

21 THE COURT: I saw that.

22 MR. MAGAZINER: -- every other month. We had a
23 discussion with plaintiffs' counsel before Court convened
24 this afternoon. They thought that by that we were
25 proposing twice a month and I meant to propose every other
40
1 month.

2 THE COURT: That's one of those words that --

3 MR. MAGAZINER: I learned my lesson. I'm never
4 going to use that word again. But anyhow, as I understood
5 Mr. Trammell said, he thought that every other month would
6 be an appropriate timeframe unless there was some
7 emergency or other urgency involved or the Court for some
8 reason wanted to convene us more frequently than that.

9 MR. TRAMMELL: That's correct, Your Honor.

10 THE COURT: Well, I'll tell you what we're going
11 to start out with, because until we get more of these
12 things firmly scheduled than we have now or likely to have
13 by the end of today's hearing, I think we may need to meet
14 more frequently than that. I welcome you all to appear by
15 phone or if you want to sit in a video conference we can
16 do that, and I didn't hear back from my technical staff
17 about the streaming audio but I think he's about ready to
18 get that available to those who don't want to hook up on
19 the phone line.

20 MR. ROTH: Can that done in the courtroom? I
21 did recommend that to several of the outside counsel but I
22 wasn't sure if we do it in here.

23 THE COURT: We have audio streaming now that's
24 internal to our network, and all I really need to do is
25 tell him -- he needs to make sure he's got a couple

1 glitches taken care of. He's confident he can do it. The
2 problem is getting it outside the court's firewall and to
3 have it on the Internet with a link that people using the
4 Internet can use, and also limiting the number of people
5 that can do that so the thing doesn't collapse. And also
6 not violate Supreme Court dictates about broadcasting
7 federal proceedings.

8 So I think he can solve those problems, get it
9 through the firewall, and then we would have it. But,
10 yes, it would be from the existing system we have. It is
11 already doing that for all -- I know Judge Conway is
12 listening to us. I don't know that, but she may be. She
13 has the capability.

14 And we have -- actually, the other divisions of this
15 court have got -- as you may see, normally we don't use a
16 court reporter for most of our proceedings, just the ones
17 there's lots going on, and we're pretty confident there's
18 going to be a transcript, we ask for a court reporter to
19 come. But most of the things are recorded on tape. We're
20 going to switch that to digital recording as soon as we
21 move into the new courthouse. So you can actually get the
22 digital file that way. There's a fee for it, but
23 anyway --

24 Anyway. I'd like to schedule another hearing for the
25 16th of January.

1 MR. MAGAZINER: I'm very sorry. I'm taking a
2 one week vacation in January that happens to be that one
3 week. Any time -- I'm actually leaving on the 12th and
4 then be gone the following week. If Your Honor could

5 possibly accommodate that schedule I would very much
6 appreciate it. It's a long scheduled vacation. I hate to
7 make such a request on the first appearance before Your
8 Honor but I think if I didn't my wife would not be
9 pleased.

10 MR. ROTH: I took an informal poll of our side
11 and Thursdays generally worked pretty good. Because
12 Fridays are bad travel days and Mondays are Mondays. So
13 to the extent that works with the Court's calendar.

14 THE COURT: All right. Set it for the 25th at
15 2:00.

16 MR. MAGAZINER: Very much appreciate that.
17 Thank you.

18 THE COURT: It's my preference to avoid weeks
19 when I have criminal duty obligations as I do this week.
20 I have got some extra criminal duty this month because
21 Judge Glazebrook is unavailable. I'm hoping January will
22 be a little bit better.

23 All right. Where do we stand in terms of the -- let
24 me -- before I get to that. The motion for creation of a
25 steering committee, defendant have any position on that?

43

1 MR. MAGAZINER: As to the steering committee, we
2 don't much care one way or the other. We certainly don't
3 oppose it. We're very much in favor of the appointment of
4 lead counsel for the plaintiffs.

5 THE COURT: Again, it struck me that having any
6 entity with the title "steering" as eleven hands on the
7 tiller is a recipe for disaster. I don't understand that
8 concept. I particularly don't understand why we have got

9 multiple people from the same firm on a proposed steering
10 committee. And I'm not entirely sure -- I understand the
11 difference between lead counsel and steering committee.
12 Maybe semantic problems on my part, but somebody want to
13 address that?

14 MR. ROTH: I know on at least for several
15 members from the same firm at least the idea is, it was
16 presented to me, was just to make sure that -- as you can
17 see, it's imposed mostly of firms who have the majority of
18 the cases. And having more than one person who's working
19 on the cases from that firm part of the steering committee
20 avoids the problem with, for example, Mr. Pennock can't be
21 available for something at least somebody else from the
22 firm is available to make decisions. And that was the
23 rationale behind it. I know it's not the traditional way
24 of doing it, but that was simply the rationale to gather
25 the firms that are going to be most involved in the cases

44

1 because they have most of the cases, and then have one or
2 more people from that firm inside all the discussions so
3 that there is continuity there. And we don't have a
4 breakdown because somebody's in trial someplace else on
5 some other case for four weeks from that firm. And that's
6 the sole reason, Judge, on that. And again, it's mostly,
7 I think there's maybe, what, five or six firms total out
8 of the maybe 11 names or so that are on that list?

9 THE COURT: Well, what's the difference in
10 function between the steering committee and lead counsel?

11 MR. CAMP BAILEY: I think lead counsel was
12 specifically so the defendants would have somebody to come
13 to on our side and know that when we represent something

14 or make an agreement with the other side we have the
15 authority to bind the group. The committee was basically
16 our ability to go back to a representative sample of the
17 people who represent most of these cases to make sure we
18 had a consensus on behalf of whatever official group we
19 have on our side to get an agreement to then relay back to
20 the defendants.

21 THE COURT: Would I be empowering that committee
22 with any authority by designating them as a steering
23 committee?

24 MR. CAMP BAILEY: They would also have the
25 ability to take multiple other tasks like depositions.

45

1 THE COURT: You can do all that -- you're going
2 to be doing that by yourself anyway. I'm wondering if I'm
3 giving them some authority that they exercise by majority
4 vote or super majority vote or that binds other people who
5 aren't on the committee. I mean, is there some magic to
6 this or is this really, just really blessing your internal
7 convenience?

8 MR. CAMP BAILEY: I think just recognizing the
9 people who have a significant stake in that they have a
10 significant number of cases in this case, in this MDL,
11 that they have sufficient seat at the table to not be
12 excluded from things, get to weigh in on their own
13 opinions, get to participate as they will. But I don't
14 think there is anything magic that prevents them from
15 doing any more or less work than someone not on a
16 committee.

17 MR. ROTH: I think that also the -- it was at

18 least intended, we tried to keep the -- you asked for the
19 specifics or the role or functions of the PSC or whatever
20 better name or acronym we come up for it, but like I know
21 over the weekend and last week there was discussions
22 about, you know, all sorts of issues and different members
23 of that group participate in the different issues, and so
24 that's how we thought that we would maintain both
25 flexibility of the continuity in terms of being able to

46

1 come to this -- you know, meet and confers because the
2 lead counsel may not be present for meet and confers
3 possibly and but somebody else from the committee would be
4 and they could make those decisions. So we tried to keep
5 it as loose as possible and as general as possible in
6 terms of what their functions would be. But basically,
7 it's help steer the ship as we go forward. And if
8 anybody -- no one has -- I canvassed every plaintiff's
9 lawyer so far and no one has had objection to, you know,
10 that proposal in that format or however the Court may
11 tweak that format either as individuals or as to
12 functions.

13 THE COURT: This is another one on which I'll
14 make the report and recommendation to Judge Conway, and if
15 you don't like what I have done, you can comment on it.

16 Let's move on to the -- one other little thing. My
17 prior notice of hearing provided that if you wanted to
18 have an order for bringing in Blackberrys and the like
19 that you file a motion at least three days in advance. I
20 point out to you that under Rule 6A, that means three
21 business days. And it really is an imposition on the
22 Court if those things show up a day before a hearing or in

23 this case Friday before Monday hearing. So I remind you
24 of that.

25 Let's get to the initial round of discovery problems 47
1 that you got. I gather that discussions on that continued
2 through the weekend. Where do you stand in terms of
3 plaintiff's understanding how defendants keep documents
4 and what's going to be produced and what you need? So the
5 IT deposition.

6 MR. JENSEN: Keith Jensen for plaintiffs, Your
7 Honor.

8 In terms of where we stand right now is able to
9 achieve a quorum, if you will, among the plaintiffs'
10 counsel in terms of the order we originally moved for on
11 December 5th and the second order we just filed yesterday,
12 Sunday the 10th. And that quorum has reached the decision
13 to propose just yesterday's filed order, a much less
14 onerous one, one that was tailored off what we first got
15 Friday late afternoon from AstraZeneca counsel. I might,
16 Your Honor, there's a number of issues that go into how
17 that final order that you might sign should be shaped. I
18 choose to start with the, I believe, the more
19 straightforward issue before I get into the ones where
20 there's perhaps more disagreement.

21 First one is database discovery, Your Honor. The
22 order now before the Court that the plaintiffs filed
23 yesterday, Sunday, the 10th, the order to the parties to
24 simply confer on database production and the format of how
25 the database will be produced. And to facilitate those 48
1 discussions, requiring what AZ filed with the Court on

2 Friday, which are the Delaware Federal Courts e-discovery
3 default standards that they be used to require AstraZeneca
4 for the first time to give us a list of who their
5 e-custodians are, for example, and other basic disclosures
6 required by the Delaware Federal Court.

7 We submit that not ordering such discussions right
8 now, Your Honor, allows AZ to hypothetically dictate the
9 type, if any, timing of database discovery in which may
10 very well impede if not render impossible our ability to
11 comply with the Court's refreshingly aggressive deadlines
12 on preemption issue, discovery and briefing.

13 Second issue, search terms, Your Honor. Again, right
14 back to the Delaware default standards, AZ brought to our
15 attention and the courts on Friday, they require the
16 parties meet and confer on search terms to be used to
17 search electronic databases. All this order does is,
18 again, order the parties hypothetically to confer and
19 reach agreement on search terms, words and phrases. It
20 also allows plaintiffs the ability to ask AZ and have them
21 run potential second searches because, of course, all
22 we're doing when we guess at search terms is exactly that.
23 Prior litigations would indicate that we would have no
24 idea what relevant terms might be because we don't know
25 the terminology like semi-monthly, that they might or

49

1 bimonthly that opposing counsel, their entire corporation,
2 might use to designate certain documents.

3 Hence, we have asked for, very similar to a
4 deposition transcript, Your Honor, that a concordance be
5 produced. Perhaps ironically a software program called

6 Concordance which would allow the defendants in their
7 electronic searches to produce -- pardon the repetition --
8 a concordance of all the search terms, how often they
9 appear, and how many different documents they appear in.
10 This would allow the plaintiffs' guesses to become
11 slightly more educated guesses as to those search terms.
12 It's all straightforward and reasonable.

13 It ordered also privileged logs and redaction logs,
14 Your Honor. I think there's two easy issues under those.
15 The prior discussions between counsel, AZ had expressed a
16 justified concern that they didn't want either such log
17 creation or submission to slow down this Court's schedule
18 for preemption discovery and briefing.

19 Hence, the order before Your Honor contemplates that
20 AZ need not produce a privilege log until something is
21 done and provides them an "or." Either that they produce
22 all discovery they assert is responsive to plaintiffs'
23 already filed and served first request for production or
24 issues they believe are relevant to preemption discovery.
25 Obviously -- there needs to come to that point, we submit,
50

1 Your Honor, before we could have preemption service.
2 Doing it otherwise would allow the potential production to
3 be halfway through before we're required to review all the
4 evidence, take our depositions, and respond to their preemption
5 brief.

6 And secondly, in oral discourse as recently as
7 yesterday, Your Honor, they objected to the type of
8 information we're requiring or asking they be required to
9 give in privilege redaction logs. Those requirements in
10 the proposed order before Your Honor came virtually

11 verbatim out of Judge Fallon's MDL production preservation
12 protocol order entered in the Propulsil products liability
13 litigation as was our first order was based on.

14 Now, hard copies. The parties have been unable to
15 reach an agreement on hard copies, documents produced by
16 AstraZeneca. Your Honor, there is really two types of
17 hard copies. There is ones already in existence in a
18 format ready to send to a document depository either
19 because copies have already been made or because AZ
20 chooses to put original documents in depository. For
21 those documents this copying and scanning obligation
22 expense is plaintiffs'. But there is also documents not
23 in a format ready to go to a document depository. Such as
24 uncollected or unidentified custodian files. As we sit
25 here today, we don't have any custodial file identities.

51

1 We don't have an organizational chart, despite the fact
2 they produced one a year ago in other litigation. But
3 they stand on confidential and have chosen not to give it
4 to us yesterday.

5 For all these second type of documents, Your Honor,
6 the cost of scanning/OCRing and copying is substantially
7 the same. For example, if the cost of scanning is 13
8 cents a copy and the cost of a copy is 12 cents a copy,
9 you need to, we submit, subtract the cost of maintaining,
10 manning and making a physical depository available. Those
11 are the producer's costs, not the requester's cost.

12 Further, Judge, we believe to the extent that any
13 equity should play a role in your decision, here --
14 sitting here three months after organizational chart

15 discussion began, not even having one, not having any list
16 of electronic systems or databases, not one or any
17 information about what their document production or
18 retention standards or practices are, we believe the
19 plaintiff should not be further prejudiced with
20 AstraZeneca's choice to hypothetically produce what
21 amounts to a paper dump of documents and custodial files.
22 Because we want to adhere to and have the ability to
23 adhere to this Court's refreshingly aggressive schedule
24 for preemption briefings and discovery.

25 Hence, our order proposes this, Your Honor, as a

52

1 potential resolution to the matter. If the difference
2 between the scanning/OCRing of documents by AZ versus the
3 copying of documents is greater than 15 percent, then that
4 is the percent for which the parties should be ordered to
5 agree. And if they fail, come to Your Honor for a
6 resolution of those additional costs.

7 Another alternative, Your Honor, is for the type one
8 set of documents that I defined, ones that are already in
9 a format to be put in a document depository or originals,
10 that we copy and provide AZ our OCRs of them. But for all
11 others, for yet to be identified custodians for other
12 documents they yet to create a potential paper dump for us
13 that AZ do the same. And that they scan/OCR them and
14 provide us the OCRs.

15 Next is redactions. How should it be handled. There
16 are two issues. There is a cost issue of redaction.
17 There is a content issue of redaction. First, the cost of
18 a simultaneous OCR, we're talking about redacting a
19 document. As we understand it, subject to correction, AZ

20 is going to produce all redacted documents in electronic
21 TIFF form and Bates stamp, Your Honor. Because AZ is
22 scanning them, whether the purpose is to protect patient
23 confidentiality or to advance their assertion of a
24 privilege, AZ is degrading that original document, whether
25 it's hard copy or whether it's an electronic form. There

53

1 is virtually no additional cost to a simultaneous OCR of
2 the document. Therefore, we submit, that the plaintiff
3 shouldn't incur the costship of AZ's choice to follow the
4 law and/or advance their assertion of a privilege and have
5 a degraded document that's less searchable that will pick
6 up less characters through electronic searches.

7 Next issue is how do you handle the redaction. The
8 content of nonredacted material and metadata, Your Honor,
9 needs to be produced, we submit, in text searchable form.
10 We understand AZ's position -- they can correct me if I'm
11 wrong -- that they propose a TIFF/OCR of the unredacted
12 material, and the TIFF, not a text, if you will, dot txt
13 searchable file of the unredacted material. If this is
14 the case, the plaintiffs lose the ability to the search
15 capability on the nonredacted content and metadata.

16 And I mean by metadata, two things. One, the
17 objective list, that is sender, the recipient, the author,
18 the data of creation. And two, the metadata based on some
19 definitions includes or excludes the actual content of the
20 document. Okay?

21 AZ, as I understand it said, well, we can't do that.
22 We can't pull the content of the document out of the
23 original electronic image without messing up, without

24 altering the metadata. No, we believe there is very
25 easily available, in fact free Microsoft available

54

1 software, that allows them to pull the redacted content
2 from the electronic image and therefore produce a fully
3 .txt searchable electronic form.

4 And, again, we don't believe we should be prejudiced
5 by their advancement of the searchable privilege and
6 therefore we should get a fully .txt searchable of the
7 nonredacted content and of the metadata.

8 Preservation order, Your Honor. We believe there are
9 a number of reasons why it's appropriate in this case.
10 First, despite numerous requests and opportunities
11 including Your Honor's directive on November 20th to have
12 a full discussion of nature of recordkeeping and record
13 retention policies, as I indicated, but to be clear, we
14 don't know of a single recordkeeping practice. We don't
15 know of a single record retention policy despite at least
16 three scheduled multi-person teleconferences to adduce
17 such information on three of which we had our at least one
18 IT person present who was on the phone. And on two of
19 which we had a second IT person with us who's presently on
20 the phone. They've yet to bring an IT person to any of
21 these teleconferences.

22 They propounded -- excuse me -- submitted law for the
23 proposition that need a temporary injunction to enter a
24 preservation order. Your Honor's I'm sure aware that the
25 Pueblo versus U.S. case, '04, the United Medical case is

55

1 U.S. -- is just three months ago, September '06. They
2 said, no, we don't need to meet probably injury or