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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

)
 In re: Baycol Products) File No. MDL 1431
 Litigation) (MJD/JGL)
)
)
) Minneapolis, Minnesota
) September 27, 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.
 KEVIN GIEBEL, ESQ.
 RICHARD ARSENAULT, ESQ.

For Defendant Bayer: PHILIP BECK, ESQ.
 ADAM HOEFLICH, ESQ.
 PETER SIPKINS, ESQ.
 SUSAN WEBER, ESQ.
 DOUGLAS MARVIN, ESQ.
 JAMES MIZGALA, ESQ.
 CHARLES MOORE, ESQ.
 For Defendant
 GlaxoSmithKline: FRED MAGAZINER, ESQ.

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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1 THE CLERK: In re: Baycol Products Litigation,
 2 MDL No. 1431. Counsel, note your appearances for the
 3 record.
 4 MR. ZIMMERMAN: Good morning, Your Honor. Bucky
 5 Zimmerman for the PSC.
 6 THE COURT: Good morning.
 7 MR. LOCKRIDGE: Good morning, Your Honor. Richard
 8 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: Ron Goldser for the PSC. Good
 14 morning.
 15 THE COURT: Good morning.
 16 MS. GEOPPINGER: Good morning, Your Honor. Jean

17 Geoppinger for the PSC.
18 THE COURT: Good morning.
19 MR. GIEBEL: Good morning, Judge. Kevin Giebel.
20 THE COURT: Good morning.
21 MR. ARSENAULT: Richard Arsenault for the PSC.
22 THE COURT: Good morning.
23 Mr. Beck.
24 MR. BECK: Phillip Beck for the Bayer defendants,
25 Your Honor.

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1 THE COURT: Good morning.
2 MR. HOEFLICH: Good morning, Your Honor. Adam
3 Hoeflich for Bayer.
4 THE COURT: Good morning.
5 MS. WEBER: Good morning, Your Honor. Susan
6 Weber for Bayer.
7 THE COURT: Good morning.
8 MR. SIPKINS: Good morning, Your Honor. Peter
9 Sipkins for Bayer. And with me this morning is Charles
10 Moore, who is now assisting me on this case.
11 THE COURT: Good morning, Charles.
12 MR. MAGAZINER: Fred Magaziner for
13 GlaxoSmithKline.
14 THE COURT: Good morning.
15 MR. MARVIN: Good morning, Your Honor. Douglas
16 Marvin for Bayer.
17 THE COURT: Good morning.
18 MR. MIZGALA: Good morning, Your Honor. James
19 Mizgala for Bayer.
20 THE COURT: Good morning.
21 Mr. Zimmerman.
22 MR. ZIMMERMAN: May it please the court, Charles
23 Zimmerman for the PSC. I hope everyone had a good summer.
24 We took August off and I am sure everyone had time to do
25 some reflection on Baycol and other related and not so

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1 related matters. It's nice to be back before Your Honor.
2 THE COURT: It's good to have you back.
3 MR. ZIMMERMAN: Thank you. We have filed a
4 status report and agenda with the court, and we will track
5 that with any questions that may interrupt or in any way
6 change the form of the agenda as the court may desire.
7 But we will start going from top to bottom and
8 then if there's anything you want to take out of order,
9 we'll obviously do that. Normally what we do is we kind of
10 go to the agenda and then we give comments from either side.
11 Unless anybody feels differently, that's how we will proceed
12 today.
13 Starting with pending cases, Your Honor. As of
14 the 24th of September 2004 defendants have been served with
15 6,653 cases that remain active, and that is down from
16 14,349 cases filed since this litigation commenced. 16
17 percent of the cases filed in state court remain active,
18 that is, 871 cases of the original 5,707 filings. I am not
19 in any position to comment on that. It's just a matter of
20 reporting. I don't know what that means in terms of where
21 those cases -- what cases got resolved, what cases got

22 dismissed; and I am not sure it's relevant to this inquiry
23 at this point anyway. But 76 -- or 67 percent of the cases
24 filed in federal court remain active, 5,777 cases remain
25 active of 8,637.

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1 As we know, Your Honor, this does not always
2 represent number of plaintiffs or number of claims
3 necessarily. It represents number of filings, but the
4 number of claims does remain difficult to track. So I guess
5 we just need to know that claims -- claimants may be
6 different than the number of filings.

7 I think what's really going to be important is
8 the status of the narrowing concept or procedures that are
9 in place as opposed to number of filings, but we always do
10 start with filings.

11 At the last status conference in June -- was it
12 July or June?

13 UNIDENTIFIED SPEAKER: July.

14 MR. ZIMMERMAN: It was July. In July defendants
15 were served with 7,642 cases that were active. Of that
16 total, 6,046 were pending in federal court and 1,596 were
17 pending in state court. Frankly, I'm not understanding that
18 paragraph and how that relates to the paragraph before.

19 MR. BECK: Sure.

20 MR. ZIMMERMAN: If you could explain that.

21 MR. BECK: Yes. Phil Beck for Bayer, Your Honor.
22 Traditionally what we have done in our status reports in
23 terms of reporting on number of cases is we've given you
24 the current numbers. We've also given you the numbers as
25 of the last status report so that the court can see what

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1 has happened in the last period of time, whether it's one
2 month or whether it's a few months.

3 So I guess the only significance of it would be
4 that there is a trend downward in terms of the number of
5 active cases, a faster trend in state court than in the MDL,
6 but a trend downward nevertheless.

7 THE COURT: All right.

8 MR. BECK: There's no significance to it other
9 than that and other than that somebody at some point along
10 the way asked us to include that in each status report and
11 so we do.

12 THE COURT: Thank you.

13 MR. ZIMMERMAN: An updated list of plaintiffs'
14 counsel has been provided recently to the PSC and has been
15 provided by an e-mail that we received recently, and we
16 appreciate that.

17 Next we will move into settlement.

18 THE COURT: Before we move on to settlement,
19 let's put in another category before I forget it. I have
20 it on my agenda. I just received the trial calendar and I
21 would like a report on that before we move on.

22 But also I received -- well, it was on Verilaw on
23 9-24-04 dealing with an open letter to the court from
24 Plaintiff Edward Ronwin, and I don't know if you all have
25 seen that and pulled it down. It addresses some issues

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1 dealing with the PSC and, of course, with Bayer, but I don't
2 know if you want to make just preliminary comments on that
3 or address that later.

4 MR. ZIMMERMAN: I can make a preliminary comment
5 on that, Your Honor. I have not read it. I saw it come
6 about. I have seen a lot of letters from Mr. Ronwin. I
7 just did not have an opportunity to look at it.

8 THE COURT: This is an open letter to the court,
9 so I do want some response from both sides.

10 MR. ZIMMERMAN: Do you want it in writing or do
11 you want it today? I can look at it at the break and
12 comment.

13 THE COURT: Just take a look at it at the break
14 and then comment briefly, and then if you would respond in
15 writing to some of the issues that he is presenting about
16 not receiving notification of some of the depositions and
17 that he could listen to them.

18 And then, of course, he has some comments about
19 Bayer. So I don't know if Mr. Beck wants to respond at this
20 point.

21 MR. BECK: We're innocent. No, Your Honor, I saw
22 a summary of the letter, but I haven't seen the letter
23 itself.

24 THE COURT: All right. Well, if you would -- if
25 there's anything for the defense to respond to on that,

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1 please do. But there are some things dealing with the PSC,
2 him not receiving some notifications. And, again, to make
3 sure the record is clear, he has filed it, it's an open
4 letter to the court, and I would want the PSC to respond to
5 any allegations that he's put forth against the PSC.

6 MR. ZIMMERMAN: And I think because it's a
7 letter, Your Honor, we will certainly comment to Your
8 Honor, but I think we probably should respond in writing so
9 that there's a record.

10 THE COURT: Exactly.

11 MR. BECK: And, Your Honor, I understand where
12 because he's a plaintiff and he is making some complaints
13 about how litigation is being handled procedurally by the
14 PSC, there's a need to respond. In terms of charges he
15 makes against Bayer, unless Your Honor instructs us, we
16 don't feel a particular --

17 THE COURT: I said if after you review the letter
18 there's something that you wish to respond to, you may do
19 so, but it wasn't anything specific other than --

20 MR. BECK: Yes.

21 THE COURT: -- you are the defendant.

22 MR. BECK: Right. Your Honor asked about the
23 trial calendar.

24 THE COURT: Yes.

25 MR. BECK: Do you want us to jump to that now?

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1 THE COURT: Yes, let's do that now before I
2 forget it.

3 MR. BECK: We filed with the court our updated
4 trial calendar. Right now we in October -- well, we don't
5 have any trial settings in the MDL. Then we've provided a

6 list of trial settings in state court.

7 In Philadelphia, where most, if not all, of
8 them -- that's not all of them, but most of them that are
9 coming up in the next few months that are filed, 37 of the
10 57 muscle injury cases, as the plaintiffs call them, or
11 cases where there was a claim of rhabdo but we contest
12 whether there was rhabdo, in any event, 37 of the --

13 THE COURT: What kind of classification is that?
14 How does Philadelphia --

15 MR. BECK: When I say "muscle injury," I was just
16 trying to avoid --

17 THE COURT: I understand muscle injury. I am
18 talking about contested rhabdo.

19 MR. BECK: That's where somebody says I've got
20 rhabdo and we say, no, you didn't and we dispute that they
21 experienced rhabdo, but they are claiming that they
22 experienced rhabdo. There's, you know, a small number of
23 those. In any event --

24 THE COURT: Well, I see the whole month of April
25 is you are going to be tied up with contested rhabdo cases.

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1 MR. BECK: That's what it says here. So far --
2 and all I wanted to report, Your Honor, was that we had
3 originally 57 cases that are either muscle aches or
4 contested rhabdo cases that were scheduled for trial this
5 fall. Of those 57, 37 of them have been discontinued. And
6 the pattern has been as we get closer to trial, the cases
7 get dropped. There's no, obviously, guarantee that that's
8 going to continue and I raise that only --

9 THE COURT: Are those cases being dismissed with
10 prejudice or are they being dismissed and then refiled in
11 the MDL?

12 MR. BECK: I don't believe they are being refiled
13 in the MDL. Whether the dismissal acts as a dismissal with
14 prejudice or not is an issue under Pennsylvania law that
15 I'm not competent to comment on.

16 I have heard different people say different things
17 about it, but as far as I know, it's not a situation where
18 it's a tactical dismissal with an intention to refile
19 somewhere else. It is a decision that the case is not worth
20 pursuing and we are going to drop it.

21 And I mention that only because if one were to
22 look at the trial calendar here in Philadelphia, one would
23 think that we were going to be extremely busy over the next
24 several months in Philadelphia; and we don't anticipate that
25 we are going to be nearly that busy in the Court of Common

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1 Pleas.

2 MR. MAGAZINER: Your Honor, may I --

3 THE COURT: Good morning.

4 MR. MAGAZINER: Good morning, Your Honor. There
5 are a number of cases pending in the Philadelphia Court of
6 Common Pleas that have been dismissed with the intention,
7 apparently, of refiled in the MDL and Your Honor may have
8 seen some of those refiled --

9 THE COURT: Right.

10 MR. MAGAZINER: -- in the MDL. The cases

11 Mr. Beck describes are for the most part not in that group.
12 They are cases which have come up on the trial list and as
13 they approach trial the plaintiffs discontinue them, but
14 that's -- so they are two distinct groups.

15 THE COURT: Okay. In dealing with -- if I can
16 have -- Mr. Zimmerman, before we finish up on the trial
17 calendar, if I could have a clarification dealing with the
18 contested rhabdo cases that are pending in Philadelphia.
19 Where would they fall in our classification under 127?

20 MR. MARVIN: Your Honor, if I may address that?

21 THE COURT: Yes.

22 MR. MARVIN: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. MARVIN: I think most of those cases would
25 probably be in the category of cases where there is a

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1 contemporaneous complaint of muscle aches along with some
2 kind of objective criteria, such as an elevated CK.

3 What we're seeing is there are a number of
4 plaintiffs who are saying that if the CK is one and a half
5 or two times the normal level, then it's considered to be a
6 rhabdo case in their eyes, which in our opinion is not --
7 does not fit the common or the classically accepted
8 definition.

9 THE COURT: So that would be category B?

10 MR. MARVIN: Yes.

11 MR. BECK: Your Honor, I believe there may

12 also --

13 MS. GEOPPINGER: If I may?

14 THE COURT: Yes.

15 MS. GEOPPINGER: As the categorization person, we
16 agree they would fall into category B. That is further
17 subdivided as -- that's the category with objective evidence
18 and they would be further subdivided whether it was
19 contemporaneous with the use or within 30 days thereafter.

20 THE COURT: Thank you.

21 MR. BECK: And, Your Honor, just to be complete,
22 I believe that there may be some cases where the contest
23 may be more over causation than rhabdo. I'm not sure which
24 category those fall within on our trial calendar sheet, but
25 there are out there a few cases where somebody has rhabdo

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1 and they were taking Lipitor, but sometime previously in
2 their medical history they took Baycol. Then once Baycol
3 was withdrawn from the market, they got it in their head
4 that their rhabdo was due to a drug they were not taking
5 when they contracted rhabdo instead of one of the statins
6 that they were taking.

7 So there are cases like that and I frankly don't
8 know whether they fall within the contested rhabdo or the
9 rhabdo categories, but there are a few of those kicking
10 around in Philadelphia as well.

11 THE COURT: In dealing with -- are these the
12 first set of contested rhabdo cases to come to trial in
13 Philadelphia? And if not, have you settled any of those?

14 MR. BECK: I'm trying to think what's -- nothing
15 has come to trial in Philadelphia. We've had trial

16 settings and we've picked juries. The two juries that we
17 picked were cases involving rhabdo, which were then settled
18 after we picked the jury and before we gave opening
19 statements, and they were settled along with other rhabdo
20 cases. So they were all rhabdo cases and that's all we've
21 settled are rhabdo cases.

22 THE COURT: All right. So any contested rhabdo
23 cases that may have come up in Philadelphia have not been
24 settled; would that be accurate?

25 MR. BECK: Yes. That's true not just in

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1 Philadelphia, that's true everywhere.

2 THE COURT: All right. Thank you for that.

3 MR. ZIMMERMAN: Your Honor, if I could make a
4 comment. What is rhabdo and what is not rhabdo has always
5 been in the eye of the beholder or William Holden and so we
6 talk about terms of what's a contested rhabdo versus a
7 confirmed rhabdo.

8 And, of course, this is -- the key to that has
9 always been in Bayer's mind and their checkbook. So I don't
10 know because I don't have perfect information whether there
11 is a rhabdo that settles or a rhabdo that's close to a
12 confirmed rhabdo that settles.

13 Information has come to me from people in
14 Philadelphia that indicate that cases that would not be
15 under the original criteria of rhabdo and settled in kind of
16 that original definition of rhabdo have settled as being
17 likened to rhabdo. And where that bar is, frankly, is very
18 difficult for us to determine because we don't have that
19 information.

20 When we talk about cases, 37 of 57 being
21 discontinued, the word dismissal is not out there. So I
22 don't know if they are continued -- discontinued and being
23 refiled. But within that 37 of 57 that have been
24 discontinued, there are 20, if my math is right, that have
25 been resolved and whether those are rhabdos --

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1 MR. BECK: No, those are still pending.

2 MR. ZIMMERMAN: Still pending, okay.

3 MR. BECK: They haven't been resolved.

4 MR. ZIMMERMAN: But some of them have been

5 resolved or none of them have been resolved?

6 MR. BECK: Discontinued means dismissed.

7 MR. ZIMMERMAN: They are dismissed, okay.

8 MR. HOEFLICH: None have been resolved.

9 MR. ZIMMERMAN: But clearly within Pennsylvania
10 cases have been settled that some people would say are not
11 rhabdo, at least the PSC has looked at some of them
12 anecdotally with counsel for the other side and they
13 have -- we have concluded that under the criteria we've
14 been provided by Bayer they would not be rhabdo that have
15 been settled as rhabdo.

16 Now, I'm not here to criticize that, I'm happy
17 that any case gets resolved, but it is of concern to us
18 what is being defined as rhabdo and what is not being
19 defined as rhabdo and how they're being dealt with. And so
20 I raise that as an issue of concern to us because it's very

21 hard for us to track that.

22 And as Bayer has said and as Doug has just
23 provided to the court, they have settled cases that they
24 consider rhabdo, but it's under what criteria they consider
25 them rhabdo that we remain somewhat confused by. And I

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1 think that's the nature of the beast, frankly.

2 I think that's not necessarily a bad thing. It's
3 just a confusing thing that concerns us as we go through
4 categorization and as we address the questions asked by the
5 court, well, what are these cases if they're not rhabdo.
6 They probably do fall into B, but are some of them getting
7 resolved within B or are some of them not getting resolved
8 within B? Our information indicates it's a little bit of a
9 moving target.

10 MR. BECK: Your Honor, all I can say is to the
11 best of my knowledge if, in fact, that's their information,
12 that information is false. And I don't know who is telling
13 them what, but we have not changed our position in terms of
14 what cases will settle. We haven't changed it in
15 Philadelphia. We didn't change it in California. We
16 haven't changed it in Mississippi. And if a case doesn't
17 fit the definition of rhabdo that we have been applying all
18 along, then we haven't settled that case.

19 And I think what Mr. Zimmerman is trying to imply
20 is that we are applying some sort of a different standard in
21 Philadelphia than we are in the MDL. That's a question that
22 I know Your Honor has asked several times and that
23 Mr. Zimmerman has tried to raise, and we're not. And to say
24 that unnamed sources are giving him, you know, anecdotal
25 information without any names attached that support his

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1 suspicion, all I can tell you is it's not true.

2 THE COURT: Let's move on to settlement.

3 MR. ZIMMERMAN: Settlement, Your Honor. To date
4 defendants have settled 2,865 cases with a total value of
5 1,096,030,128. I think I got that right. And of this
6 total, 727 cases have been determined to be subject to the
7 MDL assessment with a total value of \$284,689,774.

8 As of the last status conference the numbers were
9 2,716 cases. So it looks like we are up about 49 cases, if
10 my quick math is correct.

11 MR. BECK: You are off by 100.

12 MR. ZIMMERMAN: 149. With a total value of
13 1,043,919,200. Of that amount, 675 were determined to be
14 subject to the MDL assessment -- I am going to round this
15 one -- for about \$234 million. And so the MDL group or
16 subject to the MDL assessment group is up about 55 cases,
17 52 cases, something like that.

18 I guess those numbers speak for themselves.
19 There's really no comment on those unless the court has
20 questions about them.

21 THE COURT: Well, everyone throws around billions
22 like it's a dollar or a penny, but I think the management
23 of this, both the MDL and the whole litigation, has
24 something to say when over a billion dollars has been paid
25 out. I think both sides should pat themselves on the back,

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1 both the PSC and the defense. That's a quiet billion
2 dollars that's been paid out. It may not get headlines in
3 a verdict, but I think there's a number of people that have
4 been compensated for injuries that add up to a billion
5 dollars and so that says something for this litigation.

6 MR. ZIMMERMAN: We're very happy to have that
7 occur, Your Honor, and we feel very good about the fact
8 that we are vigorously representing people who have been
9 compensated to the tune of over a billion dollars. So we
10 think those numbers speak for themselves.

11 It's obviously this litigation and the
12 coordination and consolidation and communication contained
13 within this litigation that has allowed for this effort to
14 occur and we, as the PSC, are very happy to see that in a
15 relatively short period of time over 2,700 -- 2,800 people
16 have been properly compensated for their injuries.

17 I know Phil is getting closer here and I feel his
18 presence, but I am going to continue. And also we know that
19 there are a number of people out there we also feel deserve
20 to be compensated and we are going to -- we look forward to
21 our continuing efforts to see that other people who deserve
22 compensation be compensated.

23 So everyone in this courtroom is to be commended
24 for this effort and we are glad we could help clean up this
25 problem.

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1 THE COURT: Mr. Beck.

2 MR. BECK: Normally I'm not sure I would pat
3 myself on the back because my client had paid out a billion
4 dollars. This, I think, is an unusual situation where, the
5 court may recall, in our first session that the court
6 organized that we had down in New Orleans we stood up and
7 we said that we were going to take a different approach
8 than a lot of defendants take and that anybody who suffered
9 side effects while taking our medicine, that we wanted to
10 compensate them rather than to fight about that and that if
11 we were going to do any fighting, as we anticipated we
12 would, it would be on the people who did not suffer side
13 effects in our judgment.

14 So we're pleased that the program has worked. We
15 feel like we have fairly compensated those who suffered
16 side effects from our medicine. We've defended ourselves
17 when people have insisted on more money than we thought was
18 appropriate and where people have claimed injuries that we
19 didn't think existed. We are going to continue to do all
20 three; and that is where people have suffered side effects,
21 we want to continue with the settlement program.

22 You know, we kind of had an impression that
23 nothing happened over the last few months. Not only has
24 there been a billion dollars paid out in total, but there's
25 about \$50 million paid out just in the last two months while

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1 seemingly things were inactive.

2 So we continue to meet with the lawyers for those
3 who suffered side effects and we continue to settle those
4 cases, and we continue to fight the ones where there were no

5 side effects.

6 THE COURT: Well, again, the court commends all
7 parties involved in this matter. It's been a relatively
8 smooth MDL. When you look at the figures that have been
9 paid out, it's mind-boggling.

10 You may continue.

11 MR. ZIMMERMAN: And, Your Honor, we do fight over
12 what suffered side effects really is and that's where the
13 rubber meets the road and that fight will continue.

14 Next, Your Honor, number C. Approximately 136
15 cases have --

16 THE COURT: I was just saying that the defense
17 did not take a scorched earth policy, which in some MDLs
18 the defendants have and that has backfired, but in this
19 case a new formula was used and it changed the landscape of
20 MDLs.

21 Whether or not it will work on other MDLs is a
22 whole another question and not my concern, but with this one
23 it has -- that amount of money, it has to be one of the top
24 ten MDLs or litigations to have that kind of money paid out.
25 Would you agree or not agree?

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1 MR. ZIMMERMAN: I would definitely agree, and we
2 commend any defendant that comes to the plate and says they
3 have a problem and they want to compensate people.

4 And we were the first to -- I remember sitting
5 down with Adam early on and talking about getting the people
6 to start buying into the program, that they wanted to settle
7 serious cases, and we were the first to go out there and
8 champion that people should look at settling serious cases
9 if the compensation was appropriate. So I have no argument
10 with that strategy.

11 I do have a little bit of an argument about their
12 secondary strategy and that's what we are here working on
13 right now. But I don't have any argument with their first
14 strategy, which is as they define a serious case and they
15 want to pay it, we are willing to accept it assuming it's
16 responsible and reasonable; and it has been.

17 THE COURT: All right. Dealing with the
18 mediation program.

19 MR. ZIMMERMAN: Yes, the mediation program.
20 Approximately 136 cases have been submitted to the MDL
21 mediation process. In addition, of course, there are a
22 limited number of cases where direct negotiations are still
23 taking place.

24 I think Special Master Remele is here to comment
25 on that further. And then if there are any further comments

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1 after Special Master Remele's report, each of us will have
2 those.

3 THE COURT: Good morning.

4 SPECIAL MASTER REMELE: Good morning, Your Honor.
5 Lewis Remele reporting on behalf of the mediation program.

6 Your Honor, sort of in line with what has been
7 said by both the court and by Mr. Zimmerman and Mr. Beck,
8 the mediation program has been working in the sense that we
9 have been identifying and continue to identify cases --

10 so-called rhabdo cases.

11 And even as we have gone through the
12 categorization process that was mandated by PTO 127, we
13 found some cases that were categorized as rhabdo cases by
14 both sides and those cases have been submitted and generally
15 either -- some of them, I think, are still being negotiated,
16 but generally have been settled by Bayer.

17 So there are about 34 cases that have actually
18 been settled out of the mediation program so far. There are
19 also about four presently that are under -- waiting for
20 dates for future mediations at the present time and there's
21 a handful of cases that we have under consideration to make
22 a determination as to whether they fit within the parameters
23 of the pretrial order that defines what a rhabdo case is for
24 purposes of the mediation.

25 And then, Your Honor, sort of in line with some

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1 of the comments that have been previously made in terms of
2 where the line is between a rhabdo case and a nonrhabdo
3 case, the categorization process has actually helped to
4 begin to at least define and identify cases that the
5 parties have a dispute over as to whether or not they are
6 rhabdo cases or they're nonrhabdo cases or whether they fit
7 somewhere in between.

8 And as we begin to refine those categories, we are
9 getting better and better and have a better handle on
10 exactly what those categories are and how many cases are
11 falling within those categories, and I think ultimately it
12 will be very helpful for the court to be able to make a
13 determination as to exactly what the universe looks like.

14 And we have been -- in line with that, we have
15 been actually identifying some of those cases that have
16 been submitted for mediation that don't meet the actual
17 criteria of what was required under the mediation pretrial
18 order in the sense they're not strictly rhabdo cases, but
19 they are cases that fall somewhere in between, a so-called
20 muscle injury case and a rhabdo case.

21 And we have actually been identifying those as
22 ones that we will reconsider once the categorization process
23 is completed and the court can have a better handle on
24 exactly what those -- how many of those cases there are and
25 what categories they fall under and how those might be

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1 handled in terms of further refining the process.

2 So that's really where we are now. Those cases
3 that are rhabdo cases are being submitted. They are being
4 handled -- for the most part they are being negotiated and
5 settled by the parties. And to the extent that they can't
6 be and they are rhabdo cases, we are getting them into the
7 mediation program.

8 And as we narrow and winnow down those cases,
9 which are becoming fewer and fewer, we will then be
10 confronting this next group of cases once we get the
11 categorization completed and we will have to make those
12 determinations.

13 Unless the court has any questions, that's it,
14 Your Honor.

15 THE COURT: Thank you.
16 SPECIAL MASTER REMELE: Thank you very much.
17 THE COURT: All right. Mr. Zimmerman, Mr. Beck,
18 any comments?
19 MR. ZIMMERMAN: We look forward to the next step,
20 Your Honor.
21 MR. BECK: We have nothing further on that, Your
22 Honor.
23 THE COURT: Let's move on to discovery.
24 MR. ZIMMERMAN: We are going to provide a report
25 to the court on Pretrial 114. That report is going to be

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1 provided by Jeanne Geoppinger on behalf of the plaintiffs,
2 and I don't know if James Mizgala or Phil or whoever is
3 going to do it on behalf of the defense. But this is where
4 we are today on categorization so everyone knows what we
5 have been doing and where these cases fall at the present
6 time.
7 I think it will be very informative for everyone
8 to understand it and help us really see what this process --
9 and it's been a difficult -- I mean, it's been quite a
10 process -- has brought to bear on helping in the
11 categorization process.

12 MR. BECK: Your Honor, perhaps I might go first
13 on this one because I suspect that I will be talking about
14 a slightly different aspect of this than the plaintiffs
15 will.

16 Part of PTO 114 has to do with submission of
17 reports or information supporting claims, and this was done
18 in phases based on when the claims were filed. For the
19 earliest filed claims that was called phase one, that
20 information was due in June. For phase two it was due in
21 July. For phase three it was due in September. So just to
22 give the court an update on our best information concerning
23 the number of plaintiffs in those different categories and
24 what's been provided by them.

25 For the phase one group that was due in June there
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1 were approximately 2,300 plaintiffs, 1,700 of whom got
2 extensions and those are due sometime in October. Of the
3 remaining 600, about half of those cases have gone away. A
4 couple of them, I don't know how many, but a small number
5 were settled because in the sifting and winnowing process we
6 and the plaintiffs' lawyers discovered that they were
7 legitimate rhabdo cases and they were settled. And then the
8 vast majority were not pursued because they decided that
9 they did not have the kind of support that was contemplated.
10 And then for the remaining 300 something was filed, whether
11 it's medical records or an expert report.

12 For phase two, these were cases that were filed
13 somewhat later and the reports or the supporting materials
14 were due in July. There were approximately 3,000
15 plaintiffs in this category, about 2,800 of whom received
16 extensions. So their reports are not yet due. That left
17 200 who did not receive an extension beyond July. About
18 100 of these are either dismissed or in the process of
19 being dismissed or will be dismissed in the future because

20 no filings have been made to support the claims. And then
21 about 100 plaintiffs filed something, whether it's in the
22 form of medical reports or contemporaneous records or
23 so-called expert reports, which is a subject that we will
24 come to later in the morning.

25 And then last week the phase three plaintiffs
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1 material was due. There are approximately 5,800 plaintiffs
2 in phase three. About 800 received extensions and then
3 several thousand fall into kind of another world, most of
4 whom are represented by the Weitz & Luxenberg firm where
5 they have filed a motion to withdraw or a motion to dismiss
6 without prejudice; and that is kind of up in the air and we
7 are going to have to resolve, I don't think today, but we
8 may be able to resolve those by agreement. We hope we
9 will. But in any event, they haven't received extensions,
10 but neither have they filed reports. And then we did
11 receive a fair number of reports, but we haven't had a
12 chance to count them all up. When I say "reports," I mean
13 either so-called expert reports or the supporting
14 materials.

15 Here's our best estimate on the totals. From
16 phase one and two there are about 4,500 extensions, so we
17 are still waiting for materials on those plaintiffs.

18 THE COURT: Now, were any of those Weitz &
19 Luxenberg cases?

20 MS. GEOPPINGER: Yes, sir, there were.

21 MR. BECK: Yes. And then we've got 800 actual
22 extensions from phase three plus a few or several thousand
23 that just kind of have to be dealt with. Most of those are
24 Weitz & Luxenberg cases, so they are kind of in a state of
25 limbo.

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1 We have about 1,800 submissions. About a thousand
2 of those are letters, letters, you know, talking about -- I
3 believe about contemporaneous medical reports, that sort of
4 thing. In any event, a thousand of them fall in the letter
5 category and then we have 800 that fall in the report
6 category.

7 And without being argumentative about the
8 significance of it, our count is that of these 800 what I
9 call so-called expert reports, approximately 75 to
10 80 percent fall in the category of the two-page form report
11 without any supplementation; and that's a matter that we've
12 raised in terms of the adequacy of that.

13 So that I give you by way of our best count in
14 terms of just the objective count of how many people filed
15 what and did not file what.

16 THE COURT: All right. Before you leave the
17 podium let me shoot something across your bow, both to
18 Weitz & Luxenberg and the defense bar. Dealing with these
19 dismissals, you may come in agreement, but under our local
20 rule and Rule 41 there has to be good cause and I haven't
21 seen any good cause as of yet.

22 And so you may agree that these matters should be
23 dismissed or that they should go pro se and have -- I am
24 just talking so you understand. What I saw in the proposed

25 agreement that you submitted to Weitz & Luxenberg would not
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1 even come close to the court agreeing to.

2 MR. BECK: Okay.

3 THE COURT: All right? It would not even come
4 close. And so when you start putting conditions on pro se
5 clients that they don't even have now, such as signing up
6 for Verilaw and paying for that, you're way off base, way
7 off base.

8 And so I am telling you that I am taking a very
9 close look at this and so both you and Weitz & Luxenberg are
10 in the same boat and so it does not mean that the court is
11 just going to sign off on something that you submit to the
12 court on that.

13 MR. BECK: We had actually anticipated requesting
14 the assistance of Special Master Haydock in this regard and
15 I think that that would be particularly helpful so that we
16 don't go off on a wild-goose chase on something that's
17 going to be unacceptable to the court, because that's not
18 in anyone's interest.

19 THE COURT: I can tell you that the hairs on the
20 back of my neck stood up when I saw that. It's just not
21 going to occur. It's just not going to occur.

22 MR. BECK: Okay. May I yield the --

23 THE COURT: Yes, you may.

24 MS. GEOPPINGER: Good morning, Your Honor. Just
25 a bit more information regarding the categorization

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1 process.

2 THE COURT: Yes.

3 MS. GEOPPINGER: According to the numbers that I
4 have exchanged with defense counsel, there have been 1,935
5 total submissions received to date.

6 In terms of the narrowing process itself, thus far
7 approximately 600 have either been dismissed with prejudice
8 or involuntarily -- I'm sorry -- either voluntarily
9 dismissed with prejudice or involuntarily dismissed with
10 prejudice. And the narrowing process is continuing. We
11 continue to exchange lists and come up with stipulated
12 lists.

13 With regard to the categorization -- well, a word
14 on extensions and late due dates. There's more than 2,500
15 plaintiffs presently in the three phases that have received
16 extensions that have not yet expired. So we have
17 approximately 2,500 plaintiffs there.

18 And then there are approximately 3,400 additional
19 plaintiffs whose submissions will be due on or after October
20 the 1st based on an agreement that we have reached, which
21 has been submitted as a proposed order but has not been
22 issued, plus then rolling deadlines that will come beyond
23 that.

24 With regard to the categorization itself, we have
25 completed, as you know, categorization round one. That

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1 categorization included 332 plaintiffs and we had an over
2 98 percent agreement rate on the categorization.

3 We are in the process of categorizing what we're

4 calling round two, which will be all reports that are
5 submitted between June 29th and August the 13th. To date,
6 based on the list that we have developed, we have
7 approximately 463 plaintiffs who will be on that list.

8 And we are at the point where the PSC has finished
9 most of its categorization, the defendants have finished
10 most of their categorization, and we are going to be in a
11 position to exchange lists and work out the differences we
12 have between us shortly.

13 THE COURT: All right. Keep up the good work.

14 MS. GEOPPINGER: Thank you.

15 MR. BECNEL: May I address the court on this
16 issue, Your Honor?

17 THE COURT: You may. Good morning, Mr. Becnel.
18 Do you still have any property down in New Orleans or is it
19 under water?

20 MR. BECNEL: My place in Gulf Shores, Alabama, I
21 haven't been able to get to nor have I heard anything about
22 it, but I don't think it's where it used to be. Maybe it
23 will rise from the dead, but I doubt it.

24 In any event, Your Honor, I rise at this time
25 because of a particular problem you just raised. As you

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1 know, the ethics rules require lawyers to report continually
2 to their clients. I do that every quarter, whether it's
3 what the court is doing here or what the state courts are
4 doing, what experts are doing, so on and so forth.

5 I also flew down to Phoenix and met with
6 Mr. Goldberg, who is one of the people who referred a great
7 number of these cases to Weitz & Luxenberg.

8 I got inquiries from literally hundreds of people
9 who have been told that because all of the serious rhabdo
10 cases have settled, no one wants to represent these other
11 individuals who, whether rightfully or wrongfully, think
12 that they have a case and they've been harmed by Bayer.

13 I have attempted, where possible, to try to figure
14 out what's the status, whether they are going to get thrown
15 out because they don't have reports, whether there's
16 extensions or not.

17 But I bring this to the court because a very, very
18 similar thing happened years ago with Judge Pointer in the
19 breast implant case when women from all over the United
20 States -- and the judge at that time had issued, because of
21 a preliminary settlement agreement that they had, that the
22 court would pay no one but an hourly rate to represent
23 women. So no one would represent these women who had breast
24 implants. Lawyers wouldn't get percentages and therefore
25 they just couldn't get represented.

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1 And Judge Pointer, who helped write the MDL -- the
2 original MDL manual, said, This is just unacceptable. And
3 although I wasn't on the PLC, I had done a great deal of the
4 work in terms of the documents and all, with as many as 35
5 lawyers, for the committee.

6 But in any event, he then imposed upon the
7 lawyers, who were supposedly the PLC, an obligation to take
8 on the representation of those people on an hourly rate

9 compensation program.

10 And then when Dow Corning went bankrupt that all
11 disappeared and eight and a half, nine years later I am
12 still dealing with literally hundreds and hundreds of these
13 women with no idea if I will get paid at any time anywhere.

14 A similar situation is here now. These people are
15 going to file ethical complaints against all of us, and they
16 are very close to the indigents you deal with every day in
17 the criminal side of the legal system.

18 And I am very concerned about those issues. You
19 know, we take the good cases and we get paid, we take our
20 money and we run and we leave the guys and ladies, who by
21 and large are elderly, who by and large have never been
22 involved in the legal system, but are very, very upset.

23 Even though I have been in trial for the last 18
24 months on three different cases -- I mean, at night on our
25 website we're getting comments sent to us. We try to call

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1 them back. And I'm just very concerned about these issues
2 and I just thought I would raise it to the court since the
3 court seems to be very concerned about those also.

4 THE COURT: Yes, I am.

5 Mr. Zimmerman, do you have any comments?

6 MR. ZIMMERMAN: On that issue, Your Honor?

7 THE COURT: Yes.

8 MR. ZIMMERMAN: I am concerned about this issue,
9 Your Honor. I have been for some time concerned about the
10 process of settling good cases, which I support, and
11 leaving cases that are more difficult, or where defendants
12 haven't said we are willing to pay money, on the dock while
13 the ship sails away.

14 We have looked at that obligation from the PSC
15 point of view and we feel it's very important that we play
16 out this hand to see how this is going to shake out and stay
17 in the camp of the plaintiffs so that we do not do anything
18 that would be short -- give these people short shrift.

19 Having said that, we understand that many of
20 these cases don't have merit. They are not -- they didn't
21 take Baycol or they didn't have injuries related to Baycol,
22 which is why, of course, we brought the categorization
23 process before the court.

24 But then we do see a large pile of cases that
25 have some degree of merit, to a great degree of merit. And

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1 we do not believe, frankly, that counsel should be able to
2 withdraw from those cases in midstream and we are very
3 encouraged by the comments of the court in that regard
4 because we didn't know where people were going to -- the
5 court was going to stand on that issue.

6 Having said that, however, we do not know exactly
7 what to do about it because the PSC cannot take up the
8 individual representation of everyone seeking counsel.

9 We did have a program in breast implants where we
10 did allow the PSC to take up the representation of people
11 who do not have counsel or whose counsel vanished in a
12 system that was quite unique. In other words, we provided
13 representation on an hourly basis to help people be guided

14 through the process in the breast implant litigation on the
15 common benefit nickel, if you will.

16 And I think we should give some thought and
17 consideration to that, but the bottom line, Your Honor, is
18 that we think until we shake that out, until we think that
19 through, that there should be very circumspect withdrawals
20 of counsel and good cause must be demonstrated absolutely
21 to this court before people are cut loose from their
22 counsel or counsel are cut loose from their clients.

23 We support categorization. We support the
24 process of trying to make sure what is serious and what is
25 related and what isn't. But until that process is complete

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1 and until we've sat down at the table with Bayer to
2 determine how we're going to deal with cases that we all
3 might agree have merit, we believe the status quo should be
4 protected and these people should be protected; and we feel
5 strongly about that and have from the get-go felt strongly
6 about that.

7 As you have heard me say from this podium many
8 times, that we may not be the ones who are going to do the
9 final heavy lifting for the rhabdo people because the rhabdo
10 people have been taken care of by Bayer to the tune of over
11 a billion dollars to date, but the rest of these people, to
12 the extent their injuries are related and to the extent they
13 have suffered and to the extent that suffering is deserving
14 of compensation, not in just the minds of Bayer, but perhaps
15 in the minds of others other than Bayer, we want to be here
16 for them and we want to make sure their interests are
17 protected.

18 THE COURT: All right. Thank you.

19 Mr. Beck.

20 MR. BECK: Yes, Your Honor. We take to heart
21 Your Honor's earlier comments about imposing conditions and
22 whatnot on pro se plaintiffs, but an overarching concern
23 that we had, which we were trying to address in response to
24 these motions to withdraw, is we did not want a situation
25 where thousands of plaintiffs have their lawyers disappear

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1 and they are left kind of not -- perhaps not even knowing
2 that and being on the court's docket.

3 THE COURT: Educate me. How are the lawyers
4 going to disappear if I don't sign off on it?

5 MR. BECK: It's fine with us if --

6 THE COURT: I don't understand that. That's not
7 a worry as far as I'm concerned because --

8 MR. BECK: Good.

9 THE COURT: -- if they've signed the papers,
10 they're the lawyers until I've allowed them to get off the
11 case or there's a substitution of counsel in that matter.

12 So it's not one that the court is going to
13 rubber-stamp anything that just comes in dealing with this
14 because although it is not public record what that firm
15 settled their cases for, but it's a substantial amount of
16 money and they had a substantial number of cases within the
17 MDL and they have a responsibility for those cases.

18 And so let's not be afraid that -- I think I've

19 always stated that it was my mission that we wanted to make
20 sure the cases that should not be in court should not be
21 here and cases that should be here stay. And just because
22 someone feels that it's not economically viable after two
23 and a half years into the case, I've never allowed a lawyer
24 to walk away from that.

25 MR. BECK: And what we're concerned about, Your
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1 Honor, is the lawyers who determined that the cases are
2 without merit, perhaps they and their clients disagree, but
3 we want those things disposed of on the merits. Maybe
4 we'll lose, but we think we'll win.

5 And what we don't want is two and a half years
6 into the process, with expert reports overdue and a regime
7 that involves consequences for the failure to come forward
8 with any evidence that would support a claim, for then the
9 cases to somehow go into suspended animation or get
10 dismissed without prejudice because the lawyers choose to
11 walk away rather than to come forward with any information.

12 So we are delighted if all these various motions
13 to withdraw are turned away and we deal with the cases based
14 on the merits.

15 MR. ZIMMERMAN: I believe that concludes the
16 Pretrial 114 report, Your Honor.

17 Next is item Roman numeral III-B, Pennsylvania
18 state court. The state court has required plaintiffs to
19 submit case specific reports for all remaining nonrhabdos.
20 And it looks like of the 3,400 cases in Pennsylvania that
21 were subject to Lone Pine, only 156 of those cases remain
22 active. Again, this is not something I have tremendous
23 knowledge of.

24 MR. BECK: Right. And just to update, that, of
25 course, is a variation on what we're doing here as well.

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1 So most -- the vast majority of the nonrhabdo cases that
2 were pending, plaintiffs and their lawyers were not able to
3 come forward with the kind of support contemplated in Lone
4 Pine.

5 The only update on these numbers is that I believe
6 today -- is that right, Doug? -- today the judge put into
7 effect the Lone Pine order for the remaining cases and those
8 are cases that were filed in 2004. They had not been
9 included in this program.

10 MR. ZIMMERMAN: Phil, I didn't hear. Is that
11 Pennsylvania?

12 MR. BECK: Yes.

13 THE COURT: Pennsylvania, III-B.

14 MR. BECK: Yes, this is Court of Common Pleas.
15 And there are only 40 such cases, but what that means --
16 and they haven't gone through the Lone Pine process yet,
17 but that now means that there are 196 nonrhabdo cases
18 active in the Court of Common Pleas, but 40 of those
19 haven't gone through the vetting process that occurs under
20 Lone Pine.

21 THE COURT: All right. Thank you.

22 Mr. Zimmerman.

23 MR. ZIMMERMAN: Thank you. Discovery

24 depositions. Your Honor, Mr. Arsenault is going to report
25 on behalf of the PSC on the discovery that has been

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1 completed to date. I just think it's an overview of what
2 we have done and what we think remains. We are pretty much
3 done with deposition discovery, but Mr. Arsenault will give
4 you the details.

5 THE COURT: Good morning.

6 MR. ARSENAULT: Good morning, Your Honor. How
7 are you?

8 THE COURT: Glad to see you.

9 MR. ARSENAULT: Nice to see you.

10 Thus far the plaintiffs have taken some 91
11 depositions in this case. 54 of those were Bayer witnesses,
12 including experts; a dozen of those were Bayer AG people; 16
13 are GSK people; and nine were nonparty.

14 Your Honor, there are approximately four or five
15 depositions that are currently scheduled for October. A few
16 of those are Bayer people and a few of those are GSK. There
17 are about seven other depositions that are currently under
18 discussion to be taken in the near future and the defendants
19 continue to take the plaintiffs' expert depositions. All of
20 that is moving along nicely. There have been no problems
21 and they are proceeding as they get noticed.

22 THE COURT: All right. Thank you.

23 Anything for the defense?

24 MR. BECK: No, Your Honor.

25 MR. ZIMMERMAN: Your Honor, it may be helpful for

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1 the court, I don't know, about the generic expert protocol
2 and how that's going. Mr. Hopper of our office has been in
3 charge of that. And as you might imagine, that's a fairly
4 ambitious project because, you know, you're taking the
5 depositions of people who have opinions and expert opinions
6 in the case. I think it's probably a credit, again, to
7 both sides that this is occurring quite smoothly. It's not
8 without some problems. But maybe Mr. Hopper could report
9 on it and the defense could comment.

10 THE COURT: All right.

11 MR. SIPKINS: Your Honor, before Mr. Hopper
12 begins, I have a court appearance in New Orleans. I have
13 to leave. I always enjoy listening to Mr. Hopper, but I
14 won't be able to today.

15 MR. HOPPER: I thought you were going to give me
16 accolades or something.

17 MR. ZIMMERMAN: That's the second time
18 Mr. Sipkins has left when --

19 THE COURT: My understanding is you're going to
20 New Orleans.

21 MR. SIPKINS: I am. Down to see Judge Fallon,
22 Your Honor.

23 THE COURT: Say hi to him for me.

24 MR. HOPPER: Ask him where he is staying, Your
25 Honor.

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1 Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. HOPPER: Specifically, the generic expert
4 witness depositions have gone quite well. We have just a
5 few remaining. In fact, the one tomorrow is, I believe,
6 the final expert on plaintiffs' side and I believe
7 Mr. Mizgala is traveling to Toronto to take that expert
8 report.

9 And then as Your Honor sees in the agenda, we have
10 two experts, not specifically designated as experts but
11 Bayer AG witnesses, but they are of the science and medicine
12 scope and nature, that we're taking in Amsterdam. Those
13 will be held on the 6th, 7th, and 8th of October.

14 The cooperation between the plaintiffs and
15 defense has gone quite well. I am always happy and able to
16 say that working with Mr. Marvin is a pleasure and happy to
17 say and to tell the court that we believe we will be able
18 to proceed with these final two depositions in Amsterdam
19 without the need of the special master or hopefully, Your
20 Honor, any involvement with the court at all.

21 If we get into a sticky wicket, we promise to call
22 Special Master Haydock at approximately 2:30 a.m.
23 Minneapolis time, just to get him back for law school if
24 nothing else.

25 Unless my colleagues on the other side have
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1 something to say or add, we are wrapping up the generic
2 expert discovery. It's gone quite well and we look forward
3 to the close on that. It's been a long haul for well over a
4 couple of years and I think that both sides deserve some
5 credit for their management of that.

6 THE COURT: Mr. Marvin.

7 MR. MARVIN: Your Honor, I can only echo that the
8 cooperation has been extraordinary and we're happy that we
9 have gone through so many depositions, both in scheduling
10 them and taking those depositions, without having to come
11 to the court for only a few times and maybe it's only one
12 or two times at all. So the cooperation has been
13 extraordinary. I'm pleased that it's worked out well and I
14 am sure the plaintiffs are as well. Thank you.

15 THE COURT: Thank you very much, Mr. Marvin.

16 Mr. Hopper, if I could ask you one question that
17 was on some previous agendas dealing with the payment of the
18 support staff that were over in Europe for those
19 depositions. Has that been rectified?

20 MR. HOPPER: To my knowledge, Your Honor, it has.
21 We did a full and final accounting for the court and in
22 cooperation between our PSC accountants and the court
23 appointed accountants and with Your Honor's involvement and
24 through the assistance of the special master, I believe, in
25 fact, all those final payments have come in from state
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1 counsel and to my knowledge everyone has been paid.

2 Certainly I want to be on record to say the PSC
3 has paid everyone. And in my understanding and working with
4 Mr. Marvin, so have the defendants. So if there are any
5 outstanding payments owed, Your Honor, they come from other
6 state counsel and to my knowledge everything has been
7 received from those state counsel.

8 THE COURT: All right. Thank you very much.
9 MR. ZIMMERMAN: Miracles do happen, Your Honor.
10 That was a pleasant surprise. Your Honor --
11 THE COURT: It shouldn't have taken that long for
12 those payments to be made. I was at the depositions and I
13 saw how well they worked and how hard the support staff
14 worked to make sure that things went smoothly. You know,
15 it's very important that they pay their bills too.
16 MR. ZIMMERMAN: Well, Your Honor, to say we were
17 disappointed at the cooperation by some of the states is an
18 understatement. We were shocked by that and --
19 THE COURT: Well, you just should have gotten the
20 court involved a little sooner and I could have used my
21 powers to get that done because it's important that the
22 court reporters and the video staff who traveled to Europe
23 and expended quite a bit of money did not have -- did not
24 get paid on time is just not the way things should be
25 handled.
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1 MR. ZIMMERMAN: And it's an excellent segue into
2 number E, Your Honor. This is a little bit of a problem
3 for us and maybe it would be nice -- maybe it would be
4 appropriate for us to be able to meet and confer with one
5 of our special masters over this issue. I won't argue it.
6 I was just going to tell you where it was.
7 THE COURT: I see what it is. Special Master
8 Haydock will meet with you on this issue after this session
9 is over with.
10 MR. ZIMMERMAN: And I just hate to make it the
11 subject of a large court -- I don't think it's a huge
12 amount of money, but it is an issue for us that we think we
13 should be equalized on and we will be able to try and be
14 very reasonable about it.
15 THE COURT: All right.
16 MR. ZIMMERMAN: Motions that --
17 THE COURT: You don't mind meeting with a special
18 master dealing with this issue?
19 MR. BECK: Absolutely not, Your Honor.
20 THE COURT: All right. Thank you.
21 MR. ZIMMERMAN: Your Honor, motions. There are
22 two motions set for argument. I don't know if you want to
23 hear them now. Normally we do it at the foot of the
24 calendar, but we can certainly do it now.
25 THE COURT: Well, let's finish with the calendar,
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1 then take a break, and then come back.
2 MR. ZIMMERMAN: Sure. I think we all should be
3 prepared to respond to some of the Ronwin things as well
4 after the break and we can put that under the comments or
5 contested matters.
6 In terms of motions set for argument, there are
7 two, the two listed. I think those are the only two that
8 are set for argument.
9 There is the motion of Weitz & Luxenberg to
10 withdraw as counsel. We have heard the court on that.
11 Whether or not people want to continue to argue that one, I
12 don't want to get into the cross fire of that at all. I

13 have heard the direction of the court and I feel strongly
14 that we have nothing further to say on that, but I know that
15 is being -- that is in play. I have nothing further to say
16 other than what's been said, but that's here and I know
17 counsel for Weitz & Luxenberg --

18 MR. BURKE: Dan Burke from Weitz & Luxenberg. If
19 you would like for us to discuss it today, that's fine. I
20 have been in discussions with Ms. Weber. We have discussed
21 that proposed order that you mentioned earlier.

22 THE COURT: Certainly you haven't had your
23 opportunity to talk and so you are here and so we will have
24 you up here and you --

25 MR. BURKE: Thank you, Your Honor.

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1 THE COURT: -- can argue as you wish.

2 MR. ZIMMERMAN: So we will put that under the
3 contested calendar for after our break?

4 THE COURT: Yes.

5 MR. ZIMMERMAN: Trial settings and remand issues.
6 As Mr. Beck said, there are no trials set in the MDL. The
7 state court list has been provided, which is B, and we
8 talked about the 37 of 57 contested rhabdo and muscle
9 injury cases in Pennsylvania.

10 Number C, I think, is a matter that we would like
11 to take up informally and in chambers if we are going to
12 have an in-chambers discussion about how we get from here to
13 the end and through trials.

14 THE COURT: Yes, we will take that up in
15 chambers.

16 MR. ZIMMERMAN: I don't think -- I don't want to
17 discuss that, if we don't have to, from the podium at this
18 time.

19 And then the last is Mr. Becnel's motion. I
20 believe it was originally addressed to the Judicial Panel
21 on Multidistrict Litigation. Mr. Becnel is here. He wants
22 to talk to the court about his motion to disband the PSC
23 and the MDL. I always like listening to Danny. So he is
24 here and either we can do that on the contested calendar or
25 we can do it now.

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1 THE COURT: It's been filed before the JPML, so I
2 have no jurisdiction over it and I've received a copy of
3 his pleadings. I don't need to hear any more on it.

4 MR. ZIMMERMAN: I am sure he would like to talk
5 about it, though. He's come a long way.

6 THE COURT: There's no need for -- let me repeat
7 myself.

8 MR. ZIMMERMAN: I know. I am just teasing, Your
9 Honor.

10 THE COURT: I don't need to hear anything more
11 about it since I don't have to rule on it, it's not my
12 issue.

13 MR. ZIMMERMAN: And I think that issue does
14 dovetail with what we are going to be talking about anyway
15 with the court in terms of how we get to the end, and it's
16 part of the end. But the PSC has not taken a position and
17 does not take a position on it at this time, although we

18 are certainly thinking about the ramifications of whatever
19 is being filed.

20 I believe that concludes the calendar, Your
21 Honor.

22 THE COURT: We have one other matter, Special
23 Master Haydock.

24 MR. ZIMMERMAN: We forgot Special Master Haydock.

25 SPECIAL MASTER HAYDOCK: Your Honor, at this

0049

1 point I have nothing to report. I just want to say that I
2 was offended, though, of having been kept off the agenda.
3 That's all, Your Honor. That's all I wanted to say.

4 THE COURT: Thank you. We'll take a 15-minute
5 recess and come back with arguments.

6 (Recess.)

7 THE COURT: Let's go to arguments.

8 MR. ZIMMERMAN: Do you want to go in the order of
9 the agenda, Your Honor, which would be the defendants'
10 motion to compel with respect to PTO 114?

11 THE COURT: Yes.

12 MR. ZIMMERMAN: Jeanne Geoppinger will argue for
13 the PSC.

14 THE COURT: All right. Again good morning,
15 Mr. Beck.

16 MR. BECK: Good morning, Your Honor. Just by way
17 of context, as near as we can determine right now, of the
18 800 so-called expert reports that have been filed pursuant
19 to PTO 114, we believe our motion would apply to
20 approximately 600 of them.

21 And that means that of the 800 plaintiffs who
22 purported to comply with PTO 114 by way of an expert report,
23 approximately 600 have done nothing more than the kind of
24 two-page form report unsupplemented by other material. And
25 so it's a significant matter in that respect.

0050

1 And then, of course, it has even more significance
2 because for the vast majority of plaintiffs, extensions have
3 been granted. And so there are several thousand plaintiffs
4 looming out there, including the several thousand that I
5 think we all believe right now Weitz & Luxenberg will
6 continue to represent. And so this is a significant matter
7 both in terms of what's been done and what's going to be
8 permitted to be done in the future.

9 And our position is set forth pretty thoroughly in
10 the briefs. If I can just briefly summarize what I think
11 are the highlights; and that is that these two-page form
12 reports do not meet the standards of this court's order
13 PTO 114, Section 1A and 1B, in that they do not comply with
14 Federal Rule Civil Procedure 26(a)(2), which is specifically
15 referenced in the court's order.

16 And also the court's order goes on independently
17 to require that any expert report must include an
18 explanation of the bases of the attestation that Baycol
19 caused the plaintiff to suffer injuries or damages and a
20 description of the specific injuries or damages suffered.
21 We don't think that these checkoff form reports comply with
22 that.

23 And I think it's especially significant, Your
24 Honor, in terms of the history of PTO 114 that at the
25 eleventh hour the Plaintiffs' Steering Committee suggested

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1 to the special masters that a provision be included that
2 would allow them to use these kind of checkoff short form
3 type things in lieu of what one would consider a proper
4 expert report under the federal rules and that effort by
5 the plaintiffs was futile.

6 The proposal that was submitted to the court by
7 the special masters and approved by the court specifically
8 required compliance with the federal rules and reiterated
9 the federal rules requirement that a full explanation of the
10 bases be set forth.

11 And any review of these forms, I think in a normal
12 case you would look at these and no way in the world would
13 anybody say that these little checkoff forms comply with
14 Rule 26.

15 There hasn't been, so far as I could tell, a
16 serious effort to contest that and instead the plaintiffs
17 have said, well, but they do accomplish some other goal and
18 that is that they enable us all to go forward with the
19 categorization process that is also contemplated by another
20 one of the PTOs.

21 However, my understanding -- I haven't been
22 personally involved in this activity, but my understanding
23 is that the categorization that has taken place and that's
24 been successful, where we heard earlier that there's over
25 90 percent agreement on the first group, that is not

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1 because people were able to look at these forms and come to
2 any conclusions or agreements about categorization.

3 In fact, even for that purpose, which is, in
4 fact, not the purpose of the expert reports, but even for
5 that ancillary purpose these forms have been inadequate and
6 we've had to go behind them and look at medical records and
7 look at a lot more information.

8 So these things that are supposed to comply with
9 the federal rules as being expert reports and do not comply
10 with the federal rules, it can't be excused that they
11 accomplish this other goal because they don't even
12 accomplish that.

13 But more important is that the purpose of the
14 expert reports is to figure out who's got a basis for their
15 claim and who doesn't, figure out what cases can be set for
16 trial and when and in what order, and what cases can be
17 subject to dispositive motions, what cases can be subject
18 to Daubert motions.

19 In other words, they are supposed to file expert
20 reports just like people file expert reports in any case and
21 they have to comply with the rules about expert reports just
22 like you have to comply with the rules in any case.

23 And they have been given lots of time to do this
24 and they have been given more time where they have asked for
25 it. The relief that we ask for is not draconian. We are

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1 not saying, okay, they had their one chance, they failed,

2 off with their head, dismiss their case, although I would
3 submit that the effort to comply is so feeble that one could
4 in good faith ask for that.

5 But what we've asked for instead is for the court
6 to tell the plaintiffs' lawyers, That doesn't cut it, go
7 back to the drawing board, you've got another 30 days to
8 come up with a real expert report that a lawyer could say in
9 good faith complies with Rule 26. That's what the court
10 ordered.

11 That's what we're entitled to in order to defend
12 ourselves in these cases and that's what we need, I think,
13 in order to really get these cases in a position where we
14 can start resolving them one way or another.

15 The last point that I would make, Your Honor, is
16 that there's also been a suggestion by the plaintiffs that
17 our motion is somehow deficient because we should have
18 brought the motion as to each one of the 600 reports and
19 that we should have gone through the meet and confer
20 process as to each one of the 600 reports.

21 And all I would ask Your Honor to do is step back
22 for a moment and imagine that we had proceeded on that
23 basis, what we would be hearing from the plaintiffs'
24 counsel; and that is that the big bad pharmaceutical
25 companies are trying to impose ridiculous staggering costs

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1 on the plaintiffs and to make each one of these cases
2 uneconomical to pursue by taking the same problem, which is
3 the same form report filled out largely by the same doctors
4 for the same plaintiffs' lawyers with the same sort of
5 substance, that we're insisting on briefing and arguing and
6 meeting and conferring on 600 of these essentially identical
7 forms individually. If the court wants us to do that, we'll
8 do it. It will be an enormous waste of everybody's time and
9 money.

10 But I think it comes with especially ill grace
11 from the plaintiffs' lawyers, who are now -- having accepted
12 our money on behalf of the injured plaintiffs are now
13 claiming that we are trying to grind them into dust by
14 defending ourselves on the cases that we believe are without
15 merit, to say that we should have dealt with this in a
16 different way. We think we raised it in the proper way.

17 If instead we have to fight report by report by
18 report, we can do that and we'll be here for a couple of
19 years doing nothing but fighting about these expert reports.
20 Instead what we ought to do is get guidance, is this
21 two-page form satisfactory to the court, does this in the
22 court's view comply with Rule 26, would this be acceptable
23 as an expert report that informs us of what we're entitled
24 to know before we go to trial against somebody, before we
25 bring a Daubert motion, before we bring a summary judgment

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1 motion or not.

2 And if the court deems that that's acceptable,
3 we'll live with that. If the court says no, again, we're
4 not asking that anybody be thrown out of court. We're
5 asking that they be told to go back and do what they're
6 supposed to do.

7 MS. GEOPPINGER: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MS. GEOPPINGER: Jean Geoppinger for the PSC.
10 Your Honor, according to the defendants, by developing a
11 template to assist plaintiffs' counsel in preparing expert
12 reports, which I would note is not only permitted by law
13 but also arguably within the scope of the PSC's MDL
14 obligations, the defendants' position is that the PSC is
15 engaging in what is essentially a nefarious attempt to what
16 they call warehouse cases and to write the requirement of
17 Rule 26 out of PTO 114.

18 As an initial matter I would note that it's
19 interesting to observe that in this context defendants are
20 now seeking what they vehemently opposed for the last three
21 years that this MDL has been in existence, and that is
22 basically class type treatment on this issue. Rather than
23 addressing cases individually, which has been the
24 defendants' mantra throughout this litigation, they now wish
25 to attack them collectively in this motion.

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1 The defendants' rationale is, however, flawed for
2 several reasons. First of all, what defendants assail as a
3 form report and must comply with the requirements of Rule 26
4 is not a report at all. What it is is, like I said, a
5 template that was developed to assist plaintiffs' counsel in
6 preparing Rule 26 compliant PTO 114 submissions.

7 The issue, therefore, isn't whether the form
8 template or the template complies with Rule 26, but rather
9 the reports that are prepared utilizing that template comply
10 with that rule.

11 The PSC in its papers and here respectfully
12 suggest that that determination must be made on a
13 case-by-case basis taking into account the fact that
14 PTO 114 specifically provides for the supplementation of
15 such reports.

16 This is particularly true, we believe, because
17 defendants have conceded that numerous reports that have
18 been prepared using the template actually comply with
19 Rule 26 and their stringent read of what Rule 26(a)(2)
20 requires, and I would refer the court to Exhibits B through
21 N in our memorandum in opposition.

22 Secondly, notwithstanding the defendants in their
23 papers what I would characterize as rather self-serving
24 characterizations for the purposes of PTO 114, the fact
25 remains the PTO 114 narrowing process is actually working.

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1 To date, as we discussed earlier, more than 600
2 cases have been eliminated by virtue of that process and it
3 will likely eliminate hundreds or even thousands more in the
4 coming months.

5 With respect to the issue of categorization, the
6 categorization of the cases that have survived the narrowing
7 process thus far is also proceeding expeditiously and
8 efficiently. With counsel's agreement -- at this point we
9 have counsel's agreement regarding more than 98 percent of
10 all of the cases that have been categorized.

11 With regard to the contention that the

12 categorization is happening despite the form, what I would
13 note is that, as Special Master Haydock and Mr. Mizgala, who
14 has been personally involved, can confirm, the issue of
15 whether or not the reports are sufficient for categorization
16 and the requirement of medical records is by virtue of the
17 nature of an expert report, which is summary and rather
18 conclusionary in nature by its actual form; that we have
19 discussed this issue of perhaps modifying PTO 114 to require
20 medical records for every submission that is made,
21 notwithstanding whether or not the report might be
22 sufficient.

23 Finally, I would just state that it's
24 disingenuous at best for the defendants to claim that they
25 met and conferred in good faith with the plaintiffs who are

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1 the subject of this motion. Not only did the defendants
2 summarily reject the PSC's overtures to resolve this issue,
3 but they took advantage of the July 4th holiday weekend to
4 set individual plaintiffs up for inclusion in this motion.

5 By that what I mean is after the close of business
6 on July the 1st defendants began faxing form letters to
7 individual plaintiff's counsel which contained no details
8 regarding alleged deficiencies in the plaintiff's expert
9 reports.

10 The defendants then gave the plaintiff's counsel
11 less than three business days on either side of a holiday
12 weekend to submit a report that would comply with their
13 reading of Rule 26 or face this motion.

14 Thereafter the defendants rebuffed all of the
15 individual plaintiff's counsel's attempts to determine what
16 the insufficiencies with individual reports were as required
17 by local Rule 37.1 and Rule 37.

18 And then they filed this motion literally one
19 minute after the deadline, when Special Master Haydock asked
20 them not to file it until we had the issues of categories
21 under PTO 127 resolved.

22 In short, I believe that it strains defendants'
23 credibility to characterize their efforts as conferring,
24 much less conferring in good faith. In fact, to me it
25 seems that it's simply a matter of demonstrating that the

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1 defendants wish to pick and choose which rules should be
2 applied to this litigation and apply to them.

3 So for all those reasons we would ask that the
4 form or the template that has been developed be allowed to
5 stand for plaintiffs' assistance in preparing their expert
6 reports and that the defendants' motion be denied.

7 THE COURT: All right. In dealing with the
8 modification of 114 to add medical reports, where is that
9 at?

10 MS. GEOPPINGER: We have had a discussion with
11 Special Master Haydock, Mr. Mizgala and I have had, and
12 what has been happening is anyone who has received an
13 extension in recent weeks, in the latest wave of extensions
14 that have been granted, every one who is given an extension
15 is not only required to file an expert report, but they are
16 also being required to submit the equivalent of the

17 plaintiff's letter that is contemplated by PTO 114 that
18 contains the details that allow for the categorization.

19 My understanding of and why I believe that this is
20 potentially a good thing and why we have had this discussion
21 and why -- let me take a step back. We have discussed
22 whether or not that should be extended to all of the cases
23 and that's where we left it, I mean, in terms of where the
24 extensions are.

25 But the reason that it might be necessary is an

0060

1 expert report -- a doctor may say in an expert report that
2 even the defendants would concede is sufficient, you know,
3 such and such a person took Baycol for such and such a
4 period of time, but from that recitation we may not know if
5 it was taken -- if the complaints were contemporaneous,
6 whether it was within 30 days, and the way the various
7 categories are set up within Pretrial Order Number 127.

8 So the thought being to be able to specifically
9 get the information that goes to the issue of
10 categorization, notwithstanding whether or not it might be
11 in a sufficient expert report.

12 THE COURT: Let's press that issue. Thank you.

13 MS. GEOPPINGER: Thank you, Your Honor.

14 THE COURT: Mr. Beck, anything further?

15 MR. BECK: Yes, briefly, Your Honor. I am told
16 that Ms. Geoppinger is incorrect in terms of the timing of
17 what we did when.

18 People from our side conferred with the PSC at
19 some length on the issue of whether these reports were
20 adequate or not. We did not then contact individual
21 plaintiff's attorneys and demand that they file reports to
22 our satisfaction within three days.

23 What we asked them to do is tell us within three
24 days whether they would file real expert reports rather than
25 these form reports. So we weren't imposing any kind of

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1 unilateral draconian requirements on the plaintiffs'
2 lawyers.

3 Also, we have been asked not to raise this matter
4 until we dealt with the categorization issues and had
5 those -- a framework for that ironed out. We said we would
6 hold off until we did that. Once we did that, then we filed
7 a motion just like we said we were.

8 And then most important, Your Honor, is when you
9 listen to the argument from the -- Ms. Geoppinger, there
10 was no argument, again, that these forms comply with Rule
11 26. What I heard her say was that these are not expert
12 reports, they are just templates which may be useful down
13 the road when they do real expert reports or that have been
14 useful in some instances where they have done expert
15 reports.

16 And that may or may not be true, but we have a
17 pretrial order that sets forth deadlines for expert reports
18 and apparently their position is, even though they admit
19 these are not expert reports, that by giving us these forms
20 that may assist them down the road if they ever get around
21 to doing an expert report, they somehow satisfy the court's

22 deadline.

23 We don't think they have done that. They
24 submitted these things as if they were expert reports in
25 order to meet the deadline that was contained in this

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1 court's order.

2 Now, you know, the truth of the matter is that
3 against our will it works as sort of an automatic extension
4 even without asking the court for one because, as I said,
5 this happened a long time ago and we are still not asking
6 that they be thrown out, but we are asking that they be
7 directed to comply with Rule 26 even though it is going to
8 end up being months after they should have in the first
9 place.

10 And equally important, Your Honor, as to all
11 these thousands of others that are going to be coming in
12 here sooner or later, we ought to skip the interim process
13 of giving us a form that is not an expert report and
14 instead give us an expert report.

15 THE COURT: All right. The court will take this
16 matter under advisement and have an order out as quickly as
17 possible, within the next several weeks.

18 Let's move on to the next issue dealing with the
19 defendants' request to quash the PSC's motion for letters
20 rogatory.

21 MR. BECK: Again, Your Honor, I think this has
22 been pretty thoroughly briefed on all sides, so I am not
23 going to take a lot of the court's time but try to just
24 reinforce some of the main points.

25 One thing that's of some significance here is

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1 that, so far as we have been able to determine, never in
2 history has the Italian government honored a request for
3 letters rogatory in a civil suit.

4 When they ratified the Hague Convention they did
5 so with the stipulation that they will not execute letters
6 rogatory for purposes of discovery of documents as known in
7 common law countries; and that was without any if's, and's,
8 or but's, without any qualification.

9 And, Your Honor, that would apply -- the thing
10 that struck me so much reading over the materials is that
11 would apply if we were talking about letters rogatory
12 directed to Fiat or some other Italian company.

13 But we're not talking here about letters rogatory
14 directed to some corporation or private individual in Italy.
15 We are talking about something much more bizarre and extreme
16 than that, and that is letters rogatory that they want this
17 court to issue directed to a prosecutor in Italy, who if he
18 were to comply -- if the government were to issue them and
19 he were to comply would himself be committing a crime.

20 It would be like somebody from France sending
21 letters rogatory over to ask for information that's been
22 developed in a grand jury in the United States despite grand
23 jury secrecy law.

24 The law in Italy is clear not only that they have
25 opted out of letters rogatory for cases such as this, but

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1 also that even within Italy for a prosecutor who is
2 conducting an investigation to release information that he
3 has obtained and developed in advance of his final report
4 violates Italian law.

5 So it would be not only a futile gesture by this
6 court, but I would submit an affront to the government of
7 Italy and a breach of international comity for this court
8 to purport to -- to make such a request in some sort of
9 supposed expectation that the government of Italy would
10 honor such a thing when they have said that they won't
11 generally and when we know what the law is about the
12 conduct of an investigation by an Italian prosecutor.

13 Lastly, even if Italian law were different about
14 whether they will issue these things in connection with
15 discovery in civil disputes and even if Italian law were
16 different in terms of the obligations of secrecy on an
17 Italian prosecutor who is conducting an investigation, then
18 and only then would you get to the traditional analysis of
19 whether they've met the factors, the five-factor test,
20 that's set forth in the briefs in terms of when letters
21 rogatory should issue. And as we explained there and I
22 won't go through each one, they have failed to meet that
23 test.

24 So for all those reasons we think that this
25 request to the court should be denied.

0065

1 THE COURT: Well, do you want to deal with the
2 affidavit dealing with -- and I will allow the surrebuttal
3 to come in and the affidavit dealing with that that came
4 along with that -- the affidavit where plaintiffs' expert
5 talked about the preliminary investigation is over?

6 MR. BECK: But I don't think that there's any
7 dispute that while a preliminary investigation -- that even
8 though a preliminary investigation is over, that the
9 secrecy requirements on the Italian prosecutor remain until
10 his final report is issued.

11 And I don't believe that they have disputed that.
12 I think that there was some initial sort of maneuvering on
13 their part on that, but I don't think in the last analysis
14 that they have come forward with anything that disputes the
15 conclusion from our Italian lawyer that says that the
16 conclusion of the preliminary investigation does not relieve
17 the Italian prosecutor of the secrecy obligations. Of
18 course it doesn't have anything to do with whether Italy
19 will honor such requests even in a typical civil case.

20 THE COURT: All right.

21 MR. BECK: And when I say the final report, I am
22 sorry, I was using imprecise language. It's the requisite
23 notification to the persons being investigated. It is sort
24 of the conclusion of the report, the wrap-up of the report.

25
0066

1 time. It's not like everybody is waiting on pins and
2 needles and it is going to come out in a couple of weeks.
3 That final notification can take a substantial amount of
4 time even after the preliminary investigation may have been
5 completed.

6 THE COURT: All right. Mr. Hopper, should the
7 court be involved in an international comity directed by
8 Fellini or should I just watch it and be on the sidelines
9 here?

10 MR. HOPPER: Well, that's a very legitimate
11 question, Your Honor, and at least slightly I anticipated
12 that based on defendants' arguments. Because before I
13 actually present plaintiffs' arguments and address
14 defendants' arguments, I'd like to take a moment and put
15 this in context.

16 Because I think that if the court follows Bayer's
17 arguments and the logic behind those arguments, the court
18 would be led to believe that resort to the Hague Convention
19 for purposes of discovery within any foreign sovereign is
20 essentially prohibited and is a futile exercise. I mean,
21 Mr. Beck himself even said it's futile and he's trumped this
22 up now to use colorful language, bizarre and extraordinary
23 and too stringent, in their briefing.

24 But as Your Honor knows, perhaps better than
25 anyone else in this courtroom since Your Honor did a --

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1 forgive me for not knowing precisely, but a tour of duty at
2 the Hague, the process has been greatly simplified and is
3 not restrictive at all. That door is open and that door is
4 open for purposes of international discovery. The entire
5 purpose of the convention when it was agreed to by the
6 various signatories was to create measures of international
7 cooperation between the sovereigns.

8 Defendants want to paint this antagonistic
9 perspective or context for this whole thing, but by and
10 large the Hague Convention was entered into to create an
11 open system and to create what now in common day language is
12 a more user friendly, if you will, system for obtaining
13 evidence abroad.

14 In short, Your Honor, the convention procedures
15 and the comity between the signatories and importantly the
16 case law, which has emerged interpreting these procedures,
17 confirm quite the opposite of what defendants argue.

18 This is true because the Hague Convention and the
19 letters rogatory procedure contemplate and indeed
20 anticipate a ground swell of transnational litigation.
21 That's what its purpose is designed to entreat. That's why
22 it's there.

23 So that when a federal district court sitting in
24 an MDL who has an international or a multinational
25 corporation that has marketed a drug all over the world and

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1 has caused injuries with that drug and many third parties
2 and others have become involved in that procedure, Your
3 Honor, I would submit that that's precisely -- and I don't
4 know and maybe Your Honor does, if the doors of the Hague
5 swing inward when they open and I don't know if you can
6 honestly say that they invite the litigants in, but I
7 certainly believe that in the interest of international
8 comity there is ample evidence showing that the letters of
9 request and its procedure invoke cooperation between the
10 sovereigns, not this antagonism which Mr. Beck wants to try

11 to lead the court to believe.

12 Your Honor, it's within this context and against
13 this backdrop that plaintiffs ask the court to view our
14 arguments and to reject Bayer's.

15 Now, turning to Bayer's three arguments.
16 Essentially they have made three. First, Bayer says that
17 the Article 23 of the convention prohibits foreign
18 litigants, particularly those from a common law sovereign,
19 from engaging in pretrial discovery.

20 As the PSC has shown in its papers, Italy's
21 reservation offered to ratify Article 23 is subject to
22 interpretation. In no way does the reservation, qualified
23 or not -- and they try to say that it hasn't been -- act as
24 a complete bar to the execution of letters rogatory.

25 It just simply doesn't prohibit a federal district
0069

1 court from issuing that letters rogatory on the front end,
2 on the very front end of that procedure. The purpose of the
3 convention is to reconcile, as I have said, not antagonize,
4 parties to the international legal system.

5 As our Italian counsel has stated in his affidavit
6 to this court, pretrial discovery has differing meanings
7 among all of the sovereigns who are signatories to this
8 agreement. I think that's essentially what you might have
9 been alluding to in your question to Mr. Beck.

10 Therefore, I believe the Italian courts would be
11 the most appropriate venue to adjudicate this
12 interpretation, certainly not Bayer's or the defendants' or
13 Mr. Beck's own biased interpretation of Italian law. To
14 this end, Your Honor, I think both the Tulip Computers and
15 the Aerospatale cases will be instructive to the court.

16 In Tulip Computers that court stated, and I quote,
17 That it was satisfied that a foreign tribunal will be the
18 best tribunal to make a final decision on the evidence to be
19 used in a U.S. court.

20 Justice Blackmun came behind that in his dissent
21 and while he disagreed with the majority's opinion in
22 Aerospatale, he agreed with an important issue germane to
23 the discovery process that's at issue here when Justice
24 Blackmun stated, and I quote, That a reservation in practice
25 is not a significant obstacle to the discovery that the

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1 broad wording of Article 23 suggests. It's just simply not
2 this bizarre procedure that Mr. Beck wants to paint it to
3 be.

4 Accordingly, Your Honor, the Article 23
5 reservation in no way precludes this court from signing the
6 letters rogatory, issuing it to the Italian authorities and,
7 importantly, thereby deferring to an Italian court for an
8 interpretation of their own laws. In so doing and
9 importantly, and I underscore, this court would be acting
10 consistently with the Tulip Computers court.

11 Second, Bayer has also said that if this court
12 issues a letter rogatory it would axiomatically require the
13 Italian authorities to break their own laws and they are
14 trying to run that up the flagpole in front of this court.
15 Bayer can't make this presumption validly.

16 Simply citing to an Italian civil code, again,
17 doesn't automatically preclude the federal district court
18 from initiating the process on letters rogatory. Again,
19 that's an issue for the appropriate court in Italy, I would
20 urge this court to consider, and to have that court evaluate
21 that under their laws. It in no way creates a legal basis
22 for a bar to letters rogatory or precludes this U.S. court
23 from proceeding.

24 I believe that a careful reading of Article 329
25 shows that it turns on the close of the preliminary

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1 investigation. Even Bayer's own affiant in his affidavit
2 refers to the preliminary nature, as Your Honor
3 acknowledged.

4 The PSC is not asking Mr. Guarenello to divulge
5 secret information that he has learned. We are not asking
6 him to open his files, as their papers said. We are not
7 attempting to take his deposition. We're not blowing this
8 up into the level that may require detente between two
9 nations. We are trying to obtain documents that were in
10 Bayer's Milan offices that are now in the possession of a
11 third party that I believe that we are entitled to seek.

12 As Mr. Geffers, our affiant, states in his
13 affidavit, the preliminary investigation typically lasts
14 six months to a year. He refers and references to another
15 section of the Italian code.

16 We are now closing in on two and a half years.
17 Given the procedure associated with the letters rogatory, no
18 doubt the investigation will be closed by the time that
19 letters rogatory makes its way through the consul to the
20 Italian authorities, then to the Italian court and then to
21 the prosecutor. I can't imagine after two and a half years.

22 But, of course, Mr. Beck wants to continue to
23 paint this picture that this is a bizarre process and that
24 it is going to be very dilatory and that we shouldn't even
25 be allowed to engage in international discovery at all.

0072

1 Finally, Your Honor, Bayer says the PSC should
2 not be allowed to proceed with the letters rogatory because
3 the procedure, as I have said, is extraordinary and too
4 stringent, to use their words.

5 Well, this is far from the truth, Your Honor, and
6 importantly it's not supported by the case law. The
7 Aerospatale court stated, Holding the convention does not
8 apply would deprive litigants of access to evidence through
9 treaty procedures to which the contracting states have
10 assented. In other words, the convention procedures are
11 there for a reason, simply to assist foreign litigants with
12 discovery.

13 The letters rogatory is not an extraordinary
14 measure or any unusual discovery device, as defendants would
15 have the court believe, nor does it create an exceptionally
16 high burden for a litigant who pursues it; and that's
17 important.

18 Indeed, the Aerospatale court set forth
19 guidelines for U.S. courts to follow and for Your Honor to
20 certainly be instructed through that case. But the court

21 was quick to point out that it was not articulating
22 specific rules, only guidelines for achieving international
23 comity. It's trying to set the tone, I believe, for the
24 spirit of cooperation.

25 The PSC's request meets these guidelines.

0073

1 Mr. Beck didn't want to take the time to elucidate on those,
2 but I do and I think it's important that the PSC presents
3 this to the court.

4 First, our request is not overly broad. We only
5 seek the documents, Your Honor.

6 Second, it's not intrusive on the Italian
7 sovereign or on the prosecutor himself. We're not
8 attempting, as I said, to take the deposition of
9 Mr. Guarenello nor are we making any intrusive inquiries
10 into what he knows or asking him to open his files.

11 Third, the PSC will cover all the costs. This is
12 why we've retained Italian counsel, Your Honor, so that we
13 do this responsibly. Mr. Geffers is a very experienced
14 international lawyer and familiar with these procedures. He
15 will work cooperatively with Mr. Guarenello in his office
16 and he will assist the PSC with the process and guide us
17 through it.

18 These actions by the PSC are reasonable and they
19 satisfy the elements set forth by the Aerospatale court to
20 avoid any abuses in that process, and the court did urge
21 the federal district court to have oversight on that and I
22 believe that what we are attempting to do is anything but
23 abusive.

24 Similarly, the Supreme Court in Aerospatale
25 recognized the importance of comity, as Your Honor has

0074

1 referred to, as it relates to international discovery. The
2 PSC's use of the letters rogatory procedure satisfies these
3 principles.

4 First, the documents in question relate to the
5 same drug, Lipobay, Baycol; the same injuries caused by that
6 drug; and the same defendant is a party here. The documents
7 also are reasonably calculated, we believe, to lead to the
8 discovery of admissible evidence. We believe once we have a
9 chance to look at them, we will be able to use those
10 documents in the process as this MDL proceeds.

11 Second, the PSC has been specific in its request.
12 I don't know how we can be any more specific. We are
13 seeking the documents obtained by the prosecutor in Turin
14 which came from Bayer's Milan offices.

15 Third, while we don't know the origin of the
16 documents, we know they originated with Bayer.

17 And fourth, both the formal and informal requests
18 that the PSC has made for months on Bayer and on the
19 defendants have failed to produce those documents.

20 And finally, Your Honor, fifth, in the spirit of
21 comity, the procedure made available through the Hague
22 should be utilized by the PSC and any other international
23 litigant attempting to engage in foreign discovery. It's
24 used to satisfy -- it should be used to satisfy its broad
25 discovery requirements in this MDL.

0075

1 Knowing, Your Honor, that 100,000 documents could
2 go undiscovered could lead to injustice on behalf of
3 thousands of plaintiffs that Your Honor has referred to in
4 earlier proceedings today, could lead to injustice on behalf
5 of thousands of plaintiffs under the jurisdiction of this
6 MDL court. Noncompliance with the letters of request could
7 undermine the important interests of this MDL court and of
8 the plaintiffs in the United States.

9 Notwithstanding this court's interest to
10 supervise, which the case law certainly directs the court to
11 do, the procedure associated with the letters rogatory,
12 consistent with the instructions that the case law provides,
13 does not set a high burden for the plaintiffs or for the PSC
14 to have to follow.

15 Consistent with *Tulip Computers*, the party from
16 whom we are seeking the discovery is a third party. The
17 nonparty or the third party is located within the country
18 where the letter is directed and the nonparty is not subject
19 to the jurisdiction of this court. That's why we must
20 engage the procedure made available by the Hague for persons
21 who are situated, as the PSC is, in a transnational
22 litigation.

23 With these important points in mind, Your Honor,
24 I think Bayer's arguments fail. No matter what kind of
25 colorful language Mr. Beck wants to attach to it, bizarre,

0076

1 unwieldy, too stringent, extraordinary, none of those apply
2 here. The case law certainly does not support that.

3 The PSC's request for letters rogatory is based
4 upon sound procedure. It finds a solid basis in case law.
5 It's reasonable, it's not abusive or an affront at all to
6 the Italian sovereign, and it's easily effectuated, Your
7 Honor.

8 For these reasons, Your Honor, I think without
9 question the PSC respectfully requests that the court deny
10 this motion to quash, particularly in the context as I
11 presented in the beginning of my argument, and to assist the
12 PSC with its third party international discovery and sign
13 the letters rogatory.

14 THE COURT: All right.

15 MR. HOPPER: Thank you, Your Honor.

16 THE COURT: Thank you. I am assuming that the
17 PSC would not object if the court changed some of the
18 language?

19 MR. HOPPER: Absolutely not, Your Honor.

20 MR. BECK: Your Honor, when Mr. Hopper waxes
21 eloquently about the Hague Convention, he does so in a way
22 that acts as if all signatories are the same and that all
23 signatories took the same position and that all signatories
24 had the same thing in mind when they were subjecting
25 themselves to the Hague Convention.

0077

1 But as Your Honor knows, that is not true, that
2 some -- that the convention itself permitted signatories to
3 opt out of specific provisions; and Italy did that and
4 there's no dispute about that and they did that without

5 qualification.

6 In contrast to the country that was involved in
7 the, for example, Tulip Computers case, the Italian
8 government when it signed the Hague Convention opted out of
9 the procedures under Article 23 and was very clear and there
10 was no ambiguity about that whatsoever.

11 And so the Italian government has proclaimed,
12 Don't bring us requests for discovery in the kind of civil
13 litigation in common law countries, we're not going to
14 participate in that. And they've stated that policy quite
15 clearly.

16 And as I said, it's no surprise in light of that
17 that neither we nor the PSC have been able to come up with
18 a single example where letters rogatory issued from the
19 Italian government in such a case.

20 And again I say that has to do if we were talking
21 about Fiat, but certainly we haven't heard anything from
22 Mr. Hopper that would suggest that anywhere in the Hague
23 Convention it was contemplated that an ongoing
24 investigation that has not been resolved should be the
25 subject of letters rogatory issued by a United States court

0078

1 to a foreign prosecutor, especially when the law is plain
2 that under Italian law he's not free to release that
3 information.

4 Mr. Hopper's response to that is basically, well,
5 let's just leave it to the Italians, let's let the Italian
6 courts deal with that. You just rubber-stamp the letters
7 rogatory or edit the letters rogatory and we'll just leave
8 it to the Italians to decide those issues.

9 Of course, you know, that is a way out for the
10 court, but we suggest, Your Honor, that the Aerospatale
11 case specifically requires this court to engage in the
12 comity analysis.

13 And to answer Your Honor's question, you are not
14 allowed to just sit back and watch the Fellini movie. You
15 are part of the movie and you are required under U.S. law to
16 engage in the comity analysis before you issue those letters
17 rogatory.

18 And this requires the court to look at Italian
19 law and to respect Italian law and to not engage in
20 fanciful interpretations that say the Italians don't mean
21 what they say when they say that they will not respect
22 requests that ask for the kind of discovery that nobody
23 disputes is exactly the kind of discovery that's taking
24 place in this case.

25 And, Your Honor, I suggest that there's something

0079

1 offensive about a foreign nation issuing letters rogatory to
2 another country saying, Tell us what's in your prosecutor's
3 files before he's finished his job and notified the subjects
4 of the investigation what the outcome is.

5 And even though we know it's against the law in
6 Italy for him to release that information, well, somewhere
7 along the way his investigation will be complete and so we
8 just want this thing in the works.

9 My view is -- and obviously it's a matter of

10 judgment for the court, but my view is that international
11 comity does not permit this court simply to punt it over to
12 the Italians and say, well, if it's against Italian law,
13 the Italians will take care of it. I think that you're
14 required in the first instance to consider Italian law
15 before you make your decision.

16 And then finally under the factors -- they spent
17 more time on them today than I think they did in their
18 briefs, but the factors under the Aerospaziale case are:

19 The importance of the request. The fact that the
20 documents involve in some way the same drug doesn't -- is no
21 kind of a showing that these documents are any more, less,
22 or the same level of importance as any of the other tens of
23 millions of documents that they have gotten out of Bayer and
24 Bayer AG.

25 The specificity of their request. They say it's a
0080

1 very specific request, we ask for everything. I don't think
2 that's what's contemplated by the notion -- the factor of
3 specificity. To say that all I've asked for is everything
4 the fellow has is not a specific request. It's a hopelessly
5 overbroad request.

6 Then Mr. Hopper kind of glazed over the next one
7 in terms of origination. He said, well, we don't know
8 where they originated, but they have to do with Bayer.

9 Well, I think that factor is more -- is a little
10 more specific than that; and that is whether the information
11 that is sought in the letters rogatory originated in the
12 United States because that would, you know, give the United
13 States some interest in it even though the information now
14 resides somewhere else.

15 And there's no claim whatsoever here that the
16 information sought, which is some documents out of the files
17 of Bayer SPA, which is an Italian entity, there's no
18 indication whatsoever or claim that that information
19 originated in the United States.

20 Whether there's an alternative means to obtain
21 it, I mean, they have had about as a wide ranging and broad
22 discovery as anybody could imagine in terms of all of the
23 files of the U.S. company, the German company, other
24 companies.

25 And there's no reason to think there's anything

0081
1 different in the -- that came out of the files of Bayer SPA
2 and certainly nothing that would be germane in litigation in
3 the United States.

4 And then finally, whether noncompliance with the
5 request would undermine the interests of the United States
6 or a foreign country. Certainly this court declining to
7 issue letters rogatory would not undermine any interests of
8 Italy. Italy has no interest in Your Honor pursuing that
9 at all nor, we suggest, does the United States.

10 This case has been nothing if not thoroughly
11 discovered and thoroughly prepared and we're now sort of in
12 a fishing expedition that, frankly, I believe is sort of
13 just the result of a frolic that one of their members went
14 on improperly where the Italian prosecutor said, No, I am

15 not going to cooperate with you; and then he embarrassed
16 himself as well as the Plaintiffs' Steering Committee by
17 pretending otherwise and then that sort of has led, I think,
18 to a motion that -- I apologize, but it doesn't make any
19 sense to me and appears to me to be grossly overreaching
20 under what we know to be Italian law.

21 THE COURT: All right. Thank you.

22 Hopefully I will not make any errors in my
23 interpretation of the comity. I will take it under
24 advisement.

25 MR. HOPPER: Thank you, Your Honor.

0082

1 MR. ZIMMERMAN: Thank you, Your Honor. Your
2 Honor, we have two other matters. One will be the PSC's
3 comments on the Ronwin open letter and then the Weitz --
4 whether Weitz & Luxenberg counsel want to be heard on the
5 two issues of dismissals and withdrawals. I suspect we
6 should probably do the Weitz & Luxenberg first if that's --

7 THE COURT: That's correct.

8 MR. BURKE: Daniel Burke from Weitz & Luxenberg.
9 Good afternoon, Your Honor.

10 THE COURT: Good afternoon.

11 MR. BURKE: I am not really sure these motions are
12 ripe for argument today. Defendants haven't had an
13 opportunity to put in papers in opposition.

14 THE COURT: They aren't ripe, but I have made
15 comments and I will give you an opportunity to shoot
16 your --

17 MR. BURKE: Just a couple of comments, Your Honor.
18 First, there's kind of been a suggestion that's been bandied
19 about here today that Weitz & Luxenberg somehow wants to cut
20 and run from these plaintiffs, they are making money on
21 other cases and they just want to abandon these plaintiffs.
22 And that couldn't be further from the truth.

23 We've come to the conclusion, based upon the two
24 and a half or three years that we've been litigating these
25 cases, that it's not in the clients' best interests in these

0083

1 cases we are seeking dismissals or withdrawals to proceed.

2 Bayer has indicated that they are simply not going
3 to settle cases that don't rise to the level of
4 rhabdomyolysis right now and to proceed to a trial we
5 feel -- for these particular clients we are seeking
6 withdrawal and dismissal for, the expenses for these clients
7 would outweigh any potential recovery that we'd get.

8 So it's not a matter of Weitz & Luxenberg looking
9 to protect its assets as much as -- or at all. It's a
10 question of whether or not this is in our clients' interest
11 to proceed with these cases.

12 That being said, we've been in negotiations with
13 Bayer's counsel regarding the withdrawal as counsel motion
14 and I think we basically agree in theory that that would be
15 a good way to handle these issues.

16 There were certainly concerns that the court
17 raised earlier today, which I shared and my office shared,
18 which I brought to Ms. Weber's attention. We couldn't
19 support the Verilaw requirement for pro se plaintiffs and we

20 couldn't support the early due dates for compliance. We
21 need a little more time for these plaintiffs to have some
22 real opportunity to secure new counsel and to comply with
23 the requirements of PTO 114 and 127.

24 That being said, I don't know what the best answer
25 is or what the best way to proceed is now. Perhaps with the

0084

1 court's comments this morning, maybe we should go back to
2 the drawing board and see if we can reach an agreement
3 between counsel that would be amenable to the court and
4 something that everybody could live with.

5 THE COURT: You can do that, you can continue on
6 with your negotiations, but we should tee this up for
7 argument and it will be the next status conference.

8 MR. BURKE: Thank you, Your Honor.

9 MR. BECK: Your Honor, in light of the court's
10 earlier comments, as I said, we took those to heart and the
11 last thing in the world we want to do is to somehow be
12 lugged in with Weitz & Luxenberg.

13 As far as I'm concerned, what they ought to do is
14 come up with something that they think will satisfy the
15 court's concerns, we'll take a look at it and we'll tell
16 them whether we agree or disagree, and then they can file a
17 motion and we and the PSC can respond to that.

18 But I believe that we went down the wrong road and
19 Your Honor told us we went down the wrong road; and I just
20 want to make sure the Weitz & Luxenberg people understand
21 that we're not going down that road anymore, that we're
22 going back to square one. Let them come up with a proposal.
23 We and the PSC will respond and say whether we think that
24 the proposal is appropriate or not.

25 And then even if we all agree it's appropriate,

0085

1 it's going to be put before Your Honor and Your Honor is
2 going to decide whether it's appropriate.

3 THE COURT: All right.

4 MR. BURKE: Thank you, Your Honor.

5 THE COURT: Thank you.

6 MR. ZIMMERMAN: At the risk of beating something
7 that maybe has been well discussed, it seems to me what
8 Mr. Beck is saying is they went down this road to try and
9 do something with the defendants to give them these
10 settlements in their rhabdo cases and wanted to work with
11 them to get these dismissals and withdrawals; and now that
12 they've seen it sort of blow up in their face, now they
13 want to kind of work with us on what's right. I find that
14 slightly difficult to accept.

15 MR. BECK: Well, since I didn't say that, he
16 doesn't have to struggle, Your Honor. I didn't say that.
17 I didn't mean it. So he doesn't need to accept it or
18 reject it.

19 MR. ZIMMERMAN: Well, then I am glad that's not
20 what was said because that's what I heard. I had heard
21 something different; and if that isn't what happened, then
22 that makes me comforted.

23 The next issue is the Ronwin question and Shawn
24 Raiter of the PSC is going to be commenting on the open

25 letter.

0086

1 THE COURT: All right. Thank you.

2 MR. RAITER: Your Honor, I will be brief. As
3 plaintiffs' liaison counsel we have had a large amount of
4 contact with Mr. Ronwin. And to the extent we need to
5 respond in writing to some of the substantive issues, we
6 will, but I just wanted to address the communication issues
7 that he raises.

8 Mr. Ronwin has our toll-free number, my law firm,
9 the Larson King law firm's toll-free number. He has used
10 that liberally. I have spent literally hours on the phone
11 with him, as have other members of my law firm and my staff.

12 The suggestion that we haven't reported to him,
13 that the PSC has not provided reports to him, I think, is
14 not taken well by us. There are a number of things in
15 place in this MDL which are unique in terms of the
16 communication that it provides to all parties, including
17 Mr. Ronwin.

18 He has been kept apprised of the litigation by
19 both letters and reports from lead counsel from the PSC.
20 He has received or at least certainly been able to have
21 received the joint agendas and status reports that the
22 parties file on Verilaw. Mr. Ronwin is signed up on
23 Verilaw. He does, as I understand it or at least what he
24 has told me, monitor Verilaw.

25 So each status conference when we come here with

0087

1 an agenda of what's going on, what remains to be completed,
2 what discovery is being done, what motions are being argued
3 are available to him every month. And whether he sees
4 those or not, I don't know, but they are certainly there.
5 We are reporting to him.

6 The court's status conference transcripts are on
7 the court's website and so anything that's said here is on
8 that website at some point and that can be reviewed by
9 Mr. Ronwin.

10 The motions and orders for motions that have been
11 decided before Your Honor are on Verilaw and certainly,
12 again, provide adequate reporting and status to Mr. Ronwin
13 about what's going on.

14 The depositions, which he also comments about,
15 many of the transcripts have been made available to him.
16 He has requested them at times. He simply doesn't want to
17 pay for them the same way that other plaintiffs or
18 plaintiffs' counsel pay for them in this litigation. And
19 we have made accommodations to Mr. Ronwin. We have
20 provided him with deposition transcripts at, I believe, a
21 penny a page for copying costs.

22 He at one point requested generic expert reports,
23 but then didn't want to pay for them the same way that
24 everyone else has to pay for them.

25 So we've really gone out of our way to make

0088

1 Mr. Ronwin happy with how this litigation is going and his
2 latest filing, unfortunately, indicates that he's not.

3 Myself, plaintiffs' counsel, defense counsel, and

4 the court have all been the subject of criticism by
5 Mr. Ronwin, but when we step back and look at the access
6 that he's had to the litigation and the access that he has
7 had to the plaintiffs' work product and the status, we
8 really, I think, can agree, at least from the plaintiffs'
9 side, that he has been provided extremely detailed analysis
10 and reporting about what's going on on our side of the
11 litigation.

12 So I just wanted to touch on the communication
13 issues that he raises at the very end of his letter. To the
14 extent we need to address anything else, we will do so in
15 writing, Your Honor.

16 MR. ZIMMERMAN: Do you want to take a stab at
17 that one, Phil?

18 MR. BECK: Having reviewed the letter, I don't
19 think that we will be filing anything in response.
20 Whatever he says about us here does not require a response,
21 Your Honor.

22 THE COURT: All right. Anything further,
23 Mr. Zimmerman?

24 MR. ZIMMERMAN: I don't believe so, Your Honor.
25 I think that does conclude the agenda.

0089

1 I have been seeking some counsel with the court
2 about developing end of the game strategies and I think
3 perhaps at some point, at the court's discretion and
4 instruction, we should meet and start discussing those
5 issues, but that's all I have on the formal agenda.

6 THE COURT: All right. Anything further,
7 Mr. Beck?

8 MR. BECK: No, Your Honor.

9 THE COURT: All right. Let's adjourn. Before we
10 adjourn let's set up another date for a status conference
11 in October.

12 MR. BECK: Your Honor, I need to get the playoff
13 and World Series schedule out before we do that.

14 MR. HOPPER: You dreamed the first time and you
15 dream again.

16 THE COURT: The Cubs versus the Twins.

17 MR. BECK: So if we can do it in the morning.

18 THE COURT: Do you have the schedule there?

19 MR. ZIMMERMAN: Do you have some suggestions?

20 THE COURT: I think the American League has the
21 first home games.

22 MR. BECK: October 19th is a travel day, Your
23 Honor. The teams will be coming from bus up from Chicago
24 to Minneapolis and we could sort of follow in the caravan.

25 MR. ZIMMERMAN: We like the 19th, Your Honor. We

0090

1 think that's a good day.

2 THE COURT: The 19th?

3 MR. ZIMMERMAN: I have been told that's a good
4 date for our side if that works.

5 MR. BECK: I didn't actually ask anybody on our
6 side.

7 MR. ZIMMERMAN: They follow your lead.

8 THE COURT: What about the following week?

9 Because that's the week of an MDL conference down in
10 Florida, the 19th.
11 MR. ZIMMERMAN: The 26th, that looks good for our
12 people.
13 MR. BECK: That would be the first game in
14 Wrigley. How about the 25th, does that work?
15 MR. ZIMMERMAN: Yes.
16 MR. BECK: Let me make sure that that actually
17 works.
18 MR. MAGAZINER: Your Honor, I want to be sure
19 that the schedule doesn't conflict with the Super Bowl
20 because the Eagles --
21 THE COURT: That's in January, isn't it?
22 MR. MAGAZINER: I just want to give the court
23 plenty of advance notice.
24 MR. BECK: October 25th.
25 THE COURT: Mr. Zimmerman.

0091

1 MR. ZIMMERMAN: Yes, that works for us, Your
2 Honor.
3 THE COURT: 10:00. Is that agreeable to the
4 special masters? 25th of October at 10:00. Let's adjourn
5 to chambers.

6
7 (Court adjourned at 12:40 p.m.)
8

9 * * *
10 I, Lori A. Simpson, certify that the foregoing is a
11 correct transcript from the record of proceedings in the
12 above-entitled matter.

13
14
15 Certified by:
Lori A. Simpson, RMR-CRR

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17 Dated: October 26, 2004
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