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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 20-md-02924-ROSENBERG

IN RE: ZANTAC (RANITIDINE) .
PRODUCTS LIABILITY . West Palm Beach, FL
LITIGATION. . January 19, 2023
. .
. .

STATUS CONFERENCE (through Zoom)
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFFS:

ROBERT C. GILBERT, ESQ.
Kopelowitz Ostrow Ferguson
Weiselberg Gilbert
2800 Ponce de Leon Boulevard
Suite 1100
Miami, FL 33134
305-384-7270

ASHLEY C. KELLER, ESQ.
Keller Lenkner LLC
150 N. Riverside Plaza
Suite 4270
Chicago, IL 60606
312-741-5222

FOR THE DEFENDANTS:

ANDREW T. BAYMAN, ESQ.
King & Spalding LLP
1180 Peachtree Street Suite 1600
Atlanta, GA 30309
404-572-4600

JULIA ZOUSMER, ESQ.
King & Spalding LLP
353 N. Clark Street 12th Floor
Chicago, IL 60654
312-995-6333

ANAND AGNESHWAR, ESQ.

Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019
212-836-8011

ANDREW D. KAPLAN, ESQ.

Crowell & Morning LLP
1001 Pennsylvania Avenue NW
Washington, D.C. 20004
202-624-2500

THOMAS J. YOO, ESQ.

Holland & Knight LLP
400 Hope Street 8th Floor
Los Angeles, CA 90071
213-896-2400

Court Reporter: Pauline A. Stipes
HON. ROBIN L. ROSENBERG
West Palm Beach/Ft. Pierce FL
561-803-3434

Pauline A. Stipes, Official Federal Reporter

1 THE COURT: All right. Good morning, everyone. We
2 are here in the matter of In Re: Zantac Products Liability
3 Litigation, MDL 2924, and we are here on the Zoom platform. We
4 are here for a status conference that in many respects follows
5 up from the status conference that we held on January 5th to
6 review some of the topics that we began to discuss on that
7 date.

8 There are a list of topics that I know I have provided
9 to our special master, Jamie Dodge, and I believe she has
10 shared those with the leadership who will be presenting today.
11 They are the same topics that we discussed on January 5th.

12 So, consistent with how we handled the status
13 conference last time, if I could ask those attorneys who are
14 presenting on topics one and seven -- I think I am going to
15 combine those topics, that would be helpful. Once you are all
16 on, we will have everybody state your appearance for the
17 record.

18 I know that is always tough because you don't know who
19 should go first. I could tell you in the order I see you on
20 the screen, but I think we all see each other differently. I
21 will let you go for it and state your appearance for the
22 record.

23 Can everybody hear me okay?

24 MR. GILBERT: Yes. Good morning, on behalf of the
25 Plaintiffs, Robert Gilbert and Ashley Keller addressing topics

1 one and seven.

2 MR. BAYMAN: Good morning, your Honor, Andrew Bayman,
3 counsel for BI and also counsel for the brand Defendants on
4 these matters. I along with my partner, Julia Zousmer, will be
5 responding to your Honor's questions about these topics.

6 MS. ZOUSMER: Julia Zousmer on behalf of Boehringer
7 Ingelheim and the brand Defendants, as Mr. Bayman just noted.

8 MR. YOO: Good morning, your Honor, Thomas Yoo. I
9 will be speaking for the generics on topic one today.

10 MR. KAPLAN: Good morning, your Honor, Andrew Kaplan
11 on behalf of the distributor Defendants.

12 MS. MAGUIRE: Good morning, your Honor, Robin Maguire
13 on behalf of the retailer Defendants.

14 THE COURT: Good morning, everyone, nice to see you.

15 All right. In the interest of kind of laying the
16 landscape, just sit back and listen for a minute, kind of much
17 what I did the last time. I am going to -- and I have my
18 prepared notes, as I usually do. I am going to lay out my
19 questions thinking interest in hearing from you on these
20 topics. I think they overlap to some extent, which is why I
21 asked that everybody addressing topic one and topic seven get
22 on the screen.

23 Topic one, as you may recall, is sort of the general
24 topic of orders, judgments that need to be filed in personal
25 injury cases in designated cancers, and topic seven is the

1 application of the Daubert order to the retailers and the
2 distributors.

3 When I was going back over my notes and reviewing the
4 transcript from January 5th, it seemed to me that there were
5 enough overlapping issues that it would be helpful to talk
6 about them together before we go on to the other topics.
7 Excuse me if I am diverting my eyes because I am looking at my
8 notes to left of me, and when I am looking to the right, then I
9 am looking at you on the screen.

10 The general goal of the question as to topic one was
11 sort of how mechanically should final judgment be entered, what
12 cases need final judgment, and when should final judgment be
13 entered.

14 Some of the questions that I presented initially were
15 that when the Plaintiffs sought Rule 58 final judgments to
16 appeal the Court's Federal preemption rulings, the Court
17 entered a final judgment on the MDL docket, and that judgment
18 included an attachment, Exhibit A, and it listed all of the
19 cases in which an individual Plaintiff had named only generic
20 manufacturer Defendants.

21 And then the Court directed the Clerk of the Court to
22 enter a copy of the final judgment in each individual case
23 listed on Exhibit A. There were 18 cases on Exhibit A. So, I
24 had questions about should the same procedure be used for the
25 Court's general causation ruling, have the parties prepared a

1 list of the cases that qualify for final judgment -- I am
2 summarizing a little bit so as not to be repetitive from the
3 last time -- and should the Court enter final judgment as soon
4 as possible, should the Court resolve pending non-designated
5 cancer cases.

6 And the response, in summary, from my review of the
7 transcript was that the Defendants want judgment entered as
8 soon as possible, although they seem to suggest that the
9 appropriate date may be the date the tolling ends for the
10 registry, which is on or about April 5, 2023.

11 The Plaintiffs stated on January 5th that they were
12 close to an agreement on this topic, and in fact, you forwarded
13 a proposed joint order on January 18th, which I have as a
14 proposed order styled Judgment in Cases Alleging Designated
15 Cancers. You had a list included, and that had approximately
16 1,100 cases on the list.

17 In essence, the proposal seems simple and fairly
18 straightforward insofar as it states that all designated
19 cancers are due for final judgment. It recognizes that the
20 appendix with the list of cases could have errors because of
21 how difficult it is to create such a list.

22 The proposed order contemplates that once the order is
23 entered, for 14 days the burden is on individual counsel to fix
24 the list. They should inform the Court if a case he is on the
25 list that shouldn't be, and inform the Court if a case isn't on

1 the list that should be, and if anyone points out an error, the
2 order says the parties will give me a proposed order to address
3 the error. Otherwise, after the 14-day correction period the
4 Clerk of Court is directed to enter final judgment in each case
5 on the list.

6 So, in connection with that I have several questions.
7 Sit back and listen, you don't have to answer them just yet.
8 Then I will move to topic seven, and then maybe you will
9 understand the totality of what I am thinking.

10 So, the questions I have are, when considering the
11 proposal to enter final judgment in designated cancer cases the
12 Court observed that the proposed pretrial order that you sent
13 does not expressly draw any distinction between cases that were
14 filed or consolidated into the MDL prior to December 6 -- that
15 is the date the Daubert order was issued, summary judgment
16 order -- and cases filed or consolidated after December 6.

17 So, one of the first questions I want to hear you on
18 is, does that distinction matter, cases that came in to the
19 Court after December 6, after the order? And if the
20 distinction doesn't matter in your view, meaning -- when I say
21 doesn't matter, that they are treated the same as cases that
22 were before the Court before December 6 for purposes of entry
23 of a final judgment based on the application of the Daubert
24 order, summary judgment order.

25 So, if your position is that it doesn't matter, came

1 in on December 7, December 8, they are in, they are part of the
2 MDL, they are governed by the Court's ruling, is there any
3 difference between those cases and cases that have been coming
4 in, direct filed from the registry, and presumably will
5 continue to be coming in? I know the subject of how they come
6 in, multi-Plaintiff complaints or not, is the subject of the
7 briefing and the hearing that we had, and the Court is waiting
8 on further briefing on that.

9 Regardless of how they come in, individual Plaintiff
10 or multi-Plaintiff, they are coming in, and is there any
11 difference between a case that was transferred in or direct
12 filed on December 7, December 8, January 2nd, and this group of
13 cases that have been and will continue to be coming in from the
14 registry?

15 What the Court is getting at is that if I am to delay
16 final judgment until after the claimants have filed their
17 cases, which seemed to be contemplated at the last hearing
18 until after that April 5 deadline, so final judgment is not
19 going to be entered until then, would the cases that came in
20 after December 6, and the ones that continue to come in,
21 whether they were transferred in or direct filed in from the
22 registry, or from anywhere else for that matter, would they be
23 included on the appendix? Would that appendix of 1,100 become
24 some larger appendix and be part of the final judgment that
25 everybody is contemplating, at a minimum, that the Court would

1 be entering as to the brands' designated cancers?

2 We will talk about the nonbrands in a minute, but the
3 thrust of this for now is something that you already had agreed
4 to in that proposed PTO.

5 Alternatively, if you think the distinction matters --
6 and I ask this because there was a comment made by Mr. Cheffo
7 at the last hearing on January 5 -- I keep saying January 5 --
8 no, it was at the motion hearing on January 12.

9 So, there was the January 12 hearing on the
10 multi-Plaintiff complaint issue, and in the transcript at page
11 27 he said, "as to the claimants that is, the claimants coming
12 in, the Plaintiffs would file the tens of thousands of short
13 complaints that they file. We would then get a printout of
14 those, but let's assume we file just one motion saying, based
15 on all these cases and your Honor's ruling, we would request
16 that you grant summary judgment in, say, these 50,000 claims."

17 So, I need to understand that more. I need to
18 understand, is there contemplating -- contemplated a motion as
19 to all those claims from the registry that are going to be
20 filed, but not as to transferred cases coming in after
21 December 6? So, I wanted to appreciate if there is a
22 distinction between the two; if so, why, and what.

23 If you do believe there is a distinction, that is if
24 the claimants could not be included on the cases that receive
25 final judgment for some reason, but you are of the view that

1 the transferred in cases or other direct filed cases post
2 December 6, then why wouldn't the same reason apply to post
3 December 6 cases?

4 Alternatively, the proposed order that you submitted
5 to me, did that order treat post December 6 cases differently,
6 but it is just not readily apparent or expressed because the
7 post December 6 cases were not included on the list?

8 And if they were not included on the list, how would
9 individual counsel know in those later filed cases if they
10 should be treated differently? If they are, for example, left
11 off that appendix without explanation, how would counsel for
12 those post December 6 cases know that their cases are being
13 treated differently?

14 So, maybe it just has to go to the fact that I don't
15 completely understand what the intent was behind the proposed
16 PTO or whether you had thought about it, but you can consider
17 that issue as I move on.

18 A second question I have is -- and I would think the
19 benefit of asking all my questions first is so that you can
20 think about everything together before just sort of responding
21 to individual issues.

22 So, the second issue has to do with the Court's entry
23 of final judgment with respect to nonbrands. The question is:
24 Shouldn't the Court's entry of final judgment wait until the
25 Court has decided whether final judgment should be entered in

1 favor of nonbrands? The Court does not want to be in the
2 position of directing the Clerk of the Court to enter final
3 judgment multiple times, particularly when the Clerk is likely
4 to be under pressure to process the filing all of these new
5 cases that are coming in.

6 The proposal from the parties in that proposed PTO
7 only directs the Clerk of the Court to enter final judgment in
8 favor of the brands.

9 My followup question is, will the nonbrand
10 Defendants be moving for relief in the form of requesting the
11 entry of final judgment in designated cancer cases? Many, if
12 not almost all, of the short form complaints at one time or
13 another checked boxes for nonbrand Defendants, and individual
14 cases that have not kept their short form complaints up to date
15 may still to this day have nonbrand Defendants listed as
16 Defendants.

17 Although the Court previously had to grapple with the
18 fact that short form complaints could be unilaterally amended
19 at any time, the deadline for unilateral amendments has now
20 passed and the short form complaints can only be amended with
21 the Court's permission.

22 The third question ultimately is, I would want the
23 parties, as they did before, to provide a form final judgment
24 for the Clerk of the Court to enter. The Southern District of
25 Florida Clerk of the Court does not enter final

1 judgment independently of a Court provided order for docketing.

2 Let me move on to topic seven because it fills out the
3 questions I had. The focus in question six, in topic one was,
4 you know, final judgment and drawing this distinction between
5 pre December 6 and post December 6, and then claimants, and
6 maybe you don't see a distinction. I am not intending to
7 create something that you didn't contemplate, but the exchange
8 that took place at the motion hearing, which I hope all of you,
9 if not arguing, I know were listening in, dovetails with topic
10 seven, which is final judgment also issue, and the application
11 of the Daubert order to the retailers and the distributors, and
12 I suppose to the generics as well.

13 I know that at the -- at the January 5th hearing the
14 parties said they needed to confer on a process for
15 adjudication of the short form complaints, that no party or
16 attorney was aware of a short form complaint that had actually
17 pled an independent claim for negligence, and I want to get
18 confirmation of that.

19 I know one of the questions I asked was, does any
20 party know of an individual claim that has been brought by an
21 individual Plaintiff pursuant to pretrial order 31, section
22 2(b)(4)(N), that is not contained in the master complaints?
23 And the distributors at the status conference on January 5th
24 represented that they would be preparing a proposed procedure
25 and submitting that proposal to the Court.

1 The parties' disagreement in the area seemed to
2 pertain to whether nonbrands should receive a final judgment,
3 so this is really getting to the crux of this topic.

4 If they do, then that would seem to take care of
5 claims in the short form complaints. If they don't, perhaps
6 there is no jurisdiction to enter the judgment as a result of
7 the Court's prior Rule 54(b) certification. That was raised at
8 the January 5th hearing and that's when the distributors
9 discussed the possibility of moving for the entry of an
10 indicative ruling, which is essentially a ruling that says if
11 jurisdiction were returned to the District Court, this is how
12 the District Court would rule.

13 I understand the parties now are discussing that a
14 retailer/distributor motion on the subject is forthcoming.

15 These are the questions that I have surrounding this
16 topic that I would be interested in what you have to say about
17 it.

18 In the Court's ruling granting in part and denying in
19 part the entry of Rule 58 and Rule 54(b) final judgment, it's
20 on page 24 of that order, the Court entered Rule 58 final
21 judgment in individual cases where -- where the only Defendants
22 named were generic manufacturing Defendants, and where the
23 Plaintiffs waived their right to amend to add additional
24 claims.

25 But in cases where only generic manufacturer

1 Defendants were named, and where the Defendants had not waived
2 their right to amend, the Court noted, and I quote, "There is
3 still a theoretical possibility that the individual Plaintiff
4 could obtain relief in this MDL" and the Court declined to
5 enter Rule 58 final judgment.

6 The Court's ruling as to the other nonbrand Defendants
7 was much the same. For example, the Court noted that the
8 Plaintiffs could in theory plead claims for ordinary negligence
9 against retailer and distributor Defendants, and the Court
10 accordingly declined to enter Rule 58 final judgment in favor
11 of those Defendants as well.

12 Although the deadline has passed for the Plaintiffs to
13 unilaterally amend their short form complaints, it does remain
14 theoretically possible to this very day for the Plaintiffs to
15 amend their short form complaints with Court permission and
16 through that amendment to add claims against any Defendant,
17 including the generics, retailers, and distributors.

18 By way of example, I pulled one. Now, this happened
19 to be done without Court permission, meaning it was after the
20 deadline, but presumably the person could ask for leave to do
21 it. This is just one example, it's at case number 23-CV-80054,
22 Docket Entry 4, filed on January 13, 2023, where a Plaintiff,
23 Nathan Barker, filed a first amended short form complaint,
24 version 2, and named brand name manufacturers, generic
25 manufacturers, distributors and repackager, retailers and -- so

1 that is an example.

2 It therefore seems to the Court that, with the small
3 exception of the very few generic only cases that received Rule
4 58 final judgments, that is those 18, every individual case in
5 this MDL is alive. They would be alive for a few reasons, the
6 Court believes, but again, I share all of this with you because
7 I would like to hear your thoughts on it.

8 One is that the Plaintiffs can still amend, they can
9 seek leave to amend. Two -- of their short form complaints.

10 Two, no Defendant has moved to dismiss the individual
11 short form complaints.

12 And three, no final Rule 58 final judgment has been
13 entered.

14 True, some of them may be barely alive, some of these
15 individual cases, insofar as counsel may possess the belief
16 that the Court should enter adverse rulings upon motion, but
17 the Eleventh Circuit had this to say about the individual cases
18 and individual short form complaints:

19 Mr. Cartee -- and I am quoting now from the mandate at
20 page 18. "Mr. Cartee and Ms. Williams argue that their actions
21 are more or less dead given the District Court's rulings
22 dismissing certain claims from the MPIC, but there is a big
23 difference between mostly dead and all dead. Mostly dead is
24 slightly alive. It may be that the claims remaining in their
25 amended short form complaints once paired with a viable and

1 pending MPIC have little hope of surviving given the District
2 Court's rulings, but at the moment, there is no final ruling
3 putting their operative complaints, the combination of the MPIC
4 and individual SFCs, to rest. For that reason, we lack
5 jurisdiction to consider their appeals. The Defendants'
6 motions to dismiss these appeals are granted."

7 So, it seems to this Court that almost every
8 individual case in this MDL remains alive, and it seems to this
9 Court that the Eleventh Circuit holds the same view.

10 If almost every case remains alive, and every case has
11 been consolidated into the MDL, why doesn't the Court's MDL
12 ruling on general causation and summary judgment as to
13 designated cancers apply with full force to the living active
14 individual cases? Why doesn't the Court's ruling bind those
15 cases?

16 The Court understands that the parties are disputing
17 whether the nonbrand Defendants can avail themselves of the
18 Court's ruling on general causation, but the Court does not
19 fully understand this dispute. Why wouldn't the Court's ruling
20 already be a part of every individual case's record?

21 It doesn't seem to be the case to the Court that
22 because only the brands moved for Daubert exclusion, the other
23 parties cannot avail themselves of the ruling, at least this is
24 what -- the question that I seek your input on.

25 The Court's ruling was not on brand causation, but on

1 general causation. The Court's ruling was not on a molecule
2 manufactured solely by the brands. Ranitidine is Ranitidine
3 and the ability of Ranitidine to cause cancer is the linchpin
4 of every designated cancer claim in this MDL regardless of who
5 was sued.

6 The Court's questions for the parties are two-fold.
7 First, aren't all individual cases, almost all of them, still
8 alive? And if they are still alive, doesn't the Court's ruling
9 on general causation apply to those cases? And if the Court's
10 ruling on general causation applies, how can it be that the
11 nonbrands cannot as a matter of law avail themselves of that
12 ruling?

13 In other words, if the cases are alive, how can it be
14 that there is no procedural avenue that the nonbrand Defendants
15 can avail themselves of the Court's general causation ruling?

16 So, when the parties are addressing this issue, I
17 would appreciate hearing answers to those questions.

18 So, I know that is a lot. I hope that you feel you
19 sort of were adequately prepared coming into the hearing
20 knowing from the last status conference what my general
21 questions were. I drilled down a little bit more based on some
22 of the things that you said at the last hearing and some
23 feedback that I received in the interim from the special master
24 about where you were in your discussions and, quite frankly,
25 from receiving your own agreed upon PTO.

1 I don't know if you want to take a moment to confer
2 either behind the scenes or otherwise on who would like to
3 address these issues. It might benefit us to hear Plaintiffs'
4 view first, and then that would give the Defendants a little
5 bit of time to figure out who and how you want to address it
6 from the Defendants' perspective. And I realize there is the
7 brand and the nonbrand. I think hearing from everybody,
8 however, would be helpful.

9 So, from the Plaintiffs.

10 *MR. GILBERT:* Thank you, your Honor, Robert Gilbert on
11 behalf of the Plaintiffs. I am joined by Ashley Keller.

12 I am going to briefly address some of the topics and
13 turn it over to my friend, Mr. Keller, to address your many
14 questions and issues. There is a lot packed in there, as you
15 warned, and we hope we can remember them all and address them
16 all.

17 Let me first say something that is very clear, and I'm
18 certain that my colleagues, Ms. Zousmer and Mr. Bayman, will
19 concur with this when they have their opportunity to speak.

20 The conversations and discussions that I have had with
21 them both before the January 5th CMC and since the January 5th
22 CMC have been specifically relating solely to -- and now I am
23 speaking about the proposed order that you referred to that we
24 submitted on January 18th -- specifically relating solely to
25 the brand Defendants, and it has been my understanding

1 throughout these conversations that it relates only -- that the
2 Appendix A that the Defendants compiled and worked very hard on
3 relate solely to cases that were pending as of the time of the
4 Court's Daubert order.

5 There has never been any discussion during our prior
6 meet and confers, of which there have been several, and there
7 have been a number of emails exchanged, that any of the cases
8 listed on Appendix A were directly filed in or transferred to
9 this transferring Court after December 6th. It never came up.

10 So, while I -- while we appreciate the distinction you
11 are drawing, and Mr. Keller is going to address it head on, I
12 want to make sure that you know from these meet and confers
13 what was discussed and what was not discussed because it is
14 material here and directly relates to your questions.

15 And second of all, I know I don't need to say this,
16 but I am going to say it anyway, the proposed agreed order that
17 was submitted, this and the one with regard to non-designated
18 cancers, obviously -- specifically with regard to the
19 designated cancers, while the form of those orders is agreed
20 upon by the Plaintiffs, it preserves all of our objections and
21 is not intended to waive any of our objections to the Court's
22 Daubert and summary judgment rulings.

23 I just say that for the record.

24 Unlike the meet and confer process that we have had
25 both before January 5th and since January 5th with the brand

1 Defendants' counsel, the meet and confers that were -- that
2 took place with the generics, frankly, left much to be desired.

3 We promptly met and conferred with them right after
4 January 5th. We did not receive a proposed final judgment from
5 them until the eve of this hearing. We also and heard for the
6 first time last night tat they were filing a brief on that
7 issue, disappointing to say the least, and we made our position
8 known to them during the meet and confer. Why it took until
9 the eve of the hearing to receive their proposed order is
10 unknown to us.

11 With regard to the distributors and retailers, we had
12 productive conversation with Mr. Kaplan and Ms. Johnston.
13 While we disagree on the fundamental issue, I think that what
14 we did agree on, and what Mr. Kaplan indicated to us as late as
15 yesterday, was that they were going to be filing a motion on
16 this issue after today's hearing that we would have the
17 opportunity to respond to.

18 So, I'm going to now turn over the gavel, if I may, to
19 Mr. Keller for us to try to unpack your many questions and
20 issues.

21 *THE COURT:* Okay, thank you.

22 *MR. KELLER:* Thank you, your Honor, Ashley Keller for
23 the Plaintiffs. You always retain the gavel, but I will take
24 the baton from Mr. Gilbert. I tried to jot down all of your
25 questions, but please interject if I missed anything or you

1 have any follow-ups.

2 With respect to direct filed versus transferred cases,
3 I don't think that distinction makes any difference, so whether
4 the case is transferred by the JPML or whether it is directly
5 filed pursuant to the PTOs, that is not a distinction that at
6 least I would suggest has any significance.

7 I do think there is significance, though, to the date
8 of the filing, and this wouldn't apply to any of my clients,
9 but in a leadership position I am thinking about all of the
10 Plaintiffs. I don't harbor any illusions that your Honor is
11 going to change your mind, for example, on something like
12 preemption, but every Plaintiff has a due process right to make
13 themselves heard and to present some arguments that potentially
14 we missed.

15 So, formally speaking, if a Plaintiff wasn't on file
16 and therefore didn't have an opportunity to raise his or her
17 hand through counsel and say, here is an argument that your
18 Honor needs to consider before you throw out all of my claims,
19 I think they have a right to do that. So, whatever process you
20 want to contemplate for someone who files, for example,
21 tomorrow, I think it needs to give an opportunity for those
22 Plaintiffs to be heard.

23 It can be streamlined and efficient. Something I have
24 seen in other MDLs is an order to show cause process where a
25 Plaintiff would have to show cause why your previous decision

1 shouldn't apply to him or her, but some sort of due process I
2 think is required, and whichever Defendants are moving against
3 a Plaintiff who shows up in your courtroom after prior
4 decisions have already issued needs to be given that fair
5 opportunity to respond to a summary judgment motion that would,
6 you know, end that Plaintiff's actions.

7 So the date, I think, is the critical dividing line
8 for due process purposes as opposed to direct file versus JPML
9 transfer.

10 *THE COURT:* Let me ask you -- you are in leadership,
11 and we have two of you in leadership on the Zoom. You
12 represent everybody insofar as a leader, not as individual
13 counsel, obviously. We know that is the differences in an MDL
14 versus a class, but you continue in your role of leadership to
15 this day. As leaders, are you aware, have you touched base, do
16 you seek to guide the Court on what needs to occur, whether
17 there are those who want to raise new issues that you, as
18 leaders, did not raise in your Daubert or summary judgment or
19 at any juncture in this three-year litigation, almost three
20 years?

21 *MR. KELLER:* If the question is what type of process
22 would I establish --

23 *THE COURT:* Are you aware of persons that you are
24 leading that they want to be heard?

25 It is not a substitute for any process you may

1 ultimately propose and that I would consider, but what is your
2 sense of the landscape right now in terms of cases that have
3 come in post December 6th, transferred in, direct filed? Are
4 you aware?

5 *MR. KELLER:* To be candid with your Honor, I don't
6 even know how many cases have been filed since December 6th. I
7 get the docket entries, but I have not, admittedly, been
8 keeping a running tab. Of course, as leaders in this MDL for
9 the plaintiffs we have certain responsibilities. It is a
10 strange beast because we don't have an attorney/client
11 relationship with the other Plaintiffs who come into this MDL.
12 We have responsibilities, but it is not the same set of
13 responsibilities or communications directly with those clients
14 on a regular basis.

15 I don't have any insight to give you, unfortunately.
16 Maybe others on the Zoom do, but I can't answer that sitting
17 here today. I don't have anything intelligent to say about it.

18 *THE COURT:* This kind of dovetails a little bit into
19 the -- and I will give Defense an opportunity to be heard -- a
20 little bit into the other topic, but do you have any sense --
21 so a final judgment hasn't been entered. The case isn't over
22 as to everybody except those 18 Plaintiffs that got the Rule
23 58. So, when you come into a case and there is no final
24 judgment entered, what is the procedural landscape the Court
25 should be considering?

1 I know you keep saying due process, and I know that is
2 an important concept theoretically, and your answer to it, at
3 least, you know, doing the best you can today, to suggest
4 borrowing from experiences in other MDLs an order to show
5 cause, and that doesn't seem necessarily unreasonable.

6 But with no final judgment being entered, and if a
7 case is coming in are raising the designated -- as to the
8 designated the cancers, how do the rules of procedure apply
9 here in terms of why a final judgment that is ultimately
10 entered, let's say in April, wouldn't apply without a
11 procedure, let's say? Is it just -- not just, but the notion
12 of due process, they came in, they haven't been heard, as
13 distinct from what, the person who filed on December 5th?

14 What about the person who filed on December 5th, was
15 he heard? You all had already filed your motion, you argued
16 your motion. Did they have a chance to step up to the plate
17 and say, no, I don't agree with what they are doing?

18 That is where I would like to sort of understand the
19 rules. What is the procedural context in which I should be
20 thinking about this?

21 MR. KELLER: The December 5th example is an
22 interesting one, it is one I would like to think about more.
23 Let's put an pin in that because I don't have an answer off the
24 cuff. The rules that apply are the rules that apply in every
25 individual civil action. Your Honor has already held that

1 every Plaintiff has his or her own action, so the ordinary
2 Rules of Civil Procedure apply.

3 The fact that you have already considered important
4 legal and factual questions with a record that has been
5 developed by others may have significant influence on what you
6 do with respect to a new Plaintiff who has his or her own
7 individual action, but Defendants still have to move for
8 summary judgment in the ordinary course with respect to those
9 new Plaintiffs, and your Honor has to rule on those summary
10 judgment motions before you can issue a final judgment as to
11 those Plaintiffs.

12 So there is no automatically you lose because you have
13 just come into this MDL as a new Plaintiff.

14 *THE COURT:* In a non-MDL case, if you had a Plaintiff
15 that was joined, say, after a motion to dismiss order was
16 entered, an order on a motion to dismiss or even a summary
17 judgment, or a defendant is brought in, would that mean that
18 party automatically has the right to ask the Court to be heard
19 on issues that had been litigated before they were added to the
20 case?

21 *MR. KELLER:* I want to make sure I am understanding
22 your question. When you say joined, do you mean joined into
23 someone else's action or do you mean just brought in front of
24 the Court?

25 *THE COURT:* Joined into the action.

1 MR. KELLER: That is a different context because now
2 you are becoming a party to someone else's case, so there are
3 rules with respect to joinder, voluntary and involuntary
4 joinder, and I don't have an answer for you, but that could
5 potentially be a different context.

6 The Plaintiffs that are filing actions now, subsequent
7 to December 6th, they are not being joined. They are being
8 consolidated under 1407, but as your Honor has already held,
9 based on the Supreme Court's decision in Gelborn, (phon) every
10 Plaintiff has an individual action, they are not joined as
11 parties to someone else's action.

12 So, the person who your Honor referenced, I haven't
13 had a moment to pull that docket entry, who amended the
14 complaint, I don't know if they were on file many, many months
15 before or if they were amending a recent filing. Someone who
16 files on January 19, today, they are not joining the action of
17 the thousand plus Plaintiffs who are subject to the exhibit
18 that you were sent that is agreed to by the Plaintiffs and the
19 brand Defendants. They have their own individual action the
20 Defendants have to move to dismiss.

21 I don't think that there is any doubt that your Honor
22 is going to grant summary judgment as to them, and I am not
23 trying to relitigate issues on that hypothetical person's
24 behalf, but your Honor has already adjudicated, but they do
25 have a right to oppose summary judgment if they want to, or

1 they can say we respectfully disagree with your Daubert
2 decision, but assuming you are going to stick with it, go ahead
3 and enter judgment against me and we don't have to have a fight
4 about it.

5 They have due process rights that are the ordinary due
6 process rights that obtain for any Plaintiff who files his or
7 her own case under the Rules of Civil Procedure.

8 THE COURT: Okay.

9 MS. ZOUSMER: Your Honor, may Defendants be heard on
10 this issue before you move on?

11 THE COURT: Yes, just state your name.

12 MS. ZOUSMER: Julia Zousmer for the record.

13 THE COURT: Let's make sure Mr. Keller is finished.
14 We can hear from Defendants on the issue of sort of the
15 difference between pre December 6 and post December 6, I
16 suppose, before we talk about final judgment as to nonbrands.

17 Mr. Keller, is there anything more you wanted to say
18 on that topic?

19 MR. KELLER: Not on that topic, thank you, your Honor.

20 THE COURT: So, I understood your position to be that
21 you see no distinction between direct filed or transferred
22 cases post December 6, but you do see a distinction between pre
23 December 6 and post December 6, and that some form of process
24 should be in place, whether it is an order to show cause or
25 something else, so as to afford due process because you believe

1 as a matter of law, under law and the rules, that anyone
2 brought in under December 6 is not necessarily and
3 automatically bound by the Court's rulings without having some
4 opportunity to be heard.

5 Is that kind of an accurate summary of what you said?

6 *MR. KELLER:* It is, your Honor.

7 *THE COURT:* Okay. Ms. Zousmer.

8 *MS. ZOUSMER:* Thank you, your Honor. With respect to
9 the cases being filed or transferred, we agree with Mr. Keller
10 that there is no distinction there.

11 In terms of the distinction of the cases that are
12 filed before December 6 and after December 6, we also believe
13 that there should be no distinction. I think that your example
14 about the December 5th case that would be filed highlights why
15 there is no distinction.

16 First of all, the registrants who would be filing
17 cases after December 6th all certified that they would be bound
18 by the Court's orders. So, with respect to any registrants who
19 are filing cases after your Honor's Daubert and summary
20 judgment order, those registrants should be treated like any
21 filed case because they certified to be treated as any filed
22 case in that regard.

23 In terms of the non-registrant new cases that are
24 filed after December 6, the Daubert order should also apply to
25 those cases because there is leadership in this MDL who is

1 empowered to choose the cancers that they designated and then
2 to work with their experts and general causation opinions,
3 litigate the motions, and the Court has ruled on the motions
4 and -- in other words, any new people -- if those new people
5 were in the MDL before the Court's Daubert ruling, they
6 wouldn't have had the opportunity to litigate the motion, so
7 that is the December 5 example.

8 For the same reason that we would think your Honor's
9 opinion applies to the December 5th filed case, we would think
10 the order applies to post December 6th filed cases because
11 there is leadership in the MDL that was empowered to litigate
12 this issue for Plaintiffs.

13 *THE COURT:* Okay. Did any other Defense counsel want
14 to be heard on just this topic of kind of -- it sounds like
15 there is agreement between Plaintiff and Defense from what
16 counsel who have spoken so far have said about no distinction
17 between filed and transferred, but a distinction between pre
18 and post December 6.

19 Is there anything else that anybody wants to add to
20 that topic? If not, I am happy to move on to the next part of
21 this topic.

22 *MR. YOO:* Your Honor, Thomas Yoo for the generics.

23 I am not sure if this is the right time to make these
24 comments on behalf of the generics, but to the extent this
25 relates to the proposed judgment we submitted, your Honor, I

1 want to make our views very clear with respect to the
2 applicability of the Court's Daubert order.

3 As I indicated at the prior --

4 *THE COURT:* Sorry to interrupt, but I think you are
5 going to be delving into the next part of the topic. In other
6 words, you are now going to speak to the application of the
7 Court's summary judgment order to nonbrands.

8 *MR. YOO:* Correct, your Honor.

9 *THE COURT:* Bear with me for a second.

10 Let's reserve that for one moment because I want to
11 hear from Plaintiff first on that issue and then hear from
12 Defense. I want to go back for a moment to what Ms. Zousmer
13 said about the certification.

14 Is the certification that you are referring to that
15 the claimants made part of Exhibit A to the PTO 37 where in
16 Subsection B of the registry consent the claimants were
17 saying -- were agreeing that in order to negotiate PTOs each
18 claimant agrees that lead counsel is authorized to represent
19 them in these negotiations, and more broadly, to act on their
20 behalf to the same extent as a filed Plaintiff in this MDL?

21 The scope of this authorization, is that set forth in
22 PTO 20? I want to be clear I understand what you are referring
23 to when you say the certification.

24 *MS. ZOUSMER:* I was referring to the certification
25 process set forth in PTO 72, so the process by which the

1 registrants had to certify over the summer whether or not they
2 were going to be certified Federal participants; and if so,
3 that they would be bound by the Court's orders and subject to
4 its jurisdiction and estopped from going to State Court.

5 So, checking the box, as we called it, for the
6 registry claimants that PTO 72 sets forth is what I as
7 referring to.

8 *THE COURT:* Okay. I wanted to be clear on that.

9 Since I understand Mr. Yoo's comments were going to be
10 directed to how the Daubert order applies to nonbrands, that
11 was the second part, topic seven.

12 Mr. Keller, did you want to be heard now on the series
13 of questions that I asked with respect to topic seven, which in
14 sum is based on, among other things, the Eleventh Circuit
15 opinion, the mandate, and everything else that I laid out, you
16 know. Aren't the short form complaints alive?

17 No final judgment has been entered as to anybody other
18 than the 18, and why wouldn't -- and in fact, people are still
19 amending and naming -- again, they should be seeking leave of
20 Court. I am not saying it is being done properly procedurally,
21 but why wouldn't any final judgment that is contemplated being
22 entered as to designated cancers be equally contemplated as to
23 brands as it is to nonbrands without any further motion
24 practice, so to speak? And that would be as to the generics,
25 retailers, and distributors.

1 MR. KELLER: Your Honor, I am happy to address that.
2 Again, Ashley Keller for the Plaintiffs.

3 Yes, the actions other than the ones with respect to
4 Rule 58 are technically still alive, not all the way dead, or
5 whatever the language that you previously quoted was, but it is
6 not correct to say that there aren't final judgments that have
7 already been entered. Your Honor entered a Rule 54(b)
8 judgment.

9 So, look to the text of Rule 54(b), what it says is,
10 normally, if you don't adjudicate all of the claims and all of
11 the parties that is not final, and so you can still revise the
12 previous decisions that resulted in the dismissal even with
13 prejudice of certain claims.

14 If you say that there is no just reason for delay
15 under Rule 54(b), you have made the claims or the parties that
16 you certified pursuant to that order final judgments. Final
17 means final, so they can no longer be revised.

18 With respect to the claims that your Honor fully
19 dismissed, and this is quite distinguishable from Cartee where
20 the Eleventh Circuit said the Court could have certified with
21 respect to Mr. Cartee under Rule 54(b), but you didn't.

22 With respect to the question that you were asking
23 earlier, you did certify, over Plaintiffs' objection, a Rule
24 54(b) judgment. So, all of the claims that you certified are
25 gone and can no longer be subject to your Honor's Daubert

1 decision. There was the theoretical possibility left open
2 that -- apparently you found an example of a Plaintiff who
3 availed himself of the opportunity to amend his complaint.
4 With respect to any amended complaint that adds a claim that
5 hasn't been already certified as final, I suppose you do have
6 the opportunity with respect to that new claim to issue a
7 judgment, but it still wouldn't be automatic.

8 Under Rule 56, you can't just enter summary judgment
9 when a nonparty hasn't asked for it except with notice and an
10 opportunity to be heard, and the generics, the retailers, and
11 the distributors, they haven't asked for summary judgment at
12 any time.

13 Moreover, with respect to the generics --

14 *THE COURT:* I am sorry, you say a nonparty. They are
15 a nonparty, are they not, to the master complaint, which the
16 Court did not find was the result of a full merger, and that
17 the individual complaints still remained, and so they are
18 parties in those short form complaints.

19 *MR. KELLER:* Well, it depends on your Rule 54(b)
20 certification, which can be as to either claims or parties.

21 But when I said nonparty in the previous remarks, I
22 meant nonparty to the summary judgment motion, that only the
23 brands were a party to the summary judgment motion. The
24 generics, the retailers, and the distributors never asked you
25 to grant summary judgment as to any claim, including the

1 theoretical ones that could still be pleaded. Until your Honor
2 found that example, I had seen no short form complaint that
3 availed itself of that theoretical possibility to add, for
4 example, a hot truck in the desert claim against the retailers.

5 I also respectfully disagree with your Honor's
6 statement that general causation is general causation and it's
7 not specific to the brands. Summary judgment is something that
8 is adjudicated in the wake of a full evidentiary record. We
9 don't have a full evidentiary record, for example, against the
10 generics because they won and we lost.

11 Your Honor certified, under Rule 54(b), that every
12 claim against them was out. We might have been able to test
13 generic Ranitidine and found 20 million nanograms per pill. We
14 might have used different experts to testify about the testing
15 protocols with respect to generic Ranitidine. We never
16 presented those hypothetical experts and they never opposed
17 them because they didn't have to go through the full discovery
18 process that normally obtains when you're a litigant in a case
19 with live claims against you.

20 So, after giving them everything that they wanted, a
21 final judgment on every claim that every Plaintiff had pleaded
22 against them, not an almost final judgment, completely dead
23 with respect to the actual short form complaints that people
24 pleaded against generics, retailers, and distributors, it's too
25 late now with respect at least to those claims, the ones that

1 you certified as final, for them to get the benefit of a
2 Daubert process that they didn't participate in.

3 *THE COURT:* Okay. You have been heard in full on that
4 issue?

5 *MR. KELLER:* Unless your Honor has further questions,
6 yes, I have.

7 *THE COURT:* Okay. I may, but let's see what Defense
8 has to say.

9 I know we are spending more time on these topics, but
10 I think these were the meatiest topics of the status
11 conference, just so you are aware.

12 How does Defense want to be heard? I suppose it is
13 more of a nonbrand, although brands may have a view on the
14 legal issue, but why don't we start with the nonbrands and we
15 can circle back with the brands.

16 So, why don't we hear from Mr. Yoo, and then anyone
17 else who wants to speak on behalf of any nonbrands, and then if
18 the brands have anything to add.

19 Again, how should the Court be thinking about this in
20 a legal context, or what should the Court be considering
21 procedurally? What guides the Court procedurally to answer
22 this question?

23 *MR. YOO:* Thank you, your Honor, Thomas Yoo for the
24 generics. We have grappled with these issues, your Honor, and
25 at least from our perspective, this is advanced civil procedure

1 to be sure, and I have had a lot of input from folks on my
2 side. This is how we view the issues.

3 First of all, what is absolutely clear to us is the
4 Court set up Daubert, heard Daubert, and ruled on Daubert for
5 application to the litigation as a whole.

6 I don't need to remind the Court that the bellwether
7 process and the deadlines and discovery and everything were
8 directed toward the singular dispositive proceeding that would
9 be had on the question of general causation. And so, for the
10 Plaintiffs to now say, well, it wasn't really that dispositive,
11 we only looked at certain issues, I think that is, frankly,
12 without any merit whatsoever.

13 So, whether we look at it as collateral estoppel or
14 law of the case, or look to pretrial orders -- Ms. Zousmer
15 referred to some, but this docket is full of references to
16 Plaintiffs' leadership acting on behalf of all Plaintiffs and
17 claimants in the registry, and as your Honor pointed out, it
18 was the Plaintiffs' leadership that decided what the designated
19 cancers would be that would be tested for general causation on
20 Daubert grounds.

21 So, we think the Court's finding there is no reliable
22 evidence for general causation for designated cancers
23 absolutely applies to every Plaintiff and to any and every
24 Defendant named by any Plaintiff or claimant.

25 And as to Mr. Keller's last suggestion about the

1 Plaintiffs not having an opportunity to ask their experts to
2 look at generic drugs, I think that is disingenuous. There was
3 no limitation on what the Plaintiffs' experts would rely on for
4 their general causation opinions. Your Honor may recall the
5 generics provided a significant amount of discovery to the
6 Plaintiffs before we were dismissed on preemptive grounds.

7 In addition, even after we were dismissed on
8 preemption grounds, if the Plaintiffs felt they needed
9 additional data from the generics, they could have subpoenaed
10 us as third parties, I suppose.

11 So, to now come in and say their reports were somehow
12 limited and Daubert didn't look at all general causation issues
13 and evidence for the designated cancers I think is just wrong.

14 Now, the procedural issues are complicated, we agree.
15 We have gone back and looked very carefully at the Court's
16 ruling on the parties' motion for entry of final judgment,
17 Docket Entry 4595. We have also looked closely at the judgment
18 the Court previously entered, and here is our analysis, your
19 Honor.

20 You entered final judgment in all generic only cases
21 where a Notice of Appeal had been filed at the time of that
22 judgment, which was November 2021. You also entered partial
23 final judgment on 54(b) certification grounds in all mixed
24 generic cases on file at that time, and any future mixed
25 generic cases that would be filed.

1 You denied entry of final judgment in generic only
2 cases where the Plaintiff had not filed a Notice of Appeal, and
3 you also declined to enter final judgment in the class actions
4 because you determined that that needed to await additional
5 determinations.

6 So we have these two categories of cases where the
7 generics had been named where we still need final judgment.

8 What we have submitted to your Honor for consideration
9 and discussion today is a proposed final judgment relating to
10 generic only cases that were not covered by the November 2021
11 judgment. So, those would be generic only cases where a Notice
12 of Appeal had not been filed at that time, and any generic only
13 cases that may be filed in the future.

14 We feel the time is right for the Court to enter that
15 final judgment because the reason the Court declined to enter
16 final judgment back in November 2021 was, as the Court
17 mentioned today, there was the possibility that a Plaintiff
18 could unilaterally amend his or her short form complaint to
19 allege some other cause of action against the generics.

20 Well, Plaintiffs no longer have that ability, your
21 Honor, and there are three reasons why. One is, no Plaintiff
22 has amended his or her short form complaint to bring in such a
23 cause of action since the time of the November 2021 judgment.

24 Additionally, the deadline to amend has now passed
25 pursuant to the Court's pretrial order 78. And in addition,

1 based on the Court's Daubert ruling, it would be moot for a
2 Plaintiff in a generic only case to seek to amend his or her
3 short form complaint in a designated cancer case.

4 So, for all of those reasons we think the generics
5 should be granted final judgment under Rule 58 in any current
6 and future generic only cases.

7 As to class actions, your Honor, we would defer our
8 request for entry of judgment until the Court rules on the
9 pending motions and those issues are sorted out.

10 *THE COURT:* In response to Mr. Keller's comment that
11 because I entered a Rule 54(b) as to some of the generics who
12 didn't get the 58, that the Court is thereby precluded from now
13 entering a Rule 58, do you have a response to that?

14 *MR. YOO:* We do struggle, your Honor, with the idea of
15 getting a judgment after already having received a 54(b)
16 judgment.

17 Now, as to the question of a motion for an indicative
18 ruling, I would defer discussion on that to Mr. Kaplan, of
19 course, but frankly, your Honor, our proposal right now we felt
20 was in many ways the path of least resistance.

21 We have not ruled out the possibility that we may join
22 in Mr. Kaplan's request, but we felt, given the complexity of
23 these issues, the request for entry of a 50(a) judgment in
24 generic only cases was what we should request of the Court at
25 this time.

1 As to the mixed generic cases where the Court
2 previously granted 54(b) judgment, at this time we decided that
3 we would not ask the Court to revisit that.

4 MR. KELLER: Your Honor, may I quickly respond?

5 THE COURT: Let me just make sure I understand. As to
6 generic only, remaining a Rule 58, that is, those that did not
7 get a 58 or a 54(b) before, you are saying a 58 now, and as to
8 the generics that received the 54(b), nothing?

9 MR. YOO: That is correct, your Honor. If you look at
10 the judgment you entered in November of '21, there is a
11 provision in there, we have been referring to it as a
12 continuing judgment provision, but there is a provision that
13 provides for application of your judgment to any future mixed
14 generic cases. And so we believe by virtue of that provision,
15 any subsequently filed mix generic case already has judgment
16 entered in that case, and that would also apply to any mixed
17 generic cases that are filed coming out of the registry.

18 THE COURT: What page of that order, do you know off
19 hand? So I know what you are referring to.

20 MR. YOO: So, this would be page five, your Honor, of
21 Docket Entry 4664.

22 THE COURT: What language on page five, starting
23 where?

24 MR. YOO: It's in the middle of paragraph three which
25 says, "For mixed generic cases filed after the date of this

1 order, but which incorporate claims from the MPIC or NPIC,
2 judgment shall be effective as of the date that an individual
3 Plaintiff filed such a short form complaint."

4 Your Honor, I am not prepared today to address this in
5 full, but we would be open to an opportunity to analyze whether
6 there is a way for that part of the Court's prior judgment to
7 be revisited and amended so that there -- if there is a
8 procedural vehicle the Court has in mind for application of the
9 Daubert ruling to nonbrand Defendants, that be incorporated in
10 an amended judgment.

11 I am just not prepared to lay out procedurally how
12 that would work, but we would like an opportunity to consider
13 that if that is something the Court may be interested in.

14 *THE COURT:* Okay. Okay. Before I hear back from Mr.
15 Keller, though, let's hear from the other nonbrands if you want
16 to be heard.

17 *MR. KAPLAN:* Good morning again, your Honor, Andrew
18 Kaplan on behalf of the distributor Defendants, and for
19 purposes of this issue, we coordinate with retailers, so I will
20 convey the position of both groups at the moment.

21 I won't rehash what Mr. Yoo said, but we are in full
22 agreement with the general applicability of the Daubert
23 rulings, but as to the nonbrand Defendants, I will note -- I
24 think Mr. Keller referenced us as nonparties. I think we were
25 more technically nonmovants, but in terms of the specific

1 procedure contemplated, as Mr. Gilbert mentioned, we met and
2 conferred and discussed generally what we would like, and we
3 were not able to come to an agreement. We intend to file a
4 motion, with the Court's permission, and we will be in a
5 position to file that by Monday if the Court allows that, and
6 at least in our discussion with Mr. Gilbert and Mr. Keller, we
7 anticipated the normal Southern District of Florida local rules
8 could apply for purposes of the timing and length of the
9 briefing.

10 So I think that would -- if that were to occur, that
11 would complete briefing by February 13th, if we filed on
12 Monday.

13 *THE COURT:* What was the motion that you were going to
14 file?

15 *MR. KAPLAN:* The motion more in detail, the motion
16 would be seeking essentially two things; one would be the
17 application of the Daubert general causation rulings to the
18 distributors and retailers, and there are a couple of
19 mechanisms for that.

20 And then for purposes of Count 7 of the MPIC, the
21 M-P-I-C, which was the count that the Court declined to certify
22 for judgment, for 54(b) judgment, and allowed time for the
23 Plaintiffs to amend without leave, which has now passed, we
24 would seek entry of final judgment on Count 7. In terms of --
25 this is the timing issue that the Court's questions

1 anticipated -- we think that the application of the Daubert
2 ruling to that count, which I think there is no dispute the
3 Court has jurisdiction over, would go first, then Rule 58
4 judgment on that count.

5 At that point, once that is done, and this goes -- for
6 those cases in which brands are also in there, or other parties
7 are in there, that would close out, I believe, all of the
8 claims against all of the parties with respect to those
9 Plaintiffs' cases.

10 In terms of what -- for the counts that the Court did
11 certify for appeal under 54(b), we think there is a
12 jurisdictional issue in that the Court wouldn't be able to
13 explicitly enter summary judgment, or apply the summary
14 judgment necessarily on those counts. So, as we mentioned the
15 last time we discussed this on January 5th, we will ask the
16 Court to enter an indicative ruling essentially indicating that
17 were the Court of Appeals to remand specifically for the
18 limited purpose of applying the ruling, that the Court would
19 then apply the ruling.

20 We will weigh all the legal support for that out in
21 the motion. In fact, given the complexity of these issues, it
22 would be better to address in a motion and briefing so both
23 sides have the opportunity to provide you all the law and any
24 questions that the Court had would be fully informed by the
25 parties' positions. Would that help?

1 THE COURT: Yes. Thank you.

2 MR. KAPLAN: Sorry, your Honor, one more side note.

3 The Court mentioned an example of a recently amended
4 short form complaint, the Docket Number 23-CB-80054, the Nathan
5 Barker claim, and I think there may have been a
6 misunderstanding in Mr. Keller's comments, and I know he
7 prefaced his comments with saying he didn't have that in front
8 of him.

9 I think Mr. Keller suggested that there may have been
10 an independent negligence claim asserted or a hot truck claim
11 asserted in that. We had that pulled while we were speaking
12 and that wasn't the case.

13 THE COURT: That is correct. I only used it as an
14 example of Defendants being added as recently as January 13, to
15 make the point of whether the cases were still alive or not,
16 but no, it was not intended to be used as an example of a hot
17 truck case.

18 MR. KAPLAN: Thank you, your Honor.

19 THE COURT: Anything else from nonbrands? What about
20 from the brands on this issue?

21 MR. BAYMAN: Your Honor, Andrew Bayman for the brands.
22 As Mr. Gilbert mentioned, we have not been part of the
23 discussions with the generics, that has really been their
24 issue. We didn't think we had a dog in the fight. We think,
25 obviously, the order clearly applies to us, and we want to get

1 judgment entered.

2 In thinking about your Honor comments and thinking
3 about these issues, I don't think your Honor's order is
4 Defendant specific. I think your Honor says the linchpin of
5 all of the claims in the MDL is the question of whether
6 Ranitidine causes cancer. So, just reacting to it here in this
7 discussion, we think that it should apply across the board, if
8 you will.

9 As I say, we have not really been involved in these
10 discussions, we have not had a reason to be and haven't been
11 privy to all the arguments that have been made, but that is
12 just our reaction based on a lot of the comments the Court made
13 earlier.

14 *THE COURT:* Okay. I will turn back to Mr. Keller, but
15 I want to be clear, and you can say what you want to say in
16 addition, but is it Plaintiffs' position that a Rule 58 appeal
17 subsumes an earlier Rule 54 appeal or not?

18 *MR. KELLER:* I am sorry, your Honor, could you clarify
19 your question? I don't know what a Rule 58 subsequent appeal
20 would look like.

21 *THE COURT:* Well, almost like if you have a trial
22 record, say a case gets past summary judgment and it goes to
23 trial, and the trial record subsumes the summary judgment
24 record. I am trying to understand your position with respect
25 to if one were to take an appeal -- so, say there was the 54

1 appeal -- 54(b) appeal that we have in this case, then the case
2 ends, and Rule 58 is entered, and another appeal is taken, but
3 the Rule 54(b) never got the appellate ruling. Would the Rule
4 58 appeal subsume the prior appeal that was made on the 54(b)?

5 *MR. KELLER:* Got it, now I understand. No, your
6 Honor. Normally you are exactly right, if you deny summary
7 judgment and then you go through trial and develop a record,
8 what Rule 54 says is that all of the orders are nonfinal and
9 you can amend them. So you can look at your prior orders and
10 amend them because there is not a final judgment yet.

11 Once you certified under Rule 54(b), those claims are
12 gone. They are not almost final, you have made them completely
13 final, so those claims are no longer in the case, which is why
14 there is actually a tension between what you heard from Mr.
15 Yoo and Mr. Kaplan. At least the retailers and distributors
16 realize they have to seek a conditional ruling from your Honor,
17 and we'll oppose that in due course because we don't think it
18 is proper.

19 They have at least recognized that those claims are
20 gone and are in the Eleventh Circuit. Mr. Yoo said he might
21 join what they are filing, but I think the generic's position
22 is inconsistent with the retailers and distributors' position.
23 They think they can still get a Rule 58 judgment even though
24 you have already certified under Rule 54(b) that the claims
25 against them are final.

1 The other points I wanted to raise really quickly, the
2 same discovery point that I mentioned to your Honor with
3 respect to the generics applies to the retailers as well.
4 Wal-Mart, for example, manufactured its own product. We didn't
5 get full discovery from them, appropriately, because you
6 dismissed every live claim against them. That could have
7 changed the summary judgment record when you considered a
8 properly filed Rule 56. So, I think that needs to be taken
9 into account.

10 I will also say, I don't think I answered one of your
11 questions about timing, should you delay entry of judgment
12 vis-a-vis the brands while we consider all of these other
13 issues. Obviously, you have discretion to do so, but the
14 Plaintiffs' position is that you should not. The brands are
15 entitled to a judgment, and nobody disputes that. As you see
16 from the discussion we are having with respect to the
17 nonbrands, if you ultimately disagree with the Plaintiffs'
18 position, that is going to be messier.

19 We'll preserve all of our rights to tell the Eleventh
20 Circuit, with nothing but respect to your Honor, you should not
21 have issued a Rule 58 or a modified Rule 54. So, there is no
22 reason for the brands to be slowed down by a more clean
23 appellate process, that is just going to be a straight up
24 review of your Daubert decision with these extra issues.

25 The final point I'll make, I think I heard Mr. Yoo say

1 things like law of the case or collateral estoppel could
2 potentially be the reasons that they get the benefit of your
3 Daubert decision. I am pretty familiar with those doctrines,
4 I'll say off the cuff I don't think they apply, but we
5 shouldn't be at a case management conference throwing around
6 doctrinal reasons that someone should get a final judgment.

7 If they want to brief collateral estoppel or law of
8 the case, they are obviously welcome to do so, they didn't in
9 the motion that they filed to your Honor. To cavalierly throw
10 out doctrinal terms like that I think is inappropriate. They
11 can't get the benefit of those doctrines, but if they think
12 they can, they have an obligation to put that in writing before
13 your Honor so we can properly join the issues.

14 It is not something that you can just toss out and
15 say, oh, because of law of the case, now we can modify the Rule
16 54(b). That is not appropriate.

17 *THE COURT:* Okay, all right. I have learned a lot, I
18 appreciate it, and I am going to allow everybody to have that
19 additional briefing because these are complex issues. I wanted
20 to further understand the contours of your position, so if I
21 was going to ask for briefing I knew what to ask for so that it
22 made clear and didn't cause confusion. I am sure that I can
23 craft an order based on what I have heard today that will make
24 sense to you about what I would like.

25 I would need to look more closely at what the generics

1 have filed. I have not had a chance to review that. I know
2 the distributors have said, and retailers, that they plan on
3 filing something on Monday, so it may be that I am dovetailing
4 with what already has been done or what anticipates being done.
5 No doubt, I think that you all should have the opportunity to
6 brief these relatively complex civil procedure issues, and
7 certainly I would benefit from it so that I could attempt to
8 get the answer correct.

9 Thank you muchly and I appreciate it. I think that
10 takes care of topics one and seven.

11 Let's move on to -- let's see. We are going to move
12 off of topic two because everyone is in agreement it doesn't
13 need to be addressed.

14 Topic three, which is the process for addressing any
15 filed PI cases alleging non-designated cancers, so, if we could
16 have those who are handling that case. Okay, for the record,
17 everybody state your appearances for the record for purposes of
18 Pauline getting that down.

19 *MR. GILBERT:* May it please the Court, Robert Gilbert
20 on behalf of the Plaintiffs.

21 *MR. BAYMAN:* Andrew Bayman on behalf of the brand
22 Defendants, also as counsel for Boehringer Ingelheim.

23 *MS. ZOUSMER:* Julia Zousmer, counsel for Boehringer
24 Ingelheim and on behalf of the brand Defendants and Patheon.

25 *THE COURT:* Okay. This was how the MDL gets finalized

1 with respect to individual cases remaining with non-designated
2 cancers. I framed the issue back on January 5th that we didn't
3 know exactly how many non-designated cancers there were, but I
4 had sampled some to confirm that cases do remain in the MDL
5 that allege non-designated cancers and we know we have pro se
6 litigants who brought non-designated cancers, and the Court had
7 inquired, how do we handle this?

8 You have forwarded a joint proposed PTO which I have
9 that, in essence, calls for a proposal for a 60-day deadline
10 and a 120-day deadline. For the first deadline a
11 non-designated cancer must file a notice indicating he or she
12 will pursue a non-designated cancer, identifying the cancer,
13 and Plaintiff will provide a general causation report.

14 For the second deadline, the expert must be produced,
15 the expert report must be produced. These deadlines seem to
16 apply to the cases in the MDL now and would apply to cases that
17 continue to come in when the new cases arise.

18 So, the question the Court has is, is it contemplated
19 that, for example -- if, for example, there are a hundred
20 non-designated cancer cases, and only one files the notice of
21 intent to pursue general causation for their non-designated
22 cancer, does that mean the 99 cases -- other 99 cases would be
23 subject to dismissal, that counsel for the one non-designated
24 cancer does not -- not that they represent, but does not stand
25 in any kind of a role to be bringing his notice of intent to

1 pursue general causation to represent the other 99?

2 For example, I analogize it to how leadership has
3 handled this case, and I know there has been a comment by Mr.
4 Gilbert back at the January 5th status conference when you
5 said, "Your Honor, Robert Gilbert. That is not how things are
6 contemplated to proceed. Plaintiffs' leadership made the
7 decision not to pursue the non-designated cancers as part of
8 this MDL. This order would apply to those non-designated
9 cancers that are on file on an individual basis, so that if a
10 particular lawyer or law firms have filed non-designated cancer
11 cases, that they would be under an individual obligation to
12 come forward with their experts if they choose to pursue their
13 non-designated cancers, as we call them, as part of the MDL.
14 This is not a responsibility of Plaintiff's leadership."

15 So, there hasn't been a ruling one way or another.
16 The order appointing leaders didn't distinguish with this kind
17 of a detail. It's clear that leadership made a decision to
18 pursue certain cancers, the designated cancers, and not others,
19 the non-designated cancers.

20 So, is it the position of everyone that the
21 non-designated cancer cases are kind of like on their own
22 without leaders to litigate their individual cases
23 individually? One doesn't benefit from the other's work such
24 as, in this case to date, where so many others benefited from
25 the work of leadership in bringing forth all of the work

1 leadership has done up and to including Daubert.

2 I just want to make sure I understand that, and do you
3 have a list of all cases that remain with non-designated
4 cancers broken out by cancer?

5 So, let me hear from Plaintiffs first.

6 *MR. GILBERT:* Thank you, your Honor. May it please
7 the Court, Robert Gilbert on behalf of the Plaintiffs.

8 First the easy question -- answer to the easy
9 question, your last one, do we have a list of the
10 non-designated cancer cases that are on file? Yours truly does
11 not. I don't know whether the Defense does. Ms. Zousmer will
12 capably answer that question, I am sure.

13 Let me perhaps fill in a little bit of the background
14 about the proposed order that was submitted to your Honor.

15 During our post -- during our pre January 5th
16 conferences, we had contemplated an order that included all
17 sorts of deadlines, more than the two that are set forth in
18 this proposed order, including deadlines to complete expert
19 depositions, deadlines to file Daubert motions, deadlines to
20 oppose Daubert motions, and the whole gamut of deadlines
21 similar to the deadlines that apply to the designated cancer
22 cases that just went through Daubert.

23 Following the January 5th conference, my friends on
24 the other side, Ms. Zousmer and Mr. Bayman, suggested that
25 perhaps we were taking one step too many right now and that

1 this order that has been submitted to you, the form of which we
2 have agreed to, would be the first step in the process, and
3 this goes hand in hand with your question about leadership as
4 well, so I am going to address it.

5 This order, if you adopt it and enter it, would give
6 notice to those litigants, whether represented by counsel or
7 pro se, who are alleging non-designated cancers that they now
8 have 60 days from the date of this order -- and we are talking
9 about the ones on file already, there is provisions here for
10 ones that are later filed -- but 60 days from the date of your
11 order to disclose a list of any non-designated cancers they
12 intend to pursue through GC. It is as simple as that.

13 It doesn't require the disclosure of who their experts
14 may be; it just requires them to step up to the plate and to
15 tell the Court and to tell the Defendants whether they do
16 intend to pursue an NDC, as we call it, so that -- through
17 general causation so that your Honor knows and Defense knows
18 that they are going to do so.

19 If they do accomplish that step, this proposed order
20 then gives them an additional 60 days thereafter to prepare and
21 submit their expert reports on general causation with respect
22 to the NDCs that they have identified. That would be the time
23 when their experts are disclosed, their reports are disclosed,
24 and following that, Ms. Zousmer and Mr. Bayman thought, and I
25 agree, that it would be better to see how many, if any,

1 litigants asserting -- alleging NDCs actually come forward and
2 comply with these deadlines.

3 We don't know whether there are going to be a handful,
4 whether there are going to be any, or whether there will be
5 dozens or hundreds. But once that time passes, the Court will
6 be in a position to analyze it and determine whether there is a
7 need for any Daubert briefing schedule at all on these NDC
8 cancers, presuming perhaps that nobody has come forward. Maybe
9 there has been one or a handful of people that have come
10 forward and those few can work together.

11 Maybe there have been dozens or hundreds, and at that
12 point the Court can say, look, I don't really want to have
13 hundreds of individual people filing expert reports and briefs
14 on NDC general causation. Let me ask these people that have
15 satisfied the first two deadlines to submit a proposal to me
16 for a leadership of that group.

17 But these are all things that may happen or may not
18 happen, and my friends on the other side suggested, and we
19 agreed, that it would perhaps be a little bit too much too
20 quickly to throw all of these things into the first order, and
21 instead, with this first order see what happens.

22 *THE COURT:* And if they don't comply with the first
23 deadline of the notice, they will get dismissed?

24 *MR. GILBERT:* If they don't comply with the first
25 deadline, the Defendants will bring that to the Court's

1 attention, and the Court will, I presume, either -- and I don't
2 know which is the right move here. The Court will either enter
3 an Order to Show Cause why your individual case should not be
4 dismissed for failure to comply with this deadline or would
5 immediately dismiss it.

6 I think the former would be a better procedural step
7 than the latter, but that would be the case. If they didn't
8 satisfy the first, or they satisfied the first, but not the
9 second deadline, the Defendants would move -- they would attach
10 an appendix to their motion of those NDC cases where the
11 litigants haven't complied with these two deadlines. They
12 would ask for the Court to enter an order either dismissing
13 them outright or enter an Order to Show Cause why they should
14 not be dismissed.

15 If you entered an Order to Show Cause, say you have 20
16 or 30 days to show cause why you shouldn't be dismissed.
17 Probably most of them would not respond. Maybe one of them,
18 and again we're talking in a hypothetical world, would come
19 forward and say, I never received a copy of this order for the
20 following reason, and the Court and/or the Defendants might
21 change their position with respect to that single litigant if
22 there was a credible good faith reason shown that your Order to
23 Show Cause would not apply.

24 But the answer to your question is, yes, if the
25 procedural posture was they didn't comply with these deadlines,

1 the first and/or the second, the Defendants would move and the
2 Court would act accordingly.

3 *THE COURT:* Okay.

4 *MR. GILBERT:* Before I turn it over, I just want to
5 address was your final question about leadership.

6 The leadership team that the Court appointed was asked
7 to make decisions about how to proceed in this MDL and which
8 cancers to pursue through the general causation phase. Without
9 recounting the history, the chronological history of how those
10 decisions were made, the Court is aware that over time
11 Plaintiffs' appointed leadership ultimately made the final
12 decision to pursue five designated cancers, and we memorialized
13 those decisions with filings to the Court that are part of the
14 record.

15 In so doing we made it clear that appointed leadership
16 did not intend in this MDL to pursue the non -- NDCs through
17 general causation. Your Court appointed leadership still is of
18 that same view in this MDL, and so, if there are litigants, and
19 apparently there are, whether they are pro se or represented by
20 counsel, who wish to do this they need to comply with your
21 order, if you choose to adopt the form of the one that we have
22 submitted with Ms. Zousmer and Mr. Bayman on behalf of the
23 Defendants, and they need to do so through their chosen
24 individual counsel or pro se.

25 Again, as I said earlier, if so many of them come in

1 that the Court feels is part of the Court's case management
2 duties, you feel that there needs to be a streamlined process
3 involving many of them, the Court can then solicit the input
4 from those who have complied about who they wish will lead
5 their team, but it would not be the current Court appointed
6 leadership.

7 *THE COURT:* Okay, thank you. From the Defense.

8 *MS. ZOUSMER:* Julia Zousmer on behalf of brand
9 Defendants. With respect to the question about what would
10 happen to Plaintiffs who don't meet the requirements of the
11 current order, the order that we submitted and agreed upon
12 contemplates that those individuals would be dismissed with
13 prejudice under Rule 41(b).

14 I understand Defendants would have to bring that
15 motion, but because these were filed by Plaintiffs, and they
16 have been, some of them, for years, we weren't contemplating a
17 show cause process. It was these are the requirements; if you
18 don't meet the requirements you will be dismissed with
19 prejudice. That was the process that we had in mind and had
20 agreed on.

21 With respect to the other issues that Mr. Gilbert
22 discussed about the two -- why we took out the subsequent
23 deadlines from this order, I agree with him completely. What
24 he represented is exactly right. We thought that doing this
25 would make a lot of sense so we could see if anyone going to

1 proceed with a non-designated cancer; and if so, how many
2 people are going to proceed with non-designated cancers and how
3 many non-designated cancers are they going to proceed with, and
4 how many law firms are involved.

5 So, at that point the Court would be able to assess
6 the lay of the land and decide whether appointing leadership
7 would make sense. If there is one non-designated cancer case
8 that meets this first 60-day deadline and discloses the intent
9 to move forward with his or her case, there would be no need
10 for leadership.

11 If there are cases across every non-designated cancer
12 type and multiple firms and Plaintiffs involved, we would think
13 that leadership would make a lot of sense, but of course that
14 would be at the Court's discretion, and we would expect at
15 least some sort of informal coordination from the Plaintiffs
16 with the same types of -- moving forward with the same types of
17 cancer if it were not a formal leadership appointment from your
18 Honor.

19 *THE COURT:* Okay. All right. I don't think I have
20 any more questions. So, what you submitted is what you all
21 have agreed to.

22 *MS. ZOUSMER:* Yes.

23 *MR. GILBERT:* Yes, your Honor.

24 *THE COURT:* Thanks so much. We'll move on to the next
25 topic, topic five, which is maintaining the MDL to address any

1 transferred cases, any remand motions or other open items. We
2 have kind of discussed it a bit, but there is one avenue of
3 inquiry I haven't made yet.

4 If we could have counsel state their appearance for
5 the record.

6 *MR. GILBERT:* Once again Robert Gilbert on behalf of
7 the Plaintiffs.

8 *MR. AGNESHWAR:* Anand Agneshwar on behalf of
9 Defendants. Good morning, your Honor.

10 *THE COURT:* Good morning. I know we have talked a lot
11 about cases filed before a final judgment is entered and I know
12 there is a disagreement between the Plaintiffs and the
13 Defendants as to pre December 6 and post December 6 cases,
14 which we will get sorted out.

15 Let's move forward to the date when the Court finally
16 does enter a final judgment, whether it is as to brands only,
17 whether it's some variation of everything we have spoken about.
18 Based on your experience with MDLs, after the final judgment is
19 entered what should be the posture of the MDL? Should the MDL
20 be getting no more cases?

21 You know, we can communicate with the JPML about not
22 transferring cases any more, but what if people direct file,
23 what do we do about cases coming in after the judgment. I
24 don't think I have any more questions about pre file judgment
25 because we have covered that ground.

1 MR. GILBERT: Would you like me to address that first,
2 your Honor?

3 THE COURT: Yes.

4 MR. GILBERT: Robert Gilbert on behalf of the
5 Plaintiffs.

6 Mr. Agneshwar and I had good discussions. I think as
7 a principal matter, we both agree at a high level that once you
8 enter final judgments on the pending issues, on the Daubert
9 ruling and the summary judgment, and however the other issues
10 sort out, and those appeals ensue, this MDL does remain open
11 during the pendency of this appeal, and is not technically
12 closed or finished.

13 I think that the general view is that in MDLs where
14 this occurs, and it is infrequent, the MDL itself remains open
15 if for no other reason, as we just finished discussing on the
16 prior topic, it has to remain open to deal with the NDCs, for
17 example.

18 You raised an interesting point and that really --
19 which Mr. Agneshwar and I did not discuss, and that relates to
20 future cases filed outside of the district that would be tagged
21 for transfer typically to the MDL. I don't have a set view on
22 that today, but clearly your Honor, as the transferee judge,
23 has the ability to communicate to the panel that if it is, for
24 example, future designated cancer cases from multitude of
25 districts -- I think there are 90 now around the country --

1 that those should -- that they should simply stay in their home
2 transferor districts and be litigated there.

3 I am not taking a position that they should or they
4 shouldn't, I think that is within your discretion, but it is
5 something that you can confer with the panel about, which would
6 reduce the number of new cases being transferred into the MDL
7 insofar as they relate to designated cancer cases.

8 I hope that addresses your question.

9 THE COURT: Yes, sort of.

10 MR. GILBERT: Well, is there -- do you want me to
11 elaborate a little?

12 THE COURT: Well, I guess if they come in, and they
13 make it here, whether they -- you know, the JPML sends them
14 here, the question is, they land here -- I was trying to think
15 about what should happen to them, and I wonder if the
16 Plaintiffs' position is the same position you have with respect
17 to your post December 6 cases, which is due process, they have
18 the right to be heard, so devise some procedure, Order to Show
19 Cause or why the Court's prior final judgment shouldn't --
20 something similar shouldn't be entered as to you, because you
21 are alleging exactly what the pre December 6 Plaintiffs alleged
22 and summary judgment was granted against them.

23 MR. GILBERT: If you are done --

24 THE COURT: Yes.

25 MR. GILBERT: -- yes. The answer is, we would rest on

1 the position we took with regard to post December 6 filings.
2 Whether they are filed in this district or elsewhere and
3 transferred to this district, our position is post December 6
4 filings by designated cancer Plaintiffs are entitled to due
5 process through whatever procedural mechanism the Court
6 designs. So, if they make their way here, that would ensue.

7 *THE COURT:* If they don't make their way here, and I
8 were to somehow reach out to the JPML and say, don't send them
9 any more, and they would go to -- in their own transferor
10 district, the transferor district wouldn't have the benefit of
11 all the MDL work in his or her case, so that could also present
12 a problem insofar as it would be inconsistent with the intent
13 of an MDL, I would think.

14 *MR. GILBERT:* The answer is yes, but. You are a
15 hundred percent correct in that regard, but if the Defendants'
16 position is that the December 6 Daubert order should apply to
17 any designated cancer case, whether filed prior to December 6
18 or thereafter, they could as easily move for entry of summary
19 judgment in the transferor district if it is remanded there as
20 they could move here.

21 Obviously the transferor judge would not have the
22 knowledge and benefit of the workup that you have been privy
23 to, but they could -- the Defendants could still make the same
24 motion there, in that transferor district, as they could make
25 before you.

1 THE COURT: Okay. And from the Defense.

2 MR. AGNESHWAR: Your Honor, Anand Agneshwar
3 representing Sanofi Defendants, but speaking on behalf of the
4 brand Defendants.

5 On this last question, I don't think the time has come
6 to let transferor Courts kind of make their own decisions in
7 individual Federal cases that are filed or cases that get
8 removed. I think the MDL's work is done when the appeal is all
9 exhausted and we come back and we've had a hearing for
10 efficiency that applies to all Federal cases. That is the
11 typical approach that is taken by other MDL judges in similar
12 cases.

13 As to the pre and post December 6th cases that are
14 filed, I have two answers. Number one, I think you have to
15 distinguish between, as Ms. Zousmer said earlier, claimants
16 that were on the registry, but then choose to file their cases
17 after December 6th.

18 Whether it is before judgment is entered or later, I
19 think those individuals are bound, and that is clear not just
20 because of PTO 72 that Ms. Zousmer referenced, but also because
21 of the common benefit order PTO that the Court entered, that is
22 PTO 37, that expressly has a condition of by being on the
23 registry and getting the benefits of the registry they accede
24 to leaderships' decision about negotiating PTOs and litigating
25 PTOs and agree to be bound by them.

1 I think those cases are just -- there might be
2 something procedural that has to happen, but they don't get the
3 chance to do any kind of a do-over.

4 I do understand Mr. Keller's argument about, let's say
5 a case is filed that has never been on the registry in -- take
6 Florida State Court for example, and we removed the case to
7 Federal Court and it comes here, say, in June of next year --
8 June of this year -- we are in 2023 now, I keep having to
9 remind myself about that -- in June 2023, and the issue is what
10 about that person.

11 I would say, your Honor, as the first answer, I think
12 that because leadership has already litigated that exact issue,
13 and that is what leadership is tasked with, before and after
14 doesn't really matter and they should be bound as well.

15 I take Mr. Keller's point that as a technical matter,
16 they didn't get the opportunity to say, oh, you should make
17 this argument or make that argument. So, in that situation
18 probably an Order to Show Cause process, giving 30 days to say
19 why they have something different to say is probably the
20 appropriate path.

21 *THE COURT:* Okay. All right. Yes. You are on mute.

22 *MR. GILBERT:* Thank you, your Honor.

23 *MR. AGNESHWAR:* I don't have anything more, your
24 Honor. Oh, Mr. Gilbert does.

25 *MR. GILBERT:* I didn't contemplate there would be

1 argument on this particular issue -- in your question I didn't
2 contemplate you were inviting argument on the issue of the
3 legal impact of the Daubert order on registry claimants who may
4 file versus those who file anew for the first time.

5 Just for the record, we do not agree with Mr.
6 Agneshwar's comments. It is our position that each new filer,
7 whether filing for the first time never having been on the
8 registry, or coming off of the registry and filing, are
9 entitled to the same due process rights.

10 The amended PTO 37, PTO 72, we have no doubt in our
11 mind what your eventual ruling may be, but we don't believe
12 that those orders in and of themselves deprive new litigants
13 for the first time, newly filed cases for the first time -- we
14 don't believe that they bind them under a ruling under Rule 56
15 or a Daubert ruling and they must be handled procedurally in
16 the proper way going forward.

17 *THE COURT:* Okay. All right. Thank you very much.

18 I think that concludes everything. I know there were
19 a couple of other topics before, but I don't think I need to
20 hear anything further on the other topics. I appreciate
21 counsel being ready to -- well, actually, I had decided that if
22 you wanted to say something, I guess that was -- let's see what
23 the other topics were.

24 I didn't have any other questions, that is what I
25 meant to say. Let's see here. We just did topic five. Topic

1 six, we have already had the hearing. We did topic seven.

2 I didn't have any questions on topic eight or topic
3 nine, but if anyone wanted to say something on topic eight or
4 topic nine, you could because I know you had speakers lined up,
5 but I don't have any questions.

6 MR. GILBERT: Your Honor, may I be heard for just a
7 moment?

8 THE COURT: Yes.

9 MR. GILBERT: Robert Gilbert on behalf of the
10 Plaintiffs, may it please the Court.

11 I wasn't able to attend the hearing that you held last
12 week on the motion for multi-party complaints because I was
13 ill. I know it was a lengthy hearing and you invited us to
14 refile a renewed motion, and it was refiled on Tuesday, and you
15 then entered an order expediting the Defendants' response due
16 in today by 5:00 p.m.

17 For the record, your Honor, we are prepared to waive
18 our opportunity to file a reply and ask that the Court please
19 expedite a ruling on this issue. The days are quickly passing
20 and the ruling is the most important thing that we need. So,
21 for that reason we are willing to waive our reply and the
22 opportunity to have further argument.

23 THE COURT: Okay, I appreciate that. I don't think I
24 have seen the response yet. Let me just see. Probably Defense
25 knows.

1 MR. GILBERT: Unless it came in during our CMC today,
2 it was not filed by the time we started. They have until 5:00
3 p.m. per your order.

4 THE COURT: All right. I will say this, I appreciate
5 that it is urgent and that is why we have been handling it this
6 way.

7 I will assume there will be no reply unless for some
8 reason the response comes in and I feel I need one, but we'll
9 leave it that no reply will come in and that you have waived
10 your right.

11 I will say that regardless of how the Court rules on
12 the motion, I will have to get a PTO out, which we will have to
13 address procedurally how all of this is done regardless of the
14 outcome. And I have started to alert our Clerk of Court as to
15 the different permutations of what we might expect to see over
16 the next days, weeks, and months, but I will work expeditiously
17 on that as well.

18 Just so you know, there is a pretrial order that will
19 have to be entered regardless of the ruling that sets out the
20 procedures for how all this is going to be done vis-a-vis the
21 logistics of handling it.

22 MR. GILBERT: Thank you, your Honor, and to the extent
23 that the ruling obviously permits multi-Plaintiff complaint
24 filing, we stand ready to assist, if the Court needs it, with
25 helping to draft or offer comments on a PTO if that is going to

1 be the route that the Court ultimately chooses to go.

2 *THE COURT:* All right. Fair enough. Thank you.

3 That does conclude the status conference. There were
4 no other questions or comments that I had. I am going to
5 memorialize what kind of briefing I would like on sort of the
6 obvious issues that came up today, which we all agree are
7 complex civil procedure issues, and I think everybody pretty
8 much has suggested they want to be heard in further briefing,
9 and I think that is a good idea.

10 Why don't the distributors hold off on whatever you
11 are going to file on Monday. I haven't looked at what the
12 generics have filed, but my order may overlap whatever it is
13 you have put in, what you have submitted. I don't even know if
14 you have done it on the record or it was emailed. I am not
15 sure.

16 I am going to issue an order that will come out today,
17 or tomorrow at the latest, that will outline the best I can
18 what I have gleaned about the discrete legal issues that I
19 would like briefing on, and I will set out a briefing schedule.
20 I think we have time because pretty much everyone agrees that
21 we still have this process in place between now and at least
22 April with respect to potential claimants coming in to meet
23 their Statute of Limitations.

24 I will try to get the briefing and orders out in a
25 timely way, but I think it is important that I hear more from

1 you on the law and your precise positions and the bases for
2 your positions on these various issues with respect to the pre
3 and post December 6, the brand versus nonbrand, final
4 judgments, and things of that nature.

5 So, expect an order out today or tomorrow, and
6 distributors and retailers, hold off on your anticipated filing
7 for Monday so that we can make sure that your filing is
8 consistent with what the Court would like to hear.

9 Thank you again for your time. I know this has been
10 relatively long, but very, very helpful to the Court in
11 thinking about the next stages of the MDL. Have a good rest of
12 the day and a good upcoming weekend.

13 Thank you so much, take care.

14 (Thereupon, the hearing was concluded.)

15 * * *

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

18
19 Date:

20 /s/ Pauline A. Stipes, Official Federal Reporter

21 Signature of Court Reporter
22
23
24
25

Pauline A. Stipes, Official Federal Reporter

<div>MR. AGNESHWAR: [3] 59/7 63/1 64/22 MR. BAYMAN: [3] 4/1 44/20 49/20 MR. GILBERT: [20] 3/23 18/9 49/18 52/5 54/23 56/3 58/22 59/5 59/25 60/3 61/9 61/22 61/24 62/13 64/21 64/24 66/5 66/8 66/25 67/21 MR. KAPLAN: [5] 4/9 41/16 42/14 44/1 44/17 MR. KELLER: [14] 20/21 22/20 23/4 24/20 25/20 25/25 27/18 28/5 31/25 33/18 35/4 40/3 45/17 46/4 MR. YOO: [8] 4/7 29/21 30/7 35/22 39/13 40/8 40/19 40/23 MS. MAGUIRE: [1] 4/11 MS. ZOUSER: [8] 4/5 27/8 27/11 28/7 30/23 49/22 57/7 58/21 THE COURT: [51] 2/13 4/13 20/20 22/9 22/22 23/17 25/13 25/24 27/7 27/10 27/12 27/19 28/6 29/12 30/3 30/8 31/7 33/13 35/2 35/6 39/9 40/4 40/17 40/21 41/13 42/12 43/25 44/12 44/18 45/13 45/20 48/16 49/24 54/21 56/2 57/6 58/18 58/23 59/9 60/2 61/8 61/11 61/23 62/6 62/25 64/20 65/16 66/7 66/22 67/3 68/1</div>	<div>1/3 20004 [1] 2/6 202-624-2500 [1] 2/6 2021 [4] 37/22 38/10 38/16 38/23 2023 [5] 1/5 6/10 14/22 64/8 64/9 212-836-8011 [1] 2/3 213-896-2400 [1] 2/9 23-CB-80054 [1] 44/4 23-CV-80054 [1] 14/21 24 [1] 13/20 2400 [1] 2/9 250 [1] 2/2 2500 [1] 2/6 27 [1] 9/11 2800 [1] 1/14 2924 [1] 3/3 2nd [1] 8/12</div>	<div>6 60 [3] 53/8 53/10 53/20 60-day [2] 50/9 58/8 60606 [1] 1/18 60654 [1] 1/25 6333 [1] 1/25 6th [8] 19/9 23/3 23/6 26/7 28/17 29/10 63/13 63/17</div>
<div>' '21 [1] 40/10 / /s [1] 69/20</div>	<div>3 30 [2] 55/16 64/18 30309 [1] 1/22 305-384-7270 [1] 1/15 31 [1] 12/21 312-741-5222 [1] 1/19 312-995-6333 [1] 1/25 33134 [1] 1/15 3434 [1] 2/13 353 [1] 1/24 37 [3] 30/15 63/22 65/10</div>	<div>7 72 [4] 30/25 31/6 63/20 65/10 7270 [1] 1/15 78 [1] 38/25</div>
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