

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA
3 FOURTH DIVISION

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4 In re: Baycol Products)
Litigation) File No. MDL 1431
5) (MJD/JGL)
6)
7) Minneapolis, Minnesota
8) October 9, 2003
9) 9:30 a.m.
10 -----

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

10 APPEARANCES

11 For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
12 ELIZABETH CABRASER, ESQ.
13 RONALD GOLDSER, ESQ.
14 VICTORIA MANIATIS, ESQ.
15 RANDY HOPPER, ESQ.
16 JOHN CLIMACO, ESQ.

17 For the Defendants: PHILIP BECK, ESQ.
18 ADAM HOEFLICH, ESQ.
19 GENE SCHAERR, ESQ.
20 PETER SIPKINS, ESQ.
21 FRED MAGAZINER, ESQ.
22 SUSAN WEBER, ESQ.
23 DOUGLAS MARVIN, ESQ.
24 SCOTT SMITH, ESQ.

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1 THE CLERK: Multidistrict Litigation No. 1431,
2 In re: Baycol Products. Please state your appearances for
3 the record.

4 MR. ZIMMERMAN: Good morning, Your Honor.
5 Charles Zimmerman for the Plaintiff.

6 THE COURT: Good morning.

7 MS. CABRASER: Good morning, Your Honor.
8 Elizabeth Cabraser for Plaintiffs.

9 THE COURT: Good morning.

10 MR. GOLDSER: Good morning, Your Honor. Ron
11 Goldser for Plaintiffs.

12 THE COURT: Good morning.

13 MS. MANIATIS: Good morning, Your Honor.
14 Victoria Maniatis from Weitz & Luxenberg for Plaintiffs.

15 THE COURT: Good morning.

16 MR. HOPPER: Good morning, Your Honor. Randy
17 Hopper for the Plaintiffs.

18 THE COURT: Good morning.

19 MR. BECK: Good morning, Your Honor. Phil Beck
20 for Bayer and Bayer.

21 THE COURT: Good morning.

22 MR. HOEFLICH: Good morning, Judge. Adam
23 Hoeflich for Bayer and Bayer.

24 THE COURT: Good morning.

25 MR. SCHAERR: Good morning. Gene Schaerr for

1 Bayer and Bayer.

2 THE COURT: Good morning.

3 MR. SIPKINS: Peter Sipkins for Bayer, Your

4 Honor.

5 THE COURT: Good morning.

6 MR. MAGAZINER: Fred Magaziner for

7 GlaxoSmithKline, Your Honor.

8 THE COURT: Good morning.

9 MS. WEBER: Susan Weber for Bayer, Your Honor.

10 THE COURT: Good morning.

11 MR. MARVIN: Douglas Marvin for Bayer.

12 THE COURT: Good morning.

13 MR. SMITH: Scott Smith for GSK, Your Honor.

14 THE COURT: Good morning. All right. Is that

15 it?

16 MR. ZIMMERMAN: Your Honor, a few more people

17 that I would like to introduce.

18 THE COURT: Yes. Would you, please?

19 MR. ZIMMERMAN: First off I'd like to introduce

20 Ms. Kaplan [phonetic], who is here from the William

21 Mitchell Law School. She contacted me the other day and

22 said that she is doing a paper on the Baycol litigation for

23 her law school studies and I invited her to come in. So

24 Ms. Kaplan from the William Mitchell Law School.

25 THE COURT: Welcome to this circus.

1 MR. ZIMMERMAN: That's not quite how I described
2 it.

3 There are also a number of lawyers from the LAC
4 Committee, and I think they can introduce themselves in the
5 back. We stipulated this would not allow them to be
6 assessed, of course, but I'll make them introduce
7 themselves.

8 MR. BIRCHFIELD: Good morning, Your Honor. I'm
9 Andy Birchfield from Alabama.

10 THE COURT: Good morning.

11 MR. SIEGEL: Good morning, Your Honor. Dan
12 Siegel for Sol Weiss from Philadelphia.

13 THE COURT: Good morning. Say hi to Sol for me.

14 MR. WOODSON: Frank Woodson from Alabama.

15 THE COURT: Good morning. All right. Ed
16 Blizzard is around here somewhere, isn't he?

17 MR. ZIMMERMAN: Yes. I haven't seen him, but I
18 saw him yesterday.

19 MR. CLIMACO: Your Honor, John Climaco. I was
20 late by a minute coming in.

21 THE COURT: Good morning. All right. I will
22 turn it over to you, Mr. Zimmerman.

23 Excuse me. Mr. Beck, anyone else that you want
24 to introduce?

25 MR. BECK: No.

1 MR. ZIMMERMAN: I figured he would bring in Sammy
2 Sosa.

3 Your Honor, it's a pleasure to be before you this
4 morning on the status conference. I think last time we met
5 was in July, so we've probably got a fairly significant
6 amount of new developments to report. And there are
7 certain matters that I think are on for argument and
8 hearing and a number of things that may come up that we
9 haven't anticipated that the Court may have in mind.

10 But let's start with the agenda. It is a jointly
11 submitted agenda. We apologize for its lateness. I know
12 the Court wanted it a couple of days ahead of time.
13 Because of some scheduling problems we weren't able to do
14 that, primarily the Yom Kippur holiday, I think, got in the
15 way a little bit.

16 THE COURT: Correct.

17 MR. ZIMMERMAN: Your Honor, let's start with the
18 pending cases because I think it's important for everyone
19 to know what we are talking about here today in these
20 proceedings.

21 Defendants have been served with 10,930 cases
22 that remain active. So I suspect what that means is many
23 have been dismissed, but those are the active cases. Of
24 that total, 5,561 cases are in the federal courts and 4,833
25 are pending in state courts and there remains 500 and some

1 cases that have not yet been indexed.

2 There also probably needs to be added to this,
3 Your Honor, filed but unserved cases, which we don't have
4 those statistics. I cannot tell you what that order of
5 magnitude might be, but I suspect there are a number of
6 cases in that filed but unserved.

7 Just so everyone understands, many of these cases
8 have multiple plaintiffs. So although there are 10,930
9 active cases, there may be a significantly greater number
10 of people represented by those cases; not just spouses,
11 which would be one side of it, but also multiple
12 plaintiffs, where you have more than one plaintiff who has
13 a claim against Bayer contained in one active case.

14 You will notice down at C of the agenda, I.C, we
15 have asked for the total number of plaintiffs represented
16 by these filings. I don't know that I necessarily agree
17 that the first time we asked for it was October 8th. I
18 don't think that's particularly relevant, but it's in the
19 agenda. But I think we should at some point get those
20 numbers. I think it would be helpful for all of us to just
21 understand how many people are involved in this litigation
22 nationwide, in the states and in the federal system.

23 As of the July -- and I think this is important
24 for the Court to understand. As of the July 11th
25 conference there are probably an additional 1,100 cases

1 that have been filed. I think the difference between 9,800
2 and 10,900 is about 1,100. Of those cases, 5,200
3 approximately were in the federal system, where we now have
4 about 5,600; and 3,737 in the states and now we have 4,833.
5 So both dockets had a substantial increase over the ensuing
6 period.

7 MR. BECK: If we are still on that item, Your
8 Honor, I guess I would note that the likely explanation for
9 that is comments by Mr. Zimmerman and others urging lawyers
10 from around the country that if they had any aches and
11 pains cases or, as he calls them, muscle injury cases that
12 they should get on file before August something because
13 that was a potential statute of limitations date.

14 So it wasn't unexpected that, in light of
15 Mr. Zimmerman's and others' urging that people file cases
16 by August, that whoever thought they might have one did, in
17 fact, file.

18 THE COURT: You may proceed.

19 MR. ZIMMERMAN: The next issue, Your Honor, has
20 to do with -- on the agenda has to do with class actions,
21 which --

22 THE COURT: Before we move on to that, dealing
23 with C, pending cases, how soon can we get the total number
24 of plaintiffs represented by the plaintiff filings?

25 MR. BECK: Your Honor, we just got this request

1 and haven't even had a chance among ourselves to discuss it
2 more than just a few minutes this morning.

3 The concern that I have is -- number one, they
4 filed the complaints. They can read their own complaints
5 and figure out how many plaintiffs they put into each
6 complaint. They can do that as easily as we can do it.

7 And my concern is I'm not at all confident that
8 we can ever give a number that's accurate or that means
9 anything because we've got plaintiffs' lawyers tripping all
10 over themselves filing cases at the last minute with
11 plaintiffs they never met before.

12 I wouldn't be at all surprised if we don't have
13 situations where the same individual saw four different
14 plaintiffs' ads on cable TV and called up four different
15 plaintiffs' lawyers and so that individual could be the
16 subject of four separate complaints and yet only one
17 individual.

18 So I have no confidence that we could go through
19 these complaints and sift through and figure out how many
20 real live plaintiffs there are. So number one is I don't
21 think we can figure that out.

22 Number two is it's their complaints. If they
23 want to know, they can read the complaints and try to sift
24 through it themselves.

25 Number three, I just don't want to be put to that

1 burden. We are trying to get ready for trials that are
2 going to take place in the spring.

3 And I don't see what difference it makes. I
4 can't -- I tried to think this morning about whether there
5 was some issue that would be involved in the litigation
6 that this task would be relevant to, and I can't think of
7 any.

8 The only thing I can think of, frankly, is that
9 Mr. Zimmerman would like to make the challenge facing Bayer
10 to seem as big as he can possibly make it seem to put
11 pressure on us to settle these aches and pains cases.

12 That was their reaction when Your Honor ruled on
13 class certification. We had a press release from
14 Mr. Zimmerman saying that's bad for the shareholders of
15 Bayer and Bayer ought to be settling these cases. So it
16 just seems to me that they are trying to enlist us and make
17 us do work so that Mr. Zimmerman can engage in his PR
18 activities.

19 I don't see what relevance it has to any issues
20 in the litigation and I frankly don't think that I can come
21 up with a real number because the complaints are such a
22 mishmash as we see how many of them get dropped as we go
23 forward.

24 So I am loathe to undertake this test. I am not
25 volunteering to do it at all. If they want to read their

1 own complaints and figure out how many clients they claim
2 to represent and they want to spend their time doing that
3 instead of getting ready for the trials in the spring, god
4 bless them, but I don't think we should have to do that.

5 THE COURT: All right. You may have two minutes.

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

7 THE COURT: Oh, I'm sorry. GSK has something to
8 say.

9 MR. MAGAZINER: Just to amplify one very small
10 point that Mr. Beck made. Last week I asked some of my
11 colleagues to try to figure out how many duplicative
12 complaints we are facing, that is, duplicative complaints
13 filed on behalf of the same plaintiff; and we are still
14 trying to figure that out. That's very complicated because
15 we see names that sometimes have a middle initial and
16 sometimes don't in trying to figure out -- match addresses,
17 whatever.

18 But we note, for example, that there are a number
19 of cases that have been filed in this court by plaintiffs
20 who are also members of multiplaintiff complaints filed in
21 state courts, for example, in Texas or in Alabama, and the
22 same is true there are plaintiffs in the Philadelphia
23 Common Pleas Court who are members of multiplaintiff
24 complaints filed in this court.

25 And we are trying to get a handle on it, but I

1 wanted Your Honor to understand a little bit about -- more
2 about what Mr. Beck said. There's a large degree of
3 uncertainty here and, as Your Honor said, it is something
4 of a circus where we have plaintiffs filing duplicate
5 complaints.

6 And for all I know there are plaintiffs who are
7 in three or four or five different complaints. We have
8 only identified those who are in two so far and still
9 working through that process, but it is very time-consuming
10 for the lawyers.

11 THE COURT: Mr. Zimmerman, do you wish to
12 respond?

13 MR. ZIMMERMAN: Yes, Your Honor. I guess I think
14 I know when I am getting punched in the nose, but I am
15 going to respond on the facts.

16 First of all, the "they" that Phil speaks about,
17 we represent lots of other people. The "they," I don't
18 have contact with all of the "theys" that he says are the
19 people filing complaints. I only have contact with the
20 PSC, which files complaints on behalf of their clients, but
21 there's a large number of people who I don't have
22 information about the filing of their complaints.

23 But more to the point, more to the substance of
24 the point, every plaintiff who files a case has to file a
25 plaintiff fact sheet and on the plaintiff fact sheet

1 there's all kinds of information. They put it into their
2 database on who has a complaint, what the complaints are
3 and who they are, what their address and telephone number
4 and related information is. I don't think that's -- they
5 keep that information. I don't think that's very difficult
6 to add up and provide that information to the Court.

7 I know Mr. Beck likes to talk about PR and all
8 this stuff, and I am just not going to go there with him.
9 But if that's where he thinks we are coming from, we are
10 not. Where we are coming from is trying to get a handle on
11 the number of people that are at risk, the number of people
12 that have claims, so both the state and the federal courts
13 know the order of magnitude or the number of plaintiffs
14 that have claims filed against Baycol and against Bayer and
15 GSK.

16 THE COURT: All right. Well, by the next status
17 conference I will order Defendants to give me a gross
18 number of how many plaintiffs there are; and of course they
19 will not be held to the fact that there may be multiple
20 plaintiffs involved in different complaints, but just to
21 give me a rough number of how many plaintiffs there are
22 both in state and federal jurisdictions, if they can break
23 it down that way.

24 I see that -- we might as well take care of this
25 other item under "Other Matters." Bayer is going to

1 provide to the plaintiffs' counsel a list of all the -- an
2 updated list of all the plaintiffs' counsel so the PSC will
3 have the names of all the plaintiffs' counsel that are
4 involved in this litigation.

5 All right. You may continue.

6 MR. ZIMMERMAN: Thank you, Your Honor. I.D, Your
7 Honor, has to do with class actions and I think the point
8 here that is important is that, as you know, there's a
9 certified class in Oklahoma and a certified class in
10 British Columbia. The Court in this -- this Court has
11 denied class certification in PTO 94 for the nationwide
12 class that we pled, but two developments I think are
13 important.

14 Number one, I have been advised by Arnie Levin
15 that a class action has been pled or repled in Pennsylvania
16 for a different class. I was told by Mr. Levin or I
17 thought I understood by Mr. Levin that he was pleading a
18 class of nonrhabdo cases because the rhabdo cases for the
19 most part, if not 100 percent at this point, but soon will
20 be resolved.

21 I was told by Susan that that's not what the
22 pleading in Pennsylvania is, that it's not the nonrhabdo
23 cases, which is what Mr. Levin told me when I met with him
24 a couple of weeks ago.

25 The point, I guess, is there's some new subset

1 that I understand is going on in Pennsylvania. I need to
2 inquire about it. I just bring it to the Court's attention
3 and I will get more information on it and provide it to
4 you.

5 From the standpoint of the PSC, Your Honor --

6 THE COURT: Mr. Siegel, do you have any
7 information on that?

8 MR. SIEGEL: It's my understanding, Your Honor,
9 that there was an amendment or a request to amend the class
10 action, not for nonrhabdo, but for the lesser injury
11 claims. I have not seen the pleading. I have heard the
12 discussions. I know something was filed by Mr. Levin's
13 office. I have not seen the actual pleadings to know the
14 terms exactly.

15 THE COURT: Thank you.

16 MR. ZIMMERMAN: Your Honor, the point, I guess,
17 from -- the federal MDL point of view is that we are
18 looking at that issue as well, we are looking at subclasses
19 statewide and subgroups, and we have not made a decision on
20 that. I just alert the Court and Counsel to that
21 potentiality and I am sure that issue will be brought
22 timely before the Court.

23 THE COURT: All right. Thank you.

24 MR. ZIMMERMAN: Any comments?

25 THE COURT: Anything on that, Mr. Beck?

1 MR. BECK: No.

2 MR. ZIMMERMAN: Settlement, Your Honor. The
3 cases that Defendants have settled to date total 545,
4 almost '46, million dollars; over half a billion dollars
5 contained in 1,514 cases. Of this total, 376 of those
6 cases were federal cases with a total value of
7 approximately 136 million dollars.

8 As of the last conference there was a total of
9 1,095 cases settled nationwide and 292 cases settled in the
10 MDL. So there's an increase of approximately 80 cases in
11 the MDL and 400 cases overall.

12 Again, I am not going to speculate as to what
13 that -- what brought that on. I just bring that as a
14 statistic before the Court so everyone can recognize what
15 is going on, the total magnitude of settlements and what
16 has been resolved.

17 MR. BECK: Your Honor, I am happy to announce
18 that as of about two minutes ago we got word that we have
19 settled another 169 cases. We have been working on this
20 for some time. That's with Sol Weiss and a group of
21 lawyers from Philadelphia.

22 So another 169 cases can be added to the mix. I
23 don't know whether any of those are in the MDL or not,
24 but -- you know, we'll find that out. But anyway, we are
25 making more progress and getting more of the actual rhabdo

1 cases resolved.

2 THE COURT: Were those all rhabdo or aches and
3 pains cases?

4 MR. BECK: There were no aches and pains cases in
5 that group. Of the 1,514 plus the 169 that we have
6 settled, there's not a single one that's an aches and pains
7 case; or if there is, it's only because we thought it was a
8 rhabdo case. I mean, we are settling only cases with
9 actual injury. We are not settling any aches and pains
10 cases.

11 With a lot of the groups of lawyers that we've
12 talked to and settled significant numbers of cases we have
13 been asked to wrap in aches and pains cases. Sometimes we
14 have been asked to wrap in large numbers, and we have said
15 no. Sometimes we have been asked just give me one or two
16 because this particular plaintiff, you know, is a pain in
17 the neck and won't go away. We have said no to every
18 single one.

19 MR. ZIMMERMAN: Your Honor, there are
20 approximately 73 cases in the MDL mediation process. I
21 believe in a moment Special Master Lew Remele will comment
22 on the mediation process, the MDL mediation process. But
23 in addition to those 73, the PSC has 26 additional cases
24 currently in direct negotiation with Bayer and GSK and
25 Bayer, whatever.

1 I am not going to comment on what's been settled,
2 it speaks for itself, I'm just not going to go there, but
3 we do believe that the settlements are significant and
4 important and are continuing.

5 That would then bring me to the mediator's report
6 from Special Master Lew Remele.

7 THE COURT: Before we get to the report, anything
8 further, Mr. Beck, before Mr. Remele speaks?

9 MR. BECK: No, Your Honor. We have nothing else
10 to report today.

11 SPECIAL MASTER REMELE: Good morning, Your Honor.

12 THE COURT: Good morning, Mr. Remele.

13 SPECIAL MASTER REMELE: Mr. Zimmerman is correct
14 that there have been approximately -- actually, I think
15 it's 74 cases that have been submitted into the mediation
16 program and a good number of those have either been settled
17 directly in negotiations between Bayer and the various
18 plaintiffs or some have been withdrawn.

19 And there are currently five cases that are
20 pending in mediations in one form or another, either
21 mediations that are about to take place or where we are
22 attempting to set a date, but there will be -- probably
23 within the next 30 days those five mediations will be
24 completed.

25 There are still two cases that are in the throes

1 of settlement negotiations, cases that have been mediated
2 and the efforts are continuing to try to settle those.

3 And there are approximately six cases that I have
4 under consideration to determine whether they should be
5 placed in the mediation program and we either have just
6 gotten records so that I can make a decision or we are
7 waiting for some additional information so that I can look
8 at those and make a decision as to whether or not they
9 should be referred to the mediation program under the
10 pretrial order.

11 There's a little bit of an uptick in terms of the
12 activity in terms of cases that are going to mediation and
13 cases that are being mediated, but I think, again, the fact
14 that there aren't as many mediations as we may have
15 anticipated is a reflection of the fact that the parties
16 are continuing to negotiate directly and they are
17 continuing to settle cases in substantial numbers directly;
18 and I think that's a good thing.

19 THE COURT: Thank you.

20 MR. ZIMMERMAN: So moving beyond case status and
21 settlement, we get to discovery. There are several items
22 here, Your Honor.

23 And as the Court knows, on number D, we do have
24 an objection to the discussion of interim reports. I think
25 given the sensitivities of those with regard to the Italian

1 prosecutor, we would like to take that matter up with the
2 Court in chambers. I know that --

3 THE COURT: Well, no.

4 MR. ZIMMERMAN: I just --

5 THE COURT: On D, I checked my orders and it was
6 just an oral order to send down to Magistrate Judge
7 Lebedoff for the discovery plan for that. I will be
8 getting an order out today that this matter will be sent to
9 him for a report and recommendation to the Court. That's
10 what I meant to do. I didn't do it. I apologize for that.

11 The documents have been sent down to Magistrate
12 Judge Lebedoff and he will see counsel from both sides at
13 11:00 this morning. Okay? So we don't have to discuss
14 that at all. That's referred to Magistrate Judge Lebedoff.

15 MR. ZIMMERMAN: Okay. Your Honor, document
16 production by Bayer, Bayer AG, and GSK, as well as the
17 depositions of witnesses, I would like John Climaco -- we
18 have prepared kind of a lengthy report internally. We have
19 not provided it to Counsel or the Court, we don't plan on
20 doing such, but we would like to give the Court an update
21 of what has transpired, what remains to be done, where
22 there might be issues that might come before the Court, in
23 other words, things that we haven't agreed on, and then
24 just report basically to the Court. There's no motion,
25 there's no argument. It's just a question of here's what's

1 been completed, here's what's scheduled, and here's what's
2 not completed.

3 MR. BECK: And I assume, Your Honor, that this
4 means that it is okay to make interim reports?

5 MR. ZIMMERMAN: You are talking under D?

6 THE COURT: You will get a chance to talk about
7 D, but -- well, let's talk about D now, interim reports.
8 This is before Magistrate Judge Lebedoff. He will schedule
9 the appropriate hearings on this matter.

10 I have never heard of interim reports dealing
11 with an issue of such a magnitude as this and I was shocked
12 that you would submit something like that instead of
13 scheduling -- continue to schedule hearings so it can be
14 resolved in an appropriate manner.

15 But in any event, that said, Magistrate Judge
16 Lebedoff will handle this matter dealing with any motions
17 that Defense has. Dealing with further discovery or
18 setting down arguments for sanctions, he will hear that and
19 then he will make a report and recommendation to me. You
20 can appeal that. You can argue it then further up here
21 after that is finished, but he is going to do the
22 groundwork for me. All right?

23 MR. CLIMACO: Good morning, Your Honor. Richard
24 Arsenault, Turner Branch, and myself continue to have a
25 weekly meet and confer with the Defendants, Doug Marvin on

1 behalf of Bayer and Jay O'Connor on behalf of GSK. There's
2 a cooperative spirit in those conferences, Your Honor, and
3 I think we're making progress to complete discovery and
4 depositions.

5 To date, Your Honor, there have been 88
6 depositions taken: 48 Bayer, 12 Bayer AG, 15 GSK, and 12
7 of nonparties.

8 We currently, Your Honor, have one Bayer
9 deposition scheduled for November 11th and that's a
10 continuation of Tig Conger, a deposition that I took.
11 There are no Bayer AG depositions scheduled.

12 At the current time we have seven GSK depositions
13 scheduled. We have not noticed, but GSK has provided us
14 dates for four depositions.

15 We are in the process of attempting to schedule
16 one additional Bayer AG deposition. We are also discussing
17 with Bayer the scheduling of three additional depositions.

18 We also have under discussion the completion of
19 some depositions. There are five depositions in the
20 process of being scheduled with GSK.

21 We, the MDL PSA -- PSC, excuse me, are
22 contemplating taking four additional Bayer AG depositions.
23 We also are looking at and discussing with the Defendants
24 some depositions regarding Japanese rigid studies, and
25 those would be Bayer AG.

1 We have some ongoing discussions over problems
2 with GSK with a couple of individuals which we hope to
3 resolve.

4 There's some ongoing issues with Bayer on
5 insurance discovery, document production. There's been a
6 motion filed, as the Court knows, to compel the Bayer
7 defendants to provide meaningful responses. To discovery
8 requests dealing with insurance related information we
9 currently have nonparty depositions, three.

10 And, Your Honor, our records as to upcoming
11 trials, to the best we can determine there are currently
12 nine scheduled, two in December, one in Mississippi, one in
13 California. There are -- I'm sorry. There are three in
14 Mississippi, but the first one scheduled is in December
15 2003. There are two in the state of Washington, two in
16 West Virginia.

17 Thank you, Your Honor.

18 THE COURT: Dealing with the other tracks on
19 discovery, the state court tracks, the Pennsylvania track
20 and the Texas track, have they finished up with their
21 discovery?

22 MR. CLIMACO: To my knowledge, they are not, Your
23 Honor. We do during our meet and confer attempt to discuss
24 those issues with defense counsel to see if it's possible
25 to coordinate any.

1 As an example, the Tig Conger deposition, I spoke
2 yesterday with Mr. Sol Weiss's partner, who is here --
3 because we keep hearing the state has also scheduled that
4 deposition, but then it is put off -- and Mr. Marvin and I
5 have been attempting to determine are the state attorneys
6 going to take Mr. Conger; and if so, when.

7 THE COURT: Any conflicts that are going on with
8 the tracks or is Bayer satisfied with the way it's running?

9 MR. BECK: Your Honor, we are working it out as
10 best we can and we have no complaints. You know, we have
11 the usual difficulties with multiple proceedings, but I
12 think that things are going reasonably smoothly when it
13 comes to coordinating. We are always going to have
14 problems and we work through it, but I don't think that
15 there are any significant problems that the Court needs to
16 be concerned with.

17 THE COURT: Thank you.
18 Mr. Zimmerman.

19 MR. ZIMMERMAN: And I would echo that issue. I
20 think if there's one area that we have had cooperation on
21 and there haven't been -- and we haven't had a lot of
22 difficulties that we've had to bring before the Court or
23 the Magistrate is the deposition and discovery program. I
24 think it is a credit to both sides. I think it is the one
25 area that we don't seem to fight about too much, we seem to

1 be getting the work done; and I think that's good for
2 everybody. We have lots of areas where we don't agree, but
3 this seems to be one area that we have been able to work
4 through.

5 There is an issue on the agenda, and maybe I
6 could jump to it or not because John touched on it, John
7 Climaco, is these trials in state courts. We, again, don't
8 have that information, are not provided that information.
9 And, frankly, it's not -- I don't believe it's appropriate.
10 I thought the Court has that motion under advisement, to
11 have us provided that information.

12 Here's the context where it comes up, Your Honor.
13 We do not like to learn about a trial in a state after the
14 fact, after a lawyer contacts us and says, hey, by the way,
15 can you help us or can you provide us with some information
16 and we have this trial going out, say, in X state in
17 January.

18 We would like to be more proactive in that
19 regard. We are all plaintiffs. We all represent victims.
20 We are all really on the same side. We can't do that very
21 well without knowing what's out there. I have been before
22 this Court a number of times asking for that information
23 and the Defendants say we can't have it.

24 The information that we do have about the six or
25 seven that we have that John delineated is just information

1 we get tangentially from e-mails and from people in the
2 field that we happen to know.

3 I know this is a matter that has been contested
4 by the Defendants, but because it was part of the discovery
5 report I just bring it up now.

6 THE COURT: All right. I did receive my report
7 dealing with the trial calendar of state court cases and I
8 guess it's three pages long.

9 Mr. Beck, anything you want to report on dealing
10 with the state court cases? It seems like there's been a
11 number of them that have disappeared off the calendar. I
12 assume that they have settled.

13 MR. BECK: Some settle. Sometimes --

14 THE COURT: They are moved.

15 MR. BECK: Yeah. And often what happens in state
16 court is that when you file a complaint or show up for the
17 first status conference you're assigned a trial date, which
18 shows up on a listing like we provide, but it doesn't mean
19 anything.

20 THE COURT: Right.

21 MR. BECK: So some of them are that way.

22 THE COURT: While we are on the trials, have any
23 specific trials been set for Philadelphia?

24 MR. SIEGEL: There are discussions about a spring
25 date. I don't recall if there are any set, but the

1 earliest would be the spring of 2004 for the first Baycol
2 trials. There's been discussions in terms of designating
3 cases on both sides and there's been difficulty with some
4 of the designations from the Defendants.

5 THE COURT: Mr. Beck.

6 MR. BECK: I thought that there was at least
7 discussion of possible trials in January, but I may be
8 wrong about that.

9 MR. SIEGEL: I could have misspoken too. I am
10 not positive on the dates. I know none of our firm's cases
11 are on that list.

12 MR. BECK: I thought that there were -- there was
13 discussions of a possibility of trials in January, but I
14 don't know whether those are going to take place in January
15 or not.

16 MR. HOEFLICH: Your Honor, my understanding is
17 the Plaintiffs' designated cases are to go forward in
18 January, February, beginning in early 2004. The Defendants
19 also designated four cases to go forward in January and
20 February.

21 It's my understanding that as of last week the
22 Plaintiffs had discontinued the four aches and pains cases
23 that the Defendants had designated and it's unclear what
24 will happen with the January and February trial dates. As
25 of today, I believe they are still on.

1 THE COURT: All right. The cases that have been
2 designated by the Plaintiffs are the aches and pains or are
3 they rhabdo cases?

4 MR. HOEFLICH: I believe they are rhabdo cases,
5 Judge.

6 THE COURT: And they are probably in the group
7 that you just settled?

8 MR. HOEFLICH: I believe that one of them that
9 was set for February is in the group we settled this
10 morning. I don't believe the other ones are.

11 THE COURT: Okay. What I am looking for is --
12 what I have been looking for for a long time is an aches
13 and pains case to go. And so we are all looking for that.
14 We've got to get -- when we get to the trial plan,
15 understand that's where I want to go and that's where we've
16 got to get some cases tried so we can find out what these
17 cases are worth, if they are worth anything at all.

18 MR. BECK: Your Honor, I have been assuming that
19 that, in fact, is going to be the focus of the trial or
20 trials that take place in this court in the spring.

21 THE COURT: That's correct, that's correct. I'm
22 sorry.

23 MS. MANIATIS: Judge Ackerman is still trying to
24 maintain a mix in these first eight cases and that some of
25 those that are still surviving are, in fact, rhabdo cases.

1 I don't know what of this group may have settled, but some
2 of them are still remaining in terms of the January,
3 February, March targets.

4 THE COURT: Philadelphia was supposed to have --
5 I don't want to misspeak, but I thought they were having a
6 settlement program. Did that work out at all or is it just
7 the designating of cases?

8 MR. HOEFLICH: Judge, I don't know the status of
9 the settlement program in Philadelphia. I know that we
10 are -- we had settlement discussions on all of the rhabdo
11 cases that I knew about. There may be three that are set
12 for trial. I believe at least some of those are already
13 under settlement discussion. So I don't know where the
14 court's program is, but I know that we are actively
15 pursuing settlement in those cases.

16 THE COURT: Anything further?

17 MR. SIEGEL: I don't believe, Your Honor, that
18 there is -- that there has been formal mediation set up
19 because of the discussions that they were only rhabdo
20 cases, so there's nothing formally yet with the Baycol
21 cases.

22 MR. ZIMMERMAN: Your Honor, I believe that now
23 brings us to, although we have gotten a little bit out of
24 order, Roman numeral III.C, which is the parties and the
25 LAC are conferring about a possible protocol for the

1 coordination of expert discovery.

2 We had a meeting on that yesterday with all the
3 various parties or at least representatives of the various
4 parties, the state cases, the MDL, the defense, and the
5 special master, to work through a protocol so that a
6 deposition of an expert can be taken and coordinated
7 between the various cases where that expert may be
8 testifying.

9 Because what we have, for instance, is in
10 California there is a case set for trial. There's a
11 witness in that case that is going to be an expert that's
12 going to be used in California and also in a case in New
13 Mexico and also in the MDL. And so a way to coordinate
14 that, we are working on it. We are not done yet.

15 I believe maybe, perhaps, it would be best for
16 Special Master Haydock to comment on the progress, but I
17 can say from our point of view we are making progress.
18 That's why the LAC people were in town, one of the reasons
19 was to have this meeting and to work on it. It's not
20 completed yet. It is an important issue for all of us. We
21 are working hard on it. There's a spirit of cooperation in
22 it, but we are not done and we are not through.

23 I don't know, Magistrate Haydock, if you have any
24 more --

25 THE COURT: Special Master Haydock, do you want

1 to say a few words on that?

2 SPECIAL MASTER HAYDOCK: Good morning, Your
3 Honor.

4 THE COURT: Good morning.

5 SPECIAL MASTER HAYDOCK: Yes, Your Honor, we did
6 meet. The LAC Committee met yesterday and one of the
7 matters on the agenda was this discussion of a deposition
8 protocol.

9 And there was a draft circulated initially
10 drafted by a subcommittee of Bayer, GSK, PSC, and state
11 court lawyers; submitted that to the full committee. And
12 some of the committee members have not seen the draft and
13 others were absent, so we scheduled a telephone conference
14 call for next Wednesday to further discuss that issue
15 regarding the expert deposition protocol.

16 And given the tenure of the conversation and the
17 comments made, it may well be that some document will come
18 from that discussion that will satisfy the needs of all the
19 various parties involved.

20 THE COURT: All right.

21 MR. ZIMMERMAN: A work in progress, Your Honor.
22 The next item on the agenda, D, I believe we are going to
23 skip at this time, Your Honor, we are going to refer that
24 to Magistrate Judge Lebedoff at 11:00.

25 THE COURT: Correct.

1 MR. ZIMMERMAN: That brings us then, Your Honor,
2 to motions. There are a few motions before the Court that
3 are fully briefed and argument may or may not be necessary.

4 I have great concern -- well, I shouldn't say
5 that. I don't want to overstate it. I have concern about
6 the PTO 24 motion. As you know, the Court indicated in the
7 status conference I believe in March, it may have been
8 April, that there has been an overdesignation of
9 confidentiality.

10 And we have briefed and put in German law and
11 brought this thing now -- I think March is the third month
12 and we are now in the tenth month, so it's been about six
13 months. We think that needs to get resolved. I have
14 been -- I have told that to both sides.

15 Susan came up to me yesterday and said she
16 thought that our side, through Wendy Fleishman of
17 Ms. Cabraser's office, and the Defendants were working
18 something through on that. I was not able to confirm that.

19 I am of the belief that we need to get that
20 worked out because it is now touching other issues,
21 including Roman numeral III.D. They are making claims
22 about confidentiality. Well, if the documents that they
23 claim confidentiality on aren't really confidential because
24 they have been overdesignated, that issue becomes mooted.
25 For instance -- and I don't know if that's the case or not,

1 Your Honor.

2 But we know we have an overdesignation, we know
3 we have had an abuse of that process. It's been six months
4 at issue. We've got German experts. We've got Minnesota
5 law experts. We've got federal law, state law experts. I
6 think the case -- that issue has to be resolved.

7 If I am wrong and there is a discussion of a
8 resolution that I am not aware of and that resolution is
9 coming quickly, I think the Court should at least put a
10 deadline down, resolve it by this date or I am going to
11 decide it.

12 Because we are six months out into an order of
13 the Court which said these documents have been
14 overdesignated, it's not an appropriate designation of
15 confidentiality. We demonstrated our good faith to the
16 Court. It's time to decide.

17 I don't know if Ms. Cabraser is aware of what
18 Wendy's discussions are. I expect not because I think
19 Wendy is in the New York office and Elizabeth is out of the
20 San Francisco office.

21 MS. CABRASER: That's right. And I have not been
22 able to get in contact with her this morning to report to
23 the Court. I know the discussions are ongoing.

24 Susan, you may have some more intelligence on
25 that.

1 THE COURT: I can tell you you may have been out
2 of the loop because I don't know if some of these
3 communications are ex parte, but I was ready to rule and I
4 think we had gotten information that it was so close to
5 settlement that I wouldn't have to rule. And so if I don't
6 have to rule, I would prefer to have a settlement. So
7 that's what I have heard.

8 And I think, Susan, do you want to bring us up to
9 date on that?

10 MS. WEBER: We are very close to a final
11 resolution on this. I was talking to Wendy about it
12 yesterday and have received their latest proposal. There's
13 basically one paragraph in the document that's in dispute.
14 Rob Shelquist was also copied on that proposal. He can
15 confirm to Bucky that we are, in fact, in negotiations. We
16 have a call set for tomorrow, and Rob and I were discussing
17 it this morning.

18 THE COURT: Okay.

19 MS. WEBER: And the communications advising the
20 Court that we were close to a resolution, I did make a
21 phone call to Katy with specific authorization of Mark
22 Anfinson from the Times and Wendy Fleishman. I believe I
23 mentioned that in the voice mail.

24 THE COURT: All right.

25 MR. ZIMMERMAN: Your Honor, I guess all I'm

1 saying is Rob tells me we are going to either reach a
2 resolution on this tomorrow or not. And if we don't reach
3 a resolution by the end of the week, we will report to the
4 Court and then perhaps the Court can rule. If we do reach
5 a resolution, fine. Is that fair enough?

6 THE COURT: That's the way it's been working, so
7 I don't think anything needs to change on that. If it's
8 just one paragraph, I am assuming that reasonable minds
9 will come together and solve that problem.

10 MR. ZIMMERMAN: The next item on the --

11 THE COURT: Susan, I am trying to remember
12 whether or not the rough draft of the agreement has come
13 through. I don't think I have seen it, have I?

14 THE CLERK: Yes, you have.

15 THE COURT: Okay.

16 MS. WEBER: Your Honor, what we are working from
17 is the draft order that we had attached to the brief that
18 we filed last week. Plaintiffs have had a few little
19 tweaks on it. We are on the same page on what the German
20 law is, which is the really hard piece of it, and there's
21 just an implementation issue that we are dealing with right
22 now.

23 MR. ZIMMERMAN: The next item, Your Honor, on the
24 agenda is the Defendants' motion for sanctions against
25 Weitz & Luxenberg. The matter is fully briefed. My

1 understanding is the parties have requested argument.
2 Vicky is here from the Weitz & Luxenberg firm. I don't
3 know if the Court wants to do this at the foot of the
4 calendar or do it now; whatever the Court's pleasure.

5 THE COURT: Do we have anyone from the United
6 States Government dealing with the Medicare liens here?
7 Oh, hi, Mary. Let's move on to that so Ms. Tripler can get
8 back to the government's work.

9 MR. ZIMMERMAN: Fine, Your Honor. We will then
10 move to the motion to declare -- actually Roman numeral
11 IV.B, the motions by the PSC for certain what we'll call
12 third party payer relief.

13 The first and perhaps most important one is PSC's
14 motion to declare nonexistence of the Medicare lien. Your
15 Honor, this has been a very interesting endeavor. I don't
16 know if you want a little history on it or not, but this
17 issue --

18 THE COURT: Yes.

19 MR. ZIMMERMAN: -- this issue arose early on in
20 this litigation. We've known from any mass tort settlement
21 that Medicare and other insurers, but let's deal with
22 Medicare right now, normally come in at the end of a case,
23 if there ever is a resolution on a global basis, and want
24 to be recognized, which means they want money.

25 We, as the PSC, decided in this case to be more

1 proactive and not wait until the end and have these tense
2 negotiations and holding up settlements, but try and be
3 proactive and find out if there really is a lien and what
4 the lien is and how to resolve it and try to enter into
5 these global negotiations, if they are going to take place,
6 early on.

7 Enter the circuit courts of appeal. The circuit
8 courts of appeal have been ruling on these issues and there
9 are a number of very important cases. The most recent one,
10 the Second Circuit, I believe -- the Second Circuit, right?

11 UNIDENTIFIED SPEAKER: Right.

12 MR. ZIMMERMAN: -- came out a couple of days ago,
13 which essentially takes the position that we have been
14 saying, which is that that lien is not valid as against the
15 industry, in this case Bayer. It had to do with the
16 tobacco industry. I don't want to interpret that case
17 right now. I am just trying to give a little overview.

18 There was another case before that which seemed
19 to be a contrary result and then there's a case earlier
20 that supported the Second Circuit. Anyway, there's some
21 division in the circuits. I don't believe the Eighth has
22 spoken on it.

23 We have then gone to try and be even more
24 proactive and then we had what happened in Pennsylvania
25 where Sol Weiss and his firm and, I think, the whole

1 Pennsylvania group took a similar position and tried to
2 declare the Medicare lien to be nonexistent. That brought
3 up a federal question. Defendants removed that to federal
4 court.

5 Sol and the Pennsylvania group didn't want to be
6 in federal court -- I don't know why, Your Honor, shocking
7 and nothing personal, I hope -- and they moved to sever off
8 that claim; and they did and the cases went back to state
9 court.

10 And then Sol came into this court under the LAC
11 hat and filed an amicus brief saying that he's joining in
12 the motion here to declare the lien nonexistent.

13 We then have had meetings with Gene Schoon --

14 MR. HOEFLICH: Gene Schaerr. It's Gene Schoon in
15 Chicago.

16 MR. ZIMMERMAN: Whoever it is.

17 MR. SCHAERR: We get confused all the time and I
18 am always flattered.

19 MR. ZIMMERMAN: You are better looking, though,
20 right? I beg your pardon.

21 We have had discussions on this for some time,
22 how to get this before the Court, how to get the right
23 parties before the Court, whether or not a joinder, how to
24 do it.

25 And we finally came upon the resolution, at least

1 from the PSC's point of view and Defendants will speak for
2 themselves, that we should have an order to -- a motion for
3 an order to show cause served upon the U.S. Attorney,
4 served upon the Government, bringing them into this court
5 for the purpose of resolving this case. So that if there
6 is a decision favorable to the Plaintiffs and the lien is
7 declared nonexistent, the U.S. Government would be bound;
8 or whatever orders might come, it would be the law of the
9 case at least with regard to the federal system.

10 Your Honor, these liens are extremely difficult
11 to resolve and you can hear the anecdotal stories from
12 people in this room who have just had no ability to
13 actually resolve their case and put it to bed because of
14 the requirement by Bayer that two times the Medicare lien
15 be escrowed and then trying to resolve it with the federal
16 government when they won't even respond with how much they
17 will take or how much the lien is or what their position is
18 with regard to the lien.

19 So this money stays in escrow. It is obviously
20 more than the full amount to satisfy the Government. It
21 doesn't go to the claimant and we have this quagmire.

22 The horror stories about this are abundant, of
23 people simply not being able to get any kind of response
24 out of the federal government with regard to the amount of
25 the lien and how they can resolve it. It's a difficult

1 situation and I won't belabor it beyond that. I think
2 everybody except, perhaps, the U.S. Government would
3 stipulate that that's factually correct.

4 So we decided to ask the Court to enter -- to
5 sign an order to show cause to serve on the U.S. Government
6 to say come into court and show cause why this lien should
7 or should not be litigated here and resolved. And that's
8 what's before the Court today.

9 I believe the Defendants' position on this --
10 they will speak to it. I think they are in favor of it,
11 but again, I don't want to speak for the Defendants.

12 But this has been a difficult question for us, as
13 to how to get procedurally to the point that whatever this
14 Court might rule with regard to the existence or
15 nonexistence of a Medicare lien will bind Bayer, will bind
16 the Plaintiffs, and bind the Government so that whatever
17 resolution there is can work rather than litigating at the
18 end of the case and going up and down the circuits at the
19 end of the case when everything is held in abeyance.

20 The cases that are in controversy that have been
21 the subject of decision: One is the breast implant
22 litigation, which has been, what, 11 years out there. It
23 started in 1992 and that case just came down. And the
24 tobacco litigation, which has been going since 1994 or '5.

25 And so we are trying to be proactive and get it

1 out front now. We ask the Court to sign the order to show
2 cause. Let's get the Government in the play. Let's brief
3 the issue fully and fairly. Let's decide it and let's see
4 what happens with regard to the law of this case.

5 THE COURT: Good morning.

6 MR. HOEFLICH: Good morning, Your Honor. When we
7 resolve cases we take account for potential Medicare liens.
8 It is something we have to do. As the Court knows, we
9 don't like any impediment to settlement of serious injury
10 claims. We understand the Plaintiffs' position. We are in
11 favor of anything that removes these impediments.

12 From our standpoint, we would like a ruling from
13 the Court. We understand the need for one, but we need a
14 ruling that would also bind the Government. Because if the
15 Government is not bound by the ruling, then it is of no use
16 to either side. So we are in favor of moving forward on
17 this, but from our perspective we need the Government to be
18 bound by it.

19 THE COURT: Ms. Tripler, good morning.

20 MS. TRIPLER: Good morning, Your Honor. Mary
21 Tripler, Assistant United States Attorney, on behalf of the
22 United States of America.

23 The Government is here today making a special
24 appearance at the Court's request. We are not a party to
25 this action and we don't consent to the Court's

1 jurisdiction merely by appearing today at the Court's
2 request.

3 Your Honor, I want to give a little background
4 and then I want to speak to the issue of the order to show
5 cause.

6 First of all, the Government understood that the
7 parties wish to have some way to resolve the issues that
8 are presented by the reimbursement process short of taking
9 every claim through the Medicare process.

10 And so we sent a letter on October 6th to the
11 Plaintiffs' Steering Committee and also to the
12 representatives of Bayer asking -- first indicating that
13 the Government is willing to try to come up with some sort
14 of global settlement now so that nothing is delayed, but
15 also asking the Plaintiffs to begin to self-identify what
16 items and services might have been paid for by Medicare by
17 providing us the information about individual plaintiffs,
18 what their names are, what their Social Security numbers --
19 not their Social Security numbers, but what their Medicare
20 claim numbers would be, the nature of the injuries that
21 they are making claims for, that kind of identifying
22 information so we can start the process working now through
23 the Medicare regulations in the administrative process.

24 So we have already agreed to try to work
25 informally on a two-tier system, either try to come up with

1 a way to settle these claims globally at this time or to
2 start working the claims through the process.

3 We are also looking at whether it would be more
4 beneficial to everyone concerned to try to streamline the
5 process by using a single contractor or a gatekeeper, so to
6 speak, for all these claims. But because the claims have
7 arisen all around the country, that may or may not be the
8 most efficient way to handle it. So HHS is also looking at
9 that possibility.

10 But in the meantime, as I said, there is this
11 administrative process in which plaintiffs for whom
12 Medicare has paid for items and services can submit those
13 requests or those bills to Medicare, to HHS, and it can
14 move through the process to determine whether HHS has an
15 interest and the extent of that interest.

16 If the parties are dissatisfied, there's an
17 administrative process that they go through and a
18 determination is made and ultimately there's judicial
19 review under the Medicare Act.

20 We are not saying in every instance, obviously,
21 that that has to happen because we are more than willing to
22 attempt to participate in settlement negotiations.

23 But so far as I understand it, very few Baycol
24 claims have been submitted under the administrative
25 process. So to a certain extent if there's a delay, it's

1 because claims are not being submitted and identified as
2 rapidly as may be beneficial to everyone.

3 Specifically as to the order to show cause, Your
4 Honor, we received the request last night. And in
5 reviewing it, it's clear that the Plaintiffs don't even
6 begin to address the issues of personal and subject matter
7 jurisdiction, that is, how the Court obtains jurisdiction
8 over the person of HHS when the Government is not a party
9 to the action, how the Court obtains jurisdiction when the
10 plaintiffs have not exhausted their administrative remedies
11 under the Medicare Act, how any order extinguishing any
12 rights that Medicare may have would operate to affect the
13 conduct of a nonparty to the litigation, or how the Court
14 would entertain an order when the Medicare Act itself
15 precludes jurisdiction at 42 U.S.C. Section 1395ii without
16 an exhaustion of administrative remedies.

17 So it seems to the Government that the Plaintiffs
18 are putting the cart before the horse. If, in fact, the
19 PSC and Bayer wish to have the issues addressed, it seems
20 at first -- the first hurdle has to be to get over the
21 jurisdictional issues or to have someone make the
22 determination that they want to make the Government a party
23 to this case and to bring them in formally.

24 So the Government's suggestion, Your Honor, is if
25 the Court wishes to set a briefing schedule on the order to

1 show cause, that it be bifurcated, that first the
2 jurisdictional issues be determined, because they are
3 substantial. And if the Plaintiffs are not successful on
4 the jurisdictional issues, there's simply no need for the
5 Court to embroil itself in the details of the Medicare
6 reimbursement statutes.

7 And in the interim the parties can continue to
8 discuss the global settlement possibilities, the gatekeeper
9 possibilities, and plaintiffs can begin or continue to
10 present their claims in accordance with the October 6th
11 letter, as requested by the Government.

12 I also have some additional information that
13 might be helpful --

14 THE COURT: Please.

15 MS. TRIPLER: -- to people. There's a website
16 that plaintiffs or their counsel or defendants can go on.
17 It makes sense if you are a government person, but I will
18 say it slowly if people want to take it down. It's
19 www.cms.hhs.gov/medicare/cob, "cob" being coordination of
20 benefits.

21 There's also an address, Coordination of -- and
22 this is the address: Coordination of Benefits Contractor,
23 P.O. Box 125, New York, New York 10279-0125. And that's
24 the place where plaintiffs can submit their claims so that
25 the Government can make the administrative determination

1 necessary on individual cases.

2 And there's a phone number, 1-800-999-1118. And
3 if an attorney is calling, you press 4 and you are directed
4 to people who can help you more directly.

5 THE COURT: In processing the claims, what is the
6 turn-around date of getting a decision?

7 MS. TRIPLER: Your Honor, first of all, Medicare
8 processes thousands and -- or hundreds of thousands of
9 requests like this every year, millions.

10 And the Baycol litigation presents some
11 significant, I think, hurdles. Because there are --
12 because of the nature of the injuries that are alleged,
13 such as I understand them, what is helpful is to get more
14 information up front.

15 The more information Medicare can get, the
16 Medicare contractor can get about where the plaintiff was
17 treated, by whom, when, for what particular claim, you
18 know, I mean, is it a renal claim, is it an aches and pains
19 claim, as I have heard today, you know, what are the
20 claims, the conditions, the diagnosis for which the
21 plaintiff may have been treated, that will expedite the
22 process, the more information that is provided up front.

23 Another thing I understand that will expedite the
24 process is if the parties can agree on what the diagnoses
25 would be for most Baycol claims or for many of the Baycol

1 claims. If we can agree that -- if we can come up with a
2 set of circumstances that Medicare can look at generally
3 overall, that that will also expedite the system.

4 But I can't say sitting here today or standing
5 here today what the amount of time would take. I can try
6 to find that out for the Court.

7 THE COURT: Would you, please?

8 MS. TRIPLER: Yes.

9 THE COURT: All right. Thank you. Anything
10 else, Ms. Tripler?

11 MS. TRIPLER: No, not from the Government.

12 MR. HOEFLICH: Your Honor, as you can imagine,
13 from our perspective we want to protect ourselves from
14 paying twice, once to the Government and once to
15 Plaintiffs.

16 It's no surprise to me that Judge Friendly called
17 this system unintelligible to the uninitiated. One of the
18 things that would be helpful to us from our perspective and
19 I would think the Plaintiffs as well would be, rather than
20 the complicated system of being directed to the complicated
21 system, if we could get the name of somebody at CNS that we
22 could contact directly. I think that would be helpful to
23 everyone. We have been unable to get that to date.

24 So if Mary could help us in obtaining that or if
25 the Court could suggest that that would be helpful

1 information to get to us, we would be appreciative.

2 THE COURT: Ms. Tripler, any one person that --

3 MS. TRIPLER: Your Honor, when I find out about
4 how long these claims take to process, I will see if I can
5 find out if there is a single person that people can
6 contact. I'm certain that if we are going to get as far as
7 global settlement negotiations there will be a person. So
8 I will try to get that person figured out early on and
9 report back to the Court.

10 THE COURT: I haven't heard that term "global
11 settlement" in a long time.

12 You wish to --

13 MR. BECNEL: Daniel Becnel. Judge, I just wanted
14 to --

15 THE COURT: Good morning.

16 MR. BECNEL: Good morning. I settled pedicle
17 screw four years ago and it was done with the chief judge,
18 a federal judge, in California. For four years we have
19 been -- and the defendants said, look, and it's not a giant
20 settlement, but this is the settlement of these 300 people
21 for this pedicle screw manufacturer, but until you get each
22 and every one resolved without paying anybody -- so the
23 money is there and we have been working on it for four
24 years and we just get beat around back and forth, back and
25 forth, back and forth and we can't ever get somebody to

1 make a decision.

2 And the federal judge, just like you, if you had
3 a settlement four years ago and you can't get it resolved
4 and it just hangs, he has to keep calling status
5 conferences. He has done everything he can possibly do. I
6 am just trying to advise the Court of the nightmare of no
7 one wants to make a decision.

8 And it's very similar to the Baycol situation
9 because most of the people with pedicle screws had bad
10 backs from Workmen's Comp accidents or broken backs or
11 degenerative conditions that had nothing to do with the
12 pedicle screws and then they got the pedicle screws and it
13 just complicated it.

14 They just -- nobody wants to make a decision of
15 what is applicable, what is not applicable and so the
16 easiest thing to do is just say we can't agree.

17 THE COURT: Well, I appreciate the update on this
18 matter and the frustration of both sides. I will take the
19 show cause order under advisement and rule on that within a
20 reasonable amount of time.

21 MR. ZIMMERMAN: Your Honor --

22 MS. TRIPLER: May I be excused, then?

23 THE COURT: Is there anything further dealing
24 with the Government?

25 MR. ZIMMERMAN: Well, yes. I don't know if the

1 Court is going to set a briefing schedule for the issues
2 that -- is it Ms. Tipler?

3 MS. TRIPLER: Close enough.

4 MR. ZIMMERMAN: I am not good at this. -- Mary
5 Tripler has brought before the Court. If there are some
6 preliminary issues, I think we should set a briefing
7 schedule on it. If the Court doesn't need it and it's
8 submitted, submit it.

9 But I just think if we are here today and there's
10 something that needs to be resolved through subsequent
11 briefing, we should at least set the schedule for it now so
12 we know what to do. That would be my only suggestion.

13 I also direct the Court to the letter that the
14 U.S. Attorney wrote wherein they request all this
15 information. They ask specifically to identify each
16 individual case involved in the multidistrict litigation
17 which involves a Medicare beneficiary, an individual who
18 has received Medicare paid for or provided by the federal
19 government, and then they want the Social Security number,
20 the gender, the age of the individual, when the person
21 first ingested Baycol, and a summary of the medical care
22 provided for each of these many thousands of cases.

23 It again goes back to what Phil Beck and I were
24 discussing. We don't even know how many plaintiffs. They
25 want it for every plaintiff, not just for every case. I

1 mean, it's just a horrible, horrible burden.

2 And I was going to ask people from the LAC
3 Committee to come forward and tell the Court their
4 experience with trying to get this information. Maybe
5 Danny summarized it appropriately for the Court.

6 I mean, we have settlements hung up that can't be
7 resolved because we cannot get a response from the U.S.
8 Government on the amount of the claim that they are
9 asserting against this individual. And we were listening
10 to those last night in our LAC meeting -- or after our LAC
11 meeting, and it was horrific and it continues to be
12 horrific. So this is a matter of utmost urgency.

13 And I don't know if the Court wants to hear from
14 anybody else on that, some anecdotal stories.

15 THE COURT: I would like to hear it. Anyone from
16 the LAC who would like to come forward so it's on the
17 record so I have a better appreciation of what the problem
18 is?

19 MR. WOODSON: Good morning, Your Honor. My name
20 is Frank Woodson and I am with the Beasley Allen firm out
21 of Montgomery, Alabama, and our firm at this point has
22 settled about 225 rhabdomyolysis cases with the cooperation
23 of Bayer.

24 During that period of time -- you know, the
25 settlement agreement calls for us to send letters to

1 Medicaid, Medicare, and, if there's an insurance company
2 involved, the insurance carrier.

3 When we identify a rhabdo case, we go ahead and
4 send those letters out way before we begin settlement
5 negotiations on a case so we can start providing Bayer with
6 that information so we can go ahead and get the case
7 settled.

8 Then when we get it settled, then we have to make
9 a reasonable estimation of the medical bills associated
10 with the treatment of rhabdo. And if somebody had \$10,000
11 that our nurse attributes to rhabdomyolysis, we have to
12 withhold \$20,000 of our client's settlement funds for some
13 period of time until we get it finally resolved with
14 whoever.

15 Now, the insurance companies are easy. You know,
16 they know what's going on and they know -- we can call
17 them, get in touch with them and resolve that fairly
18 quickly and obtain a letter saying, you know, it's over
19 with and it's gone.

20 But I was looking at one the other day where we
21 know that Medicare is probably not even involved and we had
22 written a letter in early May to the organization in New
23 York and they have not responded as of this date.

24 What that entails is -- the website, as we found
25 it, is totally useless. It does not give you any

1 information. You can call telephone numbers. I spent six
2 hours one day trying to find somebody to talk to,
3 seriously, and I could not find anybody to speak with at
4 Medicare about these issues.

5 What we understand the process to be is when that
6 letter goes to New York, that is a clearinghouse. If we
7 have a client in Nevada, then they are going to assign that
8 claim to a contractor in that area of the country that
9 should negotiate with us.

10 But what we have seen so far -- it's supposed to
11 be about a 60- to 90-day process just for the assignment by
12 the New York office to a contractor. And on that one
13 particular example, you know, it's been since May 11th and
14 we don't even have a response from them at all.

15 So at this point in time we've got this account
16 that we have had to set up to hold all these funds back for
17 our clients.

18 And what we certainly don't want to do is be
19 pedicle screw number two, especially on a limited number of
20 cases. Because, looking now, if there are 1,514 cases that
21 have settled plus an additional 169 cases, that's not a
22 burden that cannot be overcome. Medicare is not involved
23 in those cases, so we ought to be able to get something
24 from Medicare.

25 I love her idea about assigning somebody to work

1 with us, a central clearinghouse of some type where we
2 could sit down -- because we've got the medical records and
3 we've got the medical bills and we could sit there with
4 somebody very quickly with our nurse and go over it and say
5 here are the medical bills associated with it.

6 Now, you know -- and then find out, number one,
7 are they going to negotiate with us? We don't know that
8 yet, you know. Are they going to say we want reimbursement
9 of the entire amount or will they typically do as Medicaid
10 organizations and/or insurance companies do and reduce it
11 by at least a one-third amount and then we can pay that?

12 Of course, we also are having to advise our
13 clients that they may not owe this money, and we are doing
14 that. We advise them about the Goetzman decision and that
15 will advise them about the Second Circuit's decision that
16 is in their favor. And the Eleventh Circuit, I guess, has
17 gone the other way on this issue at this point.

18 We are hoping to get that issue resolved. Our
19 law firm has a lawsuit against Medicare on this issue in
20 Montgomery and they brought up the jurisdiction issue in
21 that brief, and I will be happy to provide that to the PSC.
22 That will probably give you a heads-up on what their
23 argument will be on the jurisdictional issue.

24 But it's a very frustrating thing because all
25 these clients are calling in. When are you going to send

1 me my money? This is some kind of a conspiracy. You are
2 stealing my money, aren't you? It's frustrating to hear
3 that from your client. No, I promise you, we still have
4 your money and we want to pay it out to you. Because it is
5 an accounting nightmare for us to hold onto it.

6 So anything the Court could do to help us resolve
7 it would be, you know -- we would love it. And if
8 Ms. Tripler can help us get a clearinghouse, and I think
9 everybody in this room would love a one or two person
10 contact person, we would be happy to come up here with our
11 team of people.

12 We have had enough cases, it's worthwhile, we
13 could come up here and sit down with them and work through
14 every one of our cases in a week's time or something and
15 get them all resolved if we have somebody there and if we
16 have somebody there who can make a decision.

17 THE COURT: All right. Mr. Beck.

18 MR. BECK: Yes, Your Honor. I just want to make
19 sure that the Court is not confused by the reference to the
20 other case and the horror stories there. We've got our own
21 difficulties here, but I want to make sure that the Court
22 understands that we are not doing what was done in the
23 other case. We are not holding cases hostage and saying we
24 won't pay until you resolve this on all cases. That's
25 number one. In fact, we are paying on every single case.

1 And we are just saying that we need an amount
2 withheld because we don't want to pay that amount twice.
3 As far as we're concerned, we would love all the money to
4 go to the individual plaintiffs and none of the money to go
5 to the United States Government or anybody else for that
6 matter, but we don't have control over that.

7 MR. ZIMMERMAN: Judge, may his last comment be
8 stricken from the record?

9 THE COURT: All right. Let's continue.

10 MR. ZIMMERMAN: Okay.

11 THE COURT: Thank you, Mary.

12 MS. TRIPLER: Thank you, Your Honor.

13 THE COURT: Do you need a short recess so you can
14 get your lawyers down before Magistrate Judge Lebedoff?

15 MR. ZIMMERMAN: I'm just wondering, Your Honor,
16 if -- I would like to go down this time.

17 THE COURT: All right. Do you need to be here
18 for the argument of sanctions?

19 MR. ZIMMERMAN: No. The Court has seen my
20 letter. I think the Defendants have objected to it. It's
21 on the record with the objection. I would like to be here
22 for moral support, but I think we have a good contingency
23 for that.

24 THE COURT: Who are you going to be sending down
25 before Magistrate Judge Lebedoff?

1 MR. BECK: It is either going to be Mr. Hoeflich
2 or Mr. Me --

3 MR. ZIMMERMAN: Mr. Mom.

4 MR. BECK: Mini Me. -- or both of us. But on
5 the motion for sanctions, Gene Schoon's evil twin,
6 Mr. Schaerr, will be arguing that for us, so Mr. Hoeflich
7 and I don't need to be present.

8 THE COURT: Then I will excuse you to go down to
9 Magistrate Judge Lebedoff's courtroom. I think that
10 hearing won't last very long, so you will be back up. We
11 can hear the sanctions hearing while you are gone and then
12 we'll take a short recess and finish up with the calendar.
13 If you are not back by that time -- well, we should take a
14 recess.

15 MR. BECK: We will take a recess if we are not
16 back, Your Honor?

17 THE COURT: We need to take a recess anyway.
18 I've got to give my court reporter a break.

19 MR. BECK: Because we do want to be here -- I
20 want to be here when we talk about the trial plan and that
21 sort of thing.

22 THE COURT: We can't talk about a trial plan
23 without you.

24 MR. BECK: Okay. Thanks. You make me feel --

25 THE COURT: In fact, let's take a ten-minute

1 break at this time. Ten minutes.

2 MR. BECK: Meanwhile, we should head --

3 THE COURT: You should head down to Magistrate
4 Judge Lebedoff's courtroom.

5 (Recess.)

6 THE COURT: All right. Let's deal with
7 Defendants' motion for sanctions.

8 MR. SCHAERR: Thank you, Your Honor. I am not a
9 very high tech person, but I do have a few slides to show
10 the Court this morning.

11 I have been asked to address with the Court a
12 matter that we view as very serious not only because of its
13 impact and potential impact on our costs of defending this
14 litigation, but also for its impact on the resources of the
15 Court; and that is the admitted practice by the Weitz &
16 Luxenberg firm of filing hundreds and even perhaps
17 thousands of cases without first conducting the most
18 rudimentary investigation of the factual basis for their
19 clients' claims.

20 We filed a motion that seeks what I would call
21 corrective sanctions that are directed at that practice.
22 We are not trying to have the Court punish anybody. We are
23 not trying to harm anybody's reputations. We are just
24 asking the Court for measures that will correct this very
25 serious problem.

1 We have reluctantly concluded that the only way
2 to do that effectively is through an exercise of this
3 Court's authority under 28 U.S.C. Section 1927 or its
4 inherent authority under the Chambers decision to regulate
5 and protect its own proceedings.

6 The basic problem, as I mentioned, is that Weitz
7 has been filing hundreds and perhaps thousands of lawsuits
8 without the necessary pre-filing investigation. Well, how
9 do we know this?

10 We know it, first of all, from Weitz's own lips.
11 On June 23rd a representative of the Weitz firm dictated an
12 e-mail to Mr. Mizgala of our firm in Chicago explaining why
13 Weitz was dismissing some 600 cases that day. She said,
14 "Please be advised we have completed our investigation of
15 the attached list of cases and determined that Weitz &
16 Luxenberg will no longer pursue them."

17 Now, these are cases, of course, that had already
18 been filed and already been served, but they had waited
19 until after all of that to do the investigation that we
20 believe they should have before filing.

21 And then in his August 7th affidavit supporting
22 Weitz's opposition to our motion Mr. Pennock of that firm
23 admitted that "At some point if there were any risks that a
24 statute of limitations was nearing or imminent, we would
25 file a complaint even if we didn't have all of the

1 information necessary to evaluate the claim."

2 But even if Weitz hadn't admitted their failure
3 to conduct a proper Rule 11 investigation in many of their
4 cases, that conclusion is confirmed by overwhelming
5 circumstantial evidence.

6 First of all, in their opposition to our motion
7 they admit that they've dismissed 1,337 cases that have
8 already been served once the Defendants press them for any
9 discovery. Now, obviously if Weitz had conducted a proper
10 prefiling investigation they wouldn't have to be dismissing
11 all those cases, and certainly not in those numbers, when
12 they are required to provide some information about them.

13 Secondly, also in their opposition they admit
14 that they dismissed 1,220 cases between filing and service,
15 once again suggesting that at least some significant
16 portion of those cases could have been avoided if they had
17 done a proper prefiling investigation.

18 And then the third bit of circumstantial evidence
19 that we have is that at least as of July 8th, when we filed
20 our motion, there were approximately 1,200 overdue
21 plaintiff fact sheets from the Weitz & Luxenberg firm.

22 Obviously if somebody at Weitz & Luxenberg had
23 conducted an appropriate interview of the plaintiff and had
24 done an appropriate prefiling investigation, they would
25 have had the information in their files to fill out the

1 plaintiff's fact sheet.

2 And so this lengthy delay in getting the
3 plaintiff fact sheets filled out also, in our view,
4 supports the idea that adequate prefiling investigations
5 are not occurring.

6 Well, how can the problem be fixed? In an
7 ordinary lawsuit the prospect of dismissal would be more
8 than enough incentive for the plaintiffs' lawyers to
9 conduct a responsible evaluation of the basis for the
10 claim, but the ability to file thousands upon thousands of
11 lawsuits dramatically alters the incentives of the
12 plaintiffs' firm. They know it really doesn't matter
13 whether some cases or even a lot of cases get dismissed
14 pursuant to Rule 11 or other provision.

15 I think it's a little bit like the work soldiers
16 in the Lord of the Ring movies. I don't know if the Court
17 has seen either of those movies yet, and I am not trying to
18 compare their clients to Orcs, but the problem we face as
19 defendants in these cases is that these lawsuits really are
20 kind of like the Orc armies. They require very little cost
21 to generate, but they impose large costs on us and they can
22 just keep -- you know, if one falls, there are thousands
23 more behind that one to move up to take its place.

24 So the Court's task, it seems to us, is to find a
25 way to give the plaintiffs' attorneys an alternative

1 incentive to vet their cases before filing, because we know
2 that the ordinary Rule 11 incentive of dismissal just
3 doesn't work in this context. And so we've proposed
4 something that we think is measured and responsible and, as
5 I said before, corrective rather than punitive.

6 Now, Weitz & Luxenberg doesn't dispute that the
7 Court has the inherent authority to do what we've asked
8 for. They do dispute whether Section 1927 provides a basis
9 for our proposal, but they don't dispute the Court's
10 ability to do what we propose under the Court's inherent
11 authority.

12 And we have no problem if the Court wants to do
13 it under its inherent authority rather than invoking
14 Section 1927 as long as Weitz doesn't come along later and
15 claim that the Court's inherent authority wasn't enough
16 after all.

17 And our proposal has three specific elements and
18 I will start kind of in reverse order, if I can get my -- I
19 told you I wasn't very skilled at this high tech stuff.
20 There we go.

21 The first element of our proposal has to do with
22 cases that are currently filed but not yet served and
23 future cases that Weitz might file at some point in the
24 future.

25 And our proposal there is that Weitz, which is

1 very simple, that Weitz be required when they serve a new
2 case to attach a plaintiff's fact sheet and a medical
3 release so that we can get moving very quickly with the
4 discovery.

5 And we think that will deter Weitz from filing
6 cases that would just be dismissed anyway once they were
7 required to produce a plaintiff's fact sheet. And it makes
8 no sense to have those cases clogging the court system and
9 clogging our system if they are just going to get dismissed
10 ultimately down the road.

11 And we think this procedure strikes an
12 appropriate balance between permitting plaintiffs with
13 nonfrivolous complaints to choose Weitz as their counsel --
14 we are not trying to prevent plaintiffs from choosing Weitz
15 to be their counsel -- while at the same time providing a
16 needed layer of protection to the Court and to us and from
17 other Baycol litigants who also suffer from the -- when
18 this Court's docket is clogged with insubstantial claims.

19 The second thing we've proposed has to do with
20 cases that have already been served on us, and that is we
21 are requesting -- we had originally requested an earlier
22 date than this, but obviously that's not going to be
23 possible, but we are requesting today that Weitz &
24 Luxenberg provide, with respect to all of that category of
25 cases, a certification that the firm has reviewed medical

1 and other evidence pertinent to those cases and believe
2 that the complaint has been filed and served in good faith
3 consistent with the standards of Rule 11.

4 And in that connection we would propose a safe
5 harbor, that if there are cases in the system right now
6 that upon review Weitz & Luxenberg decide should be
7 dismissed, we will let them dismiss those with prejudice
8 and not seek any other relief for those. And that will, of
9 course, give Weitz an opportunity and an incentive to get
10 rid of cases that really shouldn't be in this court.

11 The third element of our proposal has to do with
12 cases that have already been dismissed. We have incurred
13 substantial costs in having to deal with those cases, many
14 of which we know had not been filed after an adequate
15 prefiling investigation.

16 And so we simply ask for an award that allows us
17 to recoup our costs that we incurred in responding to those
18 cases. And if the Court grants that request we would, of
19 course, provide an amount or an estimated amount down the
20 road.

21 We believe these measures are closely tailored to
22 remedy the specific conduct that's at issue here, which
23 could affect over 80 percent of the Baycol cases that are
24 in federal court, and we think that these remedies will
25 protect the Court and the Defendants and other Baycol

1 litigants from having to deal with insubstantial lawsuits
2 that necessarily divert resources away from the legitimate
3 priorities in this litigation; and we ask that the Court
4 adopt these measures right away.

5 Thank you.

6 THE COURT: Thank you.

7 MS. MANIATIS: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MS. MANIATIS: I will try to keep a straight face
10 while I say that for me to read their brief and the first
11 sentence to say something that Mr. Schaerr also shared with
12 us today, is that they were reluctant to file this, I can't
13 do it with a straight face because there's nothing
14 reluctant about what they've done. Reluctant? No. They
15 are about as reluctant of having filed this brief as their
16 brief is meritorious, and neither of those have any
17 credibility whatsoever.

18 This motion is nothing other than what they've
19 been doing for the past several months, which I will call
20 mudslinging. The fact that they would file a brief saying
21 these things they say with no legal basis, no factual basis
22 whatsoever is absolutely outrageous. There was one purpose
23 that they filed this motion and it was to harass our firm,
24 and that is absolutely outrageous.

25 One thing I really want to point out quickly so

1 that nobody here who reads these papers, including the
2 Court, ever takes for granted that anything they say we
3 have admitted or conceded is so. Please, be guided other
4 otherwise.

5 The flippancy with which they use those phrases
6 is absolutely unbelievable, and I could go through these
7 briefs and through this argument and point out at least 15
8 times that those sorts of phrases have been used. That's
9 poor legal writing. That is inaccurate reporting. It is
10 just wrong.

11 I could start this argument and end this argument
12 literally with one statement, and that is -- and we have
13 pointed this out in our papers and the Defendants know
14 this. We have rejected 3,100 cases approximately. It's
15 just under 3,100 cases that we never filed, never darkened
16 the Defendants' doorsteps. Now, I ask you and I ask anyone
17 evaluating this process, how could that have been done but
18 for the fact that we investigated our cases?

19 We are a successful firm. Yes, we have
20 successfully marketed. You bet we successfully marketed.
21 But do you think we turn away cases, 3,100 of them, without
22 not having investigated them to start? Absolutely not. It
23 is absurd and right there I've pointed out the great error
24 of their papers.

25 On top of those 3,100, yes, there were another

1 1,200 we filed and we never served them. Again, 4,300
2 cases we would have turned away without investigating? I
3 don't think so. That's not our business. Could it be any
4 clearer we investigated our cases.

5 Another point I'll make right now: We have
6 served 4,300 fact sheets, 4,311 to be precise, as of
7 Tuesday afternoon. 3,505 of those are before this Court.
8 We have currently 166 fact sheets that are overdue.

9 Now, I also note that the Defendants take some
10 liberality with what they call overdue, but that
11 discrepancy being clarified for now. I only point that out
12 because so much of their motion has to do with the fact
13 that we've not provided fact sheets. I don't get it, but
14 they keep referring to it because they think it's going to
15 get them somewhere. But I will point out the facts, Your
16 Honor.

17 Early on in this litigation our firm established
18 a threshold, and these points I think you'll find in
19 Mr. Pennock's affirmation are very clearly established and
20 I will just very briefly point them out. If you have any
21 questions of me about any step of this process whatsoever,
22 please point them out. I will be happy to go into more
23 detail.

24 We quickly were evaluating cases and determining
25 where we wanted to focus our efforts. We determined that

1 we would need a client's claim of having been injured by
2 taking Baycol, that they consulted a physician for those
3 injuries, and that those injuries persisted for at least a
4 period of 30 days.

5 Now, that is step one. Our investigation and our
6 evaluation is not based solely on whether there is a claim,
7 but whether there is a claim worthy of the resources
8 necessary to pursue that claim.

9 That's a very important point to make because
10 Defendants have drawn a lot of inaccurate conclusions based
11 on circumstantial information that they have. They have
12 chosen to manipulate things any way they want to and not --
13 I understand everybody is taking a position, but they wrote
14 this stuff in a brief and they sent it to the Court seeking
15 sanctions. So I am here to correct their errors.

16 Baycol was a new tort. There was evolving
17 science, but there was a fixed statute of limitations. I
18 understand that Defendants have declared a zero tolerance
19 for statute of limitations. Well, that might be their
20 prerogative, but it is certainly not a plaintiff's attorney
21 luxury. It's not something we take lightly and, yes, we
22 have filed complaints understanding that there may be
23 applicable statute of limitations that are impending.

24 According to that, we also offered the Defendants
25 the opportunity to have a tolling agreement for

1 specifically identified cases. This was not an overall
2 approach. This wasn't anything -- these were specifically
3 identified cases, they would know exactly who they are; and
4 we asked for 90 days. This was flat out denied.

5 So the fact that they would now come back and try
6 to put this -- you know, oh, the statute of limitations,
7 throwing that in our face is absolutely without basis.

8 Now, looking at the Defendants' motion, it is
9 very clear that throughout they refer to our investigation
10 process. However, they are afraid to call it a Rule 11
11 motion and I think that's because it does not apply to
12 discovery issues, which is the main point they keep relying
13 on.

14 So it is very circular. It's like: Is this
15 Rule 11? We are basing it on Rule 11, but we don't want to
16 go to Rule 11. They are picking and choosing and they are
17 basically just throwing everything but the kitchen sink out
18 there.

19 But defending our investigation process yet
20 again, I'll look at Rule 11, which anticipates that when
21 you file a complaint you may not have all of the
22 information. In fact, the rule specifically states you
23 have a continuing obligation to continue investigating.

24 Well, I think right there you're clearly given
25 the perspective of the rule, saying we expect that you will

1 investigate, we expect that you will not be done, and we
2 expect that you will continue your investigation. We have
3 from day one been doing nothing but all of those mandates.

4 The other accusations that the Defendants make
5 relying upon 28 U.S.C. Section 1927, they allege that
6 Weitz & Luxenberg is multiplying the proceedings
7 vexatiously and unreasonably because of the scale of the
8 cases that we have. By the fact that we are representing
9 many clients, they take offense to that.

10 I don't think that Section 1927 or any of the
11 case law that I've read supporting it take this approach.
12 It's not a numbers approach. It is an abuse of process
13 approach.

14 If they are showing that you are acting
15 essentially in bad faith, that's when this analysis comes
16 into play. All of the arguments they have made have never
17 established that. And even their circumstantial evidence
18 is seriously lacking. Why? Because they don't have any.

19 What constitutes a reasonable inquiry is a
20 pre-filing investigation that uncovers a factual and a legal
21 basis. That's the Coonts case, a 2003 Eighth Circuit case.

22 Now, nowhere in that interpretation or in any of
23 the statutes we heard of today or in these papers have I
24 ever seen any requirement that you have collected all
25 medical records and reviewed them when you file a

1 complaint. Why is that? Because it's not so.

2 I would like to make a point about the medical
3 records. The medical records -- what is "all medical
4 records"? If we are dealing with somebody who is 75 years
5 old, are we talking about five years, are we talking about
6 ten years, twenty years, everything; are we talking about
7 everything before Baycol or just after Baycol or only about
8 Baycol?

9 All medical records, to have that before you file
10 a case is not only not required, it's going to be darn near
11 impossible, especially -- and when does that stop? Is that
12 when you go to trial, then you have to have the last
13 medical visit the day before? It's something that is
14 almost impossible to do and I don't think any court or
15 statute has interpreted that to be what is required.

16 Medical records are not the sine qua non of what
17 happens here. They are not necessarily always dispositive.
18 What we have in addition to medical records are people's
19 testimony. We have conversations with these people. We
20 have letters from them. We have forms from them. We have
21 their testimony; and that testimony is also very important
22 and, coupled with the medical evidence, can establish the
23 viability of a case.

24 But, again, it is not required that you have
25 every medical record before you file a complaint. And

1 that's all I am really able to distill from their papers is
2 what they can allege, and that's without basis.

3 The only people who I think are actually
4 reluctant here or, in fact, should be are perhaps the Bayer
5 stockholders watching their attorneys come up and file
6 absolutely frivolous motions, answering cases they didn't
7 need to answer when they were granted extensions, denying
8 the ability to enter into a tolling agreement which may
9 have avoided some other costs that they incurred and are
10 now seeking sanctions for.

11 This motion is full of bald accusations. It is
12 wrong and it's offensive. I ask again that you look
13 carefully at the papers that are submitted here and take
14 into context what the Defendants don't do. They never take
15 anything in context: quotes are split, accusations are
16 made that are baseless, and things that we have purportedly
17 admitted to are no such thing.

18 The real purpose of this motion was to turn this
19 Court against us, to embarrass us in front of our
20 colleagues, and to harass us; and that is outrageous and
21 offensive.

22 And on behalf of Perry Weitz, Arthur Luxenberg,
23 Robert Gordon, Paul Pennock, myself, and the rest of the
24 Weitz & Luxenberg lawyers and staff, I thank you for your
25 time and your attention.

1 THE COURT: Thank you.

2 MS. MANIATIS: Thank you.

3 THE COURT: Short response.

4 MR. SCHAERR: Yes, Your Honor. I think what is
5 most telling and most unfortunate is that we have heard no
6 response to the specific evidence that I cited to the
7 Court.

8 We have no response or no explanation of the
9 statement that Vicky made to Mr. Mizgala of our firm. We
10 have no response of the statement by Mr. Pennock admitting
11 that they had conducted investigations without -- or filed
12 complaints without adequate investigations.

13 We have no response to the raw statistics about
14 the number of cases that they've dismissed after filing but
15 before service. By the way, there's no exception to
16 Rule 11 for cases that you decide to dismiss before
17 service. Rule 11 applies at the filing of the complaint.

18 There's no response to the statistics about the
19 number of cases that they've dismissed after service or --
20 I guess we did hear that the number of overdue fact sheets
21 is lower than it was when we filed our motion; and that's a
22 good thing and a positive thing, but still, there are
23 hundreds of overdue fact sheets in a lot of these cases.

24 So this is not mudslinging. This is not
25 harassment. This is simply an effort to have the Court

1 enforce the requirements of Rule 11 and that is -- the
2 basis for our motion is that the requirements of Rule 11
3 have been violated.

4 The usual sanction for a violation of Rule 11's
5 prefiling investigation requirements is simply not adequate
6 in the context of a mass litigation like this and so we
7 would ask the Court to enter the relief that we proposed.

8 THE COURT: Thank you. I'll take it under
9 advisement.

10 Mr. Zimmerman.

11 MR. ZIMMERMAN: Your Honor, back to the agenda.
12 I believe where I left, and I don't know if it was
13 discussed in any other way in my absence, was number --
14 Roman numeral IV.B.2, the motion of the PSC to participate
15 in third party payer settlement negotiations.

16 This motion has been fully briefed and is ripe
17 for consideration they say at the next status conference.
18 So to be considered at the next -- will we argue it, or
19 just what are you saying about the next status conference?
20 For argument?

21 MS. WEBER: We can argue the matter at the next
22 status conference if it will require argument, Your Honor.
23 Briefing is still being completed.

24 THE COURT: Let's argue it at the next status
25 conference.

1 MR. ZIMMERMAN: Very good. The motion for
2 certification of a third party payor class, this motion was
3 filed in June. We are meeting and conferring on a
4 discovery and briefing schedule and we do not have that
5 completed. We will hopefully have that completed by the
6 next status -- at least we will have a briefing and
7 discovery schedule for that; is that correct?

8 MS. WEBER: We would hope that would be the case,
9 Your Honor.

10 THE COURT: All right. Did I hear you correctly
11 that you will argue it at the next status conference or
12 just --

13 MR. ZIMMERMAN: No, Your Honor. I think we will
14 have a discovery and briefing schedule proposal for the
15 next status conference.

16 The next issue on the agenda, Your Honor, is the
17 cross motions to enforce the Strickland settlement. My
18 understanding is there are cross motions to enforce a
19 settlement. The Defendants advise us they have been in
20 contact with counsel for the plaintiff and are optimistic
21 that the matter will be resolved shortly. That's really
22 all I know about it. It doesn't directly involve the PSC.
23 It's just an isolated settlement of a case called
24 Strickland.

25 THE COURT: All right. Now, if we can back up

1 for a second. Dealing with IV.B.1, is there -- my
2 understanding is there is a class action suit filed in New
3 York.

4 MR. ZIMMERMAN: Oh, yes, yes, yes. I beg your
5 pardon, Your Honor. In fact, I believe a representative of
6 John Cuneo's firm is here and can speak to the status.

7 MR. STANLEY: Good morning, Your Honor.

8 THE COURT: Why don't you step forward. You are
9 sitting on that hard bench back there.

10 MR. STANLEY: Good morning, Your Honor. My name
11 is David Stanley. I am from the firm of Cuneo, Waldman &
12 Gilbert in Washington, D.C.

13 THE COURT: Good morning. Can you give us an
14 update, what's going on and whether or not -- give me an
15 update, I guess. I have heard rumors, but I guess I need
16 to know what's going on.

17 MR. STANLEY: We have filed a case, which is
18 pending now in the Eastern District of New York, under the
19 Medicare Secondary Payor Act. It's a private right of
20 action seeking double damages on behalf of Medicare for
21 monies expended on behalf of Medicare participants who
22 suffered injuries from Baycol. There's a conditional
23 transfer order from the MDL panel. We have filed a brief
24 opposing transfer earlier this week, I believe Monday. So
25 that's the status.

1 THE COURT: Is there a hearing date or --

2 MR. STANLEY: I understand that Judge Weinstein
3 has set a status conference next week on the 15th.

4 THE COURT: All right. What about the panel, do
5 you know when they will come down with --

6 MR. STANLEY: No, I haven't seen any kind of a
7 briefing schedule or anything from the panel yet.

8 THE COURT: All right. Thank you for being here.

9 MR. STANLEY: Yes, sir.

10 MS. WEBER: Your Honor, if I may interject? With
11 respect to the hearing before Judge Weinstein --

12 THE COURT: Please come to the microphone.

13 MS. WEBER: -- I believe we are filing a motion
14 to stay on that possibly today or tomorrow, asking that he
15 hold up action on the case until the panel has had a chance
16 to act on it and transfer the matter here. We think it
17 should be dealt with at the same time as all the other
18 Medicare issues in front of you.

19 THE COURT: Thank you. Thank you for the update.

20 MR. ZIMMERMAN: Your Honor, I may add on that
21 issue, we have been in discussions with counsel for the
22 plaintiffs in that case and we have been trying to work
23 together to cooperate no matter where that case might land.

24 We are not taking a position at this time before
25 the panel as to whether or not the case is to be

1 transferred or not transferred. I think we do believe it
2 will be transferred based upon the case, but we have been
3 in contact with the plaintiffs' counsel in this and we are
4 trying to cooperate wherever that case may land.

5 THE COURT: All right. Give my regards to Judge
6 Weinstein.

7 MR. STANLEY: I certainly will, Your Honor, if we
8 get there.

9 MR. ZIMMERMAN: Motion to vacate Special Master
10 Recommended Order No. 15. This motion was filed in two
11 individual cases and presents issues under PTO 25 and 53.
12 I believe the Court has requested that Bayer and the PSC
13 file responses by October -- well, by tomorrow. Such
14 filings will be made. This has to do with where an
15 assessment attaches and what the rules for attachment are,
16 and I believe it's an appeal from the Magistrate -- from
17 Special Master Order No. 15. And we are prepared to file
18 that tomorrow.

19 THE COURT: All right. Thank you.

20 MR. ZIMMERMAN: Your Honor, that brings us now to
21 the trial plan for MDL and state trials.

22 Before we get into the areas that we don't agree
23 on with regard to the discovery plan, I think it would be
24 appropriate for everyone in the court and especially this
25 court to hear from Ron Goldser, who has been on the front

1 line, and perhaps from Adam or Tarek, who have been on the
2 front lines of this process, to just sort of hear where we
3 are, how we have gotten to where we are in terms of the
4 cases coming off the wheel, what was done, and get some
5 basic background into how we have gotten from where we
6 started in July to where we are today, and then talk about
7 the issues of discovery and the discovery plan for those.

8 There are, I think, four disputed issues, maybe
9 down to three. And if we want to hear argument on that we
10 can do that either before or after lunch, depending on the
11 Court's schedule.

12 And then I believe the Special Master would also
13 have some report on how far we have come in getting the
14 discovery plan put together and then what separates us. I
15 don't know if the Special Master wants to report on that or
16 not.

17 We were asked to provide to the Court and to
18 Counsel a clean document with things that we do agree on;
19 and then the open issues theoretically will be resolved by
20 the Court on the things that we don't agree on with regard
21 to the discovery plan.

22 But prior to that I think it would be helpful,
23 without objection, to kind of give an overview of the
24 process over these last couple of months.

25 THE COURT: Adam.

1 MR. HOEFLICH: Thank you, Judge. Special Master
2 Haydock suggested yesterday that the Court might like to
3 know where we are in terms of the makeup of the cases at
4 this point.

5 Pursuant to the pretrial order, the Court
6 provided us with a list of 200 randomly selected cases plus
7 another 30 some cases that involved Minnesota residents and
8 Minnesota filings from this district.

9 A number of those cases were procedurally
10 defective either because they had previously been settled,
11 they involved class actions, or for some other reason they
12 just shouldn't have been on the list in the first place.

13 And so dozens of cases from the list were removed and new
14 cases were put on.

15 We had a subsequent list of 200 cases plus
16 Minnesota cases and that has now been winnowed down through
17 the vetting process where the Plaintiffs decide which cases
18 they're going to move forward with and which cases are
19 going to be dismissed.

20 Initially there were 174 Weitz & Luxenberg cases
21 out of the 200 cases. What we're down to now are somewhere
22 between 94 and 96 cases. One of the 96 cases is a
23 Minnesota resident case which isn't actually a Minnesota
24 resident, so we think that will go by the wayside. There's
25 also, apparently, a case that's been settled. So we think

1 we're at 94 cases.

2 Out of those 94 cases, there are 10 Minnesota
3 resident cases. Perhaps one of those may be a rhabdo case.
4 We're not sure at this point. Of the total sum of the 94
5 cases, 10 of them appear to be rhabdo cases. The remainder
6 appear to be aches and pains of a host of different
7 varieties.

8 And that's the universe we're left with moving
9 forward today.

10 THE COURT: Mr. Goldser.

11 MR. GOLDSER: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. GOLDSER: Mr. Hoeflich is right to the degree
14 that he went, but I would like to go a little bit further.

15 My understanding is that we started with 56 cases
16 originally on the Minnesota resident, Minnesota filed list.
17 And the cases that came off that list initially came off to
18 a great extent -- many of them were Weitz & Luxenberg cases
19 which were Minnesota residents but where the lawsuit had
20 been filed in the Eastern District of Pennsylvania. And
21 the cases were removed from the list -- that doesn't mean
22 they were dismissed. Under Pretrial Order 89 they were
23 removed from the list for that procedural defect.

24 There was one case that somehow was a PPA case
25 that managed to get to this court, I think, through the --

1 the panel, I think they sent it to the wrong place. There
2 were a few that were settled. There were a few that were
3 evaluated and determined not to be appropriate. The
4 Olander case was on the list initially and obviously that
5 case was one that was settled. So we whittled that list
6 down initially for those procedural issues from 56 down to
7 18.

8 Now, one of the issues that's really extant in
9 that derivation is the Lexecon issue, and that Lexecon
10 issue really has an overlay to this entire process and I
11 have a feeling we will be talking about Lexecon throughout
12 the discussion of the trial process.

13 Can this Court try in the MDL a Minnesota
14 resident who happens to file his or her case in a
15 non-Minnesota jurisdiction? I'm not sure I know the answer
16 to that. I think you can, but I'm not sure that we want to
17 go litigate the Lexecon issue at this point in time.

18 We heard you loud and clear in July, we heard you
19 loud and clear today: Let's try a case, let's try a muscle
20 injury case. And I think the focus that we have taken is
21 to get rid of all those extraneous kinds of issues.
22 Whether we are right or whether we're wrong about the
23 issues, let's not have the issue in front of you so we can
24 get to trial on those muscle injury cases and find out the
25 values.

1 So underlying our evaluation of all of these
2 cases was to really take to heart the charge that was made
3 of us and of the parties in July; and that is how many of
4 these cases are real cases, how many of them merit trial,
5 how many of them will survive a motion for directed verdict
6 or summary judgment motion if that's what Defendants choose
7 to make.

8 And we took that charge very, very seriously. We
9 have lawyers scattered all over the country that we were
10 trying to deal with. They owned the case. They came to
11 the MDL and they are not part of the PSC, so we had to work
12 with them and work with them as closely as we could to
13 evaluate the cases. I know Weitz & Luxenberg has a large
14 number of cases and they worked very hard to go through
15 those cases and determine which ones were trial worthy.

16 So starting out with 56 Minnesota cases,
17 immediately eliminating 38 for a variety of reasons,
18 including this potential Lexecon issue, we were left with
19 18.

20 Of those 18, we submitted to the Court this
21 morning, pursuant to the order, our list of designated
22 cases. There were 11 cases on that list. And the Bedell
23 case, as Mr. Hoeflich identifies, turns out to be yet
24 another case that was on the Minnesota list that, in fact,
25 was not a Minnesota resident, so it shouldn't be on the

1 list. So out of 17 cases, 10 of them we're ready to go to
2 trial on.

3 It's my understanding of those cases that one of
4 them is a deaf case. That's the Gribbon case. It's been
5 submitted for mediation and settlement.

6 There are two rhabdo cases, one is Jones and the
7 other is Gilbertson. Gilbertson I know is in the
8 settlement program. Jones I understand is about to be
9 submitted into the settlement program.

10 So that leaves us on this list, then, with I
11 believe seven cases that are Minnesota resident, Minnesota
12 filed, muscle injury cases.

13 And I don't remember the lawyer of origin of most
14 of them, but I know that two of those cases are
15 Mr. Meshbesh's cases and that's the Soliman and the
16 Goulet case. So he has got a couple of cases on the
17 Minnesota resident, Minnesota filed list.

18 The random list, which is not Minnesota resident,
19 not Minnesota filed, that is the remainder of the list.
20 Many of those cases are Weitz & Luxenberg cases. A number,
21 of course, are not.

22 And, again, we took very seriously the charge of
23 what cases are worthy of trial, but these cases really
24 scream out the Lexecon question; can they be tried in this
25 court, can they not be.

1 If the purpose of this program is to evaluate
2 these cases, find out not only which cases are worthy of
3 trial from Plaintiffs' perspective, find out not only which
4 cases survive motions for summary judgment or the demand
5 for case specific experts, but to find out the values of
6 those cases.

7 The question that we're struggling with and I lay
8 in front of you because it's something somewhere along the
9 line we are going to have to resolve, and maybe that's not
10 now and maybe that's later, but how do we put values on
11 those cases, how do we determine of those muscle injury
12 cases whether a jury would return a verdict or not.

13 We will have some trials of real clean Minnesota
14 resident, Minnesota filed cases. We are going to be ready
15 to go on those cases and try those cases. But then we are
16 going to have this other list of 80-some odd cases, many of
17 which are muscle injury cases, many of which will survive
18 the case specific expert requirement, many of which will
19 survive summary judgment. How do we value those?

20 You are going to be faced with a variety of
21 procedural choices and I won't start down that road now
22 because I think that comes up later and smarter minds than
23 mine will address that, but that's out there on that list.

24 So that's the designation of case process that
25 we've gone through, and we have worked very hard on it.

1 The other piece of this is the other requirement for today
2 of Pretrial Order 89, and that's the discovery plan.

3 Again, we've worked very hard with defense
4 counsel to come up with an agreement on a discovery plan
5 and that's the document Mr. Zimmerman referenced moments
6 ago that we have presented to you this morning. What it is
7 is a working draft of a proposed agreed order for the
8 discovery plan.

9 You will see that we succeeded in resolving a
10 number of issues. We talked about the time frame of
11 deposing plaintiffs, who can be deposed. Third party
12 witnesses won't be deposed unless there's a specific need
13 to do so.

14 We have some issues facing the deposition of
15 treating doctors and prescribing doctors. How many, how
16 many do we need to depose in the context of 90, 95, 100
17 cases? Is it one doctor, two doctors, five doctors? Are
18 we going to depose 500 doctors between now and the end of
19 January? How do we draw those boundaries in order to
20 achieve the goals of this program? That's an issue that I
21 think we need to argue about.

22 How do we deal with the question of the detail
23 reps that worked with those doctors? If we have a few
24 doctors, we'll have fewer detail reps. If we have a lot of
25 doctors, we're going to have a lot of detail reps.

1 From my point of view, two of the major issues in
2 this litigation, the failure to warn claim from Plaintiffs'
3 side, the learned intermediary defense from the Defendants'
4 side, speak so loudly and clearly to the communication
5 between Bayer and the doctors. Where is that front line of
6 that communication but right at the detail rep's visit to
7 the doctor?

8 So the detail reps' records, that's an issue that
9 remains in this document. And you have some strikeout
10 language and some redline language designed to highlight
11 the issues for you.

12 And then the other issue that remains is whether
13 or not cases that are pulled off this list at this point or
14 shortly before this point should be dismissed with
15 prejudice or without prejudice.

16 Pretrial Order 89 simply says in paragraph 2 that
17 the cases will be dismissed. It doesn't say which way.
18 There is a history that I can comment on later about what
19 has transpired, but I will hold that thought until that
20 issue is front and center before you.

21 That's the report that I have.

22 THE COURT: Thank you.

23 MR. BECK: Your Honor, I think Mr. Goldser has
24 accurately outlined in broad terms the issues that we need
25 to discuss further today.

1 I would suggest, if we could, that we take up the
2 last issue that he mentioned first. It's independent of
3 the discovery questions that are somewhat intertwined. So
4 with the Court's permission, I would like to address just
5 for a few moments this question about whether the
6 dismissals should be with prejudice or without prejudice.

7 Mr. Goldser was not correct when he said that
8 Pretrial Order 89 just says dismissed. That's not what the
9 language says. What it says is that the cases that the
10 Plaintiffs take out of the program will be dismissed unless
11 Plaintiff can show "just cause for continuation of a case."

12 Your Honor, what we take that to mean is that --
13 and frankly, Your Honor, our understanding all along and
14 the only way this program, we think, makes sense is that
15 the cases that they decide aren't worth pursuing because
16 the plaintiffs won't fill out a fact sheet or they don't
17 want to spend the money pursuing it or they can't find any
18 experts, those cases get dismissed with prejudice unless
19 they come forth and say, In the case of Mr. Jones we have
20 particular facts, that even though it's not a case that's
21 ready for discovery and shouldn't be included any further
22 in the program, there are peculiar facts about poor old
23 Mr. Jones, he's in a coma, you know, his records were lost
24 in the flood, and it's not fair to have a dismissal.
25 That's what we anticipated would be sort of the meaning of

1 that clause.

2 But otherwise -- the whole import from our point
3 of view, or at least a very significant import of the
4 program, was to put Plaintiffs to the test and to have
5 consequences in this program, where we were to get 200
6 cases plus the Minnesota cases and the first important
7 piece of information is how many of these cases are the
8 plaintiffs' lawyers and the plaintiffs themselves even
9 willing to invest any time and money in pursuing. And if
10 they are not willing to invest any time and money in
11 pursuing them, then they have to dismiss them.

12 Now, if they are allowed to dismiss them without
13 prejudice, then all that means is that they select
14 themselves the cases that they think are the best ones of
15 the 200 randomly selected ones, the only discovery that we
16 take is on the ones that they think are the best ones, but
17 the other ones can be reinstated at any time. And that is
18 not, with all respect, what our understanding was.

19 Our understanding was that the Plaintiffs and
20 their clients are put to the test, is this a case worth
21 pursuing or not. And if it's not, it gets dismissed with
22 prejudice unless they have special circumstances.

23 And, Your Honor, in that regard, it's perfectly
24 fine with me if they want to go through their list again
25 and come back and say here's the cases that we think have

1 special circumstances. I'm assuming that that's going to
2 be a few.

3 But in terms of the broad question of whether
4 this dismissal should be with prejudice or without
5 prejudice, from our point of view a major purpose of the
6 program gets defeated if they are able to manipulate the
7 process by dismissing without prejudice so that the only
8 discovery focuses on the cases they want to focus on and
9 then later on, within -- I suppose they would say, you
10 know, X number of years from your denial of class
11 certification would be their position, they can refile
12 these cases at any time.

13 So we think that the clear import of Your Honor's
14 order was that the dismissal ought to be with prejudice and
15 we think that the purpose of the program requires that.

16 THE COURT: Let's hear from the PSC.

17 MR. GOLDSER: Thank you, Your Honor.
18 Unfortunately I believe Mr. Beck's philosophy has not
19 filtered down to the rest of his team.

20 On July 28th, I believe was the date, we were
21 provided with the Court's initial list of cases and there
22 was a case by the name of Hugh Sullivan, 03-369; there's a
23 case by the name of Christine Almada, case 3-124; Orrin
24 Hagen, case 3-0143; Esther Brumfield, 03-1818; Vahe
25 Jopalian, 3-706; Richard Worfel, W-o-r-f-e-l, 3-2067;

1 Carolyn Patin, P-a-t-i-n.

2 Those cases were all on the Court's initial MDL
3 random trial list. They were all Weitz & Luxenberg cases.
4 Weitz & Luxenberg reviewed those files and decided that
5 they were not worthy of going forward.

6 On August 29th Paul Pennock and Vicky Maniatis
7 signed a stipulation of voluntary dismissal without
8 prejudice, Your Honor. That document was signed by
9 Defendants, both Bayer and GSK. The signature list for
10 Bayer includes Dorsey & Whitney, Bartlit Beck, Sidley
11 Austin, and Eckert. The signature is by Peter Sipkins,
12 although there is some initials behind it. The GSK list is
13 Halleland Lewis, Dechert Price; Tracy Van Steenburgh signed
14 it.

15 This Court signed the order and it says, "It is
16 hereby ordered, pursuant to the above stipulation, that the
17 above-captioned matter is dismissed without prejudice."
18 And that order was signed September 9, 2003, e-served
19 September 10th.

20 And I have about six other similar stipulations
21 that I received this morning from the Weitz & Luxenberg
22 firm which are reported to be involving cases that were on
23 the original trial list -- I have not had an opportunity to
24 verify those; I will take it at face value that they are
25 cases that are also on the trial list -- which they are

1 co-signed as voluntary stipulations of dismissal without
2 prejudice.

3 So if they have a position now that the
4 dismissals must be with prejudice, they've changed their
5 mind. Does it matter? Maybe yes. Maybe no.

6 The reality is that so far, not only with the
7 trial cases, but also with cases that Weitz & Luxenberg and
8 others have dismissed without prejudice to date because of
9 fact sheet problems, those have not been refiled. So
10 there's not likely to be a case coming forward with one
11 that has been dismissed without prejudice.

12 Right now there appears to be a threshold of
13 what's a compensable case and what is not a compensable
14 case. Plaintiffs and Defendants differ about that.
15 There's a gray area, the muscle injury cases.

16 And it could well be that some of the cases that
17 are dismissed without prejudice fall within the compensable
18 cases after we try some. Chances are most of them do not
19 because good lawyers have evaluated those cases after all
20 is said and done and have determined they are not likely
21 compensable.

22 But it does leave the door open for those few
23 people that could come back. To date none have come back.
24 Whether they will or they won't, we don't yet know. The
25 statute of limitations clock is certainly ticking.

1 So I am not sure that it is a huge issue for
2 Bayer to be worrying about these cases because the
3 likelihood of their coming back is not very great and they
4 haven't expended much time and effort in defending those
5 cases.

6 Now, I can see that now or two days from now
7 would be a good dividing line where the withdrawal of a
8 case from the trial list should be dismissed with prejudice
9 because significant time is about to be expended on these
10 cases as we get them ready for trial, depositions of
11 plaintiffs, depositions of doctors, case specific expert
12 reports.

13 And costs will mount on these cases, but to date
14 they haven't and so there's no harm, no foul of treating
15 these cases that were on the randomly selected trial list
16 any different from a case that was dismissed a week ago, a
17 month ago, or six months ago because they did not complete
18 a fact sheet.

19 So with Bayer's recent history, with Bayer's
20 prior history, and with the reality of the circumstances, I
21 respectfully request that dismissals that have occurred up
22 until now be without prejudice and that dismissals that
23 occur after we get started on this program be with
24 prejudice.

25 Thank you.

1 THE COURT: All right.

2 MR. BECK: Your Honor, Susan will describe
3 momentarily how it came to pass that those dismissals
4 without prejudice were agreed to. They got kind of slipped
5 in with a bunch of other documents that were on a slightly
6 different subject.

7 But if these cases are not dismissed with
8 prejudice, then I don't think they should be out of the
9 program at all. If the cases are live cases because they
10 can be reinstated at any time for any reason, then we
11 haven't done any winnowing except that the Plaintiffs have
12 selected which cases they would prefer to focus on in
13 discovery.

14 I would rather have these cases back in so that
15 we can take the discovery and get dismissals with
16 prejudice, whether that's by summary judgment or otherwise,
17 but not a situation where they get to pick -- this was not
18 the idea, where they get to pick which segment of the 200
19 randomly selected cases will be the focus of discovery
20 through the expedient of dismissals without prejudice.

21 And now Susan will -- now Fred will rise, and
22 after Fred Susan will describe how it came to pass that
23 these particular dismissals got signed.

24 MR. MAGAZINER: Just very briefly, Your Honor.
25 Mr. Beck and I have not had any opportunity to discuss

1 this, but my idea as I listen to Mr. Goldser's argument was
2 much the same as Mr. Beck's idea.

3 Let's give the PSC an additional two weeks to
4 reconsider the 55 cases that they had said they were going
5 to dismiss; and if they would like to put some of those
6 back in the program, let them do so or otherwise those
7 cases should be dismissed with prejudice.

8 When Mr. Beck and I and Mr. Meshbesh and
9 Mr. Zimmerman met with Special Master Remele and Special
10 Master Haydock back in July, that was the concept that we
11 discussed, that we would winnow down the cases and we would
12 see what was left that was really worth anything, and it
13 was not the concept that the Plaintiffs would self-select
14 cases out of the 200 and say let's only work on these cases
15 and we will take the others out for possible reinstatement
16 later.

17 So if that's what they want to do, let's go back
18 and we will end up with 200 cases or 155 or 120 or maybe we
19 will still be down to 95, but I say let them look at the
20 list again and decide which ones they are willing to
21 dismiss with prejudice and the rest get processed.

22 Thank you, Your Honor.

23 THE COURT: What's happening in Philadelphia with
24 their program? They whittled down cases. Were they
25 dismissed out with prejudice or without?

1 MR. MAGAZINER: There is no program in the
2 Philadelphia court that is at all comparable to this. As a
3 matter of fact, our hope is that the Philadelphia court
4 will be impressed with the utility of the program described
5 in PTO 89 and will implement something similar in
6 Philadelphia, but there is no such program to date.

7 THE COURT: Ms. Weber.

8 MS. WEBER: Your Honor, as you are aware, we have
9 been agreeing to dismissal without prejudice of thousands
10 of Weitz & Luxenberg cases where they haven't complied with
11 their written discovery obligations.

12 What happened with respect to the trial program
13 cases is that Weitz & Luxenberg sent stipulations for
14 dismissal without prejudice to the same person who manages
15 the people who handle the plaintiff fact sheet program,
16 mixed them in with the hundreds of other stipulations for
17 dismissals that we get, and they slipped through the
18 process.

19 When we determined that that was what Weitz &
20 Luxenberg was doing and we actually have received attempts
21 to stipulate to dismissal without prejudice in other cases
22 listed for the trial program, we put a stop to it.

23 But the fact that they slipped a few of these
24 under our radar at the very beginning of the process does
25 not indicate in any way that they should be allowed to

1 review cases, make qualitative determinations that they
2 aren't worth pursuing, and then get stipulations to
3 dismissal without prejudice.

4 THE COURT: Anything further?

5 MS. MANIATIS: If I may, Your Honor?

6 THE COURT: You may.

7 MS. MANIATIS: I am absolutely sick of the
8 representations that are being made about what we're doing.

9 We didn't slip anything in. These accusations have got to

10 stop. The cases that we have been dismissing to date,

11 where did we say it's because it's a fact sheet problem?

12 We didn't. You want to conclude it, be my guest. You're

13 wrong. We didn't slip anything into anybody. We submitted

14 stipulations of dismissal without prejudice. There was no

15 sneakiness on Weitz & Luxenberg's part. Maybe there was

16 some inattention on their part, but that seems to be par

17 for the course.

18 That's all I have. Thank you.

19 MR. BECK: We will pay a lot more attention, Your

20 Honor, you can be sure, to anything that we get from

21 Weitz & Luxenberg.

22 THE COURT: Anything further on this issue so I

23 can take it under advisement?

24 MR. ZIMMERMAN: No.

25 THE COURT: All right, under advisement. Let's

1 move on to the second issue that we have that has to be
2 resolved, the physicians, the number of depositions to be
3 taken and which party goes first.

4 MR. BECK: Yes, Your Honor. Here's our situation
5 with the doctors. We don't want to take more depositions
6 than we have to, but the Plaintiffs' Steering Committee has
7 taken the position that we should be limited to two
8 physicians.

9 Now, our problem is that in some cases that might
10 be fine and, in fact, in some cases it might be one too
11 many, but in other cases, depending in part on how many
12 physicians were involved in the initial decision to
13 prescribe Baycol or another statin, there could be more
14 than one physician involved in that and there also could be
15 one or more physicians involved in treating the supposed
16 injuries.

17 There could be three doctors who saw one of
18 Mr. Zimmerman's clients in the months during which this
19 client now claims to have had black urine and muscle aches
20 and myopathy or something and all three doctors might have
21 seen this patient and all three doctors might have written
22 medical records that are 100 percent inconsistent with the
23 litigation claims made by Mr. Zimmerman's client. If so,
24 we want to take their depositions and we don't want to be
25 limited to two doctors.

1 So we're not going to burden doctors with
2 unnecessary depositions, we're not going to burden the
3 Plaintiffs with unnecessary depositions, but there's no
4 logic to confining us to two doctors. It just makes no
5 sense at all.

6 There's going to be some cases where it's one
7 doctor who prescribed the medicine and who took care of the
8 person afterwards and then we will only take one doctor,
9 but there are going to be other cases where it's going to
10 be two or three or maybe four. They are going to be short
11 depositions typically, but they are going to be necessary.

12 And if I have six doctors who all saw
13 Mr. Zimmerman's clients in the months after he took Baycol
14 and all six of them wrote medical records that show that
15 Mr. Zimmerman's client didn't suffer any injury whatsoever,
16 I am going to need the testimony of all six.

17 What I propose, Your Honor, is that we go forth
18 as we do in a normal case and we notice up the depositions
19 that we think are necessary of the physicians; and if they
20 think that we are abusing the process and if they think
21 that we're giving them the runaround and making life
22 miserable for no reason, then they file a motion for a
23 protective order instead of trying to limit us in advance
24 to how many doctors' depositions we can take.

25 On the issue of who goes first, to me that sounds

1 kind of like a pretty silly issue. If we notice up a
2 deposition, we ought to be able to take the fellow's
3 deposition.

4 In a lot of states we can't talk to the doctors
5 in advance because of rules concerning doctor-patient
6 confidentiality, but of course the plaintiffs' lawyers can,
7 so they will have already met with the doctors and gotten
8 whatever information they can from the doctors.

9 We want to be able to take a discovery deposition
10 when we notice up a doctor's deposition just like you do in
11 any normal case.

12 And I think, actually, the proposal that was
13 submitted to the Court on behalf of both sides incorporates
14 that, that we can take depositions and if they decide they
15 want to preserve the doctor's testimony for trial, then
16 they can do it by direct examination and then we'll do a
17 trial type cross. It's already, I think, agreed to by the
18 parties.

19 MR. MAGAZINER: May I speak to that before the
20 PSC does, Your Honor?

21 THE COURT: You may.

22 MR. MAGAZINER: I believe that -- Ron, did you
23 hand up a copy of this to the Court?

24 MR. GOLDSER: Yes.

25 MR. MAGAZINER: Excuse me, Your Honor.

1 Mr. Goldser has handed the Court the agreed order and it
2 has some highlighting and it has some provisions that are
3 stricken out.

4 And in connection with the issue that Mr. Beck
5 just addressed, I might draw the Court's attention to
6 paragraph 3, it would be B.3, which is stricken out
7 under -- which is "Counsel for Plaintiff in any eligible
8 case may elect to provide Defendants a verified bill of
9 particulars." It is at the very bottom of the third page.

10 THE COURT: I've got it.

11 MR. MAGAZINER: That suggestion originally came
12 from Mr. Zimmerman and it was, I thought, a very creative
13 suggestion; and it is pertinent to the issue Mr. Beck was
14 just addressing, the number of physicians.

15 Many of these cases are cases in which Plaintiffs
16 have alleged in their complaint, or more often in the fact
17 sheets, a whole variety of injuries that we believe could
18 not possibly be related to Baycol, blindness, impotence,
19 loss of hearing, stomach problems, whatever.

20 One of the things we need to do in processing
21 these cases is create evidence that these symptoms that the
22 plaintiff says he suffered were not caused by Baycol.
23 Because otherwise we won't be able to get to come before
24 Your Honor and ask for summary judgment, for example,
25 saying there's no injury, no medical evidence that there's

1 any injury caused by Baycol in this case.

2 Plaintiffs' lawyers know that many of these
3 conditions cannot be caused by Baycol. They don't claim
4 that Baycol can cause eyesight problems. Mr. Zimmerman
5 very creatively suggested how about if we say to the
6 plaintiffs' lawyers, If you don't want to have a lot of
7 doctors deposed with respect to a patient who has treated
8 with 10 different doctors for 10 different ailments, give
9 us -- give the Defendants a bill of particular saying the
10 only injuries we are really claiming in this case are A and
11 B and then that will allow the Defendants to limit the
12 number of doctors they depose.

13 We thought that was a good suggestion.
14 Apparently there was some in the Plaintiffs' camp, not
15 Mr. Zimmerman, but some others, who thought that was
16 unworkable and would create too harsh a burden on the
17 Plaintiffs.

18 I would suggest Your Honor in deciding this issue
19 consider the merit of Mr. Zimmerman's suggestion contained
20 in paragraph 3 because we do think it would be a way to
21 allow us to reduce the number of doctors who need to be
22 deposed, if a plaintiff's lawyer will take the
23 responsibility to say, Despite what the fact sheet says,
24 the only injuries I am really claiming in this case were
25 caused by Baycol are the following.

1 THE COURT: Mr. Goldser.

2 MR. GOLDSER: Your Honor, I have two themes that
3 I would like to present. First is the Defendants really
4 should be careful what they ask for, and the second is to
5 try and get a real understanding of what this program is
6 supposed to accomplish.

7 The first thing is short, be careful what you ask
8 for. If they want six doctors' depositions, we are asking
9 for detail rep documents for all of the doctors so that we
10 can understand the interface between the defendants and
11 those doctors. The more doctors that they want, the more
12 detail rep documents they are going to have to give us. So
13 they've got to be careful what they ask for.

14 But more to the point, what is the purpose of
15 this program? At least as I understand it, and I didn't
16 have the privilege of being back in chambers when it was
17 hammered out, it seems to me the point is let's get some
18 good muscle injury cases teed up and tried. We really want
19 to do that. That's why the Minnesota cases have been
20 isolated and focused.

21 We want to find out what percentage of cases
22 plaintiffs' lawyers think are viable. It's easier for us
23 to take a case off the list, by the way, if there's a
24 dismissal without prejudice than with, but that aside, what
25 ones are really viable?

1 Now, how do we get there and is that different
2 from preparing a case for trial? You see, I don't think,
3 from what I understand, that we are going to go trying 94
4 cases that are on this list, or at least not right away.
5 Maybe we will and maybe we will do them in bunches and
6 maybe we will do those bunches serially.

7 I don't quite yet understand what the Court has
8 in mind with that regard, but I don't think we should be
9 preparing 94 cases for trial in the next four months
10 because we are not going to try them.

11 What I think we're trying to do with this program
12 is to determine, first, from Plaintiffs' perspective which
13 cases are viable; second, from a base set of discovery
14 which cases are viable, will they survive summary judgment,
15 will they survive directed verdict, can Plaintiffs produce
16 a case specific expert report for those cases, is a case
17 specific expert report necessary to survive summary
18 judgment or isn't it, will that work on medical records and
19 treating doctor depositions.

20 I think that's where we are. I don't think we
21 are at the point where we want to take every doctor's
22 deposition and work this case up -- every case up for trial
23 at this stage in the game.

24 Defendants in most litigation have a closet full
25 of ghosts and skeletons, you know, they see all these

1 claims coming out from left field, maybe the plaintiff says
2 my baldness or my blindness or something was caused by
3 Baycol, but that's not going to fly.

4 So the first thing they're going to do is they're
5 going to take the plaintiff's deposition and they are going
6 to understand from the plaintiff's deposition because that
7 plaintiff is going to be prepared by their lawyer to talk
8 about the claims that are really Baycol related.

9 Because the minute a plaintiff starts saying my
10 blindness is related to Baycol, if that is not medically
11 supportable, then that plaintiff's credibility is going to
12 be shot not only with this Court, but with a jury or
13 anything. So you've got to prepare the plaintiff and the
14 testimony to make claims that are real.

15 If they want a bill of particulars, the best
16 place to get it is ask the plaintiff in the deposition.
17 That will by itself be limiting the doctors that are
18 necessary to depose.

19 The doctors that are going to be necessary to
20 depose will be a prescribing doctor and a treating doctor;
21 and, yeah, there may be some circumstances where you've got
22 multiple treating doctors because you go to a clinic or
23 what have you.

24 The reality is that Plaintiffs aren't going to
25 choose six doctors to testify. The reality is the

1 Plaintiffs are going to choose one, maybe two doctors to
2 testify who will review the medical records of all of his
3 or her colleagues.

4 And for purposes of determining cases that will
5 pass muster on summary judgment, they don't need five or
6 six doctors or ten or twelve doctors, they really need two
7 or thereabouts.

8 I wanted to suggest and I think I suggested
9 somewhere along the line that we make this number two a
10 presumptive number and it really comes down to who has the
11 burden, then, of saying how many doctors are appropriate
12 and asking the Court.

13 Mr. Beck said if Plaintiffs think the Defendants
14 are asking for too many doctors, we make the motion for a
15 protective order. Well, I would like to turn the table.
16 Given where we are in this program, evaluating viability of
17 cases, I would like to suggest that there would be a
18 presumptive limit of two, but if there is a third doctor or
19 a fourth doctor, that they approach us with that and say we
20 think we need this doctor for these reasons. And then you
21 get into the whole question of 56(f) affidavits and summary
22 judgment and how do we defend all of that.

23 The cases will fall out where you have a doctor
24 whose testimony has not been taken and it will be pretty
25 apparent. And if you can't get it done with two doctors or

1 maybe three doctors, you know, you are just overdoing it.

2 There is a theme going on here -- Vicky Maniatis
3 has talked about it indirectly, if not directly -- about
4 overburden, make-work, doing more than is necessary. Let's
5 get to the heart of this case. Let's try these muscle
6 injury cases and let's not make a whole lot of make-work
7 and bureaucracy in the interim.

8 Who goes first? Doctors don't like to be deposed
9 more than once. If we are going to go forward and depose
10 all of these doctors, it is incumbent on our side to make
11 sure that the deposition that we take is trial ready and in
12 that context we view these depositions really as trial
13 depositions.

14 Plaintiffs have the burden of proof. If the
15 burden is so daunting, as Mr. Beck suggests it is, because
16 there are no injuries, he should have no fear that
17 Plaintiffs go first.

18 These, in our view, will be depositions that are
19 necessary to preserve these doctors' testimony for trial
20 because it's the only shot we are likely to get. Under
21 those circumstances, obviously we would go first.

22 But we can also get down to a very silly game of
23 who gets to notice the deposition first. Because if the
24 rule is he who notices goes first, then we'll notice the
25 doctors' depositions and we'll go first; and that gets into

1 silliness and I, for one, am not real interested in
2 silliness.

3 So I think it makes more sense, with the burden
4 of proof and with the trial readiness issue for those
5 doctors who will be deposed, to allow Plaintiffs to present
6 their case first. It will be that much clearer, then, for
7 Defendants to cross-examine because they will know what the
8 affirmative testimony is from those doctors.

9 THE COURT: Thank you very much. There's no need
10 for anything further. I will take that one under
11 advisement. Let's move on to sale representatives.

12 MR. GOLDSER: Good morning again -- good
13 afternoon again. I can be brief on this one because I have
14 already highlighted the issue to the Court.

15 It is imperative to have the front line
16 communication between defendants and the doctor to discover
17 and understand the failure to warn and learned intermediary
18 issues.

19 If the doctors are being accused of knowing all
20 that there is to know, how can we elicit the appropriate
21 testimony from them of what they were told and when they
22 were told it unless we know what the detail rep said?

23 What Defendants are willing to provide us and
24 what they have provided in the Olander case was one piece
25 of paper, one sheet; and it has the doctor's name, his

1 address, the date of contact, the number of samples left,
2 if any, and what the prescription of those samples were,
3 and the name of the detail rep. That doesn't go very far.

4 Now, I have seen an awful lot of salespersons'
5 records over the course of my career and increasingly
6 contact management software is the name of the game, it is
7 the order of the day, and salespeople put into that contact
8 management software more than just the name of the doctor,
9 the date they visited it, and the samples they left.

10 There are comments that are included: This
11 doctor doesn't like Baycol, this doctor likes Zocor
12 because, this doctor has had an adverse experience with
13 Baycol, this doctor loves Baycol, this doctor is only
14 prescribing Baycol because it's on the formulary that the
15 Department of Defense mandated, or whatever.

16 And salespeople produce reports of what samples
17 they've left and what reaction they get. Those documents
18 are critical to tell us what that salesperson told the
19 doctor and heard from the doctor.

20 And those documents are necessary before that
21 doctor is deposed because if we go down one path and all of
22 a sudden we find in cross-examination, well, Doctor, didn't
23 the sales rep tell you thus and such, we have asked for
24 those documents and we don't have them.

25 So the front line, the communication, is the

1 central issue in failure to warn and learned intermediary
2 for these doctors' testimony and these documents are
3 critical.

4 THE COURT: Good afternoon.

5 MR. HOEFLICH: Good afternoon, Your Honor.

6 There's no question that every physician whom we are going
7 to depose and every physician who prescribes statins know
8 that all statins have warnings about aches and pains.
9 That's not much of an issue and I don't believe there's
10 been any issue on it in any of the litigation.

11 We are asking to depose doctors. If you look at
12 the draft order, we've told the Plaintiffs that we will
13 give them in advance of every deposition the name of all
14 the sales reps who employed or who detailed the physicians
15 at issue; we will give them the dates of all details; we'll
16 give them the numbers and types of sample, if any; and,
17 where the information is available, what was said to the
18 prescribing physician during such detailing.

19 We have given the Plaintiffs copies of all the
20 promotional materials for Baycol. That's not what's at
21 issue. And the Plaintiffs get to ask the physician, What
22 did the Bayer salesperson say to you? We have also
23 provided to them the GoldMine database, which contains all
24 of the phone calls that physicians made to Bayer and what
25 the notes are in it.

1 So we've given them a whole lot of information
2 and we've offered to give them a whole lot more. That's
3 not what's up here.

4 We're dealing with 95 cases. Each of the 95
5 plaintiffs involved and sometimes their spouses saw three,
6 four, five, six, seven physicians. Each of those
7 physicians may be detailed by three, four, five persons
8 from Bayer over time. Each of those physicians may be
9 detailed by several persons from GSK.

10 What the Plaintiffs are now asking less than a
11 week before depositions begin is that we go out to the
12 homes and the garages of each of these several hundred
13 salespersons, look to see if they have any documents that
14 are different than the approved materials, gather them all,
15 review them all, check if there's any privileged material,
16 and get them in the Plaintiffs' hands before depositions
17 start next week.

18 We don't want to hold up depositions for the hope
19 that there may be some passing reference in something that
20 may relate to one of these aches and pains cases. We think
21 we should move forward with the depositions.

22 If there's any material that comes up that the
23 Plaintiffs need, we will look for it, but there's no reason
24 to hold up the depositions and the April trial date to send
25 us on an enormously burdensome fishing expedition at this

1 point.

2 We are giving them the information relating to
3 the detail calls. We will give it to them now. We want to
4 move forward and depositions are supposed to start next
5 week.

6 THE COURT: Briefly, Mr. Goldser.

7 MR. GOLDSER: I'm not sure if I heard
8 Mr. Hoeflich correctly, but the language in the agreement
9 or the proposed agreed order, "Defendants shall provide to
10 Plaintiff all documents in" --

11 THE COURT: Where are you?

12 MR. GOLDSER: I'm sorry. I am on paragraph 2
13 under -- it's the third page.

14 THE COURT: All right.

15 MR. GOLDSER: Paragraph B.2, about 60 percent of
16 the way down beginning at the left margin, "Defendants
17 shall provide to Plaintiff all documents in the possession
18 of the detail person concerning the detailing of Baycol to
19 such physician." I'm not sure if I heard Mr. Hoeflich in
20 his argument agree to that language. Did you?

21 MR. HOEFLICH: No, I did not agree to that
22 language. That's the whole fishing expedition we'd like to
23 avoid. We will give them all of the information about the
24 calls, the number of samples, who called them, and the
25 dates they called. And they can ask the physicians, What

1 did the salesperson say?

2 MR. GOLDSER: We have been after this evidence
3 for a long time generically and specifically. We asked for
4 it in Olander. We tried to get it for weeks prior to the
5 trial in Olander. We couldn't get any of it except that
6 one page.

7 Yesterday Mr. Hoeflich told me that the GoldMine
8 database does not contain this information. Today he
9 represented to the Court that it does. I'm not sure what
10 to believe.

11 There are Rule 37 demand letters on this issue
12 that Mr. Shelquist sent out in September, so the issue
13 for -- as a motion to compel is all teed up.

14 Bayer is very concerned about their
15 pharmaceutical division, they've spun it off or whatever
16 they have done, because it's not very successful. And
17 maybe it's not successful because they don't keep track of
18 their salesmen like Abbott Labs does and Meridia, but
19 Abbott Labs and Meridia has CD-ROMs of their database, of
20 all their sales contacts.

21 I find it hard to believe that that database, a
22 similar situation, does not exist in Bayer's possession;
23 not in the garages of all of their sales reps. They have
24 documents themselves in their sales department, I expect.
25 They should produce them.

1 MR. HOEFLICH: Your Honor, I object to the
2 argument. The depositions are supposed to start next week.
3 If there's information the Plaintiffs need in these
4 particular cases, they should approach us about it and we
5 should get it to them as necessary for individual cases and
6 move forward. We don't want to hold up the deposition
7 schedule.

8 We think the language in paragraph 2 is
9 appropriate minus that one sentence. We believe we are
10 giving them all of the appropriate information. We don't
11 think it will have any bearing on the aches and pains
12 cases. And, again, we would like to start the depositions
13 next week.

14 Thank you, Judge.

15 THE COURT: What depositions, what cases do you
16 have noticed; the Minnesota resident cases?

17 MR. ZIMMERMAN: There are none noticed, are
18 there?

19 MR. MARVIN: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. MARVIN: Your Honor, we have been talking to
22 Weitz & Luxenberg about scheduling depositions. A lot of
23 these cases are in four states, California, Texas,
24 Tennessee, and Arizona, and so we have been working to try
25 to arrange for the convenience of all the parties for these

1 depositions to take place at a specific time and grouping
2 plaintiffs for depositions.

3 Some of the depositions that are scheduled to
4 start next week will be starting in Arizona and in
5 California. I think some might be scheduled for Tennessee
6 either that week or the following week.

7 THE COURT: Well, are those the 10 Minnesota
8 resident cases?

9 MR. MARVIN: None of the 10 Minnesota resident
10 cases are scheduled for next week.

11 THE COURT: Well, let's get some direction from
12 the Court on all this. I think it will save time and -- I
13 want the Minnesota cases. I don't even want to hear the
14 Lexecon word come out of Mr. Beck's mouth. So let's tee up
15 these Minnesota cases. Why spend money and time on cases
16 that I may not get to? I don't want to deal with that
17 issue at this point. I know that the Minnesota cases
18 are -- I've got them now. There's 10 of them, or 11.
19 Let's tee these up.

20 MR. MARVIN: We will, Your Honor.

21 THE COURT: All right. And here's my rulings
22 dealing with these three issues. What you can do is -- I
23 would like the Special Masters to get together with you and
24 get the final language done on this.

25 Dealing with the first one, dealing with the

1 physicians, the number of depositions will be four and then
2 with good cause further depositions can be taken.

3 These are trial depositions. The Plaintiffs will
4 go first in taking those depositions so they will be clean
5 depositions and ready for trial.

6 Dealing with number three, dealing with PTO 89,
7 these matters will be dismissed with prejudice unless good
8 cause is shown why they should not be dismissed with
9 prejudice.

10 And dealing with the sales representatives, the
11 language in paragraph 2 in the middle of the page,
12 "Defendants shall provide to Plaintiffs all documents in
13 possession of detail persons," et cetera, will pertain only
14 to the Minnesota cases. I want all those documentations
15 for those 10 cases provided for those depositions.

16 So my language can be worked out with the Special
17 Masters with the parties. I want these 10 cases for
18 Minnesota teed up. And then certainly when you are all
19 getting together, I don't know if you are ready to say
20 which ones you want to go first yet, but at least we know
21 that we have a grouping of 10 that I want you all to start
22 working on, that your direction is on those cases.

23 MR. BECK: Your Honor, may I inquire whether -- I
24 think we all have loud and clear that we want those 10
25 Minnesota cases teed up and ready to go for trial in the

1 spring.

2 My assumption is that at the same time but
3 perhaps with less urgency and different priorities we go
4 forward with the kind of discovery that we've always talked
5 about concerning the other cases and that we'll have
6 special emphasis on the Minnesota cases.

7 As you said, the sales rep documents, for
8 example, will be produced in the Minnesota, won't have to
9 be in the others, but we can still go forward in the other
10 cases and take depositions of doctors and take depositions
11 of the plaintiffs, but that we are directed to make sure
12 that we get the Minnesota plaintiffs first in line and
13 moving fastest. Is that right?

14 THE COURT: Mr. Zimmerman, how is that going to
15 affect the Plaintiffs?

16 MR. ZIMMERMAN: I think the way we should do it,
17 Your Honor, is we should go with -- we will see what
18 happens in these 10 cases. Lots of things are going to
19 appear. Let's do the 10 Minnesota cases, report back to
20 the Court.

21 If that program is working and the resource
22 allocation is working, the deposition documents are -- the
23 detail information is coming in, then we will go to phase
24 two, but let's focus first on phase one.

25 There's no sense in overburdening people. I

1 mean, we've got major law firms here that are ready, you
2 know, to overpower the Plaintiffs' Steering Committee and
3 we don't want to see that happen. Let's just do it
4 serially and appropriately. We will report to the Court.

5 The Court has made direction on detail
6 information that we have to be provided before the
7 depositions start. We've got four doctors in 10 cases.
8 That's 40 depositions. Plus the 10 people, that's 50. I
9 mean, that's a lot of work to do. Plus the documents.
10 Let's start with that, report back to the Court.

11 THE COURT: My focus is on these 10 cases. You
12 can work with the Special Masters dealing with time periods
13 that it is going to take to get these 50 depositions or 50
14 or less or 50-plus, depending on how many doctors these
15 individuals saw and that there's a need to take the
16 depositions.

17 I think that if we hone in on these 10 cases,
18 then we will end up setting a benchmark for the rest of the
19 cases so we're not having when we are working on these 10
20 cases and then on the 89th case seven doctors are being
21 deposed and the allocation from the PSC is strained. It's
22 just not necessary.

23 So let's work on these 10 cases. We can hold in
24 abeyance these other cases for a period of time. You'll
25 work with the Special Masters, work out some language so

1 you know when you can start taking the depositions of these
2 other cases. Because at some point I do want those cases
3 teed up and ready to go, whether or not they are here or
4 for the other trial courts that they've come from. All
5 right?

6 Let's take a break for lunch. Do you want to
7 have a working lunch with the Special Masters or do you
8 want to separate for a while and then come back?

9 MR. BECK: Your Honor, I'm not sure that we have
10 anything left on the agenda that needs to be -- that we
11 need to come back for.

12 THE COURT: We have Special Master Haydock. He
13 has --

14 SPECIAL MASTER HAYDOCK: Your Honor, I have no
15 further report. I made my report.

16 THE COURT: All right.

17 MR. BECK: I think we've got your instructions,
18 Your Honor, and we can work out the schedule. I don't
19 know. We are happy to reconvene, but I don't think we have
20 anything else that --

21 THE COURT: Well, I want you to reconvene. I
22 want something to happen today. I want to hear something
23 happening here. I've got you here. I know that you've got
24 planes to catch, but it's early. Let's have a working
25 lunch. You can use this courtroom. You've got the jury

1 room. We've got other places that you can convene. But I
2 want you to be working on these 10 cases.

3 MR. BECK: You want a schedule for these 10
4 cases?

5 THE COURT: I want you all to work out a
6 reasonable schedule and give me a report back so we can
7 start working on it.

8 And if I have to have status conferences twice a
9 month, I will do that. Because I think you have to hear me
10 every two weeks say that I want to try a case and I want to
11 try one of these aches and pains cases.

12 I don't care if it's a good one or a bad one or a
13 medium one, we've got to set a benchmark for these so we
14 can get moving on all of these thousands of cases that are
15 not going to be settled by Bayer.

16 MR. BECK: Your Honor, in that respect, I have
17 heard reference that there may be one rhabdo case, there
18 may be two rhabdo cases.

19 THE COURT: There's three cases that may not --

20 MR. BECK: It seems to me that we are talking
21 about aches and pains cases. I mean, we can spend a lot of
22 time doing the discovery if there is a rhabdo case. We can
23 spend a lot of time and effort doing discovery on that and
24 then they will probably settle at the last minute anyway;
25 and that's not what we want to try.

1 So all I would suggest, Your Honor, is maybe we
2 ought to be focusing even more specifically on the muscle
3 injury.

4 MR. ZIMMERMAN: Very good. You are learning. I
5 move that --

6 THE COURT: Special Masters, you know what I
7 want. It's the muscle injury cases. I don't need a rhabdo
8 case that's going to settle. It is going to settle on its
9 own. It is going to settle with the good offices of both
10 sides getting together and coming to a fair resolution on
11 those cases. We've seen that, so there's just no need for
12 me to be teeing up for a rhabdo case.

13 MR. BECK: Right. I agree.

14 THE COURT: You know, if I do have to see you
15 every two weeks, I will do that because I have got to make
16 sure that you understand that we are going to be moving on
17 these things and I want reports on what's happening with
18 these depositions and what cases are going to be ready to
19 go to trial. And I know it's -- we are getting to that
20 point.

21 I think it's time that Bayer turn over these
22 other cases. They are disappearing anyway. These are the
23 cases that we are dealing with here. There are
24 Philadelphia and there are Texas cases and Mississippi
25 cases. So it's no surprise. These cases may disappear,

1 they may be tried, but I can tell you that our cases are
2 going to be tried.

3 MR. BECK: Your Honor, can you tell us when they
4 are going to be tried? I am just thinking about when I
5 work out a schedule, if Your Honor says it's going to be
6 tried March 15th, then that tells me a lot in terms of what
7 I need to do in the scheduling.

8 THE COURT: All right. Let me put it this way.
9 I am putting 120 percent of my time in this case. You have
10 my calendar. Everything else can be moved except a
11 criminal case that may pop up that has to be tried. All my
12 other cases can be moved around Baycol.

13 So understand that I am ready and willing
14 starting in January or March, whenever -- but I want you
15 all to be ready to try the cases. You have to make the
16 motions. There may be motions. There may be Daubert
17 motions that we have to set up.

18 Let's do it in the proper fashion so you have
19 enough time so we're presenting cases that are solid, that
20 if the testimony has to be used in other cases that the
21 judges can use them, and to have good cases tried here.
22 That's what I want to do. All right?

23 MR. BECK: Okay.

24 THE COURT: And so that's where my Special
25 Masters are going to come in. Whether or not you have to

1 fly in or meet with them or me every two weeks to deal with
2 these issues or be on the telephone, this is where I am
3 pushing you to.

4 MR. BECK: It sounds to me, Your Honor, in terms
5 of our planning for the schedule, that spring certainly is
6 the outer limits, we ought to be thinking about going to
7 trial in the spring.

8 THE COURT: Yes.

9 MR. BECK: Scheduling so that we have adequate
10 time to do Daubert motions, summary judgment, and go to
11 trial in the spring. Is that fair?

12 THE COURT: That's fair. I want -- you will be
13 sitting down with the Special Masters and with the
14 calendar. My calendar is open as far as you're concerned.
15 And so I want things blocked off.

16 MR. BECK: Right.

17 THE COURT: So I don't want you saying, oh, we've
18 got to rush into something and then two weeks before we
19 have a Daubert hearing everyone says, oh, we can't do it
20 because we're not prepared and then we have to kick
21 everything. That just messes up my block.

22 Give yourself enough time to be prepared and that
23 you know that your witnesses will be available and that we
24 can go ahead with those hearings and so I can make a
25 ruling. Give me enough time to make a ruling before trial,

1 so it's not like the day before, so I can -- so we can have
2 a ruling that hopefully will be used by the other courts
3 throughout the land.

4 MR. BECK: Thank you, Your Honor.

5 THE COURT: All right. Mr. Zimmerman, does that
6 help the PSC?

7 MR. ZIMMERMAN: It does, Your Honor, very much
8 and we appreciate it very much. I just have one question
9 and that has to do with, you want us to meet now with the
10 Special Masters on the things you just ordered?

11 THE COURT: Yes.

12 MR. ZIMMERMAN: Do you also want to meet with
13 counsel in chambers with regard to matters that are not
14 before the Court?

15 THE COURT: Yes, I do. Because we are moving in
16 the right direction now, the way I want us to. I think I
17 have given you my vision. Maybe I should make it a
18 little -- I can talk back in chambers on how I want to
19 triage the rest of the cases. Because we've got thousands
20 of cases. We've got to get those ready.

21 And my directive is, so you understand where I am
22 coming from, since it's evident that I did not certify a
23 class, these cases have to be ready for -- I have to have
24 them ready when they go back to the trial. And that means
25 we are going to have to do everything that we are doing for

1 trial here before they go back. Because there's no need
2 for the trial court judge to have to go through all this
3 again. Everything is going to be screened here.

4 And so what's going to happen -- is that the
5 microphone? Anything that's going to happen, all the judge
6 is going to do is go to trial or maybe have another
7 settlement conference to try to see whether or not
8 something can be settled.

9 But we are going to have the settlement
10 conferences. We are going to do everything here. These
11 cases are going to be squeaky clean before they go back.

12 MR. ZIMMERMAN: I appreciate that, Your Honor.
13 Thanks for the direction and we will --

14 THE COURT: So that should alert the PSC and all
15 the lawyers involved with this that they will have to --
16 they might as well start getting ready doing the things
17 that they have to do to gear up for trial. They are not
18 going to be able to put it off for a year or two years
19 thinking that something is going to happen.

20 They are going to have to start getting their
21 doctors ready, getting whatever medical information ready,
22 their witnesses ready, be ready for settlement conferences,
23 and then being sent back off to their districts where they
24 came from or the states where they came from.

25 I am just not going to not do anything with those

1 cases. Every case that I have is going to be screened
2 thoroughly before they go back, whether or not they are a
3 state court case or a federal case. All right?

4 MR. BECK: What time shall we come back, Your
5 Honor?

6 THE COURT: It's ten to 1:00. Flights?

7 MR. BECK: Mine is mid afternoon, but I can push
8 it back a little. I need to basically get out by about
9 4:00.

10 THE COURT: 2:30, is that enough time? You can
11 run downstairs and get something to eat and bring it back
12 up and start talking.

13 MR. ZIMMERMAN: So you want us to talk before
14 2:30?

15 THE COURT: Yes. Oh, most definitely.

16 MR. ZIMMERMAN: Back in chambers at 2:30?

17 THE COURT: 2:30 back here telling me what's
18 going on and then we'll go back in chambers for about a
19 half hour and go from there.

20 (Lunch recess.)

21 THE COURT: All right. Special Master Haydock.

22 SPECIAL MASTER HAYDOCK: Your Honor, we met with
23 the lawyers and have discussed a calendar working backwards
24 from an end of April, April 27th, trial date. And without
25 being specific as to specific times, the stages of that --

1 would you prefer I work backwards or forwards?

2 THE COURT: Whatever you feel like.

3 SPECIAL MASTER HAYDOCK: Let me work backwards,
4 then. So an end of April trial date. Preceding two weeks
5 before that with the submission of jury instructions,
6 exhibit lists, witness lists, motions in limine. And that
7 preceded by approximately a month for a hearing on the
8 summary judgment motions. Preceding a month before that
9 with a hearing on any Daubert motions. And prior to the
10 Daubert submission of motions, the completion in that time
11 period of the depositions of all generic and case specific
12 experts by both sides.

13 That particular calendar, as to the timing of the
14 disclosures, those will need to be addressed. I think the
15 parties may want to make some comments about that as well.

16 And that would take us approximately to the first
17 of the year and the plan would be to complete the
18 depositions of all the plaintiffs for certain and the
19 treating and prescribing physicians as well as the case
20 specific and generic experts by the end of 2003.

21 And that would require, working further backward,
22 that there be adequate disclosures both initially from the
23 Plaintiffs of their generic and case specific experts and
24 the reports filed a couple of weeks later by -- and this is
25 an issue that has to be addressed yet, as to whether there

1 will be simultaneous disclosures of the Defendants' and
2 Plaintiffs' case specific experts and reports or whether
3 there will be a gap there, but within that time period they
4 would have those disclosures and both of the reports and
5 the completion of the depositions.

6 And then either -- some of those depositions of
7 experts may begin before completion of some of the other
8 third party witness depositions, but most likely it would
9 be after all the plaintiff depositions, which we've
10 narrowed it down, I believe there are seven, and those will
11 be by next Tuesday submitted to the Court, those case
12 summaries, who the law firms are, and the status of the
13 medical records.

14 And so having worked backwards, let me just begin
15 from today and work forward a little bit to try to put this
16 in perspective as well and then ask for comments from the
17 PSC and Bayer.

18 The issue regarding how soon can we begin
19 depositions of the plaintiffs depends upon the adequate
20 disclosure of the medical records, and Bayer and the PSC
21 are going to meet and confer by next Tuesday as to the
22 status of the medical records. So by next Tuesday we'll
23 know, of those seven cases, what they look like. And
24 there's some supposition that some of those depositions can
25 begin sooner than others.

1 Once the medical records are disclosed and the
2 plaintiffs beginning depositions, the identity of the
3 treating physicians can be identified, the prescribing
4 physicians, which would also then trigger Bayer's ability
5 to disclose the sales representative, which Your Honor
6 ordered within a couple of weeks or so after that time
7 period and that specific time period has not yet been
8 designated. And then during that time the depositions of
9 the plaintiffs, the physicians, and then some third party
10 ones.

11 The PSC also agreed to advise Bayer as to whether
12 or not -- the identity of any third party witnesses who may
13 testify to any of the injuries the plaintiffs have
14 suffered, to be disclosed as quickly as possible so those
15 depositions can be noticed as well.

16 Questions about that, Judge? The plan would
17 be --

18 THE COURT: We are getting there.

19 SPECIAL MASTER HAYDOCK: We're getting there. I
20 am thinking as I am talking, which is always a danger for
21 me, even when I do it separately. My thought initially was
22 to try to put some date specific times on this and have an
23 order out by tomorrow under your signature. I am wondering
24 if it may make more sense now if we waited until Tuesday --

25 THE COURT: Right.

1 SPECIAL MASTER HAYDOCK: -- to see what the
2 status of those cases look like before we got into specific
3 dates.

4 THE COURT: I think that would be best. All
5 right. I'll hear from the PSC, Mr. Zimmerman.

6 MR. ZIMMERMAN: Yes, Your Honor. Thank you. I
7 don't know if we are going to be getting into some argument
8 about the things that separated us back there.

9 SPECIAL MASTER HAYDOCK: Well, let's talk first
10 about the calendar and then we can address those issues.

11 MR. ZIMMERMAN: With regard to an April 27th --
12 we are talking about seven cases that are Minnesota cases.

13 THE COURT: Right.

14 MR. ZIMMERMAN: The others are going to probably
15 be resolved. So we are really into seven cases where we
16 are going to be preparing for trial.

17 The trial dates for those seven will be targeted
18 to April 27th and we agree with two weeks prior for the
19 instructions and the limine motions and the verdict forms,
20 et cetera, one month prior to that for summary judgment
21 motion, one month prior to that summary judgment motion the
22 Daubert hearing.

23 And then we have an issue on how to disclose case
24 specific and generic experts, and I think we should just
25 separate that out for a minute because there's a certain

1 disconnect that we have with that that I think we should
2 just separate out for the moment, as to how we are going to
3 do that.

4 Then we have we are going to -- we agree to
5 depose the plaintiffs on kind of a rolling basis as their
6 medical records become available. And Peter, I think,
7 reported to us that some of them we have fairly complete
8 medical records, I think it was three or four; and three or
9 four they are pretty incomplete, if not totally absent.

10 And so we are going to make the effort to get those
11 records, but we will start with deposing first the people
12 for which we have the most complete or the complete
13 records.

14 Then we will be identifying the doctors and
15 beginning those depositions on that same kind of rolling
16 basis, because as the medical records become disclosed we
17 identify the doctors, and try and conclude all of that by
18 the end of 2003.

19 I agree with the Special Master that waiting to
20 see exactly what --

21 THE COURT: Can I ask a question here now?
22 Again, I understand -- I want to make myself clear. That's
23 a lot to be done between now and the first of the year.
24 Are you putting yourself in a bind that it won't be
25 happening and that's going to mess up my calendar? Because

1 I am blocking off time for these things.

2 MR. ZIMMERMAN: I understand that.

3 THE COURT: In fact, I'm looking at it and I
4 don't see how you can accomplish all that by the first of
5 the year.

6 MR. ZIMMERMAN: I think in seven cases we can do
7 the plaintiffs, we can do the third party witnesses
8 surrounding the plaintiffs, and we can probably get the
9 treaters done.

10 When we get into the question of four
11 depositions, which now we are beyond prescribers and
12 treaters for tangential, if not directly caused, I think
13 that will be virtually impossible.

14 I think the part that caught me was having these
15 two weeks statuses and sort of give everyone a heads-up on
16 how this is going in the real world. Because we are really
17 talking about something -- you know, we are talking about a
18 large program and we don't know how quickly and efficiently
19 we are going to be able to get it done. We can project,
20 but we don't know exactly how it's going to work.

21 And, again, from the Plaintiffs' point of view,
22 you've got to remember we're dealing with clients who are
23 retained -- who have been retained -- who have retained
24 other lawyers who may not be in the room or in the PSC. So
25 we have, you know, a communication issue there.

1 So I guess all I'm saying is we have agreed to
2 meet on kind of a two-week basis and uptick the Court at
3 that time.

4 THE COURT: Well, can I do this to help you
5 along? The lawyers that are attached to those seven cases
6 have to be here.

7 MR. ZIMMERMAN: Absolutely.

8 THE COURT: That solves that problem. So the
9 communication that -- you're not being the bad guy. I can
10 play that role.

11 MR. ZIMMERMAN: Judge, I think what you said and
12 maybe I overlooked it, I think we need more than getting
13 this done in 2003. I guess what I am trying to say is I
14 would like to make the best effort we can, but you are
15 probably right, we will probably need a little more time
16 than that to get all these four depositions of four treaters and
17 all the plaintiff witnesses and the plaintiff third parties
18 done. John just kind of handed me that note and I think
19 he's right.

20 But what we're trying to do is -- what I am
21 trying to do is not live with projections made in a vacuum,
22 but kind of uptick the Court as things are occurring so we
23 can see how we are doing and make sure that the pressure is
24 on and we are all doing the things we are supposed to do.
25 We don't know what problems we might --

1 THE COURT: Well, the pressure is going to be
2 there. And if we say by January 15th you accomplished the
3 first stages of what you were talking about instead of the
4 first -- I'll give you two more weeks. Because when you
5 are running into the holiday season, it is going to be very
6 difficult scheduling anything without causing problems for
7 everyone.

8 So I am foreseeing that -- we are October 9th
9 now. If we get started in two weeks, you are almost
10 towards the end of October. And then you've got the whole
11 month of November, which is a short month anyway, and
12 you've got Thanksgiving in there and then we move right
13 into Christmas.

14 MR. ZIMMERMAN: It's not going to happen, you are
15 right.

16 THE COURT: See, that's what I am saying.

17 MR. ZIMMERMAN: I hear you and I think we
18 should --

19 THE COURT: Not that we shouldn't be forcing
20 things to move along, but it's just going to -- we are
21 coming to the time of the year where there are going to be
22 problems.

23 MR. ZIMMERMAN: Honestly, Your Honor, there's no
24 magic to April 27th. I mean, we can move that to May 15th
25 if we have to. I don't want to put undue pressure on the

1 Court and Counsel. I want to do it right.

2 So as much as I don't want any of these dates to
3 slip, I mean, we spent ten minutes talking about
4 Christmas -- I mean talking about the Easter holiday and
5 the fact that we couldn't have a trial in the early part of
6 April because kids are out of school and the jury pool may
7 not be around. And so we have to take these things into
8 account and we are trying our best.

9 THE COURT: For Easter, just forget about that
10 because there's a wide spread of the schools having their
11 Easter breaks. So there's no common date anymore for that.
12 It almost runs a six-week period just in the Twin Cities
13 area that the schools are out at different times. So don't
14 worry about that.

15 MR. ZIMMERMAN: I'm just saying --

16 THE COURT: The holiday I am concerned about is
17 Christmas because that's when people really have their
18 plans.

19 MR. ZIMMERMAN: The big issue after we get
20 through this first deadline of doctors, treaters,
21 witnesses, and plaintiffs is going -- is the how we are
22 going to disclose generic experts, when we are going to
23 disclose them, and the time for the depositions.

24 The other big issue is how quickly the Defendants
25 can provide us with the detail information, because the

1 detail information is critical to the deposition-taking of
2 especially the prescriber and the importance of that to us
3 we've argued to the Court.

4 The third issue that is very, very important to
5 us is an issue that was raised by Mr. Beck, is he wanted to
6 be able to either prevent the Plaintiffs from talking to
7 the treating or prescribing doctors or for the Defendants
8 to have some kind of access -- that would not be
9 authorized, I believe, under at least Minnesota state
10 law -- access to the treating doctors or the prescribing
11 doctors prior to the deposition.

12 This is a huge issue. I think we probably all
13 need to do a little research on what the Minnesota law is
14 because we are all kind of spouting what we believe is
15 Minnesota law and practice on that. And I frankly don't
16 know.

17 I think Mr. Remele made a comment about it in
18 chambers, that the practice in Minnesota is that the
19 Plaintiffs can talk to their doctors, but the Defendants
20 can't or shouldn't.

21 I would like to look at that. I have made a call
22 to our office to do some research on it. But I think we
23 all should look at that issue and see what the law is
24 before we snap to judgments on that. But that's a
25 sensitive issue.

1 I think those are the issues that we talked about
2 and the issues that we have to resolve today or soon.

3 THE COURT: Well, if we have to resolve them
4 today, let's talk about them.

5 MR. ZIMMERMAN: Okay.

6 THE COURT: How soon do you want to start the
7 depositions?

8 MR. ZIMMERMAN: We think we can start the
9 depositions -- well, the Defendants, I believe, are going
10 to start with the plaintiffs' depositions and we can start
11 those depositions within ten days or two weeks, but their
12 concern is that they not start them until they have their
13 records. And I don't know exactly how long -- they do
14 their own retrieval of records. They have some. They
15 don't have them all.

16 So we have to get -- you know, the getting of the
17 records is the first thing and I guess my idea was doing it
18 on a rolling basis. There's seven people. If they've got,
19 you know, records on the first three, notice those
20 depositions up and as the new records come in notice them
21 going forward.

22 I think we can certainly start those within a
23 week or two weeks, depending on the availability of
24 records. Is that --

25 MR. BECK: Your Honor, we can start right away on

1 a few of them. I think we are talking about, I guess,
2 seven plaintiffs now and I'm told that for three or four of
3 them, maybe three of them, their cases were just filed, you
4 know, in the last couple of months, so we haven't gotten a
5 chance yet to retrieve those records.

6 We're told by Mr. Goldser that even though we
7 haven't retrieved them, they've got a set that's probably
8 as good as we are ever going to get. We said, Fine, send
9 those over to us.

10 So we are ready to move quickly and to start
11 deposing the plaintiffs, you know, within four or five days
12 of our receipt of the -- or review of the medical records.
13 So we can get that underway within a couple of weeks.

14 Typically taking a plaintiff's deposition is not
15 a huge deal. It's not a multiday deposition, that sort of
16 thing. So they shouldn't take that long. We recognize
17 that, you know, the plaintiffs may themselves have
18 scheduling issues and we may not be able to get everybody
19 right when we want, but we can get a good head start.

20 Your Honor, I believe that an April 27th trial
21 date is doable, but if I may comment on the different
22 things that have to be done.

23 I think that the plaintiffs -- the depositions of
24 the plaintiffs, we are talking about seven depositions that
25 are going to be -- I would be surprised if any of them went

1 more than a day. They're not that hard to do and they
2 won't take that much time.

3 In terms of third parties, the only third parties
4 that we're really anticipating would be spouses or children
5 or others who the Plaintiffs expect to call as witnesses to
6 talk about what a difficult time poor old Mrs. Withers had.
7 So it's not going to be a lot of third parties.

8 And those, too, should be short depositions.
9 They are the kind of depositions about, you know, he had a
10 hard time walking around and beforehand he could go to the
11 VFW Hall and dance and now he walks with a cane. It is
12 going to be that kind of a thing. And those should be
13 fairly straightforward and easy to do over the next month
14 and a half or so and nothing needs to wait -- nothing else
15 needs to wait for those things to get done.

16 The doctors -- you know, Mr. Zimmerman now says,
17 you know, four treaters for every case. The Court ruled we
18 could take up to four. We explained that the number that
19 we'll take will depend on the nature of their case. There
20 may be four. There may be two. There may be one.

21 But the doctors also are, you know, relatively
22 short depositions, not super long, largely because the
23 doctors won't stand for it if it's super long. And there
24 we need the medical records, as they do, and they need our
25 sales rep records.

1 In terms of the sales rep records, what we said
2 was that to get what we think they'll want in terms of
3 completeness, in other words, not just stuff that we have
4 readily available in our files, but stuff from the
5 individual sales reps themselves, including in some cases
6 former employees, so it is going to be a little hard for us
7 to track them down, that realistically from when we find
8 out who the doctors are, which in some cases we don't know
9 yet because we don't have the medical records, then for us
10 to gather what we think will be a pretty complete set of
11 these detail records could take up to three weeks. For
12 some we may be able to get them sooner.

13 But in the meantime there's plenty of other
14 things to do during that three-week period before they get
15 those documents and then do the depositions. I'd be surprised
16 if they would be prepared to start taking doctor
17 depositions, you know, within three weeks of telling us who
18 the doctors are. So I don't think that that is -- that
19 giving us that time is going to cause any sort of delay at
20 all.

21 So I see all of this and I say, you know, over
22 the next couple of months, taking into account, you know,
23 Thanksgiving and Christmas, still getting that side of the
24 case, which I think of as the factual side of the case,
25 including the medical -- you know, the case specific doctor

1 stuff, done by the end of the year should be very doable
2 with seven plaintiffs and all of these lawyers for both
3 sides.

4 To me the only question on whether we could
5 commit to a late April trial is how we are going to deal
6 with experts, and I think that there there are two
7 categories of experts.

8 One, which may be the more important category,
9 are the generic experts, you know, what is their theory
10 here for what was wrong with Baycol when it comes to aches
11 and pains or, as they call it, muscle soreness; you know,
12 in what way were the warnings inadequate; you know, in what
13 way was Baycol any worse than any other statin or any
14 different from any other statin; what's the underlying
15 theory of liability here. Those generic experts are going
16 to be the ones who are likely to be the subject of Daubert
17 motions and summary judgment motions.

18 And I don't -- for the life of me I cannot
19 understand why at this late date the Plaintiffs' Steering
20 Committee is standing up and saying that they are not ready
21 to go right away with these guys.

22 When I was here arguing about class certification
23 they said that they could get all that done in two months.
24 They said they had all their people lined up, they had all
25 their reports ready to go. When we were here a couple of

1 months ago they said, Well, we have some of the reports,
2 but we don't have all of the reports.

3 THE COURT: I am trying to get a schedule here.

4 MR. BECK: Yeah, and I am saying that the generic
5 experts ought to be disclosed in a month and they should be
6 giving us the reports that they said they had written.

7 THE COURT: I haven't heard from Mr. Zimmerman
8 when the generic --

9 MR. BECK: But I have. That's why I get
10 exercised about it.

11 THE COURT: It may change once Mr. Zimmerman
12 talks to me about it. Let's wait before you get --

13 MR. BECK: So my proposal in terms of a schedule
14 is that within 30 days they provide their generic expert
15 reports and that we take their depositions -- the
16 depositions of the generic experts, I think I had said in
17 there three weeks, but we could probably shorten that to
18 two to three weeks later, recognizing we are going to be in
19 December.

20 We will do anything in terms of timing, but their
21 experts may have issues when it comes to timing, but we
22 will commit to taking their depositions within a couple of
23 weeks of getting their reports. And then our generic
24 experts can file their reports a few weeks after the
25 deposition and they can take our generic experts within a

1 couple of weeks.

2 And so at least for the generic experts we could
3 be done with the discovery by early 2004 and recognizing
4 that the case specific experts, if they have any, we may be
5 talking about doing those in January, potentially spilling
6 into early February.

7 But I don't think there's going to be a lot of
8 those. I mean, we are talking about people whose basic
9 claim is I took this pill and I had muscle aches
10 afterwards. You know, I don't think they are going to
11 have, you know, six or seven case specific experts.

12 So I think it's doable if the Court holds their
13 feet to the fire on generic experts, and I think that's the
14 big bogey.

15 If not and if it is decided that that's too
16 burdensome and they shouldn't have to produce these reports
17 they have been talking about until sometime next year, then
18 frankly we're not going to be going to trial, I don't
19 think, until sometime late in the summer because we are
20 going to have Daubert hearings, we are going to have
21 summary judgment hearings.

22 If we delay the generic experts, all that gets
23 pushed back and we're not looking at the spring. But I
24 think we ought to be looking at the spring and we can do
25 it.

1 THE COURT: All right. Mr. Zimmerman.

2 MR. ZIMMERMAN: First off, before I get into the
3 subject of experts, I do think that the record should
4 reflect that we want to have a nondestruct order on the
5 detail records that the Court has now ordered to be
6 produced.

7 It may be covered by the original nondestruct,
8 but we are talking here about people who they say are no
9 longer employed, may no longer be employed, may not be in
10 control.

11 I think the orders of the Court should include a
12 nondestruct on the detail records that the Court has
13 ordered to be provided. It's the right thing to do, I
14 believe.

15 MR. BECK: Does that include people who aren't --
16 I don't represent them. They are not parties in the
17 litigation. We are obviously not destroying any of our
18 records. We don't even know who the people are yet and so
19 I don't know whether anybody is cleaning out their garage
20 this week or not, but there's nobody to order since we
21 don't know who they are right now.

22 MR. ZIMMERMAN: Secondly, with regard to the
23 question of experts, first generic experts, the issue of
24 generic experts is an issue that we have been bouncing
25 around for some time.

1 And I want to tell the Court that we want to
2 provide in a reasonable period of time the experts so that
3 we can have the appropriate discovery and Daubert hearings.
4 We are not trying to play any games with that.

5 As the Court knows and I know, as everyone in
6 this courtroom knows, the issue of experts has become very
7 proprietary with all kinds of people around the country,
8 whether they be an FDA expert, a labeling expert, a
9 mechanism of injury expert, a person who will demonstrate
10 what damages were caused to the muscles by Baycol on a
11 class-wide basis.

12 We want to disclose those, we want to do it in a
13 timely basis, but honestly, Your Honor, we have not focused
14 on the preparing of those reports or the -- we have secured
15 many of these experts, we have consulted with them, but we
16 do not have their reports because up until today we didn't
17 have a trial date. We now have a trial date. We want to
18 do it promptly and to keep the trial date.

19 So here's my suggestion. We disclose, say, by --
20 let's see, we are in October; November, December -- the
21 middle of December the experts and the report on the
22 generic basis. They then disclose their experts and their
23 reports. Then we have the depositions of our experts and
24 the depositions of their experts.

25 Now, recognize we are probably talking about four

1 or five or maybe six experts: FDA, labeling, mechanism of
2 injury, why Baycol is not as safe as other statins, that
3 kind of thing. And then we will have -- so we are not
4 talking about a great deal of depositions, important
5 depositions, yes, but not a great deal; four on this side,
6 four on that side.

7 We'll each disclose our reports. Say we disclose
8 ours on the 15th of December, they disclose theirs the
9 first week in January. We take the entire month of
10 February to depose. Daubert motions, you know, in March,
11 like the Court asked for, I think a month ahead, two months
12 ahead.

13 We're pretty close. Now, if that has to get
14 moved a little bit one way, if you say to me it has to be
15 done on December 1st, sure, we can do that, but the point
16 is to do it well.

17 Politically I have to go out and retain experts
18 that may have been retained in other cases and have been
19 prepared for trial in other jurisdictions. It's not as
20 simple as it is for Bayer, who has direct relationships
21 with all of these experts because they've been working with
22 them on a regular basis.

23 We have a field of lawyers that we have to go to
24 and say, Now, you have an expert on FDA. Can we use him in
25 this -- him or her in this Minnesota case; and if so, under

1 what arrangement?

2 That's part of the LAC problem and the Special
3 Master saw it loud and clear yesterday. People are very
4 proprietary about these experts. So we have to go out and
5 we have a different problem than the Defendants do.

6 I am just trying to do it in a realistic way. We
7 know we have to do it. We will do it. We are going to be
8 prepared, but we don't want to have this done in an unfair
9 or inappropriate way.

10 So I am suggesting the middle of December. I am
11 suggesting for theirs two to three weeks later. Then the
12 depositions -- we are talking about the depositions of
13 maybe four on each side. That can take place in a matter
14 of three or four weeks, it seems to me. If we need more
15 time, we will know it.

16 And we have the Daubert motions that they want to
17 have on these issues. We are not going to bring the
18 Daubert. Most likely than not, they are going to bring the
19 Daubert. We will proceed to go to trial at the end of
20 April. I think that works.

21 What my concern is, what my concern is is that we
22 have a level playing field with experts: We disclose, they
23 disclose, they depose, we depose. What they suggested in
24 the back chambers was we disclose, they depose; then
25 whatever is left after we disclose and they depose, then

1 they will issue their report and we depose. I think the
2 rules provide otherwise. I think what would be fair would
3 be otherwise. That's the issue on generic experts, Your
4 Honor.

5 MR. BECK: Your Honor, on the generic experts,
6 Mr. Zimmerman said --

7 THE COURT: What timetable do you want?

8 MR. BECK: We want the generic experts' reports
9 from them in a month. And whether we take the depositions
10 first and then have ours a few weeks after that or whether
11 we take, you know, three weeks and give our reports and
12 then do depositions at the same time, it's not that
13 important to me.

14 I think it makes more sense for us to take the
15 depositions so that our reports will be fully responsive,
16 but if that's a big deal we can do it the other way.

17 In terms of what they've said about the generic
18 experts, it's amazing to hear Mr. Zimmerman say that up
19 until today they've never really thought about getting a
20 report because they didn't have a trial date.

21 Your Honor told us two or three months ago that
22 we ought to be focusing all of our efforts toward a spring
23 trial and to say that they haven't worked with the experts
24 to get reports, you know, they told -- when Mr. Zimmerman
25 spoke at that Mealey's conference and urged everybody to

1 file their aches and pains cases here, he said, We're the
2 people who have the experts lined up, we're going to do the
3 reports and then farm them out to people around the
4 country. And now what he is saying is we don't have any
5 experts, we're going to try to get them from people around
6 the country.

7 THE COURT: Generic experts to be disclosed on
8 December 1st. Then you work -- where's Roger? You work
9 from there.

10 SPECIAL MASTER HAYDOCK: Okay, Judge.

11 MR. ZIMMERMAN: Is that both sides, Your Honor,
12 or just the Plaintiffs?

13 THE COURT: Both sides.

14 MR. BECK: Your Honor, we don't know what generic
15 subjects they are going to cover.

16 THE COURT: How much time do you need after
17 December 1st to disclose yours?

18 MR. BECK: To give our reports, our reports are
19 going to be in response to theirs.

20 THE COURT: Right. I am asking what --

21 MR. BECK: Three weeks.

22 THE COURT: I will give you four weeks.

23 MR. BECK: Four weeks would be -- I am told one
24 of the weeks is going to be blown away with Christmas.

25 THE COURT: That's right. Let's say five weeks.

1 MR. BECK: Five weeks.

2 THE COURT: It will be the second week in
3 January.

4 MR. BECK: Thank you.

5 THE COURT: January 12th.

6 MR. BECK: Thank you.

7 SPECIAL MASTER HAYDOCK: That's six weeks.

8 MR. ZIMMERMAN: There's a place where --

9 THE COURT: Let's move on. I'm sorry?

10 MR. ZIMMERMAN: That seems to be a place where we
11 are losing a lot of time. Why would they need six weeks?

12 THE COURT: I am sure Mr. Beck will have them to
13 you before that time, but we are taking into account the
14 holiday season and we'll go from there. Is that all right?

15 SPECIAL MASTER HAYDOCK: January 5th.

16 THE COURT: The 5th, all right. And you all can
17 work out --

18 MR. BECK: I thought we had the 12th.

19 THE CLERK: I took off a week for Christmas, so I
20 counted five weeks other than that. That's where I got the
21 12th.

22 THE COURT: Let's use the 12th.

23 SPECIAL MASTER HAYDOCK: Do you want to use the
24 12th?

25 THE COURT: Yeah. But I am sure you will have

1 them by the 5th, so it doesn't matter.

2 MR. BECK: Your Honor, if we get some of them
3 done on December 20th, we will get them to them on December
4 20th.

5 THE COURT: Exactly.

6 MR. BECK: We won't wait and send them all on the
7 12th.

8 THE COURT: That would be helpful.
9 Let's move on to the next issue. Mr. Zimmerman, you want
10 to talk about the specific experts. Is that taken care of?

11 MR. ZIMMERMAN: I believe, although we don't have
12 a date for it, Your Honor, I think that on case specific
13 experts, normally that is --

14 THE COURT: The doctor.

15 MR. ZIMMERMAN: -- the doctor who is connecting
16 the injury with the medicine. And my sense is that that is
17 not, as Mr. Beck said, going to be the subject of Daubert
18 hearings. And I think if we had those -- I don't know.
19 Maybe we should have those 45 days before trial, 60 days
20 before trial.

21 MR. BECK: They may very well be the subject of
22 Daubert motions. They are not as big a deal in this case.
23 If it's just a doctor connecting the dots, it seems to me
24 that during that month period where we're writing -- we are
25 having our experts work on their responsive reports, that

1 by early January they ought to be able to tell us who their
2 case specific experts are.

3 And then while we are both taking depositions on
4 the generic experts, we can have whatever responsive
5 reports are done on the case specific experts within a
6 month of that and we would have all that teed up in
7 February.

8 MR. ZIMMERMAN: It seems to me I think the
9 federal rules provide, I thought I saw it, 90 days before
10 trial is when expert reports are normally due and we are
11 talking about -- now we are not talking about generic,
12 which we have a different rule for. That's going to be 120
13 days, I think, or 100 days before. So maybe we should
14 apply that 90-day-before-trial rule. That would seem
15 appropriate.

16 MR. BECK: Well, Your Honor, I think that a lot
17 of judges hold Daubert hearings two days before the trial
18 begins; and Your Honor is not going to do it that way.

19 THE COURT: No.

20 MR. BECK: And I think that that is awfully
21 smart. You are going to do it a couple of months before
22 the trial begins. So if we follow the federal rules'
23 default, then we will have missed the boat.

24 So obviously we need to adjust that in light of
25 the fact that Your Honor wants to have the Daubert

1 hearing -- and remember, now, the Daubert hearing, it isn't
2 just a day. We have to file briefs, there has to be
3 argument. That whole process takes a month.

4 So if we do 90 days, then there's no way that
5 we'll be ready to get to trial within 90 days of -- if we
6 have a Daubert hearing and summary judgment hearing. So it
7 seems to me that the Court ought to exercise its discretion
8 to adjust that timetable and move it back.

9 THE COURT: All right. Mr. Zimmerman.

10 MR. ZIMMERMAN: If we are going to be focusing on
11 the generic experts between now and December, I think we
12 would like to focus on the case specific experts after
13 that.

14 It seems to me we could disclose those the end of
15 January, the middle of January. Does that seem
16 appropriate? We are talking about the end of April, so
17 we've got all of February, all of March, all of April, and
18 half of January. That's 105 days.

19 MR. BECK: If he did it at the end of January --

20 MR. ZIMMERMAN: I said the middle of January.

21 MR. BECK: Okay. If he does it the middle of
22 January and then we do ours, you know, three or four weeks
23 later and then we have depositions, we are talking about
24 the end of February before we've completed the discovery on
25 case specific experts.

1 Then we would have to have briefing on a Daubert
2 hearing. We would have to have a Daubert hearing. We
3 would have to have the Court have time to issue a ruling on
4 the Daubert issues. That potentially would be followed by
5 summary judgment motions, which would have to be briefed,
6 argued, decided. All of this is in advance of trial. So I
7 just don't think it works to wait that long.

8 And they're not going to be working on generic
9 experts during December, we are. Their work will be done
10 on December 1st on generic experts and so they can devote
11 that month to case specific experts while we're working on
12 the generic -- on the responses to their generic experts.

13 MR. ZIMMERMAN: First off, we're not going to be
14 finished with the depositions of the doctors until, as the
15 Court indicated, sometime at the end of the year, middle
16 of -- we can't do the case specific expert reports until
17 that discovery is done.

18 THE COURT: Give me a date.

19 MR. ZIMMERMAN: January 15th.

20 THE COURT: Done, January 15th.

21 MR. ZIMMERMAN: Would they be simultaneous on
22 those, Your Honor? It seems to me --

23 THE COURT: Mr. Beck, what's your position on
24 that?

25 MR. BECK: We can't be simultaneous because we

1 don't --

2 THE COURT: How much time do you need, then?

3 MR. BECK: One month.

4 THE COURT: All right. February 15th. What's
5 February 15th?

6 THE CLERK: It's a Sunday. February 16th.

7 THE COURT: February 16th.

8 MR. ZIMMERMAN: I think that leaves, Your Honor,
9 the issue of discussions with doctors. And like I said, I
10 don't -- you may know the Minnesota rule better than I on

11 that. I would have to take a look at it. I know there is
12 some rule on that. We would vigorously object to the

13 Defendants having an open sesame access to that after --

14 THE COURT: Our next status conference will be,
15 what, in two weeks so we can see where we are at?

16 SPECIAL MASTER HAYDOCK: Two weeks.

17 THE COURT: So let's have that --

18 MR. ZIMMERMAN: Teed up then.

19 THE COURT: -- teed up for that. What's the
20 two-week date?

21 THE CLERK: The 23rd.

22 THE COURT: The 23rd at 9:30 is our next status
23 conference.

24 MR. BECK: When is it?

25 THE COURT: October 23rd.

1 MR. ZIMMERMAN: Your Honor, I think there's a
2 seminar in New Orleans.

3 MR. BECK: And the World Series.

4 THE COURT: Oh, that's right. That's the one I'm
5 not going to.

6 MR. BECK: Oh, you're not. Then I'm not going
7 either. I was on your panel.

8 UNIDENTIFIED SPEAKER: I won't either because I
9 was on your panel also.

10 MR. ZIMMERMAN: I do have a Propulsid hearing on
11 the 23rd.

12 THE COURT: I told them that I was not going.

13 MR. BECK: Well, they didn't tell me.

14 THE COURT: Hmm?

15 MR. BECK: I said they didn't tell me that you
16 told them you weren't going. That day --

17 MR. ZIMMERMAN: Is that the World Series?

18 MR. BECK: Can I have permission to turn on my
19 BlackBerry, Your Honor?

20 THE COURT: Oh, of course.

21 MR. BECK: This is awfully wishful thinking.

22 THE COURT: Just as long as you have regulation
23 batteries in it so it doesn't explode on us.

24 MR. BECK: Right. Scheduling around the Cubs in
25 the World Series, this doesn't happen very often. Let's

1 enjoy it.

2 THE COURT: I think I would want to be watching
3 TV. At the same time while you are at the game, I will be
4 watching it.

5 MR. BECK: Yeah, they are at home that day.
6 Hopefully they will be at home against Boston.

7 MR. ZIMMERMAN: Seriously?

8 MR. BECK: And I have -- it's a family thing, I
9 have to be at Bernie's Tavern across the street early, so
10 the 23rd doesn't work for me.

11 MR. MAGAZINER: The 24th?

12 MR. ZIMMERMAN: No, it doesn't work for me.

13 MR. BECK: Well, the 24th they're also --

14 THE COURT: Let's go to the next week, then. No,
15 I'm going to be out of -- hopefully I will be out of town.
16 No, I don't want to hope because I want my son in the state
17 tournament. I am in a quandary on this.

18 MR. ZIMMERMAN: How about the next week?

19 THE COURT: Let's got to the first week in
20 November.

21 THE CLERK: We have that big Laotian trial.
22 November 6th -- oh, you have FISA.

23 MR. ZIMMERMAN: What's the week after the 23rd?

24 THE COURT: What about the 5th?

25 MR. SIPKINS: Can we do it earlier in the week?

1 THE COURT: Yeah, that's what I'm saying, like
2 Monday or Tuesday.

3 THE CLERK: The 5th we are in a criminal trial.

4 THE COURT: Which one?

5 THE CLERK: We are in a criminal trial all that
6 whole week, almost the whole month.

7 THE COURT: Which one is it?

8 THE CLERK: The six Laotian defendants.

9 THE COURT: Yeah, but this is only going to take
10 an hour or two. The status conference is not going to take
11 longer than two hours.

12 MR. MAGAZINER: Would Monday, November 3rd, work
13 for the Court?

14 THE CLERK: We could do like 10:00 -- on November
15 3rd we could do 10:00.

16 THE COURT: Yeah, let's do it then.

17 MR. BECK: Can I just look at --

18 MR. ZIMMERMAN: To see if the Bears don't play --

19 MR. BECK: No, no. November 3rd we are talking
20 about?

21 THE COURT: Yes.

22 MR. BECK: I am not that good at this. I think
23 it's okay. Yes.

24 THE COURT: November 3rd at 10:00.

25 MR. ZIMMERMAN: And at that time we will brief

1 and argue this question of contact with the doctors?

2 THE COURT: Yes. Well, probably after you look
3 at the law you won't have to argue it.

4 MR. ZIMMERMAN: Okay.

5 THE COURT: It's a very -- if I remember right,
6 it has been almost ten years, but it's a simple rule.

7 MR. ZIMMERMAN: I know. I just haven't looked at
8 it for a while.

9 THE COURT: Whatever it is, it's simple.

10 MR. SIPKINS: If I can just very briefly address
11 that, Your Honor? I think we should wait until the 3rd to
12 argue it, but --

13 MR. ZIMMERMAN: Argue it anyway?

14 MR. SIPKINS: No. I'm simply responding to your
15 remarks, Mr. Zimmerman. At least two of the judges in this
16 district court, Judge Rosenbaum and Judge Doty, have held
17 that the state court rule, which I am sure you are familiar
18 with from your time on the state bench, is that you can't
19 have contact with the treating physicians. That rule does
20 not apply at least in the courts of Rosenbaum and Judge
21 Doty. They have held for more than ten years that that
22 rule does not apply in federal, it's a procedural rule and
23 not a substantive rule. So I think we should brief that
24 issue and we should submit it.

25 THE COURT: All right, might as well see that

1 issue on November 3rd. You don't need me -- do you need me
2 to tell you what dates to turn in your briefs and all that?

3 Probably so.

4 MR. BECK: No.

5 THE COURT: Do you really think you can handle
6 that one?

7 MR. BECK: We are just going to file our
8 authorities, Your Honor, and we're not going to ask to
9 respond or anything. We will just file a memo on it
10 sometime before then.

11 THE COURT: I hope it will be a day before the
12 hearing so we can have a chance to look at it.

13 MR. BECK: We will, Judge.

14 THE COURT: Okay.

15 MR. BECK: I'm certainly not going to try to get
16 anybody angry at me about the briefing on this one.

17 THE COURT: All right. We are still on for
18 April 27th for trial, it looks like. Any other dates that
19 we have to haggle over?

20 MR. MAGAZINER: Your Honor, February 16th for
21 case specific expert reports from Defendants. Thereafter
22 we would need an opportunity to take the depositions of
23 each other's case specific experts --

24 THE COURT: Correct.

25 MR. MAGAZINER: -- have an opportunity to file

1 Daubert motions and respond to Daubert motions and to argue
2 them, and potentially also to file summary judgment
3 motions. I think April 27th -- I don't think it is going
4 to be much of a delay beyond April 27th. Susan is working
5 it out right now.

6 MS. WEBER: It depends on whether we have the
7 same sort of gaps or delays that Special Master Haydock
8 previously told us you usually prefer. If we allow even,
9 what, three weeks to take those deps on the theory that
10 there wouldn't be that many of them, that's going to take
11 us into early March. And then briefing the Daubert
12 motions, that's probably going to take us into early April,
13 so we could have a Daubert hearing mid April. And then on
14 the schedule I think Special Master Haydock described, a
15 summary judgment hearing a month after that, so that's mid
16 May. And then a couple of more weeks after that for
17 motions in limine. So we would be looking at some kind of
18 June date for a trial following your usual schedule for
19 briefing.

20 THE COURT: Give me a June date.

21 THE CLERK: June 7th.

22 THE COURT: June 7th, that's it. It was June 6th
23 last year. We'll move it a day.

24 MR. BECK: What day is June 7th?

25 THE CLERK: It's a Monday.

1 MR. HOEFLICH: It's nice to avoid D-Day this
2 time.

3 THE COURT: Is that agreeable to the PSC?

4 MR. ZIMMERMAN: There was another issue. I don't
5 know --

6 THE COURT: First the trial date, does that sound
7 reasonable to the PSC?

8 MR. ZIMMERMAN: Yes, Your Honor, June 6th --
9 June 7th.

10 THE COURT: You sound like you have --

11 MR. ZIMMERMAN: Disappointment in my voice?

12 THE COURT: Yes. What day do you want?

13 MR. ZIMMERMAN: My birthday is August 17th, but I
14 don't want to -- no, I am just kidding. That's fine, Your
15 Honor. I'm sure the time will be well spent. You know, we
16 want to get this going, but I think given the things we are
17 trying to accomplish, I don't think there's any reason
18 to --

19 THE COURT: You want it sooner; is that what I am
20 hearing?

21 MR. ZIMMERMAN: No. I am just saying I didn't
22 quite follow how we got from April to June, but Susan's
23 logic seems to have got us there.

24 THE COURT: We were at the end of April anyway,
25 like the first week of May, and so all we have done is

1 continued it for a month --

2 MR. ZIMMERMAN: I don't think that's a problem at
3 all.

4 THE COURT: -- or six weeks or five weeks or
5 whatever it is.

6 MR. ZIMMERMAN: I have no problem with that, Your
7 Honor.

8 THE COURT: I want to make sure that you --

9 MR. ZIMMERMAN: I'm fine with it.

10 THE COURT: Mr. Beck, I am assuming that you are
11 fine with that date?

12 MR. BECK: Yes, Your Honor.

13 THE COURT: All right.

14 MR. ZIMMERMAN: We do have one other --

15 THE COURT: Do you have that down?

16 SPECIAL MASTER HAYDOCK: I do, Judge.

17 THE COURT: Make sure it's in red.

18 SPECIAL MASTER HAYDOCK: Bold.

19 MR. ZIMMERMAN: One of the other issues, I don't
20 know if we are to address it now.

21 SPECIAL MASTER HAYDOCK: Yes.

22 MR. ZIMMERMAN: I guess we are.

23 SPECIAL MASTER HAYDOCK: Other cases?

24 MR. ZIMMERMAN: Yes. We had understood --

25 THE COURT: Before we get there, how many days of

1 trial are we going to have, how many hours am I going to
2 give each side?

3 MR. ZIMMERMAN: Well, we had talked about that.
4 I think Mr. Beck had thought approximately two weeks. We
5 thought two to three weeks. I think we are pretty safe in
6 that time frame. Our --

7 THE COURT: Do you know which trial it is going
8 to be, which one?

9 MR. ZIMMERMAN: We are thinking all seven.

10 MR. BECK: We're not thinking all seven. I mean,
11 the Court had indicated in an earlier ruling that you would
12 take up later the question of which case gets tried and if
13 they are consolidated and if they are not.

14 I doubt very much that we would accept the
15 proposition that these cases are so similar that they
16 should all be tried together. We are going to likely have
17 different doses, different times. All the things that made
18 the cases -- the individual facts predominate for class
19 certification purposes are also, I think, going to make a
20 consolidated trial inappropriate.

21 My guess, incidentally, is that a couple of these
22 cases will fall by the wayside before we get there and then
23 the Court is going to have to decide which case goes. Or
24 if Mr. Zimmerman thinks it ought to be a consolidated
25 trial, he can raise that and we can argue it and then the

1 Court will decide. But we do not, emphatically do not
2 believe that a consolidated trial is appropriate.

3 THE COURT: I'll just wait for any motions on
4 that to decide that and hopefully it will be before the day
5 before trial.

6 MR. ZIMMERMAN: Your Honor, I don't know if the
7 Court had ruled on the issue of nondestruct or whether it
8 just took that under advisement. I just wanted to make
9 sure that that was --

10 THE COURT: I haven't ruled on it yet.

11 MR. ZIMMERMAN: Okay. The other issue we have
12 has to do with when we do the rolling start on the other 90
13 cases. And I had thought the Court had said we are going
14 to really focus on these Minnesota cases first. Obviously
15 we've got a lot of work to do on that and we should get
16 started on that.

17 The question is when do we start the program with
18 regard to the other program cases, the other 90 or so? It
19 was our suggestion that we wait a while. It was my
20 suggestion --

21 THE COURT: What date?

22 MR. ZIMMERMAN: To start?

23 THE COURT: Um-hmm.

24 MR. ZIMMERMAN: December, January time frame.
25 Let's say December 10th. I don't know if that's a Monday.

1 I'm just picking a date. I think getting this program
2 going is more important right now than starting the second
3 round. So I would say December 10th.

4 MR. BECK: We think we ought to start in about a
5 month. We are talking about different teams of people from
6 the Plaintiffs' point of view. It's predominantly Weitz &
7 Luxenberg cases, the other ones. They don't have any of
8 these seven cases and so they can work on these cases
9 independently of what the people who are going to try any
10 one of these seven are going to do and we shouldn't let
11 those things just languish back there.

12 We are prepared to put the resources on it.
13 We won't be unduly burdening the PSC since the PSC are not
14 the ones who have to defend the depositions of the
15 plaintiffs.

16 And all we are really talking about getting
17 underway here with the other cases is taking the
18 plaintiffs' depositions, seeing if they show up -- maybe
19 they won't and some of the cases will go away -- taking the
20 third parties, taking the doctors.

21 You know, Mr. Zimmerman and his trial team don't
22 have to be involved in any of those and we're prepared to
23 put the resources on it so that when we get done with this
24 trial in June, the other cases will be well along the way
25 in terms of their preparation instead of sort of just

1 getting underway.

2 MR. ZIMMERMAN: Maybe I misspoke. I was saying
3 we start in December. I wasn't saying June. I wasn't
4 saying wait until the end. I was saying getting started in
5 December so they will be six months in the program by that
6 time.

7 MR. BECK: Especially dealing with -- I will
8 leave out who we are dealing with, but if we talk about a
9 mid December time for getting started, it's awfully easy
10 for that mid December start date to --

11 THE COURT: November 17th.

12 MR. BECK: Thank you, Your Honor.

13 MR. ZIMMERMAN: I believe that's all we have from
14 the meetings we had this afternoon.

15 THE COURT: Dealing with the nondestruct order.
16 Today is the 9th. I would need something from both sides
17 by next Thursday stating your positions on how that
18 nondestruct order should be structured. So something in
19 writing to me by the 16th by 12:00 noon.

20 MR. ZIMMERMAN: You want like a proposed order?

21 THE COURT: Yeah, a proposed order so I can see
22 exactly what you are talking about. Next Thursday, the
23 16th, just a proposed order and a one-page letter. I don't
24 need a 20-page brief on that. From both sides I would like
25 that.

1 MR. ZIMMERMAN: Simultaneously?

2 THE COURT: Simultaneously.

3 UNIDENTIFIED SPEAKER: Exchanging, Your Honor?

4 THE COURT: Yes, of course, exchanging. Not
5 under seal so I have to walk downstairs and get it.

6 MR. ZIMMERMAN: I am not responsible for that
7 one.

8 THE COURT: Anything else, Mr. Zimmerman?

9 MR. ZIMMERMAN: No, Your Honor.

10 THE COURT: Mr. Beck?

11 MR. BECK: No, Your Honor.

12 THE COURT: All right. Mr. Haydock, do you
13 have --

14 SPECIAL MASTER HAYDOCK: I think my plan would be
15 to have a telephone conference call a week from Wednesday
16 and then finalize the -- because I would like to see where
17 those seven cases are with regard to the medical records.
18 So I will schedule that with the attorneys, Judge, and I
19 will draft an order incorporating those dates that you've
20 given us today.

21 THE COURT: All right. And the Defendants are to
22 turn over the same trial lists that they've given me. I've
23 ruled on the class certification. All those issues that
24 may have caused Defendants problems are now alleviated and
25 so now the PSC can see the other trials and they will see

1 what I have been seeing, that they disappear, and so
2 they'll know which ones are going to go to trial.

3 You know the Philadelphia ones. I doubt if they
4 are going to be ready. It doesn't sound like you are on a
5 fast track out there. So there may be an isolated case
6 somewhere in Texas or Mississippi, but I think we're on
7 track to be the first again. And so if we keep to our
8 schedule and I keep on you, I think we'll get there.

9 MR. MAGAZINER: Your Honor seemed to be looking
10 at me when you were asking about Philadelphia and --

11 THE COURT: I'm sorry?

12 MR. MAGAZINER: Your Honor seemed to be looking
13 at me when you said the Philadelphia --

14 THE COURT: I hope I am not cross-eyed. I was
15 looking at Mr. Beck.

16 MR. MAGAZINER: I am paranoid, that's what it is.

17 THE COURT: That's a good thing to be when you're
18 a lawyer.

19 MR. BECK: Especially when you are sitting in a
20 sight line with me and --

21 MR. MAGAZINER: My information -- lest you think
22 I should have spoken, my information is that there are
23 Philadelphia trials scheduled for January. Whether those
24 cases will actually occur, whether some of them have now
25 been settled, I don't know, but that is what the piece of

1 paper that now exists says.

2 THE COURT: But it would seem that -- have you
3 exchanged generic experts, have you taken the depositions
4 on those?

5 MR. MAGAZINER: Depositions, no, but the
6 plaintiffs in the Philadelphia litigation have given us a
7 very large stack of expert reports.

8 THE COURT: Okay.

9 MR. ZIMMERMAN: It's my understanding, and
10 correct me if I'm wrong, Fred, that there's a second tier
11 of cases in a consolidated case that the judge in
12 Philadelphia said he would try in April. Because I was in
13 court when that happened and that's what he --

14 MR. MAGAZINER: I don't know what the status of
15 that is. I just wanted to make sure that you were not
16 laboring under a misapprehension that there was nothing
17 scheduled in Philadelphia.

18 THE COURT: No, no, I understand they're
19 scheduled. But with the announcement that a large set of
20 cases were settled, I am assuming that --

21 MR. MAGAZINER: I don't know what the impact is.

22 THE COURT: It would have some impact.

23 MR. ZIMMERMAN: We will report to you on that at
24 the next status. It's my understanding there's a --

25 THE COURT: It would be nice to get some trials

1 going so we can see what's going on. All right. Anything
2 else from the Defense?

3 MR. BECK: No, Your Honor.

4 THE COURT: From the PSC?

5 MR. ZIMMERMAN: No, Your Honor.

6 THE COURT: Why don't you -- let's recess and
7 come on back to chambers for a few minutes and we can chat
8 about the Cubs and then you can be on your way.

9 (Court adjourned at 3:45 p.m.)

10

11 * * *

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

15

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17 Certified by:
Lori A. Case, RMR-CRR

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19 Dated: October 23, 2003

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