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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: GADOLINIUM-BASED
CONTRAST AGENTS PRODUCTS
LIABILITY LITIGATION
(MDL Number 1909)

Case Number 1:08-gd-50000
Thursday, March 18, 2010
1:15 p.m.

TRANSCRIPT OF PRETRIAL PROCEEDINGS
BEFORE THE HONORABLE DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

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31 Proceedings recorded by mechanical stenography; transcript
32 produced by computer-aided transcription.

1 THE COURT: Good afternoon, everyone. Please
2 be seated.

3 All right. Well, this is a large group
4 conference in our Gadolinium MDL. And I know we have a lot
13:16:54 5 of people on the phone, so if anyone on the phone speaks, if
6 you could just clearly identify yourself beforehand, please.

7 MS. SHERMAN: Your Honor, may I introduce you
8 to -- there are some new faces on behalf of --

9 A MALE SPEAKER: Hello.

13:17:16 10 THE COURT: Yes.

11 MS. SHERMAN: I wanted to make sure you know
12 who is here. You know everyone at counsel table, but you
13 have Robert Mathias from DLA Piper.

14 THE COURT: Hello.

13:17:24 15 MS. SHERMAN: And we have Dwight Tarwater from
16 Paine Tarwater.

17 MR. TARWATER: Your Honor.

18 MS. SHERMAN: You know Mr. O'Donnell who is
19 with us today.

13:17:32 20 THE COURT: Right.

21 MS. SHERMAN: And we have GE clients today
22 with us Tom Hill and Jonathan Goodman.

23 THE COURT: Okay.

24 MR. GOODMAN: Good afternoon, Your Honor.

13:17:40 25 THE COURT: Good afternoon.

1 Okay. Are there any other counsel who are in
2 the courtroom for the first time? So we start to learn
3 everyone's name.

4 MR. MORRIS: Your Honor, Larry Morris with DLA
13:17:52 5 Piper.

6 THE COURT: Okay. Thank you, Larry.

7 MS. FULMER: Brenda Fulmer from Searcy Denney
8 in West Palm Beach.

9 THE COURT: All right. I've got a few things
13:18:12 10 to say at the outset.

11 I don't know if this is the, I don't know,
12 fourth, fifth, sixth, seventh, I'm not sure, large group
13 conference and we had established a pretty good procedure as
14 to how these would go.

13:18:30 15 Unfortunately, that process appears to be
16 breaking down and it's probably a function of the
17 deterioration in the relationship between the PSC and GE.
18 The PSC is working cooperatively with Bayer, Mallinckrodt,
19 Pratt and Bracco, but things with GE weren't working too
13:18:58 20 well.

21 This is what was supposed to happen. In
22 advance of any conference I was to get -- well, counsel were
23 to confer about agenda items. Anyone could place an item on
24 the agenda. The only requirement was that before I would
13:19:10 25 consider a conflict, the parties had to confer and make

1 every effort to resolve it.

2 If the parties couldn't resolve it on their
3 own, they were to file submissions outlining their
4 respective positions along with the agenda which was to be
13:19:26 5 several days before the conference. And there were not to
6 be any last-minute filings.

7 We postponed today's conference at least
8 twice, excuse me, as the parties advised the Court that
9 there was nothing significant to discuss, and I think I
13:19:42 10 raised that once on my own.

11 For today's conference, we didn't get any
12 joint agenda. I received a GE-proposed agenda and no agenda
13 from the PSC, and then GE filed a position statement. The
14 PSC then filed an objection to GE's proposed agenda along
13:20:06 15 with a detailed filing covering one of the items, the
16 proposed CMO limiting plaintiffs' ex parte communications
17 with treating physicians.

18 This is not a very efficient use of my time or
19 counsel's time, and I'm seriously contemplating eliminating
13:20:28 20 these conferences, so this may be the last one.

21 If the parties work out a proposed CMO, you
22 can submit it at any time. If you've got a dispute about
23 something, you can submit your positions in writing. If I
24 need a telephone conference, I can schedule one or I can
13:20:42 25 just decide it, and issue my ruling.

1 I've got a huge stack of generic and
2 case-specific *Daubert* motions which I've been pouring
3 through and, quite candidly, they don't do much to help
4 focus and clarify the issues in this litigation.

13:21:02 5 I thought that the bellwether trials would
6 play a significant role in resolving this MDL, but I'm not
7 so confident anymore that that will be the case.

8 I'm aware that the PSC is working
9 cooperatively with Bayer and Mallinckrodt to resolve cases
13:21:18 10 and is in discussions with Bracco on a way to end Bracco's
11 role in the MDL.

12 And I've decided that the best use of my time
13 is to play a much more active role in trying to resolve GE
14 cases, mediate resolutions. And, in fact, I'm going to
13:21:36 15 start doing that later this afternoon with one particular
16 firm.

17 Well, I've gone through the various items that
18 have been identified by GE, and this is what I'm going to
19 say about them.

13:21:56 20 As to a CMO regarding case-specific discovery
21 on NSF diagnosis, I believe this item is premature because
22 it is the subject of discussions between PSC and GE, but
23 everyone needs to give this some attention.

24 If Bayer has settled cases in which GE is
13:22:22 25 actively challenging NSF diagnosis, I'd suggest that GE has

1 raised an artificial barrier.

2 Conversely, there may be a number of cases
3 that plaintiffs have filed that should be dismissed. If
4 after this late date you don't at least have the treating
13:22:38 5 doctor who said that "My client has NSF," that case should
6 be dismissed.

7 But I would direct the parties to have a
8 focused discussion on this. There's been similar
9 discussions involving Bayer cases that are going on, but I'm
13:22:54 10 not going to just take it up at this time.

11 The second item was GE's proposal for a CMO
12 prohibiting or restricting ex parte communications by
13 plaintiffs' attorneys with treating physicians of individual
14 plaintiffs.

13:23:20 15 I'm not prepared to enter an order without
16 extensive briefing and considering what to do, but that
17 being said, I don't think it's appropriate for any counsel,
18 either the plaintiffs' side or the defense side, to attempt
19 to influence or shade any doctor's deposition testimony.

13:23:40 20 Anyone can talk to a treating doctor. That
21 doctor is a fact witness. But it's not appropriate to try
22 and suggest to a doctor what his or her testimony should be
23 about the issues in this case, whether it's diagnosis,
24 treatment, what the doctor would have done had there been a
13:24:10 25 different warning, things like that. That's up to the

1 doctor to give that testimony.

2 Further, should things like this occur and it
3 be disclosed to the jury, because, of course, either counsel
4 can discover any communications written or oral made by any
13:24:30 5 other counsel to a fact witness, that would erode the
6 credibility of the doctor.

7 So I think all counsel know what their
8 responsibilities are and what is appropriate and
9 inappropriate communication with witnesses. But if the
13:24:46 10 problem persists, I guess I will have to rule in a formal
11 way.

12 The third item suggested was a concern that
13 plaintiffs hadn't been supplementing their fact -- I'm
14 sorry, is someone talking?

13:25:38 15 (Discussion had off the record).

16 THE COURT: All right. The third item is
17 supplementation of plaintiffs' fact sheets.

18 I think all counsel know that they're required
19 to supplement or amend fact sheets when new information
13:25:58 20 comes to light, whether it's the plaintiffs or the
21 defendants, and the obligation is reciprocal. So
22 information about liens and settlements need to be added,
23 and you should discuss how you're going to do that.

24 Also, all documents should be provided in a
13:26:14 25 timely manner, and there should not be unnecessary delay by

1 either side in providing documents in discovery.

2 The fourth item was disclosure of additional
3 expert pathology reports. I understand that the parties are
4 discussing that, so I'm not aware there is a dispute. If
13:26:36 5 there's something that has to be resolved, you can bring
6 that to my attention.

7 The fifth item was the Knase trial schedule,
8 and I gather the parties are discussing that, too, and
9 hopefully will come to an agreement. But if not, I guess we
13:26:52 10 will do what we did before, each side can submit their
11 proposal and I'll have to resolve any disagreement.

12 GE has been pushing for scheduling *Daubert*
13 hearings, and the plaintiffs are saying I shouldn't have
14 hearings. It will be my decision whether I need any
13:27:14 15 hearings. You know, I think, quite frankly, the only reason
16 I would need a hearing is if I didn't fully understand what
17 a proposed expert's testimony would be and that I needed to
18 question that expert.

19 I think I understand counsel's arguments and I
13:27:38 20 can read the expert reports, and so I think I have a pretty
21 good idea of what each expert is proposing to say.

22 As I said, I think all these motions have
23 muddled things, not clarified them, and not surprisingly
24 each side wants a very wide strike zone for its side's
13:28:02 25 experts and a very narrow strike zone for the other side's

1 experts.

2 And my job is simply to figure out what my
3 strike zone is going to be and apply it fairly to each side.
4 And I don't, quite frankly, think I need hearings for that.
13:28:14 5 That's up to me, and I think I know what to do.

6 The last item I think was product ID, and I
7 know the parties have been working very diligently for a
8 long time on this. So I think GE says that there are five
9 cases which should be dismissed as plaintiff has no proof
13:28:46 10 that plaintiff had an Omniscan scan, and GE represents
11 they've met and conferred with the plaintiffs.

12 I don't know if either Bill or someone, are
13 there ongoing discussions about these five cases, or have
14 you reached an impasse?

13:29:10 15 MR. SKIKOS: Or -- I'm sorry, I didn't hear
16 the last.

17 THE COURT: Are there ongoing discussions
18 about these five cases, or have you reached an impasse?

19 MR. SKIKOS: There are ongoing discussions.
13:29:20 20 Mr. Katz is here to address four of the five cases on behalf
21 of Burg Simpson. And I believe on -- we have resolved
22 almost all product ID disputes, as you know.

23 THE COURT: Well, I know that. I know that.
24 And I'm not looking to take them up piecemeal unless, I
13:29:38 25 mean, if we've got some that can't -- that the two sides

1 can't resolve, I'll have to figure out some mechanism to do
2 it, but I'm not looking to jump in if you're still having
3 discussions.

4 MR. SKIKOS: I will let Mr. Katz address his
13:29:54 5 four cases and Mr. Strongosky.

6 Mr. Strongosky and I worked very well on a
7 group of Burg Simpson cases in December and we got some of
8 them done.

9 MR. STRONGOSKY: That's correct, Your Honor.
13:30:06 10 Chris Strongosky on behalf of the GE defendants.

11 The answer to your question is we have reached
12 an impasse, and on one case particularly, the Armstrong
13 case, we resolved the case by agreement, with the assistance
14 of Mr. Skikos, between GE and the particular plaintiff's
13:30:24 15 firm.

16 That agreement required the plaintiffs to
17 dismiss us if they were unable to discover evidence of
18 Omnican exposure within sixty days of the date of that
19 agreement. That agreement was based upon a motion that we
13:30:36 20 filed, Your Honor, the motion to dismiss last October which
21 you denied without prejudice, and you indicated you would
22 take it up again if the plaintiffs were unwilling to
23 voluntarily dismiss those defendants.

24 We've discussed this issue to death in this
13:30:50 25 case, in particular, we've discussed frequently, and we cut

1 a deal, we made an agreement to resolve the issue. The
2 plaintiffs failed to live up to their promises and,
3 unfortunately, that's why we've had to raise it with you,
4 Your Honor.

13:31:04 5 The other cases are similarly situated. We've
6 had numerous back and forths about requesting evidence of
7 Omniscan exposure. All the cases were filed last year. The
8 plaintiff fact sheets were delinquent in each and every
9 case.

13:31:18 10 We've worked through Mr. Skikos and directly
11 with the plaintiffs' firm to no avail. There is no proof of
12 Omniscan exposure, and we think the only remedy right now is
13 dismissal with prejudice.

14 MR. KATZ: Okay, Your Honor.

13:31:32 15 MR. SKIKOS: Your Honor, Mr. Katz is here to
16 address the issue, but I must say I disagree.

17 THE COURT: Let's take up Armstrong.

18 MR. KATZ: Your Honor, if I might, Seth Katz
19 for the PSC and Beverly Armstrong.

13:31:46 20 Since the agreement of agreeing to dismiss if
21 we couldn't obtain evidence of exposure to Omniscan, we
22 obtained a sales document from GE's files indicating that
23 the facility where Ms. Armstrong was given her scans was a
24 facility that had a hundred percent contract with General
13:32:04 25 Electric.

1 We submitted that to GE's counsel. However,
2 that's not sufficient in their eyes to show exposure,
3 despite their own documents showing it's a hundred percent
4 facility.

13:32:14 5 They've also never served a defense fact
6 sheet. So under CMO-11 they're not entitled to a dismissal.

7 Also, we've gone and we've tried, we've taken
8 the 30(b)(6) deposition of the facility, and despite a
9 pretty specific notice, they put up a witness that didn't
13:32:28 10 know what products were being used at the facility. So
11 we're working with the facility to identify another witness.

12 We think dismissing the case at this point
13 would be unfair to Ms. Armstrong, as I think everybody who
14 has looked at any of these documents, including GE's
13:32:48 15 counsel, knows that this is a GE case that they're just
16 trying to get dismissed on a procedural ground as opposed to
17 on the substance and on the merits of the case.

18 MR. STRONGOSKY: Your Honor, briefly in reply
19 to that, there is not a contract with the facility that
13:33:02 20 requires a hundred percent of the product to be used by that
21 facility.

22 I don't know what document he is talking
23 about, Mr. Katz is talking about. However, I can say that
24 after the sixty days expired, they pulled out a single page
13:33:14 25 of a document produced by GE over a year ago in which the

1 facility's name is listed. That is all the document says.

2 From that, they've construed it to a hundred
3 percent contract. I'm not even sure what that means. But
4 the point is they noticed the deposition after that sixty
13:33:30 5 day agreement. We did not object. We attended the
6 deposition, understanding that if they were going to notice
7 a deposition, we might as well go see what the witness at
8 the facility had to say.

9 Mr. Katz is right, that witness was not able
13:33:42 10 to opine that this plaintiff was administered Omniscan.

11 That witness was not able to opine that there was a hundred
12 percent contract, as Mr. Katz describes it. It does not
13 exist. It did not happen. There is no evidence.

14 And this is one where the idea that there's a
13:33:58 15 chance that they might be able to prove that this plaintiff
16 was exposed to Omniscan is irrelevant.

17 We filed a motion and we made a deal. The
18 deal is what's relevant here, Your Honor. And if we're
19 unable to trust a plaintiff's counsel when we make these
13:34:14 20 deals to avoid bringing a motion before Your Honor, if we're
21 unable to trust that they will live up to their agreement to
22 dismiss us -- keep in mind the deal was to dismiss us
23 without prejudice. It was harmless. They just have to
24 dismiss us without prejudice under our agreement. They
13:34:28 25 failed to do that, Your Honor.

1 That's what we want enforced. We don't want
2 without prejudice because this, at this point, we want it
3 with prejudice. We really can't work any more cooperatively
4 than we have, and we can't wait around. GE is entitled to
13:34:42 5 finality on these open cases where there is simply no proof
6 that any plaintiff -- that the particular plaintiff was
7 exposed to our products.

8 MR. KATZ: Your Honor, the deal was lived up
9 to. Within sixty days is when we identified the document
13:34:54 10 that listed the facility, and under scan share it says 100
11 percent. It's a GE document from the files of Mr. Coogan.

12 Relevant to when it was produced, it was
13 produced amongst millions of other pages and it was
14 identified, shared with Mr. Strongosky, as he just admitted
13:35:10 15 that he saw the document.

16 THE COURT: Well, doesn't the document say
17 that the facility had a hundred percent Omniscan purchases
18 at the time of the scan?

19 MR. KATZ: It lists scan share as 100 percent.

13:35:26 20 MR. STRONGOSKY: We don't know what scan share
21 means.

22 THE COURT: I don't know what that means.

23 MR. KATZ: It's their document. We can
24 interpret the document to say the document has scan share
13:35:34 25 and it has different percentages for different facilities,

1 what percentage of the scans that they were administering
2 were Omniscan, and that's how we've interpreted it.

3 We can't take discovery of this document on
4 the GE witnesses until after we've completed discovery of
13:35:48 5 the facility under the terms of all the CMOs that are in
6 place on this issue.

7 So we need the time to go through the
8 discovery of the facility and then we can then turn to what
9 this document means by taking the deposition of GE's
13:36:00 10 witnesses. But until that, until the discovery of the
11 facility is completed and they put up a witness who has the
12 right knowledge, which is what we're working towards right
13 now, we can't go down that second road.

14 And that's what we're asking for, Your Honor,
13:36:14 15 is the time to complete discovery.

16 THE COURT: I think what I'm going to do, I'm
17 going to enforce the agreement and dismiss the case without
18 prejudice.

19 It should have been done. And I'm going to
13:36:26 20 leave it at that, and see how -- see what happens.

21 But it's clear that there was an agreement
22 among counsel, between counsel, and I think that should be
23 enforced.

24 You did not have proof of Omniscan exposure by
13:36:46 25 February the 7th, February the 8th. And you really don't

1 have it yet. You may get it, but you don't have it now.

2 So the case is dismissed without prejudice
3 against GE.

4 MR. STRONGOSKY: Thank you, Your Honor.

13:37:08

5 THE COURT: Okay. What are the other, the
6 other four? Are there still discussions on those four?

7 MR. STRONGOSKY: We've -- no, Your Honor.

8 We've asked for Omniscan proof. They failed to provide it.

9 The cases have been filed all over a year ago. We put it on

13:37:24

10 the position paper for this conference to avoid having to
11 file separate motions.

12 The response we've gotten to each and every

13 one of the multiple inquiries from the plaintiffs' counsel

14 is "We are diligently conducting discovery." That is not

13:37:38

15 true. There have been no depositions. There have been no

16 subpoenas. I don't know what they mean by it. But it

17 really is irrelevant.

18 The point is unless they have proof of

19 exposure to Omniscan right here and right now, we would ask

13:37:48

20 the cases be dismissed so we can avoid filing a formal
21 motion.

22 MR. KATZ: Your Honor, Mr. Strongosky's

23 statement is not true.

24 There are two -- there are outstanding

13:37:58

25 deposition notices in two of the remaining three Burg

1 Simpson cases, Gatano and Hickman. It's the cross-service
2 we served in response to your notice of the U. Penn
3 facility, and we're still waiting for the second day of that
4 deposition to occur and our opportunity to question those
13:38:14 5 witnesses.

6 Moreover, on those two cases no defense fact
7 sheets have ever been served. Therefore, GE is not entitled
8 to make motions to dismiss until they, A, serve defense fact
9 sheets.

13:38:26 10 MR. STRONGOSKY: Your Honor.

11 MR. KATZ: And, B, wait the required waiting
12 period. And during that time we're assuming that this
13 facility, that appears to be working relatively closely with
14 GE's counsel, will finally put up the second witness and we
13:38:38 15 can complete that deposition.

16 However, during the first day of 30(b)(6)
17 testimony, during the 2006 time frame, which is when some of
18 these scans occurred, the witness testified that they were
19 using exclusively Omniscan. I wasn't at the deposition, but
13:38:54 20 that's what the transcript will say. Mr. Tisi was at that
21 deposition.

22 So those two cases, I'm not sure why that's
23 not sufficient for General Electric to acknowledge that
24 Omniscan was the product used in those two cases. However,
13:39:08 25 we're still waiting for the completion of the deposition and

1 our opportunity to question that second witness.

2 We're also still waiting for defense fact
3 sheets which will presumptively tell us that GE was selling
4 Omniscan to U. Penn, which we know they were doing from the
13:39:26 5 first part of the deposition.

6 MR. STRONGOSKY: Your Honor, the defense fact
7 sheets are not due because in none of these cases have the
8 plaintiffs established exposure to any Gadolinium-based
9 contrast agent. That is what is most troubling about these
13:39:42 10 cases.

11 This isn't a case where the plaintiff has
12 proven they were exposed to Gadolinium and they don't know
13 which product was used. The scans that have been produced
14 by the plaintiffs in these cases have no indication that
13:39:52 15 there was even a GBCA used. It's guesswork.

16 THE COURT: Wait a minute. Gatano, you say
17 that there's three confirmed ProHance exposures?

18 MR. STRONGOSKY: The -- unknown scans.

19 MR. KATZ: There are confirmed Magnevist
13:40:12 20 scans.

21 MR. STRONGOSKY: Well, clearly those are not
22 Omniscan scans if they are confirmed against a co-defendant
23 here.

24 The scans for which they claim they still are
13:40:20 25 entitled the time to seek to prove that Omniscan was used,

1 none of those scans indicate the use of a Gadolinium-based
2 contrast agent.

3 This is most troubling with these plaintiffs,
4 is that the plaintiff fact sheet has been amended in several
13:40:34 5 of these cases to list scans in the numbers of 17, 20, 49.
6 In one instance from Mr. Katz's firm in an amended plaintiff
7 fact sheet, 49 scans.

8 When we looked at that particular instance,
9 which is representative of what's happening in these cases,
13:40:52 10 we saw that every scan that they could find, scans that are
11 not commonly employed with GBCAs, were listed. They're
12 generating a lot of smoke here. And up until now, with
13 every other plaintiffs firm really and even with Mr. Katz's
14 firm, up until now parties only listed scans in good faith
13:41:12 15 if there was a reason to believe Gadolinium was used.

16 That's not happening any more. What we're
17 seeing is a litany of scans that are CT scans or scans that
18 may have had -- most likely had nothing to do with
19 Gadolinium.

13:41:26 20 THE COURT: I see a reference to 21 in Posch,
21 and I can't imagine anyone has had 49 GBCAs.

22 MR. STRONGOSKY: Well, neither can we, but in
23 some of the cases that have been dismissed, not one of the
24 four here before Your Honor, but in the group of these cases
13:41:44 25 from the Burg Simpson firm, one of the plaintiffs amended

1 the plaintiff fact sheet after the motion to dismiss was
2 denied and amended it to add 49 scans.

3 I can get that information to Your Honor.

4 It's not here in the four cases that we're seeking dismissal
13:42:00 5 on, but it's representative of the fact that they list scans
6 that have -- no one has any good faith reason to believe
7 that Gadolinium was used.

8 MR. KATZ: Well, Your Honor, we don't know
9 that until we get through all the records.

13:42:12 10 And part of the problem is now GE counsel
11 wants their cake and eat it, too. They want to complain we
12 don't amend fact sheets fast enough, but they want to
13 complain when we amend them and include information they
14 don't think should be in there.

13:42:26 15 We're doing what we can. These people are ill
16 people. They do have a significant number of scans in some
17 cases, and in some cases they have one scan. We're doing
18 what we can. We're getting through the records. We're
19 cross-noticing or noticing the depositions to identify what
13:42:40 20 product was used.

21 And to penalize individual plaintiffs for
22 something like this is simply, you know, patently unfair in
23 these instances.

24 MR. SKIKOS: Your Honor, I have an idea on
13:42:54 25 this, on product identification. This is Steve Skikos.

1 THE COURT: All right.

2 MR. SKIKOS: The way we have successfully
3 resolved almost all product identification disputes with the
4 other three, and more recently with GE, is through the good
13:43:04 5 faith substantiation agreement. And when we reach an
6 agreement on good faith substantiation, we agree that all
7 known GBCA exposures have been sufficiently linked to a
8 specific manufacturer and that the other manufacturers are
9 entitled to a voluntary dismissal within I think it's seven
13:43:24 10 days.

11 And that process with the three had been
12 working great for a year and a half, and now in December I
13 reached an agreement with Mr. Strongosky to do it with GE
14 and it's been going great, and I agree, that agreement
13:43:38 15 should be held up and agreed to.

16 These other cases are cases in which there are
17 known unknowns or potential known unknowns, and there is no
18 agreement on good faith substantiation in these other cases
19 with the manufacturers that are in the case.

13:44:00 20 So, for example, I recall there being one case
21 with Magnevist. Magnevist has not agreed to good faith
22 substantiation yet.

23 Let the product identification river flow
24 until we know, and then GE, Bracco and Mallinckrodt will get
13:44:16 25 their dismissal.

1 One other point on Armstrong. Armstrong is a
2 unique case. The way we did staggered discovery pursuant to
3 the CMOs was that we would take the defendant depositions
4 last because we think that we can get through and prove
13:44:36 5 product ID in 99% of the cases through the case-specific
6 depositions or affidavits from the treating doctors, and
7 that has been proven to be true.

8 Armstrong may be the one case or one of ten
9 cases in the end in which a defendant deposition is
13:44:56 10 necessary.

11 So there is a dismissal or a dismissal without
12 prejudice, but there may come a day where they take that
13 other facility deposition and find out that the only sales
14 source was GE, and then in which case they would have to
13:45:10 15 move to amend and then take the deposition.

16 So my recommendation, Your Honor, having
17 resolved now maybe a thousand PID issues, is let the good
18 faith substantiation river flow on these other four cases.

19 Let the other manufacturers work towards
13:45:26 20 resolving good faith substantiation. Once they agree and GE
21 is not in the case, GE gets its voluntary dismissal in seven
22 days.

23 Mr. Strongosky can follow up with me. If he
24 doesn't get it, I will go to Court and support GE on that
13:45:42 25 for the first time ever. And if they -- and that's a fair

1 way to answer that question, in my opinion.

2 MR. STRONGOSKY: Your Honor, we believe the
3 more succinct and probably better result, if they're not
4 inclined to dismiss these cases right here, is to give the
13:45:56 5 plaintiffs 30 days to provide proof or else their cases
6 would be dismissed. And I see no other reason to complicate
7 things about requiring other defendants to be involved.

8 I don't think the other defendants serve
9 defendant fact sheets regularly anyway. I don't think they
13:46:16 10 are as concerned with product ID. They certainly are, I
11 don't want to misrepresent them.

12 But the problems we have are particular and
13 they are few at this point because Steve and I have worked
14 out many of the issues, but the bottom line is enter a
13:46:30 15 simple order requiring the plaintiffs to show exposure to
16 Omniscan within 30 days or else the case would be dismissed
17 I think would be the most effective way of resolving this
18 case once and for all.

19 MR. SKIKOS: One last point, and that's what
13:46:44 20 I've been trying to resolve and it's not in the CMOs.

21 The CMOs specifically state how you do
22 voluntarily dismissals. It is based upon a finding of good
23 faith substantiation. It took us I don't know how many
24 months.

13:46:58 25 THE COURT: I understand that, but at a

1 certain point, you know, that process can't be never-ending
2 so the question is when is -- what is a sufficient amount of
3 time, Mr. Skikos, to allow that process for these four
4 cases?

13:47:12 5 MR. SKIKOS: It would -- I'll answer it in the
6 inverse. It would be insufficient if there were a lot of
7 problems, but there are not a lot of problems, and I
8 personally get involved in firms' cases in which they seem
9 to have languished a little bit.

13:47:28 10 So to the extent --

11 THE COURT: We seem to be languishing so I'll
12 tell you what --

13 MR. SKIKOS: Ninety days.

14 THE COURT: I think sixty days is appropriate.
13:47:38 15 You want ninety. I'm going to give sixty days and the case
16 will be -- these will be voluntarily dismissed against GE
17 unless there's proof of Omniscan.

18 MR. KATZ: And, Your Honor, what if there's a
19 dispute as to good faith substantiation? I guess GE will
13:47:54 20 have to make a motion and establish it believes no exposure
21 and we will have our opportunity to submit proof of what we
22 think establishes exposure, or at least letter submissions
23 for Your Honor to consider and potentially have a conference
24 call?

13:48:06 25 THE COURT: Well, I want to look at what the

1 plaintiffs say. Remember, I'm not the -- I'm not the trier
2 of fact, and dismissing a case is a heavy remedy.

3 So if there is -- if there's anything
4 that -- from which I think a juror could conclude that it
13:48:22 5 was a GE scan, I would let it proceed.

6 That doesn't mean that ultimately at a trial
7 the jury could conclude that it wasn't a GE scan. I'm not
8 conclusively deciding the issue whether it was a GE scan, of
9 course.

13:48:36 10 MR. SKIKOS: But in that sixty days, Your
11 Honor, we're going to have to compress the time to take the
12 GE sales rep deposition, if that's okay.

13 THE COURT: All right. That's fine. GE made
14 this request so they've got to make those sales reps
13:48:48 15 available.

16 MR. STRONGOSKY: Well, I could tell you that
17 the sales reps would not have knowledge of what product was
18 administered to the plaintiffs because they are not medical
19 health care providers.

13:48:54 20 So we would insist that the facility
21 depositions be taken first under the CMOs. I'll discuss
22 that with Mr. Skikos and Mr. Katz.

23 My last request, Your Honor, in order to avoid
24 having to insert other cases for which we think that are
13:49:08 25 similarly situated where dismissal is warranted right now, I

1 would like to be able to just give to Mr. Skikos the list of
2 additional cases. There aren't that many, but there are
3 others that are ripe, and ask Mr. Skikos to resolve them
4 similarly within sixty days or else they would be deemed
5 dismissed under this Court's ruling.

13:49:24

6 THE COURT: Well, I dealt with these five
7 because they were highlighted.

8 I think there has been a mechanism to work
9 through this, and I'm going to direct the parties to
10 continue working on that, but I'm not going to take up any
11 other than these five because those are the only ones
12 identified.

13:49:36

13 MR. STRONGOSKY: Thank you, Your Honor.

14 MR. BURG: Your Honor, this is Peter Burg.

13:49:50

15 Your Honor, as to the Armstrong case, we did
16 present to the Court some information from GE's files.
17 Could the Armstrong case be treated similarly where we get
18 the opportunity to depose a GE rep about that document?
19 Since I think on the face of the document it shows GE
20 exposure for the scans in question as GE was indicated as a
21 hundred percent on their own document.

13:50:12

22 THE COURT: Well, I'm sorry.

23 MR. BURG: As the scan provider.

24 THE COURT: There was a specific agreement on
25 that, and the document is very ambiguous as it was read to

13:50:26

1 me, so my ruling stands. It's a dismissal without prejudice
2 on Armstrong.

3 All right. Well, I think that covers
4 everything that was on GE's proposed agenda.

13:50:46 5 MS. LEVINE: Your Honor, Heidi Levine on
6 behalf of the GE defendants.

7 I want to just go back for a moment to your
8 initial remarks regarding the alleged breakdown in
9 discussions.

13:50:56 10 I just want to point out that GE is the only
11 defendant who has been subjected to discovery, fact and
12 expert discovery across the docket. And so it is not
13 surprising that as being adversaries with the PSC and the
14 plaintiffs, that we have discovery disputes, and that those
13:51:16 15 are appropriate to bring before this Court.

16 In fact, the very reason of having the MDL
17 hearings is to raise these issues before Your Honor and, in
18 fact, the only reason that these issues have been addressed
19 and the reason the PSC is responding to the issues GE raised
13:51:36 20 more than three weeks ago with them is because of the
21 control date of this hearing.

22 And so we disagree that your role is not
23 well-spent on continuing to have these hearings because it
24 does serve as a control date. And while we have four
13:51:50 25 bellwether trials that are going forward and progressing, GE

1 has worked very hard over the last two-plus years, along
2 with the plaintiffs, to address and evaluate the entire
3 docket.

4 There's over 400 cases in which GE is named,
13:52:06 5 and over 50% of the docket in which there are either
6 confounded cases or cases that aren't involving GE.

7 And we are addressing and evaluating all of
8 those cases. And we can't simply wait around for these four
9 trials or even one trial. And there are legal issues that
13:52:26 10 are dispositive to the entire docket.

11 You just dealt with and you have been dealing
12 with product identification as a threshold issue. We
13 believe NSF diagnosis is exactly in the same posture as a
14 threshold issue, and it's the next thing that this Court, as
13:52:42 15 the MDL Court, should centralize and control. And you have
16 the ability to do that, just like you did product ID.

17 And so we are very happy to evaluate and look
18 at what the plaintiffs have just presented us a half an hour
19 ago on the 80-plus cases where we have some good faith
13:53:02 20 discussion or there's an ambiguity in the records about the
21 diagnosis, but whether Bayer or Mallinckrodt or another
22 defendant settled a case in which we believe we have a good
23 faith dispute, we're entitled to that. We don't know what
24 criteria they used. We don't know what price the plaintiffs
13:53:20 25 put on that kind of case. We have no idea.

1 And it's entirely relevant to GE, and so we're
2 allowed to do that. And what I'd ask Your Honor to order is
3 to allow us the discovery that we are entitled to to the
4 ability to confirm what the plaintiffs are alleging, and
13:53:38 5 that is whether there is an NSF diagnosis.

6 And so simultaneously with reviewing and
7 evaluating what the plaintiffs just gave us, which by the
8 way they should have given us a year ago, we'd like to put
9 an order in place and begin negotiating a CMO that allows us
13:53:54 10 to take that discovery.

11 We're not asking for wide-ranging, broad
12 discovery. We're talking about targeted, limited discovery
13 in a limited amount of cases that adds up to potentially 20%
14 of the docket, but we're talking about deposing diagnosing
13:54:10 15 physicians in cases where after we've reviewed what
16 plaintiffs have sent us, we still have a good faith dispute.

17 So I'd like an order that allows us to
18 negotiate the ability to take that discovery and to take it
19 as soon as possible.

13:54:24 20 And that's really all we're asking for.

21 THE COURT: I directed that the parties
22 confer. There's some information that was just provided
23 today, and I've directed the parties to come up with a
24 mechanism to address disputes about NSF diagnosis.

13:54:40 25 If you're unable to agree on it, I'll come up

1 with one of my own, but I've said that this has to be
2 addressed in some way in this MDL, and if you are unable to
3 agree on a mechanism, I'll come up with one on my own.

4 MS. LEVINE: Can we have an order that it must
13:54:58 5 be addressed by or before the next hearing?

6 THE COURT: Well, there may not be another
7 hearing, Heidi. My point is --

8 MS. LEVINE: Well --

9 THE COURT: -- I didn't mean to suggest that
13:55:08 10 work stops if there's no group conference. That would be
11 absurd. A whole lot goes on.

12 I'm just saying that I'm not sure that these
13 group conferences are productive.

14 I didn't say that I'd stop working or the
13:55:24 15 lawyers would stop working.

16 MR. WEINBERG: Your Honor, on behalf of the
17 PSC, if I may address Ms. Levine's comments, the fact of the
18 matter is it was only a short time ago that GE addressed
19 with us the issue of diagnosis on 82 cases.

13:55:38 20 And Mr. Skikos has been working diligently
21 with the plaintiffs' lawyers involved in that, in those
22 cases, to be able to respond. And the fact of the matter is
23 that in at least 70 cases there is a confirmed diagnosis.
24 And we have and will provide information about that to GE.

13:56:00 25 So the suggestion that we have been

1 unresponsive to these concerns is simply not the case, and
2 we look forward to continuing to work with GE on this issue.

3 We will certainly abide by the Court's
4 directive that we act in a cooperative way. We will do
13:56:20 5 that, Your Honor.

6 THE COURT: All right. Well, that's -- that's
7 the objective. And if you reach an impasse, it's pretty
8 clear from my -- how I've handled this MDL, I'll decide
9 those pretty quickly.

13:56:42 10 All right. When is the first state trial
11 that's scheduled? I don't think I got --

12 MR. HAWAL: April 20th, Your Honor, in
13 Chicago.

14 THE COURT: April 20th in Chicago.

13:56:54 15 And, Bill, who were -- who is the defendant or
16 defendants?

17 MR. HAWAL: GE is the defendant, Your Honor.

18 MS. SHERMAN: Your Honor, the list is attached
19 to the GE agenda that you received. If you go --

13:57:08 20 THE COURT: Oh, all right.

21 MS. SHERMAN: It's the fifth page in, the same
22 list that we've attached in the past.

23 THE COURT: All right. Well, I will see if
24 that one goes forward. It will be interesting if it does.

13:57:24 25 MS. LEVINE: Your Honor, we are also at an

1 impasse with the plaintiffs regarding the expert pathology
2 and the Knase trial schedule, and we did want to raise
3 issues for your guidance.

4 We are happy to do that separately and by
13:57:38 5 conference call or coming in, but we do want to address
6 those issues promptly.

7 THE COURT: The plaintiffs have represented
8 they're in discussion with you on both of those.

9 MR. HAWAL: Correct, Your Honor.

10 MS. LEVINE: Since then we have continued to
11 discuss up until today and agreed with the plaintiffs that
12 we wanted to discuss those issues and get the Court's
13 guidance.

14 MR. HAWAL: But, Your Honor, in reality, on
13:57:58 15 Knase, we submitted a counterproposal to GE. We had a
16 conference call several days ago with counsel, and today we
17 submitted another proposal.

18 We would hope that that would address GE's
19 counsel's concerns, and I've heard nothing back.

13:58:14 20 THE COURT: Look, that trial is not for a long
21 time. Why don't you continue conferring? If you, you
22 know -- but it's not productive to take up about 50 dates
23 with everyone here.

24 MR. HAWAL: Right.

13:58:26 25 MS. SHERMAN: Your Honor, we will come back to

1 you, I suspect very soon, because our big concern, as Your
2 Honor has yourself indicated today, the compression of the
3 end of the schedule in Bullock has obviously indicated that
4 there is extraordinarily a lot to do in these cases.

13:58:48 5 The Knase trial date is at the beginning of
6 December. It's not that far away. And our biggest concern
7 about the negotiations to date is that the proposal being
8 put forward by the plaintiffs is to compress even further,
9 even further the end of the schedule.

13:59:10 10 So we already know as we sit here right now
11 that guidelines that Your Honor has given, for example,
12 about what you expect the time line to be for the
13 opportunity for case-specific *Daubert* motions, for you to
14 have time to consider, and then there to be another 30 days
13:59:28 15 after that until trial, is already -- the proposed dates
16 don't even come close to fitting that.

17 So we will actually go back and discuss it,
18 but our biggest concern is we will do our best, we will do
19 our best to try and meet that December 6th trial date, but
13:59:44 20 with the compression at the end, it won't work.

21 We need to be able to have all of our rights
22 and be able to develop the case fully in order to proceed.

23 MR. HAWAL: Your Honor, we will confer and we
24 will probably be back to the Court.

13:59:58 25 THE COURT: Fine. Look, I'm going to be

1 spending my efforts trying to resolve these cases, all
2 right?

3 MR. HAWAL: Okay.

4 THE COURT: Because it's clear that unless I
14:00:06 5 do that, this mess is going to go on past my lifetime.

6 So I'm telling both sides that that's what I'm
7 going to be spending my time doing, not worrying about
8 particular scheduling dates.

9 MR. SKIKOS: Your Honor, on that one issue
14:00:22 10 that you just raised, we -- a lot of lawyers have traveled.

11 First, I believe the large group conferences
12 are very important and good.

13 Second --

14 THE COURT: Well, they may be. They may be,
14:00:32 15 but this is not -- this is not a good way to do them, all
16 right? So --

17 MR. SKIKOS: I agree with that.

18 THE COURT: There was a good way to do them
19 and we did them that way.

14:00:42 20 This, this is not. So unless, unless the
21 parties can -- are willing to go back to the format that we
22 had set up and that I thought was working well, I'm not
23 going to have any more.

24 MR. TISI: Your Honor, this is Chris Tisi.

14:00:56 25 You know, I think where things may have gone

1 off track a little bit, and I think it may be a little bit
2 different in how we've approached some of these issues, in
3 the past when we've had an issue, we raised the issue and
4 sometimes it takes a little longer to resolve, but there are
14:01:12 5 numerous phone calls back and forth, meetings, et cetera.

6 What seems to have happened perhaps in the
7 clutch of preparing for trials is that GE will send us an
8 e-mail or a letter and then think that that complies with
9 their meet-and-confer obligations.

14:01:28 10 And I just think -- and I invite GE to do
11 this -- if there is an issue, you know, pick up the phone,
12 let's see if we can resolve an issue. Don't just throw a
13 letter across a transom and say, "Gee, now we can throw it
14 on the agenda for the Court." That seems to be the problem.

14:01:46 15 And I think if we can go back to the way we
16 were dealing with things before, we would be much better
17 off.

18 THE COURT: I will consider scheduling one
19 more conference, but if it happens like this, it will be the
14:01:56 20 last one. All right? I mean, I'll just say that. I'll
21 schedule one more. If it happens like this, it will be the
22 last one we have.

23 MS. LEVINE: Your Honor, I think the problem
24 partially is that the parties were under the guidelines that
14:02:08 25 if they have a unilateral right to object to an item on the

1 agenda, it doesn't appear on the agenda. And that is simply
2 unworkable because then it allows a party to simply say "I
3 don't want to talk about that issue" and, therefore, it
4 doesn't get spoken about.

14:02:24 5 GE raised every issue on its agenda more than
6 three weeks ago, and simply because the plaintiffs didn't
7 want to talk about it doesn't mean it shouldn't get raised
8 here.

9 MR. SKIKOS: Well, Your Honor --

14:02:36 10 MS. LEVINE: If we go back to what we had --

11 THE COURT: The only valid, the only valid
12 reason for not having something on the agenda is if the
13 parties are still working on it and it's premature.

14 If there's a legitimate dispute and one side
14:02:50 15 wants to put it on, then it's going to go on the agenda.

16 MR. SKIKOS: Which is really interesting, Your
17 Honor, because we put on the joint report for the February
18 conference the need to discuss additional GE trials because
19 there's only four of the 400, less than, you know, about 1%
14:03:10 20 of the ultimate GE, and we agreed in March that we would
21 hold off on that as an accommodation because they weren't
22 ready to address it.

23 And all these lawyers have come out, I have
24 the February joint report here about the plaintiffs' request
14:03:28 25 for remand or additional trial settings, and these lawyers

1 have come here today because GE made claims about their
2 diagnosis. And the claims are wrong in at least 70 of the
3 cases.

14:03:50

4 And, in fact, interestingly, in 70 of these
5 cases the treating doctors diagnosed these plaintiffs with
6 NSF before the lawsuit was filed, and there's a CMO that
7 already governs the diagnosis discovery in painstaking
8 detail that took four months to negotiate.

14:04:12

9 GE didn't move to amend that CMO. Instead,
10 what they did was they dropped 82 cases on me and said
11 "Figure it out in less than a week." And we did. We have
12 another binder here with the 82 cases.

14:04:30

13 So the lawyers here have come from all over
14 the country. We're going to ask Your Honor for the
15 indulgence -- this may help with the resolution efforts --
16 to discuss some of their cases, some of their plaintiffs,
17 some of the situations in which they are.

14:04:46

18 And since GE says, "Well, if it's going to be
19 on the agenda, then they can't stop us," well, then, fine,
20 the issue for this, for the February conference, which I did
21 as a courtesy take off, was the GE remand issue because
22 there's so many cases.

14:05:06

23 And there's one-third of all NSF patients with
24 GE exposures are now dead, 128 of them, and including some
25 this week. And so a couple lawyers have asked for the

1 opportunity to present to Your Honor the case-specific
2 facts, very quickly, to support a compelling need to do
3 something.

4 And we applaud your resolution efforts, but
14:05:24 5 resolution efforts without the trial which forces reason may
6 not help.

7 So with Your Honor's indulgence, there's a
8 couple who would like to talk to you.

9 THE COURT: Well, I'll hear from some of them,
14:05:38 10 but I -- I could remand 300 cases or 400 cases, all right.
11 That isn't -- that isn't going to help anyone.

12 You think 300 other Judges around the country
13 are going to drop everything and pick up one of these? They
14 will put it to the back burner, trust me, if I do that.
14:06:00 15 It's not going to help anyone.

16 I mean, if there are compelling reasons, quite
17 frankly, you could ask my assistance in settling the case.
18 That might be more efficient, which is what I'm -- that is
19 what I'm going to start spending my time doing because I'm
14:06:12 20 not -- I'm not even very optimistic. Looking at these
21 *Daubert* motions, I think that both sides are taking extreme
22 positions, and it's not clear that the real issues are
23 really going to be tried in front of a jury.

24 So, I mean, I'll hear briefly if someone wants
14:06:30 25 to talk about his or her case, but I'm not -- I'm not

1 inclined to just start remanding cases willy-nilly here.

2 MR. SKIKOS: And we're not asking for that.

3 I should have said it better. We're asking
4 for the consideration, after appropriate meet-and-confer, of
14:06:44 5 an additional GE bellwether track under your supervision
6 if --

7 THE COURT: I don't have -- I don't have too
8 much more time to try these cases, all right, so if you've
9 got some other ideas, fine, but I've got -- I've got four.

14:06:58 10 I've got a whole lot of other things that I've
11 got to do in my job so if, you know, you all -- I mean, I
12 think you need to figure out other ways to resolve these
13 cases.

14 All right. Yes, sir.

14:07:12 15 MS. LEVINE: Your Honor, if we're talking
16 about a good use of the Court's time, I'm not sure this is
17 one of them. I think this goes --

18 THE COURT: I'll decide that, but I will hear
19 from one or two people very briefly.

14:07:22 20 MS. LEVINE: That's fine.

21 THE COURT: Yes, sir.

22 MR. NATIONS: Good afternoon, Your Honor. I'm
23 Howard Nations. I'd like to discuss with you a couple of
24 cases that I have.

14:07:28 25 I represent 33 plaintiffs who have NSF

1 confirmed by biopsy. Of those 33, nine have died already.
2 The immediate problem is that I have two clients who are at
3 death's door literally. And these are not the cases of
4 people in their sixties and seventies. One of the clients
14:07:48 5 is 34 years old, married with a child. The other one is 43
6 years old.

7 They present unique problems, but they are
8 fairly exemplary of the situation that most of the
9 plaintiffs' attorneys in this case are confronting now with
14:08:00 10 these clients.

11 So the first case is 34 year old Carson
12 Hammersley, lives in California, he is married, has an eight
13 year old daughter. Mr. Hammersley has deteriorated. He had
14 his scans in '04, '05 and '06, in March of '06. He has
14:08:24 15 deteriorated now to the point where at the age of 34 he can
16 barely get out of bed. He has to have assistance to get out
17 of bed. He can't sit up in bed by himself.

18 When he does get up, his mobility is limited
19 to a chair in his living room. He sits in his chair or he's
14:08:40 20 bedridden all day. When he leaves his house, it's only to
21 go to the doctor. When he does, that's -- he has to have a
22 wheelchair to use for that.

23 The only thing the doctors have told him, they
24 have told him his case is hopeless. They told his wife that
14:08:58 25 she can anticipate that he's not going to be with her very

1 much longer.

2 THE COURT: Sir, I don't mean to cut you off.

3 MR. NATIONS: All right, sir.

4 THE COURT: Have you sat down with

14:09:08 5 Mr. O'Donnell to try and negotiate your cases?

6 MR. NATIONS: I have sat down, I've met with
7 Mr. O'Donnell twice, actually.

8 THE COURT: All right. Well, I suggest that
9 when we adjourn, we'll set a date and you all can come in
10 and see me.

14:09:20

11 MR. NATIONS: All right.

12 THE COURT: All right. That's what I'm going
13 to start doing, start spending my time doing, so --

14 MR. O'DONNELL: Mr. Nations is in town. We're
14:09:38 15 available tomorrow, Your Honor, after we're done with the
16 other mediation, Your Honor, as Mr. Nations' schedule
17 permits.

18 THE COURT: I don't know how long it will
19 take, but I don't have -- the only thing I have is a short
14:09:56 20 change of plea from 2:30 to 3:00 o'clock, so other than
21 that, I'm available.

22 I don't have much, you know, background for
23 it, but I'm here and you're here.

24 MR. O'DONNELL: I'll talk with Mr. Nations
14:10:12 25 about it. I'll have my information on those cases shipped,

1 FedExed out tonight and we'll be ready to go tomorrow.

2 THE COURT: All right. Mr. Nations, how many
3 cases do you have?

4 MR. NATIONS: With GE?

14:10:24 5 THE COURT: With GE.

6 MR. NATIONS: I have 21. I think we talked
7 about 19. Yeah, we've talked about 19. I have two others.

8 MR. O'DONNELL: Mr. Nations, we met on
9 January 25th in Houston and they are working on getting us
14:10:38 10 some DVDs, and I just talked with Howard about it before the
11 hearing, Your Honor, and asking what the status was.

12 I understood they would be coming here
13 shortly.

14 THE COURT: All right. I guess obviously
14:10:56 15 Mr. O'Donnell will be here in the morning so I don't know
16 what time, if we should set a specific time or figure out
17 where I can -- I mean, make sure my staff knows how to reach
18 you so I can call you as soon as we're concluded.

19 MR. NATIONS: All right.

14:11:10 20 THE COURT: Then we will start up with your
21 group.

22 MR. NATIONS: Fine. Thank you, sir.

23 MR. WEBSTER: Your Honor, can I ask you one
24 question? Jason Webster.

14:11:20 25 Your Honor, I want to know what I tell some of

1 the plaintiffs like Mr. Watson and Steve Charest who wants a
2 trial, who wants his case heard and who wants it to be tried
3 to the jury? What do I tell them, Your Honor, about the
4 procedure going forward?

14:11:32 5 Would you give me some instruction on what I
6 should tell my clients?

7 THE COURT: Well, all I can say, sir, is the
8 parties to this case, the plaintiffs and the four
9 defendants, voluntarily chose to use the MDL procedure. No
14:11:56 10 one, no one forced it on you, all right? So that's where we
11 are.

12 So once you're in an MDL, you've got to ride
13 with it.

14 I suggest if -- you know, have you met with
14:12:16 15 Mr. O'Donnell?

16 MR. WEBSTER: We've got it set up, Your Honor.
17 I mean, it's set for Monday. We've had to reschedule on
18 several different occasions, but we met with Bayer, also,
19 and we're trying to move with trial settings in those cases,
14:12:30 20 also, but I --

21 THE COURT: Well, I suggest, sir, you filed
22 twelve discovery motions yesterday which I've denied without
23 prejudice, and I'm directing you to go through the PSC on
24 those.

14:12:42 25 MR. WEBSTER: Okay, Your Honor. I have no

1 problem with that.

2 I want to know -- some of these people want a
3 trial, and I don't know what to tell them.

14:12:50

4 THE COURT: Well, I understand that, sir, but
5 if you're --

6 MR. WEBSTER: It's my understanding --

7 THE COURT: There are only so many trials I
8 can do with everything else I've got, so I don't have a good
9 answer.

14:13:00

10 MR. WEBSTER: So is there some process by
11 which we should either try to negotiate with them on a
12 remand process so that maybe we can get some type of trial
13 setting going forward for these clients?

14:13:12

14 THE COURT: You think that would help you, if
15 I just -- what Federal District Court do you originate in?

16 MR. WEBSTER: Well, I've thought of directing
17 the MDL because the matter will be transferred anyway.

18 THE COURT: Where do you think it would end
19 up?

14:13:24

20 MR. WEBSTER: In Seattle, and that's in front
21 of Judge -- I don't remember which one was there now, but
22 I -- you know, Your Honor, in most of these cases if you
23 were to remand these back, they will be tried within six to
24 nine months.

14:13:36

25 THE COURT: Well, within six to nine months,

1 it's my -- I would expect these cases are all going to get
2 settled, all right?

3 So, I mean, have you talked, have you talked
4 to the Plaintiffs Steering Committee?

14:13:50 5 MR. WEBSTER: Yes, Your Honor. In fact,
6 they -- yes, I've talked to them today. I've met with them
7 on several different occasions. Mr. Williamson has met with
8 them.

9 And the process is they do have the four
14:14:04 10 bellwethers going forward, but it kind of leaves the rest of
11 the plaintiffs, who are dying, like Mr. Nations' clients and
12 my client Mr. Charest up in Seattle, it leaves them -- we
13 don't have any other alternative.

14 I guess what I'm saying is if we can't work
14:14:22 15 out numbers on these cases and they are dying, we want some
16 type of relief.

17 I think these people are entitled to a trial.
18 They have filed their lawsuits.

19 THE COURT: Have you been trying to
14:14:30 20 settle -- you have a confounded case with Bayer and GE, is
21 that what this is?

22 MR. WEBSTER: Oh. I -- we do have confounded
23 cases, but the ones I'm speaking of are strictly GE, and I
24 have straight Bayer cases.

14:14:44 25 THE COURT: All right. Well, I suggest

1 you -- I'll set up a time where you and Mr. O'Donnell can
2 come in and see me, and I'll see what I can do with your
3 cases.

14:14:54 4 MR. WEBSTER: If they don't settle, Your
5 Honor, at that point --

6 THE COURT: I don't know what I'll do, all
7 right?

8 MR. WEBSTER: Thank you.

9 MR. WILLIAMSON: Your Honor, Jim Williamson.
14:15:00 10 I appeared in front of you before.

11 My problem, five of my cases -- I have ten
12 cases. Five of them are confounded, five of them are
13 straight Bayer.

14 I don't have any problem in talking resolution
14:15:12 15 on a fair basis. Bayer has indicated to me they will not
16 talk. I have been trying since July of last year. I have
17 been trying since July of last year to get on the docket.

18 If Bayer --

19 THE COURT: It's my understanding that the PSC
14:15:28 20 and Bayer are going to do something to move your cases
21 forward, Mr. Williamson, and they've represented that to me.

22 MR. WILLIAMSON: Yes, Your Honor. We are
23 working under a CMO that I can --

24 THE COURT: All right. So your cases will
14:15:44 25 advance.

1 MR. WILLIAMSON: Thank you, Your Honor.

2 THE COURT: That's all -- I've looked into
3 that.

14:15:50

4 MR. BRIGGS: Your Honor, if I may be heard,
5 Russ Briggs of the PSC.

6 THE COURT: Yes.

7 MR. BRIGGS: Also lead counsel for James
8 Belcher which was a trial case, Your Honor.

14:16:00

9 Mr. Belcher, sixty year old, lifetime coach
10 down in the Orlando, Florida area, thanks to NSF found the
11 last three years of his life in a wheelchair, had to be
12 sled -- pardon me -- use a slide board to get into his bed.
13 His wife had to take care of him day-in and day-out.

14:16:16

14 There was a trial date. It was heavily
15 discovered. It was struck by GE in August of last year.
16 And Friday night, Judge, I got the call that I've been
17 dreading, and that is that Mr. Belcher has passed away.

14:16:28

18 And I think the point that we are trying to
19 make, Your Honor, is this MDL is not like other MDLs where
20 you have certain type of injuries that you've got to deal
21 with.

14:16:40

22 This MDL is special. It's different. And
23 these people are dying. We're getting up to a 40% rate, and
24 we're afraid that somebody here is trying to run out the
25 clock.

1 What we want to do, Your Honor, is either try
2 these cases, have a, as you are suggesting, some type of
3 organized mediation agreement or trial settings, whatever we
4 can do, to get the dispositions.

14:16:52 5 And I would respectfully disagree with you,
6 Your Honor, and agree with Mr. Webster on one point: I
7 think with remand we could get it to trial early.

8 So the point is, Your Honor, we can't delay,
9 we can't wait like we might in a normal MDL. I think you're
14:17:08 10 doing a great job. And *Daubert* is going to be very
11 important, Your Honor, this Court will have served its
12 purpose, but the problem we have here is we have people
13 dying.

14 Mr. O'Donnell has been talking and we will
14:17:18 15 continue to talk, and I appreciate everything he's trying to
16 do for GE on getting these cases resolved, but the bottom
17 line is if we keep extending by months deadlines where GE
18 asks for more time on trials, this is unlike any other MDL,
19 that we're going to have a death rate approaching over 50
14:17:36 20 percent.

21 We can't afford it. Our clients can't afford
22 it, Your Honor.

23 MR. SKIKOS: We will cut off the presentations
24 at that point.

14:17:42 25 Thank you, Your Honor.

1 THE COURT: All right. Well, I would say,
2 sir, if you and Mr. O'Donnell reach an impasse, set up a
3 meeting, set up a conference with me and I'll --

4 MR. BRIGGS: Thank you, Your Honor.

14:17:56

5 THE COURT: Because obviously I
6 will -- clearly if, if a combination of my efforts and the
7 bellwethers aren't resolving cases, the only alternative is
8 to remand them all, there's no question about that.

9 MR. BRIGGS: And the concern is --

14:18:14

10 THE COURT: So I'm not looking to do that, but
11 if everyone understands that if they don't get resolved in
12 the MDL, they get sent back all over the country.

13 MS. LEVINE: And, Your Honor, that issue is
14 just simply premature, which you've addressed and stated
15 yourself several times now.

14:18:30

16 THE COURT: All right. But I will -- that
17 will be a last resort, so but if it happens, it happens.

18 MR. BRIGGS: Our concern is that the
19 bellwether plaintiffs like Mr. Belcher, he won't be the last
20 one to die on the bellwether docket, that's our problem,
21 Your Honor.

14:18:42

22 THE COURT: Well, I understand that, and
23 that's why I have started to play an active role in settling
24 these cases.

14:18:52

25 Everyone -- I mean, the cases should be

1 settled, all right? They can be settled and they should be
2 settled. And that's going to be my -- that's where I'm
3 going to spend most of my time from now on.

4 MS. LEVINE: Your Honor, and it is important
14:19:08 5 to note -- and I sympathize with the state of the plaintiffs
6 who are sick for many reasons, notwithstanding NSF, and
7 Mr. O'Donnell is working with them to attempt to settle
8 those cases.

9 I think it's noteworthy that the Nations firm,
14:19:28 10 the Williamson firm and the Matthews firm collectively have
11 the most number of cases in our evaluation that involve an
12 ambiguous diagnosis of NSF, product identification issues,
13 statute of limitations issues, nonbiopsy and other issues.

14 And so that may be in part the cause of the
14:19:50 15 disparity of the way those cases are being treated, to the
16 extent that they are. And these are very important issues
17 to GE -- I know they are to Bayer as well -- when we're
18 talking about evaluating the docket. And that is the role
19 of the MDL Court. And that's in part in large measure why
14:20:04 20 remand is premature, because those issues need to be
21 centralized and dealt with by Your Honor.

22 THE COURT: Well, I'm not sure if they can be
23 centralized.

24 I'll endeavor to settle them if there's a way
14:20:16 25 to make some consistent ruling, but I think those are

1 case-specific issues.

2 So, all right, is there anything else to take
3 up? Because I've got a lot of other things to do on this
4 MDL today.

14:20:30 5 I guess I did say I would schedule one more of
6 these, just to see if they'll work. So I'll schedule one
7 more.

8 Do the parties have a suggestion as to what
9 makes sense in line with everything else?

14:20:46 10 MS. LEVINE: We'd like to have one before the
11 Bullock trial scheduled, so it probably makes sense to do
12 that in maybe late April, in about six weeks or so. And
13 perhaps tie that in with any type of resolution issue with
14 Mr. O'Donnell.

14:21:06 15 MR. WEINBERGER: That time frame in late April
16 works for us, Your Honor.

17 THE COURT: I think that makes sense.

18 MS. LEVINE: The week of the 21st, maybe -- I
19 mean, the 19th?

14:21:30 20 THE COURT: Well, I've got a trial that week
21 and it's probably going to go. That's only, you know,
22 barely over a month from now.

23 What about the following week?

24 MR. WEINBERGER: The week of April 26th, Your
14:22:08 25 Honor?

1 THE COURT: The week of the 26th.

2 MR. WEINBERGER: Except for Tuesday, the 27th,
3 would work for us.

4 MS. LEVINE: I can only do the 26th.

14:22:24 5 MS. SHERMAN: The 26th?

6 THE COURT: I'm pretty clear that week.

7 What day are you suggesting; the 26th, Monday?

8 MS. LEVINE: If possible.

9 THE COURT: We've been avoiding Monday, but if
14:22:38 10 that's the day that works best for everyone, that's --

11 MR. WEINBERGER: If we can do the afternoon of
12 the 26th, Your Honor, that way people don't have to travel
13 on Sunday and leave their families.

14 THE COURT: That's fine. I could do it
14:22:54 15 1:00 o'clock on the 26th.

16 How does that sound for everyone?

17 MR. WEINBERGER: That's fine.

18 THE CLERK: Large or small?

19 THE COURT: Might as well do a large.

14:23:08 20 MR. O'DONNELL: Judge.

21 THE COURT: Yes.

22 MR. O'DONNELL: I didn't know whether you were
23 going to include any other settlement or not. I have a
24 matter where I'm national counsel that I have a conflict on
14:23:16 25 that date. If it doesn't involve settlement issues,

1 then --

2 THE COURT: Well, this is just the regular
3 MDL.

4 MR. O'DONNELL: Okay. Thank you, sir.

14:23:28 5 THE COURT: I piggybacked some settlement this
6 time because people are here.

7 All right. So it will be 1:00 o'clock on the
8 26th, April 26th.

9 When should we have submissions? Oh, let's
14:23:50 10 make it at 1:30.

11 How many days in advance have we been getting
12 submissions; like, the preceding Wednesday?

13 MR. WEINBERGER: Seven days, Your Honor.

14 THE COURT: All right. Let's say by 4:00
14:24:18 15 o'clock on April the 20th. Actually let's make it 2:00
16 o'clock, make it 2:00 o'clock on the 26th. 2:00 p.m. And
17 then submissions, noon on the preceding Tuesday, the 20th.

18 MS. SHERMAN: 2:00 o'clock for the MDL
19 hearing, Your Honor?

14:24:56 20 THE COURT: Right. And we will make it a
21 large group.

22 MS. SHERMAN: And 4:00 o'clock filing on
23 Tuesday.

24 THE COURT: April 20th.

14:25:02 25 MS. SHERMAN: April 20th, is that what you're

1 saying?

2 THE COURT: Right.

3 Okay. Anything further to take up in the
4 large group?

14:25:14

5 All right. Then I guess we're adjourned. I
6 had scheduled a short meeting with trial counsel on Bullock
7 and then I'm going to do some mediating.

8 Okay. Thank you.

9 (Proceedings concluded).

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C E R T I F I C A T E

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

/s/Susan Trischan

/S/ Susan Trischan, Official Court Reporter

Certified Realtime Reporter

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