

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR : 2:14 MN 2502

Status Conference in the above-captioned matter
held on Friday, June 13, 2014, commencing at 10:07 a.m.,
before the Honorable Richard M. Gergel, in Courtroom III,
United States Courthouse, 83 Meeting Street, Charleston,
South Carolina, 29401.

REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
Official Reporter for the U.S. District Court
P.O. Box 835
Charleston, SC 29402
843/723-2208

A P P E A R A N C E S

APPEARED FOR PLAINTIFFS:

Jayne Conroy, Esquire
Mia L. Maness, Esquire
Ann Estelle Rice Ervin, Esquire
Blair H. Hahn, Esquire
David F. Miceli, Esquire
Laura Voght, Esquire
Paul Hanly, Esquire

APPEARED FOR DEFENDANTS:

David E. Dukes, Esquire
Mark S. Cheffo, Esquire
Mara Cusker Gonzales, Esquire
J. Mark Jones, Esquire

1 THE COURT: We are in the June 13, 2014 status
2 conference. Are folks on the phone yet?

3 THE CLERK: Yes, sir.

4 THE COURT: Very good. Thank you. Okay. We are in
5 the matter In Re: Lipitor, 2:14-2502, our monthly status
6 conference.

7 Let me first clarify, there were three motions to
8 transfer. There were, I think, health problems of plaintiffs'
9 families in those three. My understanding is that the
10 defendant has consented to that? And I want to make sure we
11 understand that those three cases would not be in the pool,
12 the potential pool of cases of the 14.

13 Do we have an understanding about that?

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

15 THE COURT: Very good. Okay. No problem.

16 I have a motion, an emergency motion to grant 40-day
17 extension to provide plaintiff fact sheets. Let me -- perhaps
18 I could get some explanation here, and perhaps defendant can
19 help me on this. How many basic -- how many plaintiff fact
20 sheets were due by June 2nd, how many arrived, and how many
21 have not -- nothing was filed?

22 MR. CHEFFO: Thanks to someone preparing that.

23 THE COURT: I saw you --

24 MR. CHEFFO: Rare occasions, please ask those
25 questions, because I actually have that information here

1 today, Your Honor, so I'll try to give you -- and I think
2 these numbers are, you know, accurate, could be off by one,
3 but let me see if I can respond.

4 So there were 913, according to our numbers, cases that
5 were essentially subject to being required to have to produce
6 fact sheets. And those were either the direct file cases
7 before a certain deadline, or cases that were already here.
8 On the date when they were due, there were over 209 cases that
9 we had not received fact sheets, about one in five, a little
10 more than that.

11 We then wrote some, you know, some letters and
12 deficiencies. We didn't think the appropriate thing was to
13 come in and file motions at that point in time. And there
14 were certainly, and I'll talk a little about the quality of
15 some of them, but there was clearly an effort to address some
16 of them. So there was about 72 or 75 that were still
17 outstanding as of June 11th. And then we granted extensions
18 to a number of them, some a few days, and I think 35 actually
19 that Mr. Lopez's firm that are actually due today.

20 So just on the extension point, and I think Your Honor
21 understands this, the normal course, our normal set point is
22 on courtesy extensions, sure, we expect to do that, we expect
23 to give them, but --

24 THE COURT: But at some point you have to make a
25 decision, I think by June 23rd, you need the information.

1 MR. CHEFFO: Exactly. And we need to go through it,
2 and there's hundreds and hundreds, so we have teams of people.
3 And while we can -- you know, I think our thinking was frankly
4 if we 50 or 60, we may not get to those for a week or two, so
5 why make the plaintiffs jump through hoops; but if there was
6 200 or 300, it would be a lot harder.

7 THE COURT: Mr. Cheffo, how many right now are as
8 of -- as we speak here today on June 13th, have you received
9 nothing?

10 MR. CHEFFO: A hundred three. Now, the only footnote
11 there is 35 of those cases, 35 or 36, are of the Lopez firm,
12 and they have an extension until today. So if we were to get
13 all those by the end of today, then it's in the range of 60 or
14 so; if we don't, it's 100. And that's basically no response.
15 And the only issue with, I think Miss Heacox's request is, you
16 know, obviously when you combine them, we'll talk about some
17 of the lexicon issues, I don't know if you've been apprised of
18 that.

19 THE COURT: I have not been.

20 MR. CHEFFO: There's over, over 120 cases of which
21 people have not -- basically said they will not submit to
22 lexicon, including some firms, their entire inventory of
23 cases. So we'll talk about that in a minute, because I think
24 that complicates issues substantially.

25 But, you know, we were willing, obviously, to give

1 courtesy extensions. But to give an extension beyond the time
2 that we have to pick somewhat, you know, undercuts the whole
3 purpose of this agreed process.

4 THE COURT: Mr. Hahn, what's your response to all
5 this; because obviously the Court's concerned.

6 MR. HAHN: Yes, sir. I believe Miss Heathcox is on
7 the phone and can respond specifically to her motion, because
8 those are the motions just for her cases.

9 MS. HEACOX: I'm on the phone, Your Honor.

10 THE COURT: Miss Heathcox, wait just a moment. I
11 want to hear from Mr. Hahn about these others, because she's
12 not the only one, apparently.

13 MS. HEACOX: Yes, Your Honor.

14 MR. HAHN: There are others that just haven't
15 responded. I really don't have an answer for the Court, other
16 than they said they just don't have the information, haven't
17 responded yet.

18 THE COURT: Miss Heathcox, I'll be glad to hear from
19 you.

20 MS. HEACOX: Your Honor, these 27 cases that we moved
21 for an extension on, that number has already been reduced by
22 two, because we are continuing to, you know, work on the
23 cases, and one of them we have voluntarily dismissed, and one
24 of them, a fact sheet has been served on since then. But
25 essentially these are, you know, we -- as soon as the Court

1 posted the plaintiff fact sheet, finalized it, we sent them
2 off to our clients. And we have, since that day, been calling
3 them and trying to, you know, get them done on the phone, if
4 they couldn't fill them out and return them. And these are
5 the people here who just we have not been able to -- they
6 haven't returned the plaintiff fact sheet, and we haven't been
7 able to get them on the phone to get information. At least
8 one of them, we finally got on the phone, and the explanation
9 was a family member has cancer and is dying, and they just
10 haven't been able to -- they've been at the -- they have been
11 doing that for the last month and just don't have time for
12 paperwork.

13 And these are by and large elderly people, and they are
14 chronically ill or they have family members that are
15 chronically ill. And, you know, I think that -- I'm hoping
16 that the Court will not find that the appropriate response is
17 to dismiss their cases at this point, but just allow them to
18 have some additional time to get the fact sheet filled out.

19 And as we pointed out in our papers, typically in an MDL
20 there's more than one wave of cases, you know, groups from
21 bellwether selection. I don't see the harm to defendants if,
22 you know, there's some cases that have to go into a different
23 bellwether selection wave. And these would be those cases.

24 THE COURT: Well, of course, I did not come up with
25 this precise schedule, I had the parties consent to -- plan

1 it, consent it to, and it was thought reasonable that there
2 were, in 30 days, this could be done. And I certainly
3 recognize there are going to be individual circumstances where
4 that's not going to be possible.

5 The volume of these raise a question in my mind whether
6 some of these parties really want to be in this lawsuit, or
7 have they been snared by TV ads or something and don't really
8 care.

9 You know, responsibility to the lawsuit is reciprocal. I
10 have ruled a number of times in these cases requiring the
11 defendant to produce millions of documents, but responsibility
12 is reciprocal. There's a plaintiff responsibility as well.
13 And I know some lawyers like to try these mass torts as if
14 they can handle a case 20,000 feet in the air, but you
15 represent individual people, and they have information. And
16 I've looked over the plaintiff fact sheet, it's not altogether
17 more complicated than what a patient might fill out sitting in
18 their doctor's office waiting to see a doctor, giving their
19 medical history and so forth.

20 So I don't see this as unduly burdensome. And at some
21 point we've got to ask ourselves, are some of these people
22 really don't want to be parties. I mean, I just -- they don't
23 want to be parties.

24 What I'm concerned about is if the number gets so large,
25 it starts having the ability, through that and perhaps lexicon

1 issues, that certain plaintiff counsel can manipulate the
2 pool. And I've already warned you, if I think that's
3 happening, I'm going to come up with another system in which
4 y'all will have no role in picking the cases, if I don't think
5 it's fair. And that's where I'm going right now, is I'm
6 concerned with the large number of these.

7 You know, the old -- I didn't do a lot of mass tort
8 litigation, but when I couldn't find a client, we sent a law
9 clerk over to the house and knocked on the door; we didn't
10 just say, oh, they won't answer the telephone during our
11 office's hours, and so okay, you know, we don't have to do
12 anything. Well, they do have an obligation. And frankly,
13 with all the burden I placed on the defendant, I think we have
14 to place the burden on the plaintiff, too. There's some
15 reciprocity here.

16 So it looks like -- I mean, obviously in circumstances
17 where we have a patient family member dying, this is not even
18 debatable, I mean, I'm not going to put the hammer down, and
19 Pfizer isn't standing up asking me to do that. But the volume
20 of these seem a lot greater than that.

21 Are we -- and I'm not ready today, I'm not going to make a
22 decision about dismissal of cases, and I'm going to do it on
23 an individual basis. I'm going to have a hearing, and we'll
24 take these up one at a time about what the explanation is.
25 And, you know, part of it could be whether I'm going to

1 dismiss it with prejudice or without prejudice, and what is
2 the status of statute of limitations; if I do it even without
3 prejudice, am I essentially doing it with prejudice. I mean,
4 I need to know some of these things.

5 The easier course, obviously, is to get these fact sheets
6 in. I'm not worried about small infinitesimal percentage of
7 these. But I am worried that if, in the combination of
8 events, it looks like the plaintiffs are manipulating or some
9 members of the plaintiffs' team are manipulating the pool,
10 mainly to make sure their clients don't get in the bellwether
11 trials. I think that's wrong, and I'm not going to allow it.
12 And if I need to put 913 cases in capsules and have a
13 blindfolded person pull out 14 of them, I will. If that's
14 what y'all are going to make me do, I will do that, okay? So,
15 you know, I don't think anybody wants me to do that, but I'm
16 not going to let you manipulate. I know that, because I do
17 that, y'all can't manipulate the process, okay? That's my one
18 given here.

19 So what can we do? Let's say we had a drop dead date of
20 June 18th. Can we get these -- looks like now we are -- we
21 have 103 out, with the hope -- Somebody here on the phone from
22 the Lopez firm? Apparently not.

23 MR. LOPEZ: Your Honor, this is Ramon Lopez. I
24 answered, but I had my phone on mute.

25 THE COURT: Very good. What's the status of these,

1 Mr. Lopez?

2 MR. LOPEZ: Your Honor, I'm actually out of town, I
3 just, when I heard that, I sent an e-mail to the folks in my
4 office who are handling that; I don't have a status. But we
5 have an extension through today, and I know that we've got a
6 significant team working on plaintiff fact sheets. And I can
7 just tell you that, you know, my anticipation is that they
8 will be done today.

9 THE COURT: Well, let me say, folks, that when we
10 were selecting the plaintiffs' steering committee, I said for
11 those of you who are too busy to put your top priority on this
12 case, you should not be on the steering committee, and perhaps
13 you ought not be in the case, if you can't comply with the
14 Court's mandate. And I repeat that. And I'm prepared to
15 revisit those issues, if I find any particular law firms are
16 not diligent in performing their duties, and they have members
17 on the steering committee. Because we're going to get this
18 work done.

19 And it's striking to me that a number of firms appeared to
20 have no problems getting them done, and other firms seem to
21 have chronic problems. And there are going to be a lot of
22 different explanations, sometimes it could just be the odds
23 are just improbable odds, but they exist, that they have a
24 combination of very ill patients or something. But it might
25 well suggest that people aren't being very diligent and don't

1 take these deadlines very seriously. I'm not going to
2 tolerate that.

3 So, Mr. Cheffo, if we have a drop dead date of the 18th on
4 all of these which have not been granted extensions, I know
5 that's pushing y'all a bit, but it would be the tail end, will
6 that be sufficient?

7 MR. CHEFFO: We'll make that work, Your Honor.

8 THE COURT: Very good. And what I intend to do on
9 those, I want a list after the close of business on the 18th,
10 I want a list of those who did not provide you anything. And
11 for those, I'm going to consider -- we're going to think about
12 the procedure for potential sanctions, which may include
13 dismissal. Okay? Which is, of course, what's provided in the
14 case management order for consent, which was submitted to me
15 by consent as a potential sanction for nonproduction.

16 And I'm going to tell you right now, if people have
17 situations like was mentioned earlier of someone dying in the
18 family, I don't intend to sanction anybody like that, that's
19 not what I intend to do. But if there is just -- I mean, I'm
20 sure that all of y'all wrote your clients and said this is
21 like really important, we have a very short timeline.

22 Mr. Hahn, am I right about that?

23 MR. HAHN: Yes, sir.

24 THE COURT: I mean, we're not playing around, we have
25 these court deadlines. And then, you know, clients have a

1 responsibility to be reasonable to their lawyers. I mean, you
2 know, you can't just become a plaintiff in a lawsuit and then
3 just disappear. That presents its own set of problems. And
4 though this is a mass tort and lots of people and most of them
5 are compliant, that's not good enough. If you're a plaintiff
6 in this lawsuit, you have an obligation, and I'm going to hold
7 you individually responsible for fulfilling it.

8 Okay. So that goes to the issue -- we're going to go to
9 the 18th on any that are not there, other than Mr. Lopez has
10 his due today, I expect those in, he's assured me that that's
11 going to get done. I'm going to get a report on the 18th on
12 what's not been turned in. And I'm prepared at that time
13 to -- I will request, Mr. Hahn, for all those that are
14 provided on a list, a prompt explanation of what was done
15 regarding each of those individuals. Okay?

16 MR. HAHN: Yes, sir.

17 THE COURT: And now, I know there's this issue about
18 the quality of information. Mr. Cheffo, do you want to talk
19 to me about that?

20 MR. CHEFFO: Yes, Your Honor. You know, they've
21 heard me say it, I tend to follow the goose/gander rule as
22 much as possible. So I think fairly, you know, we did have a
23 30-day period of time. So sometimes, you know, you have a
24 reasonable expectation that there may not be complete
25 information. We tried not to nitpick. To give you an

1 example, we've actually written 350 deficiency letters. I
2 would not stand up before you and say every one of those is
3 kind of case dispositive, we can't pick. And again, this goes
4 both ways.

5 But what I would say is this. Is that there's probably a
6 little more missing information than I would have expected,
7 based on the fact that the fact sheets are not particularly
8 cumbersome. When we went into the negotiations, and it was a
9 joint negotiation, a lot of what we heard, I think
10 appropriately, was I understand, you know, Cheffo team, you
11 want this, but we only have 30 days. So we'd said okay, you
12 know, we know that you have to get it.

13 So we used some metrics. And I don't want to paint with a
14 broad brush, because I think Your Honor said this exactly
15 right, and that's part -- one is, clearly if somebody called
16 us and said we have, you know, somebody has cancer --

17 THE COURT: That's the end of the discussion.

18 MR. CHEFFO: That's never an issue. We'd say take
19 them out, that's fine. What we're talking about is kind of
20 broad collection of the cases where we don't really have an
21 explanation, so what we can do is raise it with Your Honor.

22 But so there's, you know, about 40 cases of which there's
23 no pharmacy or medical records. You know, is this a
24 dispositive factor or is it somewhat arbitrary? Yes, but we
25 have a kind of a footnote, if they have 50 pages of medical

1 records or not, right? Because it's usually in these cases
2 you'd expect to see more. There's about 140 cases where
3 there's less than 50.

4 THE COURT: Of course, one of the responsibilities
5 they have to go get the records, and sometimes some of this
6 could be outside their control.

7 MR. CHEFFO: That's true, and they may not have
8 collected all of it. So again, that's why these are more of,
9 I think, guide posts than they are. But I would just suggest,
10 for example, if I tell you 128 pages of people that have less
11 than 50, that means there's probably six or 700 that have more
12 than 50. So you know, presumably when you collect the records
13 before they file as part of their Rule 11 obligations, they
14 get the records.

15 You know, and then there's proof of use issues, about 43
16 people we can't determine proof of use. Twenty-five folks who
17 have no apparent diabetes diagnosis, 39 people who say they
18 can't recall when they took Lipitor, and, you know, 20 who say
19 that they don't know when they were diagnosed with diabetes.

20 So let me just say this, Your Honor. We have been taking
21 to heart exactly what I think Your Honor wants, is to kind of
22 move ahead. We're not kind of coming in and saying let's
23 throw this -- let's throw the entire schedule out, let extend
24 this six or nine months. We are really trying to work within
25 the schedule that Your Honor has set.

1 THE COURT: I'm going to make this schedule work.
2 The question is, what happens to those people who don't
3 comply. That's going to be -- are they going to stay in this
4 case. Because we're going to stay on this schedule.

5 MR. CHEFFO: Right. And I think part of the reason
6 why it's important, and when we get to the lexicon issue, I
7 think we have some comments there, too. But, you know, you
8 want to have a situation where people, by not complying, they
9 don't get kind of a pass, right? I mean, the idea is if --
10 the thought is if you don't do a fact sheet, if you don't give
11 us enough information to pick your case, you don't get picked,
12 and then you sit in this kind of pool --

13 THE COURT: No, if they don't have a good
14 explanation, they're not going to stay a party in this
15 lawsuit. It's as simple as that. There's going to be
16 consequences. Let me say, the law firms that aren't being
17 diligent, a major block of their cases will simply go away.
18 And if I feel they're not being diligent, I'm going to
19 reconsider their service on the steering committee.

20 MR. CHEFFO: And so --

21 THE COURT: You know, Mr. Hahn isn't the only one who
22 has to do the work here, okay? I mean, there are other people
23 who, if things go the way they'd like, want to get
24 compensated, they're going to do the work. It's not -- I have
25 no complaints about the efforts and diligence of lead counsel,

1 I'm having concerns about other people who are involved and
2 expect to receive remuneration for their service. I have
3 concerns about it.

4 MR. HAHN: Judge, as to the specific issue of quality
5 of fact sheets and deficiency letters, I am not privy to that
6 information, because that goes directly to the individual
7 lawyers that are at issue. My office has received some, we
8 responded to them accordingly.

9 I think that as you've already said, it's a fact-specific
10 issue, and I think we're going to have to deal with them on a
11 case-by-case basis. Because there are going to be some that
12 is what I will consider to be a relatively minor issue, and
13 there are going to be some where, as Mr. Cheffo said, there's
14 no medical records and no doctors listed. Those are two
15 different animals.

16 THE COURT: Or they don't have medical records which
17 are core to this. I mean, is there a doctor making a diabetes
18 diagnosis, that seems a pretty material issue, when, and the
19 prescriptions. I mean, there's some medical information more
20 important. And I know in some ways if you really list
21 numbers, having metrics makes sense, but it may well be a
22 dozen pieces of paper, but they have all the information
23 Pfizer needs to make a fair assessment.

24 What concerns me, Mr. Hahn, about what you just said was I
25 don't have responsibility for this. This is one of those

1 things that these lawyers out there having this may have
2 adverse impact on the entire matter, and have -- and I don't
3 know if you have the luxury of ignoring it. It may be
4 something that your team needs to embrace the responsibility
5 about making sure it happens. Because left to their own
6 devices, you right now have a significant number who haven't
7 gotten word.

8 MR. HAHN: And I promise to the Court that we're
9 pushing them as hard as we can, they're people that I fussed
10 at in this litigation trying to get information. At this
11 stage of the game I think the appropriate way to deal with
12 this would probably be to set yet another deadline, and if
13 they don't do it, we can come before the judge -- come before
14 you and tell you why.

15 THE COURT: When that list comes to me about those
16 who have given nothing, I want to know the law firms from
17 which they come, and whether they have members on the steering
18 committee. Because I'm going reconsider their service, if
19 there's a large collection from any law firm. And I'm going
20 consider the explanations, but, you know, there's going to be
21 accountability, not just with the plaintiffs but the
22 plaintiffs' lawyers who have a role in this.

23 And I'm not trying to be unduly burdensome. I put a lot
24 of burden on the defendants here, and frankly, the relative
25 burden is light on plaintiffs in terms of their discovery

1 responsibilities, compared to what this Court has imposed on
2 the defendants. And we believe in reciprocal discovery, not
3 unilateral discovery, which frankly was requested and I denied
4 it. And I'm not going to allow the plaintiffs to basically
5 implement unilateral discovery by not complying with my
6 orders.

7 So what we're going to do here is on the eight -- I want
8 you to follow up with your colleagues, not just on the hundred
9 or so that haven't received responses, but on the 300 where
10 there are reported deficiencies. And I want them all done by
11 the 18th. And, Mr. Cheffo, in addition to this, whatever --
12 there are no responses, where you believe there are material
13 deficiencies, I want to know that list.

14 MR. CHEFFO: Yes, Your Honor, we'll do that.

15 THE COURT: And when I'm talking material, y'all
16 define it in one of the case management orders, but things
17 that go to your client's ability to assess the quality of the
18 case. And I think if you can't determine they have diabetes,
19 I mean, come on. Or they ever got the medicine, or they took
20 it for any duration, I mean, give me a break. These are just
21 fundamental.

22 And I'm not unaware how some of these clients were found.
23 And some of them, you know, call an 800 number and don't have
24 much commitment to the case. If they don't, that's okay, they
25 can go their way.

1 This case ought to be litigated by people who care about
2 this claim and who have some commitment to participating in
3 this lawsuit. And it may well be that the plaintiffs'
4 position is strengthened by getting people out who don't care
5 and don't care to participate in the case. So some of this
6 may just be a natural filtering process, and I know I'm doing
7 it earlier than you might otherwise have that happen, but
8 heck, here we are trying to get a bellwether pool collected,
9 and we're having lots of problems doing it.

10 So the 18th is our time, it's now the 13th, that's five
11 days. I think every one of these law firms with deficiencies,
12 I would expect their lights to be burning all weekend. And,
13 you know, there's no crime sending one of these summer law
14 clerks out knocking on the door to these people on the
15 weekend. I assure you, you have a better chance to get them
16 there on Saturday than you do at 3:00 o'clock on Wednesday,
17 okay? And y'all need to take this seriously. And there are
18 potential consequences for the nonresponders, inadequate
19 responders, and their lawyers. Okay?

20 I know if we had problems with the defendant, I'd be
21 hearing the plaintiff wanting me to hold Pfizer accountable,
22 and I would be receptive to that. So I expect what's good for
23 the goose is good for the gander.

24 Now what's going on with this lexicon issue; let me hear
25 about that.

1 MR. CHEFFO: Yes. Let me give you some statistics
2 and some numbers. Again, I would preface, Your Honor, by
3 saying that, you know, in fairness, this is not a systemic
4 issue. I think you had -- you talked about some of the 1404,
5 there was a showing of specifics, and obviously we were shown
6 things that made sense to us, ourselves and our clients, said
7 sure, of course we understand why someone can't travel if her
8 husband is will. And I think, again, we go back to last
9 conference, Mr. Hahn, I think appropriately, said look, the
10 plaintiffs have developed or will develop a letter that will
11 go out the PSC stands behind, and we're going to basically get
12 our clients to agree, or tell us that they won't agree. And
13 again, when you look at you've talked about this, this is --

14 THE COURT: Usually a defense issue.

15 MR. CHEFFO: Usually not say plaintiffs, don't pick
16 me, I don't want to go to trial, that's not what you hear
17 somebody --

18 THE COURT: That kind of view is I never wanted to
19 bring a case I didn't want to try. I mean, what's going on
20 here? I would expect the people who brought these lawsuits to
21 be begging to be one of those cases. I mean, for the lawyer
22 who gets to try that case, I mean, what a great opportunity in
23 their career and so forth.

24 So I'm skeptical about a response, oh, I am the plaintiff,
25 I'm asserting lexicon, and I'm not asserting 1404. I mean,

1 I'm starting to wonder what's going on here.

2 MR. CHEFFO: And here's, you know, so -- and
3 typically don't, you know, I don't like to single people out,
4 but the facts are the facts.

5 THE COURT: Go ahead.

6 MR. CHEFFO: You know, so the Johnson Becker firm,
7 Tim Becker is a PSC member. By our numbers, there's 46 cases
8 in the MDL. Do you know how many cases they're not waiving
9 lexicon? Forty-six. So, you know, a PSC member says I want
10 to come and I want to participate, and every one of my
11 clients, I don't want Judge Gergel to try that case. That
12 seems to be inconsistent with, you know -- again, I suppose
13 it's theoretically possible that they had a discussion with
14 all 46 of those people, and they said they explained to them
15 the benefits of having a trial date and going, and all of them
16 said no, we want to waive. But I don't have any specifics, I
17 just have the numbers, which seems to be wildly inconsistent
18 with the vast number.

19 So there are about 118 plaintiffs in 89 cases, but as you
20 see, it's very localized. So you have the Johnson Becker firm
21 with 46 out of 46, then you have the Cory Watson firm that has
22 31 cases and -- I'm sorry, 34 cases, and 31 of them don't wave
23 lexicon.

24 THE COURT: See, that's starting to sound to me like
25 someone is manipulating the process, that they're, you know,

1 trying to keep you from being able to pick their cases, that
2 they potentially have weak cases, and by asserting lexicon,
3 but not 1404, what they're actually doing is narrowing the
4 pool of cases that Pfizer can draw to put into the bellwether
5 pool. That is just wrong. And I warned y'all that if
6 something came like that, I'm going to come up with another
7 system.

8 Now, Mr. Hahn, what's your response to all this?

9 MR. HAHN: Your Honor, the numbers that Mr. Cheffo
10 stated are accurate. We had an agreement between us that as
11 long as less than 40 people didn't waive lexicon, we were
12 going to move on, because they have issues that we all talked
13 about. And we all believed that's what was going to happen.
14 It was -- there's two firms have submitted a statement saying
15 they will not waive lexicon. I've spoken to both firms. Both
16 of them tell me they've spoken to their clients. I have urged
17 them go to back and talk to their clients again.

18 THE COURT: I'm going to reconsider the serving of
19 both those law firms on the steering committee, I'm going to
20 reconsider that.

21 MR. HAHN: Yes, sir.

22 THE COURT: I think that is manipulating the process
23 and not in the spirit of this Court to, you know, when I even
24 heard that the lexicon issue was going to become a plaintiffs'
25 issue, I was skeptical. I mean, we all know this is a defense

1 issue. And Pfizer was prepared to waive, as I understood
2 that, is that right, Mr. Cheffo?

3 MR. CHEFFO: That is right, Your Honor.

4 THE COURT: So I just think it's a manipulation here,
5 and -- of trying to manipulate the pool. And I think
6 that's -- I don't think that represents good faith. And I'm
7 prepared to reconsider my method for picking the bellwether
8 cases and just taking it out of y'all's hands.

9 MR. HAHN: Judge, I think overall everybody's working
10 within the process and working in good faith. I would request
11 that the Court allow these two firms to respond to you either
12 today, I believe they're both represented by phone.

13 THE COURT: I'd be glad to hear from the Becker firm.
14 Anybody on the phone?

15 MS. GORSHE: Yes, Judge, this is Lisa Gorshe from
16 Johnson Becker. That statement was not completely accurate as
17 to our firm. I have personally spoken with the majority of
18 our clients. And as I advised Mr. Hahn, three of our clients
19 did waive lexicon. While out of the 45 that were eligible,
20 another seven agreed to dismiss their claims. So our numbers
21 aren't quite as high as Mr. Cheffo stated.

22 THE COURT: I just don't --

23 MS. GORSHE: We have 30 cases that were eligible, of
24 which three did stipulate to waiving lexicon.

25 THE COURT: I'm just dubious about why somebody would

1 bring a lawsuit and not want to try their case. Why would
2 they not want to be in the trial, since they have brought
3 their lawsuit, they have that opportunity, why would they not
4 want to do that?

5 MS. GORSHE: I would be more than happy to come to
6 Charleston and meet with you in camera and bring our
7 communications with our clients, as well as their responses
8 and their particular situations, ranging from the fact that it
9 is difficult for them to leave family members whom they need
10 to care for, or to take the time off work, or the fact that
11 they're merely afraid to travel to South Carolina, because
12 they're not familiar with the area because they have never
13 left their hometown area before, and so they want to stay
14 where they're familiar with.

15 THE COURT: Why didn't they file 1404 transfer
16 motions then? Those were the kind of factors we would
17 consider.

18 MS. GORSHE: We had originally filed those in their
19 home jurisdictions. And I apologize, I thought that applied
20 to if we had direct filed. I will cure that error and I will
21 file motions to transfer them back.

22 THE COURT: Well, I'm just dubious about an effort,
23 when one law firm disproportionately has virtually everybody
24 filing, that you tell me they're individuals, and I'm just
25 skeptical, frankly, when other law firms are not having that

1 experience. It just makes me wonder. And it just looks to
2 me, when I'm seeing two law firms having the bulk of these, I
3 am frankly skeptical that there's somebody trying to
4 manipulate the process.

5 And let me say, you have a right to assert lexicon, and
6 I'm not going to prevent you from doing it. It may well
7 affect how I select the bellwether cases. That's the problem.
8 Because I feel like what's happening here is an effort to
9 manipulate the pool of cases available for the defendant to
10 pick among the 913 that have been filed.

11 So you have the right, your clients have a right to, for
12 whatever reason, frankly, they don't need my consent to do
13 that, and they could pick it -- they could refuse to waive
14 their right under lexicon for any reason. So I don't want to
15 suggest that. It's just the collective action and the effect
16 of that makes me skeptical. And particularly when it's
17 focused on just a few law firms.

18 So I think the more significant issue is -- Mr. Cheffo, do
19 you have suggestions about alternatives for bellwether case
20 selection? Because, you know, perhaps I just need to put all
21 of them in a hat and draw.

22 MR. CHEFFO: I do. And, you know, I think as you
23 said, Your Honor, I don't know that that necessarily would
24 be -- certainly the Court could do it. I think that I
25 probably would say even with these deficiencies, we're

1 probably all better off having an opportunity to review it,
2 both sides have teams. But I do have some suggestions for the
3 Court to at least consider.

4 THE COURT: I welcome it.

5 MR. CHEFFO: One is this idea, because, you know, in
6 hearing that, so apparently they're telling me ten cases or
7 seven are getting dismissed, okay, we haven't seen that. But
8 I'm skeptical about three out of 30 would somehow only want to
9 deal with it. And I think part of the issue is people may
10 think they don't have to do some work. So there's probably
11 four suggestions.

12 One is if you want to have a lexicon issue, not being
13 punitive, but that means you're not going to have the case
14 tried here, and if it survives Daubert, you're eventually
15 going to have to go. So maybe there should be a separate
16 track for those cases, where we do a little more work on those
17 and get them ready, because eventually you're going to have to
18 remand them if they pass Daubert. So that will ensure people,
19 if they really are committed to the cases, that this is not a
20 pass, just by waiving lexicon, they sit in the back of the
21 party for awhile. So that's one thing that I think will, you
22 know, determine whether folks are really interested or not,
23 and they may help them reconsider whether they really want to
24 waive lexicon or not.

25 The second issue is they should explain, I think, as to

1 why, to make sure that their clients -- and they can certainly
2 do that in camera, it's not something we need to be privy to
3 their communications with their clients.

4 I would say there's two probably other things that can be
5 done that would be equitable, when you take the lexicon issues
6 as well as some of the deficiencies. The Court could
7 certainly consider allowing, you know, Pfizer to have a few
8 extra picks. There's no magic to why you have seven and
9 seven. If we had ten and seven, that would, you know, I think
10 be a way of trying to address some of this disproportionality.

11 And then the other thing that I think we would want to
12 highlight for the Court is, you know, there's some irony when
13 we say it's plaintiff picks, I didn't sue my client, so these
14 are all --

15 THE COURT: These are -- I have to say, these are
16 100 percent plaintiff picks. And so, you know, nobody made
17 anybody file a lawsuit. And they've sued the defendant, and
18 the defendant wants to go in and pick among the lawsuits. And
19 I wouldn't let them do it unilaterally. The first effort was
20 you wanting to designate the first 13, whatever it is, in the
21 pool, and I said no, I'm not going to let the defendant
22 unilaterally pick from that. But I'm also not going to let
23 the plaintiff pick. And if, you know, we're manipulating the
24 process in a variety of different ways, and one of them being
25 the invocation of lexicon.

1 Listen, folks, I practiced law for 31 years, I know you
2 get on the phone with a client, and 98 percent of the time
3 they'll do what you recommend they do. I mean, I wasn't born
4 yesterday, I know how this works. Okay? And when you have a
5 certain law firms having a concentration of them, logic tells
6 me what's going on there.

7 I'm not going to prevent them from doing that. But I do
8 like the idea if you're going to invoke lexicon, perhaps you
9 ought to go ahead and there ought to be certain discovery done
10 there to -- you don't get a pass, you don't get to go and
11 hide, if you're not going to try the case here. I can only
12 try so many here. I mean, the truth of the matter is most of
13 them, they have done nothing. I probably wouldn't have gotten
14 to their case anyway, because we're only talking about trying
15 two or three of them, right, as a practical matter. But the
16 manipulation concerns me about their result.

17 Mr. Hahn, what's your thoughts about how we might correct
18 this problem?

19 MR. HAHN: I can't disagree with Mr. Cheffo on the
20 extra discovery, Judge. That might be an equitable way to
21 handle the situation. We don't think that it would be fair to
22 punish all of us, because we've got a specific issue with a
23 small number of law firms, by changing how we're picking cases
24 within the group that's left.

25 THE COURT: It concerns me that a larger pool of

1 compliant people are being punished by a smaller group of
2 noncompliant. That concerns me a lot.

3 MR. HAHN: Yes. And that's my concern. Other than
4 that --

5 THE COURT: That's why I was suggesting perhaps
6 should be aimed at the -- and I wouldn't sanction anybody for
7 lexicon. That's their right to exercise that.

8 But to the extent that -- and perhaps we need to be
9 talking about, you know, we've been pretty light on anybody in
10 discovery, of doing discovery, if you weren't in the 14, and
11 maybe we need to revisit some of that. You bring a lawsuit,
12 there's certain things you've got to do, and beyond perhaps
13 the fact sheet. And we need to revisit that.

14 I mean, there is, I believe, a thought of some in mass
15 tort litigation that get just to show up, okay? They get the
16 cases and they just show up, they don't do any work. And
17 that's just not an option here. You're going to have real
18 responsibilities. And I say many of these law firms, if they
19 don't have the time to do it, send your cases to a law firm
20 that is willing to do the work. There are obviously law firms
21 that have high percentages of compliance, are getting the work
22 done, and will do others, if other law firms aren't willing to
23 do their part.

24 So I share, Mr. Hahn, your concern that those clients of
25 yours who are dutiful and conscientious should not be punished

1 for others. On the other hand, we can't let those who don't
2 comply or who manipulate the system, get a benefit from it.

3 MR. HAHN: Yes, sir, we agree.

4 THE COURT: What about the idea that Pfizer get extra
5 picks?

6 MR. HAHN: I think that that would, in fact, skew the
7 process and punish all of us for the acts of a few. On a
8 percentage basis. And --

9 THE COURT: Of course, 100 percent of them are your
10 picks, right?

11 MR. HAHN: Yes, sir.

12 THE COURT: Who made the first pick, right? Your
13 client. The lawyers in this case made the first pick. And
14 then the second pick, you say, is distorted because Pfizer
15 targets a certain number of your picks?

16 MR. HAHN: Depends on what the picks are. I might be
17 fine with Mr. Cheffo picking all of them.

18 THE COURT: I have a feeling you're not going to like
19 Mr. Cheffo's picks. Something tells me, unless he -- let me
20 say, he's not going to like yours any more than you like his,
21 okay? And, you know, that almost makes me say, you know,
22 we're getting all bent out of shape over these deadlines and
23 all this stuff and all these dates and, you know, if y'all
24 keep -- in the end, I mean, I may just say I'm going to wash
25 with that system, I'm going to just take everybody who has a

1 compliant fact sheet, I'm going to put them in the pool, and
2 I'm going to sanction anybody who doesn't. You know, I mean,
3 I'm almost -- and I'll just somehow -- we'll figure a random
4 system to pick the cases. I mean, I'm not putting that aside.

5 MR. HAHN: Yes, sir. And I would hope the Court
6 wouldn't do that, not because I want to get a leg up. I think
7 and I think the leadership for plaintiffs agree with me that
8 we want representative cases so that we can possibly move
9 towards resolution. We don't want outliers in the trail, I
10 don't want the best cases tried, I don't want the worst cases
11 tried; I'd like to get in the middle of the bell curve.

12 THE COURT: You know, if y'all are so looking for
13 that, that sweet spot that sort of representative cases,
14 there's no crime for you and Mr. Cheffo to come up with the
15 first four cases by agreement.

16 MR. HAHN: Yes, sir.

17 THE COURT: That's maybe another way to avoid all
18 this rigmarole, is that y'all just agree, say here's the first
19 four, and we randomly select. As I told you, whoever gets the
20 first of the cases from their selection, the other side could
21 do that, and that, I -- you know, y'all can -- y'all come to
22 me with a proposal like that, I'm open to talking to you about
23 it.

24 MR. CHEFFO: And --

25 MR. HAHN: We're willing to have that discussion with

1 Mr. Cheffo.

2 MR. CHEFFO: Yeah, I think absolutely, I think all
3 those are creative and they could happen. I think at this
4 point our view is it's, I think, an appropriate number, 14,
5 but it's still relatively small compared to the universe. And
6 both sides would probably agree we need to understand a little
7 more about really what is representative and what's not. I
8 mean, I think we would have --

9 THE COURT: I tell you what, if you both had to pick,
10 agree to the other's picks, that is, you had to have
11 consensus, it's sort of like for years in South Carolina we
12 had Senator Thurmond and Senator Hollings as our senators. We
13 got the best federal judges by both of them having to have
14 consensus, we have these fabulous federal judges. People in
15 other states say, how do you have these great judges? Because
16 they got people who were sort of in the middle, they didn't
17 get people on extremes. And frankly, y'all might be able to
18 vote, okay, your 14 representative cases, we'll take any one
19 out of the box, you try, either one of us. I mean --

20 MR. CHEFFO: And I think ultimately we will consider
21 that. Because I think it is something that we do share. I
22 mean, no one wants to have a case that, you know, that
23 either -- if we ultimately get to trial, that's tried and
24 really doesn't tell us anything. I think what we're doing
25 right now, there's some growing pains, clearly. But I'm not

1 suggesting throwing it all out. Because ultimately, in order
2 to really make that considered decision, we do need a
3 fundamental base of information. Right? Make sure there's
4 fact sheets. Because otherwise, I would literally be
5 guessing. Once we do some work, do some depositions, we could
6 do that.

7 And that does raise one other, just something I want to
8 just -- really make, I guess, a footnote. Is to the point of
9 what we're both saying, which is that we want to have
10 representative cases, we are making picks, we've not met these
11 people, we can't interview them, we're largely going on fact
12 sheets, and we're going on medical records. Really that's all
13 we have. And, you know, these are done under oath. And I
14 think the vast majority of people make good faith efforts and
15 try and deal with it.

16 However, in certain cases, and we're not looking to pick
17 these cases, but we're seeing things in fact sheets that are
18 just fundamentally different than are in the medical records.
19 And we're not talking about someone forgetting a year or
20 something, we're saying fundamental. And today is not the
21 issue to raise those, this is not a motion to compel day on
22 these issues.

23 The only thing I want to at least alert for the Court is
24 that, you know, if, in fact, we kind of make a selection, and
25 in 30 days from now or something we see something that

1 fundamentally changes it, we -- first, we probably go to Mr.
2 Hahn and say, hey, this wasn't real, we only had seven picks,
3 this is probably not one we would have picked had we known
4 this information. And I suppose if he thinks that's
5 reasonable, he'll agree and we'll swap it out. And if not,
6 we'll come to the Court.

7 THE COURT: We obviously don't want a fraud on the
8 Court.

9 MR. CHEFFO: Right, and --

10 THE COURT: Either way.

11 MR. CHEFFO: I don't anticipate that, but I've seen
12 enough in some of these things --

13 THE COURT: But, Mr. Cheffo, you know, I spent 30
14 years trying medical malpractice cases, I worked a lot of
15 medical records, had a lot of people tell me one thing, and it
16 was something completely different than the medical record.
17 That does not shock me the slightest that people may want to
18 be a part of a lawsuit, but there's no merit to their claim.
19 And everybody's interest is to get rid of those cases, right?
20 Nobody has an interest in chasing those cases. And in some
21 ways, what we're going to do is help all of us. I mean, I
22 noticed one of law firms said we dismissed several cases.
23 They got into this and said, hey, some of these people aren't
24 what we thought they were. And part of this process is to put
25 a filter on this thing. And I mean, it's not surprising to me

1 that some of the people who may have gone to sign up don't
2 have meritorious claims, but the sooner we know that and get
3 them out of the case, the better for everybody.

4 Okay. Let's do this. And I think the --

5 MR. MICELI: Your Honor, there's really three points
6 that I wanted to bring up on what we've discussed so far.

7 David Miceli from the PSC.

8 One, with regard to the deficiencies in the fact sheets,
9 we have 913 cases, is what Mr. Cheffo has represented, and we
10 have until next Wednesday to clear deficiencies for those who
11 have done nothing, and for those who have --

12 THE COURT: Deficiencies.

13 MR. MICELI: Material deficiencies or any
14 deficiencies. One, I will say that it has been my experience
15 thus far in this litigation that Pfizer has been very diligent
16 in reviewing the fact sheets and getting our deficiencies to
17 us, sometimes in less than 24 hours.

18 However, we have a large number of cases and have, by just
19 that nature, have had sort of a rolling basis of getting the
20 fact sheets to Pfizer, and Pfizer, in turn, getting the
21 deficiency notices, if any, back to us.

22 Because we have 913 cases, some of those cases may have
23 received a deficiency letter a week ago, and some may received
24 it Saturday morning. And if we have somebody that does not
25 receive a deficiency until Monday, I don't know that they

1 should have the same burden thrust upon them for the Wednesday
2 deadline as a person who has held one for ten days.

3 THE COURT: Well, let me say this. How many of
4 these -- are y'all still looking at -- of course, you're just
5 getting some of these, that's your problem.

6 MR. CHEFFO: We are still getting. And while I -- I
7 kind of take the point on timing, what the deficiencies
8 letters are, is looking at the agreed fact sheet and saying
9 you haven't filled this in and filled that. So I mean, it
10 frankly shouldn't be a surprise to anybody what they are,
11 particularly after you've received 300, you know what they
12 are.

13 So I think the rule of reasonable would apply to someone
14 -- if they tell us they couldn't reach someone and there's a
15 specific case. So I think what I would suggest is have the
16 Wednesday rule. If somebody comes and there's a specific
17 hardship, if Dave says one of my clients, I can't reach, we'll
18 address that, as we always do, appropriately, and kind of
19 carve that out.

20 THE COURT: Maybe I'm overinterpreting. Mr. Miceli
21 is here in the courtroom, he's hands on, he knows what's going
22 on, he hasn't delegated this to a bunch of summer associates,
23 and he's taking it seriously. I have a lot more confidence in
24 that. I want to see that kind of effort by other members of
25 the steering committee.

1 MR. MICELI: I agree with Your Honor, and I'm just
2 trying to protect the other plaintiffs' lawyers that Mr. Hahn
3 and I represent as we stand before the Court today, on what
4 they have before them, and how reasonable it is to get it in.
5 I will say --

6 THE COURT: I think you've been personally involved
7 in this.

8 MR. MICELI: I have been personally involved, my
9 associate who is on the phone, Eric Johnson, has been
10 personally involved on a day-to-day basis. I've gone out to
11 meet clients myself. I know that Eric has gone to meet
12 clients himself to get some information.

13 And Pfizer has been reasonable when we said we need a few
14 additional days to get these seven or eight in. They have
15 been kind enough to give us that extension. There are others
16 we've communicated that we'll dismiss because we do learn
17 something differently.

18 However, having handled medical malpractice cases as I did
19 for 11 years before on the defense side, before joining the
20 plaintiffs' side, I'm sure you've seen before where incorrect
21 information can be perpetuated through a medical record. And
22 I can use myself as an example. My doctor gives me a copy of
23 everything he does. And it said, when I go to the emergency
24 room, I received a note from an emergency room visit where it
25 says this is a -- now a 51, but then a 48-year-old gentleman

1 who smokes a pack of cigarettes a day. I've never held a
2 cigarette to my lips. And I immediately wrote a letter to the
3 hospital --

4 THE COURT: Listen, I understand there can be errors
5 in the records, and those are all things we need to get
6 clarified, and we're doing a lot of people within a short
7 period of time and it's hard to do.

8 There are things that are fairly important in terms of the
9 assessment for this pool. And, of course, those are, you
10 know, did you ever take Lipitor, when did you start, how long
11 did you take it before you manifested an elevated blood
12 glucose, are you, in fact, diabetic. I mean, these are -- I
13 would think most of these people are -- is their primary care
14 doctor providing this and getting those records should not be
15 such a heavy lift. This is not like someone's gone through
16 open heart surgery and had 12 different doctors. This is not
17 that kind of issue.

18 MR. MICELI: I understand, and I would agree as far
19 as materiality of information goes, I would agree those are
20 threshold pieces of information that the defendant needs. I
21 do think that at some point in time we need to have our
22 discussion as to what truly is a material deficiency, whether
23 it's a -- whether you left off an address over a list of 20
24 years, versus did you leave out the fact that you took the
25 drug.

1 THE COURT: You know, I would think that part of the
2 discovery, you know, I've said this before, that these issues
3 are so new, that y'all are going to be having a pool of data
4 that can be very insightful for all of you about these issues
5 in this case. And that y'all all need to be involved in
6 gathering this information, because there are not a bunch of
7 long-term studies to establish this stuff. And there is going
8 to be some value to all of you seeing this information
9 collectively. So there's really a reason for everybody to be
10 kind of actively engaged in gathering this, and not delegating
11 it away or using devices so that you don't have to try your
12 cases.

13 So I'm going -- what we're going to do is have the 18th as
14 our drop dead date. And I want to clarify earlier, anyone
15 just simply seeking to assert lexicon transferred here with
16 the intention of transferring back, they do not need to file a
17 1404 motion. And it's their right to exercise that. I am, if
18 I think they're manipulating the process, I'm going to be open
19 to doing some discovery to make sure that we're not using that
20 simply as a device so they don't have to do any work.

21 And also, you know, law firms who seem to -- I'm going to
22 want to know who exercises lexicon, it seems to be large a
23 number of law firms, so I might have to have a hearing about
24 their continued service on the steering committee.

25 So for law firms who have just maybe not as carefully as

1 they could have, raised this lexicon issue, there's no shame
2 in going back and reversing your position. There's no shame
3 in that. Some maybe, without a lot of thought, kind of did
4 that, or gave their clients advice to do that. I find it
5 difficult to believe that having been recommended one way,
6 that all these clients in one law firm and nowhere else would
7 suddenly say, I insist on not being -- my case not being
8 tried. My experience with clients is they'd love to have
9 their cases tried sooner, not later, if they think they have a
10 claim. They're honored to be part of it.

11 And I suspect, Mr. Miceli, if you were told suddenly that
12 you were -- you could try the first case, you'd be so excited
13 you couldn't stand it.

14 MR. MICELI: I would welcome the opportunity, Your
15 Honor.

16 THE COURT: I bet you would.

17 MR. MICELI: Thank you.

18 THE COURT: And you may end up getting it.

19 MR. CHEFFO: As long as it's my case, that's fine.

20 THE COURT: Okay. So we're going to do it the 18th,
21 I want a status report on the 19th of where we stand on these
22 issues. Because we've got -- you know, there are -- I
23 believe -- what are the dates for -- the plaintiff designates
24 its seven cases when?

25 MR. MICELI: Next Friday, Your Honor.

1 THE COURT: Then Monday?

2 MR. CHEFFO: It's Monday, Your Honor.

3 THE COURT: And, you know, one of the things, Mr.
4 Cheffo, I will go through on those dates, but if you feel like
5 that the process is such that it was not a fair process, I'm
6 going to be open just to putting those aside and randomly
7 picking cases myself. Okay? If we feel that -- if you feel
8 like that's -- and I share that view, I may reconsider the
9 method by which we did it. And I always warned everybody if
10 people try to manipulate this system, I will abandon it.
11 Because there's so many different ways beyond what anyone can
12 anticipate.

13 THE COURT: Anything else we need to talk about that
14 issue?

15 MR. HAHN: No, Your Honor, not from plaintiffs.

16 THE COURT: Everybody be diligent, get your fact
17 sheets in, supplement them. Pfizer, don't be nitpicking, get
18 the stuff that's important.

19 MR. CHEFFO: Understood, Your Honor.

20 THE COURT: Okay. I understand that there's an issue
21 from -- motion for a desire for a motion to remand from
22 California. Is Mr. Robbins on the phone?

23 MR. ROBBINS: I am, Your Honor.

24 THE COURT: Mr. Robbins, I understand that you wish
25 to move to remand, and I want to just facilitate some way in

1 which you don't need to unduly file, you know -- How many
2 cases do you have?

3 MR. ROBBINS: Your Honor, I am speaking this morning,
4 I'm along with -- Helen Duken (phonetic) is also on the phone
5 on the executive committee for the JCCP in California. And so
6 I am here to speak with you about, you know, a large body of
7 cases that were removed by Pfizer from California State Court.
8 There are 81 cases that were, as the Court may be aware, were
9 recently transferred by the JPML up to you. And there may be
10 a handful of those cases that are not -- are for lawyers that
11 have not been working with the steering committee in
12 California, but the vast majority of them have been. And so
13 what we're hoping to be able to do is talk with you about a
14 procedure here in order to get those cases, those remands teed
15 up, and we're looking for some guidance on how to best
16 streamline that process.

17 THE COURT: Well, if you wanted to, if you -- I
18 understand the cases have been transferred to me by the MDL,
19 but not physically -- they have not been transferred by the
20 Central District of California; is that your understanding?

21 MR. ROBBINS: Your Honor, we're starting to get
22 orders coming in from the cases in the Central District, where
23 it looks like the files are moving that direction. But we
24 don't have docket numbers yet on, I don't think, any of them.
25 At least as of last night at -- they're in South Carolina.

1 And so that's sort of where we are, we're in a process where
2 they're moving east, but I don't think they've all arrived
3 there.

4 THE COURT: Mr. Robbins, my clerk tells me she spoke
5 with the folks from Central District clerk's office, and they
6 should arrive today.

7 MR. ROBBINS: Okay.

8 THE COURT: Here's what I want to do, is if you want
9 to file one motion and one memorandum, or if there are a
10 collection of groups of cases, you can file every one
11 individually, if that's what you want to do. I'm trying to
12 limit your paperwork. If there's certain factual scenarios
13 among the 81, there are 30 in one category and 30 in another,
14 whatever, you can do it. I'm trying to not unduly burden you
15 or the defendant to answer, you know, large numbers of merely
16 identical motions.

17 MR. ROBBINS: Your Honor, here's what I would
18 suggest. And I spoke with your law clerk yesterday about
19 perhaps this approach. We do have some differences among
20 certain plaintiffs, you know, in terms of the timing of when
21 they filed their lawsuit, you know, vis-a-vis the JCCP, and I
22 think it does implicate some different legal issues. However,
23 we do think there are groups of plaintiffs, we know there are
24 groups of plaintiffs that all have, you know, sort of the same
25 issues. And so what we were thinking would make the most

1 sense, with the Court's permission, you know, rather than
2 bogging up the docket with -- Let me back up. There are
3 also -- there are certain remands that were -- that are sort
4 of just pending and there was no ruling. And some of the
5 courts in the Central District, I think -- I think I'm right
6 in this -- I know in some of the courts, and they're in not
7 only the Central District, but the Eastern District as well as
8 Northern District, there were some judges who denied the
9 remand without prejudice to refiling once the JPML ruled.

10 So we got one group of -- at least one group where we've
11 got, you know, sort of hanging out there remands where there
12 hasn't been a ruling, there's others where they were dismissed
13 without prejudice. What we'd like to try to avoid is having
14 to file a bunch of notices unnecessarily, and then come in
15 behind that with amended remands, because there are some
16 unique issues that have been raised now that the cases are up
17 there with you.

18 So what we would propose is we file, you know, as few as
19 we need to, but we probably will need to file, you know,
20 several remands that address the groups that are similarly
21 situated. And then we could provide a memorandum to Your
22 Honor that, you know, just lays out, you know, what those, you
23 know, what those groups are, if you will, you know, so the
24 Court and the defendant's aware these are the issues that
25 apply to this group of 20, these are the issues that apply to

1 the other group. And then we can get it all hopefully teed up
2 in a logical fashion.

3 And that's the approach we would suggest, rather than, you
4 know, coming in and having to file notices and then coming
5 back behind it that way, you know, with the motions. And
6 so --

7 THE COURT: I don't have any problem with that. I
8 want to ask you to consult with Mr. Cheffo and see if y'all
9 could work out something that is mutually satisfactory. I'm
10 going to assign these motions to my Magistrate Judge, Judge
11 Marchant. I spoke to him last evening, he's ready to go,
12 he'll do them on reports and recommendation to me. And we're
13 intending, if you'll file them, get these motions activated.
14 You're going to need to file new motions here. We'll have no
15 gavels on any of these things, you're going to have to file
16 them here. But once you file the motions, we'll promptly
17 schedule hearings on that, or we'll promptly schedule -- Judge
18 Marchant will address it, and then it will come to me if you
19 have an appeal or you have objections to his findings, either
20 party have objections to his findings. But we're going to do
21 this very promptly.

22 And I think wasn't there a request about wanting to stay
23 your response to the fact sheets pending the disposition of
24 these motions to remand?

25 MR. ROBBINS: Yes, Your Honor, there's two issues

1 there, Your Honor. First issue is, you know, just how to get
2 that motion teed up. And because all of these cases are
3 similarly situated, my proposal would be that we file, you
4 know, that we be allowed to file a joint motion for stay
5 rather than be filed in each individual case, because it is a
6 sort of classic common issue. If there's a necessity for the
7 motion, we'd like to do it that way, with the Court's
8 permission. Again, you know, with the caveat that I'm fairly
9 certain I'm speaking with, you know, for the vast majority of
10 these plaintiffs, perhaps there may be one or two that, you
11 know, want to file their own motions for whatever reason, I
12 think the vast majority of these we would be able to tee up at
13 once.

14 And then, you know, of course we are sensitive, you know,
15 and have taken the opportunity to read all your pretrial
16 orders, and we want to be sensitive to what is in place there.
17 And part of the reason of that request is to be able to visit
18 with you this morning is -- and I wasn't sure, frankly,
19 having, you know, not personally litigated there in your
20 court, you know, exactly how, you know, how these motions get
21 noticed up, or if there's routinely oral hearing or whatever.
22 But we knew the next status conference wasn't going to be
23 until after we would technically be required to serve fact
24 sheets. That if we would look at your order that says
25 generally we would be required actually 30 days after the JPML

1 order is entered, I want to just make sure that Your Honor was
2 aware that we were going to be asking for relief from that
3 order. And, you know, our position would be that we would,
4 you know, we would request that we have a stay from responding
5 to the fact sheet, and, you know, other discovery obligations,
6 until a reasonable time after we have a final order of remand
7 in place.

8 And so, you know, we -- I've told -- I reached out to Mr.
9 Cheffo late yesterday, I know he probably doesn't have a
10 position yet on his -- from his client as to whether they
11 would agree to oppose that, or he may by now, I'm not sure.
12 But I wasn't really looking for his position as of this
13 morning, but other than just to give a heads up that we'd be
14 requesting it. And just looking for Your Honor's guidance on
15 that, you know, in terms of, you know, how to proceed, because
16 we do have over 3000 plaintiffs here. And, you know,
17 certainly our view is, and we were just in the process of
18 getting to the point of negotiating these kinds of things in
19 the JCCP at the time of the removal. And our view is that
20 that really should happen back in State Court, if we're right
21 on the remand.

22 So that's what we would like. We would like to file the
23 joint motion, and then, you know, but we want to make sure
24 that we're not going to be running a foul of your order, if
25 for whatever reason there's not a, you know, there's not a

1 ruling on that motion by the time this 30-day time period
2 would otherwise run. So --

3 THE COURT: Let me ask Mr. Cheffo, what's your view,
4 if you have one yet, on a motion to stay pending the remand
5 order?

6 MR. CHEFFO: Two issues. If I could address the
7 briefing one first, I think that's easier. You know, it
8 certainly makes a lot of sense, you know, now that we
9 understand you're going to refer that to the Magistrate Judge.
10 I will talk to Mr. Robbins. I can't imagine we have any
11 objection to trying to simplify things. And if they need a
12 few different motions, we'll figure out the procedure. Maybe,
13 you know, include the Magistrate Judge about what would be
14 most helpful to him. And then get a briefing schedule that
15 the parties can agree with. So I think that will work itself
16 out. The only issue we want to make sure is that everybody's
17 included, right, not someone gets transferred later and says,
18 I wasn't bound by that order. But again, the lawyers can
19 probably work that out.

20 THE COURT: But you ought to be there when the train
21 leaves the station, because we're going to rule in these
22 cases, so later arrivals will be the law of the case, unless
23 their facts are different.

24 MR. CHEFFO: Understood, Your Honor, and that makes
25 sense. And under discovery, here's -- I'm not faulting, I did

1 just get this last night. But here's, I think, the one issue.
2 We don't have, you know, I don't have a strong objection on
3 the fact sheet. I mean, part of me says, well, this is
4 information that you're going to have to produce, it's not
5 particularly burdensome, and getting discovery going, whether
6 here or there, I'm not sure I really --

7 THE COURT: Somehow I don't think anybody is quite
8 doing what we're doing here in terms of discovery.

9 MR. CHEFFO: Well, that's true. So if the point is
10 they don't want to have to do the coordinate fact sheet,
11 here's what I would say though. You know, some of the cases,
12 like there are a limited number, but they're, you know, like I
13 think Mr. Robbins has 17 cases with 492 plaintiffs, and the
14 Mulligan firm has 15 cases with 1200 plaintiffs.

15 The premise, and I don't want to argue the motion here,
16 but one of the issues here is fraudulent joinder removal.

17 THE COURT: I'm familiar with what the issues are.

18 MR. CHEFFO: Okay. So the McKesson issue, right, is
19 a distributor. The view, I think, in there is, well, you
20 know, these issues then. The point is, what I would think is
21 this, is very very important, clearly not burdensome, but
22 critically important for these issues, I think both for the
23 report and recommendation, and ultimately for Your Honor, is
24 that the plaintiffs share the minimum, if they don't want to
25 go through the whole process of fact sheet, at a minimum what

1 they should do is provide pharmacy information, proof of use,
2 and, you know, information. Because that will allow us --

3 THE COURT: You know, frequently I have motions to
4 remand. We used to do it on the pleadings. We don't do a lot
5 of extra -- Let me tell you my own inclination. I think right
6 now I am intending to very promptly address these issues. So
7 we're not talking about long delays. And clearly, to the
8 extent the remand motion is denied, they're going to have 30
9 days later to have to produce these fact sheets, okay? But
10 normally, we do remand motions based on what's in the
11 pleadings. I mean, that's normally -- and then to the extent
12 I have had situations where they go do discovery, and they
13 find out it wasn't true, and one party or the other may then
14 move, again, based -- what was represented was, in fact, not
15 true.

16 MR. CHEFFO: That happens. I guess what I'm really
17 trying to avoid -- Look. In normal situation we have all done
18 removals, they usually are done at the time of removal from
19 the pleadings, and I get that. What I'm suggesting here is
20 because there are over 3000 cases, and they do have this
21 coordinated litigation, and really a -- two fundamental
22 premises. One is, was it a medicine that was distributed by
23 McKesson. Because if not, you know, there's no issue.

24 THE COURT: This McKesson, help me on the facts here,
25 they are the Lipitor distributor in California?

1 MR. CHEFFO: Yeah, see --

2 MR. ROBBINS: Yes, sir.

3 MR. CHEFFO: Yes. And what happens is the way these
4 are pled, they -- whether it's intentional or not or
5 strategic, you can't tell -- they don't say Mr. Smith from
6 here, here is where she used it. You can't look at the
7 pleading and determine whether -- because they're from all
8 over the country. So it may have been a certain time, a
9 certain jurisdiction. So we think it's just basic information
10 that frankly should have been pled. And if we can at least
11 understand and have -- if they can identify, did they actually
12 give us the pharmacy records, then we can determine if it's a
13 McKesson issue. Because that analysis, frankly, is very
14 different.

15 THE COURT: Do they allege in the complaints that
16 McKesson was a distributor?

17 MR. CHEFFO: I believe they make that allegation.
18 But in this 1200 person complaint, for example, they're from
19 all over the country. Other than having the name, and they
20 say they took Lipitor, there's no way of kind of verifying or
21 looking at that. So part --

22 THE COURT: Mr. Robbins, what's your take on the --
23 just addressing the issue of showing that for these individual
24 plaintiffs, McKesson was actually the distributor of their
25 drug.

1 MR. ROBBINS: Your Honor, our position is that
2 McKesson is the national distributor, it distributes all over
3 the country. And that it's not a matter of it having to be,
4 you know, that the plaintiff actually has to be in, you know,
5 California or has to be North Dakota. I mean, they're a
6 national distributor, they were -- just incidentally were, you
7 know, entered into a very large settlement with the Federal
8 Government where they admitted to certain violations related
9 to Lipitor in relation to their national distribution of it.

10 So the notion that somehow we need to do individual
11 discovery on this, we've made the allegations, many many
12 courts have addressed this issue already, adversely, almost, I
13 think, universally. You know, at this stage of the pleadings,
14 against Pfizer and in this type of circumstance, there's --
15 I'm not aware of any court in connection with this kind of
16 motion ever ordering preliminary discovery as in the way that
17 they're suggesting it.

18 And if they come back later somehow, you know, think that
19 there was, you know, some fraudulent joinder way down the
20 road, I mean, I suppose they could raise that. But, you know,
21 as Your Honor pointed out, this is a pleading issue, and it's
22 not appropriate to engage in that kind of discovery at this
23 point. And we may just face allegations. We rested on the
24 law. We have numerous cases out of California that have ruled
25 on this exact issue by Federal Courts there, numerous cases

1 nationally. That's one of the reasons we told the JPML that
2 really, you know, to the extent that Pfizer even has a CAFA
3 argument, which we say they don't, this case never should have
4 been transferred in the first place. Because I'm sure Your
5 Honor well knows that if it's a CAFA case, it doesn't belong
6 in an MDL.

7 So, you know, this is an issue that has been addressed
8 many many times. And, you know, we are -- we're just simply
9 asking that the same procedure that is appropriate in any
10 other remand context would apply here. It's really pretty
11 straightforward.

12 THE COURT: Mr. Cheffo?

13 MR. CHEFFO: I would say briefly, Your Honor, I don't
14 represent McKesson, and I wouldn't have raised it unless I
15 believe that there is a difference. And if I'm wrong, I will
16 check it. I'm pretty sure that while they are a national
17 distributor, the point is they don't distribute every tablet.

18 Maybe what we can do is I can reach out to the McKesson
19 folks, and maybe we can make a submission to the Court and
20 Your Honor could evaluate, you know, at least to determine,
21 because if there are material differences, that probably is
22 something that at least Your Honor would want to consider.

23 THE COURT: Well, I just think at this -- that
24 introduces, Mr. Cheffo, a level of inquiry that's not normally
25 associated with remand cases. I'm just simply going to base

1 it on the pleadings. There are legal issues, we're not going
2 to get -- we're not going to get down in the weeds of the
3 cases to sort this out.

4 Assuming that the information I have is correct,
5 Mr. Robbins, how soon do you think you could file your various
6 motions?

7 MR. ROBBINS: I think we can get them on file by the
8 end of next week, Your Honor.

9 THE COURT: Okay. I want you to get them done. You
10 know, it would be nothing wrong if you had a motion to remand
11 that, say, went on one particular issue, and just list the
12 civil action, you know, put on the face of it the civil
13 action, the captions of every one of those cases you wanted to
14 apply. My clerks will figure out how to file that. We don't
15 need to, you know, you don't need to -- In fact, you can speak
16 to Miss Ravenel, my courtroom deputy, or Miss Shealy, my
17 docket clerk, and they can help you on the mechanics of this.
18 But I'm not trying to make you produce, you know, do
19 unnecessary work. We'll get it done, I'll let them work with
20 you on the mechanics.

21 But what we really want is an efficient way, and I'm
22 saying this to Mr. Ravenel sitting here, an efficient way to
23 get these motions promptly in front of a Magistrate Judge, to
24 give the defendants a fair opportunity to respond to it, for
25 the Magistrate Judge to make it a high priority. I've already

1 asked him to do this, to give me a report and recommendation.
2 And then I intend to review it. And I don't expect this to
3 take long. And I'm going to grant your request, if you'll
4 make the motion, I intend to grant, by text order, a stay in
5 your response to the fact sheets, pending the disposition of
6 these motions. Okay?

7 MR. ROBBINS: Yes, Your Honor. Thank you.

8 THE COURT: But let's do it promptly. And obviously
9 just hearing -- everybody seems to know these issues pretty
10 well, so let's get on with it and let's get it decided up or
11 down one way or the other. I frankly am the only one in this
12 courtroom that doesn't have an opinion about this. But y'all
13 bring me up to speed.

14 Okay. I understand there's also an Illinois motion to
15 remand. Is someone on the phone relating to that? Mr. Hahn,
16 do you know anything about that?

17 MR. HAHN: No, Your Honor.

18 THE COURT: It's -- Well, we'll just -- Hold on just
19 a moment.

20 (Brief interruption in proceedings.)

21 THE COURT: Yeah, this is the Driscoll firm has filed
22 a notice of a pending motion to remand. I suppose we got one
23 coming.

24 Mr. Cheffo, are you familiar with this issue?

25 MR. CHEFFO: I am generally. I think it's a fully

1 briefed motion that probably traveled with the transfer. So,
2 you know, we certainly could look at it to see if there's
3 anything that needs to be supplemented, but it probably is
4 something that Your Honor could address.

5 THE COURT: I'm going to also send that to my
6 Magistrate Judge. I just wanted to keep these things moving.
7 We'll give everybody a full opportunity to brief them, and
8 then we'll see -- whether there's oral argument on them, I'm
9 going to leave it to the Magistrate Judge in terms of his
10 addressing it. And then I will, to the extent there are
11 objections, I'll consider those at that time. Okay.

12 Are there other matters that you need to bring to my
13 attention, first from the plaintiff?

14 MR. HAHN: Yes, Your Honor. Mr. Miceli wants to
15 address with the Court issues dealing with the defendant fact
16 sheet.

17 THE COURT: Okay.

18 MR. HAHN: I think he has a red line of our
19 disagreements, and there are also two other discovery disputes
20 that he would like to --

21 THE COURT: Very good. Glad to hear from you.

22 MR. MICELI: Your Honor, I'm sort of hesitant, with
23 where we've been here today, and time, we're usually walking
24 out of here long before now.

25 THE COURT: I'm not going fishing this afternoon, we

1 can take our time.

2 MR. MICELI: Great, I appreciate that. And before I
3 get started, because we've been talking a lot about the
4 plaintiffs' obligations in discovery and the need for full and
5 open discovery, I know Your Honor addressed this on first or
6 second case management conference. It's a two-way street. We
7 understand that the discovery by way of the plaintiff's fact
8 sheet is critical to the defendant. The documents that we
9 have requested, and even requested prior to formation of this
10 MDL, back when it was a consolidated litigation, and our
11 defendant's fact sheet are critical to the plaintiffs'
12 discovery. We are set to identify which cases -- if we stick
13 to the current scheduling order, we have six months and one
14 day before we identify which case is going to be tried first.
15 And so following through on our discovery obligations is
16 important for both parties.

17 And I want to address three things; two are old and one is
18 new. The first two are the custodial file productions that
19 have been made, and more importantly we feel have not been
20 made to date, and then there are the issues of certain
21 clinical trial data that was produced. Initially the
22 discussions began back last September; they continued into
23 2014; and they continue to this day, concerning the clinical
24 trial data, what is referred to within the industry and within
25 our experts, our core experts, are the code books, and certain

1 prior -- excuse me -- program analysis, files that go along
2 with that data that takes raw data and puts it into the
3 useable form that Pfizer and ultimately our experts will
4 utilize to recreate or create the data sets that are submitted
5 to the FDA and to certainly publications.

6 Then, of course, the third item is the defendant's fact
7 sheet. The custodial production, first issue. Last month the
8 Court ordered -- Court entered CMO 7, that dealt with what
9 would be produced, and how the parent-child documents would be
10 produced. We also addressed with the Court whether we were
11 going to use a search term basis or predictive coding.

12 You received rather lengthy letters from both the PSC and
13 from Pfizer. And Pfizer represented at that time to the Court
14 that -- and they advocated to use search terms over predictive
15 coding. And to quote them, rather than creating an entirely
16 new process -- and I have the quote here, Your Honor -- that
17 Pfizer could, if we went with the search terms, Pfizer, with
18 slight adjustments, could immediately recommence document
19 production. And that's on the final page of Mr. Cheffo's
20 letter from May 19th, prior to the last hearing.

21 As we stand here today, no new custodial productions have
22 been made. There have been further discussions, it's been
23 more than three weeks since our last status conference. There
24 were discussions as recently as Monday of this week, where we
25 have been informed that it will be at least two weeks before

1 we can know what additional custodial production will be made.

2 I don't want to take jabs, but I don't know what the
3 definition of immediately means in reference to our receiving
4 discovery responses. But if we take the three weeks that's
5 been passed and the two weeks that are at least contemplated
6 before we hear anything, even the identity of what we're going
7 to receive, five weeks falls short of an immediate
8 recommencement of document production.

9 With regard --

10 THE COURT: Let's stop there, I can do one at a time.
11 Mr. Cheffo?

12 MR. CHEFFO: I can address that. I think --
13 generally I think there was one step that was missing, Your
14 Honor. I recall that we had some negotiations, discussions,
15 and I think Mr. Hahn and Mr. Cole and I, people from chambers
16 and on the phone discussed some agreed modifications.

17 So here's the bottom line. Much of what Mr. Miceli said,
18 we don't disagree with. What we did do, I said that, we would
19 immediately take those terms, there was about a week or so, as
20 you recall, where we then changed, had some negotiations,
21 could have been ten days, literally from that date, what we
22 decided to do, and we've told this to plaintiffs, is there
23 were 11 custodial files that were previously produced. We had
24 to go back and take the new protocol, set up the new
25 provisions, new search terms, which we've done, and reapply

1 those to the 11 coded files, and produce any additional
2 documents. That has started from --

3 THE COURT: Have you given those documents?

4 MR. CHEFFO: We have not produced those documents
5 yet. They will be produced.

6 THE COURT: When?

7 MR. CHEFFO: Within the next two weeks, they will be.

8 THE COURT: If they've already been gathered, why
9 can't you immediately give it to them?

10 MR. CHEFFO: We're not holding on to anything, Your
11 Honor. Part of the process is, you know, I don't -- unless
12 you want the details -- there's probably 50, 60 people,
13 there's protocols that have to be put in place. Things happen
14 quickly once it starts spitting out. And it could be sooner,
15 it could be next week. I don't want to promise and then have
16 Mr. Miceli --

17 THE COURT: You can tell me that you'll do it as soon
18 as you can, not longer than two weeks?

19 MR. CHEFFO: I will commit that to you, Your Honor.

20 THE COURT: Very good, that's progress on the 11.
21 How about any others?

22 MR. CHEFFO: The others are, once we have a protocol,
23 I think part of this is we want to talk to them about, you
24 know, if they have specific names, specific people they want
25 to -- I mean, their view is we should just be doing it. I

1 think there's a few things. One is do we have an outside date
2 here of September, right? That was the date. I mean, so now
3 we're saying all the sudden in June we haven't received
4 everything. And I know they want everything immediately.
5 We've produced millions and millions of pages, and if I'm
6 standing here in August saying we haven't done anything, I
7 expect Your Honor to have a very different view of this.

8 Part of it is we do have to get the folks in line, we have
9 to clean up the 11. As I said, that's a very large number of
10 documents, they will get those.

11 THE COURT: Eleven custodial files, the 11 original
12 sort of targets, is that right?

13 MR. CHEFFO: Which are really relevant people that
14 the plaintiffs have asked for. So we'll continue to get more,
15 and I know that I'm sure there'll always be a question, could
16 it -- plaintiffs want it faster, done quicker, and -- but we
17 are committed to get it done, we just need a little bit of
18 reasonable time.

19 THE COURT: We'll work with Mr. Miceli. How about
20 the others, do you have a list of other -- of the other
21 custodial files you're targeting?

22 MR. MICELI: Your Honor, I can identify others.

23 THE COURT: Will you do so promptly?

24 MR. MICELI: I can give you the dates we did. So
25 Pfizer originally gave us the names of 15 individuals. We

1 then provided the names of 11 other individuals, and that was
2 going back to pre-January 2014, they started working on that
3 at that time.

4 THE COURT: Was there overlap between the 11 and the
5 15?

6 MR. MICELI: There was one, I think, because of a
7 marriage. I think a lady that we identified --

8 THE COURT: So you're seeking 26; they gave you 11?

9 MR. MICELI: Well, we were seeking 26 up to that
10 point. On April 28th of this year we produced another 22
11 names of custodians to them. And right now what we have
12 received is partial productions on 11. And you'll recall we
13 brought the parent-child issue on the documents up, that was
14 subject to another CMO. And we have not begun to receive the
15 supplemental information on that. We have received some --

16 THE COURT: But the deadline -- Let me ask this, the
17 deadline is September.

18 MR. CHEFFO: We also didn't have a protocol in place
19 until two weeks ago.

20 THE COURT: Let me say this. Mr. Miceli, I know you
21 weren't directly involved with it, but I know that Mr. Hahn
22 and Mr. Cheffo and others were very diligently trying to find
23 some middle ground with this parent-child issue, which I
24 thought was appropriate, because there's a lot that was going
25 to bury everybody, plus unduly burden Pfizer. So that made

1 sense. And that did explain, to some degree. But the
2 discovery deadline is September, is that correct?

3 MR. MICELI: September is when we're going to start
4 rolling out doing depositions. But before we get to that
5 point, we would like to have the opportunity to review these
6 millions and millions of pages of documents from these
7 custodial files, so we can be prepared to cross-examine and
8 examine the witnesses from which the documents derive. And
9 while the current discovery schedule has the September
10 deadline, you have to recall that this is an issue that we
11 have been working with defense on since --

12 THE COURT: Well, I have no idea that Mr. Cheffo's
13 waiting till September 7th to back up a moving van and giving
14 you 10 million documents, okay, he's not trying to do that.

15 Mr. Cheffo, can you represent to the Court that you're
16 going to diligently supplement and respond, as you have these
17 available, once you go through the process?

18 MR. CHEFFO: That's the plan, Your Honor. And I
19 think I can probably go one step further, is once I have a
20 better sense, I mean, frankly, of kind of how long it's taking
21 with the process with the new protocol, and we've done this in
22 other litigation, you have a dialogue, they want something
23 specific to other issues, and then I think we'd probably even
24 talk to them and say, okay, here's how long it generally
25 takes, you know, from start to finish, and give them that

1 information.

2 THE COURT: Apparently Mr. Miceli has a particular
3 responsibility for this. Are you talking to each other?

4 MR. MICELI: We talk. I think that the more regular
5 substantive conversations take place on certain issues between
6 myself and Miss Cusker Gonzalez, and Miss Passaretti-Wu, and
7 then Mr. Cheffo on occasion, and along with, on our side,
8 Christiaan Marcum, who is absent today, but you know
9 Mr. Marcum. Clint Fisher and David Suggs.

10 THE COURT: Well, we're going to meet monthly, and I
11 want a status report next month how we all are doing on these.
12 But obviously we don't want to wait till the last moment.
13 They do have a deadline. I think it's worthwhile to know
14 everybody is paying attention to all this, with these -- This
15 data starts arriving, you may well be, Mr. Miceli, like the
16 dog that caught the tire, right? Got what you asked for. Oh,
17 my God, what do I do with it now. But I appreciate you
18 bringing that matter to my attention. And it seems to me
19 we've got an understanding about the 11, we know that you've
20 got obligations to others, that the defendant has obligations
21 to others, and that it's going to seasonably supplement as
22 they are produced.

23 Now let's to go that second issue, the clinical trial
24 data.

25 MR. MICELI: The second issue is the program analysis

1 files. This dates back to September 13th of last year,
2 following a telephone conversation between Mr. Suggs and
3 Pfizer's counsel, seeking certain information. Data from the
4 trials, and there was submitted with the NDA, certain other
5 trials have been identified, and certain grouping of data from
6 17, and then 24 different studies has been produced.

7 Following its production, it was learned that what didn't
8 come along with that production was the code book. The code
9 book delineates what certain data fields represent. So
10 looking at it, it's like looking at a puzzle without a picture
11 or looking at a model --

12 THE COURT: When you say book, how voluminous is
13 this?

14 MR. MICELI: I wish I could answer that for you. I
15 have to rely upon my experts to tell me what these are. But
16 what they do include is the legends for the data in each
17 study, and the programs that are used to take that data and
18 run it so that you can come up with the various data sets and
19 objective information.

20 THE COURT: Mr. Cheffo, do you know anything about
21 this?

22 MR. CHEFFO: I do, not the level of specificity, I
23 didn't know that we were going to be getting into that. But
24 Miss Cusker Gonzalez, if I get it wrong, she will stand up and
25 tell me that, does know more details about it. Here's, I

1 think, where we are. I don't really think there's a dispute
2 about this. In other words, every clinical trial they use
3 different programs, this is very complicated data, and there's
4 different SAP programs that have to help you interpret it.
5 For many of the clinical trials that Mr. Miceli, we have given
6 that and located, my understanding is, I don't disagree. I
7 think there's one clinical trial issue where we are having
8 trouble finding the right program that will help them extract
9 it. And I think they talked about this on Monday. And it's
10 one of these things that's a technical glitch. So all I can
11 tell you --

12 THE COURT: Folks, one of the reasons I had this
13 status report a week ahead of time is y'all actually talk
14 about these issues. And I'm getting the impression, Mr.
15 Cheffo, you didn't know this was going to be raised today.
16 And I prefer y'all go through a process where y'all kind of
17 talk about it beforehand. Because if they knew that was an
18 issue, they would have had a week to look at it, and if there
19 was a legitimate reason why they hadn't given it to you, they
20 would be ready to answer it. And if they didn't have a
21 legitimate reason, they would have given it to you already.
22 So I think I don't mind getting into these discovery disputes,
23 and I'm here every month for that very reason, but y'all have
24 got a process to go through here as well, which is to talk to
25 each other beforehand. Because about 98 percent of these can

1 be resolved. If they know you're going to stand up,
2 Mr. Miceli, and talk to me about it, they'll be highly
3 motivated for you not to do that.

4 MR. MICELI: I agree with Your Honor. This has been
5 a continuing dialogue with regard to this data, the code books
6 and the analysis.

7 THE COURT: Have you gotten some of the code books?

8 MR. MICELI: We've gotten some of the information,
9 yes, Your Honor. That's why, just so you understand, it
10 started in September of last year, continued through the end
11 of the year, discussing what needed to be produced. And then
12 it continued into January, where we got a -- on February 9th,
13 received a portion of the code book, but did not include the
14 analysis files, due to setting up of this MDL, I think both
15 sides had to concentrate on what was going to be formed into
16 an MDL. And since forming this MDL, it rekindled that
17 discussion about the program files.

18 Now, the most recent discussion has only been in the last
19 couple of weeks. And we can continue to discuss it, but it's
20 important, when we are looking at a November, early November
21 disclosure date of experts, that we have the information that
22 we can analyze for our experts --

23 THE COURT: Mr. Cheffo, can assure me that you will
24 get your staff, whoever needs to -- who are working on this,
25 to make this a priority. And to the extent you need my

1 Court's intervention before the next status conference on this
2 issue, if y'all reach an obstacle we can't resolve, I'm glad
3 to take it up on a phone conference.

4 MR. CHEFFO: That's our intention, Your Honor.

5 (Brief interruption in proceedings.)

6 MR. MICELI: Your Honor, if we can distill the issue
7 down to where our true dispute is before January 18th --
8 excuse me -- July 18th, which is our next conference, can we
9 set that call up in between? The only reason I say that --

10 THE COURT: The key is, this should be a status
11 report. Y'all should have addressed it, everybody could
12 have -- because if they know it's in the status report, that
13 gives them a chance to know the priorities. They're trying to
14 do all these things simultaneously. And though they may be a
15 large company and a lot of resources, it's not unlimited. And
16 they're trying to do what they can. So I think you'll help
17 yourself by making sure we get these done. But they know
18 you've raised the issue about the code book, they agree you
19 should get it, the code books, plural, and --

20 MR. MICELI: And program files.

21 THE COURT: And program files. And let's, to the
22 extent it's not resolved, and there's more urgency than
23 waiting till the July meeting, we'll have a telephone hearing
24 about that. I'm hoping you, having raised it today, Mr.
25 Cheffo's response, his staff here, that hopefully we can get

1 this resolved. I agree with you we're compressing a lot of
2 time, it is important for your experts to have the underlying
3 data to form their opinions.

4 MR. MICELI: Correct. The final issue then, the
5 defendant's fact sheet. This is an issue where the initial
6 draft was submitted to the defendants prior to our last -- or
7 at the time of our last status conference. And we have had, I
8 believe, three, I think, meaningful discussions. And --

9 THE COURT: That is a proposed defendant fact sheet?

10 MR. MICELI: Proposed defendant fact sheet.

11 THE COURT: Because I haven't seen a defendant fact
12 sheet.

13 MR. MICELI: We have gone back and forth, and we
14 believe there are certain fundamental issues in this defendant
15 fact sheet that we must have.

16 THE COURT: Tell me an example what you're trying to
17 get from the defendant fact sheet.

18 MR. MICELI: Well, there's a number of different
19 issues. But the first is, I think is sort of mission
20 critical, is how we define what a treating healthcare provider
21 is. We would like to define a treating healthcare provider,
22 interestingly, as someone who is treating our client. The
23 defendants would like to define that as a person who treated
24 our client and prescribed Lipitor. That's -- so the
25 definition of treating physician is our first issue.

1 The second issue is the availability of what promotional
2 material was utilized or available to be utilized by the sales
3 representatives.

4 The third issue is if a person is no longer an employee of
5 Pfizer, we just want to know the last known address so that we
6 can subpoena them, if necessary.

7 The fourth issue is what specific education and training
8 on medical and scientific issues their sales reps had as they
9 were prepared to go in and discuss and promote the use of
10 Lipitor with physicians.

11 THE COURT: And why haven't you submitted these kind
12 of issues just by routine discovery?

13 MR. MICELI: Because the routine discovery is
14 supplanted by this fact sheet. We're going to use this fact
15 sheet in the 14 bellwether cases.

16 THE COURT: Some of this stuff seems sort of generic
17 to the whole case.

18 MR. MICELI: And it is. And we're not asking for
19 this information for the 913, we're only limiting this to 14.

20 THE COURT: Let me just say this. To the extent
21 y'all can't work out the defendant fact sheet, send them a set
22 of interrogatories and requests for production and ask for the
23 same documents, if y'all can't work it out. I mean, obviously
24 defendant fact sheet makes it a lot easier, okay? But if you
25 can't work it out, I mean, I think it would be in everybody's

1 interest to have these common fact sheets, but you've got
2 another option, too.

3 MR. MICELI: We do have another option, Your Honor,
4 but the problem with that is we've created a discovery
5 schedule that contemplates this type of discovery.

6 THE COURT: Mr. Cheffo, when can we get the defendant
7 fact sheet?

8 MR. CHEFFO: As Your Honor will recall, in the CMO we
9 do provide for defendant's fact sheets. And we're not
10 objecting to that. And I think what I would suggest is this,
11 and there has been some back and forth. I think that like we
12 have done in the past, it may well be that we consult for the
13 next day or two, not weeks and weeks, and then we submit
14 something to Your Honor, a joint plaintiffs/defendants,
15 because I think what --

16 THE COURT: Can we get that done by the end of next
17 week?

18 MR. CHEFFO: Absolutely.

19 MR. MICELI: Your Honor --

20 MR. CHEFFO: Let me just --

21 MR. MICELI: I'm sorry.

22 MR. CHEFFO: One issue, I think, is here is this goes
23 to standard proportionality. The way the order is set up is
24 for -- it does only apply to 14 cases. It's a 30-day limit,
25 right? So this idea that -- so we have to return it within 30

1 days, but for all 14 cases, right? So the idea of how you
2 define treaters, it's just in terms of, for example, then we
3 have to find the sales reps and provide data, which can go
4 back 15 years, just as certain.

5 So we basically said, look, at some point during the
6 course of discovery, certainly when the case is picked,
7 there's a lot of different steps here that we will get you. I
8 don't think there's very much of what he's asked for,
9 plaintiffs have asked for, that we disagree. Basically just
10 said, just like when you came to us on the fact sheet and
11 said, we know you want collateral source information, but you
12 know, you don't need it right now, we have said before
13 depositions we'll get it. So I think there's some room here,
14 and ultimately if we can't agree, we'll say X and Y, and I
15 think --

16 THE COURT: And I'll just check one or the other.
17 It's not hard. What I want to get it done though, is I don't
18 want this thing dragging out unnecessarily.

19 MR. CHEFFO: Only thing I would say is just so we're
20 clear on timing, right, everything needs to move quickly. But
21 this has to be done by June 23rd or so, because we have 30
22 days from that date. So we have a short window, but it's not
23 passed. I think if we were to meet and confer and talk in the
24 next few days, I just got their thing yesterday, we'll
25 probably give it by the middle of next week, submit to you

1 something that you can --

2 THE COURT: That's the 18th?

3 MR. CHEFFO: The 18th?

4 THE COURT: That's the magic day?

5 MR. MICELI: Can I be heard?

6 THE COURT: Absolutely.

7 MR. MICELI: We have been discussing this for over a
8 month. And I feel a bit like the old fellow in It's a
9 Wonderful Life, when George Bailey and his girlfriend are
10 walking by, "Are you going kiss her or are you going to talk
11 her to death?" Are we going to get the information or are we
12 going to talk ourselves to death.

13 THE COURT: Here's what you just got. You stood up
14 today, and you have a deadline of the 18th, and I'm going to
15 take it up after that.

16 MR. MICELI: Yes, Your Honor, fine. There are other
17 issues in there --

18 MR. CHEFFO: I'm not going to say I'm going to kiss
19 Mr. Miceli.

20 THE COURT: We're also not going to talk it to death.
21 You know, some of these issues, I know it's hard to get
22 everybody's attention and on what's important and what's not
23 important. And sometimes it may be hard, at the level where
24 the discussions are going on, you're not making progress. But
25 we can get the leadership involved, maybe we could get it

1 done. Maybe the purpose today is that we've highlighted the
2 issue, and by the 18th we'll have a proposed defendant fact
3 sheet, or a list of options on the issues that are in dispute.

4 MR. MICELI: Just so the Court is aware as well, Your
5 Honor -- First of all, thank you for the deadline of the 18th.
6 Some of the issues that we didn't get to that we want, that
7 have been points of discussion, we have met -- I don't want to
8 say resistance, but we have met the other side's position that
9 perhaps it may be difficult to find that. Because,
10 fortunately, this is not my first dance with Pfizer, I have
11 done these types of discovery in the past, and I can provide
12 them with the names of their databases from which they can
13 gather this information. And I can stay after this hearing
14 and begin those discussions.

15 THE COURT: Well, you're welcome, you have Mr. Cheffo
16 right here and his staff here, maybe y'all can have that
17 discussion.

18 I'm not -- I can't relive litigation of the past, Mr.
19 Miceli, but I haven't seen a lot of resistance from Pfizer
20 here to provide any information. So let's not relitigate the
21 past wrongs, our past sins.

22 MR. MICELI: No, I understand, Your Honor, and I'm
23 not objecting to their stated willingness to comply, I just
24 haven't received the information.

25 THE COURT: We're making progress, and you made some

1 success today. But I want to say in the future I want this --
2 part of the status conference process is that a week before,
3 we get a report. And before then, y'all talk to each other.
4 And I prefer to take up issues that are in that status report.
5 I'm not going to foreclose it completely, but some of this, I
6 think, could have been resolved if they knew how high a
7 priority it was for plaintiff. Okay?

8 Are there any other issues, Mr. Hahn, from the plaintiff?

9 MR. HAHN: One more issue, Your Honor.

10 THE COURT: Yes, sir.

11 MR. HAHN: Miss Maness is going to address the Court
12 on reporting requirements for time and expenses, we want to
13 make sure we get it right.

14 THE COURT: Very good.

15 MS. MANESS: Yes, sir, Your Honor, good morning. Mia
16 Maness for the plaintiffs' liaison counsel. We have been
17 working diligently with IT and our CPA to collate the material
18 and the information that is plaintiff counsel time and expense
19 through April the 30th.

20 I had hoped to be able to file a report with you this
21 week, but with all things there were some hiccups and we are
22 working through them. As we worked through them, though, we
23 wondered whether you would want to weigh in on the style of
24 the report that we anticipate providing to the Court.

25 I have something here that you could look at. There is

1 one report that has all of the firms on PSC with all of their
2 hours through April 30th, and then it shows expenses broken
3 down by category.

4 If an expense required understanding for some sort of
5 limitation or particular back-up, like a hotel or a travel
6 expense involving airfare, then there's a check by that
7 expense saying that that was, in fact, checked against CMO 4.
8 And then there are totals at the bottom for different
9 categories of expenses.

10 The second page is, again, all of the firms on the PSC,
11 and their total hours through April 30th, again stated, the
12 two match from page to page, as we would hope they would, and
13 then they will be broken down by the litigation categories.
14 So that, as you know, if you're interested in looking at how
15 much time was spent on developing an expert, you can go to
16 that tax code and look at those hours.

17 If you would like to look at it --

18 THE COURT: I don't need to look; sounds like you're
19 doing it. I know, Mr. Hahn, you're also following that as
20 well?

21 MR. HAHN: Yes, Your Honor.

22 THE COURT: With counsel. I'm satisfied with the
23 explanation, and I don't need to see it in advance. I'll look
24 forward to getting the reports as they're prepared.

25 MS. MANESS: Thank you, sir.

1 THE COURT: Very good. Anything further?

2 MR. HAHN: No, sir.

3 THE COURT: Mr. Cheffo?

4 MR. CHEFFO: Nothing, Your Honor, thank you.

5 THE COURT: Very good. Okay. Well, folks, it's -- I
6 think status conferences are helpful in keeping us moving.

7 And are there any other matters that I need to address --
8 First of all, anyone on line need to address anything with the
9 Court at this time who have not previously spoken?

10 There not being any, our hearing is closed. Thank you
11 very much.

12

13 (Court adjourned at 11:50 a.m.)

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR