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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

)	
IN RE: FRESENIUS)	
GRANUFLO/NATURALYTE DIALYSATE)	No. 1:13-md-02428-DPW
PRODUCTS LIABILITY LITIGATION)	
-----)	
)	
FLORELLA DIAL, Personal)	
Representative of The)	
Estate of Carley Dial,)	
Plaintiff,)	
)	
vs.)	No. 1:14-cv-11101-DPW
)	
)	
FRESENIUS MEDICAL CARE)	
HOLDINGS, INC., et al,)	
)	
Defendants.)	

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

DAY TWO OF FINAL PRETRIAL CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Tuesday, February 9, 2016
10:08 a.m.

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617) 439-3214

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P R O C E E D I N G S

THE CLERK: This is Civil Action 14-11101, Dial v. Fresenius Medical Care Holdings, Inc., et al. Court is in session. You may be seated.

THE COURT: I hope to get some things done today, but I had focused on the jury questionnaire as being the first thing that I wanted to take up. And I gather there's still discussion going on with respect to it. Is that --

MR. KETTERER: I think that's right, your Honor.

10:09 THE COURT: Okay. You know, time is of the essence, and it's fairly important that we get to this if it's going to be used, and I think one should be used. It could be of value to the parties. I think it imports fairness to the jurors as well in connection with this case. And so when do the parties think they're going to be prepared to talk about this?

MR. BENNETT: I'm prepared.

MR. KETTERER: We can discuss it certainly now, your Honor. In terms of have we reached some sort of -- I don't know if there's been a final -- I haven't seen the final, final version, but, I mean, I've seen other versions, other iterations, so I'm happy to discuss it.

MR. BENNETT: The status is that the parties, through a give-and-take process, submitted an agreed one to the Court. The Court told us a lot of it needed to be taken out, which we're fine with. Then we're supposed to supply you a list of

1 witnesses by Thursday, is I believe the state of play.

2 THE COURT: Right. I have Mr. McAlear coming up to
3 just explain the process from his perspective. Then there's
4 this issue, which is, we've got a holiday weekend coming up.
5 They have logistical problems of making sure they have enough
6 copies and that sort of thing, and you have an idea of what's
7 going to transpire here; we all have an idea of what's going to
8 transpire. So maybe we will deal with the jury questionnaire
9 in a moment.

10:11 10 But the other set of issues is I want to be sure that
11 the clerk notes accurately reflect what transpired at the
12 hearing before. We've been back and forth, Mr. Hohler and Ms.
13 Gioia and I. As I understand it, the transcript is not yet
14 available for this. It may be that it makes sense to await
15 that transcript before we do it. I just -- what I'm concerned
16 about is a set of clerk notes that are the equivalent of a
17 transcript on the one hand or that say, on the other hand, "a
18 hearing was held and motions were addressed." So that's what
19 I'm trying to deal with.

10:11 20 I guess, maybe, if the parties are comfortable enough
21 without having clerk notes right now, then we'll just put that
22 part over, and Mr. Hohler can cross-check.

23 MR. TARRICONE: I think we have a clear understanding
24 from the last time we were here.

25 THE COURT: Then I had asked Mr. Hohler, because I was

1 not altogether clear on what the parties were pressing by way
2 of the remaining motions in limine the -- and received a list
3 including some motions that I don't think opposition has been
4 filed on. I guess we can use this time -- I'm not sure I'm
5 fully prepared to deal with those motions, as fully prepared as
6 I want to be. But Mr. McAlear is going to be up at 10:30, so
7 we'll start there and see where we go with it so I've got at
8 least an idea of what the arguments are. It may be that -- I
9 think it is that we'll have to come back this afternoon, and
10:13 10 then I'll be in a better position to deal with these motions.

11 But I assume that -- as I'm told, that all of them are
12 like the children of Lake Wobegon, all above average, and have
13 to be treated in that fashion, none that are --

14 MR. KETTERER: I think that's right, your Honor, at
15 this point.

16 THE COURT: -- to be compromised?

17 MR. KETTERER: But I think that the argument -- you
18 know, when we had done the motions in limine in Ogburn, the
19 position is the same as it would be in this court, is I think
10:13 20 the arguments can be brief and to the point.

21 THE COURT: Let me jump to the status of Dr. Buchanan.
22 There's some question about that or --

23 MR. BENNETT: There's no issues, your Honor. I spoke
24 to him after the hearing. He'll be here ready to go first
25 thing Friday morning at the opening of court.

1 THE COURT: To the degree that we've got -- if he's
2 going to have to be taken out of order, I'm prepared to do
3 that. I don't know how long the examination is going to be,
4 but I'll accommodate his schedule at least to that degree.

5 MR. TARRICONE: Well, your Honor, we certainly will
6 have him on and off the stand on Friday, that day.

7 THE COURT: Okay. So we'll talk about it. But Friday
8 he's going to be in Boston, and that's when he's going to be in
9 Boston so --

10:14 10 MR. BENNETT: I've asked him to come up early too if
11 Thursday afternoon worked better for the order of proof, and
12 I'll just keep everybody posted on that.

13 THE COURT: Okay. So we've got that. Let's go back
14 down to the various motions. And since they're all equal and
15 because, throughout my life, I've been at the end of the
16 alphabet and consequently never got to go first, I'm going to
17 start with No. 15 rather than No. 1. The Avandia litigation,
18 what's the story on that?

19 MR. BENNETT: I haven't even seen that motion.

10:14 20 THE COURT: Well, we have several motions that were
21 filed under seal. One of the reasons I'm not quite prepared
22 for them is that I didn't see them until today -- or last
23 night, I should say.

24 The plaintiff filed what now has been marked as
25 Exhibit 151, which is to exclude evidence and testimony

1 concerning the drug Avandia and the Avandia litigation. What's
2 up?

3 MR. KETTERER: Your Honor, I'd be happy -- or my
4 colleague, actually, Miss Graziano would be happy to describe
5 the motion if you'd like just so you can get an overview.
6 We're happy to allow the defendant some time to respond, but I
7 think it's a relatively straightforward motion if you'd like to
8 hear about it now.

9 THE COURT: I would. I guess Mr. Bennett would like
10:15 10 to hear about it too.

11 MS. GRAZIANO: Good morning, your Honor. My name is
12 Christina Graziano, and I will be arguing on behalf of the
13 plaintiff today.

14 The essence of our motion, your Honor, and the remedy
15 that we seek involves testimony concerning Mr. Dial's use of
16 the drug Avandia. And this testimony came out during the
17 deposition of --

18 THE COURT: May I just pause there? Are you going to
19 do that?

10:16 20 MR. BENNETT: Pardon me?

21 THE COURT: Are you going to bring out testimony about
22 him using Avandia?

23 MR. BENNETT: I think I can respond and tell you what
24 -- quickly and probably come to resolution on it. Right before
25 he died, Mr. Dial asked our clinic manager to send a bunch of

1 medical records to a lawyer in Texas. Our clinic manager sends
2 an email saying, I don't know what this is about. He doesn't
3 have any complaints. Then in the deposition they're describing
4 -- they said they saw a TV ad about Avandia and pursued a claim
5 about that.

6 And so in the absence of them saying, We never would
7 have pursued litigation. You know, we're here for some -- they
8 do have a track record of seeing ads and doing things like what
9 happened here. If they say stuff --

10:16 10 THE COURT: "They" meaning?

11 MR. BENNETT: The plaintiff's representatives who
12 testified, saw a Avandia commercial, filed suit -- sent it to
13 the lawyers. And then they weren't eligible for it, as I
14 understand it, because of his past cardiac history. If they
15 don't say anything that is to the contrary to the fact that
16 they have thought about suing before and went through those
17 steps, I would not think that that would come in that way.

18 In addition, the Avandia issue is heart attack,
19 myocardial infarction with a diabetes drug. And so we view
10:17 20 that as consistent with their testimony that they gave, which
21 is to say that they were aware he was having heart problems
22 before he died. This was in January. He died in February. I
23 expect them to say things totally consistent with that too. So
24 in the absence of them testifying contrary to what I just said,
25 which I don't think will happen, we will not talk about

1 Avandia.

2 THE COURT: Avandia as the drug, but you will be
3 talking about the representatives' pursuit of remedy wherever
4 they thought it was appropriate?

5 MR. BENNETT: If that becomes an issue in the case.

6 THE COURT: How would it not?

7 MR. BENNETT: I don't -- I think that it's inevitable
8 that they might say things that would make that an issue in the
9 case.

10:18 10 THE COURT: So Miss Graziano?

11 MS. GRAZIANO: I mean, we certainly do not plan to
12 introduce any evidence or any testimony from any of our
13 witnesses about Mr. Dial's use of Avandia as there's no causal
14 connection between the use of that drug and the injuries
15 complained of in this case.

16 THE COURT: What about the issue of Avandia being a
17 drug for cardiovascular problems, suggesting that inquiry about
18 it represents knowledge with respect to cardiovascular problems
19 for Mr. Dial?

10:18 20 MS. GRAZIANO: It's my understanding, your Honor, from
21 the testimony of Mr. Dial's wife that the symptom he was
22 complaining of that led him to inquire as to his eligibility
23 into the Avandia litigation was concerning his eyesight.

24 And it's noteworthy, your Honor, that when a family
25 member of Mr. Dial's inquired as to his eligibility to

1 participate in the Avandia litigation, he was found to be not
2 fit as a plaintiff, meaning he didn't meet the scientific
3 criteria to be a plaintiff. Furthermore, your Honor, Avandia
4 is actually a diabetes drug. So we would posit that it's in no
5 way connected to his injuries complained of in this case, and,
6 furthermore --

7 THE COURT: You heard what Mr. Bennett says. I think
8 Mr. Ketterer may have had an observation that he wanted you to
9 look at.

10:19 10 MS. GRAZIANO: I did, your Honor. It was the
11 diabetes.

12 THE COURT: The -- as I understand it, they are
13 saying, that is, the defendants are saying, we're not going to
14 -- unless prodded, we're not going to talk about Avandia as
15 Avandia, but they are apparently going to talk -- I think
16 they're going to talk about related matters that I might put in
17 the context of litigiousness and complexity of medical
18 condition. Now, does your motion extend to that?

19 MS. GRAZIANO: It does, your Honor. That's kind of
10:20 20 our second concern. We feel that any attempt by the defendant
21 to paint Mr. Dial and his family as litigious is at best
22 peripheral and at worst prejudicial and misleading to the jury.
23 It's as your Honor has put it repeatedly: a sideshow that
24 detracts from the issues that are the essence of this case.

25 THE COURT: Well, I don't know enough about it. Of

1 course, I don't have the response to it. I guess I have to
2 have fleshed out -- would expect to have fleshed out by the
3 defendants exactly how you're going to -- I've got a 6:00 news
4 headline of it, but I think I'd like a magazine article that
5 tells me more fully what it is that you plan on doing with
6 this.

7 I have this response if it's helpful, which is to say,
8 I don't see this coming in in opening statement in any fashion
9 here, so there's a little bit of time to deal with it.

10:21 10 MS. GRAZIANO: I might add, if it's beneficial to your
11 Honor, that none of the defendant or plaintiff's experts have
12 incorporated Mr. Dial's use of Avandia into their reports. So
13 this would be a new proffer.

14 THE COURT: Neither the plaintiff's or the
15 defendants'?

16 MS. GRAZIANO: That's correct.

17 THE COURT: Either one of them?

18 MS. GRAZIANO: No party has made reference to his use
19 of Avandia in their reports.

10:21 20 THE COURT: Okay. When are you going to have a
21 response to it? It's not a turnaround right away. Now I'm in
22 triage mode. I suspect you are too.

23 MR. BENNETT: Exactly. I agree, of course, we would
24 never mention it until we get clarity from the Court. So I
25 haven't read it. Nobody on our side has actually received this

1 yet. Assuming we get it this afternoon and look at it, and
2 would close of business on Friday be --

3 THE COURT: I'm not rushing on it, but, obviously, the
4 motion's made. It has to be dealt with.

5 MS. GRAZIANO: Thank you, your Honor.

6 THE COURT: So then No. 14 is to exclude unsupported
7 characterizations of prior treatments. You want to talk about
8 that?

9 MR. BENNETT: Yes, your Honor. That's a plaintiff's
10:22 10 motion seeking to -- I'm not exactly sure of the scope of the
11 relief that's requested, but I can tell you why the defendants
12 believe that the prior treatments are admissible. This is a
13 patient who was on dialysis starting in March of 2008, until
14 February 3 of 2012. The statement in the headline of the
15 motion that the prior treatments as being uneventful or
16 successful as unsupported isn't actually the case.

17 Every day in dialysis our clinic managers -- and we're
18 going to have a clinic manager here testifying about it -- does
19 a predialysis assessment of the patient; every 30 minutes at a
10:23 20 minimum takes vital signs and pulses and checks in on the
21 patient. And that continues until the end of the treatment.
22 And then at the end of the treatment, they do a post-dialysis
23 assessment.

24 And so, in that sense, we actually do know that the
25 treatments went well because they were never be discharged with

1 an arrhythmia, with breathing issues that would be an
2 indication of alkalosis, with heart problems or with chest
3 pains or anything like that.

4 In addition, the physician, Dr. Buchanan, will testify
5 that he and his practice group have rounding practices on these
6 patients in the clinics. The records are filled with rounding
7 notes taken while seeing that patient in the chair during the
8 treatment.

9 THE COURT: Explain to me "rounding notes."

10:24 10 MR. BENNETT: Certainly. Dr. Buchanan and his
11 physician assistant, who was Christina Revels, and Dr.
12 Buchanan's practice partners -- he has 10 or 11, and they would
13 rotate and see patients -- would come in to the clinic to do
14 their rounds on a regular basis. In fact, a doctor or the
15 physician assistant generally saw the patient every week.

16 In connection with that, they would review all the
17 labs, and the notes reflect the review of the labs; would
18 interact with the patient. The notes reflect things like,
19 Okay, he's having problems with his low potassium, so he needs
10:24 20 to change his diet; or I reviewed these labs with him and he
21 has no complaints. And Dr. Buchanan or the physician assistant
22 would do then a detailed note every month that would have all
23 the labs listed, look at his vitals, blood pressure, and so on.
24 And so we're certainly going to ask Dr. Buchanan and play video
25 -- or, hopefully, play video deposition of the physician

1 assistant describing how they check in on the patient and know
2 that they're not in arrhythmia, suffering from alkalosis.

3 Most critical of all, the claim in this case is that
4 this product is somehow defectively designed and not used
5 properly. What we're going to show is that every single month,
6 from March of 2008 through February of 2012, labs were taken
7 from the patient. Serum bicarbonate was evaluated and that his
8 serum bicarbonate was within the ideal range, as determined by
9 this physician and his practice group partners, or below it,
10:25 10 and adjustments were made to it, and that throughout the course
11 of all of this history of treatment, during these years' long
12 period, NaturaLyte, which was used for a last couple of years,
13 was used very effectively to manage the issues that --

14 THE COURT: You said "very effectively." I've been
15 listening to characterizations. It's one thing to talk about
16 what the course of his treatment is, but the characterizations
17 "very effectively"?

18 MR. BENNETT: I guess what I would say is it was being
19 used in treatments that, when his monthly labs were taken, were
10:26 20 within or just about within the desired range as determined by
21 the physician group and that it was used in treatments whereby
22 each assessment that was made, he was not in distress. His
23 acid base issues were being corrected to the satisfaction of
24 his physician. And in terms of adjectives like "effectively,"
25 the way that that would be measured would be objectively in the

1 sense of his lab values, his vital signs, his breathing
2 patterns, as reflected in the actual medical record of the
3 patient.

4 THE COURT: So let me understand the plaintiff's
5 objection with respect to this. Of course, I'm going to let in
6 the medical records, and presumably the doctor will be asked
7 about it. To the degree that it's argumentative, I'll sustain
8 objections to any argumentative questions or responses on the
9 part of the doctor. But I don't know that I can at this stage,
10:27 10 apart from giving general directions about argumentative usages
11 or adjectives or adverbs, that I can do much more than that.
12 And so maybe you can tell me what more you think you want
13 before -- apart from that kind of direction.

14 MS. GRAZIANO: Yes, your Honor. I think you just hit
15 the nail on the head in terms of what we're seeking to exclude
16 with our motion, which was very narrowly tailored as a result
17 of testimony that we heard in the Ogburn case in which counsel
18 for the defendant, in opening, articulated that the treatments,
19 while certainly in number -- as counsel stated, Mr. Dial had a
10:28 20 number of treatments that didn't result in an adverse event for
21 a period of time. But counsel went further to characterize
22 those treatments as both safe and perfect. What we'd like to
23 avoid in the opening is any inappropriate argument where --

24 THE COURT: Let me just pause. Is "safe and perfect"
25 part of your vocabulary?

1 MR. BENNETT: No, your Honor. We intend to rely on
2 the medical record and the --

3 THE COURT: I guess if they say, The evidence will
4 show that he had this treatment, the doctor says this, the
5 doctor expresses himself as satisfied, if that's what it is,
6 all the things that one might expect to find in medical records
7 with respect to that, that's going to be okay.

8 If either side -- but it's your motion -- either side
9 strays in opening statement into argument or in the examination
10:28 10 of witnesses into argument, then an objection would be
11 sustained. May not even have to be an objection. That is, if
12 I think that the jury is being exposed to argument
13 inappropriately, I may sua sponte act. Don't rely on that, but
14 this is not supposed to be argument at that stage. There will
15 be argument at the end, and then I suppose concepts of
16 perfection will be brought forward, but that's a different
17 issue.

18 MS. GRAZIANO: Thank you, your Honor.

19 THE COURT: So I think we have an understanding with
10:29 20 respect to that, that just it's allowed to the extent -- and
21 this is -- I'll have to get the number here so I don't keep
22 you. But this is the plaintiff's motion in limine to exclude
23 unsupported characterizations. It's allowed to the extent that
24 no argumentative characterizations will be made in opening
25 statement or in eliciting testimony.

1 I note that Mr. McAlear is here, and so maybe we can
2 take this time and talk about how we anticipate the jury
3 selection to proceed. So let me recite it. Mr. McAlear will
4 correct me as he frequently does.

5 The intent would be to bring in a group of jurors, I
6 think 120 to maybe 150. I don't know what the availability is
7 but in that range. They would be separated from other jurors
8 who may be brought in that day. They would be the recipient of
9 a questionnaire. What I would propose to do is -- and I think
10:31 10 I've outlined this, but I have -- I'm saying it for Mr.
11 McAlear's benefit as well because we've been passing by and
12 discussing this, but I'm not sure we've pulled it together all
13 in one place.

14 What I propose to do is come down, give the jury a
15 brief introduction to the case, what my wife calls my Boy Scout
16 speech, to the jury and then tell them that they are -- and I
17 want to have present the lawyers who are going to be examining
18 witnesses at a minimum. Now, if you want somebody else, tell
19 me about it and I'll think about it. But rather than take too
10:31 20 much, you know, a phalanx of -- on both sides, the people with
21 speaking parts would be introduced to the jury so they know who
22 the people are. But then we will have a list within the
23 verdict slip [sic] that deals with who they're likely to see or
24 have reference during the course of the trial so we've got them
25 outlined, identified.

1 Then the jury would go do the verdict slip which would
2 -- I say "verdict slip" -- questionnaire, which I think would
3 take probably 20 minutes or so for them. Mr. McAlear would
4 arrange for copies to be made, but in digital form, for the
5 parties; that is, you'll -- Jim, do you want to add to that?

6 MR. McALEAR: Yeah, your Honor. Whether it's in paper
7 form or digital form is going to be really dependent upon how
8 long the questionnaire is. We just did a questionnaire with
9 Judge Casper, which the original idea was to do the digital
10:32 10 form like we did with the previous big trials that we had.

11 THE COURT: Right.

12 MR. McALEAR: We found that we can get the
13 questionnaires back, if it's a shorter questionnaire, much
14 quicker to the judge and the attorneys with a paper copy. We
15 keep it in-house.

16 THE COURT: Define "short."

17 MR. McALEAR: Five to seven pages.

18 THE COURT: Double-spaced?

19 MR. McALEAR: So -- but the longer it is, then we'll
10:33 20 have to send it out.

21 THE COURT: That's helpful for the parties as they
22 think about what they're doing with their questionnaire.

23 So the questionnaire comes back. The jury clerks go
24 through it. They make copies of the questionnaires for you,
25 for me, and then you review them.

1 My intent, I think, is -- again, this can be refined.
2 My intent is to send them home. They fill out the
3 questionnaire that day. They go home. That gives you a chance
4 to go through it. And then at some point in the afternoon, I
5 would hope -- and is that doable, Mr. McAlear?

6 MR. McALEAR: Yes, it is, your Honor.

7 THE COURT: To get the copies back? At some point in
8 the afternoon we'll go through the questionnaires more
9 accurately. You'll draw my attention to the numbers of people
10:34 10 that you would like to have excused by agreement. This is not
11 meant to be -- the parties have their own strategies and they
12 can pursue it, but it's not meant to be an opportunity for
13 gamesmanship here.

14 There will be a number of people I would expect that
15 both of you think should be off -- should not serve on this
16 jury; and to the degree that you do, I'm going to be highly
17 differential in that, differential to the point of simply
18 saying, Okay, they're excused, unless I see some pattern that's
19 bothersome.

10:34 20 That would get us down, let's say, to 60 people maybe.
21 I don't know. I would propose to bring those people back the
22 next day and at least bring a panel sufficient to ask some
23 further questions that are cause related that may be suggested
24 by the questionnaires that the parties are not agreed upon or
25 whatever and also, frankly, because part of the jury process

1 for me -- since I conduct it, not you -- is to at least give
2 you a chance to see their demeanor and what they say and how
3 they introduce themselves. Do they seem diffident? Do they
4 seem overly assertive? All of the demeanor things. So you get
5 a little chance to see them answer questions by the judge in
6 the courtroom.

7 Once we get a group of people -- and I think it's now
8 we're really talking about 18 because each of you will get
9 three peremptories as peremptories. They will be in the box.
10:36 10 You'll see where they are. And you can exercise your
11 peremptories. Now, I may have more people in the -- maybe the
12 front row of -- when we get it done, and I might extend a
13 couple more peremptories depending on how that is. But core
14 value would be to do it then. I think it can be done in the
15 morning on the next day. And then we would swear the jury and
16 off we go with opening statements and first witness if
17 necessary on it.

18 Jim, is there anything that I've said that's -- needs
19 refinement now?

10:36 20 MR. McALEAR: Not at this time, your Honor.

21 THE COURT: Okay. So what we may want to do -- I want
22 to use your time as effectively as my time. But what we may
23 want to do is -- and you'll tell me -- talk about the
24 questionnaire so that you've got some further direction, maybe
25 not, and deal with the motions in limine today, which we're

1 dealing with them, or maybe you prefer that I was better
2 prepared, because I'm listening to what you have to say, but
3 I'm not prepared as I'd like to be. But I'm going to leave
4 that up to you.

5 I do want the questionnaire by tomorrow, and I do want
6 to have it clarified then because we've got to give it to Mr.
7 McAlear. I have to do it myself, I mean the typing, in my own
8 chambers and so on and give it to Mr. McAlear.

9 MR. KETTERER: Your Honor, if I may, so the one thing
10:37 10 I haven't seen is -- I am aware of sort of the slash-and-burn
11 version we were supposed to have done. That's what I haven't
12 seen, the final, final version of it. The parties have -- I
13 have not seen it in terms of that final version. It's no
14 problem to look at it right now in real time and have a
15 discussion about it right here and now. That's no problem for
16 me at all.

17 I did have a couple of just quick questions about the
18 process that you laid out because I think it comports generally
19 with what you said. One thing you had mentioned on Friday,
10:38 20 that while you anticipated having the lawyers who were
21 examining witnesses be present, you had mentioned you didn't
22 have a strong feeling either way about the family
23 representative. I think I would ask the Court to allow us to
24 have a family representative and introduce that person.

25 THE COURT: If you want to have someone there, the

1 party can be there.

2 MR. KETTERER: Thank you.

3 THE COURT: And a representative of the company as
4 well.

5 MR. KETTERER: The other thing I wanted to ask is: Do
6 we have a time frame of roughly -- let's assume that the jury
7 questionnaire is five pages. Do we have an anticipated -- or
8 less. Do we have a time frame of approximately how long that
9 takes to get scanned and returned to the lawyers?

10:38 10 MR. McALEAR: I can speak most recently with the
11 questionnaire we did with Judge Casper in the Philip Morris
12 case. We had the questionnaires out in the courtroom by about
13 10:45 or 11:00.

14 MR. KETTERER: Perfect.

15 MR. McALEAR: If it's five pages.

16 THE COURT: Right.

17 MR. KETTERER: Okay. Go ahead. I'm sorry.

18 MR. BENNETT: No. You can finish your list.

19 MR. KETTERER: The only other thing that I had, your
10:39 20 Honor, is that then I think that what we had discussed was then
21 -- or we weren't sure because I think I wanted to hear about
22 how long that was going to take -- how long you were going to
23 give us with the questionnaires before you brought us back to
24 do whatever challenges we thought were -- let's say challenges
25 for cause and things obvious.

1 THE COURT: You'll have all the time that's necessary,
2 which may not be, from your perspective, very long.

3 MR. KETTERER: Fair enough.

4 THE COURT: But, you know, I've done these
5 questionnaires a lot, much more complex ones, with -- inflected
6 with other issues like race and terrorism and that sort of
7 thing. They can be done very quickly. This is a kind of a
8 first cut, maybe a little bit more than a first cut. This is
9 someone perhaps you would say never got farther than seventh
10:40 10 grade. There's some science in this case. Perhaps we don't
11 want to have someone like that on the -- sit in the case. You
12 may not feel that way. We have a difference of strategic
13 judgment with all of that. But I just use that as an example.
14 Then you'll both agree: This one doesn't serve.

15 You'll see, you know, single moms. You know, we all
16 have, I suppose, stereotypes and of prejudices. I happen to
17 think that the stay-at-home parent is someone who has had to
18 develop extraordinary skills in organization, and it's just the
19 kind of person you'd like to have on the jury. On the other
10:41 20 hand, it's a burden, and it may be that you don't want to have
21 them on the jury.

22 I know -- I will tell you that when the question pops
23 up, outside of the jury questionnaire, I generally turn to the
24 individual and say, It's up to you. I mean, we'd love to have
25 you. And maybe I'll say some happy talk to them, too, about,

1 you know, how difficult the job they do is, and it's important
2 for us to have a fair cross-section of the community, and they
3 have special skills in providing adult supervision, which is
4 always helpful in a jury trial. And some of them say, Well, I
5 have a sister. She could probably do Wednesday. And they may
6 end up on the jury. But you may have a view that you don't
7 want to keep these people and particularly for a full-day
8 trial, which is different from the ordinary on it.

9 What I'm expecting in that first cut is things that
10:42 10 you agree on, that you're just not going to fight about it.
11 And maybe, even if you would be inclined to fight about it,
12 it's not worth fighting about because you've got a lot of
13 people here, and at some point the judge is likely to knock
14 somebody out.

15 Every so often when I do these questionnaires -- I
16 don't do them a lot, but there are cases like this that seem
17 important. The first cut comes out, and it turns out that they
18 have agreed on one out of 120. Then there is a Dutch uncle
19 discussion about respective responsibilities to the
10:42 20 administration of justice and an epiphany, and then there's 59
21 more people who are found to be ones that you can exclude.
22 That's the way it goes.

23 Now, what does that take? I don't know, you know,
24 probably 2:00 on the schedule that Mr. McAlear is talking
25 about.

1 MR. KETTERER: Okay.

2 THE COURT: Judge Casper has practices that I think
3 are worthy of emulation. What was the timing on that one, Mr.
4 McAlear?

5 MR. McALEAR: The timing, I think it was 2:30 or
6 somewhere right around there.

7 THE COURT: So I'm going to be generous, 2:30. But
8 that's what we're talking about in terms of the timing.

9 MR. KETTERER: Okay. Thank you.

10:43 10 THE COURT: Enough time for you to look at it. You've
11 got the questionnaires obviously for purposes of thinking about
12 the exercise of your peremptories and some idea of who it is
13 you're dealing with once the jury is chosen. Is that --

14 MR. KETTERER: That is, and that's very helpful.
15 Thank you, your Honor.

16 MR. BENNETT: Your Honor, I had two questions, one of
17 which I think you've basically just answered. The first phase
18 of the Boy Scout speech is in the juror assembly room and not
19 here?

10:44 20 THE COURT: I think so. Jim, where do you want to do
21 it?

22 MR. McALEAR: The easiest place is down in the jury
23 assembly hall just because of the shear number of jurors. That
24 way the judge doesn't have to do multiple readings.

25 THE COURT: Right. The issue, I think, is -- do you

1 know now what you have by way of other juries on Tuesday, I
2 mean, in the pipeline?

3 MR. McALEAR: I know we have a plan to have the group
4 that you're going to address remain in the jury assembly hall.
5 All other jurors will be moved up to courtrooms at another
6 holding area.

7 THE COURT: That's what we'll do. We'll do it
8 downstairs. There will be set up a podium, seats for you --
9 people with speaking parts, not just examining. If there are
10:44 10 people who are different, who are going to be doing opening,
11 closing, that kind of thing, but speaking part lawyers, and a
12 representative, I think, of the parties.

13 MR. BENNETT: Then my second question was -- and I
14 think I have this down, but it was directed at hardship because
15 sometimes people like to not have to have them come back the
16 next day if we know they're struck. As I understood what you
17 said, there may be some answers on the questionnaire that would
18 be obvious hardships then that we could agree on but that there
19 will be no other even hardship inquiry on the first day to get
10:45 20 them excused so they don't come back the next day, or did you
21 want to do some level of hardship on the first day so they
22 wouldn't come back?

23 THE COURT: No, I really wouldn't. I want to do the
24 questionnaire -- the jury clerks are familiar with my views
25 about hardship, and they do some screening as well. If someone

1 hasn't brought it out -- it's frequently the case that somebody
2 gets here and says that they managed to scrape it together for
3 one day or two days but they don't think they can do it for
4 three weeks on a full-day schedule, then I'm taking up
5 hardships.

6 And, of course, when you take two days with jury
7 selection, there's an overnight, and people start thinking
8 about what it really means to be a juror and the
9 misunderstanding of one day, one trial, as a way of approaching
10:46 10 it. So all that we deal with. But I suspect we'll have
11 hardships on the second day as well. And I'll do the best I
12 can with them. I've given you some inclination of how I deal
13 with it. Okay?

14 MR. KETTERER: Thank you, your Honor.

15 THE COURT: Any need -- there's always need for Mr.
16 McAlear's presence but any further salient need for Mr.
17 McAlear's presence? Okay, Jim. Thanks very much.

18 MR. McALEAR: Thank you, your Honor.

19 THE COURT: Mr. McAlear and I and others will be
10:47 20 looking at the questionnaire, too, for various reasons, and
21 that's why I'd like to get something back promptly.

22 MR. KETTERER: So I'm prepared to discuss it. The
23 version that I have is four pages, your Honor. That's the
24 latest version that I have. I was just able to, with the help
25 of my colleague, get it produced electronically to me. So I'm

1 prepared to discuss it now if there's things that the Court
2 would like to discuss or things that you're concerned about.

3 THE COURT: Is this the version the parties are
4 working with now? I'm not sure I have the same version. I
5 have the previous version of it.

6 MR. BENNETT: Your Honor, I think the version
7 everybody is working at was emailed from Miss Sara Silva to
8 your clerk at 2:04 p.m. on February 4th. I have a copy here.

9 THE COURT: Okay. I've got it. So we'll start on
10:47 10 Page 1 and just work our way through.

11 Who cares whether they lived in the Boston area for
12 any period of time? What difference does that make? What
13 difference does any of this stuff make apart from children with
14 occupations? There are renters or owners, persons in default,
15 foreclosure, victims, all of that, that's not this case. So it
16 seems to me that they give us their name. If they have
17 children, they answer what their children's occupation is, and
18 that's it. They probably -- they will have in the form that
19 you get, the list that you get, listed there occupation as
10:48 20 well. So you'll have that.

21 So we're really down to, I guess, Question 4 there.

22 Question 5 seems to me fine.

23 Question 6 seems to me fine.

24 Question 7 seems to me to be fine. You may want to
25 conflate them.

1 Question 8 seems to be fine. The assumption is that
2 you want to know something about anything more than high school
3 education. Do you want to know about lack of high school
4 education? G.E.D.? Only gotten to the seventh grade?

5 MR. TARRICONE: We should start with high school
6 diploma and post-high school.

7 THE COURT: High school diploma. I graduated --
8 indicate highest level of your education, high school --
9 starting with high school.

10:49 10 MR. TARRICONE: Post-high school courses of study.

11 THE COURT: Something like that seems to me to be
12 okay.

13 MR. TARRICONE: Degrees, certificates.

14 THE COURT: Right. So that seems okay.

15 Then we go to Question No. 9, which seems to me to be
16 okay. Do you want to say insurance or claims handling? I
17 mean, people are -- the assumption is that the jurors don't
18 know that there's insurance somewhere lurking around, and
19 they're going to make a choice about it. But I ask about it so
10:50 20 that, you know, you're raising the issue in the presence of the
21 jury.

22 MR. KETTERER: Your Honor, I do think it's an
23 important issue to --

24 THE COURT: No. This is really, I think, more --
25 perceived to be more a plaintiff's issue.

1 MR. KETTERER: It is.

2 THE COURT: Concern. So that I'll -- all of these
3 seem to me to be okay as questions.

4 We turn to Page 2. You know, I have some concern
5 about just general officer and director, but I'm likely to let
6 these come in as well.

7 Military service, why?

8 MR. KETTERER: So, your Honor, let me just say that I
9 think that the reason it might have made its way onto this
10:51 10 questionnaire is because, in the Ogburn case, what had
11 happened -- I think we'll have some sort of template of
12 understanding what the parties were using it -- in Ogburn, the
13 plaintiff had been in the military, so I think that there was
14 some desire by probably both parties in that particular case to
15 know about it. Whether it's relevant here or not, you know, I
16 don't know. If your Honor doesn't feel it's an issue --

17 MR. BENNETT: No objection to removing it.

18 THE COURT: Then take it out. It's just one more
19 thing. I'm not sure -- if it's not salient, it's not salient.

10:51 20 The healthcare issues, it seemed to me, are okay until
21 I get to the Question No. 15, which is a kind of sliding scale
22 question. I have some problems with the reference to a clinic,
23 the particular clinic, that sort of thing. But I think you'll
24 know more about the clinics and their implications. So I'll
25 leave that in.

1 And I'm prepared to leave in the sliding scale at this
2 point. This is the one that I will ask people about, you know.
3 You said here that you were very dissatisfied or somewhat
4 dissatisfied with dialysis treatment. I'll ask them to explain
5 what the problem was. That's the kind of thing that I do when
6 I do the inquiry of the jurors.

7 Someone died within three years, I understand the
8 impulse, but do we really need it?

9 MR. KETTERER: No.

10:52 10 MR. BENNETT: We can remove it.

11 THE COURT: So we'll get rid of that. Any chronic
12 medical conditions with which -- to which -- for which you
13 receive medical treatment? I guess I can leave that in or
14 permit you to leave that in.

15 Question 18 is a little broad. Is there a way to
16 focus that a little bit? I mean, they didn't get my cavity?
17 Is that --

18 MR. KETTERER: I mean, your Honor, one of the things
19 that could be done there is you could specify, let's say, the
10:53 20 severity or the complexity of the medical treatment that we're
21 referencing, you know, something that was significant medical
22 care. But, I mean, I actually think that this is a question
23 that might be important to both parties on some level, you
24 know, understanding whether or not there's a bias because of a
25 personal experience, you know, with respect -- in a case where

1 you're dealing with medical treatment, the idea that someone
2 may be biased against either the medical industry or -- you
3 know, for or against it may be significant based on something
4 that occurs in their personal experience. I think that's the
5 drive of the question, is to sort of vet that out or at least
6 that's our understanding.

7 MR. BENNETT: I think that that's fine. The other
8 option would be just to have that be yes or no, and then you
9 could follow up if you didn't want to have them give a
10:54 10 narrative.

11 THE COURT: No. I think I'd like them to give -- if
12 somebody says -- if it's some minor matter, maybe we won't
13 follow up with it. I don't know. I will be giving them, you
14 know -- part of the Boy Scout speech is the duty to be fair and
15 impartial and not impose their own views if they're contrary to
16 what the Court has imposed and that you will understand will
17 get to questions of -- the last two questions, 20 and 21, which
18 I think are walking wounded right now. If someone is
19 permanently disabled, you know, I guess I'd ask that.

10:55 20 MR. KETTERER: You know, again, your Honor, some of
21 these questions -- and we're going to get to some of these
22 things in the experiences and opinions as well. Some of these
23 things, when they're looked at in combination, are also going
24 to be helpful to the parties in eliminating down in that first
25 cut.

1 Again, this is a question. If someone has some sort
2 of permanent disability, you're going to view that person a
3 little bit differently in term of their ability to sit for,
4 let's say, three or four weeks depending on what that
5 disability is. I think that it's an easy way for the parties
6 to look at some of that information out of the gate and sort of
7 potentially --

8 THE COURT: If they're permanent disabled, they
9 probably have been excused already if that's the reason for it.
10:55 10 The reason for permanent disability, at least as I read it, was
11 will be unduly empathetic, sympathetic, with a plaintiff's
12 side.

13 MR. KETTERER: That's another reason.

14 THE COURT: Or maybe have the view that I could do it.
15 Why couldn't they?

16 MR. KETTERER: I think there's dual purposes to some
17 of these questions.

18 THE COURT: Mr. Bennett, any problem with that?

19 MR. BENNETT: I think you said yes, and we would like
10:56 20 it, and we don't have to talk about it then.

21 THE COURT: Right. Now, to experiences and opinions,
22 I do not ask it this way. I just don't. The process of jury
23 selection is to take people from the lay world into a highly
24 formalistic world in which there are particular rules. I will
25 keep asking them about the rules. I'll tell them about the

1 rules. I'll ask them about the rules. Say, you know, you may
2 have views on the litigation process. You're entitled to them,
3 but you've got to follow what I say here. You may have views
4 about how we compensate for-profit medical corporations.
5 You're entitled to it, but don't make it part of this case
6 unless I tell you it's relevant in the case.

7 The problem is that, in my experience, that asking a
8 question like this has a way of causing a juror to answer
9 without full reflection of their ability to perform their
10:57 10 duties. And I rebel against it. The jury -- part of the jury
11 selection process and the questions are designed to shape the
12 understanding of the jury, at the same time fleshing out
13 whether or not there's someone who's got some unique views or
14 views that are not legally supportive that they may impose on
15 the jury itself. So I'm going to ask questions along these
16 lines, but I don't see asking these experience questions here.
17 What is your overall opinion of ethics and honesty of the
18 following? Should I add lawyers? Judges?

19 MR. KETTERER: Your Honor, if I may just briefly on
10:58 20 this particular subject -- and let me just make sure I'm
21 hearing the Court correctly. Is it your position that on No.
22 20, those are things that the Court would address and you feel
23 should be eliminated off the questionnaire?

24 THE COURT: Yeah. In a general sort of way, I'll use
25 this to see what are the hot-button issues that the parties

1 think are involved. I won't quite say them this way. The one
2 about, Should they be a hundred percent safe? I'm not going to
3 say it that way. I'm going to say, There are rules. I'm going
4 to tell you what those rules are. You may have an idea of what
5 better would be, but you can't impose those during the course
6 of the trial. People are candid. In my experience, people are
7 candid about it. People will come up and say, This stuff
8 drives me nuts, and I can't trust myself. Some of them come up
9 and that's the fourth time they've come up, and they've also
10:59 10 told me about being disabled and having childcare
11 responsibilities and stuff like that. That's a different
12 classification. But people who are dangerous, for the most
13 part, you can figure it out. And these questions do nothing
14 other than to prematurely distort juror judgment in the case
15 and candor in responding to their ability to be fair and
16 impartial. That's my --

17 MR. KETTERER: If the Court is going to ask, we don't
18 have any objection with eliminating No. 20.

19 MR. BENNETT: We don't have an objection to 20 or 21.
11:00 20 And my review of your standing order is that, if a party wanted
21 to suggest questions for you to think about before you do voir
22 dire, you do accept such a submission and take it for what it's
23 worth, which sounds like what you're going to treat this as,
24 which may not be much.

25 THE COURT: That wasn't what I was smiling about.

1 What I was smiling about is regionalizing the pronunciation of
2 "voir dire," which sounds to me the kind of Missouri -- maybe a
3 little bit farther down.

4 MR. BENNETT: I have a few problems with this. That's
5 definitely one of them.

6 THE COURT: No. I listen to it because one of my
7 shaping experiences about lawyer-conducted voir dire was
8 observing lawyer-conducted "vo dire" in Waxahachie County in
9 Texas in a murder case, which was something else.

11:01 10 MR. BENNETT: You may not be surprised to learn that
11 we also call them "Dalbert" motions.

12 THE COURT: I think that's the accurate one.
13 "Dalbert" is, I think -- rather than, you know, faux French
14 *Daubert*.

15 MR. KETTERER: Your Honor, now, Mr. Bennett just
16 mentioned No. 21, and this is what I wanted to clarify because,
17 with respect to No. 21, I want to understand whether or not the
18 Court intends to ask these questions or, as I understood the
19 Court, I thought I understood that you did not think that the
11:01 20 questions in 21 were really things that you intended to cover
21 at all. Is that correct or not?

22 THE COURT: To the degree that it's covered, it's
23 going to be, We have a system in this country of litigation and
24 rules for it in which people seek vindication. Some people
25 think that that's -- needs to be refined or changed, and you're

1 certainly entitled to that view, but you can't impose it in
2 this case. That's what I'm going to be saying to them.

3 With respect to foreign corporations doing business in
4 the United States, I don't see that. I'll tell them the rules.
5 If somebody thinks that there's a xenophobic thread in the jury
6 pool or in the arguments of counsel, I'll deal with that. I
7 don't think that's going to happen. Maybe I'm missing
8 something.

9 The question about Native Americans, I have to say
11:02 10 that it's a third rail when you start talking about ethnic
11 background or racial background and it's delicate, but I've
12 done it. If you really think this is going to come out in some
13 fashion -- is it going to come out in some fashion?

14 MR. KETTERER: Well, I think --

15 THE COURT: Tell me how.

16 MR. KETTERER: First of all, I think it's part and
17 parcel of who the family is. I think that -- just let me say
18 that I think that there's a piece of it that, physically, when
19 you visually see them, you can see that they're of a different
11:03 20 ethnicity. I think that it's certainly possible -- they're not
21 ashamed of the fact that they're Native American. I think that
22 that's just part of the lexicon.

23 I do think, your Honor, that it's -- can be important
24 information to determine if, for some reason -- and I'm not
25 anticipating that this will be the case in the panel -- but I

1 do think that it's important to know that if there is a
2 prejudice or if there is a feeling that would potentially
3 pollute the jury, that that's something that's worth at least
4 asking about.

5 THE COURT: So I'll put it in this way. If I were
6 speaking directly to the jury, I would say, What's your overall
7 opinions of the ethics and honesty of Native Americans?

8 MR. KETTERER: No, I'm not --

9 THE COURT: No, I'm not doing that.

11:03 10 MR. KETTERER: I'm not suggesting that, your Honor.

11 THE COURT: You are.

12 MR. KETTERER: It's a bad suggestion.

13 THE COURT: This is what was passed up to me.

14 MR. KETTERER: Then it's a bad suggestion.

15 THE COURT: It is. The way in which I deal with it is
16 a generalized sort of way. I will -- I'm not disclosing it.
17 It's something I do almost all the time in any kind of
18 contested cases. I will say this so nobody else tries using my
19 schtick for their opening statement. But I point up to Lady
11:04 20 Justice and I say, We've got a lady up there as a symbol of
21 justice in this country and elsewhere. She's got a sword in
22 one hand; she's got scales in the other; and she's got a
23 blindfold. Why does she have a sword in her hand? She's there
24 to enforce the law. Why does she have scales in her hand?
25 She's there to balance the evidence. But why does she have the

1 blindfold on? She has the blindfold on because she is going to
2 be indifferent, shield herself from extraneous matters like
3 race or ethnicity or anything like that. That has been my
4 experience anyway, is more likely to identify issues than
5 themes and variations on: Are you a bigot? That doesn't work.
6 Well, every so often it works, but when they say they can't
7 follow my rules, that does the same thing.

8 So when I say it's a third rail, I'm a little
9 concerned about the idea of introducing something like that in
10 a way that is potentially to raise a matter that would not
11 otherwise be so salient and can be dealt with effectively in
12 this other fashion.

13 By the way, nobody gets to refer to Lady Justice in
14 their opening statement.

15 MR. KETTERER: Your Honor, I'm satisfied with your
16 explanation, but I -- the reservation that I'm expressing is,
17 again, throughout the records -- and the fact of the matter is
18 he's actually Native American. Some of the medical records
19 indicate that he's African-American. It's just an issue, and I
20 understand there's different ways of approaching it. I think
21 the manner in which you're sort of discussing it is fine. For
22 me, it's just an issue to be sensitive about in terms of
23 asking. It's something that I'd want to at least know
24 something about, but I defer to the Court.

25 THE COURT: I'm not sure that, for the people you're

1 most concerned about, you'd get a candid answer and that a more
2 nuanced answer comes out this way.

3 MR. KETTERER: Okay.

4 THE COURT: At the end I ask every one of them -- it
5 will be kind of like going through -- down the line. The
6 questions go pretty quick when I do it, but I'll give you a
7 chance to suggest something else, is at the end of the day, I
8 want you to assume that you're Mrs. Dial or you're Mr. Castle.
9 You're here in litigation in which something very important is
10 to be decided. Is there anything, if you were Mrs. Dial or Mr.
11 Castle, that you'd want to know before you took the next step
12 about picking jurors that you think would be relevant to you?
13 And if there is, tell us. Tell us what you think we haven't
14 asked about so far. That's the kind of question that I ask.

15 MR. KETTERER: Okay.

16 THE COURT: Now, that -- frequently nobody says
17 anything, but not infrequently they do. They come up and they
18 point out something, and I figuratively smack myself in the
19 head and say, I should have asked that question. That was a
20 really terrific question. But that's part of this process of
21 picking, I guess.

22 MR. KETTERER: Okay. Thank you, your Honor.

23 MR. BENNETT: Your Honor, we agree that that shouldn't
24 be on there, and I just didn't want you to have the wrong
25 impression that the only way it could conceivably come in is

1 the medical record. Dr. Buchanan and his group set up that
2 clinic in Pembroke in the Lumbee area. It's almost exclusively
3 Native American as is our clinic staff. We would not intend to
4 emphasize that, but that has come out in some of the
5 depositions. And so it is a predominantly Native American
6 population.

7 We don't view it as relevant and don't intend to focus
8 on it in any way. It's conceivable that -- how the clinic
9 started, he came into the clinic at the very beginning. It was
10 opened right next to his home, and part of the underserved area
11 that was opened to do by Dr. Buchanan was the group of Native
12 American population. It's come out in discovery. I don't
13 think we intend to emphasize it in any way, but I didn't want
14 to mislead you into thinking that the only possible way it
15 could come up would be the medical record.

16 THE COURT: I guess I'm not -- I don't think there's,
17 as a general proposition, so much of an issue for race in cases
18 like this. Criminal cases, white on black or black on white,
19 allegations of crime, that's another matter and requires great
20 delicacy. I don't think this does.

21 MR. KETTERER: I guess the only sort of way, as I was
22 listening to Mr. Bennett talk, is if you're going to assert
23 that a certain ethnicity is sicker than the rest of the
24 population.

25 THE COURT: Let's pause with that. Are you going to

1 show or attempt to show that there's a greater incidence of X
2 in Native American communities?

3 MR. BENNETT: Well, there is definitely a much higher
4 incidence of diabetes, but I think our emphasis is on the fact
5 that he has diabetes.

6 THE COURT: Are you going to call that to the
7 attention of the jury?

8 MR. BENNETT: No, just the fact that he has diabetes,
9 not that --

11:10 10 THE COURT: So we're not talking about epidemiological
11 racism here.

12 So I think you've got an idea of what I want. I'd
13 like it back by the end of the day here in Word.

14 MR. BENNETT: Is 22 out also?

15 THE COURT: Yup.

16 MR. BENNETT: Thank you.

17 THE COURT: But I will use that as something that is
18 valuable and as an inquiry. I think we haven't caught up with
19 the question of instructions and timing of instructions and
11:10 20 questionnaires themselves -- verdict slips themselves. Now
21 I'll call them -- verdict slips questionnaires -- the verdict
22 slips themselves and additional voir dire questions, you know,
23 questions, on reflection, you'd like me to ask. No harm in
24 asking me. You may be disappointed, but life is full of
25 disappointments. In any event, you will call it to my

1 attention, and I will try to deal with it.

2 I view this as giving me some idea of the tender
3 points, and I'll try to deal with those. If you're
4 dissatisfied, you can ask me for more, and I'll tell you yes or
5 no or make --

6 MR. KETTERER: Okay, your Honor.

7 THE COURT: All right. So let's talk about what is
8 the most successful use of your time: marching along here or
9 taking some time and coming back. I'm prepared to do either
10 one. Maybe, since you're here, you'd like to stay here until I
11 ask you to leave.

12 MR. KETTERER: Well, I don't have a strong preference,
13 your Honor, but I always think it's the most useful if the
14 Court is familiar with the motions and then can give us the
15 guidance. I think the arguments can be reduced to -- at least
16 speaking for the plaintiffs, can be reduced to things that are
17 short and straightforward and we get the best guidance from the
18 Court in real time.

19 THE COURT: Mr. Bennett?

11:12 20 MR. BENNETT: I would do whatever, of course, the
21 Court wants to do, but I feel like in motions in limine, at
22 least, you give guidance and we deal with it.

23 THE COURT: Here's the -- I'm open to whatever. The
24 alternative is this: Come back at 2:00. We'll march through
25 the motions. I'll be better prepared on the motions than I

1 have been so far. I can pick up the -- I think I'm picking up
2 the dominant themes in motions, but I always feel more
3 comfortable if I've worked them through something more than
4 just a quick run-through, which is what I gave them over the
5 weekend, some of these, not all.

6 MR. BENNETT: I could provide a little bit of guided
7 reading on the ones that almost have a very narrow area of
8 dispute.

9 THE COURT: Why don't you try that.

11:12 10 MR. BENNETT: Fresenius' Motion in Limine 13 about a
11 rebuttal report from Dr. Schwartzbard who did not make a
12 rebuttal report in the case. It was simultaneous opening
13 reports; and then you could do a rebuttal report if you wanted
14 to comment directly on what the other expert said, and he
15 didn't do that. I think that that is -- I don't think they
16 intend to say, Well, the criticism of the defendants is X.
17 What do you say about that?, or to re-call him in rebuttal. So
18 I don't know that we have any disagreement on this one.

19 THE COURT: What's up with that?

11:13 20 MS. GRAZIANO: There is no disagreement on that.

21 THE COURT: I can simply treat that as moot?

22 MS. GRAZIANO: Correct.

23 MR. BENNETT: Moot or granted by agreement, however
24 the Court wishes. Then No. 2 --

25 THE COURT: I think I'm going to do moot because there

1 is no present intention to make use of it.

2 MR. BENNETT: Thank you, your Honor. I believe that
3 the evidence on size, wealth, resources, corporate status, and
4 German parent company is a pretty straightforward argument by
5 us. Their only argument is that -- as I understand it, is (a)
6 punitives, which you addressed last time; and (b), we can't say
7 that something wasn't feasible to change the label because
8 we're big enough to change the label. We're not going to
9 present evidence that we couldn't have changed the label. So I
10 think that that one is pretty straightforward too.

11 THE COURT: I guess I was looking at that. This is
12 No. 9?

13 MR. BENNETT: Yes, your Honor.

14 THE COURT: Looking at that, thinking that it was
15 really folded into -- I hadn't thought about "big enough to
16 change the label." I was folding it into the question that's
17 still to be resolved, and probably won't be resolved until we
18 get more deeply into jury instructions, of how I deal with
19 punitive damages.

11:14 20 My view, which I stated before, I think, is that, (a)
21 it's not going to be the part of the initial part of the case
22 and won't be opened on. If the jury comes back with answers to
23 questions that implicate the -- a potential for punitive
24 damages, we'll open again; and at that point, it seems to me
25 that it is fair game to introduce evidence about the financial

1 resources of the defendants -- defendant or defendants
2 themselves.

3 But is there any other use for it? I'm just holding
4 back on those. Anything else that the plaintiffs are thinking
5 that they want this for?

6 MS. GRAZIANO: Your Honor, the main reason why we
7 opposed this motion goes beyond just the issue of punitives.
8 We just don't want to be precluded from making mention of the
9 parent company and evidence gathered from depositions.

11:15 10 THE COURT: Tell me what you're going to say about the
11 parent company in evidence. Incidentally, that's not a
12 problem, I don't think. Introducing xenophobic impulses might
13 be a problem. Dwelling on matters that seem to me to be
14 irrelevant might be a problem.

15 I mean, now, if there are documents that say that
16 there's a corporate relationship and they're incidental to the
17 core of this case, then I suppose you can get into that but --
18 not get into it, just touch on it.

19 MS. GRAZIANO: Certainly, your Honor. We have no
11:16 20 intention of making xenophobic comments or in any way --

21 THE COURT: That was the -- that's one end of the
22 spectrum. It's a long spectrum. The entire spectrum is --
23 virtually the entire spectrum is verboten to just choose a
24 particular language.

25 MS. GRAZIANO: Duly noted, your Honor. I think that,

1 in addition to evidence gathered from the depositions of
2 employees of the parent company, we'd also like to delve into
3 some issues, for example, data taken from a clinic of
4 Fresenius' in Portugal, for example, or any evidence regarding
5 the CEO of Fresenius also being -- the parent company also
6 being --

7 THE COURT: What's the relevance of that?

8 MS. GRAZIANO: It just comes up in various deposition
9 transcripts.

11:17 10 THE COURT: It may. What's the relevance of it in
11 trial here? This isn't a deposition. This is trial. What's
12 the relevance of the fact that the CEO is -- performs a similar
13 function or role for the two companies?

14 MS. GRAZIANO: It could be relevant, your Honor, in
15 terms of issues of notice and also what the parent company was
16 undertaking in terms of feasible alternatives.

17 THE COURT: Okay. I guess, if you're going to argue
18 that stuff or say that that's got relevance, then I'll tell you
19 that you have to tell me before you introduce anything that
11:17 20 touches on the parent company because I'm not -- I don't have a
21 settled feeling that this is controllable.

22 I've outlined what I think is true, which is, you can
23 have some incidental references, but getting into those kinds
24 of relationships seem to me to be wholly irrelevant and, to the
25 degree, relevant fraught with some danger.

1 MR. KETTERER: Your Honor, let me just clarify this
2 because I don't think there's a misunderstanding between the
3 plaintiffs. First of all, the incidental mentioning is really
4 the only thing that the plaintiffs intend to proffer on their
5 own. The reason this came up -- and I think the reason we
6 mentioned the CEO is, when he did testify -- and that's not
7 going to happen in this case -- they affirmatively raised the
8 issue after filing this motion that he was CEO of the entire
9 worldwide company and that, you know, here's the structure and
10 all these other things. So that's the reason why we're just
11 sort of raising that --

12 THE COURT: Let me be as clear as I can. I think I've
13 been clear but, you know, this kind of drive-by stuff --

14 MR. KETTERER: Right.

15 THE COURT: Be careful because, if I get a sense that
16 there is reference to Native Americans or to Germans, I'm going
17 to start getting involved. If it's you can't avoid it, that's
18 another matter. But if it's brought out in some fashion that
19 suggests to me inappropriate considerations, I'm going to deal
20 with it.

21 MR. KETTERER: We certainly heard you. Thank you.

22 THE COURT: So with respect to that one, that is, on
23 your list is No. 2 -- it's Motion in Limine No. 9 -- we have a
24 docket number that will translate it into -- it is allowed --
25 well, allowed and granted and denied in accordance with the

1 instructions I've given, which are that if it's incidental it
2 can be referenced, but anything beyond that, it can't.

3 Now, are there other ones that are as easy as that?

4 MR. BENNETT: That one wasn't as easy as I thought it
5 was, but there are no other ones that I think are easy.

6 THE COURT: So then what we will be doing is we'll
7 talk about what -- on your list 1, 3, 4, 5, 7, 8, 9, 10, 11,
8 12, 13. I think we've talked about the other ones, dealt with
9 the other ones here. Is 2:00 a -- I'll put it in terms of, I
10 guess, litotes, not inconvenient time to come back. Is that
11 all right? Okay. So I'll see you at 2:00.

11:20

12 (Recess taken at 11:20 a.m.)

13 (The Court entered the room at 2:10 p.m.)

14 THE COURT: I have received the redrafted version of
15 the jury questionnaire. I'll go through it. I haven't -- it
16 looks fine to me now.

17 The list of lawyers and witnesses will be when?

18 MR. BENNETT: We can do it any time you want. We were
19 saying by Thursday just to be on the safe side, but --

02:12

20 THE COURT: Well, I spend my time scheduling
21 schedules. I'm just trying to figure out what free time we
22 have; and having gone through some of these motions, I may have
23 more questions. But if we carve out as available time Thursday
24 afternoon, does that work for the parties for last-minute kind
25 of issues like the jury questionnaire and so on?

1 MR. KETTERER: Your Honor, just a moment.

2 (Discussion held off the record.)

3 MR. KETTERER: Your Honor, that's fine. Thursday is
4 going to be fine. I won't be able to be here myself. Mr.
5 Tarricone will be here, and we will be able to proceed.

6 MR. BENNETT: That's fine.

7 THE COURT: I just want to carve out that time because
8 -- as potential. I would also say potential is Monday
9 afternoon, which is a holiday, is the day before. We've made
02:13 10 separate arrangements for a court reporter, not imposing on
11 Miss Dahlstrom.

12 MR. BENNETT: No problem.

13 MR. KETTERER: That's fine.

14 THE COURT: Those are just, you know, on your dance
15 card. Whether or not we dance, that's another matter. I think
16 we will on Thursday because I do want to go through the final
17 scheduling kinds of issues and -- for sure and the jury
18 questionnaire and some discussion about the likely jury
19 question -- verdict slip as well, which brings me back to
02:14 20 that -- verdict slip, voir dire questions, and instructions.

21 MR. TARRICONE: So, your Honor, you want the jury
22 instruction -- requested jury instructions before Thursday?
23 That's --

24 THE COURT: If it's problematic, then we won't do
25 that. But I do -- I think I do want to look at least a draft

1 of the verdict slip here so we can have some discussion about
2 where that's going.

3 MR. TARRICONE: May I ask a question about that?

4 THE COURT: Sure.

5 MR. TARRICONE: In the last session, when we were
6 talking about punitive damages and a secondary proceeding --

7 THE COURT: Right.

8 MR. TARRICONE: -- it wasn't clear to me. Was it your
9 intention that a question concerning the type of conduct that
02:14 10 might give rise to punitive damages --

11 THE COURT: Whatever adjectives we apply to the
12 conduct and whether that reaches -- provides the foundation for
13 punitives.

14 MR. TARRICONE: So that question should be in the
15 first --

16 THE COURT: I believe so.

17 MR. TARRICONE: Okay. I just wanted to make --

18 THE COURT: Any disagreement about that?

19 MR. BENNETT: No.

02:15 20 THE COURT: So that's what I'd like to have. If I
21 could have that as something to talk about by -- see if I've
22 got these right -- say, 10:00 in the morning on Thursday.
23 10:00 we would have the list of witnesses and lawyers, the
24 verdict slip, and I think any voir dire questions that --
25 they've been touched on here, but as you reflect on it, if

1 there are additional voir dire questions, I'd like to look at
2 those.

3 MR. KETTERER: That's fine, your Honor.

4 Your Honor, I was remiss before. I wanted to make
5 sure that I introduced my co-counsel who's here today. Joe
6 Kott is here. He's going to be handling some witnesses at the
7 trial. I wanted to make sure -- this is the first time he's
8 been able to appear.

9 MR. KOTT: Good afternoon, Judge.

02:16 10 THE COURT: Good to have you here, Mr. Kott.

11 MR. KOTT: Thank you.

12 THE COURT: So I think I've got at least a handle, but
13 I'm not sure I can yet carry all of these motions. But let's
14 start where we stopped, which is your No. 13, which I believe
15 is Motion No. 153. And I'm not sure how I slice this one, Mr.
16 Ketterer -- or Mr. Tarricone.

17 MR. TARRICONE: Which one is this? I'm sorry.

18 THE COURT: I'm sorry. The motion to prohibit the
19 defendants from presenting any evidence of a debate regarding
02:16 20 prescribing high bicarbonate settings. It appears on you -- on
21 the list that was sent over to Mr. Hohler as No. 13, and it's
22 -- it's 153.

23 MR. TARRICONE: Miss Graziano is going --

24 THE COURT: What do you want really? There's going to
25 be some discussion about what the medical community thought

1 about these issues.

2 MS. GRAZIANO: Sure, your Honor. I can actually
3 narrow what the plaintiffs want even more so than how it's
4 presented in the brief if you'll indulge me.

5 THE COURT: Okay.

6 MS. GRAZIANO: The specific evidence that we're
7 seeking to have excluded from trial is the transcript and any
8 reference to a debate that took place in 2014 at the American
9 Society of Nephrology conference. And this debate centered
02:17 10 around the efficacy of low bicarbonate baths versus high
11 bicarbonate baths. And the participants in that debate were
12 not, and presently are not, employees of Fresenius. The debate
13 itself did not yield any --

14 THE COURT: Let me just see. Are you going to offer
15 that or make reference to it in any way?

16 MR. BENNETT: Your Honor, one of our expert witnesses
17 who's going to testify in this case, named Dr. Kalantar-Zadeh,
18 had one of his partners present on that debate. We are going
19 to present evidence that there is a debate, that it's still
02:18 20 ongoing. If the question is whether we're going to talk about
21 this particular conference, I don't think we have to do that.

22 THE COURT: Well, it's problematic if you do, not
23 proscribed.

24 MR. BENNETT: Understood. We won't offer that.

25 THE COURT: So that, I think -- if that's the specific

1 piece of evidence, Miss Graziano --

2 MS. GRAZIANO: I have nothing further to add. Thank
3 you, your Honor.

4 THE COURT: The time to sit down, I think, is after
5 you hear that.

6 Okay. So having been focused, the Motion No. 153 is
7 allowed to the extent of exclusion of the 2014 discussion at
8 the American Society of Nephrologists.

9 Okay. Then we turn to No. 12, which is the -- also,
02:19 10 since different people have different numbers they're working
11 with, our Motion No. 91 -- or motion on the docket is 91, and
12 it is to prohibit the claim that the FDA approved or determined
13 NaturaLyte safe. I think -- Mr. Bennett, I'm not sure of what
14 you think you're going to get in.

15 MR. BENNETT: The only thing we think we're going to
16 get in is that NaturaLyte was cleared by the FDA in 1981.

17 THE COURT: You have an anxious anticipation, as I
18 read your papers, that somebody is going to suggest that you
19 weren't or you didn't square your corners in a regulatory
02:19 20 fashion. What's the basis for that? Why should I -- apart
21 from your anxious concerns, why should I adopt them?

22 MR. BENNETT: Well, we don't intend to say that the
23 FDA approved it or that they -- after a study of it. We're
24 going to say that it was cleared. In terms of --

25 THE COURT: Why do you have to say it? I used the

1 phrase "squared your corners." But is that really something
2 that should concern us more than apprehensions?

3 MR. BENNETT: I don't know that it should because --
4 especially in light of our discussion at the prior pretrial
5 conference about your view of the scope of the plaintiff's
6 case. So I think beyond us saying -- we do intend to have a
7 witness come in -- witnesses say it was cleared by a 510K
8 process in 1981 through this other company that we bought 15
9 years later and that that happened. But beyond that, we don't
02:20 10 expect to put on --

11 THE COURT: When does this witness come on in your
12 case?

13 MR. BENNETT: That would come in, I think, on
14 cross-examination of certain of their witnesses. And then in
15 our case, we would have a person just say what I just said.

16 THE COURT: Why do you need it said?

17 MR. BENNETT: I think that we need it said because the
18 -- there's often an unknown -- we want to prove that this
19 product was used and has been used for some period of time. In
02:21 20 addition, there's been an element of the plaintiff's case
21 throughout that we did not sufficiently test our products, that
22 we did not sufficiently conduct clinical studies before selling
23 our products. I don't know if that extends to their theory of
24 NaturaLyte where a different company cleared it 15 years before
25 we bought it, and we started using after that. So maybe that's

1 never going to become an issue.

2 But what we're looking at presenting is just making
3 sure the jury understands that this product was cleared. We're
4 not going to say "approved" or "studied," you know, the
5 buzzwords that are used in the motion, and sold for many years
6 before we bought it, and then it has been used since that time
7 up until the date of Mr. Dial's final treatment as well.

8 THE COURT: Let me take what I understand to be your
9 proffer or where you're going to be introducing this evidence,
02:22 10 first in the cross-examination of the plaintiff's case. You
11 have to do that in the plaintiff's case?

12 MR. BENNETT: It depends on whether their FDA expert
13 comes in. That would be the only place that we thought we
14 intended to use that in plaintiff's case. Otherwise, in -- as
15 long as we can ask their experts general causation and specific
16 causation, Isn't it true that NaturaLyte is used by you and in
17 many other places, we would not have to get into FDA clearance
18 for that.

19 THE COURT: Right. So I still don't find it
02:22 20 compelling, I guess, yet.

21 So what's the plaintiff going to do with this aspect
22 of the FDA issue?

23 MR. BROWNE: Your Honor, we don't need to go into -- I
24 think you have it exactly right, your Honor. We don't need to
25 go into the 510K whatsoever. If we're going to discuss a

1 deficiency in testing, that would be based on post-market
2 evidence that has nothing to do with the 510K that was
3 submitted many years before.

4 Your Honor, here's the concern and here's how we think
5 this evidence is going to be used. We have the closing from
6 Ogburn case, and I know you've read the transcript.

7 THE COURT: Let me just get it out.

8 MR. BROWNE: Yes, sir. It would be at Page 3248, Line
9 24.

02:23 10 THE COURT: What date again?

11 MR. BROWNE: This is closings, so this would be on the
12 17th, I believe, from memory. I don't have it -- yes, that's
13 right, 12/17, at Page 3248, Line 24.

14 What defense counsel said in closing was, "On strict
15 liability, plaintiff cannot show" --

16 THE COURT: Hold on just a second.

17 MR. BROWNE: Sorry.

18 THE COURT: I guess you're going to have to do it by
19 the oral tradition. I thought I had that.

02:24 20 MR. BROWNE: No problem. And I'll paraphrase --

21 THE COURT: I have the entire *War and Peace*, but I
22 don't have the conclusion.

23 MR. BROWNE: I'll paraphrase for brevity. In closing
24 they said, Plaintiff cannot show that GranuFlo is defective.
25 The evidence is that GranuFlo was cleared by the FDA in 1994.

1 So they're going to suggest to the jury that --

2 THE COURT: Let me -- let's stop. Mr. Bennett, are
3 you going to use that closing argument?

4 MR. BENNETT: I don't believe that I will use that
5 closing argument with regard to NaturaLyte, but I would close
6 on the idea -- actually, I think I would like to say that
7 NaturaLyte was cleared in 1981, used for 15 years prior to us
8 acquiring it and used from 1996 to 2012, up until the date of
9 his death, in thousands of clinics. I would like to say that.

02:24 10 THE COURT: I just don't see introducing this FDA
11 matter unless, you know, something pops up in the course of
12 trial, some --

13 MR. BENNETT: I understand.

14 THE COURT: -- thrust upon it. So I'm going to allow
15 No. 91, subject to the customary reservation that, you know, if
16 something happens during the course of trial that requires the
17 introduction of or justifies the introduction of FDA clearance,
18 I guess is the word that defendant wants to use, then I'll
19 reconsider it. But I -- I'm trying to carve this back, and I
02:25 20 don't see that coming in there and being relevant.

21 So then we turn to the learned intermediary doctrine.
22 I haven't immersed myself in North Carolina law on this
23 entirely, but how do you plan on, or if you do, implicating
24 this, Mr. Bennett?

25 MR. BENNETT: Thank you, your Honor. Our response, I

1 believe, does recite the North Carolina law and the learned
2 intermediary doctrine which is, in essence, that we manufacture
3 a product that is dispensed by doctors. The only duty to warn
4 or inform runs to the doctor regarding the risks associated
5 with --

6 THE COURT: Right. I just want to understand how this
7 is -- you anticipate this being brought to the attention of the
8 jury probably in the form of argument, and so I want to know.

9 MR. BENNETT: Exactly. As we're looking at the
02:26 10 verdict slip, it is an actual affirmative defense under North
11 Carolina law, and so we're evaluating and we'll submit to you
12 Thursday how that will need to be included in that or not
13 included in it. But, in essence, the evidence will just be the
14 evidence of what the doctor knew, saw and did.

15 THE COURT: Let's -- again, trying not to cross the
16 bridge before I get to it, in the form of opening statement, I
17 take it there will be a recitation of what the doctors saw,
18 learned, did, but not some reference to learned intermediary or
19 anything like that.

02:27 20 MR. BENNETT: That's true.

21 THE COURT: So the point at which this becomes
22 meaningful, I think, is -- well, there is a request with
23 respect to some documents that have been challenged but really
24 is in closing argument in connection with the verdict slip, I
25 think.

1 MR. BENNETT: I agree, as a matter of possible
2 instruction and possible closing, if it's consistent with -- to
3 argue certain facts consistent with the instructions that are
4 going to be given. But we will not be mentioning anything
5 about this legal doctrine until we bring it up to the Court at
6 the instruction conference.

7 THE COURT: Okay. Now, turning to the specific -- or
8 more or less specific documents that plaintiff has expressed
9 concern about, which are PowerPoints, I guess, basically
02:28 10 PowerPoints or instructions that were given in some fashion to
11 doctors. I don't know what you plan on introducing and whether
12 or not it crosses the red zone for the plaintiffs.

13 MR. BENNETT: So let's just take -- there's two forms
14 of information that's going to -- to have been communicated
15 that we believe are relevant. Let's start first with the ones
16 that actually went directly to Dr. Buchanan himself, which I
17 think should come in if it's an issue -- a disputed question.

18 THE COURT: Any dispute about that; that is, whatever
19 Dr. Buchanan received from Fresenius on this is admissible?

02:29 20 MR. KETTERER: Right. No.

21 THE COURT: Okay.

22 MR. BENNETT: Then the only other items that we would
23 like to introduce or were contemplating introduction of are
24 other communications that we made to the medical community
25 generally such as, we have witnesses who made presentations to

1 the medical director meeting that Dr. Buchanan's partners were
2 at that he will say they discussed after the meeting. We have
3 PowerPoints that were provided to the -- a group of renal care
4 group physicians from someone at our company who went through
5 all this total buffer.

6 In addition, I think this should not be in dispute
7 also. Our clinic manager, who was responsible for the care of
8 Mr. Dial, received three communications on this subject that
9 she then talked about with Dr. Buchanan.

02:30 10 So in terms of things that are not directly tied to
11 things Dr. Buchanan saw and heard, there are a series of
12 communications made generally to our nephrology community that
13 we thought we would try to introduce.

14 THE COURT: Mr. Ketterer.

15 MR. KETTERER: Well, so, now, as soon as we start
16 going to the nephrology community, immediately alarm bells go
17 off.

18 THE COURT: Okay. And I understand that. The broader
19 nephrology community, except to the degree that Mr. -- Dr.
02:30 20 Buchanan has heard this in some form. There is hearsay
21 referenced there, but it probably is -- overcomes the hearsay
22 objection as being notice if it's properly introduced.

23 As I see it, Dr. Buchanan gets on the stand. He
24 testifies. And then presumably he's going to be asked some
25 questions about what he heard and what he learned in

1 cross-examination. That's, I think -- I don't think that's
2 objectionable.

3 MR. KETTERER: No.

4 THE COURT: I mean, we'll walk down the step and then
5 you can --

6 MR. KETTERER: I'm sorry.

7 THE COURT: -- tell me that we missed one. Then we're
8 talking about their case in chief, I think, the degree to which
9 they introduce things about the broader nephrology community.
02:31 10 I'm not sure I understand how that would come in, in any event,
11 but it would depend on the plaintiff's case in chief and the
12 way in which the plaintiff talks about lack of warning and so
13 on, that it didn't reach Dr. Buchanan but, nevertheless, was
14 given, may be broken down into not effective warning, or it may
15 be he didn't have his earphones on at the time. But, in any
16 event, I don't have to deal with that until -- I think, until
17 the case in -- the defendants' case.

18 MR. KETTERER: Okay.

19 THE COURT: Any -- have we missed anything on -- broad
02:32 20 outlines but missed anything?

21 MR. KETTERER: Well, no, I don't think so, your Honor.
22 I think that the way that you're laying it out with respect to
23 how Dr. Buchanan may be presented in the sense of what did he
24 actually see is going to be a subject of our examination as
25 well. So the documents are important. And I think that you

1 will have to see, just like we've been talking about. Once we
2 start bleeding away from what he actually saw into areas of
3 things that other people may or may not have seen or there's --
4 you know, subject to foundation, I think. And if the
5 foundation is going to be, Well, somebody -- you know, one of
6 my partners might have been at this meeting and might have told
7 me whatever, that's --

8 THE COURT: Part of the notice -- I'll call it notice,
9 under the rubric of failure to warn is they didn't do much,
02:33 10 then I probably -- if they did something, we'll consider
11 whether or not that's included subject, obviously, to the idea
12 that it never reached Dr. Buchanan. That's the broader
13 nephrology community theory.

14 MR. KETTERER: Right.

15 THE COURT: I'm not going to spend -- think I'm going
16 to spend a lot of time on interactions with the broader
17 nephrology community unless there's something that -- a thrust
18 in the plaintiff's case that suggests that that might be
19 appropriate.

02:33 20 MR. KETTERER: Well, and I think that the discussion
21 that we've been having ongoing about Dr. Pence's testimony then
22 following Dr. Buchanan's testimony is impacted by then what Dr.
23 Buchanan says about some of these larger nephrology things,
24 which then impacts some of the latitude and the scope of what
25 Dr. Pence is saying about the information he received.

1 Again, I guess my thing, when we get to these kinds of
2 things, it's hard to see it in this sort of abstract puzzle
3 piece. I appreciate the guidance from the Court. Those were
4 the only concerns that we had.

5 MR. BENNETT: The offer of broader communications, of
6 course, would not go to what happened with Dr. Buchanan or with
7 Mr. Dial. In reading the responses to the motions in limine,
8 it is my understanding that the plaintiffs intend to present a
9 case in their case in chief that would be that we knew about
02:34 10 these issues, covered them up, didn't report them, and didn't
11 tell people. It's an element of an intent component of their
12 liability for punitive damages, and it's an element of a
13 broader failure to warn-type approach. And so I think that, if
14 they contend your goal was to hide this and you did hide this
15 and you didn't tell people this, that that would open the door
16 to this type of evidence.

17 THE COURT: No. I guess we'll get to the -- a
18 discussion of that with the PSO, back and forth. But the
19 guidance which Mr. Ketterer kindly refers to what I say as
02:35 20 being is that I do not see it coming in at this point in the
21 plaintiff's case in chief, that I do see that you will be able
22 to introduce what it was that Dr. Buchanan was introduced to.
23 And if it goes beyond that, I want to have a discussion about
24 it and your intention to use it based on whatever initiatives
25 the plaintiffs pursue in their case in chief.

1 MR. BENNETT: Understanding that then I would not be
2 permitted to open on general communications that did not get to
3 Dr. Buchanan, and the plaintiffs would not be able to open on
4 the idea that we had some cover-up or idea of hiding things.

5 THE COURT: I don't know about the hiding and cover-up
6 language, which is quite arresting, something I want to take up
7 earlier. But I have a feeling that, if there are openings like
8 that, I'm going to have to modify this ruling with respect to
9 the exposure to or the delivery of information to the broader
02:36 10 community. So, Mr. Ketterer, do you -- maybe we'll just wait
11 rather than --

12 MR. KETTERER: Yeah.

13 THE COURT: -- think in hypothetical terms, we'll
14 speak more specifically here. So the short of it is that the
15 use of the predicates for the learned intermediary doctrine I
16 think I've laid out here, that as much as I know right now, you
17 will be permitted to -- it's -- the motion itself is granted to
18 the extent that we're not going to be dealing with a learned
19 intermediary doctrine, qua doctrine, until the time of jury
02:37 20 instruction, that the defendant will be permitted to make
21 reference to the delivery of information to Dr. -- that he
22 received -- that Dr. Buchanan received, that anything further
23 will require the Court's order.

24 MR. BENNETT: One point of clarification is that, in
25 addition to sending items directly to Dr. Buchanan, we sent

1 items directly to the specific clinic manager who received it.
2 And I would understand that part of their case is about
3 notifying the clinical staff too, and it would be limited to
4 just the clinic staff that treated Mr. Dial. And I wanted to
5 see if that was within the Court's ruling as well.

6 THE COURT: It sounds right. Mr. Ketterer?

7 MR. KETTERER: Your Honor, yeah. No, I don't want to
8 be verbose.

9 THE COURT: That sounds okay. Whoever received it, I
02:38 10 assume that these people are going to testify too.

11 MR. BENNETT: Absolutely.

12 THE COURT: So that deals with 91 -- excuse me. 89, I
13 think. Is that right, Dan? Number 11 on your list, but the
14 motion is 89 as docketed.

15 Now, this back and forth on the No. 10, which is
16 Motion No. 150, the back and forth with respect to 20 percent
17 risk increase and so on, isn't this embedded in the plaintiff's
18 expert reports?

19 MR. KETTERER: Yes.

02:39 20 THE COURT: I thought so. Mr. Bennett, since it's
21 embedded in the plaintiff's expert reports, why am I keeping it
22 out if I haven't kept those experts out? I mean, it's -- you
23 raise the issue that this is a quack-worthy scientific
24 argument.

25 MR. BENNETT: We presented some scholarship that

1 stated that an odds ratio of less than two is not considered
2 reliable. This is our own document and I acknowledge that.
3 It's also a document that was sent to Dr. Buchanan, and so it
4 has some independent perhaps relevance in that regard. And so
5 I --

6 THE COURT: Don't I have an expert here that -- not I.
7 But don't we all have an expert here who takes a -- what I call
8 a diluted version of statistical significance and is willing to
9 say that 1.2 is maybe there?

02:40 10 MR. BENNETT: I think that you will have experts from
11 the plaintiffs who say, I looked at that graph, and they will
12 lay that foundation of saying, I looked at that graph, and it
13 is the type and nature of information upon which people in my
14 field rely.

15 THE COURT: Right.

16 MR. BENNETT: Then it becomes the subject of
17 cross-examination. I think it becomes incumbent upon me to
18 object if and when I think it's appropriate or that they've
19 crossed the line. And in light of my being here at the Daubert
02:41 20 ruling where you talked about your views about how experts come
21 in, I do believe that this -- we don't need to spend more time
22 on it today and that it would be fairly subsumed in your prior
23 rulings.

24 THE COURT: Okay. So I think that, subject obviously
25 to further refinement as the witness testified, I believe that

1 this is within generally the scope of admissible, if not
2 credible, testimony on behalf of experts; and, accordingly, I'm
3 going to deny Motion No. 150.

4 Now, let me go to the PSO, which is No. 9 on your
5 lists. It's Motion No. 149, which the opposition seemed quite
6 florid, I guess is the way I would describe it, as opposed to
7 rigorous. How is this going to work? I mean, you know -- and
8 I don't think I understand how the PSOs work well enough to be
9 able to have an independent view of this. But the use of
02:42 10 hiding, concealing, dropped in a black hole may have been one
11 of the vivid phrases used. I guess maybe that's argument at
12 the end. But am I correct that the PSO is a place where this
13 information can be sent? And you will elicit from witnesses
14 that it never got any farther and probably say in closing
15 argument the PSO is a place where complaints go to die,
16 something like that?

17 MR. KETTERER: I think something along those lines
18 could be argued in the closing. But let me be a little bit
19 more streamlined on something in the PSO and just talk a little
02:43 20 bit about it because the PSO is something where the very issues
21 in this case were discussed at length, which is the whole basis
22 for why the PSO is important to the plaintiff's case.

23 I think a fundamental concept of what did they know
24 and when did he know it extends to the issue of notice and
25 liability, of course, duty of breach, causation, damages, you

1 know, you're looking at the duty and breach. And the PSO and
2 what kind of information was being discussed in the PSO, what
3 kind of information was being disseminated in the PSO, the
4 purpose --

5 THE COURT: Assume I don't know that much about the
6 kind of push and tug of discovery over the PSO. But are you --
7 have you been restricted from inquiring into what happened in
8 the PSO, what the discussions were?

9 MR. KETTERER: Well, there are some elements, yes,
02:44 10 that were -- Mr. Browne, I think, is even better versed on it,
11 but let me give you the sort of shorthand version.

12 The issues of the PSO is that there were attorneys
13 that were part of the PSO, and the purpose of the PSO is to
14 have some discussions outside of the loop so that there's less
15 in legal vulnerability. That's not just true for Fresenius.

16 In and of itself, a PSO -- and I'm sure this is the
17 position that Fresenius is going to take -- is not, in and of
18 itself, is not something which is illegal. It's allowed by
19 statute. They're allowed to be created. There are
02:45 20 organizations which are allowed to exist. The question is,
21 though, What do you do with the information? And what was the
22 purpose behind Fresenius, at least, their PSO? And we have
23 some evidence with respect to that.

24 I know it appears in our response with respect to Dr.
25 Lazarus, who is the chair of the PSO and the former chief

1 medical officer talking about what his belief of the patient
2 safety organization was. He talked about its creation. He
3 talked about what the functions were. And he talked about what
4 the purpose was.

5 Now, I know that the language that is sensitive to the
6 defendants and important to the plaintiffs is this issue with
7 cover-up and what the purpose of it was. This was allowed by
8 Judge Kirpalani after fairly much the same argument that
9 they're going to make here today before this Court.

02:46 10 The cover-up, in terms of the opening, let me just
11 remove that, we're not intending to present on this is a
12 cover-up. That's not the way in which we intend to approach
13 the opening, especially in light of, again, the Court's
14 instruction and sort of guidance about what this Court expects
15 of the parties in terms of opening statements.

16 Now, that being said, I don't think that it impacts
17 the admissibility of the evidence. I think that that is
18 directly impacted by the issues that the PSO, is affected about
19 why it was created, not just why it was created, why it was
02:46 20 created at Fresenius. It comes from the testimony of the
21 former chief medical officer who also was the chair.

22 THE COURT: Well, give me the highlights of that. Did
23 he actually say "cover-up"?

24 MR. KETTERER: He did. He used those words.

25 THE COURT: What context?

1 MR. KETTERER: This is the backdrop. The backdrop
2 was, Dugan Maddux, the wife of the current chief medical
3 officer, Frank Maddux, was doing a series of interviews about
4 the history of dialysis and important figures and personalities
5 in the history of dialysis. Dr. Lazarus is and remains a very
6 important person in the history of dialysis. He's a very
7 bright guy. And he was an important figure. She interviewed
8 him.

9 During the course of the interview, she asked -- and,
02:47 10 your Honor, I don't have a transcript right here with me, but
11 I'm happy to provide you a transcript of the entire interview
12 so you can see the full context. What happened was she was
13 asking him what he was planning to do when he stepped down as
14 chief medical officer. And I'm sure Mr. Bennett recalls
15 because Mr. Bennett defended the deposition of Dr. Lazarus.

16 And so what he said was -- he said that he was
17 planning on doing these Patient Safety Organizations, what he
18 believed the value of the Patient Safety Organization is. And
19 he said, basically, We get mistakes here. And when we get
02:47 20 mistakes, what do we do? We cover them up.

21 I asked Dr. Lazarus during the deposition, I said, Is
22 this basically an accurate statement? The answer was: Well,
23 it might have been a little overzealous in terms of using that
24 word, but he didn't contradict what essentially he had said in
25 the reference of what a Patient Safety Organization is. He

1 didn't say that would be completely improper to cover things
2 up. That's not what we do.

3 THE COURT: Okay. So if I understand this correctly,
4 this part of the PSO is coming in through Lazarus, is that it?

5 MR. KETTERER: It is.

6 THE COURT: Are you calling him in your case in chief?

7 MR. KETTERER: We will call him via deposition, yes.

8 THE COURT: Okay.

9 MR. KETTERER: We've condensed the testimony of Dr.
02:48 10 Lazarus to a shorter clip than what was played in the Ogburn
11 case. This is an important piece of our testimony, and I
12 believe it shows the state of mind of the company. It's not
13 the only piece of evidence that we have with respect to the
14 state of mind, but it is an important piece, and it's a piece
15 of information where much of the scientific discussion, much of
16 the scientific data, went to be discussed, and there's a
17 failure to act and disseminate the information based on some of
18 the discussion that occurred.

19 THE COURT: What do you say they should have done? It
02:49 20 should have been -- not a holding tank for this information,
21 but it should have been some sort of a valve to move it on to
22 people who design the product or design warnings? Is that the
23 theory?

24 MR. KETTERER: Yeah. I mean, look, this occurs on the
25 services side of the company, right? This information doesn't,

1 in total -- or if it did reach the product side, nothing is
2 done as a result of the information. So there's an entire
3 separate side which guides the product, which yields the
4 warning for the product, which deals with the instructions for
5 use of the product. This is doctors, nurses, staff, trying to
6 figure out policy issues. That's important because there's a
7 failure and a breakdown there.

8 But that information is being buried and -- we talked
9 about these notebooks before. You look at the correspondence.
02:50 10 Most of the correspondence is talking about which lawyer is
11 going to -- which, again, I don't want to, in and of itself,
12 say that's automatically a problem or intimate the fact that
13 legal counsel might have reviewed is automatically nefarious.

14 But there's a -- separate and apart from that is
15 what's the obligation that, when you're doing all of these case
16 reports, when you're making analytics about causation analysis,
17 when you're doing scientific study and you're collecting data
18 and you discuss it and then you discuss what's the action that
19 should be taken, the physicians and the medical community have
02:50 20 a right to get that information. That's information that they
21 can't get.

22 THE COURT: Okay. I think I understand more fully
23 that argument. So Mr. Bennett?

24 MR. BENNETT: Thank you, your Honor. First, to put
25 this in a little bit of context, the evidence that we're

1 talking about that shows that we're covering something up is a
2 public website interview. It's a project done of oral history,
3 of the history of nephrology, that the plaintiffs obtained not
4 from us but that we've posted out there that is posted. So
5 it's not like it was hidden. But what he actually said is
6 recounted on Page 3 of our motion. And he's talking in
7 September of 2009, which is two years prior to the PSO actually
8 even being in effect. And what he's talking about there is
9 what happened at Harvard where he had trained and where he
02:51 10 worked.

11 And what he says is that he's talking about this whole
12 idea of not being afraid of malpractice cases, the concern of
13 litigation. What he wants to do, and he says this, "show
14 people errors. I mean, we get errors. We cover them up and we
15 tell people. And my view is CREICO, which is the Harvard
16 health insurance plan, that they're talking about how they
17 disclose this information and it's helpful to doctors." And so
18 he finishes by saying, "That could have been me. I could have
19 done that. And it's important to tell people about it." So
02:52 20 that'S the full context of his statement. It's an hour and 44
21 minute interview, of which this is a minute. In addition, when
22 he was --

23 THE COURT: It only takes a minute. It only takes a
24 minute. And so you've got this language of cover-up which
25 someone is going to have to talk about, okay? So I'm not sure

1 what you want me to do about it. They say that this -- they've
2 got a theory about this, is a kind of, you know -- not to
3 introduce too many similes or metaphors, but the PSO is like a
4 vermiform appendix. It's only valuable for or heard from when
5 it starts to get toxic. And I guess their theory is you get
6 this stuff. You're supposed to pass it on and you didn't.

7 MR. BENNETT: And --

8 THE COURT: I mean, that's what they say. I don't
9 know this.

02:53 10 MR. BENNETT: I understand you're not commenting on
11 the evidence. The actual -- what happened was that the Dr.
12 Hakim memo came out of the PSO. The memo that got us all here,
13 this work that was done that resulted in Figures 2 and Figures
14 3 that we talked about last time, was out of data collected for
15 the PSO. They had a discussion about whether, even though it
16 was PSO data, it could be communicated to the field, and they
17 sent the memo out. And so that is the process that underwent,
18 and I don't think that there's any dispute about that.

19 THE COURT: So that may be so. So you offer in some
02:54 20 diluted form that piece of information; that is, we had data,
21 not the Hakim memo; we had data. The data was disseminated.
22 The data came in through the PSO. It was disseminated. That's
23 not a cover-up. It's a little like CREICO, which is the
24 Harvard insurance program. At least that's what he says, and
25 that's my recollection. So it's fair game, isn't it?

1 MR. BENNETT: I don't think so under 403 or 401
2 because what he's talking about is this situation where a PSO
3 is being used to -- in a situation where there's a concern
4 about medical malpractice, which is the exact purpose of
5 Congress in setting up the PSO. So when he says, There's a
6 concern that we're covering up and that we're not
7 communicating, that's being said, Oh, well, that's a bad thing
8 about your PSO. But that's actually what the legislation was
9 enacted for.

02:55 10 When he was asked about it in his deposition, he said,
11 "Actually" -- and this is on Page 3 of our response -- "not
12 trying to cover anything up. I was talking about medicine in
13 general and doctors in general to a lady talking to me about
14 how PSOs came about and what their purpose was." So I think --

15 THE COURT: That's his explanation. Maybe it's
16 plausible. But this isn't something that should be kept from
17 the jury, I guess. As I said, the language of the plaintiff's
18 submission with respect to this was florid. I'm not sure
19 exactly how I deal with it in an argument setting, but there is
02:55 20 a foundation for the theory.

21 MR. BENNETT: And then I think that that means that we
22 have to explain how we did not withhold information from people
23 which goes back right -- if this is opened on and this is part
24 of their case in chief, all of the information that we did
25 disseminate over the years would seem to me to be necessarily

1 responsive to that as well going back to the last ruling.

2 THE COURT: I don't know what that precisely means.
3 Are you talking about the general non-Buchanan dissemination?
4 Is that it?

5 MR. BENNETT: Exactly. We would present evidence that
6 we were telling people about this issue in a lot of different
7 settings and not covering anything up.

8 THE COURT: Okay. Well, that may be but a way of
9 taking the string out.

02:56 10 MR. KETTERER: Your Honor, I guess my response to all
11 that is: okay. When we're talking about Dr. Lazarus'
12 explanation, then we intend to play the part where Dr. Lazarus
13 perjured himself at the deposition and admitted to perjuring
14 himself and lying under oath about a material fact. He had
15 been embarrassed that he hadn't read a specific piece of
16 medical literature.

17 THE COURT: Have I had this part of it presented to
18 me?

19 MR. KETTERER: No, because I didn't know exactly how
02:57 20 they would come down and argue this. And now that they're
21 saying there's an explanation to it, that explanation is
22 subject to, obviously, an issue with respect to --

23 THE COURT: Well, am I correct, you will put some
24 snippet or more of Dr. Lazarus on? You did not intend to
25 impeach him until you heard this --

1 MR. KETTERER: That's right.

2 THE COURT: -- by virtue of perjury. Perjury is
3 pretty strong language, and so I guess I've got to think about
4 this a little bit more so --

5 MR. KETTERER: The --

6 THE COURT: What's the story?

7 MR. BENNETT: Well, I mean, first things first, I
8 think the portion I was reading about his explanation is in
9 their own designation. So I don't think we're going to get to
02:57 10 this.

11 Secondly, there was a question asked of Dr. Lazarus
12 about whether he knew of a certain journal. He said in his
13 deposition that he didn't remember it; and then he said the
14 next day, on his third day of deposition, that he had talked to
15 two people about it and learned that it was out there. And
16 then he made that up, and then he corrected it.

17 MR. KETTERER: That's lying under oath.

18 THE COURT: Yeah. I'm not sure that I'm going to be
19 permitting anybody to say "perjury" unless he said -- after he
02:58 20 said "cover-up," he said "perjury."

21 MR. KETTERER: No. What he said is -- with respect to
22 this, your Honor, is that the exchange in Ogburn was that, if
23 they're going to play something affirmatively, then --

24 THE COURT: It seems to me that they will. You know,
25 I guess my view is this: I think I'm letting this in. I think

1 there may be some discussion about what PSOs are and what they
2 do and what the purpose was at Fresenius. You have, you know,
3 this language that has a broader context and puts a somewhat
4 different light on it. And if parties want to impeach someone
5 who testifies, they can do it.

6 MR. KETTERER: Right.

7 THE COURT: And that someone said I knowingly made an
8 untruth, it's fair game. Now, somebody saying "perjury" and
9 that this should go up to the ninth floor of this building for
02:59 10 the U.S. Attorney to think about it carefully, no. But this is
11 a kind of person who lies when convenient, I guess, is probably
12 one of the arguments that's going to be made.

13 MR. BENNETT: And I guess I'm -- I believe that the --
14 all of the designations we're talking about are things that the
15 plaintiff is offering.

16 THE COURT: It doesn't make any difference. They're
17 not vouching for their witness. They can impeach their own
18 witness. So, you know, I guess this gets a little broader on
19 that back and forth. But I don't see that I'm going to be
02:59 20 excluding this testimony and this evidence with respect to the
21 PSO. I don't think that -- I want to, as I said, think about
22 the argumentative quality of it. I understand that it's not
23 going to be raised in opening statement here. And if somebody
24 wants me to look more carefully, I gather there's a video. If
25 somebody wants me to look more carefully at what the final

1 video is, I'll take a look at it. But it doesn't sound to me
2 like that there's much for me to do other than get a
3 prescreening.

4 MR. BENNETT: Well, of course, we'll be making an
5 objection, once the evidence is open, before it's played.
6 We'll have to bring it up again during the actual trial.

7 THE COURT: I just want to understand. Is there
8 something more involved here? You've got a witness who's
9 affiliated with you who says these things. They are
03:00 10 uncomfortable, no doubt, language that he wishes now that he
11 hadn't used perhaps. But that's what he did. So I don't
12 understand how you keep it out.

13 MR. BENNETT: I was just saying, mechanically, I think
14 we will have to at least make the same objections and get
15 perhaps the same ruling once the case starts.

16 THE COURT: Right. I want to be sure --

17 MR. BENNETT: I'm not asking you to think about
18 anything new right now.

19 THE COURT: That's all I wanted to know. I've got
03:01 20 enough things to think about.

21 So I am denying the motion to exclude evidence and
22 testimony with respect to the PSO, as we've discussed it so
23 far, reserving the question of what kind of argument is going
24 to be made on the assumption that opening statement will not
25 include reference to this information so I don't have to

1 calibrate further on it.

2 So next one is the 0.1 to 1.0, which is your No. 8 and
3 Docket No. 112. I guess my general view about this is this is
4 just too far afield to come in. This is not a 0.1 to 1.0
5 milliequivalent case. It doesn't even come close to it. They
6 may have been sloppy in the way in which they dealt with those
7 kinds of circumstances. May not. I don't know. But this just
8 seems to me to be, at the very best, quite attenuated and
9 perhaps not even worth treating as attenuated but another case
03:03 10 involving another person if they ever did something with it.

11 Now, I understand there's some secondary kinds of uses
12 that this is going to be put to, like, does Fresenius have the
13 -- or undertake to direct certain kinds of policies within the
14 clinics, that sort of thing? I want to think about that a
15 little bit, see it in context. I just don't see this coming
16 in.

17 MR. KETTERER: I think there's a primary purpose, your
18 Honor, and I'd like to spend a few minutes on that.

19 THE COURT: Sure.

03:03 20 MR. KETTERER: Can I borrow the flip chart there?

21 THE COURT: Sure.

22 MR. KETTERER: So the issue is, in this case, your
23 Honor -- I'm going just to start with 0K because 1K primary is
24 the same sort of line of argument.

25 Here's the issue. The theory of the plaintiff's case

1 with respect to how does the injury of sudden cardiac arrest or
2 cardiac injury occur is that, as bicarbonate goes up, potassium
3 -- it draws potassium down. That's, in its simplest form, part
4 of our theory. Now, it actually causes other electrolyte shift
5 as well, calcium and other things, which affect the electrical
6 conductivity of the heart.

7 The reason why the OK issue became an issue is because
8 of a similar causation issue. So when I just told you there's
9 a primary line that's involved here, this is the primary line.
03:05 10 So it isn't just that was he exposed to OK? That's not our
11 contention. The importance of talking about the history of OK
12 and FMC's relationship with OK -- and I'm going to get to this
13 in a second -- is because it directly impacts their thoughts on
14 general causation today.

15 Now, OK, what happened was -- and this is, again, in
16 the testimony of Dr. Lazarus, and it happened during his
17 tenure -- the OK bath was part -- what happens is, when you
18 have dialysate concentrate series, so different acid
19 concentrates -- and those acid concentrates have different
03:06 20 constituents. So you have a GranuFlo product or a NaturaLyte
21 product. You have those products. And you have NaturaLyte
22 with, let's say, sodium component, magnesium component, and a
23 potassium component, the most common being 2K.

24 But let's say you want to drop someone's potassium,
25 how would you do it? You would do it with a OK. Except that

1 what Dr. Lazarus testified to, what was going on in their
2 clinics, was that physicians were forgetting that they had
3 prescribed OK, and it was remaining set on the patients. So
4 what was happening? The potassium was dropping too low. And
5 what do you have when the potassium drops too low? Sudden
6 cardiac arrest.

7 THE COURT: Okay. So that's somebody else's case. I
8 mean, the -- I suppose, you know, exploring the biochemistry
9 with experts may provide some mechanism to deal with this, but
03:07 10 this really strikes me as distracting the jury from the case
11 involving Mr. Dial.

12 MR. KETTERER: If I may, your Honor, there's actually
13 a secondary piece I didn't get to.

14 THE COURT: Okay.

15 MR. KETTERER: And so what did they do with this
16 particular acid concentrate series, the same kind of acid
17 concentrate that NaturaLyte is? They restricted -- part of
18 their defense is, Well, the doctor can make any decision they
19 want to make. That's actually not true. If you are in a
03:07 20 Fresenius clinic, you can't access this particular acid
21 concentrate series.

22 THE COURT: Let me just deal with that.

23 MR. KETTERER: Sure.

24 THE COURT: If their argument is, in respect of the
25 kind of treatment that Mr. Dial received, they ultimately don't

1 restrict. That's true, isn't it? That they restrict other
2 kinds of treatments for other kinds of people with other kinds
3 of indications is one thing. But with respect to Mr. Dial,
4 we're dealing with a particular kind of treatment that seems,
5 anyway, to have been largely in the hands of Dr. Buchanan and
6 not even subject to some directive from Fresenius. Now, the
7 tertiary maybe is that they knew how to do it if they wanted
8 to, and they didn't do it. But I think that's too far afield
9 as well.

03:09 10 MR. KETTERER: Well, let me just frame it a little bit
11 differently then, your Honor. If the defendants are not
12 contending that they had the ability -- or they lacked the
13 ability, I should say, to actually restrict or give better
14 guidance as to how to properly use their product, then this
15 argument isn't as relevant.

16 THE COURT: It isn't relevant at all. Mr. Bennett,
17 your response to that?

18 MR. BENNETT: Our response to that is that within this
19 -- we do not restrict the physician's ability to prescribe in
03:09 20 the range of Mr. Dial's treatment in any way. We do have a
21 certain formulary restrictions. Like the OK, we only allow
22 that to be done in a hospital setting where you can put
23 somebody on a telemetry to check their pulse. I don't think
24 we're going to say that we under no circumstances have no
25 ability to restrict the formulary of our clinics if we think

1 that it's necessary to do so to be consistent with the range of
2 medical behavior or medical views.

3 THE COURT: Well, I guess my thought on this is as
4 follows, because I'm always keeping alternatives open. But I
5 don't see this coming in your case in chief at all. I'm not
6 even sure I see it coming into your case if they say something
7 about restricting or inability to restrict. I don't know about
8 that. I'd have to think about it.

9 But this one reminds me of when my father, at the
03:10 10 dinner table, would point outside and say, "See that bird," and
11 I go look at the bird, and then the hamburger had disappeared.
12 It's distracting and doesn't nourish the jury at least as I
13 understand it now.

14 MR. KETTERER: I don't want to belabor the point
15 overly because I think I understand why you believe that this
16 is distracting, your Honor, but I don't think it's necessarily
17 accurate to look at it as these are two disparate issues, that
18 because he wasn't necessarily exposed to a OK that means that
19 then somehow the issues surrounding what he did receive are not
03:11 20 interrelated.

21 THE COURT: They are but they're going to be drawn out
22 by -- can properly be drawn out by experts, not this matter,
23 which gives an illusion of admission on the part of the
24 defendant as to something that is not directly relevant to this
25 case. So, you know, somebody talks about the biochemistry,

1 they can talk about the biochemistry, that things go up, things
2 go down, that sort of thing. You don't need the 0.1, 1.0, to
3 develop that.

4 MR. KETTERER: Why isn't it, your Honor -- I mean, if
5 the chief medical officer researched and said that drops in
6 potassium and acknowledges that drops in potassium leads to
7 cardiac arrest, that's an important piece of evidence.

8 THE COURT: It may be, but what you're -- or what is
9 the subject of this motion to exclude is has to do with this
03:12 10 particular kind of policy --

11 MR. KETTERER: I see.

12 THE COURT: -- of the company. And so you've got
13 experts saying that certain kinds of consequences flow from
14 certain kinds of introduction of chemical or medicine --
15 medical material. I just don't see it, and so I don't want to
16 hear a -- I'll let you argue about it, but I don't want to hear
17 reference to it, I think, until it's been brought out with some
18 particularity how we tie this to it.

19 I think your colleague may have something that he
03:13 20 wants to add too.

21 MR. KETTERER: Sure.

22 MR. KOTT: Just a moment, your Honor.

23 (Discussion held off the record.)

24 MR. KETTERER: I think the point that Mr. Kott wanted
25 to raise, and I think it's a fair one, your Honor, is that, if

1 they're going to allege -- if Fresenius alleges that they have
2 no control over what the physician does -- and that's somewhat
3 what they're going to offer through Dr. Buchanan -- then this
4 evidence is directly contradictory to that.

5 THE COURT: No. That they've got control of certain
6 circumstances doesn't mean that they don't have control or they
7 don't see -- they don't irrigate to themselves control in other
8 circumstances. In any event, got to see it in real time before
9 I make that determination.

03:13 10 MR. KETTERER: Okay.

11 THE COURT: So I'm allowing the Motion No. 112 to --
12 subject, as always, to if there's a foundation that you want to
13 bring to my attention, you will.

14 MR. KETTERER: I do want to clarify something. It's
15 somewhat related, so I want to make sure, as I present Dr.
16 Fine, I don't run afoul. It's somewhat related. Obviously,
17 he's reviewed many depositions, and one of the depositions is
18 of Dr. Lazarus. To say that Dr. Lazarus also agrees and drew
19 the conclusion that lower potassium can lead to cardiac
03:14 20 arrhythmias, is that something that is considered part of this
21 or not part of this?

22 THE COURT: I don't know. Mr. Bennett? I can't
23 imagine that Dr. Lazarus is going to disagree with that broad
24 general point.

25 MR. BENNETT: We will never be contesting that OK

1 policies don't -- are not a risk factor. We won't --

2 THE COURT: No. There's a different issue, that is,
3 that dropping --

4 MR. KETTERER: Potassium, raising bicarbonate.

5 THE COURT: Right. I was just trying to focus on
6 it -- can, under certain circumstances, lead to cardiac arrest.

7 MR. BENNETT: Yes. No witness from our side is going
8 to say that using a low potassium bath that causes a rapid
9 decrease in serum potassium can't result in arrhythmias.

03:15 10 THE COURT: Okay. So as to the asking Dr. Fine that
11 question seems to me probably a little far afield. It is not
12 disputed, and it seems gratuitous to introduce it.

13 MR. KETTERER: I guess then the issue is, of course,
14 if he's cross-examined on issues with respect to that, then
15 part of his answer might be, This is something that they may.

16 THE COURT: Maybe this is a point to take an afternoon
17 break of, say, 10 minutes or so.

18 (Recess taken at 3:15 p.m.)

19 (The Court entered the room at 3:30 p.m.)

03:31 20 THE COURT: So I think we're now at No. 7, which is
21 the heeding, so-called, presumption. It strikes me this is the
22 kissing cousin of the learned intermediary and ought to be
23 dealt with in more or less the same way at this stage.

24 MR. TARRICONE: I think so, your Honor. And what we
25 would do is inform the Court that, aside from presumptions,

1 there is decisional law in North Carolina concerning when a
2 case -- what is appropriate to go to the jury. And,
3 specifically, there's a case that addresses the situation where
4 a doctor comes in and says, Doesn't matter what anybody would
5 have told me. I would have done the same thing. And it's the
6 *Holley* case. And I have a copy which I'll hand up to the
7 Court. And it -- this decision predates the statutory
8 enactment that will be the subject of the law in this case.

9 Then in 2010, there is a federal decision from federal
03:32 10 court in North Carolina. I think it's the middle district, the
11 *Fussman* case, which I will also hand up to the Court, which
12 says essentially that the *Holley* case is still good law. It
13 was not supplanted by the statute. And it also points out that
14 the defendant has the burden of proof on the issue that was
15 raised by Mr. Bennett earlier, that is, the adequacy of
16 warnings that were provided with respect to a medical product.

17 THE COURT: Okay. I'll look at it. The *Holley* case
18 is a state case?

19 MR. TARRICONE: Yes. It's the North Carolina Supreme
03:33 20 Court. I'm sure you guys have this, but --

21 I really don't think there's anything for the Court to
22 address with respect to this today.

23 THE COURT: Okay. All right. So I guess I'm going to
24 treat this the same way that I'm treating the question of
25 learned intermediary, which is, it will take on a life probably

1 -- or a significance at the charging stage. The evidence will
2 be submitted that either supports or does not support this and
3 that I'll try to sort through it. I don't think you need any
4 more instruction than that. Is that fair? Okay.

5 So then we turn to what we already dealt with, Dr.
6 Schwartzbard testifying in rebuttal, this morning.

7 So we turn to the failure regarding what's called
8 compliance with FDA design controls requirements or guidance.
9 It appeared that it was a little bit broader than that in
03:34 10 response or what was anticipated. So, Mr. Browne, what --

11 MR. BROWNE: Your Honor, I might be able to save us
12 all some time. The plaintiff will not be offering any expert
13 testimony regarding design controls evidence. So I don't think
14 this is something that we need to address.

15 THE COURT: So nothing that was within the scope of
16 concern from the Motion in Limine No. 12 is at issue now?

17 MR. BROWNE: Yes. As I understand defendants'
18 position, they don't want plaintiff's experts to talk, as they
19 did in their expert reports, about the design control
03:35 20 regulations. And Dr. Pence will not address the design control
21 regulations in our case in chief.

22 THE COURT: Okay. That's moot then?

23 MR. BENNETT: If the full scope of the motion's relief
24 is agreed to, then we don't have anything to raise at this
25 time.

1 THE COURT: Sounds like it is. So I'll treat that as
2 -- well, Motion No. 101, and your No. 5, as moot.

3 Now, your No. 4, and it's Motion No. 100, is:
4 Standards published after Mr. Dial's death. That's the
5 headline anyway. So the plaintiff's response?

6 MR. TARRICONE: On the motion standards enacted
7 afterwards, we have no intention of using them. We will refer
8 to and rely on the standards in effect up until the time of his
9 death.

03:36 10 THE COURT: Right. So I'll treat that as moot in
11 light of the statement that it's not going to be used.

12 Now, No. 99, Motion No. 99, No. 3 on your list, which
13 is: Regulatory actions unrelated to excess buffer or that
14 post-date -- Mr. Browne.

15 MR. BROWNE: Your Honor, we can slice this very thin.
16 We will not be using the documents that were raised in
17 defendants' motion regarding FDA inspections and things of that
18 nature.

19 Additionally, the very limited evidence that may be
03:36 20 introduced at trial would be product neutral. It would
21 literally be just a couple questions, and it would be -- go
22 right to the point that your Honor -- the way you phrased our
23 case earlier today, that this case is about the delivery of
24 information. It's about did the right content get there and
25 did it get in the right manner?

1 And all plaintiff's expert would say was that
2 Fresenius communicated, delivered, the information inadequately
3 and Mr. Dial died as a result because what happened in this
4 case is -- there's two parts to the company, as you know. And,
5 basically, Fresenius left it to the clinic side, to FMS, to
6 deliver product information rather than the product side of the
7 company, RTG, Renal Therapies Group, they have different
8 policies, procedures, and tools to be able to communicate this
9 information more effectively.

03:37 10 That didn't happen per their testimony in this case,
11 which we anticipate will be played at trial. It didn't happen
12 because there were no complaints. There were no adverse
13 events. That necessarily requires us to then explain to the
14 jury why there were no adverse events and complaints. And the
15 reason, your Honor, is because they did not follow the industry
16 standards that they cited to in their policies and procedures.

17 So all we would simply say with regards to the
18 information raised in this motion is defendant knew that its
19 policies and procedures were incorrect, that they didn't follow
03:38 20 industry standards. They had a chance to fix them. They
21 should have fixed them. Had they fixed them, it would have led
22 to the corrective and preventive actions that we say should
23 have happened in this case. It would have led to the delivery
24 of proper information through proper means. That's it.

25 There's not going to be blood tubes or any of this other stuff.

1 Thank you, your Honor.

2 MR. BENNETT: The motion is directed at precluding any
3 evidence that there was any regulatory action taken against
4 Fresenius or related to Fresenius for any product other than
5 NaturaLyte and GranuFlo. If they're saying they're not
6 offering that, then the motion is agreed. If what they're
7 saying is they want to talk generally about the same topic
8 without talking about the specific products, then we want the
9 motion -- then we think the motion should be granted. The case
03:39 10 is about the acetate content, this NaturaLyte product, and what
11 happened there. And so anything else we think would be --

12 THE COURT: I mean, it was phrased in a broader sense,
13 but I do share the view that it's got to be focused on the
14 product at issue in this case. Their policies -- your policies
15 may cut across the board sufficiently that it implicates the
16 product at issue in this case.

17 MR. BENNETT: I agree that our policies that apply to
18 this product, as applied to this product and as applied to Mr.
19 Dial, is different than what this motion is at. But if they
03:39 20 want to say -- I'm not quite sure, but I think the proffer I
21 would make of my understanding is, well, you guys have a
22 products division. You should have known from other instances
23 that you're doing something wrong here; and, therefore, and if
24 you had taken action in a timely manner on these other issues,
25 it would have affected how you handle NaturaLyte and total

1 buffer. I think that that should be excluded because it's
2 talking about other products and other issues with the FDA.

3 THE COURT: Mr. Browne.

4 MR. BROWNE: Your Honor, the expert would say they did
5 not characterize the adverse events that Miss Baker, Miss
6 McIntyre -- they didn't associate them with the product. They
7 didn't report complaints to products.

8 THE COURT: I just want to be sure I've got it right,
9 too, which is this is going to be product, that is, the product
03:40 10 at issue here, focused.

11 MR. BROWNE: Yes. Why wasn't there adequate warnings
12 about NaturaLyte, and why weren't they delivered the right way?
13 It's because their policies and procedures were deficient.

14 THE COURT: That affect NaturaLyte?

15 MR. BROWNE: Correct.

16 MR. BENNETT: That's not the subject of our motion, so
17 our motion, I think is --

18 THE COURT: It sounds to me like it's moot by terms.
19 I appreciate the kind of preview of what the argument is going
03:40 20 to be, but -- and that gives me an opportunity to say focus on
21 this product itself. So I'll treat 99 as moot.

22 That takes us -- well, we've already dealt with the
23 size, wealth issue, and I'm holding that in the same fashion as
24 the wrongful death punitive issue, which is 78, I think, until
25 we get to that point.

1 So No. 1 is the timing of adjustment of Mr. Dial's
2 machine setting for bicarbonate. Now, I'm a little perhaps
3 simpleminded about this, but why isn't that just part of the
4 circumstances of the events at issue?

5 MR. BENNETT: I think that you're correct. The term I
6 sometimes use is part of the *res gestae* of what happened here.

7 THE COURT: I'll tell you that you tripped over a
8 wire.

9 MR. BENNETT: Uh, oh.

03:42 10 THE COURT: It won't kill you. The thing that I used
11 to hate most in the state district court was the --

12 MR. BENNETT: The hearsay exception?

13 THE COURT: Yes. Hearsay, it's everything. What
14 would happen is that judge would not want to make a ruling on
15 evidence and say -- somebody would say it's *res gestae*. He'd
16 say, That's right, it's *res gestae*, on the assumption that, if
17 you can say it in Latin, it's the universal solvent.

18 MR. BENNETT: I hope I was using it right.

19 THE COURT: I think you are. But the short of it is
03:42 20 we're going to hear evidence about, you know, how they set the
21 machine and that kind of thing. And it may lead to arguments
22 on certain issues, but I don't know how I keep anything out.

23 MR. BENNETT: Yeah. I do think that, in terms of
24 motions in limine, this is more of an argument than an evidence
25 issue for us. Our concern in filing the motion was that the

1 case is about whether we told people about the products,
2 whether people understood the products, and it's not a medical
3 malpractice case or a clinic malpractice case. And so we
4 wanted the emphasis on the products and the discussion and the
5 knowledge as opposed to, well, the reason why Mr. Dial's death
6 happened was they didn't adjust that in time, and they should
7 have under his order. I think that that's more of a matter for
8 how you give guidance on how evidence should be argued and then
9 you instruct after argument so --

03:43 10 THE COURT: I mean, I think it comes up in the
11 argument sets -- argument phase. I don't understand that there
12 would be occasions to go beyond that in the presentation of
13 evidence.

14 MR. BENNETT: I think you're correct.

15 THE COURT: The presentation of evidence is going to
16 be: Here's what happened in this setting, I guess.

17 MR. TARRICONE: Well, I mean, the facts are the facts.
18 It's how he was treated on this last day, the last treatment he
19 had, the order, the standing order, and the protocols and
03:44 20 algorithms that were in there and whether they were or were not
21 followed and how much bicarbonate he was given and what the
22 product was and what additional acetate and bicarb was given.
23 These are all facts.

24 THE COURT: I understand. But it has to be -- the
25 importance of those facts has to be tied to a failure on the

1 part of Fresenius of some sort.

2 MR. TARRICONE: Well, absolutely.

3 THE COURT: I know you have a theory about that,
4 but --

5 MR. TARRICONE: Well, directly, your Honor. There was
6 an algorithm that required the nurse on that day -- and I know
7 the defendant has an explanation and another version of what it
8 means. But on its face, the order says, If the patient has
9 bicarb of 28, his bicarb should be lowered by two. And it goes
03:45 10 right to the heart of causation. It shows that it makes a
11 difference.

12 THE COURT: But the point is that this is tied to your
13 warning issue --

14 MR. TARRICONE: Yes.

15 THE COURT: -- in some fashion, and it's not argued --
16 this is not a case about Mr. Buchanan, although Mr. Buchanan
17 has many things to say in connection to this case.

18 MR. TARRICONE: We have no intention of accusing him
19 of malpractice, your Honor.

03:45 20 THE COURT: From that perspective, I'm going to deny
21 that Motion No. 4, Motion in Limine No. 4, which is Motion No.
22 96, which is on the list as No. 1, with the understanding that
23 this evidence is admissible but only for purposes of
24 identifying some failure on the part of the defendant and not
25 offered -- focused on Mr. Buchanan. And we'll take that up for

1 purposes of argument there.

2 You know, if it happens, you know, I'm not above
3 saying this isn't a malpractice case, so ladies and gentlemen,
4 you hear this but only on a limited basis, but I can't imagine
5 I'm going to have to do that. You know my view about it. So
6 that deals with all of the motions that were on the list.

7 Now, I got a number of --

8 MR. TARRICONE: Your Honor, there was one other aspect
9 of Dr. Buchanan that I wanted to bring up, and Mr. Ketterer
03:46 10 just reminded me. And it's related and it's a discussion that
11 we've been having with Mr. Bennett. It's my understanding that
12 the defendant intends to ask Dr. Buchanan his opinion on the
13 cause of death. And we have not filed a motion on it, but it's
14 part and parcel of the death certificate.

15 THE COURT: Let me stop. Are you going to do that?
16 And he did not conduct an autopsy, didn't do anything. He
17 signed the medical -- or death certificate, and there was some
18 back and forth about the conclusion that he had and his basis
19 for signing it, I guess.

03:47 20 MR. BENNETT: I guess, although that didn't -- he was
21 not questioned about that at all in his deposition. I guess
22 "opinion" is the term that I would quibble with. In 2012 when
23 Mr. Dial died, Dr. Buchanan had to do three things, one of
24 which is he signed the death certificate, which we're not going
25 to attempt to introduce. He had to determine whether an

1 adverse event report needed to be filed. He had to determine
2 whether a medical device report had to be filed. And he had to
3 discuss the death in the monthly quality assurance meeting
4 where every event of mortality is discussed. In the minutes of
5 that meeting, which have been produced and are on our exhibit
6 list, reflect Dr. Buchanan and the clinic staff view that he
7 died of a heart attack. In addition, he had to do a discharge
8 diagnosis, which is in the patient's medical chart.

9 As I understand the plaintiff's case -- and we argued
03:48 10 a motion in limine on it last time -- they intend to say, You
11 don't report things, and this is an example of the things you
12 shouldn't have reported, but we're going to show that they did
13 it.

14 And so the opinion -- it's not like saying, Looking at
15 all the medical records, Dr. Buchanan, as you sit here today,
16 do you have an opinion as to what caused the death? It is,
17 Back at the time, did you reach a conclusion about what you
18 believed was the cause of death as you were required to do
19 under all these regulations and rules that the plaintiffs keep
03:48 20 talking about? I expect his answer to that to be, Yes. As
21 reflected in the minutes, I thought it was this, and here was
22 my basis for it. And it's things that he knew at the time and
23 concluded at the time.

24 THE COURT: Well, does that lend itself then to a
25 limiting instruction as to the admissibility of that testimony?

1 That is, if you're, as I expect you will, saying, you know,
2 they don't have a robust mechanism for calling out adverse
3 events in various forms, then I suppose what they did to do
4 that is fair game for them in response.

5 On the other hand, it's not presented as an opinion.
6 It has been presented as opinion testimony, and that's the kind
7 of thing that I simply say what he said at the time. This was
8 his conclusion at the time.

9 MR. TARRICONE: I'm sorry, your Honor. I don't mean
03:49 10 to interrupt.

11 THE COURT: Go ahead.

12 MR. TARRICONE: When we were discussing the death
13 certificate, the way it was left was, if we got into saying
14 this was a cover-up, he didn't report it, then it opened up the
15 door to this whole line. But if we don't get into that, then
16 this really is extraneous.

17 THE COURT: But you are going to get into it, aren't
18 you? Why wouldn't you? You know, your theory is they, at
19 best, had a slapdash mechanism for dealing with things, that
03:50 20 they had this place where complaints go to die. And they're
21 going to say, Well, no. Here's what we do. This guy, Dr.
22 Buchanan says he's got to make this report and that report, and
23 then in the report he said this.

24 Now, I go back to the idea that I can have a limiting
25 -- I can provide a limiting instruction to deal with the

1 concern -- the more fundamental concern, I think, that we've
2 got yet another witness opining about the cause of death when
3 he's not really -- he hasn't been qualified for doing it.
4 Whether he could be qualified is another matter. But he's not
5 been qualified to do it, and I'm not going to let him to it.

6 MR. TARRICONE: I guess that's the point. If there's
7 a limiting instruction, that's how we'll --

8 THE COURT: Okay. In that connection, I welcome a
9 draft of one to deal with it when it pops up. But that's how I
03:51 10 think I'm going to deal with -- I will be likely to deal with
11 this issue.

12 MR. TARRICONE: Thank you, your Honor.

13 THE COURT: The death certificate, we're not going to
14 revisit the death certificate, I take it?

15 MR. BENNETT: No.

16 THE COURT: And with good reason because it takes on a
17 life of its own.

18 MR. BENNETT: That's the reason why we agreed to that
19 without agreeing to the other. It's a State of North Carolina
03:51 20 record, that we basically have taken the position isn't
21 admissible in any of these cases.

22 THE COURT: All right. So we've gone through that.

23 Now, I received what are marked as -- I say "received"
24 because they come to me in different forms, but three motions
25 that I think we've dealt with. At least two of them we've

1 dealt with, what is 153, which was the bicarb debate, I think
2 we've dealt with. I'm just using these kind of sealed
3 documents that come in without a provenance sometimes, at least
4 they get to me. The DaVita witnesses, what's the story?

5 MR. BENNETT: Your Honor, I think I addressed that
6 last time. And the minutes, when we get them, will reflect
7 that we agreed to withdraw those designations and -- because
8 they agreed not to contend that we failed to disclose this to
9 other clinics.

03:52 10 THE COURT: So that's No. 155. That just reminds me
11 of that.

12 And then there is No. 157, which is unsupported
13 treatments of some sort.

14 MR. BENNETT: We argued that motion early on today
15 where I talked about the rounding notes and so on, and you've
16 ruled on it.

17 THE COURT: So these are duplicative of things that we
18 already have been through. Okay.

19 Now, are there any other motions that are outstanding
03:53 20 that we have here?

21 MR. BENNETT: Not related to this case that we know
22 of.

23 MR. TARRICONE: I think that covers everything.

24 THE COURT: Okay. I mean, I told you to hold your
25 time. I'm not trying to impose on you, but I do think we have

1 to go through the verdict slip -- I mean, the questionnaire at
2 the last point because that's when it's going to be copied and
3 it's frozen.

4 I probably will want to talk about schedule because
5 I've made some schedule adjustments. I'll make more. But I'm
6 keeping my options open to the very end. There's at least one
7 day in which I will have to be in Washington, and I think it's
8 March 2nd, but I'll check on it just so I can make sure I've
9 got my schedule clear and you've got the schedule. But you are
03:53 10 obviously the important activity in the next three weeks.

11 I may try to slip things in during breaks and stuff so
12 the breaks may be a little bit longer than usual. But those
13 are to deal with motions that require attention or activities
14 that require attention. I get to swear in a former intern as
15 an assistant United States attorney. Your case is very
16 important, but it's not going to dissuade me from doing that.
17 Okay.

18 So we'll just deal with those. I think it should be
19 light duty. Sounds to me like we don't have a concern for
03:54 20 Monday, although we're available if something pops up there.
21 So I'll see you, shall we say, at 2:30 on Thursday? Is that
22 okay?

23 MR. TARRICONE: That's fine, your Honor.

24 MR. BENNETT: Yes, your Honor.

25 THE COURT: Then we'll be in recess. Thank you.

1 (Whereupon, at 3:54 p.m. the hearing concluded.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Cheryl Dahlstrom

February 11, 2016

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter

Dated