

1 Appearances of Counsel:

2 For the Plaintiffs'
3 Steering Committee:

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5 For the Plaintiff,
6 Blue Cross/Blue Shield:

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9 For Takeda Pharmaceutical
10 Co., Ltd., et al:

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15 For Eli Lilly & Company:

MR. DAVID R. DUGAS
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18 Also Present:

MS. CARMEN M. RODRIGUEZ
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1 MR. ARSENAULT: Yes, Your Honor. Richard Arsenault
2 here on behalf of the Plaintiffs' Steering Committee.

3 THE COURT: All right. Blue Cross/Blue Shield.

4 MR. McMORRIS: David McMorris, M-C-M-O-R-R-I-S.

5 MS. MCGOLDRICK: And Marilyn McGoldrick,
6 M-C-G-O-L-D-R-I-C-K.

7 THE COURT: Okay. I'm going to need, Cory, that
8 written down big for me so I'll know.

9 Marilyn, I'm sorry, I didn't catch the pronunciation of
10 your last name. If you are on a speakerphone, please get off of
11 it. We can't hear you very well.

12 All right. Now let's continue with the record,
13 identifying for the record. Who else?

14 MS. DAVIS: D'Lesli Davis and Jeff Cody for the
15 defendants. And it's D'Lesli, D-apostrophe-L-E-S-L-I.

16 THE COURT: And who else is with you? The person that
17 is with you, I need to actually identify so Cathleen can hear
18 your voice.

19 MR. CODY: My name is Jeff Cody.

20 THE COURT: If you're on a speakerphone, Mr. Cody, get
21 me off of it, please. All right. I'm going to come back to
22 that.

23 MR. McMORRIS: Your Honor, this is David McMorris. We
24 are going to have to dial in again because we're on a conference
25 phone that doesn't have a nonspeaker capability.

1 THE COURT: Okay. Well, hold that thought. We're
2 going to come back to that because I want to talk with you about
3 that in a minute.

4 Now I want to get everybody identified for the record,
5 please. Has everyone physically spoken and identified for the
6 record?

7 MS. GOURLEY: I did before, Your Honor, but on this
8 round again, this is Sara Gourley for Takeda.

9 MR. DUGAS: Your Honor, David Dugas for Eli Lilly &
10 Company.

11 THE COURT: Now, Sara, Richard, and probably David
12 already know this, but I'm going to point this out for the rest
13 of you.

14 First off, whenever we have a telephone conference, I
15 anticipate and expect that lead counsel/trial counsel must be
16 present, period. Notice the pregnant pause. Sometimes we can
17 get permission for you not to be, but that has to be gotten from
18 either me or the Special Master who has asked me. So that's
19 number one, because institutional memory is very, very important
20 for me.

21 So do I have lead counsel/trial counsel vis-a-vis the
22 Blue Cross/Blue Shield and defendants Lilly and/or Takeda on this
23 call?

24 MR. McMORRIS: For Blue Cross, yes, you do.

25 MS. DAVIS: For defendants, yes, you do.

1 MR. DUGAS: Your Honor, for Lilly I am lead counsel and
2 will be one of the trial counsel. The other trial counsel is
3 Steve McConnell, but we didn't have notice of this call, so Steve
4 didn't get notice of it and is traveling. But I'm here as lead
5 counsel for Lilly.

6 THE COURT: All right. David, you know me. You know
7 how persnickety I am about this point. Ask Mr. Parker what
8 happens if someone does not show up for these conferences and we
9 get close to trial.

10 Now I understand, you know, since you've kind of come
11 in and you're playing catch-up --

12 MR. DUGAS: Right.

13 THE COURT: -- you know, it's a problem, and it's a
14 problem for this gentleman. But, David, from here on out, if
15 that fellow is going to stand up and speak at trial in any
16 appreciable fashion as trial counsel, he's got to be on these
17 calls, David. Okay?

18 MS. DAVIS: Your Honor, I understand. I can assure
19 you, if Mr. McConnell knew that this was going on, he would be
20 mortified. We just received the information about the call this
21 morning because we didn't get the original notice because we had
22 not yet enrolled, and unfortunately, Mr. McConnell is traveling.

23 THE COURT: Wait a minute. Who is joining the meeting,
24 please?

25 MS. MCGOLDRICK: Your Honor, I had to rejoin to get off

1 the speakerphone.

2 THE COURT: I had asked everyone to kind of wait
3 because we were going to talk about this. Come on, people. I
4 don't mean to be persnickety about this. This is my call.
5 Therefore, there is a certain protocol I need to go through. I
6 know you are trying to do the right thing, but I asked everybody
7 to wait until I got a complete listing of who is on the record so
8 I can go from there.

9 So we had two joining the calls, which requires me to
10 now go back through this yet again to make certain that no one is
11 on this call that has not identified or I am unaware of their
12 being on the call. So we're going to do it one more time, and
13 then I'm going to continue with the rules of the road.

14 Let's start once again with plaintiffs. Richard
15 Arsenault, that's you, right?

16 MR. ARSENAULT: Yes, Your Honor.

17 THE COURT: Blue Cross/Blue Shield is McGoldrick and
18 McMorris. You're on the phone, correct?

19 MR. McMORRIS: Yes, Your Honor.

20 THE COURT: I only heard McMorris.

21 MS. MCGOLDRICK: Yes, Your Honor.

22 THE COURT: All right.

23 MS. MCGOLDRICK: I'm here as well.

24 THE COURT: All right. Takeda. Davis, you're on the
25 phone?

1 MS. DAVIS: Yes.

2 THE COURT: Cody, you're on the phone?

3 MR. CODY: Yes.

4 THE COURT: Gourley, you're on the phone?

5 MS. GOURLEY: Yes, Your Honor.

6 THE COURT: Lilly, you're on the phone?

7 MR. DUGAS: Yes, Your Honor.

8 THE COURT: That's Dugas.

9 MR. DUGAS: Yes, Your Honor.

10 THE COURT: And is there anyone else of any ilk who is
11 on this call that has not let it be known of their presence?

12 MR. McMORRIS: Your Honor, not at the moment, but I
13 have a law clerk, Joel Quick, who will probably be sitting in, in
14 a few minutes.

15 THE COURT: Then that person must be here and they must
16 identify because that brings me to my next point. The next point
17 is, whenever I have a telephone conference, I don't like
18 speakerphones because what happens is people wander in and out of
19 the call, and I don't know they are there. And that is a Brownie
20 button no-no, for just a lot of reasons, and I will give you one
21 anecdotal reason.

22 I will never fuss at a lawyer in front of their client.
23 I will never embarrass a lawyer in front of their client. I go
24 out of my way to make certain I do not do that, but I will
25 explain to a lawyer with particularity what problems I have if it

1 is just the lawyer and the Court.

2 One time a young lady who was the lawyer had me on
3 speakerphone, and she did not tell me her client was there. I
4 had a very frank discussion with her about her conduct before the
5 Court and the level of the work that she had presented because it
6 wasn't the first time we'd had this issue, and her client heard
7 every word. Had I known her client was there, I never would have
8 done that to her. That's number one.

9 Number two, there is a great deal of interest in this
10 case out in the stratosphere. There are rules of the road about
11 how -- you know, there's some confidentiality agreements that are
12 in place, particularly, with Blue Cross/Blue Shield, et cetera.
13 I don't want people wandering in and wandering out and listening
14 to the frank discussions the Court might be having, or the
15 parties might be having with the Court, that might or might not
16 encompass something that is the subject of a confidentiality
17 agreement, and this person wandered in or wandered out and they
18 do not know about the confidentiality agreement or, you know,
19 they are not bound by it. So that is why I am persnickety about
20 conference phones. Okay?

21 Now the lawyers that have been in this case for a long
22 time, they know this. They also know that if any portion of a
23 conference with the Court gets recorded in any fashion, other
24 than that which is being done by the Court, that is against the
25 rules of this Court. I will -- it's sanctionable.

1 And go read Judge Scott's decision that went all the
2 way to the United States Supreme Court against a firm in Lake
3 Charles. We take that very seriously in the Western District.

4 So now, as I said, Sara and Richard and probably David,
5 because he and I, you know, he's been in my court before, are
6 aware of these rules. Once everybody knows it and I know they
7 are going to abide by it, and if they have it on a speakerphone,
8 they are going to have the door closed, and they are not going to
9 let law clerks or anybody else wander in and wander out and they
10 know that and I can trust them to do that and they realize how
11 important that is, then I don't have a problem with it. But this
12 is a whole new group, so I'm making the point of what the rules
13 of the road are.

14 Now, so those of you who are on speakerphones, if you
15 will assure me, as an officer of the court, that you will close
16 the door, that nobody else will be wandering in and out of the
17 office that you are presently in, and no one else will be privy
18 to the discussions, then you can stay on your speakerphone, but
19 in the future I really would appreciate it if each of you would
20 call in.

21 Now, if you need to do, because ask Sara. I mean -- or
22 Richard. There are a lot of times you need to have several
23 people in a room. You just don't have enough hand phones, you
24 know. That's not a problem as long as you know my expectations
25 and you will abide by them.

1 So, Ms. McGoldrick, you understand those expectations
2 and you will, in fact, abide by them?

3 MS. MCGOLDRICK: I do, Your Honor, and I will.

4 THE COURT: Mr. McMorris, you understand those
5 expectations, and as an officer of the court, you will abide by
6 them?

7 MR. MCMORRIS: Yes, I will, Your Honor.

8 THE COURT: Ms. Davis, you understand those
9 expectations, and you will in fact abide by them?

10 MS. DAVIS: Yes, Judge.

11 THE COURT: Mr. Cody, you understand those expectations
12 and you will, in fact, abide by them?

13 MR. CODY: Yes, Your Honor.

14 THE COURT: Mr. Dugas, you understand those
15 expectations and you know better than to not abide by them,
16 correct?

17 MR. DUGAS: Yes, I do, Your Honor, and I will
18 communicate your expectations to Mr. McConnell before the next
19 phone call so that he is aware of them.

20 THE COURT: Thank you.

21 Mr. Arsenault, you already knew that, didn't you?

22 MR. ARSENAULT: Yes, Your Honor.

23 THE COURT: Ms. Gourley, you already knew that, didn't
24 you?

25 MS. GOURLEY: Absolutely.

1 THE COURT: Cool beans. All right.

2 Now the next rule of the road is I actually also would
3 please ask you to get to a landline. If you're going to
4 participate -- you're all busy people. You're traveling. You're
5 going here, thither and yon. I understand that. Ask
6 Ms. Gourley. I found her one time in, I think it was, the
7 Albuquerque airport at the very beginning of this case. So I
8 understand that.

9 But if you are moving from point A to point B on a cell
10 phone, we lose you. You break up. If there's wind blowing and
11 you're standing outside the courthouse in Nebraska because you
12 stepped outside to take the call, we can't hear.

13 So if you're going to participate when you're
14 traveling, would you please see if you can't work it out so that
15 you can get to a landline because it just makes it much more
16 efficient. Sometimes I have to be on a cell phone because I have
17 to travel, but it is much better if you get to a landline.

18 So I have asked all the lawyers to please indulge the
19 Court to the extent possible -- it's not always possible -- to
20 use a landline.

21 Now, if you can't use a landline, would you please make
22 arrangements to be standing wherever you need to be where there's
23 no wind, no background noise, and nobody that can overhear your
24 conversation with the Court. That would be of benefit.

25 Again, Ms. Gourley, Mr. Arsenault, and probably

1 Mr. Dugas are aware of this. This is more for the newcomers. So
2 please put that in the rules of the road as well.

3 All right. Now some background information. And Sara,
4 Richard, this is going to be a little redundant for you, but I
5 apologize.

6 When this first began, Judge Hanna was helping me with
7 some of the things to get up and get running. After I presided
8 over the Allen trial, it was decided that, you know, there's no
9 reason to reinvent the wheel. So I have pulled up everything
10 pretty much -- not absolutely everything -- but most things that
11 have some substantive aspect to it and I'm handling all of this.

12 Judge Hanna and I do things a little bit differently,
13 and so in part that's what we will be discussing today because
14 Judge Hanna had been sort of moving forward on this.

15 For those of you also who are new, at the very outset
16 of this case, I set up a special masters system. I consider them
17 an arm of the Court. Consequently, if a special master tells you
18 to do something, I absolutely expect you to do it or to engage
19 the appeal process that we set up early on when you think
20 something is not right. Please notice the pregnant pause.

21 Now, as to this Blue Cross/Blue Shield case, if you
22 will, I'm just going to use that in a generic sense. I went back
23 and I reviewed all the orders that were done because some of them
24 had -- the concepts had originated with Judge Hanna because he
25 was sort of taking point on that early on until after, as I say,

1 I presided over the Allen case and so that seemed the better part
2 of valor.

3 The July 2nd of 2014 order on the BCBSMA Case
4 Management Order, you don't have to pull it up, but it lays out
5 the cases, and it talks on the second page about bundling. I
6 just want to clarify that.

7 The reference to "bundling" in that order was for the
8 purposes of the Clerk of Court because, as to the PSC, bundling,
9 quote, unquote, was allowed when multiple parties, plaintiffs, if
10 you will, got filed under one filing so that they didn't have to
11 pay, you know, all the different fees, et cetera. Additionally,
12 the defendants could file just one answer. I mean, it was done
13 to streamline the matter.

14 However, as I understand this matter, there is only one
15 plaintiff; that's Blue Cross/Blue Shield, okay, but it may have a
16 whole bunch -- using very technical, legal terms -- bunch of
17 claims. So when it came through, the Clerk's Office questioned,
18 "should we pull those claims apart?" Well, no, you can't pull
19 the claims apart. There's only one plaintiff. That's Blue
20 Cross/Blue Shield. They have maybe multiple different claims
21 that they paid out on, allegedly, but there's only one of them.
22 So that's the reference in the --

23 Cory, do you have the document number on that?

24 THE CLERK: I don't.

25 THE COURT: No, I don't have the document number.

1 That's all right, Cory.

2 I don't have the document number handy; but, again,
3 it's the July 2nd, 2014, BCBSMA Case Management Order.

4 The second thing I wanted to discuss is Judge Hanna
5 worked with someone -- I do not know who it was -- about
6 identifying the actual names of these numbered people who
7 represent the, quote, claims of Blue Cross/Blue Shield.

8 Because of the involvement of HIPAA, or the understood
9 involvement of HIPAA, he spoke, I think, only to the Blue
10 Cross/Blue Shield people because Blue Cross/Blue Shield, as I
11 understand it -- I was not privy to that -- felt that they
12 couldn't give up the names because of HIPAA, et cetera. So he
13 dealt with that.

14 There's an order where they, Blue Cross/Blue Shield,
15 was supposed to have given to Judge Hanna the actual names of
16 these people so that they could be run against a database, if you
17 will, to see whether or not they had these suits in the MDL. I
18 don't know to the extent that that was done by Judge Hanna or
19 not, but I didn't ask him to clarify before I got on here because
20 I was going to talk with all of you about how we're going to go
21 forward and what we're going to do anyway. So that's the next
22 point.

23 Now the next point that I want to make is that, at one
24 point in this discussion, we are going to talk about why there
25 were 11 suits, one with -- let me look at my notes -- 9 of the 11

1 with approximately 35, one with 25, and I think the other may be
2 19, something like that, but I don't want to get into that at
3 this moment because the next point I want to deal with is --
4 again, Richard is aware of this and Sara is aware of this -- the
5 Special Masters I consider as an arm of the Court. If the
6 Special Master asks you to do something, it means because I asked
7 her or him to ask you to do that. Therefore, I expect it to be
8 done unless you want to, you know, avail yourself of the process
9 of saying, you know, this is a real problem, or whatever, and
10 that's not a problem.

11 You know, Sara and Richard do that regularly. Oh my
12 goodness, no, we can't do that by this, or you really want that?
13 That's not a problem, but you don't just blow it off. Notice the
14 pregnant pause.

15 I meet with -- for those of you who are new, I meet
16 with the Special Masters every Thursday, either in person or by
17 phone, and, you know, I have a checklist that I go down: What's
18 happening here; what's happening here; have we gotten this yet;
19 have we gotten this yet? I asked you to ask them to get this.
20 Has that happened? Do that every Thursday.

21 Now I, way back when, asked Deputy Special Master
22 Rodriguez to start taking point on this as one of her assigned
23 duties so that we can get this going forward on a separate track.
24 I asked her to make certain that both sides had what they needed
25 so we could get this going on a separate track.

1 As I understand this, in large part Blue Cross/Blue
2 Shield is suggesting that the reason that this is a claim for
3 Blue Cross/Blue Shield, albeit derived by way of subrogation, but
4 a Blue Cross/Blue Shield claim is because of the contract
5 involved that grants them the right to do this, whether by
6 subrogation or otherwise, and I'm just putting that generic out
7 there. And it spans a rather long period of time and a whole
8 bunch of folks.

9 I was a defense attorney. I represented insurance
10 companies. Insurance policies change over time, not only the
11 jackets, but the individual portions. And depending upon what
12 tort law will apply -- and that usually keys off of where the
13 person lives now, maybe, just depends -- and if they are not a
14 resident of Massachusetts because they moved to Idaho, maybe. I
15 don't know. Idaho law may say, it's my guy, my resident, my tort
16 law and/or my state law, and you don't have a right, insurance
17 company, under these languagings to get this claim that you think
18 you have. I don't know.

19 But it seems to me it's a contractual claim that bleeds
20 into a tort claim, and if it's a contractual claim, we have to
21 start with the contract. I am a social contract kind of gal. I
22 am not a natural law kind of gal. So if we have a contract
23 claim, you got to have the contracts.

24 In fact, under Rule 11, before you file a suit on a
25 contract, I think one should have the contract. Seems just

1 incongruent to me that someone would go out and file lawsuits on
2 contracts where their rights to go forward grow out of those
3 contracts and they have never seen them. That was incongruent.
4 That was almost stupefied.

5 The first thing I ever did when a client came to me and
6 said, "We need you to do X or Y," and it grows out of a contract,
7 I said, "I want to see the contract." I don't quite understand
8 how under Rule 11 someone can make a claim, saying I have a right
9 to bring this suit, and I've never -- because it flows out of
10 this contractual relationship, but I've never seen the contract.

11 Illustrative contracts never work, ever, because we
12 don't know whether they actually ever were in place. We don't
13 know if that's the one that applied to ABC person. We don't know
14 whether or not, if that applied to ABC person, this particular
15 language will be enforceable for the party who is exercising
16 their alleged right under the contract to bring the claim or not.

17 So I began immediately saying, okay, get them the
18 contract. How in the world can the defendants know whether or
19 not the plaintiffs have a right under contract to bring these
20 claims if the defendants do not have the contract.

21 Additionally, contracts have to be certified copies.
22 Otherwise you end up at a pretrial conference like I did one time
23 with two very good lawyers, and their clients kept saying, yeah,
24 we've got a contract. Yeah, it's a written contract. Blah
25 blah-blah blah-blah. I looked over at lawyer A and I said,

1 "You've been talking about a contract now for about a year and a
2 half. I have been asking for it. I haven't seen it. What's the
3 deal?" Good lawyer A put his head down, cocked it over sideways
4 to good lawyer B and he said, "I told you that would be the first
5 question she'd ask." In fact, there really wasn't one for that
6 period, or it was lost or it was gone.

7 One of the types of cases that got passed down the
8 pipeline to me when I was a young lawyer were the asbestos and
9 silicosis cases. It was a big deal to try to figure out what
10 contract was in play at that time and when the start date was,
11 when the end date was, all kinds of things. Big, big deal.

12 So that brings me to the point that I have been asking
13 pretty much regularly every Thursday of Deputy Special Master
14 Rodriguez. Have the defendants gotten the certified copies of
15 the contracts? And she's been saying, well, Judge, they are blah
16 blah-blah blah-blah. Well, Judge, I'm sure -- well, Judge; well,
17 Judge; well, Judge. Hence, I asked her, get it to me in writing.
18 I want to see it. Hence, the Special Masters' Report that you
19 have all read.

20 Now, because you people, some of you, are new, you
21 don't understand that you do have the right to object, you know,
22 and say, no, that's not really right, or that's not how I
23 understood it, or blah blah blah.

24 So would someone on the Blue Cross/Blue Shield side
25 explain to me why you have not complied with the requests of this

1 Court that were sent by way of the Special Master and the Order
2 of this Court that you provide to me certified copies of each
3 policy as it applies and is tied to a given person whom you have
4 identified by a number upon which you are making a claim? Who
5 wants to answer that?

6 MR. McMORRIS: This is David McMorris, Your Honor. I
7 will address that. Our understanding and sincere belief is that
8 we have complied with everything that has been asked of us along
9 the way.

10 THE COURT: Well, let me interrupt because that is not
11 my understanding nor my sincere belief, because each time I said,
12 "Ms. Rodriguez, do we have the contract, the insurance policies,
13 the contracts that they are claiming they have this right under?"
14 And each time when Judge Hanna was involved in this he would say,
15 "yeah, because we don't even know if they are in a 'make whole'
16 state" -- he likes that term a lot -- and we don't know if the
17 language is there.

18 So I don't know where you got that sincere belief
19 unless Deputy Special Master Rodriguez did not convey to you my
20 expectations.

21 We've now been in this case how long, Sara, Richard?

22 MR. ARSENAULT: Several years.

23 THE COURT: Multiple years. Okay.

24 MS. GOURLEY: Right.

25 THE COURT: And she has not once failed to properly

1 convey to a party this Court's expectations. So unless you can
2 show me something to counter the history laid out in that
3 document, I suggest you might not want to start with "we
4 sincerely believe we have given you the certified documents that
5 have been asked for" when in fact you have not. Now, continue.

6 MR. McMORRIS: Thank you, Your Honor.

7 THE COURT: Sometimes when you're in a hole it's better
8 to quit digging.

9 MR. McMORRIS: No, I understand that, Your Honor.

10 THE COURT: But go ahead.

11 MR. McMORRIS: I understand. We have consulted with
12 our client about mapping each plaintiff -- each patient to each
13 contract under which a policy or subscriber certificate that
14 applies to them throughout their period of coverage by Blue
15 Cross. Blue Cross is in the process of doing that, and I
16 understood from your order that there would be some time
17 permitted for us to do that.

18 THE COURT: Well, let me interrupt you there, Counsel.
19 How long have you been in this case; you, this suit, Blue
20 Cross/Blue Shield? Over a year, right?

21 MR. McMORRIS: Almost a year.

22 THE COURT: Yeah, yeah, right at a year. Okay. So you
23 knew from the beginning you should have had those because you're
24 filing suit based upon it, and a certificate of subscription will
25 not do. That's like a certificate of insurance.

1 I represented a client who shall remain nameless -- and
2 Cathleen, just nod at me when I get on a roll and start talking
3 too fast -- during the 1980s when it cost a bloody fortune to
4 have insurance. Yeah, they had certificate of insurance saying
5 that they had it all through the Gulf. They did, but it was a
6 hollow insurance because they were self-insured.

7 So that doesn't get us anywhere, because I don't know
8 whether or not some of these claims that you are making may be
9 based upon corporate policies where the insurance company is
10 merely the facilitator or the administrator and it's a
11 self-insured. I don't know if it could be an ERISA policy, and
12 under that you are merely the administrator and therefore you
13 didn't pay out, Blue Cross/Blue Shield, any money on this.

14 So this is something, you know, Mr. -- where is it,
15 Cory? -- Mr. McMorris, I'm going to interrupt you periodically,
16 but please keep going because I'm interested, because it seems to
17 me this is something you should have done under Rule 11. This is
18 not a question of after you file -- you're not a defense attorney
19 here. You're a plaintiff's attorney. This is not after you go
20 out and file these big suits with all these numbers and names
21 that then you map out? How in the world do you know whether or
22 not the contract under which you're making the claim allowed you
23 to make it if you don't know which one ties up with which?
24 That's Rule 11. Go ahead, Mr. McMorris.

25 MR. McMORRIS: Each of the claims that we filed -- back

1 in November of last year we produced to the defendants and to the
2 Special Master a chart laying out two things. We produced
3 exemplars of the policies underlying each of the claims.

4 THE COURT: Okay. I'm going to interrupt you there,
5 Mr. McMorris. Exemplars, no, I didn't ask for exemplars. I can
6 100 percent guarantee you I did not ask for exemplars because I
7 don't believe in exemplars. Exemplars are exemplars of nothing
8 except the piece of paper that is being given. Okay? So it's
9 not exemplars.

10 And again, an exemplar, Mr. McMorris, is not, as a
11 plaintiff's attorney, going to give you the basis of whether or
12 not you have the right to bring a claim on behalf of Mary Beth
13 Jones and Mary Beth Jones by way of a contract of insurance gave
14 you the right to bring it on her behalf. An exemplar didn't do
15 that.

16 So I guess really, perhaps, this horse has been chased
17 and beaten, but I will let you speak, and I'm going to try very
18 hard not to interrupt you. But as you can tell, my frustration
19 level is a bit high here because I don't understand how someone
20 could file a suit on behalf of beaucoup people based on contract
21 that they do not have and have never seen. That gives me great
22 pause. You can go forward.

23 MR. McMORRIS: Your Honor, all right. The material
24 that we produced last year was produced via an informal
25 agreement. Defendants asked us to give them some information

1 about the subrogation language in the contracts. What we gave
2 them is what we produced in November, and what we produced was --
3 the exemplars were exemplars, admittedly, and what they
4 represented was the language of every benefit description,
5 subscriber certificate that Blue Cross issues under its entire
6 program. So there were none of these individuals for whom we
7 brought a claim would have a policy that was different than
8 anything that was produced in that group.

9 And to make things easier for the defendants, we pulled
10 out the subrogation language from each of those policies together
11 with a description of which policy applied for what period and
12 what the changes may have been from the prior iteration of that
13 subrogation language.

14 So we understood well before then, we understood before
15 we filed this case what the subrogation language was in all of
16 the Blue Cross policies that were issued so that, for each
17 individual for whom we filed a case, we knew that they had
18 subrogation language in their policy that gave us the right to do
19 so.

20 Admittedly, we did not have mapped that plaintiff A had
21 in one year had an HMO policy and the second year had a preferred
22 provider policy and a third year had a Medicare advantage policy,
23 but we did know that, for each of those policies, there was
24 subrogation language which we had reviewed in place. We also
25 understood that they were all Massachusetts policies.

1 THE COURT: Okay. All right. What you just explained
2 is saying, okay, every ride in Disneyland is available. When I
3 take my granddaughter there, every ride is available. Disney has
4 beaucoup rides available, and she got on one of them or two of
5 them or three of them, but I don't know which ones, I don't know
6 when, and I don't know whether or not she was tall enough to get
7 on that ride at the time that she did it or not, because at some
8 point Disney lowered the bar on some of these rides, and at other
9 points Disney raised the bar of how tall you have to be to get on
10 some of these rides.

11 And also, I have taken my granddaughter to Disneyland
12 multiple times, and during that time she has grown, but I should
13 know so that I can map out where I want to go and take her next
14 time which ones of those rides she has been on because she could
15 have been, you know, I've laid out the 15,000 rides that Disney
16 has available.

17 Not good enough, Mr. McMorris, not good enough.

18 MR. McMORRIS: I understand the --

19 THE COURT: Mr. McMorris, that was not an invitation at
20 this point.

21 MR. McMORRIS: I'm sorry.

22 THE COURT: Not good enough. Now you said you had not
23 tied that to whether it was this kind of a policy or that kind of
24 a policy. You should have. That should have been mapped out
25 before you ever filed suit. You absolutely should have because I

1 don't know whether or not under those policies there may be a
2 difference in language or not, but the defendants have the right
3 to see that language so they can decide what, if any, motions
4 they want to file. They don't have to take your word for it.
5 And this is a case where I'm not going to take anybody's word for
6 anything, quite frankly, based upon past history. Not good
7 enough, Mr. McMorris.

8 Now I understand the informal agreement when, in fact,
9 I believe it was Ms. Gourley asked you for all of your policies
10 and you said, "Oh, my, can't get it done," et cetera, and there
11 was a deal cut where she said, "All right, I will accept these
12 exemplars, but I still want the policies."

13 Am I not correct on that, Ms. Gourley?

14 MS. GOURLEY: You are, Your Honor, except it was
15 Ms. Davis.

16 THE COURT: Okay. Then, Ms. Davis, if it was you, am I
17 correct on that?

18 MS. DAVIS: That's correct, Your Honor.

19 THE COURT: Yeah. So the fact that she cut a deal with
20 you early on and said, "Okay, I need to get some sense of this.
21 Yeah, you can give me the exemplars, but I'm not waiving my right
22 to get the actual policies," did not mean that you never had to
23 do it.

24 I was fully aware of that. I am fully aware of that.
25 I keep up with this case. It may seem like sometimes that I

1 don't because I let -- you know, if the ship's running fine, I
2 don't mess with it, but I keep up with it. And I'm actually the
3 one driving that ship -- piloting, rather, that ship.

4 So, hence, after that informal agreement, I started
5 bringing it up. Hey, have we gotten those certified copies yet?
6 Hey, do we know who these people are? Hey, do we know which
7 policies goes with which? Hey, do we know whether or not this
8 was a policy where the insurance company is merely just the
9 administrator or the facilitator and yet it's a self-insured
10 policy for the corporation? Hey, do we know whether or not this
11 is an ERISA policy where Blue Cross/Blue Shield is merely an
12 administrator? They didn't really pay any money out, so they
13 wouldn't be getting it back. Hey, what are the damages that Blue
14 Cross/Blue Shield is asking for here if it is their independent
15 damages?

16 And then I asked: Okay. Well, you know, this is
17 interesting. All these people, you know, the contracts might all
18 be Massachusetts contracts. Yeah, that makes perfect sense. Is
19 every one of these people still living in Massachusetts, or did
20 some of them move to sunny Arizona to retire? And if they are
21 living in sunny Arizona now because that's where they went to
22 retire, would they be able to bring their suit in sunny Arizona?
23 Hmmm. And if they brought their suit in sunny Arizona, well, let
24 me look. What are the claims Blue Cross/Blue Shield is making
25 here? They say the right of their claim, foundational basis is

1 contract, but the claims they are making against Takeda and Lilly
2 are all pretty much in tort except one of them it looks statutory
3 and it looks to be Massachusetts law.

4 Conflicts of law in this case has been a real
5 interesting Russian -- set of Russian nesting dolls. And how in
6 the world is the defendant going to know what motions they might
7 or might not want to bring if they don't even know who these
8 people are, they don't know where they are living, they don't
9 have a copy of the contract under which the right is being
10 claimed, and therefore it gives new meaning to vagueness.

11 Now I also understand and appreciate it, because I did
12 it, I signed it. If I signed it, I read it. I read everything.
13 Just ask Mr. Arsenault and Ms. Gourley.

14 I also understand that this Court suspended the
15 obligation of the parties to answer and/or the deadlines to file
16 their threshold motions, in order to give you the time to get
17 that information to them so they could do it. Hence, I asked
18 every Thursday: Hey, have we gotten those policies yet? Hey,
19 have we, in fact, identified whether or not any of the people on
20 whose behalf Blue Cross/Blue Shield has brought a claim have --
21 all actually have claims in the MDL?

22 Because I understand, Mr. McMorris, y'all have agreed
23 that you're going to dismiss your Blue Cross/Blue Shield case or
24 claim, independent claim on the right of Blue Cross/Blue Shield
25 as to those individuals whom you might have insured under a

1 Massachusetts policy, insurance policy, and they have a claim in
2 this MDL. Am I correct in that understanding?

3 MR. McMORRIS: You are; not just in the MDL, but also
4 in any state litigation.

5 THE COURT: Cool. You will learn about me, I take
6 things step by step, particularly, when I want to get a
7 verification on the record.

8 Next point. I also understand that you have agreed
9 that if, in fact, any of these people on whose behalf you have
10 brought a claim based upon this contract that none of us have
11 ever seen; but, nonetheless, you brought it on their behalf,
12 claiming a right under a contract that even you haven't seen;
13 can't say you went on the wild -- Mr. Mouse's Wild Ride in Disney
14 merely because that's one of the many rides in Disneyland. I
15 don't know whether you went on Mr. Mouse's Wild Ride or not.
16 Okay? So let's get back out of Disneyland.

17 But these people on whose behalf you have brought these
18 claims, I also understand that you have been, pursuant to the
19 Court's request either through Judge Hanna or Deputy Master
20 Rodriguez, Special Master Rodriguez, you have been attempting to
21 identify those that have brought suit in state courts around the
22 country that might not be in this MDL because they are state
23 matters, and you're dismissing those, and you shall continue to
24 dismiss those as they become apparent. Is that accurate,
25 Mr. McMorris?

1 MR. McMORRIS: That is accurate.

2 THE COURT: All right. So we take that.

3 Now my next question with that, because I'm just a
4 curious kind of gal, was, well, cool. All righty. What about
5 those people in which the tort law of the state, which might or
6 might not be applicable, depending upon state law and how the
7 conflict-of-law question would play out, how about those people
8 who still have the right to bring a claim on their own; they just
9 haven't gotten around to doing it or made up their mind to do it;
10 or, as has happened once or twice with the plaintiffs on the PSC,
11 the people decided whatever, you know, I'm not sure I want to
12 bring this claim, and it gets dismissed for whatever reason. Do
13 you have the right to do that? Well, yeah, ordinarily you would.
14 You can file it on your behalf, and if they don't want to file
15 one, that's fine, too, but have you even talked to them? Has
16 anybody talked to them? I don't know. I'm not saying you have
17 or you haven't, but I don't know that. So that was my next
18 question.

19 Then my next question was, well, if that's the case, I
20 wonder what law applies to the negligence claim? I wonder what
21 law applies to the breach of the express warranty? Now that's
22 contractual, so that's going to be a different interpretation of
23 choice of law than the negligence which is tort.

24 I wonder what law applies to the breach of implied
25 warranties as to Betty Boop, and is that different with Paul

1 Bunyan? Breach of implied warranty, again, that's
2 quasi-contractual. That's probably Massachusetts law, I would
3 think. But, you know, I've never seen the contract, so I don't
4 know if there's a choice-of-law provision in there. I don't
5 know. I don't know if there's an arbitration. I don't know.

6 Fraudulent misrepresentation, I don't know whether that
7 would be considered tort or contract or quasi-contractual under
8 Massachusetts law. Fraudulent concealment, that's probably a
9 tort. I don't know what law would apply to that because I don't
10 know where these people are residing now. Negligent
11 misrepresentation, that's negligence, but what law applies to
12 that?

13 What if Betty Boop is living in Arizona now and Paul
14 Bunyan is in Idaho. He's gone back home to Idaho. He was only
15 in Massachusetts a brief period when he worked for ABC
16 Corporation. Or what if it's ABC Corporation and the policy is
17 in Massachusetts and it covers their people all over the country.
18 And Paul Bunyan was living in Idaho when he got all this done,
19 and he bought his Actos in Idaho, and he got sick in Idaho, and
20 he pays his taxes in Idaho, and the only thing that he has to do
21 with Massachusetts is he works for ABC Corporation who through
22 their corporate headquarters has this big policy that, you know,
23 applies to all of their people. As a matter of tort, not
24 contract, what law is going to apply to the negligent
25 misrepresentation that you are making against Takeda and Lilly?

1 And of course, fraud deceit. Well, now, that's a
2 biggie. States are real peculiar and particular about that.
3 Then violation of MGL Section 93A, which is the Massachusetts
4 Consumer Protection Statute, would that apply to Paul Bunyan if
5 he never, ever lived in Massachusetts? What if Paul Bunyan lived
6 in Idaho the whole blasted time, and his policy was through ABC
7 Corporation that is -- its home office is in Massachusetts and
8 issued the policy and it was delivered and negotiated, et cetera,
9 in Massachusetts, but as to Paul Bunyan and Actos and his getting
10 the Actos and taking the Actos and Takeda going to his doctors
11 and Lilly going to his doctors all occurred in Idaho, will this
12 Massachusetts Consumer Protection Statute apply? I don't know,
13 and neither do the defendants, Mr. McMorris, and they can't know
14 until they have this information.

15 So I hope I have made my point on a couple of things,
16 Mr. McMorris. If the Special Masters asks you to do something,
17 that's because I have asked her to ask you to do it, and please
18 do it, or tell the Special Master, we have a problem and we would
19 like you to take this to the judge, and when she does I'll say,
20 get them on the phone, or I'll talk about it at some point
21 thereafter, or I'll say, that's fine, give them more time. It's
22 not a big deal. That's how I knew about the deal you had cut
23 with Ms. Davis -- I thought it was Ms. Gourley, but it doesn't
24 matter -- where Ms. Davis had asked for all the policies, and you
25 had said, oops, it's going to be an issue, need time, and would

1 it be all right, Judge, if they go ahead and give them exemplars
2 now, but go ahead and be working to get them the policies, and I
3 said, sure. So it was a bit of a surprise to me when some almost
4 year hence, couldn't even come up with one certified copy tied to
5 a specific person, not one, not one.

6 And then the Court issued an order. You've had a year
7 to do it. There was a valid discovery request. The way we're
8 doing it in the MDL, it's done informally unless there's a
9 problem. There was a valid discovery request. She cut a deal to
10 accept an exemplar, but did not waive her right to get them
11 thereafter, and you sat on your hands.

12 So I said, get them to me, and what I get is a
13 CD-ROM -- I guess that's what you call it; I think that's what it
14 is, okay, from -- downloaded from your TPS, FPS, whatever it is,
15 site. I'm not technologically savvy, Mr. McMorris, I'm the first
16 to admit it, but downloaded from there that is nothing different
17 than what has already been thrown about. So technically you are
18 in direct violation of this Court's Order which leaves you open
19 to sanctions by this Court.

20 Now I'm not going to sanction you now, but if it ever
21 happens again, you are on notice, I will. And I will not
22 hesitate, and I will not stutter, and I will make a record. So
23 if you want to take it up to the Fifth Circuit, all the dirty
24 linen will be there because I will make a record.

25 As Judge Higginbotham said one time to me at a cocktail

1 party -- he's on the Fifth Circuit -- "Becky, I always enjoy
2 getting an appeal from your court because we have no doubt why
3 you did what you did." He might not always agree with me, but he
4 says, "We always know what you did, why you did what you did."
5 Hence, when I asked the Special Master, get it to me in writing.
6 I do not understand why this is not happening.

7 So I'm not -- everybody gets one mea culpa. You just
8 used yours up, Mr. McMorris and Ms. McGoldrick. You've used it.
9 It's done. You don't get another mea culpa.

10 MR. McMORRIS: Understood.

11 THE COURT: Thank you. Now we're going to turn our
12 attention to where we're going to go from here and how this is
13 going to be managed. I hope I have made my point. If a Special
14 Master tells you to do something, you do it, unless you tell her
15 you want to talk to me about it, and she'll let me know, and the
16 odds are you'll talk to me about it or I'll tell her you don't
17 have to do it.

18 Secondarily, you get those policies to the defendants,
19 and we're going to talk about a time frame, and if it's not done
20 in that time frame, then I will sanction you. I am making my
21 record right now, you are on notice, and we will do a time frame.
22 What is reasonable for that time frame? Well, you were asked for
23 it almost a year ago, reminded of it periodically by the Special
24 Master, and you still haven't done it, and ordered by this Court
25 to do it, and you didn't do it. So you're on thin ice there.

1 Okay? So we will talk about a time frame for that.

2 Now, Cathleen, you need a break?

3 (Conferring with court reporter.)

4 THE COURT: Mr. McMorris, the amount of time that I
5 spent fussing should make my point, huh?

6 MR. McMORRIS: Your point is very clear to me, Your
7 Honor.

8 THE COURT: Good.

9 All right, Cathleen, you want to take a break?

10 THE REPORTER: Yes.

11 THE COURT: Cathleen is going to wiggle her fingers for
12 three or four minutes. I am going to look at my notes so we can
13 turn our attention to a more productive discussion about how
14 we're going to go forward from here.

15 I'm going to put you on mute, but I'm going to warn
16 you. When I put you on mute, you can't hear me, but the system
17 we have here, we can hear you. So if you want to go scream about
18 what a big horrible person I am, go away from the speakerphone
19 that you're on to do it. Okay? All right.

20 MR. McMORRIS: It won't be necessary, Your Honor.

21 THE COURT: Okay. Well, there's a lawyer here -- and
22 Cathleen, this doesn't have to be on here.

23 (Recess taken.)

24 THE COURT: All right. Ms. McGoldrick, are you back on
25 the line?

1 MR. McMORRIS: She is not, Your Honor. She is at the
2 restroom, but she will be back momentarily.

3 THE COURT: Okay. Hold that thought. Mr. McMorris, is
4 that you?

5 MR. McMORRIS: It is, Your Honor.

6 THE COURT: Ms. Davis, are you back on the line?

7 MS. DAVIS: Yes, Your Honor.

8 THE COURT: Mr. Cody?

9 MR. CODY: Yes, Your Honor.

10 THE COURT: Ms. Gourley?

11 MS. GOURLEY: I am here, Your Honor.

12 THE COURT: Mr. Dugas?

13 MR. DUGAS: Yes, Your Honor.

14 THE COURT: Mr. Arsenault?

15 MR. ARSENAULT: Yes, Your Honor.

16 THE COURT: All right. Mr. McMorris, let me know when
17 Ms. McGoldrick returns, please.

18 MR. McMORRIS: I shall.

19 (Off the record.)

20 MR. McMORRIS: Ms. McGoldrick has returned, Your Honor.

21 THE COURT: Okay. So we have everyone now back on the
22 line.

23 Okay. Let's turn -- one last thing for the record
24 before I leave. Mr. McMorris and Ms. McGoldrick, you've had
25 10 months from filing and give or take nine or ten months from

1 request from Ms. Davis to get these policies together, and it's
2 been six months since the Special Masters, Deputy Special Master
3 started telling you, you have to do it. So I want that to be
4 borne in mind when I talk about how long it's going to take you
5 to get these certified copies and this information.

6 Now the other thing I would ask you to bear in mind, it
7 seems to me the information that I'm going to be asking you to
8 get now is information you should have had in your file based
9 upon your due diligence pursuant to your obligations under Rule
10 11 -- calm down, settle down, whoever is fatching about -- before
11 you ever filed suit. It is not sufficient for you to look in
12 Blue Cross/Blue Shield's database for people for whom Actos was
13 bought and shown as a subscriber and used them to file suit and
14 that is all you know about them. That is not sufficient under
15 Rule 11, in my opinion. So bear that in mind when we talk about
16 how long it's going to take you to get this information. You
17 filed suit. No one asked you to. You chose to do it. You chose
18 when you chose to file suit except for if there was a statute of
19 limitations applying.

20 That's another interesting thing. On these tort
21 claims, there could be a statute of limitations, but the
22 plaintiffs -- I mean, defendants don't know because they don't
23 know the names of the people, they don't know where they lived,
24 they don't have a copy of the contract that applies to them, they
25 know nothing. Shoot, if I were a plaintiff's attorney I'd like

1 that, too. Suffice it to say that's over.

2 Now let's move to more productive matters. I hope I
3 never have to fuss you again. All right. Now the certified
4 copies of the policy were due by formal order of this Court
5 March 17th by 4:30 p.m. Central Time. That did not happen. What
6 was provided was neither certified nor were they actual copies --
7 I mean -- yeah, copies of policies that we know actually applied
8 to the universe of people upon whom you have -- for whom, rather,
9 you have filed claim. It might be -- you might have put in every
10 ride in Disneyland, but I have no idea whether or not the actual
11 people that you filed suit, based upon the subrogation rights, in
12 fact, had one of those policies or which one. You say, "Well, I
13 gave you the whole universe." Well, yeah, but that doesn't help
14 the defendants know whether or not this particular person went
15 on -- Cathleen, you got a problem?

16 (Conferring with court reporter.)

17 THE COURT: Whether or not that particular person went
18 on Mr. Toad's Wild Ride at X amount of time at this point in time
19 before the park opened or after the park shut down or whether
20 they went on the Wild Hurricane Ride where they probably threw
21 up. Defendants can't know that. And I'm just going to give you
22 a foreshadowing.

23 If you are bringing these claims based upon the
24 contract -- and we've belabored that point; that horse is beaten
25 dead -- and you're bringing those claims based upon that, but

1 based upon tort, you're going to have to do Plaintiff's Fact
2 Sheets just like any other plaintiff. That's what you are here.
3 You're not coming in by way of an intervenor because you are
4 dismissing those suits. You've already told me that. You're not
5 coming in as an intervenor into an existing suit here. So you're
6 not an intervenor. You are bringing these claims in your own
7 right, as I understand it. Correct, Mr. McMorris?

8 MR. McMORRIS: Very correct, Your Honor. We are in the
9 process of preparing those Plaintiff's Fact Sheets.

10 THE COURT: We're going to talk about what "in the
11 process" means, and we're going to talk about which Plaintiff's
12 Fact Sheets. The point I'm making is, if you are bringing this
13 as an independent claim, not as an intervenor, you are no
14 different than any other plaintiff.

15 That having been said, you are coming late to this
16 party. That having been said, you shall work through the PSC
17 just like any other plaintiff. That's the way this is set up.
18 The only reason I am pulling you out separately rather than
19 working through the PSC is because, to be perfectly blunt, you
20 have been recalcitrant and/or obstreperous and/or ignorant of how
21 it works. I don't know which. Don't care at this point. Every
22 plaintiff is assigned a PSC member based upon the state.

23 Mr. Arsenault, do you happen to know who the PSC member
24 is for Massachusetts?

25 MR. ARSENAULT: Your Honor, I don't, but under these

1 particular circumstances, I would like to personally serve in
2 that capacity.

3 THE COURT: You may do so.

4 All right. Mr. McMorris, just like any other
5 plaintiff, you work through that PSC, just like every other
6 plaintiff in this suit. You are not an intervenor. You have
7 made that perfectly clear. And I have a sense of why because
8 there are some conflicts floating around in that, but you are a
9 plaintiff just like any other plaintiff. You will work through
10 the PSC just like any other plaintiff.

11 Mr. Arsenault has volunteered to be your representative
12 on the PSC. He's now it. He will see to it that you are kept
13 advised just like any other plaintiff, and if you have something
14 you want to do, you run it past the PSC. Doesn't mean you have
15 to abide by what they say or don't, but you better run it past
16 that, and then he will bring up to me why you are doing or not
17 doing.

18 See, if you had done this the way it should have been
19 done, I would have been saying to Mr. Arsenault, had he already
20 been volunteered to do it, "Hey, Richard, we don't have those
21 contracts yet. Talk to your guy and find out why, would you?"

22 So that's number one. You're not an intervenor here.
23 You have no special status. You are a plaintiff just like
24 anybody else. And you only have one plaintiff and that's Blue
25 Cross/Blue Shield. You might have beaucoup claims, but only one

1 plaintiff. And that's Blue Cross/Blue Shield.

2 So I'm going to ask you to please familiarize yourself
3 with the scheduling orders in this case. Familiarize yourself
4 with how the administrative aspect is set up on this case and
5 abide by it. Understood, Mr. McMorris?

6 MR. McMORRIS: Clearly.

7 THE COURT: Good. All right. Now the next point.
8 Mr. McMorris, when shall you have certified copies of each policy
9 as it applies to each claim you have made? Now, before you
10 answer that, I want to back up.

11 Based upon the orders that I reviewed when Judge Hanna
12 was taking point on this, I understand he ordered you to identify
13 those numbers with people's names. Did you do that?

14 MR. McMORRIS: Yes, we did.

15 THE COURT: Okay. Ms. Davis, I understand you never
16 got those, right?

17 MS. DAVIS: That's correct, Your Honor.

18 THE COURT: All right. Now we also have in place, am I
19 not correct, a protective order -- is that right? -- a
20 confidentiality protective order. We have got it in place,
21 correct? Two of them, don't we?

22 MS. DAVIS: Yes, Your Honor.

23 MR. McMORRIS: We do.

24 THE COURT: Okay. Now who is that speaking?

25 MR. McMORRIS: Mr. McMorris.

1 THE COURT: Okay.

2 MS. DAVIS: Ms. Davis.

3 THE COURT: Oh, now who was that second person?

4 MS. DAVIS: I'm sorry, it was Ms. Davis. And I
5 apologize, I have a cold, but I was agreeing, Your Honor.

6 THE COURT: Don't apologize. All the time, not only
7 because my voice is very deep for a woman, but secondarily
8 because I'm a judge, they always call me "he," so don't worry
9 about it. I'm sorry.

10 Okay. Now is my memory correct, the second Blue
11 Cross/Blue Shield protective order did address the HIPAA issue,
12 did it not? Wasn't that done ad nauseam? Cause I read that one.
13 I went through it. The first one Judge Hanna was taking point
14 on. So I am not as familiar with the first one as I am the
15 second one. So now, unless I am in error, Mr. McMorris and
16 Ms. McGoldrick, you are protected under HIPAA, so you can give
17 those names to the defendants, correct?

18 MR. McMORRIS: Absolutely correct, Your Honor.

19 THE COURT: You shall have those to her before the end
20 of today, correct?

21 MR. McMORRIS: I shall.

22 THE COURT: Good. Ms. Davis, you will let
23 Ms. Rodriguez know that you have received them before the end of
24 today. And when I say "end of today," I am not talking about
25 Shanghai time. I'm talking about 5:00 o'clock Central -- is it

1 daylight time now? -- Central Daylight Time. Okay, Mr. McMorris?

2 MR. McMORRIS: Okay, Your Honor, yes.

3 THE COURT: Yes. Now, Mr. McMorris, I also understand
4 that, in complying with the Order that Judge Hanna put in place,
5 you tied these names to a specific number that you had used in
6 your complaint. Am I correct in understanding that as well?

7 MR. McMORRIS: You are, Your Honor.

8 THE COURT: Then you shall tie those names to the
9 number when you send it to Ms. Davis. Agreed?

10 MR. McMORRIS: Yes.

11 THE COURT: All right. So, Ms. Davis, by the end of
12 today, and it's 5:00 o'clock Central Daylight Time, you should
13 have the names that go with the numbers within the claims made by
14 Blue Cross/Blue Shield. If you do not, you immediately let the
15 special -- Deputy Special Master Rodriguez know, and
16 Mr. McMorris, you should go ahead and buy your ticket from Boston
17 to Lafayette. Understood?

18 MR. McMORRIS: Yes, Your Honor.

19 THE COURT: Okay. Second, once you start getting them
20 the certified copies -- and again, I mean, I'm going to digress
21 one last time. You know, yeah, it's going to take time; yeah,
22 it's going to cost money. You have a judge who believes you
23 should have done it before you filed suit, but even setting that
24 aside, a judge orders you to do something or her Special Master
25 instructs you to do something, I would have gotten at least one

1 or two, at least one or two out and say, hey, I'm working on it.

2 You know, it's kind of like, you know, you owe a
3 creditor a thousand dollars. You don't have it, but you give her
4 five a month. Okay. I'm continuing to make my point because I
5 am stupefied about this. I really am, but I'm hoping it will
6 never, ever happen again. So let's go back. Okay.

7 When these policies -- certified copies of the policies
8 that were applicable for a given number, now identified as Betty
9 Boop, for each year that you are claiming damage by Betty Boop,
10 because they change over the years, you will have one for each
11 year. They will be tied to Betty Boop.

12 Now, as I said, I used to defend companies, insurance
13 companies, so I understand sometimes those policies are hard to
14 find. That's why you should have already been looking for them,
15 but I would heartily recommend you do not certify to this Court
16 that they do not exist and then they later pop up in some
17 discovery. That would not be wise.

18 Now you shall present those -- and again, pay attention
19 to the dates because if, you know, for instance, in Louisiana
20 under property damage, after one of the sets of hurricanes -- I
21 don't remember which -- they changed it, that if it's a named
22 hurricane, your deductible is no longer a thousand dollars. Your
23 deductible is a certain percentage of the insured value of your
24 property. That's a big deal. So you get them, you know.

25 Now, if you had been doing this all along and working

1 with the Special Master, Deputy Special Master on this, she could
2 have come to me and said, "You know, Judge, they are having a
3 hard time doing that, but they know any policy that was issued in
4 Massachusetts between this date and this date for health would
5 have been this one, you know, if they paid this amount of
6 premium, and if they paid this amount of premium, X plus Y, it
7 would have been this one." You know, we could have been working
8 on that, Mr. McMorris, but you chose not to do anything. So I
9 want you to go get it.

10 And I suggest you work with the Deputy Special Master
11 on this, because if there are some real problems, I will work
12 with you on it if I believe you are working on it, but I cannot
13 tell you how unwise it would be for me to be told something does
14 not exist when, in fact, it does. Just read my spoliation ruling
15 which was based on evidentiary matters, not tort. This will be
16 an evidentiary Federal Rule of Civil Procedure issue.

17 Now, so the next point we need to know is, first,
18 Ms. Davis has to know who these people are. Do you know where
19 these people lived during the time that they took the Actos? Do
20 you know where they lived, Mr. McMorris?

21 MR. McMORRIS: Yes.

22 THE COURT: Then you will give that information to
23 Ms. Davis as well. Do you have that pulled already so that you
24 can get it to her this afternoon?

25 MR. McMORRIS: No. In fact, the information that we

1 had at the time that we filed the complaint is in the complaint
2 as to the state of residence.

3 THE COURT: I do not want to know that. I don't care
4 where their state of residence is now except tangentially I will,
5 but I need to know where they lived when they took the Actos
6 because I think that's probably going to play in the choice of
7 law, particularly, if they are living in Idaho now. Do you have
8 that information?

9 MR. McMORRIS: I do not have that at the moment. I can
10 make sure that that information is part of the mapping.

11 THE COURT: Is part of the what?

12 MR. McMORRIS: The mapping of the patient to the
13 policy.

14 THE COURT: Okay. Let's not use the term "mapping." I
15 don't care whether you want to call it mapping or not, but what I
16 am suggesting is you shall get them those policies for the full
17 time frame involved for the type policy that they had and they
18 shall be certified copies. You shall get Ms. Davis the names.
19 You're going to get that to them this afternoon. You shall get
20 the defendants, Ms. Davis and Mr. Dugas --

21 Mr. Dugas, if I forget you periodically, just pipe up
22 and make certain you get included in these orders, because
23 heretofore the same defense team represented Takeda and Lilly.
24 So old habits die hard.

25 Whenever I say "you shall get it to them," you are

1 going to get it to Lilly, too, or you can get it through Takeda,
2 if Mr. Dugas gives you permission. I don't care, but it's both
3 of them. So now let's go back.

4 MR. DUGAS: Thank you, Your Honor.

5 THE COURT: You're welcome, Mr. Dugas.

6 You shall get them, Mr. McMorris, where these people
7 lived when you filed suit. That's in the complaint. I'm
8 interested in where they lived when the alleged tort took place
9 and under whatever conflict of law analysis, because this turns
10 into a really interesting set of Russian nesting dolls. Where
11 were they when they bought the Actos and took the Actos and got
12 bladder cancer? If you don't know that, you should. You're the
13 plaintiff. You're filing suit on behalf of them.

14 How do you know what suit to file and what claims to
15 make if you don't know what law applies? And that's going to
16 govern what law applies as to tort under a conflict of law
17 analysis. Not to the contract. Doesn't matter. Contract was
18 probably negotiated, delivered, all the factors that go under
19 contract law in Massachusetts. That's easy. I want to know what
20 law applies to these tort claims against Takeda. Did Takeda go
21 visit these doctors in Idaho? Did Lilly send its rep to doctors
22 in Idaho? Was the Actos bought in Idaho? Was the Actos taken in
23 Idaho? I think that would make a difference.

24 I could be wrong because it's not my job to think this
25 through. It was your job before you filed suit. So you should

1 already have this information. If you do not, please get it. Do
2 you have it available to you?

3 MR. McMORRIS: Not at the moment, but I will get it.

4 THE COURT: By when?

5 MR. McMORRIS: I don't -- I need to check with my
6 client to see how much -- basically, how the information is
7 stored, so how long it will take them to get it.

8 THE COURT: You don't already know that, Mr. McMorris?
9 You filed suit, and you have to know all this information, and
10 you don't even know where it's stored and how long it will take
11 you to get it? That's rhetorical. You need not answer.

12 Ms. Rodriguez, just make a note. We'll come back to
13 the whens.

14 Now, as to these policies that you're going to be
15 giving, is there a specific provision of the policy which is
16 consistently in the policies that you will be relying upon to
17 make your claim? In other words, do you know whether or not it's
18 always under, quote, subrogation, XI, or is some of this going to
19 be found somewhere else? Is there a choice-of-law provision? Do
20 you know that?

21 MR. McMORRIS: In some policies, yes; in others, no.

22 THE COURT: My Disney point is now just made. My point
23 about Disneyland has just been made.

24 Now can you provide to Ms. Davis by the end of today
25 within -- well, no, because you don't even have the policies.

1 When you provide those policies to Ms. Davis, you shall
2 indicate which provisions of the policy -- under which provisions
3 of the policy you are making your claim, and you shall declare
4 whether, under those policies, or not, there's a choice-of-law
5 provision, cause you're saying some there are and some there are
6 not. You shall provide that when you provide the policies.

7 Next, do you know, Mr. McMorris, as to this plethora of
8 claims that you have made as to the tort claims, as opposed to
9 the contract, as to the tort claims what law you are alleging
10 applies to the tort claims? Do you know that as to each one of
11 these?

12 MR. McMORRIS: We're currently alleging that
13 Massachusetts law applies.

14 THE COURT: Well, I would think that would be erroneous
15 on your part, and I would think that would be a shallow analysis
16 of the issue. I suggest you give that some thought.

17 Now, unless the defendants know what law you are
18 claiming applies, they don't know what motions they can file to
19 say you don't have this right. Most states have products
20 liability laws now. I don't know whether under choice of law
21 Massachusetts would apply to the tort claims or not. I tend to
22 think it's not going to be applying to Paul Bunyan because,
23 remember, Paul never lived in Massachusetts. He never bought
24 Actos in Massachusetts. He never went to a doctor in
25 Massachusetts. He never had surgery in Massachusetts. His

1 doctors were never visited by a Lilly or a Takeda representative
2 in Massachusetts; rather, it all happened in Idaho because that's
3 where Paul Bunyan lives because, remember, he works for ABC
4 Corporation which is housed in Boston, and they bought this
5 policy and/or they got Blue Cross/Blue Shield to administer this
6 policy for all of their people who live -- I mean, who work for
7 them around the country. Paul Bunyan has never even been to
8 Boston, nor been to Massachusetts, but he's kept up with how much
9 snow Boston got this year, but that's about it. So I would
10 suggest that probably as to Paul Bunyan Massachusetts law is not
11 going to apply to the tort. It might apply to the contract and
12 the interpretation of the contract and whether you have a right
13 to bring a claim on behalf of Paul Bunyan at all, but as to the
14 tort claims, and you certainly have at least negligence, but you
15 also have some quasi-contractual claims, and that well might be
16 Massachusetts law, but not to the tort claims. I'd be willing to
17 bet the price of the next time I take my grandchildren to Disney
18 World, which is not cheap, that it's going to be Idaho law that's
19 going to apply to ole Paul's torts that you are subrogated to; it
20 is not going to be Massachusetts law. And if you didn't know
21 that when you filed suit on behalf of Paul, shame on you.

22 So I suggest you get started actually doing the work
23 that has to be done if you want us to take your claim seriously.
24 Otherwise I'm going to lift the stay. I'm going to let the
25 defendants file whatever motion they want, and if your claims get

1 dismissed, they get dismissed. You have the burden of setting up
2 a claim on the face of your pleadings under Twombly and Iqbal.
3 And I don't -- the defendants didn't know if they could bring a
4 Twombly or Iqbal motion because they didn't even know who they
5 were, more or less where they lived, and I would suggest to just
6 say, "Well, we believe Massachusetts law is going to apply to all
7 the torts," you'd flunk my course if I were teaching law school.
8 You just flunked out of Torts 101. So get that information,
9 Mr. McMorris.

10 Cory, make me a note. We're going to come back to it.
11 Get that information. You should have already known
12 it. You don't make a claim on behalf of somebody when you don't
13 even know -- I'm sorry, Cathleen -- what law applies.

14 All right. Let's move to the next point that
15 defendants need to know before they can start defending this
16 suit. And again, I remind you, you are a plaintiff like any
17 other. You are not an intervenor who can ride the coattails
18 here. That might be what the problem was, is you are accustomed
19 to riding the coattails. No, you're not an intervenor. You
20 chose not to come in by way of intervention. You're dismissing
21 those claims. You are a straight-up plaintiff just like any
22 other.

23 All right. Let's talk about -- Judge Hanna is much
24 more abreast of this than am I, but evidently it makes a huge
25 difference as to what rights you can exercise as to whether or

1 not the state involved that would govern that is a, quote, make
2 whole state or not. I admit my ignorance on it. It is not
3 something I am fully, completely conversant on, but every time I
4 talked with him about this, which I did as we were going along,
5 he'd say, "and it makes a difference whether it's a 'make whole'
6 state or not."

7 Now, if that goes to contract only and it's only
8 Massachusetts, and Massachusetts is a "make whole" state, that's
9 easy, but I don't know. And the defendants can't know because
10 they don't know what you're doing. So that needs to be
11 addressed. You need to figure that out.

12 Next, as to each claim you are making, you are going to
13 need to give me a description of Blue Cross/Blue Shield's alleged
14 damages, 500-word limit. Now that does not mean, you know, they
15 bought Actos, we paid this amount, and we want it all back. No.
16 There are a couple of things hidden in that.

17 The first thing hidden in that is the ERISA type claims
18 where you might just be an administrator and Blue Cross/Blue
19 Shield didn't pay anything except administration costs. Could be
20 the corporate Paul Bunyan issue. Might not even be an ERISA.
21 Probably is, quite frankly, but it might not even be an ERISA. I
22 can't think of a way it wouldn't be ERISA, but, hey, you know, I
23 don't know the facts because you haven't given them to us. So I
24 don't know whether Blue Cross/Blue Shield paid for the Actos and
25 the subsequent bladder cancer that is alleged to be linked to

1 Actos or whether ABC Corporation paid for it. Well, ABC
2 Corporation is not a party to this suit, so you don't have a
3 right to get that back unless you have another contract somewhere
4 that says you do, but I am clueless on that one, clueless.

5 Additionally, I need to know -- this isn't the one that
6 redhibition was brought up in, is it? Okay.

7 I need to know whether or not you are saying, okay, we
8 want what we paid, all right, for Actos, for them to buy the
9 Actos, and that's all we're going after, ala those who have been
10 here the whole time, the exactment case issues, Arkansas, or
11 whether you're saying, hey, we want the price of the Actos, and
12 we want everything we paid out on this person's bladder cancer
13 claim.

14 Now you should have already isolated those costs that
15 are tied to bladder cancer versus high blood pressure or
16 orthopedic surgery because Paul was skiing and he broke his leg.
17 Everything you paid out is not tied to Paul's bladder cancer
18 which is alleged to be tied to Actos.

19 And quite frankly, depending upon when he took it and
20 how much he took it and whether he's a white male of a certain
21 age who is a smoker or nonsmoker with environmental or
22 occupational -- there are all sorts of things that play into
23 that, but just immediately the amount that you believe is a
24 result of his bladder cancer and taking of Actos separate and
25 apart from his orthopedic surgery. You should already have that.

1 That should be gotten to Ms. Davis as well.

2 And within the 500 words or less, as to each claim you
3 are making, you need to tell the Court and the defendants what
4 your actual, Blue Cross/Blue Shield's actual, quote, damages or
5 expenses are, and that's going to depend upon the type policy.
6 Was it an 80 percent deductible; was it a -- you know, what is
7 it? Was it a, again, where Blue Cross/Blue Shield didn't pay
8 anything except the cost of having the administration, and if so,
9 how are you doing that? Is that something you're asking for
10 here? If so, what are you doing? Saying I want my electric bill
11 and my office, you know, one-fifth of that? I mean, I don't
12 know.

13 You shall get that to them, 500 words or less, as to
14 each one, and you should have already done this. This should be
15 in your file, in your database somewhere before you ever filed
16 suit.

17 Again, caveat. You can ask the people who have been in
18 this claim from the beginning. The mere fact this is an MDL does
19 not mean it's not a lawsuit, and I handle it as if it's a
20 lawsuit. We make a lot of changes and accommodations because
21 it's an MDL and it's a different type beast, but we do not
22 abandon the basic aspects here. Okay. So you shall get that to
23 them. We will talk about when.

24 Now the next thing, have you provided a list of the
25 cases where your claimants -- no, your claims -- they are not

1 claimants, where your patients -- let's just use that term
2 here -- have granted access to their medical records and which
3 ones have not? Have you already provided that, Mr. McMorris?

4 MS. MCGOLDRICK: We did not, Your Honor. We understood
5 we were going to be discussing that today.

6 THE COURT: Then you shall. We will talk about when.
7 Do you have those, Ms. McGoldrick?

8 MS. MCGOLDRICK: We do, Your Honor.

9 THE COURT: You have that list already?

10 MS. MCGOLDRICK: Well, we know how many.

11 THE COURT: No. "How many" is again back to my Disney.
12 I want to know which one said yea and which one said nay. Do you
13 have that information?

14 MS. MCGOLDRICK: We do.

15 THE COURT: So you have that physically now, correct?

16 MS. MCGOLDRICK: Yes.

17 THE COURT: You shall get that to Ms. Davis by the end
18 of today, 5:00 o'clock, Central Daylight Time, by name, and
19 Mr. Dugas, by name. Betty Boop has granted access to the medical
20 records and I assume signed a medical authorization. If so,
21 provide the medical authorization.

22 If not, you shall facilitate having the medical
23 authorization executed in favor of Takeda and/or Lilly as to all
24 treating physicians over the full period of the alleged claim,
25 and those shall either accompany the information that shall be

1 received today, or you shall work with the Special Master and the
2 defendants on when you will have those to them.

3 And I hereby instruct the Special Master they shall be
4 in the hands of the defendant no later than 15 days of today.
5 And you shall provide them as you receive them and not wait until
6 the 15th day and dump them all at one time.

7 Do you have any medical authorizations now in favor of,
8 let's say, Blue Cross/Blue Shield, Ms. McGoldrick?

9 MS. MCGOLDRICK: Do we have them in favor of Blue
10 Cross/Blue Shield, Your Honor?

11 THE COURT: Yes.

12 MS. MCGOLDRICK: We do, and we also have the forms --
13 the ones that we have received from certain members, we've asked
14 them to sign the form that is attached to the Plaintiff's Fact
15 Sheet.

16 THE COURT: That doesn't answer my question. So you do
17 have some medical authorizations from these people in favor of
18 Blue Cross/Blue Shield, so Blue Cross/Blue Shield can get those
19 medical records, correct?

20 MS. MCGOLDRICK: Yes, Your Honor.

21 THE COURT: Have you obtained any medical records based
22 upon those authorizations?

23 MS. MCGOLDRICK: We have requested medical records,
24 yes.

25 THE COURT: No. Have you obtained any?

1 MS. MCGOLDRICK: Some records have been received.
2 Others have not.

3 THE COURT: The ones that have been received, you shall
4 identify them with particularity, and you shall provide a copy to
5 the defendants pursuant to the confidentiality agreement. You
6 have those now, so they shall be to Ms. Davis and Mr. Dugas no
7 later than 12:00 noon tomorrow, Central Daylight Time, because
8 you already have them.

9 You shall, pursuant to that same deadline, give a list
10 to the defendants of these people who have refused to give you
11 access to their medical records and yet you have brought claim on
12 their behalf, so to speak -- it's your claim by way of
13 subrogation -- and allegedly pursuant to the language of a given
14 contract, but that they are refusing to give medical
15 authorizations to you. That's a real problem for you. It's a
16 real problem for the Court.

17 So do you have that list, Ms. McGoldrick?

18 MS. MCGOLDRICK: We do, Your Honor.

19 THE COURT: How many are saying "no, I'm not going to
20 give you access to my medical records"?

21 MS. MCGOLDRICK: I believe it's 131 people, Your Honor.

22 THE COURT: So what are you planning on doing about
23 that, Ms. McGoldrick?

24 MS. MCGOLDRICK: Your Honor, we understand that Blue
25 Cross & Blue Shield has a right to obtain those records through

1 their contract with the members, and we are going to, and
2 attempting to, try to get them through their rights.

3 THE COURT: So if I'm understanding all the languaging
4 that was just used there, the 100 and some people who said, "no,
5 I'm not going to let you have access to my" -- which is, quite
6 frankly, would have been my response -- "no, I'm not going to
7 give those to you," those people you believe, pursuant to these
8 contracts that we've never seen, that Blue Cross/Blue Shield has
9 a right to go to those doctors and say, "notwithstanding HIPAA,
10 we, pursuant to this contract, have a right to get all of this
11 person's medical records and give them to us." That's pretty
12 much what you're going to do?

13 MS. MCGOLDRICK: That's what we believe we have the
14 right to do, or Blue Cross has the right to do, Your Honor.

15 THE COURT: Have you even begun that process?

16 MS. MCGOLDRICK: We have -- we're bringing it through a
17 HIPAA protected company, so we have all those things in place,
18 and we are going to try to do that. We have not sent a request
19 specifically with a Blue Cross/Blue Shield authorization to see
20 if it will work.

21 THE COURT: Well, given the fact that you keep saying
22 "we believe," et cetera, et cetera, and I have grave concern
23 about that, this is a rhetorical question. Why have you not
24 already started that if you don't even have their medical
25 records, if you don't know when they were diagnosed with bladder

1 cancer vis-a-vis when they began taking Actos?

2 I digress. Mr. Arsenault, one of the seven claims that
3 the defendant -- that got put in the hopper that the defendants
4 picked, Ms. Gourley, was a fellow who had bladder cancer
5 diagnosed before he ever took Actos. I suggest you give that
6 some review, Mr. Arsenault [sic].

7 If you don't even know that, if you don't even know
8 whether or not they took Actos before they were diagnosed with
9 bladder cancer, I'd say you have a real problem.

10 MR. McMORRIS: Oh, we know that, Your Honor.

11 THE COURT: How do you know it?

12 MS. MCGOLDRICK: Because Blue Cross & Blue Shield paid
13 claims for individuals who bought and used Actos and subsequently
14 developed bladder cancer.

15 THE COURT: Ah, see, now the truth comes out. You
16 filed this claim based upon Blue Cross/Blue Shield's records of
17 when they did Actos and who showed up as having bladder cancer,
18 and that's pretty much all you had. That's rhetorical. That's a
19 Rule 11 issue. So that's why I don't want you to say anything.

20 So you shall give to Ms. Davis and Mr. Dugas before the
21 end of today the list of the people who have given Blue
22 Cross/Blue Shield the right to get their records and the ones who
23 have not. And you shall by tomorrow noon get to Mr. Dugas and
24 Ms. Davis those records that Blue Cross/Blue Shield has obtained
25 tied to the person that identifies the doctors, et cetera,

1 et cetera.

2 And I suggest that Blue Cross/Blue Shield is going to
3 have a real problem proving their case as to these 123 [sic] if,
4 in fact, what you believe to be the case and haven't even yet
5 tested -- that's a Rule 11 problem -- believe to be the case that
6 you have a right, notwithstanding HIPAA, to get these records
7 from these doctors, because if you can't get them, you can't
8 prove your case because I guarantee you, from an evidentiary
9 standpoint, it will not be sufficient for you to put on evidence
10 that Blue Cross records show that you paid for Actos at some
11 point in time and at some subsequent point in time they came up
12 with a bladder cancer. That's a directed verdict. Having sat
13 through the Allen trial, that's a directed verdict. That's a
14 motion to dismiss which would be granted.

15 Rhetorically, I find it beyond the pale that you don't
16 even know for sure whether you can get these records and the
17 people whose records they are have specifically said, "we're not
18 waiving our right to privacy; I'm not giving them to you,"
19 because I can just envision all sorts of things, whether or not
20 those policies that issued way back before HIPAA, what will
21 apply; does HIPAA govern that? The ones that were issued after
22 HIPAA, has the language that you are relying upon, which you are
23 going to identify for Ms. Davis and Mr. Dugas and this Court when
24 you provide those policies, for those 123 people, what language
25 are you relying upon in that policy that allows you to get around

1 HIPAA so that you can get their individual personal medical
2 records?

3 You will and shall identify the language in the
4 policies that you are relying upon that you believe gives you the
5 right to vitiate HIPAA, and that raises just a whole interesting
6 question whether or not, as a matter of public policy, HIPAA is
7 going to allow you to get around it. I don't know if that's ever
8 been raised anywhere, because quite frankly I've never had --
9 I've been on the bench 23 years. This is the first time I've had
10 this kind of case that's not an intervention.

11 Intervention, easy. This isn't an intervention.
12 You've made that clear. So you shall in each of those policies
13 identify the language you are relying upon, and at some point,
14 please, when you submit it to the Court, I would ask that both
15 sides investigate when the effective date of HIPAA is. I don't
16 know when the effective date is and whether or not the language
17 of the statute specifically addresses retroactivity.

18 And I would ask that both sides look into whether or
19 not there is specific language within HIPAA that addresses the
20 right of insurance companies to be able to get access to this
21 over the objection of their insured so that the insurance company
22 can bring a claim that the insured does not want to bring.
23 Something about that just sticks in my gut.

24 Yeah, you can have a contract that says you have the
25 right to do that, but it seems that that's violative of public

1 policy, HIPAA, unless within the tension of the applicable public
2 policies the lawmakers, when they drafted it, said, no, we're
3 going to give that to the insurance companies. You want to have
4 insurance, you have to give up your right to privacy because they
5 have the right to bring this suit even if you don't want to, and
6 that means they have to have access to your insurance -- I mean,
7 to your medical records. I don't know.

8 All right. You shall, unless you wish to be subject to
9 a motion to dismiss on these 123 -- 131? Thank you -- 131, you
10 shall make immediate attempts to obtain those medical records, or
11 I will allow the defendants to file a motion to dismiss on that
12 131 of failure to be able to carry your burden because you have
13 no evidence of their medical condition other than Blue Cross/Blue
14 Shield paid for Actos and, at some point thereafter, they
15 developed bladder cancer. We'll talk about the timing on that,
16 but I suggest you get started on it yesterday.

17 Let's move on down my list. And Ms. Rodriguez, and
18 Cory, I'm going to come back to that one, too.

19 Now I need, when we do this timeline, okay, time when
20 the defendants will actually receive copies of the completed
21 medical releases in favor of Takeda and Lilly, or is it that Blue
22 Cross/Blue Shield is going to say, as a plaintiff here, we're not
23 going to give those to you. We're going to use ours, and we're
24 going to get the medicals, and we're going to give them to you,
25 which seems to be what they are suggesting. I don't know whether

1 there will be an objection to that by the defendants or not.

2 What's your intention here or do you have one? Have
3 you thought that far ahead, Mr. McMorris, or Ms. McGoldrick, as
4 to what kind of medical releases you are planning on giving the
5 defendants?

6 MS. MCGOLDRICK: Your Honor, Ms. McGoldrick. As I
7 referenced a little bit earlier when we requested that the
8 individual members sign releases, we had them also sign or signed
9 the form attached to the Plaintiff's Fact Sheet. So those should
10 be, unless I'm incorrect, for the benefit of Takeda that you are
11 speaking about.

12 THE COURT: Okay. So you have -- I'm not familiar with
13 that form in my head right now, Ms. McGoldrick; but, Ms. Davis,
14 that form is sufficient for you to get what you need from the
15 doctors, the one that's attached to the Plaintiff's Fact Sheet?

16 MS. DAVIS: Yes, Your Honor.

17 THE COURT: All right. Cool beans.

18 MS. GOURLEY: This is Sara. Can I just add that, in
19 some instances, there are institutions which have their own
20 special form of release. So we always start with the standard
21 one attached to the Plaintiff Fact Sheet, but there have been
22 occasions when we've had to go back to the plaintiff's counsel to
23 get different releases executed because some institutions will
24 simply not accept anything but their own form of release.

25 THE COURT: Ms. McGoldrick.

1 MS. GOURLEY: So there may be some need for follow-up.

2 THE COURT: Okay. Ms. McGoldrick, should that be the
3 case, you shall provide them with a -- an executed form peculiar
4 to that institution within 10 working days of notice that it's
5 needed or you shall contact the Special Master and the defendants
6 to say why that can't be done in 10 days.

7 And, Ms. Rodriguez, a specific date shall be put on
8 that. Not as soon as they can. I don't want it falling through
9 the cracks again. If you can't get it in 10 days, explain why --
10 business days -- explain why, and then if they need X amount of
11 time and it's reasonable, you can give it to them, but it in no
12 instance shall exceed 30 days, calendar days.

13 All right. Now the forms that the remaining people
14 signed pursuant to the Plaintiff's Fact Sheets, have you provided
15 those executed medical releases to the defendants,
16 Ms. McGoldrick?

17 MS. MCGOLDRICK: We have not, Your Honor.

18 THE COURT: You shall. Okay? Now did I say you had 15
19 days to get those executed releases to them? I had done that
20 thinking you didn't have them. How many do you physically
21 already have?

22 MS. MCGOLDRICK: I believe we have 143, Your Honor.

23 THE COURT: If you have 143 and 123 said "no," then the
24 rest are still hanging out there?

25 MS. MCGOLDRICK: No, those people have cooperated with

1 regard to the Plaintiff's Fact Sheet but have not signed an
2 authorization as of yet.

3 THE COURT: So they are hanging out there pursuant to
4 medical releases.

5 MS. MCGOLDRICK: Yes.

6 THE COURT: You shall, by the end of today, get a list
7 to the defendants and this Court. All of this stuff that you're
8 doing, when I say "to the defendants," it comes to the Special
9 Master because she is the Court, and if I order you -- on these
10 points. If I order you to do something, it goes to her, too,
11 always. That is the default position unless I say no. Okay.

12 So you shall get to the defendants and the Court by the
13 end of day a list, by name, of the people for whom you have
14 releases, and get them those releases by tomorrow at noon cause
15 you got them. Those who have said "no," that shall be gotten to
16 them by the end of today, and those that have done the
17 Plaintiff's Fact Sheet but have not executed the medical release,
18 I want the names listed.

19 Now, as to the ones that you, again, that you already
20 have, get them to them by tomorrow noon. The ones that they have
21 not, you shall -- the ones who have said "no, not going to give
22 it to you," I want -- you shall begin --

23 Ms. Rodriguez, within five working days, they shall
24 begin the process to try out and see whether or not under the
25 applicable law -- and that's going to be really cool for Paul

1 Bunyan cause that's not going to be Massachusetts law, in all
2 likelihood -- maybe; I don't know -- because it's going to be --
3 I don't know whether it's going to be evaluated under contract or
4 state law with these doctors.

5 And I have a nephew-in-law who is a doctor. We talk
6 about these things over glasses of wine. I guarantee you he
7 wouldn't give it to you. No way he'd give it to you, but I don't
8 know.

9 So you shall within five working days of now -- didn't
10 I say working days of now? -- start that process as to all of
11 them. It's not a big deal.

12 Now I'm going to find it fascinating to see how you go
13 about doing that vis-a-vis these doctors who are dead because
14 they treated Paul Bunyan, you know, 10 years ago, 15 years ago,
15 5 years ago, or got killed in a car wreck yesterday, who's closed
16 down their offices. I'm going to find it fascinating to see how
17 you get that from every single doctor, every treating physician
18 who treated Paul Bunyan in Idaho cause some may say "okay" and
19 some may say "not." This is a big undertaking. You should have
20 already done this, but you shall get started on it.

21 Ms. Rodriguez, it will be a rolling -- they shall give
22 to the Court and to the defendants the result of this weekly.
23 They shall report to you that they have gotten X and Y as to the
24 list -- what is it? -- the total number of these people are 350,
25 okay, and of -- taking out the 123, so you got a little over a

1 hundredish -- I don't know -- but of those you're going to have
2 to -- 131, we know you're going to have to try to get this way
3 vis-a-vis Blue Cross/Blue Shield, and there are going to be more
4 than 131 doctors because there are going to be a whole bunch of
5 doctors, and you know who they are because you paid their
6 offices. You've got it in your records. So you're going to have
7 to contact every one of those doctors and see if they are going
8 to give it to you under Blue Cross/Blue Shield, not Paul Bunyan.
9 And it's going to be fascinating if Paul Bunyan, you're trying to
10 get them in Idaho. This could be like a year-long process, but
11 it shall not be because you've already had 10 months since you
12 filed suit, and you're the one who chose to file suit.

13 And if you couldn't even get the medical records on
14 these people and you didn't know if you could even get the
15 medical records on these people when you filed suit, I'd say you
16 got a little problem with Rule 11. So go get it done.

17 You shall work with the Special Master on this. She
18 shall report to me every Thursday. You shall have a rolling
19 deadline. And you shall produce information saying they won't do
20 it, they will do it, or we are, you know, we're starting in Idaho
21 first or we're starting in Massachusetts first and we haven't
22 gotten to Idaho yet. And she will create a schedule, and you
23 shall abide by it unless you can explain to me why you can't or
24 shouldn't. And as you get them, you shall provide them to the
25 Court and to the two defendants.

1 So we've dealt with the medical releases you've already
2 had. You're going to get them to her by tomorrow noon. You're
3 going to get them the list of who has agreed, who has said
4 absolutely no, who has said, I have done the fact sheet, but I
5 didn't sign the authorization. All right? You're going to get
6 them that list.

7 The people who signed the fact sheet but did not sign
8 the authorization, you shall within the next 15 days contact each
9 one of them in some fashion and have them execute it or have them
10 tell you they will not, and you shall provide that information to
11 the Court and to the defendants.

12 And if they say they will not, you shall put them into
13 the grouping of the ones who have already said, "No, I'm not
14 giving you access to all my medical records. I didn't file suit.
15 I didn't want to file suit. If I had wanted to file suit, I
16 would have already filed it." And you're saying, "but under this
17 contract that nobody has seen, I have the right to do this. And
18 not only do I have the right to do this, but under this contract
19 that I've seen, it's not a hollow right because there's some
20 language in there that says that I can get your medical records
21 over your objection." Going to be interested to read that
22 language, particularly, after HIPAA came into effect, but we'll
23 see.

24 So if they say, "no," they go into that pile. If they
25 execute it, you shall get that to the defendants and the Court no

1 later than five working days from when you receive it and within
2 the schedule laid out by the Special Master.

3 Now I move to the next point on my list. As to each --
4 and I'm going to use the term "patient" here -- I am interested
5 under the tort law that is applicable whether or not the claims
6 are premature or prescribed or there might be a statute of
7 limitations that would apply to the tort claim, because if you're
8 subrogated to Paul Bunyan's claims, and in Idaho there's a
9 one-year prescriptive period for products liability claims and
10 you're bringing it now and he's, you know, already had cancer, he
11 knew he had bladder cancer in 2011, is it prescribed or do they
12 have the concept of a continuing tort? I don't know.

13 Can you tell me that as to each claim you have
14 presented, Mr. McMorris, whether or not you looked into whether
15 there might be a statute of limitation that might apply to the
16 tort claims, not the contract.

17 DEPUTY SPECIAL MASTER RODRIGUEZ: And prescribed means
18 that the statute of limitations has run.

19 THE COURT: Oh, I'm sorry, yes. Prescription is a
20 civilian term. When I say "prescribed," that means statute of
21 limitations has run for the applicable tort law. Has anybody
22 looked into that? Can you tell me that as to each claim,
23 Ms. McGoldrick, or Mr. McMorris?

24 MR. McMORRIS: Your Honor, I'm going to have to go to
25 the dates of service to tell you that.

1 THE COURT: I beg your pardon? To the what service?

2 MR. McMORRIS: The dates of service. I need to know
3 where the man lived or where the person lived at the time, as you
4 pointed out before.

5 THE COURT: Yeah, but you don't know that, do you?

6 MR. McMORRIS: I do not.

7 THE COURT: Yeah. So you don't even know whether you
8 have a claim on behalf of these people or not because it might
9 well be beyond the statute of limitations as to the tort claim.
10 That's a Rule 11 issue. Find out. And those claims that have
11 prescribed -- not prescribed -- statute of limitations has run on
12 the tort claim and there's no concept of continuing tort under
13 applicable law, you need to dismiss them. And if not, I'm going
14 to let the defendants bring a motion, and if you can't even say
15 that you know where they lived when they took it and you cannot
16 even say that you know what law applies, so you can't argue it to
17 the tort, I'm going to grant the defendants' motion and they are
18 going to be dismissed.

19 Go find that out. You shall work with the Special
20 Master to set up a schedule to identify as to each of their
21 claims, where did they live during this time? Are they Paul
22 Bunyan? And what law in theory might apply. It's either going
23 to be Idaho or Massachusetts. Okay?

24 You don't have to fight out the choice-of-law
25 question -- conflicts of law, rather, right now, or choice of law

1 if there's a basis for it, but under Massachusetts and Idaho law,
2 if he was diagnosed with bladder cancer and took Actos and had
3 reason to know, et cetera, et cetera, maybe it's -- I don't know,
4 but neither do the defendants, and they can't know if they don't
5 even know the name of the person, the language under the contract
6 that gives you the right, have medical records for these people
7 because you haven't given them or gotten them or even tried to
8 get the ones that you're not sure that you're going to be able to
9 get under a Blue Cross/Blue Shield request. You don't know where
10 they lived when the tort occurred, using that metaphorically and
11 generically. You don't have any idea whether under the
12 applicable law the claim that you might have brought might be
13 beyond the statute of limitations. Basically, you don't know
14 whether you have the right to bring this claim at all. You
15 better go find out. You shall work with the Special Master to
16 set that up.

17 Now there are the remaining Rule 26(a)(1) initial
18 disclosures. In this MDL we have made some adjustments to that
19 because it is an MDL. You shall work with the Special Master and
20 your PSC member on making certain that you comply with the
21 remaining aspects of Rule 26(a)(1) as modified by the Orders of
22 this Court that apply to this MDL, and you shall make certain you
23 do it -- comply, that is, timely.

24 You shall familiarize yourself with what rules and
25 obligations -- what rules apply by way of modification and

1 obligations you have as any other plaintiff under this. You get
2 no special treatment. You're one plaintiff here.

3 So you shall, if you're already dilatory, I suggest you
4 get it done and you talk with the Special Master about when
5 you're going to get it done.

6 And Ms. Rodriguez, I will be expecting a report on that
7 the next time we meet. Not this Thursday, tomorrow, but the next
8 or the next, depending. And I heartily suggest, if the Special
9 Master suggests you do something, that you do it, or you explain
10 to her why you cannot, and she will bring that to me, and then I
11 will tell you whether or not, or not, or I'll let you talk to me,
12 but I don't think after today you're going to really want to talk
13 to me, but if you do, I'll let you.

14 So the Rule 26(a)(1) initial disclosures,
15 Ms. Rodriguez, you will work with it to set that up. Make
16 certain -- Mr. Arsenault, work with them, as their PSC rep, to
17 make certain that they comply, they comply timely, they know what
18 it means, just like y'all have done with all the other
19 plaintiffs' counsel.

20 MR. ARSENAULT: Will do, Your Honor.

21 THE COURT: Thank you, Mr. Arsenault.

22 Now, Mr. McMorris and Ms. McGoldrick, it is my
23 understanding that you already have and shall continue to
24 dismiss, and I'm going to call them the duplicative claims within
25 the MDL.

1 In other words, if you brought a claim on behalf of
2 Betty Boop and Betty Boop has already filed suit by way of some
3 other plaintiff's attorney here and you're not coming in as an
4 intervenor, you are dismissing that suit. You've already
5 attested to that.

6 I want to know, and you shall work with the Special
7 Master on an ongoing review -- I also suggest you work with your
8 PSC member, Mr. Arsenault -- to determine, now that we know the
9 names, so he gets those names, too, by the way.

10 And Mr. Arsenault, you are subject to the protective
11 order as well, agreed?

12 MR. ARSENAULT: Yes, ma'am.

13 THE COURT: All right. You get those names to him,
14 too, because he's going to help you find out whether those people
15 have filed suit or they are filing suit. We're getting them,
16 Mr. McMorris, daily. People are -- I'm still letting them come
17 into the MDL because of the posture here.

18 So somebody, Mr. Arsenault, you need to work with
19 Mr. McMorris, to make certain that Mr. McMorris or Ms. McGoldrick
20 or someone on their staff is regularly -- and by "regularly" I
21 mean weekly or biweekly -- checking those filings to make certain
22 that some of these people are not filing suit on their own right
23 because, if they are, Mr. McMorris has assured the Court he will
24 immediately dismiss those claims under the Blue Cross/Blue Shield
25 claim. Correct, Mr. McMorris?

1 MR. McMORRIS: That is correct, Your Honor.

2 THE COURT: All right. So, Mr. Arsenault, you work
3 with him. Mr. McMorris, you work with him. The Special
4 Master -- and Ms. Rodriguez, I am telling you I want some
5 regularly scheduled process review to be working on that.

6 Same thing as to state courts. Now with that, the PSC
7 may or may not know that they have been filed. So the parties
8 that are more likely to know are going to be the defendants.

9 Ms. Davis, do you have a problem working with
10 Mr. McMorris and Ms. McGoldrick as to, you know, suits that have
11 been filed in the state court so we can know whether it's the
12 same person that has -- Blue Cross/Blue Shield has filed here so
13 that they can dismiss it?

14 MS. DAVIS: None at all, Your Honor.

15 THE COURT: Please do so.

16 MS. DAVIS: Will do.

17 THE COURT: Okay. Keep it current. I have an order in
18 place, Ms. Davis, that requires the defendants to give me
19 information about when state suits have been filed. It is
20 relatively new. Just to protect you from a procedural
21 standpoint, your disclosure will be made pursuant to that order.
22 So just to protect you, it's an Order of the Court that you give
23 me this information.

24 Secondly, however, Ms. Rodriguez, set up a subset
25 timing schedule for Ms. Davis to give us that information. It

1 may or may not be efficient for her to operate under that same
2 time frame. And then, Ms. Rodriguez, set up with either
3 Ms. McGoldrick or Mr. McMorris and Ms. Davis how the process is
4 going to work. Okay? Be able to report back to me at the next
5 point in time. All right?

6 Then I am correct, Mr. McMorris, that as, and if, new
7 cases are identified where these people who you have filed suit
8 on their behalf choose to file it on their own, should they,
9 you're going to dismiss those claims. That's what I understand.
10 Accurate?

11 MR. McMORRIS: That is accurate, Your Honor.

12 THE COURT: As to both the state courts and the MDL,
13 correct?

14 MR. McMORRIS: Correct. And it will be very helpful to
15 have the defendants assist us on the state law claims.

16 THE COURT: Cool beans. She said she didn't care,
17 so -- I mean, didn't mind doing it. They are the ones who are
18 going to know.

19 And Mr. Dugas, I'm going to leave that with Ms. Davis
20 because usually Lilly is not going to get sued unless Takeda is
21 sued.

22 MR. DUGAS: Thank you, Your Honor. That's fine.

23 THE COURT: You're welcome.

24 All right. Now this I almost lay out rhetorically
25 because I think I know the answer to this, but my question to

1 Blue Cross/Blue Shield is did you contact any of these people to
2 see if they were planning on filing suit on their own right
3 before you filed it here, because they may be planning on filing
4 suit somewhere, or say they don't want to at all, which is going
5 to get brought up in the evidentiary problem. But was that
6 discussed with them? Did, you know, anybody ask? I'm just
7 asking? I'm curious.

8 MS. MCGOLDRICK: Yes, Your Honor, we did. And in the
9 information we provided to Magistrate Judge Hanna, we identified
10 those cases where the individuals told us that they had filed
11 cases. They were state court cases, and we weren't able to
12 verify it completely, but we -- in every instance our first
13 question was "are you represented by counsel," or "are you
14 planning on filing a claim?" So we got an answer, at least at
15 that stage, as to what they were planning on doing or had already
16 done.

17 THE COURT: Well, cool. That would be covered by the
18 second protective order, would it not?

19 MS. MCGOLDRICK: Would what be, Your Honor?

20 THE COURT: That information because I'm about to order
21 you to give it to the Court and to the defendants. So it
22 wouldn't be violative of anything for you to give that
23 information, correct? I'm asking.

24 MS. MCGOLDRICK: I guess I don't know. I don't know
25 what information you're -- you mean, particularly. We've already

1 provided a list to Judge Hanna of the cases where they have
2 identified or stated that they have a filed claim.

3 THE COURT: What I'm asking -- it's my fault,
4 Ms. McGoldrick. I'm clearly not being clear. I have not gotten
5 that from Judge Hanna. That has not been provided by Judge Hanna
6 or you to the defendants. I could go get it from Judge Hanna and
7 give it to the defendants, but I don't want to violate any
8 obligation you might have to privacy with these people. And
9 secondarily, whatever you did with Judge Hanna may or may not
10 still be accurate.

11 So my question to you is, is there anything that would
12 prevent you from providing exactly what you gave to Judge Hanna
13 as to those people who wanted to sue or didn't, getting that
14 information to both the Special Master -- cause we don't have it;
15 he didn't share it with us because there was a HIPAA problem that
16 would have prevented, possibly, that sharing with anything other
17 than the Court by order until the second protective order was in
18 place. Well, it's now in place.

19 So my question is, will you give that information to
20 the Special Master and to the defendants, the same information
21 that you say you provided to Judge Hanna?

22 MS. MCGOLDRICK: Certainly, Your Honor, we'd be happy
23 to.

24 THE COURT: Cool. Can you get that to them by the end
25 of today?

1 MS. MCGOLDRICK: I certainly can.

2 THE COURT: Now because, again, I was not necessarily
3 privy to what Judge Hanna did or didn't do, I think when all this
4 was going on I was knee deep in alligators with a capital scarlet
5 A on the top of them, as in Allen, was there anything else he
6 ordered you to do that you gave to him that I have not already
7 discussed generically because I don't want to make you waive
8 anything, because I can go ask him but I'm asking you.

9 MS. MCGOLDRICK: No, Your Honor.

10 THE COURT: So everything that he ordered you to give
11 him you would have now, by this discussion with me, been ordered
12 to provide to both the special -- Deputy Special Master and the
13 defendants, and with the expectation it would, I guess, I assume,
14 be covered by the second protective order, or no need for that
15 protective order at this time? Is that accurate?

16 MS. MCGOLDRICK: I believe so. We were -- we provided
17 what we were supposed to provide to the Special Master, and we
18 are certainly happy to now do that for the defendants.

19 THE COURT: Well, that information that went to Judge
20 Hanna, Ms. McGoldrick, never made it to the Special Master
21 because we didn't have that second -- as I understood it from
22 talking with Judge Hanna, there was a HIPAA concern, and nobody
23 wanted to trip over HIPAA. So the information you provided was
24 only to him, and he would have continued working, but a
25 protective order was needed. It finally got done. Once I got

1 Special Master Rodriguez working -- Deputy Special Master
2 Rodriguez working on that, because by then I had pulled
3 everything up from Judge Hanna because, bless his heart, he's
4 having to take the lead on a lot of my other civil cases and a
5 lot of the criminal because I'm otherwise occupied now.

6 So what I'm trying to get at, and I'll break it down
7 because I asked you compound questions. Everything he ordered
8 you to give up, you are now giving to the Special Master, Deputy
9 Special Master and the defendants, pursuant to this conversation.
10 Accurate?

11 MS. MCGOLDRICK: Accurate, Your Honor.

12 THE COURT: All right. The next thing I have on my
13 list I have touched on briefly, and that is the ERISA interplay.
14 I don't have any way of knowing, but I cannot imagine, within
15 this day and age, that there are not many of these, quote,
16 claims, close quote, that are not pursuant to an ERISA policy,
17 and if that's the case and it's a large enough corporation where
18 Blue Cross/Blue Shield was merely the administrator and actually
19 did not incur any payout expenses because the company did, do you
20 know whether or not that is actually the case within the claims
21 that you have made, Mr. McMorris, or Ms. McGoldrick?

22 MR. McMORRIS: I do know that's the case.

23 THE COURT: You do know that is the case?

24 MR. McMORRIS: Yes.

25 THE COURT: You shall identify as to each named party,

1 when you send that list, whether it is -- whether Blue Cross/Blue
2 Shield paid out monies or whether they were merely the
3 administrator. Can you do that by the end of the day today if
4 you already have that information?

5 MR. McMORRIS: I do not have that information, Your
6 Honor.

7 THE COURT: I thought you told me you did.

8 MR. McMORRIS: No. I'm sorry, perhaps I didn't
9 understand your question. I do know that many of these policies
10 are ERISA.

11 THE COURT: We're in Disneyland again. Okay. I'm
12 running with you. You know that out in the Disneyland park there
13 is a Mr. Toad's Wild Ride.

14 MR. McMORRIS: Correct.

15 THE COURT: You do not know which of the claimants upon
16 which you brought claims and alleged that damages were owed,
17 whether you, Blue Cross/Blue Shield, paid anything on it or not,
18 a given specific particular claim. Is that accurate?

19 MR. McMORRIS: Yes.

20 THE COURT: That's a Rule 11 problem. You shall get
21 that information, and you shall give it to the Special Masters
22 and to -- I say Special Masters -- to Deputy Special Master
23 Rodriguez and to the defendants within the next 10 working days,
24 or you explain to the Special Master why it cannot be done, and
25 if she agrees, she can give you a rolling deadline not to exceed

1 30 days. That's a rather large Rule 11 issue.

2 Let me ask you something, Mr. McMorris. In those cases
3 where you know certain of these are ERISA, you don't know where
4 these people lived, accurate?

5 MR. McMORRIS: In some cases, yes.

6 THE COURT: Yeah. You don't know where they lived, so
7 you don't know what law applies, and we've been down that path.
8 Okay.

9 What damages are you claiming on behalf of Blue
10 Cross/Blue Shield if it was an ERISA type policy where the
11 corporation actually paid these expenses and all that Blue
12 Cross/Blue Shield did was act as the administrator? What damages
13 are you claiming?

14 MR. McMORRIS: The claims that Blue Cross/Blue Shield
15 made as administrator, part of their administration
16 responsibilities was to exercise the subrogation right.

17 THE COURT: No-no-no, no-no-no. I'm talking about
18 damages. You're saying, okay, we're going to get it. Now, if
19 you are suggesting that you have a contract between Blue
20 Cross/Blue Shield and ABC Corporation that employed Paul Bunyan
21 and that contract says, "Hey, Blue Cross, you get to go against
22 these people for the money we paid," then that's a whole 'nother
23 contract that has to be produced, isn't it?

24 MR. McMORRIS: It is, and I understand that. I have
25 that in my notes.

1 THE COURT: But do you have them?

2 MR. McMORRIS: I do not have them.

3 THE COURT: Have you made any attempt to obtain them?

4 MR. McMORRIS: No.

5 THE COURT: Do you know whether or not as to any
6 specific or particular claim made on Betty Boop -- well, let's
7 use Paul Bunyan, let's be consistent -- claim made on Paul Bunyan
8 who worked for ABC Corporation and Blue Cross/Blue Shield was
9 merely the administrator, do you know whether or not, under the
10 time frame that is relevant to Paul Bunyan's Actos use, whether
11 or not Blue Cross/Blue Shield, in fact, had a contract with ABC
12 Corporation that, in fact, allows Blue Cross/Blue Shield, rather
13 than ABC Corporation, to go back against Paul Bunyan for that
14 information, or money, actually -- I mean, against Takeda,
15 rather, for that money. Do you know that?

16 MR. McMORRIS: Aside from the representations made to
17 me by my client, no.

18 THE COURT: I'd say that's probably malpractice, close,
19 or Rule 11. Not good.

20 Now let me ask you about that, follow up on that a bit.
21 In those cases where it was an ERISA style plan, okay, and it was
22 a Paul Bunyan situation, and we're going to assume for this
23 hypothetical that Paul Bunyan said, "hell, no, I'm not signing
24 that to give you my medical records," and Blue Cross/Blue Shield
25 didn't pay anything on it, only ABC Corporation paid on it, and

1 Blue Cross/Blue Shield is not the policy owner, they are merely
2 the administrator; does Blue Cross/Blue Shield have any legal
3 right whatsoever to get around HIPAA and say, "I get to get those
4 medical records"? That's a rhetorical question.

5 I would think it's getting a bit attenuated there, but
6 I don't know. You shall of the 123 -- 131 -- thank you,
7 Cathleen -- I'm dyslexic, guys. Know that. And once I flip a
8 number, I get it wrong in my head, it will keep popping up, so
9 you just need to correct me.

10 Of the 131 you shall identify at some point in time --
11 Ms. Rodriguez, you can schedule it -- but in no instance later
12 than 30 days. Within 10 working days, no instance later than 30
13 calendar days, you shall identify which of the ones where these
14 people have said, "no, I'm not giving you that," and the
15 additional people when you contact them about why they didn't
16 execute the medical authorization in conjunction with the
17 Plaintiff's Fact Sheet and say, "nope, I'm not giving it to you."
18 I wouldn't give it to you, but at any rate, that's not the point.
19 You shall identify of those, which ones Blue Cross actually paid
20 out money on and which ones they were merely the administrator of
21 a plan.

22 And I would be careful if I were you, if I were out
23 there practicing, I'd be careful asserting to those doctors on
24 those that I have "Blue Cross/Blue Shield has the right to get
25 it" when you're not the policy owner, you are merely the

1 administrator. I don't know whether under law that gets you that
2 right or not. I have no idea.

3 Now, as a plaintiff, like any other, you are already
4 late on your Plaintiff's Fact Sheets. You've been in this case
5 for 10 months. Now there were deals cut on that to some degree.
6 So I'm now telling you, get them done. You shall work with the
7 Special Masters on a rolling deadline to get those Plaintiff's
8 Fact Sheets in.

9 Also work on a rolling deadline to get those status
10 reports done. If you don't know what the status report is,
11 Mr. McMorris, and Ms. McGoldrick, I suggest you talk with your
12 PSC member -- that's Mr. Arsenault -- and he will explain that to
13 you.

14 I think you will find that, in order to do that, you
15 have to be able to answer all these questions I've already asked
16 you that you do not have the answer to and that you should have
17 had the answer to before you ever filed suit, in my opinion, most
18 of them. Some maybe not. Most of them.

19 You shall have a deadline to do that just like any
20 other plaintiff. The only reason you have been delayed so far to
21 begin with was HIPAA and your need for time because you had so
22 many individual claimants, and that's why I gave it to you --
23 well, that's not accurate. That's why I instructed Judge Hanna
24 to grant you some time to get that done and the same with the
25 Deputy Special Master. That does not mean you don't do anything,

1 and that does not mean you shouldn't have already done 82 percent
2 of this before you ever filed suit. The mere fact this is an MDL
3 does not mean you just get to come tag along.

4 Just ask anybody who is in this MDL. Ask
5 Mr. Arsenault; he will explain that to you. And you're not an
6 intervenor, so you don't get to ride the coattails of the
7 plaintiff. You chose not to come in as an intervenor, so you
8 don't get to ride the coattails. You have to stand up and live
9 up to the obligations that anybody else has as a plaintiff in
10 this suit.

11 And you're not a class action because I'm going to come
12 back to why you filed the 11 different suits. I'm going to ask
13 you that in a minute. You're not a class action like Arkansas
14 attempted to be and like Mr. Vance has out in California. You're
15 not a class action. I'm handling them on yet another track
16 because of the unique procedural aspects. You're not. You're a
17 plaintiff just like anybody else, and you've got to have the
18 information to prove up your case and to get past threshold
19 motions, and I put the stay on the threshold motions to give you
20 time to get it done and to deal with HIPAA.

21 HIPAA has been dealt with, I assume, by the protective
22 order you helped craft, and you've had 10 months to do things, in
23 my opinion, you should have done before you ever filed suit. And
24 you can't even say you filed suit quickly because you were
25 worried about the statute of limitations because you don't even

1 know what law applies to 80 percent of these cases because you
2 don't know where Paul Bunyan lived and, therefore, you don't know
3 whether there's a statute-of-limitations problem. I hope as this
4 rhetorical analysis points out that, if you were in my torts
5 class, you'd flunk.

6 Now let me go back to my list. Cathleen, you need to
7 take another break because I'm about to go into why they filed
8 the 11 suits?

9 Cathleen wants to take another break. You can take
10 another bathroom break, five minutes.

11 (Recess taken.)

12 THE COURT: Okay. Let's see, do we have McGoldrick?

13 MS. MCGOLDRICK: Yes, Your Honor.

14 THE COURT: McMorris?

15 MR. McMORRIS: Yes, Your Honor.

16 THE COURT: Davis?

17 MS. DAVIS: Yes, Your Honor.

18 THE COURT: Cody?

19 MR. CODY: Yes, ma'am.

20 THE COURT: Gourley?

21 MS. GOURLEY: Yes, Your Honor.

22 THE COURT: Dugas?

23 MR. DUGAS: Yes, Your Honor.

24 THE COURT: Arsenault?

25 MR. ARSENAULT: Yes, Your Honor.

1 THE COURT: Okay. A couple of little things before we
2 get into it. First, I remind you, Counsel, you are a plaintiff
3 just like any other plaintiff.

4 Mr. Arsenault, review those orders that were signed by
5 all plaintiffs' attorneys early on and make certain they are
6 aware of them and, if applicable, that they sign them.

7 MR. ARSENAULT: Will do.

8 THE COURT: We have some things talking about expenses,
9 we have some reporting requirements, all sorts of things.
10 Mr. Arsenault, review those with them.

11 And also, Mr. Arsenault and Ms. Rodriguez, if when you
12 get into this working with them to do the things that they are
13 supposed to do, if you have a problem, Mr. Arsenault, you let
14 Ms. Rodriguez know, and Ms. Rodriguez, you let me know, and I'll
15 let them know.

16 All right. So -- because, Mr. Arsenault, you're taking
17 on a -- kind of like we've done with some of the late -- the ones
18 who have come in late, you know, the PSC gets them all those
19 orders they need to sign and which apply to them, and make
20 certain they understand how this administrative process is set up
21 from the bottom up, et cetera. So I'm going to rely upon you to
22 do that, Mr. Arsenault, and any of those orders that should apply
23 to them as a late coming plaintiff that they execute as well.
24 You know what I'm talking about, Mr. Arsenault?

25 MR. ARSENAULT: Yes, ma'am.

1 THE COURT: Cool beans. If you'll do that for me, I'd
2 appreciate it because I don't want to have to go back and look
3 and dig them out because you do this -- or the PSC does this as a
4 regular matter as these new plaintiffs' counsel come into this
5 claim.

6 All right. Now the last thing on this point of just
7 saying that Blue Cross/Blue Shield, you know, paid for Actos and
8 then somebody ultimately got bladder cancer. In my lo 23 years
9 here, there have been times when the insurance company made the
10 check out to the wrong person, like the spouse when they were
11 both insured, and it's not the spouse who has a problem, it's the
12 insured. So the defendants have to have the right to know this
13 and have to have Plaintiff's Fact Sheets on all of this because
14 what's in the bowels of that computer may or may not be
15 100 percent totally accurate.

16 Now, Mr. McMorris and Ms. McGoldrick, I am curious, why
17 11 separate suits?

18 MS. MCGOLDRICK: I'm sorry, Your Honor, you mean why we
19 filed bundled complaints or why there were 11 as opposed to one
20 listing all?

21 THE COURT: Well, see, this is why I started this
22 discussion with the concept of bundling because your answer to my
23 question, I think, has created -- illustrates a misunderstanding
24 that has created a great deal of confusion and problem in this
25 case.

1 The way that bundled complaints have been used, at
2 least in this MDL, was when a given plaintiff's attorney wished
3 to file 15 different or 20 different or however many different
4 plaintiffs, individual plaintiffs' complaints under one filing,
5 they were able and allowed to do that by agreement of the
6 defendants and the Court.

7 Once they had been filed, the Clerk's Office
8 automatically, by way of signature of Magistrate Judge Hanna,
9 unbundled those individual plaintiffs' suits. One attorney may
10 represent 15 people because there's no conflict, and we let them
11 file it under one filing in what we called a bundled complaint,
12 and the default position with the Clerk of Court is, and was,
13 that because they are separate plaintiffs claims they are
14 automatically unbundled once the -- they have gone through the
15 filing process. Okay.

16 Why we did that is because, if these cases are
17 remanded, we have set it up so that we are creating one docket
18 sheet, one set of applicable information, if you will, to go back
19 to the transferor court, and that one plaintiff's attorney might
20 have filed 15 suits with somebody in Idaho, somebody in
21 Massachusetts, somebody in North Carolina, wherever; but, see,
22 they are separate individual suits because they are separate
23 individual plaintiffs.

24 Here you are one plaintiff only. You might have
25 beaucoup numbers of subrogated rights, arguably, but you are just

1 one plaintiff. So there was no unbundling to be done. Hence,
2 that instruction to the Clerk of Court in the order that I began
3 today's discussion with. That was to tell the Clerk of Court,
4 even though it might look like a duck and look to sound kind of
5 like it quacks like a duck, this is not a duck. We have only one
6 plaintiff here that's based upon many of the people they insured,
7 but it's Blue Cross going for Blue Cross' expenses, in theory,
8 and it's not by way of intervention. It's Blue Cross. So
9 there's only one plaintiff.

10 So this was to tell the Clerk of Court, no-no-no, don't
11 try to pull these apart; they cannot be pulled apart because
12 there's only one plaintiff with multiple claims, but only one
13 plaintiff. So it's not a matter of bundling for you. You're it.
14 You're the only plaintiff.

15 So my question is, why did you do it in 11 different
16 suits? Was it based upon -- and I hesitate to say this because,
17 based upon my conversations with you so far, I think I'm giving
18 you more credit than is due on this, but was it because the first
19 35 cover a time frame between X and Y and those policies had
20 specific language that would be common to all, but after a
21 certain date, that language on the policy changed, and so it
22 would be another time frame, Z to M, with different policy
23 language that would be common to all, et cetera?

24 MS. MCGOLDRICK: No, that is not the case.

25 THE COURT: I didn't think so after today. I had hoped

1 it was. Quite frankly, that's what I sort of thought I'd hear
2 from you until we had our discussion.

3 So my question to you is, if Blue Cross is bringing a
4 claim on Blue Cross' behalf only of all these claims, why did you
5 put it in 11 different suits? It's all the same suit, is it not?
6 Blue Cross, you are saying, has subrogated rights. You're
7 telling me you didn't break them apart for any factual basis or
8 legal basis. Why did you file 11 of them? Why didn't you just
9 file it and say, here's Blue Cross/Blue Shield. We know -- which
10 we know isn't the case, but we know we had, you know, effective
11 insurance policies on these people. We know we had subrogation
12 rights in that policy. We know that that language under the
13 applicable contract law grants us the right of subrogation.

14 We know that these people do not want to file suit on
15 their own, and we know that, under the applicable law as to the
16 tort, it's not barred by the statute of limitations and just put
17 everybody in there. Why did you do 11?

18 MS. MCGOLDRICK: We did 11 separate complaints. We
19 could have done one complaint, but we would have filed individual
20 claims within there because we believed that we were stepping
21 into the shoes of our members and not that we had to do it that
22 way.

23 THE COURT: Well, let's assume that you are stepping
24 into the shoes of your members, but you're not intervening.
25 Okay? That's the problem with your assumption. You're not

1 intervening here. What you're doing is you're filing one suit on
2 behalf of Blue Cross/Blue Shield, saying we have these members,
3 we paid money on them, we want our expenses back. That's one
4 suit.

5 MR. McMORRIS: Your Honor, you're correct. It probably
6 would have been more appropriate to file one suit with all the
7 claims below it.

8 THE COURT: So, basically, there's no reason, factually
9 or legally, why you filed the 11. Is that accurate?

10 MR. McMORRIS: Well, the only reason was we had thought
11 it would be easier for the Clerk's Office to unbundle if it
12 wasn't a huge group.

13 THE COURT: Okay, this is my point. That
14 misunderstanding as to the nature of your suit has created all
15 sorts of havoc here. You can't unbundle one plaintiff's claim
16 based on that plaintiff alone.

17 Let me think of an analogy. Let's say you are
18 corporation ABC and you paid out cleanup funds because of an
19 emission that happened over time at various and different sites,
20 but you paid the cleanup fees on all of it, but you're suing
21 these other people because they are the ones who caused those
22 emissions on those various sites. That's not bundling. That's
23 one claim made by ABC Corporation saying there are multiple bases
24 for you to get money back because this other company, you know,
25 put emissions on your property, at various properties around the

1 country at various times. Clerk's Office can't unbundle that.
2 Hence my putting in that order, "don't unbundle." There's
3 nothing to unbundle.

4 If you were an intervenor, you are right. You are not.
5 You have made it perfectly clear you are not coming at this as an
6 intervenor. However, you are coming forward by way of
7 subrogation rights, but the claims that you are making are yours
8 and yours alone, not the parties -- the members, if you will.

9 Because if a member filed suit, you're dismissing your
10 claim, whether they file it in state or here. There's no
11 unbundling to be done, and that has created a tremendous amount
12 of confusion each time I try to talk to someone about this
13 because it makes all the difference in the world, both
14 procedurally, legally, and conceptually, quite frankly. You're
15 it. There's nothing bundled or unbundled.

16 You know, if there weren't an MDL and we had never
17 talked about bundling, you know, various plaintiffs' individual
18 claims made by one attorney, if we had never talked about that
19 and you were not coming into an MDL and we're not even going to
20 go into, you know, some aspects of the waiver or deferral, or
21 whatever you want to call it, on venue. That's for a whole
22 'nother day right now, Ms. Davis, but at any rate, not going
23 there.

24 So as to, if you were just going to come in and say to
25 a Massachusetts district court judge, Hey, Blue Cross/Blue Shield

1 paid out \$4.8 million to its members who have a claim under
2 Massachusetts law, all the stuff you don't know, but let's assume
3 you do, to its members and we want that money back and those
4 people have not filed suit, so we're not intervening. Would you
5 think there's something to, quote, unbundle there, that the Clerk
6 of Court should pull something apart there?

7 MR. McMORRIS: No. I understand.

8 THE COURT: Well, then, my point is, Mr. McMorris, you
9 and Ms. McGoldrick should have understood that before you ever
10 filed it. So I brought me back to why did they do it in 11
11 different suits; I don't understand. It's just one suit on
12 behalf of Blue Cross/Blue Shield with bunches of members that you
13 feel your contractual rights with give you this right. There's
14 nothing to bundle or unbundle.

15 So, basically, if I'm understanding you, you just did
16 it because perhaps you misunderstood the nature of what you were
17 doing and how it was working with the MDL, and that's why I'm
18 going -- and the reason I'm belaboring this is because you should
19 have worked with the PSC. You should have gone through the PSC.

20 Filings that occur in this, if for nothing else other
21 than courtesy, go with the PSC and the management committee,
22 Steering Committee, because you are bringing it in and you know
23 how to do it, and they will tell you how the Clerk of Court's
24 Office operates. They will tell you what you need to do and what
25 you don't need to do.

1 And they would have told you, this is not a judge that
2 you can throw spaghetti up on the wall and just hope that
3 something sticks. You are not an intervenor here. You are --
4 it's an independent claim made on your part, and like any other
5 plaintiffs' attorney, I set up an administrative process within
6 this with an appeal process to the Special Masters from the PSC
7 and from the Special Masters to me, and you just totally
8 disregarded it. I suggest you do not do that again.

9 MR. McMORRIS: You can be sure we will not do that
10 again.

11 DEPUTY SPECIAL MASTER RODRIGUEZ: Judge, may I
12 interrupt for a moment? When I scheduled this, sent the notices,
13 the invitations to everyone, I put 11:00 to 2:00. We are coming
14 up on 2:00. Would you ask people whether there's any issue --

15 THE COURT: Okay. I'll tell you what I'll do. Given
16 that because, you know, I'm to some degree beating a dead horse,
17 I'm going to try to finish up, and then I'm going to order y'all
18 to work with the Special Master on the remainder of this stuff.

19 So there's no basis right or left as to these 11 suits.
20 So it would seem to me they probably ought to be consolidated.
21 So, Ms. Rodriguez, work with them on consolidating it. I see no
22 reason to keep them out there the way they are. So just
23 consolidate it.

24 Okay. Next, right now the defendants are on an
25 April 1 deadline to file their threshold motions because I

1 trusted that, in fact, they would have the information they
2 needed. They don't. They have no basis to file these motions,
3 so they will work with the Special Master to set up a new filing
4 deadline for those threshold motions.

5 Additionally, all the information that is produced
6 pursuant to this Court's order reflected in the transcript of
7 this hearing shall be deemed part and parcel of the complaints
8 filed within these 11 suits and are to be considered part of the
9 petition.

10 The reason I am doing that is that there is -- it is an
11 absolute complete and utter waste of time for the defendants to
12 have to file a vagueness matter objection. Foolish, stupid. And
13 we haven't had a single one in this MDL because the Court has
14 ordered, pursuant to its authority under the Federal Rules of
15 Civil Procedure, notwithstanding the statute that creates the
16 MDL, to order exchange of information that's necessary to go
17 forward.

18 So now I'm going to ask the defendants to put your
19 thinking caps on, and if you come up with anything else you need
20 to know to avoid having to file a motion for vagueness, that you
21 notify the Special Master as soon as it occurs to you.

22 And Ms. Rodriguez, you have the authority of this
23 Court, as you have always had since the outset, to order Blue
24 Cross/Blue Shield to present that information and within a
25 specific time frame.

1 And Blue Cross/Blue Shield, you have, as you have
2 always had, the ability to object and ask that that be brought to
3 this Court. But I'm telling you, if it is an underlying
4 fundamental foundation of your claims, I'm going to say, no, you
5 give it to them, and you shall give it to them, I can tell you.

6 Now, Mr. Arsenault, I'm going to ask that you work with
7 them to get them in the loop. Make certain they understand what
8 their obligations are, like any other plaintiff, because this
9 Court will have those expectations. If they will not cooperate,
10 you shall let me know, and I will get them on the phone, and
11 we'll figure out what the problem is, if any. All right?

12 MR. ARSENAULT: Will do, Your Honor.

13 THE COURT: Thank you, Mr. Arsenault.

14 Ms. Rodriguez, you work with them, and you get this --
15 and I want to have it reported back to me.

16 So, defendants, can you think of anything right now
17 that you additionally need to know before you can file your
18 threshold motions?

19 MS. DAVIS: No, Your Honor.

20 MR. DUGAS: No, Your Honor.

21 THE COURT: That's Dugas and Davis, Cathleen.

22 If anything comes to mind, you call the Special Master,
23 let her know. She will get Blue Cross on the phone.

24 And Blue Cross/Blue Shield, I would heartily recommend
25 that, if she instructs you to get something, you do it, and that

1 you do it within the time frame she instructs you to do it,
2 because if you don't, she's going to be telling me on Thursday,
3 and I'm going to pull up a copy of this transcript, and I'm going
4 to ask why you should not be held in contempt of court. Okay?

5 Now, if you have a real problem with it, tell her what
6 it is. Ask Mr. Arsenault. Ask Ms. Gourley. I'll work with you
7 if you have a real problem and so will the Special Masters. But
8 just not doing it, you are on formal notice by this Court, which
9 I will cite as part of the record to go up on appeal should you
10 appeal me on sanctioning you, that I will sanction you, if you
11 just blow her off again.

12 Okay. Now the vagueness. Made aware of.

13 All right. I have several other things, but they are
14 really tangential off the points that I've already made, and I'll
15 let you go because I know she told -- I did not know, but she now
16 tells me that she did it until 2:00 o'clock, and everybody is
17 busy. So that's fine. I'm sure she told me it was 2:00 o'clock.
18 It just didn't register with me.

19 All right. Are there any other matters that need come
20 before the Court at this time? Mr. Arsenault?

21 MR. ARSENAULT: No, Your Honor.

22 THE COURT: Ms. Davis?

23 MS. DAVIS: No, Your Honor.

24 THE COURT: Ms. Gourley?

25 MS. GOURLEY: No, Your Honor.

1 THE COURT: Mr. Dugas?

2 MR. DUGAS: No, Your Honor.

3 THE COURT: Mr. McMorris?

4 MR. McMORRIS: No, Your Honor.

5 THE COURT: Ms. McGoldrick?

6 MS. MCGOLDRICK: No, Your Honor.

7 THE COURT: I hope my point has been made. Good day,
8 Counsel.

9 (Hearing concluded.)

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13 **C E R T I F I C A T E**

14 I, Cathleen E. Marquardt, RMR, CRR, Federal Official Court
15 Reporter, do hereby certify this 20th day of March, 2015, that
16 the foregoing pages 1-99 constitute a true transcript of
17 proceedings had in the above-entitled matter.

18 /s/ Cathleen E. Marquardt
19 Federal Official Court Reporter
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