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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: Flouroquinolone)	File No. 15-MD-2642
Products Liability Litigation)	(JRT)
)	
)	Minneapolis, Minnesota
)	April 21, 2016
)	2:12 p.m.
)	
)	
)	

BEFORE THE HONORABLE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

Court Reporter:	STACI A. HEICHERT
	RDR, CRR, CRC
	1005 U.S. Courthouse
	300 South Fourth Street
	Minneapolis, Minnesota 55415

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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P R O C E E D I N G S

I N O P E N C O U R T

THE COURT: This is Multidistrict Litigation No. 15-2642, In Re. Flouoroquinolone Products Liability Litigation.

First, let's have counsel note appearances. We will start with plaintiffs' attorneys in the courtroom today.

MR. ROBINS: Good afternoon, Your Honor. Bill Robins on behalf of plaintiffs.

THE COURT: Mr. Robins.

MS. FLAHERTY: Good afternoon, Your Honor. Yvonne Flaherty on behalf of plaintiffs.

THE COURT: Ms. Flaherty.

MR. BUDD: Good afternoon. Russell Budd for plaintiffs.

THE COURT: Mr. Budd.

MR. SIMS: Good afternoon, Thomas Sims for the plaintiffs.

MR. RICHARDS: Jason Richards for the plaintiffs.

MR. MOSIER: Good afternoon, Your Honor. Robert Mosier for the plaintiffs.

MR. NIDEL: Good afternoon. Chris Nidel for the plaintiffs.

MR. WOOL: Good afternoon. David Wool for the

1 plaintiffs.

2 MS. HIRSCH: Angela Hirsch for the plaintiffs.

3 THE COURT: All right. And just to continue with
4 plaintiffs, we have plaintiffs' attorneys on the phone. Is
5 that correct?

6 UNIDENTIFIED PLAINTIFF'S ATTORNEY: Yes, Judge.
7 That is correct.

8 THE COURT: Okay. Let's have any plaintiffs'
9 attorneys on the phone just identify themselves for the
10 record.

11 MR. LEE: Dae Lee for the plaintiffs.

12 MR. ANTANOBICH: Good afternoon, Your Honor. Tom
13 Antanobich appearing on behalf of Jamie Goldstein for the
14 plaintiffs.

15 MS. WELLING: Good afternoon, Your Honor. Lauren
16 Welling on behalf of plaintiffs.

17 MS. VINER: Good afternoon, Your Honor. Olga
18 Viner on behalf of plaintiffs.

19 MS. GRIFFIN: Good afternoon, Your Honor. Katie
20 Griffin on behalf of plaintiffs.

21 MS. BARTON: Good afternoon, Your Honor. Kristen
22 Barton on behalf of plaintiffs.

23 MS. CORDES: Good afternoon, Your Honor. Lindsay
24 Cordes on behalf of the plaintiffs.

25 THE COURT: All right. Anyone else?

1 MR. BUCKLIN: Good afternoon, Your Honor. Stephen
2 Bucklin on behalf of plaintiffs.

3 THE COURT: Say that again, please.

4 MR. BUCKLIN: I'm sorry, Your Honor. Stephen
5 Bucklin on behalf of plaintiffs.

6 THE COURT: All right.

7 MR. LEDGARD: Don --

8 MR. SILL: Matthew Sill for plaintiffs.

9 MR. LEDGARD: Don Ledgard for plaintiffs.

10 THE COURT: All right. I'm not hearing anyone
11 else. Okay. Excellent.

12 Now for the defense here in the courtroom.

13 MS. BERNIER: Good afternoon, Your Honor. Jan
14 McLean Bernier on behalf of the Janssen defendants.

15 MR. WINTER: Good afternoon, Your Honor. John
16 Winter for the Janssen defendants.

17 MR. MURDICA: Good afternoon, Your Honor. Jim
18 Murdica for the Janssen defendants.

19 THE COURT: Good afternoon.

20 MR. SOLOW: Good afternoon, Your Honor. Andrew
21 Solow for the Bayer defendants. I would like to introduce
22 to you my colleague Alan Rothman who will be arguing the
23 remand motion.

24 MR. ROTHMAN: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 MS. MILTICH: And Cicely Miltich, also on behalf
2 of Bayer defendants. Good afternoon.

3 THE COURT: Ms. Miltich, good afternoon. Anyone
4 else?

5 And how about on the phone for the defense,
6 anybody?

7 MS. JOHNSTON: Yes. Good afternoon, Your Honor.
8 Sarah Johnston for the Janssen defendants.

9 THE COURT: All right.

10 MS. PARK: Good afternoon, Your Honor. Julie Park
11 for McKesson.

12 MS. DOWNIE: Good afternoon, Your Honor. Ericka
13 Downie on behalf of McKesson defendants.

14 THE COURT: All right. Anyone else?

15 Okay. Very well. Let's proceed. We'll begin,
16 Mr. Robins.

17 MR. ROBINS: Good afternoon, Your Honor. Do you
18 have a preference on, I was just going to run right down the
19 agenda, but if you wanted to cover the motions earlier in
20 the agenda, we can certainly do that.

21 THE COURT: Why don't we just run through the
22 agenda, and then we'll turn to the motions.

23 MR. ROBINS: Okay. That sounds fine. Mr. Sims,
24 my colleague, is going to address item No. 1 dealing with
25 the status of federal and state filings.

1 THE COURT: All right. Very well.

2 MR. SIMS: Good afternoon, Your Honor. We have
3 383 cases currently pending in MDL. About four or five of
4 those are multiplaintiff complaints. And the collective
5 number of plaintiffs for those multiplaintiff complaints is
6 approximately 328.

7 In the state of Pennsylvania we show there are
8 39 cases pending. All of them have been filed in
9 Philadelphia. And there is a hearing next week on
10 April 29th in front of the judge in that particular case.
11 As we shared with you previously, those cases have not been
12 consolidated and are not being treated pursuant to the mass
13 tort program, but there is an expectation that next week
14 there may be further guidance from the court on how those
15 cases will be handled.

16 THE COURT: All right.

17 MR. SIMS: There's also a case pending in San
18 Francisco Superior Court. And I believe previously there
19 was a statement that there was a case pending in New Jersey
20 state court, but we no longer believe that to be true. So
21 the only state cases then are in Pennsylvania and in
22 California.

23 THE COURT: All right. We talked about the
24 Oklahoma cases last time. Are they in the
25 multiplaintiff numbers there?

1 MR. SIMS: They are, Your Honor, correct.

2 THE COURT: Has everything been transferred there
3 yet?

4 MR. SIMS: They have. I believe all of those have
5 been now transferred to Your Honor's court.

6 THE COURT: All right. Okay. And is there any
7 reason why we shouldn't separate those out like everyone
8 else?

9 MR. ROBINS: Your Honor, we're in a process right
10 now of getting ready to file the master complaint hopefully
11 which in turn will trigger a short form complaint
12 requirement, and the order that was originally entered
13 addressing that requires that if there are multiparty
14 complaints that are coming into the MDL that at that
15 juncture they would have to -- each plaintiff would have to
16 file a short form complaint. So it seems to me that would
17 be the appropriate time to handle that, unless there's some
18 reason locally, you know, that Your Honor or the clerk here
19 would want those broken apart, it seems to us that that's a
20 step that may not be necessary, particularly since we're
21 going to be following a master complaint practice here.

22 THE COURT: All right.

23 MR. ROBINS: They would, of course, obviously need
24 to get their own file numbers once this short form is filed.

25 THE COURT: Sure. So each of the -- the filing of

1 each of the short forms would trigger an assignment of a
2 number then?

3 MR. ROBINS: Ideally that's the way it would -- we
4 hope it would work in the clerk's office when that occurs.
5 It's a little unusual because we don't have, you know -- we
6 don't have a direct filing order in place here yet, so it's
7 going to be coming up. This is an issue that's going to
8 come up with other cases that are coming up here as well.
9 But in the perfect world, that's the way hopefully it can
10 work is that they would file and at that point in time they
11 would get their own cause number and it would just be a
12 separately docketed case at that point.

13 THE COURT: Okay. All right. Good. Thank you.

14 MR. ROBINS: Thanks.

15 THE COURT: Okay. Was that all on the status of
16 the filings?

17 MR. SIMS: Yes, Your Honor.

18 THE COURT: Okay. All right. Now, the master
19 complaint, where are we at on that right now?

20 MR. ROBINS: Your Honor, we were originally going
21 to be filing it on the 14th, last Thursday, but then we
22 intend -- we need to file the complaint or at least portions
23 of it under seal because it's got documents, particular
24 documents cited that are subject to protective orders from
25 courts -- from transferor courts, and so we had contacted

1 your office about this, and we were told through local
2 counsel that we needed to file a motion to seal, which we've
3 filed, and that's what's here today, at least to be
4 considered.

5 Right now we have an agreement that we would file
6 the motion -- the master complaint tomorrow, assuming we can
7 address the correct way to deal with this sealing issue.
8 Our intention, Your Honor, would be that we would file the
9 master complaint under seal and then we would file a
10 redacted version of the master complaint on the ECF which,
11 you know, as we read *IDT Corp. versus eBay*, the Eighth
12 Circuit opinion that addressed this issue, is that it's, if
13 you can file a redacted version, that's the more appropriate
14 way to do it, and so that's what our intention would be, but
15 we wanted to, you know, just address this with you today.

16 We are not necessarily and really, frankly, aren't
17 agreeing that the documents we're citing actually have
18 documents that are, you know, would be appropriately subject
19 to a confidentiality order, but that said, they've been
20 marked that way, and we haven't gone through a challenge
21 process on that. And at least for purposes of, you know,
22 this process right now, we were hoping to not, you know, to
23 put that down the road, if we needed to have challenges
24 later on these things, you know, we can, but right now we're
25 just respecting the fact that the defendants marked certain

1 documents confidential. We have a protective order that
2 we've submitted to you in this litigation that is also going
3 to govern these same documents, but we were, you know, as we
4 were drafting this complaint, we were dealing with the fact
5 that we had orders from, for example, the Northern District
6 of California that we had to contend with.

7 We have, just to put a little bit more leaves on
8 the tree for you, Your Honor, we have fraudulent concealment
9 allegations in the complaint that's going to be filed as it
10 relates to statute of limitations questions, and so we feel,
11 you know, out of an abundance of caution that we need to be
12 particular and particularized in the allegations that we
13 make that show the defendants' fraud, and so we're wanting
14 to quote and cite to particular documents that we say show
15 the fraud, and the way the protective orders are written,
16 even if we just talk about information that's derived from
17 those documents, we are -- we would be arguably violative of
18 the protective order if we didn't seal those particularized
19 allegations, so that's why we're trying to handle it this
20 way.

21 THE COURT: All right. Is there any -- defense
22 have any issue relative to the sealing that you wish to
23 raise, Mr. Winter?

24 MR. WINTER: Your Honor, we've met and conferred
25 several times on this, and when this was brought up, what we

1 had suggested, and it's in the 7.1, is that they could
2 reference whatever documents that they think are necessary
3 to survive a motion that we would file, attach blank
4 exhibits, have that publically filed, and then file whatever
5 exhibits are subject to confidentiality under seal
6 separately. That's what we thought would work, and you
7 wouldn't have a redacted complaint. But if we're going to
8 go the route of a redacted complaint and the other documents
9 filed under seal, Your Honor, I think we would live with it.
10 But if it's going to be filed in a redacted form, we would
11 just ask before the redacted document is actually publically
12 available that we get to look at it so that we can confer to
13 the extent we think something else should be redacted.

14 Thank you, Your Honor.

15 THE COURT: All right. Anything else?

16 MR. ROBINS: Your Honor, just to be clear about
17 why we're saying we need the documents themselves, there is
18 case law that suggests that if we just refer to a document,
19 even if we're just referring to a part of it, without being
20 very specific, we could be subject to adopting or
21 being -- putting into evidence for purposes of a motion to
22 dismiss and/or a conversion into a summary judgment that,
23 you know, those -- that all of that evidence is essentially
24 comes in, and we have a concern about that because they're
25 3,000-page documents in some instances, and we're not

1 agreeing that everything in those documents are accurate,
2 you know, and so there are some evidentiary reasons why it
3 won't work for us to just attach the documents.

4 We certainly don't have a problem, you know, with
5 filing it. We -- one of the things is we want to keep the
6 trains moving here towards the motion to dismiss briefing
7 and everything that follows that, so, you know, we certainly
8 can file the complaint the way it is and then meet and
9 confer with the defense if they have an issue of saying we
10 didn't redact enough or something like that. We can
11 certainly deal with it that way.

12 The only other way we could think to do it is, you
13 know, to just go ahead and file it under seal and then meet
14 and confer about the specific documents and then come to
15 you, you know, and have you review those documents in camera
16 and determine whether or not the confidentiality, you know,
17 objection is valid or not and substantially look at each
18 document and weigh it against the public interest in that
19 particular document. We were trying to short circuit that
20 for right now, because our view is, you know, there will
21 come an appropriate time when those documents will come into
22 evidence, but we're not -- you know, we're just trying to
23 get the pleadings on file at this point.

24 But, you know, if you were inclined to say, well,
25 we want you to -- I'd like to adopt the defendant's approach

1 and make us attach a document, we would say that's not the
2 right way to do it, we need to go in and look at each and
3 every document and have a challenge on each and every
4 document and then have you rule on it and either the piece
5 of it comes in or it doesn't. So, you know, we're trying to
6 avoid that kind of, you know, drawn out thing. But if
7 that's the approach that needs to be taken, we can certainly
8 meet and confer on that. We're trying to -- we feel like we
9 have a more efficient solution to this. And certainly we
10 can meet and confer if they have some concerns about any
11 particular words that are in the complaint as arguably being
12 derived from a, you know, a confidential document.

13 THE COURT: Okay. Thank you. Anything else?

14 MR. WINTER: No, Your Honor.

15 THE COURT: Okay. I think we ought to go ahead
16 and file the master complaint under seal and do that as
17 quickly as possible. And then I would prefer the filing of
18 a redacted version of the master complaint, and I would ask
19 that there be a meet and confer session about the redactions
20 first before that document is filed. I would like to have
21 that filed relatively quickly. And we will address
22 the -- these confidentiality issues probably relatively
23 soon, but it doesn't have to be done right away. I think
24 it's more important to get the master complaint filed and
25 get that all under way. So that's -- chances are there's

1 probably more documents that are under seal by order of the
2 transferor courts than should be, but I don't know that; I
3 haven't looked at them. But let's tee that up probably for
4 two, three months down the way, all right?

5 Okay. Mr. Budd.

6 MR. BUDD: Thank you, Your Honor. On No. 4 on the
7 schedule, on the agenda, we've -- did you want to go through
8 the schedule and then the motion or did you --

9 THE COURT: Yes. Let's go through the schedule --
10 go through this first and then get back to the motions.

11 MR. BUDD: Great. So we've had a busy couple of
12 weeks, and we've reached agreement on a number of proposed
13 pre-trial orders. I think we filed a PTO5, the initial case
14 management plan, about two weeks ago.

15 THE COURT: I believe so, yeah.

16 MR. BUDD: And we've got agreement on that.

17 THE COURT: Okay.

18 MR. BUDD: The protective order, the preservation
19 order, and a plaintiffs' fact sheet.

20 On the ESI protocol, we've worked out everything
21 but one issue, and we propose that we continue discussing
22 that and that hopefully we can reach agreement. If we can't
23 reach agreement, that we file competing briefs seven days
24 before the next hearing on May 17th.

25 THE COURT: Okay.

1 MR. BUDD: And then on --

2 MR. MURDICA: I was just going to -- yeah, that's
3 acceptable.

4 MR. BUDD: Is that acceptable?

5 MR. MURDICA: Yeah, that's acceptable to
6 defendants.

7 THE COURT: Okay. Good. All right.

8 MR. BUDD: Okay. And then on No. 5 on the agenda,
9 plaintiffs would propose that on the defense fact sheet that
10 we meet and confer with defendants about that and since we
11 don't -- since the plaintiffs' fact sheets aren't due for
12 quite awhile that if we have any dispute that we submit
13 competing briefs on that three days before the June status
14 conference.

15 THE COURT: All right. That sounds good. That's
16 okay with you?

17 MR. MURDICA: And that's -- that schedule is fine.
18 All we'd ask, Your Honor, is that we get the first draft of
19 what they're going to be requesting as soon as possible,
20 because it will take some time to figure out what we are
21 going to be able to do and what we want to -- you know, what
22 would be in dispute.

23 THE COURT: All right. That's fair.

24 MR. BUDD: We'll do that.

25 MR. MURDICA: Thank you, Your Honor.

1 MR. BUDD: And deposition protocol, we will meet
2 and confer, and if we can't agree that three days before the
3 May 17th hearing that we submit competing briefs.

4 THE COURT: All right. Are we on -- go ahead.
5 I'm sorry.

6 MR. MURDICA: I'm sorry, I was just looking back
7 to Mr. Solow for Bayer. Mr. Budd, it was my understanding
8 we'd submit competing proposals. I think you just said
9 briefs.

10 MR. BUDD: I'm sorry, proposals.

11 MR. MURDICA: Okay. All right.

12 THE COURT: Just one second. For May 17th, are we
13 moving someplace else? The national CJA committee is in
14 this courtroom that day, the 16th and 17th of May.

15 THE COURTROOM DEPUTY: I will have to -- yep, I'm
16 going to have to find a courtroom, potentially maybe Judge
17 Davis's, but I haven't -- I'll let everybody know what we're
18 going to do.

19 (Discussion off the record.)

20 THE COURT: What do you think about the next
21 hearing moving to the 18th instead of the 17th? Is there
22 any problem with that?

23 MR. ROBINS: Can I just check my calendar?

24 THE COURT: Is there an issue?

25 MR. WINTER: That would be okay with the Janssen

1 defendants, Your Honor.

2 THE COURT: Okay.

3 MR. SOLOW: That would be okay with Bayer, Your
4 Honor.

5 THE COURT: All right. Any problems for the
6 plaintiffs?

7 MR. ROBINS: No, sir.

8 MR. SIMS: No problem.

9 THE COURT: We've got -- there's a national
10 committee that is reviewing the Criminal Justice Act
11 requirements, and they -- they're using this courtroom on
12 Monday and Tuesday of that week, so we might be hunting for
13 a different courtroom to use so, and Wednesday would be
14 better. We think.

15 MR. ROBINS: What time, Your Honor?

16 THE COURTROOM DEPUTY: We had it set for 3 on
17 Tuesday. And --

18 (The Court conferred with the clerk.)

19 THE COURT: We can do it most any time on
20 Wednesday. Is there a time more convenient? Morning or
21 afternoon?

22 MR. ROBINS: 1:30 if that's good for you.

23 THE COURT: 1:30 okay?

24 MR. WINTER: Yes, Your Honor.

25 THE COURT: All right. 1:30 on the 18th it is.

1 All right. And we'll get the orders that have
2 been agreed upon out in the next day or so. All right.

3 MR. ROBINS: Your Honor, the next item on the
4 agenda is for discussion of the bellwether selection
5 protocol, scheduling, and trial dates. And Your Honor may
6 recall that we had a brief discussion about this topic last
7 time. I told Your Honor that we thought we would -- or I
8 think maybe Mr. Budd said we might consider submitting a
9 proposal before this status conference. Frankly, we were
10 working through the other orders, and it also just seemed
11 that, to me anyway, that rather than just put in something
12 without any meet and confer ahead of it, it would make some
13 sense to engage, at least engage in a meet and confer to see
14 if there was any common ground we could reach. And so I
15 didn't submit the order and -- or the proposal in
16 anticipation of this particular status for that reason.

17 In talking further with the defendants -- and
18 also, Your Honor, the other aspect of this is, you know,
19 we're mindful of, you know, what was the schedule going to
20 be, and we've now worked the schedule out and submitted, you
21 know, thankfully, without any -- without the necessity for
22 briefing, or further briefing, the issue of, you know, what
23 the schedule looks like for the liability part of the case,
24 and that's what we've submitted to you.

25 Just to put it into some context, the proposed

1 schedule is, in part, at least, mind -- you know, being
2 developed -- mindful of what's happening in the state
3 courts. And, particularly, we talked a little bit about the
4 Philadelphia state courts and the fact that, you know,
5 there's all these cases there, and there's not a mass tort
6 program, per se. We think Judge Young is going to, you
7 know, do some degree, you know, or may do some degree of
8 coordination, but it's not going to be like as if there was
9 a, you know, a mass tort program. And right now, you know,
10 they are barreling toward a fall 2017 trial date.

11 So, you know, when we decided that we -- we
12 created this schedule, we have the end of nonexpert fact
13 discovery at the end of July in 2017, so, you know, we think
14 this is a really good thing because we can have our
15 colleagues go to Philadelphia in state court and say, look,
16 the MDL is moving in an orderly fashion, we're going through
17 discovery, it's not way out of line with the schedule that
18 you have, and so let's let the MDL, you know, start leading
19 the train here in terms of, you know, discovery and all of
20 that.

21 So part of that also requires, in my view, a trial
22 date that we can work toward. If we just leave this blank
23 and say we're going to wait to get a trial date that that
24 leaves a vacuum, and, you know, at that point there's
25 nothing to really say when -- what's the end game for the

1 MDL, at least for early bellwether trials, and we're going
2 to be, you know, once again dealing with the fact that the
3 state courts are going to get ahead of us.

4 So my thought was, you know, let's start working
5 on a schedule that has a trial date, has a schedule for
6 bellwether selection, has a schedule for specific discovery,
7 and let's get that in place sooner rather than later,
8 because, I mean, right now, April 29th is the next status in
9 Philadelphia, and if the answer is what the defendants'
10 answer has been to us which is we're not willing to
11 negotiate about an order, a bellwether order, until after we
12 get the fact sheets back and we have a chance to review the
13 fact sheets, and we have an agreement through the order that
14 we're submitting with the facts sheets that fact sheets are
15 going to be due 90 days from now because, you know, there's
16 over 600 plaintiffs that are in the MDL and people need some
17 time to fill out those facts sheets, you know, essentially
18 we're going to be a long way down the road, 120 days,
19 150 days before we have a schedule in place. If that's what
20 happens, we can be almost guaranteed that the state courts
21 are going to run over the MDL in terms of a schedule.

22 So I get the fact that they may not want to right
23 now commit to the exact process of a bellwether, you know,
24 how exactly things are going to unfold with the bellwether
25 process, but we certainly can have broad parameters of how

1 that looks. We certainly can have a schedule in place for
2 when bellwethers are going to be selected. And this is
3 certainly -- this is the kind of approach we took with Judge
4 Kennelly in the testosterone litigation is we had sort of a
5 sequential set of orders that came out, and we kept meeting
6 and conferring about how bellwether is ultimately going to
7 be selected, and the parties ultimately didn't, as I recall,
8 didn't completely agree about that, and Judge Kennelly, you
9 know, ended up doing what he did. But we had the parameters
10 of a schedule set fairly early. And that's really
11 important, in my view, in terms of getting the ball rolling
12 here.

13 So we have -- we're in a logjam here because, you
14 know, the defendants are saying we won't meet and confer
15 with you about this at all until after the facts sheets, we
16 get a chance to see this. And so what we're saying to you,
17 I think, now knowing that to be their position, is that we
18 think that we need to have a firm schedule in place where we
19 can submit some papers on how we see it, how they see it, we
20 submit a proposed schedule, if they choose not to do
21 anything, they can choose that, but we can get this teed up
22 for you so that by the next status, you know, you can make a
23 decision about are we going to have, you know, a trial
24 schedule here in the MDL.

25 And, you know, from our perspective as the

1 plaintiffs, it would be tremendously helpful to go to
2 Philadelphia state court and be able to say this is going to
3 be addressed in the next status, the plaintiffs are, you
4 know, are seeking trial dates, we think there's, you know,
5 not predicting what you would do, but at least say, you
6 know, His Honor is considering this and so we'd like you to
7 be mindful of that as things are unfolding in state court.
8 So that's where we're coming from on this.

9 And we'd like to, you know, we would propose that,
10 you know, about the same time, maybe ten days before the
11 next status, we submit competing proposals so you have some
12 time to review them and, you know, hear any additional
13 argument you might want to hear at the next status. And
14 then, you know, we, you know, hopefully can convince you
15 that we do need a schedule here and then we have those
16 parameters in place.

17 THE COURT: All right. Mr. Winter.

18 MR. WINTER: Thank you, Your Honor. Your Honor, I
19 can't swear to you, but virtually every case in Philadelphia
20 is controlled by Mr. Richards, who is seated over my right
21 shoulder, and he's a member of the plaintiffs' executive
22 committee here. It will be the first conference with the
23 judge in Philadelphia. So what I just heard is the tail is
24 becoming the dog. We believe that we need to see what is in
25 the facts sheets. That is what made the first Levaquin MDL

1 work efficiently. And it worked very well, Your Honor
2 knows. We will look at them at the end of July. They come
3 in July 20th, I believe, Your Honor. And we will look at
4 them very quickly, and we will be able to formulate what we
5 think makes sense so we can have a robust meet and confer as
6 to how this MDL moves forward, all recognizing we have an
7 end of fact discovery date already in place. So everything
8 would then be not built backwards but we know where we have
9 to end. We all know what you would say in terms of the time
10 for expert discovery, when we're going to start it, when we
11 finish it, and we can pretty much predict when you're going
12 to tell us a trial date is with an end of discovery date in
13 June of 2017. So that part, more or less, is there. We
14 still, I believe, only have one Minnesota plaintiff, so we
15 don't know what our respective clients are going to do on
16 lexicon, and we can't know that, Your Honor, until we've
17 looked at the facts sheets.

18 We also believe, as we said last time, there are a
19 group of cases which, on a motion to dismiss for statute of
20 limitations, we're pretty sure you're going to say, sorry,
21 too many factual issues. But there are cases, given
22 different state laws, where we think we may be able to come
23 up with a summary judgment, evidentiary pathway on a group
24 of those. Again, we need to see those facts sheets, because
25 we need to put this all together so we can deal with this

1 litigation quickly and effectively.

2 All of us have worked collaboratively over the
3 past four months, five months, getting many orders in place,
4 having disagreements, meeting and conferring but ultimately
5 getting things done in an efficient manner, so we're all
6 committed to doing that.

7 And if you were to say to us give us your trial
8 plan next month, I can tell Your Honor we're going to have
9 to tell you we can't come up with what we think is a plan
10 that makes sense until we see the facts sheets. So what
11 we're thinking is probably in early September, or, you know,
12 late August, your call, Your Honor, we would then have the
13 ability to have in a meet and confer so that we could put
14 this plan in place. And doing it that way is going to keep
15 this MDL in front of the litigation, driving the litigation,
16 as it should be. Thank you, Your Honor.

17 MR. ROBINS: I'm sure it was just -- he didn't
18 mean to say this, but he did misspeak. We don't have a fact
19 discovery deadline for anything other than the defendants'
20 discovery in the order we submitted to you. It's -- it was
21 completely negotiated just to deal with the defendant's
22 liability side of the case. There -- it was -- we carved
23 out anything related to the plaintiffs' side of the
24 discovery. We don't have that in the order. And so that's
25 just simply not in what we've done so far. We did the piece

1 of the defense because we weren't ready yet to talk about
2 the plaintiffs' side. Now that we know when the facts
3 sheets are going to be due, we have that in place now. We
4 know that they're going to first start rolling out 90 days
5 from now.

6 This is not the first pharmaceutical MDL that's
7 ever been done. Your Honor is well versed in doing this.
8 These things are handled all over the country. We don't
9 typically wait until all of the facts sheets are filled out
10 and the defense has analyzed all of them to come up with a
11 schedule. This is -- we can always come back and tweak
12 things and work on the more specific things as we get down
13 the road, but the broad parameter of this is really
14 important.

15 There are 39 cases in Philadelphia, and it is not
16 correct that all those cases are controlled by Mr. Richards.
17 There are other plaintiffs' lawyers involved in those cases.
18 And most importantly, there's a judge there who's going to
19 be dealing with a lot of different judges and trial dates
20 going in a lot of different directions.

21 And, you know, I've talked to lawyers in
22 Philadelphia. I've handled cases there. It's not -- you
23 know, Philadelphia judges and state court judges consider
24 themselves independent, as I'm sure you know, and, you know,
25 we need to give some guidance. It's -- I'll agree with one

1 thing. The tail will control the dog if we let it. And we
2 need to be in control here in the MDL, and that's what we're
3 asking to do.

4 And this is not rocket science. Every case has,
5 you know, statute of limitations issues. Every case has
6 discovery rule. Every case, you know, in this particular
7 case they came out with a warning about information that
8 they knew about we're now finding out, you know, for at
9 least over a decade, and you'll see this in the complaint
10 the degree to which they were covering this information up.
11 It's not surprising that we've got people that are just
12 figuring this out late. And this is what happened in, you
13 know, many, many MDLs.

14 And it's just their management plan is not a plan
15 that is the way that these are typically handled, for
16 obvious reasons. We need to get the ball rolling, and we
17 need to have particular dates that we can work toward. So,
18 you know, we're just suggesting to Your Honor let us put
19 some papers in on this, let us suggest to you what we would
20 suggest on a plan. They can get up and make the same
21 arguments at the next status they're making right now. But
22 we think it would be good to have some milestones for us to
23 get this thing at least teed up for a decision by you
24 formally.

25 THE COURT: All right. Anything else, Mr. Winter?

1 MR. WINTER: Your Honor, we -- we were believing
2 that we would negotiate a schedule where the plaintiff fact
3 discovery ended at the same time that the defendant fact
4 discovery ended so that we'll then have to roll up our
5 sleeves and start doing plaintiff discovery in tandem with
6 discovery from the defendant, which is how every MDL works.
7 We never envisioned like a year and a half of defendant
8 discovery and then followed by a period of time of plaintiff
9 discovery. So we're all on board to move this along.

10 THE COURT: All right. I'd like to discuss the
11 schedule at the next status conference, which means I would
12 like to see from the plaintiffs your vision, shall we say,
13 for a schedule going forward.

14 And I understand you're not ready for that yet,
15 and I don't expect to get a submission from you, and I'm not
16 going to decide at the May hearing on what the schedule is
17 going to be, but I want us to start talking about it because
18 I need to make -- I need to make sure I understand what your
19 thinking is, what potential roadblocks you see, Mr. Winter
20 and your colleagues, but we're going to have a discussion
21 next time on it, and it would be very helpful to have your
22 vision of what it would look like to start out with. All
23 right?

24 MR. WINTER: Yes.

25 THE COURT: We will have a firm schedule in place

1 as quickly as we can. It may be sometime this summer, but
2 we'll have it. And if you get your proposal into me, it's
3 something that's under advisement, it's something that I'm
4 looking at, and you can use that in state court actions if
5 you wish.

6 MR. ROBINS: Yes, Your Honor. Thank you.

7 THE COURT: All right.

8 MR. ROBINS: Do you have a date by which you'd
9 like us to file it? Is it -- my suggestion of ten days
10 before --

11 THE COURT: Ten days before would be just fine.

12 MR. ROBINS: Great.

13 THE COURT: And at some point we're going to have
14 a meet and confer on this, but we don't need to have it yet.
15 I'd like to see what your vision is.

16 MR. SOLOW: Thank you, Your Honor. Respectfully,
17 in advance of the April 29th conference in Philadelphia
18 before Judge Young, I just want to be clear, Your Honor, our
19 18 cases in Philadelphia are all brought by counsel who are
20 appointed members of the plaintiffs' steering committee, and
21 I'd like to deal with the issue now, today, in front of Your
22 Honor, as opposed to in May. I'd like to be clear that for
23 this MDL to work, there needs to be a strong PSC, and since
24 that PSC has my cases in Philadelphia, I just want to make
25 sure we're all on the same page here before Your Honor that

1 I'm not going to be hearing next Friday of attempts to move
2 those Philadelphia cases and have the tail become the dog
3 and certainly Judge Young in an initial conference hearing
4 motions on forum non-convenience in cases where initial day
5 one schedules have certainly been extended. I just want to
6 make sure we're all on the same page here, Your Honor.

7 THE COURT: Anyone wish to comment on that?

8 MR. ROBINS: Your Honor, I don't have any cases
9 there, but I, you know, what I would -- I'll speak for the
10 PSC as the lead of the PSC is that we are certainly, our
11 message certainly is cooperation and coordination between
12 the state courts and the federal courts. We certainly will
13 be encouraging and I know Mr. Budd will be encouraging the
14 notion of common depositions, not, you know, having to
15 reproduce documents more than once and that sort of thing.
16 You know, we are -- it's sort of my point, he's sort of
17 making my point is that if I don't have a schedule, you
18 know, we're going to have to -- we're dealing with a trial
19 date, or they are anyway, that's already in place, and I,
20 having litigated in the mass tort program, anyway, in
21 Philadelphia, going into a Philadelphia judge and saying I
22 want to move something without a clear indication of to when
23 or to where is not going to go very far. So, you know, I
24 think that's part of the issue here. I, you know, I think
25 our colleagues are going to certainly -- you know, we're

1 going to do everything we can to share costs, we're going to
2 do everything we can to cooperate, but when it comes to
3 trials and when those happen, there's not a whole lot that
4 we can do other than to say, you know, we're going to get
5 ready as the Court wants us to.

6 You know, we certainly would be in a better
7 position, frankly, to be able to go and say, this happened
8 in testosterone, you know, by the way, where I'm on the
9 executive committee, and Mr. Solow is involved in that, and
10 he knows that this is a situation that's happening right now
11 with one of the defendants there where, you know, the cases
12 start moving, and so, you know, what we really need to be
13 able to do is be able to say there's a schedule, and that's
14 what we really -- that's why it's so important. So that's
15 what we would say about that.

16 THE COURT: I understand. And you can say,
17 obviously, we have a partial schedule in place already. We
18 have the first elements of it, and we'll have a firm
19 schedule in place sometime this summer. And I would hope
20 that -- I mean, I don't want to proceed far ahead of state
21 court proceedings. I would just as soon do as simultaneous
22 as possible. That usually is what works the best. Some
23 state courts want to lay back and wait and see what happens
24 in the federal proceeding, and I understand that, but they
25 want to move their cases forward, it's certainly fine with

1 me, but I'd like to do it at the same time so we can do
2 things together.

3 MR. ROBINS: That would be our hope as well, Your
4 Honor, so that there's -- I think it helps for everybody --

5 THE COURT: Yeah.

6 MR. ROBINS: -- to do that.

7 THE COURT: You can certainly express my view
8 there, and if we'll -- Judge Young, is it, in Philadelphia,
9 will he be handling the cases going forward or is there a
10 preliminary?

11 MR. SIMS: We don't know that for sure, Your
12 Honor. I think for this initial status conference it will
13 be Judge Young. Beyond that, we don't know yet.

14 THE COURT: All right. Well, if there's a
15 permanent assignment, once there is, I probably will have
16 some communications with the judge just to keep the
17 communications open. But I'll wait and see what happens in
18 the first hearing. All right. But point well-taken so
19 thank you.

20 MR. SOLOW: Thank you, Your Honor.

21 THE COURT: All right. What's next, do we want to
22 move to the remand motions or do you want to -- you had on
23 here scheduling a science day. How soon are we going to be
24 ready for that, do you think?

25 MR. ROBINS: Your Honor, we were hoping to be able

1 to do it in June. We felt like that would give everybody,
2 you know, a couple of months to get ready, and it would be
3 an opportunity, at least our vision of it, is, you know, the
4 type of science day that's somewhat abbreviated, you know,
5 maybe an hour each side that the plaintiffs and the, you
6 know, we weren't -- from the plaintiffs' perspective, we
7 weren't thinking we would bring experts, what we would bring
8 a presentation where we could educate, you know, on the
9 science related to this particular injury, which is very
10 different from the tendon litigation, and to give you some
11 context for that. And so, you know, that's what we would be
12 suggesting we do.

13 We've found that these can be very helpful at the
14 beginning of an MDL just to educate the Court about, you
15 know, some of the particular issues that are going to be
16 coming up as we deal with discovery, as we deal with other
17 issues, and so that's what we were going to suggest that we
18 do it at that point.

19 THE COURT: Mr. Winter.

20 MR. WINTER: Your Honor, I'm the science presenter
21 from our side, and I am going to be in trial from the first
22 week of June until I think the second or third week of July,
23 so I have a personal scheduling problem doing anything in
24 June or July.

25 And I just to also highlight for Your Honor,

1 peripheral neuropathy is actually -- and we agree, it's very
2 different than the tendon rupture, and it actually becomes
3 very complicated science depending on certain
4 characteristics of each plaintiff. So our view is we need
5 to understand how many diabetic plaintiffs there are in this
6 group, because depending on that number, it actually very
7 much shapes how the science will be presented in this
8 courtroom. So a general presentation we don't think is
9 actually as meaningful as it could be if we have some
10 granularity about the cases. And we can do this very
11 quickly. I mean, I had a scheduling problem in the near
12 term, but we could do this very quickly at the end of the
13 summer, Your Honor.

14 THE COURT: What about August?

15 MR. ROBINS: I think August would be -- would be
16 okay. Sure, I think if we could do it then, I think that
17 would be fine.

18 THE COURT: I mean, I'd like to do it as soon as
19 possible because I really view it as introductory more than
20 anything else, just a kind of a help to get us underway with
21 the science part of it. We'll pick a time in probably mid
22 to late August to do it, all right?

23 MR. ROBINS: Okay.

24 MR. WINTER: Thank you, Your Honor.

25 THE COURT: Yeah. Where are you going to be in

1 trial?

2 MR. WINTER: New Jersey, then Philadelphia.

3 THE COURT: Okay. Well, we probably won't see you
4 at the June hearing then.

5 MR. WINTER: Highly unlikely, Your Honor.

6 THE COURT: Okay. Busy summer for you. All
7 right. Go ahead.

8 MR. MURDICA: Your Honor, one housekeeping matter.

9 THE COURT: Sure.

10 MR. MURDICA: That came up, and I just want to
11 note it for the Court. On the agenda, we had the plaintiff
12 fact sheet for today but we didn't have the pre-trial order
13 that governed the plaintiff fact sheet and puts into place
14 the deadline, so I just wanted to highlight for the Court
15 that that was submitted as agreed. Right, Mr. Budd?

16 MR. BUDD: That's correct.

17 MR. MURDICA: And so that's ripe for the Court's
18 decision as well. Thank you, Your Honor.

19 THE COURT: Okay. All right. Should we address
20 the motions to remand?

21 MR. MOSIER: Sounds good, Your Honor.

22 THE COURT: All right. Yep, Go ahead.

23 MR. MOSIER: Robert Mosher for the plaintiffs.
24 Your Honor, I just have a few comments. The briefing --

25 THE COURT: And let me just clarify that these are

1 16-388, Mr. Buries, correct?

2 MR. MOSIER: Correct.

3 THE COURT: 16-389, Ms. Bohannan?

4 MR. MOSIER: Correct.

5 THE COURT: And 16-390, Mr. Misakian?

6 MR. MOSIER: Correct.

7 THE COURT: And 16-391, Mr. Hulsh?

8 MR. MOSIER: Correct, Your Honor.

9 THE COURT: All right. Go ahead.

10 MR. MOSIER: Just a few comments. The burden of
11 proof, as the Court knows, is by clear and convincing
12 evidence that there's no possibility of a colorable claim.
13 As the Court saw in defendant's moving papers, they
14 submitted declarations stating that McKesson is in the
15 direct chain of distribution for the medications. Based on
16 California law, there is a claim of strict liability against
17 McKesson, and in my humble opinion, that's where the
18 analysis ends.

19 I just wanted to note, hearing Mr. Winter made a
20 mention that they may or may not waive lexicon in this case,
21 so even if we were here, we could find ourselves back in
22 California in trial on these cases.

23 THE COURT: What's the current status of the is it
24 Zachman, the one case that has already been remanded?

25 MR. MOSIER: Correct, Your Honor.

1 THE COURT: Do we know? Anything happen there?

2 MR. MOSIER: In the Zachman case, discovery is
3 underway at this current time. And that's where we stand at
4 this point.

5 THE COURT: And that's in San Francisco also?

6 MR. MOSIER: Correct, Your Honor.

7 THE COURT: Discovery, okay. Let's see if I had
8 any other notes here. In the -- in the MDL, will there be
9 discovery against McKesson?

10 MR. MOSIER: I think that's probably a question
11 for leadership.

12 MR. ROBINS: I can speak to that.

13 THE COURT: Okay. Go ahead.

14 MR. ROBINS: Your Honor, we are not intending -- I
15 don't believe this -- is McKesson in the master complaint?
16 No, we're not intending to include McKesson in the master
17 complaint. I live in Los Angeles, so I'm aware of, you
18 know, certainly McKesson cases and NJCCP in California, you
19 know, there's certainly -- that is a claim that is developed
20 in the California state courts and typically would be, but
21 here in the MDL, the cases are coming up as just straight up
22 claims against the named defendants, so I don't anticipate
23 we would develop any discovery here on that.

24 MR. SIMS: But I should add, Your Honor, there is
25 the option in the short form complaint for California

1 residents to include McKesson as a defendant; it's just it
2 won't be in the master complaint. But there is the option
3 in the short form.

4 MR. MOSIER: And, Your Honor, regarding McKesson
5 discovery in California, I'm lead counsel in the Risperdal
6 cases that are coordinated in Los Angeles Superior Court.
7 We have over a hundred thousand pages of documents regarding
8 McKesson, their distributorship, their marketing, and so --
9 and the Risperdal cases, of course, have the same Janssen
10 and Johnson & Johnson there as well. So McKesson is alive
11 and well and a California entity that we do do discovery
12 against and have claims against in California.

13 THE COURT: And explain a little bit more about
14 McKesson's role in all of this, in California, a supplier of
15 the pharmaceutical to Wal-Mart or is it Walgreen's or where?
16 Explain a little bit about.

17 MR. MOSIER: Sure. Sure. McKesson is I think the
18 third largest distributor of pharmaceutical drugs in the
19 United States. They distribute drugs everywhere, 97 percent
20 I believe of the pharmacies, a significant, I believe 40 or
21 50 percent, of hospitals that cover a large percentage of
22 pharmacies, so they are, you know, one of the 3,800-pound
23 gorilla distributors in the country for distributing drugs.

24 They are so -- so engulfed in the distribution of
25 drugs that, in 2009, McKesson settled out a \$350 million

1 RICO claim for actually being able to manipulate the
2 wholesale pricing of drugs that it distributes, including
3 Cipro and Levaquin. So this is not a small distributor
4 that's a passthrough. They market. They have discount
5 programs. They track. They use Sigma Six to make sure that
6 the distribution channels are as quick and as clean as
7 possible. So they do much more than a simple passthrough.

8 THE COURT: All right. That's helpful. The only
9 other question I have, really, relates to whether there
10 would be any efficiencies by keeping these four cases here
11 for now while we go through the early round of discovery or
12 whether the fact that there's already a California case
13 moving forward that these would likely be appended to in
14 some way, shape, or form, whether it's more efficient for
15 them there? Do you have a feeling on that?

16 MR. MOSIER: I do. My personal opinion, I'm a
17 California practicing lawyer, I've been there, practicing
18 there for 23 years, I would like to have them with the
19 Zachman case in San Francisco as well because efficiencies
20 there.

21 THE COURT: Would they be consolidated for
22 pre-trial at all in San Francisco?

23 MR. MOSIER: They may be, Your Honor, yes.

24 THE COURT: Is there -- which judge is assigned to
25 Zachman?

1 MR. MOSIER: I do not recall the judge's name off
2 the top of my head.

3 THE COURT: Okay. Because they have a program
4 where they -- they move cases through pre-trial discovery
5 together, I believe, I've heard about that.

6 MR. MOSIER: Yeah. They have both a consolidation
7 and if other cases get filed in other California counties,
8 they have a coordination proceeding as well.

9 THE COURT: So if this, these cases were remanded,
10 there would be a motion to consolidate them with Zachman?

11 MR. MOSIER: I expect so, Your Honor, yes.

12 THE COURT: All right. Okay. Thanks.

13 MR. MOSIER: Thank you.

14 THE COURT: Go ahead.

15 MR. ROTHMAN: Good afternoon, Your Honor. Alan
16 Rothman for the Bayer defendants. If I may pick up on Your
17 Honor's last question about efficiency, because I think
18 we've had certainly a discussion today about efficiency and
19 the MDL process, and really, this motion, in addition to
20 dealing with McKesson, which Mr. Murdica will address as
21 well in his remarks, it really goes to the heart of the MDL
22 process. And certainly there is authority administering
23 cases in multidistrict litigation is different from
24 administering cases on our routine docket. The Eighth
25 Circuit, the *Gideon* case, has made that clear, and I think

1 the proceedings here today and at every status conference
2 make that clear as well. So clearly there is a discretion
3 given to an MDL judge like Your Honor in terms of how to
4 manage and maybe looking at it from a somewhat different
5 perspective than if this were a standalone case and a visual
6 case presenting McKesson.

7 But it goes beyond that. It goes to the MDL
8 statute. It goes to the JPML, the judicial panel's order,
9 creating this very MDL: the just and efficient conduct.
10 It's a mandate from by statute but also by the JPML.

11 And it's interesting in terms of how McKesson fits
12 into this picture. I guess I first heard of McKesson myself
13 about 13 years ago in a case that's from California, the
14 *Skinner* case, which is actually referenced in our briefing,
15 where plaintiffs named McKesson a California distributor,
16 and the Court in that case actually found fraudulent joinder
17 of McKesson. But since that time, there is a pattern, of
18 course, of McKesson being named, and the question is why.

19 And the question also goes, Judge Kaplan, who is a
20 member of the JPML and an MDL judge himself, in a
21 concurrence, when he was sitting by designation in the
22 Second Circuit, he talks about particularly this quandary of
23 how to deal with cases in an MDL which may have
24 jurisdictional objections, there may be remand motions, can
25 they be subject to certain orders of the MDL judge that does

1 not go to the merits? And he, in his concurrent, said an
2 MDL is a complex situation and therefore may require and the
3 MDL judge in his or her discretion may find it that maybe
4 things should be done from a different perspective and what
5 is that perspective and here we come to the efficiency
6 argument.

7 We have a process in place in this very case. We
8 have a short form complaint, as we've heard about, 30 days.
9 We have product ID discovery that follows on the heels of
10 that within 30 days. We have a plaintiff fact sheet that
11 follows on the heels of that within 30 days. Within 90 days
12 we will have some very valuable information in a time
13 efficient and immediate manner where we'll know, to test,
14 really, what plaintiffs themselves said in their reply brief
15 regarding McKesson, plaintiffs have a good faith belief that
16 McKesson was a distributor that provided the very drug that
17 plaintiffs ingested. We have that process in place. And if
18 we can test really the bona fides of the allegations of the
19 complaint in terms of McKesson, and I know plaintiffs'
20 counsel discussed the role of McKesson, what I do know about
21 McKesson is from the *Avandia* decision that we referenced in
22 our papers where Judge Rufe actually found fraudulent
23 joinder of McKesson because looking in hindsight after years
24 of the MDL concluded, even though there was some discovery
25 from McKesson, it really wasn't a true bona fide attempt to

1 get to the heart of McKesson.

2 But here's what the decision says about McKesson,
3 and it's actually stating what the plaintiffs said about
4 McKesson. McKesson is a major, national distributor of
5 Avandia. Plaintiffs acknowledge that it is not the only
6 distributor. And counsel for plaintiffs argued that drug
7 distribution chains are complex, making it difficult to
8 establish that McKesson distributed the Avandia used by
9 their clients without further discovery.

10 So we have a mechanism in place, Your Honor. We
11 have this process in place over the next 90 days to be able
12 to digest that information, take that information and be
13 able to work with McKesson to see, did McKesson actually
14 distribute the particular product to the particular pharmacy
15 at the particular time that plaintiffs allege? Plaintiffs
16 say they were a good faith belief. They probably have the
17 information readily available.

18 But I think also, where is the efficiency and
19 what's the impact? Why not send the case back right away?
20 And again, we believe, based on our papers, that California
21 law does not establish a claim against McKesson. But
22 where's the inefficiency? The answer, Your Honor, is it
23 does have real impact on defendants but has no prejudice to
24 plaintiffs. Plaintiffs can coordinate the discovery in
25 these cases whether they're here, in California, they can

1 stay here, they can be coordinated.

2 But let's watch the timeline. If Your Honor does
3 choose to remand these cases now and concludes that there is
4 a basis, a reasonable basis, under California law and there
5 is a real intent to pursue a claim against McKesson, cases
6 will go back. Discovery will have to be served to get the
7 very information that the short form complaint the product
8 ID discovery will provide, that the PSS will provide. It
9 will take some time to serve that discovery, to get that
10 back.

11 And then once that's provided, a couple of things
12 could happen. We could either conclude what we could have
13 concluded in the MDL, that there's no basis for a claim
14 against McKesson. The problem is by that time, we're up
15 against the one year issue in terms of removal. These cases
16 were filed in August of 2015. If we do not obtain that
17 information until after August 2015 in state court, there is
18 a potential hurdle to the ability to remove.

19 And let's say the information enables us to
20 conclude with McKesson that McKesson did not distribute the
21 particular product to that pharmacy, so at that point, what
22 would happen, it would be re-removed, assuming it's timely,
23 go back through the JPML process, whether the plaintiffs do
24 or do not oppose the transfer that's plaintiffs'
25 prerogative, it comes back to this Court and we're back

1 where we were if the cases had remained in the MDL. So
2 that's why this limited window is really what defendants are
3 asking for, process is in place, it's efficient, it makes
4 some sense, and there simply is just no prejudice to
5 plaintiffs if it takes that course.

6 And I just to address something that's been
7 mentioned in the papers, whether this Court must address
8 jurisdiction immediately. Addressing jurisdiction
9 immediately is not what the jurisprudence suggests and quite
10 to the contrary in whether it's a non-MDL context or an MDL
11 context. The case law, including Supreme Court precedent in
12 the *Sinochem* case which said a Court could decide forum
13 nonconvenience issues before jurisdiction, it's the
14 merits-based issues that are of concern. And certainly in
15 the MDL context there's no dispute that a court has
16 discretion, as happened here, cases are removed, they could
17 be stayed by the transferor court, and the JPML transfers it
18 even though there's a jurisdictional objection.

19 So, Your Honor, what, in effect, defendants are
20 asking for here, in addition to getting a better handle on
21 what product was actually distributed, again, based on the
22 good faith belief that McKesson was actually the distributor
23 of the very product that plaintiff ingested, is the time to
24 be able to test those bona fides, get that information in an
25 efficient manner. It's efficient, it's consistent, and it's

1 also furthering a mandate. It's efficient in that it's
2 that's what this MDL is all about, getting this information
3 together in a short period of time to be able to have it.
4 It's consistent with what the Eighth Circuit has held is one
5 of the roles of the MDL judge to organize the cases in an
6 efficient way, and it does further the mandate of the JPML
7 and the MDL statute to be able to run these cases in a just
8 and efficient manner.

9 THE COURT: Discovery has already been served on
10 McKesson in the Zachman case, correct?

11 MR. ROTHMAN: My client is not named in that case.
12 But that's my -- Mr. Murdica can address that.

13 THE COURT: Is that correct?

14 MR. MURDICA: That's correct, Your Honor.

15 THE COURT: So that one is proceeding ahead
16 quickly?

17 MR. MURDICA: It is not, Your Honor. By agreement
18 of the parties, a stipulation was proposed to the Court to
19 extend discovery until December 2017. The Court, instead,
20 decided to adjourn the trial date and stated that they would
21 follow the schedule here in the MDL.

22 THE COURT: Okay. All right.

23 MR. ROTHMAN: Thank you, Your Honor. I'll defer
24 to Mr. Murdica.

25 THE COURT: Okay. All right. Thank you,

1 Mr. Rothman. Appreciate it.

2 MR. ROTHMAN: Thank you, Your Honor.

3 THE COURT: Mr. Murdica.

4 MR. MURDICA: Thank you, Your Honor. I first
5 wanted to just pick up on one question you asked about
6 efficiency, and that was whether McKesson was going to be
7 pursued in this MDL. What Your Honor should know is that
8 aside from the these four cases, there's 44 other cases
9 naming McKesson. So if what I just heard is true that
10 McKesson is not going to be pursued, there's 44 McKesson
11 dismissals that should be happening right away.

12 THE COURT: And those are cases that are already
13 in the MDL?

14 MR. MURDICA: That's right. And if that's not the
15 case, if we're not going to dismiss McKesson from every
16 case, then it would be efficient to conduct discovery of
17 McKesson here because there are 44 other cases in which
18 McKesson is named.

19 Now, going back to the background on McKesson and
20 what's really at issue here, what you heard Mr. Mosier say
21 was McKesson is a distributor of Levaquin and Avelox. True.
22 But what he didn't mention is that the law in California is
23 that McKesson would have had to be the actual distributor
24 for these four plaintiffs. And what you heard was
25 Mr. Rothman saying let's find that out, and the reason he

1 said let's find that out is because that makes a very big
2 difference in whether these cases should be remanded.

3 What I would like to present to the Court is a
4 recent decision from after our briefing. The name of the
5 decision is *Martinez versus McKesson*. It's very similar,
6 and it walks through the process of distributor liability,
7 and, you know, it's one, was there any manufacturing? No,
8 they don't dispute that. Two, is it a distributor? Yes.
9 We don't dispute that. But was it actually the distributor
10 of the plaintiffs' product? We don't know that. And that's
11 what we need to find out to know if these really should be
12 remanded, if you believe their arguments on the law. And
13 then three --

14 THE COURT: Was McKesson the distributor in
15 Zachman? Or don't we know that yet?

16 MR. MURDICA: We don't know that yet. There is a
17 motion for summary judgment set in Zachman on this issue for
18 August 2nd of 2016. But what I will say, Your Honor, on
19 that point, and this gets to the kind of behemoth that
20 McKesson is or is not, these same lawyers filed numerous
21 other cases against McKesson in California state court and
22 filed motions to remand or remove them on the same bases,
23 and we did take some discovery there, and out of eight
24 cases, eight of them we were able to come to agreement to
25 dismiss McKesson because they weren't the distributor. So

1 just because it's a California plaintiff and McKesson is
2 California based does not mean by any means that McKesson
3 was the distributor. I can speak for Levaquin, McKesson was
4 one of 22 nonexclusive distributors of Levaquin throughout
5 the country. So, you know, you can do the percentages, but
6 it's not an automatic thing.

7 THE COURT: All right. Thank you.

8 MR. MURDICA: Thank you, Your Honor.

9 THE COURT: All right. Yes.

10 MR. MOSIER: Just real briefly, Your Honor.

11 Number one, again, the question is jurisdiction. Burden of
12 proof is clear and convincing evidence, do we have a
13 colorable claim? Yes, we do. We have the Zachman case
14 that's already been remanded back down. It has been sitting
15 in San Francisco. These cases would also be remanded back
16 to San Francisco and the same efficiencies of consolidation
17 of course would apply there.

18 THE COURT: What about the 44 cases in the MDL
19 that name McKesson, are they going forward? I thought I
20 heard earlier that in the master complaint, no but there's
21 an option for others to -- for plaintiffs to sign up in
22 their individual complaints. Is that correct?

23 MR. SIMS: There is in the short form complaint,
24 Your Honor.

25 THE COURT: The short form.

1 MR. SIMS: In the short form complaint there is an
2 optional line on adding McKesson or other defendants, so
3 that is available.

4 THE COURT: Okay.

5 MR. MOSIER: And the other issue as well, Your
6 Honor, not only direct distribution but also under *Bay*
7 *Summit*, California law, parties outside the direct chain of
8 distribution can be held liable as well. As you heard from
9 my comments earlier, McKesson is a large marketing and sales
10 machine, and they fall under the outside chain of
11 distribution under *Bay Summit* as well. So they will be
12 alive and well in California along with discovery that we're
13 doing. Thank you.

14 THE COURT: Thank you. Go ahead.

15 MR. MURDICA: Your Honor, if I can just respond to
16 that last point you made on *Bay Summit*. You have in the
17 record affidavits from Janssen and from numerous McKesson
18 employees that, if you look at them fairly, state we did
19 nothing with respect to these products other than distribute
20 them. We didn't market them. The discount programs he was
21 talking about, that didn't exist for Levaquin. So the whole
22 *Bay Summit*, you know, outside of the direct chain of
23 distribution, that is not going to apply to McKesson in
24 these cases. This is purely about were they actually the
25 distributor of these plaintiffs, and I think we're going to

1 find that out here in the MDL if those cases stay for the
2 next few months during discovery.

3 The case that I wanted to hand up to Your Honor, I
4 would like to do that. I sat down with it. But for the
5 record, it's 3:15-CV-02903 from the Southern District of
6 California, April 7th, 2016, *Victoria Martinez versus*
7 *McKesson Corporation*. May I approach, Your Honor?

8 THE COURT: You may.

9 MR. MURDICA: Thank you, Your Honor.

10 THE COURT: Anything else on the motions? All
11 right. Yes.

12 MR. MOSIER: No, Your Honor.

13 THE COURT: All right. The Court will take the
14 motions under advisement. We'll issue a written order
15 quickly on this matter, and I appreciate the arguments
16 today. Thank you very much. All right.

17 Anything else that we need to address? Go ahead.

18 MR. ROBINS: Your Honor, we were hoping to get
19 some additional dates for status conferences.

20 THE COURT: Sure.

21 MR. ROBINS: And we were going to propose, from
22 the plaintiffs' perspective, either June 16th or June 21st
23 for the June date.

24 THE COURT: The 21st would work for me.

25 MR. ROBINS: At 1:30 again?

1 THE COURT: Yeah, let's do that, June 21st.

2 MR. ROBINS: And then --

3 THE COURT: -- July.

4 MR. ROBINS: And then July 19th we were going to
5 propose.

6 THE COURT: I believe that works.

7 MR. ROBINS: Again at 1:30?

8 THE COURT: 1:30 would be fine.

9 MR. ROBINS: And then August 16th?

10 THE COURT: I think the following week might be
11 better if there's a date the following week that works.
12 Monday is the 22nd, then the 23rd and the 26th. I have a
13 question mark on the 16th, that's the only reason why, it
14 might work fine, but would the following week be a problem?

15 MR. SOLOW: It may be a problem for me, Your
16 Honor. That's a -- right now I plan to be out of the
17 country the last two weeks of August.

18 THE COURT: Okay. Does that include the week of
19 the 15th?

20 MR. SOLOW: Candidly, Your Honor, I didn't think
21 we would be looking at August calendars. I would have to
22 check with my wife, the most important person.

23 THE COURT: Well, that seems reasonable.

24 MR. SOLOW: I'm looking at the 29th. I don't know
25 yet, Your Honor.

1 THE COURT: Let's hold off on the August date.

2 MR. ROBINS: Sure.

3 THE COURT: We'll figure that out next time.

4 MR. ROBINS: Okay.

5 THE COURT: All right. Anything else to address
6 today?

7 The orders that I have based on the stipulations,
8 we will have those out by tomorrow at the latest so.

9 MR. ROBINS: Great. Thanks very much, Your Honor.

10 MR. MURDICA: Thank you, Your Honor.

11 THE COURT: Thank you very much for your time.

12 We'll be in recess. Thank you, everyone.

13 (Proceedings concluded at 3:22 p.m.)

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18 I, Staci A. Heichert, certify that the foregoing is

19 a correct transcript from the record of proceedings in the

20 above-entitled matter.

21

22 Certified by: s/ Staci A. Heichert

23

Staci A. Heichert,

24

RDR, CRR, CRC

25