

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.,	:	
	:	
Plaintiff,	:	
	:	Orlando, Florida
v.	:	December 6, 2021
	:	1:31 - 2:17 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 Todd R. Friedman

10

11 Counsel for Defendant:

12 Robert E. Johnston

13 Elyse A. Shimada

14 Joe G. Hollingsworth

15 Grant Hollingsworth

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

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

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

MR. ELIAS: Richard Elias on behalf of the
plaintiffs.

MS. WICHMANN: Lawana Wichmann on behalf of
plaintiffs.

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

JUDGE DALTON: Good afternoon to all.

MR. OXX: Chris Oxx on behalf of the plaintiffs.
Good afternoon.

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

MR. FRIEDMAN: Todd Friedman on behalf of the
plaintiffs.

JUDGE DALTON: Good afternoon.

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

MS. SHIMADA: Good afternoon, Your Honor.

1 Elyse Shimada for Defendant Novartis Pharmaceuticals
2 Corporation.

3 MR. GRANT HOLLINGSWORTH: Good afternoon,
4 Your Honor. Grant Hollingsworth for Novartis.

5 MR. JOE HOLLINGSWORTH: Your Honor,
6 Joe Hollingsworth on behalf of Novartis.

7 JUDGE DALTON: Good afternoon, all.

8 I'm not sure if Judge Harz was able to join us.
9 Judge Harz, are you with us?

10 JUDGE HARZ: Yes, sir. I'm here.

11 Thank you. Good afternoon.

12 JUDGE DALTON: Good.

13 Well, good afternoon and thank you for joining us.

14 So I've had a chance to look at your agenda.

15 What I'd like to do is let Judge Baker take over
16 and talk to you initially about where you are with respect
17 to document production. It looked to me like some good
18 progress was being made. So I want to commend the parties
19 there.

20 I know the plaintiffs are probably in the early
21 stages of your review of the materials that were produced
22 by Novartis.

23 But, Mr. Johnston, you and your team, I want to
24 tell you that I'm very appreciative of the initiative that
25 you all have shown in terms of turning to our requests at

1 Judge Baker's direction with respect to production of
2 documents. So things seem to be moving in the right
3 direction there.

4 Let me let you take -- Judge Baker, do you have
5 some specific things you want to talk to them about?

6 JUDGE BAKER: Well, let me ask counsel for
7 Novartis, since the time of your status briefing and the
8 document filed on November 22nd, any updates?

9 MR. JOHNSTON: Yes, Your Honor.

10 I think there are --

11 JUDGE DALTON: Counsel, by the way, if you're
12 fully vaccinated and you are comfortable removing your
13 mask, when you're at the podium, you can remove your mask.
14 Otherwise, I would like for you to leave them in place.

15 But we're a long way from out of the woods here.
16 But we're making a little bit of progress.

17 So if you're fully vaccinated at the podium, I
18 know it helps us here and I know it helps the court
19 reporter.

20 But if you're uncomfortable taking it off, you can
21 leave it on.

22 MR. JOHNSTON: Thank you, Your Honor.

23 JUDGE DALTON: Yes, sir.

24 MR. JOHNSTON: Your Honor, let me just give you a
25 brief update.

1 On November 9th, we produced 134,945 documents
2 from 20 custodians. On the 16th of November, we
3 produced 150,030 documents. And then on December 3rd,
4 we produced an additional 71,793 documents.

5 The total produced in the cases that are part of
6 this MDL at this point is 356,768 documents. Obviously,
7 there's millions of pages.

8 And then if we include the 468,215 documents that
9 had been produced in prior litigation, that means that
10 there have currently been produced 824,983 custodial
11 documents in this litigation.

12 In order to meet the Court's deadline, we expanded
13 our document review team by 176 attorney reviewers,
14 bringing our team up to 223 attorney reviewers, essentially
15 the size of a moderate to semi-large law firm added to the
16 team.

17 And the documents that I've just discussed have
18 been through first-level review -- 759,187 documents from
19 the agreed custodians and the agreed search terms have been
20 reviewed at first-level; 24,000 of those documents have
21 currently been withheld for relevance undergoing a higher
22 level review.

23 It's not that we are withholding all those
24 documents. We've got an elevated level of review. And
25 some of those documents will be produced.

1 There are also 32,000 documents that have been
2 elevated for higher review for privilege. Again, those are
3 not documents that we are saying we are withholding. We
4 have elevated those for an additional layer of review.

5 The good news is we expect to be able to complete
6 the review of those groups of documents and produce what
7 we're going to produce, either unredacted or in redacted
8 form, by the Court's deadline.

9 There are two aspects of that that I want to flag,
10 though. There are 4,000 Excel spreadsheets that contain
11 data not only about Tassigna, but about other Novartis
12 products. And because those are in native Excel and are
13 quite large, that's taken a lot of time for us to review.

14 We talked to the plaintiffs last week, and I'll
15 let them tell you what their understanding is. But our
16 understanding is they have agreed as to those 4,000 Excel
17 spreadsheets, they would agree to a 60-day extension. And
18 we would continue to talk because I think it's possible
19 that they might decide they don't even want some of these
20 things.

21 These are -- some examples, there are documents
22 that are regular updates on adverse event reports from the
23 hematological business. Those would include Tassigna
24 reports. But they would also include other hematological
25 medicines that are not even involved with CML.

1 We understand they might want those reports about
2 -- the adverse event reports for Tassigna, but there's a lot
3 of other stuff that has to be redacted.

4 Similarly, there are some budgeting documents that
5 would have line items for Tassigna but also have line items
6 for the rest of the hematological franchise.

7 So I think we agreed to work that out outside of
8 the confines of the current deadline, if that's acceptable
9 to the Court.

10 The other caveat I would offer is that January 1
11 is a Saturday, which is the date that the Court set. The
12 plaintiffs' PFSs are due on the 1st also.

13 We discussed perhaps pushing the deadline back to
14 that following Friday, January 7th, as the due date for
15 production and for the production of the plaintiffs' PFS
16 forms that would be due, otherwise, on January 1st.

17 So that is -- I would also just let you know that
18 as to the second grouping of documents for which there
19 isn't a current deadline, which would be those
20 custodians and search terms that were added by
21 Magistrate Judge Baker's order, we have reviewed
22 637,000 documents that fall within that category. That
23 review is ongoing. We will produce many of those by
24 January 1st.

25 And so we feel like we're in pretty good shape as

1 to that second category that no deadline was set for in
2 your prior order.

3 JUDGE BAKER: Let me hear from the plaintiffs in
4 terms of your reaction to the status of things and how your
5 review is proceeding.

6 MR. ELIAS: Thank you, Your Honor.

7 Richard Elias for the plaintiffs.

8 I can't, as I sit here right now, confirm the
9 exact number, but what Mr. Johnston says sounds correct.
10 They have made substantial productions, one of which was
11 made on Friday. And we're still uploading those documents.

12 In terms of the agreement on the 4,000 Excel
13 spreadsheets or so, yes, we have agreed to give them a
14 60-day extension.

15 What we've asked for is, in the meantime, to get a
16 few exemplars so we can see if these are documents that we
17 would consider a priority. And if we could get those
18 documents and we do consider them to be something that has
19 a priority, we'll work with them on accelerating that
20 particular category of production. But we don't really
21 foresee any issue, and we do agree to the extension.

22 With respect to the extension of January 7th,
23 I think all parties agree that, given that the deadline
24 falls on January 1st, both their production deadline as
25 well as our deadlines for the PFS should be extended to

1 January 7th, if the Court is okay with that.

2 In terms of the review, we uploaded the documents
3 and are in the process of uploading the documents. We are
4 in the process -- we are reviewing the documents and
5 assembling the document review team as well.

6 We have not been through 800,000 documents at this
7 point. And are setting up what is going to be a very
8 efficient, targeted review of the documents that have been
9 provided, likely based on word searches and certain things
10 that we know based on our knowledge of the case and the
11 documents.

12 JUDGE BAKER: Let me ask a question that you may
13 not be able to answer it in the way that I ask it.

14 MR. ELIAS: Okay.

15 JUDGE BAKER: In terms of harvesting useful
16 information, where do things stand? Are you finding that
17 search terms have worked to get you what it is you need and
18 things that you can work with? Are 90 percent of these
19 pertinent or 10 percent of them pertinent? What are you
20 seeing?

21 MR. ELIAS: I can't -- I've got to be careful --

22 JUDGE BAKER: Well, that's why I prefaced my
23 question.

24 MR. ELIAS: -- in terms of exposing how the
25 sausage is made.

1 But what I will say is, in the past, with the
2 Lauris case, these are the first time -- what we're seeing
3 is not really new to us. You know, some of the players --
4 and obviously there are new players that are involved. But
5 in terms of the terminology, in terms of how the -- you
6 know, who are involved in the relevant emails, the roles,
7 the positions, and what the key terms are, we have a pretty
8 good handle on that.

9 So what I can tell you is, so far -- and I'm going
10 to caveat this because we have not yet had a chance to go
11 in-depth into the documents that they've produced. But
12 word searches, in conjunction with other methodologies,
13 have been successful in harvesting relevant information.

14 What I can tell you is when you get a database in
15 documents as large as we have, there are a number of
16 documents that are not relevant or are marginally relevant.
17 I can't give you a ratio. I don't know as I'm standing
18 here right now what it is. But so far what I can say is
19 that I think we are effectively reviewing the documents,
20 and we'll effectively be able to.

21 But I really won't be prepared and my team won't
22 be prepared to answer that question in more detail in terms
23 of whether there are any issues until we have a chance to
24 get their full production uploaded and see what we have.

25 JUDGE BAKER: Let me ask, Judge Harz, do you have

1 any questions about status issues?

2 JUDGE HARZ: No, I don't. Thank you.

3 MR. ELIAS: And if Your Honor -- if I may on one
4 thing, and, again, we're not in a position to analyze this
5 yet; but as we've indicated, as we review certain material
6 and certain custodians appear to be involved that we
7 weren't anticipating or weren't anticipating during certain
8 time frames, you know, we're certainly seeing -- and
9 there's a potential cutoff for the information that is not
10 provided that is relevant, that is pertinent to what we're
11 looking at, we're going to be assembling that and, if
12 necessary, working with Novartis to help cover those gaps.

13 And hopefully we can meet and confer and achieve
14 that. Otherwise, we would have to come to the Court. But
15 at this point, it is way too early to assess whether
16 there's any issue.

17 JUDGE BAKER: In your status report, the parties
18 indicate they are requesting leave to submit a Rule 502
19 order.

20 Let me just say you don't need leave to request
21 it. You're going to need leave to get it. But the -- I
22 mean, you file a motion.

23 Well, anyway, there are different practices in
24 different parts of the country and everything else. But I
25 don't know what you want in your proposed 502, whether

1 there's agreement.

2 I am not a big fan, let me just say that.

3 502 says what it says. And it says the Courts can
4 issue orders. And I -- ever since we've gone through
5 different permutations of Rule 502, I've studied the issue
6 and got the latest Sedona draft here. And I'm just
7 wondering, given the resources put into the review by the
8 defendant, whether there's a need.

9 But on the other hand, there's a lot of documents,
10 and things get through. And we don't want to punish people
11 for -- we've got strict deadlines here.

12 So all of that said -- and I want to hear from
13 both of you on this. But my thought is file a motion with
14 what it is you want and put some support in there for the
15 circumstances of this case as to what provisions you want,
16 what deadlines for solving problems, or whatever it is.

17 But since you're standing there, why don't you go
18 ahead and tell me what your understanding was of the
19 reference in this status report.

20 MR. ELIAS: My understanding is certainly the
21 502 order is something that is being driven by primarily
22 Novartis. We have in the past in several of the other
23 cases agreed to an order. I think it's fairly non --
24 fairly noncontroversial. And we don't have a problem
25 entering into that order in this case as well.

1 JUDGE BAKER: But, again, you say "this order."
2 There's a lot of different 502 orders.

3 And one of the questions -- and the reason that I
4 find this a somewhat fraught subject, what do we do with
5 the fact -- let's say there was a trove of 10,000 killer
6 documents that should not have been produced but you got
7 them. You read them. Your whole team has read them.

8 What are you supposed to do with that knowledge?

9 MR. ELIAS: That's a good question.

10 JUDGE BAKER: You can't excise it. You can't even
11 do a jury instruction to tell you to disregard it. Do we
12 prohibit you from making any requests based on it?

13 I mean, I just don't know. I don't know the
14 answer to that. I don't think Sedona has an answer to
15 that.

16 And if there are documents produced on
17 December 26th and come -- of 2021 and it turns out in
18 late 2022 somebody thinks some of those are privileged, is
19 that too late to call them back? I mean, all the
20 depositions have been taken.

21 I mean, anyway, there's a lot of different kinds
22 of 502 orders.

23 MR. JOHNSTON: I appreciate that, Your Honor.

24 And we've agreed to one, a prototype that we've
25 used in other cases.

1 Frankly, as I'm sitting here right now, I don't
2 know what the answer to those particular questions are in
3 terms of -- and I don't know if Ray -- I don't think any of
4 us have the order and have studied it and are prepared to
5 speak line by line as to what it is.

6 What I can say is I appreciate what Your Honor has
7 raised. And at the end of the day, we're going to do what
8 the Court prefers first. So if it's your preference not to
9 enter one, we would abide by that.

10 But, again, we have a prototype that we've used in
11 the other cases with Novartis that we have not objected to.
12 I'll let Novartis speak on the primary issues. But we'll
13 do what the Court prefers.

14 JUDGE DALTON: While you're coming up,
15 Mr. Johnston, let me just echo some of what Judge Baker
16 says, Mr. Elias. And that is that it's the consequences of
17 the 502 order that cause us heartburn down the road, as
18 well as, you know, the problems that it may cause the
19 lawyers or the companies in terms of -- and, frankly, the
20 plaintiffs in terms of, you know, how do you put Pandora
21 back in the box? Or how do you put the evil back in
22 Pandora's box?

23 And we struggle with that because oftentimes there
24 are, you know, draconian sanctions that are sought as a
25 result of the disclosure -- inadvertent disclosure and then

1 clawback.

2 The cat is out of the bag. Depositions have
3 already been taken. In some cases, those videos are in the
4 can. And then you go back and try to excise in accordance
5 with objections that come later; and the testimony then
6 becomes nonsensical or, worse, misleading in terms of what
7 the witness' position actually was.

8 So one of the things that we need you all to give
9 some thought to is not so much the terminology about what
10 can be clawed back, when can it be clawed back, under what
11 circumstances can it be clawed back, but give some thought
12 to what are the consequences of an inadvertent disclosure.

13 Anyway, I didn't mean to jump in there.

14 Because I end up usually having to suffer the
15 consequences of trying to fashion some remedy as a result
16 of an inadvertent document disclosure.

17 Mr. Johnston?

18 MR. JOHNSTON: We will work together to fashion a
19 proposed order that takes into account, to the extent that
20 we possibly can, the concerns that you all have expressed.

21 I would say that this is the prototypical type of
22 case in which a 502(d) order is appropriate. We're moving
23 through hundreds of thousands of documents in very short
24 order, and we have a very good review team. But it's
25 likely that something will get missed.

1 And the point of this order is to facilitate the
2 prompt production without the administrative delay that
3 would be provided by a punctilious review, even if we're
4 doing a good review.

5 And the Federal Rule of Evidence 502 is a rule of
6 evidence. So that means that the document that was
7 inadvertently produced can't come into evidence.

8 I understand that there is this issue with the cat
9 out of the bag. But it seems to me that the first level of
10 analysis is whether the document, if determined to be -- if
11 challenged on clawback and the Court determines the
12 document to be privileged, whether that document could be
13 admitted at trial. And I realize there's a host of other
14 horribles.

15 But that's my client's concern, is that if we have
16 a privileged document, that because we're employing
17 200-plus attorneys to review these documents quickly in
18 order to facilitate moving the case forward something slips
19 through that is critical, you know, I just think this is
20 the kind of case where this order makes sense. But what
21 I'm hearing you all say is that you're willing to consider
22 it.

23 And the reason for putting it on the agenda was
24 that we had an order that said we couldn't make any
25 motions. So if we have leave to file that motion, we'll

1 work together to put together a proposal for Your Honors to
2 consider.

3 JUDGE BAKER: All right. And as far as I'm
4 concerned, because I think I'm going to take the first shot
5 at looking at this thing, if it's an agreed motion, it
6 still needs to be supported as to the issues we've been
7 talking about.

8 If there's disagreement, I'll leave it to you
9 whether you want to do it as a joint motion with these
10 disagreements or whether you want to file the motion and
11 let them file an objection or a response.

12 It's faster if it comes in with one document. But
13 we're moving along, so I'll leave that to you. Normally,
14 it's a motion and response and ruling. But if I need oral
15 argument, I know where to find you.

16 MR. JOHNSTON: I understand.

17 And I hope that we will be able to make a joint
18 submission. We have before. But we'll see.

19 I forgot one thing to mention, which is one of the
20 reasons why it's so important in this case for us is,
21 obviously, 502 recognizes that the parties can make an
22 agreement about clawback, but that agreement under 502 is
23 only enforceable between the parties to the agreement.
24 Right now we know who the players in this MDL are; but
25 six months from now, there might be other players.

1 And an order would be binding on all the parties
2 to the litigation. And that's one of the reasons why it's
3 important to have an order rather than just an agreement, I
4 think, too.

5 JUDGE BAKER: And, coincidentally, 502 makes
6 specific reference to federal and state simultaneous
7 litigation, which is our situation here.

8 MR. JOHNSTON: Right. Exactly, Your Honor.

9 We'll put something together, Your Honor. We just
10 wanted to be able to file something for your consideration,
11 which I assume we now have.

12 JUDGE DALTON: Thank you.

13 So the next thing on the agenda was to talk about
14 where you all are in terms of your conversations about
15 depositions of treating physicians.

16 Do you all have an update for me? Or do you just
17 want to continue to put that on there at my request and we
18 continue to visit it?

19 So Mr. Elias.

20 MR. ELIAS: Sure.

21 I mean, that was put on the agenda at Novartis'
22 prompt. From our standpoint, as the Court has advised, we
23 are willing when the Court is ready to talk about
24 depositions in individual cases.

25 It is our position, as the Court has stated, that

1 the time for those would be after the completion of general
2 discovery that's set forth in the current case management
3 order. And we would need to come up with some sort of a
4 protocol on whether there's going to be bellwether cases or
5 what type of discovery would happen in individual cases.

6 But it remains our position that the time for
7 individual depositions in this MDL, if any -- when I say
8 "individual depositions," depositions of treating
9 physicians in individual cases, case-specific, would be
10 after the general -- the current schedule on general
11 discovery.

12 JUDGE DALTON: Okay.

13 Mr. Johnston.

14 MR. JOHNSTON: Thank you, Your Honor.

15 We did ask to put this on, first, at your
16 invitation that it would probably be an agenda item for
17 a while. But I do have a couple things I want to say to
18 the Court about this.

19 You know, Novartis' view is it has done nothing
20 wrong in these cases and it will prevail in these cases,
21 and it looked forward to vigorously meeting the merits of
22 the cases because we believe we have very good cases.

23 Unfortunately, as the MDL is currently structured,
24 Novartis has had to engage in millions of pages of
25 documents requiring the hiring of essentially another large

1 law firm to conduct the review and to provide that
2 discovery to plaintiffs, who have only got the burden of
3 filling out 23 PFS forms at this point.

4 In fact, the plaintiffs now have access to more
5 than 800,000 documents currently and can already begin to
6 formulate their strategy for depositions of Novartis and
7 its employees.

8 The Court has awarded each side 140 hours for
9 depositions. And we have no doubt that early in the year,
10 the plaintiffs will begin to take corporate and fact
11 depositions based on these documents.

12 And the defense of those depositions will add an
13 additional burden and cost to NPC's current burdens as well
14 as burdening its ongoing operations and employees.

15 But the Court has precluded Novartis from taking
16 any depositions of plaintiffs, their prescribing
17 physicians, and their treating physicians. There is no one
18 that Novartis can spend its 140 hours of deposition time on
19 as the MDL is currently structured.

20 Novartis is very confident that if discovery is
21 afforded, it would be able to prevail on many of these
22 cases before -- on summary judgment on issues such as
23 whether the prescribing physician would have prescribed
24 Tassigna anyway; whether there is a basis for specific
25 causation, which as the Court is aware, resolved the

1 Seroquel MDL before Judge Conway of this district, also
2 involving cardiovascular disease where two summary
3 judgments were granted finding that specific causation
4 could not be proven and that MDL was effectively ended.

5 As structured, NPC submits that the process does
6 not satisfy the requirements of Rule 1 to arrive at a just
7 and efficient resolution of the cases.

8 So we reiterate our request that the Court allow
9 NPC to take case-specific depositions in this MDL soon or
10 now to resolve as many cases as can be resolved promptly
11 and efficiently.

12 The Court can decide these motions, regardless of
13 whether it has the ability to try the cases. At the end of
14 the day, under *Lexicon*, it can grant summary judgment.

15 So we urge the Court to provide a path for NPC to
16 obtain judgment where appropriate without needing to wait
17 until all of the discovery of Novartis is complete.

18 And to that end, we have a suggestion. We have
19 several cases in which discovery was taken before the MDL
20 was created, not of everyone, but sometimes a plaintiff's
21 deposition, sometimes a treater's deposition.

22 We would suggest it might make sense for us -- we
23 believe that that testimony is sufficient in many of these
24 cases to grant summary judgment.

25 We would suggest it might make sense for us to

1 draft and file those motions so that the Court can see how
2 those issues play out at the actual depositions to see
3 whether there's a path forward to allow us to try to find a
4 way to efficiently end this MDL.

5 The one caveat I would say is that in order to do
6 that we would need leave to refile summary judgment at the
7 close of discovery without prejudice to the early filing on
8 a limited record.

9 So that's one suggestion we have that might help
10 us begin to grapple and understand better how we could move
11 these cases forward. And we offer that to Your Honor as
12 something to consider as well.

13 We think it's important. If we could knock out
14 five cases right now, that would be useful for all of us.
15 And if we can't, we can't. And we would know where that
16 stands.

17 But we can't really defend ourselves at all as the
18 current schedule is structured until after the close of
19 general discovery in this MDL.

20 JUDGE DALTON: All right. Well, thank you,
21 Mr. Johnston.

22 MR. JOHNSTON: Thank you, Your Honor.

23 JUDGE DALTON: I'm not persuaded that I should
24 waver from my original inclination that this case ought to
25 proceed initially on the question of general causation in

1 terms of whether or not your drug does cause or contribute
2 to the deleterious consequences that are attributed to it
3 by the plaintiff; and that you have all the due process to
4 which you're entitled to fully litigate that question about
5 whether or not the drug in question is a general cause of
6 the consequences, as I've already mentioned, are attributed
7 to it by the plaintiffs; after which if the plaintiffs are
8 able to overcome that threshold, then you'll have an
9 opportunity, I can assure you, to conduct specific --
10 case-specific discovery with respect to your concern about
11 the warning issue in terms of whether the physicians, had
12 they been in possession of all of the information, which
13 I'm confident will be developed in the course of the
14 primary discovery phase.

15 My own view, Mr. Johnston, is that any motion you
16 would file even with the deposition testimony taken today
17 would not be on a complete record because the physicians
18 would not have all the information which may be developed
19 during the course of the discovery process, which is
20 currently in existence, to offer an opinion about whether
21 or not that would have changed their recommendations.

22 So I guess we just have to respectfully disagree
23 with one another in terms of whether that would actually be
24 a case-winning strategy for you or whether it would simply
25 give me a motion to resolve on an incomplete record that I

1 would then have to defer consideration of until all of the
2 discovery was completed.

3 So that's how I see the situation. And I
4 appreciate the fact that you disagree with that.

5 I don't know yet, as I've indicated previously,
6 exactly how I'm going to order or structure the
7 case-specific discovery. I have a number of options, one
8 of which would be to not do it in the MDL and send it back
9 to the originating court. I think it's unlikely that I
10 would do that.

11 Another way to do it would be to ask the
12 plaintiffs or direct the plaintiffs to make some selection
13 amongst their cases of what we'll call, for lack of a
14 better term, maybe bellwether case considerations and to
15 let them designate some number of cases or have me give
16 them some number of cases to designate and then allow you
17 to proceed with the specific -- case-specific discovery
18 with respect to a limited number of cases moving forward.
19 Maybe do them in waves.

20 Some of that will depend on how many other
21 tag-along cases we get, what our universe of cases, you
22 know, looks like as the MDL case gets fully fleshed out.

23 So the reason I -- the reason I like to put it on
24 the agenda to talk about is that it's a little bit of a
25 moving target in terms of how things develop as we go

1 forward.

2 But I'll say, again, what I've said previously, is
3 I appreciate and respect your concern about your client's
4 need to inquire of the prescribing physicians whether or
5 not this additional information, had it been known to them,
6 would have impacted their decision or whether the risk of
7 the -- the risk of nonprescription so significantly
8 outweighed via the benefits that they would have elected to
9 pursue some other course of treatment.

10 I don't know the answer to those questions. I
11 suspect you -- I know you think you do, but we'll see, I
12 guess, what the answer to these questions would be.

13 So I'm going to stay on track with what I've
14 described in terms of the development of discovery. And at
15 least in my opinion, that's the most efficient way for us
16 to afford both sides the flexibility that they need to
17 investigate and prosecute their cases and defend their
18 cases.

19 MR. JOHNSTON: Thank you, Your Honor, for letting
20 me lay out our argument.

21 I would say there are several other options
22 besides the two you outlined for selecting cases. We
23 object, obviously, to letting the plaintiff choose the
24 cases.

25 JUDGE DALTON: I mean, don't -- there's always a

1 risk, I guess, when I sort of share my thinking with you
2 all that you're going to take it as the gospel. As I said,
3 the reason I want to talk about this every time we get
4 together is because it's a moving target.

5 I've not made any final decision on whether or not
6 you'll pick or they'll pick or I'll pick or who will pick,
7 you know, the cases. A lot of that will depend on, you
8 know -- I mean, obviously, my fund of information goes up
9 incrementally every time we get together, as does
10 Judge Baker's and Judge Harz's as well.

11 So we'll be better informed about how these cases
12 should -- what we want to accomplish, which I suspect is
13 what you all want to accomplish, even though everybody has
14 got a slightly different agenda, is to try to -- if we're
15 going to get to bellwether trials or if we're going to
16 start segregating the pool in some way for disposition,
17 that we do it in a way that gives everybody the most
18 meaningful information about how are all of these cases
19 going to eventually resolve.

20 Are they going to resolve -- maybe they're not
21 going to resolve in a way that has a consistency or a
22 pattern. Usually they do. But perhaps not.

23 You know, maybe they are all on track for summary
24 judgment or a defense verdict. Maybe they are all on
25 track, you know, for plaintiffs' recovery and it's a

1 question of, you know, how much in terms of each individual
2 plaintiff.

3 You know, I have no way of pegging that at the
4 moment. I suspect I'll have some thoughts on it as we get
5 farther along. So we'll see.

6 MR. JOHNSTON: Thank you, Your Honor.

7 JUDGE DALTON: Plaintiff fact sheets.

8 It looks to me like you all think you're on track,
9 based on what I heard here, to meet, assuming that we
10 extend the deadline out to January the 7th so it
11 doesn't interfere with your football watching and your New
12 Year's Eve revelry.

13 MR. ELIAS: Your Honor, just briefly, we are as of
14 right now on track and expect to meet the deadline.

15 JUDGE DALTON: Okay. And what are you all hearing
16 in terms of the universe of cases out there about potential
17 new cases?

18 Mr. Elias, your team, I'm sure, is in touch with
19 lawyers around the country that either have or are thinking
20 about bringing some of these claims?

21 MR. ELIAS: Your Honor, we are.

22 Candidly, I'd say at this point the universe of
23 claims lies with us. We have a number of unfiled claims
24 that still need to be brought, and we will be bringing
25 more.

1 There's three additional cases, I think, since the
2 last time we met that have been brought in, then
3 transferred into this Court. And I would imagine by the
4 next time that we meet, there will be several others.

5 I don't know what the exact number is. But I
6 would imagine anywhere in the realm of between 5 and 15
7 additional cases will be brought.

8 JUDGE DALTON: Okay. So it sounds like it's a
9 manageable number, at least in terms of tagalongs.

10 Obviously, you know, the thing that happens that
11 can upset the apple cart is if we get deeply into the MDL
12 and then suddenly hundreds of new cases that have been
13 incubating for reasons which I'm always perplexed about --
14 frankly, I don't understand it -- where, you know -- to
15 some extent, I understand it if the case is -- and I don't
16 mean this pejoratively -- are being recruited. Recruited
17 in the sense that the word is getting out to people that
18 they may have a claim and they decide to bring it.

19 But the ones that you all know that are in your --
20 you already have a client connection or a connection with a
21 lawyer or a law firm somewhere in the country that has one
22 of these cases, I would encourage you to bring them -- tell
23 them to bring them sooner rather than later so we can
24 figure out.

25 Because it will be important to me if I do end up

1 agreeing to bellwether trials and we start -- I start
2 looking at the possibility of maybe setting up waves. You
3 know, will we be looking at waves of 10, waves of 20, waves
4 of 5?

5 So it becomes important for me to know what the
6 universe of the cases is likely going to be like so I set a
7 schedule that gets all the cases developed, gives you all
8 the opportunity to do it in a comprehensive way but yet
9 allows me to get the cases resolved and discharge my
10 portfolio and mandate, you know, as the MDL presiding
11 judge, get the cases as far along as I possibly can before
12 they get sent back or we come to some agreement about
13 getting them resolved here.

14 MR. ELIAS: Understood, Your Honor.

15 From -- I can say that while we can't be certain,
16 we know of no other entity that's sitting on a group of
17 cases at this point in time. If we did, we would encourage
18 them to bring those cases.

19 And we will be bringing the remainder of the cases
20 that we intend to file with this MDL in short order.

21 JUDGE DALTON: All right. Thank you, Mr. Elias.

22 Do we have anything else?

23 We're looking at our notes here, Judge Harz. But
24 while we're looking through to see if there's anything else
25 we want to take up with the lawyers, what about -- let me

1 ask you one thing as far as your information-sharing with
2 the proceedings through the liaison lawyers.

3 Are you satisfied with the information that you're
4 getting?

5 JUDGE HARZ: Yes, very much so. I'm up to date on
6 everything.

7 I thank liaison counsel for everything. Yes.

8 JUDGE DALTON: Any issues that you have that you'd
9 like for us to raise with these lawyers or you'd like to
10 raise with them while they're here?

11 JUDGE HARZ: No. Thank you. Thank you for
12 asking.

13 JUDGE DALTON: Yes, ma'am. You're very welcome.
14 All right. I don't have anything else for the
15 good of the order unless the lawyers do.

16 Mr. Johnston?

17 MR. JOHNSTON: Your Honor --

18 JUDGE DALTON: Yeah.

19 MR. JOHNSTON: -- we are going to file a motion
20 for you to reconsider or to certify to the Eleventh Circuit
21 your ruling in the Colella case on preemption.

22 JUDGE DALTON: Well, you can ask me to certify my
23 ruling. I'm not going to permit you to file a motion for
24 reconsideration.

25 You can tell me while you're here, if you want to

1 articulate your grounds, if you have Rule 60 grounds that
2 you think would warrant reconsideration in the form of new
3 evidence or case law that has developed since the time that
4 I made my ruling, I'd be happy to entertain it.

5 But I'm not going to reconsider my ruling on the
6 merits of the motion absent you demonstrating for me that
7 you've got unique Rule 60 criteria in order for me to do
8 that.

9 MR. JOHNSTON: Your Honor, I have a motion that
10 is -- I'll have to think about that. But the motion is
11 structured in the alternative.

12 If you can give us leave to file something this
13 week after we get together and if we think we have that
14 criteria, we will move for reconsideration. Otherwise, we
15 would just move for certification if we had leave to do so.

16 JUDGE DALTON: Okay. Well, I'm not inclined -- as
17 I said originally because, you know, motion practice slows
18 us down.

19 I will tell you I'm not going to change my mind on
20 my ruling with respect to the issue of preemption. And I
21 appreciate the fact that you disagree with my ruling.
22 That's certainly your right and your prerogative. And I
23 would expect you to pursue any appellate remedies that you
24 have on behalf of your client. It certainly does not hurt
25 my feelings in the slightest. But we have other fish to

1 fry, and I'm going to continue to move forward. I'm not
2 going to revisit my ruling on that.

3 So I would encourage you, if you want to ask me to
4 make a Rule 54 certification, I don't think it meets the
5 criteria for that, but I don't want to prejudge it.

6 I'll give you an opportunity -- I will give you
7 leave to file a motion for certification of that issue to
8 the Eleventh Circuit, and then the plaintiffs can respond
9 to that. And I'll -- you know, I'll deal with that in due
10 course, because I appreciate the fact that you have
11 appellate rights and I want you to be able to preserve
12 those.

13 MR. JOHNSTON: Thank you, Your Honor.

14 We will put something together and get it on file
15 this week, I would expect.

16 JUDGE DALTON: Okay. Great. Thank you.

17 MR. JOHNSTON: Thank you.

18 JUDGE DALTON: Let's talk a little bit before you
19 depart about the schedule in terms of when we get together
20 next. I would like to stay on the schedule that we have in
21 terms of submission of the status reports.

22 I would tell you all that if you all think when
23 you get together to meet and confer on your status report
24 that you don't need to be here, I'm open to that as long as
25 we don't get, you know, behind the curve, so to speak, on

1 some of the issues that are pending.

2 So I don't know, Judge Baker or Judge Harz, if
3 either of you have thoughts on it.

4 My thinking was that when you all do your next
5 meet-and-confer -- when is the due date for the next agenda
6 filing?

7 THE LAW CLERK: We haven't set one yet.

8 (Discussion off the record.)

9 JUDGE DALTON: What do you all think, Mr. Elias,
10 Mr. Johnston? What do you think is a good schedule for
11 you?

12 As I said, I want it to be current enough that we
13 don't get behind the curve. I want it to be far enough out
14 there that we have a meaningful meeting and that we -- I
15 want to be respectful of your time and the cost as well.

16 MR. ELIAS: Thank you, Your Honor.

17 I think, Your Honor, while we don't have issues to
18 raise right now, I think it would be beneficial to set
19 something for, let's say, mid-January because we very well
20 may have issues at that point.

21 JUDGE DALTON: I was going to ask you, with
22 respect to -- once you get your document review up and
23 running, that may raise some issues. So why don't we look
24 at the third week of January.

25 Do I have a date available? Do you know?

1 I should probably ask Ms. Gomez.

2 THE LAW CLERK: The week of the 24th is almost
3 fully clear, Judge.

4 JUDGE DALTON: January 24th. How does that
5 look?

6 THE DEPUTY CLERK: Yes. The 25th, the
7 26th? Tuesday, Wednesday?

8 JUDGE DALTON: Is that a Tuesday?

9 THE DEPUTY CLERK: Yes, Tuesday.

10 JUDGE DALTON: How about Tuesday, the 25th, at
11 1:30?

12 And then, again, giving you all the flexibility
13 when you have your meet and confer, if you think there's
14 not anything that we need to do, I don't want to waste
15 our -- I don't want to waste my time, Judge Baker's time,
16 Judge Harz's time, or your time and money if you don't
17 think you need any -- if you don't need any help.

18 MR. JOHNSTON: Your Honor, can I ask maybe -- can
19 I ask Mr. Elias something real quick?

20 JUDGE DALTON: Of course.

21 (Pause in proceedings.)

22 MR. JOHNSTON: Your Honor, the first week of
23 February would be better for us. They've indicated that
24 they're okay with that. If that's okay with Your Honor,
25 that would be a better date for us.

1 JUDGE DALTON: Let me look. I got the 25th
2 because it looks like I have time in that week.

3 Let me see what Ms. Gomez says about the first
4 week of February.

5 THE DEPUTY CLERK: Tuesday, February 1st. Second
6 week? I'm sorry. Or the first week?

7 MR. JOHNSTON: First week.

8 THE DEPUTY CLERK: Yes, February 1st, on
9 Tuesday.

10 JUDGE DALTON: Tuesday, February 1?

11 MR. JOHNSTON: That's okay with our side.

12 MR. ELIAS: That works for us, Your Honor.

13 (Pause in proceedings.)

14 JUDGE DALTON: All right. So we'll plan on coming
15 back together Tuesday, February 1. And that will make --

16 You can back up their meet-and-confer from there.

17 THE LAW CLERK: Yes. I'll put it up to date in
18 the order, Judge.

19 JUDGE DALTON: Okay. So we'll back up your
20 meet-and-confer date from the February 1 date.

21 And then as I said, please don't be shy about
22 letting me know you don't think we need to get together.
23 And then we'll take a look at the agenda. Judge Baker and
24 I will discuss it between ourselves. And we'll take a look
25 at it after that point, see how you all are coming along.

1 Probably having a little bit more time to get
2 together is going to be beneficial anyway. It will give
3 you all a better chance to figure out whether or not you
4 have got problems in the document production or you feel
5 happy with respect to the way things are going.

6 MR. ELIAS: Thank you, Your Honor.

7 JUDGE DALTON: And I think your request to extend
8 the January 1 deadline is reasonable under the
9 circumstances.

10 So we'll make it January the 7th for the fact
11 sheets as well as your extending the document discovery
12 date until the 7th.

13 MR. ELIAS: Thank you.

14 JUDGE DALTON: Document production date, I should
15 say.

16 MR. SILVERMAN: Thank you, Your Honor.

17 JUDGE DALTON: Anything else, Mr. Elias, for your
18 team that you want to raise while we have you here?

19 MR. ELIAS: Nothing now, Your Honor.

20 Thank you.

21 JUDGE DALTON: Thank you.

22 Mr. Johnston, how about from the Novartis team,
23 anything else?

24 MR. JOHNSTON: That's it, Your Honor.

25 JUDGE DALTON: All right. Well, I hope you all

1 have a safe, happy, and blessed holiday. And I'll see you
2 back here in 2022. I'm looking for a very good report on
3 discovery and your document production review.

4 And, Judge Harz, I hope I'll talk to you between
5 now and then. But happy holidays to you as well.

6 JUDGE HARZ: Thank you very much.

7 JUDGE DALTON: All right. We'll be in recess.

8 Thank you, all.

9 (Proceedings adjourned at 2:17 p.m.)

10 *****

11

12 C E R T I F I C A T E

13

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

17

18 December 6, 2021

19

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

23

24

25