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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 Thursday, August 13, 2015, commencing at 3:07 p.m., before the Honorable Richard M. Gergel, in Courtroom III, United States Courthouse, 83 Meeting Street, Charleston, South Carolina, 29401.

A P P E A R A N C E S

APPEARED FOR PLAINTIFFS:

Mark C. Tanenbaum, Esquire  
Blair H. Hahn, Esquire

APPEARED FOR DEFENDANTS:

Michael T. Cole, Esquire  
Mark S. Cheffo, Esquire (via telephone)  
Amanda Kitts, Esquire

REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR  
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843/723-2208

1 THE COURT: Are we on the telephone here?

2 THE CLERK: Yes, sir.

3 THE COURT: Good. We are having a status conference  
4 in the matter of In Re: Lipitor, 2:14-2502.

5 Could counsel who will be speaking during the hearing  
6 today identify themselves for the record.

7 MR. HAHN: Blair Hahn for plaintiffs.

8 MR. TANENBAUM: Your Honor, I may address a few  
9 questions; Mark Tanenbaum for the plaintiffs.

10 MR. COLE: Mike Cole for Pfizer, and Mark Cheffo is  
11 on the phone, Your Honor.

12 THE COURT: Very good. Mr. Cheffo, we'll miss you,  
13 but I'm sure you're in a better place than we are right now.

14 MR. CHEFFO: Good afternoon, Your Honor. Thanks for  
15 indulging me today, I know we have some discrete issues on,  
16 and I appreciate you giving me the opportunity to participate  
17 by phone today.

18 THE COURT: Glad to do it.

19 Who wants to raise -- some of you have some issues you'd  
20 like to raise?

21 MR. HAHN: Yes, sir, Your Honor. We have two issues  
22 today just before you generally. One is the jury  
23 questionnaire issues that Mr. Tanenbaum is going to address,  
24 and the other is the deposition designation issue, which is a  
25 little bit more complex issue, I think, that I'm going to

1 address with the Court.

2 If it please Your Honor, we have three objections and  
3 concerns with the defendant's proposal.

4 THE COURT: Which proposal; because we have two  
5 issues.

6 MR. HAHN: We have two big issues, but the  
7 defendants -- I'm sorry -- dealing with deposition  
8 designations.

9 THE COURT: Very good.

10 MR. HAHN: We have three objections. Pfizer's first  
11 paragraph in their letter to the Court dealing with deposition  
12 designations indicates in footnote one that they anticipate  
13 that they will be, quote, "a little late," unquote, on some of  
14 their disclosures. That theme continues when Pfizer states  
15 its proposal is intended to reflect the likelihood that Pfizer  
16 will change its deposition designations during trial.  
17 Accordingly, the plaintiffs are concerned, as is evidenced by  
18 the multiple savings clauses throughout Pfizer's submission,  
19 that Pfizer does not intend to meet the extremely compressed  
20 time schedule that they propose.

21 We need real deadlines, Your Honor, that can be adhered  
22 to, absent good cause shown. And so for those reasons, we  
23 object to their proposal on the 96 hours and 48 hours and 24  
24 hours.

25 Our second issue, Judge, is the order in which deposition

1 designations are played. Pfizer's assertion that its proposal  
2 will limit the volume of deposition designations is not  
3 evidenced by its own actions in prior trials. To the  
4 contrary, I spoke with Rich Lewis this morning, he is lead  
5 counsel in the Hines matter in the Federal Court in West  
6 Virginia, and it was his stipulation that Pfizer attached to  
7 their brief to the Court. In the Hines matter, the  
8 plaintiffs' lead epidemiologist was deposed for three full  
9 days. Plaintiffs designated one hour of testimony. Pfizer  
10 designated five hours of testimony. And in the Hines matter  
11 they were forced to play six full hours of deposition  
12 testimony in their case in chief, as if they were sponsoring  
13 all six hours of testimony.

14 This served Pfizer's purpose, I would suggest to you, of  
15 confusing and boring the jury, as well as hiding key testimony  
16 for the plaintiffs in hours of nonrelated testimony.

17 Pfizer points to the Manual for Complex Litigation as  
18 authority for its position. However, Pfizer has cut the quote  
19 of the authors short, excluding the second half of the  
20 sentence. The full sentence, Your Honor, states that,  
21 "Portions of depositions usually will be introduced at trial  
22 in the same sequence in which they appear in the  
23 deposition..." That's where Pfizer stopped. The sentence  
24 continues. "...although another sequence can be adopted to  
25 improve comprehension."

1 I suggest to the Court the most important part of the  
2 Manual's teachings is what was left out by Pfizer, to improve  
3 comprehension to the jury of the testimony.

4 This can only be done by playing each party's designation  
5 separately, so that each party's position can be clearly  
6 understood by the jury. The only exception, of course, would  
7 be that set forth in U.S. v. Pintar, which we cited in our  
8 papers, which is to complete a verbal statement and not cut  
9 statements short.

10 Finally, Judge, we object to Pfizer's proposal for a  
11 color-coded chart to submit deposition designations to the  
12 Court. We see that will only serve to color Pfizer's position  
13 in a light most favorable to Pfizer. We would prefer the  
14 process either be agreed to by the parties or approved and  
15 provided to us by the Court.

16 THE COURT: Okay.

17 MR. HAHN: Thank you, Judge.

18 THE COURT: Who wants to argue for defendant?

19 MR. CHEFFO: Your Honor, I'll address this point, if  
20 I might. So I think there, as I hear it and understand it  
21 with respect to depositions, Your Honor, there are two issues.  
22 First is how they'll be used in terms of the order, and I  
23 think the second is the process, Mr. Hahn's addressed the  
24 process; I guess I'll address that first.

25 I think to the extent that there was any confusion about

1 some of the language in our letter about deadlines, to be  
2 clear, the point here is not that we don't intend to deal with  
3 deadlines. Both sides, frankly, take the deadlines very  
4 seriously and have; we always will. I think what we were  
5 trying to anticipate was a concern, frankly, by the plaintiffs  
6 or either party that this would -- or Your Honor, that this  
7 would somehow be a gotcha. That if somebody, in the middle of  
8 trial, was 45 minutes late or an hour, that, you know,  
9 understanding your Court's guidance that the rule of reason  
10 should apply, that that's the point of what we're raising. I  
11 mean, to the extent we want to have hard and fast deadlines,  
12 of course we will adhere to those, but it was really just in  
13 the spirit of professionalism that we wanted to put that in.  
14 It wasn't an effort to kind of have these fluffy nonmeaning  
15 deadlines.

16 The second, you know, and I think really what -- on this  
17 process issue it's really important, because I think it's an  
18 effort, and certainly Your Honor has never shied away from  
19 taking on and helping us and facilitating us with kind of  
20 working through all the issues pretrial, but this is a process  
21 that is not new here. What we're really basically saying is  
22 from experience we know the parties, because they haven't seen  
23 all the evidence, they designate a lot of information  
24 initially. To have the Court or any court kind of go through  
25 each one of those designations early on, before having some

1 context, having the parties understand what's going to  
2 actually be used, is really inefficient, and it places kind of  
3 an unfair burden on the Court when, in our experience, and I  
4 think the plaintiffs' as well, the vast majority of things  
5 that are designated pretrial ultimately get cut.

6 So our practice is really nothing more than an effort for  
7 the plaintiffs, once they -- you know, 96 hours before, they  
8 say here's what we're really thinking about using; we, within  
9 24 hours, respond. And then it gives the Court 48 hours to  
10 issue rulings that ultimately are going to be required, as  
11 opposed to essentially a lot of kind of make work for the  
12 parties and the Court.

13 So frankly, what we, in our proposal, we had said we will  
14 do all the objections and counter designations on everything,  
15 so that to the extent that there is a need for either Your  
16 Honor wants to hear something or see something, or the  
17 plaintiffs need rulings on certain issues for openings or  
18 whatever, we have some flexibility there. So really the whole  
19 point of our proposal was to be efficient with kind of the  
20 Court's time, in asking Your Honor to rule on things that  
21 ultimately matter.

22 The second point is really the process of how these things  
23 are played. And I think there's no dispute here that this is  
24 discretionary. You know, I think we're not citing the Manual  
25 or prior experience to say that Your Honor has no input or has

1 to do it one way or the other. You can do this either way.  
2 We think, though, even with the passage that Mr. Hahn just  
3 read, it basically says that, you know, what we should be  
4 doing is taking the depositions as they have been taken. And  
5 some of the irony, a lot of what the plaintiffs are talking  
6 about here are depositions that they took. So to the extent  
7 that they're concerned about, you know, not having questions  
8 put before the jury in the first part of their deposition,  
9 that seems to be incongruous with what they're saying about  
10 having the entire story put before the jury.

11 And I would also add that, you know, as Your Honor knows,  
12 from setting the rules, other than, I think, maybe one or two  
13 depositions, there has been no deposition that is more than  
14 seven hours. So the idea that there's these three-day  
15 depositions and people are going to have eight hours, I think  
16 you have sophisticated counsel on both sides.

17 So the process of having an orderly sequence where that's  
18 what we're proposing, you basically designate in the order of  
19 the deposition throughout, is something that we think kind of  
20 makes most sense from a process perspective.

21 And the last thing I would just say, Your Honor, is to the  
22 extent you have a different view, and again, we'll be guided  
23 by how you think ultimately is most efficient here, to the  
24 extent that you are going to allow them to first designate and  
25 then us designate, we would, one, just ask that Your Honor

1 have the rule of optional completeness, so even within their  
2 designations, they have to be complete. But again, I think  
3 that weighs in favor of having everything read the first time.  
4 Because then, frankly, the parties get into this back and  
5 forth, well, did you cut that off, does this sentence two  
6 paragraphs down the road -- I mean, Your Honor has been  
7 through this before, I'm sure, many times -- does that relate.

8 So to avoid all of those problems and all those issues, we  
9 think the most efficient way, the Manual supports it, is to  
10 basically have all of the designations done kind of in the  
11 page and in the line as they were taken in the deposition. So  
12 that it's going to work, you know, goose/gander for both  
13 sides.

14 THE COURT: Okay. Anything else --

15 MR. CHEFFO: Your Honor --

16 THE COURT: Yes.

17 MR. CHEFFO: I'm sorry. I'm a little surprised at  
18 the objection to the color-coded chart, but if the plaintiffs  
19 feel strongly about that and have a different way of  
20 presenting it to the Court, we're obviously happy to talk  
21 about that. It was not -- they could even pick the color. It  
22 was nothing more than saying here's where we agree, you know,  
23 green, here's where the plaintiffs' positions and objections,  
24 and here's where we are. It's the way we've done it many many  
25 times before. But that's something I suppose either Your

1 Honor may have a preference of how we do it, or you could send  
2 us back to the drawing board about a way that we can agree on.

3 THE COURT: Okay. Well, Mr. Hahn, anything else you  
4 want to add?

5 MR. HAHN: Judge, I don't think that Mr. Cheffo or  
6 the Court wants me to pick the color of the chart.

7 MR. TANENBAUM: Blue for the plaintiffs, Your Honor,  
8 blue for the plaintiffs.

9 THE COURT: Folks, let me say here that we have a lot  
10 of issues swirling around here that I think really go to  
11 having some order and control in this trial. And it concerns  
12 me that each party, when they're putting up their case, by and  
13 large, with some limitations, ought to be the master of their  
14 own case. And clearly the Federal Rules do not anticipate  
15 that when you try to designate something, the other side gets  
16 to take over that party's presentation. That's, as they say,  
17 good for the goose, good for the gander; nobody should be able  
18 to do that.

19 I want to refer y'all to two sections, one in the Federal  
20 Rules of Civil Procedure and the other one the Federal Rules  
21 of Evidence, and I think are very relevant to this. Y'all  
22 cite me to the Manual for Complex Litigation, certainly  
23 important to consider, but it's really kind of basic. One is  
24 Rule 32(a)(6). "If a parties offers in evidence only part of  
25 a deposition, an adverse party may require the offeror to

1 introduce other parts that, in fairness, should be considered  
2 with the part introduced."

3 So to the extent it's confusing, it is misleading, and you  
4 need this additional --

5 (Brief interruption in proceedings.)

6 THE COURT: Let me just go back, and if I repeat a  
7 little bit, that's okay. I think everybody's sort of focusing  
8 on the Manual for Complex Litigation. And there's a really  
9 basic provision of the Federal Rules of Civil Procedure, and a  
10 complimentary rule in the Federal Rules of Evidence that deal  
11 with this issue. Says, "If a party offers in evidence only  
12 part of a deposition, an adverse party may require the offeror  
13 to introduce other parts that, in fairness, should be  
14 considered with the part introduced."

15 Now, there's a complimentary provision in Rule 106 of the  
16 Federal Rules of Evidence.

17 I interpret that to mean that if somebody offers  
18 something -- you know, we're talking here, you know, on every  
19 ruling I've got to deal with how it may arise at trial, which  
20 may arise in a way that makes us think differently about this.  
21 But the general situation I'm thinking about is plaintiff  
22 offers the selection of a party opponent on a point. And to  
23 the extent that the point is made that is explained later in  
24 the deposition, I don't care where in the deposition it is  
25 explained, that ought to be included there to make the

1 testimony fairly represented, that's fine. But it doesn't  
2 suggest you then turn off and turn loose for hours of  
3 depositions of the deposition of testimony just because that  
4 person's testimony on that general subject. It's to promote  
5 clarity.

6 Now, it also goes on to say, in Federal Rule 32(a)(6),  
7 that, "Any party may, itself, introduce any other parts in  
8 their own case." They can do that in their own case. So if  
9 you open the door by using part of the deposition, they can  
10 then, in their case, even though it may not, in all fairness,  
11 be required, they can still -- you've opened the door and they  
12 may be able to use it for something else.

13 So the answer to that question is -- and I've got to  
14 control this trial, and I'm not letting one party, you know,  
15 basically pile on, at their whim, in somebody else's case,  
16 long hours of deposition.

17 Let me say this, folks. On Rule 403 I can control this  
18 trial. I'm not going to let anybody confuse the jury and bore  
19 the jury to death. Rule 403 is designed to prevent that from  
20 happening, and I intend that, to exercise that control.

21 So to sort of bring it down to a practical point, if you  
22 publish something of a party opponent that makes a point, if  
23 they further explained that particular point, fine, we're  
24 going to put that -- we'll allow that to be read right after  
25 or played right after that testimony. Because otherwise it's

1 not fair. It's misleading to the jury. But we're not  
2 unleashing widespread testimony on general issues in the other  
3 party's case. And that applies to both parties. So to that  
4 issue, read those rules. It's a very circumscribed  
5 circumstance where you get to require someone else to  
6 introduce other parts. It's got to be a determination that in  
7 fairness it should be considered. And I read that as a rather  
8 narrow limitation, not an open door to then publish the  
9 party's deposition.

10 Now, in terms of the deadlines on designation, we have  
11 those for a reason, because otherwise we have chaos. And of  
12 course, if testimony comes up in a way in which there's good  
13 cause that something wasn't designated, we're going to be  
14 flexible about that. The first party that tries to jam the  
15 other is going to have it happen to them in about ten minutes.  
16 We're going to be flexible about it, but we're going to keep  
17 the deadlines we have, because otherwise we have roiling  
18 chaos, is what we have at trial, and it's just not practical.

19 The ruling is going to be those deadlines matter, but to  
20 the extent something wasn't designated and it was  
21 understandable why it wasn't designated, and something has  
22 come up that needs to be addressed, we're not going to have,  
23 as Mr. Cheffo described it, a gotcha moment. We're going to  
24 allow that. But that's not a daily, hourly thing that's going  
25 to be happening, it's going to happen from time to time and

1 we'll be flexible about that.

2 But those deadlines are there for a purpose, a really good  
3 purpose, that you guys kind of know what's coming. And if you  
4 keep roiling new designations, there's no way y'all can ever  
5 figure it all out. It's complicated enough as it is.

6 So that's my ruling. The deadlines matter. We're going  
7 to follow Federal Rule 32(a)(6) and Rule 106. And I read that  
8 to be a rather narrow circumstance under which counter  
9 designations are provided. Okay?

10 MR. HAHN: Thank you, Judge.

11 THE COURT: Let's go to this issue of the additional  
12 questions for our prospective jurors, our jury venire.

13 Let me just say something to y'all generally about this.  
14 I do not seek to be your mouthpiece to make your closing  
15 argument, or to ask for lots of damages for the plaintiff or a  
16 defense verdict. That's for y'all. Y'all are really good at  
17 that. You don't need me to do that. And I resist the request  
18 that I use voir dire or anything else, opening and closing  
19 charges as well, to be y'all's closing argument. And you'll  
20 see when you make proposals to me that I'm constantly  
21 scratching it out, if it's nothing more, I want to be a  
22 neutral presenter of the law. And the jurors -- I'm not going  
23 to comment on the facts, that's the British system, not the  
24 American system. And you guys can comment to your heart's  
25 content in your argument.

1 So understanding sort of my inclination that I don't want  
2 to be a mouthpiece for anyone, let's now look at the  
3 plaintiffs' proposals, because, frankly, a number of these I  
4 felt like y'all were trying to make me y'all's ventriloquist,  
5 y'all were -- I was the puppet and y'all were the puppeteer.

6 First of all, question one, I think the -- I would  
7 rephrase that. I think it's substantively something everybody  
8 would be worthwhile to have, and I wouldn't want to ask it  
9 live, because it's very invasive of people's privacy and so  
10 forth. But I would say something, have you or any member of  
11 your immediate family, parentheses, spouse, children, parents,  
12 et cetera, immediate family, been diagnosed with any of the  
13 following. And then we have you, and then any immediate  
14 family member. I want to define it, I don't want to hear  
15 about third cousins having a heart attack. We want to know  
16 about the immediate family. And I think that one is fine.

17 Questions two and three, do you or does any immediate  
18 family member take a drug to lower cholesterol. We probably  
19 ought to somehow combine that into one question. And you have  
20 in number three, write "unknown" if you don't know, but you  
21 didn't do that for number two. I think we need to know either  
22 way if they're on a statin. I think that's something worth  
23 knowing.

24 Questions four through nine, I felt like you were asking  
25 me to be the puppet for y'all on damages, and I declined the

1 honor of doing that. Y'all make your own argument about  
2 damages to the jury. So four through nine are out.

3 Number ten, I didn't exactly like it the way either  
4 party -- defendant also asked me a question, but I think  
5 similar to this, I think the -- it's an important issue, and  
6 that is, is a jury -- if you've got an individual on one side  
7 and a pharmaceutical company on the other, can you be fair.  
8 Either way. Can you be fair.

9 So I looked back at what my standard questionnaire is, and  
10 this is the question I would have there. Do you feel that you  
11 can be fair to both sides in a lawsuit that involves an  
12 individual on one side and a pharmaceutical company on the  
13 other. Okay? Everybody -- I mean, that's the question. And  
14 if somebody says, Your Honor, I don't think I can because my  
15 daughter works for a pharmaceutical company, fine. If they  
16 say I can't do it because I hate big corporations, fine, we  
17 know all that. That's what we want to know. We want unbiased  
18 jurors.

19 So I think that gets to it both -- questions one through  
20 three kind of went -- of the defendant's questions went to  
21 that, and I think that's a more neutral way to ask that  
22 question, not suggesting one side or the other.

23 Question 11, which asks, do you have any training or  
24 experience in the following areas. We actually asked that,  
25 questions three and seven through ten pretty much give you

1 that information in the standard questionnaire, and I don't  
2 think we need more, I think it's duplicative. And in some  
3 ways you start asking that specific, you're kind of driving  
4 perhaps some points. And I think the more neutral question  
5 is -- and it's asked in the standard questionnaire -- things  
6 like where do you work, what training do you have, where does  
7 your spouse work. I mean, we're getting to that information  
8 in a less direct way, but we're still getting to that  
9 information.

10 So in the end, you know, I like question one, questions  
11 two and three of the plaintiff. I mentioned how we would  
12 change number ten.

13 Then for the defendants, questions one through three are  
14 pretty much caught up in that revised question ten of the  
15 plaintiffs about being fair to a pharmaceutical company.

16 Question four is, have you ever developed a serious side  
17 effect from a drug that you were not warned about, I think  
18 that's a fair question and I think both sides ought to know  
19 that.

20 And question five is captured in question one, the way we  
21 described it, in which we will know who has elevated -- you  
22 know, who has been diagnosed with these conditions. Okay?

23 So I think that's kind of giving us -- and we will also  
24 ask a question -- we're working, Miss Boroughs and I are  
25 working on this now -- is to say who has a problem, serious

1 problem with being a juror for a number of weeks. We need to  
2 kind of know that. My juror folks in Columbia are calling a  
3 large number of prospective jurors. And the reason is we just  
4 think there are not a lot of people who can sit around for a  
5 month. I mean, I'm going to tell you, if somebody stands up  
6 and says, Your Honor, if I do this, I will be bankrupt, my  
7 business will be closed, I'm not putting them on a jury. You  
8 don't want them on a jury. They're going to be so distracted  
9 and upset about sitting there that you don't want them anyway.  
10 And I want to see what kind of jurors we get. I don't think  
11 it's -- you know, sometimes they say when you do long trials  
12 you get nothing but senior citizens, and we'll have  
13 100 percent of the people on statins, if we do that. I'm  
14 going to certainly want some diversity of ages and all of  
15 that.

16 But we will ask a question, and I'm going to ask y'all  
17 today in just a minute, have we made any reassessment about  
18 the length of time, because I want to tell the jurors, give  
19 them an idea about what would be the expected time. I want to  
20 put that in the jury notice, or we'll ask a question about  
21 that.

22 Okay. Y'all have heard my thoughts. Does anyone have any  
23 real heartburn about that? First from the plaintiff.

24 MR. TANENBAUM: I think I did a great job arguing  
25 that, Your Honor.

1 THE COURT: From the defendant?

2 MR. COLE: No, Your Honor, I had all these great  
3 arguments, but you've already captured them all, so we're  
4 good.

5 MR. HAHN: Your Honor, do you want the parties to  
6 submit new questions?

7 THE COURT: No, we've got it under control. Guys, I  
8 get this like, you know, 15 times every two months I have to  
9 go through this.

10 MR. TANENBAUM: Just so you'll know, the questions  
11 that we had originally that the defense complained about, we  
12 sent back 36, all came from an 85-question agreed to  
13 questionnaire that Pfizer was a party to. So that is how that  
14 all blew up --

15 THE COURT: That's okay, but you know, if you figure  
16 out where our standard questionnaire came from, it came from  
17 Judge Joe Anderson, okay, who is our most thoughtful judge in  
18 terms of figuring standard practices, he's been on the Manual  
19 for preparation of the Trial Manual for District Judges. He's  
20 very thoughtful about this. And we all use it. And it is --  
21 he's tweaked it over the years; it is really good. I mean, I  
22 have people who have come from other places say that is the  
23 best questionnaire they have ever seen. And I don't take any  
24 pride in the authorship because I didn't author it, Judge  
25 Anderson did.

1 But in situations like this, there are circumstances where  
2 it is certainly appropriate to ask additional questions. And  
3 I'll be honest with y'all, I'm surprised I don't get this  
4 request more often. I mean, I really am. Why I don't get --  
5 because in many cases there are very particularized pieces of  
6 information not captured, and which would be highly probative.  
7 But we're so rarely asked, that my juror coordinator in  
8 Columbia had to -- it was like a big deal, you know, to be  
9 asking something, which I think I would expect it to be and  
10 probably should be more commonly done. But notwithstanding  
11 the excellent nature of the questionnaire, it's just not  
12 tailored to individual cases.

13 I was asked by my court people to ask, are y'all going to  
14 seek daily transcripts?

15 MR. HAHN: Yes, sir, Your Honor.

16 THE COURT: Okay. That's good to know. Will y'all  
17 seek sequestering of your witnesses?

18 MR. TANENBAUM: I hadn't thought about that yet, Your  
19 Honor, just -- we had a list of things that we were going  
20 raise, but we've talked about waiting and coming back. Could  
21 we put our heads together and meet?

22 THE COURT: That's fine. Let me tell you why, you  
23 know, number one, obviously before the trial we need to know  
24 that. And if either party requests it, it's done, under  
25 Rule 615 it's done. I raise it in conjunction with the trial

1 daily transcripts is I want to make it clear you can't be  
2 showing the transcripts to your future witnesses. Okay? I  
3 mean, that's very important here. Because if you're going to  
4 do it, it really complicates things. And I find myself having  
5 to warn parties about that. I mean, I can understand the  
6 benefit of getting daily transcripts, but there are limits on  
7 their use, and one of them is you can't prepare witnesses by  
8 providing them the information.

9 MR. COLE: Your Honor, we talked earlier today about  
10 requesting a future meeting with you to sort of talk about  
11 these nuts and bolts kind of things. And I think the  
12 plaintiffs have got some issues, we've got some issues, we'd  
13 probably like to have the lawyers that are going to be trying  
14 the case involved in that discussion. And it might be helpful  
15 that if you have things like that, how long the trial is going  
16 to be, are you going to sequester the witnesses, some  
17 questions you need us to get back to you about, we would go  
18 back and talk about it.

19 THE COURT: Let me tell you, the length of trial we  
20 need to know fairly soon because we have to send out our  
21 questionnaire.

22 MR. TANENBAUM: I can tell you that there are 45  
23 witnesses who have been deposed in this case, so --

24 THE COURT: Hopefully that will give you good  
25 guidance that you don't need 45 testifying.

1 MR. TANENBAUM: Each side has eight liability,  
2 general liability experts. We've got --

3 THE COURT: Are you going to call -- I mean, folks,  
4 to the extent they're going to say the same thing, I'm going  
5 to exercise my control over this trial. I'm not going to  
6 allow you to put up repeated experts who basically say the  
7 same thing.

8 MR. TANENBAUM: They each have different areas, Your  
9 Honor.

10 THE COURT: That's fine, but y'all might --

11 MR. CHEFFO: Your Honor?

12 THE COURT: Yes, Mr. Cheffo.

13 MR. CHEFFO: I'm sorry, Your Honor, I didn't mean to  
14 interrupt you. I was going to say it is something we probably  
15 should talk about, maybe won't agree, but to the extent that  
16 we use our experience as a guide, that's all we can ever do.  
17 I mean, in the Zolofit litigation, which I've talked about a  
18 little bit, we had similar documents, lots of witnesses, and  
19 in those cases, and I think initial projections of four and  
20 six weeks, the two trials that have taken place have been, I  
21 think, about 12 to 14 days total. So, you know, our view at  
22 the end of the day, with kind of good lawyers and  
23 understanding that Your Honor's going to control the courtroom  
24 and that no one wants to bore juries with repetitive  
25 testimony, I think it would be much closer to a two-, perhaps

1 three-week trial than longer than that, based on the issues  
2 here.

3 THE COURT: Let me ask you this.

4 MR. CHEFFO: Particularly the general causation  
5 witnesses are not all going to come to trial.

6 THE COURT: Let me ask you this. If I tell the  
7 jurors that the outside is four weeks, is that safe?

8 MR. TANENBAUM: I think that's safe, Your Honor.

9 THE COURT: So what we'll do is we'll say this trial  
10 starts on November X, whatever day that is, and it will be a  
11 trial, and it could go till December or whatever the date is,  
12 we'll figure out, does that present a problem. And let me  
13 say, don't be surprised I have a lot of returns, because  
14 that's, of course, over Thanksgiving.

15 MR. TANENBAUM: Just to say one thing. We've been  
16 meeting regularly preparing already, as you would expect. My  
17 gut feeling is when I put a witness up on direct, even an  
18 expert, two hours is a long time. Cross-examination generally  
19 can take, from our perspective -- it just depends on how long  
20 the cross-examination would be. But I don't anticipate longer  
21 than two, perhaps three hours on direct examination with these  
22 experts.

23 I also told Mr. Cheffo and Mr. Cole that I wasn't prepared  
24 to be bound by it, but I thought, based on the timeline that  
25 we've put together, while there are 5000 hot documents, so to

1 speak, out of 5 million or whatever it is, I'm thinking about  
2 150 to 200 at most. I mean, I've seen juries, not in my case,  
3 go to sleep, and I just don't --

4 THE COURT: I'm going to be honest with you. If you  
5 put up repetitive witnesses with a direct of two or three  
6 hours, they will not hear much of that testimony. I mean,  
7 just warning y'all. Because you take a two- or three-hour  
8 direct, you're talking about taking up basically a half day of  
9 testimony for a jury. And then you get up, and you go one  
10 witness a day for awhile, you will have lost your jury. I'm  
11 going to tell you. And that is not good for either party.

12 MR. TANENBAUM: Right. So I just say that for the  
13 outside. I'm reminded always, I say this all the time about  
14 Mark Twain, "I would have written a shorter letter, but I  
15 didn't have enough time." So that's my view of how you do  
16 these things. I don't think there's any difference from  
17 theirs.

18 THE COURT: I mean, y'all know in the end, though you  
19 might have all these experts make all these points, that part  
20 of the skill of presenting a case is to home in on a few  
21 points and drive them home. The jury can't absorb the 16  
22 different arguments, okay? There are going to be two or three  
23 arguments on each side, and you've got to drive those home.  
24 That's what effective trial is. And if you just throw it up,  
25 everything against a wall and hoping something sticks, usually

1 it doesn't, it all goes off, just doesn't work.

2 So I'm not going to tell y'all how to try the case. I'm  
3 concerned that my jurors not be bored, not be burdened with  
4 unnecessary repetition. And that I'm hoping y'all will talk  
5 to your experts about speaking English. Okay? As opposed to  
6 medicalese which they love to get in and talk in acronyms and  
7 terms eight-syllable words, nobody knows what they mean. And  
8 after awhile, the jury's just staring at the sky. I mean,  
9 this is necessarily a somewhat complicated issue on the  
10 medicine, but good lawyers can explain it in a simple enough  
11 language that people without advanced medical degrees can  
12 understand it. You've got to, because that's who's going to  
13 be on your jury. You don't get a bunch of Harvard professors  
14 who are going to be hearing this case.

15 MR. TANENBAUM: Yes, sir.

16 THE COURT: So we will say a couple of -- We'll say  
17 four weeks.

18 MR. CHEFFO: Sounds like we're out again?

19 THE COURT: Hold on just a second.

20 (Discussion held off the record.)

21 THE COURT: Folks, I wanted to tell y'all when we're  
22 sitting here looking at the calendar figuring out days for the  
23 pretrial, we're going to have to compress, just by a few days,  
24 a few of the schedules to get everything in, and we'll be  
25 issuing a modified order that just very slightly, not, I don't

1 think, any great way, compresses a couple of different things,  
2 just so on the Wednesday before trial I can have a pretrial,  
3 and we're not doing it on Friday morning, if something comes  
4 up, nobody has any opportunity to really address it. So we'll  
5 be issuing that in the next few days.

6 Now, are there additional matters for the Court to address  
7 that haven't been addressed here? First from the plaintiff.

8 MR. HAHN: Your Honor, if we could look on your  
9 calendar for a date late August, I know you have a vacation  
10 coming up, but after that, where we could come and perhaps  
11 talk in chambers about these housekeeping issues?

12 THE COURT: Yeah. I don't have my calendar in front  
13 of me. Let me give you my schedule. The last week of August  
14 I start a trial, criminal trial, and they tell me it will take  
15 all week. I have got my doubts about that, but that's what  
16 they're telling me. And I think we draw juries in about the  
17 Tuesday -- first Tuesday in September? September 1st. So why  
18 don't y'all talk to Miss Boroughs here about proposed dates  
19 that work with y'all, and we'll try to match it up. I think  
20 we have between now and your trial, seven trials set. Plus,  
21 I've got y'all's general Daubert and case-specific Daubert.  
22 And, Mr. Hahn, some of your partners were -- I guess some of  
23 your -- not your partners, but counsel from firms that are in  
24 your group were mad at me; they wanted to do a patent trial  
25 ahead of your bellwether trial. And I had to explain the fact

1 that they had filed eight separate Daubert motions, made it  
2 somewhat difficult for me to get to those, in the face of what  
3 I'm looking at between now and November.

4 (Discussion held off the record.)

5 THE COURT: Any other issues from the plaintiff,  
6 anything else I need to address?

7 MR. HAHN: No, sir, Your Honor.

8 THE COURT: From defense?

9 MR. COLE: We're fine, Your Honor.

10 THE COURT: What we may try to do, and Miss Boroughs  
11 will work with us, maybe toward the end of that week of  
12 August 24, anticipating that the thing really won't go the  
13 whole week, we'll try to see about -- I have already been  
14 having that assumption and putting some things there, but I'm  
15 glad to try to accommodate y'all to get it done, okay?

16 Anything further? So much for no meetings in August,  
17 right? Anything from anyone? First of all, Mr. Cole, you  
18 don't have anything?

19 MR. COLE: No, Your Honor.

20 THE COURT: Mr. Cheffo?

21 MR. CHEFFO: No, Your Honor, thank you very much.

22 THE COURT: Anyone else on the telephone need to  
23 address any matters with the Court?

24 (No response.)

25 (Court adjourned at 3:48 p.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

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Debra L. Potocki, RMR, RDR, CRR