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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-01928-MD-MIDDLEBROOKS

IN RE TRASYLOL PRODUCTS)
LIABILITY LITIGATION,)
)
)
) West Palm Beach, Florida
) March 4, 2011
) 10:00 a.m.

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TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE DONALD M. MIDDLEBROOKS

U.S. DISTRICT JUDGE

Appearances:

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1 Appearances (continued):

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1 (Call to Order of the Court.)

2 THE COURT: Good morning. Please be seated.

3 This is a hearing in the Trasylol litigation. Let's
4 have appearances for those in the courtroom.

5 MR. DERRINGER: Good morning, your Honor. Steve
6 Derringer for the defendants.

7 THE COURT: Good morning.

8 MR. SCHOON: Good morning, your Honor. Gene Schoon
9 for the defendants.

10 THE COURT: Good morning.

11 MS. LOWRY: Good morning, your Honor. Pat Lowry for
12 the defendants.

13 THE COURT: Good morning.

14 Okay. There appears to be nobody from the plaintiffs
15 in the courtroom, but I hear there are some people who want to
16 address the motions on the phone.

17 Let's hear from those people. We need your name
18 first, though. Anybody there?

19 MR. LoPALO: Good morning, your Honor. Chris LoPalo
20 from Napoli, Bern, Ripka.

21 THE COURT: Good morning.

22 MR. LoPALO: Good morning, your Honor.

23 THE COURT: Anybody else that plans to speak? Anybody
24 else? What happened? Is this just lack of interest?

25 I know you've settled a bunch of them. Mr. Derringer,

1 do you know what --

2 MR. DERRINGER: Your Honor, I don't know. We're
3 prepared to argue the six motions that remain. There were 18
4 originally. The 12 that are -- that we're not prepared to
5 argue, although we would be happy to speak to them if you would
6 like, they've all either been dismissed or settled with I think
7 the exception of Brinson in which there's been a motion to
8 withdraw.

9 THE COURT: Okay. Well, let's go ahead. Why don't
10 you go ahead and let's -- they're your motions.

11 MR. DERRINGER: Your Honor, when we had 18 motions up,
12 Mr. Schoon, Ms. Lowry, and I divide up certain motions and, in
13 fact, within some motions some subject matter. I'm going to
14 address the statute of limitations argument and why we believe
15 our motion to dismiss on 12(b)(6) grounds in the six Delaware
16 cases should be granted.

17 Mr. Schoon will be prepared to address questions
18 relating to the different issue in those cases about whether an
19 extension of time should be granted under Rule 4(m) for service
20 of those cases.

21 THE COURT: Well, the Delaware -- so there's no
22 plaintiffs' counsel asking to be heard in the Delaware cases;
23 is that right?

24 Mr. LoPalo is in Brinson which was filed directly
25 here.

1 MR. DERRINGER: That's correct.

2 THE COURT: So we don't have any -- who is the lawyer
3 and what's the situation?

4 MR. DERRINGER: The lawyer is Jason Itkin. I'm not
5 sure if he joined since appearances were requested a few
6 minutes ago. And I don't know what the reason for his absence
7 might be.

8 THE COURT: Okay. Mr. Itkin, are you on the phone?
9 Is anybody from the plaintiffs' steering committee on the
10 phone?

11 MR. OVERHOLTZ: This is Neil Overholtz from the
12 plaintiffs' steering committee, your Honor.

13 THE COURT: Have you had any contact with Mr. Itkin?
14 Do you know why he's not appearing or is he just not
15 interested? What's the situation?

16 MR. OVERHOLTZ: I do not know, your Honor. I saw his
17 name on the list yesterday when I was reviewing what's on the
18 hearing docket today, and I'm surprised that he's not on the
19 phone.

20 THE COURT: Okay. Thanks.

21 MR. OVERHOLTZ: I'll reach out to him then.

22 THE COURT: All right. He's got -- how many cases
23 does he have left then in these Delaware cases, Mr. Derringer?

24 MR. DERRINGER: Well, that are on the docket for
25 today?

1 THE COURT: Well, that are subject to a motion to
2 dismiss for the statute of limitations problem.

3 MR. DERRINGER: Six, your Honor. They are the first
4 six listed on your -- in the caption on your order for setting
5 the hearing.

6 THE COURT: All right. So that's Good, Hammond,
7 Hutchins, Jenkins, Kumar, and Martin.

8 MR. DERRINGER: Correct, your Honor.

9 THE COURT: Okay. Go ahead.

10 MR. DERRINGER: If it please your Honor, maybe there's
11 other matters you want to address today and wait a few minutes
12 at least to see if Mr. Itkin joins before I begin an argument
13 that Mr. Itkin apparently won't hear if I start it now. We
14 would be happy to do that but also happy to the start with the
15 argument in these six cases if you would like.

16 THE COURT: Well, the only other one where there's a
17 lawyer present is Brinson, and Mr. LoPalo has asked to
18 withdraw. I guess we can take that one first. And then --

19 Mr. LoPalo, you say you've got a conflict with your
20 client in terms of direction.

21 MR. LoPALO: Correct, your Honor. And yesterday I
22 filed a motion to withdraw. It was to CMO 23. And I'm
23 requesting that any argument, hearing on this motion today be
24 postponed until there's a rule on the subsequent motions.

25 THE COURT: I guess I'm worried in this -- in your

1 case there's an affidavit which says that service was
2 effectuated on Bayer, and there's aspects of that affidavit
3 that are problematic. Anybody that comes in I guess takes the
4 case as it exists. So what do you think about that? How do I
5 deal with that problem?

6 MR. LoPALO: Well, there is an issue that's
7 (indiscernible) on the affidavit of service, and that affidavit
8 was prepared by a paralegal, an employee of my office, and I
9 will make her available if necessary if the defendants need to
10 depose her.

11 THE COURT: Do you think we should keep you in the
12 case until this issue is resolved or do you think you should be
13 allowed to withdraw?

14 MR. LoPALO: I think I should be allowed to withdraw,
15 and I'll stipulate that the paralegal from my office who
16 prepared the affidavit of service will be produced at a later
17 date if necessary for any deposition or hearing if the case
18 goes forward.

19 THE COURT: Mr. Derringer, what about that? What's
20 your reaction? I guess I -- there were -- there seems to be
21 some problems with the affidavit. The other case was, what,
22 Ross and that settled. Brinson has not settled. To the degree
23 that question -- I mean, the affidavit says service was
24 effected, but it seems like one of the companies wasn't even in
25 existence at the time they say they served it. So there are

1 some problems with that. It's hard to resolve those at a
2 motion to dismiss stage. What do you suggest we do in Brinson?

3 MR. DERRINGER: Well, your Honor, as a preliminary
4 matter, Ross has been dismissed with prejudice I believe
5 instead of settled, but it is out of the proceedings now.

6 THE COURT: Okay.

7 MR. DERRINGER: On Brinson -- Mr. LoPalo and his firm
8 have a bunch of cases pending here in the MDL. So I think even
9 if they were permitted to withdraw in this case, we would
10 still -- he's obviously still subject to the jurisdiction of
11 this Court and we would still be able to involve him and his
12 firm and his employee to the degree we need to address
13 fact-specific questions.

14 I think that, you know, our position is that the
15 affidavit doesn't really create an issue of fact here for a
16 variety of reasons Ms. Lowry would be prepared to address and
17 we can probably proceed without having to really resolve that
18 issue. But our suggestion had been to Mr. LoPalo that we were
19 not going to oppose his withdrawal. We still don't oppose his
20 withdrawal as counsel in the case. And we don't oppose
21 postponing the hearing on this matter until either new counsel
22 is selected or the time for getting new counsel has expired.
23 And then at that point I think if your Honor is so inclined, we
24 would be able to address what to do about the motion.

25 It is obviously a concern of ours, and we want to be

1 sure that whoever comes in new stands in the shoes where the
2 case is right now and, as you had noted, is left with the
3 status quo that we find ourselves in here which we believe
4 still warrants application of dismissal of this case for the
5 reasons set forth in our motion.

6 THE COURT: Okay. So you don't oppose withdrawal,
7 but -- and tell me -- you said it and I didn't quite hear it.
8 Do you think I should leave this motion pending until they get
9 new counsel? Is that what you suggest? I grant his motion to
10 withdraw and then allow -- just leave the motion sitting there?
11 Is that what you all are saying?

12 MR. DERRINGER: Yes, yes.

13 THE COURT: And I would think it might be hard to find
14 a lawyer in that circumstance.

15 Mr. LoPalo, what about that?

16 MR. LoPALO: Well, we could address the issue now,
17 your Honor. I'm prepared to argue it. You know, unfortunately
18 I don't have, you know, my witness available, Ms. Boucher, who
19 signed the affidavit of service who would be able to maybe
20 answer any disputed facts.

21 THE COURT: Well, procedurally how do we get there?
22 This is 12(b)(6) motion. Can we engage in that kind of
23 fact-finding or would it be better to leave that to a later
24 stage, summary judgment or some other issue if that was
25 necessary to be decided?

1 MS. LOWRY: Your Honor, it's our position that the
2 affidavit that's been submitted is not sufficient evidence of
3 service to even create a factual dispute, and so your Honor
4 could dismiss it without even -- we believe the affidavit is
5 not credible. But even if you believe the affidavit, because
6 of the service procedures required by PTO No. 4 which is
7 registered mail return receipt requested, that in order to
8 prove up service in the face of a challenge the plaintiff has
9 the burden on that issue, that they would have to provide more
10 than an affidavit by the paralegal even if it were credible.
11 And so it's our position that you can dismiss the case on this
12 motion by finding that the plaintiff has not put forth
13 sufficient evidence to prove service in the face of our
14 challenge.

15 THE COURT: All right. But if I were to push
16 Mr. LoPalo forward to argument on this, I guess he's subject
17 to -- and when he's already said he's got an irreconcilable
18 conflict with his client, I place him in a difficult situation.

19 Okay. I think, Mr. LoPalo, I'm going to allow you to
20 withdraw, and I'm going to leave this motion pending and see if
21 your clients can get other counsel, and then we'll figure out
22 what to do with the motion at that point.

23 MR. LoPALO: Thank you, your Honor.

24 THE COURT: Okay. And you're of course welcome to
25 stay on the line or not depending on what you want to do.

1 Okay. Did we hear from Mr. Itkin?

2 MR. DWYER: Judge Middlebrooks, Mr. Alexander Dwyer
3 from the Itkin firm. I just called him on the cell phone, and
4 he's about to call into the hearing number.

5 THE COURT: Okay. Thank you.

6 MR. DWYER: No problem. Thank you.

7 (Pause in Proceedings.)

8 THE COURT: What was the name of the lawyer calling in
9 again?

10 THE LAW CLERK: I think he said Alexander Dwyer.

11 THE COURT: Mr. Dwyer, are you on the line yet?

12 MR. DWYER: Hello.

13 THE COURT: Mr. Dwyer?

14 MR. DWYER: Yes, your Honor. This is Alexander Dwyer.
15 I apologize for the miscommunication.

16 THE COURT: Okay. Well, Mr. Derringer is ready to
17 proceed. Go ahead.

18 MR. DERRINGER: Thank you, your Honor.

19 Your Honor, in these six cases there's no dispute that
20 under Delaware law the mere filing of the complaint does not
21 commence an action and therefore it does not toll the statute
22 of limitations.

23 There's also no dispute that in order to toll the
24 statute of limitations Delaware law requires diligent effort to
25 complete service. Delaware law is clear on this issue. An

1 action is commenced and the limitations period is tolled only
2 where the plaintiff diligently seeks to bring the defendant
3 into court and subject him to its jurisdiction. Where the
4 plaintiff fails to act with diligence in completing service the
5 statute of limitations continues to run until service is
6 completed.

7 There's also no dispute, your Honor, that in the 889
8 days that have elapsed since these six cases were filed no
9 service of any complaint on any defendant in any of these six
10 cases has been completed. So the only question at issue is
11 whether the plaintiff's single unsuccessful attempt to serve
12 defendants two and a half years ago demonstrates the diligence
13 required under Delaware law to toll the statute of limitations.
14 It does not. And because it does not these cases are all
15 time-barred because they were not commenced under Delaware law
16 before September 2010, the very latest date that the two-year
17 limitations period expired.

18 Delaware law --

19 THE COURT: You clearly did get actual notice because
20 you removed it prior to being served apparently. And then I'm
21 told that there is a -- the magistrate judge in Delaware
22 recommended that the cases not be remanded because you hadn't
23 been served yet. And that still is sitting. And then in the
24 meantime I guess the district judge and the MDL panel sent them
25 here. So that's still sitting there. Does that make any

1 difference?

2 MR. DERRINGER: I don't think that it does. You know,
3 the plaintiffs in their opposition, they focus on issues that
4 we think are completely irrelevant and ancillary to the
5 substantive commencement issue that is before the Court; issues
6 about notice, issues about prejudice. These are all issues
7 that have to do under Rule 4(m) or under an analogous Delaware
8 state law provision, which also isn't at issue in these cases
9 because these are in federal court, they have to do with
10 whether the Court should exercise its discretion in permitting
11 the plaintiffs to extend the time for service. But that
12 doesn't matter here. Number one, because it's the substantive
13 issue that we're talking about in terms of commencement of the
14 action, not a procedural issue about whether the time for
15 service should be extended two and a half years later but --

16 THE COURT: Couldn't it go to the issue of whether or
17 not they've been diligent? Is it our failing not to have dealt
18 with that magistrate recommendation?

19 MR. DERRINGER: No, I don't believe so. Because their
20 diligence has nothing to do with this issue that you're talking
21 about. There's nothing about the status of the case from the
22 time it was filed up until the time it was removed up until
23 today that has prevented these plaintiffs from taking advantage
24 of the procedural mechanism in this MDL, a much streamlined
25 procedural mechanism, to serve any of these defendants.

1 THE COURT: But if the case had been remanded,
2 presumably then you would have been served because they had
3 delivered the summons to the clerk in the state court. So --

4 MR. DERRINGER: Well, it was returned unserved. It
5 was returned to the plaintiffs unserved. So we don't know what
6 would have happened. What we know is that these plaintiffs
7 know how to serve under PTO 4. They've served ten cases in the
8 MDL. They have not served these six. And they've cited no
9 case to say that the procedural status of the case excuses what
10 is a clear lack of diligence here.

11 You know, we've cited cases, the Austin case and the
12 Webster case, both of which we think speak directly to the
13 issue here. In those cases the plaintiffs were on notice that
14 the summons had not been served. And when you delve in those
15 cases with periods of non-service far less, far shorter than
16 what we're dealing with here, the Courts concluded that no
17 diligence had been shown and that the limitations period had
18 run.

19 THE COURT: Well, assuming they haven't shown
20 diligence what do we do? What do you think should be -- you
21 argue I think that we apply this Delaware borrowing statute and
22 apply Delaware law --

23 MR. DERRINGER: That's correct.

24 THE COURT: -- is that right?

25 MR. DERRINGER: That's correct. Again, I don't

1 believe that's an issue in dispute.

2 THE COURT: But why do we get to that issue?
3 Shouldn't we just dismiss it without prejudice; they can either
4 file or not file? It seems like the only reason they filed in
5 Delaware in the first place was to somehow avoid diversity.
6 These cases could have been filed probably where the plaintiffs
7 resided or where the surgery occurred more readily.

8 MR. DERRINGER: I'm not sure why they decided to file
9 in Delaware because I don't believe any of the defendants are
10 residents of the state of Delaware.

11 THE COURT: Well, they ask me to dismiss it without
12 prejudice. Presumably then they would have to decide whether
13 they're going to refile in Delaware or whether they file in
14 Virginia or any of these other places that might have a --
15 what's wrong with that approach?

16 MR. DERRINGER: Well, because they elected to file in
17 Delaware, your Honor, and under that -- under that statute,
18 under the law that they elected to file under, these cases are
19 clearly time-barred. And the cases that have come out on this
20 issue, they've been cases dismissed with prejudice.

21 There's no extension of the time to serve that is
22 going to save these cases from the time-barred that is
23 currently in place. They failed to show diligence. If they
24 filed today, that finding would be undisturbed. It's simply
25 not diligent to know that you have not successfully served a

1 defendant. And to wait two and a half years before deciding to
2 do so -- in fact, they haven't even done that now. But that's
3 assuming they get an extension from your Honor and serve their
4 cases today. Even then with that kind of extension they
5 haven't commenced their cases within the two-year period
6 mandated by Delaware law.

7 THE COURT: But aren't there -- there's some Delaware
8 law that I guess causes me to question whether Delaware would
9 apply the borrowing statute in this setting. So why do we need
10 to reach that?

11 MR. DERRINGER: Well, I'm --

12 THE COURT: For example, if we dismiss it -- if we
13 were to dismiss it without prejudice and they refiled, for
14 example, in Virginia, then we just simply analyze the Virginia
15 statute, don't we, and decide whether or not their filing is
16 timely?

17 I mean, one problem is you've got people -- there are
18 so many places these cases could have been filed. Don't I have
19 to analyze each of those locations in order to determine how
20 the borrowing statute issue would come out?

21 MR. DERRINGER: I don't believe so, your Honor. I
22 think that here -- well, first, these were filed in Delaware so
23 I think you would look at the Delaware borrowing statute. And
24 under the Burrell versus AstraZeneca case recently decided by
25 the Delaware Superior Court, September 20, 2010, that statute

1 says that no other state statute of limitations needs to be
2 considered if the claims at issue are barred by the Delaware
3 statute of limitations. So I think under that authority you
4 don't need to look at any other state.

5 And, you know, here you certainly don't need to do a
6 survey of theoretical states in which these cases could have
7 been brought because they were brought in Delaware. And again,
8 I think that the borrowing statute --

9 THE COURT: Doesn't the borrowing statute only come
10 into play if you analyze that the Delaware statute is shorter?

11 MR. DERRINGER: Well, it says that where a cause of
12 action arises outside of the state, an action cannot be brought
13 in a court of this state to enforce such cause of action after
14 the expiration of whichever is shorter; the time limited by the
15 law of this state or the time limited by the law of the state
16 or country where the cause of action arose for bringing an
17 action upon such cause of action. So --

18 THE COURT: So how do I avoid not analyzing the other
19 state?

20 MR. DERRINGER: Well, because Delaware, even if it is
21 longer, right, it bars the action here. So that's why you
22 don't have to look at any other state.

23 THE COURT: What about that Saudi case? Didn't --
24 doesn't that question whether or not they would apply it in
25 every instance? Saudi Basic Industries Corporation versus

1 Mobile, how does that come into play if at all?

2 MR. DERRINGER: Your Honor, I'm not familiar with that
3 case. I'll have to take a look at that. I apologize. Is that
4 in the briefs?

5 THE COURT: I think so as I recall. Anyway, it's 866
6 Atlantic 2d. And they didn't apply it there. The facts are
7 certainly different, and theoretically you might be able to
8 distinguish it. I just wonder why it's -- whether I should get
9 into trying to analyze where it could be filed, which seems
10 like I almost have to do if I apply the borrowing statute. And
11 if there is a preference to resolving matters on the merits,
12 why not let them have that shot? I mean, it may be a futile
13 shot, but why not do it?

14 MR. DERRINGER: Well, except that I think here, again,
15 they elected to file in Delaware. We have a borrowing statute
16 in Delaware. That borrowing statute says that you enforce the
17 limitations period that is shorter. If there's a limitations
18 period in another state that's shorter than Delaware, that's
19 going to bar it as well. So by looking at Delaware and
20 assuming that the Delaware statute is the longest possible
21 expiration period, seeing that it's barred even under that
22 longer expiration period I think answers the question and
23 removes the need to look at any other state.

24 THE COURT: If it has expired under state law, can I
25 extend the time under Rule 4?

1 MR. DERRINGER: Well, I think that it's a different
2 analysis. I think under Rule 4 -- first of all, I don't think
3 there's good cause. So you would have to extend it under your
4 discretionary powers. And I think that you look at various
5 factors there.

6 The factor that the plaintiffs in all of these cases
7 continue to bring up is whether a refiled action would be
8 barred by the statute of limitations. I think that that factor
9 does not apply here. It's not implicated. In those cases --
10 every single case that the plaintiffs have cited invoke that
11 factor. What you're dealing with is a situation where if the
12 case were allowed to continue, there's no statute of
13 limitations problem. It's only if the Court --

14 THE COURT: So it only comes into play in states which
15 require service as well as filing is the only place where --

16 MR. DERRINGER: Well, I think it depends on the state
17 of the facts. I mean, here because plaintiffs cannot show
18 diligence of this action you don't have to worry about whether
19 a refiled action would be barred or not. This action is
20 barred. So exercising --

21 THE COURT: Because without diligence the statute has
22 already run is what you're saying.

23 MR. DERRINGER: Correct.

24 THE COURT: And through Rule 4 if the statute is run
25 under state law, I'm powerless to extend it. Is that right or

1 not?

2 MR. DERRINGER: Well, I believe that's right, that an
3 extension of time to serve the complaint in a state law
4 situation where you measure diligence at the time of filing,
5 any extension -- like I said before, if you were to grant an
6 extension and said, you know, Mr. Dwyer, Mr. Itkin, you can
7 serve your cases tomorrow, if they served those cases tomorrow,
8 they still haven't shown diligence. So the statute still has
9 run because the cases were not commence within the two-year
10 limitations period.

11 THE COURT: So that rule only can save a case that --
12 the idea of looking to see if the statute to I guess exercise
13 discretion more often or at least look at the issue of whether
14 or not the statute is implicated, that could only apply in a
15 case where filing is enough; is that right?

16 MR. DERRINGER: Whether it could only apply in that
17 case I would have to think about. But certainly I think the
18 gist of what you're saying is correct, that in a state where
19 the limitations period is tolled only by filing plus something
20 else, like service, an extension of the time to serve is not
21 going to -- is not going to be something that saves one from
22 the statute of limitations, from the time bar. But I think the
23 general gist of what you're saying there is correct.

24 THE COURT: The problem -- you had actual notice and
25 you couldn't show prejudice. And you're saying that's not

1 relevant because they can't show diligence is basically your
2 argument.

3 MR. DERRINGER: That's correct. And, you know, we had
4 notice but at every turn, and as we've said in our briefs, we
5 reminded the plaintiffs that the case has not been served.
6 They knew about it a week after they filed the case because the
7 prothonotary returned the summons unserved and even told the
8 plaintiffs why they were unserved. We told them about it in
9 open court in December of 2008. Mr. Schoon had a conversation
10 in June of 2010 with plaintiffs' counsel reminding them these
11 cases hadn't been served. We told them again by letter in
12 November of 2010.

13 So in terms of notice, these plaintiffs -- I think the
14 notice issue is they've been on notice for 889 days that these
15 cases have never been served. And there's no excuse put
16 forward as to why they never served them and no real showing of
17 diligence. Everyone acknowledges the only thing plaintiffs
18 ever did was make one unsuccessful attempt at service more than
19 two and a half years ago.

20 THE COURT: Okay. Let's hear from Mr. Dwyer.

21 MR. DWYER: Your Honor, I'm going to allow Mr. Itkin
22 to respond if you don't mind.

23 MR. ITKIN: Your Honor, Jason Itkin here.

24 I would say that we could have done better, no doubt,
25 and we should have served these cases under the streamlined

1 procedures. However, that was a mistake. But I will say that
2 under Delaware law there is a test that you are supposed to
3 apply. And under that test -- I mean Bayer's knowledge, the
4 lack of prejudice -- we've been participating in these cases
5 for quite some time now -- says that you should not dismiss
6 them or dismiss them with prejudice because it would --
7 essentially what they're trying to do is play a gotcha game to
8 get us out of the cases with prejudice.

9 I think what we should probably do, your honor, I
10 think the simplest thing is just to keep these cases moving
11 forward on the right track would be to grant us leave to serve
12 so that we can just continue down the process where we're at
13 instead of dismissing us without prejudice to refile and
14 extending -- or what I would hope you would do is to extend the
15 right so that we can re-serve the cases and not be time-barred.

16 I think your Honor has hit on the key issues in the
17 case, that the dismissal that Bayer is asking for would
18 essentially bar our clients who have been participating in
19 discovery, we've been going through the process. They've been
20 doing what they need to do, from getting their day in court
21 or wherever the case may lead to.

22 THE COURT: But if he is correct that the statute of
23 limitations in Delaware has expired, how can I extend the time
24 for service?

25 MR. ITKIN: Well, I would say, first of all, your

1 Honor, assuming he's correct that it's expired, and I don't --
2 I mean, if you find that we've been diligent in trying to get
3 service --

4 THE COURT: Well, how do I find that?

5 MR. ITKIN: What?

6 THE COURT: Maybe that's my next question. But, first
7 of all, if it's expired, do you think I have the ability to
8 extend the time for service under Rule 4?

9 MR. ITKIN: I think you do, your Honor.

10 THE COURT: Do you have a case that tells me that?

11 MR. ITKIN: Your Honor, I believe we cited it in the
12 brief. And I'm looking for it right now, your Honor. But I
13 think it is -- it may be the Boley, 123 F.3d at 759. But I
14 would rather double-check that, your Honor.

15 THE COURT: Okay.

16 MR. ITKIN: I think that's the case. That would be
17 the -- here we go. Under 4(m) -- it would be the Dempsey case,
18 476 F.3d 1277, and the other cases we cited in the brief.

19 But, your Honor, even under Delaware law if you don't
20 find that, the Delaware savings statute allows us -- allows you
21 to -- would allow us to file a new action, the same type of
22 action at any time within one year after dismissal. So I think
23 we would be allowed to refile our claims within one year
24 according to the Delaware Superior Court case of US versus
25 (indiscernible).

1 THE COURT: But doesn't it say -- doesn't that savings
2 statute only apply if there's a default or neglect by the
3 officer to whom it is committed? Doesn't that mean the clerk?

4 MR. ITKIN: I don't think so. Or the action -- I
5 don't think it would be the clerk's fault, your Honor. I don't
6 think that would apply in that situation.

7 THE COURT: All right. Tell me how I can find that
8 you've been diligent.

9 MR. ITKIN: Your Honor, I would say, including a
10 number of things, that we initially tried to serve these cases,
11 as the Court knows, in state court. They were removed before
12 service. And we frankly were under the impression, your Honor,
13 because we had been participating in discovery, going
14 through the -- once they ended up in the MDL that we had
15 been -- that they had waived service essentially, your Honor,
16 they waived the service requirement because we've been going
17 through all of the processes the Court expects. We've been
18 exchanging information about the cases, going through getting
19 experts, and in going through the normal process assumed Bayer
20 waived service.

21 And there is no doubt, your Honor, that there's a
22 couple of instances where they said, hey, these cases have not
23 been served. They're littered throughout the long history of
24 these cases. But the fact is is that we were operating under
25 the assumption that if there was a service problem, that you

1 bring those to the attention at the very beginning of the case,
2 your Honor, not after the statute of limitations had passed, not
3 after the parties have engaged in discovery and gone down
4 towards the end and then you say, a-ha, we got you. I mean, I
5 think in our office we were operating under the impression that
6 these cases -- they either waived service or had been served,
7 because otherwise we assume (indiscernible).

8 THE COURT: Okay. You're breaking up some. I don't
9 know if you're using a speaker phone or the telephone itself,
10 but the court reporter wasn't able to --

11 MR. ITKIN: I'm taking you off the speaker phone. I'm
12 sorry, your Honor. We had two of us in here.

13 THE COURT: Yes, that's a lot better. The court
14 reporter I'm certain missed some of the last thing you said. I
15 think I got the gist of it. But if you want to repeat it, go
16 ahead.

17 MR. ITKIN: Your Honor, I probably couldn't do a good
18 job of repeating it. But essentially that we were under the
19 impression because we were complying and going back and forth
20 and participating in the case that Bayer had either waived
21 service in these cases or we actually had -- you know, it
22 certainly wasn't something we were checking in the files for to
23 see if there was service. We assumed that Bayer had waived
24 it (indiscernible).

25 THE COURT: You know, it was better for a minute, but

1 now it's worse again in terms of the phone.

2 What about this borrowing statute and whether or not
3 it applies or whether we need to analyze these other states in
4 terms of their statute of limitations?

5 MR. ITKIN: I think you have --

6 THE COURT: Was there any reason to file this other
7 than just to try to avoid diversity? Is that why it's filed
8 there?

9 MR. ITKIN: That is why it was initially filed there,
10 your Honor. I think you would have to probably analyze the
11 other states as you were suggesting earlier in the hearing.

12 THE COURT: I mean, if I -- at one point you asked me
13 just to dismiss it without prejudice which presumably would
14 give you a chance to try to refile either in Delaware or
15 another state. Do you think that is worth trying to do?

16 MR. ITKIN: My -- that would not be my first
17 preference, your Honor. I mean, it is I think worth trying to
18 do if you were convinced to dismiss the cases. My hope would
19 be is that because there is no deadline to serve in PTO 4 that
20 you would either find that they waived service or just on your
21 own allow us leave to serve them under the very streamlined
22 procedures that your Honor has put in place and let us continue
23 down the path that we have been on for several years.

24 THE COURT: Okay. But the problem is if there is a
25 state -- I believe the law is that if the state -- under the

1 state statute of limitations if the time has run, that I'm
2 unable to use Rule 4 to extend the time. If a state statute
3 requires a showing of diligence and if you can't meet that
4 test, I'm concerned that I don't have the authority to extend
5 it under Rule 4. Do you want to deal with that issue at all?

6 MR. ITKIN: Well, I think your Honor would have --
7 because of -- I mean, what I would say is that the comments in
8 4(m) -- the advisory committee put in the comments that the
9 rule authorizes the Court to relieve (indiscernible) the
10 plaintiff of the consequences of an application of this
11 subdivision even if there is no good cause shown. Relief may
12 be justified, for example, if the applicable statute of
13 limitations would bar the refiled action.

14 And so, I mean, I think that your Honor does have -- I
15 mean under the comments of the drafters of the rule has
16 envisioned perhaps this type of situation where
17 (indiscernible).

18 THE COURT: Something is happening to the phone again.
19 It starts out okay, and then it's just -- we're just losing it.

20 MR. ITKIN: I'm sorry, your Honor. Can you hear me
21 better now, your Honor?

22 THE COURT: Yes, I can hear you now.

23 MR. ITKIN: Okay. The point that I was saying is that
24 the advisory committee that drafted the amendments to Rule 4(m)
25 have envisioned a situation where even if you don't show good

1 cause that you can extend the time. And so I think -- you
2 know, and they even address the situation about if the statute
3 of limitations would bar the refiled action. So I think that
4 the advisory committee in the notes too -- and I think you do
5 have authority to do it, your Honor. And I think that would be
6 in the interest of judicial efficiency and (indiscernible).

7 THE COURT: Okay. It's happening again. Whatever --
8 you start out strong. And I don't know if the phone is moving
9 away or if it's some problem with the phone, but --

10 MR. ITKIN: It may be a problem with the phone, your
11 Honor. I've got it right up to my face.

12 THE COURT: When you start it's strong, and then
13 something happens as you continue going on. Right then --

14 MR. ITKIN: I apologize.

15 THE COURT: Right now I can hear you fine, but at the
16 end of whatever you were saying before we lost you.

17 MR. ITKIN: I was just asking the Court in judicial --
18 you know, for reasons of judicial efficiency, taking out the
19 uncertainty of whether a refiled action would or would not be
20 barred, that I think that this is the situation that the
21 advisory committee was talking about when they said that you
22 could enlarge the time to serve the statute of limitations --
23 or the service of process under 4(m) and especially because
24 there is no deadline in PTO 4.

25 THE COURT: Okay. But I'm governed by a state statute

1 of limitations. Don't I have to give a deference to the state
2 under Erie? I don't know if I can use a federal procedural
3 rule to extend a state statute of limitations if the time is
4 expired.

5 MR. ITKIN: I think, your Honor, that what -- under
6 Delaware law the action commences or is deemed filed when
7 you -- for statute of limitations purposes when you file the
8 case. And you have to show some diligence in service. But you
9 don't just look at diligence and service. It's a several
10 factor test that, you know, we have laid out and the things
11 that, you know, we've already discussed, that Bayer -- you
12 know, the factors that -- there's no prejudice to Bayer and the
13 fact that Bayer was on notice. Those factors weigh heavily in
14 favor of the plaintiff. And so I think that we're okay under
15 Delaware law as well.

16 THE COURT: Okay. Thank you.

17 Mr. Derringer, do you want to reply?

18 MR. DERRINGER: Yes, your Honor. Thank you. Just a
19 few very brief points.

20 To your question about whether you can use Rule 4(m),
21 a federal procedural rule, to extend a state statute of
22 limitations, I think the answer is clearly no. If you look at
23 all of the cases cited by the plaintiff for the proposition
24 that Rule 4(m) gives you that authority, the Lepone-Dempsey
25 case from the Eleventh Circuit in 2007, the Horenkamp case,

1 Eleventh Circuit, 2005, the Boley versus Kmart case, Third
2 Circuit, 1997, every one of those cases involve a situation
3 where the currently filed action is not time-barred but a
4 refiled action would be time-barred. That's why under 4(m)
5 these cases say that a federal judge has the discretion to
6 consider that issue so that you can make sure that the current
7 action which is not time-barred can continue; where if you
8 forced refileing, you would then be implicating the statute of
9 limitations. That is not the case here as I explained earlier.
10 The current case is time-barred and no extension under 4(m) is
11 going to change that fact.

12 Mr. Itkin mistakenly, I believe, references Delaware
13 law on whether extensions should be granted. First of all,
14 whether extensions should be granted is governed under Federal
15 Rule 4(m), not under Delaware law. But in any event, it's not
16 the relevant inquiry here where you have a situation where the
17 case is already time-barred.

18 I would direct your Honor if you're considering the
19 plaintiffs' argument under Delaware law to the Hovede case,
20 Hovde Acquisition. That's from the Delaware Chancery Court,
21 June 5, 2002. This is the case I believe -- the Delaware case,
22 again not applicable here, where 4(m) is applicable. But it's
23 the Delaware case I believe where Mr. Itkin gets his authority
24 for saying that your Honor should consider prejudice and
25 notice. That case dealt with a different situation entirely.

1 But one thing that I found very interesting about that case,
2 your Honor, is it was dealing not with a situation about
3 whether the statute of limitations is tolled and whether that
4 toll continues provided there's no dilatory conduct or
5 unreasonable delay in the service of process. It doesn't
6 address at all circumstances in which the commencement of an
7 action tolls a limitations period. It instead addresses
8 whether a plaintiff should be given additional time to serve a
9 defendant where the plaintiff has made numerous but ultimately
10 unsuccessful attempts at service. And critically, your Honor,
11 it addresses that question in the context of a set of
12 procedural rules that don't apply here. It's in the Chancery
13 Court in that case where there is no time limit to serve the
14 defendant. Under Rule 4(m) and under the analogous Delaware
15 rule in Superior Court in Delaware, which is where these cases
16 were filed, there is a 120-day limit. And Footnote 40 of the
17 Hovde case says, neither actual notice nor absence of prejudice
18 to the defendant provides an adequate basis for excusing
19 noncompliance with 4(m) unless plaintiff has diligently
20 attempted to complete service.

21 And, your Honor, in closing on that question of
22 diligence, this is why no extension can save this case or any
23 of these six cases, because there was no diligence. The
24 plaintiff -- when you asked the question tell me why there's
25 been diligence here, what Mr. Itkin said was, your Honor, there

1 was diligence because I made a set of assumptions. I assumed
2 that things were okay. I assumed that we didn't need to serve.
3 I assumed that the case was going forward. He cites no case
4 and there is none for the proposition that assumptions can
5 replace diligence. They don't. Especially here where it would
6 have been extremely easy for plaintiffs to simply serve the
7 cases under the streamlined provisions of Rule 4(m). That
8 could have demonstrated diligence had they done that relatively
9 soon after they were first told back in October of 2008 that
10 the cases had never been served. They did not. They did not
11 show diligence. They cannot show diligence. The limitations
12 period has run. These cases are time-barred, your Honor.

13 THE COURT: All right.

14 MR. DERRINGER: Thank you.

15 THE COURT: Thank you.

16 Apparently we don't have anybody with respect to these
17 other cases. Is there anything that you want to say about
18 those? Which one of you are going to take the -- we've got
19 the --

20 MR. SCHOON: Your Honor, Gene Schoon.

21 I'm not sure which cases you're referring to. I
22 believe that the cases that Mr. Itkin has are the only
23 remaining cases that are subject to motions to dismiss at this
24 point.

25 THE COURT: All of the others have been settled then

1 other than Brinson?

2 MR. SCHOON: For the most part dismissed. There may
3 have been one or two that were settled. Brinson is the other
4 exception here because of the pending motion that we've already
5 addressed.

6 THE COURT: Okay.

7 MR. OVERHOLTZ: Yes, your Honor. This is
8 Mr. Overholtz. We had three cases on today's docket, but two
9 of them were resolved and the other one was -- we had a missing
10 client for a couple months. But we got her stipulation filed
11 yesterday.

12 THE COURT: So the only thing we have pending then are
13 these Delaware cases other than Brinson which we --

14 MR. SCHOON: That's our understanding, your Honor.
15 All of the other of the 18 that were originally set have been
16 dismissed.

17 THE COURT: Okay.

18 MR. ITKIN: Your Honor.

19 THE COURT: Yes.

20 MR. ITKIN: Your Honor, Jason Itkin again. I just
21 wanted to say one thing that you had asked me I believe for a
22 case about extending Rule 4(m), and I'm struggling to find it.
23 I just wanted to point the Court to the Horenkamp case.

24 THE COURT: Which one?

25 MR. ITKIN: It's Horenkamp, H-O-R-E-N-K-A-M-P, versus

1 Van Winkle and Co. It's an Eleventh Circuit case. The cite is
2 402 F.3d 1129.

3 THE COURT: All right. And is that a case where
4 there's a requirement for not only filing but diligent service?

5 MR. ITKIN: It was, your Honor. The case was where
6 they had the 120-day service. The reason they did not get
7 service done within 120 days was a mistake on behalf of the
8 plaintiff. The defense -- the defendant moved to dismiss the
9 case saying you need to have good cause. The plaintiff
10 appealed to the Eleventh Circuit that relied heavily upon other
11 circuit courts (indiscernible) saying that the Court had
12 discretion (indiscernible).

13 THE COURT: You disappeared again.

14 MR. ITKIN: The Court has discretion to extend the
15 service deadline even if in the absence of a showing of good
16 cause.

17 THE COURT: And is that -- was there an argument that
18 the state statute had run by that time?

19 MR. ITKIN: I don't believe that was the issue in that
20 case, your Honor. I don't know what the -- whether the statute
21 had run or not. I presume it had run because otherwise the
22 plaintiff would have just refiled the case, but I don't know
23 that for a fact.

24 THE COURT: All right. Do you have that case handy,
25 Mr. Derringer? You have a piece of paper in your hand.

1 MR. DERRINGER: That that's my outline. Let me see if
2 I've got the case.

3 THE COURT: Never mind. I think I have it.

4 MR. DERRINGER: I do have it here, your Honor.

5 THE COURT: Let me take a minute.

6 MR. DERRINGER: Sure.

7 THE COURT: Okay. I looked at it. They don't speak
8 to that issue at all. It's really just whether or not Rule
9 4(m) allows you to -- whether you have to have a showing of
10 good cause or not. And I don't know what kind of statute of
11 limitations was presented in this case. It's a Georgia case.
12 But whether or not it was a Georgia statute I don't think it
13 says.

14 Okay. I've read this case.

15 Anything further from either side as to it? I'm not
16 sure it helps me with the issue I'm grappling with, but it does
17 say that you don't have to have necessarily a showing of good
18 cause for Rule 4(m).

19 MR. ITKIN: I would say the issue I think the Court is
20 grappling with is can you extend the time for service if the
21 statute of limitations has passed. I think that's one of the
22 issues. And what I would say, that the case will help you
23 because it is silent to whether the limitation had passed or
24 not, but it does rely -- the Horenkamp case does rely on the
25 comments to Rule 4(m) that say you can extend the time even if

1 or especially when the statute of limitations has passed. So I
2 think it is helpful in that regard, your Honor.

3 THE COURT: Well, I certainly agree that you could do
4 it in a case where if you had to refile, the statute would be
5 implicated. But it doesn't seem to help in the circumstance
6 where the statute may have -- where a state statute may have
7 already run, because I don't think 4(m) can save the state
8 statute issue.

9 Okay. Well, I want to thank you all for your
10 argument. We'll go ahead and enter orders as quickly as we
11 can.

12 If you resolve any of these cases, let us know right
13 away. We always enjoy preparing orders in cases that go away
14 just before we release them.

15 MR. SCHOON: Your Honor, this is Gene Schoon again on
16 behalf of the defendants.

17 As we were preparing for this, you know, it became
18 obvious that a lot of the Court's time and energy went into it
19 as well as the parties and we approached this whole issue very
20 carefully as we have with all of the other motions, and I
21 wanted to just preview something for your Honor and perhaps get
22 some guidance from the Court.

23 Let me give you a little bit of background. We've
24 started filing motions to dismiss for failure to serve in the
25 fall of last year, and we did that because we realized that

1 there were a large number of cases that were on the docket that
2 had not been served, and a significant percentage of those were
3 not being pursued. We filed in 17 cases that have been
4 transferred here from the Central District of California. All
5 17 we didn't even get a response even after you issued rules to
6 show cause. Those cases were all dismissed.

7 When we got to Group 5, and most of these cases are --
8 that we've been dealing with over the past couple of weeks are
9 Group 5 cases -- I believe there were 68 cases in that group.
10 Of those 40 we realized had never been served. We filed
11 motions to dismiss in those cases; I think in about 32 of them.
12 Most of them were dismissed voluntarily before we even got to
13 the point of having to have full briefing. We filed in other
14 cases. Those cases tended to dismiss. I think your Honor
15 saw -- as we approached this hearing, you set a hearing for 18
16 cases. By the time today came around all but this small
17 number, six cases, were left.

18 We're looking ahead to the next group of cases now.
19 And this is why I'm bringing this up. We again have a large
20 number of cases that are not -- that are on the docket and have
21 not been served and have not been served for at least two
22 years. They don't all present this unique issue in Delaware,
23 but they do present a variety of issues. They're taking up a
24 lot of energy on the part of the parties as well as the Court.

25 What I wanted to preview for your Honor was a

1 suggestion that occurred to us while we were preparing, that
2 rather than our filing individual motions one after the other
3 that have to be considered, that instead what we intend to
4 propose is a rule to show cause, a possible order coming from
5 the Court, that would identify those cases where there's no
6 evidence of service and requiring -- rather than our filing an
7 initial brief in each of those, requiring the plaintiffs in
8 those cases to come forward either with actual proof of service
9 under PTO 4, which as you know, your Honor, that's not
10 difficult to do, there should be a certified mailing and a
11 return receipt with those or an affidavit from a marshal or
12 some other method of service, and you require that within a
13 reasonable period of time to be filed and served.

14 In the alternative, and I think there will be
15 plaintiffs like Mr. Itkin today and others who will readily
16 acknowledge they never served, that you would require, your
17 Honor, that those plaintiffs move for -- either dismiss their
18 cases or file a motion seeking additional time in which to
19 serve in a motion that would meet the criteria under this
20 Court's prior orders, under the Eleventh Circuit authority,
21 showing either good cause or some reason why the Court should
22 exercise its discretion to allow additional time. And then of
23 course allowing us additional time to respond.

24 And in particular, because many of these cases are
25 time-barred -- I mean, if you look at the cases we were dealing

1 with coming in today, many of these cases were ten years or
2 older in terms of when the surgeries took place. If any
3 plaintiff is going to contend that their case if refiled would
4 be barred by the statute of limitations, then we ought to have
5 a preview of that as to why that case would or would not be
6 barred.

7 So that's kind of our vision of what the next step
8 ought to be. And our hope is that not to have anybody with a
9 meritorious case be thrown out of court but to have a more
10 orderly and efficient way of weeding out the number of cases.

11 We've seen, you know, through this experience much
12 like we did when we approached you with regard to the failure
13 of plaintiffs to serve fact sheets and with regard to the
14 failure to serve expert reports that resulted in PTO 20 and PTO
15 28 and other orders of the Court.

16 So that's my reason for standing up here now and just
17 asking if the Court has any reaction or any guidance on that,
18 we'd like to take it into consideration.

19 THE COURT: No, that -- I mean, that makes sense. In
20 fact, there was one we did order -- we issued an order to show
21 cause today, didn't we? What case was that?

22 THE LAW CLERK: Beauchamp. But it dismissed last
23 night.

24 THE COURT: That's one of the ones dismissed? Okay.

25 MR. SCHOON: And I should add, your Honor, we have not

1 consulted with the PSC on this. We will certainly do that
2 before we file anything. I know that Mr. Overholtz is on the
3 phone.

4 THE COURT: I wish you would. And to the degree you
5 can solve these problems -- we spent more time than I normally
6 would have. My reaction was if I have discretion to enlarge
7 the time, I will exercise that liberally. But then I started
8 running up against this issue of whether or not in these
9 states -- and I frankly was not familiar with states that
10 required -- in Florida filing is enough generally. I was not
11 familiar with this body of law that you've got to also serve
12 diligently and that that can cause a state statute to run. So
13 then my question was, well, can Rule 4(m) allow extension. And
14 I don't think it does. I don't think it can is my reaction.
15 But, you know, I appreciate the argument today.

16 MR. OVERHOLTZ: Your Honor, this is Neil Overholtz
17 from the plaintiffs' steering committee. I would like to have
18 the opportunity to discuss -- I appreciate Mr. Schoon's point,
19 and he and I have discussed this issue because we had a couple
20 of cases that have been in the criteria, unfortunately, but
21 we -- there are some issues that the plaintiffs' steering
22 committee would have Mr. Schoon confirm just to make sure it's
23 not inconsistent with some of the things that are in front of
24 them in the Court's previous order and expectations of counsel.
25 You know, the original order of streamlined service

1 specifically stated (indiscernible).

2 THE COURT: The phone is -- I don't know what the
3 problem is. It's happening with your line too. You start out
4 great, and then it kind of -- it starts breaking up.

5 I think you said you want to get together with him and
6 discuss this and tell me whether or not it's inconsistent with
7 the way we're handling it or not.

8 MR. OVERHOLTZ: I just want to make sure that any
9 process moving forward is not inconsistent with your Honor's
10 previous orders on this issue and in expectation of plaintiffs'
11 counsel there were some (indiscernible).

12 THE COURT: Okay. The last of what you said -- let me
13 ask you to get together with Mr. Schoon then and you all talk
14 about it. And if you can reach agreement, fine, tell me what
15 your agreement is. I'll work with however you want to work on
16 these.

17 We've also -- we spent so much time on it now I have a
18 fairly good sense of how we're going to handle them in the
19 future, these cases, at least in terms of the law. Now, how
20 the procedure of how you raise them with us is up to you all.

21 MR. SCHOON: And I'm not asking you to do anything
22 today nor am I asking for any agreement from the PSC if that
23 wasn't clear. But if -- I thought I would raise it now because
24 it's on everyone's minds and if the Court had any immediate
25 reaction, we would want to take that into account.

1 THE COURT: No, other than it seems like -- I don't
2 know why at this late date -- the issue has certainly been
3 raised, you know, that service isn't perfected in some fashion.
4 I do want to get back to this issue. Some of these affidavits,
5 I have a hard time -- I know Ms. Lowry says we don't need to
6 decide whether that affidavit is credible or not. Before I
7 were to rely on some of the types of affidavits we've gotten I
8 would want to have some testing of that. How do you propose we
9 do that? In the 12(b)(6) context? Should I not accept it and
10 leave that for summary judgment or for some other issue? How
11 would we deal with it?

12 For example, there was one that they relied on the
13 Clerk of the Southern District saying we'll handle service of
14 process. I find that very unlikely. Maybe there was a
15 communication problem. But before accepting that kind of
16 affidavit I want to go further than that.

17 MR. SCHOON: Those affidavits are concerning to us,
18 your Honor. And we have that problem in mind as we're going
19 forward. How you deal with them for the cases that are pending
20 I think is another matter, but going forward.

21 Actually, I think Rule 4 provides for guidance at
22 least as to how service can be proven. It doesn't apply
23 strictly here because we have PTO 4 that modifies it. But I
24 would suggest that what we do is we go to Rule 4(1) which
25 provides a method for proving service. Particularly there if a

1 marshal serves, a marshal's affidavit is good enough. We don't
2 challenge the veracity of the US Marshals typically.

3 But for those instances provided for that have
4 registered mail or some other type of mail similar to what we
5 have in PTO 4, that requires proof of the actual certificate,
6 of the return certificate. And what was so lacking here on the
7 cases where the claim was that PTO 4 had been filed was there
8 were no certificates. That's the reason why we asked for
9 registered mail. We didn't insist -- we overlooked a lot of
10 deficiencies in service. But, your Honor, if we don't have a
11 certificate, a return certificate, that's one we can't
12 overlook. So that's my suggestion, your Honor.

13 THE COURT: Okay. Anything else from anybody?

14 MS. LOWRY: Your Honor, I just wanted to give you an
15 update on the settlements and dismissals. Since we were here
16 last time and since you entered the order requiring case
17 specific expert reports, in that five-week period, we have
18 disposed of 181 cases; 124 by settlement and 57 cases have been
19 dismissed. So we're making, you know, better progress than we
20 were before.

21 THE COURT: Okay. But apparently cases are still
22 getting here I have seen in the last week or so so -- but my
23 compliments to you for resolving the ones you are.

24 Okay. Thank you all. Have a good weekend.

25 MR. DERRINGER: Thank you, your Honor.

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(Proceedings concluded at 11:07 a.m.)

C E R T I F I C A T E

I, Karl Shires, Registered Professional Reporter and
Federal Certified Realtime Reporter, certify that the foregoing
is a correct transcript from the record of proceedings in the
above-entitled matter.

Dated this 30th day of March, 2011.



Karl Shires, RPR FCRR