UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Baycol Products Litigation	)	File No. MDL 1431 (MJD/JGL)
	)	Minneapolis, Minnesota
	)	December 19, 2005
	)	9:30 a.m.

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(STATUS CONFERENCE)

Proceedings recorded by mechanical stenography; transcript produced by computer.

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APPEARANCES

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For Defendant Bayer:	PHILIP BECK, ESQ. ADAM HOEFLICH, ESQ. PETER SIPKINS, ESQ. SUSAN WEBER, ESQ. JAMES MIZGALA, ESQ. GARY McCONNELL, ESQ. LISA FLORO, ESQ.
For Defendant GlaxoSmithKline:	FRED MAGAZINER, ESQ. JAMES GRASTY, ESQ. TRACY VAN STEENBURGH, ESQ.
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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Let's call this matter.

THE CLERK: Multidistrict Litigation 1431, In re: Baycol Products. Please state your appearances for the record.

MR. ZIMMERMAN: Good morning, Your Honor. This is Bucky -- Charles Zimmerman for the PSC.

THE COURT: Good morning.

MR. LOCKRIDGE: Good morning, Your Honor. Richard Lockridge for the PSC.

THE COURT: Good morning.

MR. HOPPER: Good morning, Your Honor. Randy Hopper for the PSC.

MR. ARSENAULT: Good morning, Your Honor. Richard Arsenault for plaintiffs.

THE COURT: Good morning.

MR. BECNEL: Daniel Becnel for the plaintiffs.

THE COURT: Good morning.

MR. BRANCH: Good morning, Your Honor. Turner and Margaret Branch for the plaintiffs.

THE COURT: Good morning.

Anyone else want to be introduced?

MR. RAITER: Good morning, Your Honor. Shawn Raiter also for the PSC.

THE COURT: And?

MS. DAILEY: Deanna Dailey for the PSC.

THE COURT: Good morning.

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

THE COURT: Good morning.

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

THE COURT: Good morning.

MS. WEBER: Good morning. Susan Weber for Bayer.

THE COURT: Hi, Susan.

MR. SIPKINS: Good morning, Your Honor. Peter Sipkins for Bayer.

THE COURT: Peter.

MR. MIZGALA: Good morning, Your Honor. James Mizgala for Bayer.

MR. MAGAZINER: Good morning, Your Honor. Fred Magaziner for Glaxo SmithKline.

THE COURT: Good morning.

MR. McCONNELL: Good morning, Your Honor. Gary McConnell from Bayer.

MS. FLORO: Good morning, Your Honor. Lisa Floro from Bayer.

THE COURT: Good morning.

MR. GRASTY: Good morning, Your Honor. James

Grasty for Glaxo SmithKline.

THE COURT: Good morning.

MS. VAN STEENBURGH: Good morning, Your Honor. Tracy Van Steenburgh for Glaxo SmithKline.

THE COURT: Good morning.

Before we move into the agenda here, I should note to both sides that I have appointed Ms. Steenburgh -- Ms. Van Steenburgh to a court committee. It's one of our most prestigious committees. She's practiced before me for a number of years and it has nothing to do with the Baycol litigation. So I just wanted to give transparency to that.

Mr. Zimmerman.

MR. ZIMMERMAN: Good morning, Your Honor. It's been some time since we have been formally before you. Frankly, today I'm at a bit of a loss. I really don't know what the intention of the Court is as to how to resolve and finish the business we've been working on for some time in this court. I think we're in our fourth year starting almost today. I forget when we got our transfer order.

THE COURT: That's correct.

MR. ZIMMERMAN: And we certainly did a lot of good work at the beginning of this matter. We've done a lot of good work coming through. We've settled thousands of cases for almost a billion three in dollars. The serious rhabdo cases were resolved.

We spent a tremendous amount of time on discovery and a tremendous amount of time trying to resolve the rest of the cases. I think we spent almost the last year trying to do that.

Frankly, I don't know where we left the track. I don't know if it's appropriate in open court to discuss it. I would be happy to, but --

THE COURT: We'll do that in chambers.

MR. ZIMMERMAN: I think the issue for us now, Your Honor, is if there isn't going to be a resolution, an end game, a packaging up of this MDL, which is what I think is the appropriate resolution at this point in time, where do we go from here.

I truly believe that our work for the most part is done, that we have discovered this case thoroughly, that we have categorized at least a third, maybe more, of the cases that remain before Your Honor so we sort of know what they are in terms of where they lie in terms of the types of severity of injury.

We have presented generic experts. We have done all of the things that we believe need to be done to secure trial dates, to secure a platform for which trial dates can occur in the transferor court.

Nobody likes to see an MDL, honestly, break up and have thousands of cases going back. But if you can't

resolve those cases, you have two choices. You can continue through process and process and process and process to basically individually wear out the litigants and use the force of dollars and pressures that a corporation can exert against an individual claimant and see if they'll give up or you can send them back to --

THE COURT: Let me ask you this question. You say that, but at some point some judge somewhere will be doing that. So what is the --

MR. ZIMMERMAN: Well, here's the difference, Your Honor. I guess here's the difference. When you send the case back to a transferor court, that transferor court will then look at the case as an individual matter dealing with the counsel that are responsible for the case, plaintiff's lawyer and the defendant's lawyer, be they local, be they national, and then they will resolve through whatever means that court wants and the parties choose to effectuate to either reach a resolution or a trial, they try the case.

I just don't feel that you can continue to apply categorization, requirements of more filings --

THE COURT: Well, let's back up. Not even dealing with categorization, because I think that's out the window because Bayer has said that's not necessary and it's a waste of time, everyone's time and money, to even be considering that. And so the question becomes let's get back on the

pretrial discovery stage and do the discovery that each and every case would have to do anyway and then --

MR. ZIMMERMAN: That's the question.

THE COURT: Well, why is this any different than PPA?

MR. ZIMMERMAN: I'm not involved in PPA, so I can't speak correctly to PPA. I can speak to --

THE COURT: I can tell you that they have done all the discovery, they have had a Daubert hearing, they've had case-specific discovery, and cases are being remanded. That doesn't stop cases from being remanded. They are just ready to go back.

MR. ZIMMERMAN: So let's break it down. The first question is Daubert, should there be Daubert in this court; and if so, what's the effect. That's the very first question.

I say to this Court that we're not talking here about a Daubert where there is no question about -- well, we're not talking about the type of science for which there is scientific disconnect.

We're talking about a muscle damage case for which there has been no question throughout the course of this litigation that Baycol can cause. They've settled thousands of these cases. There really is no intellectual question.

The second part of that is what about something

less than rhabdo. I think it's very clear that the science provides that there is no question that Baycol can cause damage to muscle that is -- that does not approach, does not end up at rhabdo. If there's a legitimate scientific question there, I don't know what it is.

But let's assume there is for the moment. The Court could have a Daubert hearing, but the question then becomes is there universal acceptance of that Daubert. I think the jury is wide open on that.

I know in Propulsid that issue never got resolved because even though there were Daubert hearings, there was never a decision that those Daubert findings -- now, again, we have a different kind of causation there, a whole different kind of mechanism, but those findings were universally applicable in the transferor courts. That issue was never decided by Judge Fallon.

So I think you have that question of do you need them; and if so, do they help the transferor court. The second question you asked, I think implicitly, was should you have case-specific discovery --

THE COURT: Well, let me answer -- throw out some answers to you. If there are issues dealing with Daubert, I think this Court should hear them and most definitely they will be useful to the transferor courts.

MR. ZIMMERMAN: And, Your Honor, if that is your

position, then we'll have to have Daubert hearings. I don't believe there is a universal -- there is a real question of that, but if the Court believes there is based upon the science that has been presented --

THE COURT: Well, whether or not there's -- I don't know if there is. The defense may not raise any issues that causes any problems. I'm just saying if there are issues, if there is going to be a Daubert hearing, then I'm the one that should hear it.

MR. ZIMMERMAN: But all I'm saying is to what end, because is it universally applicable. I'm not arguing --

THE COURT: It's advisory. Certainly if I rule in your favor, I'm sure that you will be pounding the table telling the judge that he or she should accept my ruling.

MR. ZIMMERMAN: Actually not, Your Honor, because it's not up to me when they go to the next court and the transferor --

THE COURT: I'm assuming that you have some cases.

MR. ZIMMERMAN: Yes, certainly. Well, certainly. Taking Daubert aside -- we can have Daubert hearings. I don't think they're necessary. I don't think they're going to advance the cause. I don't think it's going to be that helpful.

THE COURT: I understand that, and I'm saying I don't know if there is any issues. Mr. Beck may stand up

and say the science is there, you've presented the necessary people that they're not going to challenge that and that's not an issue for this Court.

MR. ZIMMERMAN: It doesn't seem that's where they're going, but --

THE COURT: I don't know.

MR. ZIMMERMAN: So then the next question is this one of individual case-specific, client-specific, doctor-specific causation. I don't think that's the job of the transferee court, Your Honor. It is a matter of -- you know, the question is where do you draw the line on what is to be done in the transferee court versus what is to be done in the transferor court.

I personally have never been involved nor am I aware -- again, I'm not involved in PPA -- where the transferee court requires plaintiff and defendant to fully discover the case-specific causation in the MDL court. I don't think it's a good use of time.

Certainly from the Plaintiffs' Steering Committee point of view -- these are not our clients. We are doing case-specific stuff. So what we're going to have to do is each time there's a case-specific we've got to contact the case-specific lawyer, the lawyer on that particular case, and he or she then has to present the discovery and sit for the deposition and/or the discovery because these are very

case specific. Pretty inefficient to do that in Minneapolis, Minnesota, Your Honor.

I propose and I support the idea of doing that back in the transferor court. I think that would be the best place to do it and the place where it would be most efficiently done and where it would be done under the local rules of that court and the local laws of that jurisdiction.

So when you get into the case-specific stuff I believe, quite honestly, it's just an attempt by Bayer, who has total containment of all of the cases herein, to continue to hammer away on each specific case, causing each particular plaintiff to have undue hardship to come into Minnesota --

THE COURT: To give you an example, you talk about this and I've heard -- I don't mean to stop you, but I want to get to some of these issues and you can address them other than repeating what I've heard for the last year.

Judge Rothstein in her case management order dealing with depositions, I think it's case management order number 6, D, she says, she orders, Defendant shall be entitled to conduct a total of ten depositions as part of their case-specific fact discovery of each case transferred to this court. For purposes of this order, treating physicians shall be considered fact witnesses. Absent agreement by the plaintiff, defendants may apply to the

Court to conduct further depositions only upon a showing of good cause and the specific identification of the individual or individuals sought to be deposed. The deposition of each plaintiff shall be limited to seven hours actual deposition time absent agreement or further order of this Court upon a showing of good cause. Depositions of all other case-specific fact witnesses shall be limited to four hours of actual deposition time unless defendants can show a need for additional time to conduct a particular nonparty deposition. And it goes on. So it's there.

MR. ZIMMERMAN: That's --

THE COURT: And there are hundreds of cases that have gone through the process and that are being remanded for trial.

MR. ZIMMERMAN: Your Honor, if it is your will to have ten case-specific depositions, up to ten --

THE COURT: Please don't put words in my mouth. I'm just saying in her order that's what she ordered in her case. She's had a Daubert hearing. She's now doing case specific and cases are being remanded. It wasn't a situation where they stopped the plaintiffs from having their cases litigated. It just got the cases case ready and I guess --

MR. ZIMMERMAN: It's one way of --

THE COURT: I am going to hear my words from

Mr. Beck repeated to me again about what I said early on in this case. And so that's where we're at.

MR. ZIMMERMAN: Your Honor, I mean, if that's the position of this Court, you know, I'm sitting here arguing against a position that the Court believes is the appropriate one. I don't think it's the appropriate one. I do not think MDLs should or are set up to do case-specific discovery. I believe that is the responsibility of the trial court. Judge Rothstein has done it differently. This Court apparently is deciding to do it differently. I think what you're really --

THE COURT: I haven't decided anything.

MR. ZIMMERMAN: You are certainly leaning that way, that's what I'm feeling.

THE COURT: Can't I be the devil's advocate? I am going to do the same thing with Mr. Beck.

MR. ZIMMERMAN: I beg your pardon.

THE COURT: But I'm throwing out the issues that I have to decide and so --

MR. ZIMMERMAN: Well, let's play out that scenario, Your Honor. Let's assume we adopted a Judge Rothstein type of mechanism here, a procedure. The deposition notices will go out and the plaintiffs' lawyers around the country with the cases will have to make some very interesting decisions about how much discovery Bayer

wants them to put forward and how much they're willing to respond to; and it will unfold and it will be a long process, it will be complicated, and it will be administered here.

THE COURT: Well, the number of depositions, isn't that where the PSC comes and gives the Court guidance of --

MR. ZIMMERMAN: Sure.

THE COURT: -- how many depositions? You've told me that we've got the different categorizations and you can figure out, well, for a case that may be worth a thousand dollars you're not going to take ten depositions.

MR. ZIMMERMAN: That's my point, Your Honor.

THE COURT: Well, why would you --

MR. ZIMMERMAN: Of course they will. Why wouldn't they?

THE COURT: Why wouldn't you submit to me what the appropriate number of depositions would be on certain cases?

MR. ZIMMERMAN: Let's look back. History has been a good lesson for us. We did the categorization. I stood up and I said to the Court, I'm going to take a bold step, Your Honor. I'm going to come forward and I am going to sit down with Adam and the defense side and try and come up with a categorization plan where we can get some simplified answers to what do we really have here. And let's look at what that process resulted in. They never were satisfied

with the reports. We --

THE COURT: I'm asking you this. Why wouldn't -- why can't you as the PSC when I'm setting down the ground rules for the number of depositions, the hours to be taken, why wouldn't you be able to venture to the Court to say that cases that have been earmarked for Category 4 or 5 are worth a thousand dollars, Your Honor, and therefore these cases were remanded to the appropriate court, no more than two depositions would be necessary, one of the physician and one of the plaintiff?

MR. ZIMMERMAN: Let's just look at that. A case that's worth a couple of thousand dollars and you take the deposition of a doctor and a witness and you've already put in perhaps -- at least a third of them have put in a case-specific report, you've not only burned the thousand dollars, you've probably burned $5,000, $6,000. What I'm saying to Your Honor is --

THE COURT: But wouldn't that happen --

MR. ZIMMERMAN: Don't know what they're going to do back there, don't know what the judge is going to do back there, don't know how they're going to handle it.

There also was a mediation program in this Court that is a condition precedent to sending them back where at least the Court through Mr. Remele's office or through Haydock's office or through the Court's office is going to

say, Folks, you've got a case here that's a B2 case under the original categorization and there's no hospitalization, but there's some objective findings of muscle wasting or muscle weakness. The demand is $12,500 or the demand is 32,500, whatever it is. Does it really make sense to have this case discovered by taking three or four depositions? Aren't we better off doing this, that, or the other thing? Can't we reach a mutual meeting of the minds?

The only way that's going to happen, Your Honor, is if you don't have litigation fatigue come between that, that process, and the day of reckoning. If we allow litigation fatigue to be the order of the day, if we allow just more process to be put onto the back of the plaintiff in a case that we all agree is not a rhabdo case and is not a big money case, say something in the six figures or more category, and you're in federal court, don't we have a duty to make that economically reasonable and viable or do we just say, no, we'll just allow any procedure that the defendants want that I can then come in and seek protection on?

But it makes no sense to set it up in a way like Judge Rothstein did where you say ten depositions, seven hours, but I have the right to come into court and say on this particular category of cases we should limit it to two hours or we should limit it to two depositions.

I think the time and effort spent in that will be very self-defeating and I'm trying to come up with a procedure whereby an admittedly small value case is handled in a way that a small value case can get justice without being worn out by litigation fatigue.

It's just the reality of where we are, Your Honor. When you take the big cases out of the case -- and we agreed to do that -- and you have the smaller cases left, it seems to me it makes some sense to invent procedures or agree on procedures that can resolve smaller cases with less wear and tear on the litigants and the Court than cases that are, you know, death and rhabdomyolysis cases.

My point to Your Honor is to try and direct some procedures, which is why I think sending it back to the transferee court -- excuse me -- the transferor court is correct, where that reality on a case-by-case basis, not statistically and not in the terms of hundreds of thousands of cases, but two or four or six cases before a particular district court can be looked at and said, You know, folks, it doesn't make a lot of sense here to be spending all this money and all this time doing all this discovery when all the plaintiff seeks is X and let's see if we can resolve it.

Now, if you can't resolve it, maybe you have to go that way, but I think the litigant is entitled and I think the district judge is entitled and I think the defense

counsel is entitled to have that discussion, just like you would with any case that came before Your Honor.

Because what we're really talking about now, Your Honor, is not MDL, not common pretrial discovery, not the kinds of things that are usable in every case around the country, but things that are very specific to Mrs. Jones' and Mrs. Withers', I guess is the name we've used around this courtroom, case.

And I'm saying to Your Honor let's make it -- let's tailor it in such a way that it's really based upon the reality of the case.

THE COURT: I can't imagine any case coming before me on a Rule 16 that I would tell the defendants that they could not take any depositions.

MR. ZIMMERMAN: Of course not, but what if they came in to Your Honor and said, Listen, Mr. Jones has what we would call a B2 case, he has a doctor saying he has real muscle damage, it didn't become rhabdo, it lasted for six weeks and he didn't go to the hospital, and the defense came in and said, You know, I want to take Mr. Jones' deposition, Mr. Jones' doctor's deposition, Mrs. Jones' deposition, the children's deposition, and a couple of other treating doctors' depositions.

It's their right, they have the right to do that, but you sort of kind of have to look behind at why would

they be doing that. Are they really trying to do that to learn the facts and prepare for trial or are they really doing that to talk Mr. Jones out of his case?

At some point we have to look at that reality, Your Honor. Four years in the MDL, spent a lot of time in discovery. Let's assume they put in a medical report under Rule -- is it 26? -- the medical report and they've been sitting around waiting to see what happens.

Most of the time end games come out of MDLs. Not this one. And now the question before the Court is how much -- how many deposition notices can they send out before the other side is going to say, You know, it just doesn't make any sense. I was injured, Bayer had a bad product, Bayer should be responsible, Bayer, you know, did this, Bayer did that, but we can't afford to try the case.

If the answer from the Court is we just play, but we have to keep the rules and the rules are that they can take ten depositions, you will find every case going away. If that's the result that we seek, we can set up enough signposts along the road to give every plaintiff in the country the message, Just go away. Bayer is never going to face your case. They're just going to use all kinds of procedures to keep you out of court. You know something -- I mean, that's just sort of the reality.

We can lock the doors to the federal courthouse or

we can make them very hard to open, Your Honor. I'm trying to make them a little easier to open in a case of modest value.

Cases are of modest value not because they're modest cases, Your Honor. It's because there's a billion three of cases already been revolved. So it's not like we can sit here and demean this MDL as being full of a lot of small cases. That's what's left.

And I tried very hard for the last year to find a mechanism to resolve those cases that are left. Bayer doesn't want to do it. I guess it's their right. It certainly is their right.

Now we have to say so what do we do about that. Do we just keep litigating and litigating and litigating so the cases go away or do we come up with some way to do it so -- you know something, let's give them a trial?

If we were in state court, Your Honor, if we were in a smaller jurisdiction, if you will, they would go back to trial dates. They would get judges in front of them and they would all look at each other and say, Mr. Beck, Mr. Zimmerman, does this make any sense? Can't we get this case resolved? If you want to try it, we can try it, but --

THE COURT: But that would be after discovery.

MR. ZIMMERMAN: It would be, Your Honor, but how much discovery, what's necessary, what's needed, what's

appropriate.

THE COURT: You forget that I was a state court judge.

MR. ZIMMERMAN: No, I don't, Your Honor. That's why I said it. I know very well you were a state court judge.

THE COURT: Exactly. And the discovery would take its due course before --

MR. ZIMMERMAN: I understand. Under whose watch is the question. It's under whose watch is the question I'm asking.

You know, experience teaches us that nothing is easy in this MDL. We haven't had any easy issues, we haven't. Sometimes you do. Sometimes you don't. None of the stuff in this has been easy. Everything has been fought over.

If we would have had a little easier time coming to agreement on categorization or coming to agreement on the things that should be included in a Rule 26 report or coming to agreement on almost any of the issues that we had to march over over the last four years, I might be before Your Honor saying, You know, reasonable minds will figure this out, we'll figure out something between the plaintiffs and defendants that makes sense in a small case and we'll come before you and try and see if we can adopt that as our

procedure. Unfortunately, today where we sit that's not the way things are going. It's hardball all the way. It's hardball all the way.

And I'm just saying to Your Honor if you've got small cases left, don't we have a responsibility to tailor something that takes into account the magnitude of the case versus the desire for hardball?

It's no mystery that Bayer wants to put all kinds of procedures in front of these plaintiffs so they go away. It worked in Philadelphia and it's been working in part in the MDL. I'm trying to save that from happening. I do not think that's the right way to handle litigation, Your Honor, and that's with all due respect. I'm not casting any --

THE COURT: I understand that, but let's not -- unless Bayer is doing something under the rules that they're not allowed to do, I don't understand what you're saying.

MR. ZIMMERMAN: Well, I mean, there's a lot -- all I'm saying is let them go back. Let the -- you've got the discovery. You've got the body of knowledge that every lawyer around the country needs.

We may have to do some authentication because I just learned yesterday -- today that when these cases go into the state court the defendant, Bayer, is raising all kinds of objections about authenticity of business records and so some of the evidence isn't getting in.

So we may have to go back and have some proceedings in front of Your Honor so that the documents get into court because I just learned that they're not allowing them into court even if they were discovered in the MDL. So we have to go back and do some authenticity stuff. I think that's an appropriate job of the MDL, but I do not -- did you follow what I said?

THE COURT: Yeah.

MR. ZIMMERMAN: But I do not believe as we get into small cases and we get into case-specific stuff, if you do it in an isolated court away from the judge who's going to be trying the case and away from the lawyers who are going to be trying the case and put it in the hands of the PSC, it's not going to be done efficiently, effectively, more appropriately.

I think that is a job for the district court, I think it's a job for the trial lawyers whose clients they represent, and it's a job to be done on a case-by-case basis in the transferor court. That's where we differ.

And you say if they are not violating the rules, if they want to take discovery they can, I can't argue with that. It is the rules. What I would say to you is that we have the right to be a little more creative here and we have a right to protect claimants, whose cases are now four years old and don't have resolution, and we have a right to

protect them so that they can get to court and not have litigation fatigue be the order of the day.

I can't repeat myself any more on that point. I know I have made it clear to Your Honor.

THE COURT: Right.

MR. ZIMMERMAN: The last thing I would like to say, Your Honor, is this. I believe in this cause. I have stood before Your Honor for four years trying to do the very best job that I could to bring justice to the claims that we wanted to resolve and bring order to the cases, to the discovery process, and now trying to bring some justice and order to the cases that remain.

I will continue to do that, Your Honor, but I need to see some end in sight. I need to know that we're working towards a goal that we both understand. For the last year I thought we were working towards a goal of resolution. For whatever reason, and I don't want to discuss it here in open court, we were a snitch away, but it didn't happen.

Now I stand before Your Honor and say at some point we have to look to the end and we have to bring the process into closure; and the way, in my judgment, to bring it into closure is to get each individual lawyer involved in their individual case, do the remediation that this Court asked to have done here or through special masters, and send it back.

If we need authenticity of documents, I'm willing to do it. If the Court believes we need generic Daubert, even though it's not what I want to do, I'm willing to do it.

But when it comes to case-specific discovery, I think it's not the role of an MDL, especially when 99 percent of this MDL's money has already been paid and laid out and we're talking about the tail end of this litigation.

Even though there's a large number of cases, in terms of exchanging of dollars at the end of the day we're down to a very small amount and we should invent ways to handle this that are appropriate for the cases that we really have left to deal with.

That was the purpose of categorization and that was why I met and worked very hard with Adam and his folks to try and come up with a program, so we could see down the road and see the future of what we have and then deal with them intelligently.

That's my plea to Your Honor and I appreciate your time.

THE COURT: Thank you.

Good morning.

MR. BECK: Good morning, Your Honor. Phil Beck for Bayer. Your Honor, would you like the usual update --

THE COURT: Please.

MR. BECK: -- that we give at these status conferences?

Your Honor, in terms of pending cases, as of December 16, 2005 defendants have been served with 5,807 cases that remain active, down from 14,792 cases that have been filed since the litigation commenced.

About 10.45 percent of the cases filed in the state courts remain active, that is, about 597 out of a total number of filings of 5,717. In the federal court approximately 57.4 percent of the filed cases remain active, that is, 5,210 active cases out of 9,077 filings.

As of the last status conference, which I believe was in April of 2005, defendants had been served with 5,776 cases that were active. Of that total, 5,123 were pending in federal court and about 653 cases were still active in state court. Filed but unserved cases were not known to Bayer and are not included in these totals.

We've also included in the packet that we gave Your Honor an updated list of plaintiffs' counsel, which we had been requested to do quite some time ago and we've been doing with each of our status reports.

In terms of settlement, the defendants have settled 3,023 cases with a total value of $1,143,748,591. Of this total, I believe that about 915 have been determined to be subject to the MDL assessment and the cases that were

subject to the assessment total in their settlement value $345,359,662.

As of the last status conference -- and we've been comparing each time we do this, the numbers today compared to the last one. So as of the last status conference back in April, at that time we had settled 2,968 cases with a total value of $1,130,668,591. So the value of settlements since April has gone up by some $13 million. Of those, 875 were subject to the MDL assessment and the total value of those was $328,513,412.

Approximately 143 cases have been submitted to the MDL mediation process.

In terms of trial settings, I don't believe there are any trial settings -- well, certainly there are no trial settings for cases in the MDL. Since the last status conference we had one more jury trial. That was in Beard vs. Bayer in state court in Mississippi. The jury returned a defense verdict.

THE COURT: What type of case was that?

MR. BECK: That was an aches and pains case or muscle injury case, depending on one's terminology, but it was a nonrhabdo case.

Also, we had -- in September in the Court of Common Pleas in Philadelphia we were scheduled to try a class action for medical monitoring, a Pennsylvania

statewide class action for medical monitoring. The week before trial we had a Frye hearing in front of the judge in Philadelphia. He ruled that their expert -- well, he basically ruled for us on the Frye hearing.

THE COURT: Judge Bernstein.

MR. BECK: Yes, Judge Bernstein did. And then summary judgment was entered in our favor, and my understanding is that they've dropped their appeal on the case.

THE COURT: Let's go back to the Mississippi case. What court was that tried in; do you know?

MR. BECK: It was the circuit court of -- I'm not sure I'm pronouncing this right -- Amite, A-m-i-t-e, County.

THE COURT: And what's the circuit court in Mississippi, is that a general jurisdiction or is that a limited jurisdiction court; do you know?

MR. MAGAZINER: General.

MR. BECK: General.

THE COURT: So were depositions taken in that case?

MR. BECK: I believe so. I can't say for sure.

THE COURT: When I ask the questions, the heads are nodding.

MR. BECK: There are people who know and it's not me, so I need them to answer.

THE COURT: Adam, do you --

MR. HOEFLICH: Yes, Your Honor. It was a court of general jurisdiction and the trial preceded discovery [sic].

THE COURT: And how many depositions were taken?

MR. HOEFLICH: I do not know.

MR. BECK: I believe, Your Honor, in all of the aches and pains cases that have been tried -- we've had five trials. One was clear rhabdo, one they claimed was rhabdo and we said it wasn't, and then I think there were three that everybody agreed was not rhabdo.

But I believe in all of those, I can't tell you exactly how many depositions were taken, but certainly we took the treating physician, certainly we took any other doctors who were potential witnesses, we took experts because they presented expert testimony, we took the deposition of the plaintiff, and if they were going to have plaintiff's friends or family come and testify about how awful life has been for them, obviously we took those depositions as well. So we took the kind of depositions that you take in a personal injury case, no more, no less.

We've provided a list of state court trial settings to the Court and to the PSC.

In terms of the narrowing and categorization process, I do think that that has outlived its usefulness, but we have received 3,745 submissions pursuant to Pretrial

Order 114. Of those submissions, the claims of 2,959 plaintiffs remain active. Of the plaintiffs with active claims 1,579 submitted actual reports, 1,380 submitted only letters.

The defendants received 945 submissions pursuant to Pretrial Order 131. That included Pretrial Order 114 submissions that were deemed to be compliant with Pretrial Order 131 by agreement of the parties or by rulings of the special master. Of these submissions, these 945, the claims of 877 plaintiffs remain active. However, defendants believe that 385 plaintiffs submitted noncompliant PTO 131 reports and the defendants and the PSC have not met and conferred regarding these reports.

When duplicates are eliminated, the total number of active plaintiffs who have submitted reports under Plaintiff -- under Pretrial Order 114 or Pretrial Order 131 is approximately 2,190, including the 385 that the defendants believe are noncompliant.

We included for Your Honor a chart that shows the status of these things.

I think in contrast to the number of cases pending here, I believe now in Pennsylvania, where we started out with approximately 4,000 cases, are we down to one? So we've got one -- I guess there's one case left in the Court of Common Pleas.

Your Honor, now turning, if I may, to some of the points that Mr. Zimmerman made, and if you want -- I understand you want to talk about the matter they filed under seal in chambers. I am happy to do that there or here, it doesn't make any difference to me.

We, of course, approach this from a fundamentally different place than Mr. Zimmerman does. I wrote down something that he said. He said, We agreed to take the big cases out. They didn't agree to that. We didn't agree to that. The Court didn't order that.

What happened is I stood up early down in New Orleans and I said, Here's what we're prepared to do. We're prepared to settle rhabdo cases no questions asked. As long as you were taking our medicine at the time, you were diagnosed as rhabdo, we're going to settle those cases for fair money without fighting about causation, without putting anybody through any expense at all. We'll just sit down and settle those cases, and we made fair offers and plaintiffs' lawyers accepted our offers. It wasn't because of any agreement that we were going to carve those out of the MDL.

We also said that we will not pay for bogus cases, and we haven't. We haven't paid a penny for an aches and pains case. We have tried three or four aches and pains cases at significant expense to us rather than pay a thousand, 2,000, 10,000, or 50,000 dollars; and that's been

part of our program since the very beginning.

Now, Mr. Zimmerman many, many months ago announced at a Baycol plaintiffs conference that was then publicized, he said that Bayer has done a good job settling the rhabdo cases and you don't need us in the MDL, you don't need the Plaintiffs' Steering Committee to help you with your rhabdo cases because Bayer has come forward with a fair settlement program and you don't need us, but bring us all your aches and pains cases because that's where we can really do you some good.

So he advertised for aches and pains cases and he got them and now he wants us to solve his problem, that he went out and solicited referrals from lawyers who have cases that aren't worth anything, and he wants us to pay for his cases that aren't worth anything. These are the cases that I said on the first day and I've said every day since then we are not going to pay for.

You know what? We could not have afforded to pay over a billion dollars for people who actually suffered from a side effect from our medicine if part of our program was to pay people who didn't suffer anything.

You know, it gets a little bit lost in the shuffle here that when you hold up a company for clients who didn't suffer any injury or didn't suffer anything any different from a normal side effect that comes with any statin, if you

hold somebody up for dollars for them, that company can't afford to pay fair compensation.

MR. ZIMMERMAN: Your Honor, I don't see the point of this at all and I object to this. This is again Mr. Beck lecturing to me about the way I practice law and I object to it, Your Honor. That's not the point of this discussion.

MR. BECK: I sat through his lecture, Your Honor, and I would like to --

MR. ZIMMERMAN: I didn't lecture you one bit. I talked to the Court. You're talking about the things that I did or didn't do at a conference and my referral of cases. I didn't get any cases --

THE COURT: Mr. Zimmerman, please.

MR. BECK: Your Honor, it's important to us to stay with our program because the only way that you can afford to pay people who actually suffered the side effect is if you refuse to pay people who did not. That's the only way we could have afforded to do this, and we did the right thing and we're going to continue to do the right thing.

Now, Your Honor, in terms of where we go from here in the MDL, we're in an unusual situation where almost everybody --

THE COURT: Well, before we get there, let's -- since you said that you were willing to discuss the negotiations in public, we might as well do it in public and

have it on the record.

MR. BECK: I'm delighted to. Let me start with a chronology, and I'll run through the chronology that's reflected in the filing that they made under seal and then I'll also put in some things that were omitted from their chronology.

Your Honor, we can start earlier, but a sensible date to begin is November 2nd when we were in Chicago. Up until that time we had had a lot of discussions over the last year seeing if we could reach agreement. We'd made various proposals.

As I had indicated when we were in chambers during the year, we were willing to go the extra mile on small categories of cases as much out of deference to the Court as anything else because we understood that you would feel more comfortable if people who had objectively verifiable symptoms from our medicine of muscle aches would get some compensation.

It was our view, as I said repeatedly in chambers, that those people don't have legitimate claims, but we're willing to consider it if we could come up with objective criteria and dollars that made sense to us and a mechanism that made sense to us, all in the context of this would have to be part of an end game rather than just an open-ended invitation.

So we had various conversations that Your Honor is aware of over the last, I'd say, close to 12 months. I think we started in January down in Miami. So maybe 11 months, sort of bringing us up to November 2nd in Chicago.

The special masters were doing a little shuttle diplomacy to see what our bottom line was and what the Plaintiffs' Steering Committee's bottom line was. We weren't making progress there and then Mr. Zimmerman asked if he could meet privately with me. Mr. Zimmerman and I met.

This does not appear in the filing that they made under seal, but during this meeting Mr. Zimmerman said to me that the Plaintiffs' Steering Committee will accept the terms of your proposal with minor tweaking on the dollars, but we are going to need an award of attorneys' fees in order to make it happen.

And I said to Mr. Zimmerman, We'll consider that. You put together your best proposal incorporating our terms that you say you're agreeing to and the amount of attorneys' fees that you believe is the minimum that would be acceptable to the Plaintiffs' Steering Committee.

And I said, To me this is not going to be a negotiation. I am going to take this proposal to my client one time and one time only. So if you give me a number that's too high, it's not going to be a negotiation where I

come back with a lower number. And if you come back with anything other than the terms that we proposed to the special masters with minor tweaking on the dollars, then it's going to be a nonstarter. But you put together your proposal and communicate it to me. He said, Okay.

So then he came back and in a follow-up telephone call he said, Number one, we agree to your categories and to the -- your approach that you've outlined in your various proposals that Your Honor is familiar with. We're asking for a little more money for Category A and Category B, and I can't remember right now, but it was a thousand or 1,500 dollars more than what we had previously been prepared to agree to.

I talked with Mr. Zimmerman about how he should not be coming back with the dollars that the special master had suggested because those would be too high and that would be a nonstarter for us.

So he came back with modest increases in the amounts that would go under Category A and Category B and he said that their bottom-line, can't go below it, number for attorneys' fees that would go into the common fund was 11 and a half million dollars. And I said to Mr. Zimmerman, both orally and then subsequently in an e-mail that he presented to the Court, that I would urge the client to accept that proposal and I asked him then to put it in

writing.

And then what I got from Mr. Zimmerman was completely different from what he said he had agreed to both when we were in Chicago and over the telephone. I got from him a proposal that, instead of accepting all of our terms with slightly higher numbers and 11 and a half million dollars for the Plaintiffs' Steering Committee, had all of his terms and none of our terms.

And I called Mr. Zimmerman up and then editing out the expletives what I said to Mr. Zimmerman was, Bucky, you probably have blown your only chance for a deal because while I'm prepared to urge the proposal that you said you agreed to, I am not prepared to urge this proposal because these are your terms, not our terms. We've rejected these terms since last January. All you've done is add 11 and a half million dollars at the end of something that we already found unacceptable.

Plus he had added in a Category C and nobody else in the room understands this, but those of us who have been in the discussions for the last 11 months know that the Plaintiffs' Steering Committee has constantly urged a Category C which would be some sort of amorphous category without objectively verifiable criteria.

And I said to Mr. Zimmerman, Your Category C is a huge problem for us as well. The way that you've written

the thing is not objectively verifiable. It's just an open-ended thing. We have no idea what our exposure would be. That's a nonstarter for us.

Mr. Zimmerman responded that, Gee whiz, there must have been some failure of communication and that I should write up the deal that I thought he had agreed to.

Incidentally, Your Honor, if you look at his submission under seal, it's fascinating. You look at where he has a block quote of what he sent in the letter to me and in his submission he says, These are the terms of the agreed settlement.

Where is it? I've got it. You look over, Judge, to page -- I guess it's the third page. They're not numbered, but under terms of the settlement -- do you have that in front of you, Your Honor?

THE COURT: Yes, I do.

MR. BECK: So here he's quoting, These are the terms of the agreed settlement. This is his letter to me. Now, if you actually look back to his letter, which is an attachment to this -- it's the second attachment after my e-mail saying, I'll go to bat for you on this.

THE COURT: Yes.

MR. BECK: It starts off, This letter is the general outline of a proposed settlement. That's what he sent me, was a general outline of a proposed settlement, and

by the time he quotes it in his under seal filing it's These are the terms of the agreed settlement. So you can see that we've had some difficulty communicating.

So I tell Mr. Zimmerman that we've got these grave problems because these are not the terms that he said he was going to agree to and propose, instead they're his terms plus he's got Category C in. So he said, Well, why don't you take a shot at writing up something that reflects my thinking, "my" being Mr. Zimmerman's. So I'm struggling with that.

And then I called him up in a subsequent phone conversation and I said, There's another problem with the 11 and a half million dollars. I said, People from my side who know a lot more about this than I do are questioning whether it's ethical for us to pay 11 and a half million dollars into the common fund, which would basically go to the Plaintiffs' Steering Committee, in exchange for their agreement on these terms. And I said, I'm not an expert in this area, but people who are are questioning the ethical propriety of a payment to you and your colleagues of 11 and a half million dollars in exchange for agreeing to this procedure. I said, Help me out on this.

And Mr. Zimmerman said, Well, you know, the only ethical concern is -- what you have to do is agree to the terms of the settlement first independently of any dollars,

which we've done, and then afterwards it's okay if you agree on the amount of fees. That didn't really address my concern, but it addressed one ethical issue.

So anyway, we then go back to the drawing board and I sent him a -- we had more -- I think we may have had one more conversation where I told him we were having trouble with Category C, we couldn't figure out any objective criteria that we thought they would find acceptable, and meanwhile we were getting tired of trying to do their work for them in drafting a Category C and I explained the concern I had with the 11.5 million and whether that would be ethical. Bucky, Mr. Zimmerman, said, I'll get back to you on Category C and he explained his view on the ethics.

Then there was an e-mail exchange that Mr. Zimmerman did not share with you and this was on November 22nd. I'll provide -- may I hand a copy of this up, Your Honor?

THE COURT: You may.

MR. BECK: So this was left out, but I think it's kind of important. Reading from the bottom up, Mr. Zimmerman first e-mails me on November 22nd saying, Phil, I have not heard back from you or Adam, as we discussed a couple of weeks ago. I know both of you are very busy with the Vioxx Daubert hearings before Judge

Fallon. Can I get your written proposal at your earliest convenience.

Now, Your Honor, this is now weeks past what they're representing to the Court where we have a done deal agreement. He's saying, Can I get your written proposal at your earliest convenience. If you recall, you indicated I would have your thoughts in writing last Thursday. And he says, I've been working on tightening up Category C, but I will await your response.

And then I respond at the top of the e-mail string, I hope to get back to you soon. If you have something in mind for Category C, send it along. All previous versions have been unacceptable to us and this is a major sticking point. So that's what I said on November 22nd to Mr. Zimmerman. He never did get back to us with his tightened-up Category C.

So then we had a discussion within our camp as to whether we should go forward. I don't think it would be appropriate for me to share all of the comments made, but I will report to Your Honor that there were three major reasons why we decided that we could not go forward anymore.

The first one is that we had no confidence that we could ever reach an agreement that would actually be lived up to by the other side. We had a situation where Mr. Zimmerman had told me twice that he was accepting our

terms and then adding 11 and a half million dollars to it and yet when he communicated the proposal to us they were not our terms, they weren't anywhere close to our terms.

And there was grave concern within our camp that if we can't even get that in a straightforward way, when somebody tells you they accept your terms but want to add 11 and a half million and then they communicate to you something fundamentally different from that, our concern is even if we could rewrite this in a way that we could live with, we don't have any confidence that the other side will ever live up to it. So that was number one.

And I must say the concerns that we had on that score have been borne out by the under seal filing that was made because now Mr. Zimmerman is representing to this Court that his letter to me was an agreement that I entered into with him. That's not true. It's worse than not true.

The second problem that we had was that they continued to insist on a Category C without ever defining it in a way that we could get our arms around it. And as Your Honor knows, that's been a nonstarter for us from day one.

And then the third problem that we had were the ethical concerns about the 11 and a half million. And, again, I don't hold myself out as an expert on this, but as Mr. Zimmerman described the ethical issue, he created an insurmountable problem for us.

Mr. Zimmerman described it as the key is to reach an agreement on all the terms of the settlement and then after that and only after that is written in stone is it okay to agree on the amount of fees. But then the problem is when he came back and changed the deal and wrote a proposal that did not reflect our terms and had the 11 and a half million dollars in it.

Now all of a sudden I'm back in a negotiation with him over what the terms of the settlement would be, is there going to be Category C, is there not. Even Categories A and B, he wrote them his way, not our way.

So that if Mr. Zimmerman is right that the only ethical problem is that you have to reach an agreement first and then once that's done, then you can say, okay, what are fair fees, by redoing the terms that he said he was agreeable to he created a situation where any negotiations would have the fees and the terms wrapped up into one thing, which he tells me you can't do.

And then there's a broader concern from our side on the 11 and a half million and that is -- and I did tell Mr. Zimmerman I would urge it if we had the terms that he said he was going to agree to, but from our side there was a very serious concern about is it right. You know, we don't -- the ethics and then there is is it right and what's it going to look like.

We were concerned that we had a proposal out there for a long time that basically would deliver modest compensation to a relatively small number of people, and we were willing to do that because Your Honor was concerned about those people.

To tie that to the payment of 11 and a half million dollars to the Plaintiffs' Steering Committee, there were folks on our side who were concerned about whether that passed the smell test, frankly, whether it looked like we were buying off the Plaintiffs' Steering Committee to get their acquiescence to a settlement program that was not going to benefit a huge number of people. It was designed, in fact, to benefit a small number of people and to give them very modest compensation.

The likely cost to us of paying the two or three thousand dollars to however many people were going to be involved would be dwarfed by the 11 and a half million dollars that would be going to the Plaintiffs' Steering Committee.

I don't know whether we could have gotten over that problem or not internally, but when you combine that issue with the fact that Mr. Zimmerman told me it's a deal breaker that they need Category C and yet we didn't have a Category C that made any sense to us and when you combine it with the fact that we never did have from them anything in

writing that actually showed that they agreed to the terms they said they agreed to and we didn't believe that we could trust them to live up to it, we threw our hands up in the air and said, We've tried a long time to do this, we've traveled all over the country trying to do it, and we feel like we've made -- we've gone the extra mile, but it's not happening.

So that's our perspective on this process, Your Honor.

MR. ZIMMERMAN: Could I respond with my perspective on -- I think it might be instructive.

THE COURT: You may.

MR. ZIMMERMAN: Okay. First off, Your Honor, I need to be clear on a little bit of the history, at least from my perspective. I must say to Phil and to anybody in court today, Your Honor, that, you know, perspectives are perspectives. I mean, we all come to these from our own perspectives and we try and -- we see things as they appear.

And so I'm going to tell you how I see what I saw and what occurred and what my perspective was, because I think it's important to hear from me because I think I'm kind of being accused of bait and switch. More than kind of, I think I am.

First off, on the MDL and the solicitation, I think Phil is correct when he says that Bayer got up and

said we want to settle serious cases and they were defined as rhabdo. But nobody bought on that, people didn't buy it.

And I went out at the urging of a conference I had with Adam in Chicago where we met for coffee, I think at a Starbucks on Michigan Avenue, but I can't say for sure where that was, and he asked me to go out and start selling the idea that Bayer was in good faith and wanted to really settle rhabdo cases.

Because it wasn't resonating with the community of lawyers, and you can understand why. First of all, value. You know, we want to settle a case, but if you want to settle a cases that's worth $100 for a dollar -- excuse me?

MR. BECK: I'm sorry. I apologize. Mr. Hoeflich was whispering to me and I should not have made a sound.

MR. ZIMMERMAN: If you want to settle a case for the correct amount of money, it takes some good faith; and there wasn't a lot of good faith between Bayer and the plaintiffs community at that point in time.

And I went out -- and I think the Court will remember this. We went to Philadelphia and we had a hearing in Philadelphia. We had a courtroom full of Philadelphia lawyers who didn't buy the program of Bayer being ready to settle in good faith and we had people standing up in the back and saying, We're not ready to settle the cases.

And I went out and championed that cause at

seminars, at meetings before this Court, and all over the country to try and say, No, Bayer is going to be in good faith. Let's just begin the process. There's going to be a marketplace here. We're going to sit down with Bayer and we're going to talk about rhabdo cases and we're going to try and settle them.

And actually the plaintiffs put in -- the federal cases came in first, or some of them. We packaged them up. I think Turner was at the negotiations. I know Danny was at the negotiations. It was at the Four Seasons in -- no, you weren't? -- the Four Seasons in Chicago and we spent a whole day with the Shook Hardy people trying to create a marketplace and trying to get the cases done. They didn't get done right away, but we kept working, we kept working.

Because I truly believe at that point that I believed Bayer was going to be in good faith and get these cases settled, but I couldn't convince other people to put their cases in. Slowly but surely it occurred and slowly but surely the rhabdo case marketplace was created and fair value was brought.

But the fact is not quite as Phil, I believe, projected it to the Court, that they put up we'll settle and everyone came running in. It took a lot of encouraging and a lot of good faith and a lot of arm wrestling and a lot of work by the PSC and a lot of work with the federal

litigation to get people convinced that that was a good-faith offer and it was going to occur. Point number one.

Point number two. I did say to people if you settle your rhabdo cases in Philadelphia or you settle them in the MDL or wherever you settle them, this MDL will be the champion of the nonrhabdo cases because I believed within those nonrhabdo cases were many real cases that didn't get all the way to rhabdo but were still substantial in some way, shape, or form.

Now, the implication was, at least that's when I stood up and I got a little upset, that these were referred to my law firm and that somehow I was going to own these cases and become privy to them and owners of them and these were referrals to my law firm or referrals to the PSC for these cases. That did not occur, Your Honor.

We were just telling people, Keep coming. Keep playing in the MDL. Do your homework. Do the 114. We are going to try and engineer an end game for those cases. We are going to try and be the champion of those cases.

We believed in those cases and we went out and spent hundreds and hundreds and hundreds of thousands of dollars to get experts and to get people to tell us whether or not those cases were reasonable and they could occur and they were viable. That is what we did.

But to infer that I somehow put out a sign, Bring me your cases that you don't want to settle, I'll take them and I'm going to turn them into money that I can put into my pocket or those will somehow be my clients is absolutely false and an inappropriate statement. That's what I got excited about and that's why I stood up before Your Honor. We only wanted the MDL to become a place where these cases could be justly and appropriately resolved, and that was what I said and that is what I meant.

Next, Mr. Beck and I had a conversation in the chambers -- in the jury room, I think it was, at the federal courthouse, at the Dirksen Courthouse in Chicago. It was really the first time Phil Beck and I had had a one-to-one conversation that involved the settlement of these cases where we looked at each other and said how are we going to get to the end and what are we going to do to resolve these cases.

And we had a relatively short communication, but I would say it was in the nature of 20 minutes and we seemed to be able to connect to each other. That's how I felt. I can't speak for Mr. Beck.

I had one other engagement with Mr. Beck where I had dinner with him before this MDL started at a steak house near his office. I can't remember the name of it. Do you remember by any chance, Phil?

MR. BECK: There's so many, I don't want to get the wrong one.

MR. ZIMMERMAN: I won't hold you accountable for it.

MR. BECK: Probably Ruth's Chris.

MR. ZIMMERMAN: No, it wasn't Ruth's Chris.

MR. BECK: See, I got it wrong.

MR. ZIMMERMAN: Anyway, we had dinner before the MDL started and it was sort of what I normally do in MDLs with people, I like to meet defense counsel and say, Listen, I am going to be as up front with you as I possibly can. I hope you can be as up front with me. We are going to have a lot of disputes as we get down the road, but let's not make it personal. Let's have integrity in the process and the chips will fall where they may. It was sort of a nice introductory dinner, the first time I had ever met Phil.

I don't know, Adam, if you were there or not. I don't think you were. I think someone else was with me. I think it was Jim Dugan because Jim had known Phil from a previous case.

This is the second time I've had a one-to-one conversation of any type with Phil and I felt -- in November of 2005 and I felt I finally can communicate with Phil and we're hearing each other and we're going to get this case resolved.

And I went back to my partners. Dick was in town. I think Randy was in town. We went out and had dinner -- had lunch after the meeting on Rush Street and I said, You know, this is the first time I could look at Phil and feel like we connected. We talked to each other like professionals and I think this case is going to get resolved.

And Phil and I talked about this. I said, I accept your Category A. I accept your Category B. I don't like them, but I will accept them. I don't think the money is correct. I think we have to put a little more money on it. And we need what we called a tight C.

What we meant by a tight C was a C defined by objective standards, and I agree with Phil that that has not quite gotten designed properly from their point of view. I think I know what it is and I think I've tried to define it, but each time I do try and define it they're not comfortable with it, but let me get back to that in a second.

So then we had the A and the B agreed to. I said I would need some more money. We talked about the attorneys' fees, and his scenario about the attorneys' fees is basically correct.

Then Phil called me at the restaurant and said, I need a couple -- I just need to tell you a couple of more things; and this was appropriate. He said, You know those

numbers that the special master was talking about in chambers -- the special master had come to me and said, I think I can get you this for A and this for B -- he said, Those are not the numbers. If that's where you're going, we don't agree with that.

Because I think he thought that I was thinking the special master's numbers for A and B, the amount of compensation, was going to be the appropriate amount. And I said, No, I hear you on that, but it's going to be higher than what you've proposed. He said, I understand. And he said, Also you have to work with me on the remands. And I knew what he meant by that, but I'll leave that there for a moment. I think he forgot to mention that.

Now, the next thing I did was I went back to my office and I talked to Dick Lockridge and I said, Here's where we are. We have got to tighten up C and we agree with their A and their B. We've got to put more compensation on it and we have to think of what's the appropriate number for the attorneys' fees. We can't be too high. We can't be too low. It's a very tricky wick because Phil said to me, One number. I'm not going to negotiate with you. If you give me X and I think it should be Y, I'm not going to try and split the difference. I'm either going to say yes to your number or I'm going to say no, end of the game. And I respected that because I think we were at that point in the

litigation.

So we thought long and hard and we looked at all of our time records and we tried to figure out what would be appropriate, da, da, da, da, da, and we came up with a number, 11.5 million added -- that would be a contribution to the common benefit fund.

We put it now into a writing, and that's the writing that's attached to the under seal document. And I said, This is the A, this is the B, this is what we consider to be our tight C, and this is the attorneys' fees. I can't remember the date of that letter. It's probably right here. November 10th. So maybe a week later from the time of the meeting.

And here's where I think it went off the track. I sent that letter with the understanding that I was agreeing to his A, agreeing to his B, adding a few more dollars to A and B per case, put in the attorneys' fees amount, and tried to define a tight C. That was my intent.

On November -- I remember the day very well. I don't think Phil and I had a lot more discussion after that and then on November -- it was the Wednesday before Thanksgiving I got a call on my cell phone from Phil, I've got to talk to you right away. Well, it's like only the third time Phil has called me directly, so I figured I'll get back to him. I got back to him right away.

He said, We've got some problems and the first thing -- I don't know the order in which he talked. He talked about this ethical issue. I said, Phil, I'm not unethical. I'm not an ethics expert. We'll get -- we'll cover ourselves. We'll get an ethics opinion. We'll go to whoever is the foremost authority in Chicago or Minnesota or wherever. We'll get an ethics opinion so there's never going to be a question about the ethics of how we negotiated this and what was done and how it was done so we can make sure that neither one of us have a problem with the attorneys' fees issue. But he raised the question.

I did say to him, he's absolutely correct -- I think because I had just finished negotiating the Propulsid deal with the Johnson & Johnson lawyers where we had a similar issue where we left the attorneys' fees to the last piece in the puzzle, we agreed on all of the other terms and then we had a separate negotiation on the attorneys' fees -- I had thought that was the appropriate way to do it because that's the way we did it in Propulsid and that's how we disclosed it to the judge in that case and he felt it was appropriate.

But I wasn't standing on that. I was saying that's how I think it should be done, which is how -- he basically described it as something we would leave to the end until everything else had been pretty much agreed to,

which is what I thought we had been -- where I thought we were.

But I didn't say I know all the answers. I certainly wanted to protect both sides. The last thing I want is ethical -- any ethical problems for the Court, for the PSC, for the defense counsel over the attorneys' fees.

So, I mean, I wasn't trying to do anything nefarious or in any way underhanded. I just said this is, I think, the appropriate way to do it and that's what I explained to him and I said I will have to get more comfort.

But I said, On the A and the B, I understood, Phil, that these were your definitions of A and B. If I wrote them incorrectly, tell me what I did, tell me what I missed. It's very possible I did. That wasn't my intent. My intent was to accept your A, your B, add some money to it, and give him a tight C.

He said to me, I will have -- which is why that e-mail says Thursday. I will have to you -- I will talk to Adam. Now, he was busy preparing the Daubert hearings in Vioxx for the trial. He was busy, I think, in his Houston office. I think that's where I called him, because they tried that case in Houston. This is the Thursday before -- the Wednesday before Thanksgiving. He said, I will write something and get it to you, which is why in my letter I said, I've not heard back from you or Adam, as we discussed

a couple of weeks ago. Can I get your written proposal at your earliest convenience.

Because he said, I will provide you with a written proposal of what is wrong with your A and what is wrong with your B because he didn't describe it to me on the phone other than he said, It's not -- you didn't get it right.

I said, It wasn't my intent to get it wrong, but if I got it wrong, give me what's right because I had accepted your A and your B. With regard to C, I will work on tightening up the C.

By the way, the C is written here, Your Honor, with objective findings, dark urine, liver enzymes above normal, positive muscle biopsy, positive myoglobin. I felt those were very objective criterias for C, but maybe they weren't written appropriately or maybe they weren't written artfully because Phil described to me, Your C has all kinds of wiggle room in it and we can't have any wiggle room. I said, Fine, I'll work on tightening it up.

Then I was going to await their A and their B. Phil said to me very clearly, We'll write it up. We'll send it to you. Okay. He said he would have it by Thursday, which is the Thursday after Thanksgiving.

I waited until the Thursday -- two Thursdays after Thanksgiving and I wrote Phil and I think what I said to Phil was: I've not heard back from you or Adam. I know

both of you have been very busy with the Daubert hearings before Judge Fallon. Could I get your written proposal at your earliest convenience. If you recall, you indicated I would have your thoughts in writing last Thursday -- I would have it last Thursday. I have been working on tightening up C, but I will await your response.

In other words, until we had A and B, there was no reason for me to send him another thing that he's going to perhaps misunderstand or I was going to miswrite. I was waiting for the Thursday for his A and his B. It didn't come.

There was one more e-mail that I wrote and I think this was -- I can't remember when -- maybe a week after this. I can't remember exactly and I might be -- where I basically said, You know, I know you're busy in trial in Vioxx. When can -- you know, I haven't heard from you with regard to A and B. When can we talk? I didn't want to bother him with proposals and exchange things because I knew he was in trial and I was trying to be deferential.

Four or five days after that -- I don't remember the exact number of days -- I get an e-mail, not a call from Phil, an e-mail. Sorry, deal is over. We'll never be able to do business with you. We can't do business with you. Bayer rejects everything. Sorry it didn't work out. Bye.

Now, you can imagine how perplexed I was at that

point. I thought he was going to draft me what he thought was the right A and B. I was going to draft a new C once I got his A and B to tighten it up. We had basically agreement on the attorneys' fees because he said it was one number and he said he would recommend it and it was in the realm of what he would recommend.

And all of a sudden ten days ago or whatever the number of days was -- I can't remember when it happened, but it was sometime the end of November -- I get this e-mail saying, you know, I've completely -- It's completely over, good-bye, you're done, I'll never talk to you again, an angry letter to follow. This isn't exactly what he said, but I am kind of paraphrasing.

MR. BECK: Kind of like nothing what I said.

MR. ZIMMERMAN: What he said was in his e-mail and he has the e-mail. The e-mail was, Sorry, we're not going to be able to do business. I guess I would have -- I was hoping to get a letter of what was wrong with my A and B, I was hoping to provide him a letter of what was going to be in our C, and everything else was sort of agreed to.

The point of all this, Your Honor, is I'm not asking this Court to say there was an agreement, there was a deal that you must enforce, there was anything. I'm a little bit smarter than that. I understand we didn't make a deal. What we did do, Your Honor, is get very close and we

were basically there. The words got in the way, the written stuff got in the way of the intent.

The dynamic of all the pressures that occur when you're in trial or other pressures that occur when you've got people all over the United States wondering what the hell is -- what the heck is going on in your MDL, why haven't we heard from you for a year, why are we not having status reports, what's going on and I can't say a darn thing because I'm under an order not to say anything, something got lost in translation.

And I feel honestly, Your Honor, that it would be a terrible retreat from the jaws of victory to where we are today if we didn't at least tell that to the Court as to where we are.

Because as part and parcel of this agreement was going to be a remand process that Phil and I were going to work out to make appropriate methods available to people who wouldn't buy into the settlement program, couldn't buy into the settlement program, and wanted to have their cases back.

I was very willing to work with the defense on structuring that. Instead what I got was, Over, done, good-bye, we'll never talk to you again, and then all the things that he's portrayed in court about my lack of candor, my lack of ability to say what I was -- mean what I was saying or whatever.

And I just want to tell Your Honor and -- I want to tell Your Honor and I want to tell it to everybody who is listening in this courtroom right now that I thought we had a deal. I thought we had agreed on A, we had agreed on B, we were trying to tighten up C, and the attorneys' fees were agreed to and we were rolling.

Something happened. Either I miswrote what I thought I was agreeing to, that is, the A that he wanted and the B that he wanted wasn't what I said, wasn't what I wrote, or the C was going to be a nonstarter.

And Phil asked me, Is it important that you have a C? And I said, Phil, it's really important, but I want to make it tight. I don't want it to be willy-nilly where anything and everything can come in. I want it to be a tight C. It's hard to define, but I thought we did it with the four things that were positive test results.

But I'm trying to agree to what you have proposed and I want you to agree what I'm going to propose with a tight C and we're done, and something happened. And it sounds -- the four things that he says was they have no confidence that they can get this done because basically they're saying that they don't believe in me.

I'll remove myself from this, Your Honor. I'm more than happy to remove myself from it if the Court wants to replace me, if the Court wants to have someone else step

forward and do these negotiations.

But I'll tell Your Honor as far back as I can -- as the beginning of this case, I thought I was agreeing to what Phil had asked and the fact that he thinks that I didn't is disturbing to me because that's what I thought I was doing.

It's not to say he didn't see something different there, but he never told me what the difference was and I was waiting for that to come back, their written proposal as to what A and B really was.

And then he says it's borne out by what I said under seal and what he points to is the letter of proposed terms versus the terms of the agreement. He's right, I shouldn't have said these were the agreed terms. It was the proposed terms. But it is in the letter, which is why I attached the letter, these are the proposed terms of agreement. So I stand convicted of using the word "agreed terms" when I should have used the word "proposed terms."

His third point was Category C. We all agree and I think the e-mails say we're trying to define a tight Category C. We didn't quite get there. I thought I did, but it wasn't acceptable. I was awaiting their redrafts of A and B before I wrote the C. God knows -- Dick knows we spent a lot of time trying to figure out what we had to change about C to make it the tight C that would be

acceptable.

And then the ethical concerns, I think I've expressed to Your Honor the concerns I had about ethical concerns about the way the fees and how the fees were done. I don't think there's anything inappropriate about paying attorneys' fees, but I think there is something that has to be -- make sure that we're all protected and nobody comes in and criticizes how we got there, why we got there, and what occurred with regard to the negotiation of attorneys' fees.

And I think I was very concerned about that as Phil raised it and trying to respond to it by saying, I don't know the answers, just as Phil doesn't know the answers, but I certainly am willing to get an ethical opinion and to try and talk to the people that know it so we all can be properly protected.

Your Honor, I wouldn't get very far in law and I wouldn't get very far in life if I acted like Phil thinks I acted, making a deal for A but really trying to sneak something through on B, you know, making a deal that looks like this but then trying to like paper it and make it look different. That's not what I did, Your Honor.

If that's what occurred, if that's what occurred, I'm not aware of that and I apologize for it. That's not what I was trying to do. I told Phil that the day before Thanksgiving. I told him that. He said he would put it in

writing and he would get back to me. He didn't. Something happened.

And if that's what's caused the lack of ability to have a meeting of the minds and I'm the lightning rod to that, which I don't think I am, but if I am, I'll step back. I'll step back and let someone else do it.

But as God as my witness, I thought I was doing the right thing. I thought I was putting what we had agreed to between Mr. Beck and I in the courtroom and what we had talked about on the phone. I was trying to put that into a document that we could all look at.

And that's why I filed the document under seal, Your Honor, because I felt these negotiations needed to be heard by Your Honor to see how really, really close we are and what really, really, really separated us at the end of the day and for the Court to ask the question is this really the kind of division we want to have in this MDL at this point in time that's going to make us all go back to taking ten depositions of every plaintiff and all the things we talked about in the first hour in this courtroom.

And, Phil, I'll just tell you right out, if I changed something, I'm sorry. That wasn't my intent. I told you that on the Wednesday before Thanksgiving. I tell you it again. I know you can't look at me, but I mean it. That's not who I am and that's not what I do.

Thank you.

MR. BECK: Your Honor, let me say first I'm not the one who decided to put the settlement discussions in front of the Court. It was Mr. Zimmerman who decided to file something under seal.

It's stunning to me. I listen to him today and he says there was no deal, I agree that there was no deal. He says that his letter did not reflect our prior conversations. He said we had nothing down on A, we had nothing down on B, we had nothing down on C. The only thing that we had said yes to was 11 and a half million dollars for the Plaintiffs' Steering Committee. That's what he said today.

But the thing that he filed with this Court and the thing that I was responding to in my comments was his filing under seal, and what he said under seal was the essential terms of the settlement are set forth below.

It is stunning now to read that Bayer believes the case is not settled. Bayer now pretends that its agreement never happened. After long, tedious, and difficult negotiations, a settlement was reached between Mr. Beck and Mr. Zimmerman.

And what he asked the Court to do is before we go on to talk about what ought to happen with the MDL, the Court needs to adjudicate whether a settlement took place

and to enforce the settlement that he claimed took place.

So that's what he put in writing under seal and that's what I responded to, a claim which is demonstrably false, that there was a settlement that Bayer somehow reneged on. That is false.

He's got his dates all messed up too, but it doesn't make any difference. There never was an agreement because the proposal that he wrote did not even reflect the terms that he said he was prepared to agree to and which I said, If you put them in writing the way we've agreed to them, I'll go to bat for you with the client. That's what I said, that I will urge the client. We never got to the point where I could even urge the client to accept or not accept something.

Here's one fascinating footnote, Your Honor. If you look again at the terms of the agreement, whether you want to look at the letter that he sent or when he quoted the letter in his under seal filing, do you know what one of the things they were willing to agree to when we were going to pay 11 and a half million dollars into the Plaintiffs' Steering Committee? They were agreeing to case-specific discovery.

Paragraph 4, as Mr. Zimmerman wrote it up, sets forth that they would go through with case-specific discovery, they would have expert reports, they would have

summary judgment, they would have everything that today he tells you would be too burdensome and would be a bad way to manage the litigation.

Back when he was hoping for a deal he was perfectly willing to agree to that and, in fact, that was one of the essential terms. If we were going to agree to anything at all, it would have to be in that context. But today they say that that would be awful.

So that sort of brings us to what we think ought to be done with the MDL and, Your Honor, we've set forth our position in some detail in memorandum and you've been very patient with us this morning. I can walk through the memorandum, but all I'll be doing is saying out loud something that you've already read.

The bottom line for us is that this MDL has been a tremendous success because the people who suffered the side effect that prompted the MDL, which was rhabdomyolysis, almost every single one of them has been compensated at dollar figures that everybody agrees are fair. There may be a few holdouts, but that's not the concern of the -- a grand concern of the MDL court. And part of this Court's job is also to figure out mechanisms to dispose of the remaining cases, whether that's before trial or getting them ready for trial.

We're faced now with thousands of cases that

plaintiffs' lawyers filed in federal court stating that they're worth $75,000 or more, or else they had no business being in federal court. And when somebody sues you and claims that they're injured by your product, you're entitled to do some things, like get an expert report and take the deposition of the doctor and the plaintiffs. It doesn't matter whether it's ten depositions or whatever, but we're entitled to take basic discovery to get ready to defend ourselves.

And it's no answer to say our claim really isn't worth very much and if you insist on an expert report and taking the plaintiff's deposition, why then it doesn't make any sense for us to pursue the litigation. The answer is if that's true, then drop the case.

But you can't say that because our case isn't worth very much you're not entitled to defend yourself, you're not entitled to take an expert deposition and file summary judgment, you're not entitled to take our deposition because once you've taken our deposition it makes the case go away because it's not worth anything. Then they ought to drop those cases.

That's what happened in Philadelphia was -- the only thing the court did was say, Here are deadlines, meet them. These are lawsuits you chose to file, so make your filings like you do in any other lawsuit. And then what

happened is that this large mass of cases that aren't worth anything, they went away. And I think that will probably happen here.

But if they want to try the cases, we'll try them, just like we have in Mississippi and Alabama and Philadelphia, and we're going to defend ourselves. We're not going to pay money, nuisance money, to make them go away. We're going to defend ourselves.

So we think -- then the question is whose job is it. We think it is Your Honor's job, and you've heard us many times say that. If not, if you remand them and mass remand them, we'll be back in front of you soon because you'll have over a thousand of them anyway. There will be some judge or judges in Philadelphia who will have a couple thousand of them.

Some people in -- scattered around the country we'll have a whole bunch of mini MDLs where people try to sort through this and there will be a whole bunch of judges scratching their head saying, Why do I have a case remanded to me when there's no expert report, when there's been no Daubert hearings because how could I have a Daubert hearing without an expert report, why hasn't plaintiff's deposition been taken?

So we submit the right way to do it is to get these cases trial ready. I'm not going to quote Your

Honor's statements earlier, but they were very wise.

That's all I have, Your Honor.

THE COURT: Anything further?

MR. ZIMMERMAN: No, Your Honor.

THE COURT: We have had an interesting year. The record really doesn't show that for over a year that the Court has had both sides talking to each other with the Court's presence and we've had conferences in Miami and in Chicago and also in Minneapolis trying to see whether or not a settlement could be reached on some of these cases.

I believe both sides have put forth a very good effort. At this point it's clear that it is the Court's job to get these matters ready for remand and that will include case-specific reports and any Daubert issues that have to be heard by this Court.

What I would like to do is -- who would be the point person dealing with the discovery issues for the defense, Mr. Beck?

MR. BECK: Probably Mr. Sipkins, Your Honor.

THE COURT: Who from the PSC, Mr. Zimmerman?

MR. ZIMMERMAN: I don't know, Your Honor. We'll pick somebody.

THE COURT: I'm sorry?

MR. ZIMMERMAN: I don't know, Your Honor. We'll pick someone.

THE COURT: I need that name in a week's time.

MR. ZIMMERMAN: No problem.

THE COURT: And then I will set down a schedule for those parties to meet with me so we can hammer out a discovery schedule and we can get these matters ready for an orderly process for remand.

Anything else from the PSC? Do you want any of your colleagues to speak, Mr. Zimmerman?

MR. ZIMMERMAN: Daniel wants to speak.

THE COURT: Mr. Becnel.

MR. BECNEL: Judge, since most of my clients come from the Gulf Coast region -- we've lost all our hospitals. 4,500 doctors have abandoned their practice and moved to other parts of the country. 90 percent of the people of the metropolitan New Orleans area have moved to other parts of the country. All of the records have been destroyed.

The courts other than -- the federal court because it's on a piece of high ground is there, but half of the staffs are not there. All of the civil district courts in New Orleans, Plaquemines, St. Bernard Parish, are gone. In fact, they have no functioning courthouses.

And I've got a problem. I'm sitting on 400 checks right now for people that I can't find. The government will not give us the names of where these people are who applied for assistance and therefore you can't contact them. In my

town three weeks ago an invitation was sent to me for a Christmas party. I got it, I think, Saturday and it had already occurred by a week. That's what's going on down there.

And I don't know how I'm going to comply with almost anything this Court directs because of the lack of communication and lack of contact. I've got e-mail sites, I've got websites to try to get these people, but starting in Alabama, where the bulk of my cases are, all the way to the edge of Texas, either Katrina or Rita has destroyed virtually everything.

THE COURT: Well, I --

MR. BECNEL: I just wanted to make the Court aware of that.

THE COURT: I want to make sure the record is clear that the Court has stayed all actions out of Katrina and Rita and the Court is cognizant of your problems and has not in any way said that -- or signed any order that you would have to comply with anything at this point.

And certainly when I meet with the people dealing with the discovery issues and any other attorney in the Gulf area that's had clients in that area that the records are destroyed, we will have to make the appropriate adjustments. That's why we'll be meeting.

That's why we'll have a provision dealing with the

issues of the gulf course -- Gulf Coast plaintiffs and maybe even the Florida plaintiffs that are involved in this litigation that were -- their doctors or healthcare records have been destroyed by the hurricanes in Florida.

So I want you to work closely with Mr. Zimmerman on these issues and make sure that the Court gets the necessary suggestions to make sure that your clients are properly served and any orders served in a way that their litigation is not harmed in any way because of any orders that the Court may put forth.

Now, if I'm hearing you correctly, you have settled cases with --

MR. BECNEL: Other defendants on other cases.

THE COURT: Other cases, not --

MR. BECNEL: PPA and stuff, and I can't even find the clients.

THE COURT: I'm not concerned -- I understand.

MR. BECNEL: I'm just --

THE COURT: I have no control over those cases. Are there cases dealing with Baycol that you've settled that you have checks --

MR. BECNEL: No.

THE COURT: -- that you can --

MR. BECNEL: All of those --

THE COURT: If you are asking the Court to get

involved in trying to see if the federal government can help you, if that's the case, let me know about that. Let Mr. Zimmerman know and I'll see what I can do about that.

MR. BECNEL: They have a list of where all these people are, but they refuse --

THE COURT: Didn't you hear me? I said any Baycol cases. Those are the only ones I can deal with.

MR. BECNEL: That's what I am talking about. For my clients in Baycol, they have a list of where these people are located.

THE COURT: Make sure you deal with Mr. Zimmerman and make sure that I understand all the issues and so we can address those issues when we have the conference dealing with discovery.

MR. BECNEL: And, Your Honor, I wanted Mr. Beck to know that Mr. Zimmerman -- the first I heard about even any settlement negotiations was right now. Mr. Zimmerman said he was meeting with the Court, could not talk. This is the first I've heard of any of this. So this was a little bit enlightening. You know, he kept his word to keep it secret.

And I'm a member of the Plaintiffs' Committee and I want Mr. Beck to know that probably other than Mr. Zimmerman and Mr. Lockridge and their respective firms, nobody knew a thing. So I don't want you to think that the Plaintiffs' Committee was trying to throw somebody a curve

ball. I didn't even know about it.

Thank you.

THE COURT: Thank you.

Anyone else? All right. Well, I think everything has been addressed in open court. There's no need for any in-chambers meeting. I wish everyone happy holidays.

(Court adjourned at 11:35 a.m.)

* * *

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

Certified by: _____
Lori A. Simpson, RMR-CRR

Dated: January 3, 2006