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UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

- - - - -

TRANSCRIPT OF PROCEEDINGS VIA TELECONFERENCE
HAD BEFORE THE HONORABLE JUDGE DAN AARON POLSTER,
JUDGE OF SAID COURT, ON THURSDAY, JUNE 10,
2010, COMMENCING AT 3:45 O'CLOCK P.M.

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Court Reporter: GEORGE J. STAUDUHAR
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APPEARANCES :

ATTORNEYS PRESENT BY PHONE :

DEBORAH MOELLER

TAREK ISMAIL

TOM STERCHI

CHARNA SHERMAN

HEIDI LEVINE

STEVE SKIKOS

PETER WEINBURGER

CINDI RUSNAK

JIMMY WILLIAMSON

MICHAEL KERENSKY

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P R O C E E D I N G S

THE COURT: I apologize for all the technical glitches. It started with a problem at the Court.

I am going to throw out a few things. I don't necessarily think we are going to get this resolved, but we have a court reporter, and it is on the record, and it is for people to be thinking about. I said it at the last large group conference that we had, to figure out some way to move Mr. Williamson's firm's ten cases forward, and we are going to do that.

I don't think we need a whole Bayer CMO to do it because, as I understand it, Bayer has been settling cases for over a year and is settling cases. They believe that NSF has been confirmed, and there is an Omniscan that is not too remote, and in fact, GE is settling cases in the same fashion, although not as many. I think what we need to do is move this group of cases forward.

Now, Mr. Williamson, Ms. Rusnak Mr. Kerensky, the issue has been raised as to whether your ten clients have NSF. I would say at the outset I believe there is something in the Medical Canons of Ethics that you are not supposed to treat a close relative except in an emergency.

1 And I also don't think it is appropriate to
2 be an expert witness for a close relative. So that
3 really is the problem with Dr. Delgado. No one is
4 questioning his professional —

5 MR. WILLIAMSON: He is not. I misimplied
6 that. Dr. Delgado is not an expert witness. This is
7 Jimmy Williamson.

8 In the case of Reynolds Delgado, Sr.,
9 Reynolds is not an expert witness and not a treating
10 physician. He gives his father advice, of course, but he
11 is not an expert witness or a treating physician. The
12 NSF diagnosis received by Reynolds, Sr. the person who is
13 the Plaintiff, was signed by another board certified
14 doctor here in Houston.

15 THE COURT: Who signed his diagnosis?

16 MR. WILLIAMSON: Dr. Dilly Cohen, your
17 Honor, a surgeon who is also well respected, who is also
18 very highly respected has a very impressive resume.

19 THE COURT: All right. That's fine. That
20 takes care of that issue. All right.

21 The defendants are questioning NSF diagnosis
22 for these ten cases, and I gather Bayer is named in all
23 ten, and GE is named in roughly five of them.

24 MR. WILLIAMSON: No, your Honor. Bayer is
25 named, I think named in seven, and I think GE is named in

1 five, which leaves me with a couple of GE, only two or
2 three confounding cases, and if memory serves me right,
3 five Bayer only cases.

4 THE COURT: All right. Well, fine. But
5 whatever, we got ten cases. This is my suggestion to
6 move these forward because I think, these cases would get
7 settled if the defendants are convinced the individual
8 Plaintiff has NSF, and if the Plaintiff doesn't have NSF,
9 the case should be dismissed. So I'm suggesting we have
10 case specific discovery solely on the issue of NSF
11 diagnosis for they ten cases.

12 MR. WILLIAMSON: I totally object to that,
13 your Honor. May I tell you why?

14 THE COURT: Let me finish, and then I am
15 going to let the parties confer, and if you can't come to
16 some agreement, I will order something. This is my
17 suggestion, and we figure out what's a reasonable time to
18 do this. All right.

19 After that discovery is done, the plaintiffs
20 and GE and Bayer meet and confer and see if — one of two
21 things can happen in individual cases: Either the
22 Defendant withdraws their objection to the diagnosis or
23 if the Plaintiff, upon seeing the discovery, is convinced
24 that it is not likely to prove NSF, then you dismiss the
25 case.

1 If we are still left with some cases, all
2 right, it doesn't make sense to try them all because
3 presumably the issues are going to be the same. And so
4 what I suggest is the parties essentially agree on what
5 the dollar value of a settlement would be if the
6 plaintiff has NSF, and we pick two cases out of the ten
7 or however many are left.

8 The plaintiffs pick one, and the defendants
9 pick one, and you simply put that issue to the jury.
10 Does this plaintiff have NSF? Yes or no. And that's
11 what is tried, and the jury decides it. And if the
12 plaintiff wins in both, then the defendants settle the
13 remainder at an agreed upon amount.

14 If the plaintiff loses both, the plaintiff
15 dismisses the remainder. If split, you pay half of the
16 settlement of the remaining cases, and that's a lot —
17 seems to be a lot cheaper and more efficient than trying
18 all the cases because the rest of it is probably not in
19 dispute, or if it is, it can be settled along with the
20 way the other cases are being settled.

21 They are settling them according to a
22 construct and can apply the same construct with your
23 cases, Mr. Williamson, and GE is settling cases, and I am
24 sure they can come up with an appropriate valuation for
25 your cases if there is NSF. So that's my suggestion.

1 And what I would like for the parties to
2 confer further, and see if you can come to some
3 agreement. And if you can't, then I will make a decision
4 at the large group conference that we have on the 22nd.
5 So if you can come up with something better, fine, but
6 this issue seems to have only arisen with this group of
7 cases where we have one firm's cases, and both defendants
8 are challenging NSF diagnosis on all of the cases.

9 So I think this calls for a different
10 approach than we've had, and this is my suggestion. If
11 you all come up with something better, you can propose
12 it. But I don't think we need a Bayer only CMO and a
13 whole bunch of bellwether trials. That's just going to
14 interfere with the system we already have.

15 MR. WILLIAMSON: Your Honor —

16 THE COURT: Yes, Mr. Williamson.

17 MR. WILLIAMSON: — I apologize.

18 THE COURT: I am done.

19 MR. WILLIAMSON: — if you are not through.

20 THE COURT: I am done. No, I'm through.

21 MR. WILLIAMSON: Your Honor, there is merit
22 in a lot of what the Court just said, but here is the
23 part that I pretty vigorously object to. And that is, I
24 have been trying to move this docket for over a year, and
25 I am not talking about how long I have been in your

1 Court. It has been longer.

2 I produced a diagnosis of NSF from a
3 pathologist, a well-respected, well-qualified
4 pathologist. They said they were going to settle. Then
5 they said they weren't. They won't tell me the
6 disagreement, and they won't agree to a CMO. I asked in
7 September and October — I remanding, and I will engage
8 in discovery. No. Set me for trial. No. Let me know
9 the basis of your pathology objection. No.

10 And we want to handle your cases differently
11 from where we are handling every other case in the class
12 action. I said "let's get a trial date, agree to it, and
13 engage in discovery like every other case in the
14 United States with a pretrial order and trial date," and
15 they said no. They said no in October, December,
16 February, March, April, May, and now June.

17 In the meantime, I have had two of my
18 clients pass away, and I am now — what their proposal is
19 to do — and by the way, they misstated several things.
20 One thing, Charlotte Simmons was a case on your
21 bellwether docket and deposed Reynolds for hours. GE was
22 invited specifically to that deposition. They refused to
23 attend.

24 Mr. Ismail showed up. He deposed
25 Dr. Delgado and found out why Dr. Delgado held the

1 opinions he holds about Charlotte Simmons. He did not
2 ask any other questions about any of the others. In the
3 meantime, they now want to say we don't want to go to
4 trial. We don't want a CMO. We don't want to designate
5 experts. We want further delay. We want unilateral
6 discovery.

7 THE COURT: It is not unilateral.

8 MR. WILLIAMSON: And there is not a
9 chance —

10 THE COURT: Mr. Williamson, it is not
11 unilateral. You will be able to depose their expert if
12 they produce, and we will try your cases. I think it
13 will only be two to three days. I will put them in and
14 try two cases. One you pick, and one they pick, and the
15 issue will be on whether that patient, client, has NSF.
16 I will try it.

17 MR. WILLIAMSON: Right. And I now have sent
18 my client's pathology to another well-respected,
19 well-qualified pathologist who confirmed the diagnosis of
20 NSF. Never say never. I could discover something new,
21 nor am I refusing to be openminded, but I am holding two
22 different board certified pathology reports saying I have
23 NSF. The chance that I will voluntarily dismiss those
24 cases are zero. Without trying to be close minded, it is
25 impossible to think — they will not even articulate the

1 basis on which they object to the pathology.

2 THE COURT: Well, if the parties agree to my
3 procedure, not only will they have to tell you, they will
4 have to produce competing experts, who will review the
5 pathology and opine that the person doesn't have NSF.
6 Otherwise, they will have to drop the challenge.

7 MR. WILLIAMSON: Okay. Can I have them to
8 agree to produce that paperwork before I produce these
9 people for deposition because I am anxious to move the
10 ball, and they don't want to? In engaging in one-way
11 discovery for ten cases with no trial date, in my
12 opinion, is just a way for them to delay moving the ball.

13 So they have the absolute right to contest
14 the diagnosis, that's fine. But I want to get my cases
15 to resolution, and I am not making progress with defense
16 counsel quite frankly —

17 THE COURT: Well, look, I put out my
18 suggestion, and you can work with the time frame. I am
19 figuring no more than four months to do NSF diagnosis
20 discovery on these nine or ten cases, and the parties
21 will work out what the settlement value would be if the
22 patient has NSF.

23 And Mr. Williamson picks — and if you can't
24 agree to either drop the challenge or the plaintiff
25 dismisses, then there are some cases left, the plaintiff

1 picks one and the defendants pick one, and we have two
2 two or three-day trials, and the parties use that as a
3 basis for resolving the remainder. I will slot the
4 trials in. These are two to three-day trials. I can put
5 them in anytime.

6 MR. WILLIAMSON: Your Honor, I have
7 understood the Court's suggestion, and I will be happy to
8 meet and confer. I understand that I need to tell the
9 Court two things:

10 Number one, if I understand the suggestion,
11 if we cannot make headway on an accord on how to move
12 forward, then we will be discussing this issue with you
13 at the large group?

14 THE COURT: And I will make a decision
15 because we have to do something with your ten cases.
16 They are not just going to languish. But you have to
17 understand, it is not that I want a separate protocol for
18 you; it is that this is the only situation like this that
19 has occurred in the MDL, and it behooves me to come up
20 with a solution that fits your unique situation, and
21 that's what I am trying to do.

22 MR. WILLIAMSON: Right. And I appreciate
23 the Court's efforts to address mine, however. And the
24 Court, I think, is certainly doing that, which I totally
25 appreciate. Your Honor, I do need to inform the Court of

1 one last fact, and I know you ordered us to meet and
2 confer.

3 I have an irreconcilable conflict on June
4 22nd. Ms. Rusnak or Mr. Kerensky will show up with 100
5 percent authority to act on the lawsuit.

6 THE COURT: That's fine. And people run
7 into conflicts, and everyone can't be at every meeting
8 because that would be impossible.

9 MR. WILLIAMSON: And counsel will be there
10 with full authority.

11 THE COURT: All right. I have thrown this
12 out. There may be better ways to do this, but we don't
13 need a full blown Bayer CMO, but we need something to
14 address this unique situation. So I have thrown this
15 out, not to dictate a solution but to prompt some very
16 smart people to engage in and come up with something.

17 MR. WILLIAMSON: Although I will make one
18 other comment if the Court will allow me. The problem
19 with going to trial — and I only get X number of dollars
20 if I succeed — it puts the risk of loss on me with no
21 chance of reward, so that's a somewhat problem. One of
22 the advantages the plaintiff gets from settling is, he
23 gets certainty and gets to avoid the risk of trial. If I
24 get certainty but not the chance of reward, that's
25 problematic.

1 THE COURT: But, Mr. Williamson, you are
2 getting certainty on everything else. Liability and
3 damages. All right. You are only trying one issue. All
4 right. The defendants — if your case went to full blown
5 trial, GE and Bayer have a whole lot of defenses and
6 experts and issues that they would raise long before we
7 would get to damages.

8 MR. WILLIAMSON: Well, that's true, too.

9 THE COURT: So this would be not the
10 full-blown bellwether trial; it would be a one issue.
11 Does patient A, client A, have NSF? That's it.

12 MR. WILLIAMSON: I am just saying that
13 analysis is somewhat problematic. I have to think about
14 it.

15 THE COURT: All right.

16 MR. WILLIAMSON: I am not saying it is
17 insolvable.

18 THE COURT: The parties can work with it,
19 and obviously, if you come up with something, just about
20 anything that you all agree to, I will probably
21 approve.

22 MR. WILLIAMSON: So far we haven't had much
23 luck agreeing to much, Judge.

24 THE COURT: But everyone has got to look at
25 this as a problem to be solved, not as a fight, and

1 that's the same way with you, Mr. Williamson.

2 MR. WILLIAMSON: Yes, your Honor.

3 THE COURT: Because your firm is the only
4 one where this has surfaced, and so you got to recognize
5 that. All right. So I will wait to see what I get, and
6 if this is still completely unsolved, I will have to
7 impose something myself, but I will do something with
8 this group of cases. But I hope I don't have to just
9 impose it. All right.

10 Is there anything — Mr. Williamson and I
11 have monopolized this. Is there anything that any of the
12 other defendants or the PEC wants to say?

13 MR. ISMAIL: I have a number of comments in
14 regards to assertions Mr. Williamson made that we think
15 are flatout wrong, beginning with the fact that "son" is
16 noted on the fact sheet for noting the diagnosis for
17 poppa. So a lot of assertions made by Mr. Williamson are
18 flatout wrong, but I understand the spirit of your
19 Honor's direction to us, to work it out, and I don't want
20 to take everyone's time to rebut on the merits. I will
21 note only, as I think the Court has appreciated over the
22 past year, I don't have a particular bone to pick with
23 Mr. Williamson or his cases. I didn't even know that
24 firm before this litigation, so it is not a question of
25 us isolating his cases for the purpose of isolating his

1 cases.

2 It is just that without a good
3 substantiation of NSF, which we don't believe exists, we
4 can't resolve the case. We have proposed discovery. We
5 want to move the cases forward. I know the litigation
6 doesn't end with us until we resolve Mr. Williamson's
7 cases, either to the merits or by settlement, and we will
8 work — and I know Ms. Levine agrees — we will work with
9 Mr. Williamson because we want this issue done.

10 We proposed discovery to move the cases
11 forward, and if there is another mechanism he wants to
12 propose, we will consider it as well.

13 THE COURT: But discovery is two ways. You
14 discover his stuff, and he discovers your counter
15 experts.

16 MR. ISMAIL: Right. With an expert
17 discovery proceeding under Rule 26 and the like, we are
18 happy to proceed by that route as well with a timetable
19 and end game. But — but unless your Honor —

20 THE COURT: No. I didn't want to preclude
21 anyone from saying anything, but the idea was not to
22 debate my proposal. That's for you all to work on
23 privately. I just threw it out for discussion, thought,
24 reasons.

25 MR. ISMAIL: Understood.

1 MR. WILLIAMSON: Fair enough, your Honor.
2 We will be happy to meet and confer and report to you on
3 June 22.

4 THE COURT: Okay.

5 MR. ISMAIL: Thank you, your Honor.

6 THE COURT: Thank you everyone. Bye bye.

7 (Hearing concluded at 4:11 p.m.)

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9 C E R T I F I C A T E

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

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18 s/George J. Staiduhar
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