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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-01928-MD-MIDDLEBROOKS

IN RE TRASYLOL PRODUCTS)
LIABILITY LITIGATION,)
)
)
) West Palm Beach, Florida
) September 23, 2011
) 10:00 a.m.

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TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE DONALD M. MIDDLEBROOKS

U.S. DISTRICT JUDGE

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1 (Call to Order of the Court.)

2 THE COURT: Good morning. Please be seated.

3 This is a hearing in the case of the Trasylol Products
4 Liability Litigation, MDL Number 1928.

5 Let's start with appearances for those in the
6 courtroom.

7 MR. OSBORNE: Good morning, Your Honor. Joe Osborne
8 for the plaintiffs.

9 THE COURT: Good morning.

10 MR. MARTIN: Good morning, Judge. Greg Martin from
11 Martin Jones for the plaintiff in the Phipps case.

12 THE COURT: Good morning.

13 MR. MOSKOW: Good morning, Your Honor. Neil Moskow of
14 Ury & Moskow on behalf of the plaintiffs and also co-counsel on
15 the Phipps case.

16 THE COURT: Good morning.

17 MR. DERRINGER: Good morning. Steve Derringer for the
18 defendants.

19 THE COURT: Good morning.

20 MR. SCHOON: Good morning, Your Honor. Gene Schoon on
21 behalf of the defendants.

22 THE COURT: Good morning.

23 MS. LOWRY: Patricia Lowry on behalf of the
24 defendants. Good morning.

25 THE COURT: Good morning.

1 And we have a bunch of people on the phone, I presume.
2 We won't try to get everyone's appearance. But if you want to
3 chime in on something, please let us know your name first so
4 the court reporter can create a record.

5 Looking at your agenda, the first issue is an update
6 on settlements and dismissals.

7 MS. LOWRY: Your Honor, we've made significant
8 progress since we've been in front of you the last time. We
9 have had dismissed or settled almost 700 cases. So we now have
10 fewer than 700 cases remaining in the MDL. And if you'll
11 recall, we started with around 1,800. So we think that that is
12 significant progress.

13 We also want to thank and I think both sides want to
14 express our appreciation to your staff and to the clerk's
15 office for Herculean efforts that they have made to get all of
16 the various motions ruled on and the dismissals affected in all
17 of these cases.

18 THE COURT: Well, good job. We learned that we were
19 complicating life for the clerk's office, and hopefully we've
20 sorted through some of those issues. We were trying to make
21 things easier so that everyone wouldn't have to file all of
22 those motions in every case so we tried to consolidate them
23 into one and then un-consolidate them. And we've since learned
24 that while it might have worked early was making things harder.
25 So hopefully everything is straightened out. Thanks for

1 working with them and us to make that occur.

2 Anything else that we can do in terms of the
3 settlements and discussions or are things working well from the
4 standpoint of both sides?

5 MR. MOSKOW: Your Honor, on behalf of the plaintiffs,
6 I don't believe there's anything more the Court can do. We
7 would echo the defendant's comments with regard to your staff.
8 In fact, what we've been doing is the PSC and the defendants
9 have been working to create lists of open motions that can be
10 granted by the Court, and we've been periodically providing
11 those, and the response has been phenomenal in terms of getting
12 those resolved. So I think as long as that cooperation
13 continues we're on the right trajectory.

14 THE COURT: Okay. Great.

15 Well, before we get to that trial, let me ask you
16 about another -- I don't know if anybody's on the phone for
17 this one. There's a motion for consideration that's been filed
18 in these Moore and Neilsen cases. Is anybody here? I assume
19 Bayer is here for that. How about --

20 MR. LoPALO: Yes, Your Honor. It's Chris LoPalo from
21 Napoli, Bern, Ripka, Shkolnik on the phone on behalf of the
22 plaintiffs. I'm the one who filed that motion for
23 reconsideration.

24 THE COURT: It's not ripe yet, but I was curious --
25 basically the problem, as we saw it, is you filed an affidavit

1 from a paralegal but it doesn't have much specificity, and
2 Bayer came back and with pretty specific documentation as to
3 which cases had been served and which ones haven't. So I'm not
4 quite sure where to go with it.

5 I wanted to raise with you all whether an evidentiary
6 hearing was the right way to deal with this. I would have
7 thought that you would have had some way of identifying with
8 these certified mail receipts which case they went to. Just
9 having an affidavit and a bunch of receipts without some way of
10 sorting through what receipt goes with what filing or which
11 service makes it tough when you're confronted with the
12 defendant's specificity on the other side.

13 What do you suggest we do other than --

14 MR. LoPALO: Your Honor, like I asked in my motion, I
15 believe that we complied with CMOs with respect to service. I
16 don't believe that there was any other additional documentation
17 required besides what we provided to the Court, but I also
18 asked in my papers for leave to refile these claims without
19 prejudice and I'll serve them again with better documentation
20 because I'm afraid that if they are dismissed, the statute of
21 limitations may be considered expired on those two claims.

22 THE COURT: But don't you have anything that ties a
23 certified mail receipt to a particular case? I would have
24 thought you would at least in terms of paying for the postage
25 have a case number or something that ties a certified mail

1 receipt to a particular case.

2 MR. LoPALO: On those two cases, Your Honor, that's
3 all that we have.

4 THE COURT: Because your paralegal basically just
5 says, well, we sent them out, we have certified mail receipts
6 for all of our cases, but there wasn't any effort to try to
7 pinpoint which case went with what document. Bayer, on the
8 other hand, comes up with pretty specific data in terms of how
9 they got things.

10 MR. LoPALO: I understand, Your Honor. But I just
11 provided the Court with all of the documentation I have on
12 those two cases and, unfortunately, I don't have anything
13 further.

14 THE COURT: All right. You all haven't responded yet
15 and I presume you will. Is there anything that you want to say
16 about this?

17 We've got kind of dueling affidavits. The plaintiff's
18 is pretty general. Your alls is specific. And they say, well,
19 you know, we mailed them.

20 How should I sort through this?

21 MR. SCHOON: Well, your Honor, we will be filing a
22 response, and our position is that there's nothing new here
23 that you haven't already considered and so we don't think that
24 it merits reconsideration by the Court.

25 The facts remain that not only can they not tie this

1 mailing to -- this return receipt to these complaints, we were
2 able to tie them to actually other complaints that they did
3 serve. And in addition to that, these complaints under your
4 PTO are to be served on seven different parties or seven
5 different lawyers, law firms, and mine included. We checked
6 every one of those law firms to see if we had ever received
7 copies of those in accordance with the rule, and the answer to
8 that was, no, we never had.

9 So I just don't see the point. I know Your Honor
10 suggested an evidentiary hearing, but the evidence here seems
11 to me to be overwhelming that these complaints were not ever
12 served on Bayer in accordance with the rule or in accordance
13 with PTO 4.

14 THE COURT: Assuming that the evidence is
15 overwhelming, as you say, do you still need some sort of
16 factual finding or determination and can I do that strictly on
17 the papers? I need to look at that question. In your response
18 tell me whether you think an evidentiary --

19 MR. MARTIN: We'll specifically address that. I think
20 our response is due next week, and I'll talk to my colleagues
21 who are preparing that.

22 THE COURT: All right. I'll wait for the response and
23 then try to figure out what to do.

24 Okay. What about Phipps? You all going to trial?

25 MR. DERRINGER: Good morning, Your Honor. It looks

1 like we may be but we want to address a few issues with Your
2 Honor before we get there.

3 The first is that Bayer is requesting a continuance of
4 the November trial date. We don't do this lightly. I think,
5 as Your Honor knows from experience in the MDL with us, this is
6 not something that we do lightly, but there has been a
7 confluence of circumstances that will significantly prejudice
8 our ability --

9 THE COURT: Did you file a motion yet?

10 MR. DERRINGER: We haven't.

11 THE COURT: You haven't.

12 MR. DERRINGER: But we've discussed this with the
13 plaintiffs and my understanding is that their current position
14 is that they would oppose movement, but I'll let them obviously
15 address that.

16 There are three circumstances, Your Honor, that
17 require us to seek this relief. First is that our lead trial
18 lawyer, Mr. Beck, has a case that we thought would settle but
19 hasn't settled and is going to trial starting on October 3rd.
20 That trial is going to take the entire month of October. It's
21 in the Northern District of California up in San Francisco.
22 The parties are far, far apart. Again, we thought it would
23 settle, but it's not going to. And so he will be done with
24 that trial at the very end of October which gives him precious
25 little time to pivot and start preparing for a November 7th

1 trial.

2 Second factor is that our key and actually only fact
3 witness, Dr. Pam Cyrus, is going to be unavailable for a
4 November trial. She is the chief medical officer for Bayer in
5 the United States and she is the lead person at Bayer who's
6 responsible for preparing for and one of the three people who
7 will be presenting at an advisory committee meeting on another
8 product that is scheduled for December 8th.

9 Now, the advisory committee process is an intensive
10 and intense one. As the plaintiffs know from discovery in this
11 case, it takes thousands of person hours to prepare for.
12 Dr. Cyrus is in the middle of that. In November -- the week of
13 November 7th and the week of November 14th she is going to be
14 completely consumed in all day and going into the evening
15 meetings and discussions on that advisory committee meeting.
16 If we go to trial in November, she will not be in a position to
17 adequately prepare for and testify at that trial leaving us
18 without our only fact witness.

19 And the third factor is that we learned this week that
20 our regulatory expert has developed an unexpected health issue.
21 His doctors have discovered a mass. I prefer not to go into
22 detail. I'm happy to do so if Your Honor would like. I spoke
23 with him last night to try to get more details. He told me
24 that this particular mass is rare in men of his age and that
25 most turn out to be malignment. There is a high recovery rate,

1 but the course of further treatment is not going to be known
2 for another two to three weeks. He is going to undergo a
3 surgical procedure to remove the mass on October 5th. It will
4 probably be five to seven days after that until they have
5 definitive knowledge about what the further course of treatment
6 is going to need to be. But I think he's expecting and
7 therefore we are expecting that he will be undergoing treatment
8 for a period of time sometime at the end of October and into
9 November. So it is -- what this means, we think, is that his
10 ability to prepare for and testify at a November trial is
11 highly uncertain.

12 What we're asking for, Your Honor, is that we push the
13 trial back to the beginning of March. Our key fact witness
14 will be available then, our regulatory expert should be
15 available by then. It gives him adequate time to recover. And
16 our lead trial lawyer stands a much better chance of being
17 available then. If we wanted to ask for time until we knew
18 that he would definitively be available with no other trials
19 set on his calendar, we would be asking for July. We're not
20 asking for that. We're asking for March understanding that
21 there is, of course, a risk that he would not be available. As
22 of right now he is and this would be the trial that he would
23 try if we can continue this up until the beginning of March.

24 Two other points that I would like to make. First,
25 we're not proposing that we push back pretrial deadlines. What

1 this will do is give us and the Court much more time in a more
2 measured manner to deal with and resolve issues that under the
3 current schedule we're only going to have about seven days to
4 deal with. Under the schedule in long-standing PTOs the final
5 deposition designations, including everybody's objections and
6 counter-designations, and the final exhibit lists, along with
7 everybody's objections, are due seven days prior to trial.
8 That gives us very little time to whittle the issues down
9 amongst ourselves and then, of course, for the Court and your
10 chambers to deal with what looks to be a mountain of issues.

11 We've received the plaintiff's deposition
12 designations. The total hours right now is in excess of 45, 45
13 hours of deposition designations. Obviously, we're going to be
14 adding to that due to our counter-designations. So we're going
15 to have a mountain of designation issues that are going to need
16 to be resolved. If we keep the pretrial schedules on the same
17 track but start our trial in March, it's going to give the
18 parties and the Court much more time to deal with those issues
19 in a more orderly way that's not frenetic and rushed. And I'm
20 confident that with that extra time the parties should be able
21 to narrow the issues considerably so that we do not have to
22 bother the Court with the volume of material that we would need
23 to be bothering the Court with on the current schedule.

24 We also believe there is no prejudice to plaintiff
25 here. We're talking about a modest push-back of a couple of

1 months. This will still be the first Trasylol case tried in
2 the MDL.

3 Finally, let me just say that up until now, you know,
4 reasonableness, cooperation, accommodation between the parties
5 has been defining characteristics of this MDL. In fact, 43
6 times the plaintiffs have asked us to agree to their requests
7 to push cases back by an entire group, from the group in which
8 they currently were filed to a later group, and 43 times we've
9 agreed to do that. We've not raised any objection. We're
10 asking for one continuance in one case for what we believe are
11 compelling reasons. So that's our position and that's our
12 request, Your Honor.

13 THE COURT: Okay. Thank you.

14 MR. MARTIN: Your Honor, Greg Martin again. I just
15 heard about this yesterday for the first time. I think
16 Mr. Derringer did speak with Mr. Moskow late Wednesday.

17 I'm opposing the request for the continuance. We
18 agreed four months ago that we would be ready to go
19 November 7th, and we're ready to go November 7th. It appears
20 to me that the reasons stated for a continuance are at this
21 point at least not compelling. If it turns out -- the most
22 compelling reason that I heard is Dr. Fenichel's health, and
23 I'm sorry to hear about that.

24 I will represent to Mr. Derringer and to the Court
25 that if it turns out on October 5th that there is a problem

1 with a malignancy, if he needs treatment, then I will certainly
2 agree at that point to a continuance. But at this point we
3 don't know. If it turns out his health allows it, then we
4 would like to proceed on November 7th. If it turns out there's
5 a problem, we will agree with Bayer at that time to continue
6 the case.

7 But for right now we have a case -- Mr. Beck is
8 apparently double scheduled for a case that may run into
9 November or the end of October. That case may settle. It may
10 well settle between now and then, and we'll know that by
11 October 5th as well. So I think this is a scheduling conflict
12 that we could resolve, but I think a request for a continuance
13 on that basis today is premature.

14 THE COURT: What about these designations? The last
15 time when we were getting close to a trial it was probably
16 unworkable for us to get through those. There were huge
17 differences between what plaintiff's designated and the
18 defendant's and lots of objections from both sides, and sorting
19 through those seemed Herculean from our standpoint.

20 One of the things that I thought about raising with
21 you all today, anyway, was whether or not we ought to just do
22 it through a hearing, just go through deposition by deposition,
23 rather than -- I can read faster than we can talk, but on the
24 other hand we need to figure out a pattern for that. We need
25 to really -- there were way too many hours before from both

1 sides in these depositions. So how are we going to get that
2 done?

3 MR. MARTIN: We tried to be leaner in these
4 designations. There still is some fat. What I would suggest
5 is that both parties agree upon some time limit that is
6 acceptable as a maximum cap for the hours designated. If Bayer
7 will say, you know, we want to see no more than 15 hours or no
8 more than 20 hours, then we will cut ours down to that as long
9 as what we get from Bayer is a similar size. If we do that, it
10 should be manageable.

11 I would -- I believe that a lot of the objections can
12 be worked out between the parties. For those that cannot if we
13 can schedule one day, one hearing between now and the trial
14 date and get those resolved before trial, I think it would make
15 things go a lot smoother. But I'm only going to have somewhere
16 around 10 or 11 witnesses, I believe that's correct, that will
17 testify by means of a deposition. I think we can work that
18 out.

19 THE COURT: How many hours of testimony do you have
20 now, do you estimate, that you've designated?

21 MR. MARTIN: Well, they say 45. And I -- you know,
22 I'm not sure that's -- I think it was less than that, but I can
23 give you -- I'll take their word for it. 45.

24 THE COURT: How long is your case?

25 MR. MARTIN: How long is my case?

1 THE COURT: Yes.

2 MR. MARTIN: We've agreed to no more than 30 hours per
3 side.

4 THE COURT: Well, there's a problem there, isn't
5 there?

6 MR. MARTIN: Well, and the problem is I think on both
7 sides that there is some over-designation. But as I said, tell
8 me how many hours is reasonable and I'll designate that number
9 of hours.

10 THE COURT: Is there any particular magic about
11 November from your standpoint? I can see why you want to go to
12 trial.

13 MR. MARTIN: There's no magic about the November 7th
14 date, Your Honor, other than we've been working towards this a
15 long time. I have six or seven very busy physicians who have
16 agreed to be here and to clear their schedule for that week.
17 I've cleared my schedule for the next six weeks. We've been
18 working an awful long time to get the case set for trial and
19 ready to go, and we would like to go on schedule.

20 THE COURT: I was curious why something like January
21 might not work better and give us the time to do the
22 designations.

23 MR. MARTIN: My co-counsel has an HRT trial scheduled
24 to start in January that's a very important case for him and
25 would be unavailable.

1 THE COURT: And so you all think this case -- what's
2 your estimate? Two weeks? Is that what we're going to spend?

3 MR. MARTIN: No more than two weeks. Ideally a little
4 shorter.

5 MR. DERRINGER: Your Honor, with all due respect, you
6 know, we've been down this road many times before in terms of
7 seeing designations from the plaintiffs and every time they
8 tell us they were going to cut down, and we were told that too,
9 we got mainly the same designations as we've gotten before.
10 We're in excess of 45 hours. That doesn't include the ten live
11 witnesses that Mr. Martin has designated on his witness list.

12 In terms of Bayer's designations, I can represent to
13 you that the length of our designations is driven entirely by
14 needing to counter-designate the overbreadth of what we believe
15 the plaintiffs have done here. We have agreed to 30 hours.
16 Frankly, we're frustrated, we have been in the past, that we're
17 spending the last week and a half and we're going to spend the
18 next week reviewing, objecting to, and counter-designating 45
19 hours of testimony that the plaintiffs put in when I'm already
20 told that the whole case is going to be no more than 30 hours.
21 So I would like to see some evidence at some point in this MDL
22 that we're going to get down to something that approaches a
23 reasonable number of designations.

24 I do think that the extra time is going to give us the
25 opportunity to really narrow the issues. I think that the

1 schedule that we currently have is such that, you know, we're
2 going to be dealing with this in a very frenetic way. So I do
3 think that that is an issue.

4 We've agreed to 30 hours. We've also agreed, as we
5 have before in prior cases, in addition to that 30 hours to at
6 least -- I believe we've agreed to this, Neal. If not, let me
7 know. 90 minute openings, 120 minute closings. We expect to
8 be able to reach a lot of agreement, I hope, based on our prior
9 experience with Mr. Moskow in this MDL. But we frankly have
10 been hoping we got the designations the first time around in
11 this case that we would see something a lot different than we
12 did see. And I'm looking forward to seeing something a lot
13 different as soon as possible.

14 In terms of waiting and seeing, you know, this is not
15 just an issue with our regulatory expert, although that is very
16 important. But waiting and seeing is not going to change
17 anything about the availability of Dr. Cyrus who is our only
18 fact witness. We've been working very hard to get this case
19 ready for trial as well. We would like the opportunity to try
20 it without both hands tied behind our back. So that's why
21 we've requested the continuation.

22 In terms of January, I understand that Mr. Moskow is
23 unavailable then. He and I had talked about a February or
24 March kind of time frame. And I think anytime -- you know, we
25 can start anytime between the middle of February and beginning

1 of March, because I know Mr. Moskow also has an April trial, I
2 believe, such that if we start the middle of February, it
3 should give Mr. Moskow sufficient time to finish that January
4 trial and prepare for this one. And then on the back end if we
5 begin by the beginning of March, again we should be able to be
6 done in sufficient time to give Mr. Moskow time to prepare for
7 the April trial.

8 MR. MOSKOW: Your Honor, just to respond to that. I
9 appreciate the courtesy by both my co-counsel and my opponents
10 on that issue. I'm scheduled before two different judges in
11 the District of Connecticut for hormone replacement therapy
12 trials; one beginning January 12 and I believe the other one is
13 April 9th. These are cases that date back I believe to 2003,
14 Your Honor. They were filed in November of 2003. They were in
15 the MDL in Little Rock, Arkansas, for quite some time. My
16 clients need to go forward with those dates. So I can't --
17 those are immovable dates at this point in time.

18 THE COURT: What about somewhere around the 1st of
19 December? Can you all do it then? March seems too lengthy to
20 me. I think we may need a little more time for these
21 designations, and I'm trying to work with this. You'll know
22 whether your expert is okay or whether you have to go to a
23 backup. The other two problems will probably take care of
24 themselves in early December.

25 MR. DERRINGER: Well, December is problematic because

1 Dr. Cyrus -- the AdCom is, I think, December 8th and so she's
2 not going to be available until then. And I don't know when we
3 would start in December, how long we would go. Obviously, this
4 is within your control. But given what we have seen so far in
5 terms of exhibit lists and designations, I'm sceptical about
6 finishing in two weeks, frankly, and --

7 THE COURT: You're talking about the trial?

8 MR. DERRINGER: The trial. That's correct. That's
9 correct. And so --

10 THE COURT: Well, if you're limiting yourselves to 30
11 hours each, it seems certainly possible. When you get to
12 there, you stop if that's the agreement.

13 MR. DERRINGER: That's certainly right. I think when
14 we had been calculating in our heads the last time we went down
15 this path with Mr. Moskow and some other members of the PSC, in
16 pretrial stipulations the time frame that we had submitted to
17 the Court was between two and a half and three weeks, I think,
18 when you take into account all of the down time that might
19 occur during the trial, not just taking the testimony, and then
20 openings and closings as well.

21 So again, I don't think March is that far off. Again,
22 we would be able, we think, to proceed in February. I think
23 it's a reasonable time frame. And, again, it would give the
24 parties time to narrow the issues so that we don't have to deal
25 with things and try to figure out how we're going to --

1 THE COURT: This Dr. Cyrus, what does she -- does she
2 need to be just a witness in your case? I assume she can do
3 more than one thing. I know that this other venture is going
4 to be time-consuming, but what does she need to do between now
5 and trial in this case?

6 MR. DERRINGER: Well, we need to prepare her for trial
7 obviously.

8 THE COURT: Right.

9 MR. DERRINGER: One of the factors that we've got
10 going on here is due to frankly the success of almost all of
11 the parties, except for this case here, in resolving cases the
12 result of that has been that there's been a large period of
13 time that has elapsed between the time that the material events
14 in this litigation are going on, including not just the
15 underlying factual events but all of the discovery and, you
16 know, Dr. Cyrus' depositions were taken in 2009. I think the
17 last of her three days of depositions was in September of 2009.
18 So two years ago. And she hasn't, frankly, given much thought
19 to this in the interim because, as I said, we've been
20 successful in resolving the cases.

21 So I don't want to underestimate the effort and the
22 time it's going to for her to get her head back involved in a
23 very large piece of litigation with a lot of evidence. And
24 again, she is the one fact witness that we're going to be
25 calling. We submitted our exhibit list -- our witness list to

1 the plaintiffs yesterday according to the schedule. She is the
2 only fact witness that we're calling. And we're very concerned
3 that we're just not going to have sufficient time to help her
4 prepare and for her to prepare herself to give testimony in
5 this matter.

6 THE COURT: What is taking up her time?

7 MR. DERRINGER: She is the principal person at Bayer
8 responsible for organizing and presenting to an advisory
9 committee at the FDA on December 8th. It's a very large
10 undertaking. As I might of mentioned, thousands of
11 person-hours involved. She's the person leading this effort,
12 and literally her days and nights are consumed with it. We're
13 not going to be able to have time to redirect her to Trasylol
14 anytime, frankly, before the AdCom is finished on December 8th.

15 THE COURT: Well, I'm unenthusiastic about continuing
16 until March. I'm not sure November 7th is workable.

17 MR. MARTIN: Your Honor, if I -- Greg Martin. If I
18 may be heard on that briefly.

19 As I said, I will be happy to shorten our designations
20 to whatever length Mr. Derringer believes is workable. If
21 that's 20 hours, that's fine. 15 hours is fine. I can make
22 those cuts as long as Bayer agrees they'll do something
23 similar. If they do, then it's a fairly simple matter to go
24 through that number of pages of testimony and decide what's
25 coming in and what isn't. I think a one-day hearing could get

1 that done and could get it done on time. We're ready to go,
2 and I would like to proceed on the 7th. I haven't heard a
3 reason in terms of Dr. Cyrus' availability that seems a
4 compelling reason in order to be postponed.

5 THE COURT: Well, clearly Cyrus has a problem. The
6 expert has a real problem if he's having this surgery
7 October 5th. Is that the date you had?

8 MR. DERRINGER: That's correct.

9 THE COURT: So those are, you know, major problems.
10 Particularly the expert. They've got to -- and your idea of
11 waiting until then and then trying to adjust the schedule
12 doesn't appeal to me because then we're all up in the air.
13 We're trying to move -- keep criminal cases out in any event.

14 When's the earliest date you're available then if
15 you're not available in January?

16 MR. MOSKOW: Well, Your Honor, I could be available in
17 December as the Court indicated. I could be -- my trial starts
18 January 12th. We're expecting the same two to three weeks. I
19 would say by the second week of -- third week of February I
20 probably would be available. So February 15th forward.

21 THE COURT: I'm prepared to move it back a couple of
22 weeks and do it in December or February 13th is the calendar,
23 the next calendar I have after his trial.

24 MR. DERRINGER: We would be --

25 MR. MARTIN: If we could do it in December, I would

1 withdraw the objection. I would certainly agree to a month's
2 delay. That's not a significant change.

3 MR. DERRINGER: It's not going to help us out with
4 Dr. Cyrus, Your Honor. We would be fine with moving it back to
5 February 13th.

6 THE COURT: Does February 13th work for you all?

7 MR. MOSKOW: Your Honor, could I impose on the parties
8 and the Court for February 20th if that's what you're
9 considering?

10 THE COURT: Well, you need to talk to your co-counsel
11 is the problem. He's anxious to go.

12 MR. MOSKOW: And so am I, Your Honor, which is why
13 we're kind of in a pickle here. The same issue that Mr. Beck
14 apparently has in pivoting from one significant trial to
15 another, you know, I don't want to put myself in the same
16 position.

17 MR. MARTIN: What about December 12th? If we can do
18 it in two weeks and really keep to that deadline, that would
19 take you past Dr. Cyrus' appearance at the AdCom committee.
20 Could we start that week?

21 THE COURT: But you're finishing at Christmas and the
22 jury is going to be a problem then. Two weeks takes us right
23 through the Christmas holidays.

24 MR. DERRINGER: We would also need to check with,
25 obviously, our experts.

1 THE COURT: I think you would almost -- if you're
2 going to do it in December, you have to start around
3 December 1st.

4 MR. MARTIN: That's fine with us. If she has a
5 conflict, they have a lot of other -- I mean, she was head of
6 medical affairs, but there are a whole lot of other people in
7 similar roles who could come if she is unavailable.

8 MR. DERRINGER: Your Honor, that's not at all correct
9 as any reading of the testimony will show. Dr. Cyrus is
10 uniquely positioned here. She has always been the sole fact
11 witness that we've intended to call. It's been on all of our
12 witness lists. There's no replacement for Dr. Cyrus.

13 THE COURT: Do we have -- if we did it February 20th,
14 what problems do we have?

15 THE LAW CLERK: The one problem I foresee is if the
16 jury panel has a two-week assignment and we start in the middle
17 of it, that they're going to cross over to have a longer
18 period. So we could check with the jury office and find out.
19 I don't know that they coincide with our two-week dockets.

20 THE COURT: Will you see if you can call them right
21 now and see?

22 THE LAW CLERK: Sure.

23 THE COURT: I'm a little worried about juries. What
24 Sylvia was pointing out is if February 20th is the second week
25 of their -- we call juries for two-week periods. And if they

1 come, you know, it just is tougher, as you might guess, to get
2 those jurors to stay for what they see as an extra week. Even
3 if they haven't done anything the first week it's just they're
4 already psychologically disposed towards that.

5 MR. MOSKOW: Your Honor, while Sylvia is checking on
6 that, a couple of general trial management issues that we dealt
7 with prior to the Bryant, Bechara, and Morrill cases, and I
8 just wanted to inquire whether the Court was comfortable that
9 the orders and agreements that were entered in those earlier
10 cases can still --

11 THE COURT: Which ones?

12 MR. MOSKOW: In terms of --

13 THE COURT: Anything you all agreed to I generally
14 follow, although I do want to keep the trial at a two-week
15 period --

16 MR. MOSKOW: And we understand that, Your Honor.

17 THE COURT: -- no longer than two and a half.

18 MR. MOSKOW: You had actually come up with an idea
19 that was kind of novel to me at least at that point which were
20 these three-minute openings.

21 THE COURT: Yes, I'm still interested in doing that if
22 that works with you all.

23 MR. MOSKOW: Okay.

24 THE COURT: I haven't tried it yet either. Jim
25 Holderman from Illinois thinks that it really helps a jury in a

1 more complicated case.

2 MR. MOSKOW: I think it will allow us to be more lean
3 with our deposition cuts as well because we can use those
4 transitions to move from one to another.

5 The other issue I really wanted to address today, Your
6 Honor, was the issue of compelling live witnesses. Bayer has
7 made it clear that their only fact witness will be Dr. Cyrus.
8 It would be our intention to move to subpoena several other
9 Bayer employees to be present. Sitting as the MDL judge you
10 have the power to compel. If we're unable to work that out,
11 can we schedule a hearing by telephone or otherwise to address
12 those issues with you?

13 THE COURT: Sure. Yes, I'm happy to address them. I
14 would prefer, as will the jury, a live witness to a deposition.
15 On the other hand, the rules are the rules and we need to deal
16 with them. The other problem is I don't want to have both. We
17 don't want to have a live witness plus you all play all these
18 deposition designations. So it needs to be one or the other.

19 MR. MOSKOW: Thank you, Your Honor.

20 THE COURT: They're trying to figure that out in the
21 jury section now. What else do you want to -- what else is of
22 concern in this case?

23 MR. MOSKOW: I think, as Mr. Derringer pointed out, we
24 had reached a number of agreements early on and this trial team
25 is prepared to live with those agreements. I think we've

1 resolved -- I had actually ten items to go over with Your
2 Honor, and I think we resolved all of the others. So I think
3 that's good news for all of us that we continue to cooperate in
4 that regard.

5 THE COURT: Are you still talking about resolving it
6 or is that just not going to happen?

7 MR. MARTIN: Your Honor, if I may, we mediated two
8 weeks ago and we did make some progress in that mediation, but
9 we are still a ways apart. We have agreed to continue talking.
10 So I would say there's a possibility. It's going to take a lot
11 more flexibility I think on both sides, but it's within the
12 realm of possibility.

13 THE COURT: Are you going to mediate further? Are you
14 going to do it between the parties?

15 MR. MARTIN: The mediator has remained involved and is
16 willing to do it by telephone, and it may be that at some point
17 another session would be helpful. We will play that by ear.

18 THE COURT: Who are you using?

19 MR. MARTIN: Jonathan Marks.

20 THE COURT: He's not that real expensive one?

21 MR. MARTIN: He's quite expensive.

22 MR. MOSKOW: Your Honor, when we got the bill, it was
23 more than the last time. But he worked with us. And as
24 Mr. Martin said, he continues to be involved. The parties are
25 quite a ways apart, Your Honor, and I think it makes sense for

1 us to be planning for trial at this point.

2 THE COURT: And we still have, what, the Daubert
3 motion on your expert? Is that what we have?

4 MR. MARTIN: That's correct. The reply is not yet
5 due, Your Honor.

6 MR. DERRINGER: I think the reply is due on the 3rd
7 and then it will be obviously Your Honor's discretion to --
8 whether you want a hearing after that.

9 THE COURT: What are you going do if your regulatory
10 person can't do it? Do you have a backup?

11 MR. DERRINGER: No, we don't.

12 THE COURT: So how are you going to solve that
13 problem?

14 MR. DERRINGER: If our regulatory expert --

15 THE COURT: Isn't that the fellow that's going to have
16 the operation?

17 MR. DERRINGER: That's right. If we go forward on a
18 trial date in November when he's unavailable, we will have to
19 figure out what we'll do. We're going to find out after that,
20 obviously, what his course of treatment is. I'm confident that
21 even if we have the continuance, he will be able to testify.

22 THE COURT: Well, he's having the surgery October 5th?

23 MR. DERRINGER: Correct.

24 THE COURT: And you think it --

25 MR. DERRINGER: We'll update the plaintiffs and the

1 Court as soon as we have information about what his prognosis
2 is.

3 MR. MARTIN: Your Honor, as I said, if he's
4 unavailable, then we will withdraw our objection to the motion.

5 THE COURT: Well, we know he will be unavailable at
6 least through November, don't we? I mean, if you have surgery
7 on October 5th --

8 MR. MARTIN: Your Honor, I'm not clear whether it's a
9 colonoscopy or a skin biopsy or exactly what the nature of the
10 procedure is, and that's a matter of confidentiality I suppose,
11 but it seems to me that in a best case analysis he may -- and
12 let's keep our fingers crossed, he may come clean on the biopsy
13 and be able to make it in November.

14 MR. DERRINGER: Can I go back for a moment to your
15 earlier question about whether this is going to trial or
16 settlement efforts?

17 As I think I mentioned, we've been able to settle
18 cases with every plaintiff's attorney with whom we have meet
19 except for Mr. Martin in this case. As he said, we met twice
20 with him. First time was direct discussion between the parties
21 without a mediator, and the second time was with a mediator,
22 Professors Marks as Mr. Moskow said. And, frankly, at our
23 disappoint, Your honor, although we met face to face on two
24 occasions, we don't feel we've yet had any real negotiations
25 between the parties. The numbers are far apart, but there's

1 been no real engagement, we feel, in terms of any kind of back
2 and forth meaningful real discussion. And we feel that that's
3 because there's been no real meaningful movement on the
4 plaintiffs part other than movement in the wrong direction,
5 quite frankly.

6 We would like the opportunity to engage in
7 negotiations. We have real authority. We've told the
8 plaintiffs that. And we're prepared to resolve Mr. Martin's
9 cases if they can be resolved. Because of the way the
10 discussions have unfolded we don't believe that either party at
11 this point has a real sense of how each other values these
12 cases, and we would like to have an opportunity to find that
13 out.

14 It may well be that we can't resolve the cases, but we
15 honestly don't believe that we've been given the opportunity at
16 this point yet to find that out. And in the past, you know,
17 you've asked if there's anything that the Court could do to
18 help. I think that perhaps getting another mediator involved
19 would be potentially helpful.

20 So that's where we stand right now. We would like the
21 opportunity, like I said, to have some meaningful negotiations
22 and discussions before we end up trying the case.

23 THE COURT: Well, in the past I offered two -- well,
24 there are two possibilities. As long as you all are happy with
25 your mediators and the route you're going I left that to you.

1 I've suggested -- there's a magistrate down in Miami who enjoys
2 trying to resolve cases. Pete Palermo is one alternative. And
3 I've also suggested to you David Katz who is in Toledo. A
4 district judge from Toledo had expressed his willingness. He
5 likes to try to mediate and solve cases as well. So if either
6 of those suggestions appeal to you. I probably have clear
7 authority to just order you to go to Palermo. Going to a judge
8 in Toledo is a little more complicated. You all have to
9 probably agree to that.

10 THE LAW CLERK: The jury panel coincides with the
11 dates I gave you. So they would be in the middle a jury.

12 THE COURT: Yes, that date -- the 20th would be in the
13 middle of the jury. So the jury would be February 13th.
14 When's the next one then?

15 THE LAW CLERK: The 27th.

16 THE COURT: Or February 27th if we were doing it in
17 February are probably the better dates.

18 MR. DERRINGER: We're fine with either date, Your
19 Honor.

20 THE COURT: I don't see how I can stick with November
21 given this expert. I'm trying to give you as early a trial
22 date as week.

23 MR. MARTIN: In that case the earlier date in
24 February.

25 THE COURT: And you're okay with that?

1 MR. MOSKOW: Yes, Your Honor, we will work it out.

2 THE COURT: Okay, which is February 13th. I will
3 continue the case until February 13th.

4 And I do want to -- if you all can reach agreement on
5 these designations. I don't want to do what we had last time.
6 That was too unwieldy. I don't think we would have done a very
7 good job on it. We had started trying to go through them, and
8 I wasn't happy with our work product.

9 MR. MARTIN: Let's discuss it.

10 MR. DERRINGER: Sure. If we can just get a little bit
11 of guidance here because literally our team is in the middle of
12 reviewing the designations that have come in, responding to
13 them, doing our counter-designations, et cetera.

14 THE COURT: Why don't you all talk. I think your 30
15 hours a side agreement is a good one, but your designations are
16 all out of whack with that. You just can't possibly hope to
17 accomplish --

18 MR. DERRINGER: We would just rather not spend the
19 time on designations --

20 THE COURT: Why don't you all try to get together and
21 do it --

22 MR. DERRINGER: We're happy to do that.

23 THE COURT: -- and otherwise suggest to me a solution.
24 I'm prepared to sit with you and we'll go through the
25 designation objections, argument. That doesn't appeal to me,

1 but that's better than you all giving me as much as you gave me
2 last time and us trying to go through it in a vacuum because I
3 have to have more of an overall sense of the case to do that.
4 Just reading a line and these objections didn't work.

5 MR. SCHOON: Your Honor, there is one issue that I
6 think we can probably clear up right now and you sort of
7 alluded to it a little earlier. A number of their designations
8 are designations of two witnesses in particular, witnesses who
9 they are going to be calling live. One is Dr. Welsher who is
10 their retained expert and also the surgeon in this case.
11 They've designated from his deposition. There's also going to
12 have him here live. He's on their will call list. We don't
13 want to go through the exercise of counter-designating and
14 objecting if, as Your Honor said, we really shouldn't have
15 both. They're either live or they're by deposition. And
16 Dr. Fenichel is another one who we obviously will also be
17 calling live here.

18 MR. MARTIN: Your Honor, this is a very significant
19 issue to me. Dr. Wayne Welsher is the treating surgeon in this
20 case. His fact testimony is important to establish that he
21 would not have used the drug had he known about the risk of
22 renal failure. He did that in his deposition in response to
23 Bayer's attorneys questions. He's also agreed to serve as a
24 retained expert, a rebuttal expert to come in at the end of the
25 case after Bayer's experts have testified to say they're wrong

1 on causation and he believes the drug played a substantial role
2 in causing renal failure and the patient's death.

3 He lives in Arkansas. It would be extremely
4 inconvenient and expensive to have him come in twice. What we
5 have in mind is playing no more than an hour of his deposition
6 testimony, which wouldn't take much time to respond to in terms
7 of counter-designations, and then calling him live at the end
8 of the case to testify to his opinion on causation. It's two
9 separate issues, and it really would be unwieldy and
10 impractical to have him come down here twice when we already
11 have that testimony on videotape.

12 THE COURT: By "end of case" you're talking about
13 rebuttal?

14 MR. MARTIN: Yes.

15 THE COURT: On causation?

16 MR. MARTIN: He is a rebuttal expert witness to
17 Bayer's expert opinions on causation. So he would testify at
18 the end of the second week of trial. But I need his testimony
19 on proximate cause as part of my case in chief. And we have
20 it, we have it on video.

21 MR. SCHOON: Your Honor, that sounds an awful lot to
22 me like it should be in their case in chief. This goes to an
23 element of their case which is causation. If they're going to
24 establish causation, they should establish causation in their
25 case in chief, not in rebuttal. They have the burden of proof

1 on this issue.

2 MR. MARTIN: Your Honor, he's designated as a rebuttal
3 expert.

4 THE COURT: I'm not sure you'll get it in unless he's
5 really talking about what their guy says. A general
6 rebuttal -- general causation testimony, I don't think you can
7 get it in in your rebuttal case.

8 MR. MARTIN: Your Honor, you have ruled that it comes
9 in in response to the Daubert challenge that Bayer filed.

10 THE COURT: Yes, but I didn't think I ruled that it
11 came in as rebuttal testimony, did I?

12 MR. MARTIN: Yes, sir, you did.

13 MR. SCHOON: Well, Your Honor, to be clear, my
14 understanding of your ruling, Your Honor, was --

15 THE COURT: I don't remember my ruling.

16 MR. SCHOON: -- he was entitled to have a rebuttal
17 expert, a rebuttal to our experts, but that was in the expert
18 discovery phase. That didn't have anything to do with the
19 order of witnesses at trial and whether or not this witness
20 could be called at any point in trial. We didn't address that.
21 It never crossed our minds that we should be addressing trial
22 testimony at that phase when we're addressing Daubert and
23 whether the plaintiffs were entitled to a rebuttal witness.

24 MR. MARTIN: Your Honor, the ruling -- we can take a
25 look at it, but a specific part of their challenge was that

1 Dr. Welsher's proffered Rule 26 designation was not proper
2 rebuttal expert testimony. That was an issue that was briefed
3 and argued and an issue in which you ruled in our favor that he
4 will be allowed to come in and testify as a rebuttal expert
5 after Bayer's experts have testified.

6 THE COURT: Well, I need to look at it. I don't
7 remember this debate at all. My preference would be if he's
8 going to testify, you have him testify to the causation in the
9 case in chief and whatever -- and not use his deposition. But
10 I'm not sure. I need to read what we said before and try to
11 sort through it.

12 MR. SCHOON: And, Your Honor, in that regard we also
13 rely on Rule 32(a) which sets the conditions for when a
14 deposition can be used. Our position is as a retained expert
15 Dr. Welsher is within their control and so is not unavailable
16 for purposes of trial. I thought it would be easier just so
17 say you either get him live or get him by deposition, but not
18 both.

19 MR. MARTIN: We can brief that issue if it becomes an
20 issue. He is a combination fact witness and expert and he's
21 specifically designated as a rebuttal expert.

22 THE COURT: But isn't he available to you then? How
23 do you use him in deposition in the initial part of the case?

24 MR. MARTIN: We use him as a fact witness under 32(a)
25 because he is in Arkansas and we use him as a rebuttal expert

1 at the end of the case bring him in live for that purpose.

2 THE COURT: He seems pretty available to you if he can
3 come from Arkansas a week later.

4 MR. MARTIN: It is a matter of expense and
5 convenience. It would be an inconvenience to him to have to
6 come --

7 THE COURT: All right. I need to look and see what we
8 ruled before. I'm going to have a problem with that on all of
9 these issues. I have a worse problem than your expert or your
10 fact witness in trying to remember what has gone on before.
11 You all have been so successful in resolving cases. It has
12 been a long time since I've looked at some of these things.

13 MR. SCHOON: Thank you, Your Honor.

14 MR. DERRINGER: On that issue, just to follow up on
15 what you had suggested before, we would be happy to give
16 mediation another go with Magistrate Judge Palermo or in the
17 past, if I recall correctly, you've offered Magistrate Judge
18 Johnson here as well as an option. We would be happy to --

19 THE COURT: I'll talk to her. She's leaving. She's
20 retiring soon. So, you know --

21 MR. DERRINGER: I'm hopeful that --

22 THE COURT: You all talk and see if you want to agree
23 to Katz. If you don't, I'm going to then require you to go to
24 Palermo or Johnson. When do you want to do it?

25 MR. DERRINGER: We would be available I think very --

1 in the near term so that we can see if we can get this resolved
2 before we all do a lot of work.

3 THE COURT: What do you all want to do?

4 MR. MARTIN: I kind like of like Professor Marks, Your
5 Honor. My preference would be to give him some time to
6 continue the process by telephone to see if we can make some
7 progress that way and then if that impasses and we're not, then
8 I am, you know, happy to agree to whichever mediator Bayer
9 would like to use. It's not a big issue to me.

10 THE COURT: How long do you want to have to work with
11 Marks?

12 MR. MARTIN: Well, if the case is being continued,
13 then I would say 30 days.

14 THE COURT: Weren't we leaving these other deadlines
15 the same though?

16 MR. MARTIN: I would certainly hope so, Your Honor,
17 because we have already designated.

18 THE COURT: So why do you need 30 days with Marks?

19 MR. MARTIN: For the back and forth negotiations to
20 see if we can make some progress.

21 THE COURT: Two weeks can't do it?

22 MR. MARTIN: Your Honor, whatever you think is
23 reasonable we will agree to.

24 THE COURT: My problem is after you do that I'm going
25 to try to send you to either a magistrate here or Katz if you

1 all decide by agreement to go that route. So this may be two
2 stages if you can't. So tell me how much time you want with
3 Marks.

4 MR. MARTIN: I would say three weeks.

5 THE COURT: All right. Three weeks. You all let me
6 know if you've been successful and also let me know whether you
7 want to go with -- well, I need to talk to Katz if you're going
8 to go that route. That probably is not workable. I'll send
9 you to a magistrate here, either Palermo or Johnson.

10 MR. MARTIN: That's fine, Your Honor.

11 THE COURT: Okay. Anything else that we can
12 accomplish today?

13 MR. MARTIN: I can't think of anything, Judge.

14 THE COURT: All right. Thanks. I hope your witness
15 is okay.

16 MR. DERRINGER: Thank you, Your Honor. I'll convey
17 that to him.

18 THE COURT: You all communicate as soon as you can as
19 to that because if you're going to have some kind of backup
20 witness, we're going to be under the gun on that.

21 MR. DERRINGER: We understand.

22 THE COURT: Your Daubert thing, are we close to -- how
23 far apart are you on their witness? I haven't looked at any of
24 the papers on that. Is this a significant issue or not?

25 MR. DERRINGER: Yes.

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MR. MOSKOW: It depends who you ask, your Honor.

THE COURT: As to its entirety or the parts of it?

MR. DERRINGER: We've moved to exclude her in her entirety and we've also addressed specific parts of her testimony.

MR. MOSKOW: Your Honor, we filed our brief on Monday. We believe that this is trying to fit a square peg into a round hole by the defendants. I think when you read the briefs, you will see that.

THE COURT: All right. Have a good day.

(Proceedings concluded at 10:52 a.m.)

C E R T I F I C A T E

I, Karl Shires, Registered Professional Reporter and Federal Certified Realtime Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 15th day of October, 2011.



Karl Shires, RPR FCRR