

3 likelihood of success in order to get a preservation
4 order. All you need to do is show that there is a
5 necessity to have it. And it doesn't -- is not overbroad
6 in its imposition on the defense.

7 Here, Your Honor, we submit that the Court needs to
8 presume they had insufficient record retention policies
9 which allows under Pueblo versus United States case,
10 against the United States government in that case, the
11 imposition of a preservation order. In fact, there is a
12 very onerous one, far more onerous than the one we
13 proposed, which I should mention what is in our proposal,
14 Your Honor.

15 We're only in essence trying to change two things
16 that wasn't in AstraZeneca's Friday preservation proposal
17 to us. Those two things are, one, asking them to be
18 ordered to further preserve what they represented in their
19 Friday filing. In a very, very limited way, they are a
20 preserver. That's the second sentence on page 8 of the
21 order. And the other is that we simply be ordered to
22 confer on things they haven't gotten despite also repeated
23 requests any information on. When there's any record
24 retention policy or practice on nonbacked up computers.

25 Central to all drugs litigation is what is on drug

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1 reps laptops. We have asked them and have not yet been
2 told since November 20 whether or not drug rep's laptops
3 are backed up in a normal course, whether or not they made
4 any efforts to back them up. The answer might be, yes, we
5 might agree to all these things. Then give us the
6 information to allow us to review these things and whether
7 or not third-party e-mail accounts, not e-mails used for

8 Seroquel business. What if anything has been done to
9 maintain that information.

10 So those are the only two things we're asking them to
11 do in terms of impositions on them they weren't agreeing
12 to on Friday by their, what they call proposed
13 stipulation.

14 Second, Your Honor, the complexity of this case, the
15 diversity of the type, nature and of the location of
16 information further justifies at least the preservation
17 order we're proposing. They brought to Your Honor's
18 attention the Sedona conference. They support the
19 preservation order. The Manual for Complex Litigation
20 supports it. And the Pueblo case I cited including the
21 most recent case on the subject the Capricorn v. Siemens
22 case, Pennsylvania '04, also talks about the fact that
23 many complex cases almost as a matter of course now enter
24 such orders.

25 Another large reason is they actually submitted for

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1 Your Honor's review the Baycol motion to get rid of the
2 preservation order as apparently advancing their argument
3 that they would be subject to a preservation order. But
4 that was context of Bayer's representation. And they had
5 an affidavit on that said, "All Baycol e-mails, data and
6 documents are being preserved on unique backup tapes held
7 in a vault by independent experts safeguarding same."
8 That's on page 16 of their submission.

9 We have the antithesis here, Your Honor. Not only
10 have they never made any such representation, they've
11 never given us any information despite your clear

12 directive that they do so. Part of the reason we need
13 the -- what we didn't want to do but we felt we needed to
14 do to comply with your directive, give them less than
15 local rule notice of an IT 30(b)(6) deposition as we
16 requested last time. As we had already seen indications
17 that we weren't going to get the cooperation we were
18 asking for in terms of information that would allow us to
19 intelligently make proposal to Your Honor.

20 That IT deposition, Your Honor, we submit should go
21 forward whether or not preservation production protocol
22 order is entered, because without it, we lack the ability
23 to effectively negotiate, understand or appreciate their
24 electronic productions. And also, the very Delaware
25 default e-discovery standards they promptly submitted to

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1 the Court contemplate a 30(b)(6) IT deposition.

2 We submit that it should be done. And we submit that
3 it needs to be done for all the reasons, Your Honor -- if
4 Your Honor accepts our proposed order might order us to
5 negotiate from. We can hardly understand what search
6 terms might be relevant or might not in many cases without
7 finding out what types of electronic data systems they
8 have. The rest of the reasons are self-apparent.

9 If Your Honor would like any response after they
10 talk, I'm prepared to give that, Your Honor.

11 MR. MAGAZINER: Your Honor, Mr. Jensen referred
12 several times to the preemption discovery. As we
13 indicated to the Court in the statement of issues that we
14 prepared and submitted on the 6th of December when Your
15 Honor asked for it to be submitted to you, we have been
16 looking some more at the preemption issue. We're not

17 presently inclined to file a preemption motion. I'll be
18 happy at this point to explain the reasons for that
19 disinclination or explain it later or if Your Honor
20 doesn't have time, maybe no explanation will be necessary.

21 But to state it again as clearly as I can, we're
22 presently not intending to file a preemption motion for
23 reasons that I can explain whenever Your Honor thinks it's
24 appropriate.

25 If Your Honor would now like a substantive

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1 response --

2 THE COURT: I'll take it in saying that you
3 don't propose to abandon the issue?

4 MR. MAGAZINER: No, sir. May I take a moment to
5 explain it?

6 THE COURT: Well, this case is not going to work
7 if we have a hearing one month and we have a firm proposal
8 with a definite date and plan we roll out and come in the
9 next month and say we're not going to do that.

10 MR. MAGAZINER: May I explain, Your Honor? I'm
11 sure Your Honor is not happy with this but I'd like to
12 explain if I may.

13 THE COURT: I'm going to take a recess, hear my
14 criminal case which will probably take 15 to 20 minutes,
15 and we will reconvene after that.

16 (Recess)

17 THE COURT: Mr. Magaziner, I believe you were
18 about to tell me why I shouldn't disregard any statements
19 you make about the future defense of the case.

20 MR. MAGAZINER: I would like to explain to the

21 Court why we have had a change of -- our thoughts have
22 changed about preemption, Your Honor. I appreciate the
23 opportunity to do that.

24 What Mr. Davis proposed to the Court at the last
25 conference was a 12(b)(6) motion. It is a motion, as

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1 12(b)(6) is by definition a motion based on pleading
2 saying that a complaint does not as a matter of law state
3 a claim upon which relief can be granted. That was what
4 Mr. Davis proposed, a 12(b)(6) motion. Not a motion for
5 summary judgment, not a different kind of motion but a
6 12(b)(6). A rifle shot motion, if you will, directed to
7 one issue. The issue to which Mr. Davis expected to
8 direct the motion is the issue whether a claim by a
9 plaintiff who alleges Seroquel use after the label
10 changed, which I have referred to earlier, and who alleges
11 as a sole basis for liability that the label was
12 inadequate, the company was negligent in not making the
13 label more informative, whether that claim is preempted,
14 on that issue I don't actually think there is likely going
15 to be any dispute. If the claim is based on the
16 inadequacy of the label and the injury is the injury
17 warned of on the label, such claims I think are preempted
18 even with all the new decisions coming down from various
19 circuit courts. I think there's no dispute about that.

20 Two things happened after Mr. Davis said to the Court
21 that we would be interested in filing such a rifle shot
22 12(b)(6) motion.

23 One is we had an opportunity to analyze more
24 carefully the complaints that have been filed. And I
25 showed some of that to Your Honor in the slide show. Of

1 the 106 plaintiffs in the eight first filed complaints,
2 there are only two who allege post label change use of
3 Seroquel. So the motion, the rifle shot motion Mr. Davis
4 was describing, the 12(b)(6) motion, if successful would
5 have gotten rid of those two claims. Or more likely, not
6 even those two plaintiffs because most of the plaintiffs
7 are alleging a bunch of other claims and making other
8 allegations that included in different counts that might
9 not even have been preempted on that basis. For example,
10 if a plaintiff alleges in a complaint not only was the
11 label inadequate but then your sales representatives came
12 out and said things that were inconsistent with the label,
13 that would be a different challenge if we were trying to
14 deal with that on a preemption motion.

15 So we looked at the complaints more carefully. And
16 the rifle shot 12(b)(6) motion that Mr. Davis
17 contemplated, we believe, is not going to be very
18 effective in getting rid of many cases. It may get rid of
19 some portions of some claims for some plaintiffs based on
20 what we have now seen of the complaints.

21 When we learn more about these claims, when we learn
22 more about the Seroquel use, when we learn more about what
23 the theories of liability may be, we may have a
24 blockbuster preemption motion. But we don't have it now
25 based on the complaints which is what we were saying by

1 raising a 12(b)(6) motion.

2 Second thing that happened is plaintiffs asked Your
3 Honor for leave to take discovery and Your Honor agreed
4 they could do that. So the 12(b)(6) motion was

5 transformed into a summary motion. Instead of being a
6 motion judging the adequacy of a complaint, to state a
7 claim upon which relief could be granted, became a summary
8 judgment motion which is not uncommon. But that's what
9 happened here. So we're no longer dealing with a rifle
10 shot 12(b)(6) motion directed to the adequacy of the
11 pleadings but to now a summary judgment motion. The
12 plaintiffs then served on us the discovery they wanted.
13 And the discovery that they asked for is in essence all
14 the discovery that plaintiffs will ever ask AstraZeneca to
15 provide in this entire litigation. They want to know
16 basic --

17 THE COURT: You're kidding yourself if you think
18 that's true, if you think they won't be following up.

19 MR. MAGAZINER: Well, if you look at the -- if
20 you look at their discovery request -- and I'm not sure if
21 Your Honor has it but we can provide their discovery
22 request -- their document request, it basically asked for
23 everything that shows what we knew about Seroquel,
24 everything that shows what we communicated to the FDA,
25 everything that shows what it didn't communicate to the

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1 FDA, all of our marketing documents. I'm hard pressed to
2 think of categories of documents that they will want on
3 other issues in this case that they have not put into
4 their preemption discovery request.

5 So we're contemplating a rifle shot 12(b)(6) motion
6 focused on their complaint. They come back with discovery
7 that is the full blown discovery on every issue in the
8 case. It's not rifle shot discovery. And we think if we

9 go through this, we are at most going to get rid of, based
10 on the complaints alone, a couple of plaintiffs or a very
11 small sample of plaintiffs. Two percent maybe, and maybe
12 not even -- and one plaintiff in his or her entirety, just
13 one plaintiff's count of one complaint.

14 Beyond that, because the discovery they have asked
15 for is so expansive. As we have looked at what they have
16 asked for, I'll be completely frank with Your Honor, it
17 cannot be done in the timeframe that Your Honor
18 contemplated. I'm sorry to say that, but it cannot be
19 done. They want all our documents on what we knew, all of
20 our marketing documents, hard copy, e-discovery. We're
21 accustomed to moving fast. We want to move as far as we
22 can. We want to provide the Court with the -- or enable
23 the Court to move this MDL through the court system at
24 record speed. But, frankly, Your Honor, we cannot provide
25 all the discovery they have asked for in the timetable

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1 that Your Honor ordered. Even if we could, Your Honor, to
2 summarize, I think we still would not want to file a
3 12(b)(6) motion at this time because we think it would be
4 not a very efficient use of Your Honor's time, of Judge
5 Conway's time, of our time, or of the plaintiffs' time
6 because it would at the end have such a small impact on
7 the cases based on the complaints that we have studied
8 carefully.

9 What we would propose instead, if this would be
10 something of interest to the Court or to Your Honor or to
11 Judge Conway, is we could propose instead to have an
12 informational briefing on preemption. We would tell the
13 Court how preemption -- what we think the law is, where

14 the transit law -- where it's going, what we believe the
15 preemption law as it applies to these cases. Plaintiffs
16 could do the same thing and we could have a session with
17 Judge Conway perhaps in conjunction with a tutorial on
18 some of the scientific and medical issues in the case
19 which is something many courts have found useful to them.
20 We could talk about how preemption might impact it. And
21 then at the appropriate time when we have learned enough
22 about plaintiffs' cases to know what we're dealing with,
23 when they have had some discovery of us, which no doubt
24 will be proceeding on a parallel track, we could raise
25 preemption in a motion that we think is well considered

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1 and designed to help resolve many of these cases.

2 At the moment we don't have a preemption motion
3 available that we think would help resolve more than a
4 tiny fraction of the cases and not even, as I said not
5 even one plaintiff's claim, perhaps just one count of two
6 or three plaintiffs claims as we now understand it.

7 I would be happy to answer questions but that is the
8 essence of why we have rethought our position on
9 preemption. And I apologize to the Court for having
10 disappointed the Court on this. It's obvious that -- we
11 understand why you're disappointed. We would love to get
12 rid a lot of cases on preemption, Your Honor. We just
13 don't think we have the ability to do it at this point
14 with the kind of motion that we were contemplating and
15 that Mr. Davis told the Court we wanted to file a 12(b)(6)
16 rifle shot motion.

17 Thank you, Your Honor.

18 THE COURT: Have you provided the plaintiffs
19 with the corporate organizational chart?

20 MR. MAGAZINER: No. But we're prepared to do
21 that almost immediately.

22 THE COURT: That should have been done in
23 September. I really don't understand here on December 11
24 "We're prepared do did it almost immediately." That is
25 weasel language, and you know it.

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1 MR. MAGAZINER: Well, Miss Kelber is going to
2 address the specifics of the discovery issue. One of the
3 problems, Your Honor, is we reach agreements with one
4 plaintiff's lawyer and then another plaintiff's lawyer
5 says what the other lawyer agreed to, we don't want.
6 And --

7 THE COURT: That should not keep you from
8 providing basic information that's going to move this case
9 forward.

10 MR. MAGAZINER: I agree.

11 THE COURT: That's not an adequate excuse.

12 MR. MAGAZINER: I agree with that, Your Honor.

13 Miss Kelber can address that. I feel sort of sorry
14 pointing to her at this point. She's been dealing with
15 the plaintiffs constantly on the phone trying to reach
16 agreements, having them renigged, trying to reach new
17 agreements. I'm not faulting the plaintiffs, but it's
18 been a moving target.

19 THE COURT: Some of this hasn't been moving.
20 It's going to move.

21 MR. MAGAZINER: I understand. I can't speak to
22 what happened in September of course because I wasn't

23 here. Ms. Kelber has been involved.

24 THE COURT: Wrong answer too. I don't want to
25 hear that. I don't want to hear that again about what

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1 happened before you came in the case. I do not want to
2 hear that. You're in the case. You're responsible for
3 everything that's happened ahead of time .

4 MR. MAGAZINER: Well, that's why Ms. Kelber is
5 here with us today, Your Honor, to address it. I
6 apologize to the Court.

7 THE COURT: What's the problem?

8 MS. KELBER: The first problem is the
9 fundamental positions of the parties regarding how
10 discovery should proceed. As you saw from our brief, we
11 originally negotiated with plaintiffs the concept of going
12 forward with the custodial production whereby we would
13 identify document custodians. We will give the plaintiffs
14 the opportunity to prioritize the custodians they were
15 most interested in, and move discovery along on a
16 custodial basis. That has the benefit of getting all of
17 the Seroquel documents for all of the people who are
18 relevant to the plaintiffs as quickly as possible. That
19 is the quickest way to get discovery to the plaintiffs.

20 We have in -- we initially had agreement on that from
21 the plaintiffs Mr. Pennock represented in front of the
22 Court. That was something plaintiffs were willing to do.
23 Consistent with that, we were agreeable to producing a
24 list of all the custodians we had identified, producing
25 organizational charts and working together with the

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1 plaintiffs to move discovery along in an orderly fashion.

2 But the plaintiffs' response was that they would be
3 happy for us to do that and provide that information to
4 them, but they would not agree to give us the benefit of
5 such an approach and would only agree -- would require
6 also written discovery requests, formal responses to
7 written discovery requests, certification that we had
8 searched out documents responsive to every single category
9 of every single request, and then served very broad
10 discovery requests.

11 I submit that the best way and the quickest way to
12 move things along is by custodial production if that is
13 something that we can do. We're ready to move forward.
14 We have not been ready to produce any documents because we
15 have had ongoing negotiations with the plaintiffs about
16 the format of that production. I think we're very, very
17 close on the format of the production. Many of the issues
18 in the plaintiff's most recent filing are issues that we
19 discussed with them on Friday and agreed with them to
20 investigate the answers to their questions. For example,
21 some of the metadata fields that they're requesting, we
22 discussed on Friday. We told them on Friday we would
23 check and see if those were available fields. And we're
24 doing that. We do not have an answer today to a question
25 that was raised on Friday but I think we're very close to

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1 reaching an agreement.

2 The main outstanding issue to which the parties do
3 not agree is the issue of cost allocation. We have
4 proposed that costs of production be split between the
5 parties. The plaintiffs are taking the position,

6 generally, that AstraZeneca must bear that cost.

7 Specifically with regard to hard copies, they are
8 taking the position that we must bear that cost. We have
9 advised them that we are not aware of any cases which
10 impose upon the producing party the cost of copying hard
11 copy documents and providing them to the plaintiffs. We
12 have asked if they're aware of any authority. They have
13 not provided us with any authority.

14 With regard to hard copy documents, you will see in
15 our proposed order, we propose that the copies -- the
16 documents be scanned and OCR'd and the cost be shared.

17 We received yesterday the plaintiffs' motion or the
18 plaintiff's new motion regarding document production. It
19 makes several different proposals. If you are inclined to
20 address those proposals, I would request the opportunity
21 to file a response to that brief. It was just filed
22 yesterday and it was styled as a motion.

23 As for the preservation issues, the representation
24 that we have not provided information to the plaintiffs is
25 not true. As you would see from our brief, we have been

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1 having and attempting to provide information to the
2 plaintiffs regarding preservation efforts. What we have
3 told them is that document hold notices have gone out, and
4 have continued to go out since, I believe, it's 2003.

5 We are instructing all AstraZeneca employees who have
6 anything to do with Seroquel to preserve documents. We
7 have also advised them that back up media for e-mails have
8 been retained since November of 2002. What we have not
9 been able to provide them is information on other specific
10 systems. And we have explained that AstraZeneca does not