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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: HEPARIN PLAINTIFFS,) Docket No. 1:08HC60000
Plaintiffs,) Toledo, Ohio
v.) February 17, 2010
BAXTER HEALTHCARE) STATUS CONFERENCE
CORPORATION,)
Defendants.)

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

- David Zoll
- Janet Abaray
- Leslie Smith
- Renee Smith
- Melanie Bailey
- Mark Robinson
- Don Nolan
- Pamela Borgess
- Matt Rohrbacher
- Jim Silk
- Diane Nast

Proceedings recorded by mechanical stenography, transcript
produced by notereading.

1 THE COURT: Angela, go ahead. We have a court
2 reporter, and this is the heparin status conference. And
3 here present obviously for the plaintiffs is David Zoll.
4 Janet Abaray is in a car but will be here shortly, and who
5 else? John, Evans for the plaintiff -- plaintiffs, who
6 else on the plaintiff's side of the table is on the phone?

7 MS. NAST: Diane -- I'm sorry, I think I spoke
8 over someone else. Diane Nast.

9 MR. GOLDBERG: Steve Goldberg.

10 THE COURT: Of course. And then Don Nolan?

11 MR. NOLAN: Don Nolan.

12 THE COURT: Don Nolan, of course.

13 MS. BAILEY: Melanie Bailey.

14 THE COURT: Okay.

15 MS. SHAFFER: Karen Shaffer.

16 THE COURT: Okay.

17 MS. BORGESS: Pamela Borgess.

18 THE COURT: Is that it, David?

19 MR. ZOLL: I think that's it. And then Leslie
20 Smith, Renee Smith.

21 MR. SMITH: Doug Smith and John Donoley, Your
22 Honor.

23 THE COURT: Okay. For defendant Baxter -- and of
24 course Jim Silk and Matt Rohrbacher. And who else do we
25 have on the defense side of the table on the phone?

1 Anybody for Covidien or whatever? Nope. Okay. B.Braun or
2 anybody else? Or is that it? Okay. As always, folks, if
3 you could indicate who you are when you're speaking, those
4 of you on the phone.

5 And Angela, I just indicated that there were
6 three or four things I wanted to talk about, principally
7 I'd like to schedule Daubert hearings on the various
8 pending Daubert motions, and confirm the date on the Hope
9 bellweather case in June, although that may be up in the
10 air in light of something Mr. Zoll just said; and take care
11 of some matters in the Yeazel case, and let me see, I think
12 that was pretty much it for now. And Mr. Zoll was just
13 saying that given the fact that a state bellweather case,
14 one of Mr. Nolan's cases I assume --

15 MR. ZOLL: He has four cases. They have not
16 decided which one will go, they're set for May 2nd.

17 THE COURT: Basically we'll take the month of May
18 to perhaps try it.

19 MR. ZOLL: Leslie, I don't want to interrupt, so
20 whenever you're ready for me to chime in, let me know.

21 THE COURT: Let see if David's finished up, and
22 then Leslie you can speak up.

23 MR. ZOLL: With respect to the Hope case, that
24 was a defense pick, and there's been a serious, as I
25 understand it, a serious challenge to product ID as well as

1 the fact that this lady was terminally ill with cancer, so
2 rather than it being a typical case, apparently based upon
3 a report I think from the defense, they believe that she
4 didn't get contaminated heparin, so it may not be an
5 appropriate bellweather case either with respect to how
6 that goes. We have a number of cases --

7 THE COURT: Did you say Hope?

8 MR. ZOLL: Hope.

9 THE COURT: The one -- mine?

10 MR. ZOLL: Not Yeazel, I'm talking about Hope.

11 Yeah, Hope. There's -- as I recall, the defendants had an
12 expert on product ID, and he gave an opinion in three of
13 the four bellweather cases that they didn't get
14 contaminated heparin. The one case that he didn't give
15 that opinion in is the Yeazel case. All the others they
16 challenged on product ID. Now they're also challenging
17 Yeazel on product ID. So we had hoped that we could -- and
18 the other issue on the bellwethers is that we also tried
19 to, when we first started the process and we take some
20 responsibility for possibly not doing as good a job as we
21 should have in case analysis, but what we thought we'd be
22 able to get something the defendants would agree is a good
23 case by establishing these criteria that they didn't think
24 they'd object to. We don't believe that the 60 minute
25 criteria is a legitimate basis to rule cases in or out. We

1 simply adopted that because we thought we would be able to
2 get some cooperation. It was tidy and it would, you know,
3 eliminate contentions about causation, which become greater
4 with the period -- I understand that. So what we are
5 suggesting, or would like to suggest is that we have the
6 chance to reload the bellwethers without restriction,
7 because our sense is that the defendants will probably
8 challenge every case on some combination of factors, and
9 that there's probably no way that we'll ever be able to
10 get --

11 THE COURT: A case that's as tidy as we
12 envisioned?

13 MR. ZOLL: Yeah. So I guess that's the comment I
14 wanted to make with respect to the bellweather.

15 With respect to the Daubert issue, I can address
16 that separately.

17 THE COURT: Let's have a time out. In other
18 words, so far as you presently can tell, the -- it may
19 be -- you may be unable, or at least unable to get up and
20 ready for trial, but even more importantly, unable to
21 propose a set of two, three, four cases in which product
22 ID -- maybe I should sort of define that a little more
23 broadly, in which there is no question that the facility
24 received contaminated heparin. I mean, it seems to me that
25 to the extent, and I'm kind of making this up as I go

1 along, but in light of Yeazel and so forth, what you just
2 told me, and now Hope, to the extent that there is no firm
3 connection between the actual dose that was given and
4 contaminated heparin, it seems to me then perhaps we can
5 define lessened product ID questions if there's no question
6 that contaminated heparin was in the building in some
7 significant amount, okay. Do you see what I'm saying?
8 Again, I'm just -- I'm drilling down too deeply than I
9 intended to at this point. But also, you know, if you
10 don't have cases in the inventory that present that kind of
11 almost a lay down profile as I think we were talking about
12 initially, okay, yeah, she got contaminated heparin, she
13 got it in a bolus dose and she had a reaction within the
14 time frame, if you don't have those characteristics, then I
15 suppose, in terms of bellweather process, we have to expand
16 the margins somewhat. I mean, it's your call, okay.

17 MR. ZOLL: Yeah.

18 MS. SMITH: Your Honor?

19 THE COURT: Hold on.

20 MS. SMITH: If I could jump --

21 THE COURT: Hold on one minute, Leslie, please.

22 MR. ZOLL: I'll give you an example. We had the
23 Foote case, F-O-O-T-E, in which the person who got it was a
24 heart bypass case, they got a bolus dose of heparin. They
25 died. They have the vile, but it was like a day or two

1 after the recall. So Baxter will challenge that case on
2 the basis that it was a post-recall case and isn't
3 appropriate for bellweather.

4 We have other cases where there's -- the
5 distributors had all their heparin that went to the
6 distributors that furnished the particular healthcare
7 facility were receiving for the last four or five shipments
8 nothing but contaminated heparin, and that their shipments
9 from that facility -- from the distributor to the facility
10 don't show which lots were there, and then the recall
11 notice shows that that facility returned heparin. So we
12 have cases like that. But all I was suggesting was that if
13 The Court is inclined to let us reload the -- the
14 bellweather case inventory, that we not try to put
15 restrictions on things, because that -- those restrictions
16 might then be used as a basis to exclude the case later.

17 THE COURT: Well, it's not really -- I mean, I'm
18 the one who raised the question about Yeazel, okay, because
19 reading it, it seemed to me that as I understood the
20 profile, that -- of the plaintiff's cases that we were
21 going to try at least initially, it seemed to be either, as
22 I said at the margins, outside that profile. And if what
23 you are saying is, Judge, plaintiffs may have to, you know,
24 loosen up the restrictions, I mean, candidly, I don't
25 really case, okay. I mean, we could try Yeazel. The only

1 problem is if a verdict, particularly a defense verdict,
2 really isn't going to tell us much if there are three or
3 four issues that they might have gone -- even if we have
4 jury interrogatories. And I suppose we could ask the jury
5 a product ID interrogatory and tell the jury to go ahead
6 and give us a verdict, let's say that were a defense
7 verdict, normally you'd say, fine, don't deliberate
8 further, return a verdict for the defense and go home. But
9 I don't think I would have a problem, and it begins to
10 verge on an advisory opinion issue, though. If we then
11 have two or three other issues as to which we try to get
12 their insight in the form of a verdict. I'm not opposed,
13 I'm saying to you David, I'm not opposed to that. In other
14 words, as I understand the bellweather project -- process,
15 and what I think we are all trying to accomplish is to get
16 a set of verdicts, decisions, that cast light upon the
17 paths that we should follow in the future with regard to
18 cases of similar characteristic.

19 I mean, on the one hand, Yeazel, if it came back
20 with a significant plaintiff's verdict, that fulfills a
21 bellweather function, in a sense. It says, defendants,
22 hey, you may think that at the end of the day you've got
23 three or four hinge points that the case can turn on in
24 your favor, but look, here's one where at least one jury
25 said, oh, no, you know, they still found you liable. And

1 but -- so I'll give Leslie a chance to speak in a moment,
2 because I know she's eager to do so.

3 MS. SMITH: Okay.

4 THE COURT: But I'm just saying to the extent you
5 can agree on the profile fine, to the extent at the end of
6 the day you can't and we wind up with each of you giving me
7 your cases to try, hey, you're the ones who are trying to
8 employ this process in the most beneficial way possible.
9 And to springboard way ahead, and, candidly, without having
10 thought about this before, it blends in, among the reasons
11 it seems to me to move now or first, whatever the timing
12 is, and whether the actual dates are, to the -- to as
13 much -- get as much of the Daubert issues decided, I mean,
14 if -- the bellweather process, as I understand it, is
15 ultimately a settlement technique. That's why we go
16 through it, is that you try to pick cases that are a
17 sample, random -- not random, but deliberately selected
18 samples that are representative of sort of bulk quantity
19 cases and issues and get a juries to give us a sense of
20 what 12 ordinary people are going to say about them. Well,
21 candidly, if that process doesn't work, I get through all
22 the bellweather issues and decide across the board in all
23 these cases which experts are in and out, it may simply be
24 time to send the cases back from whence they came.

25 MR. ZOLL: Yeah.

1 THE COURT: That's my understanding of how MDL
2 was invented was it truly was **pretrial**. The MDL judge, you
3 know, oversees discovery so that it occurs in some
4 hopefully organized fashion, and non-duplicative fashion.
5 And also when there are evidentiary issues that have broad
6 application, decide those so that that's *res judicata* for
7 100, 1,000 or 10,000 cases, and then send them back from
8 whence they came. And the plaintiff's lawyers in those
9 cases have to get about the business of settling or trying
10 them, you know. I suspect from a defendant's standpoint,
11 the prospect of trying 350 cases throughout the country is
12 not a particularly enticing one, but, you know, if we can't
13 work out a bellweather trial process, which I'm perfectly
14 content to do because I think that's ultimately part of my
15 responsibility, but if we can't, we can't. And so Leslie,
16 David -- any further comment before I hear from Leslie?

17 MR. ZOLL: The only other thought I had was that
18 with respect to reloading the bellwethers if that's an idea
19 that The Court's willing to consider, that we simply each
20 just give you a list of four cases with a short brief
21 saying this is why we think these are four bellweather
22 cases so that they can't strike ours and go to ones and not
23 what happened last time.

24 THE COURT: That's a detail -- that was a process
25 that had been recommended to me by other more knowledgeable

1 experienced and intelligent Judges than I, and such is
2 life. Okay. Leslie, you've been patient, and let me --

3 MS. SMITH: All right. Thank you, Your Honor.
4 Thank you, Your Honor. Your Honor, first of all, the
5 bellweather criteria that we're currently operating under
6 is the process proposed by plaintiffs. It's the only type
7 of case as to which there is any reliable scientific
8 evidence of even any associations between an event and
9 contaminated heparin. And as we said from the outset, it
10 is frankly not surprising that plaintiffs are unable to
11 find cases that meet that criteria, and for that reason, it
12 is absolutely critical that we proceed to the generic phase
13 of this case as outlined in Your Honor's memo, that's what
14 we need to be doing in April, and it's that process and
15 only that process that will allow us to make progress in
16 this case.

17 With respect to issues in product identification,
18 again, we have said from the outset of this case that
19 product identification is going to be difficult for
20 plaintiffs, that is not some technicality that we've
21 raised. More the majority of the heparin that was
22 administered during the time period in question was
23 uncontaminated, either because it was not Baxter heparin or
24 because it was uncontaminated Baxter heparin. And we have
25 said from the outset that plaintiffs need to do the

1 discovery, they need to do the work to find out whether a
2 plaintiff actually received contaminated heparin. They
3 opposed our effort to put in that protocol, and it's
4 because in most cases that work hasn't been done that we
5 are having the issues that we're having now.

6 Again, what the entire discussion that makes
7 clear is that we must move to the generic phase, the phase
8 that plaintiffs have been trying since almost the outset of
9 the case to avoid. It is a critical component of the MDL
10 proceeding. Your Honor has all along been operating under
11 the framework of dual tracks, bellwethers and generic, and
12 we just can't delay any further addressing those generic
13 issues. The vast majority of the cases, by plaintiff's own
14 admission, are going to fall into those categories that are
15 going to be decided hopefully by Your Honor in April.

16 With respect to, as Mr. Zoll said, reloading the
17 bellweather process, we are comfortable moving forward and
18 always have been in parallel with bellweather cases and
19 generics, but we've got to move right now to the generic
20 and cannot delay any further. I also believe that the
21 Yeazel and Hope cases, you know, should be resolved. I
22 certainly understand that, you know, we filed -- both sides
23 have filed a lot of briefs so Your Honor needs time to give
24 careful consideration to those briefs, but we think those
25 briefs ought to be addressed.

1 And again, with respect to the discussion of the
2 trial in Illinois, we are proceeding with preparation in
3 Illinois. We are mindful of Judge Duncan Bryce's schedule
4 and will comply with any scheduling orders that she has or
5 will in the future impose, but we can't say we're not going
6 to do anything more in the MDL case because plaintiffs have
7 decided that they want to go to Cook County first. We've
8 got to proceed in parallel in Illinois, in parallel in the
9 MDL, and what we've got to do right now in the MDL is what
10 they are understandably desperate to avoid. The only thing
11 that will make real progress in this case, which is
12 resolution of generic issues.

13 So what we respectfully fully request, Your
14 Honor, is that rather than delaying generic, we proceed as
15 Your Honor outlined in your memo, and we have resolution of
16 Daubert hearings, whether it's, you know, a combination of
17 live hearings or briefs, but that's what we've got to get
18 to next and respectfully request that we do it in April as
19 Your Honor has proposed.

20 THE COURT: Okay. Let me -- there's only --
21 there is a problem that I had overlooked. I am not
22 available to the contrary even though it's been scheduled,
23 the week of April 11th. I do have a criminal case set the
24 19th and 26th, and I would simply move that back a couple
25 of weeks. I assume, Amy, we've got plenty of time on the

1 clock in Godsey.

2 COURTROOM DEPUTY: I think it's all stayed.

3 THE COURT: Lots of time, and we've got a new
4 lawyer coming in that case, and I'm down to two defendants.
5 Who knows I may not even have to try it.

6 MS. SMITH: Whatever works for your schedule in
7 April, Your Honor, whatever works for your schedule in
8 April. And I also think, Your Honor, that a lot of the
9 Daubert issues can -- obviously we will do whatever your
10 preference is, but I think a lot of those issues can be
11 decided on the briefs.

12 MR. ZOLL: I do too.

13 MS. SMITH: So whatever your schedule is in
14 April --

15 THE COURT: What I would propose doing would be
16 to simply, I will set aside on my calendar, you know,
17 starting on the 19th such Daubert hearings as I think are
18 necessary, and I certainly would hope that within a month
19 at the latest, and candidly, I'm turning to the other
20 person on the phone, I hope. She is Jessica Keegan who is
21 The Court's MDL clerk who's been made available to me, and
22 she, of course, will be working with me on those motions,
23 and between the two of us I would anticipate that within
24 the four week time frame, we might have some decided one
25 way or the other. But we certainly should know which ones

1 we want hearings on. And you know, I'm sensitive to the
2 need for you people to arrange not only your schedules but
3 those of the various experts whose opinions are being
4 challenged. I suppose you can start lining things up
5 tentatively, but nobody's unhappy when a proceeding like
6 that doesn't have to go forward. But that's what I would
7 propose.

8 And so I think, Leslie, you and I at least agree
9 that job one right now is for me to get the pending Daubert
10 motions, and if there are others that are in the wings,
11 particularly with regard to any bellweather case, but if
12 we're going to, quote, reload that process, we can wait and
13 see. But I think that the principle Daubert challenges,
14 I'm going to address those, and we'll see where we are.

15 MS. SMITH: And Your Honor --

16 THE COURT: Excuse me, Leslie, if I can
17 interrupt. And I would certainly hope, earnestly hope,
18 that relatively soon after those hearings, whichever ones
19 we had, you will have decisions. I may not have shown it,
20 but I'm getting very, very concerned about, you know, how
21 long that is all taking. I understand it. I know
22 everybody's working hard, but on the other hand, you know,
23 I want to get moving briskly to some resolution points so
24 that I would hope by within a month at the latest I would
25 have decisions on whatever -- on whatever I hadn't decided

1 already, so that by mid May, we would have a set of
2 opinions. And then we can see where we go from there. So
3 I gather that that generally accords with your desire,
4 Leslie?

5 MS. SMITH: Yes, Your Honor.

6 MR. ZOLL: May I?

7 MS. SMITH: If I can just say one more thing with
8 respect to the bellweather process I forgot to mention,
9 which is that with respect to whether or not a plaintiff or
10 a defendant is given any role in striking a suggestion by
11 the other side, the reason that Your Honor, I would guess,
12 received that advice is because that's the way it's always
13 done. There is --

14 MR. ZOLL: Not true.

15 MS. SMITH: There is a long list of case law
16 indicating that it makes no sense for a plaintiff alone to
17 select a case. And I don't know that we need to discuss
18 that today, but I just didn't want to have that go, you
19 know, unanswered.

20 THE COURT: Well, I understand. But I think to
21 the extent that you may be correct that the plaintiffs now
22 realize that they can't find what I've referred to the
23 clean, neat and tidy, all the dots are in place case, I
24 think to the extent that plaintiffs desire, and I'm sure
25 they do, to have some test trials, I'm not opposed to the

1 idea of expanding the profile of what would fit. And
2 ultimately -- ultimately, I mean, if worse comes to worse
3 and we can't do it in a conventional way, and hearing your
4 concern saying, Judge, that's fine, but you've got to
5 understand, whatever the outcome, it's not going to make a
6 difference to us one way or the other. Well, maybe we'll
7 just have to run that risk. But I agree with you that at
8 least for this afternoon, we can put that on a relatively
9 low shelf, easily reached and easily gotten back to, okay.
10 Because I don't think -- I have no doubt that plaintiffs
11 will talk amongst counsel, will talk amongst themselves and
12 say, look, if it's going to work given the very firm
13 position that Baxter's taking, and the fact that it is
14 basically trying to shoot beneath the water line and
15 whatever case we send down the ways, fine. We just have to
16 do the best job we can to find those cases that have as
17 many water tight compartments as possible, to extend the
18 metaphor, and we'll go from there. That's all. So I'm not
19 about to abandon the bellweather process at all. On the
20 other hand, I think that in light of what we've experienced
21 with Yeazel, because it did not have the profile that I
22 anticipated once I got into it, David's suggesting Hope may
23 have some similar pressure points, you know, we can wait
24 and see. I think -- and let me get the Daubert business
25 done as fully and completely and as promptly as you and I,

1 we all can, and then we'll go from there. Not -- I have a
2 trial set -- do I have a trial set in September?

3 MR. ZOLL: No. Originally we did, but then we
4 abandoned that when we came down to only two. But we had
5 that date originally set aside.

6 THE COURT: Let me say this, that I will do
7 everything I can at whatever point we start bellwethering
8 things to just clear out my calendar. We'll have another
9 Judge on board by then, and this will take priority. I
10 will give you times that are accommodating to you. I
11 consider that to be the most important obligation I have
12 with my entire docket to be very candid with you. So we'll
13 just -- so I suppose what I would suggest, and we haven't
14 heard from John and other people, David, just a second,
15 would be to set those two dates to one side.

16 I would like to get, before we adjourn this
17 afternoon, some sense, if you could, of a sequence in which
18 I should look at the Daubert motions. If you can tell me,
19 Judge, you really ought to look at this one first,
20 Hoppensteadt, whatever the name is, perhaps I may have the
21 name somewhat of a domine effect or what you decide in
22 motion. It may either cast the die for motion B or who
23 knows, okay. I'll get to that in a minute. Okay. David?

24 MR. ZOLL: The only comment the I wanted to make,
25 Your Honor, because I didn't --

1 THE COURT: That's one of the other things we
2 have to talk about too, but go ahead.

3 MR. ZOLL: I didn't really -- the Daubert concept
4 that Leslie talked about, I wanted to take exception with
5 the -- that the plaintiffs are desperate to -- resolution.

6 THE COURT: Time out. I don't remember those
7 things, and if I did, I wouldn't pay attention to them.

8 MR. ZOLL: We're glad.

9 THE COURT: There has never been any kind -- I'm
10 not yelling at Leslie, there's never anything resembling
11 any one comment that has ever had any influence on me.

12 MR. ZOLL: The only thing that we wanted to make
13 sure of was we don't think it's necessary to line up all 11
14 of our experts and the three or four of theirs that we
15 Dauberted and hold like two full weeks of hearings.

16 THE COURT: I understand.

17 MR. ZOLL: But if The Court was leaning that way,
18 then we were concerned about interfering with Cook County,
19 but as I understand what you're saying, you think that as
20 you work through the motions, that you'll come with some
21 reasonable number of hearings. I think that's perfectly
22 fine. We're glad to address it as soon as possible, and
23 April's great.

24 THE COURT: I will try to get, by mid March, in
25 about four weeks at the very least, notice to you I need

1 somewhere between zero and 11 hearings. And if it's 11
2 hearings, okay, then.

3 MR. ZOLL: Then it's 11 hearings.

4 THE COURT: Then two weeks in April may not do
5 it. I understand that. But, you know, I have no idea at
6 this point because, you know, I haven't read the motions
7 yet. I glanced at them, I'm waiting for the replies to
8 come in because candidly I don't bother until everything is
9 decisional.

10 MR. ZOLL: In terms of the order, I personally,
11 having been involved in a number of different briefs, think
12 it's perfectly acceptable to just address them in the order
13 that they're fully briefed. I don't think there's any
14 magic, while there are certain ones that I could give you
15 my opinion on as to which ones are more likely than not to
16 be granted, I --

17 THE COURT: No, that's not my question.

18 MR. ZOLL: I don't think that's your question.

19 THE COURT: My question is, Judge, this one is
20 kind of a cornerstone. I think at one point somebody said,
21 you know, other experts look to Hoppensteadt, whatever her
22 name is, or at least base, to some extent, their opinions
23 on some of the things she said. I mean, if there's
24 circumstances like that, fine. I don't really care. I can
25 take the earliest filed motion first and go from there, it

1 doesn't matter to me. Janet?

2 MS. ABARAY: Yes, Your Honor, again, I apologize.

3 THE COURT: No problem.

4 MS. ABARAY: The case specific witnesses, experts
5 for Yeazel are Dr. Shonewall (phonetic) and Dr. Mazour, so
6 if we are going to be given the opportunity, and I did miss
7 a little bit of the call --

8 THE COURT: I can turn to that before where we go
9 from here with Yeazel, I'd like to sort of talk some of the
10 generic stuff broadly, applicable stuff first, and --

11 MR. ZOLL: So you might not need Mazour.

12 MS. ABARAY: Dr. Mazour, Dr. Shownwalled are case
13 specific experts.

14 THE COURT: I understand that. I think that's
15 indicated on the opinions -- on the motions.

16 MR. ZOLL: And there were -- there were some
17 motions that the defense filed just in Yeazel which are
18 generic, and I repeatedly tried to get those to be refiled
19 in all cases and they haven't.

20 THE COURT: Well, if you let me at least know --
21 perhaps the thing to do is if you could in a few days, just
22 e-mail, no back and forth, say, Judge, we think you should
23 decide the -- if you're looking for some suggestion about
24 sequencing of decisions, start with this one, go to that
25 one, then the other one. By the way, even though the

1 defendants have focused on Yeazel, we think it's important
2 that that's going to have -- your decision is going to have
3 broader implication, that's fine. That's okay. That's
4 all. I just --

5 MR. ZOLL: I'll just give you a list of which
6 ones are generic.

7 THE COURT: To the extent you can give me a line
8 up, that's fine. And even if they're not the same, that's
9 fine. I just want your suggestions and not a lot of back
10 and forth or whatever, just as I say worse comes to worse
11 I'll start with what the lowest numbered motion and go from
12 there, first in, first out, maybe. Okay. So Leslie, I
13 think I gather that you are reasonably content with how I
14 propose to handle the pending Daubert motions?

15 MS. SMITH: Yes, Your Honor.

16 THE COURT: Okay. David and Janet?

17 MR. ZOLL: Yes.

18 THE COURT: John and other plaintiffs, is that
19 okay with you?

20 MR. NOLAN: Yes, sir.

21 UNIDENTIFIED SPEAKER: Yes, Your Honor.

22 THE COURT: The court reporter threw up her
23 fingers, and I'm going to give her the instruction, nobody
24 said no.

25 MR. ZOLL: Just for the record, I think that was

1 Dan Robinson's voice I heard.

2 THE COURT: Dan, are you on?

3 MR. ROBINSON: Yes, Your Honor.

4 THE COURT: How are you?

5 MR. ROBINSON: Good. Good.

6 THE COURT: Let me talk a little bit about
7 Yeazel. In all candor, even though I haven't put pen to
8 paper but am about to, I do not think that Ms. Cummings has
9 personal knowledge about how things were done before she
10 was there. So I'm going to anticipate granting the motion
11 to strike. Now, I have -- does anybody know whether there
12 was somebody there at the time, and if so can we find that
13 person and why doesn't that person get deposed and let's
14 find out if they have anything to add in Yeazel.

15 MS. ABARAY: Yes, they're there.

16 MS. SMITH: Your Honor, I'll let Janet go first.

17 MS. ABARAY: They are there. We've tried to talk
18 with them to get counter affidavits, and counsel for
19 Fresenius won't let us talk to them, so we have to take a
20 depo.

21 THE COURT: If you have to then go wherever
22 you've got to go, get the subpoena and go from there.

23 MS. ABARAY: That's what we would prefer.

24 THE COURT: And Leslie, before you -- I may be --
25 this may be somewhat preemptive, okay, and may be unwelcome

1 to you, but if I'm going to vacate Yeazel and particularly
2 with regard to that issue, I think it's important for my
3 own ability to decide the motion and that case fairly, I
4 would much prefer to do it on the basis of getting the
5 benefit of whatever information is there, good, bad or
6 ugly, okay. But I'd like to have somebody be heard from
7 who says, yes, I was there, yes, this is the way it was
8 routinely and customarily done, or we didn't have a routine
9 custom and practice, I can't tell you what this chart
10 indicates or whatever. That's all.

11 So in terms of your reluctance, which I
12 understand, go back and redo or do more in Yeazel, I'm
13 inclined to allow it, and I think both Jim, Matt and David
14 will all say, Judge, we know that's the way you do things
15 in other cases. You know, what else -- Leslie, before I
16 hear from you, okay, Janet, what else do you think you
17 would want to do relative to Yeazel? Do you have other
18 discovery events or activities in mind either firmly or
19 possibly?

20 MS. ABARAY: Your Honor, I think what we would
21 want to do is to go back, first of all, make sure we have
22 the full record because we thought we did, and then things
23 came in after discovery, so we think there may be more
24 medical records.

25 Second, now that we have the complete records,

1 we'd want to redepose the nurse that we didn't have the
2 full records of. That was Jessica Wheeler. And there's a
3 few other nurses and employees there.

4 THE COURT: So you're talking maybe once the
5 inbox of records to everyone's satisfaction is full, taking
6 the deposition of whoever the manager Gerald person was and
7 maybe two or three others, I'm not setting a time limit or
8 a numerical limit, I'm just trying to get some sense, so
9 you're talking maybe a couple days of depositions?

10 MS. ABARAY: That would be our thought.

11 THE COURT: I'm not setting limits, just giving
12 everybody a sense of what, you don't have 16 depositions
13 each going to take more than seven hours and all of that.

14 MS. ABARAY: That's right. And we would also not
15 just want to look at the timing on the medical records, but
16 there's issues about the stocking and the shipments that we
17 didn't think were at issue until we started getting all the
18 motions. So there would be things about when were
19 deliveries made and when was this stock done. And the next
20 thing we would want to do, Your Honor, is to consider,
21 based on that factual discovery, do we need to supplement
22 any of the expert reports or advise anything based on that.

23 THE COURT: I understand. Again, Leslie, my
24 instinct on this, and my sort of default approach is, and I
25 know that an immense amount of time and money has been

1 spent so far in this case, would be to say, fine, let's
2 recast discovery time table. There may be some things they
3 want to do, I don't know, recast a time table for summary
4 judgment motion. It's all electronic, so you can basically
5 redo it and so forth. Sounds more extensive than I
6 thought, but -- okay. Leslie, all that being said, let me
7 hear from you.

8 MS. SMITH: Okay. Your Honor, first with respect
9 to, you know, charting and Mrs. Cummins, I certainly
10 understand what Your Honor's saying. I do want to be
11 clear, she wasn't claiming personal knowledge to
12 Mrs. Yeazel, she was claiming personal knowledge of the
13 charting practices. Having said that, I don't have any
14 issue with, you know, talking to somebody, deposing
15 somebody else with respect to the charting practices. I do
16 have an objection to redeposing a third party merely
17 because they don't like the testimony of the nurse. So the
18 only record that they're suggesting that they didn't have
19 prior to the deposition of the nurse is the early
20 termination of treatment form. And frankly, Your Honor, I
21 will confess this is a sore spot for me because I got
22 accused of withholding that document.

23 THE COURT: No, no, okay.

24 MS. SMITH: Your Honor -- they represented to
25 Your Honor that they had no knowledge of that form, and now

1 it's --

2 THE COURT: Time out. Time out. I -- I go deaf,
3 okay, when I hear things -- Leslie, all of you, these are
4 very important cases to all of you, okay. And I remain of
5 the absolute persuasion that every one of you is working
6 with absolute professionalism, and if things are fraying a
7 little bit at the edges because of the stress and the
8 demands, whether I'm imposing them or anybody else is,
9 that's understandable, and I truly mean what I say, I just
10 don't pay any attention to that, okay. It takes a whole
11 lot for me to conclude that somebody's cheating. And if I
12 ever get to that point, everybody knows that's the way I
13 feel. Okay.

14 MS. SMITH: I understand that, Your Honor.

15 THE COURT: I don't -- I don't think you've
16 misbehaved, I don't think Janet's misbehaved or anybody
17 else on this call or in any of these cases, okay, I really
18 don't.

19 MS. SMITH: I do understand that. My only point,
20 Your Honor, is unless there's some evidence that there's
21 something missing, they should not be able to redepose a
22 third party just because they didn't like the testimony she
23 gave. I don't have any objection to a deposition or
24 whatever they need with respect to the charting practices.
25 The only thing I will say on that with respect to charting

1 practices and with respect to inventory, it is frustrating
2 that we have been saying from the outset of this case that
3 plaintiffs should be required to do that discovery. They
4 not only opposed our effort to require it, they failed --
5 they chose not to do it, and we did spend, Your Honor, a
6 lot of time and money based on the representations they
7 made with respect to the facts of this case. So I
8 understand Your Honor's ruling, and I'm not going to
9 belabor the point, other than to say we have no objection
10 to additional depositions with respect to charting, but we
11 do object to a redeposition of a third-party witness who --
12 and so -- but we'll obviously abide by whatever Your
13 Honor's deciding.

14 THE COURT: Let me only give you a bit of
15 guidance. Assuming that, in fact, there's this one
16 additional document that they want to question Jessica --
17 is that her name --

18 MS. ABARAY: Yes.

19 THE COURT: -- about, I would suggest that you
20 guys set up a telephone deposition. You don't have to all
21 fly out there. Again, something like that you're talking a
22 half an hour. You give her a fax copy or a e-mail scan
23 copy and say, look, I'd like to ask you some questions
24 about this -- again, I don't think that what Janet is
25 projecting, it may be somewhat more extensive than I was

1 anticipating seven or eight minutes ago, but, again, I
2 think that given the fact that for whatever reason these
3 issues are more problematic for the plaintiff, I simply
4 think that it's important to say to the plaintiff, look,
5 I'm vacating the trial date. The volume of work that you
6 want to do to try to develop some more information is
7 relatively slight, and as a matter of fundamental fairness
8 and ultimately giving me a record that contains everything
9 that is there to be gotten, I'm going to go ahead and let
10 her do it.

11 Now, if she, you know, lines up 16 different
12 depositions spread over ten days in -- where's this
13 located?

14 MS. ABARAY: Washington courthouse.

15 THE COURT: That's right, Washington courthouse
16 down in the Southern District, et cetera, et cetera, but it
17 doesn't sound that way to me.

18 Now, in terms of, I suppose what I should do is
19 give you a time table for that, or do you want to try and
20 work one out with Leslie and so forth and just have me sign
21 an order in that case?

22 MS. ABARAY: That would be fine, Your Honor. And
23 I have to bring up, again, I'm sorry, I feel like I'm
24 imposing on The Court. My daughter's getting married
25 June 25th, so I do have that one scheduling I need to work

1 around.

2 MS. SMITH: Your Honor, I'm certain -- sure we'll
3 be able to agree on the schedule, and I will want to do
4 nothing to interfere with Janet's daughter's wedding.

5 THE COURT: I just assured Janet as the father of
6 four daughters, nothing will be due from her on the 28th of
7 June. From you on the other hand -- but why don't the two
8 of you do that. The other thing, please keep in mind, in
9 the likelihood or in the eventuality that you develop new
10 information, I think what I should do is have you file, you
11 know, revised briefs rather than a brief that contains the
12 new stuff that I've got to be shuffling back and forth. Do
13 the collating with what your electronic version that you
14 have and go from there.

15 MS. ABARAY: That would be fine.

16 THE COURT: Now, the other thing, Leslie, I think
17 that you guys should do in terms of Yeazel, is when you put
18 together a time table, to the extent that I will not be
19 addressing the Yeazel specific Daubert issues, I should
20 probably do that before I adjudicate the summary judgment
21 motion, it seems to me. I mean, to the extent that you're
22 relying upon expert opinions to get or overcome summary
23 judgment and to the extent that those opinions are being
24 challenged, be they, plaintiff or defendant experts, I have
25 to decide which is in and which is out beforehand, which is

1 to say if -- and I gather perhaps not -- if everything is
2 in place to do that now with those experts, I will do it.
3 Or if you think it makes better sense to wait until you've
4 completed this bit of discovery that you're going to be
5 doing to see if you want to get other, you know,
6 supplemental opinions or reports from your experts and then
7 each shoot at them, whatever you want to do, set a time
8 table, okay.

9 MS. ABARAY: All right.

10 THE COURT: But it seems to me the better
11 sequence is take your discovery, get whatever
12 supplementation of experts and/or I'd suggest telephonic
13 depositions of the experts on those additional issues if
14 you need to, then revise Daubert motions as to those
15 experts, give me time to decide that, and then summary
16 judgment.

17 MS. ABARAY: That would be fine.

18 THE COURT: It stretches things out. I know
19 you've got to talk to Mr. Yeazel. He won't be happy, but
20 still, it seems to me to be no sensible way to go about
21 deciding.

22 MS. ABARAY: Our preference is to have all the
23 information on the table and go with that.

24 THE COURT: Okay. Let me take a look at my list
25 here. Okay. I think -- now, what do you want to do about,

1 quote, reloading, closed quote, bellweather? Simply going
2 to wait until I decide the Daubert issues? What do you
3 want to do?

4 MR. ZOLL: That's fine. We can wait until we got
5 through the Daubert process.

6 MR. NOLAN: You should start talking, David, you
7 know, why not start talking.

8 MR. ZOLL: We can probably have a brief and our
9 cases ready within three or four weeks for you, what we
10 would suggest. So I think that would be --

11 THE COURT: Again, however you want. I mean,
12 David, on the other hand, and Don, it occurs to me,
13 assuming by mid May I give you my rulings on the Daubert,
14 and I should be able to, I mean, my God, that's three
15 months, okay. I mean, that's -- they're not that much
16 work. I mean, there's a lot of work, and it's difficult
17 work and difficult complex issues, but collectively we've
18 given myself the breathing room to do it. You know, my
19 instinct is to say let's talk mid May at the latest, maybe
20 sooner, and maybe even if I'm, you know, sort of this will
21 be a rolling, I'm not going to hold them all until May 15th
22 and drop 11 opinions on you.

23 MR. ZOLL: Why don't we start working towards
24 what we think would be appropriate in the meantime and --

25 THE COURT: But my point is maybe you should wait

1 and see what I do --

2 MR. ZOLL: Okay.

3 THE COURT: -- what I do with the Dauberts. To
4 the extent that -- obviously to the extent that you can
5 shop around for cases that to the maximum extent possible
6 have the minimum number of --

7 MR. ZOLL: Daubert issues.

8 THE COURT: -- Achilles -- other Achilles
9 tendons, okay, where the product ID issue, even if in
10 dispute, is, you know, less -- you're in a stronger
11 position than you might be, and I'm sure that there are
12 cases -- okay, I'd start with the product ID issue. It
13 seems that that's crucial. And then the bolus dose in
14 terms of within the 60 minute window, fine. But if not,
15 okay too.

16 In other words, it seems to me those are the
17 three circumstances that to the extent that you can be
18 thinking about regardless of the Daubert issues, I guess,
19 because they're going to be there. Maybe Don's right, go
20 ahead and start shopping for those now. The Daubert
21 decisions will be what they are. They're going to be what
22 they are for any set of cases up, down or sideways, and
23 yeah, maybe you should go ahead and start. That's my
24 suggestion to you. That's all.

25 MR. ZOLL: Okay. Let us see what we can do. And

1 then, Your Honor, there's --

2 THE COURT: A little louder.

3 MR. ZOLL: -- your Honor, there's one other --
4 two other issues, and I don't know if you want me to raise
5 them now or wait.

6 THE COURT: Let me ask first, Leslie, anything
7 else that you would want me to talk about now before we
8 hear from David on --

9 MS. SMITH: No, Your Honor. Thank you.

10 THE COURT: David, go ahead.

11 MR. ZOLL: Okay. So there's this -- I wanted to
12 clear up something and address this ACAS motion for summary
13 judgment.

14 THE COURT: Oh, yeah, okay.

15 MR. ZOLL: And I wanted to explain to The Court
16 just a little bit.

17 THE COURT: If I've got to decide it, that's
18 fine.

19 MR. ZOLL: I wanted to explain what was going on
20 here.

21 THE COURT: That's good.

22 MR. ZOLL: First, there is a -- we've been
23 provided with a sharing agreement between SPL and Baxter
24 that basically says that if there's a judgment, Baxter's
25 money's available.

1 MR. NOLAN: Don Nolan, or settlement.

2 MR. ZOLL: Or settlement. So as long as that
3 sharing agreement's in effect, we don't really need ACAS.
4 And for that reason, to avoid holding up the bellweather
5 trials, they were dismissed from those individual cases.

6 MS. ABARAY: Well, we offered to dismiss.

7 MR. ZOLL: Right, it hasn't been granted yet.

8 MS. ABARAY: They didn't respond.

9 MS. SMITH: Wait. Wait. Janet, we'll call you
10 and Melanie and get that entered right away.

11 MR. ZOLL: I thought that had happened. That
12 Janet had offered to and now they've accepted to dismiss
13 ACAS as a party just in that case. And similarly, Don
14 Nolan, in The State court case, as I understand, Don has
15 worked out an arrangement to dismiss ACAS in the
16 bellweather cases to avoid having to try that issue where
17 it may not even be relevant or pertinent if the sharing
18 agreement stays in place. So I wanted to explain to The
19 Court, we don't want to abandon our claims against ACAS.
20 To the extent that the sharing agreement or the joint
21 defense agreement remains viable, stays in place, we've
22 asked for some affirmation that that's still in place.
23 There hasn't been any response that I know of. I assume
24 it's still in place, but we don't want to abandon that
25 issue if Baxter and SPL are going to have a falling out and

1 abandon that sharing agreement. So that's kind of the
2 issue.

3 THE COURT: But that is, more broader scale and
4 longer term than -- it doesn't affect the bellweather
5 cases?

6 MR. ZOLL: No. And frankly we'd rather not try
7 that issue in the bellweather cases. It's an additional
8 complexity for the jury that we'd rather not clutter up
9 with.

10 THE COURT: Give me half a second, please.

11 MS. SMITH: Your Honor, I don't want to
12 interrupt.

13 THE COURT: Go ahead.

14 MS. SMITH: I just want to say, you know, we --
15 we are prepared to agree to, you know, to stipulation of
16 dismissal of ACAS in Yeazel. We think that's appropriate.
17 And for that reason, we agreed that there is no imminence
18 to the ACAS motion, but it is a motion that's well grounded
19 and we do -- would like The Court, when Your Honor has
20 time, recognizing, of course, that you're burdened with
21 many, many things to decide, we do believe the motion has
22 merits, they should be out of all these cases, and it's a
23 legal question that has nothing to do with the cost sharing
24 agreement. So whenever Your Honor does have time to get to
25 it, I certainly agree it has nothing to do with the

1 bellwethers at this point, but we would like, when you're
2 Honor has the opportunity, for you to decide that legal
3 matter.

4 THE COURT: Okay. Very good.

5 MR. EVANS: This is John Evans. David as well
6 because I'm preparing the response to the motion, the ACAS'
7 motion to have itself dismissed from all these cases. I
8 had spoken with the -- with Leslie's office, and Martin
9 Roth, given the fact that ACAS was no longer a part of the
10 bellweather case process, about relaxing slightly, the
11 tight briefing schedule that we had set.

12 THE COURT: Absolutely.

13 MR. EVANS: And -- but we were still certainly
14 intending to respond to that motion on a more global basis,
15 I guess.

16 THE COURT: Sure. Give me just --

17 MS. SMITH: And we agreed to whatever schedule
18 John would like.

19 THE COURT: And give me half a second, please.
20 I'm just typing a short order. Give me half a second,
21 please. And then, John, I'll hit the pause button. I'll
22 be right back to you.

23 MR. EVANS: Okay.

24 THE COURT: Okay. What I have typed so far is
25 trial date in Yeazel vacated, parties granted leave to

1 conduct further discovery and to submit proposed time table
2 for further proceedings in this case. Hearings on pending
3 Daubert motions set to begin April 19th and to continue
4 thereafter as needed. Court to notify parties by
5 March 20th with regard to need for such hearings, so that
6 you can do some scheduling. Plaintiff's opposition to
7 defense motion to dismiss ACAS, right?

8 MR. ZOLL: Yes, sir.

9 THE COURT: John, when do you want to file
10 that -- what suits your time table?

11 MR. EVANS: Yeah, I'm here, Judge. We actually
12 talked about extending this another couple of weeks, was
13 that right, Leslie, to March 4th?

14 MS. SMITH: Yes, I mean, again, John, whatever
15 your preference is.

16 THE COURT: John, why don't I say -- what if I
17 give you until maybe March 10th and Leslie until the end of
18 March to reply?

19 MR. EVANS: That's fine.

20 THE COURT: Okay. That gives her about 20 days
21 and gives you a little more time, because I'm going to be
22 otherwise occupied probably, but I'll get to that then.
23 But I should be able to turn to that by then, I hope.

24 MR. NOLAN: Judge, this is Don Nolan, if I could
25 interrupt.

1 THE COURT: Sure.

2 MR. NOLAN: In listening to you talk, the thought
3 occurs to me that maybe we can have conversation with
4 Ms. Smith. If she confirms, which I didn't hear her say
5 that that sharing agreement is still in effect, maybe we
6 can enter some kind of stipulation to dismiss ACAS with the
7 right to reinstate it in the event that the sharing
8 agreement somehow fails.

9 THE COURT: Or Don, if you want --

10 MS. SMITH: Your Honor --

11 THE COURT: Go ahead, Leslie.

12 MS. SMITH: It's just, you know, Mr. Nolan tries
13 this every single time. He's constantly trying to get into
14 this topic in a way that I don't feel is appropriate. He
15 has answered with respect to the cost sharing agreement.
16 The agreement speaks for itself, he has the agreement. The
17 motion with respect to ACAS and the ability to pierce the
18 corporate vale is completely separate, recognizing, of
19 course, that Your Honor has a lot to do, we think it is a
20 motion that needs to be decided. We are happy to agree to
21 any briefing schedule that John Evans wants, and we'll
22 obviously await whatever works with respect to Your Honor's
23 schedule, but I don't think we need to have discussion
24 around the edges that don't go to the legal merits of the
25 brief.

1 THE COURT: Well, let me just say this, if -- I
2 think the record of this conference shows that relative to
3 any bellweather case, including that which, or those which
4 are currently set in Cook County, the parties understand
5 that that agreement is in effect, and that ACAS need not
6 participate and can be dismissed from those cases pending
7 further developments. Would that be a fair --

8 MS. SMITH: Your Honor, that was not part of our
9 discussions with plaintiffs at all. They simply called us
10 up and said they wanted to dismiss ACAS. We agreed to
11 that. We -- I am not in a position to discuss the cost
12 sharing agreement. The cost sharing agreement is a
13 document that has been discussed at length. They have it.
14 These are not issues that are linked. They wanted --

15 MR. ZOLL: They are linked.

16 MS. SMITH: -- they wanted to dismiss ACAS.
17 There was no discussion of the cost sharing agreement when
18 they called me and said they wanted to discuss a case from
19 Yeazel, nor when they wanted to discuss dismissing ACAS
20 from the Illinois exemplar cases. And I'm not suggesting
21 that somebody's backing out. I'm just saying the agreement
22 speaks for itself. It's nothing to do with the dismissal
23 of ACAS, and you know, when they agreed, and if they're
24 going to change the terms, we're going to have to revisit
25 it in Illinois, none of this was mentioned when either

1 Mr. Nolan or Ms. Abaray called me to discuss dismissal of a
2 case. They simply said they've made a decision to dismiss
3 them. I cannot get into a discussion of the cost sharing
4 agreement. They're not linked, and the agreement is as it
5 states.

6 MR. ZOLL: Your Honor, all we wanted was
7 assurances that there have been no amendments, and if there
8 are amendments to the cost sharing agreement, because it's
9 a document that's been produced in discovery upon which
10 we're relying, we just want to be told of that. That's
11 all.

12 MS. SMITH: I'm happy to check into that. That's
13 different than what Mr. Nolan's saying.

14 MR. ZOLL: I've asked you about that.

15 MR. NOLAN: Judge, this is Don Nolan. I don't
16 know why Leslie's so upset. I'm not suggesting that my
17 dismissal of ACAS has any bearing on what you do in federal
18 court. I was just saying that on behalf of her client, and
19 it seems to me she might want to talk to her client about
20 agreeing to dismiss it from this litigation under certain
21 conditions, if she wants to do that, then maybe you want to
22 just give us a week to see about that before you require
23 further briefing and ruling. That was my only suggestion.
24 It's her choice, Judge. Sorry, I didn't mean to --

25 THE COURT: What if I did this, defendant to

1 notify plaintiffs of existing amendments, if any, to
2 ACAS/Baxter cost sharing agreement, if that's the proper
3 way to refer to it, and to provide such notice promptly in
4 the event of future amendments to that agreement. Leslie,
5 does that work for you?

6 MS. SMITH: I don't have any problem with that,
7 so long as independent of the ACAS motion, they're not
8 related.

9 THE COURT: I understand that. I understand that
10 entirely, okay. And I should, if I'm able to do my
11 homework as it comes due, if that motion's due the end of
12 March, with any luck I'll get a decision on that motion by
13 the end of April. I can't promise that, but I certainly
14 will -- Amy's here and she knows when to shovel things to
15 the top of my pile, right, Amy? And she will, okay. You
16 know, so that this whole little ancillary matter may be
17 moot one way or the other. Okay.

18 MS. ABARAY: And Your Honor, just so the record
19 is clear, we did have one condition on the ACAS dismissal
20 was that Baxter and SPL would not subsequently claim they
21 were an indispensable party to the litigation.

22 THE COURT: Whatever. That's -- that's -- that's
23 a complex -- some complexity, I won't go there yet. If we
24 have a problem with it, then we'll worry about it in due
25 case.

1 Okay. Let me ask Leslie, anything else that --
2 so far that I should talk about?

3 MS. SMITH: No, Your Honor.

4 THE COURT: Good enough. David?

5 MR. ZOLL: One other -- one final item, Your
6 Honor, on our list, that has to do with the SPL financials,
7 and our punitive damage expert. I've asked Leslie for --
8 we got the updated financials as a result of your order
9 with respect to Baxter. We still don't have the most
10 recent tax return or financials for SPL that go with that,
11 and I'd asked for that informally for the last couple of
12 weeks.

13 THE COURT: Leslie, what's it look -- I think you
14 should probably turn it over.

15 MS. SMITH: I personally thought that they had
16 been produced, I'm going to check into it.

17 MR. ZOLL: And then we can get those to our puni
18 expert guy, and he can give us his final report and you can
19 take his dep.

20 THE COURT: One thing on Yeazel, actually that
21 Jessica, the clerk, reminded me of. We talked about this.
22 I think you should file an amended complaint to tidy that
23 up and get the preempted claims out of there. Candidly, my
24 understanding of the rules is you can do it when the jury
25 was deliberating because, you know, you can conform the

1 pleadings, the pleadings can be conformed to the truth, but
2 that will take that little problem out of there. So I'll
3 give you until March 15th, all right.

4 MS. ABARAY: And in terms of what The Court would
5 want us to change, I mean, we had quoted word for word from
6 the Ohio Revised Code. Do you want us to just recite the
7 number?

8 THE COURT: Whatever they're fussing about, I
9 think you can tidy it up.

10 MS. ABARAY: Okay.

11 THE COURT: I'll let them dictate to you how --
12 and if you have a problem, whatever, I do think that to the
13 extent the complaint can be read, as I think it can, as at
14 least the plain reading of it, that you are seeking to
15 assert claims that are clearly preempted under the OCPA,
16 tidy it up. That's all. That will give the Court of
17 Appeals one less thing to worry about.

18 Okay. Leave granted to plaintiff Yeazel to file
19 amended complaint to withdraw any common law negligence
20 claims, okay. Preempted common law negligence claims.

21 Okay. Again, Leslie, anything else?

22 MS. SMITH: Not from me.

23 THE COURT: Don Nolan, anything from you?

24 MR. NOLAN: No, Judge. Thank you. You walked
25 through the minefield very well.

1 THE COURT: Well, good luck to you with -- and to
2 both of you, both sides with your case in front of Judge
3 Duncan Bryce and give her my regards.

4 John Evans, anything from you at all?

5 MR. EVANS: Nothing further, Judge. Thank you.

6 THE COURT: Anything from -- if any other
7 plaintiff's counsel has something, speak, or I'll reflect
8 that you don't, rather than try to have Angela sort out the
9 chorus of no's. David, what about yourself?

10 MR. ZOLL: The only comment, Judge, is you said
11 that you'd let us know by March 20th who we should have.

12 THE COURT: I will do the best I humanly can.

13 MR. ZOLL: That's a Sunday.

14 THE COURT: 21st.

15 MR. ZOLL: I wonder if it makes any sense to have
16 a phone status conference the week of March 21st.

17 THE COURT: That's a very good idea.

18 MR. ZOLL: If that's a good week for The Court.

19 THE COURT: Let's do it on the 21st. That makes
20 good sense to me. How about noon on the 21st. Noon our
21 time, 11:00 your time. Don and Leslie?

22 MS. SMITH: Yes, Your Honor.

23 THE COURT: Okay. Let's do that. And it will
24 just be sort of a generic 1983 MDL.

25 MR. ZOLL: Catch up.

1 THE COURT: Catch up. Exactly.

2 MR. ZOLL: That's all, Your Honor. Thank you.

3 COURTROOM DEPUTY: I think, Jessica, we were
4 looking, was the Hoppensteadt full deposition filed?
5 Jessica, is that the deposition we were looking for?

6 THE COURT: Hoppensteadt.

7 MS. SMITH: We can send it, Your Honor.

8 MR. ZOLL: I'll make sure it's filed if it
9 wasn't.

10 MS. ABARAY: Do you want all of the depositions
11 of the experts filed so you have them?

12 THE COURT: I probably should.

13 MS. ABARAY: That's probably easier.

14 MR. ZOLL: Can we just file them?

15 MS. ABARAY: Yes. We filed --

16 MR. SILK: Attached to a notice. We'll make sure
17 they're all.

18 MR. ZOLL: We'll do a formal filing in all cases
19 of the expert deposits.

20 MS. SMITH: The only thing I would say, Your
21 Honor, to the extent that any portions of the dep covers
22 anything confidential, we've got to be careful about them.

23 THE COURT: I can get to them if they're under
24 seal?

25 COURTROOM DEPUTY: Uh-huh.

1 THE COURT: File them under seal for now.

2 MR. ZOLL: All of them? These are all generic,
3 that's fine. I'm trying to make it easy, okay. I thought
4 they were all filed, but they weren't formally filed. We
5 attached them to the briefs, so it's a good idea.

6 THE COURT: Apparently we have Hoppensteadt.
7 According to the law clerk over in Cleveland, we need
8 Yeazel. We need Yeazel.

9 MS. ABARAY: Mr. Yeazel, all right. Yes.

10 MR. ZOLL: I know I attached Hoppensteadt to my
11 reply brief.

12 THE COURT: She says we have it, and I think I've
13 seen it actually. Oh, there's a motion to strike
14 Mr. Yeazel's affidavit.

15 MS. ABARAY: Right.

16 THE COURT: That will be moot assuming I decide
17 on deciding with Ms. Cummins' affidavit.

18 MS. SMITH: I'm sorry, Your Honor, those are two
19 unrelated motions.

20 THE COURT: Oh, really?

21 MS. SMITH: I see what you're saying. I see
22 because -- no, I see what you're saying because it's part
23 of Cummins. That's fine.

24 THE COURT: What I'm going to say about that,
25 just for the record, okay, all I'm going say, proceedings

1 re motion to strike Yeazel. Affidavit held in abeyance
2 pending decision. If such is granted, pending motion to
3 strike Cummins affidavit. Okay. Thank you, folks. I'll
4 talk to you at noon on the 21st, if not sooner. Thank you
5 all very much. Bye bye.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

s:/Angela D. Nixon

Angela D. Nixon, RPR, CRR

Date

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<p>W</p> <p>wait [9] 15/12 17/23 31/3 32/2 32/4 32/25 34/5 35/9 35/9 waiting [1] 20/7 walked [1] 44/24 want [36] 3/19 13/7 15/1 15/23 16/18 22/9 24/17 24/21 25/1 25/15 25/20 26/3 26/10 28/16 29/6 29/19 30/3 31/5 31/7 31/25 32/3 32/11 34/4 34/7 35/19 35/24 36/11 36/14 38/9 39/9 41/10 41/19 41/21 44/5 44/6 46/10 wanted [15] 3/6 5/14 18/24 19/4 19/12 34/11 34/15 34/19 35/18 40/10 40/14 40/16 40/18 40/19 41/6 wants [2] 39/21 41/21 was [45] 3/12 3/12 3/24 4/1 5/2 6/3 6/6 6/23 6/25 7/2 7/12 7/12 10/2 10/2 10/2 10/17 10/24 11/21 11/22 11/23 11/24 19/13 19/17 22/25 23/10 23/12 24/7 24/7 25/2 25/6 25/19 26/12 28/25 34/19 37/9 38/12 40/8 40/17 40/25 41/6 41/18 41/23 42/20 43/25 46/4 Washington [2] 29/14 29/15 wasn't [2] 26/11 46/9 water [2] 17/14 17/17 way [17] 5/9 9/8 9/9 14/25 16/12 17/3 17/6 19/17 21/25 24/7 24/14 27/12 29/17 31/20 39/14 42/3 42/17 ways [1] 17/15 we [162] we'd [4] 4/21 25/1 36/6 36/8 we'll [15] 3/17 5/9 15/14 17/6 17/18 18/1 18/8 18/12 28/12 30/2 35/9 39/21 42/24 46/16 46/18 we're [8] 11/5 12/5 13/5 15/12 19/8 19/22 40/24 41/10 we've [13] 11/20 12/19 13/7 13/9 13/17 13/25 14/3 17/20 23/17 32/17 34/22 35/21 46/22 wedding [1] 30/4</p>	<p>W</p> <p>wait [9] 15/12 17/23 31/3 32/2 32/4 32/25 34/5 35/9 35/9 waiting [1] 20/7 walked [1] 44/24 want [36] 3/19 13/7 15/1 15/23 16/18 22/9 24/17 24/21 25/1 25/15 25/20 26/3 26/10 28/16 29/6 29/19 30/3 31/5 31/7 31/25 32/3 32/11 34/4 34/7 35/19 35/24 36/11 36/14 38/9 39/9 41/10 41/19 41/21 44/5 44/6 46/10 wanted [15] 3/6 5/14 18/24 19/4 19/12 34/11 34/15 34/19 35/18 40/10 40/14 40/16 40/18 40/19 41/6 wants [2] 39/21 41/21 was [45] 3/12 3/12 3/24 4/1 5/2 6/3 6/6 6/23 6/25 7/2 7/12 7/12 10/2 10/2 10/2 10/17 10/24 11/21 11/22 11/23 11/24 19/13 19/17 22/25 23/10 23/12 24/7 24/7 25/2 25/6 25/19 26/12 28/25 34/19 37/9 38/12 40/8 40/17 40/25 41/6 41/18 41/23 42/20 43/25 46/4 Washington [2] 29/14 29/15 wasn't [2] 26/11 46/9 water [2] 17/14 17/17 way [17] 5/9 9/8 9/9 14/25 16/12 17/3 17/6 19/17 21/25 24/7 24/14 27/12 29/17 31/20 39/14 42/3 42/17 ways [1] 17/15 we [162] we'd [4] 4/21 25/1 36/6 36/8 we'll [15] 3/17 5/9 15/14 17/6 17/18 18/1 18/8 18/12 28/12 30/2 35/9 39/21 42/24 46/16 46/18 we're [8] 11/5 12/5 13/5 15/12 19/8 19/22 40/24 41/10 we've [13] 11/20 12/19 13/7 13/9 13/17 13/25 14/3 17/20 23/17 32/17 34/22 35/21 46/22 wedding [1] 30/4</p>	<p>Z</p> <p>zero [1] 20/1 Zoll [5] 1/14 2/3 3/10 3/12 12/16</p>