

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

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

IN RE: LIPITOR 2:14-MN-2502

TRANSCRIPT OF MOTIONS HEARING
THURSDAY, NOVEMBER 1, 2016
BEFORE THE HONORABLE RICHARD M. GERGEL,
UNITED STATES DISTRICT JUDGE

APPEARED FOR PLAINTIFFS:

Blair Hahn, Esquire
Mr. Derek Ho, Esquire
Christian Marcum, Esquire
Mark Tanenbaum, Esquire
Beth Burke, Esquire
Joshua Leal, Esquire
Virginia Anello, Esquire

APPEARED FOR DEFENDANTS:

Mark Cheffo, Esquire
Michael Cole, Esquire
Lucas Przymusinski, Esquire
Mara Lusker Gonzalez, Esquire
Ted Mayer, Esquire

Court Reporter: Amy C. Diaz, RPR, CRR
P.O. Box 835
Charleston, SC 29402

Proceedings recorded by mechanical shorthand,
Transcript produced by computer-aided transcription.

1 THE COURT: We are here in the omnibus motion for
2 summary judgment of the defendants in the Lipitor MDL.

3 Could counsel identify themselves for the record who
4 will be arguing the case beginning with plaintiffs' counsel.

5 MR. HO: Derek Ho.

6 THE COURT: Good to see you again, Mr. Ho.

7 MR. HO: Good to see you, Your Honor.

8 MR. HAHN: Blair Hahn, Your Honor, just in case.

9 THE COURT: I don't know how much Mr. Ho really
10 needs you, Mr. Hahn.

11 MR. LEAL: Joshua legal on behalf of the Hayes Law
12 Firm. I represent 34 plaintiffs.

13 THE COURT: Good to have you.

14 MS. ANELLO: Virginia Anello with Douglas & London.

15 THE COURT: Very good. Thank you.

16 MR. CHEFFO: Mark Cheffo, Your Honor.

17 THE COURT: Okay. For those of you who did not
18 have the benefit of being here during the summary judgment
19 argument in *Hempstead* and *Daniels*, we had a thorough
20 discussion on many issues that overlap here. I don't want
21 to cut anyone off, but on a number of these issues that we
22 have already thoroughly addressed, we need not, unless there
23 is something to add -- I say this to Mr. Ho and Mr. Cheffo --
24 you need not get into those. I'm not trying to cut anyone
25 off, but we did have a thorough discussion of those issues

1 and I took meticulous notes.

2 And I know that the folks from the other two law
3 firms, to the extent you want to address any of those, I
4 don't want to cut you off, either, but there are issues that
5 have been more focused on here regarding this argument, and
6 I'm glad to hear from those.

7 It's the defendant's motion, so Mr. Cheffo, I'll
8 hear from you first.

9 MR. CHEFFO: Thank you, Your Honor. I think I'll
10 be brief, of course subject to your questions. No
11 PowerPoints today, no charts.

12 THE COURT: It only took you three years to figure
13 that one out.

14 MR. CHEFFO: Sometimes it's more about the lawyers
15 than it is for the Judges, but --

16 THE COURT: Or the firm's IT person more than
17 anybody else, right?

18 MR. CHEFFO: As you said -- you took the words out
19 of my mouth because I think we've covered many of the issues,
20 the substantive issues. Unless you have questions, I wasn't
21 planning on addressing anything specific to the omnibus
22 issues because I think we've covered those in the prior
23 hearings.

24 THE COURT: Well, the plaintiffs argue that it's
25 just completely inappropriate for this Court to be dealing

1 with specific causation, that that is uniquely within the
2 province of the transferor courts and it's inappropriate for
3 this Court to deal with it. What's your response to that?

4 MR. CHEFFO: I have a few responses. One is there
5 isn't any authority for that.

6 A few things. One is Your Honor is, and any MDL
7 judge, are in a position to try and address issues that make
8 sense across the litigation from an efficiency perspective.
9 There is no question that in certain MDLs, in certain cases
10 when cases get remanded in some cases specific causation is
11 addressed.

12 THE COURT: These cases are very fact specific and
13 you've got to go case by case through them to dispose of the
14 case.

15 MR. CHEFFO: Here is I think the key issue, and
16 Your Honor lived through this. We had a situation where it
17 was proposed that, in fact, the PSC and lead counsel agreed
18 to a procedure whereby folks would have an opportunity to
19 present, you know, specific causation evidence, right? And
20 that was agreed and you issued orders and we've talked
21 about --

22 THE COURT: Do that pleural, orders, because I gave
23 them multiple chances.

24 MR. CHEFFO: Four times, right? So the argument --
25 to the extent it has legs, and I don't think it does -- there

1 is some prohibition on an MDL court addressing causation, it
2 happens all the time, but the core issue is that if somebody,
3 anybody felt back in January, or in the subsequent orders,
4 that they had an expert or specific issues, they could have
5 come forward. Your Honor gave them that opportunity. You
6 didn't say they have to come forward with essentially all of
7 their evidence, you said just raise your hand and then we can
8 have a procedure. At that point, just for argument's sake,
9 if 500 people --

10 THE COURT: Let's back it up a little bit. We had
11 a discussion, because I was trying to push you lawyers to a
12 bellwether trial, and we washed out on the *Hempstead* and
13 *Daniels* because of the *Daubert* rulings. And I said, okay,
14 let's get another case. And I suggested why don't we do an
15 80-milligram case. Maybe there is something about that with
16 the science that might, since we had general causation, maybe
17 there is something that would get there. And I sent y'all
18 out to report back to me these 80-milligram cases. And you
19 came back to me and said the profile we were looking for we
20 couldn't find, they didn't exist.

21 And then we said, Well, where do we go from here?
22 We've got all these *Daubert* rulings on both general causation
23 and specific causation. We don't have an expert. Where do
24 we go from here? And Mr. Cheffo, you, it was all over the
25 record, you said, Why don't we just do an omnibus motion for

1 summary judgment? And Mr. Hahn said, You must be reading off
2 my sheet, right? I mean, that's -- I remember that line.
3 That's exactly what I recommend. And then I said, Well, I'm
4 going make sure, Mr. Hahn, that everybody is on the same page
5 with you. There are a lot of other law firms out there.
6 Let's issue an order just to make sure that they don't
7 challenge lead counsel on this. And that led to me issuing
8 the first of those four orders you were referring to, to come
9 forward. And silence to each of those to come forward if
10 you think that you disagree with the lead counsel's position.

11 And so we -- you know, it was then raised very late
12 in the process after nearly three years of litigation, Oh, we
13 didn't really need an expert. All this work we've done
14 wasn't really necessary. Some mythical state isn't required,
15 which state that would be, I still wait to learn. And that
16 it was, you know, really have to go back in the states to
17 litigate those claims. And that was argued about Missouri
18 and what was the other state? Colorado, Missouri in
19 *Hempstead* and in *Daniels*.

20 And when we drilled down, the big surprise, no, you
21 need experts. On complex pharmaceutical causation cases, you
22 need an expert. And I have invited -- and let me just say
23 we've had some examples filed here of cases. Mr. Hahn cites
24 four cases that talk about temporal relationship and four
25 cases that talk about 80-milligram cases. I'm glad to talk

1 about those cases. I have been through those records
2 extensively. They all have multiple factors, confounding
3 factors. I don't know how many people off the seat of their
4 pants, certainly your experts couldn't sort it out. The
5 folks with the 34 cases, I have been through their records,
6 every one of them fits the same profile. I read the state
7 law in every one of those cases, every one of them in this
8 situation would require it. I think you briefed that.

9 My office has made an independent 50-state review,
10 my chambers, required. We had 106 files, I would call them
11 a dump, on us. There is no argument. It's just dumped files
12 on us. I read them. I sat down and went through them.
13 Not one of them could I find a layperson would even remotely
14 be able to sort out in all of the colonoscopy pictures and
15 EKG files I was given. I couldn't see how they related to
16 this, but a layperson wouldn't know how to do that. Here we
17 are, right? Do we need an expert? If in fact we need one,
18 and that's a universal requirement, there is no state that
19 says, come on, just sue in our state without an expert.

20 Do you know of any of those states that do that?

21 MR. CHEFFO: I know of none.

22 THE COURT: These are really smart lawyers. I
23 suspect if the mythic state of A really allowed that, every
24 one of these cases would be brought in State A, right? And
25 they would bring all their own, all the people in that

1 residence, and they wouldn't hire the first expert, they
2 would just schedule a jury trial.

3 MR. CHEFFO: Exactly. Nor would we have gone
4 through this process, as you said, for two and a half years
5 and worked out a CMO which is like a CMO in virtually every
6 other case. By the way, yours was.

7 THE COURT: You are not the only lawyer that has
8 complained about that. I've got this death penalty case and
9 they are all exhausted. Welcome to my court. You have
10 drilled down -- are any of these states -- I went through the
11 34. I went through all those states. Every one of them in
12 this scenario requires an expert.

13 MR. CHEFFO: That is exactly what I thought when we
14 first broached this, because we had actually -- this has been
15 raised in some other litigations. And, Your Honor, as you
16 always do, gave folks a chance to look at it. And as you
17 said, one is people would flock to those states; but two, it
18 doesn't make any sense. The cases that they talk about, if
19 there is something clearly obvious that you could look at
20 someone, hit yourself with a hammer, you have a contusion in
21 your head, sure that kind of case, but no case, basically, in
22 a complicated case like this, particularly when, as you
23 highlighted, their own very, you know, accomplished general
24 causation folks said, doctors said, We don't know how we
25 figure it out. And the idea that you would --

1 THE COURT: How about the example asked there are a
2 hundred people in the room, which one of the people allegedly
3 has Lipitor-caused diabetes? Beats me. Wouldn't have a
4 clue how to do that.

5 And it does seem a little axiomatic that if, in
6 fact, the experts don't know it, how would the lay people
7 know it? If it's so confusing that you can just look and
8 say, Oh, I know, a layperson. The one thing I've learned in
9 nearly three years of looking at this stuff is it's
10 complicated. And it's not something you do off the back of
11 an envelope. The relative risk is so small that you need
12 statistical, very careful, statistical analysis even to tease
13 out enough to show there is any difference. And even the
14 plaintiffs' experts, who claim this phenomenal
15 Lipitor-induced diabetes exists, never made the diagnosis
16 themselves. Not one time.

17 MR. CHEFFO: Many of them -- the other ironic thing
18 is if it was so easy for a juror to look at someone and
19 basically say, I think she has Lipitor-induced diabetes,
20 wouldn't it have been even more easy to find a bunch of
21 experts to say that? Yet there are no experts who do say
22 that. They haven't come forward.

23 THE COURT: One of the experts say we just kind of
24 can look at them and know, you know, we just know that. So,
25 I mean, I'm left with, you know, I've tried -- I've taken

1 very seriously the responsibility that we should not do a
2 gotcha situation. I know you haven't agreed with me on a
3 lot of my rulings where I've let the plaintiffs go back and
4 get additional information or offer different experts. I
5 thought when you are dealing with such a large volume of
6 people's claims they should have every right to prove their
7 case.

8 And so I feel like we've done that. We are down to
9 the end here. And this mythic state or states with these
10 mythic claims that are just obvious, I mean, I continue to
11 ask people to show them to me. That's what we are here
12 today about. And if any of these lawyers who want to talk
13 about specific cases, let's go into the record and look at
14 them. I'm willing to do it. Now, this whole issue about
15 whether this Court is supposed to deal with dispositive
16 issues, the manual for complex litigation, I can read right
17 from it, it says if there are issues that can be dispositive
18 and cross the entire case, I should rule on those.

19 MR. CHEFFO: Absolutely.

20 THE COURT: The alternative is these two and a half
21 years that we've spent learning all this, I've sent it back
22 to 200 federal judges across America all to do this when I
23 could do that, what is the purpose of the MDL?

24 MR. CHEFFO: It makes no sense and it's counter to
25 everything. And what I would suggest is, again, as you

1 said, and I've said many times, is I believe these are very
2 good lawyers, but when they entered into the CMO -- and
3 frankly, if it was another MDL, they would probably do the
4 same thing -- they anticipated that they wanted those
5 decisions decided once. If they had won, they wouldn't want
6 to go back and redo these issues for the same reason there is
7 efficiencies for the defendants. There is no question that
8 it's within the scope of what Your Honor can address. And I
9 think on top of that, we had -- this is an agreed procedure.

10 So even if there was some situation where it was
11 outside the Court's purview, which it's not, here everybody
12 agreed and everybody had an opportunity to raise their hand
13 if they somehow wanted to be treated separately or different,
14 and that didn't happen across the thousands of cases.

15 I guess the only thing I would add, Your Honor, on
16 the specific cases in 30 seconds or less, unless you have
17 questions, there is really nothing that is different about
18 the 137 or 40 cases here. I mean, basically none of them
19 address the law issue. I mean, they don't explain any
20 different than what I think the plaintiffs' position was from
21 the PSC, that you need an expert.

22 And then even if you were to get past that -- and I
23 don't think you can -- but if you were, there is nothing in
24 the documents or submissions that a juror could look at and
25 say, this person has Lipitor-induced diabetes. We basically

1 did somewhat of -- because some of these documents were late,
2 but I think all we needed to do, which we I think submitted,
3 is we show there is at least one risk factor, and that is
4 just off the face of the fact sheets that the plaintiffs
5 provided.

6 THE COURT: Also found a pattern that many people
7 greatly understated their weight. So if you look at the
8 medical record, compared to what they said, their weight was
9 when they were diagnosed completely different. That's just
10 human nature, that you just remembered that you weighed less
11 than what you would like to have weighed at the time. But I
12 was amazed how many of the submitted files to me had
13 inaccurate weights and thus inaccurate BMIs, just according
14 to the limited records I was provided. I mean, I would have
15 hoped somebody was a little more careful in submitting those
16 to me. And maybe, you know, one person filled out, just a
17 telephone interview and wrote it down and later records came
18 in and no one matched it up, but maybe -- somebody submitted
19 it to me here, and I guess they didn't think I would read
20 them. I did.

21 So anyway, I'll give you a chance to reply and on
22 anything specific you would like to add, Mr. Cheffo.

23 MR. CHEFFO: Thank you, Your Honor.

24 THE COURT: Yes, sir, Mr. Hahn?

25 MR. HAHN: Your Honor, this is, just for the

1 purposes of the record, I don't believe that it's accurate
2 that the plaintiffs agreed to summary judgment. We were
3 actually advocating for a certified question on your *Daubert*
4 rulings. And one of the reasons why we did that was because
5 of the issue of common versus specific issues in each
6 individual case or case-specific issues in each case. I
7 wanted to correct that for the record.

8 THE COURT: Well, Mr. Hahn, what we've got here, and
9 we ought to, it is good practice, everything is on the
10 record. So there is a record of that conversation. I
11 understood that differently than you remember it.

12 I've got to say, Mr. Hahn, and I said this to Mr. Ho
13 the last time, I thought you and your team worked incredibly
14 hard on this case. You showed incredible diligence,
15 incredible devotion to your clients. And we are not our
16 cases, right? Lawyers are not their cases. The evidence is
17 the evidence. But I don't want anything that I have said or
18 anything that has happened in this case to remotely suggest
19 that you have not done -- been incredibly diligent in leading
20 this MDL. And sometimes you have won cases where it wasn't
21 entirely all your genius that did it.

22 MR. HAHN: Most of them, Judge.

23 THE COURT: Most of them. That would be -- and
24 sometimes the cases don't work out and it doesn't reflect on
25 the effort. Because if it was measured by effort, we would

1 have, I believe, a different outcome here. So I want to say
2 that because I think it's easy for people out there perhaps
3 on the phone or in other law firms who say, Boy, we didn't
4 get the result we wanted, it must be Hahn's fault. I don't
5 take that. Sometimes the science is just not there in a
6 case. And we'll have a test in the Fourth Circuit about
7 whether -- a fair judgment about whether the Court got it
8 right here. That's what appeals are all about. I don't
9 take it personally at all. I think that is exactly the
10 system we have.

11 But going back to that conversation, I mean, clearly
12 we were looking for a way, what do we do if we don't have a
13 trial, right? I mean, I want -- I was advocating for a
14 trial. And I think people might view that as plaintiff
15 friendly, but apparently you can try what you can try, right?
16 I mean, I was trying to get a case to trial. You determined
17 that the profile you needed didn't exist in your pool. I
18 respected that. I went out to the entire group, asked them,
19 got no response.

20 So the question here today really is, you know, do
21 we really -- can we really -- first of all, we have no, under
22 my rulings, up to 80 -- up to 10, 20 and 40 milligrams, we
23 don't have a general causation expert. And specific
24 causation, we don't have an expert. And the question is, in
25 that situation can a plaintiff survive summary judgment in

1 that situation? That is the question. You know --

2 MR. HAHN: Yes, sir. And Mr. Ho is going to
3 address that. I just wanted to make sure it is on the
4 record that we have not agreed to summary judgment.

5 THE COURT: Listen, I didn't understand you agreed
6 to summary judgment. I understood you said you had no case
7 to try if my rulings were upheld.

8 MR. HAHN: Yes, sir, under the 80 milligrams and
9 the Waters criteria.

10 THE COURT: And my other rulings on *Daubert*.

11 MR. HAHN: Yes, sir.

12 THE COURT: And that you wanted to proceed to get an
13 interpretation to the Fourth Circuit of a ruling on the
14 Fourth Circuit. Because if it didn't work out, then that
15 was the end, and this whole argument you never needed an
16 expert I never heard out of your mouth, Mr. Hahn. You know
17 that and I know that. And the first time I heard it was on
18 a telephone conference with Mr. Ho. And, you know, I've --
19 I consider it sort of a Hail Mary in the case. But one day
20 we'll have people grade my papers, hear that argument in the
21 Fourth Circuit, and if they don't think we need an expert,
22 fine. I have trouble, understanding the complexity of this
23 case, that that would be so.

24 Mr. Ho, I'll be glad to hear from you, sir.

25 MR. HO: Thank you, Your Honor.

1 THE COURT: Mr. Ho, I was telling my clerks to come
2 in and watch you, you are a really skilled oral advocate.

3 MR. HO: That's fine of you to say, Your Honor. I'm
4 not sure if I'm making any headway here. I'll do my best.

5 THE COURT: I keep saying to Mr. Hahn and to you,
6 you know, the case is not you, right? I mean, as smart as we
7 all think we are as lawyers, facts do matter, right?

8 MR. HO: Absolutely, Your Honor.

9 THE COURT: Evidence matters.

10 MR. HO: We couldn't agree more.

11 THE COURT: There was the old line, Sir Lawrence
12 Olivier one time, What is the secret of great acting? And he
13 said great material.

14 MR. HO: Let me start where Your Honor started,
15 which is we agree that we've had an exhaustive conversation
16 at the September hearing about general causation, and whether
17 as to general causation we can get past summary judgment on
18 the basis of nonexpert evidence. I don't think there is
19 anything more for me to say on that.

20 THE COURT: And I'm going to give these other
21 lawyers an opportunity, if they wish, to add something to it.
22 We thoroughly briefed it. You skillfully argued it, as has
23 Mr. Cheffo.

24 MR. HO: I have been around enough to be able to
25 read the writings on the wall, and it sounds to me that Your

1 Honor is of the view that our nonexpert evidence is not
2 sufficient to get past summary judgment on general causation.

3 THE COURT: That's correct.

4 MR. HO: And as Your Honor said, that being as to
5 the 10, 20 and 40-milligram cases, there is an independent
6 basis on which summary judgment is going to be granted
7 against all the plaintiffs with respect to those doses.

8 So with respect to the question of specific
9 causation, I would frame the issue as is it appropriate for
10 the Court to reach out and decide other case-specific issues,
11 like case -- like specific causation when it's not necessary
12 to the resolution of those cases?

13 THE COURT: Here is the complicating factor here.
14 There are issues of general causation and specific causation
15 that are very complicated and have been thoroughly addressed.
16 I believe that the specific causation defect in *Hempstead* and
17 *Daniels*, that defect is universal in these cases. I believe
18 that. And then the question is, should I send back to my
19 colleagues hundreds of them, this complicated science where
20 they would have to -- how many CMOs have we had now?
21 Eighty-five CMOs. They need to absorb all this stuff to then
22 address that question, at least as to the 80-milligram cases.

23 And let me tell you something, I have been on the
24 receiving end of a few MDLs where they sent it back to us.
25 Let me tell you something, you sit and wonder as a District

1 Judge why we bothered to send it to the MDL, because it's
2 such an enormous amount of work for the individual judge.
3 Now, sometimes it's just necessary. It's very
4 case-specific. You could not possibly, on a mass basis,
5 address these issues, and it's just the nature of the beast.
6 But when that isn't true where there is a universal problem,
7 that is you need an expert witness, that is -- if that is the
8 answer, it is a universal answer.

9 Now, you've -- there have been arguments, Oh, no,
10 there are states that allow us to go. I respectfully don't
11 believe that's true. That the facts here are somehow
12 uniquely different from person to person, there are different
13 facts. But as to this issue that, do you need an expert?
14 It's universal. It's a universal application. So I think
15 to the contrary. I think I'm doing my duty to do this for
16 the purposes of the MDL.

17 You know, the Manual for Complex Litigation, I went
18 back when y'all raised this issue, and I was looking at this,
19 it says: "If the Summary Judgment Motions involve issues
20 common to all the cases centralized before the MDL, however,
21 the transferee judge may be in the best position to rule."

22 MR. HO: Your Honor, we don't agree with the premise
23 of that.

24 THE COURT: I understand. I respectfully
25 understand that you don't -- I understand you don't agree

1 with me on that. But, you know, I was told generally, hey,
2 there is states out there that don't require experts. And I
3 say which state?

4 MR. HO: Your Honor, if I could just address that
5 point specifically? Because I think there has been maybe a
6 misunderstanding about what we are saying about the law of
7 the various states. With respect to the 80-milligram cases,
8 we do have an expert. Dr. Singh has been ruled admissible to
9 opine on general causation as to 80 milligrams, and he has an
10 opinion about a hazard ratio. And that hazard ratio implies
11 a probability about the chances that any individual plaintiff
12 developed diabetes because of Lipitor. As Your Honor has
13 said, because that has a ratio, it's not greater than 2.0, it
14 alone does not surpass the preponderance of the evidence
15 standard.

16 But there are states, and we've outlined them in our
17 omnibus response, that say that you can combine expert
18 evidence with nonexpert evidence to get you over the
19 50 percent hump. So with respect to the 80-milligram cases,
20 what we are arguing is that the combination of Dr. Singh's
21 testimony and the facts about each individual case would be
22 sufficient to survive summary judgment.

23 THE COURT: I understand your argument on that.

24 MR. HO: And I believe, Your Honor, that there are
25 definitely states that subscribe to that principle. We've

1 laid them out in our brief. And the defendants have not come
2 up with a single state that has said specifically to the
3 contrary. And when I say "specifically," again, I mean
4 specifically that you cannot combine expert evidence with
5 nonexpert evidence.

6 To the point about Your Honor's role as an MDL
7 judge, I respect and understand the problem of transferring
8 back, you know, the 80-milligram cases to the transferor
9 court. And I will say that it's just a small fraction of
10 the overall MDL.

11 THE COURT: What percentage is it, Mr. Ho?

12 MR. HO: I have been told it's around 8 or
13 10 percent involve 80-milligram cases.

14 THE COURT: Mr. Cheffo, does that sound right to
15 you?

16 MR. CHEFFO: Um, the quick answer is it sounds
17 right based on the fact sheets that have been reported, which
18 we haven't verified, but I think it's around 10. So I would
19 agree.

20 THE COURT: Okay. Good. Thank you.

21 MR. HO: There is another perspective that I would
22 ask Your Honor to take into account, which is the
23 perspective -- I come from the perspective of an appellate
24 lawyer -- it's the perspective of the Court of Appeals, which
25 is going to be asked to review de novo the application of the

1 law of 30 some odd states to the facts of some number of
2 cases. And that really, I think, highlights why, especially
3 when it's not necessary to the 10, 20 and 40-milligram cases,
4 our submission is the appropriate course is not to go out and
5 rule in each and every one of these cases that here is what
6 the law of this state is.

7 THE COURT: I hear what you've got to say. I hear
8 you.

9 MR. HO: From an appellate standpoint it's going to
10 create a huge mess, frankly, at the Fourth Circuit. And I
11 think the Fourth Circuit, you know -- if the idea here is
12 judicial efficiency, you know, the Fourth Circuit's interests
13 here would be to take the general causation ruling, which, as
14 Your Honor has said, would be dispositive of all the 10, 20
15 and 40-milligram cases, but the specific causation ruling
16 might be moot after that. If the Fourth Circuit affirms,
17 there is --

18 THE COURT: Invariably. But to the extent there are
19 alternative bases for summary judgment and we've done all
20 this work on it, we ought to address it, we are going to end
21 up disagreeing with that, Mr. Ho.

22 MR. HO: So our position, just to be clear, is that
23 the 10, 20 and 40, if Your Honor is inclined to rule against
24 us on general, ought to be ruled on on that basis alone, and
25 that the 80-milligram cases ought to be remanded back to the

1 transferor court.

2 THE COURT: I'm sure you spent a little bit of time
3 studying the 80-milligram cases. They have to be the most
4 complicated medical cases in the entire pool. It's
5 enormously complicated. I've studied every one that has
6 been submitted to me, all the ones I've had access to. They
7 are incredibly complicated. The idea that lay people could
8 reach a causation conclusion on people who have -- the
9 typical pattern is they have severe cardiovascular disease,
10 they have massive obesity, some ranging into the upper 30s on
11 the BMI. Their risk factors are just incredibly high. And
12 to say, Oh, I can sort out that something that is a much
13 lower factor is, you know, is a proximate cause, lay
14 people -- I mean, your experts couldn't do it. And to sit
15 there and say that lay people can do it doesn't make any
16 sense to me. But you are going to have your shot at the
17 Fourth Circuit to say that is not what the law is. That's
18 okay. I'm fine with that.

19 MR. HO: Your Honor, we have cases in this MDL that
20 has been filed in states from California to Missouri to
21 Texas, and as you can imagine, a state court judge in
22 California may well have a different view about how --

23 THE COURT: I just sent about 2,000 cases back, so
24 they are going to test that one.

25 MR. HO: California was a bad example.

1 But we have cases here that were filed in different
2 states across the country. And as Your Honor well knows, not
3 all of these states are of the same view judicially,
4 politically, philosophically. And whether or not it is, in
5 fact, impossible for a lay juror to bridge the gap between
6 Dr. Singh's testimony and a preponderance of the evidence, we
7 submit is not the question that can be answered in a one size
8 fits all way by a court that doesn't, you know, isn't
9 received in the law of a particular jurisdiction.

10 THE COURT: What I would say is that all those
11 states, the facts, the multi-fold nature, complexity of
12 diabetes, a presenting disease, is beyond the expertise of
13 jurors. I think that is universally true. And again,
14 we'll get -- we'll get a chance to see -- to test that one.
15 I presume they will address that issue.

16 Listen, it's a big job for an appellate court. Let
17 me say this, it's a big job for the MDL judge to address
18 these cases, and we've devoted a tremendous amount of time to
19 this. I'm just trying to call the balls and strikes here.
20 That's all I'm trying to do, Mr. Ho.

21 MR. HO: If Your Honor has no further questions,
22 I'll yield the floor. Thank you.

23 THE COURT: Thank you, sir. Mr. Ho, you've got to
24 be very careful, because you are here in my court and I'm
25 going to get some really complicated issue about this

1 terribly impoverished person, and you are going to get
2 appointed. I'm going to turn and say, How do we find
3 Mr. Ho?

4 Okay. Other plaintiffs counsel from the Hayes Law
5 Firm?

6 MR. NEAL: Thank you, Your Honor. Joshua Leal for
7 the plaintiffs.

8 THE COURT: Yes, sir.

9 MR. NEAL: Your Honor, what I did is give you my
10 best faith attempt to comply with CMO 82. And looking
11 through the records, the best thing I could come up with with
12 nonexpert evidence is basically showing you three basic
13 facts: They are not diabetic before taking the medication,
14 they took Lipitor and then they became diabetic.

15 THE COURT: That's your case.

16 MR. NEAL: That's the best case.

17 THE COURT: That's not good, okay? If that were the
18 case, then everybody after they -- you know, there is the old
19 example, statistics show that in summertime murders go up and
20 ice cream sales go up. Are murders and ice cream associated
21 with each other?

22 MR. NEAL: In that particular scenario, there is --
23 I can't tell you.

24 THE COURT: Okay. And what the problem is on, if
25 you take a pool of people who take Lipitor, you know,

1 obviously they don't give Lipitor to people who don't have
2 certain symptoms and need for the drug, right? I mean, there
3 is a certain profile of a patient for it --

4 MR. NEAL: Sure, reduce cholesterol.

5 THE COURT: -- for Lipitor. And if you take that
6 pool of people who then develop diabetes, the great majority
7 of them are going to get diabetes whether you give them
8 Lipitor or not. That is what the statistics that have been
9 presented to me by these really able lawyers have shown me.

10 MR. NEAL: I understand, Your Honor.

11 THE COURT: So to say they took it and they got
12 diabetes is, from what I can see, most probably not the cause
13 of Lipitor. These lawyers have gone further than that.
14 They have not stopped with that, what I consider rather
15 simple association. They have drilled down to see if there
16 is something about -- that can prove the role of Lipitor.
17 And as much as they have tried, and as creative as they have
18 been, they have not been able to connect those dots. So the
19 great question, as I mentioned before, is a hundred people
20 are in a room, and a certain number of those people,
21 according to our statistics, would not have gotten -- perhaps
22 would not have gotten diabetes but for the Lipitor, some
23 small minority of those people, the great majority would have
24 gotten it, okay? Which ones are they?

25 MR. NEAL: I understand.

1 THE COURT: That's the specific causation problem.
2 And when we got into this case, we first did general
3 causation.

4 MR. NEAL: Yes, Your Honor.

5 THE COURT: And the -- and the defense counsel asked
6 the plaintiffs' general causation experts, How would you
7 prove specific causation? And they said, Beats the heck out
8 of me. I have no idea how you prove it. That's their
9 experts. Pretty credible response. And that's where we
10 are today. And, you know, I -- I went through -- you name a
11 case, I'm glad to go through it. You know, I spent 35 years
12 as a med mal lawyer. I'm very familiar with reading medical
13 records. I went through every one of your cases.

14 MR. NEAL: Understood, Your Honor.

15 THE COURT: And every one of those people had
16 multiple risk factors. You ought to go back and look at
17 some of your plaintiff fact sheets, they are inconsistent
18 with the records you gave me, particularly on weight. And
19 BMI is a huge risk factor, right? I mean, huge. You are up
20 in the 35, 36, 37, you've got like 10, 15, 20 times the risk
21 factor of getting diabetes. And you and many of your folks
22 that said, I didn't have elevated BMIs, and they did, I mean,
23 boom, right there. I think if it's just 25 to 27, it's five
24 times the risk. That dwarfs Lipitor. Even the most
25 optimistic statistics on Lipitor, it dwarfs that. If you

1 don't have any more than that, you are kind of at step A of
2 what -- these lawyers got to step D in the case.

3 MR. NEAL: I understand, Your Honor.

4 What I was going to make clear is I was doing my
5 best to comply with CMO 82 and didn't want to get penalized
6 for not doing so.

7 Thank you, Your Honor.

8 THE COURT: Thank you, sir. Okay. Folks from
9 Douglas & London firm.

10 MS. ARNELLO: We are going to join the PSC's
11 argument and not seek oral argument.

12 THE COURT: Okay. That's fine. I would say that
13 in the future when you file something in Federal Court, you
14 ought to do more than just dump the files. That was not
15 very helpful for us. And the Hayes Law Firm actually went
16 through and they focused -- they made their argument. I
17 wasn't persuaded by it, but they put in relevant records.
18 But I had, as I mentioned earlier, colonoscopy films, EKGs,
19 blood tests unrelated to diabetes. I just didn't understand
20 what that was all about, ma'am, I really, just to be honest
21 with you.

22 MS. ARNELLO: Yes, Your Honor. We wanted to put all
23 the evidence forward that we had.

24 THE COURT: Well, but then you just said, Oh, we
25 don't think summary judgment is appropriate. I mean, it's

1 simply not the level of lawyering I've seen in this Court in
2 this case, frankly. I haven't, you know, at the end of the
3 day I have not ruled for the plaintiffs, but they did really
4 serious work and were very methodical about what they did.
5 I frankly wasn't very impressed with that filing. I don't
6 think you personally did it, so I'm not going to fuss with
7 you more than I need to.

8 Okay. Mr. Cheffo?

9 MR. CHEFFO: I don't think I have anything else,
10 Your Honor, unless you have questions. The only -- the one
11 comment we've heard was just that you should --

12 THE COURT: What is this bridge? Talk to me about
13 the bridge the gap theory.

14 MR. CHEFFO: Well, and I'm not sure I understand,
15 but maybe -- it was the one point I was going to address. I
16 mean, I think Mr. Ho had said you shouldn't reach out to all
17 these other issues, but let's be clear, Your Honor limited
18 the summary judgment just to general and specific causation,
19 and I would go back to the point of, starting back in January
20 when you gave people an opportunity to have expert testimony,
21 right? So they could have said a number of things. We have
22 experts, and you could have said if there was a lot of them,
23 at that point I'll have somebody else deal with it or remand.
24 None of that happened; or they then could have said, like you
25 heard probably in August, you know, no, there is some way

1 that we can get past summary judgment or specific causation
2 without experts. We never heard that at all.

3 And all we've actually heard is -- and then I think
4 the one point Mr. Ho, which I do actually disagree with this,
5 he said that you haven't identified a single case that
6 disagrees with the theory about proving specific causation
7 through a combination of general causation and nonexpert
8 evidence. That is a paraphrase. That's not true. We had
9 a ton of cases where, specifically pharmaceutical cases just
10 like this case, and I would say the only cases that the
11 plaintiffs have identified are these kind of totally
12 different type fact patterns where there is obvious injuries
13 or it's an accident or something else. So I think it's
14 flipping it on its head.

15 So we have a situation here where kind of the best
16 effort is essentially, you know, trust us. There may be some
17 law out there, and trust us, maybe some other court, if you
18 send back hundreds of these complicated 80-milligram cases
19 can figure it out. But, you know, this is summary judgment,
20 right?

21 THE COURT: I have just been saying, if you've got
22 the case, give it to me.

23 MR. CHEFFO: Right.

24 THE COURT: I mean, you are like having a heart
25 attack when I kept saying, Mr. Hahn, give me a case to try.

1 You know, you were irritated with me. Give me any case to
2 try. And, you know, we know I wasn't given one to try.

3 MR. CHEFFO: Right. And this is -- you know, you
4 did not say we are going to cover every single issue, you
5 said specific and general causation, and even today, right,
6 if there was that one case from Wisconsin or Nevada or
7 wherever it is --

8 THE COURT: I would send it back. I wouldn't
9 hesitate. I wouldn't grant summary judgment.

10 MR. CHEFFO: Now is the time. It's not kind of,
11 well -- I understand their argument is we don't have any
12 information, we don't have any state law. We haven't gone
13 through the cases. We don't have the information, even
14 though it's summary judgment, but their whole argument is you
15 just shouldn't decide this.

16 THE COURT: It's so obvious that you don't really
17 have to do so much discovery. You just, you know, you open
18 the file, you heard the basic facts.

19 MR. CHEFFO: Right.

20 THE COURT: You know, you don't need a lot on
21 something that is obvious, right? This idea -- and I've
22 given additional time -- they said 15 days wasn't enough. I
23 gave them 60 more days. The case had been continued for two
24 years at the time. I mean, you know, at some point you've
25 got to quit talking about could have and give it to me, you

1 know? And I was prepared to sit down and go through any one,
2 and I was going to deny summary judgment on any one which I
3 thought they had a plausible path to deny summary judgment.

4 MR. CHEFFO: And I think -- so in terms of that,
5 the question you asked, the bridging the gap, I think there
6 is no bridge for this gap. To the extent that there was, you
7 have given the plaintiffs multiple opportunities to do it.
8 And, you know, the time to kind of kick the can down the road
9 with the idea that maybe it's going to be too complicated for
10 the Fourth Circuit, I personally don't think it's going to be
11 that complicated for the Fourth Circuit.

12 THE COURT: My colleagues on the Fourth Circuit can
13 handle this, I have no doubt about it. They might not agree
14 with me, but I have no doubt they can handle it. Thank you.

15 MR. CHEFFO: I agree with that.

16 THE COURT: Okay. Counsel, thank you very much.
17 We are going to -- we are diligently working on orders in
18 this case. I guess there is no secret that I have this
19 other small matter that is starting Monday morning. But we
20 are -- we are going to try to push ahead and get this done as
21 soon as reasonably possible. And we are going to try, at
22 the request of the plaintiffs, to grant these, to issue these
23 orders in such a way that filing appeals will not be -- will
24 not be unduly complicated by scheduling.

25 So any other matters to come before the Court from

1 the plaintiff?

2 MR. HAHN: No, Your Honor.

3 THE COURT: From the defense?

4 MR. CHEFFO: No, Your Honor. Thank you.

5 THE COURT: Thank you very much. I'm going to step
6 down and speak to counsel. Thank you.

7 ***** ***** *****

8
9 I certify that the foregoing is a correct transcript from the
10 record of proceedings in the above-titled matter.

11
12
13
14 -----

15
16 Amy C. Diaz, RPR, CRR November 8, 2016
17 S/ Amy Diaz

18
19
20
21
22
23
24
25