. That's under advisement.

3 That's what I know about pending classes other
4 than Canada, which I know very little about.

5 Under Liaison Advisory Committee and special
6 master's report, there's still this outstanding issue with
7 expense sharing. I believe Randy and perhaps the special

8 master are going to have something to say about that.
9 Frankly, it's a little disturbing to know that
10 that agreement hasn't held up very well, but they will
11 report on it and maybe I am wrong and maybe it's all come
12 together and checks have flowed in.

13 I guess I will turn it over to the special
14 masters with regard to the LAC and to Randy with regard to
15 the European expense sharing.

16 MR. HOPPER: Good morning again, Your Honor.

17 THE COURT: Good morning.

18 MR. HOPPER: I am happy to report that as between
19 defendants and the PSC that all matters, expenses have been
20 resolved and they were resolved amicably with no problems
21 or issues at any point along the way.

22 I am, however, sorry to have to tell the court
23 that after involvement with the special master and with
24 several meet and confers or, I suppose, a sidebar to the
25 formal LAC process, we still have not received further

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1 payments from any of the attorneys from the various state
2 cases, be that California, Pennsylvania, or from Texas.

3 I will say, however, that Mr. Weiss has made --
4 Sol Weiss has made a concerted effort to try to obtain the
5 various payments from his members and he's doing everything
6 he can to try to obtain those, but there's still been
7 silence from California and from Texas.

8 I honestly can't explain why and I don't know if
9 Special Master Haydock has spoken with any of them, but I
10 do know that he laid down his measure in this matter on
11 behalf of the court to tell them to pay up or they were
12 going to have to deal with this.

13 And I do want to -- it's disappointing to me
14 because there have been many times we have been able to
15 cooperate in various aspects of the cooperation with other
16 plaintiffs' counsel, Your Honor.

17 But the one thing I do want to say is that in
18 some instances the PSC and I believe in some instances
19 defendants have actually paid ahead or have front ended
20 monies to be able to cover costs associated with expenses
21 in this litigation.

22 And I just want to be sure the court knows that
23 and that that's on the record, that we've gone the extra
24 mile, if you will, to take care of these costs and so some
25 of these vendors could go ahead and get paid who are

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1 smaller vendors and needed to be paid. And I think that's
2 important for the court to note.

3 Special Master Haydock.

4 THE COURT: Well, the court was in Amsterdam when
5 the European depositions were started and it was quite an
6 operation and the state court lawyers were involved and,
7 well, you are going to have to bring your -- if there's any
8 motions to be brought on this issue dealing with payment, I
9 will hear them.

10 MR. HOPPER: Yes, Your Honor. Thank you.

11 THE COURT: I'm glad the vendors got paid because
12 it's very important that -- the operation went smoothly and

13 the way the court reporters and the video people operated
14 over in Europe was just outstanding, and I'm glad they did
15 get paid.

16 MR. HOPPER: Thank you, Your Honor.

17 MR. MARVIN: Douglas Marvin, Your Honor. Just to
18 add to that, Your Honor, as the PSC has paid various
19 vendors, we have as well advanced funds for that. So at
20 this point it's simply a question of waiting for the other
21 plaintiffs' groups to pay in accordance with the
22 spreadsheet that Special Master Haydock sent around. So we
23 are waiting for that.

24 THE COURT: All right. Randy, anything further?

25 MR. HOPPER: No, Your Honor, unless, Adam, you

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1 want to recount what we just discussed to Your Honor.

2 Sorry, Your Honor.

3 THE COURT: No, that's all right.

4 Adam.

5 MR. HOPPER: I guess not.

6 SPECIAL MASTER HAYDOCK: Good morning, Judge.

7 THE COURT: Good morning.

8 SPECIAL MASTER HAYDOCK: With regard to the
9 European expense matters, I had provided -- actually with
10 the efforts of the PSC with Randy and Bayer with Doug
11 Marvin created a spreadsheet that all the attorneys,
12 including the state court lawyers, agreed on in terms of a
13 share. The time that I gave them to make those payments or
14 respond to me with a statement that they've made them has
15 just expired.

16 I am going to meet with Randy and with Doug
17 immediately after this conference. We may need your
18 assistance -- or we will propose something if we need the
19 court's intervention in order to get those final vendors
20 paid through that process.

21 Secondly, Your Honor, with regard to the wall, we
22 have a proposed order that I sent over yesterday that both
23 the PSC and Bayer have agreed to to terminate the process
24 of reviewing medical records. That will come due and end
25 if the court approves of that.

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1 We'll monitor that if there's any further need to
2 continue to look at those. The logs that Marie Harkins and
3 any of the paralegals created regarding those medical
4 records have been sent to me and the final ones will be
5 sent so that I will have those in my custody for any
6 further need for that.

7 And I want to compliment on the record both Susan
8 Weber and Rob Shelquist, who worked with me over the years
9 on procedures regarding that wall and were reasonable,
10 cooperative, and very fair. So I wanted to thank them
11 publicly for that.

12 Any questions on the wall, Judge?

13 THE COURT: I just need to see the order. I
14 haven't seen it.

15 SPECIAL MASTER HAYDOCK: I e-mailed it to Katie
16 yesterday, I believe.

17 LAW CLERK: We have it.

18 SPECIAL MASTER HAYDOCK: Thirdly, Your Honor,
19 with regard to the categorization process, Special Master
20 Remele and I will create a process with the assistance of
21 the PSC and Bayer folks to categorize those cases in a
22 timely manner. Our hope is, as reported earlier, by mid
23 August we'll have much further progress in the
24 categorization.

25 And to the extent that the parties can't agree on
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1 a category, then we'll develop a procedure to do that as
2 quickly as possible so the court will have a full and
3 complete record by the middle of August as to what those
4 cases look like with regard certainly for the first wave
5 ones less the extensions and some of the second wave cases
6 as well.

7 THE COURT: All right.

8 SPECIAL MASTER HAYDOCK: And then lastly, Your
9 Honor, I will be this weekend in California at a special
10 master MDL administrators meeting sharing common issues or
11 uncommon issues, depending on how you view them.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 Mr. Zimmerman, anything further other than
15 setting a date for September?

16 MR. ZIMMERMAN: Let me just run through this real
17 quick and see if there is, Your Honor.

18 (Pause)

19 MR. ZIMMERMAN: I don't believe so, Your Honor.
20 I believe that concludes the agenda.

21 I want to thank the special masters for working
22 with us on this categorization stuff. It's a new process.
23 It's something that people don't have a lot of experience
24 with, so we're going to bump and grind a little bit through
25 it, frankly, but through some wisdom and patience and

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1 keeping Adam and I out of the room probably gets it done.

2 THE COURT: Adam.

3 MR. HOEFLICH: Thank you, Judge. We too
4 appreciate the assistance of the special masters. And we
5 have nothing further.

6 THE COURT: How does September 9th look for the
7 next status conference? It's a Thursday. It's the
8 Thursday after Labor Day.

9 MR. ZIMMERMAN: What day is Labor Day this year?

10 THE COURT: I believe it's the 6th.

11 MR. HOPPER: Monday, the 6th.

12 MR. HOEFLICH: September 9th works for Bayer,
13 Judge.

14 THE COURT: September 9th at 10:00. We'll
15 adjourn. And if I could see counsel in chambers for just a
16 few minutes.

17 MR. MAGAZINER: Your Honor, may I just say I may
18 be trying to schedule a vacation that would overlap with
19 September 9th, but I don't want that to be a reason for the
20 court to change its calendar. If I can't be here, I will
21 make sure someone else is here for GSK.

22 THE COURT: All right. Thank you.

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(Court adjourned at 11:05 a.m.)

* * *

I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by:
Lori A. Simpson, RMR-CRR

Dated: July 23, 2004