

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.	:	April 13, 2022
	:	11:09 - 12:14 p.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 Richard M. Elias

5 Lawana S. Wichmann

6 Raymond C. Silverman

7 Christopher C. Oxx

8 Harrison M. Biggs

9

10 Counsel for Defendant:

11 Robert E. Johnston

12 Andrew L. Reissaus

13

14 Also Present: Kelly Jones Howell

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

JUDGE DALTON: All right. Call the case for me, please, Ms. Gomez.

THE DEPUTY CLERK: Case Number 6:21-md-3006, Tasigna versus Novartis Pharmaceutical Corporation.

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

MR. ELIAS: Good morning, Your Honor. Richard Elias for the plaintiffs.

JUDGE DALTON: Good morning.

MS. WICHMANN: Good morning, Your Honor. Lawana Wichmann for the plaintiffs.

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

MR. OXX: Good morning, Your Honor. Chris Oxx for the plaintiffs.

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

JUDGE DALTON: Good morning.

MR. JOHNSTON: Robert Johnston for the defendant, Novartis Pharmaceuticals, Your Honor. Good morning.

JUDGE DALTON: Good morning.

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

1 JUDGE DALTON: All right. Good morning, everyone.
2 And I think we have Judge Harz with us. Is she on
3 the line?

4 THE DEPUTY CLERK: No, Judge. Everyone that was
5 on the line is off the line now.

6 JUDGE DALTON: Everyone is off the line now.

7 THE DEPUTY CLERK: Yes.

8 JUDGE DALTON: Lauren, maybe you want to send
9 Judge Harz's chambers a note and just let them know and ask
10 them to call back in.

11 THE LAW CLERK: I'm doing that now, Judge.

12 JUDGE DALTON: Okay.

13 (Pause in proceedings.)

14 JUDGE DALTON: All right. We have our folks on
15 the phone back on.

16 Judge Harz, are you with us?

17 JUDGE HARZ: Yes, I'm here. Thank you very much.

18 JUDGE DALTON: Okay. Great.

19 Sorry for the little bit of a technical snafu
20 there, but I'll just remind others that are on the phone
21 call to make sure you keep your phones muted if you're not
22 recognized to speak.

23 So we're here in connection with the status
24 conference scheduled for April the 13th.

25 Mr. Elias, let me invite you first to the podium.

1 And I want to explain to the parties, I guess,
2 what happened with respect to the notice on the order with
3 respect to the motion to compel.

4 We had a -- you don't care about this but there
5 was a snafu in the Clerk's Office here. We had a -- our
6 ordinary docket clerk was out and we had a temporary docket
7 clerk in who mishandled the notice. So my apologies for
8 that.

9 But hopefully we either have recovered or can
10 recover whatever ground we lost in that connection. So my
11 apologies for our Clerk's Office error there.

12 But, Mr. Elias, let me get you to bring me up to
13 date -- and then I'll hear from Mr. Johnston -- on some of
14 these issues with respect to your request for information,
15 studies from third parties. I think that might have been
16 the first item on your agenda.

17 MR. ELIAS: Yes, Your Honor.

18 JUDGE DALTON: So bring me up to date where we are
19 there. What can I do to help you all get that information?

20 MR. ELIAS: Yes, Your Honor.

21 So if you're asking specifically about the
22 noncustodial sources, the third parties, I would invite one
23 of my colleagues -- I think it's Mr. Biggs. He's prepared
24 to address that specific issue.

25 JUDGE DALTON: Okay.

1 MR. ELIAS: I can give you a more general
2 overview.

3 JUDGE DALTON: No, that's fine. Let me hear from
4 the person who knows the most about it.

5 MR. ELIAS: Great.

6 MR. BIGGS: Thank you, Your Honor.

7 JUDGE DALTON: Good morning.

8 MR. BIGGS: Harrison Biggs on behalf of the
9 plaintiffs.

10 JUDGE DALTON: What's your last name again?

11 MR. BIGGS: Biggs, B-I-G-G-S.

12 JUDGE DALTON: All right. Thank you, Mr. Biggs.

13 MR. BIGGS: And on that issue, Your Honor, the
14 non-CML and the raw data sources, we've narrowed the issues
15 with their -- not narrowed the issues. We've settled the
16 issues with the defendant. There's nothing to report
17 there.

18 So we're just waiting on them to receive
19 production for those sources and nothing further to report.

20 JUDGE DALTON: Okay. Good. Well, that's good
21 news.

22 MR. JOHNSTON: Your Honor, may I speak to that
23 real quick?

24 JUDGE DALTON: Yes.

25 MR. JOHNSTON: I agree generally with that.

1 There is a process issue with respect to the
2 clinical trials that we will be producing which is that we
3 had proposed to the plaintiffs that those be produced in
4 what we call an SAS lockbox so that they would have access.

5 It's a security issue because of personal
6 identifier information. It's the way the industry, as a
7 standard, shares clinical trial data.

8 We haven't heard back from them. So we're not
9 entirely clear what we're supposed to do on that. And they
10 may not be prepared to tell me today.

11 But I just wanted to make sure the Court was aware
12 that we had made the offer to give that production. And we
13 could put six trials in that today, but I'm not sure what
14 the plaintiffs' position on that is, I guess.

15 JUDGE DALTON: Okay. Mr. Biggs, do you have any
16 concerns about the confidentiality aspects of the
17 production?

18 MR. BIGGS: Your Honor, to be frank, that's the
19 first time I'm hearing about the SAS lockbox. We will
20 confer with opposing counsel, and I'm sure we can come to
21 an agreement on that. I don't foresee that being an issue.

22 JUDGE DALTON: Okay. Good.

23 All right. Let's get to the area of the
24 deposition notices. This is the area really, frankly,
25 where I have the most concern about our forward progress.

1 We are rapidly approaching the July 15 close of
2 fact discovery in this case, and I'm concerned about where
3 we are in terms of the depositions.

4 So, Mr. Elias, I've read your summary. And so let
5 me see if I understand it correctly. You all still have
6 not reached an accommodation with respect to the current
7 Novartis employee Ms. Habucky.

8 MR. ELIAS: Habucky, I believe, is how you
9 pronounce it.

10 JUDGE DALTON: How do you say it?

11 MR. ELIAS: Habucky.

12 JUDGE DALTON: Habucky. So you haven't reached an
13 understanding with respect to Ms. Habucky.

14 One of these individuals, I think maybe
15 Mr. Miranda, has agreed to appear for a deposition on the
16 schedule for May the 12th; is that right?

17 MR. ELIAS: Yes, Your Honor, but we are in
18 disagreement over the format of that deposition. They want
19 it to be remote, and we would like it to be in person.

20 JUDGE DALTON: Okay. With respect to
21 Dr. Gallagher and Mr. Alland, have you made progress with
22 those individuals?

23 MR. ELIAS: We have not.

24 JUDGE DALTON: Let me hear from Mr. Johnston.

25 MR. JOHNSTON: Good morning.

1 JUDGE DALTON: So here's the question I have for
2 you. With respect to these individuals that are in play
3 here -- let's start with Ms. Habucky.

4 She's currently a Novartis employee; is that
5 right?

6 MR. JOHNSTON: She is, Your Honor.

7 JUDGE DALTON: All right. So what's the
8 impediment to getting Ms. Habucky scheduled for a
9 deposition?

10 MR. JOHNSTON: There is no impediment. The
11 plaintiffs have not responded to the offered date. We did
12 ask the plaintiffs to agree --

13 JUDGE DALTON: Can you pull that microphone down
14 to you a little bit.

15 MR. JOHNSTON: I'm sorry, Your Honor.

16 We did ask the plaintiffs to agree not to retread
17 the ground that was tread in the two-day deposition taken
18 by Mr. Elias.

19 JUDGE DALTON: Well, here's part of the problem,
20 Mr. Johnston. I just will push back on you a little bit.

21 You don't get to set those ground rules. You
22 don't get to establish what questions can be asked or not
23 be asked of a witness who is in your employ.

24 That's the reason that I gave a limit upon
25 deposition time of 140 hours for each side because the

1 consequences of wasting time fall on the party that's
2 wasting the time. I don't anticipate that either of you
3 are going to waste time in deposition.

4 But I'm not going to arbitrarily limit the inquiry
5 of the plaintiffs into Ms. Habucky based off of this
6 because I have no idea whether or not there's new
7 information, new documents, other things that have come to
8 light since she was deposed the first go-around.

9 And, frankly, I'm not going to -- I'm not going to
10 micromanage that. I don't think it's productive.

11 So I'll give you an opportunity to make your case
12 as to why you think Ms. Habucky should have some sort of
13 parameters established or fences put up around the inquiry
14 in her deposition in this case.

15 But I want to make -- I want to get this train
16 moving.

17 MR. JOHNSTON: I understand, Your Honor.

18 The issue is that she was -- frankly, her
19 deposition was borderline abusive and took two full days --
20 took two days because once we did a direct examination,
21 Mr. Elias did an extended recross.

22 So she has already been deposed six ways from
23 Sunday on the issues that existed in twenty -- at the time
24 of that deposition up through 2015, which was the
25 parameters of the *Lauris* case.

1 I understand Your Honor does not want to
2 micromanage this. And plaintiffs have made some statement
3 in their submission to you that they would not retread
4 ground, but I'm going to object if they ask her the same
5 questions that she was asked based on the same documents
6 two years ago because they've already got those answers.

7 And she is being noticed as a -- in a personal
8 capacity. This is not a corporate deposition. She was a
9 corporate deponent the first time around. They are now
10 taking a personal deposition, which means interests beyond
11 the interests of the plaintiffs and Novartis are now in
12 play. And we're talking about her having to take another
13 two days out of her schedule.

14 And there should be some effort to limit the
15 discussion. And I get it. If there's a new document that
16 was produced that raises a new question, I can see that;
17 but they shouldn't be allowed to ask the same questions
18 they asked where they don't have new documents related to
19 those questions.

20 JUDGE DALTON: Well, here's the problem. You're
21 certainly -- you certainly have a right to object to them
22 reploting old ground during the course of the deposition,
23 but other than assigning a judicial officer to monitor the
24 deposition and to be able to respond on a
25 question-by-question basis, which I don't intend to do, I

1 have to rely upon the professionalism of the lawyers in
2 terms of the conduct of the discovery.

3 I'm not going to enter an order constraining the
4 examination of the witness because I'm concerned that all
5 that's going to do is engender more litigation about
6 whether or not the boundaries are being properly adhered
7 to.

8 I'm going to rely upon the lawyers to conduct
9 themselves in an efficient, professional way. If during
10 the course of the deposition you feel that your witness is
11 being abused or that you feel that the parameters that have
12 been informally negotiated between you and Mr. Elias or
13 whoever the examining lawyer is were not being observed,
14 then you can pursue your remedies.

15 But what I don't want to happen is, I certainly
16 don't expect the witness to be instructed not to respond to
17 any question based on a concern that you have about whether
18 or not it's beyond the scope of your agreement or things of
19 that sort.

20 You can ask the Court for a remedy after the fact;
21 or if during the course of the deposition if Judge Baker is
22 available and something arises that you want to get a
23 ruling from the Court, if it's possible to do that, we'll
24 do it.

25 But I want this deposition to get scheduled, and I

1 want it to get scheduled promptly. So where are we in
2 terms of a date for this particular individual?

3 MR. JOHNSTON: Let me just say one thing. I'll
4 tell you the date.

5 JUDGE DALTON: Okay.

6 MR. JOHNSTON: I haven't asked the Court to enter
7 any orders. That was a proposal to discuss with opposing
8 counsel, and I never got a response back other than what
9 they said in the papers. So I haven't had a conversation
10 or a meet-and-confer with them about the scope of the
11 deposition.

12 They just decided to announce in the papers that
13 were submitted to you that they wouldn't agree to that. So
14 they haven't told me that before the submission of the
15 papers to you, and they haven't made any effort to have a
16 conversation with me about any of the offered dates on any
17 of these depositions.

18 We have offered --

19 JUDGE BAKER: Let me --

20 MR. JOHNSTON: We have offered --

21 JUDGE BAKER: Let me respond to that, both sides.

22 We expect as you prepare the agenda items that you
23 do talk these things through. And to the extent that
24 things are open -- I mean, the agenda was filed almost
25 two weeks ago. Both sides have had time to confer on these

1 things, and we expect you to do that. There shouldn't be
2 stuff hanging where proposals have been made and not
3 responded to.

4 I don't know who's failed on that here, but I'm
5 hearing it on both sides that not everything is getting
6 vetted the way it should be.

7 Go ahead.

8 MR. JOHNSTON: We have offered her for deposition
9 on April 28th, which is eight days after the date they
10 noticed her for. And we haven't heard any acceptance of
11 that date at this point.

12 JUDGE DALTON: Okay. What about April the
13 28th, Mr. Elias?

14 MR. ELIAS: Your Honor, that works for us.

15 JUDGE DALTON: Okay. She's scheduled then.

16 Send the notice. Set her for April the 28th,
17 2022, at whatever time the lawyers agree the deposition
18 should commence.

19 I shouldn't have to say this, but the deposition
20 is not to be abusive with respect to the witness. The
21 witness should be treated with courtesy and with civility
22 and with respect for her time.

23 I would not expect her to be deposed for any --
24 certainly no longer than seven hours in one day. And I,
25 frankly, don't -- can't imagine that you would need

1 multiple days to depose this witness. I'm not going to
2 constrain you in that respect.

3 It's your time to use as you see fit, but I will
4 tell you that I will be receptive to the later argument
5 that the deposition process is being abused if witnesses
6 are being deposed for hours upon hours upon hours to replot
7 old ground or to -- in other words, if I take a look at a
8 deposition and can become convinced that the deposition is
9 being conducted in a way that's not efficient and not
10 respectful of the witness' time, then I'm going to take --
11 I'm going to take action, whether I'm asked to do it or
12 not, which may result in you losing time or may result in
13 your further opportunities to depose witnesses being
14 limited.

15 And I say that for all counsel on both sides. All
16 right?

17 So just be mindful of what's happening in that
18 deposition. If you think when it's happening if
19 Judge Dalton reads this and is unhappy with this
20 proceeding, then there will probably be some consequences.

21 I don't need to remind you, I've spent thousands
22 of hours myself chained to a chair in a deposition for days
23 upon end listening to questions being asked over and over
24 and over again by multiple lawyers, each one thinking he or
25 she can ask it better than the lawyer before or each time

1 thinking you're going to get a better or a different answer
2 from the witness.

3 I just want you to hear it from me, I'm not going
4 to put up with it. Get the information that you need. Get
5 it done. Turn the witness loose and move on.

6 JUDGE HARZ: Have the parties agreed if it's
7 remote or in person?

8 JUDGE DALTON: All of these, Judge Harz, unless I
9 say otherwise, are going to be in person unless there's
10 some reason for it.

11 I'm going to take up this concern, I guess, with
12 respect to Mr. Miranda's deposition.

13 JUDGE HARZ: Thank you.

14 JUDGE DALTON: You're welcome.

15 We didn't talk about that, but I presume that this
16 Novartis witness will be taken in person?

17 MR. ELIAS: Habucky.

18 MR. JOHNSTON: Yes, we'll make her available in a
19 location in Newark, New Jersey, for her deposition.

20 JUDGE DALTON: All right.

21 Now let's talk about Dr. Gallagher, Mr. Johnston.

22 Does Dr. Gallagher -- I understand he's no longer
23 employed by Novartis.

24 I guess what I want to know is, does Novartis
25 consider him to be a witness that you have an ongoing

1 relationship with such that Novartis is either providing
2 counsel with him in connection with the efforts to take his
3 deposition here -- I understand that you've asked the
4 plaintiffs to not contact Dr. Gallagher directly.

5 So I guess what I'm wondering, is Dr. Gallagher --
6 are you prepared to produce Dr. Gallagher on a notice, or
7 are you going to require that he be subpoenaed? And is
8 Novartis going to represent him or provide him counsel?

9 MR. JOHNSTON: We represent Dr. Gallagher.

10 The representation was that he would like to allow
11 us to accept service of subpoena for him, and he intends to
12 then move to quash the subpoena on the grounds that it's
13 inconvenient for him at this point in time in his role as
14 chief medical officer of another pharmaceutical company. I
15 don't have his declaration yet.

16 But that would be based not on Novartis' interests
17 and rights but on his personal interests and rights.

18 JUDGE DALTON: Well, so here's what we're going to
19 do. We need to get that matter to a head.

20 MR. JOHNSTON: Yes, sir.

21 JUDGE DALTON: So let's get Dr. Gallagher
22 subpoenaed. I hear from Mr. Johnson that they are prepared
23 to accept the service of the subpoena.

24 Pick a date, Mr. Elias.

25 And -- well, let's do this. Mr. Johnston, I take

1 it from what you're telling me that Dr. Gallagher is going
2 to resist appearing for a deposition no matter when it's
3 scheduled, at what time or for what period of time?

4 MR. JOHNSTON: He will. I mean, in the time
5 period left in discovery certainly. He believes he was
6 deposed adequately two years ago.

7 JUDGE DALTON: That's not his call.

8 MR. JOHNSTON: I understand but --

9 JUDGE DALTON: I'm telling you to communicate with
10 Dr. Gallagher that he will be required to appear. He will
11 be required to appear.

12 Now, whether or not there are constraints with
13 respect to the scope, length, time, duration of his
14 testimony, but he does not have the right to declare
15 himself unavailable if he has information that is relevant
16 to the prosecution of this case and was previously in the
17 employ of Novartis.

18 He has a right to assert, obviously, his personal
19 interest with respect to his convenience and his time and
20 the interruption of his business. All of those things will
21 be taken into account.

22 But you need to communicate to him that if he's
23 looking for a carte blanche excusal from being deposed in
24 this case, that will not happen.

25 MR. JOHNSTON: Your Honor, he actually has the

1 right to go to the District Court in the district in which
2 he's located, which is California, to challenge the
3 subpoena as well.

4 But I understand --

5 JUDGE DALTON: I'm very familiar with Rule 45 and
6 the consequences of the issuance of a subpoena and where
7 that can be litigated. Whether or not the California judge
8 is going to want to do it there or whether he or she is
9 going to want to send it back here for resolution, which is
10 probably what will happen, but I don't want to prejudge
11 that.

12 But I'm just telling you that we need to get this
13 matter brought to a head, and I don't want to put off the
14 litigation about whether Dr. Gallagher will or will not
15 appear.

16 MR. JOHNSTON: I understand.

17 And I find it -- we are going to brief the fact
18 that he has not worked with the company since he was last
19 deposed, and he was deposed for the entire period, except
20 for a very short period of time that he worked with the
21 company two years ago over the course of a day. And
22 Your Honor will decide what they're going to do.

23 But we owe it to our client, Mr. Gallagher, to
24 advance those arguments on his behalf as well as the
25 authority of the Court as to what competing obligation he

1 has in the short run.

2 But we're totally fine getting it teed up for you
3 to consider that, Your Honor.

4 JUDGE DALTON: Okay. Let's get Dr. Gallagher's
5 subpoena delivered to Mr. Johnston. And let's get that
6 ball rolling.

7 MR. ELIAS: Yes, Your Honor.

8 JUDGE DALTON: Now, what about --

9 MR. JOHNSTON: I think you skipped Mr. Miranda.

10 JUDGE DALTON: Well, what about Dr. Alland? And
11 then I'll get to Mr. Miranda.

12 MR. JOHNSTON: So Dr. Alland last worked for
13 Novartis 16 years ago. She has no recollection
14 particularly of her work at the time.

15 So she has asked us to ask the plaintiffs a couple
16 of questions, including what is the basis for seeking her
17 deposition. And that's what she has asked us to ask.

18 JUDGE DALTON: Okay.

19 MR. JOHNSTON: How long do the plaintiffs
20 anticipate needing her? And is there any other discovery
21 that could obviate the deposition of Dr. Alland?

22 We've received no response from the plaintiffs
23 other than them telling us they would call Dr. Alland,
24 which we had to tell them we represent Dr. Alland.

25 But we haven't heard anything back in response to

1 her questions, and there's been no further discussions
2 about that.

3 Essentially, she says she has no memory of these
4 issues. And I understand that they -- it's likely this
5 deposition will be, however long it goes, a series of "I
6 don't recall" answers.

7 She would just like some information before she
8 agrees to sit to decide whether or not she wants to try to
9 challenge the subpoena or not. And we haven't heard back
10 from the plaintiffs on that.

11 JUDGE DALTON: Okay.

12 Mr. Elias, why don't you educate me about the
13 scope of your inquiry with respect to Dr. Alland and
14 whether or not some of these things are things that can be
15 sorted out.

16 Like Judge Baker mentioned, I'm concerned that
17 we've got all these unresolved loose ends with respect to
18 discovery because time's a wasting.

19 MR. ELIAS: And, Your Honor, again, I appreciate
20 the concern.

21 These are not issues that we had dealt with in the
22 *Lauris* case because the witnesses were produced. So we've
23 been kind of taken aback at Novartis' response.

24 With respect to Dr. Alland, Dr. Alland had a
25 significant role in the clinical and preclinical stages of

1 the drug development and had a key -- that was the head of
2 safety in that role.

3 I appreciate that Mr. Johnston has had a
4 conversation with her and says she doesn't recall anything,
5 but I can't tell you how many times I've had lawyers tell
6 me their witnesses don't recall anything and then you put a
7 document in front of them and all of the sudden they do
8 recall something.

9 This was a pretty significant portion of her
10 career. And even though we're somewhat removed, this is a
11 very important witness and a very important subject for us
12 that we did not explore in *Lauris* and *McWilliams* and that
13 is the clinical and preclinical phases during the
14 development of the drug.

15 And this is a key person that is a custodian that
16 has been designated in this matter. And we have her
17 documents, and we believe that we are entitled to depose
18 her.

19 What I will tell you, Your Honor, just to echo
20 what you admonished earlier is it has never been my
21 practice to waste time in depositions and unnecessarily
22 question a witness. And I speak for everybody on this side
23 of the table when I say that. And we hear you and we are
24 going to endeavor and we will be respectful of the witness'
25 time and the questions that we ask.

1 But what we can't do is lay out a whole list of
2 questions that we're going to ask the witness prior to us
3 sitting down with the witness so that the witness can be
4 prepared in advance of the questions. That's not something
5 that I typically engage in. I don't think that's the way
6 that the process works, and I don't think that that's
7 productive for our side.

8 So what I can tell you is from our standpoint this
9 is a key witness, and we have some important questions to
10 ask the witness.

11 JUDGE DALTON: All right. Did you ask for a date
12 for Dr. Alland?

13 MR. ELIAS: We noticed -- we noticed a date. That
14 date is -- was for next week. That date is not going to
15 happen.

16 But it was -- when we sent these notices out,
17 Your Honor, we weren't expecting -- because it's never
18 happened before with the former employees in the *Lauris*
19 case -- that Novartis was going to say no, we need a
20 subpoena, and that we're going to, you know, move to quash
21 some of these.

22 So it appears now that the process needs to be not
23 just the notice, but we need to deliver to Novartis a
24 subpoena.

25 What we're not clear about, though, is whether or

1 not Novartis is representing the witnesses. We tried to
2 ask that question during the meet-and-confer and did not
3 get an answer. Are you going to be representing your
4 former employees?

5 Because if you're not, there is nothing that
6 prevents us from reaching out and contacting them under the
7 ex parte rules, from my understanding, and we intend to
8 start reaching out to them directly.

9 But we've been, out of courtesy, trying to go
10 through Mr. Johnston and the Novartis team because we
11 understood that they generally took the position that they
12 do represent the former employees.

13 JUDGE DALTON: All right. Let me have
14 Mr. Johnston back up.

15 So when would Dr. Alland be available,
16 Mr. Johnston? And are you going to require that she be
17 subpoenaed?

18 MR. JOHNSTON: I'm going to require that every
19 non-30(b)(6) witness have a subpoena issued to them.
20 That's my practice even when I depose doctors.

21 JUDGE DALTON: Well, if they're employed by
22 Novartis and you represent them, then they will be produced
23 by notice. They will not be required to be subpoenaed.

24 MR. JOHNSTON: I'm not requiring a subpoena for
25 Ms. Habucky. I'm talking about the former employees.

1 And by the way, I don't know whether I represent a
2 former employee until I have a reason to know whether I
3 represent a former employee.

4 JUDGE DALTON: So here's what we need to get
5 straight between us, Mr. Johnston, is if you're going to
6 direct the plaintiffs not to contact a witness because they
7 fall under the umbrella of your representation, then I'm
8 going to take you at your word.

9 You cannot blanketly preclude the plaintiffs from
10 contacting witnesses who might have relevant information in
11 the case by saying at one point in history they worked for
12 Novartis if you don't intend to represent them. That's not
13 the way it works.

14 MR. JOHNSTON: But it's not --

15 JUDGE DALTON: You can't have it both ways.

16 MR. JOHNSTON: But it's not up to me whether I
17 represent them or not. They're individuals --

18 JUDGE DALTON: So hear me clearly, Mr. Johnston.
19 Hear me clearly.

20 If you do not represent a witness, then the
21 plaintiffs have no ethical constraints with respect to
22 contacting that witness. That witness may or may not
23 choose to cooperate with the plaintiffs. They may or may
24 not be willing to talk to the plaintiffs.

25 But the plaintiffs are under no obligation to run

1 their witnesses through you unless you have an
2 attorney-client relationship with them based on their prior
3 employment. So you either do or you do not.

4 MR. JOHNSTON: I can't say I have relationships
5 with people that haven't authorized me to be their counsel.
6 However -- however --

7 JUDGE DALTON: In that case -- in that case -- in
8 that case, I'm going to instruct the plaintiffs that they
9 may disregard any instruction that you have given them with
10 respect to contacting a witness.

11 MR. JOHNSTON: I've never given that instruction.

12 JUDGE DALTON: Well, it's been represented to me
13 otherwise.

14 MR. JOHNSTON: What I've said is you need to check
15 the ethical rules of particular states.

16 Maryland, for example, requires that you contact
17 the former employee's counsel before reaching out to a
18 former employee. But it's a state-by-state question.

19 JUDGE DALTON: I'm telling you that we're in a
20 United States District Court. And with respect to the
21 procedure for contacting witnesses for issuing subpoenas
22 for compelling the appearance of witnesses at trial or
23 deposition, I am the decider.

24 MR. JOHNSTON: I have never instructed them not to
25 contact people except to their ethical detriment. If

1 there's no ethical problem with them contacting people,
2 I've not told them not to do it.

3 JUDGE DALTON: I am telling you that I am giving
4 them an order from a United States District Court that if
5 you do not represent the individuals involved, that they
6 are free to contact them to arrange for their appearance
7 and/or the acceptance of a subpoena.

8 Understood?

9 MR. JOHNSTON: I'm not -- I'm not sure what that
10 means. Because I will reach out to those people when they
11 tell me that they are going to seek their deposition and
12 see whether they want to be represented or not. And if
13 they do, then I will represent them.

14 JUDGE DALTON: And that's fine. If you represent
15 them --

16 MR. JOHNSTON: If I don't represent them --

17 JUDGE DALTON: Don't talk on top of me again.

18 MR. JOHNSTON: I'm sorry, Your Honor. I
19 apologize.

20 JUDGE DALTON: If you represent them, then, of
21 course, the plaintiffs are duty-bound, honor-bound,
22 ethically-bound and professionally-bound to route all of
23 their communications through you as their counsel.

24 I am trying to establish whether or not you
25 represent some of these people that are on the list that

1 the plaintiffs currently wish to depose. That's where we
2 are.

3 MR. JOHNSTON: Yes, Your Honor. I understand.

4 And what I'm saying is I don't know who ultimately
5 they're going to choose. And I don't have pre-existing
6 relationships with all of those people.

7 I am offering representation to anyone I'm aware
8 they're seeking a deposition from if there's no conflict.

9 JUDGE DALTON: Well, you told me that you do
10 represent Dr. Gallagher.

11 MR. JOHNSTON: Yes. For the four -- sorry.

12 JUDGE DALTON: And you told me that you do
13 represent Dr. Alland.

14 MR. JOHNSTON: That's correct, Your Honor.

15 JUDGE DALTON: And they are former employees.

16 MR. JOHNSTON: Yes.

17 JUDGE DALTON: So you have a right to request that
18 they be subpoenaed and not respond to a notice. You've
19 told me that you wish to have them subpoenaed.

20 MR. JOHNSTON: Yes.

21 JUDGE DALTON: With respect to Dr. Gallagher, I
22 have instructed the plaintiffs to promptly issue a notice
23 and a subpoena for some arbitrary date, understanding that
24 the date is arbitrary because the witness intends to
25 litigate his appearance.

1 MR. JOHNSTON: Yes, Your Honor. I understand.

2 JUDGE DALTON: With respect to Dr. Alland, I am
3 going to direct the plaintiffs to issue a notice and a
4 subpoena for Dr. Alland. What I'm asking, where I am now
5 is asking whether or not you have a date for Dr. Alland.

6 MR. JOHNSTON: I do not.

7 JUDGE DALTON: And how much time would you need to
8 get a date for Dr. Alland?

9 MR. JOHNSTON: I don't know. Do we know?

10 JUDGE DALTON: Well, I'm going to direct you to
11 respond --

12 MR. JOHNSTON: I know she has a medical procedure
13 coming up, Your Honor. But we would try to find a date --

14 JUDGE DALTON: Within the next seven days, give
15 the plaintiffs a date that Dr. Alland would be available to
16 be deposed within the next thirty days. Okay?

17 So seven days from today, provide a date to the
18 plaintiffs that Dr. Alland is available no later than May
19 the -- what is today? 13th. No later than May the
20 14th. All right?

21 MR. JOHNSTON: Yes, Your Honor.

22 JUDGE DALTON: And if that's not doable for -- if
23 you need to tweak a day here or there, the lawyers can work
24 together to work that out. But you understand my point.
25 We need to get this process underway.

1 MR. JOHNSTON: I do, Your Honor.

2 And part of the reason why I think we had a
3 miscommunication is that on Friday they noticed six more
4 depositions. And I was thinking about the question of
5 whether I represent those people, not these four. I know
6 my representation status for the four that we've talked
7 about. I'm not sure about the full six that was noticed on
8 Friday.

9 JUDGE DALTON: Okay.

10 JUDGE BAKER: I wanted to follow up on that.

11 JUDGE DALTON: Let me finish one thing just so I
12 don't get off track.

13 And then here's the other thing that I'm concerned
14 about. I'm concerned about the lag time. I know all of
15 you are busy, you have a lot of other responsibilities in
16 addition to this case, but we need to do a better job of
17 responding to requests for depositions. We can't allow
18 weeks to go by.

19 And again, I'm not casting any aspersion about
20 anybody's punctuality or anybody's responsiveness to
21 requests, but I'm going to help you by giving you some time
22 parameters.

23 So I'm going to direct you all to respond within
24 10 days to a request for a deposition of a witness that you
25 control or delivery of a deposition date. That will be

1 true for you as well as for you, Mr. Elias and
2 Mr. Johnston.

3 So in other words, Mr. Johnston, if you ask
4 Mr. Elias for a deposition date for somebody that's in his
5 camp, then I expect, Mr. Elias, you respond to that -- I'm
6 going to direct you to respond to that with an offer of
7 dates within 10 days, not to respond within 10 days to say
8 we don't have any dates available. In other words, I want
9 some concrete dates within those 10 days.

10 And if there's going to be litigation with respect
11 to the production of that witness, then I expect you to
12 initiate that litigation within that 10-day period.

13 In other words, if you say we're not going to
14 produce this person, even though they're currently in our
15 employ, I expect you to file a motion with the Court as to
16 why it is that you ought not have to produce that person.
17 And we need to get the process going.

18 So the other thing that I'm going to require you
19 to do is respond to a request within 10 days, with the
20 understanding that unless you all negotiate otherwise, my
21 expectation is that the deposition will occur 30 days from
22 the date of your conversation. All right?

23 So in other words, if I ask you, Mr. Johnston, I
24 want to take the deposition of Novartis employee John
25 Smith.

1 You say thank you very much. I have your notice.

2 Ten days from that notice, I want you to respond
3 to the plaintiffs and say "John Smith is available for
4 deposition on these dates," all of which are within the
5 next thirty days, unless you all can mutually agree that we
6 need to take this guy thirty-five days from now because
7 that works best for all of us. All right?

8 So I'm not going to micromanage your calendars
9 except to say that I'm not going to put up with these
10 lengthy delays that are the result of you all either not
11 getting back or not being able to get back with one another
12 in terms of getting the matter scheduled.

13 MR. JOHNSTON: I think that makes a lot of sense,
14 except there's one Philip in that, which is, for example,
15 one of the new people that they subpoenaed we believe is in
16 Singapore, and I don't have any contact information for
17 them.

18 So in this case with these four, it took some time
19 to get in touch with Ms. Alland, who we did not have
20 contact information for, and Dr. Gallagher. I'm not sure
21 I'll be able to do that in 10 days in that case.

22 JUDGE DALTON: Well, in that case you'll have to
23 bring it to the Court's attention if you can't do it
24 because I'm requiring you to do it. If you can't do it
25 physically, then you can let me know that you can't do it

1 physically and tell me why it is that you can't do it
2 physically.

3 The other thing that I am going to require you to
4 do, which reminds me, that with respect to these
5 individuals that you contend that you represent, unless the
6 client will not allow you to accept service of process, I'm
7 going to assume that you will allow the subpoena to be
8 served on you as their counsel once you've notified them;
9 is that right?

10 MR. JOHNSTON: That's fine. Once we establish an
11 attorney-client relationship, we will be asking that of all
12 of them.

13 JUDGE DALTON: If for any reason the client will
14 not authorize you to accept service of process, I'm going
15 to direct you to provide them with a current address or, at
16 least, the last known address that you used in order to
17 contact the witness.

18 MR. JOHNSTON: Yes, Your Honor.

19 JUDGE DALTON: I'm sorry, Judge Baker. Go ahead.

20 JUDGE BAKER: Well, further to this point, how
21 close is plaintiff to identifying everybody you want to
22 depose? We're running out of time here even with
23 Judge Dalton's directive. There's 90 days left.

24 MR. ELIAS: Yes, Your Honor.

25 So we have issued ten notices. And, you know,

1 that's a substantial amount of time that's going to be run
2 against our clock. There will be some additional notices
3 likely of the custodians that you ordered recently
4 production of documents for.

5 I can't say that that's the entire universe; but,
6 you know, we have a finite amount of time, and we're going
7 to use that time wisely. And, you know, with ten
8 depositions, that time -- that's going to take up a
9 substantial chunk of that time.

10 So I think as long as we get these on schedule and
11 get these started and, in the meantime, walk and chew gum
12 at the same time and start developing and start noticing
13 the other witnesses, which we will be doing very soon,
14 that's our intent in order to meet the deadlines.

15 MR. JOHNSTON: Can I respond to that, Your Honor?

16 JUDGE DALTON: Yes.

17 MR. JOHNSTON: On February 7th, we had a
18 conference with Magistrate Judge Baker where we talked
19 about depositions.

20 And I said, Look, we've got to get the deposition
21 notices out. We're going to run into time, and I'm going
22 to need time to contact and prep these people.

23 No deposition notices were issued until
24 March 11th. Okay? And there have been no corporate
25 30(b)(6) deposition notices issued at all.

1 So I'm concerned about this, too, because I don't
2 exactly understand what plaintiffs are doing. And they're
3 going to jam us all up, and I'm concerned about that. So I
4 just share that concern.

5 We didn't talk about Mr. Miranda. Do you want to
6 talk about him?

7 JUDGE DALTON: I do.

8 Let me just -- so I don't lose the thought, with
9 respect to 30(b)(6) depositions, I don't know what the
10 plaintiffs' view is. I expect -- you know, what I usually
11 hear is, well, we can't take the 30(b)(6) until we have all
12 the documents and we don't have all the documents. Once we
13 get the documents -- and it becomes a chicken-egg, catch-22
14 proceeding.

15 But I want to make sure that plaintiffs hear me as
16 well as the defendants, is that when I set the discovery
17 deadline, I set it -- it was with a considerable amount of
18 thought in terms of what needs to be done here.

19 And Mr. Johnston makes a valid point is that, you
20 know, you can't drag your feet with respect to initiating
21 discovery and then expect everything to be done, you know,
22 within a few days in terms of preparing, delivering
23 witnesses, preparing witnesses, and getting that discovery
24 underway.

25 I'm not making any judgment about whether you've

1 acted with dispatch or haven't acted with dispatch. I
2 don't know what you have in terms of documentation. I
3 don't know what you feel like you need in order to move
4 forward.

5 But I will tell you, if you haven't already gotten
6 the message on both sides, is that I'm not impressed by the
7 progress that's been made by the parties in this case to
8 this point with respect to discovery.

9 Whether it's lack of energy and diligence on one
10 side or whether it's the result of hiding the ball and
11 obstruction on the other side, I don't know where the truth
12 lies there. But I suspect it's somewhere in the middle.

13 I just want you to hear me loud and clear. My
14 responsibility in terms of managing this MDL is to get it
15 done and to get it done in a way that allows the parties to
16 have fulsome discovery and fulsome motion practice and to
17 do it out of respect for all of your due process rights,
18 which I'm certainly doing.

19 But I expect the lawyers to be able to handle the
20 case that they've taken on. So just govern yourselves
21 accordingly.

22 Let's talk about Mr. Miranda now, Mr. Johnston.

23 MR. JOHNSTON: So we have offered Mr. Miranda for
24 May 12th. He has previously scheduled vacation during
25 the two weeks around the time period that they had noticed

1 him.

2 JUDGE DALTON: I think the only concern is whether
3 or not he appears live.

4 MR. JOHNSTON: Well, they haven't told me they
5 would accept that date yet.

6 JUDGE DALTON: Well --

7 MR. JOHNSTON: So, I mean, I have no information
8 about what their position is --

9 MR. ELIAS: We'll accept the date, Your Honor.

10 MR. JOHNSTON: Now I know.

11 He has asked, because he's elderly and retired,
12 for an accommodation. I don't need the accommodation.

13 Novartis doesn't need the accommodation. This is
14 Mr. Miranda who is concerned.

15 And as the Court may be aware, Philadelphia
16 reinstated a mask mandate yesterday, and we're in
17 New Jersey, which is right next to Pennsylvania. And
18 Mr. Miranda doesn't even want me present at his deposition.
19 He wants me removed.

20 I'm simply trying to accommodate my witness'
21 health interest and whether or not those health interests
22 are reasonable -- well, whether or not -- I think they're
23 reasonable. Whether or not plaintiffs agree they're
24 reasonable, I'm not sure is their business.

25 He wants -- and by the way, he hasn't been with

1 the company for many years. And I tried to talk to him
2 about this case, and he doesn't seem to remember anything.
3 He may have a flash of memory during the deposition, but he
4 would -- he's willing to appear. He just wants to be
5 remote.

6 JUDGE DALTON: Well, he doesn't have a right to
7 appear remote unless his medical circumstances are such
8 that it warrants it.

9 I don't have anything in front of me other than
10 the representation that Mr. Miranda is concerned and wants
11 to appear remotely.

12 You know, remote is all brand new, right, since
13 COVID, absent some extraordinary circumstances. So I'm
14 not saying that I wouldn't permit Mr. Miranda to be
15 deposed remotely, but I don't have any information in front
16 of me with respect to why it is that he needs that
17 accommodation.

18 MR. JOHNSTON: I don't have any health
19 information. I know his view is he's concerned and he
20 shouldn't have to be in the room with people.

21 And I would note the plaintiffs took two corporate
22 depositions early in this matter remotely. So they've done
23 it and they did it successfully before.

24 If Your Honor wants us to get a declaration from
25 him, I doubt he's got a doctor's note. I think this is his

1 personal concern about his health.

2 JUDGE DALTON: Let me hear from Mr. Elias and see
3 whether or not there's any middle ground here.

4 MR. JOHNSTON: I will just add, I don't intend to
5 be asking for this accommodation unless the witness asks
6 for it, Your Honor.

7 MR. ELIAS: Your Honor, first, I would say that
8 the two previous depositions, corporate depositions, that
9 we did remotely happened several years ago at the height of
10 the pandemic when everybody was doing things remotely and
11 we had to do that remotely.

12 It is our position that the depositions, absent
13 just cause of some sort of health issue, should be in
14 person. And we are not going to -- if there is a
15 health issue, if there's a specific reason, we will meet
16 and confer with Novartis on those issues.

17 And if we have somebody that's immunocompromised
18 that feels that their life is in jeopardy if they appear in
19 person, we're not -- we're going to work with them on that,
20 but we didn't get any of that information in this case.

21 I don't think it's enough to just say this witness
22 is not comfortable being in a room with other people and so
23 it has to be remote. We need something more than that. We
24 don't have anything more than that in this case.

25 And what I am concerned about -- and I think the

1 concern is shared -- is that we don't want to get into
2 making this a habit. This should be the exception and not
3 the norm.

4 JUDGE DALTON: Well, I don't disagree with that.

5 Mr. Johnston has told me that he represents
6 Mr. Miranda.

7 And so, Mr. Johnston, what we're going to do is
8 set Mr. Miranda's deposition for the agreed-upon date,
9 May the 12th. At the moment, I'm going to direct that
10 it be in person with COVID protocols being observed. And
11 that means that whatever the protocols are where the
12 witness resides in terms of masking and social distancing
13 and, if necessary, plexiglass barriers or the other things
14 that would make the environment COVID-protocol compliant,
15 then those things will be required to be instituted.

16 Mr. Johnston, if after consulting with your client
17 that's unsatisfactory, then I would expect you to file an
18 appropriate motion. Judge Baker will take it under
19 consideration as to whether or not some further
20 accommodation for Mr. Miranda is warranted.

21 But based on the record in front of me, that's
22 where we are.

23 MR. JOHNSTON: Thank you, Your Honor.

24 I would just note that that's the first time that
25 they communicated anything about their views of what they

1 would have wanted to hear in order to agree. And so we
2 didn't get to have that conversation because they never
3 responded to my letter telling them of his concern.

4 JUDGE DALTON: Okay. All right.

5 All right. I know you want to take up again this
6 question of treating doctors, Mr. Johnston. So let me give
7 you an opportunity to raise that with me.

8 MR. JOHNSTON: Your Honor, at this point we will
9 today complete production of -- I'm going to get the
10 numbers right -- from the 36 custodians that we had agreed
11 to produce from and that the Court ordered to be produced
12 from in November.

13 That production will be complete today and
14 constitutes 1.4 million pages of custodial documents. We
15 still have some Swiss documents, and the custodians that
16 were the subject of the March 15th order which we
17 talked about at the opening, to go. But they have a lot of
18 documents.

19 They also have 184,000 documents totaling over
20 149 gigabytes of noncustodial sources, including board
21 charts, minutes of various committees, ARGUS productions,
22 CREDI, a host of things. They have DFSs in all these cases
23 that identify the folks who called on the treating
24 physicians, et cetera.

25 So plaintiffs are in a position -- their position

1 was they needed discovery from us first, which, by the way,
2 the Federal Rules don't contemplate.

3 We're in a position where we have six cases that
4 we have sent 28 U.S.C. 1928 letters in in which we believe
5 that the medical records themselves establish that the
6 cases are meritless.

7 We have a case in which the plaintiff was warned
8 of accelerated atherosclerosis before starting on the drug.
9 Those are the phrases that Mr. Elias likes to tell you that
10 these cases are about.

11 We have cases where folks who were warned of a
12 stroke. Then after they had the stroke -- they had a
13 stroke. After they had a stroke, they went back on Tassigna
14 with the doctor saying, you know, you still have an
15 elevated risk of stroke. We have six cases that are
16 similar to that.

17 Plaintiffs who dismissed some cases after
18 1928 letters before the creation of the MDL have said
19 they're not going to dismiss anything.

20 We could move for summary judgment, but the first
21 thing they would do is submit a 56(d) declaration saying
22 they need the deposition of the treating physician.

23 We could cut this inventory by 25 percent, in our
24 view, and maybe as much as half because there's a number of
25 other cases that we think that the deposition of the

1 treating physician would clarify. And that is part of the
2 goal of the MDL is to resolve the inventory.

3 But what happens in MDLs is that plaintiffs want
4 to park meritless cases and wait for some hope for
5 settlement down the road and not whittle the inventory
6 down. And that's where we are right now.

7 We have multiple cases which we think should be
8 dismissed and summary judgment should be granted, but we
9 won't be able to move those forward because of the lack of
10 depositions of treaters and plaintiffs. So we looked at
11 what happened in Seroquel and several other MDLs.

12 But what happened here in this district in
13 Seroquel, and in those cases, depositions of doctors and
14 plaintiffs were allowed with limitations. We've asked for
15 the prescriber and one other treater. That's all we've
16 asked for right now. We believe that that would allow us
17 to move some of this inventory off the docket.

18 The Federal Rules do not normally stage discovery.
19 I realize Your Honor is doing that here for the purposes of
20 managing the MDL, but there are management advantages to
21 allowing us to get rid of some of these cases as well and
22 this is a process that would allow us to do that.

23 There is no reason why the plaintiffs can't be
24 prepared for that at this point. They've got the discovery
25 they said they needed in these cases. And we should just

1 be allowed to move forward and try to take some of these
2 cases out of the pile that is before the Court if there is
3 a basis to do so.

4 JUDGE DALTON: Okay. So the size of this MDL, of
5 course, is vastly different from Seroquel.

6 I just came from a two-week trial in one of the
7 Combat Arms cases which, as you probably know, I think, the
8 largest MDL in the history of the federal courts.

9 And these claims against Novartis in my opinion
10 would not benefit greatly from the winnowing process,
11 having also had a significant amount of experience in the
12 approximately 5,000 individual tobacco cases that were
13 post-Engle progeny cases that I managed a decade or so ago.
14 In those cases, certainly winnowing was a huge part of the
15 process in terms of trying to identify meritless claims and
16 get those off the roster.

17 But our fact discovery here expires on July the
18 15th. I don't, frankly, think it's even possible if I
19 were to permit those depositions to go forward now for that
20 work to be done in light of what remains to be done on the
21 fact discovery side.

22 So I'm not going to change my initial assessment
23 that this case -- while case-specific discovery may be
24 appropriate as I've always indicated from the outset, I'm
25 not going to permit it to go forward until after the close

1 of fact discovery which currently is scheduled to expire on
2 July the 15th. And I'm cautiously optimistic that
3 we're going to meet that deadline.

4 So I'm not going to permit the deposition to go
5 forward on case-specific matters, whether it's the
6 individual treating physician or the prescribing physician,
7 until we get further down the road.

8 MR. JOHNSTON: May I just point out, Your Honor,
9 that that presumes a separate discovery track for these
10 depositions anyway. And so why can't we start that track
11 now and have it end a different time than the general
12 discovery track?

13 JUDGE DALTON: Well, principally because I just
14 said so.

15 MR. JOHNSTON: Okay.

16 JUDGE DALTON: Okay.

17 MR. JOHNSTON: Thank you, Your Honor.

18 JUDGE DALTON: Because I don't believe, as I've
19 already said, that it's going to be a significant
20 improvement on the management of the MDL to permit that
21 case-specific discovery to go forward now. Because even if
22 the winnowing is as significant as you've suggested it may
23 be, from 25 to 50 percent, that's still a relatively small
24 number of cases in the grand scheme of things.

25 So it's not going to enhance the progress of the

1 MDL in terms of its overall disposition, in my humble
2 opinion, which I appreciate the fact you don't agree with.

3 So I don't think that putting that into the hopper
4 now is going to do anything other than complicate our
5 ability to get the case completed through the fact
6 discovery stage on schedule on July the 15th.

7 MR. JOHNSTON: So I just would react to this. And
8 I understand what you're saying, Your Honor.

9 But if half of the inventory were meritless, that
10 inventory is still sitting here. That makes it much more
11 difficult for the parties to move towards any sort of
12 resolution on their own. Because I can't pay on those
13 cases, and they want to be paid on those cases.

14 So that delay is ultimately -- the hope for
15 resolution that's implicit in all MDLs is that the parties
16 will decide at some point to find a middle ground.

17 JUDGE DALTON: Understood.

18 We're 90 days from the close of discovery. So
19 that's where we are.

20 MR. JOHNSTON: Thank you, Your Honor.

21 JUDGE DALTON: You're welcome.

22 Judge Harz, do you have anything on your plate or
23 on your mind that you'd like to raise with the parties
24 while we have everyone together?

25 JUDGE HARZ: Thank you for asking. Hello,

1 everyone.

2 Let me ask counsel who are there. Is there
3 anything that you need to address separately with me at
4 this time?

5 JUDGE DALTON: Anything in the state court
6 litigation that you'd like to bring up?

7 MR. ELIAS: Nothing from the plaintiffs' side.

8 JUDGE DALTON: Mr. Johnston?

9 MR. JOHNSTON: No, Your Honor.

10 JUDGE DALTON: Okay. Great.

11 JUDGE HARZ: Thank you.

12 Thank you for asking.

13 JUDGE DALTON: Yes, ma'am.

14 Judge Baker, what do you have on your agenda?

15 JUDGE BAKER: At the top, we talked about the
16 studies. Is there any separate issue with respect to the
17 ARGUS database that needs to be resolved?

18 JUDGE DALTON: Mr. Biggs, you're the database man.

19 MR. BIGGS: I drew the short straw, Your Honor.

20 At this time we've narrowed the issues, and we're
21 meeting and conferring with the defendants. I'm hesitantly
22 confident that we can reach an agreement on that.

23 There's no issue that's ripe for the Court today.

24 I do expect if there is an issue, though, Your Honor, that
25 it may be ripe before the next conference, though I'm not

1 sure when that will be scheduled. So I'd just ask the
2 Court to advise us how we may be able to ask for a briefing
3 schedule between now and the next time we meet.

4 JUDGE DALTON: Well, you need to do it with
5 dispatch, I guess, is the thing I would tell you. If you
6 all find, you know, that you can't reach an accommodation,
7 you need to bring it to Judge Baker's attention. And I
8 don't know -- I'll let him tell you how he wants that to
9 happen.

10 But, you know, you need to get, either get to yes
11 or get to no as quickly as you can and then ask Judge Baker
12 to intervene if you all can't work it out yourselves.

13 I don't know, Judge Baker, what you'd like to do.

14 JUDGE BAKER: Well, I think we've got kind of a
15 general prohibition on motions. And I'm used to getting
16 motions and setting hearings on motions.

17 I also have, in many cases, had a standing
18 discovery conference set. And we didn't do that here
19 because we were having these other conferences, but I can
20 do that.

21 And that's why -- another question I have, you
22 noticed six more depositions. Are there any issues that we
23 know about today with respect to those six that we can cut
24 through and get done, or was it too recently noticed to
25 know what the problems are?

1 MR. ELIAS: Your Honor, on that issue, other
2 than -- other than is Novartis going to be representing
3 them, accepting service of the subpoena, and are they going
4 to appear?

5 JUDGE BAKER: Well, he's going to get back to you
6 on that. He does need to find them. He's got to talk to
7 them. He's got to get them retained.

8 MR. ELIAS: Right.

9 And whether they're going to file a motion in the
10 individual cases, we don't know.

11 JUDGE BAKER: Well, Judge Dalton has given you
12 guidance on that.

13 MR. JOHNSTON: I will let Your Honor know that one
14 of them is in Germany and one is in Singapore. And so we
15 haven't had a chance to discuss what that means with the
16 plaintiffs yet.

17 JUDGE BAKER: Well, I've been dealing with the
18 Singapore problem for the last three months. I've got two
19 competing 300-page affidavits from Singapore lawyers
20 telling me what Singapore litigation privilege is.

21 And I made rulings on Friday and the Singapore
22 court made rulings on Monday, and we're both trying to
23 avoid stepping on each other's toes. So I don't know.

24 Anyway --

25 MR. JOHNSTON: Can I speak briefly on the ARGUS

1 issue?

2 JUDGE DALTON: Yes.

3 MR. JOHNSTON: So the ARGUS issue is one of
4 impossibility.

5 They've got 207 fields that they want searched
6 which translates into some really large number of searches.
7 It's not just searchable once.

8 And so far the company hasn't been able to
9 actually cause that search to complete and output data
10 because it's putting too much strain on the computers. But
11 I'm still working on it. I'm not prepared to tell them
12 that it can't be done, but I have a technical challenge on
13 that front that I'm trying to work through.

14 JUDGE DALTON: What do you think you need in terms
15 of time to figure out whether or not it can be done?

16 Is it Reissaus?

17 MR. JOHNSTON: I'll let Mr. Reissaus speak to
18 that.

19 JUDGE DALTON: Mr. Reissaus, why don't you come to
20 the podium and educate me a little bit on what the problems
21 are and how much time you think you need to get to the
22 bottom of them.

23 MR. REISSAUS: Sure.

24 So we've been having routine calls with the folks
25 at Novartis that work on this particular computer system,

1 the ARGUS database.

2 And a little more detail about what the issue
3 we're running into is, is that there are -- when this
4 database is searched for clinical trials or in routine
5 matters, the company is not pulling out the same number of
6 fields that plaintiffs have requested here. They've asked
7 for about 270 different data points about each individual
8 case.

9 And then there's an unusual set of search terms
10 that plaintiffs have put together that is a combination of
11 what is used in regulatory submissions, which the company
12 can readily run those.

13 But then there are additional plain text searches
14 that plaintiffs want to run using wild cards and not using
15 the MedDRA dictionary, which is industry standard to
16 identify different types of adverse events and categorize
17 them.

18 So the issue that we're running into is that when
19 you combine searching across 270 fields for 200-plus search
20 terms, many of which have wild cards, you get 70-, 80,000
21 combinations of searches that you're running across every
22 adverse event report in the ARGUS database.

23 JUDGE DALTON: Okay. I get a sense of the
24 problem.

25 Tell me from a practical standpoint, where are you

1 and Mr. Biggs in terms of working together to try to come
2 up with a solution to your concerns.

3 MR. REISSAUS: So the plaintiff sent their list of
4 fields and said let us know which ones you can't search or
5 which ones you can.

6 And so they have included fields that we have to
7 assess. There's things like vaccine fields, medical device
8 fields, ones that don't appear at first glance to be
9 relevant or necessary.

10 So we have to go through and identify, can we
11 whittle this list down to one that will work? And then
12 we're going to have to talk with plaintiffs and see if
13 they'll accept it.

14 But there's also just the technical what's the
15 maximum number of fields we can put into the search to have
16 it run.

17 JUDGE DALTON: Well, I'm not getting any sense of
18 comfort that this is like on the cusp of being
19 accomplished.

20 So I need to hear a little bit more concrete
21 information from you all in terms of what it is that you
22 need in terms of narrowing this request such that it
23 becomes searchable and doable as far as ARGUS is concerned.

24 For instance, have you delivered to Mr. Biggs --
25 and there's a lot of asymmetry of information here, but

1 most of it is on my side -- with respect to what ARGUS
2 needs or requires? Is there, for instance, a finite number
3 of fields that they can search, or is it the way the fields
4 are being defined?

5 Can you help me with that?

6 MR. REISSAUS: Yes, Your Honor.

7 JUDGE DALTON: In other words, if they are asking
8 for 275 and ARGUS says no matter how you define them,
9 describe them, cabin them, or corral them, 150 is our max
10 or 75 is our max, that would be good to know.

11 MR. REISSAUS: And if I had an exact specific
12 number, we would tell plaintiffs and say, let us know the
13 60 that you want. I don't have that today. If I get that
14 number, I will tell Mr. Biggs.

15 Plaintiffs do have date productions from ARGUS
16 already using the methodology that is used with FDA in
17 submissions. So there is a production here.

18 This is talking about going above and beyond what
19 is typical and custom in our experience in litigation as
20 well as what the company does outside of the context of
21 litigation using ARGUS in a regular manner.

22 JUDGE DALTON: Okay. Let me talk to Mr. Biggs for
23 a minute and see if I can get a better appreciation for
24 what it is that he's looking to find.

25 MR. BIGGS: So, Your Honor, I'll say that, to

1 begin, we've been going at this for a while with the
2 defendants and have been asking them for certain
3 information regarding these fields.

4 JUDGE DALTON: So let me try to help you help me.
5 What are you looking for?

6 MR. BIGGS: So the ARGUS production that we asked
7 for the fields that they can produce from --

8 JUDGE DALTON: Yeah, I don't want to hear about
9 that, with all due respect. I don't want to hear about how
10 you describe what you're looking for. I want you to tell
11 me what are you looking for.

12 MR. BIGGS: So we're looking for the adverse
13 events related to Tassigna.

14 JUDGE DALTON: Okay.

15 MR. BIGGS: As well as the -- in our proposal to
16 them, as well as the underlying documentation for a
17 reasonable amount.

18 JUDGE DALTON: Reasonable amount of what?

19 MR. BIGGS: Of adverse events.

20 So our contention is that the underlying
21 documentation --

22 JUDGE DALTON: Let me break this down because I
23 want to make sure I'm with you. All right?

24 So you're trying to make another pass through
25 ARGUS looking for untoward events with respect to the

1 utilization of this drug and you're looking for documents
2 within the company wherein they define what's an
3 acceptable number of adverse events with respect to the
4 drug.

5 Is that what you're telling me?

6 MR. BIGGS: Not quite, Your Honor.

7 So as to certain adverse events --

8 JUDGE DALTON: Yep.

9 MR. BIGGS: -- there's underlying documentation.
10 So the ARGUS database has the adverse events.

11 There's underlying documentation that shows how
12 Novartis chose to categorize those adverse events.

13 JUDGE DALTON: Okay.

14 MR. BIGGS: We believe that the underlying
15 documentation is important to understand the steps they
16 took to categorize certain adverse events and that the way
17 to categorize certain adverse events is important as it
18 relates to the use of Tassigna.

19 JUDGE DALTON: And why is that?

20 MR. BIGGS: So if there are underlying documents,
21 for instance, if the adverse event says that there was
22 swelling in a patient's leg, then that's how the adverse
23 event is categorized, but there's underlying documentation
24 suggesting that that may have actually been a
25 cardiovascular event or an atherosclerotic event. And the

1 company didn't look into that sufficient to categorize it
2 as the latter and, rather, just left it as the former.

3 We feel that that's important to the safety
4 profile of the drug.

5 JUDGE DALTON: Okay. And how is it that you --
6 tell me what you've given to Mr. Reissaus to pass on to
7 ARGUS to try to generate that production.

8 MR. BIGGS: Sorry, Your Honor.

9 They've provided us with a list of the fields, and
10 we provided them with a selection of those fields.

11 Now, we are open, obviously, to meeting and
12 conferring with them and narrowing those. But our question
13 to them was to understand sort of the technical issues that
14 Mr. Reissaus just spoke about. We need to understand the
15 technical issues so that we can help narrow.

16 I think they are working on getting us that
17 information. And hopefully we can do it rather quickly,
18 Your Honor.

19 JUDGE DALTON: Okay. Well, I still don't have a
20 sense of confidence that we have some reasonable period of
21 time within which you all are going to get this sorted out.

22 JUDGE BAKER: I have a suggestion, with your
23 permission.

24 JUDGE DALTON: Yeah, sure.

25 JUDGE BAKER: Rather than open this up for motion

1 practice, is that I require you to file jointly a notice to
2 me -- I mean, via the docket. Judge Dalton will look at
3 it. I guarantee you he will look at it -- a status on
4 these witness issues, if you're having problems with
5 Germany or Singapore, where you are 10 days from now with
6 ARGUS, and whether you're ready for a hearing, for me to
7 resolve those issues. Are you ready for me to appoint a
8 master to go in there and solve the technical problems for
9 you? I mean, whatever it is.

10 And I'll make you do that every 10 days. Give me
11 a notice. Are there any problems? And are they ripe?
12 What do we need to do to make them ripe? Because we're
13 running out of time.

14 So that's my thought. And I'll hear you. I'll do
15 it by Zoom so you don't need to fly everybody down. But
16 that's my thought.

17 But the preamble to that is what I mentioned at
18 the top of the hearing. I really don't want these loose
19 ends. This is to prevent the loose ends. This is to focus
20 you and make sure that you really -- I mean, you're
21 communicating a lot, but you're not closing some of these
22 things; and that's what's causing some consternation up on
23 this end of the courtroom.

24 Is that something --

25 JUDGE DALTON: I think that's fine.

1 I'll just direct you to file with Judge Baker
2 every 10 days starting on the 23rd a status report on
3 ongoing discovery issues. And he'll look at what you've
4 filed; and if he thinks it's necessary to either direct
5 some briefing or to get you on the phone for a hearing, he
6 can do that. So you don't need to file a motion.

7 But with respect to your status, if you have
8 reached loggerheads, for instance, on this question of
9 defining your search terms, indicate that in the status
10 that we can't move forward from here, and then Judge Baker
11 can insert himself in the process and get it resolved.

12 MR. BIGGS: Understood, Your Honor.

13 JUDGE DALTON: And if he needs some briefing,
14 obviously, he'll ask for it.

15 JUDGE BAKER: And when we say 10 days, my thought
16 would be as that rotates through the calendar, some of them
17 are going to be on weekends or holidays. Make it the next
18 business day.

19 JUDGE DALTON: Ten business days.

20 JUDGE BAKER: That's two weeks.

21 JUDGE DALTON: Ten days, meaning -- ten days but
22 if it's on a Saturday, that means the tenth day is Monday.

23 MR. BIGGS: Understood.

24 Thank you, Your Honor.

25 JUDGE DALTON: Yes, Mr. Johnston.

1 MR. JOHNSTON: If I could just speak to this
2 situation.

3 I mean, part of the problem is even though I think
4 that what they've asked for is incredibly objectionable, if
5 I could do it and it wasn't expensive, I would do it and
6 get it over with. I'm having a technical challenge with
7 getting that done. And that puts me in a weird position
8 because I might be willing to give up my objections if I
9 knew I could do it, but I don't.

10 And so that's the problem here.

11 JUDGE BAKER: Well, that's why I want this to know
12 whether -- you've got to find out whether you can solve the
13 technical problem. If not, we'll find a way to either deal
14 with your objection or narrow their request or get a better
15 technical expert.

16 MR. JOHNSTON: Right, because I think it's overly
17 broad.

18 JUDGE BAKER: I understand.

19 MR. JOHNSTON: They want to audit all of our
20 clinical trials and all of our adverse event reporting,
21 which I have never seen done in any -- I was involved in an
22 MDL for a decade. That was never done. So I think this is
23 pretty outrageous.

24 And part of the reason why we have a bunch of
25 loose ends is because they're asking for stuff that doesn't

1 get asked for in this litigation, really. And that's part
2 of the problem I'm concerned about.

3 But I just wanted to make it clear that my issue
4 here is that I can't even decide whether I want to stand on
5 objections because I can't get an appropriate technical
6 answer, but I'm trying really hard.

7 JUDGE BAKER: How many adverse events are there,
8 reports? A thousand? A million? Somewhere in between?

9 MR. REISSAUS: It will be in the thousands with
10 the breadth of what they're asking to search.

11 JUDGE BAKER: Well, how many adverse events are
12 there for Tassigna in its history?

13 MR. JOHNSTON: Thousands.

14 JUDGE DALTON: Okay.

15 JUDGE BAKER: But not hundreds of thousands?

16 MR. JOHNSTON: But not all of these cardiovascular
17 events.

18 JUDGE DALTON: Okay. Just trying to get an idea
19 of the size of the stadium. That's all.

20 MR. JOHNSTON: It's large. And that's the issue.

21 And really there are only two fields in which the
22 events are described.

23 And by the way, I have -- the question of the
24 underlying files is something we're going to have to talk
25 about. Because we've agreed to give them the underlying

1 files for their plaintiffs, but they want the underlying
2 files for people who aren't their plaintiffs.

3 And there's all sorts of issues with that, but we
4 haven't briefed that.

5 JUDGE DALTON: So here's where we are and this is
6 where we need to go -- and both of us are saying the same
7 thing -- is that we can't decide whether or not there's a
8 proportionality problem until we know whether it's doable.
9 Right?

10 MR. JOHNSTON: Right. I agree.

11 JUDGE DALTON: So once we -- once you tell us and
12 tell the plaintiffs, tell the Court and tell the plaintiffs
13 this is doable but we ought not have to do it for these
14 reasons; or this is not doable for this reason; this is
15 what would make it doable and then -- but even making it
16 doable, we think is too much and we want to raise our
17 objections, those are things that you're entitled to do.

18 We've got to move the bus and get there.

19 MR. JOHNSTON: And I understand that.

20 And I would love to be there, and I'm trying
21 really hard to get there. I'm running into technical --
22 you know, talking to people who are technical people.
23 Sometimes it's hard to have the conversation.

24 But we are working on it and I would like us to
25 get there as soon as possible. And that's what we're

1 striving to do.

2 JUDGE DALTON: Okay. Well, in 10 days tell us how
3 you're doing and then we'll go from there.

4 MR. JOHNSTON: Okay. Thank you, Your Honor.

5 JUDGE DALTON: All right. What else can we talk
6 about today that would be helpful in terms of moving us
7 along?

8 MR. ELIAS: Your Honor, one final issue from our
9 standpoint. And, again, this is a loose end. Hopefully in
10 10 days when we file the notice, we'll have some resolution
11 on this.

12 But, Judge Baker, your order of March 15th on
13 the custodial productions, we recognize that there was a
14 delay in getting it to Novartis. But getting those
15 documents is a very high priority for us because we have
16 deponents on that list that we want to take. It's hard to
17 notice them before we get their documents. And then I
18 expect there's probably going to be some objection to their
19 taking of their depositions.

20 So we might be here -- and there's a lot of issues
21 that have to be resolved. So getting those documents is a
22 high priority.

23 Last night at about 9:00 we got an email from
24 Novartis that said, How do you propose that we narrow the
25 search terms for the individuals that were ordered?

1 That was kind of how it was presented to us, which
2 suggests to me that they don't believe that the current
3 search terms that were agreed upon that have the Tassigna
4 anchor are sufficiently narrow. And that's an issue that
5 we have to work through and get resolved right away so we
6 can get these documents.

7 JUDGE DALTON: Okay.

8 MR. ELIAS: But I wanted to flag that because
9 that's a very high priority for us.

10 JUDGE DALTON: Mr. Johnston wants to be heard.

11 MR. JOHNSTON: Your Honor, in the order -- and I'm
12 trying to find where I have it written down.

13 Do you know where it is?

14 In the order, Magistrate Judge Baker stated that
15 as to the apex -- I'm going to call them apex custodians
16 that he ordered produced for a short time -- that we needed
17 to adjust the search terms to exclude other products.

18 The plaintiffs haven't -- we raised that with the
19 plaintiffs. They haven't come to us to say how are we
20 going to achieve what Judge Baker ordered. It's in the
21 order.

22 And so all we're saying is, how are we going to
23 implement what Judge Baker ordered in his order where he
24 said that we need to modify the search terms to try to cut
25 out other products.

1 I've got some suggestions, but their response last
2 night was "I don't know what you're talking about."

3 But it's in the order.

4 We're happy to talk to them about it. We want to
5 talk to them about it, but we haven't had that
6 conversation.

7 JUDGE BAKER: Have it and report in 10 days.

8 MR. ELIAS: Yes, Your Honor.

9 JUDGE BAKER: And if I need to modify my order,
10 I've got a pen and a computer.

11 JUDGE DALTON: Okay.

12 MR. JOHNSTON: I do have one --

13 JUDGE DALTON: Yes, sir.

14 MR. JOHNSTON: -- process matter.

15 We have talked to your courtroom security officer
16 and Ms. Gomez about this.

17 Every time we come, we run into a gauntlet at the
18 front because we don't have an order that says we can bring
19 electronics that has our name on it.

20 Would the Court be okay if we jointly prepared an
21 order with a list of names of folks we expect to
22 participate in these proceedings going forward that the
23 Court would order, just to make the life of the folks at
24 the front easier?

25 JUDGE DALTON: Sure. I'm happy to do that.

1 MR. JOHNSTON: Thank you, Your Honor.

2 JUDGE DALTON: Okay. Great.

3 Well, thank you all for your input. We'll look
4 forward to getting a report with some significant progress
5 the next time we come together.

6 And, of course, Judge Baker and I will be in touch
7 with respect to your 10-day submissions.

8 And we want to -- we sincerely want to help you
9 all get through the process, but we also want to make sure
10 that we are mindful of the time parameters that we set and
11 keep you all motivated to get done what you need to get
12 done so that we can get the case resolved, get the cases
13 resolved.

14 MR. ELIAS: Thank you, Your Honor.

15 JUDGE DALTON: Thank you.

16 We'll be in recess.

17 (Proceedings adjourned at 12:14 p.m.)

18 *****

19

20

21

22

23

24

25

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

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.

April 20, 2022

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