

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF LOUISIANA  
3 LAFAYETTE DIVISION

4 IN RE: ACTOS (PIOGLITAZONE) ) MDL NO. 6:11-md-2299  
5 PRODUCTS LIABILITY LITIGATION )

6 THIS DOCUMENT APPLIES TO: ) JUDGE DOHERTY

7 Painters & Allied Trades District )  
8 Council 82 Health Care Fund, )  
9 International, Inc., et al., )  
v. Takeda Pharmaceutical Co. Ltd., )  
et al., No. 6:14-cv-02359. ) MAGISTRATE JUDGE HANNA

10  
11 TELEPHONE STATUS CONFERENCE

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13 Transcript of Proceedings before The Honorable  
14 Rebecca F. Doherty, United States District Judge,  
15 Lafayette, Lafayette Parish, Louisiana, commencing  
16 on March 31, 2015.

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1                   (Lafayette, Lafayette Parish, Louisiana; March 31,  
2 2015, in chambers.)

3                   THE CLERK: Good morning, Counsel. We've got Judge  
4 Doherty here on the line. Is everyone present?

5                                   (Collective response.)

6                   THE COURT: Okay. Good morning, everyone. This is  
7 Judge Doherty. I'm going to ask you individually to speak up and  
8 to identify for the record.

9                   Now, for those of you who have never been on a  
10 conference call with me, these are some of the threshold rules.  
11 The lead counsel, trial counsel, must be on the phone. Others  
12 may be on the phone. However, everyone who is involved in a  
13 given room must be on the phone and identified. Now, no  
14 wandering in and wandering out of the room.

15                   Secondarily, in the future, rather than using a  
16 speakerphone, it is preferable if everyone is on their own  
17 individual phone so that we don't have any of this wandering in  
18 and wandering out of the room.

19                   If there is anyone who is going to be in the room, they  
20 must be here now, they must identify for the record, and they  
21 cannot leave without permission of the Court. So those are some  
22 of the primary rules that I function by and have functioned by  
23 for 23 years.

24                   Okay. Let's start with the plaintiffs' side, if you  
25 would, please.

1 MR. BAUM: Michael Baum for Plaintiffs Painters.

2 MR. WISNER: Brent Wisner on behalf of the plaintiffs,  
3 Your Honor.

4 THE COURT: Mr. Wisner, are you on a speakerphone?

5 MR. WISNER: Yes, I am, Your Honor.

6 THE COURT: Are you alone?

7 MR. WISNER: No, I'm with Michael Baum.

8 THE COURT: Oh. So the two of you -- are the two of  
9 you the only ones in that room?

10 MR. WISNER: Yes, Your Honor.

11 THE COURT: All right. Close the door and make certain  
12 that that remains during the entirety of this conversation,  
13 please.

14 Okay. Who else for the plaintiffs?

15 MS. HOEKSTRA: Jennifer Hoekstra for Richard Arsenault.

16 THE COURT: Okay.

17 MR. ROCKFORTE: Nicholas Rockforte with Pendley, Baudin  
18 and Coffin.

19 THE COURT: Okay. Mr. Rockforte, are you the only one  
20 in your room?

21 MR. ROCKFORTE: Yes, Your Honor.

22 THE COURT: All right. Jennifer, you're alone? Just a  
23 minute. Jennifer, you're alone?

24 MS. HOEKSTRA: Yes, ma'am.

25 THE COURT: Okay, cool. Yeah, you would know the

1 rules.

2 Okay. Anybody else for either the Plaintiffs Painters  
3 Fund or the PSC?

4 MR PENDLEY: Patrick Pendley on behalf of the  
5 plaintiffs, Your Honor.

6 THE COURT: Who?

7 MR. PENDLEY: Patrick Pendley, P-E-N-D-L-E-Y.

8 THE COURT: Okay. Now are you with the PSC or with the  
9 Painters Group?

10 MR. PENDLEY: The Painters Group.

11 THE COURT: Okay. And Mr. Pendley, where do you  
12 practice?

13 MR. PENDLEY: Pendley, Baudin & Coffin in Plaquemines,  
14 Louisiana. I'm with Nick Rockforte.

15 THE COURT: Okay. So you're with Nicholas Rockforte,  
16 correct?

17 MR. PENDLEY: Right. We're not in the same building  
18 today on this call, but I practice with Nick.

19 THE COURT: And Mr. Pendley, you're on a landline, yes?

20 MR. PENDLEY: Yes.

21 THE COURT: Okay. And are you the only one in the  
22 room?

23 MR. PENDLEY: Yes, ma'am.

24 THE COURT: All right. Okay.

25 All right. Anyone else that is either for the

1 Plaintiffs Painters Fund or the PSC?

2           Okay. Let's turn to the defendants. Let's start with  
3 Takeda. Who do we have for Takeda?

4           MS. DAVIS: D'Lesli Davis.

5           THE COURT: Okay. Ms. Davis, we cannot hear you. Are  
6 you on a speakerphone?

7           MS. DAVIS: I was not on a speakerphone, but now I'm on  
8 a handset. Is this better?

9           THE COURT: Much better, thank you. All right.  
10 Ms. Davis, are you the only one in your room?

11           MS. DAVIS: I am, Your Honor.

12           THE COURT: All right. Yeah, you were on that other  
13 call, so you know the ground rules.

14           MS. DAVIS: You better believe it.

15           THE COURT: Good. Good deal. All right. Whom else?  
16 Anyone else?

17           MR. KRUSE: Your Honor, this is Layne Kruse, and I'm  
18 also here for the defendants, and I'm in a conference room in  
19 Houston on a landline.

20           THE COURT: By yourself?

21           MR. KRUSE: I've got my partner. He will introduce  
22 himself. He's on another landline.

23           MR. ANDERSON: Good morning, Your Honor. My name is  
24 Darryl Anderson, also, with Norton Rose Fulbright, D'Lesli and  
25 Layne and also --

1 THE COURT: We cannot hear you, Mr. Anderson. Either  
2 you're mumbling your words, or you are not holding it close  
3 enough. You want to run through that again, please.

4 MR. ANDERSON: Sure, let me try it one more time.  
5 Darryl Anderson, also, with Norton Rose Fulbright, with D'Lesli  
6 Davis and Layne Kruse representing defendants.

7 THE COURT: Okay. Now I doubt you are representing,  
8 quote, defendants, because do you represent Lilly?

9 MS. DAVIS: Judge, this is D'Lesli. If I may  
10 interject. Our appearances in this case have been on behalf of  
11 both Lilly and Takeda. I don't think there's been an ultimate  
12 decision with regard to who is trying what for whom, but all  
13 trial counsel for defendants are on this call.

14 THE COURT: Well, let me ask you this, Ms. Davis, if  
15 you are at liberty to explain. As I understand it, in the  
16 primary claims, we do have Mr. Dugas and Mr. McConnell. They are  
17 representing Lilly, whom will -- who might or might not handle  
18 what trial obligations or duties, you know, is like any time you  
19 have codefendants at all, but, in fact, Lilly is represented by  
20 Mr. Dugas and Mr. McConnell. Is that the case as well with the  
21 Painters Fund case?

22 MS. DAVIS: That's correct, Your Honor, and they are on  
23 this call.

24 THE COURT: Okay. So, Ms. Davis, Mr. Anderson, and  
25 Mr. Kruse actually represent Takeda. Whether Takeda and Lilly,



1 once Lilly is represented now -- rather, now that Lilly is  
2 represented by Mr. Dugas and Mr. McConnell, who is going to do  
3 what at trial, y'all can figure that out. That's fine. Just be  
4 sure you have them here. But as far as actual representation,  
5 Davis, Anderson, and Kruse are Takeda, correct?

6 MS. DAVIS: Your Honor, I would just tweak that. My  
7 original appearance in the MDL and for a number of years that  
8 this case has been going on has been on behalf of both Takeda and  
9 Lilly. I have done work for both of them. I have not withdrawn  
10 my appearance for Lilly in any aspect of the MDL currently.

11 So I just don't know that there's been a decision on  
12 that, and I just don't want to misrepresent anything to the  
13 Court. I have been working on behalf of Lilly. I currently am  
14 identified in the appearances as also representing Lilly, and I  
15 do know that for Takeda I will be a trial lawyer in this case.

16 THE COURT: Y'all need to figure --

17 MS. DAVIS: I don't know about on behalf of Lily.

18 THE COURT: Y'all need to figure that out, because in  
19 the primary claims, if memory serves me, Ms. Gourley has  
20 withdrawn on behalf of Lilly, and Mr. Dugas and perhaps  
21 Mr. McConnell have now been substituted.

22 If that is the intention here, that needs to be done.  
23 You need to file the motion, and that will be one of the motions  
24 I'll allow here, Ms. Davis, for you to withdraw and Lilly to come  
25 in, but let's hear from Lilly. Who do we have for Lilly?

1 MR. DUGAS: Your Honor, David Dugas.

2 THE COURT: David, are you on a speakerphone?

3 MR. DUGAS: No, Your Honor. I'm at home recovering  
4 from surgery, and my voice is a little hoarse from the  
5 anesthesia.

6 THE COURT: Ah, okay. That's all right. So just speak  
7 a little more slowly, David. Okay?

8 MR. DUGAS: Okay, Your Honor. I'm sorry.

9 THE COURT: That's okay.

10 Do we have anyone else for Lilly?

11 MR. McCONNELL: Yes, Your Honor. Good morning, this is  
12 Stephen McConnell on behalf of Defendant Lilly. I'm on a handset  
13 in my office, the door is closed, and I'm alone.

14 THE COURT: And you exist, huh?

15 MR. DUGAS: I do. And I did read the last transcript,  
16 Your Honor, so I believe I'm up-to-date on the rules.

17 THE COURT: All right, great. Okay. All right.  
18 Mr. Dugas, Mr. McConnell, would you please speak to Ms. Davis on  
19 behalf of your client. The two parties, Takeda and Lilly, need  
20 to figure out who is going to be designated as representing them.  
21 That is a different question from who might take which witness at  
22 trial. That's just the normal same old same old.

23 But in the primary claim, as I understand it,  
24 Ms. Gourley, et al., has withdrawn from representing Lilly, and  
25 Mr. Dugas and Mr. McConnell have been substituted as counsel for

1 Lilly.

2           If that is the intent as to the Painters Fund, please,  
3 Ms. Davis, et al., and Mr. Dugas and Mr. McConnell, file those  
4 motions, get that done so the docket sheet will reflect that, and  
5 we will have, you know, we'll get that cleaned up.

6           If in fact this portion of the claim -- and I say that  
7 meaning the MDL -- is going to be handled differently than the  
8 primary claim, then I'm going to be interested in why and what  
9 the distinction is, and we need to get that clarified on the  
10 record.

11           So, David, when you get to feeling better and,  
12 Mr. McConnell, and D'Lesli, y'all get together and decide what  
13 your clients want to do. It doesn't matter to me. I just need  
14 to know, and the docket sheet needs to properly reflect that,  
15 because somebody has to be the one person who speaks for Lilly,  
16 and I need to know who that one person is, so when I want to pin  
17 Lilly down, I know to whom I need to direct my question. Okay?

18           MR. DUGAS: Understood.

19           MS. DAVIS: Yes, Your Honor.

20           MR. DUGAS: Understood, Your Honor.

21           THE COURT: So, Cathleen, that was Mr. Dugas,  
22 Mr. McConnell, and Ms. Davis.

23           Is there anyone else on the phone in any capacity,  
24 senior partner floating around, paralegal floating around? If  
25 so, I want them introduced on the record. No client either

1 without being introduced on the record.

2 (No response.)

3 THE COURT: Okay. Now, first, I want to thank the  
4 plaintiffs for doing what I asked you to do, and that was address  
5 this with particularity and with detail, and I thank you for  
6 doing that. You did just that.

7 So we're going to start with looking at a little  
8 differently than we did for those of you who were involved in the  
9 Blue Cross/Blue Shield matter where I had to approach it from a  
10 different perspective, but here I'm going to be wanting to have  
11 some clarification of what was sent.

12 First, it seems to me, plaintiffs -- and when I say  
13 "plaintiffs," Jennifer, I'm going to be talking about the  
14 Painters Union unless it's clear otherwise, okay?

15 MS. HOEKSTRA: Yes, ma'am.

16 THE COURT: Okay. All right. Now it looks like, not  
17 having gone through each and every exhibit that you sent, that  
18 the majority, if not all, of the exhibits that were provided are  
19 exhibits that were pretty much within the Allen trial. Is that  
20 an accurate generalization?

21 MR. WISNER: Your Honor, this is Brent Wisner. That is  
22 correct.

23 THE COURT: So I'm not going to take my time to go  
24 through each and every one of them with specificity because I've  
25 already done that in the Allen case. It is, however, the, shall

1 we say in generic terms, twist you are putting on it that I'm  
2 going to be focusing on more here today. All right.

3 Now, additionally, the Painters Fund -- that would be  
4 the Painters Fund. The Painters Fund has made a RICO claim,  
5 arguing that there is also a national class action for RICO and  
6 several claims based on consumer, either consumer protection or  
7 consumer laws in various states, California being one, I think  
8 Massachusetts. I have it somewhere, but at any rate.

9 Today I am not, directly, going to be addressing the  
10 consumer protection class actions. I will, however, in time and  
11 near future be addressing that, but when I do, Jennifer, I'm  
12 going to bring in Vance Andrus, okay, because he's got one on  
13 consumer protection laws in California as well, and that raises  
14 some really interesting interplay.

15 Now, first, to get some basic foundational, procedural  
16 matters dealt with. This particular matter, the Painters Fund, I  
17 think, when we finish this, you will agree is a plaintiff not  
18 unlike any other. Consequently, you are bound by the  
19 administrative coat hanger, if you will. For those of you who  
20 weren't here early, you don't understand the genuine significance  
21 of that, but you can find out from your PSC representative. You  
22 are bound by the administrative coat hanger in this case and, you  
23 know, you need to function through the PSC.

24 Now what happened in the Blue Cross/Blue Shield is,  
25 because these are a little bit different in nature, Mr. Arsenault

1 volunteered to be the PSC representative rather than whomever  
2 might be the PSC rep for, say, Massachusetts or California, or  
3 whatever. For those of you who are new, every new plaintiff who  
4 comes in is assigned a PSC member representative, and it's done  
5 by state. But because of the potential national aspects and so  
6 forth, we'll do that.

7 So, Jennifer, I'm assuming Richard is also willing to  
8 be the PSC rep for the plaintiffs in this Painters Fund case; is  
9 that correct?

10 MS. HOEKSTRA: Correct.

11 THE COURT: All right. So, Mr. Baum, Wisner, Rockforte  
12 and Pendley, you need to get with Mr. Arsenault. He's going to  
13 show you all the orders that apply to you, just like anybody  
14 else. He's going to tell you how things are done, you know. We  
15 don't just file motions helter-skelter.

16 He's going to, you know, give you the concept involved  
17 and, you know, any other aspects because you're just like any  
18 other plaintiff. You're just one alleging a different procedural  
19 vehicle that I sort of carved out at the beginning until we could  
20 get everything else up and running, and now I'm turning my  
21 attention to you. So, please, operate through the PSC. Your PSC  
22 representative is Richard Arsenault.

23 Now, that having been said, let's turn -- I'm sorry?

24 MR. BAUM: This is Michael Baum. I said, we're happy  
25 to do that, Your Honor.

1 THE COURT: Great. All right. Now -- now I'm going to  
2 turn our attention to, again, what we're going to do today. We  
3 started with the general administrative and procedural things.  
4 We're trying to figure out who's on first and what's on second.  
5 So Ms. Davis and Mr. Dugas and Mr. McConnell are going to  
6 straighten that out.

7 You now know, Painters Fund, if you have a question,  
8 you call Mr. Arsenault. He'll tell you how to do it or get you  
9 in touch with Pat Morrow or, you know, who is liaison, to make  
10 certain you get copies of everything and all of that. So we've  
11 got that set.

12 Now, as I said, today we will not discuss, I think, the  
13 five state court -- not state court -- state based consumer  
14 protection claims, potential class action and claims. I will do  
15 that at another time.

16 Ms. Davis, I will do it relatively soon, but I want to  
17 bring Mr. Andrus in because he's going to be in a similarly  
18 situated position with his case in California, and that's really  
19 interesting because the Painters people seem to say that they  
20 have one in California as well. So we're going to have some  
21 unique issues we're going to have to talk about there, but that's  
22 not for today; that is for another day's discussion.

23 Now, as to the RICO claim and alleged national class,  
24 it seems to me, just on a gut check, based upon what has been  
25 presented, that cap is met. We've got jurisdiction. We have

1 simple diversity. At least one member of the plaintiffs' class  
2 is diverse from at least one defendant. We have at least  
3 five million at issue based upon the allegations, it would seem,  
4 and the plaintiff class must have at least 100 members.

5 Now that might be an issue on the RICO claim. We're  
6 going to come back and talk about that in a minute because I am  
7 interested in, in who the true party at interest is. So we're  
8 going to come back and talk about that one. It will be pulled in  
9 later when we start talking about who the true party at interest  
10 is.

11 Now **the Federal Rule of Civil Procedure Rule 23**  
12 **requirements and the prerequisites**. Numerosity. I don't know.  
13 That one is going to be interesting when we talk about who the  
14 true party at interest is. Commonality. Again, depending upon  
15 who the true party at interest is, that's going to be  
16 interesting. Typicality is going to be really interesting when  
17 we talk about who the true party at interest is, and the adequacy  
18 of the representation. I don't know either. That's going to tie  
19 into, again, who the true party at interest is.

20 Now, additionally, on 23(b)(3) type of class actions,  
21 of course, you have to have the common questions of law and fact,  
22 and they must predominate over the individual questions which, in  
23 fact, if that is the case here, then I'm not certain all these  
24 individuals are really the true party at interest. I think that  
25 perhaps the third-party payor, i.e., the Fund, might be the true



1 party at interest, but that means we don't have a class, but  
2 we're going to talk about that, and whether a class action is the  
3 superior method to deal with this issue. And again, I'm not so  
4 sure it is, but we're going to talk about that, because I think  
5 there might be an equally interesting question as to the RICO  
6 claim, and that's what I want to start with before we get into  
7 all the concept of the class, potential class.

8 But we're going to come back to the potential class  
9 because what I'm going to ultimately do, in all likelihood, at  
10 the end of this conference is set up a date to allow motions to  
11 be filed because I think there's some real issues, both as to  
12 RICO, jurisdiction, and whether we have a genuine class here at  
13 all that are threshold and need to be addressed.

14 So, defendants, I'm going to give you the opportunity  
15 to file those motions, and let's get that out of the way. I  
16 don't know how they will come out, but, you know, those of you  
17 who were on the Blue Cross/Blue Shield call with me last time,  
18 you know I really love this stuff. I enjoy finding issues. They  
19 are fun to me. I like to see what the law says, and we just have  
20 a plethora here.

21 Now the first thing, before we get into the RICO  
22 matter, that I want to do that is tangential is that this is  
23 proposed an ERISA plan. My gut tells me there are no issues as  
24 to preemption as to any of the claims made here because it's not  
25 an enforcement of the contract or, actually, anything that is

1 flowing from the contract.

2 But if anybody on the defense seems to believe that  
3 this might be a preemption issue, please, let the Deputy Special  
4 Master know, and I'll probably let you file one of those as well.  
5 But if it's not a strong argument, it's really not there and you  
6 just want to file it to keep your E & O coverage clean, let's  
7 wait and do that later. I don't want to get bogged down in that.

8 And I really don't think this is a preemption issue at  
9 all, but I could be wrong. So I'm just setting that off to the  
10 side that, if somebody really thinks it is and can convince the  
11 Special Master, because for those of you who are new, we have a  
12 rule in place. You can't just file motions helter-skelter. You  
13 have to present like a one-page argument as to why it's valid,  
14 et cetera. They look at it. They say yea or nay. If you  
15 disagree, you can appeal it to me, and we go from there.

16 So if you really think that that's, you know, something  
17 that really has merit, rather than just needs to be filed to keep  
18 your E & O carrier happy, then talk to the Special Master and  
19 we'll add that in as well.

20 All right. Now that we have dealt with that, let's  
21 talk about the RICO claim. Now, as I said, I certainly thank the  
22 plaintiffs' attorneys for doing what I asked you to do. You did  
23 lay it all out there with particularity. But what we're going to  
24 do here is peel the onion a little bit.

25 And the bottom line when I was working my way through

1 this, yeah, you have got all those documents. Yeah, you have put  
2 them within a context that certainly sounds despicable, if you  
3 will, but everything that is despicable is not illegal, and  
4 everything that is despicable is not indictable.

5 And if you are going to make a RICO claim, it's, in  
6 essence, if you will, engaging in generalization that is so broad  
7 as to be inaccurate, almost a piggyback statute in the sense that  
8 there has to be an indictable offense.

9 RICO was originally put together to get at organized  
10 crime and, primarily, you know, money laundering, drugs, things  
11 that there was just no doubt was illegal. Everybody knew it was  
12 illegal. That wasn't in question.

13 But RICO has been used, since its inception, in a much  
14 broader fashion than perhaps was originally contemplated, and  
15 within that broad use, the question of what is the indictable  
16 offense sometimes gets overlooked because the parties say, well,  
17 and they give a list of statutes, particularly, that one on  
18 fraud, and say, it's under that. Well, a lot of times just  
19 because you can cite a statute does not mean that you have an  
20 indictable offense underneath the applicable statute. So let's  
21 talk about that.

22 Plaintiffs, I know the statutes that you have alleged.  
23 You allege RICO, of course, 18 U.S.C. § 1962. Then you allege  
24 misbranded drugs, 21 U.S.C. § 352. I am not sufficiently  
25 familiar with that statute, nor have I had opportunity to go read

1 it with deliberate intent to know whether or not this is really a  
2 misbranded drug case, but my gut tells me, I don't know. I'm not  
3 so sure it is. Maybe, maybe not.

4 Mail fraud, 18 U.S.C. § 1341. We're going to talk  
5 about that one. Wire fraud, 18 U.S.C. § 1343. We're going to  
6 talk about that one.

7 Now -- so if you note that, in the complaint, the  
8 plaintiffs seem to be alleging that using the mail and the wires  
9 to market and distribute Actos was either a misbranded drug  
10 violation or maybe a fraud violation. Well, I'm not so sure it  
11 is. Remember, we start with the premise, despicable.

12 And Ms. Davis, don't get me wrong, I am not suggesting  
13 -- or Lilly, Mr. Dugas, that Lilly or Takeda's conduct was  
14 despicable. I'm suggesting that the way that they have framed it  
15 in their briefing, if you just read it on the surface, you go,  
16 oh, my goodness gracious type of thing.

17 But for our purposes today in discussion and  
18 clarification, I'm merely going to make that assumption. I am in  
19 no way suggesting that that is, in fact, accurate or not  
20 incendiary. All right? So with your permission for discussion  
21 today, I'm going to operate under that hypothesis.

22 Now -- excuse me. So what, you know, you say that  
23 distributing it and using the wires and the markets to distribute  
24 Actos is a criminal violation. Why? It might be a civil, rise  
25 to civil liability, but at the time it was, it would seem --

1 because, remember, now we're talking about criminal versus  
2 civil -- at the time it was an FDA approved drug. At all times  
3 it was an FDA approved drug when they were using the wires,  
4 et cetera.

5 Now, does that completely mitigate potential criminal?  
6 Now, not civil. It's a whole different ball game on civil. We  
7 fought that out in Allen. Let's not get balled up again on that.  
8 But in criminal, is distributing through the wires and the mail  
9 an FDA approved drug, you know, a misbrand or fraud? Well, I  
10 don't know.

11 Well, you say, well, yes, however, they lied to the FDA  
12 or they didn't give FDA all the information. Well, then, the  
13 question becomes is that a criminal offense, or is it an  
14 administration violation, or is it nothing, is it just tacky? I  
15 don't know. I don't know.

16 And then you say, well, it's not just the FDA. They  
17 marketed this to doctors all across the country, Lilly, and  
18 sometimes Takeda, and they didn't tell the doctors about this.  
19 Well, is that a criminal violation? I don't know. Because even  
20 with the information, once it was on the insert, once they  
21 started telling doctors and once it came out, okay, certain  
22 doctors went ahead and prescribed it anyway for certain patients  
23 because certain patients needed it.

24 So it's not that the drug is in and of itself -- it's  
25 kind of like when we played with Allen a little bit, for those of

1 you who might have been involved in that. I think maybe only  
2 Jennifer would be. You know, is it a defective product claim?  
3 It had arsenic in it or rat poison. No. It's a failure to warn,  
4 perhaps, and they didn't tell them.

5 So is that illegal, is that criminal? I don't know. I  
6 don't know under what statute it would be. I don't know, unless  
7 you are saying, well, it's fraud. Well, I don't know if it's  
8 fraud. I don't know.

9 If that were the case, you know, every car that gets  
10 recalled and that they knew that it had thus and so wrong with it  
11 is a fraud case under RICO. I don't know. I don't know. But,  
12 you know, it's not for me to figure that out. I'm not getting  
13 paid three or four or five hundred, you know, dollars an hour.  
14 I'm just a lowly government employee. That's for y'all to figure  
15 out.

16 So I'm really not certain what the underlying criminal  
17 intent is if you peel the onion away from the allegations that  
18 sound horrible, granted; but, yet again, despicable behavior --  
19 assuming this is despicable, but despicable behavior is not  
20 criminal. So I want one person from the plaintiffs to tell me  
21 what your indictable criminal offense is under these facts.

22 MR. WISNER: Your Honor, this is Brent Wisner on behalf  
23 of the plaintiffs. First of all, I just want to say, thank you  
24 for having us go through this disclosure exercise. It was, I  
25 think, very helpful for us on the plaintiffs' side to really

1 coalesce our understanding of the case and RICO violations. So I  
2 wanted to say that was very helpful.

3 Part of that process, actually, I think you're hitting  
4 the nail squarely on the head, and that is, what is the  
5 indictable offense underlying the pattern of racketeering  
6 activity that would be sufficient to sustain a RICO claim?

7 And I would first point out that, you know, the issue  
8 of when something is indictable is, you know, is there a  
9 reasonable probability that the, you know, the defendant  
10 committed the elements of the crime. And as the Court knows, I'm  
11 sure, through your criminal docket, you know, reasonable  
12 probability is not the same standard of proving beyond a  
13 reasonable doubt.

14 In that vein, the question then becomes, is the conduct  
15 that we're alleging sufficient to be a violation of the mail  
16 fraud or the wire fraud statutes, and I would submit, Your Honor,  
17 that fraudulent promotion of a drug, meaning failure to disclose  
18 material information about a drug knowingly, and this is  
19 obviously with the scienter element of fraud, meaning the intent  
20 to actually defraud. When that is done in the context of  
21 prescription marketing, people are frequently -- the DOJ  
22 frequently indicts pharmaceutical companies, pharmaceutical  
23 representatives for engaging in that conduct.

24 Lilly, for example, has been indicted by the Department  
25 of Justice previously.

1 THE COURT: Whoa, whoa, let me stop you. Is this  
2 Mr. Wisner?

3 MR. WISNER: Yes, Your Honor.

4 THE COURT: Okay. Mr. Wisner, there were a couple of  
5 things that we fought out in Allen that you weren't party to, and  
6 Lilly's prior indictments, et cetera, is one of them. Again,  
7 probably you don't do criminal law, but the mere fact somebody  
8 robbed a bank before does not mean that they robbed the bank  
9 today unless it's pattern of practice, et cetera, et cetera.  
10 It's 404(b). Okay? So let's just not get off into that.

11 So my question to you is, under the fraud statute, and  
12 fraud -- and again, I'd have to look it up, but I think it's  
13 doing, you know, intending to get money when it's not due you,  
14 et cetera, et cetera, and you are engaging in activity that is  
15 fraudulent, which is bringing itself back to itself, but look at  
16 the statute on what fraud is.

17 Let me ask you this. Query. Okay. If the companies,  
18 Lilly and/or Takeda, had in fact told -- and we're talking about  
19 the doctors now, I'm assuming, not the FDA, okay, had told the  
20 doctors, hey, look, this provides an increased risk of bladder  
21 cancer, as they did in 2011, at that point under your hypothesis  
22 there certainly would be no fraud after that point, correct?

23 MR. WISNER: That is correct, Your Honor.

24 THE COURT: Okay. So if we say that, then what we have  
25 here, it would seem, prior to that time is that they just didn't



1 tell them that it might have an increased risk of bladder cancer,  
2 and yet when they did tell the doctors that it might be an  
3 increased risk of bladder cancer, certain doctors continued to,  
4 in fact, prescribe it. And why I'm hammering on that is I want  
5 to talk to you about that 75 percent in a minute. We're going to  
6 do that when we come back to the business about the class.

7           So if I'm understanding what you're saying is that  
8 Lilly and Takeda prior to 2011, but after at some point in time  
9 when you allege they flat-out knew that this particular drug  
10 posed an increased risk of bladder cancer and that it, in fact,  
11 does, is your argument, of course, but we're again, Ms. D'Lesli,  
12 Mr. Dugas, I'm just dealing in hypothets here to try to clarify.

13           So you're saying that at some point Lilly and Takeda  
14 flat-out knew that this drug created or presented an increased  
15 risk in bladder cancer, and once they knew that, they didn't tell  
16 the doctors until 2011. So during that period of when Lilly and  
17 Takeda, you say, flat-out knew, which is an interesting point  
18 when that might or might not be, but nonetheless, they flat-out  
19 knew, or Lilly and Takeda would argue that never was the case  
20 until 2011, so -- but we're not getting into that right now.

21           All right. That they flat-out knew between that period  
22 and 2011 when they didn't tell the public and the doctors and yet  
23 they marketed an otherwise FDA approved drug for that use, that  
24 that is the basis for mail fraud because they used the mails and  
25 wire fraud because they used the internet, et cetera. Is that

1 what you are saying?

2 MR. WISNER: In part, Your Honor.

3 THE COURT: Okay.

4 MR. WISNER: We're also saying that they not only knew  
5 that the drug could cause bladder cancer, but took active steps  
6 to hide that fact from people and conceal that information during  
7 the various publications, through the work and drafts of the FDA,  
8 and our allegation is they used the wires, as well as the mail,  
9 to facilitate the concealment of that risk from consumers and  
10 doctors.

11 THE COURT: Okay.

12 MR. WISNER: And it is --

13 THE COURT: Go ahead. I'm sorry.

14 MR. WISNER: And it is those acts, specifically, the  
15 E-mails that were exchanged -- and again, I don't mean to use  
16 inflammatory language, Your Honor, but these are our allegations,  
17 so, you know, the conspiring that occurred amongst the executives  
18 of Takeda with Lilly; the coordination of the deliberate decision  
19 to not conduct research or turn over any stone; the fact that in  
20 2003 they conducted a survey with physicians which indicated to  
21 them that physicians would not prescribe the drug if they had  
22 known about the bladder cancer.

23 We have, obviously, a litany of facts in our disclosure  
24 statement, as well as the complaint, but the thrust of it, Your  
25 Honor, is there are specific instances of them using wires and

1 fraud, with an intent to defraud.

2 THE COURT: Well, but, now, here we go, "with an intent  
3 to defraud." How do you define "defraud," or how is "fraud" or  
4 "defraud" defined under the statute or the jurisprudence  
5 interpreting that statute when it comes to drugs, do you know? I  
6 don't know. I'm asking.

7 MR. WISNER: Absolutely. It's the deprivation of a  
8 material piece of information that they had a duty to disclose or  
9 represent to physicians.

10 THE COURT: No, that's not going to be sufficient to be  
11 fraud because they can do that all day long and it's not a big  
12 deal. I think, usually, with criminal fraud it requires their  
13 trying to get money or benefit that they are not otherwise due.  
14 Is that your suggestion?

15 MR. WISNER: Absolutely, Your Honor, it's precisely the  
16 allegation. And we believe that, you know, when the warnings  
17 were called to the attention of -- when the warnings occurred in  
18 2011, that, you know, the precipitous drop in sales related to  
19 Actos reflect the fraudulent enterprise's general success, that  
20 specific enterprise that was identified in 2003.

21 THE COURT: Hold that thought just one minute.

22 Put them on mute, Cory.

23 (Off the record.)

24 THE COURT: Okay. Now, all right, defendants, you've  
25 now heard what he believes is his basis as to the indictable

1 offense. I do not know whether or not that is sufficient under  
2 applicable law or not, but that is the allegation that's being  
3 made as to mail and wire fraud.

4 Now, Mr. -- is it Wisner or Wisner?

5 MR. WISNER: It is Wisner, Your Honor, although my law  
6 professors always did say Wisner to give me a hard time.

7 THE COURT: Well, I'm going to try not to give you a  
8 hard time unless I want to give you a hard time. So, Mr. Wisner,  
9 let's talk about misbranded drugs. What specifically do you  
10 believe constitutes your allegation that 21 U.S.C. § 352, i.e.,  
11 misbranded drugs, is an indictable offense at play?

12 MR. WISNER: Well, Your Honor, I want to be very clear.  
13 For a RICO claim --

14 THE COURT: Okay, just one moment, please.

15 (Off the record.)

16 THE COURT: Okay. Counsel, I have to take this call.  
17 If you want to go to the bathroom, take a bathroom break, get a  
18 cup of coffee, 10 to 15 minutes.

19 MR. WISNER: Yes, Your Honor.

20 (Recess taken.)

21 THE COURT: All right, Counsel, I'm back on. I  
22 apologize. That was a call I had to take. I knew that it might  
23 come during this call, but I apologize.

24 All right. Now I think where I was, Mr. Wisner, I had  
25 asked you with specificity what constitutes your allegation that

1 there is an indictable offense under 21 U.S.C. § 352, misbranded  
2 drugs.

3 MR. WISNER: Yes, Your Honor. Before I respond to  
4 that, I just want to let the Court know that I received an E-mail  
5 from my cocounsel, Joe Snodgrass, on behalf of the plaintiff in  
6 this case, and he says he's called in, but for some reason he  
7 can't speak. So he's been listening to the conference so far. I  
8 just want that noted for the record.

9 THE COURT: Well, no, let's stop. That shouldn't be  
10 the case. We've used this call before. I'm going to let the  
11 Deputy Special Master deal with that.

12 Cathleen, this doesn't have to be on the record. We'll  
13 try to get that straightened out for him.

14 (Off the record.)

15 THE COURT: Okay. Mr. Snodgrass.

16 MR. SNODGRASS: Yes, Your Honor.

17 THE COURT: You can hear us and now you can speak, yes?

18 MR. SNODGRASS: Yes, thank you.

19 THE COURT: Mr. Wisner, can you hear Mr. Snodgrass?

20 MR. WISNER: I can, Your Honor. Thank you.

21 THE COURT: Well, cool beans. All righty. Okay. Now  
22 I think we have everyone still on the line. So let's just run  
23 past and make certain we have everybody. Everybody just identify  
24 to be sure, starting we have Mr. Snodgrass.

25 Mr. Rockforte, are you there?

1 MR. ROCKFORTE: Yes, Your Honor.

2 THE COURT: Mr. Wisner?

3 MR. WISNER: Yes, Your Honor.

4 THE COURT: Mr. Baum?

5 MR. BAUM: Yes, Your Honor.

6 THE COURT: Mr. Pendley? Mr. Pendley? Mr. Pendley?

7 He's not here. I don't know what happened to him. We're going  
8 to come back.

9 Ms. Davis?

10 MS. DAVIS: Yes, Your Honor.

11 THE COURT: Mr. Anderson?

12 MR. ANDERSON: Yes, Your Honor.

13 THE COURT: Mr. Kruse?

14 MR. KRUSE: Yes, Your Honor.

15 THE COURT: Mr. Dugas?

16 MR. DUGAS: Here, Your Honor.

17 THE COURT: Mr. McConnell?

18 MR. McCONNELL: Yes, Your Honor.

19 THE COURT: All right. Mr. Rockforte, since you are in  
20 the state of Louisiana, would you step out for just a moment and  
21 call Mr. Pendley and see what the issue is, but I'm going to go  
22 on since we have a plethora of people here for the Painters Fund,  
23 but step out for a minute. Come back and let me know what his  
24 problem is, okay?

25 MR. ROCKFORTE: Yes, will do. Thank you.

1 THE COURT: Now, Mr. Wisner, I had asked you what  
2 specifics did you have to support your allegation that there is  
3 an indictable offense under 21 U.S.C. § 352 which is misbranded  
4 drugs.

5 MR. WISNER: Yes, Your Honor. It's the longest I've  
6 ever taken to answer a federal judge's question. Simply put,  
7 Your Honor, the misbranding statute actually is not a predicate  
8 act sufficient for a RICO claim. It is, however, an indictable  
9 offense because the statute provides that should a drug  
10 manufacturer transport in interstate commerce a drug that has a  
11 label that is misleading in any way, it is considered  
12 transportation of a misbranded drug and, in fact, indictable.

13 THE COURT: Slow down. Whoa, Mr. Wisner, say that one  
14 more time for Cathleen, please.

15 MR. WISNER: Absolutely. I apologize. I speak very  
16 quickly. It drives court reporters crazy. The misbranding  
17 statute provides that the transportation of a drug that has a  
18 label that has -- that is misleading in any particular is deemed  
19 transportation of a misbranded drug and is, in fact, an  
20 indictable offense under federal law.

21 THE COURT: Now you began your discussion of that, you  
22 said, well, it's not a predicate act sufficient for RICO. In  
23 other words, it's not one of the ones listed in RICO, correct?  
24 Is that what you were intending to convey?

25 MR. WISNER: Yes, Your Honor.

1 THE COURT: However, you believe it also gives you  
2 basis for RICO, or are you suggesting that you see it as a  
3 separate and independent claim, and if that's the case, it's  
4 criminal, so we're not here about criminal matters, or do you  
5 believe it interplays with your RICO allegation in some fashion?

6 MR. WISNER: I believe, Your Honor, it goes to the  
7 knowledge and scienter element of the wire fraud claim because  
8 the misbranding statute puts a manufacturer on notice of the  
9 responsibilities to properly represent the risk and benefits of a  
10 medication on its label, and in failing to comply with that, they  
11 also were committing wire fraud as part of the predicate act  
12 alleged elsewhere.

13 THE COURT: So let me make certain I'm understanding  
14 what you are saying. You are saying, just to put it, again, in  
15 generalized terms perhaps so broad as to be inaccurate; however,  
16 you are saying that, hey, look, RICO says that if you, you know,  
17 committed some of these acts, wire fraud, mail fraud, et cetera,  
18 could be a predicate act under RICO. We say they did. Well, how  
19 do we know that they knew that what they were doing was wrong?  
20 Well, because this particular statute, the misbranded drugs  
21 statute, put them on notice of that and, you know, it's a  
22 criminal act. They knew that and they hid this information or  
23 they didn't put it on the label with full knowledge and intent.

24 So that in your -- as I'm understanding it, would be  
25 evidence to show that they had knowledge and intent sufficient to



1 rise from perhaps the civil violation to a criminal violation  
2 when they were sending this material through the mail and over  
3 the internet. Is that a layperson's nutshell of what you're  
4 saying there? Is that correct?

5 MR. WISNER: Yes, Your Honor. I couldn't put it better  
6 myself.

7 THE COURT: Okay. Okay, defendants, you now know what  
8 they are saying as to that. They are not using the misbranded  
9 drugs as a predicate indictable offense, if you will. They are  
10 rather saying that that particular statute put Takeda --

11 Now I'm going to come back and ask you in a minute, so  
12 be thinking about it, Mr. Wisner, as to whether this is the same  
13 for Lilly, all right?

14 So as to Takeda, that that statute put Takeda on notice  
15 that, if you've got a label that's misleading in any fashion, you  
16 know, you can get indicted for that, broadly speaking.

17 I'm sure there are other elements, Ms. Davis.

18 And so you knew that. You also, he's alleging, Takeda,  
19 he's alleging Takeda knew that this particular drug created an  
20 increased risk of bladder cancer and that Takeda deliberately  
21 omitted that information as opposed to just failed to include.

22 Am I correct, Mr. Wisner?

23 MR. WISNER: Yes, Your Honor, and specifically took  
24 affirmative action to conceal it as well.

25 THE COURT: Yeah, because that's what you're arguing

1 makes this rise from perhaps a civil, potential civil violation,  
2 into the world or realm of the criminal. Okay. All right.

3 Now are there any other aspects of the indictable  
4 offense requirement under the RICO statute that you are relying  
5 upon or have alleged that perhaps I have not mentioned because I  
6 do not have it in my notes from when I reviewed it?

7 MR. WISNER: No, Your Honor. The two indictable  
8 offenses are the wire and mail fraud.

9 THE COURT: Okay. All right, defendants. Now, when I  
10 say "defendants," I have been using it collectively.

11 Mr. Wisner, is there a distinction between Lilly and  
12 Takeda, in your mind, as to the underlying predicate offenses,  
13 and also the misbranded drugs notice, if you will, being evidence  
14 of deliberate intent as to Lilly who was not the manufacturer of  
15 the drug and, you know, was not directly involved, arguably, in  
16 the interplay with the FDA in the creation of the insert and, in  
17 fact, did not create nor, I think, probably in any relevant  
18 capacity write -- and I lose that term quite loosely -- the  
19 insert. So what did Lilly do?

20 MR. WISNER: Lilly, Your Honor, in the same vein of  
21 Takeda, we allege knew, specifically, the bladder cancer risks,  
22 starting from as far back as 1998, and in 1998 was even  
23 instructing its sales force to specifically tell doctors that  
24 there was no bladder cancer risk.

25 So we believe that it's just an extension of the

1 overall fraudulent enterprise. Lilly was a participant in that  
2 enterprise and engaging in the same fraudulent predicate -- type  
3 of fraudulent predicate act that would create RICO liability.  
4 Same with Takeda.

5 THE COURT: So, again, to take it out of the particular  
6 and let's put it into general. Basically, the drugs, illicit  
7 drugs, cocaine here, if we were talking about that, to run a  
8 metaphor and analogy. Lilly didn't create the meth -- let's do  
9 meth because you have to create it.

10 Lilly didn't create the meth. Lilly didn't put it out  
11 there, but Lilly was distributing it down here in Oakdale and  
12 knew very well that meth was dangerous. Is that kind of what you  
13 are saying?

14 MR. WISNER: Yes, Your Honor, but I have to stress it's  
15 not just the distribution, but the marketing as well. But that's  
16 generally the gist of it.

17 THE COURT: Well, that's why I'm doing these analogies  
18 because I want to parse out. So it's not just that Lilly was  
19 distributing it. You are also saying that the marketing that  
20 Lilly did, in fact, created this -- engaged in this racketeering  
21 indictable offense thing. All right. I'm going to leave that  
22 broad because I'm sure, rather certain you are aware that as of  
23 2006, isn't it, Lilly stopped active participation in the  
24 marketing and any possible distribution.

25 Now, in the Allen case, this Court ruled -- and that's

1 one of the things I'm rather certain is up on appeal or certainly  
2 will be argued on appeal -- I haven't read the briefs. This  
3 Court held that the contract between Lilly and Takeda which in  
4 effect -- and again, I am engaging in such broad use of terms as  
5 to risk being inaccurate -- said, basically, Hey, Takeda, we,  
6 Lilly, did such a bang-up job in our marketing, that its impact  
7 and influence is going to extend X number of years out. I think  
8 it was three or four, three years out, and so you are going to  
9 pay us for that because, you know, that's because our Super Bowl  
10 commercial was so good, you know, that you're still going to be  
11 buying Budweiser three years out based upon those little puppies,  
12 or whatever. So this Court held that for civil purposes, you  
13 know, Lilly had a potential for liability beyond 2006.

14 Now, Mr. Wisner, as to criminal engagement, are you  
15 suggesting that Lilly should or would have potential criminal  
16 indictable -- an indictable offense, conduct that would support  
17 an indictable offense after 2006 and Lilly got out of the active  
18 aspect of marketing and distribution?

19 MR. WISNER: Yes, Your Honor. It's not simply also  
20 just the marketing was so good, though. It was also the fact  
21 that, in 2006, following the FDA's renewed interest in the  
22 bladder cancer issue arising from the KPNC and PROactive data  
23 being made available to the FDA. It is at that point that Lilly  
24 was also instructing and advising Takeda on how to better  
25 basically stonewall -- again, these are allegations. I don't

1 mean to be name calling, but essentially stonewall any changes to  
2 the bladder cancer warning that were -- and those activities and  
3 advice and conspiracies actually is why it didn't happen until  
4 2011 that the label was finally changed.

5 THE COURT: And so, again, to put it in layman generic  
6 kind of terms, Lilly as of 2006 was no longer -- you're alleging  
7 no longer distributing or actively marketing, but because they  
8 were getting a certain percentage, based upon this extension of  
9 the contract out for three years, you are alleging that Lilly was  
10 in cahoots, so to speak, with Takeda in stonewalling and not  
11 putting the information -- assuming that happened, Ms. Davis;  
12 remember, we're just in hypotheticals here -- in stonewalling the  
13 FDA so they did not have to change that insert -- I'm just going  
14 to use that generically -- that insert because Lilly had a  
15 financial interest in it, at least, for three more years, and so  
16 they were in cahoots, and therefore, those acts you are alleging  
17 would be sufficient by way of, I guess, a criminal enterprise, to  
18 use a more stable criminal term, but I don't know. But this is  
19 what everybody is going to brief for me in motions, so -- with  
20 Takeda to make money off of this drug that wasn't properly  
21 labeled, you allege. Am I understanding what you're alleging?

22 MR. WISNER: Yes, Your Honor. Again, because this is  
23 RICO, there's one other wrinkle, and I want to make that very  
24 clear. We've alleged two claims, right? One is under 1962(c) as  
25 well as 1962(d). And under the conspiracy statute, which is the

1 "(d)" subsection, Lilly's conduct in 2006 facilitated the  
2 enterprise's activity through 2011. They are also liable under  
3 the conspiracy charge as well, but for the "(c)" purposes, you  
4 correctly articulated our reasoning for believing Lilly is still  
5 liable past 2006.

6 THE COURT: Well, you might have just overreached a tad  
7 there, and I don't know. That's what I'm exploring here. So  
8 it's 1962(d), the conspiracy aspect, which is, from what I gather  
9 from what you're saying, is where you think you can hook Lilly to  
10 an indictable offense.

11 Are you suggesting that Lilly's conduct or activity  
12 that would have constituted this conspiracy would extend beyond  
13 the additional three years out from the 2006 contract, so '7, '8,  
14 '9? So you've got '10 and up until the change in '11. Are you  
15 suggesting Lilly was involved even after they were no longer  
16 obtaining any financial return which with fraud is getting a  
17 benefit, whether financial or otherwise, that's not due,  
18 et cetera?

19 Are you alleging and suggesting that Lilly's indictable  
20 offense under fraud, okay, mail or wire, extended beyond the end  
21 of their benefit from the contract which was sometime, let's just  
22 say, January 1 of 2010, just for our discussion purposes here,  
23 because if memory serves me, they got royalties, if you will --  
24 not a proper term -- but for three years after the contract  
25 ended. Contract ended in 2006, '7, '8, '9. So January 1 of

1 2010 in theory, pursuant to the hypothet that we are discussing  
2 today, Lilly had no more financial incentive because they weren't  
3 getting any money.

4 Are you suggesting that their conduct would still  
5 constitute fraud because they are helping Takeda get money even  
6 though they are not getting it, or does it end with Lilly as of  
7 January 1, 2010?

8 MR. WISNER: That's a very good question, Your Honor,  
9 and I think that goes to the distinction between a (c) allegation  
10 and a (d) allegation.

11 THE COURT: But even under the (d) allegation, they are  
12 not getting any money anymore. Fraud is getting something of  
13 benefit, financial or otherwise, that's not due and engaging in  
14 conduct that is blah, blah, blah.

15 Have you just not thought about it? And if you  
16 haven't, Mr. Wisner, that's cool. You say, "haven't thought  
17 about that, Judge," and then we'll deal with that.

18 MR. WISNER: Yes, Your Honor. What I was trying to say  
19 was, for the (d) allegation, you don't have to show a fraudulent  
20 predicate act. You just have to show conduct that was in  
21 furtherance of the conspiracy. And after 2006, again, I don't  
22 mean to use inflammatory language, but Lilly kept it's mouth shut  
23 and didn't disclose all this information that it knew about what  
24 Takeda was doing, and in so doing, furthered the conspiracy, but  
25 I'm not saying that they engaged in fraudulent conduct,

1 specifically, predicate acts indictable under the wire and mail  
2 fraud after 2006.

3 THE COURT: Okay. See this is what I'm trying to do.  
4 We're parsing it out. And again, Ms. Davis and Mr. Dugas and  
5 Mr. McConnell, et cetera, don't get upset. I'm not suggesting he  
6 can prove it. I'm just trying to understand what he's doing  
7 here.

8 All right. So you're arguing that thing that I always  
9 caution young women about who think they are, quote, in love,  
10 close quote, with a drug dealer. They may not have gotten any  
11 money out of it necessarily, but if they let him take her into  
12 all these places where he's selling because she gives him  
13 legitimacy, she has done one act in furtherance of the  
14 conspiracy, and therefore she can get indicted.

15 Now that is a very loose analogy and one that may or  
16 may not in any fashion hold up, but -- to a comparison under the  
17 wire fraud and the mail fraud, but if I'm understanding what  
18 you're saying, even after Lilly no longer was getting a financial  
19 gain, Lilly helped Takeda, their buddy, so to speak, because they  
20 kept their mouth shut.

21 There's a very famous Fifth Circuit case where  
22 girlfriend had a house. Broke up with the guy. Hadn't been with  
23 him in quite some time. He does something, I don't know, down  
24 the street he shouldn't have done. He comes running into her  
25 house. She's not sure she's going to let him stay, but she hears



1 the siren and she gets up and closes the front door because she  
2 knew he was running from the police, and under the law, the Fifth  
3 Circuit, under that criminal conspiracy -- not saying it would be  
4 the same thing here under RICO; I haven't even examined that --  
5 that was sufficient, one act in furtherance of the conspiracy.

6 So, basically, running the analogy, if I'm  
7 understanding you, you are saying that Takeda and Lilly are buds.  
8 Lilly knows that Takeda is, you know, running from the police or  
9 whatever, and Lilly is keeping its mouth shut when it could or  
10 should have had a duty to speak up.

11 Now I don't know, quite frankly, whether keeping its  
12 mouth shut is sufficient. That is not always sufficient under  
13 criminal law. If we see a crime happening, we do not in all  
14 instances have the obligation to speak up, and in fact, if we  
15 don't speak up, we are not in violation of criminal law. We may  
16 be negligent, but not in violation of criminal law.

17 So I do not know, quite frankly, whether under the  
18 theory that you're using here for Lilly to just keep its mouth  
19 shut after that time is sufficient under criminal law as opposed  
20 to civil because, again, not all despicable acts are criminal and  
21 certainly not all negligent acts are criminal, and that which  
22 might or might not grant civil liability does not certainly  
23 always rise to the level of criminal. And we are dealing with  
24 allegations of a criminal indictable offense here, and you're  
25 doing it as to Lilly after 2009 -- well, January 1, 2010, you're

1 saying under 1962(d) they did an act in furtherance. I don't  
2 know whether keeping your mouth shut is an act in furtherance of.  
3 I don't know. But at any rate, that's what you're alleging,  
4 correct?

5 MR. WISNER: Yes, Your Honor. And I'd also make a  
6 comment. I think it's going to become relevant at some point in  
7 the briefing is that the acts that Lilly did in 2006 were in  
8 furtherance of the conspiracy. And from my understanding of the  
9 RICO law and the conspiracy component, the entire existence of  
10 the enterprise, you are liable for all of it, even if you were a  
11 coconspirator at the beginning part of it. That's how conspiracy  
12 works.

13 THE COURT: Well, usually, that is often the case, but  
14 if one has specifically pulled oneself out of it, exited from it,  
15 if you will, let's go back to drugs, okay? You're suggesting  
16 that Lilly was involved with -- let's use Lilly, we'll call  
17 Lilly, Lilly, and Takeda, Tom.

18 Lilly was involved with Tom. Tom is distributing meth.  
19 Lilly decides that she doesn't want to be involved with this  
20 anymore and she exits the conspiracy. Does an overt act to exit  
21 it. Says don't come near me anymore, nothing, da-da-da-da-da.  
22 Generally -- don't know about in RICO, but generally under  
23 criminal law she can argue, no, no, no. I exited that  
24 conspiracy. I did a sufficient, you know, overt act to exit the  
25 conspiracy. Therefore, I am no longer liable for the other.

1           Sometimes that happens. So once we start bleeding over  
2 into the criminal law, we're just going to have to be careful and  
3 make certain that we're, you know, some things that sound really,  
4 really good, just don't get you there, you know, as to criminal  
5 law. I don't know. But I'm trying to understand and clarify  
6 what you are alleging so we can tee these up for proper motions  
7 because I find some very interesting questions here.

8           Okay. So, basically, under 1962 you are saying that  
9 Lilly and Takeda were involved in a sufficient racketeering or  
10 criminal -- and I'm just going to say activity, because I don't  
11 know that you actually are alleging an enterprise -- under mail  
12 fraud, wire fraud, all the, you know, the predicates that are  
13 required for that, and at some point Lilly might not have  
14 continued to be actively engaged, but they, quote, kept their  
15 mouth shut, close quote, and because of their prior involvement,  
16 that is sufficient for them to be liable for the whole matter.

17           And I just put one caveat. Also, it has to be, you  
18 know, that it could have been reasonable for them to do it. For  
19 instance, putting it in drugs again, if you're just, you know,  
20 involved in selling meth, but nobody has any guns because they  
21 are pacifists and all that, and then somebody has a breakdown and  
22 starts shooting somebody with an Uzi, they may have never  
23 realized that, so they are not going to be held for that because  
24 it's outside the contemplated conspiracy, if we're just going  
25 straight criminal law.

1           So there are a lot of nuances here is my point.  
2 Whether those nuances are going to translate into RICO, I don't  
3 have any idea, but I'm not getting paid, you know, eight, nine  
4 hundred dollars an hour to figure it out. Y'all are. So I'm  
5 going to be very interested to read your briefs.

6           All right. Mr. Wisner, what else are you alleging?

7           MR. WISNER: With regard to the fraudulent predicate  
8 acts, Your Honor, I believe we've covered everything.

9           THE COURT: All right. Defendants, both Takeda and  
10 Lilly, you now understand what the allegations are, the general  
11 factual bases of those allegations as to the indictable offense  
12 for both Lilly and Takeda and for the time frames which are more  
13 relevant to Lilly than Takeda, as to what might be involved.

14           Now, Mr. Wisner, Mr. Dugas, who has not spoken up yet,  
15 but Mr. Dugas was for a period of time under the last  
16 administration the U. S. Attorney for the Middle District of  
17 Louisiana. So the concept of the interplay of the criminal here,  
18 I think, is going to be very interesting when we start reading  
19 Lilly's brief, and I'm sure Ms. Davis and her group will be  
20 pulling that in as well.

21           So I'm just going to ask everyone not to gloss over  
22 this concept of the indictable offense. He certainly -- he being  
23 Mr. Wisner -- has made an interesting argument on its face.

24           Now we're going to come back to that in a minute and  
25 see if, in fact, Ms. Davis -- and Mr. McConnell, I'm going to

1 probably talk to you a little bit more than Mr. Dugas today  
2 because Mr. Dugas can't speak very well today.

3 So, Ms. Davis and Mr. McConnell, am I correct in my  
4 underlying assumption that you perhaps might be of the opinion  
5 that a motion would be meritorious on this concept of the  
6 underlying indictable offense as to the RICO matter?

7 MS. DAVIS: Your Honor, this is D'Lesli Davis, and you  
8 are absolutely right. Layne Kruse from our team is going to  
9 address the substantive RICO issues. We wanted to have one voice  
10 speaking in front of you, and so I would direct this over to  
11 Layne Kruse.

12 THE COURT: Well, now -- okay, Mr. Kruse, you want to  
13 speak to that?

14 MR. KRUSE: I'd be glad to, Your Honor. And I think  
15 you've hit on several issues that need to be addressed in a  
16 motion to dismiss.

17 But beyond simply -- and I'll get back to the  
18 indictable offense issue which I think you have aired out here.  
19 But there are other elements of RICO that I don't believe that  
20 the plaintiffs have met and I think warrant a motion to dismiss.

21 You could start out with fundamentally the basic  
22 standing argument with respect to these particular individuals,  
23 and I think maybe you did allude to that earlier about wanting to  
24 know who is the proper plaintiff.

25 THE COURT: Let's come back to that -- let's come back

1 to that one, Mr. Kruse, because I'm going to get into that one.  
2 Let's come back to that one --

3 MR. KRUSE: Okay.

4 THE COURT: -- because that plays to the whole concept  
5 of who the true party at interest is. And I think you're right.  
6 There is an issue there we're going to want to talk about, but  
7 let's set that aside.

8 What I'm doing now, Mr. Kruse, is I'm going to ask you  
9 to particularize what you think your thoughts are on this to give  
10 it to the benefit of the plaintiffs, just like I asked the  
11 plaintiffs to do it for benefit of the defendants, so that we  
12 will get motions that really will address genuine issues and not,  
13 you know, be like two ships passing in the night.

14 Okay. We're going to come back to the genuine party at  
15 interest. It does play in the RICO, but I'm going to address  
16 that, I think, more in the way my mind works properly when I come  
17 back to the class action concept.

18 All right. Mr. Kruse, what else under RICO?

19 MR. KRUSE: Let me go back to the indictable offenses,  
20 but let me start with the fundamental issues about there's no  
21 enterprise. We will argue that. We will argue there's no  
22 distinct persons under that statute, and again, I'm talking about  
23 1962(c) which is the fundamental statute which they are suing  
24 under, and also there's really no valid pattern of racketeering  
25 activity.

1           Those are the three elements that you focus on with  
2 respect to 1962(c). And in particular when you talk about no  
3 enterprise, what you're talking about is the fact that what the  
4 Fifth Circuit has been very careful about trying, as this Court  
5 has mentioned early on about you have a RICO case or a RICO  
6 statute that was really developed for criminal conduct in the  
7 drug area or the Mafia area, how do you keep that from getting  
8 out of bounds with respect to business transactions.

9           And so the Fifth Circuit has focused on the issue of no  
10 enterprise, no distinct persons, and no pattern. When you talk  
11 about no enterprise, the courts have said, and we will argue this  
12 in the Fifth Circuit and the Burzynski case in particular that --

13           THE COURT: Wait, spell that, Mr. Kruse.

14           MR. KRUSE: Burzynski. It's, B-u-r-z-y-n-s-k-i.

15           THE COURT: Oh, "i." I thought it was a "y." All  
16 right. So everybody knows -- whoa, Mr. Kruse, let me interrupt  
17 you. Whoa, Mr. Kruse. Do you happen to have handy the cite so  
18 you can give that to the California attorneys as a matter of  
19 courtesy? Do you happen to have it right there in front of you?

20           MR. KRUSE: Your Honor, give me -- I'll get back to  
21 this. I know I have it here. Somewhere I have it here.

22           THE COURT: That's all right.

23           MR. KRUSE: Mr. Anderson has the cite. Go ahead,  
24 Mr. Anderson.

25           MR. ANDERSON: It's 989 F.2d 733.

1 THE COURT: 733?

2 MR. ANDERSON: Yes, ma'am.

3 THE COURT: Now for the -- all right. Somebody is  
4 fotching around. Oh, Mr. Snodgrass, it's you. Quit fotching in  
5 front of the phone, would you?

6 MR. SNODGRASS: Sorry, Your Honor.

7 THE COURT: Fotching is a very technical term, and it  
8 means you're making indiscriminate noise that your microphone is  
9 picking up. Okay?

10 MR. SNODGRASS: Okay.

11 THE COURT: All right. So stop fotching.

12 Okay. Now, remember when I started this discussion,  
13 and I knew I was going to come back to the defendants. The Fifth  
14 Circuit, particularly, Mr. Wisner, has felt that -- in my  
15 opinion, has felt that RICO has been misapplied in the past and  
16 read in an overly broad fashion.

17 So you might want to be sure that you read,  
18 particularly, the Burzynski case, and there are a couple of  
19 others that you'll find are floating around out there as well  
20 about, you know, just because you want to use it this way, and if  
21 you read it broadly and close one eye, you might be able to use  
22 it this way, we're not going to let you use it this way. So you  
23 might want to read those.

24 Okay, Mr. Krouse. Kruse, I'm sorry, Mr. Kruse.

25 MR. KRUSE: That's fine, Your Honor. It's like if you



1 have a single discrete business transaction, and what we're  
2 talking about here, as this Court indicated before, is an FDA  
3 approved drug that you're trying to market, and is that a single  
4 enterprise that should be construed as a single enterprise.  
5 That's the issue that we will brief for the Court.

6 THE COURT: Well, you might want to just chat with  
7 Ms. Gourley about that one, but okay. I'm not -- so just a  
8 minute, just a minute. So you are now aware --

9 (Conferring.)

10 THE COURT: All right. I'm sorry, my lunch arrived  
11 because I have a 3:00 o'clock, and I'm not going to be able to --  
12 this is going to perhaps take me close to that.

13 I don't know, but at least we know what you're saying.

14 And plaintiffs, you hear what they are saying, that  
15 enterprise is to be defined as getting this one drug and that  
16 it's FDA approved, et cetera.

17 I don't know. Be sure to chat with Ms. Gourley about  
18 that one, but okay. I understand where you're going there.  
19 What's your next point?

20 MR. KRUSE: Second point would be that there's no  
21 really distinct persons. I mean, the irony under RICO is that  
22 you've got to have this enterprise, but then you've got to have,  
23 you know, if you just lump together Takeda and Lilly, and  
24 frankly, here you have -- I think as this Court has explored the  
25 issue of a copromotion agreement that ended in 2006, may have

1 been extended to, let's say, 2009; but, again, this is more  
2 like -- and I'm not sure if I have the cite on this, but it's  
3 like the Fitzgerald case out of the Seventh Circuit where you had  
4 Chrysler and all their dealers, or certain dealers were being  
5 included in this so-called RICO enterprise. Well, the court  
6 said, wait a minute. You know, these dealers were hired or made  
7 to promote the sale of your product. You know, they are all part  
8 of this promotion to sell your product, and we are not going to  
9 treat that as a distinct person.

10 THE COURT: Okay. I'm going to interrupt you. Hence,  
11 Mr. Wisner, remember early on I said, car dealer recall,  
12 et cetera. It was an allusion to the Fitzgerald case. So, okay,  
13 go ahead.

14 MR. KRUSE: And that's 116 F.3d 225.

15 THE COURT: But now that's a little different, I think,  
16 from here, but still we know where you're going.

17 MR. KRUSE: Okay. And then -- and the no pattern, you  
18 know, RICO cases talk about long-term continuing criminal  
19 activity. The Fifth Circuit says, again, you don't have a  
20 pattern when basically you're talking about a single transaction,  
21 and again, what we're talking about here is that you're trying to  
22 get this drug, you know, approved and marketed, and that's really  
23 what we're talking about. It doesn't project into the future.  
24 That's the language out of the RICO cases.

25 Because, basically, Lilly, as this Court has discussed,

1 dropped out in '06 or '09 and has a finite end date. And so what  
2 you have in that -- in fact, I think, in their disclosures I  
3 think they say the enterprise ended in 2011. But what you have  
4 is, does this qualify for a pattern of this long-term continuing  
5 criminal activity which we say it does not.

6 THE COURT: Okay. So we've got -- okay. Let me  
7 interrupt you. I want to keep us focused on point orientation  
8 rather than arguing the merits. Remember how Mr. Wisner did it?  
9 He didn't get too much into the facts if he didn't have to.

10 All right. So here you're saying, okay, we don't have  
11 a pattern of conduct. Mr. Krouse -- Kruse, I'm sorry, only one  
12 of us can talk, and if I'm talking, it's me, okay? Okay. Now,  
13 before that -- because Cathleen can't get it. She can't get both  
14 of us talking.

15 So you're saying, hey, no, no, no, there's not a  
16 sufficient pattern of conduct here. What we were doing is  
17 getting one drug through the FDA and selling it, and for Lilly  
18 for sure it ended in either 2006, maybe 2009, or maybe even 2011,  
19 but it flat-out ended, and as I understood the plaintiffs, they  
20 are saying, huh-uh, keeping the mouth shut is sufficient. I  
21 don't know, we'll see. But that's the tension there. Okay.

22 What's the next point, if there is one, Mr. Kruse?

23 MR. KRUSE: I'd like to focus just a few minutes on  
24 identifying the issues on the predicate act issue that you've  
25 raised here, Your Honor.

1 THE COURT: Okay. All righty.

2 MR. KRUSE: For instance, I'm going to say that I  
3 appreciate the efforts on the disclosures; but, for example,  
4 number 5 asks to list, you know, criminal indictments. That's  
5 typical in a RICO disclosure statement. There was no mention of  
6 that in the disclosures they had, but I think at least we deserve  
7 the statement that there are none, because there are no criminal  
8 indictments supporting their RICO case here, and that's typically  
9 asked in a RICO case, and that's what Your Honor did in these  
10 disclosures.

11 But it leads me to the other point. They pled -- I  
12 know the Food and Drug and Cosmetic Act, and I know you discussed  
13 that with counsel, and I appreciate that, but it is clear that  
14 congress has amended this statute many times with respect to  
15 adding more predicate acts. They have never added this  
16 particular predicate act.

17 But secondly, I noticed in their disclosures, and I  
18 think maybe I'd like to hold them to it, they dropped the Travel  
19 Act. That was listed in their amended complaint.

20 THE COURT: All right. Stop. Whoa, whoa, Mr. Kruse,  
21 Mr. Kruse. I realize you're on a roll here, but if we don't stop  
22 and sort of encapsulate each of these points, then we end up with  
23 just a big ole ball. I don't want to have, when I get this  
24 motion, a big ole ball. Okay.

25 So let's go back to the FDA and the Cosmetic Act,

1 et cetera. Yes, I think everyone agrees there were no  
2 indictments under this. Haven't been. None contemplated of  
3 which I am aware. So I think we're going to start with that as a  
4 given. I don't think that's in dispute.

5 Is it, Mr. Wisner?

6 MR. WISNER: No, Your Honor.

7 THE COURT: Okay. Now the Travel Act, or even some of  
8 the other ones that you argue were not predicate acts, from what  
9 I understood from Mr. Wisner, for instance, let's just use by  
10 example the misbranded drugs, 21 U.S.C. § 352. As I understood  
11 Mr. Wisner, he's not arguing that that's a predicate act under  
12 RICO. He is saying that may or may not, and he believes it may  
13 be evidence of their intent, okay? So there might be others that  
14 might be evidence of their intent. Okay?

15 Now I don't want to get into the one that he dropped or  
16 didn't drop at this point, okay, because even the Travelers Act,  
17 I don't believe that Mr. -- and I could be wrong. Mr. Wisner, I  
18 don't believe you were ever arguing that as a predicate act under  
19 -- predicate statute act under RICO. Is that correct?

20 MR. WISNER: I believe that was contained as a  
21 predicate act in the complaint. However, as part of the  
22 disclosure statement, we did not include it.

23 THE COURT: Well, that is wonderful legalese. So I'm  
24 going to pin you down. Excuse me?

25 MR. WISNER: I know you are.

1 THE COURT: Yes, I am. I'm going to pin you down. So  
2 at this stage, you are no longer asserting that the Traveler Act  
3 is a predicate act under RICO, notwithstanding it is alleged to  
4 have been so in your complaint. Is that accurate?

5 MR. WISNER: Your Honor, I'm going to say "yes"  
6 provided I don't get in trouble for saying that.

7 THE COURT: No, you're not going to get in trouble for  
8 saying that, but I might hold you to it, okay? Now -- and if you  
9 need to --

10 MR. WISNER: Yes, Your Honor.

11 THE COURT: If you need to think about that, that's  
12 fine. But when you do your -- these motions and the responses,  
13 okay, at that time you're going to have to ante up, okay, as to  
14 what you are arguing is a predicate act and what is not -- you  
15 are not arguing as a predicate act, notwithstanding what you had  
16 in your complaint, and you're going to have to ante up that even  
17 perhaps, for instance, by example, the misbranded drugs, you're  
18 not arguing that's a predicate act anymore, but you are arguing  
19 it might or might not be evidence of their intent. And I'm going  
20 to have you do me a separate outline that clarifies this,  
21 notwithstanding what you have in your complaint, and I'm going to  
22 ask you to go back to your complaint and make certain that you  
23 have addressed every allegation in your complaint as to whether  
24 you're still pursuing it; if so, in what capacity, i.e., as a  
25 predicate act; or if not as a predicate act, as evidence as to

1 the intent for the predicate act, or as evidence as to some other  
2 possible relevance under the criminal law as to the predicate  
3 act. Get me that outline.

4 And that outline, Mr. Kruse, will govern, and once we  
5 have that clarified, we will either do one of two things. In the  
6 motions that are filed, the defendants can ask that those  
7 portions of the complaint that were not included in the outline  
8 of the plaintiffs or -- I use as a generic term here, not a legal  
9 term -- abandoned by the plaintiffs, once they had time to give  
10 it more considered thought, be stricken from the complaint, and  
11 the Court will grant it because it should at that point not be in  
12 dispute.

13 So I'm going to ask you to do that for me, Mr. Wisner.

14 And that will, Carmen, precede the deadline for the  
15 filing of the motion so the defendants know what they are dealing  
16 with before we get started.

17 What I'm trying to do here, Counsel, is parse all this  
18 out, narrow it down so we can really do something with these  
19 motions and so I don't have all this plethora of chaos or  
20 confusion or innuendo or, you know, whatever left and we get down  
21 and focus on the actual issues. So we're coming back.

22 So, Mr. Kruse, you were saying -- and Mr. Kruse, I'm  
23 going to apologize to you ahead of time. Back when I practiced  
24 law, one of my colleague's name was Gary Krouse, and so I want to  
25 say Krouse instead of Kruse each time, so I apologize.

1           Mr. Kruse, so we now talked about those things that  
2 Mr. Wisner, et al., might have alleged in their complaint but did  
3 not include in the disclosure here, and I'm going to ask that you  
4 talk with Mr. Wisner when we get off and give him the list of the  
5 ones you think are not there.

6           And Mr. Wisner, if you're not pursuing them anymore,  
7 like that one that we just discussed, then, you know, note that  
8 it's in your complaint -- when you do the outline, note that it's  
9 in your complaint, but you are no longer pursuing that, okay?

10           All right. So, Mr. Kruse, as we go forward, we had  
11 some of the things that were in the disclosure that were not --  
12 you know, in the complaint, but not in the disclosure. We've now  
13 dealt with that.

14           Okay. What's your next point, Mr. Kruse?

15           (Recorded voice: Joining the meeting.)

16           MR. WISNER: Your Honor, I would like to highlight --

17           THE COURT: Well, wait, who is joining the meeting?

18           MR. DUGAS: Mr. Dugas. I got cut off.

19           THE COURT: Is that David?

20           MR. DUGAS: Yes, Your Honor.

21           THE COURT: Okay. Mr. McConnell, you have been with us  
22 the whole time, huh?

23           MR. McCONNELL: I have, Your Honor. Thank you.

24           THE COURT: Cool. Let David know what happened while  
25 he was cut off when you get off.



1           Okay. Mr. Kruse, the next discrete point. We're going  
2 to take them point by point. What's your next discrete point?

3           MR. KRUSE: With respect to the --

4           THE COURT: Wait, I'm sorry. You're cutting out or  
5 something.

6           MR. KRUSE: Okay. With respect to the mail fraud/wire  
7 fraud.

8           THE COURT: Okay.

9           MR. KRUSE: Okay. We will raise, or we plan to raise  
10 the issue of it appears to be that most of this is what may be  
11 called fraud on the FDA, and I think, you know, we -- I know  
12 you've been over these issues before on preemption and Buckman.  
13 I appreciate that, but I think in this particular circumstance  
14 where there's -- we will argue about the administrative  
15 procedures that are available, and I don't think it rises to the  
16 level of this indictable criminal offense with respect to mail  
17 and wire fraud, but it raises certainly those preemption issues  
18 and certainly those alternative avenues for resolving any type of  
19 issues with respect to misleading the FDA.

20           THE COURT: Okay. Let's stop there.

21           MR. KRUSE: That's one issue.

22           THE COURT: Let's stop there. Okay. When I first  
23 began this discussion, I believe -- I think I did; if I didn't, I  
24 did it in my mind while I was analyzing this -- I made the  
25 distinction between not giving information and perhaps hiding

1 information from the FDA versus the doctors. Okay?

2 As to the FDA, if you hide information, allegedly, or  
3 don't give information, allegedly, to the FDA, I think I  
4 indicated, but, again, could have been when I was thinking it  
5 through, that that may or may not be a criminal offense. That  
6 may be an administrative violation that's dealt with differently.  
7 So that's number one as to the FDA. Okay? So let's set that  
8 aside. I don't think that's going to get you to the preemption  
9 issue, but maybe. I don't know. But let's set that aside.

10 Then I think Mr. Wisner responded that, yes, maybe so  
11 in this discussion, Judge, there's a difference. He didn't admit  
12 it or agree, but, you know, there could be a difference, perhaps,  
13 between telling or not telling the FDA, but then telling and not  
14 telling the doctors, particularly, as to Lilly. Going out there  
15 and marketing this to doctors and specifically telling your  
16 people, which is their allegation, don't tell them that it might  
17 create bladder cancer, and as to that, I'm not certain you get  
18 bound up in the FDA issue, do you, Mr. Kruse?

19 MR. KRUSE: Well, if the focus is strictly on the  
20 doctors, that raises the other problem that I was wanting to  
21 highlight with respect to what I would call the lack of  
22 causation, proximate cause as well as "but for," and also as  
23 related to that is you've got to have reliance somewhere, and  
24 again, I appreciate their disclosure statements that were filed,  
25 but we saw none of that in their disclosures.

1 THE COURT: All right. Let's step out of this for just  
2 a minute. I know I have asked that we wait and talk about the  
3 proper party at interest until we come back to the potential  
4 class action, but let's foreshadow for just a moment.

5 Plaintiffs, as I understand it, this is a union or  
6 trade shop fund. Betty Boop who works for you, she goes out and,  
7 you know, gets a prescription from her doctor. She goes and gets  
8 the prescription, and then she puts it in for reimbursement from  
9 the Fund, and it reimburses it in whatever fashion it might be,  
10 80 percent, a hundred percent, whatever it is under the fund, or  
11 there's a copay maybe.

12 So Betty Boop -- and let's just for our purposes of our  
13 discussion, let's assume it's 100 percent reimbursement, just for  
14 our purposes. Betty Boop is not the true party at interest. She  
15 didn't pay for it. She's not out the money. The third-party  
16 payor is.

17 I am not at all convinced, based upon what I have right  
18 now, that I have a firm grasp and understanding of how the  
19 plaintiffs are suggesting that these individual parties who were  
20 members of this payment -- I mean, members of this trade union  
21 who have this insurance, if you will -- I'm using that term  
22 loosely here and generically again -- that reimburse them for  
23 their medical expenses, how those individuals are the party at  
24 interest and not the third-party payor.

25 Now this gets us -- I have stepped out and I'm going to

1 allude a little bit more to this class action problem, because if  
2 it is a third-party payor, I do not know whether across the whole  
3 United States everybody within this painters trade union has the  
4 same copay or not copay -- I apologize for the coughing, excuse  
5 me -- pay or copay, and quite frankly, I'm not at all certain  
6 that the trade union, depending upon how they do it for their  
7 members, would be sufficiently representative of other  
8 third-party beneficiaries -- I mean, third-party payors, say Blue  
9 Cross/Blue Shield which thinks they have their own, certainly, in  
10 Massachusetts claim or, you know, lumbermen's fund or the pullman  
11 association, you know, trade union. I'm not at all certain that  
12 it's sufficiently typical. I just don't know.

13           But I have grave concern and question as to whether all  
14 the plethora of individuals would be the proper party at interest  
15 here when, in fact, it is the third-party payor who was paying  
16 this on behalf of their members but for a possible copay or  
17 deductible or whatever, and if that's the case, I'm not certain  
18 we have commonality, typicality, or whether or not a class action  
19 is the best way to go forward with this when we've got so much  
20 difference across the whole United States as to third-party  
21 payors.

22           But when it comes back to and translates into the RICO  
23 claim, you know, again, perhaps it's going to, you know, where,  
24 you know, where is the analysis going to lead us when the doctors  
25 were not, allegedly, not told. They wrote the prescription.

1 Some doctors would have written a prescription even if they had  
2 been told because of the severity of the diabetic condition of  
3 the individual, all right, and that person took it to the  
4 pharmacy, got the Actos, paid for it, brought it in, turned it  
5 into the Painters Fund under the ERISA plan, and they got  
6 reimbursed a certain percentage. You know, I'm just not certain  
7 who the individuals are that are going to play into the RICO. I  
8 really am not.

9 I was hoping to deal with that primarily under the  
10 class action allegations and maybe even the jurisdictional basis  
11 here, which is going to, of course, be the threshold matter, but  
12 it comes up under the RICO, too, as to who the true party at  
13 interest is. And it might be the true party at interest is the  
14 third-party payor plus the individuals as to each of their  
15 deductibles or copays. It may well be that it's both, but then  
16 how are we going to know -- and since, Mr. Kruse, you've gotten  
17 me down this path, how are we going to know which doctors would  
18 have prescribed it anyway and might have continued to prescribe  
19 it anyway because they needed it, or how are we going to know  
20 which of these people never got bladder cancer at all and never  
21 will, for whatever reason. How are we going to know that?

22 And to allege that, well, after 2011 when they actually  
23 put the information of the bladder cancer out there within our  
24 group, the Painters Trade Union Group, the prescriptions went  
25 down by -- what was it? -- 75 percent. Therefore, that was the

1 experience across the whole United States with every third-party  
2 payor. That's not an assumption I'm willing to make. So how are  
3 we going to know? I'm not certain that's going to get us there.

4 And on top of that, to say that, as of 2011, it went  
5 down 75 percent because of the bladder cancer information is a  
6 very seductive argument. However, at some point in time right  
7 around that time, Takeda lost the exclusivity on this product,  
8 and generics began to get into the game, which was one of the  
9 arguments alluded to in Allen was that Takeda was attempting to  
10 stall until they weren't going to have exclusivity anyway, and  
11 they were trying to get a pediatric drug in place that would give  
12 them exclusivity.

13 So there are just a whole lot of reasons about,  
14 perhaps, why this went down 75 percent. Although it is on its  
15 face a very seductive argument, but that brings us back to,  
16 again, who is the party at interest? If that's the argument  
17 you're making, the party at interest is the third-party payor,  
18 which is the Fund. It's not the individual.

19 Your very own allegation as to why, you know, this all  
20 happened, to put it in very generic terms, is because we have to  
21 pay these bills. We paid them, based upon not knowing, the  
22 doctors not knowing that this could cause bladder cancer. Once  
23 it was known, it went down by 75 percent, and we only had to pay  
24 that 25. So we want that 75 percent reduction. Well, that's the  
25 third-party payor, guys, gals. That's not the individuals.

1 That's not Betty Boop and John Williams and Paul Frederick or  
2 Annie Snyder or Rickey Rose or John Cardarelli, or Marlyon  
3 Buckner, or Sylvie Bigord.

4 It's right here, Cathleen, for the spellings because  
5 some of them are strange.

6 It's not those people. Their prescriptions of Actos  
7 didn't go down 75 percent, or maybe they did. I have no idea,  
8 but that's not what you're arguing, plaintiffs. You're arguing  
9 that the third-party payors' costs associated with Actos because  
10 of the prescriptions went down 75 percent at some point -- you're  
11 suggesting 2011 -- and you're suggesting it's based upon the  
12 knowledge or the information, rather, of this association coming  
13 out. Could have been because they now can get generic. Who  
14 knows.

15 But again, that begs the question. That's a  
16 third-party payor allegation. That's not Mr. Cardarelli and  
17 Ms. Buckner, et cetera. So you see that distinction, that  
18 blurring of those lines plays into not only this concept of  
19 should we have a national class, a typicality, and whether or not  
20 this is the superior method to deal with this problem and whether  
21 or not common questions of law and fact predominate over  
22 individual questions, et cetera, and numerosity and all that,  
23 because I'm not certain you have numerosity if what you're  
24 dealing with is a third-party payor rather than Annie and Rickey  
25 and John, et cetera.

1           And if you're saying, well, there were multiple  
2 third-party payors, well, I'm not certain you're typical of them.  
3 I'm not certain that it's representative what happened with your  
4 people with everybody else. I don't know. I don't know.

5           And if we go back to CAFA, which is how you got here,  
6 since we're off on this, the plaintiff class must have at least  
7 100 members. If the true party at interest is not Marlyon and  
8 John and Rickey and Annie, but third-party payors, then I don't  
9 know if you have a hundred members. And then I don't know if  
10 there's commonality among. May have been 20 percent deductible  
11 here. Might have been a copay of \$5 in Blue Cross/Blue Shield.  
12 It might have been a whole 100. It may be that we pay it. I  
13 don't know. And I don't know that what the Painters Union, trade  
14 union would be would have sufficient typicality if we're talking  
15 about third-party providers and then the leftover, if you will,  
16 of the copay, the deductible, et cetera. That could be just  
17 completely different all the way across the country, depending  
18 upon what kind of plan. And if that falls, we don't have  
19 jurisdiction, because you got here by way of CAFA. Okay.

20           So I was holding that till last, notwithstanding that's  
21 a threshold issue because, you know, if the RICO business falls,  
22 then we don't have to get into all of that, but if it doesn't  
23 fall, then we're going to have to get into all of that.

24           But since Mr. Kruse wants to go there with his argument  
25 as to RICO, I felt I needed to step out of the explicit RICO



1 discussion and go into that concept.

2           Now, Mr. Kruse, what I am hoping to accomplish here is  
3 to segment out the motion. We may not take the full motion of  
4 everything on RICO. What we might take, you know, as a threshold  
5 matter is pull out, you know, maybe the predicate act, the  
6 indictable act matter. Let's do that one first because that's  
7 the most straight-up one. Maybe, maybe not. Y'all are going to  
8 work with the Deputy Special Master on how we're going to go  
9 forward with this. And we may, you know, parse it out and do it  
10 in stages, okay, because if there's no sufficient predicate act,  
11 you know, to get us our indictable offense, then all the rest of  
12 this doesn't matter. It becomes moot. So that's why I started  
13 there.

14           All right. But, Mr. Kruse, in order to give the  
15 plaintiffs the same benefit that you got, what's your next point?

16           MR. KRUSE: Well, those are the key points that we plan  
17 to raise on the RICO. And going to your last points, I think  
18 those were certainly standing type issues under RICO. We'll take  
19 a very close look at that. As to the real party in interest, I  
20 think that you've articulated there. We'll take some time and  
21 take a very close look at that just to see what we need to do.

22           But I think, you know, you raise a very good point  
23 about whether or not we should maybe just do predicate act first,  
24 and I appreciate that, the idea of staging. You know, it, as a  
25 practical matter, I wouldn't mind, you know, these other three

1 points of enterprise, persons, and pattern of racketeering, you  
2 know, maybe if we could maybe include, since a lot of these are  
3 related to each other, would it may be simpler just to focus on  
4 those?

5 THE COURT: Well, let me throw this out, and it's  
6 another, to use Mr. Wisner's phrase, one other wrinkle. When I  
7 was in law school, I had a gentleman who was of French heritage  
8 teach me procedure, federal procedure, and he was just enamored  
9 of saying: It does not matter if you have a superb argument that  
10 gets you to the top of the stairs. If you do not have  
11 jurisdiction, the king will kick your butt all the way down the  
12 stairs.

13 So if I don't have jurisdiction, I can't be ruling on  
14 that. So the question becomes, do we have a genuine  
15 jurisdictional issue. See, I was going to end with this. I was  
16 going to go through all of it, but, Mr. Kruse, you forced my  
17 hand, and that's okay. So once we go through all of this so  
18 everybody would have a sense of what we were dealing with, then I  
19 was going to come back to, but if I don't have jurisdiction,  
20 Counsel, none of this matters. And the manner by which  
21 jurisdiction is granted here is CAFA, and if that's the case and  
22 we do not have the requirements of CAFA, I don't have  
23 jurisdiction.

24 Now, if you are arguing RICO, I might, but it's going  
25 to be as to an individual aspect, you see, not a class action.

1 If you're making a RICO claim against Takeda and Lilly separate  
2 from a class action, maybe, perhaps, there's separate independent  
3 jurisdiction under federal question. Maybe, maybe not. Haven't  
4 thought about it fully because of the interplay there. But  
5 maybe.

6 So the question is, we've got to decide with our focus  
7 which way we're going. But see, if we're going with RICO being  
8 federal question jurisdiction, okay, I don't know if that's going  
9 to get us there or not because that's the criminal matter, but I  
10 just haven't thought that part completely through.

11 But if the allegation is going to be that the true  
12 party at interest are not Annie and Rickey and John, but the  
13 third-party payor, and the third-party payor wants to bring a  
14 claim for civil RICO under federal question jurisdiction, not  
15 CAFA, but federal question jurisdiction individually, not class  
16 action, then we have to see if we have a sufficient basis under  
17 RICO.

18 So it seems that we have two possible jurisdictional  
19 bases, I think. To be perfectly, you know, blunt with you, I  
20 haven't run these rabbits down the trail. Not my job, your job.  
21 However, I can raise jurisdiction at any time sua sponte. But  
22 you see, it's tied into whether it's a class action or not.

23 Now you talked about standing. Now standing was the  
24 next point that I had, but standing as to what? It's not really  
25 a standing question under the class action. It's who the true

1 party at interest is under the class action, and I think it is  
2 the third-party payor, except to the extent if maybe the  
3 individuals, Annie and Rickey, et cetera, and John, those  
4 individuals also have a copay or deductible, and their doctor  
5 would not have prescribed it had he or she known, and I don't  
6 know that as to Annie and John and all those people, but let's  
7 set that aside.

8           So as to Annie and John, maybe they have standing to  
9 raise this because they -- but they didn't pay for it, but they  
10 paid the copay. Well, copay on the insurance as to the medicine  
11 only. But if that's the case, I'm not certain -- I don't know --  
12 whether you're going to be able to meet the requirements even  
13 under CAFA of commonality, et cetera, and whether this is the  
14 best way to go forward, because as I understand it, the  
15 plaintiffs in this case are in no way wishing to go forward with  
16 anybody who has brought a lawsuit on their own as to having  
17 developed bladder cancer, okay, because of use of Actos, and if  
18 that happens, as I understand it, you're going to dismiss it. So  
19 that led me to wonder, well, I wonder if most of these people  
20 don't even have bladder cancer, and some may, some may not. Some  
21 may have fear of cancer, some may not. You know, it's a mess to  
22 get us to typicality in the similar causes of action, et cetera,  
23 if we're going under CAFA for our jurisdictional basis or  
24 standing, because standing is going to come into play as to the  
25 class action. And is that -- are Annie and Rickey sufficiently

1 representative of the whole group? I don't have any idea.

2           And then we say, well, maybe the Fund has proper  
3 standing, but if that's the case, it's not a class action.  
4 You've only got the one fund, unless they are asking to be  
5 representative of all the third-party payors across the United  
6 States, and I just cannot envision a way where that would be  
7 sufficient, sufficient commonality that you'd end up with a  
8 class -- maybe -- because it's going to depend on a plethora of  
9 companies and a plethora of companies' contracts and a plethora  
10 of contracts under those companies. Think back to Blue  
11 Cross/Blue Shield if you were here. But maybe, but I don't think  
12 so.

13           So then if we go over and say, well, all right, let's  
14 look at the RICO. We have federal question jurisdiction. Well,  
15 who has standing to bring that? Again, is the true party at  
16 interest the third-party payor or is it all of these individual  
17 people? Well, all these individual people, you know, were not  
18 the ones that necessarily paid for it except for codeductibles,  
19 et cetera. So who has standing to allege this on behalf of the  
20 public, so to speak? I don't know. So standing is a separate  
21 issue as well.

22           I didn't want to get us into this far down into the  
23 weeds until we had worked our way through everything else because  
24 it becomes overwhelming when you get to this point. You start  
25 looking at it and thinking, well, I've got a Gordian Knot here.

1 So I was trying to find a way to cut the Gordian Knot, because if  
2 we get down into, you know, filing one motion or even set of  
3 motions that have not parsed some of this out, there's no way  
4 that we're going to be able to get it all pulled together and  
5 dealt with because it is a genuine Gordian Knot.

6 So I was trying to find the linchpins which under RICO  
7 seemed to me to be the predicate act and the indictable offense.  
8 If that goes away, we don't have RICO as a basis of jurisdiction.  
9 Gone. We don't have it. RICO goes away no matter whom might be  
10 the one -- who, rather, might be the one that has the standing  
11 for it. If there's no sufficient predicate act or no sufficient  
12 enterprise or no sufficient racketeering, et cetera, then whether  
13 it's the third-party payor or whether it's the individuals, it  
14 doesn't really seem to matter. I mean, it will ultimately, but  
15 we don't have RICO here. So that's why I wanted to start with  
16 that on RICO.

17 We got all this other stuff on RICO too. We've got  
18 standing. We've got who the proper party at interest is,  
19 et cetera, you know, all of that, and who has standing here to  
20 raise this on behalf of the public, if you want. Is this a  
21 Sierra Club situation? Do you have to be a tree hugger? I don't  
22 know.

23 But if we don't have the sufficient indictable offense,  
24 it really doesn't matter. Might be a fascinating legal question,  
25 but it really doesn't matter. That's why I had thought we might

1 want to do just that and see what happens, but recognizing might  
2 not even have jurisdiction.

3 Now the Fifth Circuit is very, very firm on this. You  
4 have to deal with jurisdiction, first, period, end of discussion.  
5 But on the RICO it's federal question. So if we don't have RICO,  
6 that undoes the jurisdictional basis under RICO. So I think we  
7 are relatively safe to go that way.

8 But on the class action aspect of CAFA, that's a  
9 different matter. Then we have to get into the jurisdictional  
10 aspect of CAFA in and of itself which brings in some of the  
11 things Mr. Kruse brought up that I was going to come back to.

12 Again, remember I said the plaintiffs' class must have  
13 at least 100 members. If the genuine class under CAFA are not  
14 the individual payors but the third-party payor, we may not  
15 have -- I mean, a third-party payor, we may not have it at all.

16 But if you're saying, well, then we're going to bring  
17 in all those codeductibles and copays and all that, whoa, then we  
18 get down to Federal Rule of Civil Procedure 23 requirements,  
19 commonality, typicality, et cetera. I don't know whether we've  
20 got that, but -- and then we get to adequacy of representation.  
21 Well, I don't know what Annie and Rickey and John might be  
22 because Annie's doctor might still be prescribing it to her  
23 because she needs it. Annie's copay might be \$10, but Rickey's  
24 copay was 80 percent because he only paid Y amount toward it, and  
25 his local union shop only paid Y amount toward it, but Rickey,

1 Rickey does have cancer, bladder cancer, but he isn't going to  
2 sue, but he might later. But John, okay, he doesn't have bladder  
3 cancer. He may never get bladder cancer, and he may say, I like  
4 my Actos. I want to still take it. I don't know.

5 And then we come down to 23(b)(3) which is the type of  
6 class action. Common questions of law and fact predominate over  
7 individual questions. As to the individual, I'm not so sure. As  
8 to third-party payors, maybe so. But I'm not certain that this  
9 is going to be the superior method to deal with this question.  
10 I'm just not.

11 So, Mr. Kruse, you forced my hand to get me a little  
12 bit ahead of the deal of where I would go or was headed. I don't  
13 think it benefits or suits us to ball it all up together. So I  
14 think we certainly need to parse out the CAFA jurisdictional base  
15 and the RICO base. Okay? We may not have to go to the CAFA base  
16 right now. We may want to start with the RICO base.

17 Within the RICO basis of jurisdiction, okay, we've got  
18 to have a RICO claim. To have a RICO claim, you have all these  
19 other factors, yes, but generally you've got to have an  
20 underlying indictable offense. Okay?

21 Basically, Takeda and Lilly were selling an FDA  
22 approved drug without giving notice that there -- arguably,  
23 without giving notice that it might have certain side effects.  
24 What law did they break? And we've gone through that, what they  
25 are arguing. Okay? What's the indictable offense?



1           So it seems to me that, although on its face all this  
2 looks really, really persuasive and good, there are some issues  
3 that need to be explored, not the least of which is jurisdiction  
4 under CAFA, jurisdiction under RICO, because we have to start  
5 there.

6           So I think if we start with jurisdiction, it might  
7 limit the breadth of some of the arguments, if you will limit  
8 yourselves, and I will say, you can come back and go on, you  
9 know, file a motion as to some other issue.

10           Now if -- particularly, if one has -- if your basis of  
11 interpreting the universe around you as didactic in approach, you  
12 know, you may just not be able to stop yourself from arguing  
13 everything because you are going to follow that string all the  
14 way down, but my thought was, let's take it step by step. Let's  
15 start with that concept of jurisdiction, and let's start with the  
16 RICO concept of jurisdiction cause it's simpler and let's focus  
17 on the underlying aspects that are required under RICO, and  
18 standing is one of them, who has the right. That's the Sierra  
19 Club concept sort of. Who has standing to bring this on behalf  
20 of the public?

21           Then if you're talking about not giving information to  
22 the FDA, that is the process that there's an -- I mean, the  
23 question that there's an administrative remedy there, then it may  
24 be not necessarily preemption, but it's not criminal. It's an  
25 administrative remedy that's allowed or not allowed. Okay?

1           But then if you're talking about the doctors, then  
2 maybe so. But then, again, who has standing to raise that? Is  
3 that Annie and Rickey and John because they didn't have notice?  
4 Well, it's generally not given to them anyway. It's generally  
5 given to the informed intermediary, which is the doctor, but  
6 that's not -- they are not, you know, going to be the ones that  
7 are going to have standing to bring here or are attempting to  
8 have standing. It's the third-party payor, and do they have  
9 standing?

10           Does the third-party payor here -- are you suggesting  
11 that the third-party payor has standing, Mr. Wisner? What do you  
12 think your jurisdictional bases are, Mr. Wisner?

13           MR. WISNER: Your Honor, I believe that the issue -- I  
14 believe we've been focusing here on subject matter jurisdiction,  
15 and I believe that there are two grounds, and I think you kind of  
16 hit the nail on the head, and that is, first, there's a federal  
17 question issue because of the RICO claim which has been alleged,  
18 and there is subsequently jurisdiction under CAFA, at least, as  
19 alleged in the complaint.

20           And I think one of the reasons why procedurally this is  
21 becoming difficult is because I think we need to articulate an  
22 important distinction, and that is, the purpose in the subject  
23 matter jurisdiction, the question is on the face of the  
24 complaint, at least at the pleading stage, are there sufficient  
25 allegations to have subject matter jurisdiction for this Court,

1 and I think the complaint as it reads, for the most part,  
2 suffices the requirements of subject matter jurisdiction.

3 THE COURT: Well --

4 MR. WISNER: And then when we get --

5 THE COURT: Let me interrupt you, Mr. Wisner, because  
6 what worries me is the comma, for the most part, comma. Not  
7 arguing that point with you.

8 MR. WISNER: Fair enough, Your Honor. I redact "for  
9 the most part." I think based upon the allegations in the  
10 complaint, there is alleged subject matter jurisdiction. The  
11 question that you've raised, though, which I think is a very  
12 important one, and it's one I have specifically briefed and  
13 argued in other MDLs involving third-party payors in RICO cases,  
14 as well as, you know, the third-party payor and the consumer  
15 component which we have done in another MDL up in Boston is, I  
16 think, the question you are getting at is really a question for  
17 class certification, and that is, is the representative that  
18 we've put forward, i.e., painters and individual plaintiffs that  
19 we have, do they satisfy the typicality requirements under Rule  
20 23.

21 But I think your instincts are right, Your Honor. I  
22 think the first question for us is how do we state the claim  
23 under 12(b)(6) sufficient to proceed forward, and if we have,  
24 then we go through some discovery, I think, and then get to the  
25 bigger question of, okay, do we have a valid class action here.

1 THE COURT: Okay. Just one minute. Just one minute,  
2 Mr. Wisner.

3 Put him on mute.

4 (Off the record.)

5 THE COURT: Two things. I wanted to double check. I  
6 pulled up your RICO disclosure statement, Mr. Wisner. I wanted  
7 to make certain my memory was correct. Turn to page 1 of that.  
8 You say, "RICO Disclosure Statement March 25, 2015. Plaintiffs  
9 Painters and Allied Trades District Council," blah, blah, blah,  
10 comma, Annie, Rickey, John, Marlyon and Sylvie collectively known  
11 as plaintiffs, blah, blah, blah.

12 So you're arguing under RICO that these individuals,  
13 not just your fund, but these individuals have standing to bring  
14 a RICO claim. Am I not correct?

15 MR. WISNER: That is absolutely correct, Your Honor.

16 THE COURT: Okay. That's where I think we may have an  
17 issue. We'll see. Y'all will brief it.

18 Now the other thing, once I got that clarified, I  
19 wanted to bring up, yeah, you're right, you know, if it's a  
20 12(b), one of the 12(b) motions, we do look to the petition,  
21 et cetera. But we got those pesky little things out there called  
22 Twombly and Iqbal which I cannot tell you what exactly they mean.  
23 If you can, more power to you, but they're out there.

24 So we can't just say, like we might have been able to  
25 say in the olden days, for those of us who have been at this

1 awhile. Hey, look, on the face it's sufficient, sufficiently  
2 pled. Therefore 12(b) is no longer relevant. Okay.

3 So the problem we've got is that we've got Twombly out  
4 there and Iqbal, or whatever it is. Not Ichabod. I always want  
5 to say Ichabod because of Ichabod Crane, but Iqbal, we've got it  
6 out there, Iqbal out there. Reminds me again of Ichabod, but  
7 Iqbal out there. So, no, Mr. Wisner, it's not quite that simple.

8 Now the question then becomes, does that allow for  
9 discovery to get us to that point or not. Not so sure that it  
10 does. You've got to meet that standard under Twombly and Iqbal  
11 to deal with these 12(b) motions, and I think those are on the  
12 face of what you have. And I -- you know, so we can't just say,  
13 oh, it looks pretty on the page because we now have that. Okay.

14 So, again, I come back to why I wanted to work our way  
15 up to this point because this is where it all comes together, in  
16 my opinion, and creates a Gordian Knot. So either we are stuck  
17 with a Gordian Knot that we're going to spend 15 years untying,  
18 and for those of you who have been in this case and know me,  
19 that's not going to happen, or we're going to find a way to cut  
20 the Gordian Knot.

21 Now I think, again, we have to start with jurisdiction,  
22 because if I don't -- this court doesn't have jurisdiction,  
23 doesn't matter. And we've got to look at standing, because if  
24 standing is not there, and we have a generically referenced  
25 Sierra Club case, and we don't have anybody but tree huggers by

1 way of principle, but they never went and walked in the forest.  
2 I don't know whether Annie and these people walked in the forest  
3 or not. They didn't pay for it. They didn't act upon the hidden  
4 information, i.e., prescribe it. They took it because their  
5 doctors prescribed. I don't know.

6 Now I'm not suggesting, Mr. Wisner, that you might not  
7 have argued this elsewhere and you might have prevailed. I'm not  
8 suggesting you might not prevail here, but I'm going to give you  
9 one anecdotal caution.

10 The government -- we have the Atchafalaya Basin out  
11 here, and the government was engaged in a watershed program, and  
12 they couldn't make up their mind whether it was going to be a  
13 complete taking of this property or only a portion of it. And so  
14 I suggested to them they needed to make up their mind so that we  
15 could determine the amount of compensation, if any, et cetera.  
16 And when I became problematic, they sent down the big guns from  
17 DC, a gentleman by the name of Mr. Williams who at that time was  
18 a part of that branch, if you will, of the government.

19 And I told him, I said, Mr. Williams, you know, I  
20 realize you've been doing this all across the country and it  
21 hasn't been a problem, but to me it seems to be problematic if we  
22 don't know whether it's a complete taking or just a partial  
23 taking because, you know, the landowners may not object if it's a  
24 partial, but they might object to a complete. But if they can't  
25 object because you're going to expropriate it anyway, we need to

1 know how much is proper payment.

2           And he again brought up that in Oklahoma -- I said,  
3 well, I understand that, Mr. Williams. You know, indulge me here  
4 that, you know, we might do things a little differently here  
5 because I really think this is a threshold issue that has to be  
6 dealt with. And the mere fact it didn't seem to be in Oklahoma  
7 does not govern whether it seems to be a problem here or not.

8           So we went in forward. We ultimately tried to get them  
9 to do it. The government wouldn't do it. And so I filed an  
10 order enjoining the Army Corps of Engineers from doing anything  
11 within the Atchafalaya Basin water district until they made this  
12 distinction. Lo and behold the general who couldn't make up his  
13 mind and on whose desk this distinction question had been sitting  
14 made up his mind, and we moved forward, and that's been going  
15 on -- that project got completed and we're now, actually, in  
16 another one.

17           Mr. Williams ultimately moved from that branch to  
18 another branch. I think the civil rights division, I don't  
19 remember, and he was making his rounds, you know, closing up shop  
20 in all the different places, and he came by and asked to see me  
21 on a personal matter. I said, sure. He came on in and sat down  
22 and he grinned. He said, Judge, I handle these cases all over  
23 the United States, and everywhere I went the judge started out  
24 with "we do things a little differently here," or "this is how we  
25 do it," so forth. He said, "You know, Judge, you were the only

1 one who really meant it."

2           So I understand and appreciate that you might have been  
3 successful in other MDLs. I'm not arguing that point. But what  
4 I'm going to ask you to do is focus on the questions that we have  
5 here, in the way it's been raised here, and under the law that  
6 you have argued here whether there's standing, whether there's  
7 jurisdiction, who the true party at interest is. Just as I did  
8 not wish to hear from, you know, earlier that Lilly had been  
9 indicted before. Yeah. Merely the fact they robbed a bank  
10 before does not necessarily mean they robbed a bank here.

11           So I'm not suggesting there may not be case law out  
12 there, but my immediate bosses are going to be the Fifth Circuit,  
13 and I'm going to be interested in what the Fifth Circuit has said  
14 on some of these questions. And the bottom line is, Mr. Wisner,  
15 the Fifth Circuit reads RICO perhaps a little more narrowly than  
16 some other places, and it might just be that if you think, you  
17 know, if your claim is there and it's viable, it might be one  
18 that you're just going to have to take up to the Supreme Court on  
19 the split of the circuit if it's one of those issues. And that's  
20 why I go through that long discussion because I got to deal with  
21 my immediate bosses, and they are the Fifth Circuit Court of  
22 Appeals, and the Fifth Circuit Court of Appeals just as a general  
23 matter, they don't like RICO and they don't like class actions to  
24 be overly broadly read. I don't know whether they are right or  
25 wrong or indifferent, but as a general matter, you know, that's



1 kind of the case.

2           So when you start researching it, if you would, you  
3 know, kind of look to the Fifth Circuit case law first. Well,  
4 first, of course, Supreme Court. If there's Supreme Court on it,  
5 please, let's go there. If not, please go to the Fifth Circuit,  
6 and then if there's nothing on it in the Fifth Circuit, please  
7 tell me there's nothing on it in the Fifth Circuit and then argue  
8 the Seventh Circuit, argue this, argue that.

9           Same thing with the defendants. Don't get into  
10 Fitzgerald or whatever over in the Seventh unless the Fifth, you  
11 know, hasn't spoken kind of thing because that's where -- let's  
12 get it out of the abstract, Counsel, and let's get it into the  
13 particular of the case that is now before this Court under the  
14 petition and complaint filed, the disclosures made, and the  
15 applicable law, preferably, Supreme Court; if not Supreme Court,  
16 Fifth Circuit; and in the absence of Fifth Circuit, the other  
17 circuits. Or if you think the Fifth Circuit is just flat-out  
18 wrong, tell me what the Fifth Circuit says and say, in nice  
19 formal legalese, and we think the Fifth Circuit is just flat-out  
20 wrong.

21           I will tell you ahead of time, not likely to go against  
22 the Fifth Circuit unless the Fifth Circuit is at odds with the  
23 Supreme Court, which you will have made your record if you feel  
24 you end up having to go there. Both sides. So that is the  
25 cautionary tale I would give for when you write your briefs.

1 Okay?

2 Now, back to where you were, Mr. Wisner. I want you to  
3 please focus on party of interest and standing because, under  
4 your RICO disclosure, you don't -- you put the Fund in and of  
5 itself, and then you do Annie and Rickey, et cetera, under RICO.  
6 I don't know if they are the -- if they have standing to raise  
7 this under RICO. I don't -- I don't know. I mean, at that point  
8 my mind just started like that robot going eh (phonetic), you  
9 know. It was like, this is overload. And what came to me at  
10 that point was we got ourselves a Gordian Knot. We're going to  
11 have to talk about this.

12 Now what I'm going to ask you to do, meaning the  
13 collective you, is work with the Special Master to figure out how  
14 we are going to, in a meaningful, logical, segmented way, get  
15 these very real questions before the Court in a manner in which  
16 they can, in fact, be addressed without our falling into a morass  
17 and ending up, you know, tied up in knots of the Gordian Knot.

18 So I am open to suggestion on that point. And, I mean,  
19 I can keep talking about all these other aspects as well, but I  
20 think y'all get the drift. I still have a whole 'nother stapled  
21 portion of things that I can raise, but I think y'all get the  
22 drift.

23 So which way do you want to go forward, defendants,  
24 cause you'll be the ones who will be filing? And Mr. Kruse, I  
25 really would prefer we not go into a motion that is 189 pages

1 with everything balled up together because I don't have time to  
2 deal with that.

3           So do you agree or do you not agree, and I really am  
4 genuinely asking for your thoughts, of whether it might be of  
5 benefit for us to take this first round of motions -- and  
6 Mr. McConnell and Mr. Dugas as well, if you want to chime in --  
7 on the RICO, let's talk about jurisdiction, and we'll talk about  
8 jurisdiction on the RICO, and that's going to determine whether  
9 or not, you know, the linchpins, if you will, of RICO are there  
10 and whether there's standing under RICO for Annie and Rickey and  
11 Marlyon as opposed to the Fund, but be careful, because if you  
12 say it's a Fund matter, and it's not Annie, Rickey, et cetera,  
13 then we've got a problem with CAFA as to the RICO. It's a  
14 catch-22.

15           And you will learn, all of you who have not been here  
16 before, I'm an equal opportunity fusser, and I don't hide stuff.  
17 If there's a catch-22 or a trap, I'm going to point it out to you  
18 so you don't step in it unknowingly. But there's a trap there  
19 for you, I think, for the plaintiffs.

20           MR. KRUSE: Your Honor, I would --

21           THE COURT: And who is speaking?

22           MR. KRUSE: Your Honor, this is Layne Kruse.

23           THE COURT: Okay.

24           MR. KRUSE: And I appreciate -- I think you made a good  
25 suggestion with respect to segmenting it, and we can work with

1 the Special Master. But I think this RICO, RICO jurisdiction  
2 that would include the elements of standing under RICO,  
3 especially, I'm troubled just like I think we discussed about  
4 these individuals claiming they have standing, and I think we  
5 could address those, those issues first, and we could work this  
6 out with the Special Master and set up a briefing schedule, Your  
7 Honor. And we may take a little more than 25 pages, but I don't  
8 want a lengthy brief for this, if we could do this, and maybe we  
9 can discuss that with the Special Master, but --

10 THE COURT: Well, you can, but I'll tell you this,  
11 Mr. Kruse, that 25-page limit, I'm going to try to hold your feet  
12 to the fire in the following particulars. It argues to motivate  
13 you to segment the motions, doesn't it?

14 MR. KRUSE: Good point.

15 THE COURT: Yeah.

16 DEPUTY SPECIAL MASTER RODRIGUEZ: And you know, one of  
17 the things that we've done before -- we did last year in the  
18 earlier briefing -- I'm not sure. I think maybe Jennifer  
19 Hoekstra is the only one on the phone who might have -- might  
20 remember this, is to the extent that you have multiple rounds of  
21 motions or you want to do motions in different pieces, you can do  
22 one collective, sort of put your facts in one brief that sort of  
23 is the hook, the --

24 THE COURT: Common, it's common as to all questions.

25 DEPUTY SPECIAL MASTER RODRIGUEZ: The common factual

1 allegations or assertions that are going to apply to all of the  
2 following briefs. And so we can work on that. There's a way to  
3 do that so that you don't have to repeat the same things over and  
4 over and over again.

5           So we've got lots that we're dealing with, lots of  
6 things that we can do. I'm going to send an E-mail out in a few  
7 minutes or when we're done here. I'd like to know everyone's  
8 availability for tomorrow and Thursday so we can try to, while  
9 it's fresh in everyone's mind, set up that briefing schedule. So  
10 I'll send that E-mail out shortly.

11           THE COURT: Okay. So I think -- and this is directed  
12 to Mr. Wisner. I think it will be the defendants who will be  
13 filing motions. Mr. Wisner, I'm assuming you're not  
14 contemplating that you're going to be filing -- wish to file any  
15 motions at this stage, correct?

16           MR. WISNER: At this time, Your Honor, no, although --  
17 no.

18           THE COURT: So we're talking with the defendants.  
19 Okay. So I would suggest that we limit it to Rule 12, 12(b) type  
20 motions. I would suggest that we focus on RICO first. I would  
21 suggest that under RICO, because RICO is what gives us the  
22 federal question jurisdiction. Under RICO we look to and focus  
23 on standing and -- of the underlying predicate act and those  
24 other three or four things that come up there, too, Mr. Kruse. I  
25 just didn't focus on those because they are more factual based

1 rather than legal analytically based. Okay. You've got  
2 information and facts that you can argue to be seen in one way  
3 versus the other, as to some of those other elements.

4           However, what the indictable offense is, that's a  
5 different matter because we've got to deal with the criminal law  
6 there.

7           So, Ms. Rodriguez, I would suggest we focus on those as  
8 our entrée here. I suggest we limit it to that, and then put it,  
9 you know, up front and center, that this is phase one of the  
10 motion. It's limited to this. It in no way prejudices their  
11 right to bring up other aspects, but as to these legal aspects  
12 that are being raised, they do not have the right to come back  
13 and reurge unless there's a change of law or change in  
14 circumstance. And let's see if we can't start whittling this  
15 down. You know, we got to bleed the rhinoceros, guys and gals,  
16 so this is -- we're going to start, you know, this is our first  
17 run at bleeding this rhinoceros.

18           Then when we see what happens with that, we'll have  
19 another conference, and we will see where we're going to go from  
20 that. And then eventually we'll get to whether or not we need to  
21 do individualized discovery.

22           However, Ms. Davis.

23           MS. DAVIS: Yes, Your Honor.

24           THE COURT: You can give some thought to what  
25 discovery, if any, that we can get this, shall I say, paper

1 discovery that we can be doing at the same time. In other words,  
2 if in fact it's relevant whether or not Betty and -- Annie,  
3 rather, and Rickey and John had copays or not, if those kinds of  
4 things are relevant and Mr. Wisner should know that. He filed  
5 this complaint, and he's certainly done his due diligence, and  
6 I'm rather certain, given his articulate defense of his position,  
7 knows that. So why don't you talk with him and see what he's  
8 got.

9 And Mr. Wisner, as a general proposition, in the  
10 vernacular of the south, whatever you got you give to her. Okay?

11 MR. WISNER: Yes, Your Honor.

12 THE COURT: Cool beans. Also, I'm not certain,  
13 Ms. Davis, as I think about it, that we're going to have to have  
14 medical authorizations here. I don't know. We're not making a  
15 claim for cancer. We're only making it for the fact that they  
16 bought Actos. Doesn't really matter. So I don't think there's  
17 any need for medical authorizations or any of that because that's  
18 not the claim here. That's what makes it so interesting as to  
19 who the true party at interest is, because we're not talking  
20 about these people getting cancer. We're talking about they  
21 bought a defective widget, and it was defective, whether it gave  
22 them cancer or broke down and wouldn't mow their lawn, and it was  
23 defective because they lied about it.

24 See, that's what we're talking about here. It's a  
25 widget. That's it. It's a widget and they lied about it and

1 used the mail and the internet to lie about this widget being  
2 able to mow the lawn. They went out and bought it, but really  
3 they didn't. They went out and bought it, but really it was  
4 their husband who paid for it, so it's really the husband that  
5 has, i.e., here the third-party payor. So I don't think,  
6 Ms. Davis, there's any reason we would need to get medical  
7 authorizations here or get their medical records. Doesn't  
8 matter. All we need to know is did this third-party payor buy  
9 Actos. And it doesn't really matter, quite frankly, on a 12(b)  
10 motion -- maybe later it will -- but on a 12(b) motion whether  
11 they bought it on behalf of Annie or Rickey or John. They just  
12 bought the Actos. They bought these widgets that they were told  
13 would mow the lawn and they won't mow the lawn, or they mow the  
14 lawn and they cut you or something. It's really more than not  
15 mowing the lawn because it worked. It mowed the lawn. We've had  
16 a couple of people say, I don't want to be a part of all this  
17 because I like my Actos and I want to keep it.

18           So this widget mowed the lawn, but what happened is it  
19 also might cut your foot off as a defective widget, I guess. But  
20 when you talk about that, the problem is it's not defective.  
21 They just didn't give you notice that it might cut your foot off  
22 if you stick it underneath the blade. That's what we're talking  
23 about. It's not that it's defective. It's that they didn't tell  
24 you that, if you are stupid enough to stick your foot underneath  
25 the blade, your toe can get cut off.



1           Now I'm not suggesting these people were stupid enough  
2 to take Actos. That's not my point at all. I'm just running the  
3 analogy. And don't get off the path here, people. This is not a  
4 cancer case. This is not a medical case. This is a product that  
5 was promoted and marketed which under the law on its face, once  
6 it had FDA approval under the law, it was legally marketed under  
7 the law that -- God bless.

8           DEPUTY SPECIAL MASTER RODRIGUEZ: Thank you.

9           THE COURT: You're welcome -- that had a possible  
10 propensity to cause some other consequence that wasn't warned  
11 about. So, again, it's not even that the widget wouldn't mow  
12 your lawn, because the widget mowed the lawn really, really well,  
13 actually. It's when it was mowing the lawn for some people --  
14 this is a better way to put it, better analogy. For some people  
15 who had really big feet -- not for everybody -- but for some  
16 people who had really big feet, you need to warn that, if you've  
17 got really, really big feet, you might not want to use this model  
18 of widget because your toe can get cut. You might want to use  
19 another model of widget or another kind of widget. That's what  
20 we're talking about.

21           So, Ms. Davis, I don't see all this medical that we  
22 went into with Blue Cross/Blue Shield being at issue here. So  
23 I'm not certain --

24           MS. DAVIS: Okay, Your Honor. Sorry. We'll put our  
25 heads on, our thinking caps on, then, on that front.

1 THE COURT: Good. All right. So, all right. Work  
2 with the Deputy Special Master. Get a time set up.

3 Carmen, I don't -- maybe paper discovery, you know, so  
4 we don't lose the time during the motion practice, but nothing  
5 that's going to cost anybody a whole lot of time and money in  
6 case we don't have a case here. Then let's segment. He's  
7 identified these issues. Let's segment them, find a way to deal  
8 with threshold issues straight up, if we can limit it to just  
9 that, get some language that's laid up that says, the mere fact  
10 they don't raise this element here, they can still raise it  
11 later, but if they do raise it here, they don't get to revisit  
12 it, and let's get a briefing schedule set up and a response  
13 schedule set up.

14 Mr. Kruse, I'm not going to -- I'm going to hold your  
15 feet to the fire on the 25 pages unless she specifically says  
16 that you can have more.

17 I do want, Carmen, them however in his briefing to  
18 segment each element -- each issue with a title, predicate act,  
19 indictable offense, so it's not all balled up together.  
20 Mr. Kruse tends to want to just get going on a roll and he's got  
21 it going so well he doesn't want to punctuate it. I want it  
22 segmented out and punctuated. I'm not saying it's a bad thing.  
23 I just would prefer that you do it.

24 Mr. Wisner, when you respond, if at all possible,  
25 please respond in kind. In other words, if he says, predicate

1 act, and he does that first, please, you know, give the  
2 commonality, if you agree or disagree with the common factors,  
3 like we did before. Jennifer can explain. See, your PSC can  
4 help you, Mr. Wisner. Go talk to them. But at any rate, get the  
5 commonality. You all agree to that, and I can use that from here  
6 on out.

7 But then if Mr. Kruse has started with predicate act,  
8 please, you start with predicate act. Limit your response to  
9 predicate act. Then if his next subheading is standing, I don't  
10 know, however he does it. If it does not prejudice you, please,  
11 do it in that fashion.

12 Now, before, Carmen, we start a briefing schedule, I  
13 want Mr. Wisner to go through the exercise of the outline of  
14 what's really left there and what isn't after he went through the  
15 exercise of doing the disclosures.

16 All right. Anything else that we can discuss now that  
17 can help get this on track?

18 MR. McCONNELL: Your Honor, this is Stephen McConnell  
19 on behalf of Lilly. I just want to point out that you seem to  
20 have arrived at a very sensible plan without me saying a word,  
21 and I'm not sure I want to think too much on what that means.

22 THE COURT: Well, I think that's good. If I were you,  
23 I'd just hide behind that log, you know.

24 MR. McCONNELL: Will do, Your Honor, thank you. We're  
25 totally on board with the program.

1 THE COURT: All right. Anything else that we can do to  
2 make certain we have this up and running?

3 MR. WISNER: Your Honor, this is Brent Wisner on  
4 behalf -- sorry.

5 THE COURT: Go ahead.

6 MR. WISNER: Your Honor, this Brent Wisner on behalf of  
7 the plaintiffs. I just wanted to raise one other point that  
8 occurred to me while we were having -- during these discussions,  
9 and I think it's relevant because it goes to the heart of the  
10 question that the Court has been asking, and that is the issue of  
11 jurisdiction.

12 I just want to point out, also, that we have two  
13 diverse -- we have diversity of parties amongst painters as well  
14 as the defendants and their individual claims. We have, I think,  
15 in excess of \$75,000. So even outside of CAFA, there is  
16 potentially an issue for subject matter jurisdiction even in the  
17 traditional context.

18 THE COURT: As to individual claims and as to the Fund  
19 and Takeda and Lilly, but not as a class action, correct?

20 MR. WISNER: Correct, Your Honor. I was just speaking  
21 on alternative grounds that wasn't in our briefing.

22 THE COURT: Yeah, that's an interesting point because  
23 we might be left with just plain old vanilla diversity, but for  
24 you to argue that point, you're in a bit of a trap, too, because  
25 then you're arguing against your class action concept.

1           This is just fun. I mean, you know, for those of you  
2 who have not been with me before, I love a good legal Rubik's  
3 Cube. But if you take that argument, you know, I think it would  
4 have to be perhaps your last ditch effort, you know, to hold the  
5 moat and keep the castle from falling, because to argue that you  
6 are destroying, or certainly damaging your class action argument.  
7 But cool, I just hadn't gotten down to that last part and it  
8 might be there. I think you probably do, but that would be an  
9 individual straight-up Painters Union claim against Takeda and  
10 Lilly for -- but the question then is for what? Then we come  
11 right back to that RICO. For what? For you having to buy Actos  
12 for these people when it's an FDA approved drug and the doctors  
13 prescribed it, and even after they learned of the notice, they  
14 flat-out still prescribed it. I don't know. I'm going to be  
15 real interested to see what Mr. Dugas has to say about that. I  
16 realize he can't speak today for the other, but having been a  
17 former U. S. Attorney, I'm just going to be interested to see  
18 what comes out of that.

19           MR. DUGAS: I have quite a few observations, Your  
20 Honor, which I'll state in our briefing.

21           THE COURT: Yeah, David, we can't understand you. So  
22 your few observations, I caught that. We'll save those to  
23 another day when you don't have the throat problem, but --

24           MR. DUGAS: Thank you, Your Honor.

25           THE COURT: Yeah, so we'll save those. But this is

1 just interesting stuff. So, now, that all having been said, this  
2 is my last caveat.

3 I do not want the plaintiffs in this matter to come  
4 away with an improper impression. I don't have a dog in the  
5 fight either way as to who wins or who doesn't. I just see these  
6 issues, and these issues, I think, need to be addressed. That's  
7 number one. Okay?

8 Number two, neither do I believe that you have a  
9 jurisdictional basis to be here because I've let you sit here for  
10 so long. I just -- it was not time to turn my focus and  
11 attention to these ones alleging, you know, class actions. It is  
12 now time.

13 Now, last thing. Please remember that, at some point,  
14 we will come back and revisit the individual consumer protection  
15 claims within the five states and the allegations of a class.

16 Whether, Carmen, we do that in this or we want to do it  
17 after this, I don't really care, but when we do it, I think  
18 Mr. Andrus and his California claim need to be involved.

19 Okay. Good day, ladies and gentlemen.

20 (Hearing concluded.)

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

22 I, Cathleen E. Marquardt, RMR, CRR, Federal Official Court  
23 Reporter, do hereby certify this 3rd day of April, 2015, that the  
24 foregoing pages 1-94 constitute a true transcript of proceedings  
25 had in the above-entitled matter.

/s/ Cathleen E. Marquardt  
Federal Official Court Reporter