

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

IN RE: LIPITOR : 2:14 MN 2502

Motion Hearing in the above-captioned matter held
on Friday, October 21, 2016, commencing at 10:04 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
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A P P E A R A N C E S

APPEARED FOR PLAINTIFFS:

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APPEARED FOR DEFENDANTS:

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10:04:42AM 1 THE COURT: Do we have folks on the telephone as
2 well?

10:04:45AM 3 THE CLERK: Yes, sir.

10:04:45AM 4 THE COURT: And they're there?

10:04:46AM 5 THE CLERK: They're there.

10:04:47AM 6 THE COURT: Very good. Okay. Folks, we have
7 something which I've never done, try to handle ten appeals at
8 the same time, right? That's a challenge for all of us, I'm
9 sure, counsel as well as the Court. And I presume everyone
10 saw my order of yesterday in which I was trying to create some
11 sanity to this process and rationality.

10:05:08AM12 And, folks, for those -- I want to hear from everybody who
13 has something important to say, but there's obviously an
14 element of repetition here after awhile, on -- there's, you
15 know, obviously some distinct issues in certain states, which
16 I expect those state counsel to address. But we need not
17 relitigate over and over again, the same issues. If you have
18 something you need to point out that maybe somebody else
19 didn't, I want to hear that. This argument is not an empty
20 exercise; I'm trying to make sure I've considered everything.

10:05:51AM21 For those of you who have not had the opportunity to
22 previously appear before me, let me start with some premises.
23 I read everything. I have read every Magistrate Judge order,
24 I have read every brief, and I'm embarrassed to say I've read
25 every case, okay? So somebody giving me a factual background

1 or a legal standard, it's not that helpful. I kind of know
2 where we are.

10:06:20AM 3 Mr. Cheffo, are you going to argue on behalf of the
4 appellant here?

10:06:29AM 5 MR. CHEFFO: I am, Your Honor.

10:06:31AM 6 THE COURT: Very good. And we're going to begin with
7 the California cases. Do you wish to reserve anything in
8 reply?

10:06:39AM 9 MR. CHEFFO: I do, Your Honor, thank you. Thanks for
10 the order. It was actually very helpful to get that guidance.

10:06:44AM11 I would like to reserve three minutes. I would just say
12 this, too, Your Honor, I'll be guided however you want to
13 proceed. I took to heart a lot of what you said, and as you
14 can see, frankly, if there are four or five arguments that
15 would apply to California, frankly, those -- four of them, if
16 you will, will apply to Illinois and Missouri.

10:07:03AM17 THE COURT: Correct.

10:07:04AM18 MR. CHEFFO: So I, again, with your indulgence, I
19 don't think I need a lot more time. If I had an extra five
20 minutes, I could probably cover those, and then basically when
21 we get to Illinois, say see what I told you a little earlier.

10:07:15AM22 THE COURT: That would be helpful. I just want to --
23 Illinois counsel may have a particular twist on something, and
24 I want to give you both a chance to address those and to reply
25 to that, if you feel like you need to. But you've appeared in

1 front of me enough to know that there's certain things that
2 are kind of a waste of time and some things that are useful in
3 terms of oral argument.

10:07:37AM 4 So let's start with -- we're going to reserve three
5 minutes. And why don't you come to the podium, if you might.

10:07:45AM 6 MR. CHEFFO: Yes, Your Honor.

10:07:47AM 7 THE COURT: And I'll be glad to hear from you on the
8 California remand issues.

10:07:51AM 9 MR. CHEFFO: Thank you, Your Honor. And I also
10 did -- I thought this one lent itself -- hopefully you'll find
11 it helpful, some Power Points. We don't use them every time,
12 but maybe this is as helpful for me as it is for you.

10:08:03AM 13 THE COURT: Well, it always sends my staff into
14 uncontrollable laughter when anyone tries to do a Power Point
15 with me, but I'm glad to hear you out on that.

10:08:13AM 16 MR. CHEFFO: I think I've tried to helpfully get to
17 the point here, and we'll leave obviously copies for counsel
18 and for Your Honor.

10:08:18AM 19 So the four issues, and again, really at any time
20 obviously this is for Your Honor, so you tell me, as you will,
21 I know, if things -- First going to talk about the Magistrate
22 Judge's ruling, just to determine, as you know, he determined
23 that there's essentially no jurisdiction to hear that, so I
24 was going to talk a little bit about that, and then move
25 specifically into the reasons, assuming that you agree or

1 you're going to entertain that, to hear CAFA, why we think
2 there is CAFA jurisdiction. Frankly, beyond that, as Your
3 Honor probably knows, we wouldn't need to probably get to
4 fraudulent joinder and misjoinder and severance, if you
5 determine CAFA, at least as to the California cases, but I'm
6 prepared to at least --

10:08:57AM 7 THE COURT: I think you ought to be prepared to argue
8 all of those, because they do -- the last two obviously have
9 something to do with other states.

10:09:03AM 10 MR. CHEFFO: They do.

10:09:04AM 11 THE COURT: And they're important issues. Let me
12 start with you, just to disrupt your planned presentation
13 here.

10:09:10AM 14 MR. CHEFFO: That's okay.

10:09:11AM 15 THE COURT: That we start with this -- let's just
16 assume for purposes of this argument that with the Ninth
17 Circuit cases, this would be a mass action, okay? Just the
18 sort of unique aspects of Ninth Circuit law interplaying with
19 the California law about saying for all purposes. Let's just
20 assume for purposes of that, we've got a mass action.

10:09:36AM 21 Here's where it's confusing to me. The JPML has taken the
22 position it won't look at the reasonableness of removal, that
23 that's something for the transferring court. It said that in
24 the Darvocet case, it said it in my very case, there were 91
25 California plaintiffs who asserted this and were told, go to

1 South Carolina. I understand the defendant argument to be I
2 can't look at it. And it strikes me, Mr. Cheffo, that just
3 can't be the law that you can -- that a defendant can remove a
4 case, and no court can review that. That just can not be the
5 law.

10:10:18AM 6 And I agree with you, and I think y'all kind of
7 straightened out my Magistrate Judge, that he couldn't -- we
8 could not remand cases directly to the District Court of
9 California; that is a unique prerogative of the JPML. But
10 there can be a recommendation of that from my court.

10:10:37AM 11 And so I have trouble understanding how, number one, I
12 can't look at it, which doesn't make sense to me. And then,
13 you know, when we get down to looking squarely at the issue,
14 I've dug a little bit into the legislative history of CAFA,
15 and there was obviously this huge debate going on about class
16 actions that were sticking in the state courts because of the
17 very issue y'all are raising about fraudulent joinder. Okay?
18 I mean, they weren't winning because the case law is so
19 terrible. And defendants like your clients were urging the
20 Court to -- the Congress, because they weren't winning in the
21 courts, to provide some federal jurisdiction. And Congress
22 looks like to me it reached a compromise, as Congress, when it
23 works, does. And agreed, A, we're going to let, with minimal
24 diversity, not complete diversity, we're going to allow
25 federal jurisdiction, but we are not going to let 407

1 transfers, we're not going to have MDL transfers. That's what
2 I sort of understood to be the deal. Unless, unless, the
3 plaintiffs consented.

10:12:02AM 4 So yes, I mean, the way I read -- and I got into the
5 legislative history a little bit -- was yes, we're going to
6 allow federal jurisdiction in the districts where these cases
7 were removed, but the plaintiffs are going to have to consent
8 to join an MDL.

10:12:27AM 9 What I see your argument is that I should basically, for
10 one reason or another, ignore what seems to me a central part
11 of the deal under CAFA, and force the plaintiffs who do not
12 wish to be here, to join this MDL. And I understand the
13 policy argument that it would be, in a perfect world, it would
14 be wonderful to have everybody here at the party, right? I
15 mean, that's a rational orderly way of doing things. But it
16 just appears that's not what the law is. And if I were in
17 Congress, I might vote differently.

10:13:09AM 18 But tell me, as a judge, how, when I'm trying to apply the
19 rule of law in a neutral way, how I'm able to overcome these
20 problems, and force this group of plaintiffs who don't want to
21 be here, under CAFA, how I can make them be here.

10:13:26AM 22 MR. CHEFFO: Let me see if I can answer. I
23 understand those points and I think they're fair points, or
24 they're fair questions, mainly because you asked them.

10:13:36AM 25 THE COURT: Kind of important. You know, I try not

1 to hide the ball here, I kind of want to let people know where
2 my concerns are. And if I were your client, I would have
3 sympathy for your view. I can understand the plaintiffs' view
4 as well.

10:13:51AM 5 MR. CHEFFO: Actually I think I have answers to both
6 of them.

10:13:54AM 7 THE COURT: Good, I want to hear that.

10:13:55AM 8 MR. CHEFFO: Let's see if I can skip ahead, you'll
9 get a preview.

10:13:58AM10 THE COURT: I always make you do this on your Power
11 Point, you have to go skipping around.

10:14:03AM12 MR. CHEFFO: Pretty much. Good thing I looked at
13 these before today.

10:14:06AM14 So the first issue really is kind of like what the --
15 Where is the Darvocet cases? Is that earlier on? So
16 here's -- I think as the --

10:14:20AM17 THE COURT: We're talking about the Darvocet JPML
18 cases?

10:14:24AM19 MR. CHEFFO: Correct. And really yours. This is the
20 issue. So as I hear Your Honor saying, look, you know, how is
21 it that these cases, you know, can be transferred, and what's
22 the remedy, right, is there a remedy for appeal, and I think
23 there is a remedy. So the Darvocet JPML and the JPML in
24 connection with these cases essentially said we understand
25 plaintiffs' position on CAFA, that you can't transfer these

1 based on the CAFA rules; however, we are reading that
2 consistent with the MDL rules, that if there are other bases
3 for --

10:15:01AM 4 THE COURT: First of all, let me say I agree with
5 that, but then you have to win the fraudulent joinder issue to
6 get there.

10:15:07AM 7 MR. CHEFFO: Again, that's -- I'll address that, too,
8 Your Honor, but here's the issue. Let me get first, if I
9 could, what's the way to address this? There is a way. If
10 any case -- forget about CAFA -- if a case is transferred
11 improperly or somebody believes it's been transferred
12 improperly, there is a provision, to take an extraordinary
13 writ to the Fourth Circuit in this case. That's what people
14 can do if they think that the case is improperly transferred.

10:15:32AM 15 THE COURT: That is not what the JPML thinks is going
16 to happen, and how they interpret the rule as a practical
17 matter, requiring some extraordinary -- I mean, there's always
18 in every case the ability to go to a court in an extraordinary
19 writ, regardless what the rules are. We've had that come up
20 in a variety of areas. But there is -- listen, it is very
21 clear that my colleagues on that panel, A, do not feel they
22 have the authority or really the capacity, with their limited
23 staff, to get into these cases, and they expect a transferring
24 court to deal with it. I'm just going to tell you that. I'm
25 just telling you, that's reality.

10:16:13AM 1 MR. CHEFFO: Sure.

10:16:14AM 2 THE COURT: And so I'm going to review it. I'm
3 sorry, Mr. Cheffo, I'm going to look at it. But then I've got
4 to look at this, you know, this provision that says I -- first
5 of all, I'm going to assume -- I'm asking a question I know
6 the answer, but let's just put it on the record -- the
7 plaintiffs do not consent to be here, the majority; am I
8 correct?

10:16:37AM 9 MR. CHEFFO: I think that's fair.

10:16:39AM10 THE COURT: Okay. So I see a nod.

10:16:41AM11 MR. CHEFFO: Any of them, I think. I think --

10:16:43AM12 THE COURT: So I mean, I think there's a procedure
13 better than the one that always exists, which is you can seek
14 an extraordinary writ.

10:16:53AM15 I don't believe that the -- that there was an intention to
16 create a situation where no court responsible for the case
17 could review your action in removal. That just can not be the
18 law.

10:17:10AM19 MR. CHEFFO: And that's not really our position. So
20 there's a few things. One is the idea was you remove it, you
21 have multiple causes of action. Certainly you have the good
22 faith provisions and when the cases are removed if there's
23 something obviously egregious. Then the cases get tagged and
24 they go to the JPML. Now, JPML's job is not to look at the
25 merits, we all agree with that, but they've determined, based

1 on 1407, that they're going to transfer them to you, just like
2 they would any remand motion.

10:17:35AM 3 THE COURT: There's like no filter there. I'm
4 telling you, there is no -- Let me say this. There is both
5 the law, there is the interpretation, and there's a certain
6 knowledge that those of us who are handling these major cases
7 have acquired, okay? And there's a famous Fourth Circuit case
8 that says, "You seek to persuade us as judges what we know to
9 be untrue as men." Okay? I mean, there just can't be the law
10 that you could just sort of bring them all there, there's no
11 filter there, it's just a mechanical process.

10:18:11AM 12 MR. CHEFFO: On that one I would disagree, Your
13 Honor.

10:18:13AM 14 THE COURT: They do not. They don't have the --
15 their staff -- I don't know if you know about their staff,
16 it's very limited staff.

10:18:19AM 17 MR. CHEFFO: It is.

10:18:20AM 18 THE COURT: I have one person assigned to this case.

10:18:22AM 19 MR. CHEFFO: And they do a fantastic job --

10:18:24AM 20 THE COURT: I don't criticize them, I'm just telling
21 you there's one staff member assigned to the Lipitor case.

10:18:29AM 22 MR. CHEFFO: But there is a process, right? So
23 there's things, once you get tagged, and I know Your Honor
24 knows this, but sometimes there's also a provision to file
25 objections, and they get briefed. And these issues were

1 briefed. So --

10:18:38AM 2 THE COURT: And they said, under Darvocet, we don't
3 review this. They're expecting me to do it. I'm going to do
4 the job that the transferring court has responsibility to do,
5 which is to take a look at this, and to say, hold it a minute,
6 CAFA jurisdiction -- Now, you know, if it's CAFA plus
7 something else, and there's otherwise jurisdiction, diversity,
8 for instance, as you assert, no problem. No problem. Okay?
9 That's not an issue. But if there's no other jurisdiction but
10 CAFA, you can't make the plaintiffs be here.

10:19:14AM 11 MR. CHEFFO: So there's two issues, right? Let's see
12 what Judge Reeves did in Darvocet. Judge Reeves basically had
13 the cases transferred -- I was involved in that litigation,
14 too, and he --

10:19:24AM 15 THE COURT: There's a famous story that Thurgood
16 Marshall, arguing at that very podium, was arguing a major
17 civil rights case, and somebody said, what about this case?
18 And he said, I handled that case. What about this case? I
19 handled that case. And every case, he handled the case.

10:19:39AM 20 MR. CHEFFO: Let's be clear, this is not Thurgood
21 Marshal arguing remand issues, just so we're very clear today.

10:19:49AM 22 But so with respect to Darvocet, what Judge Reeves did was
23 he basically said, you know, I think he shared a similar view.
24 But what he did do was he decided CAFA. Right? And then what
25 he said -- so he first -- he took the case, he decided it.

1 Because look, there's --

10:20:05AM 2 THE COURT: When you say decided CAFA, what do you
3 mean by that?

10:20:09AM 4 MR. CHEFFO: He said there is CAFA jurisdiction. He
5 decided the ultimate issue. So I just want to make sure we're
6 clear on this. To me, there's like three or four different
7 set issues. One is, you know, can this essentially be an
8 appeal or correction of the issues before you? The second
9 issue is, once you have them, can you ultimately look at them?
10 You know, we think the magistrate judge --

10:20:26AM 11 THE COURT: You've got one issue is, does this appear
12 to be a mass action? I think you're right. I think under the
13 fourth -- the Ninth Circuit cases, I think it's -- I might not
14 have logically reached that conclusion, but I understand how
15 they did it, makes sense to me, I'm going to apply their law.

10:20:43AM 16 MR. CHEFFO: That's what Judge Reeves did.

10:20:45AM 17 THE COURT: But then I've got to say this has been
18 transferred, so I'm assuming the Federal District Court in
19 California -- now, there is one issue I haven't addressed,
20 timeliness. Okay? The question is, who should do that, we'll
21 talk about that in a second.

10:21:02AM 22 But yes, I think there is likely CAFA jurisdiction in the
23 Federal District Courts of California. Okay? But the next
24 question is, is it subject to removal, with that the only
25 basis of jurisdiction, to the In Re: Lipitor MDL in the

1 District of South Carolina? That is the problem.

10:21:25AM 2 MR. CHEFFO: There's two remedies. So if we get --
3 potential remedies, right? Three. One is you've now, let's
4 assume you decide there is CAFA jurisdiction here, you then
5 can say I'm going to -- these cases, essentially the venue
6 transfer provisions are really a one-way street, and there was
7 colorable claims -- and of course I'm not, you know, throwing
8 away the other claims, because you may also agree with us on
9 some of these others.

10:21:48AM 10 THE COURT: We're going to get to that.

10:21:50AM 11 MR. CHEFFO: Assume for argument sake you said I've
12 looked at everything, I find CAFA, I don't find anything else,
13 right?

10:21:55AM 14 THE COURT: Yes.

10:21:55AM 15 MR. CHEFFO: You then can say, well, because there
16 was a good faith, these are not frivolous arguments, I'm going
17 to keep the case. That's one.

10:22:01AM 18 The other thing you could do is you could certify the
19 question to the Fourth Circuit. Not appeal, I'm not
20 suggesting appeal, but you could say, hey, I now have this
21 case --

10:22:12AM 22 THE COURT: I don't feel the need to do that.

10:22:14AM 23 MR. CHEFFO: And you may not. Or what you could do
24 is you could then do a suggestion of remand to the MDL panel.
25 Right? And you could do that. And then probably what would

1 happen at that point is that this issue may get briefed with
2 that, and they may not, they may --

10:22:29AM 3 THE COURT: They avoided it in the Darvocet case.

10:22:32AM 4 MR. CHEFFO: They did, but what happened ultimately
5 in Darvocet, once it got back to California, you know what the
6 judges did?

10:22:37AM 7 THE COURT: No.

10:22:37AM 8 MR. CHEFFO: 1404'ed it back to the MDL.

10:22:39AM 9 THE COURT: And that may be what they do here. And
10 you know, one of the things you have -- counsel has asked,
11 lead counsel has asked me not to close down the MDL after
12 these orders. And I am, you know, inclined not to do that.
13 For one reason, the Fourth Circuit might not agree with me,
14 and second reason is there could be issues like this that they
15 could come back.

10:23:03AM 16 The question is, what's the right court to do -- I mean,
17 let me just say this, Mr. Cheffo. I don't want to blow past
18 this timeliness issue. It's not a small issue. And I've
19 looked at it. I think it's better for the District Courts in
20 California who have, you know, they know that -- they apply
21 that California state law regarding the consolidation of
22 cases, Ninth Circuit's their circuit, I think they're the
23 better court, frankly, to look at this issue. But it's not a
24 small issue, Mr. Cheffo. I'm going to tell you, it's not a
25 small issue. And I think I'm probably doing you a favor not

1 to rule on it, frankly. If you pressed me, I might, but I
2 think you're probably better served let the district judges.

10:23:48AM 3 My general practice -- I want to talk to you about this.
4 Is like these fraudulent joinders, there's some issues that
5 have been raised in this MDL no District Judge in America has
6 ever seen. I mean, they're just unique, interesting issues.
7 Fraudulent joinder is like something we get like seven times a
8 day. Okay? I mean, we have these counties in South Carolina
9 where the plaintiffs love to try cases, and they're always
10 looking for the conductor or, you know, the pharmacist or
11 whoever it would be, the random state party of the defendant
12 to defeat diversity. And we get these cases constantly. And
13 our practice here is that we remand them. And many times my
14 defendants go back there and immediately do discovery. I
15 mean, they don't mess around, when that thing is -- there's a
16 challenged remand, they take it right back, because they have
17 that one year, they get back there, they do discovery, they
18 get summary judgment against the defendant who, as they
19 asserted, there's no real claim, and they come back. I see
20 that all the time. Y'all elected not to do that. You had
21 your own strategic reasons, I don't question it. Some
22 defendants don't do that, I mean, I don't question the
23 strategy. But that was an option your client had to do. But
24 I don't keep those cases. I don't sit there and dig into
25 whether there's -- I mean, my circuit, you know, glimmer of

1 hope, whoever heard of such a legal standard, right? Who
2 could invent a glimmer of hope standard. I don't think
3 there's any other area of the law that has a lower legal bar
4 or standard than fraudulent joinder. I mean, it is --

10:25:38AM 5 MR. CHEFFO: I agree.

10:25:39AM 6 THE COURT: It is the lowest standard that I have
7 ever encountered in any area of the law.

10:25:43AM 8 And you can -- I mean, I have the occasion to deal with
9 capital cases which, you know, people's lives are in jeopardy.
10 Higher standard, okay? I mean, this is like the lowest
11 standard known. And it's not a new issue, Mr. Cheffo. This
12 has been a century of this stuff, right? This is 1913 is the
13 original case.

10:26:10AM14 MR. CHEFFO: There's no question. And everything you
15 said, I frankly agree with. I think there are a few different
16 issues here, right, there are issues here of fraudulent
17 joinder, but there's also issues here of procedural
18 misjoinder, which is not quite as clear.

10:26:23AM19 THE COURT: Let me say this, and to make it easy for
20 you, I think y'all's various variations of the fraudulent
21 joinder theory are interesting, and in the right case are
22 credible. I found them pretty interesting. But they're all
23 going to have the glimmer of hope, no possibility standard.
24 Because they're joinder issues.

10:26:44AM25 MR. CHEFFO: No, well --

10:26:45AM 1 THE COURT: I believe that's the standard. And --

10:26:48AM 2 MR. CHEFFO: I would say -- I'm sorry to interrupt,
3 Your Honor, but the only thing I would say is we've actually
4 approached this from two ways. So we approached it the --
5 it's not egregiousness, but I would give you the standard is
6 high. But here's what most courts, there's a Benicar court
7 just did this in New Jersey. The Court basically looked at
8 this and said, you know, probably similar to much of what
9 you're saying, this is kind of complicated, there's a lot of
10 different ways of dealing with this; however, I don't need to
11 get there, I can basically decide this by just good old Rule
12 21 severance. Right? I'm going to look at these cases. And
13 frankly, when you do that, you basically -- all of the issues
14 that we've been talking about. So here, so the Benicar case,
15 and there are others, said I have CMOs in place that
16 essentially disaggregate this. Well, we do, too, we have
17 short form complaints. No one has ever suggested that, you
18 know, you could even file a multi-person complaint. You have
19 been, you know, kind of in this litigation, you know what the
20 claims are, what the differences are, right? So from a
21 joinder perspective in severance, look at -- these are just a
22 few of them, different pharmacies, different purposes,
23 different doses, conversations --

10:27:56AM 24 THE COURT: My Magistrate Judge pointed out, same
25 drug, same research, same marketing. I mean --

10:28:04AM 1 MR. CHEFFO: But those are not severance.

10:28:05AM 2 THE COURT: I mean, I think these very -- I call them
3 the variations of the fraudulent joinder theory which you
4 apply to defense claims, you apply to plaintiffs, are
5 interesting ideas. I don't think they are particularly
6 persuasive in this particular set of facts.

10:28:22AM 7 MR. CHEFFO: Your Honor, I mean here's where -- I
8 would just urge you to think differently about fraudulent
9 joinder of plaintiffs and defendants, and procedural
10 misjoinder. They make my kind of head spin, but those are
11 different contexts, there's some law on them, and they talk
12 about very high standards, and there is -- some courts have
13 adopted them, many courts have not. But when you look at the
14 basic severance, there is a huge number of cases that I think
15 sometimes people try and make this too hard. Right? They
16 basically, look, this is the Benicar case, the issue of
17 complete diversity is mooted by virtue of the management order
18 requiring severance of the plaintiffs. So when they got there
19 they had to be severed.

10:29:01AM 20 There's actually this Propecia case, "If plaintiffs can
21 escape the MDL by joining multiple, unconnected and nondiverse
22 parties in a State Court of their choice, they defeat the
23 purposes of the MDL and deny defendants their rights."

10:29:13AM 24 Most of -- this is Propecia is a hair loss -- most of
25 these, if you look at these, these are all medical device

1 pharmaceutical cases, same exact issues, they go on and on.

10:29:22AM 2 THE COURT: Let me tell you something. I know y'all
3 disagree with the State Courts that -- I mean, in Missouri,
4 for instance, you know, there is these -- my colleagues in
5 Missouri are all over the place about -- and there's no
6 appellate court case in Missouri. But there's at least an
7 Eighth Circuit case that hasn't been reversed and still
8 followed as recently as this year, in which it says, you know,
9 that these -- that the defendant has consented to personal
10 jurisdiction in the -- to jurisdiction in the state by
11 registering -- and I mean, I -- listen, I know that argument,
12 okay? That's not the law in South Carolina, but I'm saying --
13 I'm looking at is there no possibility that they're going to
14 be successful there? I would say, depending on the judge they
15 get, they may have 100 percent chance of winning; depends who
16 the judge is.

10:30:20AM17 MR. CHEFFO: So I look at this -- Can I step over
18 here, Your Honor?

10:30:23AM19 THE COURT: Absolutely.

10:30:23AM20 MR. CHEFFO: A few things. So we have CAFA, right?
21 First. Then we basically -- let me look at my note here -- we
22 have -- before we even get into fraudulent joinder or
23 misjoinder -- Can you see that?

10:30:42AM24 THE COURT: I can.

10:30:45AM25 MR. CHEFFO: We basically have this idea of

1 severance, right, so you don't even need to get into these
2 first.

10:30:52AM 3 THE COURT: Why would I sever it?

10:30:54AM 4 MR. CHEFFO: Because if you looked at severance, you
5 would have a number of cases that would have just straight --
6 and this applies, frankly, in the Missouri cases as well --
7 it's what -- and this is what the Federal Courts do. And I
8 think this is like setting the table. It's not a substantive
9 merits issue. So you'd say wait a minute, let's say someone
10 came into Federal Court and they filed a 97-person complaint
11 from all over the place. Right? If the clerk would even
12 accept that, without doing it, you know, most -- in this case,
13 forget the other one --

10:31:25AM 14 THE COURT: These are not direct file cases, these
15 are coming out of a State Court in which the clerk in the
16 State Court allowed it.

10:31:31AM 17 MR. CHEFFO: I understand.

10:31:31AM 18 THE COURT: And the court in that state permitted it.
19 I agree with you, we wouldn't allow it.

10:31:36AM 20 MR. CHEFFO: Okay. But here's what the point is. We
21 are investigating, you are investigating determining whether
22 my client, right, has Federal Court jurisdiction, a very
23 important, you know, issue for us and for you and for the
24 courts. And when you set the table to make these decisions,
25 you have to use the tools that you have. Just like you'd

1 apply Daubert here if the state had jurisdiction.

10:31:57AM 2 So before you get all these things, you should, like all
3 of these other cases do, say, wait a minute, you could file --
4 I recognize there may be in St. Louis or in California, if you
5 did it, you could do it, but we're not in St. Louis or
6 California, we are trying to determine if there's Federal
7 Court jurisdiction here.

10:32:14AM 8 So you have to look, I believe --

10:32:16AM 9 THE COURT: Under CAFA. Under CAFA.

10:32:18AM10 MR. CHEFFO: Well, under CAFA, now we're actually
11 on -- probably under fraudulent joinder and misjoinder.

10:32:22AM12 THE COURT: Okay. Okay.

10:32:23AM13 MR. CHEFFO: Okay? So CAFA is easy for California,
14 you decide it, and if you keep it, we're all --

10:32:29AM15 THE COURT: I'm with you.

10:32:29AM16 MR. CHEFFO: But in terms of severance, this has very
17 significant implication, because if you first sever, there's
18 frankly hundreds of cases where just by the virtue of
19 severance, you don't even have to reach fraudulent joinder.
20 There's cases, for example, where you have a Wisconsin person
21 in one of those, you know, 97-person California claims -- and
22 there's complete diversity, right -- the only issue there,
23 and, in fact, some of those, they've waived the forum
24 defendant rule. So let's say there's two, 300 cases where, if
25 you had basically -- if you sever and you broke them up and

1 look at them individually, say okay, Mrs. Smith versus Pfizer
2 here and McKesson. Some of them would automatically be in
3 this court. Not all of them, in fact, the majority would not.
4 The majority then, once you sever it, then you would have to
5 go through and do a fraudulent joinder analysis.

10:33:24AM 6 So whether you want to call this severance under Rule 21,
7 or you want to call it procedural misjoinder, those are
8 important issues. Then I think what you would look at, and I
9 understand Your Honor's -- your point on some of the
10 fraudulent joinder issues. But McKesson is a unique animal.
11 This is not like, you know, a local defendant who actually
12 you're suing a big company and someone actually did something.
13 There's three cross-cutting arguments as to McKesson, that I
14 think are incredibly powerful, particularly here.

10:33:57AM 15 The first is preemption, right? And, you know, very
16 simply, in Mensing and Bartlett, if you can't change the label
17 and you can't redesign it, how can you respect McKesson, all
18 they are is the distributor of the medicine.

10:34:16AM 19 THE COURT: Of course, they allege marketing, sales,
20 representations.

10:34:20AM 21 MR. CHEFFO: No, and we'll talk about that, I'll go
22 back to the podium in a second, but there is essentially
23 failure on the pleadings. So basically what they say is they
24 say McKesson distributes one-third of all medicines in
25 America, and on information and belief, you know, all the

1 people in this complaint did it. So that doesn't meet any
2 standard.

10:34:39AM 3 And then there's actually this intent issue. And I will
4 give you, as to people, some of the plaintiffs will talk
5 about, that's a harder argument for us, but as to a number of
6 them, it's a pretty easy argument. Because the Lopez firm,
7 for example, filed motions to remand. So let me just take
8 them one at a time.

10:35:12AM 9 THE COURT: I mean, you acknowledge that the sort of
10 egregious circumstances of Avantia are not here.

10:35:19AM 11 MR. CHEFFO: I do and I don't. Okay? So, for
12 example, and I don't in any way mean to pick on Mr. Lopez, but
13 these cases -- So what happened -- you probably remember
14 this -- very back in 2014 -- so, you know, Mr. Lopez is one of
15 the executive committee members, as Your Honor knows, and he
16 had some cases, right? And he said, I am going to keep all
17 these cases here, right? And he -- not only is he an
18 executive committee member, he had three discovery pool cases,
19 was intimately involved in discovery, they have not served a
20 single document request. I haven't even heard McKesson in any
21 of these depositions use -- they've never attended.

10:35:58AM 22 So then -- and basically this is what they did, remember
23 we were talking about all kind of minutia about adverse
24 events, and they pursued all that; they did not pursue
25 anything versus McKesson.

10:36:08AM 1 So when you talk about intent -- and these were discovery
2 pool cases. So I would argue two things on that, Your Honor.
3 The first is, at least as to all of the cases that are in --
4 and this is -- these remand motions --

10:36:23AM 5 THE COURT: But if McKesson was a party in some of
6 the pool cases, we would not have tried McKesson, would we
7 have? I mean, my MDL is --

10:36:34AM 8 MR. CHEFFO: No, but here's why, right, and this goes
9 to the intent point. They only filed motions to remand
10 hundreds of cases, after your Daubert ruling came out. So
11 they basically -- this is Avantia --

10:36:43AM12 THE COURT: Let me say this.

10:36:44AM13 MR. CHEFFO: -- on steroids.

10:36:45AM14 THE COURT: We all know that everybody games
15 jurisdiction. No one is free of that. My friend, Andre
16 Davis, a Fourth Circuit case which he dissents from an en banc
17 case, and he, in a great dissent, he said, listen, everybody
18 games jurisdiction. Start looking at people's ethics, because
19 everybody does it, and there's nothing wrong with it, it's
20 just the defendants want to be in Federal Court, the
21 plaintiffs want to be in State Court, that's just the way it
22 is. And they all use the rules, and it's just -- the court's
23 trying to be neutral in these things and apply the rules.
24 So --

10:37:24AM25 MR. CHEFFO: Your Honor, this is not about ethics.

10:37:25AM 1 THE COURT: So when you say -- I mean, I stayed all
2 the remand cases, so they didn't do any discovery in those
3 cases. They moved to stay, you consented to it, so I mean,
4 they weren't going to do discovery in those cases. And I
5 wasn't going to try McKesson cases if they were in my pool,
6 right?

10:37:44AM 7 MR. CHEFFO: Right. Well, that's why I said there
8 are two issues. Right? And I'm not -- just to be clear, I'm
9 not in any way challenging ethics, I think this was the right
10 choice. Basically what happened -- and let me put aside the
11 non -- let me only talk about Mr. Lopez' cases and then we'll
12 talk about the state California cases.

10:38:00AM 13 These are cases that are in your court that are not
14 stayed. Okay? He filed in the -- for hundreds of them. He
15 filed motions to remand, after Your Honor ruled on Daubert.
16 Based on the cases that are already here. So that's what I'm
17 talking about right now, right? So those, when you want to
18 look at did he have an intent, this is not ethics; he was
19 right, he said, look, I don't really need McKesson in these
20 cases, I want to stay in Federal Court, they don't add any
21 value, and I'm not going to really pursue them. And that's
22 what he did all through the litigation, and then after the
23 Daubert rulings come down, he says, oh, by the way we have a
24 subject matter jurisdiction here and there's no diversity. So
25 that's one.

10:38:35AM 1 THE COURT: But you want me to reach down and point
2 out in these thousands of cases, one lawyer, and focus on his
3 intent. You know, there are practical limitations on an MDL
4 management of reaching down like this.

10:38:48AM 5 MR. CHEFFO: I agree.

10:38:48AM 6 THE COURT: I mean --

10:38:49AM 7 MR. CHEFFO: I agree.

10:38:50AM 8 THE COURT: And you know, this is not like a single
9 case which we could -- we wouldn't have the time -- I mean,
10 one of my great disappointments in this MDL is we never found
11 a case to try. And, you know, I -- you know, I went to great
12 lengths --

10:39:04AM13 MR. CHEFFO: You did.

10:39:04AM14 THE COURT: -- to try to get one tried. And lo and
15 behold, after we did all that, that the new theory is they
16 don't need an expert, right? I mean, I would have loved one
17 of them to step forward and we'd have tried the case.

10:39:18AM18 But, you know, I can't be -- it's just not practical to be
19 reaching down and trying to get the measure of the intent of a
20 lawyer, of a lawyer, when most of his cases were stayed, the
21 remand cases, he later did this, listen, I get it, I saw what
22 he did, I mean, you know, wasn't any secret to me, I saw. He
23 was -- everybody's gaming the system, just like somebody would
24 say, well, what is Pfizer reaching in California and
25 transferring these cases to the MDL? I don't fault you for

1 it. That's a reasonable effort, whether you succeed or not,
2 it's done in good faith, I don't question your good faith. It
3 might have been pushing the limits of the law, but what's
4 wrong with that? That's what good lawyers do.

10:40:06AM 5 So I think what's good for the goose here is good for the
6 gander. I'm not big on trying to examine the bad faith of
7 lawyers.

10:40:15AM 8 MR. CHEFFO: Let's me say this. There's no question,
9 as to all of the others, I think we raised the argument,
10 that's not our strongest argument. When you look at the
11 issues here, once you -- if you do sever, or frankly, even if
12 you don't, when you look at the fraudulent joinder, I think
13 the preemption argument as to McKesson is the strongest, and I
14 think also this issue of intent, failure to state a claim.

10:40:42AM 15 So plaintiff's complaint must allege causation. McKesson
16 was in some way responsible for the pills that caused
17 plaintiffs' alleged injury. The fact the pleadings are
18 liberally construed does not dispense with this requirement.
19 And Your Honor, I'm sure, has and will go back, but I went
20 back and looked at the complaints --

10:40:58AM 21 THE COURT: I went back, I have them in my notebook.
22 I didn't read obviously every one, but I did read several.

10:41:03AM 23 MR. CHEFFO: Sure. And we understand liberal
24 pleading, but I think this is a very strong and very fair
25 argument that when you're basically trying to look at

1 putting -- if you get past preemption, then you have the
2 pleading issues in terms of fraudulent joinder.

10:41:17AM 3 I think there's two other quick arguments that we have
4 that are actually a little more specific.

10:41:22AM 5 So here's kind of the wrinkle. Upon, you know, upon
6 information and belief, then you have maybe one --

10:41:31AM 7 THE COURT: Then you have 15 states that don't have
8 it. But here's my point on that. I can understand it's a
9 strategy call in complex litigation you have to make. Am I
10 going stay here and fight for jurisdiction here, or am I going
11 to go back to the State Court and move for summary judgment in
12 those states that have -- obviously there's no liability to
13 the distributor. You make the call to do that. I don't
14 question it. There's not a right or wrong answer to this,
15 there's a strategic calls you make.

10:42:02AM 16 But having me get into the weeds on these individual cases
17 doesn't make a lot of sense to me. What we do here is we send
18 them back and we try it. You know, we have these like really
19 sound practices, and you can't always follow them all in an
20 MDL, but you try to use sound practices.

10:42:23AM 21 When we have a removal and there's this -- there's
22 fraudulent joinder issues, we remand it, and some defendants
23 aggressively jump on it and whack them good, there's no claim,
24 and -- you know, before I even know they're gone, they're
25 back.

10:42:41AM 1 MR. CHEFFO: Judge, here's the difference, I think,
2 in this, right, just so we're clear what's been going on. I
3 would understand if we were kind of selectively around the
4 country saying, okay, we're not going to remove cases from
5 Wisconsin because there's some tactical advantage, right? We
6 have removed and tagged every case --

10:42:58AM 7 THE COURT: But that doesn't make it right. If you
8 don't have jurisdiction, you don't have jurisdiction.

10:43:03AM 9 MR. CHEFFO: No, I understand that, but you were
10 saying why don't you just kind fight these battles out. And I
11 think the difference is in the one off cases is that's the
12 whole point of the MDL. Our position when, you know, when the
13 first MDL was -- once the Court established it, was we want to
14 have all of these issues. You know, we didn't remove after
15 Your Honor's Daubert ruling or after this or that, we
16 basically said we think these cases have jurisdiction, you
17 should not be able to file, you know, 3000 plus cases in
18 California, of which four or -- 400 something of them are
19 California residents, right, lump them together, they have
20 nothing to do, they maybe could find California on a map,
21 probably most people have never been to California or done
22 anything, and we basically said, we're entitled to this thing
23 called federal jurisdiction, there's an MDL. So our efforts
24 from the very beginning were to move. In fact, we asked for
25 jurisdictional discovery. So we --

10:43:51AM 1 THE COURT: And I wasn't going to get into the weeds
2 on these individual cases.

10:43:55AM 3 MR. CHEFFO: Right.

10:43:56AM 4 THE COURT: You see, if I put my hat on as the MDL
5 judge and say I want -- you know, my preference would be to
6 have every case here, have it in one place, and then all these
7 different courts wouldn't have to tackle, and all these
8 parties wouldn't have to run around the country litigating
9 these issues. I get that. But that's not what Congress
10 provided with CAFA. I mean, that's not what Congress did.
11 And I can't rewrite the deal that Congress -- the compromise
12 Congress wrote about that.

10:44:26AM13 And similarly, this issue about the, you know, defense,
14 this is not a secret that many defendants have loudly
15 complained with the manipulation of jurisdiction. And one of
16 the solutions could be to do something about fraudulent
17 joinder, not to -- reverse somehow in the rules, establish a
18 statutory basis that's higher than, you know, glimmer of hope.
19 Okay? Congress could do that, they could --

10:44:58AM20 MR. CHEFFO: But severance does that, Your Honor.

10:44:59AM21 THE COURT: Well, I'm not -- I frankly think that
22 these -- if I took down an individual case, these parties
23 would have -- I wouldn't sever them, I just wouldn't do it.
24 And it's not something we normally do. And I think it's
25 creative, it's interesting. It's not practical. It's not

1 practical how we apply the rules, and I don't think we ought
2 to be trying to defeat what seems to be the policy in CAFA,
3 your jurisdiction under CAFA is very limited, and you're
4 trying to, through different devices, to turn it into general
5 jurisdiction.

10:45:32AM 6 And if I were in Congress, I might have voted that way,
7 but that's not my hat I'm wearing here.

10:45:38AM 8 MR. CHEFFO: So, Your Honor, I only want to be up
9 here as long as it's helpful.

10:45:42AM 10 THE COURT: By the way, I'm giving the other side as
11 long a time as you get.

10:45:46AM 12 MR. CHEFFO: They may not need it, depending on how
13 Your Honor comes out.

10:45:51AM 14 So is it Your Honor's view, and again, just so I know kind
15 of what may be helpful and may not be helpful, is your view
16 that this CAFA decision is not something that you believe you
17 should be ruling on, and --

10:46:05AM 18 THE COURT: Yeah, I think that there's -- it seems to
19 me that the issue of whether this is a mass action is largely
20 settled by the Ninth Circuit decision. So I don't think
21 that's the question. There is a timeliness question that
22 needs -- about whether removal was timely, but I feel like the
23 right decision on my part is to send to my colleagues in
24 California whether that initial removal was proper, allow them
25 to rule on that issue and litigate that issue. And then if it

1 wasn't timely, and/or otherwise they determined there's not
2 CAFA jurisdiction, they could send it back to State Court. If
3 they determine no, it was timely and there is CAFA
4 jurisdiction, then they can consolidate them within each of
5 the districts where these cases are pending, and can have
6 their sort of mini MDL within those individual districts.

10:47:04AM 7 Listen, I wouldn't design that as a system, but that's
8 what Congress, as I read the CAFA statute, to provide for
9 that. That was the deal. And there were benefits to that,
10 because if you didn't have that, you couldn't even argue you
11 had federal jurisdiction without complete diversity, but it
12 came with strings. And I can't shed those strings.

10:47:29AM 13 I've got to say, I started considering all this remand
14 issue, saying, gee, wouldn't it be nice to keep everybody
15 here, I'll be honest with you, that's sort of the MDL judge,
16 that's sort of your idea is you want all the cases here. But
17 that's not what the law is. I have to apply the law.

10:47:50AM 18 And as I read each of the MDL -- each of the remand orders
19 that my Magistrate Judge did, Judge Marchant, I began to --
20 every time they came in, I read them, I would look at the
21 underlying cases, and then eventually in preparation of this
22 argument I looked at everything again. And I went back and
23 read the legislative history of CAFA. And I know it's not a
24 result that you particularly endorse, but I think it's the
25 proper application of the law. I really do.

10:48:21AM 1 Now, you might go back to the JPML and urge them, you
2 know, to send it back to me, I mean, I can't remand. Okay? I
3 don't have the authority. I could make a suggestion, and my
4 colleagues at the JPML will make a decision about what to do.
5 And if they send it back in the District of California, you
6 can contest this issue about whether you have even CAFA
7 jurisdiction.

10:48:57AM 8 You know, it's not a perfect solution, but that's -- we
9 have this rule of law in America, you know, we follow the
10 rules, and those are the rules, as I read them.

10:49:06AM11 MR. CHEFFO: Okay, Your Honor. And I understand
12 that. And just so then the only other issue, right, is all of
13 this other severance, fraudulent joinder, is that something
14 that -- because we do have a report and recommendation, we
15 have the ruling here, is that something -- because we do have
16 some other arguments that if your point is they're better
17 positioned on timeliness. So, for example, right, when the
18 cases first came in, we said, look, you know, we don't want a
19 lot of discovery, but we know most of these people are not
20 going to have proof of it, so why don't you give us some
21 limited jurisdiction. And what Your Honor said was -- you
22 didn't say no, you said, I'm going defer on that, because if
23 there ever comes a time where that is relevant, which is a
24 reasonable position --

10:49:48AM25 THE COURT: Let me just say my thoughts about that,

1 because this issue was raised, is the idea that we were going
2 to go find -- How many California cases are there?

10:49:58AM 3 MR. CHEFFO: Cases or plaintiffs?

10:50:00AM 4 THE COURT: I mean how many plaintiffs.

10:50:01AM 5 MR. CHEFFO: Three thousand plus.

10:50:02AM 6 THE COURT: Okay. We were going to take thousands of
7 people who had tens of thousands, maybe hundreds of thousands
8 of prescriptions, and we were going to somehow dig into where
9 every one of those prescriptions came from. Now, in a perfect
10 world one person would go to the same pharmacy. You're now
11 the world's expert that that's not what happens, right? They
12 go to all kinds of pharmacies. And it was going to be a, you
13 know, huge confusing -- I mean, this was not like anything you
14 could briefly do. I know y'all said, oh, we can tell McKesson
15 and who these pharmacies are. Just the process of figuring
16 all that, that just seemed to me a complete diversion. Some
17 of them were going to stay, there was no question McKesson was
18 a substantial number, we didn't know what percentage, but some
19 substantial number was going to stay. That's just not the way
20 we do these issues. We don't do all of the discovery here,
21 when there's -- we send it back to the remand court to do
22 that. And you will have the opportunity at some point to
23 raise that issue. And I understand your client's view is that
24 we fight here for federal jurisdiction, we don't go back and
25 fight in every state. I get that strategy. But that strategy

1 comes with some pluses and some negatives. And one of the
2 negatives is you don't get to go back there and whack these
3 cases out of the -- you know, removing those defendants
4 that -- in which there is no legal basis for them.

10:51:30AM 5 Listen. You know, we could have a conference on this
6 issue in which parties could discuss -- we could have a thing,
7 what are the areas of the law which, you know, over the years
8 involved adoptions that if we ever were starting over, we
9 wouldn't adopt, this might be near the top of the list. But
10 that's the law.

10:51:55AM 11 MR. CHEFFO: Your Honor, I have been before the Court
12 enough to know that you give everything a full and fair
13 opportunity. We may not agree on this issue, but I hear what
14 you're saying.

10:52:03AM 15 The last thing I will just say is I would -- the law
16 doesn't change in an MDL per se, but there are different
17 considerations.

10:52:13AM 18 THE COURT: There are different, I agree with that.

10:52:14AM 19 MR. CHEFFO: That's what I think all of these other
20 courts, there's about 15 or 20 of them, Benicar, Fosamax,
21 because what every court says is I do not have to basically be
22 the victim of someone's creative lawyer's word processor. And
23 I'm able to basically set the table and look at this under the
24 Federal Rules and find out what's really going on here.

10:52:34AM 25 And I think if you do that, I don't want to be

1 presumptuous, but we all know exactly what's going on here, is
2 that people are trying to basically -- See, we're looking at
3 it from Pfizer trying to get jurisdiction, but this is
4 frankly, as I see it, an affirmative effort to deny Pfizer the
5 jurisdiction that it deserves under both diversity and under
6 CAFA. And that is an affirmative effort.

10:52:57AM 7 THE COURT: That's an argument that is a hundred
8 years in the making. This approach of naming parties is done
9 every day in the courts of America. You're laying out an
10 argument that defendants complain about every day. But that's
11 the law.

10:53:17AM12 MR. CHEFFO: Well --

10:53:18AM13 THE COURT: And you may not like it, and you might
14 want me to find some work around to avoid what I believe is
15 the law of the country. And I'm just not going to -- you
16 know, I understand if I was sitting at one of these seminars
17 and you were talking about how we might change the rule, we
18 might talk about it. But I don't have that freedom, and I
19 don't believe I should manipulate the rules.

10:53:41AM20 You know, you talk about your client's interests; there's
21 also issues of state comity between State Courts and Federal
22 Courts. These aren't single factors here in which there's
23 only -- all good is on one side and all the other -- there are
24 arguments, some would say you overreached pulling these cases,
25 California has this system, they consolidate cases and you

1 snatched it out. I don't fault you for it, I think it was,
2 you know, why not try it. But in the end we all have to work
3 out these things, and the only way I know how to do it is to
4 neutrally apply the rules in a way that I think is reasonable,
5 and then whatever happens, happens.

10:54:30AM 6 MR. CHEFFO: So are you going to rule, Your Honor, on
7 the -- all these fraudulent joinder issues, or is that
8 something that you're going to allow the District Courts in --

10:54:39AM 9 THE COURT: I'm going to have the district courts do
10 it. I really think there's enough -- you know, I've looked at
11 these several -- this is like, you know, something that's
12 so -- as much baked into what we do every day as different
13 judges, we see these things. And you're not from here, but
14 there are certain counties here, I could tell Mr. Cole could
15 look at it, we could name the counties where everybody -- all
16 these plaintiffs' lawyers are trying to, every time somebody
17 stubs a toe in the county, they're bringing major lawsuits.
18 And there are all these devices to avoid federal jurisdiction.
19 And it takes a fairly unskilled plaintiff's lawyer not to get
20 it back. I mean, I'm just saying to you, the ones who know
21 what they're doing, it's not heavy lifting. Now, should that
22 be the law? I mean, that's my circuit's law, it's the
23 country's law, and -- but, you know, you're preaching to the
24 choir a little bit here, but I think under the limits of what
25 I can do about it.

10:55:44AM 1 MR. CHEFFO: Thank you, Your Honor.

10:55:45AM 2 THE COURT: Thank you.

10:55:46AM 3 Okay. How about my California counsel; who's going to
4 argue that?

10:55:54AM 5 MR. CHEFFO: Thank you, Your Honor.

10:55:54AM 6 MR. KAUFMAN: I don't know if I'm that plaintiff.

10:55:56AM 7 THE COURT: What is your name?

10:55:57AM 8 MR. KAUFMAN: My name is Justin Kaufman.

10:55:59AM 9 THE COURT: Yes, sir, Mr. Kaufman. Where are you
10 from?

10:56:01AM11 MR. KAUFMAN: I am from New Mexico, but I am here on
12 behalf of the California, Missouri --

10:56:07AM13 THE COURT: Mr. Cheffo would say that's part of the
14 conspiracy that -- even the lawyers have no California
15 connection. Have you ever been to -- By the way, have you
16 ever been to California?

10:56:15AM17 MR. KAUFMAN: I have been, Your Honor. There is a
18 good reason for that. We're here out of the Lipitor JCPP. My
19 law partner, Bill Robbins, who is on the executive committee,
20 had a conflict, I drew the short straw, so here I am.

10:56:30AM21 And based on your conversation with Mr. Cheffo, you know,
22 our position, as you've read, is very clear. We think the
23 Magistrate Judge was correct in his orders, we think he
24 eventually came around to the right decision with respect to
25 the JPML. And unless you have any other questions for us, we

1 agree with everything you've said so far this morning.

10:56:50AM 2 THE COURT: Well, many lawyers will get up after I
3 questioned the other lawyer and try to buy it back, they want
4 to give me other arguments.

10:56:59AM 5 Yeah, it just seems to me, Mr. Kaufman, that y'all
6 adequately pled it to -- the claims to survive a claim on
7 fraudulent joinder. That I have no doubt if the Court digs
8 into these that many of the claims might go away, would go
9 away. But I'm not able, I don't think it's proper for me to
10 do that, that's for the traditional practices for the remand
11 court to do it. And I don't ascribe any bad motives to
12 anybody, it's just the gamesmanship of jurisdiction that both
13 parties practice. But if you don't have anything further,
14 we'll move on to another state.

10:57:44AM15 MR. KAUFMAN: That's it, Your Honor. We've actually
16 touched on. Obviously I'm here for Missouri and Illinois as
17 well, so I'll have the same thing to say.

10:57:52AM18 THE COURT: Okay.

10:57:53AM19 MR. KAUFMAN: But we've touched on really all the
20 issues from those states as well.

10:57:56AM21 THE COURT: Thank you, sir.

10:57:58AM22 MR. KAUFMAN: Thank you, Your Honor.

10:57:59AM23 THE COURT: Okay. Mr. Cheffo, do you want to proceed
24 to Missouri?

10:58:02AM25 MR. CHEFFO: Yes, Your Honor.

10:58:03AM 1 THE COURT: Yeah.

10:58:14AM 2 MR. CHEFFO: I think this filing was helpful that we
3 had, because a lot of what we've been talking about, I think
4 are, you know, arguments that we've made here. There are some
5 differences.

10:58:29AM 6 THE COURT: There are some Missouri twists.

10:58:26AM 7 MR. CHEFFO: Yeah, there are. So there are three
8 cases, right, each has one Missouri and one or more
9 plaintiffs. I won't make the argument again, other than to
10 encourage you to look at these through severance and
11 misjoinder, because I think that, frankly, when you set the
12 table like that it really makes many of these cases diverse
13 and you don't need to go, because there's not a fraudulent
14 joinder issue here. These are just basically putting a bunch
15 of folks together with one nondiverse plaintiff, and were you
16 to --

10:58:54AM 17 THE COURT: Missouri law, I mean, I know Judge Perry
18 very well, who is a St. Louis judge who ruled most recently
19 in -- she's like a really serious judge, I know her very well
20 from the MDL conferences and so forth, and she -- I don't
21 remember which of the cases, but in one of them she, you know,
22 basically said the Eighth Circuit in Nolton said you can bring
23 these, you know, that an out-of-state defendant which has
24 registered to do business and designated an agent for service,
25 has consented to service -- I mean, that's one view of the

1 law. There are other colleagues there who have a different
2 view. And I've got to look at it and say is there like no
3 possibility that they would -- that that's -- is there no
4 possibility? No, there is a possibility. I mean, the split
5 in the law basically answers the question. And so --

10:59:56AM 6 MR. CHEFFO: I guess -- I am sorry.

11:00:00AM 7 THE COURT: Go ahead.

11:00:00AM 8 MR. CHEFFO: Two things. One is, which I will get to
9 the personal jurisdiction argument I think you're referencing,
10 but the rules of severance would be governed by this circuit,
11 and I think you looked at them, basically just Rule 21, and
12 then you then look at them kind of differently.

11:00:16AM 13 THE COURT: But it's the same -- my Magistrate Judge,
14 I thought, made a lot of sense on this. Same drug, same
15 research. I mean, yeah, you know, that there are some
16 differences, but we wouldn't, in a normal case, sever this
17 case. We wouldn't sever it and try separately. No, we'd
18 never do that. We'd try them together. So just practically
19 speaking, I'm telling you we would.

11:00:41AM 20 MR. CHEFFO: If people filed, I mean,
21 a-hundred-person complaint here --

11:00:44AM 22 THE COURT: Well, I wouldn't do that, but Missouri
23 apparently does that.

11:00:48AM 24 MR. CHEFFO: But if you -- again, I would just argue,
25 Your Honor, that for severance issues, we're not talking

1 substantive law here. It's the what would happen if. If
2 someone came in --

11:00:57AM 3 THE COURT: It's just a device. I mean, these cases
4 came to us from Missouri. Arguably, that procedure is allowed
5 in Missouri. And I'm supposed to come in and carve out the
6 New York person, I mean, it's just a more intense involvement
7 than we would normally do in these cases. And I'm just not
8 persuaded that's the role for us to do.

11:01:22AM 9 And there was a method -- you've elected not to do it --
10 to go back and get the Missouri courts to rule on that. God
11 knows somebody needs to get them to rule on it, right? And
12 you elected not do that. And then if you were right on that,
13 there's just -- that the New York plaintiff was improperly in
14 the case, you know, you would have had complete diversity and
15 you'd have -- I just -- you know, you're asking me to now use
16 the Rule 21 as sort of this device that is a work around, and
17 I just think that's a proper -- we wouldn't normally do that.

11:02:11AM18 MR. CHEFFO: I don't want to be presumptuous --

11:02:13AM19 THE COURT: Go right ahead.

11:02:15AM20 MR. CHEFFO: No, no, just a practicality, because you
21 don't, you know, I mean, I don't think this district wants to
22 become a place where people come and start filing, you know,
23 thousands cases from all over the country. So I would
24 actually just -- I think --

11:02:28AM25 THE COURT: Usually the JPML has some role, and I

1 have kind of consent over whether we're going to --

11:02:33AM 2 MR. CHEFFO: But let's assume now they decide, okay,
3 well, we can go down to South Carolina and we can file one
4 complaint, you know, 80 people. Lipitor is all over the
5 world, all over the country, right, and pay one filing fee. I
6 actually disagree. I think that, one, your clerk would do it,
7 and I think if you had seven or eight of those cases and you
8 had 800 cases and you would say, wait a minute, you're putting
9 these all in the same complaint, you're not telling me
10 anything about these cases, you would say wait a minute, you
11 have to break these up. These are individual cases. Like you
12 did in your case management order here, you have to file
13 single party, you have to do a fact sheet, you have to look at
14 them individually.

11:03:09AM 15 So no one is suggesting that you couldn't have mechanisms
16 to combine them. But in terms of whether these -- the
17 standard, do they all arise out of the same transaction or
18 occurrence. You know certainly as well as I do the
19 differences in these cases. And that's the issue here. This
20 is not a work around. This is what would happen if you had
21 people who said, you know, I drank Coke-a-Cola and I think
22 there's a problem, and I'm coming from Wisconsin and I drank
23 it eight years ago, and then I'm coming from New Mexico and I
24 drank it yesterday, and this person drank it for one day and I
25 drank it for ten years, I think any court, and most courts

1 and --

11:03:43AM 2 THE COURT: You're talking about a direct file.

11:03:45AM 3 MR. CHEFFO: Well, right, and essentially that's
4 what's before the Court. You'd say if that was the case, if
5 that was filed today, this case direct file, what you would
6 do, and I think any court in this circuit would do, is to say
7 wait a minute, do these satisfy the Rule 21 standards? Is
8 this appropriate?

11:04:01AM 9 THE COURT: But you're talking about a direct file
10 case versus a case which is arguably, you know, properly filed
11 in Missouri, pulled out of Missouri, where there is not
12 complete diversity, brought here --

11:04:20AM 13 MR. CHEFFO: Right.

11:04:15AM 14 THE COURT: -- on the basis there is complete
15 diversity, and you're asking me now to drill down into the
16 cases, which would be proper in Missouri, arguably proper in
17 Missouri. The normal way we would deal with that is I'd send
18 it back to the Missouri court, and if it's not proper, that
19 would be addressed within the year, and they could come back.
20 That's the way we do it. And to ask me now, using the device
21 of severance to separate something that under Missouri law is
22 proper, it just -- You talk about being on steroids; you'd be
23 turning removal on steroids.

11:04:51AM 24 MR. CHEFFO: But, Your Honor, there is a difference
25 here. And the real difference is this is not a single-person

1 case where you send it back and you come back. This is a
2 situation where people are putting hundreds of cases that on
3 their face, right, I mean there's three complaint --

11:05:04AM 4 THE COURT: You say on their face? Apparently
5 Missouri courts don't feel that way. At least some Missouri
6 courts don't feel that way.

11:05:10AM 7 MR. CHEFFO: What we're asking you to do, Your Honor,
8 is determine if this court has Federal Court jurisdiction.
9 How the procedural findings, you may issue a Daubert ruling,
10 and the Court may says that's Daubert, I have Frye or Kemp, so
11 there may be differences, and that's even more substantive. I
12 believe this court and every court in the Federal Courts has
13 to look at -- I mean -- there are times when you look, and
14 I'll talk about with jurisdiction, whether you look at what
15 the underlying law is. But frankly, this is a relatively -- I
16 don't want to lean on the Court, but it's a mechanical federal
17 look, under the law of this circuit. It doesn't matter what,
18 you know, what happened before and how they put their word
19 processor. Once we get in court we say, Judge Gergel, we'd
20 like you to look at this and put your -- the real world
21 glasses on, and if someone did file this same case for the
22 first time here, I believe that every court would sever it.
23 And if that's the answer, then that's the way for something
24 as --

11:06:02AM 25 THE COURT: But removal cases, the practice is to

1 send it back to the State Court to address that issue. You
2 elected, for your own reasons, I understand them, not to do
3 that. There is a procedure; you elected not to use it, Mr.
4 Cheffo, that's the problem. Is you could go back to -- Let's
5 look at the practical thing. They moved to remand. You say,
6 listen, I think I got the right position, this is not proper
7 under Missouri law. I go back to Missouri, I immediately
8 move, explain to the court we're trying to do this within the
9 year, we want to do expedited discovery and get this issue,
10 and then we want a definitive determination. There is a
11 method; you elected not to pursue that. And now you're asking
12 me to drill down into these cases, which arguably under the
13 fraudulent joinder standard are properly before me, and you
14 want me to drill down and start applying Rule 21 severance to
15 those cases. That's just not -- that is a role in the process
16 on removal and remand we don't do.

11:07:10AM17 MR. CHEFFO: Judge --

11:07:11AM18 THE COURT: That's just not what we do.

11:07:12AM19 MR. CHEFFO: Look, I'm going to -- I hear you, and I
20 am just going to make one other point, just because the fact
21 that there may be procedural rules in a particular state that
22 allow people to file multi-party complaints, okay, that really
23 has -- someone should not be able to take something as
24 important as diversity -- now, you're saying maybe if we go
25 back, they allow it, and I would probably agree with you, and

1 if we do go back, we'll make those motions, may or may not
2 win, depending whether somebody can file the complaint. But
3 assuming they can, that doesn't change the court's look here,
4 again, that's just the fact that someone --

11:07:49AM 5 THE COURT: But the plaintiff started their case in
6 Missouri. They filed it in Missouri. We give some deference,
7 and we say under very limited circumstances, very limited, we
8 let the defendant remove the case, not just because we don't
9 like the venue in St. Louis or -- We have certain rights under
10 federal law to remove. Very limited rights. And now we're,
11 you know, we're really, under fraudulent joinder status, we
12 couldn't really remove it, but now we want the Court to come
13 and put a surgical knife, go in and cut out all those people,
14 sever them into another case, and then say, voila, we now have
15 complete diversity. I'm not going to do that. In all due
16 respect to you, I'm not going to do that.

11:08:40AM 17 And I think that's a manipulation of jurisdiction that I
18 wouldn't feel comfortable doing.

11:08:48AM 19 MR. CHEFFO: Okay, Your Honor.

11:08:49AM 20 THE COURT: Different from it was a direct file to
21 me. Different status of direct file versus --

11:08:54AM 22 MR. CHEFFO: Respectfully, I think they're the same,
23 but I'm going to move on because you told me where you are on
24 this. And, you know, we'll talk about the jurisdiction, and
25 you may be in the same place. But basically our argument on

1 jurisdiction is really twofold. Right?

11:09:08AM 2 And just to be clear, this is -- I am not arguing now for
3 the kind of jurisdictional type discovery and documents, I
4 mean, so this one is -- you know, you don't even need to do
5 anything, right, we're talking about if you sever or even look
6 at them separately, all you have to say, is this guy from New
7 York or Delaware, they're not, Michigan, you know, so this is
8 not -- you don't need to know anything more than where their
9 complaint is, and you can make your determination. So it's a
10 relatively easy one.

11:09:33AM11 THE COURT: I understand that.

11:09:33AM12 MR. CHEFFO: But so for -- you know, and this goes
13 to, you know, the Supreme Court cases and Daimler, and really
14 our argument is straightforward. And they're flip side.
15 First is they're fraudulently joined because there's no
16 personal jurisdiction.

11:09:47AM17 THE COURT: Yes.

11:09:48AM18 MR. CHEFFO: Right? And you've talked about, you
19 know, some of the issues there. But the other side, frankly,
20 is under the Ruhrgas decision, Supreme Court decision, I think
21 it's 1999, Your Honor can address the personal jurisdiction
22 separately. Because we did file motions there, and there is
23 some, you know, some precedent in this case that actually
24 might work well, because it's -- rather than sending all these
25 cases back, you could address it. That's essentially our --

11:10:14AM 1 THE COURT: But obviously the Supreme Court case, the
2 Ruhrgas case, talks about the general preference when we do
3 subject matter, there are circumstances where it would be
4 judicial economy to do personal first. Couple of my
5 colleagues in MDLs had very definitive answers where they
6 thought the subject matter jurisdiction was complicated,
7 personal jurisdiction was simple.

11:10:39AM 8 Personal jurisdiction here is like really complicated in
9 Missouri. It doesn't really accomplish -- first of all, I
10 have to rule on the subject matter elsewhere, so I'm not
11 avoiding subject matter, I've got to rule on. And the
12 personal here is, I mean, I've read every one of those cases I
13 could find. I went and Shepardized the -- I went and looked
14 up cases that they cite. I mean, I was amazed what the
15 division, and it seems to me on such a major issue, how there
16 could be no State Court. And then I found like State Court
17 trial court says, please, Missouri Supreme Court, reach a
18 decision, you know.

11:11:17AM 19 MR. CHEFFO: There is an appeal of one of them,
20 there's an --

11:11:20AM 21 THE COURT: Thank goodness. It's ridiculous. But
22 you're asking me to get in there and try to figure out
23 something that has confounded the Missouri judges? No.
24 That's exactly one I would stay on subject matter, which I
25 think is fairly clear, versus what is very unclear.

11:11:35AM 1 So it's my call under Ruhrgas, and I looked at that hard.
2 And I mean, listen, let's face it, Mr. Cheffo, that Missouri
3 thing is a little unusual, right? I mean, allowing these
4 folks to come in and -- it's an unusual thing. But apparently
5 it's sort of allowed in Missouri. And part of our Federal
6 Court State Court system is that we have some respect for the
7 State Court processes, that we respect that. That we aren't
8 sort of like the super court, that everybody just has to
9 follow our tune. We try to respect State Court processes.
10 And sometimes it's easier than others. Sometimes we just feel
11 like the federal interests are so great we just have to do
12 that. I mean, look, I grant habeases, right? But we do it
13 sparingly.

11:12:24AM14 MR. CHEFFO: Is that an option here?

11:12:28AM15 THE COURT: You don't want to be a criminal defendant
16 in my court.

11:12:32AM17 MR. CHEFFO: No, again, I do appreciate the
18 opportunity to present this to the Court. I don't think on
19 this one I have anything else, Your Honor.

11:12:39AM20 THE COURT: Thank you very much. Mr. Kaufman, you
21 have Missouri?

11:12:47AM22 MR. KAUFMAN: Thank you, Your Honor. Very briefly,
23 we, again, agree with everything you said. The only
24 additional point I wanted to make, you talked about how, you
25 know, this is really a State Court issue, you have the ability

1 to send it back to State Court, Pfizer knows well. So the two
2 cases that -- the two later filed Missouri cases, Scotino and
3 Allen, at the time that those were filed, there were actually
4 two other cases that didn't make it here, that's Polk -- and
5 the other case was called -- let me grab it here.

11:13:24AM 6 THE COURT: Wasn't there a case set for trial that
7 got settled?

11:13:28AM 8 MR. KAUFMAN: No, this is different, Your Honor.
9 Four complaints were filed at the same time.

11:13:30AM 10 THE COURT: Okay.

11:13:31AM 11 MR. KAUFMAN: And the Clark versus Pfizer case and
12 the Polk versus Pfizer case, they were both remanded before
13 they were transferred to the MDL.

11:13:38AM 14 Okay. And the same arguments were made there by Pfizer as
15 were made here, and the Federal Judge in Missouri rejected all
16 those arguments and sent it back to State Court. Now, Pfizer
17 in the State Court in Clark argued personal jurisdiction,
18 which they have a right to do in the State Court in Missouri.
19 And the State Court in Missouri denied that as well. So they
20 found that there was personal jurisdiction over the
21 non-Missouri plaintiffs in that State Court case. Pfizer took
22 it up on a writ, the writ was denied.

11:14:07AM 23 So there is a procedure in place, I think Your Honor's
24 identified it; that's the procedure that we think is
25 applicable.

11:14:12AM 1 THE COURT: Obviously, Mr. Kaufman, when we do this
2 mass tort situation, it stresses -- it creates complications
3 from our ability to normally drill down in an individual case
4 and focus. It's just a weakness inherent in this, and we have
5 to design procedures. And if I've got 5000 cases up here, I
6 just can't drill down on 5000 cases. We couldn't manage it in
7 that way.

11:14:37AM 8 And so it's not a perfect system. If I had the time and
9 the resources, but we'd need, you know, four times the law
10 clerks, and I mean, it's the same reason my colleagues on the
11 joint panel, they have like minimal staff. They don't have
12 any ability. They have their arms full just transferring the
13 cases to us. I mean, they are just -- they're doing all they
14 can do.

11:15:02AM15 So I have some, frankly, some personal sympathy for the
16 defendant's inability to get a quick ruling. I wish I could
17 do it. There's just not a practical way to do that. And the
18 process is, as you described, you go back to the State Court,
19 you address it in State Court, and frankly, I think the
20 defendant didn't do it here because they didn't think -- they
21 thought they had more chance of winning here. I respect their
22 strategic call, these are good lawyers, they make their call.
23 And maybe the experience in Missouri validated that they
24 didn't have very good options either way.

11:15:37AM25 So I think the right decision is to send it back and allow

1 the State Court in Missouri to address these issues.

11:15:43AM 2 MR. KAUFMAN: We agree, Your Honor, and that's all I
3 need to say on that.

11:15:46AM 4 THE COURT: Very good.

11:15:47AM 5 Okay. The next is Illinois related cases. Anyone want to
6 speak with regard to Illinois?

11:15:58AM 7 MR. CHEFFO: I think I've said our -- It's the same
8 argument, Your Honor.

11:16:02AM 9 THE COURT: Very good. How about Michigan?
10 Anything, Mr. Cheffo?

11:16:07AM11 MR. CHEFFO: Yeah, I'll be very brief, because again,
12 I do think --

11:16:12AM13 THE COURT: By the way, I'm not allowing attorneys'
14 fees. They asked for attorneys' fees. No. No.

11:16:20AM15 MR. CHEFFO: Thank you.

11:16:24AM16 THE COURT: I thought you might like that. You can
17 call your client and say the bad news is they sent you the 700
18 jurisdiction, but good news is I didn't get tagged for
19 attorney fees.

11:16:40AM20 MR. CHEFFO: I'm going to flip them actually. I have
21 some good news for you today.

11:16:46AM22 So again, I just wanted to make sure that there's nothing
23 kind of specific. I think the issues here, if you don't get
24 to severance, you don't get to our arguments, Your Honor, so
25 you'd have to sever, and then --

11:17:00AM 1 THE COURT: Same thing with the pharmacy defendant.
2 Same situation.

11:17:03AM 3 MR. CHEFFO: And it's a fraudulent joinder argument
4 which I think we've talked about.

11:17:08AM 5 THE COURT: Yes.

11:17:13AM 6 MR. ALTMAN: Your Honor, Keith Altman on behalf of
7 the Michigan plaintiffs. I think everything has pretty much
8 been said. If Your Honor has any questions I can address --

11:17:22AM 9 THE COURT: I don't. I think these issues largely
10 overlap with these others. Thank you, sir.

11:17:29AM11 MR. CHEFFO: Not to go back, but this is from
12 Missouri on one second. Again, I know you have lots of things
13 going on and -- but you probably already worked on your order.
14 So one thing I would ask you to consider is the Eighth Circuit
15 is actually addressing that issue of personal jurisdiction. I
16 think it's pretty soon, it's been briefed fully, so, you know,
17 you may or may not want to --

11:17:52AM18 THE COURT: I just think let the -- I mean, you can
19 go back and try to -- having me drill down on these individual
20 states, I just think that's just more than the MDL court ought
21 to be doing. But I've got the law as it is now, I have to
22 apply the law. On every issue, believe me, there's court
23 cases coming in, and y'all have been very good about
24 supplementing, I think we have like multiple surreplies. I
25 don't know what you call the eighth surreply, but you know, I

1 fear for the future of trees in America, they're all killed in
2 this case. But, of course, you can accuse me of contributing
3 to that by allowing all that discovery, right?

11:18:34AM 4 MR. CHEFFO: We're not going to go there today, Your
5 Honor. No. Okay. I just wanted to bring that to your
6 attention.

11:18:41AM 7 THE COURT: Thank you.

11:18:42AM 8 Okay. We are working on an order. I did, frankly, come
9 here with a certain sort of view of the legal and factual
10 issues here. And I largely agree with my Magistrate Judge,
11 certainly on the result. There might be a twist or two in
12 terms of how I get there. But I am going to deny the appeals
13 in all nine cases and remand those cases to the districts
14 where they came, other than California. And I intend to have
15 a suggestion of remand to the JPML as to the California cases.

11:19:25AM16 Are there other matters to come before the Court now, Mr.
17 Hahn? I'm stunned with your silence up to this point.

11:19:35AM18 MR. HAHN: Your Honor, on behalf of the plaintiff
19 steering committee we have no position on --

11:19:39AM20 THE COURT: I thought that would be your view.

11:19:41AM21 MR. HAHN: However, to the extent that any of the
22 remanded cases either have used or will use in the future any
23 of the discovery of the plaintiff steering committee, we would
24 like the Court to protect us as far as the confidential
25 assessment.

11:19:57AM 1 THE COURT: I thought we tried to address that issue.
2 Remind me, what CMO is it? I thought we tried to address that
3 in anticipation that that might happen.

11:20:09AM 4 MR. HAHN: There is an order out there. The
5 plaintiffs that are being remanded back, I'm not sure that
6 they've all signed the document recognizing. And that it may
7 come back around, Your Honor.

11:20:24AM 8 THE COURT: Listen, I think the work the plaintiffs
9 did, both sides did in discovery, is just remarkable. And I
10 don't think it's proper for counsel to come in, and in their
11 capacity as part of this case, take that work product and then
12 go back and basically, without compensation, not contribution
13 to all these lawyers participating in this, I think that's
14 wrong. And if I need to address it, I will. I think y'all
15 have done a yeoman's work in pulling together that.

11:20:59AM 16 So if you see that we need to address the issue, I need to
17 bring all the parties here, I want to give everybody notice,
18 so I can hear from all sides here. But obviously I am very
19 aware of extraordinary efforts that the litigation team for
20 the plaintiff undertook here. And the understanding was that
21 they were to receive this information as part of a share or a
22 cost, that there was a collective effort, and I would --
23 unless you can show me law I don't have the authority to do
24 that, I would intend to enforce that, Mr. Hahn.

11:21:36AM 25 MR. HAHN: Thank you, Your Honor.

11:21:37AM 1 THE COURT: Any other matters to come before the
2 Court? Very good. With that, the hearing is adjourned.

11:21:42AM 3

11:21:42AM 4 (Court adjourned at 11:30 a.m.)

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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