UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket No.6:06-MD-1769-Orl-22DAB

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| IN RE: SEROQUEL PRODUCTS LIABILITY LITIGATION | |
| MDL DOCKET No. 1769 | Orlando, Florida<br>March 2, 2007<br>10:00 a.m. |
| ALL CASES | |

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: Paul Pennock
Larry M. Roth
Fletch Trammell
Kenneth W. Smith
Lawrence J. Gornick
Michael E. Pederson
Scott Allen
Scott Burdine
E. Ashley Cranford
Dennis Canty
Lowell Finson

Court Reporter: Sandra K. Tremel, RMR/CRR

APPEARANCES CONTINUED:

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| For the Plaintiffs: | Lezzlie Hornsby |
| | David Matthews |
| | Howard Nations |
| | Robert Schwartz |
| | Lorie Siler |
| For the Defendant AstraZeneca: | Fred Magaziner |
| | Stephen J. McConnell |
| | Shane Prince |
| | James Freebery |
| | Robert L. Ciotti |

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY CLERK: The case number is 6:06-MD-1769-ORL-22DAB. In re: Seroquel products liability litigation.

Counsel for the plaintiffs in the courtroom, please state your appearances.

MR. ROTH: For the record, Larry Roth on behalf of the MDL plaintiffs.

MR. PENNOCK: Paul Pennock on behalf of the plaintiffs.

MR. ALLEN: Scott Allen, Houston, Texas, on behalf of the plaintiffs.

MR. TRAMMELL: Fletch Trammell, Bailey Perrin Bailey, for plaintiffs.

MR. BURDINE: Scott Burdine, Hagans Burdine, for the plaintiffs.

MR. NATIONS: Howard Nations, Houston, Texas, for the plaintiffs.

MS. SILER: Lorie Siler, Nations Law Firm, for the plaintiffs.

MR. MATTHEWS: David Matthews, Houston, Texas, for the plaintiffs.

THE DEPUTY CLERK: Counsel for defendants in the courtroom, please state your appearances.

MR. MAGAZINER: Fred Magaziner for AstraZeneca.

MR. McCONNELL: Stephen McConnell for AstraZeneca.

MR. PRINCE: Shane Prince for AstraZeneca.

MR. CIOTTI: Robert Ciotti for AstraZeneca.

THE DEPUTY CLERK: And now counsel on the phone, please state your appearances for the record.

MR. SMITH: Ken Smith for the plaintiffs.

MR. GORNICK: Larry Gornick for the plaintiffs.

MS. CRANFORD: Ashley Cranford for the plaintiffs.

MR. CANTY: Dennis Canty for plaintiffs.

MR. FINSON: Lowell Finson for plaintiffs.

MR. PEDERSON: Michael Pederson for plaintiffs.

MS. HORNSBY: Lezzlie Hornsby for the plaintiffs, Nations Law Firm, Houston, Texas.

MS. NIXON: Angela Nixon, non-counsel filling in for Robert Schwartz for plaintiff.

THE COURT: Anybody else?

All right. The clerk has asked me to notify plaintiffs' counsel that we're going to make a change in the MD docket. There's going to be -- some of the entries end up listing all 6,000 or 7,000 plaintiffs as having filed something, which is tedious to print or display on the screen and not useful. We're going to create a new party called "all plaintiffs." And so that the effect

will be the same, but instead of listing all names, we will list "all plaintiffs" as a designation.

So if you could, that should be a box that you should be able to choose as who you're filing on behalf of, and that will change the look and appearance. Should be easier for you and for us.

I have got to say that I'm perplexed by the approach the parties are taking with respect to discovery. Let me ask, plaintiffs' counsel, as of today, what level of documents have been made available to you and how much have you actually reviewed?

MR. PENNOCK: Paul Pennock for plaintiffs, Your Honor.

As of today, we have been provided the NDA and the IND, which we believe to be complete, although I don't think it's been certified to be complete. However, I don't think there's a requirement it be certified. I just -- we believe that it is a complete document.

We have essentially completely reviewed the IND and NDA. And in fact, the folks that we had reviewing it, we're holding a meeting with them in Houston at the end of the month in order that everyone else can sort of be educated on the findings and the outlines of everything that's happened in terms of their review of the IND.

That was I think something on the order of 470,000

pages, which we finally, after working out the formatting and so forth with the defendants, we received that in a way that we could review it and in the format that we wanted. Again, I'm not faulting the defendants for the formatting issues that we had to work out, but I think we got that, I want to say six or eight weeks ago. So I think we have done a substantial amount of document review for that.

In addition, about four or five weeks ago, or it may have been a little longer than that, we got the eight custodial files. Those are not complete. We have been told that those are not complete.

And we have completed some portion of the review of that, although our stated goal is that prior to our meeting in Houston at the end of the month, we will have completely reviewed all eight of those custodians and will be prepared with respect to those eight custodians. We have started the review of that. We have people, including my office, looking at those files as we speak.

So if the Court has concerns that we're getting things that we're not actually working on, I understand those concerns, and I think they're fair and legitimate, but the fact is that we are dedicating a tremendous amount of time and resources to looking at those documents.

THE COURT: Well, I mean, that's not my --

that's part of my concern. My concern is, I don't understand why we need 80 custodians. To me, what you're entitled to from the defendants, it doesn't make any difference whether this is a single plaintiff case or a 200,000 plaintiff case. You're entitled to documentation, and I don't understand why this is complicated. I don't know why we should have to wait months for you to get those things, and I don't know why you need 80 custodian depositions to talk about them.

MR. PENNOCK: I don't know that we do, Judge. You're right.

The first part of it is that we have not -- we certainly don't have enough information now to say to the defendants who are the custodians that we want. I mean, there are certain ones that we could identify clearly we would want and we've -- you know, I think that would not be in dispute.

But these 80 custodians were selected by the defendants, and we just frankly, the vast majority of them, we just don't know whether they actually are custodians that we would want or that we would want to look at. In fact, we're sort of worried that we're going to go through a lot of these custodial files and expend a lot of effort only to find that it isn't anyone that we could care less about, and yet, we really won't know until

we dig in and do that.

So those are the two problems. We didn't pick them and we just don't have the information yet. We are going to build information as we go along. We're going to ascend a learning curve, and we're already starting to ascend it.

And that's why in the order that we propose, we want to be able to notify them of what custodians we want and then get those files per some reasonable schedule. The scheduling, when we were here the last time, the Court said that it would like some deadlines, and we agree there should be some fixed and certain deadlines.

It's often been said that attorneys are like -- litigators are like a gaseous substance, we will fill up whatever space there is. And so deadlines I think will be helpful even though we will no doubt fill up those deadlines.

So we are going to ascend a learning curve, and we are going to hopefully, with the Court's permission, be able to ask the defendants for custodians that we want. I'm sure that some of these 80 are ones that we would want, but not all of them.

But we've sort of -- without any other way of putting it, I feel we've sort of been saddled with these 80. So if these are the 80 that they think are most important,

then we would like to get them as soon as possible so that we can get through them as soon as possible and figure out whether this is enough or whether it isn't.

The Court raised the issue of depositions and how many depositions need to be done. Typically in an MDL -- I certainly don't think there are going to be 120 depositions or anything close to that in this MDL of the defendants. Typically in an MDL, I think there are somewhere -- I think the Baycol litigation, maybe there were 70 or 80 depositions of corporate personnel. I really don't think we will have that many depositions here.

And part of the proposal that we have is just leaving some leeway to ensure that we're not truncating ourselves. But, you know, at the end of the day, I mean, we feel that it's likely that we will need somewhere in the range of 30 to 40 depositions. Typically the majority of those are depositions that flesh things out and sort of just give you the picture so you can understand the most important five or ten depositions. But you still need to do those extra ones to understand the important ones.

But I do understand anyone's reaction to how in the world, why in the world would you need 120 depos. I don't think we do, and there was certainly a notion of let's not truncate ourselves in that proposal.

But, you know, we are -- there is no doubt that in a case like this, there is a tremendous amount of information that we need to learn and understand. In the Vioxx trials, which I participated in, there are documents and discovery things that come up that no one has ever seen before. In the middle of trial you will have an hour-long side bar on some document that gets pulled out by defendant from the discovery that has never even been looked at.

So there's a lot of information that is relevant, and although at the end in a trial you boil that down to a fairly limited amount, in order to boil it down, you still need to collect and review a great deal. But believe me, we want to collect and review as little as we have to, and we're not looking to burden the defendant with document production and depositions that don't need to happen.

We have too small of a plaintiffs group here to even contemplate doing that. So that is not our goal, and it's certainly -- even if it were, it's not something we could -- a goal that we could reach.

So I hope that in some way answers Your Honor's concerns and questions.

THE COURT: All right. We're calling these people custodians. I take it from reading the context that that's not really an accurate term.

MR. PENNOCK: The term --

THE COURT: They're not your witnesses, so...

MR. PENNOCK: The term has been developed, and I think the defendants often prefer to go about document production this way, although I'll let Mr. Magaziner comment on that, but the term has been developed that if you have, you know, the director of -- let's take the medical director of the company for drug development. That person has within his or her possession, literally in his or her office, on the laptop, on the Palm Pilot, on their computer, and arguably even at their home, documents which are relevant to the drug.

And so the way the production works is they, the defendants will go to that person's office quite literally, as I understand it, and collect everything and print it and take the data off the computers and get it all together for that one person. So now we know that everything that has been -- that the medical director has maintained over the years that's relevant to the drug has been collected.

And then we go to the next person who may have been involved, let's say the national sales director for the drug. And we will collect everything from that person, and now we know we have all that person's documents.

But that doesn't mean we now have all the medical

documents or all of the sales documents. That just means we have whatever those two people had.

THE COURT: Well, that's what I'm saying. You're entitled to the corporation's documents, wherever they come from, and some 30(b)(6) depositions, to follow up with the individuals that you think either you need explanations from or that you think there's something that isn't quite kosher, that you don't think the documents reflect the true picture.

This seems like an awful cumbersome way to get you the information you need.

MR. PENNOCK: Well, I don't disagree it's cumbersome, although I think in litigation by --

THE COURT: Normally when we talk about a custodian, it's a person who has charge of documents under some set of responsibilities, and you take a deposition for 45 minutes to establish a chain of custody or -- but if these are substantive witnesses that you want to depose -- I just don't understand why we need any depositions to establish what documents you're getting. It makes no sense to me. And you do 15 a month and carry this thing out for a year. It makes no sense.

You're entitled to the documents sooner than that, and then you're going to pick the witnesses that you really need to take. I don't know why it should take more

than six or seven months to get all -- everything you need.

MR. PENNOCK: Well, Judge, we have been here, as the Court is well aware, for six months already.

THE COURT: That's what troubles me. You should have had some -- a lot of this stuff way before now. If you haven't gotten it, that's a problem.

MR. PENNOCK: We're equally troubled by that, and the -- you know, by Judge Conway's order, we're prevented from taking any depositions until the first 2500 fact sheets are served. And those, we have about 1700 served, and by April 1st, which is the deadline, I think we will have our 2500, and then we will be able to proceed with depositions.

And I'm certainly in agreement with the Court that we want to proceed with depositions and start discovery and do it on -- based on the files that we have already received and reviewed. But I don't know that that -- that we will be able to get all those depositions done in six or seven months, although our schedule doesn't call for much longer than that.

THE COURT: Well, the schedules that both of you proposed that you -- you've got some may be achievable and might allow the possibility of the case getting ready. That's not going to work.

And let me hear from defendant on this subject.

MR. McCONNELL: Our Honor, the reason we have custodial production and the reason it was agreed to in this case, and the reason that's the way the documents are typically produced in these type of mass torts is, it's the only way that it reasonably works.

When the case is filed, we know we're going to have to produce all the reasonably relevant documents relating to Seroquel and it's going to be millions and millions of pages. And we have an obligation to go out and identify where those documents are and how we can collect them and put them in a state where they could be produced to the plaintiffs, and that's what we did.

And what we did was, looking throughout the company, we identified everybody who we thought might have any documents relating to Seroquel, and we identified 80 people. So you're right, the word "custodian" here isn't used in the sense that we typically use it when we talk about a custodian of documents.

But we came up with the 80 people, and the reason you have to do the collection and the production on a custodial basis is, first of all, it's really the only way you can do it. If you think about how we get these documents, we have to go -- and as Mr. Pennock said, if you know there's somebody who has a position where they

may have something to do with Seroquel, we have to go in, we have to interview that person and find every possible place where they've had documents, hard documents, in storage, out in the hallway, in any device they have. At home. We have to find all those documents. So that collection is done on a custodial basis.

And we have collected those documents. We have already produced for the initial eight custodians something like 220,000 pages of documents. Another 600,000 are on the way.

Now, Mr. Pennock says that we may not need to depose all 80 of those custodians, which is of course great news. He also says, what if there are other people, what if we find out that there are other custodians, other people who had something to do with Seroquel who are not on the initial 80 list. Then we have to add those people. We have to get the documents from those people, and we have to turn them over.

And if the plaintiffs want a different priority, if they think that some of these 80 custodians are not people they're really interested in, that's fine. If there are other people they are more interested in, that's fine. We will move those people up in priority.

But the point is, if you want us to get moving and collect all the documents, we have got to get out there

and collect those documents from those 80 custodians, and you produce them on a custodian basis because, first, that's really the only doable way to do it, but second, if you want to depose somebody, you want to depose somebody when you know you have got all their documents.

If we were to sort of just go in there the way you do on a typical smaller case and say, let's just try to corral all the documents in the company relevant to this, that's something that you can do in a smaller scale case. You can't do that here.

We never have all the documents from particular custodians. They take depositions of witnesses. It would turn out there are still certain things that haven't been collected or produced, and we have to go back and do depos and do them again.

As the plaintiffs recognized in their paper, they don't want to do that. If they're going to take a deposition of somebody, they want to take one deposition. They want to know that they have everything from that person.

So the custodial way is the way that was agreed to earlier. It's the way we have been working for months in this case. It's the way that we are working.

We have a schedule. We can produce all the documents no later than September. That's not that far off. And in

a case of this magnitude, that's with unprecedented celerity.

And I think that the only disagreement that we had coming in was sort of the pace of doing that. Whether all the documents would have to be produced in April, which is absolutely undoable, or, in some of our negotiations, whether we produce files from 15 a month as opposed to 20 a month. That's doable.

That's a gap that can be bridged, and that's a gap that can allow us, once we bridge it, to get this production done, bring in all the documents that are relevant, whether from these 80 custodians or anybody else that any of us figure out, us or the plaintiffs, and get this case in a position to have it ready within two years as Your Honor ordered.

MR. PENNOCK: Your Honor, may I respond? First, with respect to these 80 custodians which they have selected, part of the initial problem we have and why we're worried that there will be a lot more people who we will actually want documents from, is that I think the earliest time any of these people worked at the company, at least by a -- per a chart that they gave us, was 1997.

Now, this drug -- development for this drug began in the late '80s. I think the IND was filed in like '88 or '89. And certainly there is an awful lot of information,

and typically very critical information, that becomes available to the company during that development period, and during both the preclinical and clinical trial period, which all took place before 1997.

So I don't think there is any doubt that there are going to be different folks whose information and files that we want. But again, we didn't select these 80.

As far as --

THE COURT: Have you talked to them about 30(b)(6) subject matters?

MR. PENNOCK: We have discussed with them that we would like a 30(b)(6) depo on the organization of the company, both presently and going back basically 15 or 20 years.

We talked to them about a 30(b)(6) depo for MIS, so that we can sort out databases.

But what Judge Conway -- right now we're operating under an order that we are not allowed to get those depositions, again, until the 2500 fact sheets are served, which we'll have --

THE COURT: You can't designate them and get them set?

MR. PENNOCK: The notices?

THE COURT: Right.

MR. PENNOCK: Actually, I'm not sure that we

would be entitled to serve that notice. I think we're stayed from --

THE COURT: Well, you can negotiate and get it ready.

MR. PENNOCK: Well, we can --

THE COURT: Or I'll modify the order.

MR. PENNOCK: -- certainly try to do that, but we're stayed from conducting those depositions or serving notice of them until after the 2500 fact sheets are due. But then we're allowed to move forward and notice whatever depositions we want.

Can I just say one thing about the 80 custodians also in terms of how quickly they should be delivered to us? And I know that they're concerned about the April 7 date. Perhaps that's a little abbreviated for the time period, but I'm not sure how abbreviated.

Of those 80 custodians, I was looking at it last night, 30 of them, according to a document that we got from them that's in the papers, 30 of them were -- they have a collection date of 2005. So now they would have to update the collection of those -- from those custodians up through a later time period, because we want to see what those custodians were saying and doing up through the middle of 2006.

But a huge chunk obviously of those custodial files

was done, I guess, a year and a half ago. I mean, we're talking the earliest date was sometime in like October or September of two thousand --

THE COURT: If they were collected two years ago, why didn't you have them six months ago?

MR. PENNOCK: I don't know. We just got this last week.

And then that's 30 of them were in 2005. The other 50 were all, according to this document, collected in 2006, and every one of those has a collection date of at least July 6, 2006, which is two months before the initial conference almost to the day that this Court held.

So I don't -- I understand that they need to go through and update some of these -- some of this collection, although July 6 is the cutoff that we have agreed to.

So I'm not sure why we don't have them. I'm not saying that there is anything intentional at all. I know this is in all a very large and substantial project for everyone concerned. But my point is simply that getting those documents sooner than September, much sooner than September, is something that we think should happen, and once we get them we'll commence reviewing them and we may not -- in fact, I will say it's very unlikely we will conduct even a quarter of those 80 custodial depositions.

THE COURT: Well, yeah.

MR. PENNOCK: But we're going to find new people, Judge.

THE COURT: You need certification as to who this person is, what they searched and, you know, you may look at most of those and say, yeah, that's exactly what we wanted.

MR. PENNOCK: We may.

THE COURT: And if you need to depose them to clarify something, it would be very brief. And then you can focus on the merits. I mean, you're talking about corporate organization and MIS, but I mean, have you talked to them substantively about who it is you need, the medical director and any research scientist and that sort of thing?

MR. PENNOCK: Well, until we look at the documents, we don't know. I mean, you know, if -- you know, I've personally been handed --

THE COURT: Well, no, no. I mean, you've got an idea what the theory of your case is. You know what --

MR. PENNOCK: I do, but I don't know what that person knew. I mean, I have taken depositions of medical directors who were post withdrawal from the market because there was some thought that may -- and it turns out that he knew virtually nothing that would be admissible at

trial because it all postdated the events in question.

So I mean, until we look at their documents and figure out what the person knew and when did they know it, so did they know anything, was what they knew relevant and -- or might lead to some relevant evidence, and when did all this transpire, until we've looked at all those documents, we can't take the depo.

But we're willing to do that on a very quick timetable, Judge, and we are doing it, and there are no doubt depositions that we're going to take in these first 80, but those depositions will not be that brief. I mean, typically these depositions take -- I mean, we have a two-day agreement between us that we would do the depo of these people in two days.

But you're laying out the entire case in these depositions. Not only are you authenticating documents, which often has to happen, and marginalia, writings in these documents, but in addition, more importantly, you're cross-examining the witness with their own words and their own documents, and then those depositions are used by the remand courts at the trials that may take place.

So that these witnesses are -- do not have to be called into trial again and again and again at the remand court. Rather, the deposition, the videotape record is used.

THE COURT: How many -- do you have any estimate as to how many people other than these custodians that you're going to want from the defendant? Substantive people.

MR. PENNOCK: Again, I apologize for being redundant, Judge, but we didn't want these 80.

THE COURT: I know that.

MR. PENNOCK: Okay. So I don't have an idea, although I think it would be a very substantial number, because these 80, not one of them, at least by the information we have so far, not one of them had anything to do with Seroquel before '97.

THE COURT: In some cases 15 is a substantial number. Are you talking about 100 or are you talking about 30?

MR. PENNOCK: I don't think it would be more than 30.

THE COURT: How about third parties, the FDA and other scientists?

MR. PENNOCK: There certainly are some third parties that we have already identified in the course of our NDA review that we may want to depose. It would be a limited number.

As far as the FDA is concerned, if we're able -- I'm not sure -- we haven't really reached that level --

whether there is anyone there that we would ask the Court to permit us to depose.

THE COURT: That's a -- you start out talking to a brick wall when you're dealing with the FDA, and you're going to need help from the Court in dealing with them, it's a cumbersome process, as you know.

MR. PENNOCK: That's right. We haven't --

THE COURT: It's not something to be put off to the end.

MR. PENNOCK: No, it wouldn't be, Judge. It's something that we may be able to decide in the next several weeks, having completed the NDA production now, review now.

And you're right, we will definitely need the Court's assistance because they will -- generally at least will not voluntarily appear for depositions.

THE COURT: Well, or -- those are the ones where I feel like I need a dental degree in oral surgery, to extract anything out of government agencies.

Let me hear from the defendant.

MR. McCONNELL: Your Honor, as to the question about if these documents were collected a while ago, why aren't they being produced yet, the first answer to that is, that it wasn't until January that we reached an agreement with the plaintiffs as to the format of the

production of the documents.

More and more of these documents over time involves electronically stored information. The plaintiffs want certain sorts of metadata. It took a long time to work that out, and we worked it out in January, which mines you collect the documents, but then documents have to be processed to be put in the form that the plaintiffs want, and that's one thing that's taking a lot of time.

But let me go back to this concept of custodian. If you take out the word "custodian" and put in the word "witness," these 80 custodians are the people we've identified as the people who are likely witnesses because they did in fact work on Seroquel. These are all the most obvious suspects in terms of who worked with Seroquel.

If other people develop, they'll be added. Fine. If the plaintiffs want to prioritize, they can do that. In fact, they already have. They have already told us which of the remaining 72, who are the ones they want us to do first, and that's who we are doing first.

The 30(b)(6) point, Your Honor is right, that is going to happen, and if, based on 30(b)(6), there are other witnesses that the plaintiffs want to depose, they're going to do that.

But the final point, Your Honor, is, in all of our talks with the plaintiffs, what we have talked about is

doing these productions and doing these depos on a rolling basis. Doing, whatever it is, 15 or 20 per month.

That's the way that the plaintiffs want to do it. It's the only logical way to do it, especially if you want to dispose a witness when you have all their documents. And that's a schedule that's manageable, and we're on track to meet that schedule.

MR. PENNOCK: Your Honor, may I just make one final comment. I mean, we have continued to propose that this be done on a rolling basis, except for these first 80, which we feel that since it's been going on for so long, that we need to get those files out as soon as possible.

But as to the remaining work that we need to be done, in terms of new custodians that we might identify, new witnesses that we might identify, we have proposed that that be done on a rolling basis.

And moreover, even as to these first 80 witnesses, to the extent that we're going to depose them, we have proposed that it be done on a rolling basis, between now and next February 1st.

MR. MAGAZINER: Your Honor, may I respond to that briefly?

I'm somewhat mystified about what's going on here. The discussions we had with the plaintiffs, and I can --

Mr. Pennock can confirm this, I think, or I can show you an e-mail that will confirm it -- they said they're okay with the custodial production. That means, instead of saying here are all the documents that deal with advertising during 1999, give us documents by the person, the witness in whose custody the documents are found. They were all right with that. It's incorporated in an order, CMO2.

We then had a discussion about the timetable for getting those documents to them. What they proposed was 20 custodial files, that is files found in the possession of a witness, 20 per month starting April 1st.

In our proposal, we said, we think that's ambitious. Can we do 15 per month starting April 30th. These are not large differences. 20 per month starting April 1st, 15 per month starting April 30th.

In the papers plaintiffs filed, they said, instead of 20 per month starting April 1st, let complete the whole thing, all 80, by April 7, which obviously is preposterous and nothing to do with the position that we have been talking about and try to negotiate for some time.

But the important point here is, what is reasonable is some number of witnesses' files per month, starting sometime in April. They say 20 per month. We said 15. They say April 1st. We said April 30. That's where the

difference lies between what we think is feasible and what they have, until the papers they filed on Monday, what the plaintiffs have said they wanted from us.

So it's nice for them now to talk about April 7 for completing it all, but that has nothing to do with the reality of where we are, where we have been, what is feasible and what is reasonable.

Also, I very much doubt that the plaintiffs can do their job of reviewing the documents, analyzing them, figuring out what additional information they may need from us, at a faster pace than what we're proposing and turning out documents.

We are proposing -- whether it's 15 a month or 20 a month, it's going to be 10 million pages, maybe 15 million pages. Who knows? In the Zyprexa litigation, which they say is similar, it certainly involves another atypical antipsychotic, as I understand, the number was between 16 and 20 million -- I don't have the precise number of pages of documents -- which took two years to produce under Judge Weinstein's supervision.

We're proposing to do an equally mammoth job in a much, much shorter timeframe. And I think the plaintiffs understand that that's reasonable, that that is about what one could expect the company to do, and that's what we're proposing to do.

I think that the term "custodian," I think all the lawyers on both sides of the aisle here have failed in our job to communicate to the Court what we were talking about.

THE COURT: Well, no, I understood what you were talking about. I just think the term is not useful, but -- it doesn't change the reality.

MR. MAGAZINER: It's a term of art that the lawyers use, and it's not something the Court -- we're using it without informing the Court what it meant.

THE COURT: Oh, no, I understood what you were doing. I just -- I think it's a poor term.

MR. MAGAZINER: Well, we apologize.

THE COURT: Given what that word normally means. But I don't understand the approach either. You just -- if you roll these out 15 a month starting the 1st of May, you're not going to finish this year.

And then after all that is done, plaintiffs still have lots of other people they're going to want to look at, and this isn't going to get done in time.

MR. MAGAZINER: Well, we think we can do all of the 80 by -- including updating from the earlier collection dates up through 2006, the middle of 2006, as Mr. Pennock said -- by September 30.

We invite the Court to enter an order telling us we

need to complete it by September 30th.

If they, as they look at the documents, decide we don't want witness Jones, we think he's not that important, so stop collecting witness Jones files but give us witness Smith's files instead, we'll do that. We then need to collect them from witness Smith.

We have a --

THE COURT: I mean, I think what plaintiffs need to do is get all the documents as quickly as you can produce them, with certifications from each of these witnesses as to the efforts they undertook to get things from their files and the files for which they have access and their predecessors', I assume we're getting, since people leave the company or change duties, that through this designation process you have identified everybody -- somebody -- there are probably some orphan documents out there that no longer have a custodian because somebody's changed titles or changed jobs or people have left, but that all of the documents are produced.

And then plaintiffs figures out, out of those 80 people or anybody else whose name has popped up in any of the documents, which ones they really want, which ones they really need. It won't be most of those 80, I wouldn't think, and it would be a few other people. So that that gets done way sooner than you're talking about

here, so that they have got their best case to prove their cause of action.

MR. MAGAZINER: Your Honor --

THE COURT: They have got to name experts based on your documents.

MR. MAGAZINER: Your Honor, I'd like to make two points, if I may.

In my experience in other litigations of this sort, what plaintiffs typically request is the documents be produced on a custodial basis.

VOICE OVER PHONE: Bailey & Galyen. Our focus is on solving your legal puzzle.

MR. PENNOCK: I'm just glad it's not Weitz & Luxenberg, Judge.

MR. MAGAZINER: Maybe that term has something to contribute here, but if I can continue.

In other litigations of this sort, what plaintiffs are typically requested from the defendant, is that documents be produced to them on a custodial basis. As my esteemed colleague has just explained to Your Honor, when we go out to collect the documents, we have to go to various people in whose custody we might find documents. That's the only way to collect them.

And we collect them -- plaintiffs typically say, give us those things on a custodial basis, rather than just

giving us documents as we collect them from various people, here's some documents that came out of this file, that file, the other file.

We're going through this process of using a custodial approach because that is what in other litigation plaintiffs typically request and what the plaintiffs in this litigation agreed to. No doubt because they also find that is the most convenient way for them to receive documents.

So it's not like we're inventing some sort of complicated process that is unprecedented. This is the typical way documents are produced in this kind of pharmaceutical mass tort litigation.

In terms of churning these things out as fast as they can, Your Honor, I've prepared a little slide show. A lot of it has now sort of been covered, but if I can just --

MR. PENNOCK: I'm sorry to interrupt Mr. Magaziner, but I just -- there was something that was said about five, ten minutes ago that I feel requires a reply, and that was that we had, we the plaintiffs had agreed to a rolling production of these 80 custodians and then suddenly changed our mind and submitted a different order.

But what -- the fact that I think needs to be again enunciated is that after we had been discussing for some

weeks a rolling production, we received this proposal from the defendants, which we objected to for a whole bunch of reasons, that had this Exhibit A attached. And for the very first time we learned what I mentioned to the Court earlier, that these files, commencement -- that collection commenced on these files back in 2005.

So suddenly we were kind of -- first surprised we got this Exhibit A from them, but secondly, we said to ourselves, why are we agreeing, and why have we been discussing this rolling basis production for months on end or for weeks on end, when these files have already been substantially collected, and as the Court pointed out, if they've already been in the process of being collected for two years, why don't we have them already?

And that was the reason that we had the change in position that Mr. Magaziner referred to.

MR. MAGAZINER: That's a little disingenuous, I fear, Your Honor.

We gave them that list because we were -- let me try to put this in context, if I may, Your Honor.

Seroquel is a drug that is still on the market. Most of the pharmaceutical mass tort litigations -- not all, but most involve drugs that have been withdrawn from the market. But Seroquel is a drug that is still on the market. So as we are in court today, there are people at

AstraZeneca creating documents today relating to Seroquel.

We said to the plaintiffs, we need to establish some sort of cutoff date for -- that we will collect documents that were created up to a particular date in time, rather than forever, because if you just say all Seroquel-related documents, that means documents created on March 2nd, 2007, and it will mean documents created in August of 2007, and we will never come to an end.

They asked us what we had been doing in collecting documents, and we said, we established different dates as we went through and we can give you a list of the dates that we've used as cutoff dates for the collections for various of these witnesses or custodians, and we presented that chart.

That doesn't mean the documents were ready to go in 2005. It means we collected documents from a particular witness through a particular date in 2005 or 2006, and then we have been negotiating with the plaintiffs for a month to several months about the format, as Mr. McConnell mentioned to you, about the metadata they want us to include in the documents, et cetera.

And as recently as February 20th -- here is Mr. Pennock's e-mail to me as of February 20th.

THE COURT: Mr. Magaziner, I've got to tell you, the negotiations that you all had are not of great

interest to me, because as far as I was concerned, nothing that the two of you were talking about is getting this case ready fast enough.

MR. MAGAZINER: I'm only responding to Mr. Pennock's statement that they have not been proposing a rolling basis for producing custodial files all along. And they have been.

I agree with Your Honor -- I'll take this off the screen.

I agree with Your Honor that the negotiations that we have had should not be of interest to the Court. They're of interest to us because we're trying to reach some resolution. They shouldn't be of interest to the Court.

What should be of interest is what can feasibly be done in a way that will allow us to get documents out in a reasonable time and will allow them to review them and to take the depositions of these 80 or however many of the 80 they want to depose on the substance of their documents, and whatever other documents they want that are in the custody of other witnesses within the company, and to take the depositions of those people.

That's what we're trying to propose. We believe that we can get the documents that are already in the process, all of them, to them on a 20 a month or 15 a month basis. That will bring us to September 30, even updating the

people whose documents we collected earlier. If they have other people they want us to substitute, we're happy to do that.

We have tremendous resources assigned to this, Your Honor. I just -- if I may, here is what we're doing. Just so Your Honor has an idea, we have had for some time 170 lawyers reviewing documents full-time. We have 30 additional lawyers conducting second-level document review.

We have recently retained another law firm, an additional law firm, McCarter & English, to open another facility in which there will be an additional 50 to 100 lawyers reviewing documents full-time in order to meet this very ambitious but we believe feasible schedule.

And it's a schedule that the plaintiffs also believed was reasonable until the papers they filed on Monday. So as I said, I'm a little mystified why it is that we're having this discussion with the plaintiffs now when all along they have thought this kind of schedule was appropriate, reasonable, and the kind of thing that one would expect a defendant dealing with what could be ten million, 15 million pages of documents, the kind of thing a defendant would have to do in order to deal with that volume.

We're going to end -- we're going to have 220 or 300

or 270 lawyers, within a month we'll be up to that kind of staffing, full-time document reviewers responding to the plaintiffs' document requests here. Full-time lawyers.

It's not like we are not investigating in this process. It's not like we're not pouring our resources into it. Just the contrary.

And we believe we can get these things out to them in the format that they have requested on the schedule we're proposing, which as I was saying is not very different from the schedule that they themselves proposed until their Monday filing.

THE COURT: Mr. Pennock, how many expert witnesses do you anticipate designating?

MR. PENNOCK: I think that a trial of this nature should -- general witnesses that may be subject to a Daubert challenge will probably be two to three, I would assume; that in addition -- meaning experts who will be testifying regarding the foundations of general causation, that Seroquel does indeed cause these injuries or can indeed cause these injuries. I think it will be two to three of general causation.

I think additionally, whether they -- again, I don't know that all of these we would end up deciding to use at trial, but, you know, I imagine that we will have a regulatory expert, somebody in that field.

As to the general causation, obviously -- maybe not so obviously, but we would have an endocrinologist and we would have probably an epidemiologist or a clinical epidemiologist.

And in addition to those, the general causation and the regulatory experts, I think there would be somebody who typically -- this is again for trial -- who will take the stand to discuss what was discovered in terms of what the defendant knew and when did they know it. We will probably need a -- probably have a pharmacologist expert.

So when all is said and done, when our generic, as some people call it, or I call it general expert disclosures take place, I would imagine we will have six or seven general experts.

There may be a marketing -- including a marketing expert. I don't know about a marketing expert, but typically we have someone who will -- has reviewed everything and sort of synthesizes everything for the jury.

Obviously there's sometimes battles over what they can say, is that within the realm of an expert opinion, and so forth, but more often than not, we win out and those experts are allowed to get on and you can put in some documents through them and sort of paint the story.

So you will have those experts, and then I think six

or seven for the general, but I don't think any of that could happen until discovery.

THE COURT: Well, that's what I'm -- what do you need to be able to designate these people?

MR. PENNOCK: Well, we --

THE COURT: Make them available?

MR. PENNOCK: Before we would designate those people, we would need to learn what our case is. We would need to have this evidence as to what the company knew and when did they know it.

General causation is a perfect example. It is, you know, absolutely necessary that our general causation experts have available to them not just what's in the medical literature, but what the company had internally in terms of studies that may not have been published, information that has not yet and probably never will be made available to the public. And that information is almost always the -- a bedrock for the general causation opinion.

One of the reasons is, it's a little difficult to cross-examine a general causation expert on their opinion that the drug can cause these problems when their own people inside, their own medical people inside were drawing the same conclusions ten years ago.

So we will need to do the discovery against the

defendant and review these documents and do some number of depositions, which I anticipate to be in the range, as I said, between -- I think I said 30 to 40 depositions. And once all of that is done, and the entire record of this case can be made available to our regulatory experts and our medical experts and our clinical epidemiologist, then we will be able to issue those expert reports, which I suggested to be a year from yesterday. That we would have our generic general expert reports issued, and theirs would be due a month from then, and we'd have two months to get all the depositions done, with any general motions being filed on July 1st of 2008.

And we will be essentially done with what really needs to happen in this MDL -- there's no way these cases can be remanded without all of that happening in this MDL, and all of that would be done within two years from the first conference.

And I think it's realistic. I know that we're committed to doing it, and that's the plan that I outlined in my order that was attached to the papers filed by my office.

THE COURT: Mr. Magaziner, what areas and number of expert witnesses do you anticipate from your side?

MR. MAGAZINER: It's hard to say until we see what their experts have opined. Typically -- I'm

delighted to hear Mr. Pennock's prediction of how many experts they'll have. In other litigation like this, typically the number that plaintiffs have is more like 20 or 30 of them rather than six or seven.

But I would think that if they have six or seven experts, we probably would have an approximately equal number.

THE COURT: And in your mind, after you get their disclosure of experts with reports -- I mean, I'm confident you've already talked to some potential witnesses, and of course you've got a lot of expertise in house with the defendant, I mean they're by definition the most knowledgeable and I assume have lots of good credentials and expertise and experience, and so forth.

But how long will it take your people to be able to do responsive reports, disclosures? He's talked about 30 days, which is typical for a typical case.

MR. MAGAZINER: Let me give you a two-part answer.

THE COURT: Because it does seem short to me, given the complexity of some of the issues. On the other hand, you have been thinking about it for over two years probably.

MR. MAGAZINER: Sure, but --

THE COURT: Nothing they say is going to be a

real surprise. At least parts of it that will -- you won't know exactly what they're going to say, but --

MR. MAGAZINER: I don't know what their experts are going to say. I don't believe their experts are going to agree with the view that those in the company have about what the drug does and doesn't do and the effect it has.

So their experts presumably are going to develop theories that are going to be somewhat of a surprise to us when we read the reports, because, as we know our own documents and our own experience with the drug, we don't think that it supports the claims they have made. So we will see.

But to answer Your Honor's question, 30 days is shorter than is typically used in a litigation of this sort. Whether we can do it in 30 days depends in large part on, I think, how many experts they have and how complete their reports are, because we see different sorts of reports from different sorts of plaintiffs' experts. If it's a kind of bare-bones report --

THE COURT: Some look like this (indicating). Very helpful.

MR. MAGAZINER: Right, exactly.

And we have proposed in the order that we put together which the plaintiffs have rejected, we have

proposed that we get their reports, we depose their experts, then we give them our reports and they depose our experts.

They're very adamantly opposed to the idea that we would depose their expert before giving them our reports, which we think is a more sensible way to go, but if Your Honor wants reports, reports, depositions, depositions, we can work with that format as well.

And 30 days I think is something we can probably do, if we're talking about six or seven experts. If we're talking about more than that, we would need more time.

If there are reports included among the plaintiffs' experts that are really quite different from anything we anticipated, we may have to ask them for more time to respond, because we --

THE COURT: Or if the report is inadequate.

MR. MAGAZINER: Or if the report is inadequate, sure. And we see --

THE COURT: Well, I mean, my experience has been that the reports can be inadequate because they look like this, or because they look like this, and they really ought to look like this (indicating).

MR. MAGAZINER: Yeah. I've seen both of those things many times. I'm sure Mr. Pennock has as well. I'm sure that he's had as many problems with reports that

defendants have submitted as we've had with reports that plaintiffs have submitted.

THE COURT: We have seen it from all sides.

MR. MAGAZINER: I would think 30 days is quicker than is normally done, but is feasible if we're talking about the number of expert Mrs. Pennock has just estimated.

MR. PENNOCK: Your Honor, I was estimating the number of specialities -- maybe I was unclear -- as opposed to the number of experts. I still don't think it's going to be more than ten.

I mean, we are creating the general expert testimony that presumably will be used in many trials when these cases are remanded. And presumably the expert testimony will be on videotapes so that any lawyer around the country can -- and that's typically what happens -- can then use this general testimony at the trial.

So as a result of that, those six or seven specialities that I mentioned, we may actually designate more experts within that specialty just to have some variation. More than one expert within those specialties.

But for the purposes, I think, of general motions in this court, we probably would be looking at six or seven specialities.

MR. MAGAZINER: If I may just make an

observation about an issue that the Court and the parties will need to deal with at some point.

Typically the MDL Court in a situation like this will enter an order at some point that says that all the general experts whose testimony is ever going to be used in court of any -- in trial of any case in the MDL after remand, has to be disclosed in the MDL rather than after remand.

Typically what happens -- Mr. Pennock is very familiar with this procedure -- typically what happens is the lead counsel or the steering committee say, here is our roster of experts, and it's 10, 12, whatever Mr. Pennock is now expecting.

There then needs to be some procedure for plaintiffs' lawyers who are not working hand in hand with the steering committee or with the lead plaintiffs' counsel to designate additional generic experts that they may wish to use.

So that if there are plaintiffs' lawyers who are not part of the group that's controlling the MDL who have some additional experts, they need the opportunity to designate them, and then we have to respond if we think there is a response needed.

So it's not always quite as neatly tied up in a package as Mr. Pennock was describing. He may have 10 or

12. There may be another 10 or 12 that other plaintiffs' lawyers around the country may wish to designate.

That doesn't necessarily mean we will need to have exactly as many, because it could be that the other 10 or 12 designated by other plaintiffs' lawyers are completely duplicative.

On the other hand, sometimes we have seen other plaintiffs' lawyers not part of the steering committee or not lead counsel who designate an expert whose opinion is quite unexpected and unanticipated and not something we were prepare to deal with, and we may need 45 or 60 days to deal with that kind of thing. It's hard to say.

MR. PENNOCK: Your Honor, I doubt there will be other lawyers from around the country who are not part of this group that are litigating before Your Honor that will be designating experts. I suppose it's possible, but if there are other plaintiff lawyers out there that are doing that kind of level of work in this litigation, we certainly would like to know about it. We could use their assistance.

In any event, I do think that once all the document discovery is done and the defendant depositions are done, we would be able to serve our reports and move quickly to conclusion of what needs to be done here by September of '08.

THE COURT: Mr. Magaziner, what -- is there anything in addition to the expert reports and depositions that you need to be able to raise your Daubert issues?

MR. MAGAZINER: Yes. It depends what the generic expert's report says. Many of them -- in order to raise a Daubert issue, we're going to have to -- we may have to have discovery of plaintiffs whose situation is encompassed within one of these generic expert reports. Maybe not. It really depends on what their generic opinions are.

For example, if an expert says that this drug, that the risks outweigh the benefits, which is something that we often hear plaintiffs' experts say, the question is to whom? For whom? This is a drug which is still, as I said, on the market and widely prescribed. It is being prescribed day in and day out by physicians today who know all of the risks that the plaintiffs say the physicians needed to know when they prescribed Seroquel.

Even with all of that in the label today, a label that says there are reports of diabetes in people using Seroquel, the drug is being widely prescribed. If they have an expert who says, well, the risks of the drug outweigh the benefits, then we will have to have some examples of what kind of plaintiffs we're talking about where you believe the risk outweighs the benefit, or want

to develop some cases to test that proposition and see whether plaintiffs' expert really has in mind particular classes of plaintiffs or clients, particular plaintiffs, individuals for whom the risks outweigh the benefits. I don't know what their experts are going to say.

There are other experts, if the question is, for example, is Seroquel capable of causing diabetes, I would think that's -- if we have their expert reports, their expert depositions, we will then be in a position to respond with expert reports of our own, and we won't need more discovery. It's a different kind of expert report.

If it's -- if there is an expert report about our sales activities and promotional activities, it's hard to know what we will need to challenge the factual background. For example, if the -- we have seen experts in other litigations who opine on the kind of sales and promotional activities the defendant company is engaged in, and oftentimes depositions of the doctors shed great light on whether what the experts' assumptions are -- whether the premise of the expert's report is true or false.

So it's hard to say, but in general, there will be reports from their experts that I think we will need reports and depositions. There will be others where we may need some factual discovery in order to deal with the

opinions stated in those reports.

I apologize for that very long answer.

MR. PENNOCK: Your Honor, I think -- I mean, I would differ with Mr. Magaziner in that I don't think there is any case-specific factual discovery needed for these types of general Daubert challenges that may be made.

He mentioned risk-benefit analysis. I think that that would be the most individual evaluation that could be done in these cases. I mean, that's really very, very, very case specific.

Also, I'll add that in a pharmaceutical prescription drug case, risk-benefit analysis technically doesn't even really come into play because it's -- there is no design defect claim that's really viable in these cases. It's a failure to warn claim that's the viable claim for the most part.

There may be some jurisdictions that would have a risk-benefit analysis involved with a drug case. I can't think of one off the top of my head.

But in any event, I do think that general experts can be adduced and deposed, and we can make motions with respect to them, without any detailed factual record from any case-specific cases, and that -- I believe that's the way it's always done. In fact, there is often an effort

by defendants to include the injection of any case-specific cases into that general process.

MR. MAGAZINER: Your Honor, I agree with something Mr. Pennock just said, which is I don't think that risk-benefit analysis as a general matter has any place in this litigation, nor even in an individual case.

I'm only reporting to the Court that in other litigations there have been plaintiffs' experts who have opined that a particular drug had so many risks, that the risks outweighed the benefit and it should not have been marketed. That's not an unusual expert report for the plaintiffs to submit.

And if we have a report like that, we're going to have to figure out what -- how to deal with that, and that may require discovery of a kind that Mr. Pennock thinks won't be required otherwise.

If they don't have an expert who's going to say such a thing, then that is not a problem for us, of course.

THE COURT: Mr. Magaziner, have you identified the subject matters that you anticipate raising in general dispositive motions? Or partially dispositive motions?

MR. MAGAZINER: Yes and no. Let me elaborate on that if I may. And I think one of the slides we prepared may be of some help.

Each of these issues could be the subject of a

dispositive motion. Some of them are going to be of general applicability to large groups of cases or maybe all the cases. Some of them will be more case specific.

We know a little bit more about some of these cases based on the first 629 fact sheets that have come in and thus can tell Your Honor a little about that and give Your Honor an idea of where we might be headed.

We know that 25 percent of the plaintiffs, according to the fact sheets, are still using Seroquel today. After we understand that a little more and understand how it is that someone who is still using the drug today is suing us on the theory that we should have warned about the risks of the drug in a way that we didn't, but nonetheless they still want to use it today, we may make a general motion that challenges the validity of any claim by a plaintiff who is still using the drug today.

We know that 18 percent of the plaintiffs -- and I'm talking about the first 629 fact sheets. 18 percent of them state in their fact sheet that they used the drug for the first time after the label change in January of 2004. After the FDA mandated a label change for all three drugs in the class, saying that there were reports of diabetes in people who use the drugs. That could give rise to a preemption motion, which says that if someone is claiming diabetes as an injury, any claim that the label was

inadequate is preempted because of the preemptions doctrine Your Honor is well familiar with, and the plaintiff who says he first started using the drug after the label warned of the risk, that plaintiff is out of court under the doctrine of preemption.

We know that 39 percent of the plaintiffs, according to these fact sheets, state that they also use Zyprexa. Now, we have to get more deeply into those cases with some discovery, but it may be that we will come to the Court with some sort of motion that will apply very broadly to large groups of cases that a plaintiff who has filed a lawsuit alleging -- I'm sorry -- who's using Zyprexa and Seroquel simultaneously may be in a different posture and subject to some sort of dispositive motion than a plaintiff who alleges only Seroquel use.

Incidentally, Your Honor, 50 of the plaintiffs in this first 629 participated in the Zyprexa settlement. They actually received money apparently on a claim that Zyprexa caused them to develop diabetes, and now they're suing AstraZeneca on a claim that Seroquel caused them to develop diabetes.

That may be a motion that we will file and will apply to hundreds of cases down the road. Given the 7,000 or 8,000 cases in the MDL, it may be seven or eight hundred cases based on what we have seen in the small sample so

far, where we will try to have those cases dismissed or have a judgment entered in those cases based on the fact that you can't have collected from Eli Lilly saying Zyprexa caused my diabetes, and then turn around and say Seroquel caused my diabetes.

There are 38 percent of them say they use Risperdal, which is a Janssen product, another atypical antipsychotic.

So there are a whole bunch of issues that are subject to motions that will either be generic in the sense they will apply to all the cases or will be case specific but applicable to large numbers of cases.

No Seroquel use of course, that would be an individual case. If we go through the records and take the discovery and determine that the plaintiff actually never used Seroquel, of course we would expect to come to the Court with a dispositive motion in that case and the Court's opinion granting our motion might be such as other plaintiffs who have similar evidence would decide they don't wish to go forward with their cases.

The no general causation, we would think that litigation being what it is, there may well be a Daubert motion we would file with respect to their general causation experts who say Seroquel causes diabetes.

That could be -- if Your Honor granted that notion or

Judge Conway did and knocked that expert out, that could be the end of the entire litigation. We'll have to see.

The no specific causation, of course that would be an individualized matter, but again, it may extend and apply to large numbers of cases. Let me explain to Your Honor how that might be.

We would anticipate many of these plaintiffs have used Risperdal, Zyprexa, Seroquel, many other drugs. Many of them will have a family history of diabetes. Many of them will have risk factors for diabetes that are unrelated to these drugs. Diabetes is a very, very prevalent condition in our society, as Your Honor knows.

Diabetes is particularly common without regard to any drugs among people with schizophrenia, for example. They have a much higher incidence of diabetes than the general population.

So we're anticipating many of these plaintiffs, perhaps most of them, will have all sorts of other things in their records which could account for their diabetes besides their use of Seroquel, even assuming that there is admissible expert testimony that Seroquel is capable of causing diabetes.

We would anticipate that the plaintiffs' experts will nonetheless opine that a particular plaintiff's diabetes was caused by his use of Seroquel, not by his use of

Zyprexa, not by his use of Risperdal, not by the family history, not by his preexisting risk factors, not by the fact he's a schizophrenic, et cetera.

We may well bring to Your Honor a Daubert motion attacking that particular expert's methodology for determining that Seroquel was the cause of diabetes rather than some of the other things. If the Court in deciding that motion says this kind of methodology is not Daubert worthy, that could apply to hundreds or thousands of cases. So it would be an individual motion, but the principles that the Court might use in deciding the motion could be a very broad applicability.

Estoppel of double recovery, that has to do with people who participated in another settlement.

The continued Seroquel use after filing suit, I have already mentioned that.

Learned intermediary, that may be an individual issue, but again, a very broad applicability. As I said, this drug is on the market and there are doctors prescribing it today. It is the -- as I believe, it is the most widely prescribed antipsychotic today. I may be wrong, but that's my understanding.

So doctors are prescribing it today in Orlando as we speak because they believe that even with the reports of diabetes in Seroquel users, the risks are far outweighed

by the benefits to patients who need an antipsychotic.

Now, if doctors in individual cases when we take their depositions say, "I would have prescribed Seroquel to this patient even if I had known then what I know now, and the proof that I would have done that is that I'm continuing to prescribe Seroquel to great numbers of my patients," we might then come back to the Court and say, under the learned intermediary doctrine, all of these cases where a doctor says, "I would have prescribed it anyhow," all those cases are without merit, they cannot go forward, they cannot be the basis for liability.

That again could be an individual motion that has very broad application.

Statute of limitation is another sort of generic sort of individual motion. The reason I say that, there will be some clear cases, as there would be in any pharmaceutical litigation, where discovery shows that a plaintiff knew about the alleged injury and the alleged cause of it more than two years, or whatever it is, depending on the state, before the suit was filed.

But we have a different issue which is going to be a very interesting legal issue for the Court to determine down the road, which is that many of the plaintiffs apparently are in court on the theory that the statute of limitations is tolled for people who are incompetent. So

even if they otherwise would have had all the knowledge they needed to file their lawsuit five years ago, and they only filed it a year ago, they're saying the statute has been tolled because of their incompetence.

Now, most of those people are in court on their own name rather than through a guardian or a conservator or someone who would have legal responsibility for someone who's incompetent, so we're going to have a very interesting issue. Do they get to toll the statute of limitations because of an alleged incompetence? On the other hand, they can be here in court without a conservator or guardian.

And that issue when it's teed up to the Court may have broad applicability to many, many hundreds or thousands of cases, depending how many fall into that category.

The forum non conveniens issue, I don't have a list here, but again, that could be an issue which the Court rules on in great numbers of cases at once. The Court could say under applicable law, plaintiffs who live in Florida should not have filed suit in the district of Massachusetts and those lawsuits should be dismissed under forum non conveniens grounds, with the right to refile in Florida, for example.

THE COURT: I was going to raise that issue,

whether we need briefing on whether they could be dismissed or remanded to someplace else other than where they came from.

MR. PENNOCK: I think the rule says that when an FNC motion is made in federal court with a -- certainly with a claim that's United States based, it shall be transferred to the appropriate district.

So I don't think there could be a dismissal, as Mr. Magaziner has suggested, for U.S. plaintiffs in a United States federal district court. I think if an FNC motion is made, then it has to just -- and it's granted, then it's not dismissed. It's just transferred to wherever it's supposed to be done.

So I don't think there's going to be a dismissal.

MR. MAGAZINER: I don't know whether that's right or wrong. I thought Your Honor was asking a different question, which is, is that something that the MDL Court can deal with or is it something that --

THE COURT: Well, I think this Court has to, for the cases that get to that stage, decide where these cases go back to. I mean, presumptively they go back to the transferor court, but we know that there were lots of plaintiffs from all over the country combined in one action or a few actions filed in the particular court that those plaintiffs apparently have to relationship to.

I don't know if it goes back to -- if it goes to a Court where they lived at some point in time or if it goes someplace else.

MR. PENNOCK: Judge, it typically has been done one of two ways. As Your Honor has suggested, the Court, the MDL Court has remanded them to the district where the MDL Courts think they should have been filed pursuant to forum non conveniens principles, or the Court remands them to the district where they were filed, the transferor Court, and has some type of order saying within -- you know, if the defendants want to challenge FNC, that motion should be made within 90 days or whatever it is. I've seen it both ways.

THE COURT: Well, that seems like something we ought to take care of here.

MR. PENNOCK: And very often it's stipulated to by plaintiffs and defendants at the end where the cases should go.

If I may, Your Honor, may I respond to some of the things that --

THE COURT: Well, I'm not quite done with him.

Mr. Magaziner, out of the issues that you have talked about, it seems to me some of them require completion of expert discovery, some of them are highly dependent on state law, others it may be that the state law is so --

even though it provides rule of decision, is so uniform or nearly so, that we don't need to worry about that too much, and some of them frankly you need a little more than you have now to raise them.

My concern is that if we push all these off to the end, whatever the end is, that there will be too much for you to raise and too much for the plaintiffs to respond to and too much for Judge Conway to deal with at one time. That it's going to delay things. So that's my concern in raising the issue.

And I can also tell you that as a matter of practice, Judge Conway is not sympathetic to multiple motions for summary judgment or partial summary judgment, and is not -- is certainly not a fan of serial motions, so we have got to overcome that in terms of setting the schedule.

MR. MAGAZINER: You mean in the same case.

THE COURT: Yes. I mean, we get one in almost every case, but --

MR. MAGAZINER: Well, this is not like a patent case where there are typically 15 motions for partial summary judgment.

THE COURT: Patent cases, I've lamented with my patent lawyer friends about their predilections and how they want to space things out, they want what I call

illusory certainty on each point before they move to the next. And I say illusory because Federal Circuit reverses us half the time anyway, on Markman issues and other things as well. So I don't know why the patent lawyers do that. Frankly, it mystifies me.

MR. MAGAZINER: Your Honor, I was at a social function where there were some district court judges and several judges from the Federal Circuit Court of Appeals, and one of the district judges said to the Federal Circuit judge, why do you reverse us on more than half the Markman decisions? And the Federal Circuit judge said, because more than half the time you have it wrong.

THE COURT: Well, I invite those judges to read their en banc multiple opinions, and I also invite them to come down and sit for some patent pretrial proceedings.

MR. MAGAZINER: To return to -- that's a little off subject, but to return to this case, we don't anticipate we would file more than one summary judgment motion in any individual case. There could be a summary judgment that is overarching all the cases, and then after this Court -- if the Court denies that, there may then be a particularized motion.

But no, we would not think in the Sally Jones v. AstraZeneca case we will file multiple summary judgments.

THE COURT: But if you had a motion on each of

these, a separate one on each of these, that would be a problem.

MR. MAGAZINER: No, I don't think we would do that. I think --

THE COURT: If you did all these in one motion and argued each one in three pages, I think that's a problem for you.

MR. MAGAZINER: I think what we would look at is, the Sally Jones case, if she didn't use Seroquel and the -- and she also participated in the Zyprexa settlement, and she also had a long family history of heart disease, and her doctors also testified that he would have prescribed Seroquel to her no matter what, we would think that's a pretty good case for us to get judgment, and we would put a motion together, we would make three or four points and try to brief them and a small number of pages and submit it.

But, no, we don't anticipate filing separate summary judgments in the same case.

THE COURT: Well, what about in the MDL case? Which of these do you want to raise in the MDL docket as a general matter, and when do you want to raise it, and how much discovery do you need in advance to be able to do it?

MR. MAGAZINER: We would like to be able to raise all of these, because we think the Court's rulings

on these sorts of motions would provide significant guidance to all the other plaintiffs for whom no motions are yet filed.

So I know there's been some controversy and Your Honor has expressed some views about whether there should be discovery and how many cases and what that should entail. We have made a proposal as Your Honor has seen.

THE COURT: I'm coming to that next.

MR. MAGAZINER: Okay. But we think what makes sense is, we deal with -- we work up a number of cases through the discovery process, through the depositions of individuals, and then we would file whatever motions we thought those cases gave rise to, and the Court would decide those motions, and that would provide guidance to both us and plaintiffs in all the other cases that are similarly situated.

So that if, for example, we tee up a motion saying, Sally Jones participated in the Zyprexa settlement, she cannot be now in court claiming that Seroquel caused her diabetes, having collected money from Lilly saying Zyprexa caused her diabetes, if we tee that up in one case, after discovery, if Judge Conway rules that we are correct and that we are entitled to judgment, that would then be applied, not automatically, but --

THE COURT: I'm picturing you having a

spreadsheet with 8,000 names down this side, and all of these categories across the top, and filling in information in the boxes so that in your own mind you decide Miss Jones has -- everybody has a general causation issue, but she has a Zyprexa issue and a continued use issue, and I assume that you're going to be having that kind of a mental process.

MR. MAGAZINER: Sure.

THE COURT: In your back room.

MR. MAGAZINER: Right. We don't expect -- we're not now asking the Court to allow full-blown discovery in all of these 7,000 cases obviously.

THE COURT: Well, but for a lot of those issues, you don't need full-blown discovery. You've got the fact sheets and --

MR. MAGAZINER: For some of them we think the fact sheet will provide a basis. For others, if someone says in the fact sheet -- and remember, the fact sheets come from the plaintiffs.

THE COURT: Let me come back to that. Because I want to get plaintiffs' response on this subject matter before I turn to individual plaintiff discovery.

MR. MAGAZINER: Very well, Your Honor.

THE COURT: But what I'm getting at is, I'm concerned about pushing all of this off to the end of

discovery, because we're going to run out of time.

MR. MAGAZINER: I know. And let us come back to the Court with a proposal. I haven't thought about the issue Your Honor has raised, and I'd like to come back with a proposal on what sorts of motions we can file earlier.

THE COURT: We had this discussion actually before you were in the case, and then, you know -- well, I mean on the specific preemption issue, and we changed gears on that, so that's -- we're not doing it that way.

That issue is -- not just that specific legal issue, but the issue of how to get these things presented to Judge Conway so she can deal with them in a way she's comfortable with and that provides both sides with due process.

MR. MAGAZINER: I appreciate that, Your Honor. In our proposed order, we didn't say -- we said there should be a deadline for the filing of the dispositive motion, but they can be filed at any time before that deadline.

THE COURT: But again, I'm concerned that Judge Conway is not going to want to see six of them covering different subject matters over the course of eight months unless she specifically approved that because she thinks it makes sense.

And the date that you have got in there, if we raise all of these things at the end, isn't going to work.

MR. MAGAZINER: The reason we didn't say no dispositive motion shall be file before such and such a date is because we think that we could start filing some of them very early on, depending on the individual case and what kinds of issues are raised. Some of them will be later, some of them will require a great deal of discovery, some of them may require none.

THE COURT: Okay. Mr. Pennock, you want to speak to this issue?

MR. PENNOCK: Judge, first, I was hoping we could stop putting down the Sally Jones case. She happens to be a very nice woman and has a very strong case. She no doubt exists in the context of 9,000 cases.

THE COURT: That's what I was worried about.

MR. MAGAZINER: I apologize to Miss Jones, Your Honor.

THE COURT: Let's use Sallie Mae and Freddie Mac. How about that?

MR. PENNOCK: First, I think the Court is asking, and I just want to make it clear for myself so I can answer, how and when can general motions go forward, and are they going to be in some staggered way, and how -- and I think the Court's made a point it can't be that

staggered and so forth. And those issues we've not discussed with Mr. Magaziner. As he said, we can come forward with a proposal for these general motions.

The only really -- the comments that I wanted to make is that, and I think it sort of dovetails into the next discussion, and that is that the fact sheet process was envisioned by the defendants in particular and asked for by the defendants in particular, as one that would develop a great deal of information on these individual plaintiffs, and I'm happy to hear that it is doing so. They're able to, just by having reviewed some 600-odd fact sheets come up with all sorts of information that they think they can already make motions on.

The defendants came to this Court and wanted a very, very extensive and detailed fact sheet. Something -- a couple of hundred interrogatories really are within the context of that fact sheet. They wanted all these authorizations, medical records, insurance records, workers' comp records, disability records, employment records. They have gotten all of that.

They are now in the process of collecting and evaluating that vast amount of information with respect to all of these individual plaintiffs. It's going to go forward.

We're being very diligent in meeting the Court's

deadlines, and at some point over the next several months they will have all of that information on all of those plaintiffs, and many of these motions that they say are general, at least to the extent that they may apply to a large group of individuals, as Mr. Magaziner just pointed out, can be made on the basis of the medical record collection and the fact sheets that's happened, and I think it's just a matter of determining how the Court wants those general motions made and on what schedule.

But the general motions can be made on the basis of the fact sheets for all of these things, or most of these things. In fact, the only thing that is probably of concern, which would probably have to be a case-specific motion, is going to have to wait full discovery in all of the cases, is a case-specific learned intermediary motion, but, you know, you're talking about, there will have to be 14 or 15 thousand depositions done before you can do a learned intermediary motion in an individual case, specific case. Obviously there can be motions for summary judgment generally on the adequacy of the warnings.

So -- but a lot of these other things, as Mr. Magaziner has pointed out, they have gleaned a tremendous amount of information from the fact sheets. I think that was the intention.

No Seroquel use. Of course they're getting all the

pharmacy records and prescription records. And let's remember that the fact sheet is signed under the penalties of perjury by the client. That was something they insisted on, and that's what allows them to get the sort of information they need to make whatever general motions they feel they have to make. And again, by general I mean that will affect some large portion of the cases.

We're happy to meet these motions whenever they make them, as long as we have a reasonable amount of time to respond.

For example, the fact that there are people that took Zyprexa and may have gotten a Zyprexa settlement but are alleging that Seroquel somehow was also a substantial contributing factor in their illness, I think that that's a motion that we would be happy to argue.

I know some of the money values that were obtained from some clients in the Zyprexa settlement, and depending on what was the perceived contribution of another drug, they may have gotten much less money.

So there are a lot of issues that surround those Zyprexa clients, and I don't want the Court to think that we were filing cases with double -- seeking a double recovery. I think they are very legitimate claims of people that Seroquel was a substantial contributing factor to their illness, as was Zyprexa.

THE COURT: How much variation around the country is there on the substantial contributing factor, verbal formulation? Multiple causes?

MR. PENNOCK: There is not tremendous variation. I mean the only one I can think -- Pennsylvania, for example, I think is somewhat different than some of the other states. They don't use the word "contributing."

So I think that they're, by and large, in terms of case -- in terms of causation, that substantial contributing factor is the standard, but there is some variation. No question. And as I mentioned, Pennsylvania being one of them.

In any event, you know, we're producing this information. There's a vast amount of information that's being produced with respect to each clients, and we're happy to hereafter sit down with the defendants and work out with them or try to work out with them a proposal for how they might make these general motions which they have just elucidated can probably be made based on the medical records and all the other records of the fact sheets.

But, you know, other than that, we're just waiting to hear what motions they want to make and we'll -- we will meet.

THE COURT: Well, let's put that on our agenda for the next conference.

One of my reasons for raising this with you particularly, Mr. Magaziner, is so you don't get surprised with Judge Conway, if you're anticipating this flow of events that just may be inconsistent with the way -- I have given you some idea of her general predilections, so that if we're going to do something that tends to cut into those predilections because you want to bring four motions at four different times, you need to have an explanation for it, and if you can convince me of it, I can recommend it to her, you're better off, and if it's logical, that it fits with the discovery schedule, and it lets her divide up her work in a way that she would appreciate the benefit of.

So let's work toward that goal. And it's -- some of it has to do with how much discovery you need. Some of it has to do with how universal the application is, which you're not going to know for sure, and I understand that.

But, I mean, obviously a Daubert motion can't be brought until after the experts are discovered. But some of these others don't need to wait for that. We can group them and show the logic of it. I think we can get Judge Conway to bless that in advance so that you don't get motions stricken because they're repetitive.

Let me turn to the issue of plaintiff-specific discovery. You spent a lot of pages arguing that you

ought to go forward on that and before cases are remanded.

Let me ask you, each plaintiff is different, what -- given the detail and scope of the fact sheets, what scope of plaintiff-specific discovery do you anticipate with respect to each plaintiff?

MR. MAGAZINER: I would be happy to address that, Your Honor.

The fact sheets are, as Mr. Pennock said, like interrogatory answers. It is a commonplace preliminary universal experience of litigants that interrogatory answers are very helpful and they serve a purpose, but much more is learned after interrogatory answers are in place during depositions and further discovery.

For example, if the plaintiff -- I'll give Your Honor the most common example. Plaintiff says, "I have no family history of diabetes." We get the medical records. We take a deposition of the doctor. We take depositions of someone else that the doctor gives us the name of. And we discover that sure enough, the mother and father of the plaintiff both have a history of diabetes.

We don't know that from a fact sheet. The fact sheet just gives us the plaintiff's interrogatory answer, as it were, but not necessarily the truth that may emerge through the deposition process.

Plaintiff says, for example, that she received -- she

used Seroquel.

THE COURT: But let me stop you right there.

MR. MAGAZINER: Sure.

THE COURT: With the plaintiff fact sheets and records authorizations, you will have gotten the doctors' records. I guess -- I mean, I'm asking a simpler question. You're going into a longer explanation than I wanted at this point.

MR. MAGAZINER: I'm sorry.

THE COURT: I mean, you can take the individual's deposition, and you can take the doctors', the main treating physicians' depositions, I suppose. I'm not sure you want all of them, but maybe you do.

What else?

MR. MAGAZINER: Typically it would be the plaintiff, the spouse or some other family member who knows what's the plaintiff was doing with regard to medication and diseases and whatnot.

A doctor or more typically several doctors. Oftentimes there is a prescribing doctor who may not be the same person as the doctor who treated the plaintiff for the injury or may be one of several prescribing doctors, so it's hard to say how many doctors.

In other comparable litigation, I would say the number of depositions per case has ranged from as few as

three to as many as 15, depending on the complexity of the plaintiff's situation.

Sometimes there are -- there needs to be depositions of other family members besides the spouse. Sometimes the coworker or employer, depending on what the allegations are and what the -- where the discovery leads.

We would then in an individual case expect to have an expert report from the plaintiff, and we would want to depose a plaintiff's expert because we may or may not want to have an expert report of our own. The burden is on the plaintiff. We may or may not wish to have an expert report after that.

THE COURT: On medical issues?

MR. MAGAZINER: On medical issues. If the plaintiffs typically are going to have an expert who will say, Seroquel caused, or was a contributing cause or something, my client's diabetes.

And we would -- that case-specific expert report, we would want to take that expert's deposition so that we would know whether we do or don't have a basis for filing a Daubert motion with regard to that expert.

The important thing about the Daubert motion, as I said, is it might, depending on the Court's ruling, have very broad applicability.

By the way, I'd just point out one other issue that

we are confronting. The medical records collection process is not quite as simple as what Mr. Pennock said. Plaintiff says to his lawyer, "I treated with Dr. Zilch. That's the only -- he's the doctor who prescribed it and who treated me for the side effects of Seroquel."

When we get the records, we see that Dr. Zilch has in his records references to 15 other doctors who apparently were dealing with issues of great interest to us, such as the endocrinologist who maybe was treating the plaintiff for diabetes before the plaintiff ever took Seroquel.

So we then want to collect that doctor's records, and that doctor's records may lead us to someone else's records.

The fact sheets don't necessarily contain the names of all the doctors, and almost every litigation I have been involved in, what we say is that through investigation and discovery, we learn the names of many other people who have records.

And I'm not faulting Mr. Pennock for that. I think that Mr. Pennock has to rely on what his clients tell him, and the other plaintiffs' counsel rely on what their clients tell them, but it often turns out to be a much more comprehensive investigation than just collecting the records from the people identified on the fact sheet.

THE COURT: Do you have a rough idea of what

percentage of Seroquel prescriptions are made by psychiatrists and how many are made by GPs or internists or --

MR. MAGAZINER: I do not have any idea, Your Honor.

THE COURT: I mean, I know some antipsychotics and other mental health drugs are routinely prescribed by family doctors, others are not because they require more specialization. Not to say they're not done, but --

MR. MAGAZINER: I just don't know the answer to that, Your Honor. I'm sorry.

THE COURT: Mr. Pennock, do you want to speak to individual plaintiff discovery?

MR. PENNOCK: I think the first thing I would say is, I'm not sure why we need such a devastating extensive and complex program that's been proposed by the defendants. I felt that way before I walked in here this morning, and having just heard that there are -- I just added it up -- summary judgment motions that the defendants could make right now, based on the fact sheet discovery they have done -- as Mr. Magaziner said, the record collection is a comprehensive investigation, and I agree with that. And I don't disagree that he discovers new doctors, and we give them all those authorizations as well.

So I just heard that we could -- there are 25 percent of the clients are still using the drug today, based on their own sworn statement in the fact sheet. And that they think a summary judgment motion could be made on those.

18 percent used the drug for the first time after the warning. For the first time after the warning. Based on their own sworn statement and the support of the medical records. They could make a summary judgment motion on those, they think. I don't think they'll win them, but they could make these general motions.

And then about 50 plaintiffs participated in the Zyprexa settlement, and they think that may fall under a double recovery estoppel motion. I estimate that's about 7 percent of the 600 and some that they mentioned they looked at.

That means that just on those three issues, they could make, based on the investigation to date, summary judgment motions in 50% of the cases in this MDL. Generally speaking.

And if they could do that, and in addition, you know, whatever else we -- that they propose and the Court agrees with and we look at that are issues that are fleshed out through this massive fact sheet and record disclosure, if those types of motions in all these cases and issues can

be dealt with -- by the way, along with all the general discovery that we're doing that we spoke about earlier, along with all the general expert work that we're doing, I'm not quite sure why we would need to come do something like 1500 depositions of plaintiffs, their family members, their spouses, their several doctors, their treating doctors, their main treaters.

You know, Mr. Magaziner mentioned that there is anywhere between three and 15 depositions case specifically in one of these types of cases. I have never seen one with three. I agree with 15. I have seen them with 20. I just completed a Vioxx case that had 21 case-specific depos.

Let's go with 10. If we do 100 cases, that's 1,000 depositions. And only in 100 cases. And it just seems to me that if we're talking about getting this case ready to be remanded, as we should, and we know for a fact that a huge volume of really case-specific issues just can't be dealt with in this MDL and really need to be dealt with individually, if we ever get to that point, and I do want to talk about an ADR proposal that we've made in a moment, but if we are only talking about dealing with 100 cases, and yet if we spend our time and focus our energy on what they asked for four months ago, massive comprehensive investigation of -- based on records and sworn statements

from these plaintiffs, if we focus on that, we have already seen this morning that they are going to be able to tee up, as they say, a very substantial number of general or nearly general issues that this Court can address, and perhaps they'll get what they want, which is reducing the number of cases.

But this 100 cases with 1,000 depositions, it's only going to take us away from doing this, it's only going to take us away from doing the general discovery, the Daubert issues, the general preemption and all that, and we don't get anything from it, other than discovery in 1,000 cases.

THE COURT: The discussion I have had with Mr. Magaziner poses the risk of a double bind for him. I'm telling him he's got to bring these motions one time, and I agree that the fact sheets provide -- I don't know what percentage -- a lot of the -- most of the information they need, but they're certainly entitled to test the reliability of it, and there certainly will be other things they need to support these motions that he's contemplating. I mean, it stands to reason.

And if he's forced to file the motions before he's got some of that discovery, well, like I say, that's a double bind that I think he's entitled to avoid.

On the other hand, you know, there's not an infinite set of resources to go forward here, but let me say my

inclination is to approve some number of individual plaintiffs going forward, but what I haven't settled on yet is whether the defendants should be able to pick them, the Court should pick them, the plaintiffs should pick them, whether we use a random number generator or some other basis for picking them.

MR. PENNOCK: May I comment on that, Your Honor?

THE COURT: But I'm also not going to allow the same range of discovery of any of those individual plaintiffs that I would if there was just the one case here, where you take your ten depositions or 15 and -- because I think, given the scope of the plaintiff fact sheets, that we don't need that for most of them. I really don't. If there's specific showing that things are inaccurate or incomplete or misleading, yeah, but -- go ahead.

MR. PENNOCK: Your Honor, as to the -- if the Court is inclined and does select the number, some number of cases to go forward, and again, I'll come back to why I don't think we need to do that in a moment, but as to the selection process, we had an issue in the Vioxx litigation before Judge Higbee, this exact issue, how do we pick the cases that are going to go to trial.

And we briefed it and argued it, both sides, for about two hours, and then the judge came out, and after

she said what she said, we all looked at each other and said, why didn't we think of arguing that?

She came out and said, you know, I've thought about it, and the defendants have said publicly, and she read the press release, we're going to try every case. So if you're going to try every case, why should you have anything to say about which cases get tried, because you're going to try all of them. So she allowed us to select the cases for trial.

In this case I think two weeks ago I read in Bloomberg or somewhere, one of the officers of AstraZeneca came out and said, we're trying every case. So I think we're in the similar situation. If they really are intent on not discussing these cases, and they have told us they won't do the ADR program we have, then I think it might -- I think logic is very compelling that the plaintiffs should be able to select the cases that are going forward with discovery, and sort of putting on -- purportedly putting our best foot forward and living and dying by our own decisions with respect to the cases that we wanted to push forward.

Coming back to whether we should do this, there was a great deal of discussion in defendant's papers regarding what other MDLs have done. And I would like to point something out that I think is a great distinction between

what happened in those MDLs as what has happened here.

Let take Baycol, for example. Both Mr. Magaziner and I were extensively involved in that. And yes, there was an order with respect to case-specific discovery in a select group of cases. But that order -- and that was being done specifically because it was a trial program. In other words, the cases were going -- some of them or one of them or five of them were going to ultimately be selected to go to trial before the MDL judge because the parties had waived the lexicon issues and had agreed to try it before the MDL judge, so that's why that individualized discovery was going forward. There was going to be a trial.

The second point on Baycol. The company had already come out and settled a couple of thousand cases for over $2 billion. So they had -- and none of this trial program or doing happened until after all of that had transpired. There was general discovery. There was a general -- there were settlements of numerous cases, as I said, 1700 or 1900. Then there was a trial program -- not trial in terms of pilot, but a trial program in terms of cases going to trial, and that's why they had a case-specific discovery. We don't have that here.

In Zyprexa, all of those cases settled without any case-specific discovery being ordered. It wasn't until

all of the massive cases settled and there were a few hundred, I think six or seven hundred cases left out of, I don't know, 17,000 that settled, that Judge Weinstein then directed some case-specific discovery go forward.

In PPA, there was an order in here and a reference that case-specific discovery took place in the MDL. I mean, my experience with that is that it didn't, that it happened after remand. In fact, I have the Gooding Zenaro case in the -- that's in the Eastern District of New York right now, where we're doing the case-specific discovery following remand from Judge Rothstein to that court.

There was a mention of Fosamax litigation and case-specific discovery going forward there. There are 18 cases in the Southern District of New York in that MDL.

There was also a mention of the Fen-Phen litigation and case-specific discovery going forward there. That was after not one but two settlements that took place. And then there were all these hangover cases that had not resolved in the national class or outside the class or in the second -- what they call Fen-Phen 2.

And consequently, case-specific discovery began in Fen-Phen, and I should note that to date, ten years approximately after that MDL was formed in the Eastern District of Pennsylvania, there has not been a single remand from that MDL. The vast majority of cases have

settled, but those that are there have not been remanded and that MDL is still going on ten years later with case-specific discovery.

So, the main point is that we have not -- in terms of this discussion of having case-specific discovery in cases, if anything, it's not right. But I think that in the context of this MDL, it need not even be done at all ultimately, but certainly at this juncture, with what we just learned about the comprehensive information that the defendants are getting, as expected and ordered by this -- by Your Honor and Judge Conway, from the fact sheets, at this juncture this is really something that I think is extremely premature.

What I don't think is premature is possibly setting up some type of framework for an ADR, an alternative dispute resolution, at this point. I'm not saying one that's -- where the defendants are forced to come meet with us just to tell us they have a no-pay position. But as I suggested in the ADR order that I presented, with all this information they have, and I think I allotted 90 days after they get the fact sheets so they can get the records and evaluate it, why is it that we can't sit down before we start doing -- start moving ahead with lots of cases for remain motions and so forth, why is it that we can't sit down in this MDL and have them say, look, based on

these records, we think that this one case out of 500 or this ten out of 500 or this 50 out of 500, we're willing to talk to you about these cases.

I mean, you know, the Court asked about an ADR program, and that's why I'm bringing it up. And let's face it, we're in the context nationally of an atypical antipsychotic litigation, where one company, Eli Lilly, with almost the identical situation, has settled those cases, and these are publicly reported numbers, I'm not disclosing anything, for about $1.2 billion and eradicated a 17,000-case litigation.

So we know that at least one company has evaluated and understands that there are some cases that although they -- you know, I understand their settlement agreements say we're not agreeing that there is any validity to these cases or they have any merit, but we know that we have a tremendous scientific basis that this drug can and does cause these injuries in some people, and we know that there will be some cases.

That the defendants themselves, looking at all of the information, will say, you know what? We can talk about that case.

And so why not set up a framework, as I have suggested to the Court, and when I say why not, I'm not saying to the Court, I'm referring to the defendants,

because they have declined it, why not set up a framework for allowing us to do that? At least something is in place so that if the defendants look at these fact sheets, after 90 days or whatever time they want, they can come to us and say no, we're not agreeing to mediate them, or yes, we will agree to mediate these and get that process potentially started.

But in sum, I do think that the case-specific discovery is not something that we need. I do think it's devastatingly complex and we'll just complicate an already difficult situation in terms of everything else we have to do.

I think that the precedent for it is in situations where there have been massive settlements already, and where cases were being prepared for trial before the MDL Court.

And lastly, if there is to be some small number of cases, I would urge the Court to consider allowing plaintiffs to select those cases, unless the defendants are changing their position that there are some cases we will talk about and there are some cases we won't. In that instance, the logic is a little more compelling for the defendants to have some input on the selection process.

MR. MAGAZINER: May I respond, Your Honor?

THE COURT: Yes, sir.

MR. MAGAZINER: I need to respond to several factual assertions that Mr. Pennock made, lest they go unanswered.

First of all, the comparison to Zyprexa is of some usefulness but not that much. These two drugs are different. The science and medicine on whether Zyprexa causes diabetes is not going to be the same as whether Seroquel does. These are two different drugs. They're used differently, that is some doctors prefer Zyprexa because of its profile, some prefer Seroquel because of its profile, the risks associated with each drug is going to be different.

So I hope that this Court is not going to think this is just going to be a copy of the Zyprexa litigation and whatever happened in Zyprexa should happen here. It's not going to be the way this is.

We believe our drug is different. We believe it is better. And we're not going to so quickly fall into Mr. Pennock's hope that we will engage in some global settlement just because Eli Lilly chose to do so in the Zyprexa litigation.

With respect to the Bloomberg article, I guess Mr. Pennock has read a different article than the one I read. I don't -- I did not see an article that said that

a company spokesman said we will try every case.

What I saw was an article that said that the company had said it believes in Seroquel and it's a widely prescribed drug, the drug of choice for many doctors, we believe these cases are defensible and we intend to intend them vigorously.

So I know Merck is taking the deposition in Vioxx that it will try every case, but that is not what we have said. A small point, but I think it needed to be clarified.

Mr. Pennock is just completely wrong about Baycol. There was no waiver of lexicon in Baycol. Didn't happen. There were cases filed in the District of Minnesota. Judge Davis said he wanted to try one of the cases. It was originally filed in his district, thereby avoiding a lexicon problem. There has been no such trial because as he each of those cases approached trial, the plaintiffs dismissed them.

The pilot program that we described in our papers in Baycol was 200 cases filed in other districts, transferred to the Baycol MDL, plus a number of cases filed in the District of Minnesota, and Judge Davis ordered the program of discovery on all 200, I think it was 38 cases, with the understanding that the only ones eligible for trial would be the -- those filed in the District of Minnesota.

Just to talk about Baycol for a moment, here's what happened in Baycol. Of the 34,000 plus plaintiffs in the MDL, 941 cases settled. There are still 1,116 pending, and 34,194 were dismissed either voluntarily by the plaintiffs or by the Court because of the plaintiff's failure to meet minimal discovery obligations. So it's kind of different from what Mr. Pennock was telling you.

We don't have, by the way, the luxury that Judge Davis had in Baycol of trying one of the many cases filed in the District of Minnesota. There are three cases filed in this district. One of them has been voluntarily dismissed. Plaintiff's counsel yesterday or the day before filed a motion to withdraw from representing the second of the three, so we are now down to one case in this district. A very different situation from Baycol, where there were lots and lots of cases filed in the District of Minnesota.

With respect to ADR, which is, I know, a very important issue for Your Honor and for Judge Conway, we do not object to there being an ADR program. What we have said to the plaintiffs is, we're not going to agree to mediate cases when we have not had discovery. I don't know how much discovery we will need to mediate, but we're going to need some discovery. We're not going to do it on the basis of a plaintiff's fact sheet and the

plaintiff's -- like an interrogatory. This is what the plaintiff has said, therefore, we're now willing to talk with you about a settlement. That we cannot do.

But after discovery has been had in some number of cases, we can then say, if we think this is appropriate, we will talk with you about the cases that have this profile. We will never talk with you about cases that have that profile.

What we may say, we will talk with you about none of them, or maybe we could say we'll talk with you about all of them. I don't know, but we can't make that assessment based on the plaintiff's fact sheet, nor based on the plaintiff's fact sheet and medical records alone.

But, you know, the idea of mediating a case without there having been a deposition of a plaintiff I think is anathema to me and to all the counsel and to our client.

But we are not opposed to an ADR program. We think it's premature to be talking about ADR until there has been some discovery in a group of cases that will allow us to see what sorts of cases we're dealing with here.

THE COURT: All right.

MR. PENNOCK: Judge, can I just -- I don't want to -- I know there's a lot that goes on and we're all working on a lot of litigations, but the order by Judge Davis, and I was involved, I had 138, I think, of

those 200 cases, was very clear. It says at the outset that the parties were asked to meet and confer to agree to a plan for the management of discovery, selection of cases for trial and pretrial procedures.

It goes on in Paragraph 2 to say that, discuss the program cases that PSC determines warrant discovery for the purposes of trial, which were the eligible cases, and it goes on to discuss what those are, and this case-specific discovery that's going to happening, and there is going to be a trial of -- we were arguing for upwards of five cases consolidated together out of that group, not just one. It never reached that point because, as Mr. Magaziner pointed out, as things proceeded the plan sort of fell apart and went by the wayside.

But I stand by what I said, that those cases were selected after 2,000 cases nationally were settled. That that's when that program was put into place, and that it was put into place as a pretrial discovery program.

MR. MAGAZINER: I was only correcting Mr. Pennock when he said the company had agreed to waive lexicon.

MR. PENNOCK: I'm sorry. I do recall that there was at least in the hallway agreement with lots on both sides that we were going to try cases before Judge Davis, and that we weren't -- we were going to meet with Special

Master Haydock and discuss that.

MR. MAGAZINER: Yes, that's true. Because there were several hundred cases filed in the District of Minnesota. It's a small point and not particularly pertinent to Your Honor --

THE COURT: Mr. Magaziner, if I were to give you the nod and say you could start taking certain kinds of individual plaintiff discovery starting April 1, how many would you want to do a month?

MR. MAGAZINER: I would want to --

THE COURT: Ten, 100, 1,000?

MR. MAGAZINER: How many depositions per month?

THE COURT: How many cases? I'm contemplating giving you a very circumscribed authorization with respect to individual plaintiff discovery, a short period of time for each case. This would be the initial, and limit it in duration and number of depositions and scope, and then you could seek authorization for further discovery when some circumstances point to it.

MR. MAGAZINER: I would think we could take discovery in 15 cases per month. I think that would work out well for us.

THE COURT: Well, the trouble with that is assuming cases don't get dismissed for other reasons, we don't get 7,000 cases ready for remand that way.

MR. MAGAZINER: Oh, I was -- I'm sorry. Your Honor asked a question. I misunderstood it.

I was not contemplating discovery in all of the cases. If Your Honor wants us to talk about discovery in all the cases, I would like to come back with the Court very promptly next week with a schedule for doing that.

I was thinking if we were to have a program of 100 cases, for example.

THE COURT: Well, I have heard what you said a time or two ago and today, and I understand, like I say, the spreadsheet that I have in my mind, but I'm not sure how helpful sample cases are for that purpose, for -- and I know in your papers you talk about illustrating things and educating the Court and so on.

But if our goal is to get all of these cases, either the Florida cases, get them tried for the cases that have been sent here, get them dismissed or settled or ready for trial, I mean, in an ideal world, when we remand these back to the -- whatever court they should go to, you should theoretically be ready for a final pretrial conference and a trial date.

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

THE COURT: If we send 60 of them back to each court around the country, they'll need to divide them up among the district judges and if there's consents to the

magistrate judges, and go to town with them. However they do that.

There might need to be a little bit of follow-up on a case or two, but -- and it may be that we decide that that's just too ambitious and we won't get them all ready to do that, but --

MR. MAGAZINER: We will devote whatever resources we need to -- on AstraZeneca's side -- to take the discovery. It would be ambitious, but we're willing to devote those resources to take the discovery in all of these cases on any schedule that the Court proposes.

If we were to try to do that in all 7,000 cases, and let's say we have another 18 months, whatever 7,000 divided by 18 turns out to be, we would do that many per month.

I think it won't turn out that way because I think many, many of these cases will not go forward because plaintiffs, for example, will choose not to proceed even through their own depositions if they don't want to invest that kind of time or money in it.

MR. PENNOCK: That's called breaking the bank, and that's why we may not want to.

It would be an unprecedented situation with the defendants, what's being proposed.

I just would like to point out, even if they did a

plaintiff and a prescriber and a main treater, that's 21,000 depositions that would have to take place. Which, by the way, all that would be done knowing that there is simply no possibility ever that 99.9 percent of those cases would ever see a courtroom or even have a pretrial.

It would be a massive amount of transactional cost for both sides, and the defendant more so than us probably, that would just be spent on something that I don't think would advance the ball or get these cases ready for a trial that just would never ever happen.

As I see it, there are a couple of ways that these mass tort situations resolve. Settlement, or there's dismissal of some large number of them and then settlement of the rest, or there is an ADR process.

But to -- there's just typically no way these cases are all going to trial, so why -- I'm just not sure why we would want to proceed to do 21,000 depositions at a cost of -- you know, my experience, we were able to get defendants -- we got a -- we made a motion in the Vioxx case to get defendant's billings for preparation of one case up to trial with case-specific discovery, and there was a lot of back and forth, but, you know, we have learned over the years anyway that a single plaintiff deposition is -- for the defendants is probably a total of ten to twenty thousand dollars in prep work leading up to

that. And you start adding treating doctors and so forth.

I mean, I'm sure that Mr. Magaziner would be thrilled to have the company spend, you know, 100,000 or 200,000 a case just to get three depositions for cases that are never going to be tried.

But I think that that money could be far better spent trying to get a more focused way of resolving these cases one way or the other. Either successfully for the plaintiffs or the defendants, or partially from both sides.

MR. MAGAZINER: My response to that, Your Honor, is this. Obviously to take 21,000 depositions would be unprecedented, but it won't happen. What happens, what history has shown in other MDLs is, when the courts say the time has come to start case-specific discovery, cases start dropping in large numbers because plaintiffs' counsel for the first time have to confront the question whether the particular case has enough merit to justify the plaintiffs expending some resources on it.

And the Baycol example is a perfect example, I believe, of what happens. Many, many of these cases in Baycol disappeared once Judge Davis said, let's start case-specific discovery. Plaintiffs' lawyers apparently concluded that many of their cases were not cases that they wished to pursue.

Mr. Pennock's firm itself, I believe, dismissed some 5,000 or so cases from Baycol rather than go through discovery in them. So this is what typically happens.

If we have to take 21,000 depositions, of course that would be a mammoth undertaking. I know that the company would devote resources necessary to do that if it came to be, but it's not going to happen that way.

What's going to happen is, many of these cases will just disappear because the plaintiffs, when they really evaluate their cases, will determine that many of them have so little merit as to make it not worth pursuing the case further.

MR. PENNOCK: Judge, the Baycol situation that keeps getting drummed up here again is an entirely distinguishable.

In these cases we have people who allege type 2 diabetes or diabetes caused by this drug, a very severe and very triable case in terms of ultimate damages outcome.

In Baycol the cases that ultimately were in our inventory were not the serious cases. They were these pain cases where the people had pain for a few, three, four, five weeks. So when that was determined, that these people were not people with rhabdomyolysis, the severe injury that was settled, he's right, we rejected those

cases. But it wasn't because we had to go do depositions in 100 cases. We did depositions in that pilot program in 40 or 50 of the cases.

So it's really a complete mischaracterization of what happened in Baycol. In any event, it's not applicable in this situation. We have here thousands of cases of people who either have or don't have the injuries that we've claimed. If they don't have them, that will be clear from the interrogatory or certainly the medical records that are being collected in vast numbers.

If they don't have the injuries that we the plaintiffs have claimed and that we the plaintiffs' lawyers are willing to represent, represent them for, we're not going to go forward. It's not going to have anything to do with a deposition or not. If the person doesn't have diabetes, we're not going forward.

If they do, if they do have diabetes, and if that injury was by all appearances -- if that injury was by all appearances proximately caused by their use of Seroquel, at least a substantial contributing factor, we're going forward with this case.

So I mean, you know Mr. Magaziner and AstraZeneca can -- you know, I'm warning them that this is not a Baycol situation. And be careful what you ask for, because if you want 21,000 depositions, you're right, some

number of them may fall out from the fact sheet process, that they don't meet our admissions criteria, but we're not taking pill takers, as we call them. We're not taking anyone that just took the pill and then says, oh, I should get some money, $100 or a thousand. We're only taking cases of people that we believe were injured by this drug, that took this drug for some period of time that it might in fact have caused them injury based on our expert analysis generally of how it works, and then they filed a lawsuit for those very serious injuries.

We're not going to have them -- we're going to have to do the deposition. You're not going to see the kind of attrition that he's claiming.

You may see significant attrition from this fact sheet process, and additionally, as I pointed out, there can also be a massive dealing with issues that globally affect these people from this fact sheet process.

But this is not Baycol, this is Seroquel. The injury is not, as the defendants called it, aches and pains for four or five or six weeks, as we discovered. This is a very severe lifelong and debilitating injury in people many of whom were already debilitated but many of whom, perhaps as many as 30 to 40 percent, weren't even prescribed this drug for the severe bipolar or other indications.

So, I think this is a very dangerous concept that we would be proposing for this MDL. I think it would essentially destroy any possibility of this MDL creating a trial package and creating the discovery necessary so that cases can -- so that this MDL can wrap up.

I don't see that -- we will be here for ten years. There is no question. But as I said, we won't achieve anything. These cases won't all individually be tried.

We need to move forward with the defendant discovery and see where we stand, and if the discovery turns out the way we're hoping, and if the documents are as damning and as devastating as the Zyprexa documents, who knows, maybe the company will have a change of heart on how they want to deal with this litigation, without having to spend two or three billion dollars doing a plaintiff's deposition and a prescribing doctor's deposition in 7,000 cases.

MR. MAGAZINER: Your Honor, it's not surprising that plaintiffs would advocate that they can take all the discovery they want.

THE COURT: I understand. And it's a two-way street here, and you have got the fact statements coming in, and that's where we started, was that was part of the exchange of getting the IND and the NDA.

Again, I'm disappointed we didn't get all of that done much sooner, but that's moving forward now, and the

fact sheets are moving forward, and so these things are on track, but it's still a two-way street.

Let me -- I have got a couple other subjects, and then I'm going to ask both sides to wrap up.

I think one is what effect we do -- what effect there may be of what we do here on the schedule in the Delaware State litigation and what effect the Delaware State litigation should have on what we're doing here. If we can address that.

MR. PENNOCK: I think Mr. Gornick may still be on the phone.

MR. GORNICK: I'm here.

MR. PENNOCK: And Judge, Mr. Gornick has been sort of taking the point with Delaware, and if I could defer to him on his thoughts on that.

MR. GORNICK: Your Honor, if I may, we have a very ambitious schedule in Delaware. I don't have the Delaware scheduling order in front of me, but the defendants there, including AstraZeneca, have been ordered to respond to my request for production of documents, which in their own words requests everything related to Seroquel. They're ordered to produce those documents by the end of May.

We do not have any documents yet other than those that have been produced in the MDL. We have -- we're in

the middle of exchanging meet and confer letters. I hope that I won't have to, but I believe I'll be filing a motion to compel production of documents within the next week or two. So that's where we are on documents.

The current scheduling order is that AstraZeneca has to produce everything to us by the end of May. We're allowed to start taking depositions of individually identified witnesses I believe starting either June 1 or July 1. We're entitled to start taking 30(b)(6) depositions on circumscribed subject matter starting now. So that's the general discovery schedule.

As far as case-specific discovery goes, the plan is that the parties will select ten cases which will be put upon a trial track. Those cases are to be selected by March 15. In those particular -- those ten cases, there will be full discovery of the individual plaintiffs' claims. And there will be expert discovery -- the current program is designed to have those ten cases completely ready for trial by sometime in November of 2008.

In November of 2008, there will be a trial setting conference, at which time the trial date will actually be set, but the schedule contemplates them being fully and completely prepared for trial by November of '08. Those ten cases.

MR. MAGAZINER: May I respond, Your Honor?

THE COURT: All right.

MR. MAGAZINER: I don't believe that Mr. Gornick's description of Delaware is completely accurate, by any means. I will be happy to submit to the Court the transcript of hearings, transcripts of hearings in front of the special master in Delaware.

He could not have been more clear in saying to plaintiffs' counsel that if you want a May 31 production date, you are going to have to narrow your requests and ask for far less from AstraZeneca than is happening in the MDL, but why should it matter to you, plaintiffs, because you will still have the benefit of all the additional documents that are produced in the MDL later on.

So for Mr. Gornick to say AstraZeneca is required to produce all of its documents on Seroquel by May 31 is just not accurate.

The rest of what's going on in Delaware, as I understand it, is in somewhat of a state of flux. I believe that at a hearing that I did not attend, so I can't give you a firsthand report, I believe Judge Slights indicated that he would be interested in seeing what sort of discovery order comes out of the MDL and suggested that he might then conform the Delaware schedule to the MDL schedule, once the MDL Court has issued a scheduling order.

THE COURT: Well, let me state what ought to be obvious, which is, I'm mindful of what's going on in Delaware. I think from the schedule, that regardless of the precise terms, that the schedule entered so far in Delaware is consistent with this Court's approach that these cases be moved with expedition.

And it's my firm resolve that nothing we do here would slow down those cases, and that nothing that the Delaware Court does will slow down -- that nothing we do here will slow done their cases, and nothing they do will slow down these.

So keep that in mind, that you may get the benefit of whatever is faster on either track. That's what's going to drive it. Not whatever is slower.

And because I think the general approach is going to be the same, that we expect you to move forward.

All right. The other issue that I want to -- I think -- I have got to check my notes here, but I think the other issue that I still want to discuss with you is the motion for reduced fees.

Let me ask how many of the -- using the imprecise number 7,000, out of the 7,000 plaintiffs that are now here, how many of those originated in cases that were originally filed in a state court and then removed by the defendant to federal court?

MR. PENNOCK: I'll let Mr. Trammell from the Bailey law firm respond to that, if that's all right.

MR. TRAMMELL: About 21 petitions were filed -- Fletch Trammell for plaintiffs.

About 21 petition were filed in the United States District Court for the District of Massachusetts containing about 6500 plaintiffs. And so a small minority of the plaintiffs actually in the MDL were cases filed in other federal courts or in state courts and then removed.

THE COURT: Okay.

MR. TRAMMELL: I would like to address the merits of our motion, if Your Honor has any interest in that.

We filed these cases in the District of Massachusetts because we determined that an entity related to AstraZeneca was headquartered there. We thought that was an appropriate place to lay venue, and we thought we had enough similarity among these plaintiffs to join them for purposes of Rule 20, and we did that in good faith.

However, we also knew that the MDL had been established, that filing cases in the federal system would make it easier to consolidate those cases here in this course.

Had we filed those cases in defendant's headquarters, headquarters state of Delaware, we would have paid about

half the filing fee that we are scheduled to end up paying in this court. On top of that, Your Honor, the defendants would have paid a removal fee.

So really the point of our motion was, in light of the -- one of the primary purposes of an MDL was to reduce the costs and create efficiency for all the parties, that some reduction in the filing fees is appropriate. Without a reduction in filing fees, obviously we would maybe look harder at filing in state court venues and pay a lower filing fee when we have a large inventory of cases. They would then have to remove those cases. They would pay a removal fee.

And it really -- applying this type of filing fee increases the cost to both parties as opposed to lowering it, which we understand to be the purpose of coordinated proceedings.

THE COURT: What's the filing fee in state court in Massachusetts?

MR. TRAMMELL: I'm not certain of that, Your Honor. I can supply that to the Court. It's $150 in Texas, which I'm sure is not helpful.

THE COURT: Well, I raise that. You talked about Delaware in your papers. I think Massachusetts is $250, depending on which court's jurisdiction you're invoking. And other states have other fees.

All right. Well, I'll take that under advisement.

Let me ask the parties whether you want to make any general statements to wrap up or whether you would like to take a break for lunch and come back.

And I think I've covered the subjects I wanted to cover, which would lead up to my entry of some orders giving you direction for going forward, obviously subject to -- I'm not entirely clear in my own mind how many -- which parts of which of this are going to be in an order by me and how much will be in a report and recommendation to Judge Conway.

I think of all the issues we have talked about today, I have the authority to enter orders, obviously subject to anybody seeking review from Judge Conway. So in that sense, it doesn't make any difference, it substantively doesn't make any difference whether I do the order or the R&R, but for a reason peculiar to myself I may split it up.

So let me just ask, do you want break and then come back and kind of having heard what I have said this morning, and hearing your responses, whether you want to do a summation or whether I've worn you out completely.

MR. PENNOCK: No, Judge, you haven't warn us out completely. I don't know what the consensus is.

Larry, do you have anything?

MR. ROTH: Judge, I had just had a couple of comments to make as liaison counsel to some of the things that happened, and maybe it will take no more than just a couple, five minutes.

In terms of --

THE COURT: I can -- we can keep going forward if it's only going to be five or ten minutes. If you want a half-hour between two sides to talk a little bit, we can do that now, or we can take a five-minute recess for a comfort break and then come back in five minutes and finish up, or we can take a lunch break and come back. I'm willing to do it however --

MR. MAGAZINER: We have nothing more that we wish to say, Your Honor. Of course if the plaintiffs saying something, then we may --

THE COURT: You reserve the right to respond.

MR. MAGAZINER: But at this point, no, we would not wish to take a break and come back. We're done.

MR. PENNOCK: Judge, the only additional thing that I have --

THE COURT: And the reason I'm offering this is because I have interrupted both sides quite a bit and I have gotten you off track, and you may have things you wanted to mention to me and didn't because I put you off someplace else.

MR. PENNOCK: No, I think actually these types of back and forth discussions are the most useful with all these issues, and I appreciate the Court's indulgence in letting us go back and forth.

The only thing that I would want -- I think I'm compelled to mention is that before we reached the discussions with respect to how we would continue the discovery against the defendants, in other words, before those discussions were crystallized entirely, as proposed in my order, and before we really kind of granted the loggerheads on this pilot program idea of 100 cases or how many cases, we had come to an agreement thinking that everything was going to work out.

We had come to that joint deposition protocol agreement, and I have to say that there are some things we, the plaintiffs, agreed to in there that were extremely important to the defense. I mean that are the most important things always to defendants.

Primarily that is, Paul, use these depositions in every state court venue. Agree to that. Don't put us under the pressure of having to do depositions again and again and again in these other state court venues. Do the depositions once, get everybody on board, do the depositions for two days, get it done, and then you can just -- don't make us go through these hoops all over the

country.

And, you know, that was a major -- the most major concession that we made to date in this litigation and that any MDL or plaintiffs' lawyers would make, because more typically there are these different litigations going on with different potential for depositions against the defendants.

We've taken that problem off the table for them. I don't know if that order has been entered yet, but I have to say that based upon some things I have heard this morning, such as an agreement by the defendants to go forward with as many as 21,000 plaintiff depositions, I mean, that really does kind of undermine the spirit of going-forward cooperation that we had in mind when we made the agreement on only doing their depositions here.

And I would -- I would ask, until I have had an opportunity to let all of this sink in, to allow me to say that I'm not so sure that joint proposal is -- I may be estopped from saying this and I may be stuck with having proposing it already, I understand that, but I would ask that that order not be entered.

THE COURT: Let me ask you a question about that. How many of those -- of these depositions do you anticipate having to be done by subpoena?

MR. PENNOCK: A very small number. Almost none.

They're going to produce all the current and former employees by consent, and they're going to try and do what we agreed at their offices in Philadelphia. And if somebody didn't want to come to -- some former employee didn't want to come to Philadelphia, they would try to make that person agreeable to being made available without subpoena in the district where they live, and we'd go take that depo there. These are the company witness depos.

MR. MAGAZINER: Can I just clarify one thing. A very small point, but I hate to have things said and not respond.

I don't think there will be very many that have to be done by subpoena, but I don't think we ever represented that we can necessarily produce every former employee.

MR. PENNOCK: If you can. If you can. I was just going to finish, there may be some we have to subpoena.

THE COURT: There are going to be some third parties, too.

MR. PENNOCK: There will be some third parties, there will be probably some marketing firms, third parties. There will be some clinical investigators who we've already identified, I think, that we're going to want to take the depositions of.

But a limited number of third parties. I mean, I

don't think -- I don't think we're talking 20 or 30 third parties. We're probably talking ten, five to ten.

MR. ALLEN: I can take ten. We have marketing firms -- Your Honor, Scott Allen, Houston, Texas.

We have marketing firms, public relations firms. We have two clinical investigators who have been convicted of crimes, that we want to take their depositions. Probably ten.

THE COURT: Plus the FDA.

MR. ALLEN: And the FDA. Probably ten. It could be less, because a lot of times the defendants have inroads with these people and can talk to their lawyers, who sometimes they pay for their lawyers, and they can arrange it. But if they do not, ten.

THE COURT: Mr. Roth?

MR. MAGAZINER: Well, the broader issue about the proposed CMO3, I am astounded that plaintiffs would now seek to withdraw their agreement to an order that we jointly proposed.

MR. PENNOCK: I'm sorry. I didn't say that, Fred. I just said I'd like an opportunity to let all this sink in, because we've just been -- you've just come forward with a position that has never been mentioned.

THE COURT: Respond to the question I asked.

MR. PENNOCK: That's all.

THE COURT: Mr. Roth?

MR. ROTH: Yes, Judge. Two things. One, I don't know if you wanted to go ahead and set a date for the next conference.

And the other thing is, as liaison counsel, what I have been doing is reporting to the 70-odd attorneys that I communicate with about what's going on in the case, and in terms from my perspective, I have gotten a little disconnect here this morning in terms of what two or three status conferences ago was initially referred to, I think, brought up by Your Honor as Bell Weather cases, has become a pilot program that was recommended 100 -- I'm not talking to the substance of any of this, just clarification -- 100 cases, which the plaintiffs thought was unpractical.

And then if I have understood things correctly, now an idea that we're going to do discovery in 7,000, or whatever the number is, individual cases, although restricted discovery. And that was a proposal that's never been made.

And I'm trying to get some read on what to report, you know, to those people who are not on the phone and not here of, you know, what this issue is that you may ultimately rule on in terms of case-specific discovery, and the arguments for both ways have been made, but I'm

not clear if from Your Honor's comments, whether you're talking about case-specific discovery, however limited or circumscribed, in all cases or in their proposed 100 pilot program or again the original concept of maybe 20 or 30 cases.

And then you also mentioned about the difficulty in how are we going to select those cases.

So I just wanted to get some clarification from Your Honor, not a ruling obviously, but it seems to me that you're talking about selection, you're talking about circumscribed depositions, and we have all recognized how extensive and valuable the plaintiffs' fact sheets have been, and the follow-up with the medical records that we're obviously, or at least to me you're not talking about, or at least you're not telling us that you're thinking about 7500 cases being individually litigated within the context of what's going to be going on in the general discovery and the general production and the depositions of the defendants.

So I just -- if Your Honor could, without telling us what your ruling is, I'm just trying to get some clarification from my standpoint so I can tell everyone what sort of options are being weighed and what to expect.

THE COURT: Well, I raised the subject matter because those were thoughts that went through my mind as I

was looking at the disagreements between the parties about how to go forward, and I have not -- I listened as carefully as I could to what everybody has said here, and I have given you some idea, I think, of what I think is important. But and how I'm going to come out on that is to be determined.

The -- but just to summarize, I mean, I think everybody needs to recognize that discovery in these cases is a two-way street. You have got -- not to say it's like a tennis match, but because the plaintiffs have different needs than what the defendant has in terms of information.

And there's different ways to build momentum or keep momentum going in these cases, whether it's towards settlement or towards trial or towards dismissal. And my objective is to enter an order that frankly keeps pressure on both sides to move forward, and recognizing the practicalities of what has already been set in place and what is absolutely necessary.

So you tell the other lawyers that a lot of things are on the table and that there will be an order coming out probably early next week that will give you more specific guidance.

MR. TRAMMELL: If I might, I hate to revisit this, but on the issue of the filing of the new cases, we've spoken with the clerk about having some sort of

delay procedure for after a fact sheet is served, the obligation to then file a new petition. We have also spoken about having to file a short one-page --

THE COURT: I don't have any problem with that.

MR. TRAMMELL: Okay.

THE COURT: And again, we talked about tying the fee requirement to the exchange or the supplying of the fact sheets, so if -- I don't know, have you identified plaintiffs that you just can't go forward with because they're not going to have their fact sheets?

MR. TRAMMELL: Your Honor, today we've produced 1700 fact sheets and we have been satisfied with the merits of those cases.

THE COURT: So none of them are getting or very few are getting winnowed out that way?

MR. TRAMMELL: Very few. But I'll say this. That what we envisioned was serving the fact sheet and then having a certain amount of time to then file a short amended petition with the individual plaintiff's name on it. And we put those positions in our papers before the Court.

THE COURT: Anything else from the plaintiffs?

MR. PENNOCK: No, Your Honor. Thank you for your time.

THE COURT: Mr. Magaziner?

MR. MAGAZINER: No, Your Honor.

THE COURT: Let's talk about dates.

In terms of -- you may change your mind once you see my order or orders as to how soon you want to see me again, if at all.

Mid April sound right?

MR. MAGAZINER: That will be fine, Your Honor.

THE COURT: Friday the 13th comes on a Friday in April.

MR. PENNOCK: That's my lucky day, Judge, Friday the 13th.

MR. MAGAZINER: I think all counsel previously told the Court that if it were convenient for the Court, we would rather not have conferences on Fridays, but if it's --

THE COURT: I couldn't remember whether you wanted them on Fridays or didn't want them on Friday.

MR. MAGAZINER: No, I think we all said we would rather not, and I think plaintiffs and we both suggested Tuesdays, Wednesdays or Thursdays would be better, since so many lawyers are traveling.

THE COURT: We can do it Thursday the 12th.

MR. MAGAZINER: That's fine with me.

MR. PENNOCK: Judge, I don't think I would be able to make a morning conference on Thursday the 12th.

My wife's birthday is the day before, and so I won't be able to fly out that night if I want to have a home to return to.

MR. MAGAZINER: Then make it that afternoon, Your Honor. That would be fine with us.

THE COURT: How about 2:00 on Thursday the 12th?

MR. PENNOCK: That would be fine.

THE COURT: All right. We're in recess.

(Adjourned at 12:37 p.m.)

C E R T I F I C A T E

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

_____ _____

Sandra K. Tremel