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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, April 25, 2014, commencing at 10:03 a.m., before the Honorable Richard M. Gergel, in Courtroom I, 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:

- Jayne Conroy, Esquire
- Ramon R. Lopez, Esquire
- Mia L. Maness, Esquire
- Mark C. Tanenbaum, Esquire
- Ann Estelle Rice Ervin, Esquire
- Blair H. Hahn, Esquire
- Christiaan Marcum, Esquire
- Thomas D. Rogers, Esquire
- D. Charles Dukes, Esquire
- David F. Miceli, Esquire
- Laura Voght, Esquire
- Eric Maynard, Esquire
- Jennifer Hisel, Esquire
- Rick Barreca, Esquire
- David L. Suggs, Esquire

APPEARED FOR DEFENDANTS:

- Michael T. Cole, Esquire
- David E. Dukes, Esquire
- Mark S. Cheffo, Esquire
- Lyn Pruitt, Esquire

1 THE COURT: This is United States District Judge
2 Richard Gergel here in the matter of In Re: Lipitor,
3 2:14-2502. Could counsel who will be speaking, first for the
4 plaintiff, identify themselves for the record, and then the
5 defense.

6 MR. HAHN: Blair Hahn for the plaintiff, Your Honor.

7 MR. TANENBAUM: Mark Tanenbaum. I may say something
8 about the proposed order.

9 THE COURT: Very good.

10 MR. CHEFFO: Good morning, Your Honor, Mark Cheffo.

11 MR. COLE: Good morning, Your Honor, Mike Cole. And
12 Lyn Pruitt from the Mitchell Williams firm in Little Rock is
13 going to be part of our team.

14 THE COURT: Glad to you have here with us.

15 MS. PRUITT: Thank you, Judge, nice to meet you.

16 MR. DUKES: David Dukes.

17 THE COURT: Yes, Mr. Dukes, good to see you.

18 Okay. Folks, I have reviewed your various submissions to
19 me; thank you. And let me just sort of go through the ones
20 that sort of have gotten my eye, and let's sort of talk
21 through those. There was an issue about -- and there's no
22 particular order, certainly the order, as I noted them here.
23 First of all, on the expert disclosures, both parties have
24 submitted to me a proposed schedule. The sort of end dates
25 are very close to each other, the begin dates are of the date

1 of identifying -- plaintiffs would identify their experts.
2 The defendants proposed October 24, and the plaintiffs
3 proposed December 5.

4 How big a deal is it to each party about that? Let me
5 just hear. Mr. Hahn?

6 MR. HAHN: Thank you, Judge. The issue is not so
7 much the end date as it is the begin date.

8 THE COURT: I get that. You tell me how important it
9 is to you and why, the begin date December 5th, and I want to
10 hear from Mr. Cheffo about why it's important to be earlier.
11 If it is.

12 MR. HAHN: Well, the issue is document production.
13 And we have had issues, as the Court is aware, with document
14 production. And we need to have all the documents, and we're
15 expecting obviously millions of pages of documents, and the
16 time to review those documents before we can get with our
17 experts and then do our expert disclosures. And so the issue
18 really backs all the way up to today, because we haven't had a
19 document production since -- When? Since January, I think it
20 was late January. We got one this week. But it's --

21 THE COURT: Be careful what you ask for.

22 MR. HAHN: Yes, sir.

23 THE COURT: It's about to turn loose.

24 MR. HAHN: Well, we've had a number of issues with
25 the defendants are working through, we met multiple times this

1 week trying to work through these issues. And we have some
2 things we'd like to talk to the Court about in that regard.

3 THE COURT: Yes.

4 MR. HAHN: So the issue is getting the documents.
5 And we can live with either of these dates, as long as we have
6 the documents far enough in advance. And we don't believe
7 we're going to get documents far enough in advance to do the
8 October 24th date.

9 I -- well, that's enough right now.

10 THE COURT: Mr. Cheffo, what's your thoughts?

11 MR. CHEFFO: Yes, Your Honor, I'm going to try and
12 answer your question directly, but if you'd just bear with me,
13 give me a little bit of leeway. I just want to explain how we
14 approached it, I think, frankly, both sides. We heard Your
15 Honor loud and clear last time and, you know, before that,
16 that you want us to move quickly and you want the trial date
17 that's consistent with what the Smalls case were. So frankly,
18 that's why that June date was pretty much, I mean, that was
19 negotiated, we said, you know, Your Honor might have liked to
20 see a March date, but this was something that probably --

21 THE COURT: I can live with a June date.

22 MR. CHEFFO: -- in good conscience we could both
23 propose.

24 THE COURT: Most MDLs be would be 2019.

25 MR. CHEFFO: That's exactly the point, Your Honor,

1 this is, in my experience, you know, we'll kind of be in the
2 Guinness Book.

3 THE COURT: That's okay. That's a good one to be in
4 for this. We may become the model.

5 MR. CHEFFO: We're ready --

6 THE COURT: I talked -- by the way, Mr. Cheffo, I've
7 been talking to my colleagues, these things are going on
8 interminably, nobody is happy about them. And I know we're
9 putting it at the rocket docket phase, but I think we will all
10 look back and be thankful that we did it that way.

11 MR. CHEFFO: Look, I have grown old in some of these
12 MDLs with some colleagues on both sides. So I think we do
13 appreciate, and I think there are some benefits to having an
14 aggressive schedule.

15 So having said that, you know, we also want to make sure,
16 and of course the Court does, too, that these are important
17 issues, that both sides have an opportunity to fully vet them.
18 Because kind of speed for the sake of speed is, I think, not
19 what the Court wants.

20 THE COURT: But, you know, obviously the expert
21 testimony in this case is going to be very important.

22 MR. CHEFFO: Exactly.

23 THE COURT: I get it.

24 MR. CHEFFO: So here's where I think a little bit
25 ships passing in the night. I think the expert deadline, and

1 I'll talk about that, but where we kind of start is that if
2 you're going to have a June date, and we've proposed a
3 schedule, and what we did was we said, you know, the
4 plaintiffs have viewed this as kind of, as I understand it, an
5 all-in approach, let's get fact sheets, let's get everything
6 done. And we've said, in order to have a June date, to have
7 multiple tracks, so we have to have experts going, we have to
8 have fact discovery of the plaintiffs and --

9 THE COURT: No question, all this has to be going on
10 simultaneously.

11 MR. CHEFFO: We've developed what I call tier one.
12 So we said, look, there's 14 cases that were initially filed.

13 THE COURT: Mr. Cheffo, I'm going to get you to that;
14 that's our next issue.

15 MR. CHEFFO: I understand. So I'll address the -- so
16 the perspective then -- let me talk specifically about
17 experts. I think that, you know, it is very important, if
18 we're going to keep a June date and, you know, that we do have
19 plenty of time for the experts. Because what I think you see
20 there, reflects both general and specific causation.

21 I think it is important that we're not kind of jammed up
22 on depositions and briefing. Because having just gone through
23 a hearing in the Zolofit litigation that went for eight days
24 last week, these are going to be issues that I think the
25 parties and Your Honor wants plenty of time and we don't want

1 to be rushed. And I also think it will impact kind of the
2 trial prep. So a schedule that allows -- that basically kind
3 of puts on Your Honor, you know, very short deadlines -- and
4 this is really for the Court, from our perspective, as much
5 for the Court. Because we want to make sure that we have
6 enough time to get the experts done, that we can adequately
7 depose them, that we can put together the best Daubert briefs,
8 to the extent we're going to move on the Daubert, and that we
9 can have hearings and have a ruling in sufficient time that we
10 can track.

11 And we think if you start that process in December with a
12 June date, you know, again, the plaintiffs' schedule doesn't
13 even in that regard account for specific causation. They --
14 the schedule that I think they've proposed has the Daubert on
15 specific causation, the opposition briefs due a week before
16 the June trial.

17 So, you know, that's really -- for a week or two, would we
18 stand on ceremony? Absolutely not. But we do think moving it
19 substantially a month or two will, you know, would make it
20 very very difficult, I think in the grand scheme of how this
21 should play out, for the parties and for the Court, in order
22 to find the appropriate cases and appropriate issues.

23 THE COURT: I somehow missed that specific causation
24 proposal being a week before trial. We're not doing that.
25 Okay? I'm telling you that right now. These are too

1 complicated issues and I will want to address and I don't want
2 to jam up on top of a trial that.

3 So talk to me, Mr. Hahn. I want these expert issues -- I
4 want to give you enough time to get the documents and process
5 them, you know, that's a reasonable argument. But I don't
6 want anything a week before trial. Because a week before
7 trial, I want you guys to have a good fix on what's going to
8 trial. If anything is going to trial, what's going to trial.
9 And it's not fair to the Court or to y'all to, two or three
10 days before, know what evidence is going to be admissible.
11 That's just not fair.

12 So I want to build in a schedule, and we're going to --
13 we're going to get to this, y'all are going to submit
14 something to me by May 9th. And I want y'all to work out this
15 issue. I'm not going to be dealing with Daubert motions the
16 week before trial. I never do that, I don't like that,
17 because nobody knows what the trial is going to look like if
18 you do it that way. So we're going to do it early enough.
19 You need to design a schedule early enough. I'm not going to
20 make a decision but about this issue today, because I want you
21 to go back, and y'all revisit the issue of having -- but I
22 want both general and specific causation testimony in
23 sufficient advance of trial that I have time to study it, and
24 you guys know what your trial looks like, rather than a couple
25 days before trial.

1 MR. HAHN: We would like that as well. But if I may
2 ask the Court a question. We have two big issues right now
3 that we're grappling with. And we met as recently as
4 8:00 o'clock this morning with defense counsel. From the
5 defendant's perspective, they want enough time to fully
6 discover whatever plaintiffs are going to be in a trial pool.
7 We understand that.

8 From our perspective on that issue, we need to be
9 inclusive, because this is an MDL, we can't use just the 14
10 people that are already from South Carolina. And so we have
11 proposed a process for them to do that. They have said that
12 they would consider that type of process, but we don't have
13 enough time to do that right now. So that's one big issue.

14 The second big issue that we have is document production.
15 And this case is going to be very heavy with documents. And
16 after the documents, then there's obviously depositions.
17 We've currently limited it to five depositions a month. You
18 know, that's for negotiation possibly to get more depositions
19 per month going.

20 THE COURT: Y'all limited yourselves to five
21 depositions a month?

22 MR. HAHN: That's what's currently been discussed.

23 THE COURT: Guys, you'll never get it done. Forget
24 that. I mean --

25 MR. HAHN: So we --

1 THE COURT: The one thing y'all have got to remember
2 is I did complex medical litigation, okay, I know a lot of
3 this stuff. Did I want to do back-to-back depositions over
4 many days? No, I mean, it was hard to do, took a lot of
5 preparation, but we did it all the time. I mean, so five a
6 month is not enough -- is not fast enough.

7 Now, you get to fully do the deposition, I'm not trying to
8 stop you from doing adequate discovery. But, you know, tell
9 your wives, you're not going to see me around for awhile, I'm
10 taking depositions all over the country. That's just what
11 we're going to be doing here.

12 So if you set that kind of comfortable pace, y'all are
13 going to be crying in March y'all are nowhere near ready for
14 trial. So y'all need to go back and revisit those
15 assumptions.

16 And you've got one heck of a team, Mr. Hahn, you don't
17 need to be -- you don't have to attend every deposition,
18 obviously. And y'all need to set up teams to be ready to go.
19 And I would expect there would be parallel depositions going
20 on in different cities on different matters on the same day.
21 I can't imagine it not happening, with the kind of discovery
22 schedule I'm putting you on. Y'all just got to expect that.
23 But y'all, you know, brought this multi-district litigation,
24 you've got a 21-member steering committee, you have a lot of
25 talent, people want to spend time, this is going to be

1 productive, they want to put time in, you ought to do it. Mr.
2 Cheffo has a lot of resources his company has, they're
3 prepared to gear up to have people do it. Y'all just need to
4 get on a more aggressive discovery schedule. And if y'all
5 need guidance here -- if you come back on May 9th and y'all
6 haven't worked it out in a way that I think is satisfactory,
7 I'm going to do it myself. I'm going to set it. I don't want
8 to do it and y'all don't really want me to do it, but I will
9 do it.

10 MR. HAHN: Well, and to get to that point -- and
11 we're ready to take depositions, we're ready to be aggressive
12 and do whatever we need to do. To get to that point, we have
13 to get the current log jam from the plaintiffs' perspective of
14 documents done. And so we either need guidance from the
15 Court, or we think we may be able to work it out, we had a
16 call last night dealing with documents.

17 THE COURT: But the document production is from the
18 defense to y'all you're worried about, or from the plaintiffs
19 to defendant?

20 MR. HAHN: From the defendants to us.

21 THE COURT: Y'all need to work that out. If you
22 can't work it out, y'all bring the issue to me and I'll work
23 it out promptly.

24 MR. HAHN: Okay. Yes, sir. And one thing that has
25 been suggested by the defendants is a relatively new way of

1 going through the documents that's called predictive coding.
2 And we think that's something that we can probably come to
3 terms with between the plaintiffs and defendants, it's going
4 to take us a little bit of time, a week, to make that happen.
5 But that is going to add probably another month to before we
6 actually start getting documents, because the computers have
7 to be trained and geared up and all that kind of stuff, and
8 I'm already over my head on talking about that, Judge. But
9 that's --

10 THE COURT: I want to tell you the good news, is that
11 my law clerk was a former E-expert at Department of Justice,
12 she knows this stuff very well. So she is not at all
13 intimidated by all this predictive coding discussion and
14 everything. So, you know, we're -- y'all got an issue to work
15 out, we'll get on it, but y'all try to work it out. With the
16 millions of documents you've got to go through in short order,
17 you've got to have some system, right? Otherwise, this is
18 going to be chaos. Because they can give you every document
19 in the company and you'd just be buried, right? There's no
20 value either way. You've got to have a way to get to it. But
21 y'all work that out. I respect your ability to do it better
22 than the Court can do it. But y'all are going to be on a
23 schedule that on May 9th, if y'all haven't worked it out, Miss
24 Boroughs and I are going to work it out. We're going to
25 figure it out and impose it on you.

1 MR. HAHN: So my question, Judge, to the Court, and I
2 think I already know the answer, but I'm going to ask it
3 anyway, is, do we have any room to have a trial date, instead
4 of June 15th, to either July or August 15th?

5 THE COURT: Not right now. Not right now. We'll see
6 how things go, but as of now at this moment, no.

7 MR. HAHN: Thank you.

8 MR. CHEFFO: If I could, Your Honor?

9 THE COURT: Yes. Mr. Cheffo, I'm always going to
10 give you a chance to be heard.

11 MR. CHEFFO: No, I kept thinking Mr. Hahn was done,
12 so I stood up; I wasn't trying to interrupt.

13 What's interesting is we're actually not far apart. Okay?
14 There's an issue, and I think Mr. Hahn would agree, we
15 actually or maybe would like the Court's guidance or input on
16 this, because frankly, it's one of these things that will
17 cascade.

18 So here's really the issues. We have looked at the June
19 date, and this really, to us, comes about who we use initially
20 in the pool that will become the trial pool. And we've
21 essentially said, look, we have a really head start -- this is
22 Pfizer's position, the plaintiffs don't agree with this -- but
23 we have these 14 cases, if you look at the firms involved,
24 they are really the executive committee.

25 THE COURT: Mr. Cheffo, let me make it easy for you.

1 I'm not going to let either side pick the cases. What we're
2 ultimately going to do is we're not going to do the first 14
3 cases, I'm telling you right now. I'm not going to let either
4 side be unilaterally picking the cases. We're really down to
5 what is going to be the first bellwether trial or trials.

6 And here is sort of my thinking about this. And I want to
7 give y'all a little guidance. I get the idea that y'all need
8 to primarily focus on pool of cases that are going to go to
9 trial early, because it's impossible to do discovery on 7000
10 cases, I mean, you just can't physically get your mind around
11 it. And Pfizer needs to do plaintiff discovery on a limited
12 group, I get that, that's very important. And I think having
13 a group, calling it tier one or whatever you want to, of 14
14 cases is fine. My inclination, and I'm going to let each side
15 pick seven cases, and we'll be 14. And then we'll give each
16 side the opportunity to strike, say three each, something like
17 that. And then on that remaining pool, we're going to pick
18 randomly those cases. And if the first case randomly drawn is
19 a plaintiff's case, the second case that will be tried will be
20 a defense case. And we're going to do it seriatim like that,
21 and that's what we're going to do. So the absolute most
22 fabulous cases on each side are going to get struck by the
23 other side, right? And so it's going to be -- and what I
24 don't know yet about the cases, do they fall into different
25 categories, so that it is important we representatively, you

1 know, have one that has some feature in it and another that
2 has another feature in it; I don't know enough about the case
3 for that. I'm not sure y'all yet know that. And that's going
4 to influence how we do the final sort of selection for
5 bellwether. And that's why I'm a little hesitant right now to
6 tell you exactly how we're going to do it, because I want to
7 leave some flexibility that the first case may represent some
8 distinct issue, and the second case some other distinct issue
9 that's important to y'all to resolve.

10 MR. CHEFFO: To tell you the truth, that's incredibly
11 instructive, and frankly that's kind of consistent, right? So
12 just to be clear, we're not suggesting that -- it really
13 depends on the question I think that we both have is where we
14 start. Let me give you two scenarios, one idea would be, and
15 no one gets to pick the case right now, you have a pool of 14
16 cases.

17 THE COURT: And by the way, I'm not sure you need a
18 tier two. I might just say, guys, go at it with 14 cases, you
19 know, just go at it on those. And the only concern I have is
20 y'all don't maybe know enough yet to pick representative cases
21 in certain areas, that's the only concern I have, and maybe
22 why a tier two is to be able to bring some over into tier one
23 if they --

24 MR. CHEFFO: I understand. And here's really our
25 kind of fundamental, and it's a very practical issue, why

1 we've suggested -- again, we don't know -- certainly the
2 plaintiffs know more about the cases, they filed them, they're
3 initial cases. And we figured since it's South Carolina,
4 there's no lexicon issues, right, and the plaintiffs' PSC
5 filed the cases, we have a lot of information. The problem,
6 or at least the issue for us is if we were to basically say
7 kind of plaintiffs' proposal, well, you know, let's wait until
8 these thousands of cases get transferred, we don't have any
9 information, authorizations, then we basically have, I think,
10 under their proposal we first get fact sheets and
11 authorization --

12 THE COURT: Mr. Cheffo, let me make it easy for you.
13 If y'all -- I intend that on May -- by May 16th -- by the way,
14 our next status is May 16th; I didn't want to lose another
15 week. May 9th y'all want to submit your stuff. On May 16th
16 we're going to have a status conference. And what I will want
17 to do, either before then or at that hearing, is we're going
18 to go ahead and pick a tier one group of cases. We're not
19 going to wait till the tidal wave hits us. We're not going to
20 be limited to the 14, we have 637 right now, we've got a
21 plenty good pool of samples to pull from those. And we'll be
22 another hundred by the time y'all get around to it. And y'all
23 are going to have to draw from that. We have to start
24 somewhere. And I'm going to -- I want your proposal to have
25 seven each. If you're worried that that tier one isn't

1 enough, go ahead and we can think about a tier two. But I
2 think 14 is probably enough. I mean -- and if we go ahead
3 and -- I mean, that's a lot of work to do, 14 cases. But
4 y'all will get good at it, you know what you're looking for.
5 And let's just throw all your energy at those 14.

6 Now, fact sheets and all that, I think y'all need to do
7 discovery, I think y'all need to work out something where
8 y'all are providing information. You can't just neglect
9 everybody else. Y'all work that out. If you can't, I'll do
10 something. But I want your energy focused on those 14 cases.

11 And if we see that our discovery's revealing sort of
12 certain categories that need to be sort of treated separately
13 in terms of trials, I am open to figuring out something about
14 that. But, you know, we're going to -- my plan is in June of
15 2015 we're going to try the first of these cases. And if that
16 ain't good enough, you know, we're going to, couple weeks
17 later, try the second one. We're going to, you know,
18 Mr. Cheffo, you may take the family, buy a place in
19 Charleston, you're going to be here. It's not a bad gig.

20 MR. CHEFFO: There could be worse places.

21 THE COURT: I'm thinking this weather is pretty nice;
22 it's not New York, you know.

23 But I want to help y'all get there, so y'all can get
24 some -- we've got to define this down to something that's
25 humanly manageable. And then if we kind of know earlier, not

1 later, really what is that first case, if we know that. That
2 really gives y'all a chance. And that's why I don't want to
3 be doing Daubert things a week ahead. I want you to know what
4 this trial looks like. You need to know, this is an important
5 case for all the parties, and it needs -- we need to give
6 y'all the opportunity to forecast what your trials look like,
7 and to have the important decisions resolved. I'll do my
8 part, y'all get them to me, I'll resolve any issues that
9 exist, and we will go to trial on this thing. I don't see
10 this as an interminable trial, really, I think the issues are
11 something that are pretty discrete. And whether there's merit
12 or not merit, I told y'all, some of these issues are so new, I
13 think y'all are genuinely dealing with what is called
14 discovery, y'all are learning a lot from each other in the
15 course of this, and that's fine.

16 So I want to give you guidance for that, and I'm -- that
17 if y'all need it, leave me to my devices, I'm going to do 14
18 cases, seven each, with some strike situation, and some random
19 way of picking the remaining case, so -- and what order they
20 go in.

21 I remember when I started practicing in the Richland
22 County Courthouse they had the Commission for the Blind ran a
23 concession there, and a blind guy ran it. And when they drew
24 the jury in Richland County, they'd go get the guy out of the
25 concession and take him up the courtroom and he would, you

1 know, pick the jurors. It was wonderful. I mean, amazing
2 that this was done. Now Miss Ravenel has this random computer
3 and we do it in this fancy way of doing it. But there was
4 something charming about the blind guy being brought in and
5 drawing the things.

6 But we probably won't use a blind guy, but we'll come up
7 with a system that is fair. And I want to do it enough in
8 advance so that everybody kind of knows the name of the game.
9 Okay?

10 MR. CHEFFO: This is very instructive, I think, to
11 both sides and much appreciated, Your Honor. So I think the
12 only thing I would ask, and I really welcome that, is that
13 we'll talk about making sure that -- because we don't want to
14 be completely random, that the cases that we ultimately pick
15 from seven, both sides have to have some access to information
16 about them.

17 THE COURT: Absolutely. And I want y'all to have
18 enough control for that, that you feel like they're
19 representative cases. And we'll, you know, sort of the
20 extreme ends of the bell curve will knock out with the
21 strikes, and we'll have hopefully a group of cases that seem
22 fair. And if at some point the process doesn't seem to be
23 working, we'll talk about it, you know, I mean -- but that's,
24 to me, the best system.

25 So I will ask you all to get together, and I've given you

1 a little guidance on my thinking about the bellwether cases.
2 I know that a lot of this sort of turns on, you know, how do
3 we sort out that situation, and I hope that will help you.

4 Y'all talk to me about the plaintiffs' fact sheet. Talk
5 to me about what -- Let's assume the cases that are not part
6 of this tier one or tier two or whatever, what are y'all
7 talking about in terms of what you might need in gathering at
8 this point?

9 MR. HAHN: Plaintiff fact sheets are relatively
10 common in the MDL world. We have a draft one that we just
11 finished last night, have not yet shared with defendants. And
12 I expect that they're going to add some more stuff to it. But
13 this one is five pages long. I expect that by the time we're
14 done, it will be more like eight or nine pages long.

15 THE COURT: This gives a basically medical history of
16 the plaintiff?

17 MR. HAHN: Yes, sir, family history, medical history,
18 facts about --

19 THE COURT: Like an initial history an internist
20 might do for a new patient, something along those lines.

21 MR. HAHN: Yes, sir. And along with that are
22 authorizations for them to go get certain records so they can
23 get a good feel for plaintiffs.

24 THE COURT: Mr. Cheffo, how much of that are you
25 going to want to chase before the trial? I would imagine some

1 of the data will be helpful just to sort of know what the big
2 pool looks like.

3 MR. CHEFFO: I'm a big believer in goose/gander. So
4 if I'm going to stand up and say here's where we have to have
5 proportionality and targeted discovery, you know, I can't let
6 the other side say, well, I need every last document from 7000
7 plaintiffs. Right?

8 So this, I agree really with the way Mr. Hahn -- I haven't
9 seen it -- but whether it's five, six pages, the idea is you
10 get enough information about the constellation of cases,
11 right? So you know, did someone use it, are they still using
12 it, do they have risk factors. And usually what happens is
13 they answer those questions, and they're fully within the --

14 THE COURT: Mr. Cheffo, that's important sort of
15 understanding whether we need categories of cases, right?

16 MR. CHEFFO: Exactly. Or whether there's motion
17 practice. Until we know what the claims are, is it just about
18 people who have been diagnosed with diabetes, is it just
19 people that claim they may at some point fear, you know,
20 again, I just don't know.

21 THE COURT: The complaints, and I haven't read every
22 complaint, but they're sort of initial complaints where people
23 who had no prior history of any diabetes, and suddenly, boom,
24 they got diabetes. That was sort of the allegation. And
25 that's interesting, but I doubt every person fits that

1 profile. And that might be an important ingredient in terms
2 of separating these cases out, is those who have certain
3 specific risk factors.

4 MR. CHEFFO: Exactly right.

5 THE COURT: I think it's very important to know. But
6 on the other hand, we want y'all's energy primarily focused on
7 the cases that are going to come first. And without trying to
8 keep you from getting it, I don't want either of you so
9 overwhelmed chasing the stuff that doesn't matter, like we're
10 not saying, okay, you've got so many days to depose all 7000,
11 the treaters of all 7000; we're not doing that.

12 MR. CHEFFO: Right. And I think we're where Your
13 Honor is on this. So typically what happens is we've got, you
14 know, we get the fact sheet information, and that's not to do
15 any depositions, that's really just so you can pick
16 representative cases to go into the discovery pool. That's
17 really what both sides have proposed. And then once we get
18 that, we focus our efforts on, even there, not doing kind of
19 scorched earth, probably do four or five or six depositions of
20 the discovery pool. And then from there, we say okay, here's
21 the few cases after strikes, and then we kind of work up those
22 cases for trial.

23 So that the initial fact sheet really just gives us enough
24 information to say here's the cases we want to put into the
25 pool. And then there's usually a second, and this works for

1 both sides. So once we get, typically, I mean, every MDL can
2 be different, but typically then there's even a defense fact
3 sheet that will apply to the discovery pool in other cases.
4 Because again, just the same thing, we don't want all the
5 information on 7000 cases, you know, we can't be kind of
6 running around on every single case and the sales rep for 7000
7 cases.

8 So this is basically kind of just a very -- it's not a
9 huge amount of work, typically stuff that usually the
10 plaintiffs know, and we'll work with them, if they tell us
11 there's something too burdensome. And two things happen. We
12 get this information; they also give us authorizations and
13 medical records in their possession, and that is a very very
14 helpful -- I mean -- is there some work required? Sure. But
15 is it wildly burdensome? I've not found it to be --

16 THE COURT: What you want to know is if you get down
17 to focusing on 14 or 28, are they really representative.

18 MR. CHEFFO: Yes.

19 THE COURT: And that's an important thing to know for
20 everybody. And so I think that makes sense. And, guys, we
21 can do something, and if it's like wildly wrong, we launch it
22 and it's not working, let's, you know, get on the phone, let's
23 talk about how we might tweak it to make it work right.
24 Because the goal here is efficiency of effort. We want y'all,
25 in a very short period of time, to assess a fairly complicated

1 issue, pick a limited number of cases to go to trial, focus on
2 those and start and do it within a reasonable time frame.
3 That's all we're trying to do here.

4 So I'm open to tweaking once we do it, so that we'll --
5 but don't let something sit that's stopping y'all; you get on
6 the phone. If something is stopping y'all from doing
7 something, let me hear about it. I don't want to slow you
8 down.

9 There was this whole thing the defense has something about
10 30(b)(6) witnesses, and I'm not quite -- and the plaintiff
11 didn't take a position on that. Mr. Cheffo, do you want to
12 tell me what's sort of going on with that issue?

13 MR. CHEFFO: I'm not frankly sure there's any
14 disagreement on this. So I'm sure -- my colleagues are not
15 shy, they'll tell me. Here's what we're trying to do. For
16 the most part, like things like ESI is not a lot of
17 controversy, you put somebody up, and we will. And what I
18 understand the plaintiffs typically want in this case and
19 other litigation, they want to know kind of where to send
20 document requests, where to look, who the players are. So we
21 will, let's say pharmacovigilance, you know, how do you do
22 safety and what's the departments and how do you maintain
23 documents and things like that. So we have a schedule that's
24 proposed, I think that's actually agreed, where we will find
25 that person. Sometimes that happens very early in a

1 litigation, like in some of them here. And what happens is we
2 proposed -- and I don't think there's a disagreement -- that
3 that person, let's -- Let me give you an example. Let's
4 assume somebody might have a lot of substantive knowledge,
5 they may have been at the company for ten years, and you'd
6 have to collect all their files and spend a lot of time making
7 sure they're prepared on the substantive issues. But they
8 also are the person that --

9 THE COURT: I know the problem. I know what you're
10 worried about, because they both may be a critical liability
11 witness, and they're the person most knowledgeable in the
12 company on certain issues about where the documents lie.

13 MR. CHEFFO: Right. So we want --

14 THE COURT: And what the rule is, you give them
15 notice as the 30(b)(6). If they start wandering into
16 liability issues, you object. If you can't work it out, you
17 get on the telephone to me and I'll sort it out for you right
18 then.

19 MR. CHEFFO: And that's what we like to do, and I
20 think -- and there may be situations where it works the
21 converse, where they give us a very long list and we say this
22 person is a liability expert and they're also going to cover a
23 30(b)(6), so they're going to cover a certain area, but you
24 can also ask them about liability. But we would make sure
25 that we're very transparent, that, you know, they have the

1 custodial file documents and they're designated. So --

2 THE COURT: The line is sometimes not clear. Right?
3 I mean, that's the problem. You're there and you're asking
4 about where the documents are, and the person makes some
5 statement that's obviously both relevant where the documents
6 are, and is like a really important issue regarding liability.
7 And, you know, I mean, I always tried to work it out with the
8 lawyers when we did that. But I'm reasonably available, and
9 we will try to sort it out, if something arises like that.

10 MR. HAHN: That's all, Judge, that was our position,
11 we just want to follow the Federal Rules.

12 THE COURT: Yes, Federal Rules are pretty clear about
13 it.

14 Okay. The issue of direct filing. As I discerned the
15 difference, the plaintiffs want the right to do the
16 multi-plaintiff filing, and the defendant wants single-
17 plaintiff filing. That is fair, Mr. Cheffo?

18 MR. CHEFFO: We're in favor of it, we want people to
19 come to the MDL; the only disagreement was allowing
20 multi-plaintiff cases.

21 THE COURT: Mr. Hahn, here's sort of where I think
22 about it; you tell me where I'm wrong with this. This is a
23 defendant's right to waive venue, and they say to you, we're
24 willing to waive venue on this issue. And I think your choice
25 is, it's their prerogative, I will either take it the way they

1 offer it, or we won't have direct filing, and y'all make a
2 call which one is better for you. It's of no consequence to
3 me. Okay? It really isn't.

4 MR. HAHN: That's very persuasive, Judge, and we'll
5 accept that, thank you.

6 THE COURT: Okay. I had a wonderful conversation
7 with Judge Falon, who everybody knows is like the world's guru
8 on this stuff. And he said to me, Judge, let me tell you the
9 one thing you need to do; you need to get a pay thing in
10 place, because if money ever hits the table, all those
11 cooperative plaintiffs lawyers will become barracudas and they
12 hate each other and they say terrible things about each other.
13 And the way I solve that problem is I have made everybody file
14 ahead of time a monthly basis expenses and fees, and it solved
15 the problem, I never had a problem after that. And he says he
16 regularly monitors with a CPA the hours and fees. The lead
17 counsel monitors them, so if he has concerns, he will be in a
18 position to address them. And I think that makes a lot of
19 sense.

20 A couple small matters. Mr. Tanenbaum submitted this to
21 me. I think y'all have worked out, Mr. Tanenbaum, the
22 software you're going to use? I think using software is
23 great.

24 MR. TANENBAUM: Miss Maness has been giving me that
25 directly, Your Honor.

1 THE COURT: Yes, ma'am.

2 MS. MANESS: Yes, Your Honor. I hope you can hear
3 me. We have worked with the IT person at Richardson Patrick,
4 and he identified the software that I included in a proposed
5 order. I keep saying it backwards, either Time for Billing or
6 Billing for Time. I have looked at it, I've had our
7 accountant look at it, our in-house accountant, and I know
8 that the IT man at Richardson Patrick has also looked at it.
9 It is -- although it will work across a variety of
10 professions, it has all the components that you need. We can
11 include it in our website. It also has a mobile app that the
12 attorneys can use. It will allow --

13 THE COURT: I mean, I think it all sounds great. The
14 couple thoughts I had about it was I think, you know,
15 generally these filings are under seal, because the defense
16 has no business looking at them, this is really -- so I think
17 we'll include an order that when they're filed, they're filed
18 under seal. I think that's important. And there was a
19 mention, it really was from Judge Falon's order, he had like a
20 summary sheet he referenced, which I don't know that the
21 software that summary sheet is now any longer necessary.

22 MS. MANESS: If you want it, I think the software can
23 generate it. If you don't care for it --

24 THE COURT: I mean, if it can be generated, fine, I
25 just didn't want anything where people manually had to do it.

1 MS. MANESS: I don't believe we'll have to do that.

2 THE COURT: Then we're fine with that, we're glad to
3 have the summary sheet, it will be easier.

4 And somebody asked about can we do \$300 an hour instead of
5 250 an hour for hotel rooms -- I mean a day for hotel rooms.

6 MR. TANENBAUM: I have one -- I heard this morning
7 some feedback on that, Your Honor. Right now, for example,
8 the Mills House, which is a Wyndham hotel, is \$500 a night for
9 this season. Charleston Place is over 500 a night.

10 THE COURT: Let me give you a little hint. I just
11 did -- before you tell me about this -- I just had the Fourth
12 Circuit here, all my District Judge colleagues, and Miss
13 Tapscott had to find hotel rooms. I'm fully aware.

14 Now, if your people want to stay at Charleston Place and
15 Mills, they're going to pay the difference. Okay? I
16 understand that. There are many options in the Charleston
17 area. And what I don't want is people running up huge bills
18 later on that is not fair to others who have expended a great
19 deal of effort in the case.

20 MR. TANENBAUM: Absolutely. I was going to say
21 Double Tree, which is not thought of as that -- is \$400 a
22 night right now. I'm just sort of -- I did some checking last
23 night, and yes, there are some 295 deals, but that requires
24 that you stay a minimum of two nights and over a weekend. So
25 the only thing --

1 THE COURT: Why don't you do this. Why don't you
2 submit to my chambers the product of your research, we'll
3 check behind it a little bit, and we'll make a judgment.

4 MR. TANENBAUM: I have web pages.

5 THE COURT: I just worry -- You know what I'm worried
6 about. And Judge Falon talked about the \$10,000 air cost
7 which was some guy with his jet, and he had to stop that. And
8 I'm just trying to keep it down so that we're -- and I don't
9 begrudge lawyers living at a high style, but it ought to be on
10 their own nickel; they shouldn't be, you know, they shouldn't
11 be expense account millionaires on somebody else.

12 MR. COLE: Sir, this might be a time to bring this
13 up, not that I want them to stay in any nicer places. But one
14 of the issues with hotel rooms period right now in the summer
15 is the availability. And we both talked that to the extent
16 that you foresee when we're going to have hearings, if we
17 could get a schedule of when those are, it would -- when you
18 get hotels rooms cheaper, get flights cheaper, cuts down the
19 expense for everybody. So to the extent we can get a schedule
20 when hearings are going to be --

21 THE COURT: Let's see how that goes. My present
22 thing was to do them about a month apart. A good suggestion.
23 I didn't do it yet, because I didn't want to lose a week when
24 we're trying to get this scheduling order done, and that's why
25 I've done three weeks instead of a month. But I think we'll

1 consider giving you a schedule on that. I think that's a very
2 reasonable request, and that would help.

3 Guys, you know, for people who are worried about going
4 over whatever limit we set, the last I checked, west of the
5 Ashley and Mt. Pleasant are available by car. They're there.
6 Okay? You can drive across the bridge, it's not hard. And if
7 people don't want to pay the difference, it's about a four-
8 minute drive, okay? Now, I get it they want to stay in the
9 Mills House and walk out and eat dinner on East Bay and all
10 that. I get it, okay? But, you know, some of that is going
11 to be on your own nickel.

12 Okay. There was a suggestion by the defendants on wanting
13 the plaintiffs to write all plaintiff providers to preserve
14 documents. I just had a little concern about burden on
15 plaintiffs for having to do that and getting every provider.
16 Mr. Cheffo, how about this?

17 MR. CHEFFO: If it sounded like it was kind of a
18 beyond the rule of reason, that wasn't the intent. Here's
19 really the issue, is, you know, and you probably know this as
20 well as any of the people in the room, you know, a lot of
21 these providers are chains, after seven years, they have kind
22 of document --

23 THE COURT: You know, I've got to tell you, my
24 experience regarding medical records is not that. That they
25 don't tend to toss things, because they're worried about

1 liability issues. And you may have different experience.
2 It's been my experience in South Carolina was that we
3 generally were able to run down -- now, you're talking about
4 20, 30 years ago, you know, who knows. People in small town
5 practices, the doctor dies, who knows where the records are,
6 okay? That problem. But the general routine of, you know, we
7 purge the records after so many years, that wasn't my
8 experience in South Carolina medical records.

9 MR. CHEFFO: I think it's -- some people, right, will
10 keep them forever. I can tell you, there's a lot of
11 situations where it becomes a problem, particularly --
12 particularly in the issues of product identification, then you
13 have a situation someone says, well, you know, I got a sample
14 or I have an affidavit. So really we're trying to avoid, and
15 I would be willing to kind of, you know --

16 THE COURT: Here's my concern. You say -- and I have
17 had the issue come up both as a judge and a lawyer. Where did
18 you buy the medicine? And the patient says, well, I usually
19 bought it at the Rite Aid over on Smith Street, but sometimes
20 I didn't. They don't have a log. I mean, sometimes they're
21 out in another town, they buy it, you know, they buy it in a
22 different part of town there, they don't remember. And to
23 say, okay, I'm going to now say the plaintiff didn't properly
24 preserve it because they didn't get every potential source
25 where the drug was bought, and didn't write that Rite Aid

1 about it, I just think that the burden would just be
2 unbelievable. Particularly you may have people with very
3 simple medical histories that say, tell me all your doctors,
4 and they tell you three names. But a lot of people may have
5 15 or 20 doctors, and you're going to have them identify who
6 is going to go through all 7000, get all those doctors, write
7 them all a letter and say, preserve your records. I mean, it
8 just seems to me kind of a burden, and I thought sort of
9 potential low benefit.

10 MR. CHEFFO: And, you know, obviously the -- if
11 that's where Your Honor is, that's fine. I probably would --

12 THE COURT: Let me hear from Mr. Hahn though about
13 how he feels about that.

14 MR. CHEFFO: Could I?

15 THE COURT: Yes, go ahead.

16 MR. CHEFFO: I was going to say I think there is a
17 mid ground between kind of sending everything out to everyone.
18 And basically if Your Honor said, look, make reasonable
19 efforts to send it to a person that treated you for kind of
20 diabetes or diagnosed with diabetes, and where you
21 prescribed -- you know, the pharmacy that you reasonably
22 prescribed the medicine.

23 THE COURT: The most of them.

24 MR. CHEFFO: So at least as to those, we know that
25 there's -- because the main issue really is this product I.D.

1 issue, if someone used and we can't find the pharmacy records.
2 So I agree with you that we don't need it for everybody, but
3 if we had those two, I think that would accomplish our issues
4 and maybe would be less burdensome on the plaintiffs.

5 THE COURT: Mr. Hahn?

6 MR. HAHN: Judge, in my experience, doctors typically
7 aren't friendly to plaintiff lawyers. They're always afraid
8 we're going to sue them next. I don't have any problem, and
9 the cover letter that we send with the medical authorization
10 form ordering records, to put a paragraph in there that says
11 you're under an obligation to preserve records. No problem
12 doing that. But anything more than that is putting a burden
13 on us and responsibility on us that --

14 THE COURT: Are you writing for every one of your
15 plaintiffs? You're writing for the primary treater who has
16 diagnosed and treated the diabetes anyway, aren't you?

17 MR. HAHN: Yes.

18 THE COURT: And I think you're trying to get the
19 pharmacy records, I take it.

20 MR. HAHN: We tried to do that, but you're right,
21 there's usually an issue with getting pharmacy records.

22 THE COURT: Yeah. And let me say this. As
23 pharmacies go, I mean, because of the consolidation of
24 pharmacies, and within a few national companies, and they
25 don't lose anything, they retain everything, because they're

1 worried about their liability issues. So I wouldn't worry so
2 much about the national pharmacies. But I think if you could
3 include a paragraph asking them to preserve all records for --
4 and I do think it is reasonable for those who are diagnosed
5 and treated, the diabetes, and -- because what you're saying
6 is, in your recent past they developed diabetes secondary to
7 the Lipitor. We're not talking about some generally very
8 remote medical history. So I think that's probably
9 reasonable. Why don't y'all see if y'all can't work out
10 middle ground.

11 MR. HAHN: We're talking about using a joint medical
12 records collector or provider. And that could be worked into
13 whatever their process is.

14 THE COURT: I think that would be a reasonable middle
15 ground.

16 MR. HAHN: Judge, can I go back real quick to
17 expenses?

18 THE COURT: Yes.

19 MR. HAHN: You had also put in your prior order on
20 expenses that the common benefit expenses, expenses of experts
21 and fact witnesses, that kind of thing, that you want to
22 review those expenses before we pay them?

23 THE COURT: No. No, I do not want to.

24 MR. HAHN: All right. But do you want to review them
25 at all?

1 THE COURT: I'm less concerned about those. I
2 appointed you lead counsel because I thought you were a
3 responsible guy. I'm not so worried about that. And what I
4 really want is, unbeknownst to the executive committee and
5 lead counsel, someone is running claiming huge hours, huge
6 expense, and then suddenly at the end they submit a bill, and
7 they say they're entitled to some huge thing, and we have a
8 four-day hearing about that. That's what I'm trying to avoid.

9 MR. HAHN: We're concerned about that as well for
10 held costs, and so we will be looking at it monthly and
11 providing the Court --

12 THE COURT: Very good. I don't need to be looking
13 over your shoulder. And we'll make it clear, to the extent
14 you need me to clarify anything on that, I'm glad to do that.

15 MR. HAHN: Thank you, Judge.

16 THE COURT: As I mentioned, May 16 we have our next
17 status conference. That's a Friday, 10:00 o'clock in morning,
18 same time. And by May 9th, I want you to submit me something.
19 And I would hope -- you have given me some guidance here, but
20 to the extent we still have outstanding issues, give them to
21 me like you've been doing side by side, and I will either pick
22 one of yours, or a third one I come up with, but we're going
23 to get final on this, because we need to get y'all to work on
24 the next stage of discovery here.

25 Okay. That's sort of my list of things. Let me hear

1 first from the plaintiff the issues you would like to address.

2 MR. HAHN: Briefly, Judge, you had suggested early on
3 that we do a small status conference and then a large one and
4 alternate, which we thought was a great idea. This is
5 obviously a small one; most people are on by phone. Just to
6 let the Court know, we plan on having a PSC meeting prior to
7 the next status conference, so you'll have a full courtroom
8 next time.

9 THE COURT: Good. We like to have them coming here.

10 MR. HAHN: The main issue that the plaintiffs have,
11 Judge, left, is dealing with document production. And we can
12 either continue discussing with the defendants. We have the
13 ability to present to the Court the specific issues today.
14 However you'd like --

15 THE COURT: I would prefer you, on May 9th, submit it
16 to me in writing. Let me think about it a little bit where
17 the issues are. Y'all continue to try to work them out. I
18 take it some of this is parent-child issue and some of that
19 stuff? You know, I'm generally familiar with it.

20 MR. HAHN: If you'd like to see examples, we can give
21 them to you, or just do everything on the 9th.

22 THE COURT: I do better, give it to me in writing
23 first, let me read it, you both give your best shot about how
24 you want to explain it, and then if I need to hear from you, I
25 will do that at the status conference.

1 MR. HAHN: Thank you, Judge.

2 THE COURT: I just do better as a reader and looking
3 at it. If you want to give me examples and so forth, I'm
4 glad -- I don't hesitate you giving that to me so I can see
5 it.

6 MR. HAHN: Judge, if I can have one minute to confer
7 to see if we have anything else, and I think we're probably
8 done.

9 Nothing further from the plaintiffs, Your Honor.

10 THE COURT: Mr. Cheffo?

11 MR. CHEFFO: We've covered everything.

12 THE COURT: Okay.

13 (Brief interruption in proceedings.)

14 MR. HAHN: Your Honor, the only other thing, we'd
15 request that you go on the phone and ask everybody to make an
16 appearance.

17 THE COURT: I intend to do that next.

18 MR. HAHN: Thank you.

19 THE COURT: Okay. We've had the lawyers speak in the
20 courtroom; is there anyone on the phone who wishes to speak?
21 And if so, I'm glad to hear you. Identify your name and
22 whether you're -- I presume all plaintiffs counsel, so we
23 won't need to know that.

24 MR. HAHN: Yes, sir. I believe the way it's been set
25 up is that they will have to tell the operator, by pushing a

1 button, then she'll get them in the queue to speak to the
2 Court one at a time.

3 THE COURT: Very good. So if anyone has a question
4 or wishes to speak.

5 OPERATOR: Ladies and gentlemen, if you would like to
6 ask a question or a comment, please press star then one on
7 your touch tone phone. You will hear an acknowledgment tone
8 indicating that you've been placed in queue. If you wish to
9 remove yourself from queue at any time, you may hit the pound
10 key.

11 (No response.)

12 THE COURT: It must be a reflection of your
13 leadership or lack thereof, Mr. Hahn.

14 OPERATOR: There are no calls in queue at this time.
15 Please go ahead.

16 THE COURT: Thank you very much. Miss Boroughs makes
17 a point. We have a June 15th trial date, just to give you a
18 little -- the reality of how we work. We draw juries every
19 two months, and we would draw a jury for the July term. So
20 we're not trying the case literally on June 15th. We will
21 draw a jury in early July, and try the case sometime in July.
22 So literally it will not be June 15th. So give you a little
23 bit of a comfort that it's literally not that day. So, Mr.
24 Hahn, you go back to that guy with a little something. That's
25 just in terms of we -- but I would want, you know, I'm likely,

1 without setting a precise date here, we'll draw a jury, it's
2 usually on a Tuesday or Wednesday or something, we don't
3 usually like to do it on Monday. I would probably start the
4 trial the next day, or like the next Monday, something like
5 that.

6 Now, the one thing that gets in the way of that, which
7 we'll get closer, I'll know, is I have speedy trial
8 obligations on criminal cases, and I've just got to make sure
9 I can get them done during that term. But my inclination
10 would be -- I'm going to give you all a date certain. You're
11 going to know in advance so you can get all your experts lined
12 up.

13 I used to be amazed, particularly in State Court, judges
14 wouldn't give us date certainties, and we had experts from out of
15 town. How do you do that? How do you try a case like that?
16 It's crazy. So I'm going to try to give y'all a good fix.
17 But it will likely, just for practical purposes, when we draw
18 juries, it will likely be more like a July trial than a
19 June 15th trial. So with that.

20 Okay. If there are not further matters, I will see you
21 guys on May 16th.

22 MR. HAHN: Thank you, Your Honor.

23

24 (Court adjourned at 10:55.)

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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