

1 UNITED STATES OF AMERICA
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 - - - - -

5 IN RE:) Case No. 1:08GD50000
6 GADOLINIUM-BASED) MDL No. 1909
7 CONTRAST AGENTS)
8 PRODUCT LIABILITY)
9 LITIGATION)

10 - - - - -

11 TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE
12 HONORABLE JUDGE DAN AARON POLSTER,
13 JUDGE OF SAID COURT, ON TUESDAY, FEBRUARY 16,
14 2010, COMMENCING AT 4:35 O'CLOCK P.M.

15 - - - - -

16 Court Reporter: GEORGE J. STAUDUHAR
17 801 W. SUPERIOR AVE.,
18 SUITE 7-184
19 CLEVELAND, OHIO 44113
20 (216) 357-7128

21 - - - - -
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: This is a teleconference in the Gadolinium MDL concerning an issue that has come with respect to the deposition of Dr. Mueller, M-u-l-l-e-r, which is to take place in March out of the country. All right.

I would like to get very succinctly what it is — Dr. Mueller is a fact witness, correct? He is not an expert witness?

MR. HAWAL: Correct.

THE COURT: From the plaintiffs, Bill Hawal, correct?

MR. HAWAL: Yes, your Honor, it was.

THE COURT: All right. What are you planning to ask him concerning the Saebo Report.

MR. HAWAL: Consistent with Dr. Saebo's testimony that he collaborated in much of the data, and he affirmed her conclusions in the report. We simply want to ask him whether or not the methodology she used and whether the conclusions she used were, in fact, correct in those respects and also what the involvement was with Nycomed at the time because he was one of their hired consultants.

THE COURT: Let me slow down. He is a fact witness?

1 MR. HAWAL: He is a former consultant who is
2 an expert in relaxometry and was doing studies --

3 THE COURT: Bill, he may be expert on
4 relaxometry, but he will not be giving any testimony on
5 Nycomed in this case.

6 MR. HAWAL: Well, your Honor, to the extent
7 his opinions are in that report, that's the extent to
8 which we intend to ask him any expert type -- he is kind
9 of a hybrid. He was doing some work for Nycomed, and
10 that's the extent to which we intend to ask him about.

11 THE COURT: If you are asking him as an
12 expert, that's different. You have to designate him as
13 an expert, and then this is a different discussion. I
14 don't understand what he is doing.

15 MR. HAWAL: Well, I believe it is as if he
16 were an employee of Nycomed. He was their agent and
17 doing some work with Omni Scan. He was doing some
18 testing to determine its stability and why it was
19 behaving differently from other products, and we intend
20 to get into that, those types of issues with him, and
21 part of that is contained within the Saebo Report.

22 THE COURT: Well, this isn't making sense.
23 If you are going to call him -- someone else is talking
24 in the background. Is that relative to this case?

25 MS. LEVINE: Sounds like it is in an

1 airport.

2 MR. WEINBERGER: This is Peter Weinberger.

3 I am in an airport.

4 THE COURT: I thought it was someone else.

5 If he is talking — if he is going to be
6 testifying as a quasi expert, you need to designate him
7 as an expert.

8 MR. HAWAL: Your, Honor, we have taken the
9 depositions of umpteen GE former employees, former
10 consultants, all of whom have provided quasi expert
11 testimony, but they are not — I mean — I mean, we are
12 not — he is not a hired expert. He is a former
13 consultant, a former agent of Nicomed, and it is only
14 with respect to his capacity as a former consultant who
15 was doing expert type of analyses that we want to get
16 into what type of conclusions and analyses he reached as
17 a result of that consultation work.

18 THE COURT: But how is that relevant what
19 conclusions he reached in 1993.

20 MS. LEVINE: It is difficult to hear the
21 Judge, Peter.

22 Thank you.

23 MR. HAWAL: Your Honor, it is relevant
24 because back in 1994 there were considerable concerns
25 raised by not only Dr. Saebo and Dr. Mueller but many

1 others inside and outside the company about the safety
2 and stability of Omni Scan and its potential and release
3 of free Gadolinium and was studying that issue.

4 THE COURT: Okay. You can ask him — what I
5 don't understand why he needs Saebo's report. I don't
6 think you can ask a fact witness whether he agrees or
7 disagrees with some other expert's conclusions.

8 MR. HAWAL: Well, your Honor, the data in
9 the report according to Dr. Saebo was his. She was
10 collaborating with him —

11 THE COURT: Bill, you can ask him anything.
12 You can ask him what he did.

13 MR. HAWAL: She was a technician at the
14 time. She was doing the work under his supervision and
15 his approval, and it was actually a lot of his work that
16 she was incorporating into that report —

17 THE COURT: Has he ever seen this report?
18 Hold it, hold it.

19 MR. HAWAL: — that he collaborated with her
20 on on that report or any other work that he was doing —

21 THE COURT: Has he ever seen this report?
22 Has he ever seen the report?

23 MR. HAWAL: I don't know. I have never
24 spoken to Dr. Mueller. I suspect he has in the past.

25 THE COURT: All right. Well, look, this

1 will be very simple: I want it propounded — if he has
2 seen the report in the past, you can send it to him now.
3 He will sign, the confidentiality order, and you can
4 depose him on it.

5 If he has never seen this thing, however, I
6 don't think it is appropriate to send it to him and have
7 him study it, have him study it. You can certainly
8 cross-examine him about anything he did, anything he
9 provided, and what his conclusions were.

10 MR. HAWAL: Well, your Honor, if you have
11 seen the report, you will notice that there are the
12 relaxometry graphs in the body of the report, and I
13 believe that it is unequivocal that Dr. Saebo testified
14 that those are actually his graphs.

15 THE COURT: All right.

16 MR. HAWAL: I mean —

17 LAW CLERK: You can show him the graphs. If
18 Dr. Saebo says that any of the graphs or the data was
19 Mueller's, you can send him the graphs.

20 MS. LEVINE: This is Heidi Levine, your
21 Honor.

22 If I may, the graphs of Dr. Mueller and
23 Dr. Mueller's work, that was an exhibit to our response
24 brief. That was produced in the litigation, and under
25 the protective order he is an appropriate recipient

1 because he is the author of it, and we agree with
2 everything you said and all the questions you have asked,
3 your Honor, are exactly what is appropriate here.

4 And we believe that it is appropriate to ask
5 Dr. Mueller at the deposition, not in advance, but at the
6 deposition, as you would with any other non party fact
7 witness, whether they are familiar with the document, and
8 if he says yes, then they can show him, and he can sign
9 the protective order at the deposition.

10 And if he says no, they can ask him all the
11 questions they need to ask him about his work, but there
12 is not a shred of evidence in Saebo's testimony or in the
13 documents produced that he has ever seen this report, had
14 anything to do with the drafting of it.

15 The facts are that he provided the data to
16 Dr. Saebo. They did work together at some point, and
17 thereafter, she was asked by Nycomed to put together a
18 report that included some of his data, but there is no
19 evidence that she showed it to him, worked with him on
20 it, and we are concerned that Mr. Hawal and others will
21 treat Dr. Mueller as they said, as a hybrid quasi expert
22 and ask about opinions not only about the Saebo Report
23 but everything else about the release of free Gadolinium
24 and otherwise. And we think it will come up at the
25 deposition, and we will have an issue, and this is just

1 the beginning, the tip of the iceberg. And if your Honor
2 will recall, one of the key documents that we discussed
3 with your Honor about confidentiality —

4 THE COURT: I know, but my order was very
5 clear. The parties could use them freely in depositions.

6 MS. LEVINE: Sure. Under the Guidelines of
7 the heavily negotiated protective order, and that
8 provides for three parties to get the depositions,
9 treating physicians to sign the protective order, authors
10 or recipients of the documents or experts —

11 THE COURT: Look, this is what I want: I
12 want someone to direct a question in writing to
13 Dr. Mueller. Did he — has he ever seen this report?

14 MR. HAWAL: Your Honor, here is the answer
15 to the question. Contrary to what Heidi just told you on
16 page 23 of Karen Saebo's deposition, which we have
17 appended to the letter, the question was asked: "Did he
18 openly have any role in the drafting or review of your
19 report, which is Exhibit 4?

20 "He was involved in going over the data, and
21 a lot of the figures presented in this report are his."

22 And the question then was asked "in terms of
23 the figures you are talking about the charts or graphs
24 that are seen in this report?

25 "Answer: Yes. All of the end MMR data

1 profiles presented in this report were obtained in his
2 laboratory."

3 Your Honor, I don't see how it could be any
4 clearer that Dr. Mueller was intimately involved in the
5 preparation and inclusion of the data in that report
6 contrary to what Heidi just told you.

7 MS. LEVINE: It doesn't say anywhere in that
8 testimony that he was involved --

9 THE COURT: Why does it matter? He sees the
10 report if he signs the confidentiality order. This was
11 seen 16 years ago and Saebo testified she got most of her
12 data from him. That's how I read the deposition that
13 way, so I am satisfied that she got a lot of it.

14 MS. LEVINE: Our issue is a few points:
15 One, we have a concern with this document getting out,
16 regardless of the protective order a month in advance of
17 the deposition. It is a document and the subject of
18 discussions from the Business Week Reporter and
19 elsewhere, and we do have concerns about documents
20 getting out in the public that are confidential. We
21 don't see a need for a fact witness to see a document an
22 entire month in advance.

23 THE COURT: This is what is going to
24 happen --

25 MR. CALABRESE: Let her finish.

1 MS. LEVINE: A month in advance.

2 THE COURT: What else?

3 MS. LEVINE: There is no need to see it a
4 month in advance. We view the fact the plaintiffs want
5 to show Dr. Mueller a month in advance, that they want
6 to — they want to obtain his expert opinion, which is
7 not properly the subject of a fact witness deposition,
8 and that the only reason you show a witness something in
9 advance is for them to study it, to give opinions, and he
10 can't properly give opinions at his deposition.

11 THE COURT: Maybe he can. If he did the
12 work he can give an opinion on his own data.

13 MS. LEVINE: You will see that again in a
14 motion in limine to exclude opinions of a non expert
15 witness. I disagree that he is allowed to give opinions.
16 He can talk about his recollection of the facts and what
17 he intended.

18 MR. HAWAL: Your Honor, what is going to
19 happen, the defense is going to say that Dr. Saebo's
20 report is unreliable, and that her data is based upon
21 poor methodology and, therefore, should be excluded —

22 THE COURT: Wait. Who is going to testify?
23 Wait a minute.

24 MR. HAWAL: — taking the deposition of the
25 expert whose data is in the report.

1 THE COURT: Wait. This is my report. Is
2 Dr. Saebo going to be an expert witness?

3 MR. HAWAL: No. Dr. Saebo — I'm sorry. I
4 didn't mean to interrupt.

5 Dr. Saebo was already deposed, and she
6 expressed — she essentially told what she did and who
7 she did it with and the conclusions she reached in her
8 report, but we need Dr. Mueller, who was actually the
9 scientist who did most of the work, according to
10 Dr. Saebo, that the data that went into that report —

11 THE COURT: Look, look.

12 MS. LEVINE: Your Honor, Dr. Saebo —

13 MR. HAWAL: I am not done, Heidi.

14 THE COURT: I am done. Neither of these
15 people are experts. The only issue is: What did GE know
16 in 1993, so it is not coming in for the truth of the
17 matter. People's opinion is irrelevant. All right.

18 This is — this is information that GE knew.
19 GE can say someone else; they can call an expert and say
20 we discredited this. Saebo didn't know what she was
21 talking about, but it is relevant that GE knew about it.
22 So that's how it comes in, but I don't think — I mean,
23 Mueller's opinion on it, I don't think he is competent to
24 express an expert opinion if he is not an expert.

25 MR. HAWAL: Well, he has enormous expertise

1 in the area, your Honor. He was doing —

2 LAW CLERK: Then designate him as an expert,
3 Bill.

4 MR. HAWAL: To give his validation of what
5 he was telling GE at the time and should have had
6 reliability to them.

7 THE COURT: Well, wait a minute, wait a
8 minute. That's — that's what you can't do. You can get
9 him to testify to what he found and what he told GE.

10 MR. HAWAL: Okay.

11 THE COURT: All right. And you can get him
12 to say, yeah, what I gave was accurate. This was my
13 data.

14 MR. HAWAL: For him to have to study what he
15 may have put in that report, in a 36-page report because
16 Ms. Levine is worried about his —

17 THE COURT: All right. I will tell you —

18 MS. LEVINE: It is not Dr. Mueller's report.
19 There is nothing for him to study. They just send him
20 his document that he authored that is in the past.

21 THE COURT: All right. Look, I am going to
22 cut through this. He doesn't need one month, but he
23 needs more than five minutes. So what day is his
24 deposition?

25 MR. HAWAL: The 18th of March, your Honor.

1 THE COURT: March 18th. All right. That's
2 a Thursday. What time, 9:00 a.m.?

3 MR. HAWAL: 7:30 in the morning.

4 THE COURT: 7:30 in the morning. Well —

5 MR. HAWAL: Your Honor, if I may just point
6 out, you in your order said plaintiffs may use the
7 documents to support their cases and may have use of the
8 documents to the post facto —

9 LAW CLERK: That's fine. You will get the
10 document on Tuesday, March 16th.

11 MS. LEVINE: But, your Honor, only if he is
12 asked the question whether he seen it and he says yes.
13 Is that right? Because if he says no —

14 THE COURT: No. At this point, he will get
15 the document if he is willing to sign the confidentiality
16 stipulation. If he is not, he doesn't get it at all.
17 All right?

18 MS. LEVINE: Is there going to be a question
19 to him in advance of whether he has seen it or not so
20 that, at least, we know going into the deposition it is
21 something he has seen?

22 THE COURT: If someone wants to pose that in
23 advance, that's fine, but I have read Saebo's testimony
24 and a lot of the data are Mueller's, and she said that
25 she discussed a lot of it with him. So whether he has

1 seen the actual document, he certainly is familiar with
2 the data and her conclusions.

3 So I am going to let him look at it 48 hours
4 in advance if and only if he signs the confidentiality
5 stipulation, and then, obviously, he gives the document
6 back after the deposition. He doesn't keep it, and he
7 doesn't keep any copies of it.

8 MR. HAWAL: Thank you, your Honor.

9 THE COURT: That's what we will do, and
10 again, you know, I know experts can express opinions.
11 All this guy can do is say what he did and what data —
12 what he passed on to GE. He cannot offer expert opinions
13 on anything. He cannot testify as an expert. He is a
14 fact witness. If he did studies or generated data, he
15 can say this is what I did, and this is what I gave to my
16 boss, whoever my boss was. All right? And that's it.

17 MR. LYSAUGHT: We will be producing
18 Dr. Mueller, who is a consultant to Bracco, in the
19 litigation, and I want to make sure we are complying with
20 the Court's orders and understand what the Court is
21 saying.

22 I may read this differently, but it seems
23 Dr. Mueller can testify this is a fact, this is the
24 opinion he held back in 1994. The fact that was his
25 opinion points out, you know, whether the opinion is

1 truthful or not in other issues.

2 THE COURT: Well, no, I don't think his
3 opinion is relevant. He can testify to what he said
4 because that's relevant. If he generated reports, data,
5 studies that had, that led — had some conclusions and he
6 told his boss about it, then GE is on notice.

7 They can come in through someone else and
8 say we got this, but Mueller didn't know what he was
9 talking about, and we rejected it for XYZ reason, but he
10 can't testify about his opinions because he is not an
11 expert.

12 MR. LYSAUGHT: I am not trying to make this
13 more difficult than it is, but he is an expert. He is a
14 Ph.D. in the field of organic chemistry, and I am not
15 talking about his opinion he holds today or developed
16 that week but what he developed based on his work back in
17 1994.

18 THE COURT: I don't think he can do that,
19 Pat. If he is a testifying expert, he can testify to his
20 expert opinions based on his work and research in 1994.
21 If he is a fact witness, he can't. He can testify to
22 what he — I mean, he can say, look, this is what I did,
23 and this is what I told my boss. All right?

24 MR. WEINBERGER: Based on the fact he
25 reached conclusions, he communicated those conclusions to

1 GE, I am assuming you are not limiting our ability to
2 obtain that information.

3 THE COURT: No, Peter. He can testify to
4 conclusions he reached, and then he transmitted them, but
5 he can not offer those independently as the product of
6 some — of some expertise that the jury is to consider as
7 to the ultimate fact on relaxometry or whatever. All
8 right? Only your testifying experts can do that.

9 And GE can have their testifying expert say,
10 yeah, I have looked at what Mueller prepared in 1993 or
11 '4, and it is a lot of bunk or whatever, but you can't
12 use a fact witness as an additional expert.

13 MR. WEINBERGER: We understand that. I want
14 to make sure to the extent he reached conclusions and we
15 believe that he did and he communicated those conclusions
16 to Saebo or somebody else at GE, that should be —
17 because that's all about the notice issue in this
18 case.

19 THE COURT: Right. Peter, he can testify
20 that I reached conclusions, and I transmitted them. The
21 fact of the matter, if he didn't transmit them, his
22 conclusions are not relevant to anything because they are
23 just in his head, and he is not an expert. It is only
24 relevant if he transmitted them to GE, and he can testify
25 to that, but he can't give testimony as to how he reached

1 these conclusions or why they are appropriate conclusions
2 or why they meet the Daubert test or whatever.

3 The fact he — you know, because he is not
4 an expert. You are going to have to have other people
5 who are going to have to give those opinions.

6 MS. LEVINE: Thank you, your Honor.

7 THE COURT: And the same way for GE. I am
8 not going to let GE —

9 MS. LEVINE: Absolutely.

10 THE COURT: — sneak in a bunch of experts
11 through fact witnesses.

12 MS. LEVINE: We don't intend to and
13 appreciate the guidance and will be helpful for the
14 deposition in March. To avoid any concerns about the
15 instruction of the document and the dissemination of it
16 thereafter, we would request that it get sent through DHL
17 with a tracking number to the witness and because of the
18 signing of it, we would agree they can send it a day
19 prior to the 48 hours, but that it get there on that
20 day.

21 THE COURT: Is it coming from Bracco? Is
22 that —

23 MR. LYSAUGHT: We did have a copy of it, so,
24 yes.

25 THE COURT: All right. Seems to me the

1 simple thing is the witness be instructed not to make any
2 copies of it, and when the deposition is over — I guess,
3 Pat, he should get it back to you.

4 MR. LYSAUGHT: Okay.

5 MS. LEVINE: He can give it back at the
6 deposition to my partner who is going to be there.

7 THE COURT: All right. When the deposition
8 is over, he should return it to counsel.

9 MS. LEVINE: And, your Honor, if we can ask
10 that he sign the protective order in advance.

11 THE COURT: Yeah.

12 MS. LEVINE: As soon as possible and send
13 that back to us.

14 THE COURT: If he doesn't sign the
15 protective order, he doesn't get it.

16 MS. LEVINE: Cathy will send you a copy of
17 what it is we wanted sign, and we will copy Bill Hawal on
18 it.

19 MR. WEINBERGER: Is it any different than
20 the protective order —

21 MS. LEVINE: No. Just trying to make your
22 life easier.

23 THE COURT: All right. Thank you.

24 MR. HAWAL: Thank you, Judge.

25 MS. LEVINE: Thank you, your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Bye.

(Teleconference concluded at 5:15 p.m.)

- - - - -

C E R T I F I C A T E

I, George J. Staiduhar, Official Court Reporter in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

s/George J. Staiduhar
George J. Staiduhar,
Official Court Reporter

U.S. District Court
801 W. Superior Ave., Suite 7-184
Cleveland, Ohio 44113
(216) 357-7128