

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NUMBER 6:21-md-3006

IN RE:

TASIGNA (NILETINIB) PRODUCTS LIABILITY LITIGATION

ROBERT MERCED, ET AL.,	:	
	:	
Plaintiffs,	:	
	:	Orlando, Florida
v.	:	November 15, 2022
	:	10:00 - 11:09 a.m.
NOVARTIS PHARMACEUTICALS	:	
CORPORATION,	:	
	:	
Defendant.	:	
.....	:	

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE ROY B. DALTON, JR.
UNITED STATES DISTRICT JUDGE
AND
THE HONORABLE DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE
AND
THE HONORABLE RACHELLE L. HARZ
NEW JERSEY SUPERIOR COURT JUDGE

Court Reporter: Amie R. First, RDR, CRR, CRC, CPE
Federal Official Court Reporter
401 West Central Boulevard, Suite 4600
Orlando, Florida 32801
AmieFirst.CourtReporter@gmail.com

Proceedings recorded by Realtime Stenography.

Transcript produced by Computer-Aided Transcription.

1 APPEARANCES:

2

3 Counsel for Plaintiffs:

4 Raymond C. Silverman

5 Christopher C. Oxx

6 Harrison M. Biggs

7 Richard M. Elias

8 Lawana S. Wichmann

9

10 Counsel for Defendant:

11 Andrew L. Reissaus

12 Grant Hollingsworth

13

14

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

(Court called to order.)

THE DEPUTY CLERK: In Re: Tasigna Products
Liability Litigation versus Novartis Pharmaceuticals
Corporation, Case Number 6:21-md-3006.

Counsel, please state your appearances for the
record starting with the plaintiff.

MR. ELIAS: Attorney Elias for the plaintiffs.
Good morning.

JUDGE DALTON: Good morning.

MS. WICHMANN: Lawana Wichmann for the plaintiffs.

JUDGE DALTON: Good morning.

MR. SILVERMAN: Good morning, Your Honor. Raymond
Silverman on behalf of the plaintiffs.

JUDGE DALTON: Good morning.

MR. OXX: Good morning, Your Honor. Chris Oxx on
behalf of the plaintiffs.

JUDGE DALTON: Good morning.

MR. BIGGS: Good morning, Your Honor. Harrison
Biggs on behalf of the plaintiffs.

JUDGE DALTON: Good morning.

MR. REISSAUS: Good morning. Andrew Reissaus for
Novartis.

JUDGE DALTON: Good morning.

1 MR. HOLLINGSWORTH: Good morning. Grant
2 Hollingsworth for Novartis.

3 JUDGE DALTON: All right. Good morning. And I
4 know we're missing Mr. Johnston this morning. He's
5 otherwise engaged.

6 JUDGE BAKER: And we have Judge Harz.

7 JUDGE DALTON: And we have Judge Harz, I think, on
8 the phone checking in.

9 Judge Harz, are you with us?

10 JUDGE HARZ: Yes, good morning. Judge Harz is
11 here. Thank you.

12 JUDGE DALTON: Good morning, Judge. Welcome to
13 you. I hope things are well in New Jersey. Starting to
14 get cold up there, I suspect.

15 JUDGE HARZ: Well, we didn't have a hurricane
16 so --

17 JUDGE DALTON: Yeah, well, there's that. That's
18 true. That's true. I told Judge Baker earlier this week
19 that it seems that all I need to do to summon one up is to
20 impanel a jury. Both times, both of our hurricanes have
21 been in the middle of criminal jury trials, which presents
22 some interesting challenges of sending people home and then
23 inviting them back.

24 Anyway, we're here for a status in the Tassigna
25 litigation. And I have had a chance to review your

1 proposed agenda and status briefing.

2 I guess maybe the first thing -- Judge Baker is
3 with us here, of course, also -- is maybe to get an update
4 on sort of the loose ends with respect to the wrap-up of
5 fact discovery. And then I know you guys have had some --
6 you folks have had some issues with respect to how you're
7 going to move forward on the case-specific discovery which
8 I'll get to in a minute.

9 But, Mr. Elias, maybe I can invite you to the
10 podium first. And tell me where you are in terms of
11 wrapping up the loose ends of this out-of-time fact
12 discovery that you all had agreed to do outside the close
13 of discovery.

14 MR. ELIAS: Yes, Your Honor.

15 So I'm happy to report that we have concluded, at
16 least from the fact discovery that was awarded to the
17 plaintiffs, all of the depositions that we were -- fact
18 witnesses that we wanted to take.

19 We have also disclosed all of our expert reports.
20 And we disclosed, ended up disclosing four expert reports
21 being very mindful of the Court's admonition at the
22 beginning of this case to not be repetitive and to
23 adequately cover all the areas we need to cover but not be
24 redundant. So we have disclosed four expert reports and
25 have concluded our depositions. Not the expert discovery,

1 which hasn't started.

2 And so from our perspective in terms of the
3 discovery that we were awarded, we are in good shape.

4 JUDGE DALTON: Okay.

5 Well, let's talk about -- what about from
6 Novartis' position, Mr. Reissaus, do you all have any
7 outstanding issues with respect to either disclosure of
8 expert, expert reports, or wrapping up fact discovery?

9 MR. REISSAUS: Yes, sir. There's, I'd say, one
10 outstanding issue. And just a little bit of background
11 related to it.

12 So the Court previously ordered a 45-day extension
13 of the general fact discovery of Novartis based on a
14 third-party vendor that is doing data anonymization for
15 clinical study data. And that work was completed within
16 that extension, and plaintiffs had an expert that was
17 working with that data, Dr. Madigan. And he had submitted
18 a declaration and supported plaintiffs' motion to compel
19 that discovery in the first place.

20 And as a part of plaintiffs' expert disclosures on
21 October 18th, Dr. Madigan was tentatively disclosed.
22 And plaintiffs informed us that they -- they were working
23 on it with him still and were considering not serving the
24 report. And we found out last week on November 7th
25 that plaintiffs were withdrawing Dr. Madigan.

1 And, of course, Dr. Madigan's whole basis -- we
2 extended the fact discovery by quite a bit to get discovery
3 that was exclusively for Dr. Madigan. And Novartis
4 incurred significant cost to provide discovery that only
5 Dr. Madigan ended up not using.

6 So we had a motion to -- that we had filed to
7 request cost shifting for that work. And Judge Baker
8 denied that without prejudice at that time understanding
9 that we needed to see what would happen once plaintiffs had
10 that discovery.

11 Novartis would like to renew that motion now that
12 we know that Dr. Madigan is not going to be an expert for
13 plaintiffs. And we'd like to see cost shifting on that.

14 In terms of moving forward from there, we have --
15 Novartis has its expert disclosure deadline today, and
16 we'll be serving our reports on time. And in terms of
17 wrap-up for the general discovery of Novartis, I think that
18 covers things.

19 Obviously, I can provide you an update on
20 case-specific workup, but I don't know if you want to take
21 a break before that and --

22 JUDGE DALTON: Okay. Well, I'm going to let --
23 I'll let Judge Baker speak to whether or not he wants to
24 entertain a new motion with respect to cost shifting in
25 connection with that discovery. And we'll -- just put that

1 on your list and we'll circle back to that.

2 But let's talk a little bit about case-specific
3 discovery, Mr. Reissaus, while you're up there.

4 Let me just share with you an observation before
5 we start talking about the merits, is that I'm struggling
6 when I go through your status reports, quite honestly, to
7 try to imagine that there's seven hours' worth of
8 deposition time necessary to depose a prescribing
9 physician. Just the thought of that strikes me as facially
10 abusive. Again, you know more about the case than I do.
11 I'm just telling you that's my initial reaction to that.

12 The other thing that struck me is that I --
13 there's a little touch of irony in this, I guess, is that
14 in trying to imagine that Novartis is going to repay the
15 prescribing physicians for positing trust in their product
16 and the health of their patient by subjecting them to
17 seven hours of deposition time in a small conference room
18 answering questions about their decision to prescribe the
19 drug.

20 Just, again, you try the case any way you want to
21 within reason, but I have to say that that seems to me to
22 be counterproductive to your ultimate goal. I just can't
23 imagine that you would need seven hours to take these
24 depositions.

25 I appreciate that the plaintiffs would like to

1 have an opportunity to hopefully salvage something out of
2 this discovery deposition that they might be able to
3 utilize later on at trial and not have to redepose some of
4 these prescribing witnesses or to have an opportunity, of
5 course, to examine them themselves, to cross-examine them
6 after the Novartis discovery.

7 I do think -- and I'm open to be persuaded that
8 I'm wrong, but I'll just share with you my initial reaction
9 is that Novartis ought to be entitled to take the
10 initiative with respect to the questioning on these
11 witnesses.

12 But what I'm inclined to do is to have you take
13 the first two of these, send me the transcripts. Don't
14 file them. Send them to me. I'm going to review the
15 transcripts.

16 And if I find the process is being abused, the
17 witness is being abused, you're overstretching your time,
18 you're asking repetitive questions, you're being abusive to
19 either counsel or the witness, then I'll fix it because I'm
20 not going to put up with it.

21 But I think it's probably counterproductive for me
22 to try to set down some deposition rules. You know, these
23 docs are all going to be different, I suspect. Some of
24 them are going to be very -- probably sympathetic and
25 helpful to the plaintiff. Some are going to be mad that

1 they're there to begin with, don't want to be cooperative,
2 don't want to be deposed, don't want to give you, you know,
3 five minutes much less seven hours. And I suspect there
4 will be some every place in between.

5 So I just wanted to put my cards on the table
6 before you guys opened up and started telling me what you
7 think ought to happen. So I'm disinclined to set down some
8 hard-and-fast parameters that are going to apply to all the
9 witnesses until I see how you're behaving. So that's my
10 inclination.

11 But I'll be quiet now and let you speak,
12 Mr. Reissaus.

13 MR. REISSAUS: Thank you, Your Honor.

14 And I can assure you that we don't want to
15 disrespect the doctors or their time, that they're our
16 client's clients.

17 We have been in contact with the offices of the
18 prescribing physicians in the cases that are -- have been
19 selected for limited discovery, and we've been working on
20 getting dates. And obviously they have full schedules.
21 They're taking care of patients with cancer and don't have
22 a lot of free time, and we've been trying to work with
23 their schedules.

24 We're getting lots of "Can we do it at 5:00 p.m.
25 on a Friday?" "Can we do it on a weekend?" We're working

1 through that with the offices, making sure they understand
2 that probably starting at 5:00 isn't the best time to start
3 a deposition.

4 We're not going to go seven hours. We're trying
5 not to. From our perspective --

6 JUDGE DALTON: Again -- and I know I said I was
7 going to be quiet. But if you think about the practicality
8 of what you just described to me, to ask, you know, the
9 prescribing physician who really has, you know, probably --
10 I shouldn't say in every case, but probably no real dog in
11 the hunt other than the health and safety of their patient,
12 the efficacy of the drug in terms of the risk-benefit
13 analysis, that whether or not they'd be inclined or
14 disinclined to prescribe it going forward, whether they're
15 happy or regretful of their decision to prescribe it in the
16 first case, I suspect you're going to see some of all of
17 that in the course of your discovery.

18 But, I mean, the prospect of getting these
19 physicians, however many of them that you're expecting to
20 line up, to sit in a small conference room and to suffer,
21 you know, the inquisition of hour upon hour upon hour upon
22 hour is not going to serve you well. I mean, it's not.

23 MR. REISSAUS: Yes, Your Honor. We agree.

24 And this is perhaps us just being -- covering our
25 bases in case we have an exception, but we certainly aim to

1 complete the deposition much quicker than seven hours. And
2 I would say we're aiming for less than half that.

3 That's subject to plaintiffs having questioning
4 that could go on for a long time. I mean, we've talked
5 with them. It appears they are looking to ask a lot of
6 questions.

7 But we're working with the doctors. And we
8 recognize they have limits to their schedules, and that's
9 what we're going to work with.

10 One thing we've heard from the doctors is that
11 they do not generally want to be doing this before the
12 holidays, and they've -- we're getting responses that are
13 pushing us into January and February.

14 And we're concerned that that's going to be a
15 problem given that we have somewhere around 42 depositions
16 that have to be taken between fact and expert depositions.
17 And we only have 50 percent of the plaintiffs' dates as of
18 today. So eight out of sixteen depositions we have dates
19 for. And for the most part, those are falling toward
20 January too. So we're getting tight on time there.

21 Also, you know, we had a plaintiff offer date that
22 coincides with a prescribing physician, and we were
23 informed this morning that plaintiffs aren't able to
24 double-book that day and they can't cover two depositions.

25 JUDGE DALTON: Let me just -- let me try to

1 short-circuit this, because one of the things that I said
2 when we began to talk about case-specific discovery was the
3 prospect of, you know, are both sides prepared, frankly, in
4 terms of having the resources, having the manpower, the
5 womanpower, you know, to get these things done.

6 My concern was exactly what's happening right now,
7 is that, you know, we're going to get into this
8 case-specific discovery and we're going to have all kinds
9 of scheduling problems and we're not going to have enough
10 resources to cover it. I'm just not going to hear that.

11 I granted -- I allowed you to have the
12 case-specific discovery in the limited number of cases I
13 had that you were permitted to do it because I judged that
14 to be a manageable number. And I thought it was fair,
15 frankly, for Novartis to have an opportunity to begin to
16 explore whether or not you were going to have a colorable
17 defense on this question of causation in terms of whether
18 or not the prescribing physicians would have moved forward
19 with their advice notwithstanding whatever the list of
20 potential adverse consequences was. So I'm not very
21 sympathetic to the time problems that you're describing for
22 me.

23 Just as I said, I suspect the physicians are not
24 going to be happy about being deposed for seven and a
25 half hours. They also will respond to a subpoena. They

1 will respond to a subpoena. So I expect these things to be
2 worked out.

3 But I also want the physicians to know that this
4 is not an RSVP-type of operation, you know. If the Court
5 is going to permit them to be deposed, which I have, then
6 they are going to need to be cooperative in terms of giving
7 you dates and whether that means that the plaintiffs -- I
8 suspect, at least based on my own experience of many years,
9 that some of these physicians are happy to sit down and
10 talk with the plaintiffs and work something out; others are
11 not interested in talking to them at all; and there will be
12 some that are somewhere in between.

13 But you all are going to need to figure this out
14 within the time frame that you have. And for those
15 physicians -- if you run into physicians who are either
16 unable or unwilling to give you a date, then you need to
17 come see Judge Baker about it and get a court order giving
18 them some direction in terms of what they need to do to
19 make themselves available. Because it has to be done.

20 MR. REISSAUS: Thank you, Your Honor.

21 JUDGE DALTON: Okay. Let me hear from your
22 colleagues on the other side with respect to this
23 case-specific discovery.

24 Is that going to be you, Mr. Silverman?

25 MR. SILVERMAN: It is, Your Honor. Thank you.

1 Good morning, Judge Dalton. Good morning,
2 Judge Baker.

3 JUDGE DALTON: Good morning.

4 MR. SILVERMAN: So a couple of issues, I guess, to
5 raise based upon what you said a moment ago, Your Honor.
6 And maybe I need a little bit of clarity with respect to
7 what this period of time, this case-specific discovery
8 period is supposed to entail.

9 So one of the issues that you saw in the status
10 report that I believe Your Honor was just raising a moment
11 ago was the question of priority of questioning and
12 allocation of time for the depositions.

13 It's my understanding that Novartis intends -- let
14 me take a step back. These are obviously equally if not
15 more important depositions for the plaintiffs than they are
16 for Novartis.

17 JUDGE DALTON: Well, it's interesting you say that
18 because you resisted the discovery. I mean, you didn't
19 want it to happen at all.

20 MR. SILVERMAN: Judge, I think what we resisted
21 was doing it prior to the completion of general fact
22 discovery or at least getting into general fact discovery
23 so that we had some basis to be able to ask what we thought
24 were some important questions of the prescribers.

25 If you remember at the last --

1 JUDGE DALTON: Well, again, Mr. Silverman, I don't
2 want to joust with you.

3 MR. SILVERMAN: That's okay.

4 JUDGE DALTON: I don't want to joust with you, but
5 as I recall the lay of the land the plaintiff was resistant
6 to any case-specific discovery happening in the MDL
7 proceeding and that the fallback position was certainly if
8 it was going to happen it could not happen before all the
9 fact discovery was completed, not so that you could be
10 armed with questions but so that you could provide your
11 physicians with the information with respect to the
12 asymmetry of information in terms of what potential
13 consequences were associated with the prescription, the use
14 of this prescription drug, that may not have been known to
15 the prescribers at the time that they made their
16 prescription.

17 That's what was -- that's what you told me, that
18 you wanted -- you said, We don't want the case-specific
19 discovery. But if you're going to do it, don't do it until
20 after all the fact discovery is closed so that at least the
21 physicians know everything that we know about the potential
22 bad effects of the prescription.

23 MR. SILVERMAN: That's 100 percent correct,
24 Your Honor. That is.

25 JUDGE DALTON: Okay.

1 MR. SILVERMAN: And if I did not state that
2 clearly enough, my apologies. That is exactly what was
3 meant.

4 And when we were here last time and the discussion
5 had come up about doing some case-specific discovery in the
6 MDL, it was plaintiffs' position that we were, in fact,
7 ready to move forward with case-specific discovery. But
8 what we had proposed was actually doing a more fulsome
9 case-specific discovery to get cases worked up. Your Honor
10 adopted what Novartis had been asking for for some time.

11 But my understanding, Your Honor, is that Novartis
12 intends to use these depositions of prescribers to
13 ultimately make motions for summary judgment based upon the
14 learned intermediary defense. That is plaintiffs' burden
15 to prove as an element of his or her failure to warn claim.

16 So these depositions are equally -- although it's
17 been Novartis asking for them from the beginning, and
18 somehow that has become that these are Novartis'
19 depositions. They are equally important to us. We are --
20 if not more.

21 We are very concerned about the idea of getting an
22 opportunity to ever redepose these physicians. In my
23 experience, most of the time working with doctors like this
24 or doctors of any kind, they will sometimes willingly,
25 sometimes not so willingly, sometimes under power of a

1 subpoena come to a deposition but that is going to be the
2 one and only time that they will seek to be deposed.

3 So considering the importance of these
4 depositions, what we had proposed to Novartis, which we
5 believe is also consistent with virtually every MDL or MCL
6 case that I'm familiar with, is that we divide the time up
7 evenly, 50/50, so that we have equal opportunity to depose
8 the prescriber as they do.

9 And with respect to the priority of questioning,
10 that we come up with some type of -- and there's several
11 different ways, so to speak, to skin this cat but have a
12 way where they lead on some of the depositions, we lead on
13 others.

14 We could do it, we proposed, where it could be in
15 the MCL we lead on the plaintiffs' picks, they lead on the
16 defense picks, and then perhaps pick names out of a hat
17 with respect to the MDL cases. But ultimately a fair
18 division between them because we do believe that priority
19 of questioning is something -- if it wasn't something
20 important to the parties, it wouldn't be something that's
21 ultimately gone back and forth and negotiated in other
22 MDLs.

23 So we are concerned that these, all of these
24 depositions are going to ultimately become the basis for
25 motions to dismiss, and we're going to be without the

1 necessary opportunity, both time-wise and through the
2 benefit of priority of questioning, to depose these very
3 important witnesses.

4 We had believed that what we were proposing to
5 Novartis was just fair on its face. It wasn't designed in
6 any way to be gaming the system. We didn't even come to
7 them and propose anything that we thought was more on our
8 side so that ultimately they met us in the middle. We just
9 said why don't we just divide it all up evenly. Their
10 response was to just flatly reject that and not even make a
11 counterproposal at all.

12 And so as we sit here, Your Honor, and there are
13 certainly numerous examples in recent cases of precisely --
14 and, frankly, the division of time, 50/50, for a prescriber
15 or an implant or a medical device case is usually something
16 that's agreed to between the parties.

17 Again, we're concerned that we're not going to get
18 an opportunity to ever redepose these prescribers. These
19 are going to be their one and only opportunity to take
20 their deposition.

21 And as I said, as bearing the burden of proof on
22 learned intermediary, I suggested to Mr. Reissaus during
23 the meet and confer that if he wanted to, you know, take
24 the majority of the time and have priority on every case,
25 then we agree not to be moving at this time for, you know,

1 summary judgment on learned intermediary, and he wouldn't
2 agree to that.

3 So we think that fairness dictates that we both be
4 given an opportunity in some cases to lead. And I'd be
5 open to other solutions on how to do that as well and also
6 be given an opportunity to have a 50/50 split on the
7 questioning, Your Honor. I think it's vitally important
8 given these important witnesses.

9 JUDGE DALTON: Okay. So much of what I said, I
10 guess, at the outset didn't hit its mark. And I'm not
11 unsympathetic to your position that you need to have the
12 opportunity for a fulsome exchange for the position to make
13 your record. I think you're correct.

14 The whole purpose of these, at least one principal
15 purpose of these, of my permitting these depositions was
16 to, in fairness to Novartis, give them the opportunity to
17 explore whether the record was going to support their
18 assertion that the learned intermediary defense was going
19 to break the causation chain and that they were going to be
20 entitled to summary disposition based on the prescriber's
21 testimony. So I'm not unsympathetic to anything that you
22 just described.

23 But what I thought I said at the outset -- and, of
24 course, I did describe it as my inclination, in fairness to
25 you -- is that setting down some arbitrary rule now in

1 terms of either the allocation of the time or the priority
2 of the questioning seems to me to be a little bit cart
3 before the horse because I believe when you all actually
4 start taking these depositions that the practicality of the
5 circumstances is going to begin to insert itself into the
6 proceedings and that you're going to figure it out. Right?

7 You're going to figure it out in such a way that
8 you're going to split the time fairly, you're going to not
9 abuse the witness, you're going to be respectful of the
10 witness' time, you're going to be respectful of each
11 other's relative positions. Maybe that's being, you know,
12 cockeyed optimist from my standpoint.

13 But that's the reason that I suggested that maybe
14 the way to go forward is let you all take a couple of
15 these, send me the transcript. I'm going to look at the
16 transcript. I have a lot of experience in this area. I
17 can look at the transcript and pretty quickly figure out
18 whether or not you're getting a fair shake, Mr. Silverman,
19 in terms of how much time you're getting, whether or not
20 allowing Novartis to take the lead is prejudicial to you or
21 at least potentially prejudicial to you such that I need to
22 adjust it going forward.

23 The only, the only fly in that ointment, it seems
24 to me, is the lag time between the first two depositions
25 that you take and getting me the transcript and letting me

1 react to that.

2 My hope is that by telling you that's what I
3 intend to do you're all going to be on your best behavior
4 because you know I'm going to be reading that transcript
5 and I'm going to be looking at it closely.

6 And I'm going to be paying attention to, you know,
7 are there a litany of, you know, uncalled for objections?
8 Are the parties being obstreperous in terms of getting to
9 the essence of the information? Are the questions
10 repetitive? Are you bullying the witness? Are you talking
11 on top of one another? Or are you acting as I expect you
12 to act in a courteous, cooperative, professional way,
13 getting the information that you need without asking the
14 same question 15 times, without -- well, you know.

15 I mean, you've been in the trenches certainly long
16 enough to know what abusive discovery is. I promise you I
17 know it when I see it. Judge Baker knows it. And I'm sure
18 Judge Harz knows it as well.

19 So it struck me that that might be the best way to
20 go forward is just see how you do. If you meet my
21 expectations and do well, we're not really going to have
22 any problems. If you don't meet my expectations and you do
23 poorly, I will fix it.

24 MR. SILVERMAN: Thank you, Your Honor. And I
25 appreciate the opportunity to be heard on this important

1 issue.

2 JUDGE DALTON: Okay. Thank you, Mr. Silverman.

3 I don't want to nominate either -- Judge Harz, I'd
4 be interested to know, you have so many more of these cases
5 than we have. And I appreciate the fact that anything
6 that, you know, I do may give you -- put you in a place
7 where you don't want to be.

8 I want to give you an opportunity to speak to this
9 if you have any thoughts on it that are different from what
10 I've just described, because there's no particular pride of
11 authorship in this.

12 I'm just reluctant to, at this stage of the game,
13 at least in these cases, say, you know, divide the time
14 evenly or impose some arbitrary limits on how much time
15 other than the time that the rules provide for.

16 But I would love to have the benefit of your
17 thinking on it.

18 JUDGE HARZ: I concur with you on it in regard to
19 all those points.

20 The next issue having to do with the deceased
21 plaintiff, after having reviewed the submission, it's so
22 much more tilted towards the MCL cases that I don't know if
23 you wanted me to ask the questions with regard to -- or
24 what your feelings were with regard to that. Because I
25 think there's only two in the MDL and all the other cases

1 are in the MCL.

2 JUDGE DALTON: Yes. I would like you to take the
3 lead on that. Let me -- before I get to that, though, let
4 me just check in with Judge Baker and see if he has
5 thoughts on kind of where we are at this point.

6 JUDGE BAKER: Yeah, I hate to expose myself to a
7 charge of being flippant, but what Judge Dalton has been
8 talking about, I would characterize it as take two
9 depositions and call us in the morning and see if you need
10 further treatment. Because both sides are entitled to due
11 process here subject to the constraints of case management.

12 I couldn't tell how serious the problems are
13 scheduling the doctors and the lawyers and the other
14 witnesses. And I think I mentioned this early on in the
15 case. If you need a project management office to help you
16 with that, I've done that. And it worked extremely well.
17 I had the parties pay for to the effect of a third party to
18 help with your schedules and the doctors' schedules and
19 work through the HIPAA issues, if there are any. And if
20 you need a HIPAA order, you know, get them to me and we can
21 do what we need to do. But so that's out there.

22 I did kind of want to know the extent to which
23 plaintiffs' counsel has been able to talk to the doctors
24 and whether that influences how you're preparing for
25 things.

1 Again, given the HIPAA constraints and the fact
2 that, at least I assume, a number of the plaintiffs are
3 still being treated by these doctors, there's a
4 relationship there. The same thing, there's a relationship
5 between pharmaceutical companies and prescribing
6 physicians. Those are very different relationships and
7 have different constraints.

8 But I'd certainly like to have a comment on that
9 as to how that affects how you're approaching this.

10 MR. ELIAS: Sure.

11 On that issue, so my firm along with the Onder
12 firm have the bulk of the cases in this MDL and in the MCL.
13 And I can tell you, I don't think we've had success, in
14 terms of the cases that fall into our responsibility, of
15 speaking to any of the oncologists at this point. Our
16 efforts aren't exhausted. Certainly, we would like to talk
17 to them before the depositions. That's our duty to our
18 clients to try to do so.

19 But the reality is, A, getting in touch with these
20 folks is hard. And then it also depends on what kind of
21 practice that they're involved in. When you're involved in
22 a big practice, it goes right to a lawyer for, you know,
23 for the organization and the lawyer says talk to them at
24 the deposition.

25 So I can tell you from our perspective, we don't

1 anticipate being able to talk to a lot of these doctors
2 prior to the deposition. We will, I'm sure, be able to
3 talk to some.

4 And I don't speak for Mr. Silverman. I do think
5 his firm has been able to talk to one or two. But yeah,
6 that's the reality. For many of these depositions, the
7 first time that we will ever be speaking to these doctors
8 is at the deposition.

9 JUDGE BAKER: And, of course, some doctors don't
10 like to talk to lawyers under any circumstance unless
11 they've each got a cocktail in their hands, so I
12 understand. And it's not a litigation setting, so I
13 understand that.

14 All right. Do you want me to take up this issue
15 of the motion, renewing the motion?

16 JUDGE DALTON: Yes.

17 JUDGE BAKER: I recall the issue. And I really
18 did -- it's one of those where I pushed it forward, not
19 wanting really -- I really did want to know what the lay of
20 the land was going to be. So if you want to renew that,
21 how soon can you get the motion in?

22 MR. REISSAUS: I was going to propose
23 December 1st, get us past Thanksgiving.

24 JUDGE BAKER: That's fine.

25 Usual time for response from the plaintiffs?

1 MR. SILVERMAN: That's fine, Your Honor.

2 JUDGE BAKER: All right. So I'll take that up in
3 December when it's ripe.

4 MR. REISSAUS: Thank you, Your Honor.

5 JUDGE DALTON: What about this -- just in terms of
6 the schedule, when would be -- when would you expect that
7 you will have a couple of depositions taken of the
8 prescribers?

9 MR. REISSAUS: The first prescriber deposition we
10 have scheduled is December 21st. I think the next one
11 is in January. January 13th.

12 JUDGE HARZ: Are you doing these depositions by
13 Zoom, or are counsel intending on going to the location
14 where the physician is?

15 MR. REISSAUS: Novartis' intent is to appear live
16 for those depositions, to sit down with the doctor.

17 JUDGE HARZ: Okay.

18 MR. REISSAUS: We think it will work more smoothly
19 that way.

20 JUDGE HARZ: Okay.

21 MR. ELIAS: And plaintiffs' intent, we're possible
22 to attend in person as well.

23 JUDGE HARZ: Understood. Thank you. I just
24 wanted to know.

25 JUDGE DALTON: So here's what I'm going to require

1 that you do, because I'm concerned about the time, is I'm
2 going to require that you order these transcripts, the
3 23rd and the 13th, on an expedited basis and that
4 you split the cost of expediting the transcript.

5 And deliver those to my chambers. Don't put those
6 on the docket. Deliver those transcripts directly to my
7 chambers.

8 And you can instruct the court reporter once
9 they've been expedited, even if they've been -- even if
10 reading and signing has been reserved, just go ahead and
11 tell her to send me the transcript prior to that. In other
12 words, as soon as it's available.

13 Because it won't be used for any purpose other
14 than for me to see how you're doing. And I'm concerned
15 about too much time passing before I get a chance to look
16 at kind of how things are moving forward.

17 Judge Harz, do you want to talk about the death
18 cases?

19 JUDGE HARZ: Sure.

20 From the submission, it was very clearly laid out
21 there were just three categories involved, you know, cases
22 filed in the name of the plaintiff who died prior to the
23 filing, which I think is a more serious issue right now;
24 and then cases for which it's a purported personal
25 representative; and cases with a named plaintiff who was

1 alive when the Complaint was filed but has since died.

2 I'm not sure -- I recognize that plaintiffs say
3 with regard to the first group that they want to have --
4 well, let me be quiet and hear from plaintiffs and
5 defendants.

6 Why don't I hear from the defendants first
7 regarding your position about the cases filed in the name
8 of a plaintiff who died prior to the filing of the
9 Complaint because I'm anticipating we're going to have to
10 have written submissions on this.

11 MR. ELIAS: Did you ask to hear from the
12 defendants?

13 JUDGE DALTON: She wants to hear from Mr. Reissaus
14 first, from Novartis.

15 MR. REISSAUS: Thank you, Your Honor.

16 So with regard to the cases involving a named
17 plaintiff who was predeceased, so deceased at the time the
18 Complaint was filed, we don't object to plaintiffs
19 dismissing those cases without prejudice and refileing them.

20 Our purpose in including that in the part of our
21 proposed CMO is that we've seen in recent filings, actually
22 in federal court, one of the Middle District cases, where
23 this is an issue, where this is a recurring thing. And we
24 want to make sure that we have some procedures set for
25 these cases in case there are new cases that come up with

1 the same problem.

2 Right now we have 17 cases in this category.
3 Hopefully they can be resolved based on plaintiffs'
4 agreement. But, again, we are requesting a CMO because
5 this could come up again for that category.

6 Would you like me to address the other categories,
7 or do you want to limit it to this one right now?

8 JUDGE HARZ: I'd like to hear the plaintiffs'
9 response to what you just said with regard to category one.
10 It would be easier to handle that way.

11 MR. ELIAS: Yes, Your Honor. This is Richard
12 Elias. And I -- hopefully this won't be an issue.

13 We do agree that those cases need to be dismissed
14 and refiled. And I don't -- 17, I'm not sure that's the
15 number. But whatever the number is, we have told Novartis.
16 And that was our response in the email which is attached to
17 the pleadings that, you know, once they get us -- or once
18 we agree to a joint stipulation of dismissal, we will
19 dismiss this case without prejudice and then refile.

20 And these are -- I'm not sure exactly how that
21 slipped our scrutiny, but we are going to ensure that that
22 doesn't happen again.

23 JUDGE HARZ: Oh, that's fine.

24 And I just see the email. It was just I didn't
25 see a response to that email. So that's why I thought this

1 was going to be an issue of contention, but I'm glad I'm
2 wrong. Okay.

3 MR. ELIAS: Okay.

4 JUDGE HARZ: All right. Then this is a nonissue
5 then?

6 MR. ELIAS: That first category is a nonissue.

7 JUDGE HARZ: Oh, great.

8 MR. ELIAS: I'm happy to address the others. I
9 don't think we would have any issues.

10 JUDGE HARZ: Great. Let me hear from -- great.
11 Let me hear --

12 MR. ELIAS: Okay. So the second category are
13 cases where they want proof of personal representation.
14 The cases were properly filed in the name of a
15 representative, and they're just looking for proof of
16 personal representation or proof of representation and
17 appointment. And we are -- as we stated in our letter, we
18 are working on getting those. And we'll make sure that
19 those papers are in proper order and we will get those over
20 to them.

21 And then the last category is the category of
22 plaintiffs who have died since the case has been filed,
23 which I think is the most problematic for us, because they
24 want to enter an order in the MDL which governs primarily
25 an issue -- I think it's exclusively an issue in the MCL

1 right now where there is some sort of requirement that
2 plaintiffs' counsel files a suggestion of death upon
3 learning of the death of the plaintiff and then there being
4 some sort of a time limit imposed that would -- for a
5 motion for substitution. And if that wasn't timely filed,
6 then the case would terminate. And so we definitely have a
7 problem with that.

8 First of all, that's not the procedure in
9 New Jersey. In New Jersey the case continues unabated as
10 we've cited in the email that we sent.

11 JUDGE HARZ: Yes.

12 MR. ELIAS: And on motion of any party, a
13 substitution can occur.

14 In the federal case, there is no requirement that
15 under Rule 25(a) that a plaintiff, upon deceased, that
16 their counsel or the plaintiff or the personal
17 representative of the plaintiff file a suggestion of death.
18 In fact, the Middle District of Florida has said that would
19 be highly unusual because it's not required for a motion
20 for substitution and it sets off -- and it could
21 potentially prejudice the estate because it sets off a time
22 line in which the case can be distinguished --
23 extinguished.

24 And secondly, the Court in the Middle District of
25 Florida has pretty clearly set forth that plaintiffs'

1 counsel is not competent to file suggestions of death on
2 the record.

3 So in both federal and state court, when a
4 plaintiff dies the case continues unabated. There should
5 be a motion for substitution. Those will be made, but we
6 certainly don't want any time line that imposes -- any
7 artificial time lines that are not set forth in the rules
8 that could potentially extinguish our client's claim. We
9 don't think that that's called for and we think the order
10 that they're proposing is an overreach in that regard.

11 JUDGE HARZ: I saw the proposed order.

12 I mean, obviously, it's in the interest of the
13 plaintiff and plaintiffs' counsel to have, you know, the
14 appropriate administrator or executor, whatever it be, be
15 put in place.

16 I recognize that depending upon what county you're
17 in or what state you're in, these things aren't necessarily
18 done within the same time frame. Sometimes they're done
19 very quickly. Sometimes it takes forever.

20 Why don't I hear from defense counsel -- well, let
21 me ask you, I think it was Mr. Elias that was just talking.

22 Are you saying we don't need an order or we should
23 have an order in place but without these specific time
24 lines and without the suggestion of death?

25 MR. ELIAS: I don't think we need an order at all.

1 JUDGE HARZ: Okay.

2 MR. ELIAS: I think we continue to work through
3 the process as the rules envision. And, you know, these
4 are complications that are present in MDLs and MCLs like
5 this. And we will follow the rules and continue to work
6 through that way. I don't think an order is in place.

7 And if there was an order, certainly we would need
8 to weigh in on what we think that order should look like
9 because it wouldn't look like what was proposed by the
10 defendants.

11 JUDGE HARZ: Okay. So why don't I hear from
12 defense counsel, why do you think we need an order?

13 MR. REISSAUS: Thank you, Your Honor.

14 We're requesting an order here because this is
15 about managing the docket and the cases in an orderly way
16 within a -- in New Jersey, a multicounty litigation, and
17 here in the MDL.

18 The basic question of is there a plaintiff to
19 pursue the claims in the Complaint, that's a threshold
20 issue. We should not have to look at a PFS. We should not
21 have to produce a DFS in the situations where there is not
22 a party appearing.

23 And all three of these categories raise serious
24 questions about whether there is someone to pursue the
25 claims in the Complaint. So the first category we've dealt

1 with already, that's the most obvious.

2 But the second, you know, the cases that Mr. Elias
3 said were properly filed in a representative capacity, that
4 isn't necessarily the case. And it isn't the case for some
5 of these. We know that for a fact.

6 And we're asking for an order that sets a
7 procedure that holds plaintiffs' counsel to making sure
8 that they follow the steps necessary to make sure that
9 someone with standing is actually appearing. Because if a
10 judgment is going to be entered in any of these cases, we
11 need to have the proper party.

12 JUDGE HARZ: Oh, of course. Of course, you need
13 to have the proper party there. I'm just -- I'm just
14 hesitant to put a time frame on it at this juncture.

15 I mean, I'm assuming -- Mr. Elias, is it a fair
16 statement that your offices are coordinating and all
17 plaintiffs' counsel are coordinating to put in motion
18 everything that has to be done to get the appropriate
19 representatives in place?

20 MR. ELIAS: Yes, Your Honor, that is a fair
21 representation.

22 JUDGE HARZ: Okay. Wouldn't it suffice to say
23 that in four months' time maybe we could have a report on
24 this, because maybe, you know, three quarters of the cases
25 at that point in time will have already had the appropriate

1 substitution?

2 I think we should -- I'm not saying no. I
3 recognize the issue. And I realize there's this problem.
4 But to just have an arbitrary time frame put in for when
5 these substitutions have to be made, I'm not comfortable
6 with that because it's not within the attorneys' control.
7 It's not like they have control over the surrogate court or
8 whatever court they have to deal with to get those papers
9 processed.

10 Would it be fair to say that we could revisit this
11 in four months and at that point you can let me know how
12 many cases you believe there isn't an appropriate
13 representative named plaintiff?

14 I mean, because the case does continue unabated.
15 I mean, that is the rule. That is the procedure. And
16 there is no judgment being entered right now. It's not as
17 though money is being disbursed and where's the money going
18 or we need a release signed. We're not at a critical point
19 like that.

20 MR. REISSAUS: Your Honor, Mr. Elias misstates the
21 law that applies to his cases that are in the second --
22 well, the third category. An action does not abate when
23 there is a surviving party.

24 So in the context where a Complaint is filed in
25 the name of the patient and the spouse, if the patient

1 passes away and the spouse has their own independent claim
2 and is a party to the suit that's already filed, in that
3 instance, the rule Mr. Elias cites 4:34-1(a) applies.
4 However, that is not the case in the filings that we've
5 identified in the MCL.

6 A different rule, subsection of that rule,
7 applies. It's 4:34-1(b), which is the section for
8 non-party survivors. And that rule states: If a party
9 dies and the claim is not thereby extinguished, the Court
10 shall on motion order substitution of the proper parties.

11 And so we're asking for an order to require
12 plaintiffs to take the steps necessary to substitute in a
13 proper party here.

14 JUDGE HARZ: I mean, I don't think anyone is
15 disagreeing with that. And the plaintiffs are already
16 doing that.

17 My problem, if that's what you want, I'm not
18 comfortable with giving them a set time frame and then if
19 they don't do it by a certain period of time the case is
20 dismissed with prejudice. I'm not going to do that. They
21 don't have control over when those papers will be
22 necessarily finally processed.

23 That's why I'm saying, I have no problem entering
24 an order indicating that all activity must, you know,
25 commence to get things in motion and that there should be a

1 report to the court, say, in four months, but I'm not going
2 to give them a time frame by which it must be completed.
3 I'm just not.

4 MR. REISSAUS: Thank you, Your Honor.

5 If I may say, our point is not to extinguish
6 claims where actions are being taken to open an estate in a
7 proper place to get the party with the legal authorization
8 to pursue the claim. That's not the intent of this order.

9 This order is to make sure that that process is
10 started now. Four months from now if we find out that
11 plaintiffs have not taken the proper steps, not begun to,
12 this will drag out a very long time.

13 We saw that with the PFS process and the fact that
14 in New Jersey --

15 JUDGE HARZ: Okay. All right.

16 So, Mr. Elias, do you have an objection to an
17 order being entered that directs that this process must be
18 undertaken now on all the cases? I mean, it sounded to me
19 like that's what you were doing anyway.

20 MR. ELIAS: Your Honor, we don't have an objection
21 to that short of an order. That is what we are doing
22 anyway.

23 The only thing that we object to is an order that
24 puts, as you said, time frames in that extinguished the
25 claims if something isn't done within a certain time. We

1 think your suggestion is perfectly reasonable that we
2 continue to do what we're already doing and then revisit
3 this issue in four months and see where we're at. And we
4 support that.

5 JUDGE HARZ: All right. Could I ask, Mr. Elias,
6 could you put --

7 Judge Baker, would you be -- as the magistrate
8 overseeing all this, do you want to enter that order, or do
9 you want this Court to enter that order?

10 JUDGE BAKER: Well, since I -- I'm happy to do
11 whatever you'd like, Judge Harz. And I'd like to be of
12 assistance.

13 I just -- I don't have the least idea of what the
14 surrogacy procedures are in New Jersey or elsewhere,
15 frankly. But I can certainly set deadlines and get things
16 in motion, if that would help move things along.

17 JUDGE HARZ: That would be great. That would be
18 great. Yes, I would appreciate that.

19 And I think it's just to reflect the concern of
20 the defense to make sure that the plaintiffs on each case
21 are taking the necessary steps presently to have an
22 appropriate representative substitution and that in
23 four months' time there will be a report to the Court
24 regarding the status for each case. Something to that
25 effect.

1 Because that's what I'm understanding, Mr. Elias
2 and defense counsel, you both agree on. Well, actually,
3 defense counsel wants a set period of time, but I'm not
4 giving that. I think that's the concern, just that to make
5 sure that action is being taken now, beginning now.

6 Okay. So is that the end of that issue?

7 JUDGE DALTON: I think so. I think so, unless the
8 lawyers have anything else they want to talk to Judge Harz
9 about with respect to those death cases. And Judge Baker
10 will enter an order reflecting the discussion.

11 I wanted to circle back just before I leave it for
12 good.

13 MR. REISSAUS: Your Honor, I'm sorry.

14 JUDGE DALTON: Yes.

15 MR. REISSAUS: Mr. Hollingsworth just passed me a
16 note.

17 We do have cases that are in the case-specific
18 workup pool that have issues with deceased patients who --
19 there's questions in those. And we're a little bit --

20 JUDGE HARZ: Those are MCLs? Those are MCL cases
21 or MDL cases?

22 MR. REISSAUS: One in the MCL and two in the MDL.

23 MR. ELIAS: Just to be clear, the two -- there's
24 two in the MDL. One is a plaintiff that did die prior to
25 the Complaint being filed. We are dismissing that case.

1 We've already agreed that we will dismiss the case without
2 prejudice and refile appropriately.

3 The other one, I think, involves just the proof of
4 representation, which we are working on. So those are the
5 only two --

6 JUDGE HARZ: Okay. And the MCL, what's the status
7 of that one?

8 MR. REISSAUS: Just a moment, Judge Harz. I'm
9 opening up my notes on that particular case.

10 JUDGE HARZ: Okay. I put you on the spot there
11 with that. Sorry.

12 MR. REISSAUS: So I'm not sure that we have -- he
13 passed away after the filing of the Complaint, and I'm not
14 sure that we have proof of representation yet.

15 And I'm looking at Ms. Wichmann. Am I being
16 accurate there?

17 MS. WICHMANN: That is correct.

18 MR. REISSAUS: Thank you.

19 JUDGE BAKER: Are you going to be substituting --
20 wrong word perhaps -- but putting in another case-specific
21 plaintiff to cover the one that's going to be dismissed
22 without prejudice?

23 MR. ELIAS: Correct. We will -- the appropriate
24 representative of the estate will be added.

25 JUDGE BAKER: No, but I'm talking about for the

1 case-specific discovery schedule.

2 MR. ELIAS: Oh, for that particular case. We're
3 going to have to -- there's really not a procedure, I
4 think, to substitute. So we're going to have to dismiss
5 the case --

6 JUDGE BAKER: I understand. What I'm saying is,
7 are you going to take another plaintiff to go into the pool
8 of case-specific discovery because that case will
9 disappear.

10 JUDGE DALTON: It's not going to disappear. It's
11 going to --

12 JUDGE BAKER: Well, it's not going to be refiled
13 and ready for deposition any time soon.

14 MR. ELIAS: It's not going to be refiled and ready
15 for deposition. And since that was an MDL case, that was
16 based on the cases that were filed in the Middle District
17 of Florida. So there really wasn't a selection beyond
18 that, I think, if I understand correctly, for the MDL.

19 So there isn't really another case to put into the
20 pool unless the court orders another case.

21 JUDGE BAKER: Well, that's what I was trying to
22 find out. Do we need to order another case to go into the
23 pool?

24 MR. ELIAS: Well, I think we have our work cut out
25 for us as it.

1 JUDGE BAKER: Well, I understand.

2 MR. ELIAS: I would say no, but I'll let
3 defense --

4 MR. REISSAUS: It's a defense pick. So --

5 MR. ELIAS: It's not a defense pick. It's an MDL
6 case.

7 JUDGE DALTON: It sounds like you ought to just
8 cancel that case-specific discovery and focus on the cases
9 that are in the procedural posture where discovery is
10 prepared to go forward.

11 I mean, your position remains the same, right,
12 with respect to your Lexecon rights. You're not going to
13 waive your Lexecon rights. So that means that I'm
14 constrained in terms of case-specific discovery to cases
15 that are in the Middle District if I want to -- I mean, I'm
16 not constrained to that. I can order case-specific
17 discovery in the others.

18 But my inclination is to confine it, as I said
19 before, to the Middle District cases because then I retain
20 control over those. And if I want to try those cases, then
21 I can do it.

22 MR. REISSAUS: So, I'm sorry, I think I was
23 talking across Mr. Elias, at least. And so we have three
24 cases in the discovery pool that this applies, that there
25 are issues on this, two in the MDL that are Middle District

1 of Florida cases, the first which is being -- you are
2 voluntarily dismissing and refileing.

3 MR. ELIAS: Correct.

4 MR. REISSAUS: The second that, I guess, there's
5 -- you're working on proof of representation or --
6 establishing a representative authority. They are opening
7 an estate, is my understanding.

8 MR. ELIAS: I think it's -- I don't know if it's
9 already opened or not. That case is not going to be
10 dismissed. That case is going to have proof of proper
11 representation. So that doesn't really affect the
12 discovery.

13 MR. REISSAUS: Well, there's not a proper
14 plaintiff in the case. So I hate to take discovery that
15 may not be valid during that time. So perhaps we need to
16 touch base with plaintiffs about that.

17 JUDGE BAKER: Well, yeah. Let me suggest that you
18 all continue your conferring on this, and in the next
19 discovery report that's due in however many days talk about
20 it.

21 MR. REISSAUS: Okay. Can we make it --

22 JUDGE DALTON: So these ought to obviously be
23 pushed to the back of your discovery period in terms of the
24 case-specific discovery so that it doesn't keep you from
25 making forward progress on, I think, some of these

1 milestones met.

2 MR. REISSAUS: Of course. Everything is in
3 parallel.

4 And then with regard to the New Jersey MCL case, I
5 think we would want to replace that case. There's five
6 plaintiff picks, five defense picks there. We wouldn't
7 want to be four and five at this early of a stage.

8 MR. ELIAS: And I will just say that is a case
9 that we are dismissing because it was a plaintiff that
10 predeceased. Is that the case?

11 If it is the case we're dismissing, then we don't
12 object to them picking another case in the MCL. But I
13 don't think we're dismissing this case. I don't think it's
14 a case that needs to be dismissed.

15 JUDGE DALTON: Well, let me just suggest this.
16 You can raise that -- and Judge Harz is on the phone. She
17 can speak for herself. But if you all can't reach some
18 accommodation to even out your MCL cases 5 and 5 based on
19 the procedural posture of the case, then I'm sure
20 Judge Harz will be happy to decide for you. But you all,
21 it seems to me, ought to be able to figure that out.

22 JUDGE HARZ: It sounds to me you can figure it
23 out. I mean, if it's being dismissed, then you have to
24 just pick another one, if it's a plaintiffs' pick or a
25 defense pick, whichever one it is.

1 MR. ELIAS: Fair enough.

2 JUDGE HARZ: Okay.

3 JUDGE DALTON: So let me -- where I was headed is
4 going back to these depositions. Because one of the things
5 that I would like to try to do is to give you some insight
6 into what I'll be looking at.

7 I would say, Mr. Reissaus, that as I said, I don't
8 presume to know all the facts in the case at all, but it's
9 just hard for me to imagine that you couldn't substantially
10 cover the waterfront with a prescribing physician on most
11 of the things that you care about or need to inquire about
12 in a couple of hours.

13 And so I would tell you that something you all
14 might want to think about talking about is passing the
15 baton at the two-hour mark and -- in other words, if you
16 get to two hours with a witness and you're not finished, I
17 think it would probably be prudent for you to pass the
18 baton and let the plaintiffs then undertake an inquiry, and
19 then if there's time remaining, come back and finish up.
20 And maybe do that over the course of a couple depositions
21 and see how things shake out.

22 I just will tell you in advance that if I get the
23 first transcript and the defense, you know, asks four and a
24 half hours' worth of questions and the doctor is frazzled
25 and fit to be tied and ready to get out of there and it

1 prejudices the plaintiffs in terms of not being able to,
2 you know, get done what they need to get done, then you're
3 going to be looking at probably something that you would
4 think is Draconian coming from me in terms of cabining your
5 time, you know.

6 And you don't want me in a situation where I say,
7 okay, Novartis, you've abused the process. Now you get an
8 hour and no more. You know, do the best you can. I don't
9 think anybody wants to end up there. So I just am telling
10 you that my thinking is that two hours with a prescribing
11 physician ought to give you more than enough time.

12 And I'm certainly not suggesting you need to take
13 two hours, but I'm just saying that if you get to the
14 two-hour mark and you're not finished, Mr. Elias,
15 Mr. Silverman, you know, my suggestion would be that you
16 maybe step up and say pass the baton, let us have a go.

17 And I'm not requiring you to do it. I'm not
18 ordering you to do it. I'm just telling you that that
19 seems to me to be a relatively equitable way to move
20 forward and to not abuse the process.

21 So I'm not -- again, I'm not ordering it. I'm
22 just telling you that I'm going to look at what happens and
23 see how you all conduct yourselves. My hope is that, you
24 know, you'll find that you're able to knock these things
25 out in, you know, two or three hours and be respectful of

1 the physician's time and share your time such that there
2 are no real substantial significant fights over it.

3 I suspect that's kind of where we're going to end
4 up, but it sounds like you need a little help here on the
5 front end. So I'm just telling you, at the two-hour mark,
6 I think the flag ought to go up and say that's time to pass
7 the baton. Okay?

8 MR. REISSAUS: Thank you.

9 JUDGE DALTON: All right. What else can we get --
10 how about from the lawyers? What can we do to help you
11 since I have you here?

12 MR. ELIAS: Yeah, one issue I think that we do
13 need to address, we have a mediation deadline of
14 December 9th, which from the plaintiffs' perspective
15 we'd like to get -- we'd like to move forward on and get
16 scheduled. The defense has said that they want to wait and
17 push that until after more fact-specific discovery.

18 So I do think that that's something that the Court
19 should be aware of. It hasn't been briefed or anything
20 before you, but we would like to -- we think it makes sense
21 to mediate now rather than, rather than later.

22 And we've already had extensive attempts at
23 mediation, but it is a process. And while it may not get
24 resolved, the mediation -- in the mediation in December, I
25 think it can continue us on our path towards potential

1 resolution.

2 JUDGE DALTON: Well, the mediation date, if memory
3 serves me right, was set before we extended some of these
4 other deadlines.

5 MR. ELIAS: Correct.

6 JUDGE DALTON: So I hear you, Mr. Elias, that, you
7 know, oftentimes it's hard to figure out exactly what's the
8 most productive, whether, you know, an earlier mediation
9 date. At this point you guys have already got a lot
10 invested in the discovery of this case.

11 I'll hear from Mr. Reissaus in terms of what
12 Novartis would like to do.

13 What I don't want to do is order you into a
14 process where the parties feel like they don't have enough
15 information or their clients feel like they don't have
16 enough information, you know, to make an informed decision
17 about resolving the case.

18 Let me hear from you, Mr. Reissaus, about that.

19 MR. REISSAUS: Thank you, Your Honor.

20 The parties, as Mr. Elias alluded to, continue to
21 talk during the pendency of the MDL. And based on the
22 current state of discussions, there's a distance between
23 the parties. And, you know, we had serious discussions,
24 but at this point we believe that plaintiffs are looking
25 for Novartis to bid against itself. And that's really a

1 showstopper at this stage of the litigation.

2 And we don't think that mediating by
3 December 9th is the right time to do that right now.

4 JUDGE DALTON: Okay. Well, I don't want to get
5 into the weeds on, you know, who's negotiating in good
6 faith and who's not and whose bid it is, but I am sensitive
7 to two things.

8 One is that I appreciate the fact that Novartis
9 might want to have at least one or two of these treating
10 docs deposed so that they kind of get the lay of the land
11 on is this going to be a productive exercise for us in
12 terms of this causation defense. Mr. Johnston is not here,
13 but I can hear him now, you know, pounding the table about
14 that, about that issue. And I say that without criticism.

15 So I think, frankly, in order to give you all,
16 meaning I'm looking at the plaintiffs, the best shot at
17 having a receptive audience, that if I force you to
18 mediation prior to getting any of that done, even one or
19 two of those docs done, it's not likely to be productive.

20 So what I would be inclined to do is to extend
21 that mediation date in the MDL cases from its current date
22 of December 9 and maybe add the 45 days that we have added
23 to the discovery period. And let's reset it at a period
24 that's 45 days from December the 9th, and then leave it
25 to you all to get that coordinated and scheduled.

1 And, you know, if you all feel like you want to do
2 it in 20 days, I mean, I'd be happy about that, but I want
3 to give you an outside limit by which I want to see it
4 accomplished.

5 And that will do two things. It will add some
6 incentive to you to get some of this discovery scheduled,
7 set, and in the can so that you know what to expect and you
8 can communicate it to your clients.

9 And it will also give you, I think, an opportunity
10 to look at the prospects of mediation in light of sort of
11 harbinger of the costs and time consumption that you're
12 looking at down the road. And you'll have, you know,
13 probably a better -- you'll be on more equal footing, I
14 think, in terms of your knowledge about where the case
15 could ultimately end up.

16 JUDGE BAKER: Let me add, I don't -- I think you
17 do, but I don't know this mediator we've approved. I don't
18 know what his practices are.

19 Does he require mediation statements that you
20 submit to him in advance? And does he keep you there until
21 he's exhausted, or does he adjourn things?

22 MR. REISSAUS: I'll let Mr. Elias respond after me
23 if he feels it's necessary.

24 But we've worked with Mr. Caparello previously,
25 and we've submitted mediation statements. I think at this

1 point he knows the parties and is pretty comfortable. I
2 expect we would want to submit something to him in writing
3 before we had another session with him and he would accept
4 it.

5 JUDGE BAKER: It's sort of a paradigm. But then
6 yet I've seen probably -- I won't even hazard a guess, but
7 it's hundreds, if not thousands, of mediation reports, many
8 of which are continuing, and I've never quite known how
9 that fits our deadline. Because we set a deadline, expect
10 it to be done. But mediations continue a life of their own
11 depending on the mediator and the parties.

12 MR. REISSAUS: Okay. I'm sorry.

13 JUDGE BAKER: So you're talking about having that
14 session, but that may not be the end of it as long as
15 there's a report. So I'm just trying to get a feel.

16 MR. REISSAUS: So I can give you a little more --
17 Mr. Caparello stayed engaged after our prior sessions. And
18 he kept us in the room until it was clear we were not going
19 to conclude that day and -- but that didn't necessarily end
20 his work so --

21 JUDGE BAKER: Well, that's typical.

22 MR. REISSAUS: Yeah, I mean --

23 JUDGE DALTON: Well, let me tell you what my
24 expectation is. My expectation is that within 45 days
25 you're going to have done whatever the mediator requires

1 you to do in terms of your submissions, you are going to
2 have had your substantive mediation conference, and you're
3 going to notify me the case is either settled or impassed.
4 If you want to continue, then you're going to need to ask
5 for permission to continue beyond that date.

6 I don't want to ever throw cold water on
7 productive discussions if they're moving forward in a
8 productive way, but I don't want this deadline to be seen
9 as just some, you know, aspirational goal that we must all
10 at least get in the same room between now and 45 days.

11 My expectation is you'll have a substantive
12 mediation conference and resolve the case or come to the
13 place where you cannot resolve the case and it's going to
14 move forward on a trial track.

15 So and, you know, I think -- I mean, I haven't
16 worked with Mr. Caparello a lot. I know him. I know him
17 both personally and by reputation. And I think you made a
18 good selection here.

19 But I do want to echo what Judge Baker said. I'm
20 not looking at this to be just, you know, a let's schedule
21 our first meeting. If you schedule your first meeting and
22 the talks are productive and you've got loose ends, you
23 know, or other things that need to be done and you can come
24 back with a reasonable request for an extension to try to
25 continue, I'm open to that. I'm not suggesting I'm not

1 open to it. But I don't want you to see that date as
2 being, as I said, aspirational. Okay?

3 MR. ELIAS: Understood.

4 MR. REISSAUS: Yes, Your Honor.

5 JUDGE DALTON: And I think, you know, the
6 practical matter, I mean, this is -- this is
7 November the 15th. December the 9th. You know,
8 for you all to come up with submissions and get a date on
9 his calendar between now and the intervention of the
10 Thanksgiving holiday, you know, that's probably not going
11 to happen anyway.

12 So if it's going to happen, it ought to happen
13 with both parties being fully invested, fully motivated to
14 try to get to a -- you know, and I say this, again, not to
15 be flippant, you know, Mr. Elias, but in my years, I mean,
16 people said do you want to mediate, I said any time you
17 want to have a meeting the purpose of which is to pay me or
18 my clients money, I'll show up.

19 What else? What else can we help you with?

20 MR. REISSAUS: I believe we had one other topic.
21 And this should be quick.

22 There are four cases in the MDL where we did not
23 yet have PFSs. And plaintiffs have provided two of those
24 PFSs now. There are two cases where we don't have a PFS
25 yet. And under the CMO for the PFS process, I'm sorry, the

1 pretrial order, we have -- on November 22nd would be
2 the deadline to provide those.

3 And so we'd like to request leave to file a motion
4 to dismiss if we don't receive those two PFSs by
5 November 22.

6 JUDGE DALTON: Yes. I think the order
7 contemplates that. But to the extent that it doesn't, then
8 you certainly have leave to file a motion to terminate
9 those cases if they're not in compliance in terms of
10 providing you with your PFS.

11 MR. REISSAUS: Thank you, Your Honor.

12 JUDGE DALTON: You're welcome.

13 All right. Anything else?

14 Mr. Elias, Mr. Silverman? No?

15 MR. SILVERMAN: No, Your Honor.

16 JUDGE DALTON: Ms. Wichmann? No.

17 Anything else from the defense?

18 All right. Well, thank you all. Keep up the good
19 work.

20 I do want to just circle back to what Judge Baker
21 mentioned in terms of, you know, project manager in terms
22 of the scheduling of this case-specific discovery. If we
23 can be helpful with that, you might want to think about it.

24 Because one of the things that it does do, it
25 gives the physicians sort of a central location in terms of

1 talking to the plaintiffs, talking to the defendants,
2 trying to coordinate dates, trying to deal with their
3 scheduling person.

4 You know, I mean, in my experience, some of them
5 have schedulers that are very sharp and on top of things.
6 Others, you know, your request for a date goes into the
7 black hole and you never hear back.

8 And so the project -- a project manager would be
9 able -- you know, would be a central location that would be
10 able to have dates from you all, know what was suitable on
11 both your calendars and help coordinate that. And it's not
12 a big expense, but it can be helpful.

13 Judge Baker has a lot of experience with it. So
14 I'll just leave that to you all. But if you want to
15 revisit that or raise that with him, I'm sure he'd be open
16 to it.

17 MR. SILVERMAN: Thank you.

18 JUDGE DALTON: All right. Great.

19 Anything else, Judge Harz, before we let you go?

20 JUDGE HARZ: I'm good. Thank you very much for
21 asking.

22 JUDGE DALTON: Okay. Great.

23 All right. We'll be in recess then. Thank you
24 all.

25 (Proceedings adjourned at 11:09 a.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.

November 18, 2022

s\ Amie R. First
Amie R. First, RDR, CRR, CRC, CPE
Federal Official Court Reporter
United States District Court
Middle District of Florida