

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MINNESOTA

3 -----  
4 In Re: Baycol Products Litigation ) File No. MDL 1431  
5 )  
6 ) 9:00 a.m. o'clock  
7 ) November 21, 2002  
8 ) Minneapolis, MN  
9 )  
10 -----

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

14 APPEARANCES:

15 ON BEHALF OF THE PLAINTIFFS: CHARLES ZIMMERMAN, ESQ.

- 16 RICHARD LOCKRIDGE, ESQ.
- 17 RONALD GOLDSER, ESQ.
- 18 JOHN CLIMACO, ESQ.
- 19 STANLEY CHESLEY, ESQ.
- 20 JOSEPH ARSHAWSKY, ESQ.
- 21 VICTORIA MANIATIS, ESQ.
- 22 DANIEL BECNEL, ESQ.
- 23 ELIZABETH CABRASER, ESQ.
- 24 BRADLEY HARNOLD, ESQ.
- 25 WENDY FLEISHMAN, ESQ.
- DAVID PETERSON, ESQ.
- REID STEWART, ESQ.
- KEVIN ROGERS, ESQ.

ON BEHALF OF THE DEFENDANTS: PHIL BECK, ESQ.

- KENNETH MOLL, ESQ.
- ADAM HOEFLICH, ESQ.
- SUSAN WEBER, ESQ.
- FRED MAGAZINER, ESQ.
- GENE SCHAERR, ESQ.
- TIMOTHY COON, ESQ.

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1 THE CLERK: Multi-District Case 1431, In re 09:16:53  
2 Baycol Products. Please state your appearances for the 09:17:00  
3 record. 09:17:02  
4 MR. ZIMMERMAN: Charles Zimmerman for the 09:17:06  
5 plaintiffs. 09:17:08  
6 MR. LOCKRIDGE: Richard Lockridge for the 09:17:08  
7 plaintiffs, Your Honor. 09:17:11  
8 THE COURT: Good morning, good morning.  
9 MS. CABRASER: Elizabeth Cabraser for plaintiffs, 09:17:13  
10 Your Honor. 09:17:15  
11 THE COURT: Good morning.  
12 MR. CHESLEY: Good morning, Your Honor, Stan 09:17:16  
13 Chesley for the plaintiffs. 09:17:18  
14 THE COURT: Good morning.  
15 MR. BECK: Good morning, Your Honor. Phil Beck 09:17:20  
16 for the Bayer defendants. 09:17:20  
17 THE COURT: Good morning.  
18 MR. HOEFLICH: Good morning, Your Honor, Adam 09:17:25  
19 Hoeflich for the Bayer defendants. 09:17:27  
20 THE COURT: Good morning.  
21 MR. MAGAZINER: Fred Magaziner for  
22 GlaxoSmithKine, Your Honor. 09:17:32  
23 MR. SIPKINS: Good morning, Peter Sipkins for 09:17:32  
24 Bayer. 09:17:33  
25 THE COURT: Good morning.

1 MS. WEBER: Good morning, Your Honor, Susan 09:17:35

2 Weber for Bayer. 09:17:36

3 THE COURT: Good morning. We got the back row. 09:17:38

4 Anybody want to be introduced. Mr. Zimmerman, you may. 09:17:39

5 Before you get started, I would like to make some 09:17:47

6 introductions. We have Magistrate Judge John Lebedoff who 09:17:53

7 is the Magistrate on this matter present, and we also have 09:17:58

8 Special Master Roger Haydock. 09:18:03

9 MR. ZIMMERMAN: Good morning, Your Honor, Bucky 09:18:13

10 Zimmerman for the Plaintiffs. We have filed with the Court 09:18:17

11 a joint report and agenda for this conference that I 09:18:19

12 believe everyone has a copy of, and we will go through that 09:18:26

13 agenda, probably in the order of the agenda, unless the 09:18:28

14 Court has anything it would like to take out of order for 09:18:33

15 any reason. I will go through certain things, and I think 09:18:36

16 each of us may have some additional comments that are not 09:18:41

17 on the paper with regard to updates and/or comments. 09:18:44

18 First of all, Your Honor, just for the record, we 09:18:50

19 did not have, obviously, the October status conference due 09:18:52

20 to the tragic death of our beloved Senator Paul Wellstone. 09:18:58

21 And we are here today after a brief continuation of the 09:19:05

22 October conference that was schedule in Texas. We are now 09:19:09

23 at the November conference which is here in Minneapolis. 09:19:12

24 The first issue on the agenda, Your Honor, is the 09:19:15

25 settlement program. As the Court knows, Bayer is moving 09:19:19

1 forward with a program that we are cooperating with as the 09:19:23  
2 MDL Plaintiffs and the Steering Committee to try and settle 09:19:27  
3 our serious injury cases. I've been advised this morning 09:19:32  
4 that approximately 98 cases have now been resolved within 09:19:37  
5 this MDL settlement program. What I mean by that is that 09:19:42  
6 the MDL settlement team has settled with Bayer 98 cases. 09:19:46  
7 There are approximately 25 additional cases in direct 09:19:53  
8 settlement negotiations at this time. 09:19:57  
9 Cases are being provided to the MDL settlement 09:20:00  
10 committee by lawyers throughout the country and at a fairly 09:20:04  
11 regular basis, but they are not overwhelming numbers, quite 09:20:09  
12 honestly. 09:20:17

13 THE COURT: Do you know what the numbers are? 09:20:17

14 MR. ZIMMERMAN: I do. Ron can you tell me, how 09:20:17  
15 many cases have come into the office or come into the 09:20:20  
16 program that are being worked through. 09:20:23

17 MR. GOLDSER: Good morning, Your Honor, Ron 09:20:27  
18 Goldser. We usually get between 3 and 10 cases submitted 09:20:31  
19 to us on a weekly basis. I think Mr. Zimmerman indicated 09:20:35  
20 that we have about a hundred settled and 25 that are still 09:20:40  
21 ongoing. There are only a few right now that are not yet 09:20:40  
22 submitted to Bayer for the settlement program that we still 09:20:45  
23 have in hand. Everything that he's told you has been given 09:20:48  
24 to you.

25 THE COURT: Thank you. 09:20:54

1 MR. ZIMMERMAN: This is obviously a voluntary 09:20:55  
2 program at this point, and it's opened to all lawyers, 09:21:00  
3 whether they have MDL cases or don't have MDL cases, and we 09:21:03  
4 are getting some cases from people that don't have filed 09:21:10  
5 cases, whether or not filed in federal court. But I cannot 09:21:14  
6 say that's been an overwhelming number by any means. Less 09:21:17  
7 serious cases which are of concern to all of us that don't 09:21:21  
8 meet the settlement criteria are not being resolved or 09:21:25  
9 negotiated or discussed at this time. 09:21:28

10 THE COURT: Before we move on, so we can have the 09:21:31  
11 universe, we have first year or second-year law students 09:21:33  
12 present. So, let's give them a little history of how many 09:21:40  
13 cases are in the system so they can understand what we are 09:21:45  
14 dealing with. 09:21:49

15 MR. ZIMMERMAN: Sure, Your Honor. Currently 09:21:50  
16 filed in the federal court are approximately, and I think 09:21:53  
17 I'll be corrected, approximately somewhere under 2,000 09:21:58  
18 cases. 09:22:02

19 THE COURT: No. 09:22:03

20 MR. ZIMMERMAN: Okay, I'm wrong.

21 THE COURT: We have -- how many cases do we have 09:22:04  
22 here -- 2,256 here in the district, so, nationwide, the 09:22:08  
23 numbers are much larger than that. 09:22:15

24 MR. ZIMMERMAN: I've been told 2,800 -- no, I've 09:22:21  
25 being told wrong. 09:22:23

1 MS. WEBER: The numbers we have are about 09:22:26  
2 forty-two hundred in the federal system, and in the last 09:22:28  
3 couple of weeks we have received a number of mass filings, 09:22:31  
4 typically by Weitz and Luxenberg, primarily filed in this 09:22:35  
5 district and the Eastern District of Pennsylvania. 09:22:40

6 MR. ZIMMERMAN: Sorry, Your Honor. And this 09:22:45  
7 really goes to one of the problems we are having which 09:22:46  
8 we'll talk about later which is getting this information on 09:22:50  
9 a regular basis to the PSC in regard to the number of filed 09:22:54  
10 cases and who are filing the cases is something we want to 09:22:59  
11 discuss with the Court. And I think we got a resolution to 09:23:03  
12 that because we are not getting the numbers on a regular 09:23:06  
13 basis, and it's very hard for us to track through filings 09:23:10  
14 because we don't know multiple parties and we don't know 09:23:13  
15 who the attorneys are in the Verilaw filings. We can 09:23:17  
16 discuss that with the Court. 09:23:21

17 THE COURT: All right.

18 MR. ZIMMERMAN: At any rate, there are 4200 cases 09:23:23  
19 in the federal system and in the state system -- ? 09:23:26

20 MS. WEBER: 2,001, total 6400 cases. So that 09:23:30  
21 works to about 2,200 -- more like 2,000 in the state 09:23:40  
22 system. 09:23:43

23 MR. ZIMMERMAN: Okay. And it is true that Weitz 09:23:47  
24 and Luxenberg, Rob Gordon's firm, has been filing a 09:23:50  
25 tremendous number of cases recently, and I will discuss 09:23:55

1 with the Court later an arrangement has been made with them 09:23:58  
2 to participate fully in the MDL process that has to do with 09:24:05  
3 something having to do with our holdback order, but I will 09:24:09  
4 discuss that when we get to the holdback issues. 09:24:14

5 THE COURT: Fine. 09:24:19

6 MR. ZIMMERMAN: I believe in court today is Brad 09:24:21  
7 Harnold from the Shook, Hardy firm who is essentially the 09:24:25  
8 point man that we've been in the MDL negotiating our cases 09:24:25  
9 with, and Brad has been extremely accommodating and very 09:24:29  
10 good to work with and I commend their services. Albeit, in 09:24:32  
11 our judgment a little slow when we got 6400 cases and we've 09:24:38  
12 only settled about a hundred, you can see that it will be 09:24:43  
13 hard for Brad or our team -- 09:24:46

14 THE COURT: I don't think it's slow. I think 09:24:49  
15 they are doing a fine job of getting starting. 09:24:50

16 MR. ZIMMERMAN: And I'm here to commend their 09:24:55  
17 services. 09:24:56

18 THE COURT: I met you last night -- 09:24:57

19 MR. HARNOLD: Good morning, Your Honor. 09:25:01

20 THE COURT: Good morning. I commend the efforts 09:25:01  
21 and you will see later on that the Court is going to try 09:25:03  
22 and get involved in the settlement process and mediation 09:25:07  
23 process so it will facilitate the settlement of more cases. 09:25:13  
24 So, I commend your efforts so far without the Court's 09:25:19  
25 efforts. 09:25:21

1 MR. HARNOLD: Thank you. 09:25:23

2 MR. ZIMMERMAN: Further, we understand that Bayer 09:25:28

3 has settled approximately 220 or 228 cases, maybe a little 09:25:29

4 more with the uptake now that we've heard this morning 09:25:35

5 throughout the country. So this would include both MDL 09:25:38

6 cases and non-MDL cases or state court cases. Numerous 09:25:42

7 other cases are certainly under review and discussion. 09:25:47

8 That is sort of the update on the individual 09:25:53

9 settlement program. There are no other kinds of settlement 09:25:57

10 talks under way at this time. I know that there has always 09:26:02

11 been a concern as to what the MDL PSC is doing with regard 09:26:06

12 to other discussions, and I'm here to report that there 09:26:10

13 have been no other discussions with regard to other kinds 09:26:16

14 of settlements or resolutions. That's just as a matter of 09:26:20

15 information for the Court. 09:26:24

16 Phil or anyone else, do you have any comments on 09:26:28

17 that? Otherwise, I was going to move to the common 09:26:32

18 benefits issues. 09:26:36

19 MR. BECK: Your Honor, Phil Beck. 09:26:38

20 THE COURT: If you would come to the microphone, 09:26:41

21 I appreciate it. 09:26:44

22 MR. BECK: Your Honor, I would simply add that 09:26:44

23 the program that we have been following and that Brad and 09:26:45

24 his colleagues have been implementing has been the same one 09:26:50

25 that we announced early on in New Orleans, and that is that 09:26:54



1 we are prepared and, in fact, eager to discuss any case 09:26:59  
2 where there was a demonstrative injury, and we made, I 09:27:04  
3 think, real progress. As Bucky said, we've settled about a 09:27:13  
4 hundred of the federal cases and a slightly larger number 09:27:18  
5 of state cases, and as he alluded to, we continue to 09:27:22  
6 evaluate any claim where there was Rhabdo or a serious 09:27:27  
7 injury. We have not been entertaining discussions on the 09:27:32  
8 claims where we think there is no injury at all. And that 09:27:37  
9 will continue to be our approach in these cases. 09:27:41  
10 As we said early on, we are prepared to settle 09:27:45  
11 anything where there was an actual demonstrative injury, 09:27:50  
12 but we aren't going to be entering into settlement 09:27:55  
13 discussions on cases where someone was not hurt, and, in 09:27:58  
14 fact, the medicine worked perfectly for them. 09:28:00  
15 So, that's our basic program. We've stuck with 09:28:04  
16 it so far, and we anticipate that we'll continue to stick 09:28:08  
17 with that. I think we've been moving about as quickly as 09:28:08  
18 we can. One of the problems is simply with some of the 09:28:11  
19 lawyers, the plaintiffs' lawyers. They've had some 09:28:15  
20 difficulty simply processing their own files so that they 09:28:19  
21 can determine which cases fall in the category that we are 09:28:23  
22 prepared to enter into settlement discussions. So, it's no 09:28:27  
23 fault on their part, but it takes a while for them to sort 09:28:31  
24 out which cases fall in which categories. 09:28:34

25 THE COURT: Thank you. Mr. Zimmerman. 09:28:39

1 MR. ZIMMERMAN: I do want to make an explanation 09:28:42  
2 or comment to the Court on what is really being settled 09:28:44  
3 just so everybody knows what we are talking about. 09:28:48

4 What is being settled is essentially Rhabdo 09:28:51  
5 myolysis and Rhabdo -- what we call Rhabdo-like which looks 09:28:56  
6 and smells very much like Rhabdo, although there may not be 09:28:58  
7 an actual diagnosis in the file or in the medical chart. 09:29:04  
8 That has really been the criteria that has been set up for 09:29:08  
9 what they are willing to discuss. And we have told people 09:29:13  
10 what they are. Now, there are some gradations of that 09:29:18  
11 which include hospitalization, dialysis and other organ 09:29:23  
12 involvement and in some cases death. 09:29:31

13 But there are a number of cases, obviously, that 09:29:34  
14 are being filed as part of this sixty-four hundred that 09:29:36  
15 represents something above what Phil just said, someone 09:29:40  
16 took the medication and it worked perfectly in Rhabdo, and 09:29:43  
17 that's this area that currently is sort of being left for a 09:29:46  
18 later discussion. 09:29:52

19 But Plaintiffs Steering Committee, I think, and 09:29:52  
20 the defendants just take different positions on the 09:29:57  
21 severity, the importance, the debilitation of the injury 09:30:00  
22 and the causation with regard to those large groups of 09:30:04  
23 cases. Is that a fair statement, Phil? 09:30:08

24 MR. BECK: Yes. I think it's the basic criteria 09:30:12  
25 for cases that we will discuss settlement on is the Rhabdo 09:30:15

1 or Rhabdo-like cases. I suppose that it's conceivable that 09:30:19  
2 someone can show a case with a significant injury that 09:30:26  
3 wouldn't fall in that specific category, but we do take 09:30:28  
4 different views on the great mass. That's actually a very 09:30:32  
5 small percentage of the people who took the medicine. And 09:30:36  
6 even among the cases that are filed, it's a minority of the 09:30:40  
7 cases that are filed have what we consider to be actual 09:30:43  
8 injury or at least Rhabdo, and the bulk are people who we 09:30:47  
9 don't believe suffered any injury at all. 09:30:52

10 And we do disagree with the Plaintiffs Steering 09:30:55  
11 Committee as to whether there is any injury in that group. 09:30:58  
12 But since that is our position, those are not cases that we 09:31:02  
13 are talking about settling right now. If we have to fight 09:31:06  
14 those cases, we'll fight those cases. 09:31:09

15 MR. ZIMMERMAN: I think we've had an enough 09:31:12  
16 discussions on this point of view. 09:31:14

17 THE COURT: Let's move along. 09:31:17

18 MR. ZIMMERMAN: Part C under settlement is the 09:31:18  
19 amendments or the supplementations to PTO 25. I don't know 09:31:24  
20 if the Court wants me to provide a little bit of history on 09:31:31  
21 this. I shall, but I believe the bottom line is that 09:31:35  
22 through the LAC Committee, the Liaison Advisory Committee, 09:31:39  
23 and the tremendous work by the Special Master and others, 09:31:45  
24 we have been able to craft an order that I think everybody 09:31:49  
25 agrees with for a mechanism to withhold back portions of 09:31:52

1 settlements under certain categories of federal cases and 09:31:59  
2 federally assisted cases. In other words, cases that the 09:32:05  
3 MDL assisted in the settlement of and/or cases of the PSC 09:32:10  
4 and PSC subcommittee people. That those funds -- 6 percent 09:32:14  
5 of those funds will be held back for basically later 09:32:18  
6 determination by the Court as to how they might be divided 09:32:22  
7 for payment of attorneys' fees and costs. 09:32:26

8 I would be happy to discuss it at length, but I 09:32:29  
9 think the bottom line is we do have an agreed order or 09:32:33  
10 pretty close to an agreed order. I think there's a couple 09:32:38  
11 of issues that we didn't come to agreement on, and I 09:32:41  
12 believe the Special Master indicated that Your Honor was 09:32:44  
13 going to take a position on. If we want to have that 09:32:47  
14 discussion now or wait until later, I just don't know what 09:32:51  
15 the position of the Court is on that. But we're concerned 09:32:54  
16 that because settlements are occurring, that this order be 09:32:57  
17 put into place so that we're making sure that settlements 09:33:03  
18 are properly distributed and proper moneys are held back 09:33:06  
19 and how they are held back and where the funds are kept and 09:33:10  
20 things like that. 09:33:16

21 THE COURT: My understanding is you will be 09:33:16  
22 meeting with the Special Master after this hearing, and 09:33:17  
23 I've given my thoughts to the Special Master so we don't 09:33:21  
24 have to get into that right now. 09:33:28

25 MR. ZIMMERMAN: Okay, thank you. 09:33:28

1 THE COURT: I appreciate the hard work that 09:33:30  
2 everyone has done on this issue the last month or so, and 09:33:34  
3 really the last 48 hours. It's one thing that I want to do 09:33:38  
4 is compliment you on all your efforts on this issue. 09:33:48

5 MR. ZIMMERMAN: There also is a small issue 09:33:53  
6 contained within this that I want the Court to be aware of 09:33:55  
7 with regard to one PSC member in the state of Illinois. 09:33:59  
8 That has to do with the retroactivity of this order because 09:34:04  
9 of some ethical considerations that exist in Illinois law. 09:34:08  
10 And I know the Special Master has been apprised of that, 09:34:13  
11 but I just want to assure our member from Illinois that we 09:34:18  
12 are taking that issue into consideration so the order will 09:34:23  
13 be properly crafted to protect any ethical considerations 09:34:27  
14 in his state. 09:34:28

15 THE COURT: The Court is aware of that. 09:34:29

16 MR. ZIMMERMAN: Next, Your Honor, is the lien and 09:34:32  
17 third-party payor issues. As the Court knows from the 09:34:36  
18 status conference we had in Pennsylvania, certain 09:34:41  
19 negotiations are going on with third-party payors on the 09:34:46  
20 subrogation issues to try and potentially resolve those 09:34:53  
21 cases -- or those claims outside of the settlements of 09:34:58  
22 individual claims so that when you get to an individual 09:35:02  
23 claim to settle, you don't have the overhang of the 09:35:05  
24 subrogation issue and the amount and the dealing with the 09:35:09  
25 subrogation, which has made settlements in some states and 09:35:15

1 under some state laws very, very difficult. 09:35:18

2 The reason I'm bringing that up, Your Honor, is 09:35:22

3 two things are in play -- three things are in play right 09:35:25

4 now. One is a proposed order is before the Court to 09:35:27

5 appoint Joe Arshawsky and Steven Schwartz as liaison 09:35:31

6 counsel with regard to union and employer plans maintained 09:35:37

7 by unions on behalf of employees, for Joe Arshawsky to be 09:35:42

8 appointed liaison counsel along with his partner Art Sadin 09:35:48

9 and for Steve Schwartz to be appointed MDL Pennsylvania 09:35:53

10 liaison counsel for Health and Welfare funds. And this has 09:35:57

11 been ongoing before the Court for some time, and I believe 09:36:03

12 we have an agreed order that everyone has agreed to. 09:36:04

13 So, I believe the entry of that subject to the 09:36:09

14 Court's discretion, the PSC and the defense and Mr. 09:36:10

15 Arshawsky and Mr. Schwartz would asked to be entered. 09:36:15

16 THE COURT: Mr. Arshawsky, good morning. Are 09:36:21

17 you -- have you had an opportunity to review the proposed 09:36:24

18 order? Welcome. 09:36:28

19 MR. ARSHAWSKY: Good morning, Your Honor, thank 09:36:34

20 you. It's a pleasure to be in Minnesota. We have reviewed 09:36:39

21 the order and it's fine. So, we appreciate the efforts of 09:36:45

22 the parties in reaching an agreement and we appreciate the 09:36:45

23 Court entering the order. 09:36:50

24 THE COURT: Counsel, as I mentioned to counsel 09:36:53

25 last night, I apologize for the long delay. It percolates 09:36:55

1 to the top to get to the front burner and I'm glad that we 09:37:02

2 got it resolved for you. 09:37:06

3 MR. ARSHAWSKY: We're pleased to have it be 09:37:10

4 resolved and we're pleased to be working with the MDL. 09:37:12

5 THE COURT: I will sign the order. 09:37:15

6 MR. ZIMMERMAN: Also, recently, Your Honor, the 09:37:16

7 Blue Cross people have contacted me regarding various Blue 09:37:19

8 Cross plans, and I invited, actually, Kim West, who I 09:37:26

9 believe is here from Birmingham. Kim West, who is here, 09:37:30

10 and represents a number of Blue Cross plans and she has 09:37:35

11 asked for information -- asked to become involved in the 09:37:40

12 process. So, we have not really had much of an opportunity 09:37:45

13 to talk because we were going to talk last night and then 09:37:48

14 had to go to other meetings. I said I would introduce her 09:37:52

15 to the Court and let the Court know about her interest, and 09:37:56

16 she can probably describe it better than I and then take 09:37:59

17 the next step regarding this. 09:38:02

18 THE COURT: Good morning and step forward and 09:38:04

19 introduce yourself for the record. 09:38:05

20 MS. WEST: My name is Kimberly West, and I'm from 09:38:08

21 Birmingham, Alabama, and it's a pleasure to be in 09:38:13

22 Minnesota. 09:38:15

23 THE COURT: Thank you. I'm happy that you are at 09:38:17

24 least engaging in conversations with the MDL because it's 09:38:19

25 very important that we resolve these issues as early as 09:38:23

1 possible because they cause problems at the end. And I 09:38:27  
2 appreciate you being here and engaging in conversations 09:38:32  
3 with the PSC. 09:38:35

4 MS. WEST: I appreciate the opportunity, and my 09:38:39  
5 clients acknowledge that this issue is being recognized and 09:38:42  
6 being dealt with by the parties. Thank you. 09:38:44

7 THE COURT: Thank you. 09:38:46

8 MR. ZIMMERMAN: One of the issues, Your Honor, 09:38:49  
9 where I think the PSC and the defense counsel disagree with 09:38:50  
10 regard to third-party payor issues is a desire to be 09:38:55  
11 participatory in these discussions and to be updated. 09:39:00

12 Frankly, the last we heard about the status of 09:39:04  
13 negotiations was when you were updated back in Philadelphia 09:39:07  
14 regarding these discussions, I guess, would be two months 09:39:12  
15 ago or so. 09:39:16

16 The PSC wants to be involved, or at least wants 09:39:17  
17 to be able to understand and monitor and be present during 09:39:22  
18 these discussions. I think this is an issue which we met 09:39:25  
19 and conferred on. I don't know that you have taken a 09:39:29  
20 position with regard to that firmly, but I think we should 09:39:33  
21 discuss it a little bit now to see if we're really that far 09:39:38  
22 apart on what our positions are. 09:39:41

23 THE COURT: Adam.

24 MR. HOEFLICH: Thank you, Judge, we will continue 09:39:44  
25 to -- 09:39:48



1 THE COURT: Good morning. 09:39:48

2 MR. HOEFLICH: Thank you. Good morning. We will 09:39:52  
3 continue to talk to Mr. Zimmerman and apprise him generally 09:39:52  
4 of where we are in negotiations with other parties. But 09:39:55  
5 for persons who do not have cases in the MDL at this point 09:39:57  
6 or persons who have cases in state court, we don't think 09:40:02  
7 there is a requirement, and we don't think it's appropriate 09:40:06  
8 for Mr. Zimmerman to be involved personally in those 09:40:09  
9 negotiations. Where a person has a case in the MDL or is 09:40:13  
10 active in the MDL and there's a reason for Mr. Zimmerman 09:40:16  
11 to be involved, we'll apprise him and he can talk to the 09:40:20  
12 other parties, and we can discuss whether he should be 09:40:22  
13 involved. 09:40:26

14 But as a matter of course, when a different 09:40:27  
15 plaintiff wants to meet separately with the defendants, we 09:40:30  
16 think that's perfectly appropriate, and we think that Mr. 09:40:33  
17 Zimmerman should become involved if and when he's invited 09:40:38  
18 by one or more of the other parties. 09:40:41

19 MR. CHESLEY: Your Honor, may I speak for just a  
20 moment?

21 THE COURT: Good morning.

22 MR. CHESLEY: Good morning, Your Honor, Stanley 09:40:46  
23 Chesley for the plaintiffs. 09:40:48

24 I respect what Adam has said, but this is 09:40:48  
25 blending over into our case, and let me explain why. In 09:40:53

1 each of these settlements that has been -- that we have 09:40:58  
2 been dealing with, the 98, there is a requirement that, 09:41:03  
3 frankly, I have not ever seen before. I know about 09:41:07  
4 Medicare liens and indemnity whereby counsel for the 09:41:11  
5 plaintiff must, must indemnify the third-party payor. The 09:41:16  
6 problem with that, Your Honor, is the claim that the 09:41:25  
7 third-party payor has is against the plaintiff. 09:41:28  
8 And what's happening here in this type of case, 09:41:31  
9 if you have an automobile accident, one type of trauma, you 09:41:36  
10 can pretty well identify the bills for that particular 09:41:39  
11 trauma. You cannot really identify the bills for this 09:41:44  
12 particular thing because it's a series of events, and it is 09:41:48  
13 likely that these third-party payors, maybe with this type 09:41:52  
14 of indemnity, taking a very hard look at possibly getting 09:41:59  
15 whatever they may have paid over the last three or four 09:42:03  
16 years or two years with some contemporaneous injury. 09:42:07  
17 Additionally, there is a very aging population, 09:42:12  
18 and the statistics show that when people get past 60, 09:42:16  
19 unfortunately, I'm not one of them, past 60, illness is 09:42:23  
20 more prevalent, and these type of illnesses are more 09:42:24  
21 prevalent, and, frankly, the defendant is using this as one 09:42:28  
22 of the defenses. That is impeding the ability to settle. 09:42:32  
23 Therefore, it is my recommendation that we do not have to 09:42:36  
24 sit in negotiations. But, for example, in Sulzer and 09:42:40  
25 Phen-fen, we were actively involved with the defendants. 09:42:44

1           It was my belief up front in this case that           09:42:50  
2   rather than waiting until the end to deal with the           09:42:55  
3   third-party payors as happened in Breast Implant, which was 09:42:59  
4   a mistake, it's better to deal up front. We, on behalf of 09:43:08  
5   the plaintiffs, having done these before, and I worked with 09:43:10  
6   Ms. West on more cases than we know and want to speak    09:43:12  
7   about, and have great respect for her abilities.           09:43:14

8           I believe that we lend credibility and meaningful 09:43:19  
9   negotiations to the process because we bring a piece of    09:43:23  
10   sophistication, not taking anything away from the        09:43:26  
11   defendants, because it does directly impact the plaintiffs 09:43:29  
12   and the plaintiffs' lawyers. Thank you, Your Honor.       09:43:32

13           THE COURT: Adam.                                   09:43:36

14           MR. HOEFLICH: Thank you, Judge. There is now a 09:43:38  
15   liaison counsel for the third-party payors. We have met    09:43:42  
16   with Ms. West as well. In fact, we have been involved in 09:43:45  
17   negotiations with third-party payors, I believe, for more 09:43:49  
18   than a year now. If Mr. Chesley wishes reach out to Mr.    09:43:55  
19   Arshawsky or Ms. West, and they agree they want to be with 09:43:59  
20   us, we're happy to do that. But we don't believe there    09:44:01  
21   should be a rule that the PSC is automatically a party in 09:44:03  
22   our negotiations with other parties. Thank you.           09:44:07

23           THE COURT: Thank you.                               09:44:10

24           MR. ZIMMERMAN: We respectfully disagree, Your 09:44:13  
25   Honor, and we will have more discussion on that.         09:44:15

1 Finishing, then, with settlement, we move to 09:44:20

2 discovery. On the document discovery issue -- 09:44:23

3 THE COURT: Before we move on to this matter, 09:44:32

4 discovery issues, I have been the final arbiter on 09:44:35

5 discovery issues on this matter because I wanted to see 09:44:43

6 what type of problems we would have and that you have. I 09:44:46

7 will set the tone for any discovery disputes. I will be 09:44:52

8 putting out an order as soon as possible delegating that to 09:44:59

9 Magistrate Judge Lebedoff. He will be handling the 09:45:04

10 discovery disputes from now on. 09:45:09

11 MR. ZIMMERMAN: Thank you, Your Honor. 09:45:15

12 THE COURT: I want to make sure that you make 09:45:16

13 sure that your committee that's doing the depositions know 09:45:18

14 that and make sure that they are in the order. Hopefully, 09:45:23

15 in the order we'll have his telephone number, and I will be 09:45:26

16 the backup if he's not available. I will be the backup 09:45:30

17 dealing with any discovery disputes. So, you will have 09:45:36

18 someone available to deal with any discovery disputes. 09:45:40

19 MR. ZIMMERMAN: Thank you, Your Honor. And those 09:45:45

20 of us in Minnesota obviously know Magistrate Judge Lebedoff 09:45:46

21 very well, and we look forward to working with him. 09:45:52

22 On the documents, Your Honor, I would really say 09:45:56

23 on the document issues, they are somewhat folded into the 09:46:00

24 deposition issues because of the questions that have to do 09:46:05

25 with the documents that we need for the depositions being 09:46:08

1 produced timely. We do have an issue with regard to that, 09:46:13  
2 but it's been somewhat of a problem. We're just going to 09:46:16  
3 discuss it briefly with the Court under depositions. 09:46:20  
4 But with regard to documents, the depository is 09:46:26  
5 really going at full board. I think we averaged just 09:46:28  
6 about -- I think about 500 people hours there -- is Julie 09:46:31  
7 here -- people hours a month in people working there and 09:46:36  
8 coding and subjectively and objectively coding and 09:46:42  
9 reviewing documents, and we're doing quite a job there. 09:46:45  
10 And I think at this point, I don't think it's worth the 09:46:48  
11 time to really update too much unless the Court wants an 09:46:52  
12 update on where we are with our document program. But I'm 09:46:55  
13 here to report that it's going very, very well. We are not 09:47:00  
14 caught up, but we're staying above water with it, and we 09:47:05  
15 have a protocol in place that's getting us a lot of 09:47:09  
16 important document vetting and coding, and we have a very 09:47:16  
17 good group of people who are doing the work. 09:47:22  
18 There are some issues having to do, as I said, 09:47:30  
19 with the timely production which has slowed down somewhat 09:47:32  
20 the deposition program. So if I can move into the 09:47:36  
21 deposition aspect of the case, you'll hear some of our 09:47:39  
22 concerns about the document production as part of the 09:47:42  
23 deposition program. And if I could, unless counsel has a 09:47:46  
24 comment on the document, I would like to turn this over to 09:47:49  
25 Richard Arsenault, who's going to give you a brief, I 09:47:53

1 believe, a power point presentation, very brief, on where 09:47:57  
2 we are with depositions, what's been done and what are some 09:47:59  
3 of the issues left to do -- I beg your pardon, John 09:48:03  
4 Climaco, I'm sorry. 09:48:10

5 MR. CLIMACO: Good morning, Your Honor, John 09:48:13  
6 Climaco. May it please the Court, Your Honor, before I go 09:48:16  
7 into the power point presentation, I just want to give you 09:48:18  
8 a little overview. 09:48:22

9 The members of the PSC Discovery Committee, in 09:48:23  
10 particular, the Co-Chairmen and myself, Mr. Arsenault is 09:48:29  
11 here and Mr. Branch. We believe that we have been working 09:48:34  
12 very cooperatively with out counterparts, Doug Marvin and 09:48:37  
13 Joe O'Connor. We have a weekly meet and confer where we 09:48:42  
14 attempt to straighten out various issues, and as Mr. 09:48:47  
15 Zimmerman has pointed out, one of the ongoing issues has 09:48:52  
16 been the -- what we call the untimeliness of document 09:48:57  
17 production. And we understand that's probably as much a 09:49:00  
18 problem in many ways for the defendants as it is for us. 09:49:03

19 But during our presentation, I will make 09:49:06  
20 reference to certain issues that have given rise that have 09:49:10  
21 slowed down the process, and I think we need to be able 09:49:15  
22 to -- we should be able to deal with that. 09:49:17

23 I also, Your Honor, will be touching on our 09:49:21  
24 efforts and our cooperation with four members of the State 09:49:25  
25 Liaison Committee which you appointed, Mr. Ed Blizzard, Mr. 09:49:30

1 Ramon Lopez, Ms. Dawn Barrios and Sol Weiss. I know Ms. 09:49:36

2 Dawn Barrios and Ramon Lopez are both here.

3 We have been working with them, basically, 09:49:39

4 attempting to coordinate an effort for the Bayer AG 09:49:45

5 depositions, and that will be the last part of the power 09:49:47

6 point. 09:49:51

7 I was finishing up a deposition yesterday in New 09:49:51

8 York, so I was not able to attend a meet and confer that 09:49:55

9 took place on document production, but I understand from 09:49:59

10 Misters Arsenault and Turner that there may have been some 09:50:07

11 progress made. We're talking about limiting search terms 09:50:13

12 which hopefully will reduce the number of false positives. 09:50:17

13 One of the things I had raised a while ago -- one 09:50:19

14 of the problems, Your Honor, is we get an overall 09:50:22

15 production on regular basis. But then when it comes to the 09:50:25

16 individual electronic and paper files of a particular 09:50:28

17 deponent, sometimes those documents are not produced until 09:50:34

18 the last minute. And, so, we have made an effort, an 09:50:36

19 unbelievable effort to attempt to keep to the depositions 09:50:40

20 schedule. 09:50:43

21 One of the things I have indicated, as I think it 09:50:44

22 would be good if the concentration beyond the electronic 09:50:47

23 and paper files of the individuals now scheduled or who 09:50:51

24 will be in the future scheduled, so we get that and we can 09:50:58

25 begin to concentrate on that. 09:51:02

1           And with that, Your Honor, I will attempt,           09:51:04  
2    although I'm not very good at it, to do this power point   09:51:06  
3    presentation.   09:51:11

4           Your Honor, to date we have deposed 33 witnesses; 09:51:30  
5    we have 16 scheduled, and we are in the process of       09:51:34  
6    discussing 31 additional. Help. (Laughter).           09:51:39

7           MR. CHESLEY: I feel much better now. I was       09:52:05  
8    really nervous.

9           MR. CLIMACO: I was pressing the right button.   09:52:26  
10   This is a listing of the Bayer witnesses whom we had   09:52:26  
11   deposed, Your Honor, and GSK witnesses deposed, including 09:52:28  
12   Kristin Elder who was just deposed just a few days ago. 09:52:32

13           These are the Bayer depositions that are       09:52:36  
14   currently scheduled, Your Honor, through early January. 09:52:38

15           GSK or Bayer depositions in the process of being 09:52:42  
16   scheduled, Your Honor.                                       09:52:48

17           The last section, Bayer depositions requiring an 09:52:48  
18   additional day is Tig Conger, and that's been scheduled for 09:52:51  
19   February 4. Dr. Richard "Buzz" Goldstein, I've taken these 09:52:59  
20   three depositions, Your Honor. We'll point out later one 09:53:04  
21   of the instances where during the deposition, Mr.       09:53:08  
22   Goldstein, in response to a question said, "Well, I will 09:53:11  
23   better prepared to answer that question if I had a document 09:53:18  
24   which was in my files." And he acknowledged it was in his 09:53:22  
25   files. It was never produced. We did not have it. There 09:53:27



1 were a number of documents like that. 09:53:31

2 Raj Sharma, Your Honor, was one of our early 09:53:34

3 deponents and there were some particular documents that we 09:53:38

4 needed which have now been produced. 09:53:42

5 GSK depositions currently scheduled, and these 09:53:45

6 are -- they're ten in process of being scheduled. 09:53:51

7 THE COURT: What deposition was it that I was 09:53:57

8 called on in New York City -- 09:54:03

9 MR. CLIMACO: You didn't -- 09:54:05

10 THE COURT: I want the law students to understand 09:54:07

11 what happens when you get a bunch of lawyers together and 09:54:11

12 time is going on, and I'm in my car going to the airport to 09:54:14

13 do some business out at the airport, and I get a call from 09:54:21

14 my office saying that I have lawyers on the phone because 09:54:25

15 they want fifteen more minutes in a deposition. It's taken 09:54:32

16 them half hour to find me, and they are arguing over 09:54:37

17 fifteen minutes of time. So, you can imagine how I felt 09:54:41

18 when I received that phone call. 09:54:45

19 MR. CLIMACO: Your Honor, I know how you felt 09:54:48

20 because I don't think you heard me, but they also hooked me 09:54:52

21 on, and I was in my car, and I was traveling from the new 09:54:55

22 United States District Court building in Cleveland to a 09:55:00

23 dinner with our Chief Judge and others as member of our 09:55:05

24 advisory committee. And during that, the Chief Judge was 09:55:08

25 standing across the street saying, come on. And, 09:55:11

1 basically, Your Honor, that was the deposition of Robert 09:55:15  
2 Harrison. That's an example, Your Honor, of a deposition 09:55:18  
3 that's had to be continued twice because at the last minute 09:55:23  
4 we received his documents. I was there on the first day of 09:55:26  
5 that deposition. It seemed to be going well. I then 09:55:30  
6 received a call from Sam Davis who was taking it on behalf 09:55:33  
7 of the PSC saying that he needed fifteen more minutes, and 09:55:39  
8 the defense counsel said we need to call the Judge. And I 09:55:44  
9 said this is absurd.

10 THE COURT: I don't need you to go on about that 09:55:50  
11 because the other side will want to respond. 09:55:52

12 MR. CLIMACO: I apologize.

13 MR. BECK: I have a complete defense to this, 09:55:55  
14 Your Honor. (Laughter). 09:55:58

15 THE COURT: I just wanted to point that out to 09:55:59  
16 our group of law students that will be attorneys, that 09:56:03  
17 depositions are battles of great importance. So, time is 09:56:06  
18 of the essence in those depositions. 09:56:12

19 MR. CLIMACO: We will try to make every effort, 09:56:18  
20 I'm sure as will the defense, not to be making any in the 09:56:22  
21 future to the Magistrate Judge Lebedoff. 09:56:25

22 Your Honor, I have already given the example of 09:56:28  
23 Bayer and GSK documents not being timely produced by 09:56:31  
24 pointing out the Dr. Richard Goldstein deposition.

25 Tig Conger, Your Honor, we received a substantial 09:56:38

1 number of documents only one week prior to the depo and 09:56:43

2 there's still missing documents. 09:56:47

3 Patricia Stenger, documents produced three days 09:56:51

4 prior to the depo. Eric Pauwels, two weeks prior to the 09:56:56

5 depo we received 17 CD's with approximately sixty-nine 09:56:58

6 hundred -- with approximately a hundred thousand pages. It 09:56:59

7 took us a while to convert that, and we had less than seven 09:57:01

8 days to review those and that had to be continued. 09:57:06

9 The case of Roger Celesk, during his deposition 09:57:09

10 on September 12, he was asked about Bayer's adverse 09:57:13

11 incident reporting, source documents, including 09:57:17

12 handwritten, telephone intake logs associated with 09:57:20

13 paperwork and copies of correspondence from health care 09:57:25

14 professionals, detail reps and consumers. And he stated, 09:57:28

15 "They are currently in the process of being copied to my 09:57:31

16 understanding, and you will be receiving the source 09:57:34

17 documents as well." To date, Your Honor, these documents 09:57:41

18 have still not been produced. 09:57:41

19 Documents for John Littieri arrived Friday before 09:57:44

20 the Monday depo. Larry Posner, defense counsel arrived at 09:57:50

21 the depo with documents. Art Mazzu, scheduled October 16 09:57:57

22 to CD where documents were received weeks after the 09:58:00

23 deposition was concluded. 09:58:03

24 Susan Gallipoli, during the depo an off the 09:58:04

25 record discussion was held, and defense counsel insisted 09:58:09

1 they would produced. They have not been produced. 09:58:11

2 Documents were produced with Carol Sever a few 09:58:15

3 days prior to the depo. 09:58:18

4 Fred Sunderman, we received a CD with his 09:58:20

5 documents on the day of the depo, and it goes on, Your 09:58:24

6 Honor. 09:58:29

7 GSK example, Kristin Elder, deposed this week. 09:58:29

8 No documents were produced from her personal files prior to 09:58:33

9 2000, although she started working for Bayer in 1998. 09:58:37

10 Your Honor, there is also redaction -- 09:58:41

11 MR. MAGAZINER: She started working for GSK. 09:58:43

12 MR. CLIMACO: I'm sorry, GSK. Your Honor, we 09:58:50

13 believe and Mr. Shelquist has been taking this up, 09:58:51

14 including in the privilege log discussions, that the 09:58:55

15 redaction is just overly, overly broad, Your Honor. And we 09:58:58

16 can if we need to motion this up, we'll point out in the 09:59:04

17 transcript where even the deponents, when we are attempting 09:59:08

18 to ask particular questions, has indicated that there is no 09:59:13

19 reason why that would be redacted. And if it wasn't, he 09:59:16

20 can thoroughly answer the question. And, again, there is a 09:59:20

21 great example in the Richard "Buzz" Goldstein deposition of 09:59:23

22 a document of May 23, 2000. 09:59:28

23 These are Bayer AG depositions in the process of 09:59:33

24 being scheduled, Your Honor. There are definitely 15 which 09:59:37

25 the MDL and state attorneys agree upon. There are some 09:59:40

1 additional ones that the state attorneys may want to have 09:59:44

2 included. 09:59:47

3 Your Honor, as I said, we are working in a 09:59:48

4 cooperative spirit with the State Liaison Committee and the 09:59:51

5 defense, Mr. Doug Marvin, who is here from Williams and 09:59:56

6 Connolly has sort of been spearheading that effort in 10:00:01

7 attempting to work out a protocol. I believe that we have 10:00:05

8 agreed that the location will be London. Documents are 10:00:09

9 going to be produced on February 2. Forty percent of those 10:00:15

10 will be in German and must be translated. So that's an 10:00:19

11 open issue. 10:00:23

12 Mr. Doug Marvin agreed, Your Honor, to compress 10:00:25

13 the period of time during which the depositions will take 10:00:30

14 place from something like a six-week period, Your Honor. 10:00:34

15 We can now be working six days a week, a number of double 10:00:37

16 track depos, and we hope to have the depos begin on March 3 10:00:41

17 to be completed by March 19. 10:00:47

18 Discussions are continuing, Your Honor, dealing 10:00:49

19 with the protocol. And by then we have proposed that we 10:00:50

20 need two days. They need a day for redirect, and we are 10:00:57

21 just trying to work it out that it may be better off if 10:01:00

22 they go first and then we cross. But I'm sure we'll work 10:01:03

23 that out. 10:01:07

24 One of the other issues, Your Honor, is Texas 10:01:10

25 attorney Dawn Barrios has taken the position the Texas 10:01:13

1 Eighth Region by state court order has the right to proceed 10:01:17  
2 first with four depositions. Basically, Your Honor, we 10:01:21  
3 have agreed with the State Liaison Committee attorneys that 10:01:25  
4 we can work the order of depositions out between us. By 10:01:27  
5 that, I mean who is going to question, who will be the 10:01:31  
6 examiner for a particular deponent. I think that can be 10:01:34  
7 worked out, but I think, with all due respect to Barrios, 10:01:39  
8 and she's obviously obligated to follow a court order, the 10:01:44  
9 only existing problem between the state MDL and the 10:01:49  
10 plaintiffs' counsel for the MDL at this time is that 10:01:55  
11 particular issue. 10:01:58

12 And unless the Court has any questions, Your 10:01:59  
13 Honor, that completes our report and I thank you. 10:02:03

14 THE COURT: Thank you. Mr. Beck. 10:02:06

15 MR. BECK: Thank you, Your Honor. Initially, I 10:02:09  
16 just note that we were not furnished with a copy of the 10:02:11  
17 slide show that Your Honor and the assembled multitudes 10:02:15  
18 sitting have been shown. We understood that we are 10:02:20  
19 supposed to prepare a joint report to the Court, and had we 10:02:23  
20 been given an advance copy of what they have decided 10:02:29  
21 unilaterally to present to the Court, then, of course, we 10:02:36  
22 could have been prepared to respond to any specific 10:02:41  
23 criticisms that they have made. But because they chose not 10:02:44  
24 to share that with us, I suppose I can call on some of my 10:02:47  
25 colleagues to try to do it off the cuff, but since it 10:02:51

1 doesn't sound like they're actually making a motion or 10:02:54  
2 asking for any relief, I think that would probably be a 10:02:56  
3 waste of time. Let me just say on a general note -- 10:03:01  
4 THE COURT: I appreciate that. 10:03:02  
5 MR. BECK: I'm sorry?  
6 THE COURT: I appreciate that. It's just not 10:03:06  
7 necessary. 10:03:06  
8 MR. BECK: Okay, because it gets into a he said, 10:03:08  
9 she said kind of thing. 10:03:10  
10 THE COURT: That's right. 10:03:12  
11 MR. BECK: I would just say, generally, that they 10:03:14  
12 are going to be called on to work six days a week when it 10:03:17  
13 comes to taking depositions overseas, and our people who 10:03:21  
14 have been doing this document production and preparing for 10:03:26  
15 the depositions have been working six or seven days a week 10:03:29  
16 for sometime. I think we're not only doing our best, the 10:03:33  
17 truth is we are doing, I believe, an excellent job. We 10:03:36  
18 have a very aggressive discovery schedule. I think it's a 10:03:41  
19 tribute to Your Honor, and I think it's also a tribute 10:03:44  
20 really to the cooperation that's taken place in this MDL 10:03:47  
21 between the Plaintiffs Steering Committee and the defense 10:03:55  
22 counsel. I think if things go according to plan, and I 10:03:58  
23 don't think there is any reason it won't, we will have 10:04:01  
24 completed the MDL discovery in substantially less time than 10:04:06  
25 any other MDL of comparable scope. 10:04:12

1           Part of the aggressive schedule, of course, is    10:04:15  
2   that they want to take depositions -- starting depositions   10:04:17  
3   in advance of the full completion of document production.   10:04:19  
4   And that's fine, but when that happens, there are going to   10:04:23  
5   be glitches. When we're producing documents on a rolling   10:04:27  
6   basis and we're pulling together files from people all       10:04:29  
7   around the country and all around the world, and everybody   10:04:34  
8   has been in cases where you are finding out when you are    10:04:37  
9   meeting with a witness three days before a deposition that   10:04:40  
10   there is some file in the drawer that she didn't believe    10:04:43  
11   was called for because she thinks it's her personal file.    10:04:47  
12   Well, you don't find that out all the time until sometimes   10:04:52  
13   the last minute. And, so, what we have endeavored to do     10:04:54  
14   when these things come up, is we copy them and give them to  10:04:57  
15   the plaintiffs' counsel.                                       10:05:03  
16           So, we are doing our best, and if you want to       10:05:03  
17   hear, you know, anything on the details of that, we have    10:05:05  
18   Tim Coon who has been handling document production, and     10:05:08  
19   Doug Marvin has been scheduling depositions. What I would    10:05:11  
20   say, and I'm not bragging because I haven't had to do any   10:05:15  
21   work on this, but I think that Tim and Doug have done an     10:05:20  
22   excellent job, and there have been some glitches and there   10:05:24  
23   will be more glitches. I think that overall we have done     10:05:27  
24   an excellent job, and I think we have been able to work out  10:05:30  
25   the difficulties. And when we have had to reschedule         10:05:33



1 people, we reschedule. When we've had to give an extra 10:05:38  
2 day, we give an extra day. And, overall, we are proceeding 10:05:40  
3 very expeditiously and in a responsible and cooperative 10:05:45  
4 way. 10:05:49

5 THE COURT: If you want your people to have two 10:05:49  
6 or three -- Mr. Beck, if you want your people to have two 10:05:54  
7 or three minutes to talk about the document production, I 10:05:54  
8 want to hear it because it's important that I hear that 10:06:00  
9 side of the production. 10:06:03

10 MR. BECK: I think -- it looks like Mr. Magaziner 10:06:09  
11 wants to rise. But after that, I think it probably would 10:06:13  
12 be useful for the Court to hear from Tim Coon about the 10:06:17  
13 work that's going into the document production, the 10:06:21  
14 magnitude of the job, and how we're trying to go about it. 10:06:24

15 THE COURT: I would appreciate that. Good 10:06:28  
16 morning. 10:06:31

17 MR. MAGAZINER: Good morning, Your Honor. First, 10:06:31  
18 I would like to introduce my colleague. Jay Hunter. Jay, 10:06:32  
19 do you want to stand?

20 THE COURT: Good morning. 10:06:37

21 MR. MAGAZINER: Mr. Climaco mentioned Jay's name 10:06:43  
22 when he said -- when he described the weekly calls that are 10:06:44  
23 being had between the Plaintiffs Steering Committee 10:06:45  
24 representatives and Bayer representatives and GSK. Jay is 10:06:47  
25 our point person. They have had weekly calls in which 10:06:48

1 many, many, many disputes have been resolved. Jay has done 10:06:52  
2 this far more efficiently than I would which is why I have 10:06:56  
3 asked Jay to do it. 10:06:59

4 From GSK's perspective, we think this is going 10:06:59  
5 remarkably fast for an MDL of this size. And I just wanted 10:07:03  
6 to bring to Your Honor's attention to aspects of it that 10:07:07  
7 may not have been clear from what Mr. Climaco said. 10:07:10

8 Number one, Mr. Climaco showed the names of GSK 10:07:11  
9 witnesses who have been deposed. He, of course, was 10:07:15  
10 focused on the witnesses deposed by the MDL Plaintiffs 10:07:19  
11 Steering Committee. We, at the same time, are trying to 10:07:23  
12 deal with witnesses who have been deposed by the Texas 10:07:25  
13 lawyers and witnesses who have been deposed by what we call 10:07:31  
14 the Pennsylvania-California Coalition of Lawyers. And 10:07:33  
15 Bayer, of course, is dealing with the same requests from 10:07:36  
16 differing groups of lawyers who have differing priorities, 10:07:38  
17 and we're trying to schedule them all, keep everyone happy, 10:07:40  
18 and the documents out ahead of time, and as Mr. Beck said, 10:07:44  
19 from time to time there have been glitches. 10:07:50

20 But as Your Honor knows, there have been no 10:07:52  
21 motions yet filed by plaintiffs complaining about these 10:07:54  
22 glitches because these are the kinds of glitches one always 10:07:58  
23 runs into with cases of smaller magnitude than this. And 10:08:03  
24 the fact that there have been no motions is a tribute to 10:08:06  
25 the cooperative efforts on the part of the plaintiffs and 10:08:08

1 lawyers for both GSK and Bayer. 10:08:11

2 The other thing I would point out to Your Honor 10:08:15

3 is that I would echo what Mr. Beck said about the speed in 10:08:18

4 which this MDL was progressing as compared to any other MDL 10:08:20

5 that's ever been created, is that this is the first MDL, I 10:08:23

6 believe, which is trying to deal with the volume of 10:08:26

7 electronic documents that are at issue in this case. 10:08:30

8 In the last few years, the world as changed very 10:08:32

9 dramatically, and each of the companies involved here, 10:08:36

10 Bayer and GSK, has created, not deliberately, but just 10:08:40

11 because of the way the world has changed, millions of pages 10:08:45

12 of electronic documents of the kind that never would have 10:08:50

13 existed five years ago. And the plaintiffs and the lawyers 10:08:52

14 for both Bayer and GSK have worked very hard and are 10:08:55

15 continuing to discuss how to deal with this very different 10:08:58

16 kind of discovery, different than Your Honor or any of us 10:09:03

17 older lawyers would ever have been used to. Indeed, there 10:09:06

18 are very few lawyers in the country who've never had to 10:09:08

19 deal with the kinds of electronic discovery that we are 10:09:11

20 being confronted with in this case. 10:09:13

21 So, I think we are doing remarkably well. I 10:09:17

22 think it's due to the cooperative efforts. 10:09:18

23 MR. BECK: Your Honor, Tim Coon will give a 10:09:31

24 report, sort of a global report on the kind of task that we 10:09:32

25 are facing. 10:09:38

1 THE COURT: Good morning. 10:09:38

2 MR. COON: Good morning, Your Honor. I'm Tim 10:09:39

3 Coon. The Bayer defendants have produced to date between 10:09:43

4 the two companies, 3.3 million pages of image documents, 10:09:46

5 several hundred videotapes. We made several hundred more 10:09:54

6 available for review and copying and a number of 10:09:58

7 specialized databases that various plaintiffs groups have 10:09:59

8 requested, including the adverse group database, a database 10:10:04

9 concerning physicians' staff in prescribing information, 10:10:10

10 and a database used by the Communications Department. 10:10:11

11 There were a variety of other things that have 10:10:16

12 been produced, mailing lists related to materials sent to 10:10:18

13 the health care providers concerning Baycol. 10:10:21

14 We have -- the two companies have over 200 10:10:26

15 attorneys, paralegals and other legal staff working over 10:10:30

16 full time on document production as well as several dozen 10:10:34

17 outside vendors and other technical persons. 10:10:37

18 As Mr. Magaziner mentioned, particularly the 10:10:41

19 electronic documents is just an enormous process. If one 10:10:46

20 only looks at your own e-mail account, it seems a very 10:10:50

21 small number of e-mails in there, but it turns out to be 10:10:58

22 thousands and thousands of pages. We've had instances 10:10:58

23 where the individual's e-mail account was in excess of 10:11:01

24 five, six hundred thousand pages, which has to go through a 10:11:06

25 complicated process to electronically determine what are 10:11:08

1 the Baycol documents from the documents that are not 10:11:11  
2 Baycol, and all of those documents have to be reviewed and 10:11:15  
3 redacted as necessary and go through a complex process to 10:11:19  
4 ultimately come up to the electronic images that we provide 10:11:22  
5 to the various plaintiffs groups. 10:11:27

6 What we have provided to date, what Bayer Company 10:11:31  
7 has provided to date, are complete files of approximately 10:11:34  
8 50 individual employees who were key personnel department 10:11:37  
9 heads, assistant department heads, and executives who were 10:11:41  
10 involved substantially in Baycol. 10:11:45

11 The animal and clinical study reports we have 10:11:45  
12 provided several hundreds of those for Baycol. 10:11:49

13 The investigation of the new drug application, 10:11:54  
14 the supplemental new applications submitted to the FDA have 10:11:55  
15 all been produced in their entirety along with the regular 10:12:01  
16 brief. Bayer's department files included all the 10:12:04  
17 correspondence and a number of communications with the FDA 10:12:05  
18 about the applications. 10:12:09

19 A large amount of sales and marketing, sales 10:12:10  
20 training and Baycol promotional materials has been 10:12:13  
21 produced. There have been a variety of other miscellaneous 10:12:17  
22 materials that have been produced and requested by 10:12:22  
23 different plaintiffs' groups across the country including 10:12:28  
24 the MDL. 10:12:30

25 The types of materials that we are working on 10:12:31

1 right now, we are working on the adverse event report 10:12:34  
2 source wall with Professor Haydock. They are being copied 10:12:37  
3 now and our first production of those will be next week and 10:12:41  
4 will continue on a rolling basis. 10:12:44

5 Those are particularly a bit troublesome because 10:12:48  
6 probably 60 to 70 percent of the pages require some type of 10:12:51  
7 redaction to remove confidential patient identifying 10:12:54  
8 information, names, addresses and Social Security numbers. 10:13:00

9 Other things we are preparing to produce are 10:13:03  
10 various additional databases that have been requested by 10:13:06  
11 both the MDL and other plaintiffs groups across the 10:13:09  
12 country. We are continuing to prepare individual employee 10:13:13  
13 files. Our goal would be to produce by the end of January, 10:13:18  
14 certainly by February 3, the complete files for the Bayer 10:13:24  
15 AG witnesses who have been scheduled for depositions so 10:13:29  
16 far. There will be a large, very large amount of material, 10:13:32  
17 and it will be produced on a rolling basis over the next 10:13:36  
18 couple of months. In fact, a couple of witnesses' files 10:13:39  
19 have been produced in its entirety. 10:13:44

20 There are literally millions of pages still in 10:13:47  
21 the production process at various stages. We intend to 10:13:52  
22 meet later this morning with the Liaison Committee, the 10:13:57  
23 plaintiffs' groups to discuss some proposals, both to speed 10:14:00  
24 up the process and to make it more efficient, and at the 10:14:04  
25 least I hope to have some priorities on what the 10:14:14

1 plaintiffs' groups desire to have because we do have 10:14:16  
2 competing priorities. 10:14:19  
3 The MDL desires to have certain types of 10:14:20  
4 material. The Texas plaintiffs' groups desire to have 10:14:24  
5 other types of material, and the Pennsylvania and 10:14:27  
6 California litigation desire to have a third type of 10:14:29  
7 material. And given, although we have large resources 10:14:35  
8 devoted to it, there is a finite limit to it, and we'd like 10:14:39  
9 to set some priorities and, hopefully, have everyone agree 10:14:43  
10 on what we should focus on next in terms of production. 10:14:47  
11 THE COURT: Thank you. 10:14:51  
12 MR. BECK: Your Honor, lastly, on behalf of 10:14:54  
13 Bayer, as I observed and Mr. Magaziner did as well, despite 10:14:55  
14 the anecdotes and today's slide show that we saw, in fact, 10:15:04  
15 there had been no motions to compel and people have been 10:15:10  
16 working things out, and I hope that that will continue to 10:15:13  
17 be the case, because I believe that if we -- if we stop 10:15:16  
18 working these things out and start arguing about them in 10:15:20  
19 court and making speeches in court, the whole process is 10:15:24  
20 going to slow down incredibly, because instead of working 10:15:30  
21 it out as best as we can, realizing that things aren't 10:15:34  
22 going to work perfectly to either side's satisfaction a 10:15:38  
23 hundred percent of the time and we start filing motions and 10:15:42  
24 then responses and then reply briefs and scheduling 10:15:46  
25 arguments with the Magistrate Judge, then things that may 10:15:48

1 take two or three days to resolve, end up taking a month to 10:15:54

2 resolve. 10:15:57

3 So, I hope that people will continue in the same 10:15:58

4 spirit that we have proceeded so far. 10:16:01

5 THE COURT: I'm sure they will, and Mr. Zimmerman 10:16:04

6 and Mr. Lockridge have used their experience in dealing 10:16:09

7 with Magistrate Judge Lebedoff, and they know that he will 10:16:14

8 certainly keep things under control and sanction lawyers 10:16:19

9 when they bring in trivial matters as I have sanctioned the 10:16:26

10 lawyers for bringing in trivial matters. And he will have 10:16:32

11 my marching orders. So, I don't think that will happen 10:16:35

12 anyway. I think there will be a continuing cooperative 10:16:39

13 spirit between both sides in this matter. 10:16:43

14 MR. CLIMACO: Your Honor, may I have one more 10:16:50

15 moment, please?

16 THE COURT: Don't add gasoline to the fire. 10:16:54

17 MR. CLIMACO: I will not, Your Honor. Your 10:16:57

18 Honor, I just want to point out all of the issues we have 10:16:58

19 pointed out to you in the power point are repeatedly 10:17:01

20 discussed in the meet and confer. And I did raise this 10:17:05

21 with Special Master Haydock a while ago. We do not want to 10:17:08

22 have to file motions, but we believe that we were 10:17:13

23 obligated, Your Honor. 10:17:17

24 The narrow issue I wanted to point out, 10:17:17

25 unquestionably, they have produced millions of documents, 10:17:20



1 but when we are faced with a witness telling us, I turned 10:17:25  
2 over my Baycol electronic and paper documents in May or 10:17:30  
3 June and they are not produced before the deposition or a 10:17:38  
4 week before, that's what's frustrating to us. Thank you. 10:17:38

5 THE COURT: Mr. Zimmerman. Are you moving on to 10:17:43  
6 another area? 10:17:47

7 MR. ZIMMERMAN: Yes. 10:17:50

8 THE COURT: Before we do that, I would like to -- 10:17:51  
9 we have talked about the PSC's staff and the defense staff. 10:17:54  
10 I've brought up some of the people that have really kept me 10:17:59  
11 afloat and have kept this MDL going in this district. 10:18:09

12 I would like to introduce my Clerk of Court, Rich 10:18:14  
13 Sletten. And Cindy Francis, who is a great person down in 10:18:20  
14 the Clerk's office. Ms. Knoblauch who is designated as the 10:18:28  
15 Baycol clerk along with Mary Singleton. 10:18:34

16 These are the people that you never see and do 10:18:44  
17 yeomen's work, working on weekends and making sure all the 10:18:50  
18 appropriate papers are filed for the court and all the 10:18:54  
19 documents are ready for me. And when people talk about 10:18:58  
20 Government service, my hat is tipped to my clerks because 10:19:03  
21 they do a fantastic job. Thank you. 10:19:11

22 MR. ZIMMERMAN: And we thank you very much as 10:19:15  
23 well. 10:19:17

24 MR. BECK: Your Honor, the next subject is 10:19:23  
25 actually a concern that we have in terms of production of 10:19:23

1 information from the other side. Susan will address that. 10:19:28

2 THE COURT: Good morning, Ms. Weber. 10:19:38

3 MS. WEBER: Good morning, Your Honor. As you are 10:19:41

4 aware from our motion filings, we have been having major 10:19:42

5 problems extracting plaintiff facts sheets, basic 10:19:48

6 plaintiffs' discovery from the plaintiffs. At this point 10:19:51

7 and time, there are more than 2,000 plaintiffs in the MDL 10:19:54

8 who owe us discovery. That's not 2,000 cases because the 10:19:58

9 2,000 plaintiffs are sometimes plaintiffs who filed in 10:20:01

10 multi-plaintiff cases. In more than 50 percent of those 10:20:05

11 cases they either haven't gotten us fact sheets or 10:20:08

12 documents on a timely basis. 10:20:13

13 We are particularly concerned because the 10:20:17

14 tardiness rate is very high with the Weitz and Luxenberg 10:20:21

15 firm, which at this point and time has 83 percent of the 10:20:24

16 cases that are pending in federal court. So, as more and 10:20:27

17 more of those move into the MDL, we are going to have more 10:20:31

18 and more of a backlog problem. 10:20:34

19 Now, in an attempt to address this, we have been 10:20:37

20 negotiating a pretrial order with the Plaintiffs Steering 10:20:42

21 Committee, and I believe you should have that before you. 10:20:43

22 I handed it up to Katie. And we agreed on it last night. 10:20:47

23 And the idea is to try and put a big stick behind our 10:20:49

24 ongoing efforts to prod plaintiffs. 10:20:55

25 The basic structure of the order is that we would 10:20:57

1 notify plaintiffs that they owe us a plaintiff fact at the 10:21:00  
2 time their case is transferred to the MDL. We would send 10:21:11  
3 them a nag letter when the materials are overdue and advise 10:21:11  
4 Plaintiffs Steering Committee at that point and time. 10:21:13  
5 If the plaintiffs do not come forward with their 10:21:16  
6 discovery materials in short order, we'll ask the Court to 10:21:18  
7 enter an order advising plaintiffs that if they don't 10:21:22  
8 respond with their discovery within 30 days, their cases 10:21:27  
9 will be dismissed with prejudice. Plaintiffs Steering 10:21:30  
10 Committee will then take that order, send it to the 10:21:34  
11 plaintiffs, get their attention with it, hopefully, and 10:21:36  
12 we'll get our discovery. And if they don't at that point 10:21:38  
13 and time, and we think with that pattern of proceedings 10:21:41  
14 established, there would be sufficient grounds to dismiss 10:21:46  
15 with prejudice any plaintiffs who have not come forward 10:21:48  
16 with discovery at that stage. 10:21:52  
17 The dismissal order, if it becomes necessary, 10:21:54  
18 would be 120 days after their case is transferred to the 10:21:57  
19 MDL. The plaintiff fact sheets are due at day 45. So, 10:22:00  
20 cases would have to be seriously in arrears for dismissal 10:22:07  
21 to be an issue. 10:22:09  
22 The procedure we have proposed in agreement with 10:22:11  
23 plaintiffs, we hope will prod plaintiffs to come forward 10:22:13  
24 with their plaintiff fact sheets, which we need just to 10:22:17  
25 start basic discovery to proceed to get medical 10:22:21

1 authorizations and to be in a position to depose plaintiffs 10:22:24

2 and to assess the value of the cases that are outstanding,. 10:22:27

3 So, we have provided that to the Court, and I'm 10:22:31

4 ready to answer any questions about that, if you have any. 10:22:34

5 THE COURT: Mr. Zimmerman, any comments dealing 10:22:38

6 with that? 10:22:41

7 MR. ZIMMERMAN: No. I believe that was worked 10:22:42

8 out last night at some length in our office with regard to 10:22:43

9 this procedure. I believe the specifics with regard to the 10:22:48

10 Weitz and Luxenberg issue is representatives of Weitz and 10:22:52

11 Luxenberg are here and they are going to argue that. 10:22:58

12 THE COURT: We have those motions.

13 MR. ZIMMERMAN: Right. But with regard to 10:22:59

14 procedure, Rob Shelquist advises me this was all worked out 10:23:00

15 last night, actually, after some work, and we are in 10:23:05

16 agreement with the proposal. 10:23:08

17 THE COURT: I will review it and more than likely 10:23:14

18 sign it. 10:23:19

19 MS. WEBER: We contemplate that the order Your 10:23:23

20 Honor enters would apply to those cases in which motions 10:23:27

21 have not yet been filed. We have two motions for overdue 10:23:30

22 plaintiff fact sheets that are now pending. One of them 10:23:37

23 was filed in June. And at this point and time, there are 10:23:41

24 four plaintiffs that have still failed to come forward with 10:23:45

25 either their plaintiff fact sheets or their responsive 10:23:48

1 documents, in spite of repeated prodding from defendants 10:23:52

2 and from the Steering Committee. 10:23:57

3 With respect to those four plaintiffs in the 10:24:02

4 first-wave motion, Your Honor, we would ask you to enter an 10:24:05

5 order providing for an order to show cause why their cases 10:24:11

6 should not be dismissed if they don't produce their 10:24:15

7 discovery within a very short period of time. I believe we 10:24:18

8 proposed 10 days. That motion has been ripe and over ripe, 10:24:23

9 and we would ask you to address it promptly. 10:24:28

10 THE COURT: We are talking about -- 10:24:30

11 MS. WEBER: This is the first wave motions. 10:24:31

12 THE COURT: And we are essentially talking about 10:24:33

13 four people? 10:24:38

14 MS. WEBER: Right, Mitz, Stone, Kemp and Webber. 10:24:39

15 THE COURT: Right. Mr. Lockridge. 10:24:46

16 MR. LOCKRIDGE: I'll respond, Your Honor. It is 10:24:47

17 correct. Richard Lockridge, Your Honor. It's correct that 10:24:49

18 we have been working to get these. If Your Honor feels 10:24:52

19 necessary to enter an order, we ask that you at least give 10:24:58

20 us 30 days on these four people. 10:25:02

21 THE COURT: The problem with that, Mr. Lockridge, 10:25:04

22 is that this has been hanging around for a long period of 10:25:07

23 time. And I hate to have these cases hanging around any 10:25:14

24 longer. I think 10 days is appropriate, and I will sign 10:25:22

25 the order for 10 days. 10:25:31

1 MS. WEBER: Thank you, Your Honor. We also have 10:25:38  
2 what we call the wave two motion. Originally, this was 10:25:40  
3 addressed to about 200 plaintiffs whose discovery was due 10:25:44  
4 at different times ranging from May to August for their 10:25:50  
5 plaintiff fact sheets, slightly after that for their 10:25:55  
6 documents. And, again, we have given you examples of the 10:25:57  
7 numerous, what I indelicately refer to as the nag letters 10:26:02  
8 that we have sent to plaintiffs. We filed a motion in 10:26:05  
9 October addressed to this. 10:26:09

10 THE COURT: You can see why I'm sending all of 10:26:10  
11 this to Magistrate Judge Lebedoff. 10:26:13

12 MS. WEBER: I sympathize entirely. Since we 10:26:17  
13 filed our motion, only 18 people have actually complied, 10:26:20  
14 which I think goes back to why we want you to enter the 10:26:24  
15 pretrial order to try and help us lean on folks a little. 10:26:27

16 Weitz and Luxenberg has responded by indicating 10:26:31  
17 that they either have or will provide to us the 10:26:36  
18 stipulations to dismiss 72 cases. And we are agreeable to 10:26:40  
19 those dismissals at this time with a big caveat, Your 10:26:44  
20 Honor, which is, if they come down the line and re-file the 10:26:48  
21 same cases so it becomes clear that they were stipulating 10:26:53  
22 to dismiss in order to evade discovery, we are going to ask 10:26:57  
23 you to throw out those new cases with prejudice because we 10:27:01  
24 don't think evading discovery is the appropriate basis for 10:27:06  
25 dismissal. 10:27:09

1           The motion remains pending as to dozens of           10:27:10  
2 plaintiffs where discovery is 3 to 6 months overdue.           10:27:15  
3 Again, they are mostly Weitz and Luxenberg's cases, and we   10:27:19  
4 are experiencing enormous administrative problems with       10:27:23  
5 Weitz and Luxenberg filings.                                   10:27:25

6           Just to give you the whole picture, we've got 30   10:27:27  
7 or more cases that have been filed; the same case in       10:27:32  
8 multiple jurisdictions. We got the same cases being filed   10:27:35  
9 in absence of diversity jurisdiction. Late PFS's are the   10:27:36  
10 biggest problem. It's overdue in half of the Weitz and   10:27:43  
11 Luxenberg cases. And it's critical for the Court to       10:27:48  
12 enforce this and to put some teeth in its orders now as to   10:27:51  
13 Weitz and Luxenberg given the big load of cases coming in   10:27:52  
14 now.   10:28:00

15           In Weitz and Luxenberg's opposition brief, and   10:28:00  
16 they filed a second opposition yesterday which updated  
17 information a little bit, demonstrates some of the problems   10:28:02  
18 with their cases. Their brief doesn't even address about   10:28:04  
19 30 of those Weitz and Luxenberg plaintiffs who are now in   10:28:10  
20 the original motion. So, no opposition has been filed as   10:28:13  
21 to those plaintiffs. We don't have their discovery. We   10:28:15  
22 don't have an opposition. We think the order should be   10:28:18  
23 entered as to those plaintiffs.                               10:28:22

24           As to the plaintiffs that they do address, they   10:28:24  
25 have the facts wrong in many instances. In some of the   10:28:26

1 cases where they say we have plaintiff fact sheets, we 10:28:31  
2 don't. In some of the cases where they say they're sending 10:28:34  
3 stipulations, we haven't seen them yet. Maybe we will in 10:28:37  
4 the next few days. 10:28:41

5 In some of the cases where they say we're about 10:28:43  
6 to get plaintiff fact sheets, we haven't seen them and we 10:28:44  
7 don't think that they are entitled to additional 10:28:48  
8 extensions. They asked for a 30-day extension on some 10:28:51  
9 people whose discovery was due back in May. And they don't 10:28:55  
10 give any justification for that. 10:28:58

11 We think the appropriate course here, Your Honor, 10:29:01  
12 is to set a firm deadline for when the plaintiff fact 10:29:04  
13 sheets have to be in, you know, last chance deadline for 10:29:06  
14 these cases. And if plaintiffs don't make that deadline, 10:29:11  
15 again, their cases should be dismissed with prejudice. 10:29:14

16 THE COURT: Okay. 10:29:21

17 MR. ZIMMERMAN: I guess Weitz and Luxenberg will 10:29:24  
18 argue for themselves. I do have one comment, and my 10:29:25  
19 comment is that probably to quote the great lawyer Phil 10:29:29  
20 Beck, that there are glitches and Weitz and Luxenberg have 10:29:34  
21 large volumes of cases. I think they are doing their best. 10:29:43  
22 I think you are going to hear from Vicki that they are 10:29:45  
23 doing their best. I think what's good for the goose is 10:29:47  
24 going to be good for the gander. We're not in a perfect 10:29:51  
25 world. They have -- we should cut them some slack because 10:29:56



1 of their large volume. I think they'll speak for 10:29:59  
2 themselves. But the point here is, I believe, we'll 10:30:01  
3 demonstrate and they will demonstrate that they are in the 10:30:03  
4 utmost good faith in what they're trying to do. We should 10:30:06  
5 not be absolute with respect to plaintiffs' fact sheets, 10:30:10  
6 and not so absolute with respect to rolling discovery and 10:30:13  
7 the glitches that are occurring because of that. So, I  
8 just want to make sure that the playing field is level  
9 before I introduce you to Vicki who will argue it. 10:30:18  
10 MS. MANIATIS: Good morning, Your Honor. 10:30:25  
11 Victoria Maniatis from Weitz and Luxenberg. 10:30:25  
12 THE COURT: Good morning.  
13 MS. MANIATIS: And it was a wonderful 10:30:30  
14 introduction by Bucky, and I myself was going to quote Mr. 10:30:31  
15 Beck, also. 10:30:37  
16 What we are frequently seeing, and you might be 10:30:39  
17 presenting this issue to Magistrate Lebedoff as well, as 10:30:43  
18 you well know, the vast majority of the plaintiffs in this 10:30:46  
19 case are over their 60's. Those present certain issues. 10:30:50  
20 We're talking about a generation that is not as comfortable 10:30:56  
21 necessarily with gathering information, relinquishing 10:30:59  
22 information and not necessarily as apt. I, myself, have 10:31:03  
23 two doctors, and I know exactly their addresses what I see 10:31:08  
24 them for once a year. Many of my clients have 10 or 12 10:31:12  
25 doctors they see eight times a year. So, it takes them a 10:31:19

1 lot longer to generate this information. They are often 10:31:19  
2 apprehensive about it. There's a lot of hand holding going 10:31:22  
3 on.

4 Another quote I would like to use --

5 THE COURT: I don't even know where my mother's 10:31:27  
6 safe deposit box is. She won't tell anybody. So, I 10:31:29  
7 understand the problem. Go ahead. 10:31:34

8 MS. MINIATUS: And I don't mean to make it an 10:31:37  
9 excuse. It's the reality of what we are dealing with, and 10:31:39  
10 we, too, are working six-day weeks in this effort to help 10:31:43  
11 them in every way we can. 10:31:49

12 We often hear that it's an endeavor to get these 10:31:50  
13 items back to us. They are incomplete and we are 10:31:53  
14 constantly following up. It's a pleasure to do that, to 10:31:56  
15 help them and create this for them, but it's a very slow 10:31:58  
16 process. 10:32:02

17 When I send a letter to defendants, they 10:32:04  
18 acknowledge the fact sheets are overdue. We are aware of 10:32:08  
19 this. We are prodding as much as we can. The prodding 10:32:10  
20 comes from you to us as well as from us to our client, 10:32:15  
21 believe me. 10:32:19

22 We are simply doing the very best we can in that 10:32:19  
23 regard. That's the general problem with the most of our 10:32:22  
24 fact sheets being overdue. When I do send a response to 10:32:25  
25 the defendants, a delinquency letter to myself, I often 10:32:29

1 state that this is an elderly client, they are having 10:32:34  
2 trouble. We're working with them and they're working with 10:32:38  
3 us. 10:32:42

4 THE COURT: Correct me if I'm wrong, Ms. Weber. 10:32:43  
5 It was just that you were getting general responses for a 10:32:47  
6 vast number of people, that you weren't getting individual 10:32:51  
7 responses on individual cases on what the problem was and 10:32:56  
8 that you needed to do that before you could even determine 10:33:02  
9 whether or not you would grant a continuance of the time 10:33:04  
10 period? 10:33:12

11 MS. WEBER: Precisely, Your Honor., our position 10:33:12  
12 on extensions is we are not doing general extensions 10:33:12  
13 because firms are taking more cases than they can handle. 10:33:19  
14 There are cases that require -- that have extraordinary, 10:33:21  
15 unusual circumstances and if plaintiffs present those 10:33:25  
16 unusual circumstances, we'll consider them. 10:33:28

17 THE COURT: Is that possible? 10:33:30

18 MS. MINIATUS: I think that the real point there 10:33:33  
19 is that the unusual circumstances are the usual 10:33:36  
20 circumstances. I have for the last several months been 10:33:40  
21 supplying individual responses. I can tell you without 10:33:47  
22 doing a data run off the top of the my head that ninety 10:33:51  
23 percent of the time that is precisely the problem. So, 10:33:56  
24 they are saying to me this is an en masse request. It is 10:33:58  
25 not en masse. It's massive because there are numerous 10:34:02

1 people facing the same problem. 10:34:05

2 I've taken it to the point that I've even sent 10:34:08

3 them individuals letters with each person's name on it so 10:34:10

4 it cannot be identified as en masse. It's individual. 10:34:13

5 It's all the same problem. So, whatever up you want to 10:34:17

6 call it, that's the major issue in that regard, generally. 10:34:20

7 Specifically, as to the second-wave motion, yes, 10:34:26

8 we did have an error in our papers where several people 10:34:33

9 were not identified. They were individuals who were in 10:34:33

10 some groups of complaints that were filed many, many months 10:34:37

11 ago in the Eastern District of Pennsylvania, and some were 10:34:40

12 severed and some were not. Several people showed up in two 10:34:43

13 different places, and that's been a confusing issue, but we 10:34:48

14 did not identify several people on the complaint as being 10:34:51

15 an issue in the motion. That is part of what I 10:34:54

16 supplemented with my opposition last night. And as far as 10:34:56

17 I know, I at least addressed everybody at this point. If I 10:35:00

18 haven't, let me know, I certainly will. I can get that to 10:35:04

19 you in the next couple of days. 10:35:08

20 THE COURT: Anything else? 10:35:15

21 MS. MINIATUS: One general thing I wanted to say 10:35:17

22 is we've been taking a bit of a hit today as being the big 10:35:22

23 ogres. But what I would like to say is what we have done 10:35:25

24 is endeavored to work hard, again, working six days a week 10:35:28

25 ourselves, and we have served over 900 fact sheets, and 10:35:31

1 that's not been an easy effort, but that's the burden we 10:35:36  
2 have. And I think the defendants would likely agree that 10:35:40  
3 the product they are getting is good product. And we are 10:35:43  
4 on occasion taking extra time to have the most complete 10:35:46  
5 document we possibly can as opposed to, well, we'll get it 10:35:51  
6 out timely, but it will be shoddy. So, that's also some of 10:35:55  
7 our problem. 10:35:58

8 THE COURT: In a way, if the Court felt that your 10:36:03  
9 law firm violated or is inefficient in the sense that you 10:36:10  
10 file a lot of cases, so, there are going to glitches. The 10:36:18  
11 Court understands that. So, what I would like to do, Ms. 10:36:23  
12 Weber, how can we -- do you want to have a telephone 10:36:29  
13 conference with Magistrate Judge Lebedoff to resolve this 10:36:33  
14 matter because there is going to be ebbs and flows on this 10:36:38  
15 issue because when we have large numbers of cases coming in 10:36:44  
16 from New York, Louisiana or California, we are going to 10:36:47  
17 have this problem no matter what. And I understand your 10:36:52  
18 position, and I want to make sure you get the information 10:36:56  
19 you need so you can proceed to discovery. But there are 10:36:59  
20 going to be delays because we are dealing with a subset of 10:37:02  
21 the population that it's going to be very difficult to get 10:37:07  
22 information out of. 10:37:12

23 MS. WEBER: So, the time frame on this is clear, 10:37:14  
24 Your Honor, the cases that are at issue in this second-wave 10:37:19  
25 motion, the later ones were filed in March. 10:37:22

1 THE COURT: Right. 10:37:27

2 MS. WEBER: They were transferred to this court 10:37:27

3 in July. So, plaintiffs have had at least six months from 10:37:28

4 the time they filed the complaint in order to get their 10:37:32

5 discovery in. And, so, we're not talking about a little 10:37:35

6 bit of trouble with an older person, we are talking about 10:37:39

7 enormous backlogs, even on their first wave of cases before 10:37:43

8 the big bulk filing started. 10:37:47

9 MS. FLEISHMAN: If I may, Your Honor.

10 THE COURT: Good morning.

11 MS. FLEISHMAN: Good morning. Wendy Fleishman 10:37:59

12 for the plaintiffs as well. We have been working with Ms. 10:37:59

13 Weber to try to resolve this plaintiffs fact sheet issue, 10:38:04

14 and we worked with her with respect to the first wave. 10:38:06

15 What the Plaintiffs Steering Committee did was we actually 10:38:09

16 wrote to everybody, all the counsel named on the first 10:38:13

17 wave, and then we followed up and called them. And we 10:38:16

18 found that many of them did not know that the original 10:38:19

19 motion had been filed because many were not participants in 10:38:22

20 the Verilaw programs. 10:38:26

21 And, so, there's been a second wave presenting 10:38:30

22 the same set of problems. A good number of the second-wave 10:38:32

23 cases are indeed Weitz and Luxenberg cases, also, but 10:38:37

24 there's a subset that are just individuals filings by 10:38:40

25 plaintiffs' lawyers from around the country. So, they did 10:38:44

1 not get a copy of the motion to compel because they are not 10:38:47

2 part of Verilaw. 10:38:51

3 And then we've had debates over whether or not 10:38:51

4 individual lawyers who have just one or two cases in the 10:38:55

5 MDL have to be participants in Verilaw. 10:38:58

6 So, we worked out a proposed PTO which is the one 10:39:01

7 that Ms. Weber preferred to earlier in which the Plaintiffs 10:39:07

8 Steering Committee would undertake to actually send a copy 10:39:10

9 of the motion and a copy of the order and actually write to 10:39:13

10 plaintiffs counsel when there's problems. And what I've 10:39:16

11 asked for is I've asked for a whole set of all the lawyers 10:39:19

12 who are the plaintiffs lawyers in the second wave so that 10:39:22

13 we could write to them and say, there are these ongoing 10:39:25

14 problems, if we can help you, please let us know. Because 10:39:29

15 in many instances, it's an issue of the response documents 10:39:33

16 have not been served, and even though the response 10:39:36

17 documents were sought under Paragraph 9 of the plaintiffs' 10:39:39

18 fact sheet, the plaintiffs' lawyers don't have responsive 10:39:43

19 documents and they don't know if they are supposed to write 10:39:45

20 a letter to James Mizgala and say, I don't have a response 10:39:50

21 document.

22 So, there have been all these confusions and 10:39:52

23 further glitches. So, in working this out, we would like 10:39:53

24 to raise this with Magistrate Lebedoff, and we'll send 10:39:58

25 letters to this other subset of plaintiffs' lawyers in the 10:40:01

1 second wave and try to get those issues resolved as quickly 10:40:05  
2 as possible. 10:40:10

3 THE COURT: Anything further? 10:40:12

4 MR. ZIMMERMAN: Your Honor, could Stan speak on 10:40:15  
5 this issue from kind of a macro point of view. 10:40:17

6 THE COURT: From what? 10:40:20

7 MR. ZIMMERMAN: A larger overview, point of view 10:40:23  
8 of reasonable. Can he be heard? 10:40:26

9 THE COURT: No. 10:40:28

10 MR. CHESLEY: Good decision, Your Honor. 10:40:32

11 MR. BECK: I decided not to ask to speak on the 10:40:37  
12 macro. (Laughter). 10:40:39

13 THE COURT: What I would like to do, do you have 10:40:43  
14 a flight out of here this afternoon? 10:40:48

15 MS. WEBER: Yes. I have some flexibility, Your 10:40:52  
16 Honor. 10:40:55

17 THE COURT: Do you have a flight? 10:40:55

18 MS. FLEISHMAN: I have flexibility as well, Your 10:41:00  
19 Honor. 10:41:01

20 THE COURT: Do you have a flight out of here? 10:41:03

21 MS. MANIATIS: I can change my flight. 10:41:07

22 THE COURT: I have two meetings after this. I 10:41:08  
23 would like to meet with you about this issue so we can 10:41:11  
24 hammer out something today and get that done. 10:41:14  
25 Let's move on to the next issue. The next issue 10:41:20



1 is dealing with the -- 10:41:45

2 MS. WEBER: The medical authorizations. I'm not 10:41:46

3 sure if you want to deal with this now, Your Honor, or 10:41:49

4 defer it to this afternoon. We have an established 10:41:51

5 procedure governing medical authorizations for release of 10:41:54

6 medical records. 10:41:58

7 THE COURT: No, this is the easy one for me to 10:41:59

8 decide. 10:42:01

9 MS. WEBER: Okay. Do you want me to argue? 10:42:05

10 THE COURT: No, you don't need to argue this one. 10:42:08

11 Let's hear from plaintiffs. 10:42:08

12 MR. ZIMMERMAN: I'm sorry? 10:42:10

13 THE COURT: The medical authorizations, PTO 10. 10:42:12

14 Weitz and Luxenberg is opposing this. 10:42:18

15 MS. MINIATUS: Thank you. 10:42:25

16 THE COURT: I'll hear you out, but you've heard 10:42:25

17 me say it's an easy one. 10:42:28

18 MS. MINIATUS: I don't know how that bodes, but 10:42:32

19 I'll give it a shot. I do agree that it's probably a very 10:42:35

20 simple issue, but I do think we shouldn't be able to be 10:42:39

21 lulled into thinking it's not an important one. 10:42:43

22 Looking over the statutes, the mandates that I 10:42:47

23 have seen from various states, including New York, 10:42:49

24 Minnesota, the word I see over and over again is protect, 10:42:51

25 protect, protect. To me that means that the initiative or 10:42:55

1 guiding force here is that we protect people's rights. 10:42:59

2 I understand, of course, we're initiating a 10:43:04

3 lawsuit. We're acknowledging there is a waiver, but I do 10:43:06

4 not think that that waiver is unfettered. I do think that 10:43:10

5 it's limited. We do have a problem with providing blank 10:43:14

6 authorizations in that we are then handing over the control 10:43:18

7 of the entire plaintiffs' litigation to the defendants. I 10:43:22

8 think the solution is the plaintiffs maintain some of that 10:43:25

9 control. 10:43:28

10 If there is a doctor that we are not made aware 10:43:29

11 of and we have not supplied in our fact sheet, it's 10:43:31

12 imperative that the defendants allow us the opportunity to 10:43:34

13 present that to our client. Our client can say, yes, you 10:43:38

14 are right, I did see Dr. Jones in 1993, orthopedic surgeon, 10:43:41

15 I had a knee injury. So be it. We have that opportunity 10:43:45

16 to say there's something we overlooked, you are entitled to 10:43:49

17 that. I also --

18 THE COURT: There is nothing in the PTO 10 that 10:43:52

19 does not require that. That is, I am protecting, 10:43:53

20 protecting, protecting. We have a mechanism in place. 10:43:58

21 There has not been any violations of that PTO 10 causing 10:44:05

22 any medical reference to be disclosed that should not have 10:44:11

23 been. I think it's a very little wall. I respect your 10:44:15

24 arguments, but you've got -- this one, you are not going to 10:44:21

25 hear today. 10:44:32

1           So, I will grant the defendant's motion on this. 10:44:33  
2           You will follow the Court's order, PTO 10, and both sides 10:44:37  
3           are to report to me if there is any glitches or violations 10:44:44  
4           of that. I have not heard of any. Mr. Zimmerman, do you 10:44:49  
5           know of any? 10:44:57

6           MR. ZIMMERMAN: None have been brought to my 10:44:57  
7           attention, although I have discussed this with Vicki and 10:44:59  
8           with Rob Gordon, and they do feel strongly about it and 10:45:02  
9           they have said they wanted very much to be heard and asked 10:45:06  
10          that the PTO be amended in this regard. So, outside of 10:45:10  
11          that -- 10:45:12

12          THE COURT: You know I have the utmost respect 10:45:14  
13          for you and Mr. Gordon. And you tell Mr. Gordon even if he 10:45:16  
14          had been here he would have gotten the same treatment. 10:45:20

15          MS. MINIATUS: I'll be sure to tell him that. 10:45:26

16          THE COURT: The same treatment that you received, 10:45:28  
17          and it's no reflect on you. It's a situation where this is 10:45:30  
18          -- the Court has looked at this issue and made sure that 10:45:39  
19          the PSC was involved in the crafting of this order. There 10:45:44  
20          is a wall. If there is any glitches, I want you to bring 10:45:51  
21          it back to me immediately, and the defense will certainly 10:45:58  
22          be alerted by the Court so we can deal with those issues. 10:46:01  
23          Rest assured that I don't want any medical records in the 10:46:05  
24          hands of the defendant that they shouldn't have. 10:46:09

25          MS. MINIATUS: Thank you, Your Honor. 10:46:14

1 THE COURT: That's appropriate. 10:46:16

2 MS. MANIATIS: I thank you for your time on that. 10:46:18

3 I would appreciate some leeway in terms of the time 10:46:20

4 requirement to produce those authorizations. 10:46:24

5 THE COURT: Thirty days. 10:46:27

6 MS. MINIATUS: That would be retroactively as 10:46:31

7 well as into the future. Obviously, we have a lot of cases 10:46:35

8 that are backloaded that we have to do that with and that's

9 why I'm asking for additional time on those -- 10:46:38

10 THE COURT: How many are you talking about? 10:46:38

11 MS. MINIATUS: Probably about the 900 that I 10:46:43

12 served. 10:46:44

13 THE COURT: We'll talk about that in the 10:46:44

14 afternoon so you can start thinking about calculations so I 10:46:46

15 can see what we are talking about, June of 2012 or June of 10:46:52

16 2003. 10:46:56

17 MS. MINIATUS: I will do that. I will be in 10:46:59

18 touch with my office and have some numbers for you. 10:47:01

19 THE COURT: All right, I appreciate that. Thank 10:47:04

20 you. 10:47:05

21 MS. MINIATUS: Thank you. 10:47:08

22 MR. ZIMMERMAN: I believe the next item on the 10:47:20

23 agenda, Your Honor, is basically the update on expert 10:47:21

24 discovery, which is essentially -- 10:47:27

25 THE COURT: We're skipping one dealing with -- 10:47:29

1 you were going to inform the Court about the employment 10:47:34  
2 records authorization that's -- I see it under -- you don't 10:47:38  
3 have to say anything about it other than that should be 10:47:45  
4 directed to Magistrate Judge Lebedoff -- 10:47:49  
5 MR. ZIMMERMAN: Okay. 10:47:51  
6 THE COURT: -- if there is a problem. 10:47:53  
7 MR. ZIMMERMAN: Yes. My understanding is that 10:47:55  
8 motion has not been briefed. 10:47:57  
9 THE COURT: Right. 10:47:59  
10 MR. ZIMMERMAN: But it will be referred to 10:48:01  
11 Magistrate Lebedoff. 10:48:01  
12 THE COURT: Right, expert discovery. I'm sorry, 10:48:04  
13 go ahead. 10:48:07  
14 MR. ZIMMERMAN: We have not really developed a 10:48:11  
15 protocol for the upcoming expert discovery. We are working 10:48:16  
16 to negotiate that out. So, this is just a matter of 10:48:19  
17 information that will be -- the expert discovery will be 10:48:22  
18 commencing soon, and we did not address it in our initial 10:48:25  
19 case management order, but I believe we are now intending 10:48:31  
20 to meet, discuss and then try and come up with something. 10:48:33  
21 Obviously, if we're having trouble, we know where to bring 10:48:37  
22 it, but we are highly confident that with all the good 10:48:41  
23 faith being exchanged in this room, we will be able to come 10:48:47  
24 up with something that we can all work with. If we have a 10:48:49  
25 problem, we'll advise the Court. 10:48:51

1 MR. HOEFLICH: From our perspective, Your Honor, 10:48:53  
2 its imperative that we begin working on a protocol for 10:48:57  
3 expert discovery if the MDL is going to continue to move 10:49:00  
4 forward expeditiously. That's an important part. We'll 10:49:04  
5 work with Mr. Zimmerman. 10:49:07

6 THE COURT: Do you wish to have some component of 10:49:10  
7 the Court involved in this, whether or not it's me or Judge 10:49:13  
8 Lebedoff or Special Master Haydock involved to make sure 10:49:16  
9 that things you are going smoothly with this. This can be 10:49:19  
10 a big issue when you start taking the depositions and the 10:49:26  
11 phone calls coming in on this issue -- these issues. 10:49:34

12 MR. HOEFLICH: I'm hopeful, Your Honor, that 10:49:39  
13 we'll be able to work it out. Obviously, we would want 10:49:41  
14 Court approval of any orders we think is appropriate, and I 10:49:44  
15 think at that time it would be appropriate to have the help 10:49:49  
16 of the Court, the Special Master or the Magistrate. 10:49:52

17 THE COURT: How soon are we talking about getting 10:49:56  
18 this to me?

19 MR. HOEFLICH: We're ready to meet whenever the 10:49:58  
20 plaintiffs are ready. 10:50:02

21 THE COURT: Let's keep this on the front burner. 10:50:03

22 MR. HOEFLICH: Thank you, Judge. 10:50:06

23 MR. ZIMMERMAN: Thank you, Your Honor. 10:50:09

24 THE COURT: Let's take a ten-minute break. 10:50:10

25 (Recess taken) 11:05:49

1           THE COURT: Let's continue.                               11:05:50

2           MR. ZIMMERMAN: Your Honor, I believe the next    11:05:55

3    item on the agenda has to do with what we call the bundled   11:05:56

4    complaint motion. The defendants have two motions pending   11:06:02

5    relating to the filing of the multi-party complaints, and I   11:06:06

6    believe this is right before argument and determination by   11:06:09

7    the Court.   11:06:12

8           THE COURT: All right, let's have argument.       11:06:13

9           MR. HOEFLICH: In July, Your Honor, the Court    11:06:23

10    entered an order denying plaintiffs' request to file        11:06:24

11    complaints with up to 50 persons. The Court did this based   11:06:29

12    on the firm and clear precedent of the bone screw           11:06:32

13    litigation, the diet drug litigation and a number of other   11:06:37

14    mass tort cases where plaintiffs had sought to join or       11:06:43

15    consolidate large numbers of plaintiffs' individual        11:06:48

16    complaints.    11:06:51

17           The Court rejected the plaintiffs' request, even   11:06:54

18    though the plaintiffs said they only sought to combine       11:06:56

19    people from one state, from one venue, and they believed    11:06:59

20    there was a common set of facts involving the defendant's   11:07:04

21    conduct that gave rise to the suits. PTO 31 is clear in     11:07:07

22    rejecting the request to consolidate complaints up to 50     11:07:14

23    plaintiffs.    11:07:20

24           While the plaintiffs' motion was pending and       11:07:20

25    subsequent to this Court's ruling, the plaintiffs have     11:07:23

1 filed a number of individual suits that contain up to 50 11:07:27  
2 persons in them. We have also received eight self-styled 11:07:33  
3 Louisiana class actions that are identical and each of 11:07:37  
4 which contains 50 plaintiffs. Five, in fact, contain 50 11:07:40  
5 plaintiffs, two each contain 20. All of these complaints, 11:07:46  
6 Your Honor, we believe are in clear violation of this 11:07:50  
7 Court's order. 11:07:53  
8 The plaintiffs have the burden of showing why 11:07:57  
9 joinder is appropriate. That's why they filed their motion 11:08:02  
10 in the first instance. We don't believe they have met that 11:08:04  
11 burden. We believe that PTO 31 is clear. We also believe 11:08:08  
12 that there are two other significant problems with the 11:08:13  
13 self-styled Louisiana class actions. 11:08:15  
14 First, you cannot have 50 Plaintiffs in a 11:08:19  
15 complaint. Second, there is no precedent for lawyers 11:08:22  
16 filing identical class actions. We believe the only 11:08:26  
17 purpose to these actions was to evade the Court's ruling. 11:08:30  
18 Plaintiffs told us immediately after the ruling that they 11:08:36  
19 were going to continue to try, try and try to do this. 11:08:38  
20 They believe it's necessary for marketing purpose. We 11:08:43  
21 understand their desires to make the MDL the focus, but, 11:08:48  
22 again, we don't believe that the MDL should be a magnet for 11:08:52  
23 cases that do not meet the jurisdictional requirements of 11:08:56  
24 the federal court by lawyers who do not want -- want to 11:08:59  
25 participate in discovery, and we think that is what this is 11:09:04



1 an effort to do. 11:09:08

2 Many of the fact sheets in several of these 11:09:09

3 complaints are delinquent. We have complaints that have 11:09:13

4 some fact sheets but not others. We would plan to file 11:09:17

5 jurisdictional fights against these complaints, and there 11:09:20

6 would be no reasonable way to handle complaints with 11:09:24

7 different rulings on jurisdiction, venue and other issues 11:09:28

8 or to remand these cases for trial and have any sort of an 11:09:35

9 efficient trial with complaints on behalf of many persons 11:09:38

10 who were exposed to Baycol at different times and sought 11:09:43

11 different treating physicians, who suffered different 11:09:47

12 injuries, if injuries at all, and who seek different 11:09:49

13 relief. 11:09:51

14 We believe that all but the first plaintiff 11:09:53

15 should be struck in all of these complaints. And for 11:09:56

16 complaints that were filed after the date of this Court's 11:10:00

17 ruling or were filed by persons who already had cases in 11:10:03

18 the MDL struck complaints and the refiled complaints should 11:10:11

19 be subject to the statute of limitations as though they 11:10:17

20 were filed in the first instance on refiling. 11:10:20

21 If somebody was innocent and had not filed a case 11:10:23

22 in the MDL before or did not know of this Court's order, 11:10:27

23 and we have set that forth in our order, we wouldn't 11:10:31

24 prejudice them. But for people who were on clear notice of 11:10:35

25 the order, either because they are part of the PSC or had 11:10:39

1 cases filed in federal court, we don't believe they should 11:10:45

2 be related back. 11:10:47

3 THE COURT: Before we hear arguments, I see that 11:10:49

4 Ramon Lopez has his coat on, and I want to acknowledge his 11:10:56

5 presence. Thank you, Mr. Lopez, for coming in. Mr. Lopez 11:10:59

6 is on the State/Federal Liaison Committee for this MDL and 11:11:02

7 has done tremendous work since being appointed to the 11:11:10

8 committee. And I know that he will continue to work with 11:11:13

9 this Court and the MDL in dealing with the Baycol 11:11:15

10 litigation. 11:11:26

11 Again, I thank you for flying in from 11:11:26

12 California -- or Cincinnati. You flew from Cincinnati to 11:11:30

13 participate today, and thank you very much. 11:11:33

14 MR. LOPEZ: Thank you, Your Honor. I actually 11:11:37

15 have to go back and check out. I forgot I'm not in 11:11:39

16 California, I'm in Minnesota. I will actually be here for 11:11:42

17 the rest of the afternoon. 11:11:48

18 THE COURT: Fantastic. Thank you, sir. 11:11:50

19 MR. HOEFLICH: The only other thing I would note, 11:11:52

20 Your Honor, is that in the Eastern District of Pennsylvania 11:11:55

21 in Baycol cases, there have been at least 17 sua sponte 11:11:58

22 severances on complaints just like this because it is 11:12:06

23 against the practice in the federal courts to allow 11:12:09

24 multi-plaintiffs filings in individual complaints. Thank 11:12:12

25 you, Judge. 11:12:16

1 THE COURT: Why shouldn't I sanction you? 11:12:25

2 MR. LOCKRIDGE: Well, Your Honor, I think -- 11:12:31

3 THE COURT: I don't want to prejudice the 11:12:35

4 plaintiffs involved in this case, but PTO 31 is clear, and 11:12:36

5 try to explain to me why it isn't clear and we'll go from 11:12:41

6 there. 11:12:46

7 MR. LOCKRIDGE: I will do that. First of all, 11:12:48

8 Your Honor, I think in some elements it was wrongly 11:12:49

9 decided, although I wouldn't want to use the word 11:12:52

10 reconsider, we would ask you to re-visit various aspects of 11:12:55

11 that. 11:13:00

12 THE COURT: You know there is an appropriate 11:13:01

13 mechanism for asking the Court to reconsider a wrongly 11:13:05

14 decided matter and you did not do that. So, I really don't 11:13:07

15 want to hear that. 11:13:12

16 MR. LOCKRIDGE: I appreciate that, Your Honor, 11:13:13

17 and what we, of course, are doing is we are responding to 11:13:14

18 their motion. 11:13:16

19 Your Honor, this is quite simply a major attack 11:13:17

20 on the MDL. As the Court said in its order and in Rule 20, 11:13:20

21 unless the plaintiffs' claims -- 11:13:25

22 THE COURT: But you didn't bring it under Rule 11:13:27

23 20. You brought it under Rule 42. 11:13:30

24 MR. LOCKRIDGE: That's correct, Your Honor, and I 11:13:33

25 believe Your Honor has determined that we nevertheless have 11:13:34

1 a right to establish and to see if under Rule 20 if the 11:13:37  
2 plaintiffs' claim arise from the same basic set of facts. 11:13:40  
3 I think without question now we know that all of these 11:13:44  
4 claims do arise from the same basic set of facts because 11:13:48  
5 now we have engaged in discovery. We have reviewed 11:13:53  
6 hundreds of thousands of documents. Mr. Branch, Mr. 11:13:55  
7 Climaco, Mr. Arsenault have now gone out and deposed 33, 35 11:13:59  
8 people. And they're not doing these depositions, you know, 11:14:05  
9 in each individual case. They are doing the depositions 11:14:16  
10 for the entire MDL, for all of these plaintiffs. 11:14:16  
11 So at the trials of these individuals, if and 11:14:16  
12 when they are remanded back to the federal court, 99 11:14:19  
13 percent of the evidence is going to be the same. We now 11:14:23  
14 know that, Your Honor. 11:14:27  
15 The videotaped depositions of these people are 11:14:28  
16 going to be played -- or the witnesses are going to be 11:14:31  
17 played. It's all going to be the same evidence. So, our 11:14:34  
18 strong belief, Your Honor, is that the evidence is the same 11:14:39  
19 in these cases and that we, in our briefs and, hopefully, 11:14:41  
20 the oral argument now and the evidence that's been 11:14:46  
21 established in the past have met our burden that these 11:14:50  
22 cases are the same and they have the overwhelming 11:14:55  
23 underlying same factual matrix. 11:14:57  
24 This is not a case, for example, Counsel 11:15:01  
25 mentioned bone screw, this is not a case where each 11:15:03

1 individual -- each individual had surgery. There were 11:15:08  
2 claims, there were medical malpractice claims against the 11:15:12  
3 doctors. We don't have those situations. We know that. 11:15:15  
4 We have a situation where a drug was ingested by people, 11:15:18  
5 and, yes, they have suffered injuries, but the whole focus 11:15:22  
6 of the case is going to be on the actions of Bayer and 11:15:26  
7 Bayer AG and GSK about how they marketed the drug, 11:15:30  
8 developed the drug, the warnings or lack thereof, and so 11:15:36  
9 forth. And I submit this is entirely different than a case 11:15:40  
10 like bone screws. And I think that is a reason, Your 11:15:43  
11 Honor, why, not only we should not be sanctioned, but you 11:15:49  
12 should not grant their motion. 11:15:52  
13 I believe that in virtually every case, it's my 11:15:55  
14 understanding that the decision should be for the court 11:15:59  
15 where the cases are remanded back to. That it is not for 11:16:04  
16 this Court to make that so-called advisory determination, 11:16:10  
17 but that it is up to the Court in, say, a year or two, if 11:16:12  
18 you send cases back, for example, to Louisiana, for the 11:16:17  
19 Louisiana court to make that determination. And we lay 11:16:21  
20 that out at some length in our brief, Your Honor. 11:16:23  
21 The effect of this -- the motion here is 11:16:28  
22 obviously to do one thing, to drive the plaintiffs into the 11:16:32  
23 state courts. And it's a very unusual situation here that 11:16:39  
24 the defendants have made the conscious determination to try 11:16:43  
25 to drive more cases into the state courts rather than into 11:16:48

1 the MDL. And it's almost the first MDL I've ever been 11:16:52  
2 involved in in my life where that's the case because, 11:16:55  
3 typically, of course, defendants want cases to be filed in 11:16:58  
4 federal court, and they do not look upon the federal venue 11:17:02  
5 as friendly and they do not want cases in the state court. 11:17:09  
6 I would also emphasize, Your Honor, once again 11:17:16  
7 that the joinder rules are to be interpreted very, very 11:17:22  
8 broadly. That's not only the teaching of the U. S. Supreme 11:17:24  
9 Court, but it's also the teaching of very, very recent 11:17:26  
10 cases, including a case which we have cited, I believe, in 11:17:29  
11 our brief, the Alexis v. GSK case decided just a few months 11:17:34  
12 ago from the Eastern District of Louisiana which emphasizes 11:17:37  
13 that the Rule 20(a) requirements are to be read as broadly 11:17:40  
14 as possible whenever doing so is likely to promote judicial 11:17:44  
15 economy, and that is simply what we are doing here, Your 11:17:51  
16 Honor. 11:17:53  
17 I know in their brief, Your Honor, they, of 11:17:55  
18 course, are relying on diet drugs, but I would point out in 11:17:57  
19 diet drugs that the court there did not sever the two 11:17:58  
20 Alabama plaintiffs. They had plaintiffs there from the 11:18:01  
21 same state, and that was also a situation where the 11:18:05  
22 plaintiff was trying to destroy diversity jurisdiction. 11:18:07  
23 Here we want to be in federal court, and I think that's a 11:18:13  
24 very, very significant difference, Your Honor. 11:18:18  
25 So, in a nutshell, Your Honor, I believe that we 11:18:23

1 have now met our burden, having gone through all the 11:18:27  
2 discovery, the depositions, the document reviews, I think 11:18:30  
3 we have met our burden that the overwhelming majority of 11:18:34  
4 the evidence in this case is sufficient to allow joinder. 11:18:37  
5 And I might add that I think that it might also be going to 11:18:42  
6 be sufficient to allow this Court to certify a class, too. 11:18:46  
7 But, obviously, that is getting a little bit ahead of 11:18:53  
8 myself. 11:18:58

9 If I could, Your Honor, I would appreciate if you 11:18:59  
10 would allow Mr. Becnel just to say a couple of words, 11:19:02  
11 please. 11:19:06

12 THE COURT: Well done. 11:19:09

13 MR. LOCKRIDGE: Thank you. 11:19:12

14 THE COURT: Now, why did you violate my order 11:19:14  
15 faxing me things, Mr. Becnel? Hasn't Mr. Zimmerman told 11:19:17  
16 you that you are not supposed to fax me anything? You 11:19:22  
17 faxed something to me the other day. I want to know why 11:19:26  
18 would you violate that? 11:19:28

19 MR. BECNEL: Probably my secretary did it. I 11:19:31  
20 have no idea.

21 THE COURT: No, no blaming your secretary. 11:19:34

22 MR. BECNEL: No. I'm just saying I've been on 11:19:36  
23 the road, Judge, for the last six weeks non-stop, and I'll 11:19:37  
24 make sure that's not done. 11:19:43

25 THE COURT: Please. 11:19:43

1 MR. BECNEL: May it please the court, Louisiana 11:19:45  
2 is rather unique. We have one of the few states that 11:19:45  
3 doesn't have punitive damages, has a one-year statute, and 11:19:50  
4 you got to figure out what in the heck is going on in a 11:19:53  
5 federal case. And we can't sue doctors. And we can't sue 11:19:57  
6 pharmacists. And we can't get any relief in terms of going 11:20:01  
7 to state court. So, my only option is to file in federal 11:20:04  
8 court. 11:20:09

9 So, we filed in federal court, and as you recall, 11:20:10  
10 I brought up the issue of what we had done in Norplant. I 11:20:15  
11 was in trial when the motion was, in fact, argued. I 11:20:19  
12 wasn't here. And I think some of the arguments I would 11:20:27  
13 have made are a little different than some of the arguments 11:20:27  
14 that were made. 11:20:32

15 Number one is because we don't have a lot of the 11:20:32  
16 statutes that other people have, i.e., this state. You can 11:20:37  
17 wait six years before you have to file a lawsuit, 11:20:45  
18 therefore, if you don't get discovery done in the first two 11:20:47  
19 or three years of any kind of litigation, you know what you 11:20:50  
20 got. In Louisiana we don't have that option. 11:20:54

21 People in Louisiana took Baycol at greater 11:20:57  
22 percentages than almost anywhere else, mainly because our 11:21:01  
23 state hospital system is a charity hospital system. 11:21:05  
24 Probably 40 to 50 percent of the people are indigent in 11:21:09  
25 terms of education, in terms of income, in terms of being 11:21:14



1 on public assistance, etc. 11:21:18

2 So, when those people come forth and want their 11:21:21

3 day in court, and these companies went to that charity 11:21:25

4 hospital system and said, hey, look, our drug Baycol is 11:21:30

5 cheaper than anybody else. So, don't give them Lipitor 11:21:34

6 with no side effects. Don't give them Zocor with by and 11:21:38

7 large no side effects. Give them the cheap drug. So, 11:21:43

8 that's normally what the states do when they're faced with 11:21:46

9 that thing -- that situation. 11:21:49

10 But they keep talking about cases that I'm 11:21:52

11 personally involved in, namely, pedicle screws. Pedicle 11:21:55

12 screws, I think I filed two to three thousand cases. 11:22:00

13 Almost everyone has been resolved. Judge Bechtle did, in 11:22:04

14 fact, order, and most of those were from other states where 11:22:11

15 they were bundled up and went to Judge Bechtle where he 11:22:15

16 ordered them to be debundled. But that was for a unique 11:22:20

17 reason, unlike what we have in Louisiana. It was because 11:22:25

18 the more filings you have, the better the dockets look for 11:22:27

19 courts. The less filings you have, for example, like in 11:22:30

20 Louisiana, and what happens is our federal judges go spend 11:22:35

21 months at a time in Texas doing immigration cases. So, I 11:22:37

22 know that that's what was the play there in terms of why 11:22:42

23 those cases were unbundled. 11:22:45

24 Now, let's talk about the next case Judge Bechtle 11:22:50

25 had.

1 THE COURT: Why won't I want them unbundled? 11:22:55

2 MR. BECNEL: Do you need help? I think ya'll 11:23:01

3 have a very efficient, well-placed judiciary that has 11:23:06

4 enough people doing your work, because you can send half of 11:23:08

5 your cases to state court. I can't send any, not one, not 11:23:12

6 if I sue a manufacturer, not if I sue a drug company. I've 11:23:16

7 got to be in federal court. 11:23:19

8 Let's go to the next case, pedicle screws. Let's 11:23:22

9 look at the effects of what that did to the clients I 11:23:27

10 represent. What it did is it made them pay \$150 extra, and 11:23:31

11 because of some of the companies had very little money, 11:23:39

12 some of them with limited funds, plaintiffs -- I don't eat 11:23:42

13 it, plaintiff eats it. So, instead of them getting a 11:23:48

14 \$10,000 settlement with a 30 or 40 percent attorney's fee, 11:23:51

15 they got to take an extra \$150 that the judiciary didn't 11:23:56

16 really need for administrative costs. 11:24:02

17 Now, let's talk about diet drugs. All of my 11:24:05

18 cases were filed in bundles. Filed some of the first ones 11:24:09

19 in the country. Of those I haven't settled, of the 11:24:14

20 thousands that I haven't settled, the ones that are left 11:24:18

21 there that I want to try are still bundled. Not only have 11:24:21

22 we done the fact sheets, not only am I in the first group 11:24:25

23 to be remanded, when they ultimately are, but they are 11:24:30

24 being remanded in a bundle. 11:24:32

25 We have taken three or four hundred depositions 11:24:36

1 on those 40, 50 cases that are left. They're still 11:24:39  
2 bundled. They are not unbundled, and they are going to go 11:24:43  
3 to Judge Portias in Louisiana, and the if they were 11:24:47  
4 unbundled, then the only difference would be instead of 11:24:53  
5 having those 30 or 40 cases come to Judge Portias, and I 11:24:56  
6 know what type of judge he is because I've tried many cases 11:25:01  
7 with him in state court, he's just going to consolidate 11:25:02  
8 them. He's not going to try these cases one at a time. 11:25:04  
9 He's going to do them in flights. What better way to do 11:25:07  
10 them in flights than 30 or 40 at a time because he's not 11:25:13  
11 going to sit there and listen to the same basic facts. 11:25:16  
12 Now, let's talk about the next one, Rezulin. My 11:25:22  
13 cases are filed. I have more cases filed in the federal 11:25:25  
14 MDL, and Mr. Lopez, as one of the lead counsels, can tell 11:25:28  
15 you they're bundled and they're still bundled. We've done 11:25:31  
16 all of the discovery, all of the fact sheets. They haven't 11:25:36  
17 come back yet. Whether the defendants are going to try to 11:25:37  
18 unbundle them, we don't know. But if they do, what is that 11:25:40  
19 going to do? Discovery is basically complete, I think Mr. 11:25:46  
20 Lopez will tell you. So, they are getting ready to come 11:25:48  
21 back to Louisiana. We're taking depositions on those case. 11:25:53  
22 The Judge is going to consolidate. 11:25:56  
23 The way we do it, or the way I do it, is I simply 11:26:00  
24 put everybody that's in the Eastern District, we have three 11:26:03  
25 districts in Louisiana, Eastern, Middle and Western, we put 11:26:06

1 them together, because the low number Judge is going to 11:26:11  
2 deal with each and every one of them. They get individual 11:26:13  
3 fact sheets. They get to take individual discovery. To 11:26:18  
4 simply make a plaintiff have to pay an extra \$150, most of 11:26:22  
5 whom were indigent, most of the clients I represent are 11:26:27  
6 indigent. And I want to be in federal court. 11:26:31

7 I think of the hundred cases they have settled in 11:26:35  
8 federal court, I think we have produced almost a third of 11:26:43  
9 those and we're participating actively. We want to 11:26:43  
10 participate actively in every case we have. And what we 11:26:45  
11 were trying to show the Court is that there is no 11:26:51  
12 disadvantage. 11:26:53

13 Now, if Judge Portias or Judge Levine or Judge 11:26:55  
14 whomever wants these things unbundled, why not in the 11:27:01  
15 interest of judicial economy allow them to be bundled here 11:27:04  
16 for total discovery. And then if you want to have them 11:27:09  
17 unbundled down the road, half of them may be settled. If 11:27:13  
18 you want to undo the rest, then let the district judge 11:27:18  
19 there say, look, I don't want to try 40 together or 30 11:27:21  
20 together, Mr. Becnel. Put in flights of 10, 12, 15 and do 11:27:25  
21 them individually.

22 What does that do other than make the clerk's 11:27:31  
23 office work harder and make the plaintiffs spend a lot of 11:27:33  
24 money and make the defendants, ultimately, if they are 11:27:37  
25 going to resolve these cases, pay some of the money back. 11:27:41

1 THE COURT: Can I ask a question? Unbundled in 11:27:48

2 Louisiana, the filing fee has to be paid there, is that 11:27:51

3 correct? 11:27:54

4 MR. BECNEL: The filing fee has to be paid 11:27:54

5 somewhere, no matter when. I haven't ever seen in my state 11:27:57

6 one judge do it, not one. 11:28:02

7 THE COURT: After they are unbundled? 11:28:06

8 MR. BECNEL: They've never unbundled them, never. 11:28:09

9 I can tell you Norplant didn't do it. I can tell you 11:28:09

10 Rezulin didn't do it. I haven't gotten them back yet, but 11:28:13

11 they're not unbundled yet. I can tell you Phen-fen, my 11:28:14

12 cases are coming back and they are still bundled together, 11:28:15

13 but we're doing individual discovery, and Judge Portias has 11:28:21

14 got those cases. He isn't going to try to make me unbundle 11:28:25

15 them and then rebundle for him for trial. It makes no 11:28:32

16 economic sense. 11:28:36

17 What we have done, Judge, is every case that we 11:28:36

18 have taken, the plaintiff has already filled out a fact 11:28:41

19 sheet from our office which is very similar because in bone 11:28:44

20 screw, we developed the first fact sheet that was really 11:28:50

21 utilized and was redefined in Phen-fen. It was redefined 11:28:55

22 in Norplant. It was redefined in all the various drugs. 11:28:59

23 So, we got him to do that. 11:29:04

24 Once you came up with the approved order that Mr. 11:29:07

25 Zimmerman and the defendants came to grips with, we sent 11:29:10

1     them back to the plaintiffs and said, look, it's a little     11:29:14  
2     different here than there, and we want you to do them. But     11:29:17  
3     we always asked them to do them if they can read and write,     11:29:20  
4     to fill them out by hand. So, although we are perfectly     11:29:23  
5     capable of doing them by computer, we have them fill them     11:29:30  
6     out by hand and we send our lawyers to their homes to get     11:29:34  
7     it done.   11:29:36

8             So, I just don't see the economy efficiency,     11:29:37  
9     because those plaintiffs are not going to pay the money.     11:29:42  
10     I'm going to pay the money. I'm going to spend, instead of     11:29:51  
11     sitting down worrying about trying to get more cases to the     11:29:51  
12     MDL settlement table that we all are interested in doing, I     11:29:56  
13     can file cases no matter where. If they want to try each     11:30:00  
14     and every one of the cases, I stand ready, willing, and     11:30:05  
15     able to do that.   11:30:09

16             I file them in state court. I file them in city     11:30:09  
17     courts because that's the only place I can go now if I have     11:30:12  
18     to file them because of the lower costs on cases that,     11:30:16  
19     despite what they say, they have no value. They have value     11:30:21  
20     if a person in Louisiana purchased a drug that we have a     11:30:23  
21     rudimentary device in the drugs that causes problems. And     11:30:31  
22     because a person didn't wind up and have health insurance     11:30:34  
23     that they can go to the local clinic where if they go to     11:30:38  
24     our charity hospitals which are located throughout     11:30:42  
25     Louisiana, and you might sit there eight hours before a     11:30:45

1 physician sees you. People know that. They are not 11:30:48  
2 running to the doctor every ten minutes. That's a whole 11:30:52  
3 day's adventure to even be seen by some resident who gives 11:30:56  
4 you four minutes. 11:30:59

5 So, what we have attempted do is get these 11:31:01  
6 people's cases before this Court, if this Court forces us 11:31:05  
7 to undo them. Another thing is in Louisiana we have unique 11:31:11  
8 law. I think I can put as many -- there's very few people 11:31:14  
9 in this country that try class actions to verdict. I've 11:31:21  
10 tried many of them to verdict, hundreds of them to verdict, 11:31:23  
11 even after Bell Weather is tried, and I can assure you that 11:31:28  
12 most all of the class action law in Louisiana, I'm involved 11:31:34  
13 in most of them, and I can assure the Court that the court 11:31:37  
14 has never, ever said you only can bring two plaintiffs as 11:31:41  
15 class reps. I can bring 500. If you look at diet drugs, 11:31:45  
16 Mr. Chesley and others who were lead counsel in that 11:31:52  
17 litigation, I think they changed the whole flight of the 11:31:56  
18 class reps because certain people, when they went and did 11:31:58  
19 the discovery, didn't meet certain subclass definitions. 11:32:02

20 So, I would suggest to the Court that this Court, 11:32:07  
21 and we won't file anymore in federal court if this Court 11:32:10  
22 affirms this order, and I think our lawyers were simply 11:32:15  
23 doing what we suggested to them to do, and that is simply 11:32:19  
24 file as many as we can to make sure our statute, although 11:32:24  
25 we file our American pipe, we think prescription is 11:32:29

1 interrupted. We're never really sure. So, it's better to 11:32:36  
2 do what we do and then file the suits. Get discovery 11:32:40  
3 ongoing. Let them look at our cases. And if we settle 11:32:43  
4 them, we settle them. If not, then we go to trial. 11:32:48  
5 I would like to tell the Court that in Phen-fen, 11:32:53  
6 not one case yet from the federal court has been remanded 11:32:55  
7 and tried, not one, not one. My cases are the first filed 11:33:01  
8 in a bundle, and I don't have one back yet despite asking 11:33:06  
9 repeatedly over the last four years, send my cases back. 11:33:12  
10 Give me a trial. Why should state courts have all of the 11:33:20  
11 trials and federal courts not. 11:33:23  
12 I don't know what else I can say other than I 11:33:25  
13 think I've practiced law 33 years and I represent 11:33:29  
14 plaintiffs. 11:33:34  
15 THE COURT: Thank you very much. 11:33:36  
16 MR. HOEFLICH: Your Honor, if Mr. Becnel and the 11:33:38  
17 other members of the PSC did not like PTO 31, they should 11:33:44  
18 have sought reconsideration of it. The Court's order is 11:33:52  
19 clear on Page 2 to state that Federal Rule of Civil 11:33:57  
20 Procedure 20 which provides for permissive joinder governs 11:34:02  
21 this motion. 11:34:07  
22 The Court, when it made that ruling, then 11:34:09  
23 examined the bone screw litigation, the Rezulin litigation, 11:34:11  
24 the diet drugs litigation, and ruled that Rule 20 did not 11:34:20  
25 allow for the joinder of multiple plaintiffs. 11:34:23



1           At oral argument, Mr. Lockridge, at Page 7 of the 11:34:28  
2 June 27 transcript explained in detail why he then believed 11:34:34  
3 these cases were appropriate for multiple plaintiffs under 11:34:39  
4 Rule 20. He explained his view of the facts. He 11:34:43  
5 distinguished the case law on which defendants relied. The 11:34:48  
6 Court rejected those arguments, and instead of seeking 11:34:52  
7 reconsideration, the plaintiffs decided to violate this 11:34:56  
8 Court's order and come in and explain in terms that are 11:35:00  
9 completely outside what they filed in their brief, with 11:35:02  
10 anecdotes that are unsupported by anything in their brief, 11:35:07  
11 why this Court's order was wrong. 11:35:12

12           If the plaintiffs believed that Rule 20 was 11:35:15  
13 appropriate for their complaints, they should have filed 11:35:18  
14 motions in the first instance, seeking to approve the 11:35:21  
15 complaints they had on file. When they sought what was 11:35:25  
16 rejected in PTO 21, they should have explained how their 11:35:30  
17 complaints as they sat, met the requirements of the rule. 11:35:36  
18 They didn't do any of that. They sought a general rule. 11:35:40  
19 It was rejected. They then violated the court order. 11:35:44

20           Mr. Becnel made the point that he's not aware of 11:35:50  
21 any cases that would strike multiple plaintiffs. I would 11:35:52  
22 refer the Court to the Ford Motor Company Bronco 3 case, 11:35:57  
23 177 FRD 368, where Mr. Becnel is the lawyer, a class action 11:36:03  
24 was struck for having too many representatives. 11:36:06

25           I would also inform the Court that as soon as 11:36:10

1 this Court ruled, Mr. Becnel told us that if this Court 11:36:14  
2 wouldn't entertain the claims of his clients with their 11:36:20  
3 small amounts, he would take us to city court, he would 11:36:24  
4 take us to county court, he would take us to small claims 11:36:31  
5 court. My response to Mr. Becnel, then, as now, is while I 11:36:33  
6 would like the MDL to be the focus of this litigation and 11:36:36  
7 I'm doing everything I believe is appropriate to do that, I 11:36:42  
8 don't have the power to expand Article III. 11:36:42

9 If Mr. Becnel's clients don't have claims that 11:36:45  
10 exceed \$75,000 each and have diversity jurisdiction, I 11:36:49  
11 can't take it from being a small claims court case to being 11:36:56  
12 a federal case. If Mr. Becnel believes that all of his 11:37:01  
13 clients have cases that are worth \$75,000 or more and they 11:37:05  
14 meet the jurisdiction of this Court, he can file them as 11:37:09  
15 individual complaints. And if his clients don't have the 11:37:12  
16 resources to file those cases here, he can file them 11:37:17  
17 *informa pauperis* and file a petition with the court. 11:37:21

18 He can also come to us and say, here's a case 11:37:25  
19 that involves serious injury. My client can't pay the 11:37:28  
20 filing fee. We want to talk to him about that case even 11:37:34  
21 before he files it. And we want to do everything in our 11:37:36  
22 power to try to resolve that case. If anybody was injured 11:37:41  
23 on our medicine, we want to talk to Mr. Becnel, and we have 11:37:44  
24 done so since the very beginning of this litigation. What 11:37:49  
25 we don't want this court to be is a funnel of all of the 11:37:54

1 insubstantial cases brought by lawyers who have not 11:37:59  
2 investigated them. 11:38:02

3 It is our view that cases must meet the 11:38:03  
4 jurisdiction of the federal court and that lawyers who file 11:38:05  
5 those cases must obtain all of the facts about them in 11:38:09  
6 advance, make sure they follow the federal rules, and give 11:38:12  
7 us complaints that allow us to either try to resolve the 11:38:17  
8 case or to defend them. We should be able to know whether 11:38:21  
9 jurisdiction is met, whether venue is met, and the Court 11:38:26  
10 should have individual files so that when we file the 11:38:31  
11 motions on jurisdiction venue and the like, those motions 11:38:34  
12 can be kept in individual files and not have to face the 11:38:36  
13 dilemma of what do I do when plaintiffs 1, 3, 7 and 8 have 11:38:39  
14 a motion granted and the remainder don't. 11:38:45

15 And courts that transfer their cases here 11:38:47  
16 shouldn't be faced a year from now or 18 months from now 11:38:51  
17 with the decision of what to do with 50 plaintiff 11:38:54  
18 complaints that have sat here for two years and then have 11:38:56  
19 to be broken into a whole number of parts for filing fees, 11:39:00  
20 for jurisdictional fights and for some sort of decision on 11:39:03  
21 how to try cases that involve different exposures, 11:39:07  
22 different physicians and different injuries along with 11:39:11  
23 different relief. 11:39:14

24 We believe that PTO 31 is clear. We think it 11:39:16  
25 followed absolutely uniform precedent. And we believe the 11:39:18

1 plaintiffs violated the order. What we are asking is that 11:39:23  
2 the Court strike the claims of all but the named 11:39:31  
3 plaintiffs, all of the first named plaintiffs and to order 11:39:31  
4 those plaintiffs to re-file their cases in federal court. 11:39:35  
5 If their cases belong here, re-file them and attach the 11:39:35  
6 original complaint, and we'll deal with them. 11:39:40

7 But we think there should be a balance of the 11:39:45  
8 rights of the defendants as well as the rights of the 11:39:47  
9 plaintiffs should be taken into account, as well as the 11:39:49  
10 limits of Article III and the federal rules, Your Honor. 11:39:52

11 THE COURT: Thank you. 11:39:55

12 MR. BECNEL: He brought up one thing on Bronco -- 11:39:59

13 MR. LOCKRIDGE: They are asking this Court or the 11:40:06  
14 plaintiffs, someone to engage in busy work. It's the only 11:40:09  
15 conceivable justification of them trying to drive cases 11:40:13  
16 into state court for this. 11:40:18

17 Further, Your Honor PTO 31 is interlocutory and 11:40:22  
18 it's our view that it can be modified at any time by Your 11:40:26  
19 Honor with or without a formal motion to reconsider. And 11:40:29  
20 as I said, we are responding here to their motion. 11:40:32

21 As far as the issue of the so-called follow along 11:40:36  
22 class actions, I would simply point out that, first of all, 11:40:41  
23 the class hearing is coming up on January 21, and that is 11:40:43  
24 the appropriate time to deal with that issue. And, indeed, 11:40:48  
25 the cases that they cited in their brief dealt with class 11:40:51

1 certification motions, specifically the Ford Bronco case 11:40:55  
2 was a motion for class certification, and as Your Honor 11:40:59  
3 knows, the Chill v. Green Tree case was a Private 11:41:02  
4 Securities Litigation Reform Act which is totally 11:41:08  
5 different. They have this ridiculous method of trying to 11:41:11  
6 have a lead plaintiff, and it's entirely a different 11:41:17  
7 situation. 11:41:20  
8 Your Honor, on behalf of the plaintiffs, we 11:41:22  
9 beseech you to not grant the defendants' motions. As you 11:41:23  
10 can tell, it's very, very critical for the plaintiffs and 11:41:28  
11 many of the plaintiffs with smaller claims, and those are 11:41:32  
12 the ones we are really talking about. Thank you. 11:41:35  
13 MR. BECNEL: May it please the Court, the Bronco 11:41:40  
14 2 case I originally filed cases for personal injuries, 11:41:42  
15 individual plaintiffs. Some other people came from around 11:41:47  
16 the country and had an MDL. I wasn't even involved in 11:41:50  
17 that. And they tried to do a coupon settlement before 11:41:55  
18 Judge Sear. When Judge Sear denied their coupon 11:41:59  
19 settlement, the people weren't getting anything but a 11:42:03  
20 telephone to call in case they got in a wreck, he ordered 11:42:05  
21 the defendant -- I'm sorry, he ordered the plaintiffs in 11:42:09  
22 that case who are on the PLC to pay for notice to the class 11:42:12  
23 nationwide which would have been two to three hundred 11:42:18  
24 thousand dollars. They then contacted Mr. Murray, who must 11:42:23  
25 have just left, and myself to see if we could save them 11:42:25

1 from the wrath of this court. 11:42:30

2 We then got involved in it, took depositions, 11:42:36

3 crafted in the back chambers with Judge Sear a settlement 11:42:36

4 that would retrofit every Bronco 2 after all of the 11:42:41

5 experts -- we spent a quarter of a million dollars doing 11:42:48

6 tests in the deserts of Arizona. Judge Sear then said I'm 11:42:50

7 going to approve this settlement because everybody is going 11:42:56

8 to have individual Broncos inspected. We're going to make 11:43:01

9 the changes and so on and so forth. 11:43:04

10 One of the lawyers who was involved in that first 11:43:08

11 coupon settlement goes out and tells the Wall Street 11:43:08

12 Journal he was so angry he couldn't stand it and I don't 11:43:14

13 blame him. He then said, Mr. Becnel and Murray, if you get 11:43:19

14 those lawyers to allow me a set fee, I will still approve 11:43:21

15 this settlement. I don't want any appeals. I want it to 11:43:28

16 be over with. We said, certainly, Judge, whatever you 11:43:32

17 feel. Some of those lawyers said no. He then said, okay, 11:43:37

18 no settlement, no certification. 11:43:40

19 So, I just wanted the Court to know what the 11:43:42

20 facts were since that case was brought up. Thank you. 11:43:44

21 MR. MAGAZINER: May I address the Court very 11:43:49

22 briefly, Your Honor? Your Honor, until Mr. Becnel and Mr. 11:43:51

23 Lockridge acknowledged it, it did not cross my 11:43:56

24 consciousness that they were in effect admitting that the 11:43:58

25 plaintiffs, as individuals, did not meet this Court's 11:44:02

1 jurisdictional requirements -- 11:44:03

2 THE COURT: I heard it. 11:44:06

3 MR. MAGAZINER: I just want to make sure Your 11:44:09

4 Honor heard it. Because there is no law ever, I have never 11:44:11

5 even heard a plaintiff argue that by joinder you can create 11:44:15

6 jurisdiction where it would not otherwise have existed. 11:44:19

7 THE COURT: It was heard by the Court. 11:44:22

8 MR. HOEFLICH: Your Honor, the only purpose of my 11:44:23

9 citation of the Bronco 3 case was even in Louisiana, you 11:44:25

10 can't add limitless plaintiffs. And we rest on our papers. 11:44:29

11 MR. LOCKRIDGE: I don't think we said that, Your 11:44:33

12 Honor, and I think the record will reflect that. 11:44:35

13 THE COURT: Certainly, the record will reflect 11:44:40

14 what you said. Let's move on, Mr. Zimmerman. 11:44:43

15 MR. ZIMMERMAN: I'm was going to do another 20 11:44:49

16 minutes on this, but I suspect that wouldn't be 11:44:49

17 appropriate. 11:44:53

18 THE COURT: We have the complaints filed by the 11:44:55

19 Canadians? 11:44:59

20 MR. ZIMMERMAN: Yes, Your Honor. 11:44:59

21 THE COURT: Dismissal of what 3 or 4 -- 6 or 7? 11:45:03

22 MR. ZIMMERMAN: Yes. These are as to specific 11:45:12

23 Canadian complaints, is that correct, that there have been 11:45:15

24 dismissals entered into. 11:45:20

25 MS. WEBER: The complaints that were the subject 11:45:23

1 of our motion were filed by two firms, Ken Moll's firm and 11:45:25  
2 Weitz and Luxenberg. Weitz and Luxenberg have given us 11:45:34  
3 stipulations of dismissal. They apparently have some other 11:45:38  
4 Canadian complaints that were in the pipeline, and I expect 11:45:41  
5 we'll be doing stipulations on those. We're also going to 11:45:45  
6 be stipulating with the Moll firm. They have agreed there 11:45:47  
7 is no subject matter jurisdiction. 11:45:51

8 THE COURT: That'll take care of itself? 11:45:52

9 MS. WEBER: That should take care of itself. 11:45:54

10 THE COURT: Thank you. The other matter dealing 11:45:56  
11 with the California transferor court, that will take care 11:46:03  
12 of itself or -- ? 11:46:05

13 MR. MOLL: Ken Moll. We didn't agree that there 11:46:17  
14 was a subject matter jurisdiction. We did agree to 11:46:19  
15 voluntarily dismiss the cases, Your Honor, just to clarify 11:46:22  
16 that point. 11:46:25

17 MS. WEBER: May I add one point, then, Your 11:46:25  
18 Honor? If Mr. Moll refiles, for instance, tries to drop 11:46:28  
19 the foreign defendants but is filing by foreign plaintiffs 11:46:34  
20 against U.S. companies, Bayer Corp. did not sell Baycol in 11:46:39  
21 Canada. The entire theory of his case, one which we 11:46:48  
22 disagree, is that Bayer is some sort of monolithic entity, 11:46:52  
23 that is factually wrong. But the legal premise of his case 11:46:55  
24 would be such that you would have to take into 11:47:01  
25 consideration the citizenship of the foreign defendants in 11:47:03



1 determining whether there is subject matter jurisdiction 11:47:06

2 for this Court. So, he can't come back and re-file either. 11:47:10

3 I believe you have a decision on point, and I 11:47:13

4 hadn't planned to argue it, so I can't remember the name of 11:47:17

5 the case. It begins with a P. You wrote it. Thank you. 11:47:17

6 MR. ZIMMERMAN: I believe there is an issue that 11:47:27

7 is still in the works, or not resolved, having to do with 11:47:29

8 Canadian coordination. But I believe that's going to be 11:47:35

9 the subject of a motion that's going to be formally before 11:47:40

10 the Court. I'm advising the Court there is this 11:47:43

11 coordination issue. I don't know if anybody wants to 11:47:47

12 discuss it. I believe Elizabeth Cabraser. 11:47:50

13 THE COURT: This is coordination with the 11:47:58

14 Canadian cases? 11:48:00

15 MS. CABRASER: Yes, for purposes of providing 11:48:04

16 access to discovery to plaintiffs in cases that are filed 11:48:07

17 in the Canadian system. It would have nothing to do with 11:48:08

18 bringing cases here or exercising this Court's 11:48:12

19 jurisdiction. 11:48:15

20 We know that the Court requested a formal motion 11:48:17

21 in the nature of an intervention motion before considering 11:48:19

22 any further action on this matter. Canadian counsel have 11:48:23

23 been advised of that. We recently received communications 11:48:26

24 from them with further specification of the type of 11:48:29

25 specific discovery they would like to have access to, and 11:48:33

1 if appropriate we would like to be filing in short order a 11:48:36  
2 motion in the nature of a motion for intervention for the 11:48:39  
3 limited and special purpose of allowing certain access to 11:48:43  
4 discovery. We want to be very careful about that motion 11:48:47  
5 because we recognize the implications for transnational 11:48:49  
6 jurisdiction. We want to discuss the matter further with 11:48:53  
7 defendants to see if there are areas of resolution we can 11:48:56  
8 reach. We hope to bring that up at the December status 11:49:00  
9 conference.

10 At this point, though, we are running right up 11:49:09  
11 against the 21-day advance filing deadline, and we wonder 11:49:10  
12 if we might ask the Court to entertain a request for leave 11:49:15  
13 to file a motion with respect to any unresolved issues on 11:49:18  
14 shortened time so that that matter can come up if your 11:49:22  
15 calendar permits it in December. 11:49:25

16 THE COURT: Certainly, my calender permits, so 11:49:30  
17 you may. We'll find time for you. 11:49:37

18 MR. SCHAERR: I'm Gene Schaerr for Bayer. We are 11:49:46  
19 delighted that they are planning to file a motion. We will 11:49:49  
20 respond on the merits once we see the motion, obviously. 11:49:52  
21 We would ask that we be given something close to the normal 11:49:57  
22 time for responding, given this is a busy period for lots 11:50:00  
23 of reasons. Thank you. 11:50:03

24 THE COURT: Thank you. 11:50:05

25 MR. LOCKRIDGE: Your Honor, I believe next we are 11:50:11

1 up to Item Number 4 on class actions, and I think this will 11:50:13

2 be a very brief report. 11:50:18

3 As Your Honor knows, there are arguments coming 11:50:19

4 up on January 21, and defendants' responsive brief is due 11:50:22

5 November 26, although I believe there is going to be, 11:50:26

6 perhaps, some discussion about some very slight alteration, 11:50:30

7 a few more days for some time on that, and then we are 11:50:33

8 filing a reply brief to that in about, I believe, 30 days 11:50:38

9 after receipt of their brief. And although we haven't 11:50:41

10 talked about the exact amount of time for arguments, it 11:50:45

11 seems to me, you know, this is obviously an important 11:50:48

12 motion. I think each side wants at least one and a half to 11:50:52

13 two hours to argue their side, depending on what the 11:50:56

14 Court's preference is. 11:50:59

15 THE COURT: I've given you two days. 11:51:00

16 MR. LOCKRIDGE: What I'm saying is I don't think 11:51:04

17 we need that much at all. In fact, I really do not think 11:51:06

18 we would need that much time at all. 11:51:10

19 THE COURT: Again, I hope you're getting the 11:51:12

20 feeling that I'm accommodating you, and on how much time 11:51:14

21 you need, you tell me and you have it. I've blocked off 11:51:17

22 two days. If you need three days, we'll do that. This is 11:51:22

23 a very important -- 11:51:25

24 MR. LOCKRIDGE: I appreciate that, Your Honor. 11:51:30

25 THE COURT: And if you wish to be Danny Webster, 11:51:32

1 you may. 11:51:37  
2 MR. LOCKRIDGE: Don't I wish. I think perhaps 11:51:41  
3 from the plaintiffs' perspective, let me say without having 11:51:42  
4 discussed it with anyone on the defendants' side, a couple 11:51:45  
5 of hours will be enough for our side. Perhaps the 11:51:53  
6 defendants have a different view. 11:51:54

7 MR. BECK: Your Honor, I think we agreed that a 11:51:56  
8 couple hours per side is nothing. I think implicit in that 11:51:58  
9 is that we both have concluded that given the nature of the 11:52:02  
10 submissions that are being made, we don't really need to 11:52:07  
11 have an evidentiary hearing with live witnesses. Given 11:52:11  
12 that, I think a couple of hours and my imitation of Daniel 11:52:12  
13 Webster will start to wear pretty thin. So, I think a 11:52:19  
14 couple of hours. I would suggest that maybe we hold on to 11:52:23  
15 that second day in case there's some other things that pop 11:52:28  
16 up along the way. 11:52:31

17 THE COURT: We have so many things going on and 11:52:32  
18 those days are blocked off for Baycol, so don't worry. 11:52:34

19 MR. LOCKRIDGE: I would certainly state for the 11:52:41  
20 record the plaintiffs agree that an evidentiary hearing is 11:52:42  
21 not needed or warranted. 11:52:45

22 We want to bring to the Court's attention the 11:52:49  
23 fact that there has been a class action motion filed out in 11:52:56  
24 Pennsylvania, and this is not just a motion for 11:52:56  
25 certification of a Pennsylvania state class, but it's a 11:52:58

1 motion for a national class which raises a whole host of 11:52:59  
2 issues which we don't need to deal with now. We wanted to 11:53:04  
3 bring that to the attention of the Court. I suppose one 11:53:08  
4 could make an argument that in a sense it could affect this 11:53:13  
5 Court's ongoing federal jurisdiction, this court's 11:53:16  
6 jurisdiction. 11:53:20

7 As Your Honor knows, the court in Oklahoma has 11:53:22  
8 certified a class and that is on appeal to the Oklahoma 11:53:25  
9 Supreme Court, and it's fully briefed and we are awaiting a 11:53:29  
10 decision. 11:53:32

11 And as the Court indicated, there have been two 11:53:33  
12 class certification motions filed in Illinois. One has 11:53:35  
13 been withdrawn and I don't, at least, know the briefing 11:53:40  
14 schedule for the one in Cook County. Maybe Susan or Pat or 11:53:45  
15 someone does. Otherwise, Your Honor, the class motion, 11:53:50  
16 we'll see you in January. 11:53:52

17 MR. BECK: Your Honor, just to round out the 11:53:55  
18 report on the motions elsewhere. There is no briefing 11:53:58  
19 schedule that has been set in Pennsylvania where we've 11:54:01  
20 asked for some depositions of the putative class reps. So, 11:54:06  
21 that's going to take sometime and it's likely not to be 11:54:12  
22 ripe, certainly before the motions are argued here. 11:54:17

23 In Oklahoma, the case has been argued -- briefed 11:54:21  
24 on appeal. And in Illinois -- 11:54:26

25 THE COURT: When is the appellate court going to 11:54:32

1 hear that? 11:54:37

2 MR. BECK: I don't think we have a date on that 11:54:37

3 yet, Your Honor. Susan over here may know better, even 11:54:39

4 though I think I'll argue it. 11:54:44

5 MS. WEBER: Your Honor, actually Phil may not 11:54:47

6 argue it. Actually, as I understand the procedure in 11:54:50

7 Oklahoma, they don't have arguments on their appeals, 11:54:52

8 unless it's an exceptional case and they calendar it. We 11:54:56

9 just sit tight and see what happens. 11:54:59

10 MR. BECK: I'm no expert on Oklahoma procedure as 11:55:03

11 witnessed by the fact that the judge actually certified 11:55:06

12 that class, notwithstanding my arguments to the contrary. 11:55:08

13 But I understand that as a practical matter, it's going to 11:55:12

14 take a while before that opinion comes down, and it's not 11:55:16

15 simply because it's been fully briefed. We are not 11:55:19

16 expecting anything the next few weeks. 11:55:22

17 In Illinois, the one motion -- 11:55:24

18 THE COURT: Was that one of the Judges that came 11:55:26

19 down to the conference in New Orleans. 11:55:27

20 MR. BECK: No, no, it is not. I believe, in 11:55:32

21 fact, that Judge has since retired. That was one of the 11:55:34

22 last orders that he entered, and he is now retired and 11:55:38

23 there is a new Judge in place in that part of Oklahoma. 11:55:43

24 And, then, in Illinois, one of the motions, the 11:55:46

25 one down state, Madison County, was withdrawn. And in Cook 11:55:50

1 County there is a motion for class certification on file, 11:55:57

2 but there has been no briefing schedule set yet. 11:56:02

3 MR. ZIMMERMAN: Just going back for a moment. As 11:56:40

4 the Court knows, we are concerned about the Pennsylvania 11:56:42

5 class action certification. I believe the briefing 11:56:45

6 schedule that was originally proposed did have this hearing 11:56:50

7 coming before our January hearing here in the MDL court. 11:56:53

8 My understanding now is that that was put off because of 11:57:00

9 the deposition program with regard to the class members. 11:57:04

10 But originally we were concerned that this purported 11:57:09

11 national class certification was being wrapped up for early 11:57:15

12 determination, or at least early hearings, and we would ask 11:57:19

13 counsel to keep us advised of those schedules so we can 11:57:22

14 advise the Court. 11:57:26

15 MR. BECK: We certainly will, Your Honor. Mr. 11:57:27

16 Zimmerman is correct that the plaintiffs' lawyers asked for 11:57:31

17 a January hearing. It was never set, and they are in the 11:57:35

18 process now of going back and forth in deciding, they being 11:57:40

19 also plaintiffs' lawyer, who their class reps are actually 11:57:44

20 going to be. And then we'll have to depose them, and after 11:57:48

21 we take their depositions, then we'll have a briefing 11:57:52

22 schedule which is not yet in place. That's why I said with 11:57:56

23 some confidence that that motion is not going to be argued 11:58:00

24 before January 20. And if lightning strikes, we'll call 11:58:02

25 Bucky and let him know. 11:58:09

1 MR. ZIMMERMAN: We also hope you have the same 11:58:11  
2 luck here as you had in Oklahoma. 11:58:14  
3 Trial issues, Your Honor. With regard to the -- 11:58:18  
4 THE COURT: Hope that he has better luck. 11:58:20  
5 MR. ZIMMERMAN: No, we don't. 11:58:23  
6 THE COURT: If they certify a national class -- 11:58:26  
7 MR. ZIMMERMAN: In Oklahoma, they just certified 11:58:29  
8 a class. 11:58:32  
9 THE COURT: I thought you were talking about 11:58:35  
10 Philadelphia. 11:58:35  
11 MR. BECK: I just knew that he was making fun of 11:58:38  
12 me, Your Honor. (Laughter) . 11:58:40  
13 MR. ZIMMERMAN: Your Honor, with regard to trial 11:58:45  
14 issues, originally, we had proposed to the Court and to 11:58:48  
15 counsel a schedule or a proposal for summary jury trials to 11:58:55  
16 be somewhat sequentially done around the country in an 11:59:02  
17 effort to demonstrate what the difficult issues might be to 11:59:09  
18 try or what verdict -- how juries might be responding to 11:59:12  
19 verdicts -- to the evidence, and what kind of verdicts, and 11:59:23  
20 what kind of verdict ranges. 11:59:25  
21 We met and conferred quite a bit on this with 11:59:28  
22 defense counsel, and we felt that at the end of the day the 11:59:33  
23 summary jury idea may not be in all of our best interests 11:59:38  
24 because primarily the ongoing settlement program could be 11:59:44  
25 significantly derailed in many respects with the outcomes 11:59:49



1 of those jury trials -- summary jury trials. And from the 11:59:56  
2 standpoint of both the PSC and defense counsel, we didn't 12:00:03  
3 feel like upsetting that apple cart at this time was in our 12:00:06  
4 best interest, although we continued to value the 12:00:12  
5 information provided in summary jury trials and think that 12:00:18  
6 oftentimes and many circumstances they are tremendously 12:00:18  
7 valuable. 12:00:21

8 When you got a settlement program going as you 12:00:22  
9 have, we felt that it was in the best interest of everyone 12:00:24  
10 to pull this summary jury proposal back for the time being, 12:00:30  
11 see what happens with the settlement program, and, then, if 12:00:34  
12 we have to re-visit at another time, revisit it. But it 12:00:37  
13 does dovetail with our great concern that we set a trial 12:00:44  
14 date. And the reason it's important for us to set a trial 12:00:50  
15 date is because of basically two strong considerations. 12:00:54

16 The first consideration is the obvious 12:00:56  
17 consideration. Trial dates focus the mind. Trial dates 12:00:59  
18 focus the parties to a day where things can no longer be 12:01:03  
19 talked about in the abstract, but are going to be dealt 12:01:08  
20 with in the, what we say, the crucible of the courtroom. 12:01:11  
21 And everybody has that day of reckoning to come to grips 12:01:13  
22 with resolution issues and with issues of how to make it a 12:01:22  
23 simpler case because they're going to have to. We think 12:01:26  
24 this is very important for all of us to be driving towards 12:01:29  
25 that date. 12:01:33

1           The second reason it's very important, Your       12:01:35  
2 Honor, is because, historically, the MDL has been kind of   12:01:38  
3 given this reputation or mantle that they don't try cases   12:01:42  
4 and that they are process oriented and that things just    12:01:48  
5 kind of drive along with all kinds of interesting and       12:01:52  
6 esoteric procedural issues on the road to a perfect         12:01:56  
7 discovery program and cases don't come back, cases don't   12:02:00  
8 get resolved, cases don't get heard, trial packages don't   12:02:04  
9 get prepared and that what we have is a less than usable   12:02:10  
10 MDL for some people who really are going to have their    12:02:14  
11 cases remanded, which is why we believe setting an early   12:02:17  
12 trial date, as early as possible, so that everybody can    12:02:21  
13 properly prepare will give us the opportunity to have a     12:02:27  
14 trial, to demonstrate how a real trial will be working in   12:02:30  
15 the real world, what real work product is necessary for     12:02:34  
16 that trial, and to, again, drive people towards the day of   12:02:38  
17 reckoning.   12:02:43

18           THE COURT: Mr. Zimmerman, I agree with -- early   12:02:46  
19 on, in fact, when we had our first status conference almost   12:02:48  
20 a year ago, I had agreed that early trial dates are         12:02:52  
21 important -- trial dates setting are important for everyone   12:02:58  
22 to get focused. However, the way that I have hopefully     12:03:03  
23 been running this MDL, we have been on a very fast track,   12:03:14  
24 and discovery is on -- has not been completed. And         12:03:19  
25 although no one has mentioned it, I guess I should mention   12:03:28

1 it. I feel there is a big elephant in the room no one is 12:03:32  
2 talking about, and that's dealing with any Daubert issues. 12:03:42  
3 No one has ever even broached the subject with me. So, we 12:03:42  
4 have those types of issues, unless maybe I'm missing 12:03:50  
5 something, that there are no issues like that. 12:03:53

6 That -- before we -- yes, I agree with you that a 12:03:58  
7 trial date should be set at some point, but before we do 12:04:08  
8 that, we have to get our house in order so when we have a 12:04:12  
9 trial that it is a trial that has all the issues before it 12:04:16  
10 and that things are done in the proper fashion. 12:04:24

11 MR. ZIMMERMAN: I don't think we disagree with 12:04:30  
12 that one iota, but nothing focuses parties to get to that 12:04:31  
13 point better than a trial date as opposed to a date that is 12:04:38  
14 not set because what happens is the procedures of an MDL 12:04:42  
15 become the driver of people's attention, whereas -- 12:04:50

16 THE COURT: In 20 years of experience of wearing 12:04:56  
17 this robe, there is nothing worse than setting trial dates 12:04:58  
18 that the lawyers know that the Judge can't meet. 12:05:02

19 MR. ZIMMERMAN: And I believe that is also the 12:05:09  
20 other side. 12:05:09

21 THE COURT: That's my concern. I can stand up 12:05:10  
22 here and pronounce a date and you all will go out the door 12:05:14  
23 laughing because you know there is no way that can be met. 12:05:18  
24 And, so, that's my concern, also. 12:05:23

25 MR. ZIMMERMAN: We understand that those are 12:05:27

1 important concerns as well, but I think that by setting a 12:05:28  
2 trial date in the early part of next year, the first half 12:05:33  
3 or the -- the first quarter or the beginning of the second 12:05:37  
4 quarter of next year, if we make the same progress we made 12:05:41  
5 in the first 6, 8 months of this case -- actually, it will 12:05:46  
6 be 11 months really since we really got started in 12:05:53  
7 February, I think the Court got the case in December, but I 12:05:56  
8 don't think we really got going until February, really in 9 12:05:59  
9 months, if we made the same progress in the next four 12:06:04  
10 months, I think that the plaintiffs believe we can be very 12:06:07  
11 much ready for trial. 12:06:10

12 I mean we are in a situation where everything has 12:06:13  
13 changed. As counsel for defendants says, everything is 12:06:15  
14 electronic. We're in a new world of electronics. We are 12:06:19  
15 in an age where the defendants came in at one of the first 12:06:23  
16 meetings said, we want to settle serious cases; we want to 12:06:26  
17 resolve litigation. 12:06:29

18 We are also in an age now where we can set a 12:06:30  
19 date, we can set a case for trial 12 or 18 or 15, 20 months 12:06:34  
20 after the case begins because we have a completed program 12:06:38  
21 that is complete enough to try a good case. If we didn't 12:06:45  
22 think we had enough good discovery and enough evidence to 12:06:52  
23 try a good case, I would be the last person up here to say 12:06:54  
24 set the case for trial because we have the burden of proof. 12:06:58  
25 We have the burden of persuasion, and we're the ones that 12:07:00

1 have to bring forth the evidence to show that the product 12:07:03

2 was defective and the product caused the injury. 12:07:09

3 But all I'm asking the Court now to do is to give 12:07:09

4 us some indications as to how early we can have this trial 12:07:12

5 date or what the Court needs to see so we can set a trial 12:07:16

6 date so that we can really focus on the things that need to 12:07:19

7 be focused on, and that is preparing the case for trial 12:07:23

8 because that's ultimately what every lawyer in the field 12:07:26

9 wants us to do. And the feedback for the Court in terms of 12:07:29

10 what, if anything is left, will only be determined once we 12:07:32

11 know what the evidence is going to be actually presented in 12:07:38

12 court. 12:07:44

13 I think the PSC is ready to set a trial date. I 12:07:44

14 know they are, and we are prepared to work with defense 12:07:47

15 counsel to -- within a hundred days of that setting to 12:07:50

16 prepare a trial plan and to work through that trial plan so 12:07:55

17 the specific case or the specific discovery or the issues 12:08:01

18 of specific discovery that we may have will be completed 12:08:03

19 within those hundred days. 12:08:07

20 MR. CHESLEY: Could I supplement Mr. Zimmerman. 12:08:11

21 THE COURT: No. Mr. Beck. 12:08:17

22 MR. BECK: Your Honor, I have two overarching 12:08:19

23 concerns. I'm going to move from the lesser to the 12:08:24

24 greater. 12:08:27

25 My lesser concern actually is with timing. The 12:08:29

1 date that they have asked for March, April, in my view is 12:08:30  
2 simply not realistic. And rather than focusing efforts as 12:08:34  
3 Your Honor indicated a date like that, it would be hard to 12:08:40  
4 take it seriously. 12:08:46

5 Why is that time frame unrealistic? We still 12:08:48  
6 have a lot of discovery that they are taking from us. 12:08:53  
7 We're talking about the MDL plaintiffs who have chosen to 12:08:54  
8 include Bayer AG from Germany. We still have documents to 12:08:58  
9 produce, and we are talking about early next year before 12:09:05  
10 the depositions take place. And that's moving rather 12:09:09  
11 heroically. 12:09:13

12 Second, we don't have, as with a lot of 12:09:15  
13 plaintiffs as Your Honor heard earlier, we don't have even 12:09:19  
14 scraps of information from the plaintiffs yet. And the 12:09:23  
15 plaintiffs' lawyers tell us that that's an arduous process 12:09:24  
16 that they have been unable to do in the last eight months. 12:09:30  
17 Well, you know, it's not going to go any faster just 12:09:33  
18 because Mr. Zimmerman would like an early trial date. So, 12:09:36  
19 we've got that problem. 12:09:40

20 And then looming out there most importantly in 12:09:41  
21 terms of the timing is the whole question of experts. Your 12:09:45  
22 Honor indicates there was an elephant in the room that no 12:09:49  
23 one has talked about. The reason we haven't talked about 12:09:54  
24 it is because they haven't told who their experts are. So, 12:09:58  
25 we're sitting here now, we have to be told who their 12:10:00

1 experts are. We have to get their reports. We have to 12:10:01  
2 then prepare counter experts. We have to take their 12:10:03  
3 depositions. And, then, for that broad case -- broad class 12:10:07  
4 of cases where there is no Rhabdo and there is some sort of 12:10:10  
5 undifferentiated aches and pains, you are going to hear 12:10:18  
6 some Daubert motions. You are going to hear summary 12:10:21  
7 judgment motions. Those are going to be every bit as 12:10:26  
8 substantial and important as the upcoming class 12:10:30  
9 certification. And that's going to take sometime. 12:10:31  
10 So, if the Court is thinking about trial dates, 12:10:35  
11 my message is that the late first quarter or early second 12:10:38  
12 quarter date they have asked for are simply not realistic, 12:10:48  
13 and I believe at this point it's premature to try to set a 12:10:50  
14 date. 12:10:55  
15 Let me now move to my more fundamental objection 12:10:56  
16 or concern. And that has to do, Your Honor, with the 12:11:00  
17 propriety of this Court conducting a trial while the MDL 12:11:02  
18 process is underway. And let me backup and explain my 12:11:07  
19 concern because I'm afraid that if you go down that road, 12:11:12  
20 the MDL has a very significant chance of unraveling. 12:11:18  
21 And let me say, Your Honor, Bayer and me 12:11:25  
22 personally, I'm going to be trying cases anyway early next 12:11:28  
23 year into the middle of next year, and I would be delighted 12:11:32  
24 if I could try one or more of them here in federal court in 12:11:39  
25 Minnesota rather than state court in Corpus Christi or 12:11:42

1 someplace in Mississippi. So, it's not that we wouldn't 12:11:46  
2 like to have trials in front of Your Honor. I understand 12:11:52  
3 from the Plaintiffs Steering Committee point of view that 12:11:57  
4 they very much would like to have a trial date set. 12:12:00

5 And, Your Honor, I'm going to talk about a second 12:12:03  
6 elephant in the room that hasn't been discussed too much so 12:12:05  
7 far today. That is simply the competition that takes 12:12:08  
8 place, and there is nothing wrong with it, but the 12:12:11  
9 competition that takes place between the Plaintiffs 12:12:15  
10 Steering Committee and the MDL and the state court trial 12:12:17  
11 lawyers around the country. And they are competing for 12:12:20  
12 referrals. And the state court fellows are saying we can 12:12:25  
13 get trials down here in Corpus Christi or Fort Worth sooner 12:12:28  
14 than the MDL lawyers can, so you should refer your cases to 12:12:35  
15 us, you local lawyers out there in Nebraska and Wyoming, 12:12:41  
16 instead of sending them to Bucky. And the Plaintiffs 12:12:45  
17 Steering Committee would like to have something that they 12:12:52  
18 can market in order to get more referrals. And as I say, 12:12:55  
19 there's nothing wrong with that, but that's a reality, I 12:12:58  
20 think, that underlies this request for an early trial date. 12:13:00

21 THE COURT: Mr. Beck, I guess I want to temper 12:13:06  
22 that because it is true that the MDL's have, rightly or 12:13:08  
23 wrongly, have a reputation of going very slowly, and that 12:13:23  
24 has caused great consternation amongst the plaintiffs' Bar. 12:13:28

25 MR. BECK: I agree, Judge. 12:13:39





1 think Your Honor has succeeded. When I was listening to 12:15:52  
2 the comments of Mr. Becnel earlier when he was talking 12:15:54  
3 about frustration where he would be stuck in an MDL for 12:15:58  
4 three or four years and he couldn't get his cases remanded. 12:16:02  
5 So, I understand and appreciate what the Court is trying to 12:16:07  
6 do. 12:16:10

7 As I said, I think the Court has largely 12:16:10  
8 succeeded there, but the point that -- and I think we're 12:16:14  
9 moving, as everybody I believe acknowledges, as 12:16:18  
10 expeditiously as could be reasonably expected given the 12:16:23  
11 nature of this case. 12:16:29

12 The point that I'm alerting the Court to right 12:16:31  
13 now, however, has less to do with timing and more to do 12:16:34  
14 with the propriety of having a trial while the MDL is 12:16:39  
15 pending. And let me explain what my concern is here, and 12:16:44  
16 if somebody can find a way out of this, that's great, 12:16:48  
17 because as I said, we have no problem with trying, you 12:16:52  
18 know, a case in federal court because we're going to be 12:16:56  
19 trying cases anyway. But here's my concern. 12:16:59

20 When Mr. Zimmerman says one criticism of the 12:17:06  
21 MDL's is they don't get tried, I think a problem with that 12:17:13  
22 is that the purpose of the MDL statute, procedures, is not 12:17:16  
23 to try cases. And, in fact, when the MDL Judges have 12:17:19  
24 reached out and decided that they were going to try the 12:17:25  
25 cases, they have been in told in no uncertain terms, that's 12:17:32

1 not your job. Your job is to get -- your job, and I'm now 12:17:32  
2 pretending I'm the Supreme Court, your job, MDL judge, is 12:17:37  
3 to get the cases to be tried. 12:17:43

4 THE COURT: You have a good record. 12:17:47

5 MR. BECK: So the MDL is all structured around 12:17:51  
6 getting the cases ready to be remanded and tried. And a 12:17:54  
7 fair criticism of the MDL process is that that has taken 12:17:58  
8 too long. But here's my concern. 12:18:04

9 If Your Honor sets a trial date and takes what 12:18:06  
10 Mr. Zimmerman said at face value where Mr. Zimmerman said 12:18:09  
11 that sitting here today that the Plaintiffs Steering 12:18:17  
12 Committee believes that a case can be ready for trial in a  
13 couple of months and all we need is a hundred days of case 12:18:22  
14 specific discovery, but that everything else is ready to 12:18:27  
15 go, if that's true, then all the cases should be remanded. 12:18:29  
16 And if Mr. Zimmerman gets to try a case here in Minnesota, 12:18:31  
17 then Mr. Becnel is going to come in and say, do you 12:18:37  
18 remember me, I'm the one who was so frustrated because I 12:18:39  
19 couldn't get my cases remanded back to Louisiana federal 12:18:43  
20 court to try my cases and all the other MDL's. Why does 12:18:47  
21 Mr. Zimmerman get to try his cases in Minnesota in the year 12:18:53  
22 2003 in June, say, and you're not remanding my cases. Let 12:18:59  
23 my people go. 12:19:04

24 There's a lot of lawyers in this MDL who don't 12:19:05  
25 want to be here, and they want to try their cases back in 12:19:08

1 their hometown. And I can't see, frankly, any principal 12:19:11  
2 basis for this Court to say that the cases that Mr. 12:19:17  
3 Zimmerman chose to file here in my district, all of the 12:19:22  
4 general discovery is now sufficiently complete, that those 12:19:26  
5 cases can be tried, but Mr. Becnel's cases from Louisiana, 12:19:31  
6 they can't be tried yet, and Mr. Smith's cases from 12:19:36  
7 Arkansas, they can't be tried. 12:19:40

8 And I think, Your Honor, what would happen if you 12:19:44  
9 were to set a trial date that's anything other than saying, 12:19:46  
10 you know, here's my target for wrapping up the MDL, at 12:19:51  
11 which time, I certainly am now you rather than the Supreme 12:19:55  
12 Court, I'm going to be ready to try the cases because I'm 12:20:02  
13 familiar with all the issues. If you do anything other 12:20:06  
14 than that you will have a stream of plaintiffs' lawyers 12:20:08  
15 with legitimate complaints asking you to remand their cases 12:20:12  
16 so they can try them. And if you say no, they have a right 12:20:15  
17 to go to the panel and say we are getting shortchanged 12:20:19  
18 here. 12:20:23

19 An MDL is not a procedure whereby the cases that 12:20:24  
20 are filed in the home jurisdiction gets special treatment 12:20:29  
21 and get tried first. So, as I said, I have no problem 12:20:36  
22 myself with trying the cases here -- 12:20:43

23 THE COURT: That's a very good. 12:20:45

24 MR. BECK: -- but I don't know a way out of this 12:20:48  
25 dilemma. 12:20:50

1 THE COURT: There are people trying to get out of 12:20:53  
2 here and trying to get back to their home jurisdiction, and 12:20:53  
3 that's the whole fight with Lexicon is to go home. 12:20:56

4 MR. BECK: Right. 12:21:05

5 THE COURT: I'd like to hear -- and this is a 12:21:07  
6 very, very good issue, and Mr. Chesley, I will let you talk 12:21:11  
7 on this issue and anyone else that wants to talk on this 12:21:12  
8 issue because that's a very good point that you just 12:21:16  
9 brought up. 12:21:19

10 MR. BECK: Your Honor, let me reiterate that I'm 12:21:20  
11 not here to argue against a trial here, I'm here to raise a 12:21:23  
12 concern -- 12:21:28

13 THE COURT: You've raised a concern that's 12:21:28  
14 certainly on my radar screen and I don't know if -- 12:21:30

15 MR. BECK: And my problem is that I think that 12:21:37  
16 Your Honor has done and can do an awful lot of good in this 12:21:37  
17 process, and I don't want the Plaintiffs Steering 12:21:43  
18 Committee's desire, understandable though it may be, to get 12:21:49  
19 an early trial date setting to lead to the unintended 12:21:52  
20 unraveling of the MDL prematurely. 12:21:57

21 THE COURT: There may be other mechanisms to get 12:22:01  
22 the result, the same type of result that the trial will 12:22:05  
23 bring, or hopefully bring without having a trial. So, 12:22:11  
24 that's an issue. 12:22:18

25 MR. ZIMMERMAN: Stan wants to talk. 12:22:22

1 THE COURT: Mr. Chesley, no disrespect to you on 12:22:24  
2 other issues. I'm trying to keep this on track and have at 12:22:29  
3 least one person speak for each side. 12:22:34

4 MR. CHESLEY: Your Honor, I did not feel that it 12:22:38  
5 was in any way disrespectful. In fact, I commented that I 12:22:40  
6 believed it was appropriate. 12:22:44

7 This one, I believe, is the gut issue, and for 12:22:46  
8 the first time I have heard from Mr. Beck what the 12:22:48  
9 philosophy of Bayer is. And this is so germane, Your 12:22:55  
10 Honor. For example, what they have literally said here is 12:23:03  
11 that this Court's role is to package it up, and if I could 12:23:09  
12 use the word bundle, bundle all of the discovery up and 12:23:11  
13 send us on our way based upon Lexicon, to whatever crowded 12:23:15  
14 docket there may be in Louisiana, Ohio, and Kentucky. So, 12:23:21  
15 therefore, claimants who are in this federal court are 12:23:26  
16 going to be the last people who get justice. 12:23:28

17 THE COURT: No, I don't know if I heard that. 12:23:32

18 MR. CHESLEY: Your Honor, that's my 12:23:36  
19 interpretation, and, please, let me just finish. 12:23:37

20 THE COURT: Okay. 12:23:40

21 MR. CHESLEY: What they have challenged the Court 12:23:40  
22 and the plaintiffs to say is under Lexicon in 281407, this 12:23:42  
23 Court has limited power. Not true. 12:23:49

24 Number one, Rule 42 provides for common issue 12:23:56  
25 trials, and there is no Daubert on common issue trials. We 12:23:56

1 have a responsibility, I believe, excuse my voice, to every 12:24:00  
2 plaintiff in the federal system to determine what the 12:24:07  
3 common issues are so that those people that want to go home 12:24:09  
4 and to another jurisdiction may have estoppel by judgment 12:24:12  
5 as to those common issues. 12:24:17

6 One, negligence; two, causal connection, generic 12:24:21  
7 causal connection; three, punitive conduct. Your Honor, 12:24:27  
8 Judge Edward Johnstone, the duke of Kentucky, Western 12:24:32  
9 Division of Kentucky, in an aviation case, Arrow Air, the 12:24:40  
10 Court may recall from 1985. It was a Warsaw. Warsaw was 12:24:42  
11 excused out of the cases because they did not have their 12:24:46  
12 tickets. He ruled that he was going to have reverse 12:24:49  
13 bifurcation as the MDL judge, prior to Lexicon, an issue 12:24:55  
14 trial only, not punitive damages. But was there punitive 12:24:58  
15 conduct? So, there is no linkage between compensatory 12:25:01  
16 damages and punitive damages because you're not trying 12:25:08  
17 compensatory. 12:25:10

18 You know what happened, Your Honor? He set that 12:25:12  
19 case for trial on one issue. Was there punitive -- was 12:25:15  
20 there punitive conduct on the part -- conduct only, an 12:25:18  
21 issue, Rule 42? Was there punitive conduct? We got ready 12:25:21  
22 to try the case on that issue. And I believe they tried to 12:25:22  
23 mandamus the Sixth Circuit, but then they gave up on it and 12:25:28  
24 every case was settled. 12:25:35

25 Your Honor, this is very instructive. For 12:25:35

1 example, this Court has jurisdictions on motions for 12:25:38  
2 summary judgment. They are not suggesting that you don't 12:25:41  
3 hear motions for summary judgment. They are not suggesting 12:25:46  
4 that you don't hear Daubert which are dispositive motions 12:25:47  
5 when we get to causal connection. What they are 12:25:50  
6 suggesting, Your Honor, is that we cannot try a case. We 12:25:53  
7 can try a class action case with a plaintiff who is from 12:25:56  
8 Minnesota who has original jurisdiction here. It has been 12:26:00  
9 done in Teletronics. It's been done in Copley. It's been 12:26:02  
10 done in a number of cases. 12:26:05

11 What we need to do, Your Honor, is come to a 12:26:08  
12 creative means. For example, we can request this Court to 12:26:11  
13 have an issues trial and we would set forth the issues, 12:26:14  
14 issues that are common to every person that ingested this 12:26:19  
15 drug under Rule 42. Perfectly appropriate. 12:26:24

16 Also, Your Honor, the courts have a right under 12:26:29  
17 14.04, which is still the law, as to what court has the 12:26:31  
18 best potential knowledge of this case. And any other court 12:26:35  
19 can respect that by writing to this Court a waiver of the 12:26:38  
20 remand provision, and it's being done every single day. In 12:26:43  
21 fact, when Judge -- are former Judge, chief of the MDL, 12:26:49  
22 Judge Nagle approached myself and other people about this 12:27:00  
23 issue when Lexicon came about. 12:27:04

24 Your Honor, cases are being resolved in 12:27:13  
25 original -- in transferee courts because the transferee 12:27:13



1 Judge, either under 14.04 or by virtue of cases with 12:27:16  
2 original jurisdiction in class actions. And to suggest 12:27:23  
3 that this Court's job is to package it up and send it back 12:27:25  
4 as quickly as you can, is a sure slow go for justice. 12:27:29  
5 And I would urge Bayer to think this through, 12:27:34  
6 because that's not the elephant in this room. The elephant 12:27:37  
7 in this room is delay. I have not figured out why there is 12:27:41  
8 a delay or why they want delay. I have yet to figure that 12:27:44  
9 one out. But what I have just heard Mr. Beck discuss is 12:27:49  
10 how we can delay all federal litigation by at least two to 12:27:54  
11 three years. Because what happens, assuming we finished 12:27:59  
12 and package up all of the discovery, March or April, 12:28:01  
13 including generic experts, and then the Court remands it to 12:28:06  
14 jurisdictions such as Miami, Florida where, unfortunately, 12:28:10  
15 by virtue of the drug world, there have been little or no 12:28:17  
16 civil litigation tried to any degree in the last year and a 12:28:22  
17 half. To places such as California, to places such as 12:28:25  
18 Washington, D.C., to jurisdictions that are so crowded that 12:28:29  
19 they are bringing in visiting judges to try and take care 12:28:34  
20 of the docket. 12:28:36  
21 So, what they have really said is that if you 12:28:37  
22 live in Miami and you have filed your case and it's come 12:28:40  
23 here, guess what, you will not get a hearing for maybe 12:28:43  
24 three to five years. And, Your Honor, that's not the 12:28:48  
25 purpose of 14.07. This is an attempt to manipulate their 12:28:50

1 understanding -- or their likened understanding of what 12:28:55

2 they would like Lexicon to stand for. 12:29:00

3 I am urging this Court to think in terms of an 12:29:03

4 early trial date, March, April or May, on specific common 12:29:06

5 issues and give us the assignment come to you within the 12:29:12

6 next week or ten days to give you the common issues that we 12:29:18

7 want to try. And we can try those issues, Your Honor, 12:29:21

8 without even a plaintiff sitting there. Whether or not we 12:29:23

9 want to do that in front of a jury, we may or we may not. 12:29:26

10 The point is these are common issues that I believe that we 12:29:31

11 as plaintiffs' counsel in the MDL have a right to bring, a 12:29:36

12 right to be here, and if they're right, there is no 12:29:39

13 punitive conduct, and there may very well not be any. Then 12:29:42

14 they ought to stand up and say we know there is no punitive 12:29:47

15 conduct and we're happy to try that issue. And if they are 12:29:51

16 right, that may be estoppel by judgment on the entire issue 12:29:54

17 of punitive conduct, a very quick way to get to issues. 12:29:57

18 Thank you, Your Honor. 12:30:02

19 MR. BECK: A small herd of elephants running 12:30:13

20 around unseen in the room. What the plaintiffs -- 12:30:15

21 THE COURT: Well, it's about time. Everything 12:30:25

22 has been going fairly good, and I expected the land mines 12:30:25

23 and everything else exploding, so we might as well start 12:30:30

24 now. 12:30:35

25 MR. BECK: Your Honor, let me back just back up 12:30:37

1 for a minute. What the Plaintiffs Steering Committee had 12:30:38  
2 proposed, and what I was responding to, was that there be a 12:30:41  
3 couple of trials for individual plaintiffs' cases, they 12:30:48  
4 haven't told us what plaintiffs, sometime early next year. 12:30:52  
5 And I responded that, you know, we've got a lot of trials 12:30:57  
6 coming up and, all around the country, and it's perfectly 12:31:03  
7 fine with me if some of them are in federal court in here 12:31:06  
8 in Minneapolis, but there were practical consequences to 12:31:12  
9 that that I thought the Court should be alerted to. 12:31:14  
10 Mr. Chesley's response is to orally suggest a 12:31:18  
11 completely different approach. Instead of now talking 12:31:24  
12 about picking Mrs. Smithers and Mr. Jones and having a 12:31:26  
13 trial on their cases, now he wants to have a class trial on 12:31:32  
14 what he calls common issues. That whole idea of whether 12:31:36  
15 common issues can be tried is the subject -- a subject of 12:31:43  
16 the briefing on the class certification, and we are in the 12:31:48  
17 process of, you know, finalizing our submission, and it 12:31:53  
18 will address what we think is the clear inappropriateness 12:31:57  
19 of trying to do that and how that has been rejected 12:32:02  
20 repeatedly in the recent pharmaceutical non-MDL cases. 12:32:06  
21 So, I don't know, I guess I can respond to Mr. 12:32:14  
22 Chesley's argument as well, but it seems to me to make a 12:32:19  
23 lot more sense if they want to talk about having common 12:32:22  
24 issues trials, why don't we talk about that after Your 12:32:25  
25 Honor has read the class certification briefs and had 12:32:30

1 arguments on January 20 and ruled on whether there is going 12:32:34  
2 to be a class in this case. And I think that ought to 12:32:38  
3 precede setting a date to have some sort of a trial on 12:32:41  
4 class issues or common issues which he says they'll 12:32:45  
5 identify for us sometime in the future. 12:32:49

6 And as I said, if they have a way around the 12:32:51  
7 problem that I identified, then we are perfectly amenable 12:32:57  
8 to having Mrs. Smithers' case tried as soon as that's 12:33:02  
9 practical to do. I don't think March is a sensible date. 12:33:09  
10 But as soon as it's actually practical to do it, we are 12:33:15  
11 happy to do it. But somebody needs to tell me that I'm 12:33:18  
12 wrong, it's not a problem, and Your Honor is entitled to 12:33:21  
13 have trials on the cases that are filed in Minnesota and 12:33:24  
14 hold on to all the cases from around the country and refuse 12:33:27  
15 Mr. Becnel's request to remand them to Louisiana so that he 12:33:32  
16 can get his cases tried. 12:33:39

17 MR. MAGAZINER: One word, Your Honor, please. I, 12:33:42  
18 of course, agree with everything Mr. Beck has said. In 12:33:46  
19 addition, I would point out to Your Honor that if Your 12:33:49  
20 Honor were inclined at some point to try any case, it would 12:33:52  
21 only be fair, and I'm sure Your Honor would do this to 12:33:55  
22 allow both sides to have some input into which case it is 12:33:58  
23 that will be tried. 12:34:03

24 One of the difficulties that we face now is that 12:34:04  
25 we don't know a lot about many of the cases, and it is 12:34:07

1 important from our point of view that Mr. Zimmerman would 12:34:11  
2 get to choose a case that he wishes to try and put that on 12:34:15  
3 trial without there being any input from us in the 12:34:19  
4 selection process, and we can't have that input when we 12:34:24  
5 don't even know the facts in many of the cases. 12:34:27

6 So, there are other problems in addition to the 12:34:31  
7 ones that Mr. Beck mention. I, of course, echo Mr. Beck as 12:34:35  
8 well. We would rather try the case before Your Honor than 12:34:37  
9 in some of the courts where we otherwise are going to be 12:34:38  
10 trying cases in the first half of 2003, state courts in at 12:34:42  
11 Alabama, Mississippi, Tennessee, Texas, etc. We would 12:34:47  
12 rather be here, but there are problems that would have to 12:34:51  
13 be overcome, and we have heard no suggestion yet from the 12:34:54  
14 plaintiffs on how they can possibly overcome the problems 12:34:59  
15 that can be identified. 12:35:01

16 MR. CHESLEY: Your Honor, may I answer Mr. Beck 12:35:03  
17 on one question? A common issue trial does not necessitate 12:35:05  
18 there being a class. There is no law, case law or statute, 12:35:09  
19 that provides it. As recently as two years ago, three 12:35:12  
20 years ago, the Honorable Judge Arthur Spiegel tried one 12:35:16  
21 issue which he thought was a very instructive issue in the 12:35:24  
22 case, and that issue was statute of limitations, and it was 12:35:26  
23 tried in front of a jury. 12:35:28

24 Also, Mr. Beck, frankly, in our opinion has made 12:35:30  
25 up the problem. There is no case law, no statute or policy 12:35:32

1 that would require an MDL court to remand all transferred 12:35:38

2 cases before trying -- filing cases tried here. 12:35:43

3 The point is, Your Honor, it is my belief that 12:35:48

4 the last thing the defendants, plural, want to do is try a 12:35:50

5 common issues trial. And then this Court needs to, 12:35:55

6 assuming hypothetically that I'm correct, and I believe 12:36:00

7 that there is no law to suggest that we have to first have 12:36:03

8 a class for us to request a common issue trial on the 12:36:06

9 following points, and we're prepared to brief it. 12:36:11

10 THE COURT: Mr. Chesley, unless I missed Mr. 12:36:14

11 Zimmerman's point, he wanted a real trial. He wasn't 12:36:22

12 talking about common issues. 12:36:27

13 MR. CHESLEY: That is a real trial, Your Honor. 12:36:29

14 MR. ZIMMERMAN: What I was talking about, Your 12:36:30

15 Honor, was setting of a trial date where we have the right 12:36:32

16 to come in and present prior -- a hundred days prior to 12:36:35

17 that trial date what we would consider to be the trial 12:36:40

18 plan, and they would have the right to respond to that 12:36:42

19 trial plan. That trial may include common issues. It may 12:36:45

20 include punitive conduct. It may include a front to back 12:36:55

21 trial of Mrs. Jones who filed her case in Minnesota. 12:36:58

22 THE COURT: I just assumed it was a trial -- 12:37:01

23 MR. ZIMMERMAN: I was saying that --

24 THE COURT: In dealing with my ignorance, I was 12:37:01

25 taking a narrow view of what you were saying was trial. 12:37:05

1 Let's break here for an hour, and we'll come back 12:37:10

2 at 1:30 -- 1:40. 12:37:14

3 (Noon recess taken.)

4 THE COURT: Mr. Zimmerman. 13:43:10

5 MR. ZIMMERMAN: Thank you, Your Honor. Your 13:43:11

6 Honor, under the Roman Numeral 5, the trial issues, we did 13:43:16

7 have one issue entitled Expedited Remand. And I think we 13:43:22

8 made a proposal to the defense counsel for a procedure for 13:43:29

9 expedited remand in cases where there are medical 13:43:35

10 emergencies or things of that nature. 13:43:41

11 THE COURT: I'm sorry, where are we? 13:43:43

12 MR. ZIMMERMAN: B., under Roman Numeral 5, Trial 13:43:46

13 Issues -- 13:43:51

14 THE COURT: Go ahead. 13:43:51

15 MR. ZIMMERMAN: -- talking about expedited remand 13:43:54

16 of a case for trial. All we are asking is that we agree on 13:43:56

17 a procedure that if a particular plaintiff needs to have a 13:44:00

18 case remanded because of failing health or some specific 13:44:04

19 reason, that there be a procedure in place to seek that 13:44:10

20 before the Court. 13:44:15

21 The reason this comes up is we have been asked by 13:44:16

22 some counsel around the country if we have a procedure to 13:44:21

23 bring before the Court a motion for expedited remand, and 13:44:27

24 we have not. So, I believe we put a pretrial proposal to 13:44:31

25 the defense counsel on that, and they have not had time to 13:44:37

1 review it, and this is just a matter of information that 13:44:41  
2 will bring, hopefully, some agreement or reason to have 13:44:45  
3 further argument on it at a later date. 13:44:49

4 THE COURT: What would, if I can ask, what would 13:44:53  
5 happen on remand that would not happen here. 13:45:03

6 MR. ZIMMERMAN: They can have their case tried. 13:45:09  
7 They could send it back and have it tried by, say, the 13:45:11  
8 plaintiff was elderly and having health issues that might 13:45:17  
9 under the doctor's opinion result in early -- in 13:45:25  
10 termination of their life or something. We have seen that 13:45:29  
11 in a number of mass tort cases where we have these kinds of 13:45:33  
12 issues. 13:45:40

13 MR. HOEFLICH: Your Honor, first, I promised Mr. 13:45:40  
14 Beck that you would give me more a favorable ruling since 13:45:40  
15 he's no longer here. So, I hope we don't deviate from 13:45:47  
16 that. We're going to review the PSC's proposal and either 13:45:50  
17 reach an agreement and report back at the next conference. 13:45:56

18 THE COURT: Can we have a timetable on that so -- 13:46:01

19 MR. HOEFLICH: We'll get back to them so that the 13:46:07  
20 issue can be raised at the December 12 conference of this 13:46:07  
21 Court. Thank you, Judge. 13:46:12

22 THE COURT: Is that soon enough? 13:46:13

23 MR. ZIMMERMAN: That's fine. Next item, Your 13:46:23  
24 Honor, is really just a matter of information for the 13:46:23  
25 Court. It's called PSC Communications. 13:46:23



1           There are several items under there that's really 13:46:27  
2 more for the information of the Court or comments or 13:46:30  
3 questions. Really doesn't have much to do with anything 13:46:33  
4 that's contentious at all. 13:46:38

5           The first is the MDL seminar in Miami. What that 13:46:40  
6 is the Plaintiffs Steering Committee, and this is often 13:46:46  
7 done in different MDL's, want to bring to people who are 13:46:50  
8 watching the MDL some of their information and communicate 13:46:56  
9 with them in a way that is not in a courtroom setting, but 13:47:04  
10 more of a seminar setting. 13:47:09

11           THE COURT: Do you have one of your brochures? 13:47:13

12           MR. ZIMMERMAN: Yeah. We have the brochure here. 13:47:17  
13 The basic premise of this presentation is two things, 13:47:26  
14 preparing the case for trial and having some mock jury 13:47:35  
15 presentations and/or mock jury consultants who will provide 13:47:40  
16 the group with some feedback from the mock juries as well 13:47:45  
17 as some presentations of issues and evidence, and then 13:47:51  
18 preparing the case for early resolution, and discussing the 13:47:54  
19 settlement protocols and the process if people choose to 13:48:01  
20 participate in the settlement. 13:48:05

21           So, what we're really doing is just going out on 13:48:07  
22 the 5th and 6th of December and writing letters and sending 13:48:11  
23 the brochure and sending e-mails to people saying, if 13:48:17  
24 you're interested in hearing where the MDL is and what the 13:48:21  
25 work product is to date and how we, I believe, we are close 13:48:25

1 to, if not ready to go trial, come and see the work 13:48:30  
2 product. And if you're interested in early resolution, 13:48:34  
3 we'll tell you how we can either help you or advise you as 13:48:39  
4 to how to package your materials so you can get to the 13:48:41  
5 early resolution program. 13:48:44

6 So that is the 5th and 6th of December in Miami. 13:48:47  
7 Unless the court has any questions about that, I'll move to 13:48:53  
8 Verilaw. 13:48:59

9 MR. HOEFLICH: Can I comment on this? As an 13:48:59  
10 initial matter, I hope this is open to us as well. 13:49:03

11 MR. ZIMMERMAN: No. We can make it. 13:49:07

12 MR. HOPPER: Adam, I did think if you guys did 13:49:11  
13 come you might learn something about settling cases. 13:49:16

14 MR. CHESLEY: Your Honor, they are more than 13:49:20  
15 welcome to come if they'll pay for it. 13:49:20

16 MR. HOEFLICH: We encourage the early resolution 13:49:23  
17 aspects of this and wish Mr. Zimmerman well. The one 13:49:26  
18 concern that we have is if anyone sees the so-called key 13:49:29  
19 document show and signed a protective order because many of 13:49:33  
20 the documents that we've produced and presented to Mr. 13:49:38  
21 Zimmerman -- 13:49:41

22 THE COURT: There is a paragraph in the brochure 13:49:42  
23 dealing with limited attendance that outlines everything. 13:49:45

24 MR. HOEFLICH: As long as all of that is worked 13:49:50  
25 out, we wish Mr. Zimmerman well with the seminar. 13:49:53

1 THE COURT: I don't know how many people you are 13:49:57

2 going to get at the Motel 8. 13:50:01

3 MR. ZIMMERMAN: That won't be where I am, Your 13:50:04

4 Honor. We've got a fairly good number signed up already, 13:50:06

5 quite frankly, Your Honor. I think there has been about 50 13:50:11

6 people signed up to date, and this brochure has not gone 13:50:16

7 out yet. It's actually just off the press. This is just 13:50:19

8 from e-mails and a letter invitation. 13:50:21

9 MR. HOEFLICH: Your Honor, I once stayed at the 13:50:26

10 same hotel as Mr. Zimmerman and I received a message and 13:50:28

11 called the front desk to be connected to the room and I was 13:50:31

12 told by the operator that I didn't have approval to be 13:50:37

13 connected with the penthouse and they would take a message. 13:50:41

14 MR. ZIMMERMAN: That is not true. I deny that. 13:50:49

15 (Laughter). That was in Las Vegas, by the way.

16 MR. HOEFLICH: He denies it. It was in Las 13:50:50

17 Vegas. 13:50:55

18 MR. ZIMMERMAN: I deny it was in Miami, but I 13:50:55

19 will give you permission next time. 13:50:59

20 The Verilaw, Your Honor, there is nothing really 13:51:02

21 on the Verilaw other than to say to the Court that we have 13:51:06

22 had very few complaints, if any, about the access to 13:51:11

23 Verilaw, the speed of Verilaw, the accuracy of Verilaw. We 13:51:15

24 think it's worked very well and hope the Court has found it 13:51:20

25 to be the same, as well as defense counsel. 13:51:23

1 THE COURT: Can I ask this question of both 13:51:25  
2 sides? We are seeing that there's a -- when we download or 13:51:28  
3 print the PDF files, they are very slow printing. Do you 13:51:37  
4 have that problem or maybe it's our -- 13:51:40

5 MR. ZIMMERMAN: When you try printing an order or 13:51:45  
6 something off of it? 13:51:47

7 THE COURT: Exhibits. 13:51:50

8 MR. ZIMMERMAN: Oh, exhibits.

9 THE COURT: Do you all have any problems? 13:51:54

10 MR. HOEFLICH: I have not had that problem, 13:51:56  
11 Judge. 13:51:57

12 THE COURT: It's slow. 13:51:58

13 UNIDENTIFIED SPEAKER: It's slow on our system, 13:52:01  
14 too. 13:52:05

15 THE COURT: I was just wondering because we are 13:52:05  
16 going to have to get a couple more printers in our chambers 13:52:05  
17 because it's tying up our printers. 13:52:09

18 MR. ZIMMERMAN: I think it's a wonderful system 13:52:12  
19 from my point of view. Having been involved in a number of 13:52:16  
20 these mass tort cases over the years, and there's just this 13:52:19  
21 volume of paper over time, and it's just so hard to manage. 13:52:23  
22 This way, you really have a chance to gaze at what you need 13:52:27  
23 to gaze at and download what you need to download on it. 13:52:31  
24 And it's just been really a pleasure from my point of view 13:52:35  
25 to work with and everyone from Zimmerman Reed, I can't 13:52:38

1 speak for everyone else, it's been really good. 13:52:44

2 THE COURT: The Court thinks it's worked 13:52:48

3 extremely well. If it hadn't, certainly I would have heard 13:52:51

4 many complaints about it. And usually with the technology, 13:52:59

5 there is always a lot of glitches and, fortunately, there 13:53:03

6 has not been with this. 13:53:08

7 MR. ZIMMERMAN: The PSC newsletter, Your Honor, 13:53:10

8 and the website, just for information, what the PSC tries 13:53:11

9 to do is after each status conference prepare a short 13:53:16

10 newsletter of the events that have transpired over the last 13:53:26

11 30 days, and we now have a dedicated website for that. 13:53:29

12 Before we had to go in and use the Zimmerman Reed website 13:53:34

13 because we didn't have a dedicated website to post that 13:53:38

14 newsletter. 13:53:42

15 We now have one, and I believe it's called -- 13:53:43

16 MR. HOPPER: -- [www.BaycolPSC.com](http://www.BaycolPSC.com). 13:53:52

17 MR. ZIMMERMAN: [Www.BaycolPSC.com](http://Www.BaycolPSC.com). And we post a 13:53:54

18 newsletter there. And I think it's just part of that 13:53:57

19 information exchange that we think is important so that 13:54:01

20 people can, at the click of a mouse, at least find out from 13:54:05

21 the PSC what's going on with the PSC and what events are 13:54:10

22 about to transpire or have transpired. 13:54:15

23 I don't know if anyone has a comment. You are 13:54:20

24 more than welcome to review that as much as you like. 13:54:22

25 We'll monitor your access, however, how many times you 13:54:28

1 look. 13:54:31

2 MR. HOEFLICH: We have nothing further to add on 13:54:31

3 this, Judge. 13:54:33

4 MR. ZIMMERMAN: The Special Master report. This 13:54:39

5 is not my issue, this is Special Master Haydock's issue. 13:54:42

6 If I could just take the opportunity to thank publicly 13:54:46

7 Professor Haydock for working us all very well and very 13:54:50

8 hard and very much together. He's just been working very 13:54:54

9 closely with all of us, and making us do things and do 13:54:58

10 things timely and come together and get resolution. It's a 13:55:03

11 pleasure working with Special Master Haydock and I 13:55:07

12 appreciate very much his efforts. 13:55:12

13 MR. HAYDOCK: My brief report will be brief. The 13:55:20

14 Liaison Advisory Committee is working well. You've heard 13:55:23

15 the reports from others who spoke more eloquently about 13:55:28

16 that. And my reports from all of the participants feel 13:55:32

17 they are working together and that's on the road that you'd 13:55:35

18 hope to go. 13:55:39

19 We had a meeting over lunch to resolve one issue, 13:55:39

20 and there will be some follow-up telephone conversations 13:55:43

21 and conference calls next week on that. There will be some 13:55:45

22 subcommittee meetings related to some of the work that the 13:55:49

23 committee is doing. 13:55:51

24 The second issue on the agenda which is the WALL 13:55:53

25 which you have created. That's also been working well. 13:55:57

1 Rob Shelquist and Susan Weber have been working 13:56:01  
2 cooperatively together and the occasional problem that 13:56:09  
3 arises there we're able to resolve that. Since the 13:56:09  
4 initiation of the WALL, 18,697 files have been reviewed as 13:56:10  
5 of yesterday. Medical records have been sealed in 303 of 13:56:14  
6 those cases, and logs have been kept of people's access to 13:56:21  
7 that. And of that number, almost 19,000 files, there's 13:56:24  
8 only 15 that are either misnumbered or mislocated that 13:56:28  
9 Bayer is still locating for Marie Harkins, the paralegal. 13:56:33  
10 Beginning November 27 of next week, the 13:56:39  
11 defendants will make available discovery of those on a 13:56:42  
12 rolling basis through February on that one. That's my 13:56:45  
13 report. 13:56:50  
14 THE COURT: Thank you. Any comments from the 13:56:51  
15 defense on the performance of Professor Haydock? 13:57:01  
16 MR. HOEFLICH: We would just like to thank him 13:57:09  
17 for his efforts, Your Honor. 13:57:11  
18 MR. MAGAZINER: Exemplary, Your Honor. 13:57:14  
19 MR. ZIMMERMAN: I've got to work harder. Your 13:57:17  
20 Honor, I believe the next item on the agenda is the 13:57:23  
21 punitive damages motion to amend. In this we are sort of 13:57:28  
22 seeking direction from the Court. The dilemma is this. 13:57:32  
23 Many cases that have been transferred into the MDL from 13:57:37  
24 other jurisdictions because of the law in other 13:57:40  
25 jurisdictions have punitive damages counts or claims 13:57:46

1 already associated with that claim. They don't have the 13:57:50  
2 requirement that we have in Minnesota law that you must 13:57:54  
3 make a prima facie case for punitive damages before you can 13:57:57  
4 add it to your prayer for relief or as a claim. 13:58:03

5 In the Minnesota cases, obviously, we have that 13:58:10  
6 requirement. Frankly, I'm not clear if that requirement is 13:58:14  
7 appropriate -- is applicable in the MDL. That is, do we 13:58:20  
8 have to really formally -- should we formally make a motion 13:58:27  
9 to add the claim for punitive damages in this court so that 13:58:30  
10 under Minnesota law, both in the Minnesota complaints and 13:58:34  
11 the transferred complaints, that that allegation is intact. 13:58:39

12 We have discussed this with counsel. We have 13:58:47  
13 proposed that they stipulate to that so that it could 13:58:49  
14 alleviate some of the argument on the issue, and, I 13:58:54  
15 believe, they are probably going to be opposed to the 13:58:57  
16 stipulation, but I think that's still under consideration 13:59:00  
17 as to how they want to deal with it. 13:59:04

18 MR. MAGAZINER: Bayer, for the very first time, 13:59:08  
19 has allowed me to address an issue first, so I'm very 13:59:10  
20 pleased. 13:59:14

21 MR. HOEFLICH: Your Honor, we are always more 13:59:15  
22 than happy to have Mr. Magaziner go first. 13:59:17

23 THE COURT: My understanding is he may be your 13:59:21  
24 boss.(Laughter). 13:59:22

25 MR. MAGAZINER: And when that issue first 13:59:27



1 surfaced in the newspaper, I said that I was expecting a 13:59:29

2 little more deference from the Bayer lawyers. 13:59:33

3 MR. HOEFLICH: And I've been saving very hard for 13:59:37

4 an early retirement. (Laughter.) 13:59:40

5 MR. MAGAZINER: As we understand the law, cases 13:59:43

6 that are transferred to this district from a district 13:59:44

7 elsewhere are governed by the law of other the district 13:59:48

8 when it comes to matters such as that which Mr. Zimmerman 13:59:51

9 raised, and we will stipulate that if a punitive damage 13:59:57

10 claim in a case that was transferred here was proper under 14:00:00

11 the law, the transferors state no amendment needs to be 14:00:01

12 filed now that it's here temporarily in front of Your 14:00:03

13 Honor. 14:00:11

14 MR. ZIMMERMAN: With regard to Minnesota claims, 14:00:11

15 that's still under advisement. 14:00:12

16 MR. MAGAZINER: The Minnesota claim should 14:00:15

17 conform to Minnesota law. 14:00:19

18 THE COURT: In order to make your motion on 14:00:25

19 those, you are clear on that, Mr. Zimmerman. 14:00:25

20 MR. ZIMMERMAN: Yes

21 MR. HOEFLICH: I believe that's correct. That's 14:00:28

22 going to be an eerie issue, and we are happy to work with 14:00:30

23 Mr. Zimmerman and see if we can resolve it before the issue 14:00:36

24 becomes ripe. 14:00:38

25 MR. ZIMMERMAN: We will file a motion on that if 14:00:38

1 we can't work it out. Hopefully, we can hear that sooner 14:00:40  
2 than later. 14:00:43

3 I believe we have talked about the coordination 14:00:45  
4 of Canadian cases, which is next on the agenda, so I don't 14:00:48  
5 think we have to go back through that again unless anybody 14:00:53  
6 else wants to comment on the Canadian coordination. 14:00:56

7 The next issue, Your Honor, is called Lists or 14:01:00  
8 List Updates, and this is a matter of some concern for us 14:01:05  
9 for a number of reasons. 14:01:10

10 The first question here is what lists are we 14:01:11  
11 asking for. And what we really need, Your Honor, is for 14:01:18  
12 the defendants to provide us on a regularized basis, we can 14:01:23  
13 say every whatever period of time, 30 days, 2 weeks, 10 14:01:27  
14 days, whatever, a list of the cases and their counsel that 14:01:32  
15 have been transferred into the MDL court. We are also 14:01:37  
16 asking for a list of non-MDL cases and their counsel. 14:01:44

17 The reason this is important is for a number of 14:01:48  
18 reasons, but the most significant one now has to do with 14:01:51  
19 the holdback order and the questions of who may be governed 14:01:55  
20 by a holdback. If we don't know who the MDL lawyers who 14:01:59  
21 have transferred cases in, we can't identify them as being 14:02:04  
22 potentially bound by the 6 percent holdback and, therefore, 14:02:08  
23 we can't notify defendants that they may have a settlement 14:02:12  
24 that is subject to the holdback. 14:02:18

25 The other reasons, of course, Your Honor, are 14:02:22

1 that we are communicating on a regular basis or trying to 14:02:25  
2 with people with MDL cases, but we don't know who those 14:02:30  
3 people are just by virtue of their filing or virtue of 14:02:36  
4 their conditional transfer order that comes in. All we get 14:02:41  
5 is the name of the case and the file number of the case. 14:02:44  
6 But we don't know much about the case in terms of who their 14:02:47  
7 counsel are. We know where it comes from, but we don't 14:02:51  
8 know exactly what city or state because it's only going to 14:02:54  
9 say the Eastern District of this or the Western District of 14:02:56  
10 that. 14:02:58

11 With regard to these lists, I don't think there 14:03:00  
12 is disagreement on it, at least as of recently. Our 14:03:03  
13 communications indicated that the defendants would and 14:03:07  
14 could do this, but we just want to make sure it was on the 14:03:11  
15 agenda, something we can discuss if they do have 14:03:14  
16 disagreement about, it, we can maybe resolve it fairly 14:03:18  
17 quickly rather than go through the motion. But if there is 14:03:22  
18 no disagreement, we have no disagreement. 14:03:28

19 MR. HOEFLICH: Your Honor, plaintiffs have asked 14:03:30  
20 for two lists, first, the list of MDL cases and counsel. I 14:03:30  
21 can clearly see why that is relevant for purposes of the 14:03:35  
22 holdback, and we are happy to give that to Mr. Zimmerman. 14:03:39  
23 He needs to know who has cases in the MDL, and if we have 14:03:44  
24 better or easier access to those cases, we are happy to do 14:03:48  
25 that and provide an updated list to Mr. Zimmerman and the 14:03:49

1 Special Master and the Court if it wants it. 14:03:54

2 The other list is of non-MDL cases and counsel 14:03:57

3 that would not relate to the holdback. But Mr. Zimmerman 14:04:02

4 has indicated that he believes that would help him in his 14:04:05

5 function as leader of the PSC. We're happy to give him 14:04:08

6 that as well. We are working on an updated list now, and 14:04:14

7 will give it to him as soon as we can and try to update it 14:04:15

8 on a regular basis. 14:04:19

9 THE COURT: Great. Thank you. 14:04:20

10 MR. HOEFLICH: Thank you. 14:04:23

11 THE COURT: That would be helpful to the Court, 14:04:27

12 too. It's just -- right now it's important to the Court 14:04:29

13 because the Court really doesn't have a feel for how many 14:04:35

14 are out there. 14:04:39

15 MR. HOEFLICH: We'll give it to Your Honor both 14:04:41

16 in hard copy and in electronic form in case that's more 14:04:43

17 helpful. 14:04:46

18 THE COURT: I appreciate that. 14:04:48

19 MR. ZIMMERMAN: The next item, Your Honor, on the 14:04:51

20 agenda is oral argument to be made in the remand motions 14:04:53

21 that are pending before the Court. I think in Artall and 14:04:59

22 Pinkerman -- 14:05:01

23 THE COURT: What about the Rolland matter? Is 14:05:03

24 the Rolland matter ready to be argued? 14:05:07

25 UNIDENTIFIED SPEAKER: From our standpoint it is,

1 Your Honor.

2 MR. ZIMMERMAN: We don't really have a dog in 14:05:11

3 that fight, I don't believe. 14:05:15

4 MR. ROGERS: There is a also a motion in the 14:05:20

5 Rizzo case -- 14:05:22

6 THE COURT: Counsel. 14:05:23

7 MR. ROGERS: Kevin Rogers on behalf of the Rizzo 14:05:27

8 case. 14:05:30

9 THE COURT: That's the medical monitoring matter, 14:05:30

10 isn't it? 14:05:34

11 MR. ROGERS: It's a jurisdictional issue whether 14:05:35

12 it be injunctive aggregate -- 14:05:38

13 THE COURT: Why don't we have the Artall and 14:05:45

14 Pinkerman matters argued first, and then we'll take the 14:05:51

15 medical monitoring cases. The Artall matter. 14:05:54

16 MR. PETERSON: Good afternoon, Your Honor. I'm 14:06:06

17 David Peterson here, and actually I'm going to argue the 14:06:08

18 Pinkerman matter. Would it be okay to address that first?

19 THE COURT: That's fine. Welcome to Minneapolis. 14:06:14

20 MS. PETERSON: Thank you, I appreciate it. I'm 14:06:17

21 happy to be here. 14:06:20

22 As you know, this case was filed originally 14:06:21

23 August 17, 2001, approximately nine days after Baycol was 14:06:22

24 withdrawn from the market. It was filed as an economic 14:06:27

25 class action only, specifically excluding all claims for 14:06:29

1 personal injury in the petition. In addition, specifically 14:06:33  
2 in Paragraph 16 of the petition, it was stipulated that the 14:06:39  
3 total amount sought by each plaintiff would be less than 14:06:41  
4 \$75,000. The case was promptly removed and a motion filed 14:06:44  
5 seeking a transfer to the MDL and, of course, there was a 14:06:50  
6 stay pending ruling from this Court and here we are. 14:06:53

7 It's our firm belief that this case needs to be 14:06:59  
8 remanded for two reasons. Number one, both, obviously, 14:07:02  
9 based on the jurisdictional limits. Number one, we 14:07:04  
10 stipulated that the damages sought per plaintiff will not, 14:07:07  
11 cannot and do not meet the \$75,000 limit. And, secondly, 14:07:10  
12 even though the defendants have challenged that 14:07:15  
13 stipulation, even if it were deemed invalid, which we don't 14:07:17  
14 believe it is, the facts do not support that we could 14:07:22  
15 possibly get to, under the legal certainty standard, 14:07:24  
16 \$75,000 per plaintiff. 14:07:26

17 We agree with defense counsel that the MDL and 14:07:28  
18 the federal court should not be a magnet in cases that 14:07:31  
19 don't meet the jurisdictional limit, and that's precisely 14:07:36  
20 this case. 14:07:39

21 Mr. Becnel wants to stay here with cases where 14:07:41  
22 he's claimed personal injuries, which we have not, and the 14:07:43  
23 defendants of Mr. Becnel apparently feel they may not have 14:07:46  
24 the claim to meet \$75,000 per plaintiff. We, on the other 14:07:50  
25 hand, only seek economic damages, the cost of the product, 14:07:55

1 and punitive damages less than an aggregate of less than 14:07:57  
2 \$75,000 per plaintiff, but, yet, the defendants argue that 14:08:00  
3 somehow we meet the jurisdictional limits. We think this 14:08:03  
4 is totally inconsistent with the position that they have 14:08:10  
5 taken here all day with respect to the Becnel cases. 14:08:10

6 The standard was created in 1938 in the United 14:08:13  
7 States Supreme Court decision of St. Paul Mercury. It's a 14:08:18  
8 legal certainty standard. The Court held that you look to 14:08:22  
9 the pleadings, and in absence of some indication of bad 14:08:27  
10 faith, the amount stated in the pleadings rule. The 14:08:28  
11 defendants have to prove, the removing parties have to 14:08:32  
12 prove to a legal certainty, a very lofty standard, that the 14:08:36  
13 amount pled will, in fact, exceed \$75,000 per plaintiff. 14:08:39  
14 In this case they cannot do that. 14:08:42

15 Number one, the stipulation is binding. It was 14:08:51  
16 stipulated in the petition that the total amount would be 14:08:51  
17 less than \$75,000. The U.S. Supreme Court indicated in the 14:08:51  
18 St. Paul Mercury case that you are able to stipulate, 14:08:55  
19 although not required to, but you are able to stipulate 14:08:59  
20 that the amount you seek is less than \$75,000. That 14:09:02  
21 position has been accepted by the Eastern District of 14:09:04  
22 Missouri in the Graham case. It's also been accepted by 14:09:07  
23 other Eighth Circuit decisions.

24 The defendants rely on one decision, the 14:09:10  
25 DeAguilar decision, saying that a Fifth Circuit decision 14:09:13

1 that created a burden shifting standard should be applied. 14:09:17

2 Obviously, that is not an applicable case in this circuit 14:09:21

3 and has not been applied in this circuit, and to my 14:09:25

4 knowledge it has not been applied to any other circuit. 14:09:26

5 Even if the stipulation were somehow deemed to be 14:09:31

6 ineffective, as I said, the amount in controversy could 14:09:33

7 not, to a legal certainty standard, exceed \$75,000. We 14:09:35

8 sought economic damages which would be the damage of the 14:09:41

9 product, in other words, of the persons who purchased 14:09:44

10 Baycol and were unable to use the product because of recall 14:09:46

11 or whatever cost they had in the purchase of the drug as an 14:09:50

12 element of damages. The defendants conceded that's a 14:09:58

13 relatively minor matter of damages for plaintiff. 14:09:58

14 The only other thing that we have sought is 14:09:58

15 punitive damages. We also sought interest in costs. Of 14:10:00

16 course, those were excluded by the jurisdictional amounts. 14:10:04

17 We have sought punitive damages. The defendants have 14:10:07

18 asserted that somehow, even though we stipulated that it's 14:10:12

19 less than \$75,000 per plaintiff, we, to a legal certainly, 14:10:13

20 are likely to exceed the \$75,000 per plaintiff limit.

21 To put that into a little bit of perspective, 14:10:18

22 it's our understanding that based on information that's 14:10:22

23 been published, there are approximately 700,000 users of 14:10:26

24 Baycol. If you take \$75,000 per plaintiff times the number 14:10:29

25 of users for an economic class, that's 52.5 billion 14:10:35



1 dollars. So, that would mean, if you look at the market 14:10:39  
2 cap of the company, Bayer AG is 16.7 billion, we would have 14:10:42  
3 to a legal certainty have to exceed three times the market 14:10:46  
4 value of the company in punitive damages alone, that's at 14:10:51  
5 the \$75,000 mark, and they say we're going to do much 14:10:54  
6 better than that to a legal certainty. It's not going to 14:10:57  
7 happen. We don't believe that they can meet the standard 14:11:02  
8 that those punitive damages somehow launched them into the 14:11:02  
9 ability to get them into the jurisdiction of the federal 14:11:06  
10 court. 14:11:09

11 The defendants also argue that claims splitting 14:11:09  
12 should somehow mean that we should look at personal injury 14:11:12  
13 damages in the petition, even though we haven't pled those. 14:11:17  
14 And we believe that's inappropriate. That may be an issue 14:11:19  
15 that will be addressed at some point in the state court on 14:11:24  
16 the issue for class certification in terms of how the class 14:11:27  
17 is structured, who's in the class or what not, but as the 14:11:31  
18 petition stands, we are not claiming personal injuries. We 14:11:35  
19 are not required to claim personal injuries, and have not 14:11:38  
20 pled personal injuries. So, you can't look at what if 14:11:41  
21 those had been pled and say we're required to do that. We 14:11:45  
22 simply have not. 14:11:48

23 The courts that have addressed that have also 14:11:48  
24 said that it is permissible in a class action setting to 14:11:51  
25 limit the type of claim that you seek. The Microsoft 14:11:55

1 decision specifically allowed claims for the cost of 14:11:59  
2 software on MS-Dos 6.0 package where they just wanted the 14:12:01  
3 cost of the defective software. The class excluded claim 14:12:07  
4 consequential damages from the problems that may have been 14:12:13  
5 caused by the defective software. The court said that's 14:12:14  
6 permissible. It said you can deal with it several ways. 14:12:19  
7 One way is to simply say that anybody that actually had 14:12:21  
8 consequential damages is excluded from the punitive class. 14:12:24  
9 Another way to deal with it is to simply say that those 14:12:28  
10 individuals have the option to opt out of the class action 14:12:29  
11 and are not bound, therefore, there is no claim splitting. 14:12:33  
12 In this case if we look at Bayer and Baycol and 14:12:36  
13 the number of cases, the amount of people we are really 14:12:39  
14 talking about in the scheme of the economic class is 14:12:42  
15 extremely small. 14:12:45  
16 From what's presented here today, there are some 14:12:47  
17 sixty-four hundred lawsuits on file, many of which the 14:12:51  
18 defendants take issue with to even having legitimate 14:12:58  
19 personal injury claims. That's less than one percent of 14:12:58  
20 the users of Baycol. So, we're talking about this issue of 14:13:01  
21 needing to opt out or this issue of splitting the cause of 14:13:03  
22 action applying to less than one percent of the population 14:13:08  
23 in the first instance. They would rather it be dealt with 14:13:11  
24 in other matters. It does not increase the amount of the 14:13:13  
25 damages that we claim here for jurisdictional purposes. 14:13:14



1           So, we think this is a case that should be in    14:14:41  
2    this court, unlike some of the cases that perhaps were    14:14:43  
3    discussed earlier, not based just on the economic claims,    14:14:47  
4    but based in significant part on the artful pleading in    14:14:51  
5    Plaintiff's complaint that we believe will allow plaintiff    14:14:56  
6    the option of seeking damages for personal injuries down    14:14:59  
7    the road.    14:15:02

8           Well, let's look at several features of            14:15:07  
9    plaintiffs' complaint and their presentation here that we    14:15:10  
10   think show by a preponderance of the evidence that they    14:15:15  
11   could, in fact, achieve \$75,000 if they were to prevail on    14:15:18  
12   their claims.    14:15:24

13           First of all, as in a number of the other cases    14:15:26  
14   that this Court has decided, the complaint talks about the    14:15:29  
15   serious injuries that plaintiffs have allegedly received    14:15:31  
16   from taking Baycol use. That was a key factor in this        14:15:37  
17   Court's decision to retain the Keyser and Amari cases. The    14:15:42  
18   complaint also includes claims for negligence and other        14:15:46  
19   claims that could be the basis for recovery for personal        14:15:49  
20   injury if the plaintiffs decided that they wanted to            14:15:54  
21   present evidence of personal injury to the jury. That's        14:16:00  
22   point number two.    14:16:03

23           Point number three is that the complaint nowhere    14:16:05  
24   says that the plaintiffs have not sustained personal            14:16:06  
25   injuries, and they have not sustained serious injuries.        14:16:09

1 And, in fact, the complaint expressly reserves the right to 14:16:14  
2 seek personal injury damages which suggest to me that they 14:16:19  
3 either know they are planning to seek personal injury 14:16:22  
4 damages in the future or at least think that they want to 14:16:26  
5 keep that option open. And although there is a statement 14:16:28  
6 in the fact section of the complaint that says that the 14:16:32  
7 amount in controversy here is less than \$75,000, when you 14:16:34  
8 look at their prayer for relief, it's not limited to 14:16:39  
9 \$75,000. It asks for, "all other relief in an amount to be 14:16:43  
10 proved at trial." 14:16:48

11 So, when you look at their supposed stipulation, 14:16:51  
12 it's not the kind of binding stipulating that this court 14:16:55  
13 and other courts have said is required to prevent a proper 14:16:58  
14 removal, but rather it's simply the statement of a legal 14:17:03  
15 conclusion by the plaintiffs of the sort that's designed to 14:17:07  
16 prevent remand to a state -- I'm sorry, it's the sort of 14:17:11  
17 legal conclusion that's designed to prevent a defendant 14:17:17  
18 from removing or discourage them from removing. 14:17:20

19 Mr. Peterson mentioned a case in the Fifth 14:17:26  
20 Circuit, the DeAguiar case. I believe that's probably the 14:17:29  
21 most important case for this Court to consider because I 14:17:33  
22 think it captures what may be happening here, and captures 14:17:36  
23 the defendants concern about this particular case. 14:17:42

24 That was a case in which the plaintiffs initially 14:17:45  
25 filed a complaint that did not specify a claim for damages, 14:17:47

1 didn't specify an amount, and the Fifth Circuit on appeal 14:17:51  
2 from a decision on a remand motion, said, well, your 14:17:56  
3 stipulation, which they had also filed, is not enough to 14:18:03  
4 establish to a legal certainty that you cannot recover 14:18:08  
5 \$75,000. 14:18:10

6 The plaintiffs then went back to the trial court 14:18:11  
7 and amended their complaint to include an express 14:18:13  
8 limitation similar to the one at issue here that said, we 14:18:16  
9 don't intend to seek more than \$75,000, and went back up to 14:18:21  
10 the Fifth Circuit and the Fifth Circuit said, well, that 14:18:23  
11 the plaintiff -- the defendant has still established by a 14:18:27  
12 preponderance of the evidence that you have a probability 14:18:34  
13 of recovering \$75,000, and, therefore, removal was 14:18:35  
14 proffered and remand would not have been proffered. 14:18:40

15 So, we think that's the controlling case here, 14:18:42  
16 and we don't believe there's Eighth Circuit precedence that 14:18:44  
17 goes against that. Thank you Your Honor,. 14:18:49

18 THE COURT: Counsel, brief reply. 14:18:54

19 MR. PETERSON: Very brief, Your Honor. The St. 14:18:56  
20 Paul case, we strongly disagree with the defendants' 14:18:59  
21 proposition that that stands for this burden shifting. In 14:19:03  
22 the St. Paul case there was not a stipulation limiting the 14:19:07  
23 amount of damages. And in the case, here's what they said 14:19:13  
24 at Page 586 of the opinion. "The rule governing dismissal 14:19:16  
25 for one of jurisdiction in cases brought in federal court 14:19:19

1 is that unless the law gives a different rule, the sum 14:19:22  
2 claimed by the plaintiff controls if the claim is 14:19:26  
3 preparedly made in good faith. It must then appear to a 14:19:28  
4 legal certainty that the claim is really for less than the 14:19:30  
5 jurisdictional amount to justify dismissal." 14:19:33

6 That same rule was then applied by Corlew -- the 14:19:36  
7 Corlew decision, which is 983 F.Supp. 878. At Page 878, it 14:19:41  
8 says, the court concludes in Corlew that the defendant as 14:19:49  
9 moving party is unable to meet its burden with regard to 14:19:52  
10 the jurisdictional amount. The removing party must show 14:19:55  
11 that it appears to a legal certainty that the amount in 14:20:00  
12 controversy exceeds \$75,000. 14:20:03

13 We agree that the DeAguilar decision from the 14:20:05  
14 Fifth Circuit appears to apply a different standard. That 14:20:10  
15 standard simply does not apply in this circuit and never 14:20:14  
16 has applied in this circuit. 14:20:16

17 The defendants talked a little bit about the fact 14:20:18  
18 that we mention personal injuries in a petition which we, 14:20:19  
19 of course, did. The reason is we also have to establish 14:20:23  
20 some sort of legal liability on the part of the defendants 14:20:25  
21 to recover. 14:20:29

22 The fact that the defendant Bayer did not, in our 14:20:29  
23 opinion, adequately and properly warn about the risk of 14:20:32  
24 Rhabdo associated with the use of Baycol, the fact that 14:20:37  
25 they knew it was the most mild toxic statin on the market, 14:20:42

1 all of those types of claims go to the Consumer Protection 14:20:46  
2 Act claims of what they misrepresented or omitted. So, 14:20:48  
3 it's not that we are seeking to recover personal injuries 14:20:49  
4 that may have been sustained, but, obviously, the nature of 14:20:53  
5 the product and the type of injuries it could cause must be 14:20:57  
6 shown so that we can be show that they didn't warn about 14:21:01  
7 it, that they violated state Consumer Protection Acts and 14:21:05  
8 the like. Obviously, we have to talk about that. There is 14:21:06  
9 no way we can present at trial and not talk about those 14:21:08  
10 problems. That's what the cases are all about. 14:21:11

11 Once again, we would request that this Court 14:21:14  
12 remand this case. 14:21:17

13 THE COURT: Thank you, I'll take this matter 14:21:19  
14 under advisement. Artall matter. 14:21:20

15 MR. STEWART: Good morning, Your Honor, Reid 14:21:34  
16 Stewart for the plaintiffs. 14:21:35

17 THE COURT: Good afternoon, Counsel. 14:21:37

18 MR. STEWART: It's pleasure to be here. To save 14:21:38  
19 the Court some time, the defendants have made the identical 14:21:41  
20 arguments as to my clients. I will not readdress what Mr. 14:21:47  
21 Peterson argued. I would just reurge his arguments, and I 14:21:49  
22 would like to just basically talk about what differs in our 14:21:50  
23 petition and what differs from the defendants. 14:21:53

24 I would like, though, to address briefly 14:21:56  
25 D'Aguilar and how it's distinguished from this case. In 14:22:00



1 D'Aguilar that dealt with wrongful death actions, and it 14:22:04

2 resulted from an airplane crash in Mexico. 14:22:09

3 The defendant Boeing in that case proffered 14:22:12

4 evidence that the plaintiffs in the instant case had 14:22:15

5 claimed damages up to \$5,000,000 each in previous actions. 14:22:16

6 There had been -- they filed previous actions in other 14:22:23

7 courts, thus, the necessary predicate for consideration of 14:22:25

8 the attorney affidavit under Bell Quentin is absent in the 14:22:29

9 case and that's what the Court stated. District court 14:22:30

10 properly -- and the court ruled that the district court 14:22:33

11 properly disregarded those affidavits. 14:22:36

12 And I will just point, Your Honor, in our case, 14:22:40

13 in our petition, we have excluded personal injury claims. 14:22:44

14 And, in fact, our stipulation also covers that. Our 14:22:47

15 stipulation states that we will not seek anything 14:22:52

16 seventy-five thousand or over to all the claims. That's 14:22:57

17 quite different from DeAguilar where the Court was well 14:23:00

18 aware that on its face, they didn't even need to look to 14:23:03

19 the affidavit. They could tell from the face of the 14:23:07

20 petition that that jurisdiction is going to be met. 14:23:10

21 I wanted like to point to Dyrda, which is a case 14:23:13

22 which I believe is more relevant, Your Honor, -- I'm sorry, 14:23:18

23 Your Honor, if I could point out Johnson v. Direct TV, 14:23:24

24 which is a '99 case out of the Southern District of Texas, 14:23:28

25 and that concerned a class action regarding DPTA claims. 14:23:32

1 And why that is important is the defendants in their 14:23:32  
2 pleadings have proffered to the Court a case, Martin v. 14:23:35  
3 Ford Motor Company, which by my copy is an unpublished 1995 14:23:41  
4 Fifth Circuit case relying on Abbott. And as the Court is 14:23:47  
5 well aware, Abbott is a case involving that particular 14:23:49  
6 peculiar Louisiana statute which we have heard maybe a 14:23:54  
7 little bit about today. 14:23:57

8 Well, Johnson v. Direct TV is a '99 case where 14:23:58  
9 the facts are quite similar to our case. They allege a 14:24:02  
10 DPTA claim, and the court stated that the court is not 14:24:07  
11 convinced that attorney's fees associated with processing 14:24:09  
12 class action lawsuits under Texas law may properly be 14:24:13  
13 attributed to the same class representatives for 14:24:16  
14 jurisdictional purposes. That's important here because 14:24:16  
15 that's what the plaintiffs are hanging their hat on to get 14:24:19  
16 us over the seventy-five. 14:24:23

17 As they argued Martin v. Ford is a DPTA case 14:24:24  
18 where the court did allow that attorney's fees could be 14:24:29  
19 allocated to the named plaintiffs. However, in Johnson 14:24:33  
20 it's clearly not Texas law and has not been followed either 14:24:38  
21 in the Fifth Circuit or this circuit. 14:24:40

22 What the Fifth Circuit does apply is somewhat 14:24:43  
23 similar to what has been applied in Louisiana, and that is 14:24:47  
24 that since the Section 1467, as the Court is aware, there 14:24:50  
25 is a minor amount of courts that have determined that that 14:24:56

1 has abrogated or overruled Zahn. The Eighth Circuit does 14:24:58  
2 not apply that. And, Your Honor, my point being that Texas 14:25:02  
3 will only allow attorney fees to be allocated to the named 14:25:09  
4 plaintiffs where there is a separate statute that 14:25:14  
5 specifically states that the attorney fees are to be 14:25:18  
6 reawarded to the class representatives. And that statute 14:25:21  
7 we do not have in Texas. Therefore, Martin v. Ford does 14:25:29  
8 not apply. The Court should look to Johnson. 14:25:29

9 I would also like to point the Court's attention 14:25:33  
10 and which is addressed in our brief is H&D Tire v. 14:25:33  
11 Pitney-Bowles, which is a 2000 Fifth Circuit case, which 14:25:38  
12 the Court stated that because the statute in question does 14:25:40  
13 not specifically provide the attorney's fees awarded to the 14:25:43  
14 class reps, the court declined to attribute the attorney's 14:25:44  
15 fees solely to the name plaintiffs to determine whether the 14:25:49  
16 amount in controversy is sufficient. 14:25:51

17 Again, Bayer is relying on three separate types 14:25:53  
18 of damages to get my clients' jurisdiction in this court. 14:25:57  
19 One, they are relying on the attorney fees to be allocated 14:26:02  
20 to the name plaintiffs. They are relying on punitive 14:26:07  
21 damages, and they are relying on personal injuries which we 14:26:09  
22 had excluded in our petition specifically. 14:26:13

23 As the Court is well aware, punitive damages, if 14:26:15  
24 they should be applied, should be applied on a pro rata 14:26:18  
25 basis and so should the attorney's fees. 14:26:22

1 I would like to state I'm a little disheartened 14:26:26  
2 at the deference my clients are receiving compared to the 14:26:32  
3 clients of the gentleman that spoke here briefly from 14:26:34  
4 Louisiana. Sitting in the back observing, it seems like 14:26:37  
5 his clients are somewhat in a similar situation, but they 14:26:40  
6 are being treated very differently. His clients ingested 14:26:43  
7 Baycol and are seeking economic, and, I believe, some are 14:26:44  
8 also seeking personal injuries, and the class counsel for 14:26:46  
9 the MDL stated that there is no way, you know, and I'm 14:26:51  
10 surmising, that his clients will meet jurisdiction in this 14:26:56  
11 Court. 14:27:00

12 However my clients, all we are claiming is the 14:27:01  
13 economic class action. They are claiming that we will meet 14:27:03  
14 and we will exceed it. And that is just a far stretch. If 14:27:07  
15 you assume that Baycol, a bottle of Baycol costs a little 14:27:11  
16 under a hundred dollars, average client took it for a year, 14:27:18  
17 you are looking at twelve hundred dollars. In Texas you 14:27:21  
18 are allowed trouble damages. That gets you to up to 14:27:24  
19 thirty-six hundred dollars. To say that thirty-six hundred 14:27:28  
20 dollars is that close to seventy-five thousand, I think is 14:27:31  
21 without, Your Honor, common sense. 14:27:32

22 I would also like to address for a moment the 14:27:34  
23 stipulation. The plaintiffs claim that our stipulation was 14:27:37  
24 too little too late. However, we believe that our 14:27:41  
25 stipulation petition was right on point. We specifically 14:27:44

1 stated that plaintiffs' petition specifically excluded 14:27:46  
2 purchasers or users of Baycol who have manifested physical 14:27:49  
3 injury. 14:27:55

4 Plaintiffs allege that we have not filed an 14:27:56  
5 affidavit timely, and, so, accordingly, we filed a 14:28:02  
6 post-petition affidavit, and that has been allowed. That 14:28:04  
7 was allowed in Dyrda, and I would just point to that 14:28:09  
8 briefly, Your Honor. 14:28:13

9 In Dyrda, the gentleman there, the plaintiff 14:28:14  
10 filed -- he alleged damages over fifty thousand, but he did 14:28:17  
11 make an allegation whether it was over seventy-five or not. 14:28:21  
12 And the Court said that post-petition affidavits are 14:28:25  
13 allowed whether used to clarify that time period, clarify 14:28:28  
14 the petition. You are not trying to remove jurisdiction, 14:28:31  
15 but you are just trying to clarify that issue. And if you 14:28:32  
16 look at our petition and look at our pleading, the language 14:28:41  
17 is almost identical. The defendants just raised an issue 14:28:41  
18 because it was not a sworn pleading. We would not be bound 14:28:45  
19 by it. We are now bound by that, Your Honor. And I would 14:28:45  
20 point out where the plaintiffs have stipulated, that 14:28:52  
21 stipulation should govern. 14:28:55

22 And, again, in plaintiffs' reliance on Martin v. 14:29:11  
23 Ford, I would also point the Court to Crosby which this 14:29:15  
24 Honor stated that it's here. In Crosby the defendants 14:29:19  
25 argued that Congress overruled Zahn. However, this circuit 14:29:22

1 has addressed the specifics that Zahn was not overruled by 14:29:28  
2 Congress' enactment, 28 U.S.C. Section 1367, and that the 14:29:30  
3 general rule does not allow class members to aggregate 14:29:34  
4 claims to meet the amount in controversy. 14:29:38

5 While defendants arguments were creative, this 14:29:46  
6 Court should not be persuaded that the authorities which 14:29:49  
7 lend itself to this analysis for the invitation of federal 14:29:53  
8 diversity jurisdiction, further, in the present case, the 14:29:55  
9 plaintiffs are asserting separate and distinct claims which 14:29:57  
10 under Zahn and Snyder their claims cannot be aggregated to 14:30:01  
11 satisfy the amount in controversy.

12 Since there are no personal injury damages 14:30:04  
13 sought, there are no aggregation of attorney's fees 14:30:07  
14 available nor punitive damages, this Court is left with the 14:30:09  
15 undisputed evidence that the amount in controversy is less 14:30:12  
16 than seventy-five thousand each for the plaintiff class 14:30:17  
17 members and representatives. And that is particularly 14:30:19  
18 evidenced in plaintiffs' petition. And even without the 14:30:22  
19 petition, Your Honor, the plaintiffs fail to meet their 14:30:25  
20 burden to establish that our clients will meet the \$75,000 14:30:28  
21 jurisdictional limits. And I thank you for your time. 14:30:32

22 THE COURT: Thank you. 14:30:35

23 MR. SCHAERR: Just a couple of points, Your 14:30:37  
24 Honor. I think it's important that neither of the 14:30:44  
25 plaintiffs that we have just heard from disputes that that 14:30:48

1 DeAguilar is right on point as to the legal standard that 14:30:53  
2 applies and that it interprets and understands the St. Paul 14:30:56  
3 Mercury case the way we have presented it to the Court. 14:31:01  
4 And there is no question that that case supports our 14:31:05  
5 position on what the burden should be and what the outcome 14:31:08  
6 should be here. In essence, I think what the plaintiffs 14:31:12  
7 are doing is asking this Court to make a ruling that will 14:31:15  
8 be in flat conflict with a controlling decision of the 14:31:18  
9 Fifth Circuit, and I don't think that makes any sense. 14:31:22  
10 Yes, there are a couple of district court 14:31:26  
11 decisions, not this court, but a couple of district court 14:31:28  
12 decisions out there that seem to take a different 14:31:32  
13 interpretation of St. Paul Mercury, but we don't think this 14:31:35  
14 Court should be putting itself in conflict with the 14:31:39  
15 controlling decision of the Fifth Circuit. 14:31:44  
16 The plaintiffs' counsel has indicated that they 14:31:47  
17 have stipulated that they will not seek damages in excess 14:31:50  
18 of seventy-five thousand. Well, that's not quite what they 14:31:54  
19 say, either in their complaint or their purported 14:32:02  
20 stipulation. If you look, for example, at Paragraph 14 of 14:32:04  
21 their complaint, and this is similar to the complaint in 14:32:08  
22 the Pinkerman case as well. The complaints are virtually 14:32:12  
23 identical. They say at Paragraph 14(a) -- 14:32:18  
24 THE COURT: Let's take a look at the stipulation. 14:32:20  
25 Anything similar to that in the stipulation? 14:32:24

1 MR. SCHAERR: There is not a stipulation like 14:32:29  
2 this in the Pinkerman case, that's correct, Your Honor. 14:32:31  
3 The stipulation in my view raises more questions than it 14:32:34  
4 answers as to their ability to achieve a judgment of 14:32:39  
5 \$75,000 if they're successful. 14:32:43

6 They say, for example, at the very end of their 14:32:46  
7 stipulation that the plaintiffs expressly state that they 14:32:50  
8 do not waive any unknown claims, claims that have not yet 14:32:54  
9 accrued, claims of personal injuries that might have 14:32:56  
10 unknowingly accrued since the filing of this matter or that 14:32:58  
11 claims of personal injury that may accrue in the future. 14:32:58

12 So, they are clearly leaving themselves the 14:33:03  
13 option of seeking damages for personal injury, and the way 14:33:05  
14 they have framed their complaint, they wouldn't even have 14:33:09  
15 to amend the complaint in order to seek damages for 14:33:13  
16 personal injuries. Their complaint already has tort claims 14:33:15  
17 written into it. 14:33:21

18 And their complaints leaves them even more wiggle 14:33:22  
19 room. In both cases they say -- they do say they are not 14:33:29  
20 seeking monetary damages for any personal injuries, but 14:33:34  
21 then they say they reserve the right to file individual 14:33:38  
22 claims for monetary damages in a separate suit. But, of 14:33:42  
23 course, the law doesn't allow them to do that. They have 14:33:46  
24 to bring all of their claims in one suit. 14:33:51

25 So, we think the stipulations and the provisions 14:33:53



1 of their complaints in which they purport to fix the amount 14:33:54  
2 in controversy at less than \$75,000 should be ignored as 14:33:58  
3 they were in the DeAguilar case, and we don't think that 14:34:04  
4 the evidence that they have presented to this Court 14:34:07  
5 establishes to a legal certainty as they are required to do 14:34:10  
6 that they cannot achieve judgments in excess of \$75,000 if 14:34:12  
7 they succeed on the merits. 14:34:18

8 Does the Court have any questions? 14:34:20

9 THE COURT: No, thank you. Short response. 14:34:24

10 MR. STEWART: Yes, Your Honor, I'll be brief. I 14:34:27  
11 would like to just read Paragraph 7 of our stipulation. 14:34:29  
12 Clients seek less than \$75,000 for plaintiff inclusive of 14:34:35  
13 economic damages, pro rata attorney's fees as distributed 14:34:39  
14 to the entire class and pro rata punitive damages as 14:34:45  
15 distributed to the entire class. Therefore, that is all 14:34:46  
16 inclusive of the damages we can seek in this petition. 14:34:50

17 This petition as I previously stated specifically 14:34:52  
18 excludes purchasers or users of Baycol who have manifested 14:34:54  
19 physical injuries. If someone were to later manifest  
20 injury were in this class, they should have an option to 14:35:01  
21 opt out. But all the damages we are seeking will be under 14:35:03  
22 the \$75,000, and our stipulation governs that. 14:35:05

23 In Dyrda the Court stated that when a plaintiff 14:35:11  
24 stipulates to recovery less than the jurisdictional amount, 14:35:14  
25 that stipulation will govern, and these cases will be 14:35:14

1 remanded. 14:35:17

2 I'd also like to point out, defense counsel 14:35:19

3 raised DeAguilar once again, and I would urge the Court 14:35:24

4 that is briefed in our pleadings and DeAguilar should not 14:35:27

5 be applied here. Due the circumstances of DeAguilar 14:35:30

6 looking at the legal standard, even if this Court finds 14:35:34

7 that the defense legal standard is a preponderance, they 14:35:36

8 have not met that standard, and they are far from meeting 14:35:40

9 that. 14:35:44

10 Just lastly, Your Honor, again the defense raised 14:35:45

11 the issue of the Fifth Circuit cases, and I'm sure the 14:35:47

12 Court is well aware the only time the Fifth Circuit has 14:35:49

13 ever allowed aggregation of attorney fees is when there is 14:35:53

14 a particular statute and those cases only arise in 14:35:58

15 Louisiana or Mississippi, and we are neither there. 14:36:01

16 So, I would thank you for the Court's time and I 14:36:04

17 would just ask the Court to grant our motion for remand. 14:36:08

18 Thank you.

19 THE COURT: I'll take this matter under 14:36:12

20 advisement. Before we move on, we have the Maryland 14:36:13

21 Rolland matter. There is no one here for that? 14:36:29

22 MR. SCHAERR: I'm prepared to address that for 14:36:33

23 the defendants, Your Honor. 14:36:36

24 THE COURT: Step forward. 14:36:44

25 MR. SCHAERR: I'm sorry, Your Honor. I'm 14:36:45

1 prepared to address that for the defendants if the Court 14:36:45

2 wishes, or if there is no one here representing the 14:36:50

3 plaintiffs, we would be happy to submit it on briefs. 14:36:53

4 THE COURT: Is there anyone here for the 14:36:57

5 plaintiffs? Submit it on the briefs. I'll take it under 14:36:59

6 advisement. Let's move on to the medical monitoring. 14:37:02

7 MR. ROGERS: Good afternoon, Your Honor, how are  
8 you?

9 THE COURT: Good afternoon.

10 MR. ROGERS: Kevin Rogers on behalf of Anthony 14:37:22

11 Rizzo and the Illinois plaintiff. Your Honor, I also was 14:37:25

12 contacted yesterday by Mr. Ben Barneau who represents the 14:37:30

13 Abrams claimant. If I may speak and if the Court would 14:37:35

14 adopt my representation as theirs, also. It is the same 14:37:38

15 issue. 14:37:43

16 THE COURT: All right.

17 MR. ROGERS: Your Honor, this, too, is a 14:37:44

18 jurisdictional issue that we have before the Court. We are 14:37:44

19 not disputing diversity citizenship, of course, but it 14:37:48

20 could only be the \$75,000 minimum jurisdictional amount. 14:37:52

21 The matter is fully briefed before you. The 14:37:55

22 defendants have presented their position, but there's two 14:37:58

23 issues that the Court will have to decide on, and I would 14:38:02

24 like to underscore those instead of elaborating more on the 14:38:05

25 entire brief. 14:38:10

1           One is the aggregation of claims. Of course, as 14:38:12  
2   this Court well knows, the overwhelming authority is 14:38:14  
3   non-aggregation of claims, particularly in injunctive 14:38:18  
4   relief. The Seventh Circuit brand names have spoken to 14:38:23  
5   that. The most recent, and I believe the reasons that this 14:38:27  
6   matter has been deferred for the time it has, Ford Motor v. 14:38:29  
7   McCauley was before the United States Supreme Court -- the 14:38:34  
8   date escapes me -- but I believe it was October 15. 14:38:36  
9   October 15, the Supreme Court denied cert. I believe the 14:38:41  
10   comment was improvidently granted, which would in turn 14:38:50  
11   uphold the Ninth Circuit appellate, no aggregation of 14:38:52  
12   claims under the injunctive theory for that. So, with 14:38:57  
13   that, I will not speak to that point anymore as the matter 14:39:00  
14   before you is fully briefed. 14:39:05

15           However, the defendants raised an interesting 14:39:06  
16   issue in common fund doctrine, which is the other aspect to 14:39:11  
17   their approach in overcoming the jurisdictional amount. 14:39:15  
18   And, you know, briefly, doctrines are just that. I mean 14:39:19  
19   the statutes or the Congressional intent to be applied in 14:39:21  
20   all courts, and it's the inherent and equitable powers of 14:39:26  
21   the court when matters certainly aren't covered. And the 14:39:31  
22   common fund doctrine is exactly one of those. As the Court 14:39:33  
23   is probably aware, in the common fund doctrine there 14:39:34  
24   generally exists in a res, the most relevant and often-used 14:39:40  
25   examples in a state where there is an undivided whole to be 14:39:44

1 divided by a class. So, hence, the doctrine is invoked. 14:39:49  
2 The common fund doctrine in that regard. There is an 14:39:53  
3 entirety of res. 14:39:59  
4 The defendants, in representing to this Court 14:40:01  
5 that the costs of injunctive relief and the cost of medical 14:40:03  
6 monitoring is a res for the plaintiffs, at least 14:40:08  
7 analogously. And there's a lot of problems with that. 14:40:13  
8 First and foremost, this fund for medical monitoring did 14:40:15  
9 not exist at the time Mr. Rizzo was prescribed Baycol. It 14:40:20  
10 did not exist before litigation. It did not exist at the 14:40:27  
11 time of filing. It does not exist now. 14:40:32  
12 There is another problem with the res concept and 14:40:33  
13 the common fund concept. And that is, theoretically, if 14:40:37  
14 Rizzo were to dismiss his claim or if he were to forgo 14:40:42  
15 medical monitoring and, let's say, take some claim less 14:40:46  
16 than that, the first personal injury or some other 14:40:47  
17 compensation, some other kind of settlement with this 14:40:50  
18 defendant, his share of a fund, of a res under the theory 14:40:52  
19 of the common fund doctrine would shift and be further 14:40:59  
20 divided by the other plaintiffs. That is not likely to 14:41:02  
21 occur. 14:41:06  
22 Likewise, if there was a trial and the judge were 14:41:07  
23 to enter an award, if you were to award medical monitoring, 14:41:11  
24 and he were to somehow settle outside of your award and not 14:41:14  
25 accept the medical monitoring, you could not, after you 14:41:21

1 rendered a verdict on behalf of all the plaintiffs, take 14:41:22  
2 Mr. Rizzo's award as if he had entitlement to it such as in 14:41:24  
3 real property. 14:41:32

4 So, the common fund theory is just -- it's just a 14:41:33  
5 characterization to create an exception to get past the 14:41:38  
6 jurisdictional requirements as set out in the statute. 14:41:43

7 And, lastly -- last but not least, in these 14:41:46  
8 jurisdictional issues, every plaintiff must stand on his 14:41:53  
9 own case, and every plaintiff's case must be worth \$75,000. 14:41:58  
10 If that so-called fund that the defendants refer to would 14:42:01  
11 not be affected one way or another if Rizzo had his own 14:42:07  
12 cause of action or not. And that is one of the key reasons 14:42:10  
13 that it is not a true fund in the common fund setting that 14:42:14  
14 most of these actions represent such as res of an estate or 14:42:21  
15 real property. 14:42:25

16 We ask that this matter be remanded. Thank you, 14:42:26  
17 Your Honor.

18 MR. SCHAERR: Your Honor, in my view, the 14:42:40  
19 simplest way for this Court to resolve this motion is on 14:42:42  
20 the basis of what I would call the Rolling Stones' test. 14:42:45  
21 It's based on their hit song which begins, and I'm sure the 14:42:48  
22 Court is familiar with this given the Court's love for pop 14:42:53  
23 music, "nothing from nothing leaves nothing, you got to 14:42:54  
24 have something if you want to be with me." 14:42:58

25 As the plaintiffs' brief seems to recognize the 14:43:00

1 key question here is one of jurisdictional fact, and, 14:43:04  
2 specifically, how are medical monitoring remedies actually 14:43:08  
3 designed and how do they actually work in practice in the 14:43:12  
4 courts where they have been adopted. 14:43:15

5 In fact, the Rizzo plaintiffs acknowledge on Page 14:43:17  
6 9 of their reply brief that the remand issue here 14:43:21  
7 effectively turns on this very critical issue of fact. On 14:43:25  
8 that issue the plaintiffs have submitted no evidence. They 14:43:29  
9 have nothing. 14:43:31

10 By contrast, the defendants have submitted an 14:43:32  
11 extensive affidavit from an expert on medical monitoring 14:43:36  
12 remedies, and that affidavit is the only evidence before 14:43:39  
13 the Court on this key issue and, therefore, must be taken 14:43:42  
14 as uncontested. That affidavit shows beyond any doubt that 14:43:46  
15 in the real world medical monitoring remedies cannot just 14:43:51  
16 be divvied up and apportioned among individual plaintiffs. 14:43:57  
17 They entail enormous fixed costs that don't depend on the 14:44:02  
18 number of complainants and far exceed the jurisdictional 14:44:03  
19 minimum of \$75,000. And, therefore, it is those fixed 14:44:08  
20 costs of a medical monitoring remedy, not the benefit or 14:44:11  
21 the value to each individual plaintiff, that this Court 14:44:14  
22 must consider in determining whether the jurisdictional 14:44:18  
23 minimum has been met. 14:44:22

24 Now, given the substantial fixed costs of 14:44:23  
25 providing medical monitoring, virtually every other federal 14:44:27

1 court to address this issue has found, as we urge the Court 14:44:31  
2 to do here, that medical monitoring entails a common fund, 14:44:34  
3 and, therefore, that the jurisdictional amount is satisfied 14:44:41  
4 on that basis. 14:44:43

5 In fact, we have discussed these at some length 14:44:45  
6 in our brief, but there are six other federal court 14:44:48  
7 decisions in very similar mass tort-type cases that have 14:44:52  
8 found that a request for medical monitoring raises the 14:44:56  
9 claim for a common fund, and, therefore satisfies the 14:44:59  
10 jurisdictional amount. 14:45:03

11 The plaintiffs have cited only one case that they 14:45:05  
12 even claim goes the other way, and that's a case called 14:45:10  
13 Gianopolis from the Northern District of Illinois. But 14:45:13  
14 it's clear that the defendants in that case lost because 14:45:19  
15 they had failed the Rolling Stones test. They hadn't 14:45:19  
16 submitted any proof as to the fixed costs associated with 14:45:22  
17 the medical monitoring remedy, and that was decisive to the 14:45:25  
18 court there. 14:45:30

19 The court began its analysis by saying to remove 14:45:31  
20 a case to federal court, a defendant must establish the 14:45:35  
21 jurisdictional requirements with competent proof, i.e., 14:45:40  
22 evidence which proves to a reasonable probability that 14:45:41  
23 jurisdiction exists. And then the court went on to find 14:45:44  
24 that there was no such proof there, and there is no 14:45:46  
25 indication that the defendant provided any evidence of the 14:45:49



1 sort that we have provided to the Court here. 14:45:52

2 I'll address briefly the alternative costs of 14:45:56

3 injunction approach which we don't think the Court needs to 14:46:01

4 reach because the common fund approach is so clear and 14:46:03

5 straightforward. 14:46:08

6 It is true that the Ford decision was dismissed 14:46:09

7 as improvidently granted. Just before arguments the Court 14:46:12

8 called for briefing on the question of whether the Ninth 14:46:14

9 Circuit, and, therefore, the Supreme Court even had 14:46:17

10 jurisdiction over the case. And I attended the argument, 14:46:21

11 and it was that issue that occupied virtually the entire 14:46:23

12 argument. 14:46:28

13 To the intent that the Justices expressed any 14:46:28

14 views on the merits, and, of course, it's difficult to draw 14:46:31

15 much from oral argument, but they seemed very receptive to 14:46:34

16 the idea that these types of cases involving extensive 14:46:39

17 equitable type remedies are the kinds of cases that ought 14:46:42

18 to be in the federal courts rather than the state courts. 14:46:44

19 There were at least two Justices with questions that 14:46:48

20 suggested that. 14:46:51

21 Now, we are not going to ask the Court to read 14:46:53

22 those tea leaves and try to anticipate where the Supreme 14:46:56

23 Court would go or will go once it finds an appropriate case 14:47:00

24 in which to resolve that issue, but we do think it's 14:47:04

25 instructive that at least at the Supreme Court level there 14:47:08

1 seems to be a feeling that these are the kinds of cases 14:47:11  
2 that ought to be in federal court. We think that's true 14:47:13  
3 here and we urge the Court to deny the motions to remand. 14:47:17  
4 Any questions?

5 THE COURT: No questions. Brief reply. 14:47:24

6 MR. ROGERS: Judge, if I may speak to that 14:47:29  
7 affidavit accompanying their brief. What is the price of 14:47:31  
8 medical monitoring for this class action going to be? And 14:47:34  
9 the affiant in their brief does not establish that in a 14:47:38  
10 hard dollar and cent, and not even a range to my reading of 14:47:42  
11 it. Trying to determine how much it's going to cost for 14:47:47  
12 medical monitoring in this case is like trying to see how 14:47:49  
13 much it's going to cost to protect from terrorism. It's 14:47:52  
14 just not practical. It's not done, and there is no 14:47:56  
15 evidence in the record right now that that can occur, that 14:47:57  
16 even medical monitoring would be a substantial requirement 14:47:59  
17 or part of the settlement or part of the finding of the 14:48:01  
18 Court. 14:48:05

19 Secondly, Judge, I really want to bring home 14:48:05  
20 again the common fund principle that I spoke of and the 14:48:10  
21 evolution of it and have the Court look at it because, you 14:48:12  
22 know, they have the experts' affidavits supporting what 14:48:18  
23 these funds generally do and what has to go into them to do 14:48:20  
24 a medical monitoring procedure. But, Judge, there is no 14:48:23  
25 difference in funding medical monitoring than there would 14:48:27

1 be funding any other kind of settlement or payout. There 14:48:29  
2 is really no distinction, whereas, this common fund 14:48:32  
3 doctrine really makes very clear the requirements for 14:48:35  
4 setting aside this exemption to a \$75,000 individual 14:48:39  
5 jurisdictional limit. 14:48:46

6 Lastly, Judge, I would offer to the Court when 14:48:47  
7 Baycol is ready to offer judgment to Mr. Rizzo and Mr. 14:48:51  
8 Abrams and probably any other plaintiff in Illinois in the 14:48:57  
9 amount of \$75,001, we will accept that. 14:48:57

10 THE COURT: Thank you very much for your 14:49:05  
11 arguments. 14:49:06

12 MR. ZIMMERMAN: It's still playing in my brain. 14:49:25  
13 I thought it was zero financing on GMC trucks. 14:49:27

14 UNIDENTIFIED SPEAKER: It's Billy Preston. The  
15 Rolling Stones had an earlier version.

16 MR. SCHAERR: I claim no personal knowledge of 14:49:43  
17 that. That's what my associate found on the internet. 14:49:45  
18 (Laughter.) 14:49:51

19 MR. ZIMMERMAN: Becnel's secretary. (Laughter.) 14:49:51

20 THE COURT: When do you think Mr. Zimmerman was 14:49:55  
21 last in a GMC truck? (Laughter.) 14:49:58

22 MR. HOPPER: I can assure you, never. 14:50:04

23 MR. ZIMMERMAN: My wife has a GMC truck. She 14:50:08  
24 does, Yukon. (Laughter.) 14:50:12

25 MR. HOEFLICH: She parks it next to her Jaguar. 14:50:17

1 (Laughter) . 14:50:25

2 MR. ZIMMERMAN: I think we are done with our 14:50:25

3 calendar, Your Honor. I think they are done poking fun at 14:50:27

4 me. So, I think that concludes the formal status 14:50:29

5 conference, as I understand it. 14:50:35

6 MR. HOEFLICH: Yes. For Bayer, we would 14:50:38

7 officially withdraw our reference to the Rolling Stones. 14:50:40

8 Aside from that, we have nothing further. 14:50:43

9 THE COURT: Thank you for this long day. We'll 14:50:46

10 adjourn into our executive sessions. I'll first meet with 14:50:51

11 the PSC and the defendants for just a few minutes to see if 14:50:59

12 there is anything that I should be aware of, and, then, 14:51:04

13 meet with the LAC Committee and, then, we still have the 14:51:08

14 discovery matters. 14:51:19

15 MR. HAYDOCK: Your Honor, the LAC Committee may 14:51:28

16 have dispersed. We met over lunch. 14:51:31

17 THE COURT: That's fine. Dealing with the -- I 14:51:34

18 kept counsel here for the discovery matters. Ms. Weber, do 14:51:36

19 you feel that you all can get together and work out 14:51:44

20 something for me without -- and if you do need assistance, 14:51:48

21 Magistrate Judge Lebedoff will be available for your help. 14:51:55

22 Is that agreeable? 14:52:00

23 MS. WEBER: Yes. Why don't we go home and talk 14:52:05

24 tomorrow and if we have problems -- 14:52:05

25 THE COURT: At this point and time, if we started 14:52:08

1 talking, you will get on each other's nerves about this 14:52:09

2 issue. So, I think it's best that we resolve it another 14:52:15

3 day. 14:52:19

4 MS. WEBER: Thank you. 14:52:21

5 MS. FLEISHMAN: Thank you. 14:52:23

6 THE COURT: Those of you that are going to meet 14:52:25

7 with me, usually meet with me after the status conference, 14:52:32

8 we'll walk down the hall to the Judge's conference area. 14:52:35

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REPORTER'S CERTIFICATE

I, Brenda E. Anderson, Official Court Reporter,  
in the United States District Court for the District of  
Minnesota, do hereby certify that the foregoing transcript  
is a true and correct transcript of the proceedings in the  
above-entitled matter.

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Brenda E. Anderson, RPR