

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Baycol Products) File No. MDL 1431
Litigation) (MJD/SRN)
)
) Minneapolis, Minnesota
) November 8, 2006
) 2:00 p.m.
)

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

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
RICHARD LOCKRIDGE, ESQ.
ELIZABETH CABRASER, ESQ.
RANDY HOPPER, ESQ.
DANIEL BECNEL, ESQ..
RICHARD ARSENAULT, ESQ.
YVONNE FLAHERTY, ESQ.
STACY HAUER, ESQ.

For Defendant Bayer: ADAM HOEFLICH, ESQ.
PETER SIPKINS, ESQ.
SUSAN WEBER, ESQ.
JAMES MIZGALA, ESQ.

For Defendant
GlaxoSmithKline: FRED MAGAZINER, ESQ.

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transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

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2
3 THE COURT: It's been a long time. Let's call
4 this matter.

5 THE CLERK: In re: Baycol Products Multidistrict
6 Litigation, status conference, Court File No. MDL 1431.
7 Counsel, will you please state your appearances for the
8 record.

9 MR. ZIMMERMAN: Hi, Your Honor. I'm Charles
10 Zimmerman for the PSC.

11 MR. LOCKRIDGE: Good afternoon, Your Honor.
12 Richard Lockridge for the PSC.

13 MR. ARSENAULT: Good afternoon. Richard Arsenault
14 for the PSC.

15 MS. CABRASER: Good afternoon, Your Honor.
16 Elizabeth Cabraser for the PSC.

17 MR. HOPPER: Good afternoon, Your Honor. Randy
18 Hopper for the PSC.

19 MR. BECNEL: Daniel Becnel for the PSC, Your
20 Honor.

21 MS. FLAHERTY: Good afternoon, Your Honor. Yvonne
22 Flaherty for the PSC.

23 MS. HAUER: Stacy Hauer for the PSC.

24 MR. HOEFLICH: Good afternoon, Your Honor. Adam
25 Hoeflich for Bayer.

1 THE COURT: Good afternoon.

2 MR. MIZGALA: Good afternoon, Your Honor. James
3 Mizgala on behalf of Bayer.

4 THE COURT: Good afternoon.

5 MS. WEBER: Good afternoon. Susan Weber for
6 Bayer.

7 MR. SIPKINS: Good afternoon, Your Honor. Peter
8 Sipkins for Bayer.

9 THE COURT: Turn around. I want to see it.

10 MR. SIPKINS: It's been a long time, Your Honor.

11 MR. HOPPER: It's old growth, Your Honor.

12 MR. MAGAZINER: Good afternoon, Your Honor. Fred
13 Magaziner for GlaxoSmithKline.

14 MR. ZIMMERMAN: How do you spell contempt of
15 court?

16 THE COURT: For those on the phone, Mr. Sipkins
17 has a ponytail now and it is stylish and the Court approves.

18 MR. SIPKINS: Thank you, Your Honor.

19 THE COURT: I've heard that you've taken a lot of
20 grief about it, but I think it's appropriate.

21 And Mr. Zimmerman, congratulations on your
22 nuptials.

23 MR. ZIMMERMAN: Thank you, Your Honor.

24 THE COURT: Let's proceed.

25 MR. ZIMMERMAN: Well, it's nice to see everybody.

1 I really mean that. It is nice to see everybody. We're
2 about to start our -- we have finished five years. I think
3 we are about to start our sixth. We've all had personal and
4 professional challenges over these last several years and
5 it's just nice to sort of reflect back again. We're all
6 here and I think we are all healthy and we are all stable,
7 so that's nice. I appreciate that and I'm grateful.

8 Your Honor, I think, if I could, I would like to
9 give a couple of introductory remarks.

10 THE COURT: Certainly. Make sure that you are
11 speaking into the microphone so everyone can hear you. We
12 have a number of people on the phone.

13 MR. ZIMMERMAN: What I thought we should look at
14 is sort of a little bit of a year-end review of what's
15 happened in the absence of status conferences and I think we
16 have -- we are at a time to look to how we can bring this
17 MDL to a conclusion if it's humanly possible.

18 We have done some very good work here. We have
19 had some real successes. We've settled many rhabdo cases
20 and people who have been seriously injured with those
21 rhabdos have been appropriately compensated, and I think
22 that's a credit to everybody here. We did that early, we
23 did that in almost historic time, and it's a credit to
24 everybody here.

25 We have had some failures. We have been unable to

1 resolve the not so serious cases. We have had no end game
2 here. I think that's a failure, at least in my opinion.
3 And we have not been able to give the nonrhabdo people their
4 day in court either through remanding or otherwise.

5 And there have been a lot of dismissals of cases.
6 The dismissals can be debated, were they meritless or were
7 they litigation fatigue. You know, probably my position on
8 that is that most of it would have been -- a lot of them
9 were meritless and a lot of them were dismissed through
10 litigation fatigue. Defendants, I think, would have a
11 different point of view.

12 But I think we have to figure out a way, if
13 possible, to have these smaller cases be able to withstand
14 the litigation and find their day in court. There are cases
15 out there that deserve to find their day in court.

16 Honestly, Your Honor, I think this is where
17 Plaintiffs and Defendants probably don't agree. I think the
18 Defendants would like containment here. They would like to
19 continue the discovery program that's been in place. They
20 would like to see the five years become six and six become
21 seven without anything breaking loose and the cases dwindle
22 down.

23 Dwindle down to nothing, I don't think that will
24 happen, but certainly they will continue to dwindle down.
25 It's only human nature. The longer they're contained and

1 the longer they can't find their day in court and the more
2 discovery they have to face, the more will go away.

3 Plaintiffs want an end game. We spent a year
4 trying to get a settlement. We were not successful. Then
5 if we can't get an end game, we would like them returned to
6 the transferor court with modest discovery occurring here
7 and the motions that Defendants want to make being resolved,
8 if they want to make them. The Daubert motion is before
9 Your Honor and I think it can be decided on the briefs
10 without further ado and move these cases down back to the
11 transferor court.

12 I looked at the manual the other day to see what
13 is it about this case that's bothering me or troubling me or
14 making me uncomfortable and I think it's, Your Honor, the
15 fact that we have this containment and we don't have
16 limits -- we really don't have much limits on the discovery.

17 Defendants are entitled to take ten depositions.
18 In many cases they are taking ten depositions, sometimes
19 six, sometimes five, sometimes three, but they're taking a
20 lot of depositions and I think it's probably accurate to say
21 that a lot of it is in an effort to get the cases to go
22 away.

23 In this regard I think we could take a look at
24 Phase I. When Phase I started in March of 2006 we had
25 approximately 1,500 plaintiffs. There are approximately 50

1 cases remaining. Many of the cases were dismissed prior to
2 the depositions and many were dismissed in the deposition
3 process.

4 Depositions are being taken of spouses, children,
5 friends, physicians, and others. And like I said, generally
6 between three and ten depositions in each of those cases
7 were taken, remembering, Your Honor, these are not the
8 serious injury cases, these are the less serious injury
9 cases.

10 The manual tells us that depositions are often
11 overused and conducted inefficiently and tend to be the
12 costly and most time-consuming activity in complex
13 litigation. The judge should manage the litigation so as to
14 avoid unnecessary depositions, limit the number and length
15 of those taken, and ensure that the process of taking
16 depositions is as fair and as efficient as possible.

17 I know you have done that, Your Honor. I would
18 only say in Phase III and IV and at the end of II could we
19 consider limiting them further so that it isn't the fatigue
20 of the depositions that cause cases to go away, but rather
21 the merits?

22 And when they go away on the merits, I support
23 that as well. As the Court knows, I don't believe that
24 money should be paid for nothing. I don't think cases
25 should remain alive if they are not worthy, but I think the

1 worthy cases should not have to withstand litigation
2 fatigue.

3 If we continue into Phase II -- excuse me -- into
4 Phase III and IV as we have done in I and as we're finishing
5 up in II, we're looking at June 2008 when all the cases will
6 be done with the discovery under the same schedule that
7 we've used for I and II. And frankly, Your Honor, I think
8 that's not appropriate.

9 And then after that we have to face the motions.
10 Defendants are saying they want to bring motions for summary
11 judgment. We've briefed quite considerably the Daubert
12 motions.

13 I would submit to Your Honor that the Daubert
14 motions should be decided by Your Honor without further ado.
15 Why do I say that? It's just a matter of expense, Your
16 Honor. I think the record is pretty clear what's in those
17 Daubert hearings and what's in those affidavits.

18 If we have to haul all the doctors in here and we
19 have to get them to testify live and we have to go through
20 all that would be required for a Daubert hearing live under
21 testimony, it would be extraordinarily expensive. I don't
22 think that's appropriate given where we are today in the
23 length and breadth of the briefs we have out there today.

24 So what's a more realistic plan, you might ask, if
25 I am somewhat dissatisfied at this point with where we are

1 today going through Phase I and Phase II? I would say this,
2 Your Honor. Number one, appoint an end game committee to
3 look at remand, what would be an appropriate way to start
4 remanding, and looking at settlement.

5 If the cases that have now gotten through Phase I
6 and II have no ability to be settled by the parties, then
7 have a plan of remand so we can get these cases back to
8 where they belong for trial.

9 Judge Fallon did this with Propulsid, Your Honor,
10 and it was -- I know about it because I was appointed to
11 that committee and our job was to look at end game and
12 remand. And we looked at remand, we looked at end game and
13 we came up with an end game. And these are in cases where
14 almost every trial, if not every trial, in the district
15 court was lost by the plaintiffs.

16 Number two, I would tailor the discovery in
17 Phases III through IV so that the case-specific discovery is
18 more limited. Judge, as the court you came out with ten as
19 being the limit and we've seen ten occurring, we've seen
20 eight occurring, we've seen seven occurring.

21 We've seen a lot of, I would say, pressure put on
22 people to dismiss cases, in my humble opinion, because of
23 the length and breadth and scope of those depositions. I
24 would like to see them more limited, Your Honor, and I would
25 again cite to you the manual as I did.

1 The third part of my suggestion, Your Honor, is we
2 are looking at Judge Tunheim's decision in the St. Jude's
3 case. I have been intimately involved in that case. I know
4 what the history of it is.

5 They worked very hard to try and get a class
6 certified so we could handle claims that were not of the
7 most serious personal injury cases but involved consumer
8 cases and involved cases that may be appropriate for class
9 certification and handling in a common way.

10 I'm submitting to Your Honor the PSC needs to look
11 at that and see if there's any vehicle through class that
12 might help us to gather the cases that remain or gather
13 cases that we could -- might be able to settle through a
14 class vehicle.

15 I don't have a proposal on that yet, Your Honor.
16 Tunheim's decision, the Eighth Circuit decision have to be
17 reviewed by the PSC to see if there's anything that could be
18 applicable to the Bayer -- to the Baycol situation.

19 Last, Your Honor, of my plan or our plan, we
20 should finish our work with the Daubert hearings as I
21 suggested. We can't have that overhanging the litigation by
22 saying all your cases are going to get dismissed through
23 Daubert, as the Defense is saying.

24 We have to decide if the cases are going to be
25 viable on the science; and if they are, as we believe they

1 are and as I believe our briefs demonstrate, this Court
2 should decide it and decide it expeditiously without the
3 need for expensive hearings. And then if after all that we
4 can't get the cases that remain settled, they should go back
5 to where they were filed.

6 There's an old quote, Your Honor, and it says, If
7 not now, when? And in thinking about that, I think the time
8 is now. And if it's not -- if we don't face this now, we're
9 going to look at three more years, two more years, a year
10 and a half of holding these cases here and really not making
11 a lot of progress toward getting the cases back to where
12 they belong to get resolved if they can't get resolved here.

13 I'm happy to participate in any of these ideas.
14 I'm happy to vet them with Your Honor and with the other
15 side, but I think there has to be desire on the other side.
16 Right now there is no desire.

17 They have total containment. The cases are here.
18 They're not going anywhere. The only thing that happens is
19 every day they put more pressure on the plaintiffs, more
20 cases go away. It's a perfect system for them.

21 If we're going to change the game -- excuse me.
22 If we're going to change the outcome and get cases resolved
23 or remanded, we have to have a different situation in this
24 MDL. We have to let the Defendants know these cases are
25 going back for trials, because they can't just be held

1 hostage here.

2 So, Your Honor, I think we need to give the
3 Defendant some desire to resolve cases. We need to do the
4 following: Send cases back that are ready, limit discovery
5 that is out there to be done so that we don't go into
6 litigation fatigue in the next phases, decide the Daubert
7 issues, rethink the class, and create an end game in this
8 MDL by way of remand or settlement.

9 That's my opening remarks, Your Honor.

10 THE COURT: The end game committee and remand
11 committee, how do you recommend that --

12 MR. ZIMMERMAN: I believe it should be two people
13 from each side, Your Honor. I would be happy to make
14 recommendations from our side and the Defense should from
15 theirs.

16 I think it should be people who understand the
17 litigation and who have been present. I think they should
18 be people who have the respect of the Court as well as of
19 each other. I'm happy to serve if you want me to, but if
20 you think I would be better stepping back, I can do that.
21 But there are people in this room that I could suggest to
22 you right today.

23 But I think it should be a small group, Your
24 Honor. It should be two people on each side.

25 THE COURT: The issue that you've raised of remand

1 and sending cases back for trial, for trial, for trial, for
2 trial, for trial, I begged for a trial. That sounds like
3 it's a mystical --

4 MR. ZIMMERMAN: Let me be frank about that. If
5 you take and we have an MDL trial now, we are going to spend
6 enormous, enormous resources trying to prove who is right
7 and who is wrong.

8 The Defendants are going to come in, as they have
9 in Vioxx and as they have in other cases, and put tremendous
10 focus and tremendous resources beyond what we can spend on
11 one case to prove a point.

12 I think that opportunity came and went, Your
13 Honor. We settled the good cases. Those would have been
14 the ones. I think we should do the discovery that needs to
15 be done here and let them be resolved in the court where
16 they came from.

17 And the reason I say that, Your Honor, is because
18 that's where the Defendants don't want to go and that's
19 where we would like them to go. Where they do want to go is
20 to focus enormous resources into one case at one time,
21 especially in a case where there's no potential for a high
22 verdict return, Your Honor.

23 These are small cases that remain. That's why
24 I've pulled back from having a trial under the auspices of
25 the MDL.

1 THE COURT: How many cases are venued here in
2 Minnesota?

3 MR. ZIMMERMAN: I don't have the answer to that,
4 Your Honor. And those would obviously have to be resolved
5 here. I appreciate and respect that. I can get that
6 number.

7 But I can tell you this. There are 50 cases that
8 are probably ready for remand in Phase I and somewhere
9 between 100 and 150 in Phase II. Of that, I don't know how
10 many are in Minnesota. My guess is Defendants know that
11 perhaps off the top of their head, but we can certainly get
12 that information to you, unless anybody on my side knows
13 that at this time. But there are a number because I know a
14 number of them are Zimmerman Reed cases.

15 THE COURT: Would the demands for preparing for
16 trial be any different if they were remanded or being here?

17 MR. ZIMMERMAN: No, there wouldn't be, Your Honor.
18 To be quite honest, they wouldn't be considerably different,
19 but right now there's no kind of plan for remand so what we
20 have, like I said, is this sort of containment here where
21 it's just discovery after discovery after discovery with no
22 end in sight as to what we're going to do about all that
23 discovery.

24 So maybe trial dates would be a good idea or maybe
25 remands to the district courts where they have to go out and

1 do what they need to do, which is defend them in local
2 jurisdictions before local juries, is the right thing for
3 these cases.

4 You know, I can only speak, you know, as a PSC --
5 my job is to do the discovery and to try and create an end
6 game to try and get the cases reasonably prepared for
7 remand. I can't resolve them in the jurisdictions from
8 whence they came with the exception of the cases that are
9 before this Court, and those cases would have to be resolved
10 here. And maybe they never want to settle them and maybe we
11 never want to try them, but we won't know until we get
12 there.

13 THE COURT: Well, the question I was trying to ask
14 is whether or not -- what am I doing, then, with the
15 discovery schedule that you're doing that would be different
16 than would be done if they were remanded?

17 MR. ZIMMERMAN: Well, I think, Your Honor, we
18 would probably say this, that in some cases -- and I can't
19 give you the line and verse, but in some cases we would ask
20 the Court to limit discovery.

21 We've got this ten deposition order out there
22 right now and I may come before Your Honor, and I am just
23 going to give you a hypothetical case of a person that's got
24 an injury that lasted six months, say, and we think --

25 THE COURT: Refresh my memory how we got to ten.

1 MR. ZIMMERMAN: I think Dick would have to do that
2 because I wasn't here for that. That's a very good
3 question. How did we get to ten?

4 MR. LOCKRIDGE: Well, Your Honor, there was quite
5 a bit of discussion between myself -- Mr. Sipkins and myself
6 and I think we proposed just a few and I believe Your Honor
7 in large part adopted Defendants' proposal on depositions
8 and so forth and that's how we got to ten.

9 THE COURT: We'll get to the Defense later.

10 MR. ZIMMERMAN: So I think, Your Honor, it was
11 that was kind of a proposal that we didn't carry the day on
12 and a broader number than perhaps we had sought or we had
13 asked for.

14 And, again, the experience teaches us, at least
15 teaches me, that it's more than is needed for a case with a
16 value, you know, in the tens of thousands or maybe 100, 150
17 thousand, in the best case maybe a little bit more. But
18 they're small cases, especially in federal court.

19 When you take the rhabdo cases out of the game and
20 those high verdicts from those serious injuries are not
21 involved, we are left with smaller cases, but many of them
22 are legitimate cases that I thought we should resolve, Bayer
23 doesn't think we should resolve.

24 They're spending enormous amounts of money to
25 discover these cases, we think in part in an effort to make

1 them go away just by the weight of the discovery, but maybe
2 they have -- maybe at the end of the day they will have no
3 merit if they have to get into a courtroom, but maybe at the
4 end of the day it makes more sense to resolve them on a
5 basis that prevents us from having to get into the
6 courtroom.

7 But if we want to play this out to the logical
8 place, they may all fold at trial, there may be trials. I
9 don't know. I can't tell you because I don't have a working
10 knowledge of each and every case.

11 But I know that ten depositions has been hurting
12 the Plaintiffs' ability to withstand the onslaught of
13 discovery. I'm not saying this in every case. I'm not
14 saying every case was meritorious either, Your Honor. Many
15 of them should have gone away and have gone away.

16 THE COURT: Well, have I missed any filings? No
17 one has come in to change the number of depositions as far
18 as I'm aware.

19 MR. ZIMMERMAN: Well, actually, again, I can't
20 control that. People have complained to me, but I didn't
21 see any basis for which to ask for a protective order from
22 an order that says they're entitled to take ten depositions.

23 You know, I can argue to Your Honor the case is
24 worth \$100,000 or maybe \$150,000. Is ten depositions
25 excessive? In the abstract I just could fight for a

1 reasonable order, but I don't have -- it's not my job or my
2 responsibility to come into court and say in Joe Smith's
3 particular case it's inappropriate. I think people just
4 went along with the rules that were set up.

5 THE COURT: What's this class --

6 MR. ZIMMERMAN: The class idea?

7 THE COURT: Yeah. I'm not following you on that
8 one because if I remember right --

9 MR. ZIMMERMAN: You denied it.

10 THE COURT: -- the Eighth Circuit reversed Judge
11 Tunheim.

12 MR. ZIMMERMAN: Yes, and then he recertified it.
13 An order came out ten days ago, maybe, where he recertified
14 the class given the restrictions imposed by the Eighth
15 Circuit and found the appropriate way to settle it by
16 looking -- by basically saying you have to use Minnesota
17 consumer law as the law and that using that we can certify a
18 case under Minnesota consumer law.

19 I think in this case the analysis that we're
20 looking at is possibly having a class under Pennsylvania
21 law, which would be the home of the defendant, at least the
22 U.S. home. Like I say, we are just looking at it, Your
23 Honor, because it just came out.

24 You will note that there is an Oklahoma case class
25 that was certified in state court in Oklahoma, and that case

1 is proceeding with the help of the PSC who are involved in
2 that case and I think Dick Lockridge can talk about that.
3 And there was a class certified in Pennsylvania for the
4 third-party payer class.

5 So there have been some classes in the Baycol
6 litigation that have been sustained in light of what Judge
7 Tunheim did recently in the St. Jude litigation given what
8 the Eighth Circuit has provided as --

9 THE COURT: What happened to the one in
10 Pennsylvania? Wasn't that reversed?

11 MR. ZIMMERMAN: I believe that was -- I believe
12 they entered into a settlement agreement under that. No?

13 MR. HOEFLICH: No.

14 MR. ZIMMERMAN: I thought there was a settlement.

15 THE COURT: I thought the Court of Appeals
16 reversed that. Well, we'll get to that.

17 MR. ZIMMERMAN: My understanding was there was a
18 settlement of the third-party payer, but I could be wrong.
19 Again, I'm not litigating in Pennsylvania.

20 THE COURT: How do we do the Daubert on the cheap?

21 MR. ZIMMERMAN: Just decide it on the briefs, Your
22 Honor. It's submitted, as I understand it. It's extensive
23 briefing. It's exceptional work product. There are
24 affidavits and supporting documents for everything. And I
25 think the Court could go through it and decide it rather

1 than ask for hearings.

2 And I think what's been held up is it's been
3 submitted, but it hasn't been, okay, Judge, decide it. I
4 think the Defendants are going to say, no, no, we need to
5 have hearings, you know, live testimony or whatever. I'm
6 just kind of preempting that by saying let's not go there.
7 Let's think of not going there, to do it more reasonably and
8 more inexpensively.

9 THE COURT: I want to make sure that I didn't miss
10 it. You didn't send a letter or anything, a memo, a motion
11 to the Court to decide the Daubert --

12 MR. ZIMMERMAN: No.

13 THE COURT: This is the first time that it's been
14 raised?

15 MR. ZIMMERMAN: That's correct, Your Honor.

16 THE COURT: I'm hearing things and I just want to
17 make sure that I didn't miss anything during the course of
18 the time that we had not been meeting.

19 MR. ZIMMERMAN: That's right, Your Honor. And
20 certainly I'm just sort of putting those out as our plan to
21 kind of look to how to get to the end in a shorter rather
22 than longer period of time.

23 THE COURT: Anything else that you want to add?

24 MR. ZIMMERMAN: No, Your Honor. There's some just
25 minor items on the agenda, but no, that's basically what I

1 wanted to provide to Your Honor. I wanted to plant those
2 seeds. I wanted to give you the experience of the last
3 year. I wanted to see if we can commit ourselves to getting
4 this thing done in the next -- in a short period of time so
5 that this litigation can terminate.

6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. HOEFLICH: Good afternoon, Your Honor.

9 Mr. Zimmerman suggested that the Plaintiffs should get
10 together with the Defendants to discuss remand. We are
11 happy to get together with the Plaintiffs to discuss the
12 protocol for remand.

13 We believe that this Court in PTO 149 spent a
14 tremendous amount of effort to give all of the parties
15 direction on how to proceed on what the Court explained to
16 us as a multistep plan of, first, narrowing the cases;
17 second, completing discovery; third, getting through Daubert
18 motions and then getting through any other dispositive
19 motions before cases would be remanded. That's exactly the
20 course we've engaged on in Phase I and Phase II and that we
21 continue to engage on with the remaining phases.

22 Mr. Zimmerman acts as though the Defendants have
23 been out there scouring the earth and taking ten depositions
24 in every case, and that's just not true. We've been taking
25 an appropriate amount of depositions to get discovery from

1 people who have sued us and many cases have gone away not on
2 the eighth or the ninth deposition, but when we show up for
3 the plaintiff's deposition or when the plaintiffs are
4 supposed to give us their expert report.

5 This isn't scorched earth causing a plaintiff to
6 back off in the ninth hour. If that were the case, we'd see
7 protective orders. Mr. Zimmerman knows his obligations to
8 the plaintiffs across the country. Motions would have been
9 filed. We wouldn't be getting bare-bone assertions today.

10 The Defendants have acted nothing except
11 appropriately. We're here in an MDL where more than 3,000
12 serious injury cases have been settled and Defendants have
13 paid more than a billion dollars with nearly 350 million
14 dollars of settlements subject to the PSC's settlement fund.

15 So this is not a case where we have been out there
16 in every case trying to bury every plaintiff. We resolved
17 the serious cases up front. We worked with the Court and
18 the Plaintiffs diligently to put together a protocol for
19 working through discovery to see what cases merited trials
20 at the end of the day and to prepare for remands.

21 As the phases finish, fact discovery will finish.
22 We'll have Daubert motions decided. If there are
23 dispositive motions, we'll bring these before the Court and
24 we will have literally seen from beginning to end the plan
25 this Court announced for all of us, which was put together a

1 resolution program for the serious cases, find out the cases
2 that won't settle and I believe the quotes were wrap them in
3 a bow and when they are ready to go back for trial they're
4 ready to go back for trial.

5 And the Court's guidance to us was the Court
6 wanted efficiency and coordination and it didn't want to
7 burden the transferor courts across the country so that
8 we're deciding the same motions on case-specific discovery
9 in California, in Colorado, in Minnesota, in Illinois, and
10 in Florida. We wanted common issues to be decided in this
11 court so we didn't have seven judges and seven groups of
12 lawyers working on the same thing.

13 We still have work that remains. We're getting
14 close to the end of Phase I. We think Daubert motions
15 should be heard at a hearing. We would like to do that in
16 late January if that works for the Plaintiffs and the Court.
17 If that doesn't work for the Court, we are available in
18 February, we would be available in March. But we would like
19 to argue those.

20 Those are serious motions that people have put a
21 significant amount of time into and that the Court should
22 hear our positions on, not just accept on the papers, and we
23 believe the Plaintiffs have a responsibility to put the
24 effort into that hearing. This is a case where that has
25 been planned for a long time and we think it would be

1 appropriate to hear it.

2 So where do we stand and where are we now?
3 Defendants have been served with 2,195 Baycol cases that
4 remain active, which is down from 14,807 cases ever filed in
5 the litigation. This includes approximately 1,700 cases
6 that were filed or removed to federal court, down from over
7 9,000 such cases. This involves just over -- or just under
8 2,200 active plaintiffs in federal court.

9 The plaintiffs are distributed based on PTO 149
10 with 60 plaintiffs remaining in Phase I, 150 plaintiffs
11 remaining in Phase II, 431 plaintiffs in Phase III, and just
12 over 1,500 plaintiffs in Phase IV.

13 And we're prepared to report in more detail on
14 PTO 149 discovery if the Court would like it, but we believe
15 it's proceeding appropriately.

16 THE COURT: Why don't you give me more detail.

17 MR. HOEFLICH: James, would you like to address
18 the Court on the detail of PTO 149.

19 MR. MIZGALA: Sure. Your Honor, I'll address this
20 by phases.

21 Right now in Phase I we're completing the final
22 depositions of a few plaintiffs' experts and Bayer has
23 disclosed their experts and at least one plaintiff's counsel
24 has asked for availability of Bayer's experts for
25 deposition.

1 The deadline for Phase I is the end of this month.
2 Realistically we believe that most of the cases in Phase I
3 should be through discovery by the end of this year. There
4 are a couple, you know, like the Dempsey case that the Court
5 heard the motion to compel on, that drifted out a little
6 farther, but they should be done in January also.

7 Phase II, we've completed the depositions of 95
8 plaintiffs. There were 21 deposition no-shows and there are
9 12 plaintiffs yet to be deposed. Bayer has moved to the
10 process of taking the doctors' depositions in those cases.

11 And, Your Honor, based upon my familiarity with
12 the deposition process, I will represent that the average
13 number of depositions in a case is about five. There are
14 cases -- and Ms. Flaherty knows this -- where there are a
15 lot of doctors and we have to depose them and sometimes we
16 have to take more than five or six depositions, but we have
17 been working very cooperatively with plaintiffs' counsel and
18 we reached agreement with Ms. Flaherty in a case recently on
19 that.

20 The Phase II deadline for case-specific discovery
21 is at the end of January and the expert discovery is the end
22 of May.

23 Phase III, as the Court may know, the final
24 deadline for case-specific expert reports was November 1st.
25 We submitted dismissal orders for 907 plaintiffs yesterday

1 who did not provide the expert reports by that deadline. So
2 that was what took us down to the 430 plaintiffs in
3 Phase III.

4 Of the 1,535 plaintiffs left in Phase IV, 418
5 plaintiffs have submitted expert reports. That leaves 1,117
6 who will be subject to the November 28th deadline. But as
7 the Court knows, there's the process of notification and
8 setting a final deadline. So those plaintiffs would not be
9 subject to dismissal until the end of January.

10 THE COURT: Okay. Thank you. Anything further?

11 MR. HOEFLICH: I would just give the Court our
12 update on settlement. Your Honor, to date the Defendants
13 have settled 3,052 cases with a total value of
14 \$1,151,613,835. Of this total, 937 cases have been
15 determined to be subject to the MDL assessment, with a total
16 value of \$350,121,334.38.

17 On trial settings, there are no trial settings for
18 cases in the MDL. There are no trials scheduled for
19 individual actions in state court. The Cafky class action
20 in Oklahoma that Mr. Zimmerman referenced is tentatively
21 scheduled for trial on June 11th. No Baycol case has been
22 tried since the last status conference.

23 Bayer appealed the \$10,000 judgment entered by an
24 Alabama court of limited jurisdiction in the Moton case and
25 on May 24th the Alabama Circuit Court of Wilcox County

1 granted Bayer's motion for summary judgment. Plaintiff did
2 not appeal that ruling.

3 On motions, Your Honor, there are two things on
4 the schedule or on the agenda. No date has yet been set for
5 argument on the parties' Daubert motions. Again, we'd be
6 available the second half of January, February, or March,
7 whatever the Court would prefer.

8 Plaintiff Landrieu has moved to disband the MDL
9 and remand his case. The Court rejected the motion for an
10 expedited hearing on that and Defendants have not yet
11 responded.

12 THE COURT: Okay. Should we get some dates for
13 the Daubert hearing? I am pulling up my calendar. How many
14 days are we talking about? Two days?

15 MR. HOEFLICH: I would think that would suffice,
16 Judge.

17 THE COURT: Mr. Zimmerman.

18 MR. ZIMMERMAN: How many days? Is the question
19 how many days?

20 THE COURT: Yes.

21 MR. ZIMMERMAN: Again, I would love to be able to
22 do it without having to have live testimony. I think that's
23 normally the procedure that I've been engaged in in court.
24 So I think we should be able to do it in one day or half a
25 day, frankly. If you have to have live testimony, I guess a

1 day or day and a half would be required, but I would think
2 it should be done on the argument and the affidavit, which I
3 think is the practice in this district.

4 THE COURT: Let me ask you this question. How
5 many cases do you think are going to be alive once the
6 discovery is done?

7 MR. LOCKRIDGE: We'd estimate maybe 300, 200 to
8 300, Your Honor. It's very hard to say. These are cases
9 that are serious to the individuals, but obviously not
10 critical injuries usually and that's why they are falling by
11 the wayside unfortunately. So I think our guess would be
12 two to three hundred. I don't know what James thinks.

13 MR. HOEFLICH: I don't have a basis to question
14 that. I could also see it being less or more.

15 THE COURT: What about the 30th and 31st of
16 January?

17 MR. HOEFLICH: Thank you, Judge.

18 THE COURT: Is that available for the Defense?

19 MR. HOEFLICH: I believe it is. Thank you, Judge.

20 THE COURT: Is it available for --

21 MR. LOCKRIDGE: Is this for oral argument only?

22 THE COURT: I'm going to have to re-review the
23 papers to see. I don't see how we can have a Daubert
24 hearing without testimony, but do you want to submit a
25 letter brief to me stating why you believe that is

1 appropriate? I just --

2 MR. LOCKRIDGE: I don't mean to interrupt.
3 Obviously we don't think a hearing is necessary, but if
4 there is to be a hearing, we certainly would greatly prefer
5 only to have oral argument. It would be an enormous expense
6 to the Plaintiffs to have to bring in experts in here to
7 this courtroom. There are over a dozen experts.

8 MR. HOEFLICH: Your Honor, we'll address --

9 MR. LOCKRIDGE: We would be glad to draft a short
10 letter brief, Your Honor, why the showing of oral
11 argument --

12 MR. HOEFLICH: And we are glad to address that and
13 see what we can do with the Plaintiffs before we raise the
14 issue with the Court.

15 THE COURT: So let's put down the 30th and the
16 31st of January as the dates and I can decide later what the
17 form of the hearing will be.

18 MR. ZIMMERMAN: I'm sorry. Randy Hopper has been
19 handling the experts and he says it's going to be very
20 difficult to get that ready in time.

21 MR. HOPPER: If it's the Court's expectations that
22 we're going to be heard only on the 30th and 31st, certainly
23 we can address the Court's interests in that length of time.
24 If we're going to extend that and include live testimony
25 from the experts, we're going to need more time between now

1 and the end of January in order to be prepared for that, as
2 I have been advised.

3 If we want to weigh in with letter briefs on that
4 and then the Court hear us on the 30th and 31st and then
5 take the testimony later, that certainly would be doable.
6 If the Court wants to do it all at once, then the PSC would
7 propose that we push that out further to allow more time for
8 preparation since this is the first time that it has been
9 raised with the Court in over a year now.

10 Thank you, Your Honor.

11 MR. HOEFLICH: Judge, we'd prefer to stick with
12 the January 30th and 31st date. We are happy to argue it
13 without taking testimony. So I believe we have agreement
14 that we will argue the motions.

15 THE COURT: Is that all right?

16 MR. LOCKRIDGE: That's fine.

17 THE COURT: Do you agree to that?

18 MR. ZIMMERMAN: We agree to that.

19 THE COURT: Are you happy?

20 MR. LOCKRIDGE: Happier, Your Honor.

21 THE COURT: The 30th and the 31st of January.

22 We've got that taken care of. Now --

23 MR. HOEFLICH: Your Honor, Ms. Weber has a couple
24 of points and if I don't let her stand --

25 THE COURT: Welcome, Ms. Weber.

1 MR. HOEFLICH: -- it is going to be a very tough
2 ride home.

3 MS. WEBER: This is in the way of housekeeping in
4 the Daubert department. I thought we could get it addressed
5 now.

6 Before we even did the Daubert briefing last
7 spring the PSC withdrew one of their witnesses, Mr. -- I'm
8 going to slaughter his name -- Fiffis and subsequent to the
9 filing of our motions the PSC did not contest two of our
10 Daubert motions. Those were with respect to the witnesses
11 Schinagl and Corbett.

12 I understood at one point that Mr. Zimmerman was
13 going to send a letter to the Court making clear that these
14 three witnesses were out of play, and that letter hasn't
15 come in for whatever reason.

16 So I thought as long as we're here talking
17 Daubert, we should just go on the record and make clear that
18 these three witnesses are no longer part of this case, so
19 they can't be called for generic issues down the line and
20 you can cross them off your to-do list.

21 THE COURT: Mr. Zimmerman or Mr. Hopper.

22 MR. HOPPER: The PSC can go on the record with
23 that now, Your Honor, that we withdraw them.

24 THE COURT: Done.

25 All right. Let's talk about limiting the number

1 of depositions. Can we cut that down to five and if there's
2 more, if there's more doctors than that, then it would go up
3 to ten?

4 MR. HOEFLICH: Your Honor, aside from assertions
5 about what we've been doing, there's been no evidence that
6 Defendants have been unreasonable in any way.

7 We're talking about cases that have been filed in
8 federal court by plaintiffs who have family members who have
9 seen their symptoms, who have had treaters that treated
10 them, where there is alternative causation as a prime
11 defense in almost every case, if not in every case, and
12 we're entitled to defend ourselves. Ten is not an
13 unreasonable number.

14 There's been absolutely no evidence that we've
15 acted unreasonably or taken discovery that's
16 disproportionate to the cases that have been out there. We
17 looked at this issue carefully when we negotiated them
18 before the Court entered PTO 149 and we think it's perfectly
19 reasonable.

20 There's nothing in the federal rules that would
21 say it's unreasonable of us to take ten depositions and
22 there's been no showing in this case that we've acted
23 unreasonably.

24 THE COURT: Mr. Lockridge.

25 MR. LOCKRIDGE: Well, it's all in the eye of the

1 beholder, Your Honor. First of all, of course a lot of
2 these cases were filed in state court and removed to federal
3 court. Secondly, as the Court knows, the damages here are
4 of lesser amounts. This is not a major complex antitrust
5 case.

6 It is true the federal rules do allow, I guess, up
7 to ten depositions. In cases -- I think clearly, as
8 Mr. Zimmerman pointed out, under the manual in a major
9 complex case perhaps with a lot of defendants there will be
10 ten or even a few more depositions.

11 But here where you have a lone individual whose
12 damage is perhaps \$75,000 and could no doubt be settled for
13 \$25,000, the fact that somebody who is 75 or 80 years old
14 has had six or seven doctors and the Defendants feel it
15 incumbent upon themselves to take every single doctor that
16 ever touched that human being I think is outrageous, Your
17 Honor.

18 And I think your proposal that a maximum of five
19 depositions be provided for and I would amend the request
20 simply to say that if they want to take more than five
21 depositions, that they have to bring a motion before the
22 Court.

23 Of course spouses and children have seen this
24 person. That doesn't mean in a case like this you have to
25 contact every single neighbor. They have deposed neighbors,

1 children, spouses.

2 Your Honor, it's gross overkill and of course it's
3 having the logical effect, Your Honor. It's litigation
4 fatigue and people are dropping their cases and they are not
5 getting justice from this process.

6 THE COURT: Do we have an example of this?

7 MR. LOCKRIDGE: Well, there have been a number of
8 places where they've taken ten or eleven depositions. I can
9 just quote for you from what one attorney said, if I may.
10 Very briefly, I can read the quote for about one minute.
11 This is --

12 THE COURT: What case is this?

13 MR. LOCKRIDGE: Which case is this?

14 MS. FLAHERTY: One of our cases. I do not know
15 how many depositions were taken.

16 MR. LOCKRIDGE: I apologize, Your Honor. I don't
17 know the name of the case. It is apparently one of the
18 Lockridge Grindal cases.

19 THE COURT: Don't quote any case that you don't
20 have a case number so I can have it verified, Defense can
21 verify it and defend themselves on what you are saying.

22 MR. LOCKRIDGE: We will get it, Your Honor, and
23 send it to Your Honor. It's in a deposition.

24 THE COURT: So that's one case out of hundreds?

25 MR. LOCKRIDGE: Your Honor, this is one quote out

1 of perhaps a hundred, but there have been many, many cases
2 where they have taken ten and even eleven depositions. It
3 may be that the average is six or seven, but of course I
4 think even that is overkill in these very small cases.

5 But, yes, I think clearly it is appropriate to at
6 least limit them to five depositions, Your Honor, and I
7 would ask that you do that.

8 THE COURT: All right. Let's move on to the end
9 game committee. Does the Defense want to get involved in
10 that?

11 MS. WEBER: It depends on how you define "end
12 game," Your Honor.

13 THE COURT: Come to the microphone so everyone can
14 hear you.

15 MR. HOEFLICH: Your Honor, I'm not sure what
16 Mr. Zimmerman is referring to as an end game. If what he is
17 viewing as an end game is our resolving the thousands of
18 cases that remain, we've been there, we've tried that. It's
19 not going to happen. We don't have an interest in resolving
20 cases for plaintiffs who didn't have injuries and who
21 didn't -- we don't think have any sort of valid complaint.

22 So in terms of trying to sit down and restart
23 discussing that and thinking about whether there's some sort
24 of a grid Mr. Zimmerman can set up, we are not interested in
25 that sort of an end game.

1 If what an end game means is have complete
2 discovery in this case, prepare cases for trial, remand
3 those cases to trial courts, and if any of those cases need
4 mediation pursuant to this Court's PTO because they qualify
5 for it, we're certainly willing to sit down and discuss the
6 appropriate resolution of the cases that remain.

7 THE COURT: Well, is there a question -- the
8 question I have is Plaintiffs have mentioned that we won't
9 be finished with the discovery on Phase IV until June of
10 2008. Is that right?

11 MR. HOEFLICH: I don't believe that's correct. We
12 need to work through the deadlines with Mr. Zimmerman, but I
13 think that's something the parties should address. I know
14 we are proposing deadlines for Phase III and Phase IV now,
15 but I haven't heard two more years. If Mr. Zimmerman has a
16 schedule for moving things more expeditiously than what's
17 been discussed, we are happy to address that with him.

18 MR. ZIMMERMAN: May I respond? First off, on the
19 projections --

20 THE COURT: Speak into the microphone because we
21 have people on the phone.

22 MR. ZIMMERMAN: Understood. On the projections,
23 we are using kind of the same time frames that we used for I
24 and II and projecting them into III and IV. That's where we
25 got to June 2008. If we can shorten up the number of

1 depositions, shorten up the schedule, shorten up the
2 numbers, maybe we can get there sooner than that. We are
3 willing to look at that.

4 When I was talking about an end game, I was only
5 talking about cases that need to be remanded at the end of
6 the process. I'm not here to say, never have been, never
7 meant to be interpreted as settling every case just because
8 it's filed. I'm talking about an end game having to do with
9 are we going to mediate, resolve, or remand the cases that
10 get through the process.

11 THE COURT: So they would go back to the other
12 courts in an orderly fashion.

13 MR. ZIMMERMAN: Orderly fashion. Or if we resolve
14 them here, we resolve them here. That's what I refer to as
15 end game. Adam may have misinterpreted that I want them to
16 somehow settle with dollars thousands of cases. I think
17 that's that old misunderstanding we've been having for some
18 time. That's not what I'm referring to.

19 What I'm saying is once you get to the end of your
20 discovery, once you had your opportunity to depose the
21 people that -- hopefully now limited to five as opposed to
22 10 depositions, then those cases are ready for remand. What
23 are we going to do with them, send them into mediation,
24 settle them for money, dismiss them, or remand them. That's
25 the end game and that's what I meant by it.

1 THE COURT: All right. Why don't we -- who are
2 you going to recommend for the committee? Why don't you
3 submit --

4 MR. ZIMMERMAN: Elizabeth.

5 THE COURT: -- two names to me.

6 MR. ZIMMERMAN: Okay. I'll send you a letter on
7 that.

8 THE COURT: Elizabeth?

9 MR. ZIMMERMAN: I was going to recommend
10 Elizabeth.

11 MS. CABRASER: I think he was recommending me
12 because I looked alert suddenly.

13 THE COURT: I have a way of putting people to
14 sleep.

15 MS. CABRASER: We did also have a brief report for
16 you, Your Honor, on your question about the cases that you
17 have here that were filed in the District of Minnesota.

18 We did a quick survey. I don't think it's
19 complete or scientific. There are about 100 of those cases.
20 About ten of them we know of are Minnesota residents. The
21 others would be triable here depending on the Defendants'
22 viewpoint as to whether venue is appropriate, but those are
23 cases that this Court could try.

24 We are very concerned about a cost-effective trial
25 if that's what happens. If we got to that point in an end

1 game scenario, we would probably be recommending multiple
2 plaintiff trials so that we would have economies of scale
3 and a cost-effective, meaningful adjudication for Your Honor
4 to preside over.

5 THE COURT: Would you mind putting that into the
6 end game and remand committee grouping?

7 MR. ZIMMERMAN: I think that's absolutely
8 appropriate.

9 THE COURT: Before I forget it, Susan and
10 Elizabeth, I was asked to speak to the MDL conference down
11 in Palm Beach and I think I shook them up. I told the
12 judges that they should look for more diversity, more women
13 and minorities to be involved in leadership positions in the
14 MDL. I'm glad to see both of you are here.

15 And Mr. Zimmerman has done a nice job of
16 responding to my inquiries. So I can tell you I did send
17 that out. I haven't gotten any responses back on it. I
18 know Judge Rosenbaum and Judge Frank have put those things
19 in their orders.

20 So I just wanted to note that for the record for
21 you two because you have been very active in this MDL.

22 MS. WEBER: Thank you, Your Honor.

23 MS. CABRASER: Thank you, Your Honor.

24 THE COURT: So you will submit two names to me?

25 MR. HOEFLICH: We will. Thank you, Judge.

1 MR. ZIMMERMAN: Yes, Your Honor.

2 THE COURT: How soon can I get that?

3 MR. HOEFLICH: Within 48 hours.

4 MR. ZIMMERMAN: By Friday, Your Honor.

5 THE COURT: And the special master will chair the
6 committee. Hopefully we can do a lot of this by telephone
7 conference.

8 SPECIAL MASTER HAYDOCK: I was thinking we could
9 go to Breakers and meet down there.

10 THE COURT: Breakfast is \$50. I think it's past
11 everyone's budget now.

12 You know, I hear you, Mr. Zimmerman, but I don't
13 have any documentation dealing with the depositions. You're
14 going to have to do something better than just say that
15 there's cases out there that have deposition fatigue and
16 that people are dismissing.

17 Mr. Becnel wants to talk.

18 MR. BECNEL: I really would, Judge.

19 THE COURT: How can I keep you from --

20 MR. BECNEL: I am one of the few people that have
21 done a lot of things pro bono. I would like to tell you
22 about what's going on with the clients. We've taken 150
23 depositions, 60 plaintiffs, 90 doctors. People don't have
24 the money or the wherewithal to proceed, so they say we
25 quit. And that's what's happening.

1 THE COURT: Isn't that what happens in most --

2 MR. BECNEL: That doesn't happen like that. That
3 does not happen like that.

4 THE COURT: Educate me why that doesn't happen in
5 litigation.

6 MR. BECNEL: Well, in most of the cases I've had
7 I've never seen that happen. I've been doing this 38 years.
8 I've never seen it happen.

9 I'm dealing with people that are moving four and
10 five times because they have no money, they have no houses.
11 They have no doctors, they have no medical records and they
12 are just out.

13 The Landrieu case, Judge Fallon's law partner who
14 was a judge, Moon Landrieu, who was mayor of the city,
15 Secretary of Urban Affairs for Jimmy Carter, who sat on the
16 Court of Appeals for 15 years, whose daughter is a senator
17 and whose brother is the lieutenant governor of our state,
18 we can't even get this man before he dies an opportunity to
19 go to court after six years. That's wrong.

20 I had a judge yesterday after a 12-year-old case
21 where five of the lawyers died, 20,000 people against Exxon
22 Mobil. Because it's almost equivalent to what they are
23 doing in Exxon Valdez, just litigation, litigation,
24 litigation, almost all of the lawyers quit.

25 A federal judge came down after three of the

1 judges because of various maneuvers made to recuse
2 themselves in the Middle District of Louisiana on a chemical
3 explosion that inundated neighborhoods.

4 So the judge has got this case and trying to
5 figure out what to do with it and none of the lawyers want
6 to deal with him anymore. That's what's happening in New
7 Orleans right now.

8 I have tens of thousands of cases against the
9 Corps of Engineers, most of whom are African-American, who
10 no lawyer will take their case and I'm spending my fortune
11 trying to give them a day in court against the Corps,
12 against the barge dredgers.

13 It's absurd what's going on in the field of MDLs
14 right now. It's absurd. They're driving everybody out. We
15 have the Bausch & Lomb case, Your Honor, 95 percent of all
16 of the cases and all of the lawyers will not participate,
17 will not participate. So once again you have an MDL with
18 nothing because people can't afford to deal with it.

19 Judge Fallon has spent a year and a half of his
20 life trying five cases. My office supplied one of the
21 female lawyers in the case, as did Elizabeth Cabraser, the
22 one that won the \$50 million, and after it was over with
23 they had to throw the verdict out.

24 We can't get anywhere this way. I mean, it's just
25 not fair to people. It's not fair to lawyers. I can tell

1 you but for me having the responsibility of wanting to see
2 things done right I would have got out of this a long time
3 ago. I wouldn't fool with this.

4 I mean, I can spend my time on cases that Richard
5 and I just did with Judge Fallon in a year, that we're
6 getting people their money within a year, \$330 million
7 settlement, plus the defendants are going to pay our fee.
8 We spent lots of time doing that. That's real easy.

9 But taking on the U.S. government, taking on big
10 corporations, that's real hard and the clients don't have
11 the money to put up. It's the lawyers who have to put up
12 the money, you know.

13 You asked about diversity. I hired a fabulous
14 African-American lawyer. Instead of me, I put her on the
15 executive committee through the judge's appointment. The
16 defendants came, because they didn't want her there, and
17 offered her five times as much money as I was paying her,
18 five times as much to get her to go to work for them with
19 the Corps of Engineers. That's what's happening.

20 That's what's happening and I just think you ought
21 to know it, because the MDLs in my opinion -- I think I have
22 seen the last one I ever want to be on and I think I've seen
23 about the last one I want to do anything for indigents
24 anymore because my job is not to be broken financially by
25 trying to give people a day in court.

1 And I don't blame them for wanting to dismiss
2 their cases and I don't blame them because the doctors are
3 so antagonistic right now. They've lost their businesses.
4 They've lost all of their hospitals. They don't want to
5 talk to lawyers. People can't even get treated right now in
6 my area, and I just think I should tell you that.

7 THE COURT: Mr. Becnel, how many cases do you have
8 left in this MDL?

9 MR. BECNEL: About 150.

10 THE COURT: And they're all in the Louisiana area?

11 MR. BECNEL: Yes. And people can't be worried
12 about litigation for a small case when they don't have a
13 place to --

14 THE COURT: Let me ask a question. Let's say
15 you're severed and those cases are remanded, they are
16 remanded back to New Orleans where no one can handle them
17 anyway.

18 MR. BECNEL: That's not true, Judge. Let me give
19 you an example from last week. Last week I prepared -- I
20 have been in trial virtually most of the year. I go back
21 Monday for the 16th day in a bus crash that killed 24 people
22 on Mother's Day and injured 18 before an African-American
23 judge against the state and I've taken it defendant by
24 defendant by defendant in three different courts, federal
25 court with Judge Lemmon, in state court.

1 And of course that case was important because it
2 changed now that bus drivers are required to have drug tests
3 and are required not to drive buses if they're on dialysis,
4 et cetera. But that's an important case.

5 This past week was the 30th year anniversary where
6 Richard and I 30 years ago with Judge Fallon handled the
7 largest ferry accident in the country, 78 people killed, and
8 as a result of that pilots now get tested, just like
9 airplane pilots do, on boats for alcohol abuse.

10 The problem we're having is this, that it becomes
11 so expensive for those people to do anything because they're
12 moving from -- they're in FEMA trailers. A FEMA trailer is
13 not like a motor home. I mean, it is as small as small can
14 be. People are trying to cope with where to live. There's
15 no place to live. And in about three months they're going
16 to take all the FEMA trailers away and these people have
17 nowhere to go. They have nowhere to go.

18 Restaurants don't have waiters because they can't
19 find them. Hotels don't have maids because they can't find
20 them. But for the Mexicans coming in, most of whom are
21 illegal, you wouldn't have 1/10th of what has happened in my
22 area.

23 And that stretches from the Texas border, because
24 Rita did as much devastation as did Katrina, but you just
25 don't hear about it. It's the whole southern part of the

1 state.

2 You know, don't you think people would have liked
3 after six years to say, Look, if I should lose, let me lose
4 in a year or let me lose in two years. Don't keep me
5 somewhere for six years. Like right now I had two cases
6 this past month that I had to prepare, fen-phen cases that
7 are 11 years old, haven't been tried.

8 We get reported more to the bar association for
9 failure to prosecute, we get reported more to the bar
10 association for failure to communicate because you can't
11 find people and so you spend another bunch of time trying to
12 say why isn't my case going.

13 Here's what's happening practically. Judge
14 Lemelle, I had a chemical case before him, a class action I
15 resolved against Marathon Oil Company, 2,000 cases. I had
16 one serious, serious case left. It was going to trial last
17 week.

18 Judge Lemelle got the case himself. He says, You
19 took the depositions of the experts. I want to see them.
20 We took them and the defendants filed 80 million dollar
21 motions. We didn't file a one. Now, this is a chemical
22 plant explosion that inundated neighborhoods. Naturally
23 it's African-American neighborhoods because that's the way
24 they build the plants.

25 He took the case. He read the motions, decided

1 the Daubert issues on his own and he says, I'm not depending
2 on a magistrate. I'm getting involved in settlement now. I
3 want you all to be here. People came down. And guess what?
4 The case got settled. But that was four years later. I
5 mean, we can't do that anymore, you know, lawyers dying,
6 clients dying.

7 The judge yesterday in the Exxon case, she says,
8 Okay, I'm putting four juries in a box and I'm going to
9 start trying some of these cases. And the defendants are
10 screaming, Oh, no, no, no, no, we want one at a time. Why?
11 Because the same thing is going to happen. You are going to
12 have nobody left.

13 The smart lawyers who don't care about clients
14 have all quit already in this case. Why do you think -- you
15 don't think they've dismissed the cases because of the
16 defense or they didn't think they had a case. They're
17 dismissing these cases because they can't afford to try
18 them.

19 Do you know what it cost to try those six Vioxx
20 cases so far? Those six Vioxx cases, some of which just had
21 a value of 300, 500 thousand dollars, they are spending 2
22 and 3 million dollars apiece on the plaintiff's side. Some
23 of them were tried twice. Some of them were tried once and
24 then now going to have to retry them again, that 50 million
25 dollar one.

1 And we don't have a way -- and that's why people
2 have no sense of respect for lawyers or judges or anything
3 else. If you read the ABA journal on my six and a half hour
4 flight here today because of broken planes, one of the --
5 because North Dakota right next to you is trying to get
6 something passed to make judges responsible. And that's not
7 what the problem is. The judges are doing a good job. It's
8 just the litigation takes forever.

9 And why on a \$75,000 case, why on a \$75,000 case
10 do you need five depositions or ten depositions of doctors
11 who saw somebody -- you know, it just makes no sense. And
12 I'm sorry I'm getting it off my chest, but it just really
13 hurts to see people have to give up because they don't have
14 any money.

15 Thank you.

16 THE COURT: Well, I want to thank you for telling
17 the Court what's happening in your part of the country. I
18 think it has to be said and I am concerned about any -- in
19 fact, I thought the resolution of these matters would be
20 done by the end of this year.

21 I think we do have to spend a lot of time trying
22 to figure out an end game and how we get these cases back,
23 if there are any cases to go back. However, that doesn't
24 mean the Defense is deprived of their defenses on any of
25 these cases.

1 And certainly the problems in southern Louisiana,
2 Mississippi, and Texas weigh heavily on this Court, but that
3 does not give the Court the right to keep the Defense from
4 putting forth their defenses in the appropriate manner. The
5 question is how do we do that efficiently.

6 And I'm thankful that Mr. Zimmerman has brought up
7 the idea of an end game committee and remand committee. I
8 am placing a call now to my magistrate judge, Susan Nelson,
9 who is well versed in mass torts and end games, to see if
10 she can come up and then we can get some dates with her and
11 with the magistrate judge -- with the special master and
12 work on something on that end.

13 So let's take -- if there's nothing else to be
14 done right now, let's take a 15-minute break while I talk to
15 her. She's working on another case for me right now. So if
16 I can get her up so you can -- I think most of you at least
17 on the Plaintiffs' side know who she is and the Defense can
18 meet her and then we can set up some dates on her calendar
19 to get an end game committee going. Does that sound all
20 right?

21 MR. ZIMMERMAN: Fine, Your Honor.

22 MR. HOEFLICH: Thank you, Judge.

23 THE COURT: Mr. Becnel, is that --

24 MR. BECNEL: Whatever the Court desires.

25 THE COURT: We'll take a 15-minute break.

1 (Recess taken at 3:15 p.m.)

2 * * * * *

3 (3:30 p.m.)

4 **IN OPEN COURT**

5 THE COURT: Good afternoon. I have with me
6 Magistrate Judge Susan Richard Nelson, who is the magistrate
7 on this matter, on this Baycol matter for the Court. I
8 pulled her out of her business to come up today.

9 I have given her a quick summary of what I want
10 done, setting up a committee for the end game and remand and
11 also accelerating the timetable for these cases to get back
12 to their home jurisdictions and also setting up an
13 accelerated timetable for those cases that are left in
14 Minnesota so that I can try those and get those out of the
15 way.

16 If there's nothing more, Counsel, why don't you
17 introduce yourselves to Magistrate Judge Nelson.

18 MR. ZIMMERMAN: Good afternoon, Magistrate. My
19 name is Bucky Zimmerman. I'm co-lead counsel for the PSC.

20 MAGISTRATE JUDGE NELSON: Good afternoon.

21 MR. LOCKRIDGE: Good afternoon, Your Honor.
22 Richard Lockridge from Lockridge, Grindal & Nauen here in
23 town. I am co-lead counsel with Mr. Zimmerman on this case.

24 MAGISTRATE JUDGE NELSON: Good afternoon.

25 MR. ARSENAULT: Richard Arsenault with the

1 Plaintiffs' Steering Committee.

2 MS. CABRASER: Good afternoon, Your Honor.
3 Elizabeth Cabraser with Lief, Cabraser in San Francisco on
4 the Plaintiffs' Steering Committee.

5 MR. HOPPER: Good afternoon, Your Honor. Randy
6 Hopper with Zimmerman Reed on behalf of the PSC.

7 MAGISTRATE JUDGE NELSON: Good afternoon to all of
8 you.

9 MR. BECNEL: Good afternoon, Judge. Daniel Becnel
10 from Reserve, Louisiana, about 20 miles out of the city of
11 New Orleans.

12 MS. FLAHERTY: Yvonne Flaherty with Lockridge,
13 Grindal & Nauen.

14 MS. HAUER: I'm Stacy Hauer with Zimmerman Reed.

15 MAGISTRATE JUDGE NELSON: Good afternoon.

16 MR. HOEFLICH: Good afternoon, Judge. I'm Adam
17 Hoeflich from Bartlit Beck in Chicago.

18 MS. WEBER: Good afternoon. I'm Susan Weber. I'm
19 with the Chicago office of Sidley Austin. Like Adam, I
20 represent Bayer.

21 MR. SIPKINS: Good afternoon, Your Honor. Peter
22 Sipkins with Dorsey & Whitney for Bayer.

23 THE COURT: You can turn around so she can see it.

24 MAGISTRATE JUDGE NELSON: I've seen it for years.

25 MR. SIPKINS: I think Judge Nelson saw this

1 initially back in the early 1990s in the early tobacco days.

2 THE COURT: All right.

3 MAGISTRATE JUDGE NELSON: Yes. It didn't work
4 then either.

5 MR. HOPPER: Some things never change, Your Honor.

6 MR. MIZGALA: Good afternoon, Your Honor. James
7 Mizgala. I'm with Susan at Sidley Austin in Chicago.

8 MR. MAGAZINER: Good afternoon, Your Honor. I'm
9 Fred Magaziner with Dechert, LLP out of Philadelphia
10 representing GlaxoSmithKline.

11 MAGISTRATE JUDGE NELSON: Good afternoon to all of
12 you.

13 THE COURT: Is there anything else that we need to
14 discuss? If not, we'll adjourn. You will adjourn to
15 Magistrate Judge Nelson's --

16 MAGISTRATE JUDGE NELSON: Why don't you come to
17 the courtroom. There's bigger space there. That's on the
18 ninth floor, 9E.

19 THE COURT: Thank you.

20 (Court adjourned at 3:45 p.m.)

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

Certified by: Lori A. Simpson, RMR-CRR