

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 WEST PALM BEACH DIVISION

4 CASE NO. 20-md-02924-ROSENBERG

5 **IN RE: ZANTAC (RANITIDINE)** .
6 **PRODUCTS LIABILITY** . West Palm Beach, FL
7 **LITIGATION.** . October 25, 2021
8 .
9 .

10 BELLWETHER SELECTION PLAN HEARING (through Zoom)
11 BEFORE THE HONORABLE ROBIN L. ROSENBERG
12 UNITED STATES DISTRICT JUDGE

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1 *THE COURT:* All right. Good afternoon, everybody. We
2 are here in the Zantac Products Liability Litigation, MDL
3 number 2924, and we are here today pursuant to the Court's
4 order at Docket Entry 4506 in which the Court issued an order
5 setting conference on Bellwether selection plan.

6 So I see some faces on the screen, which is always
7 nice, I don't have to look into just myself.

8 Let's begin by having everybody state their appearance
9 for the record. We are here, for the record, on the Zoom
10 platform in light of the ongoing COVID pandemic.

11 *MR. PULASKI:* Adam Pulaski on behalf of the
12 Plaintiffs, your Honor. Good morning.

13 *THE COURT:* Good afternoon here.

14 *MR. WATTS:* Mikal Watts, good afternoon, your Honor.

15 *MR. BAYMAN:* Good afternoon, your Honor, Andrew Bayman
16 on behalf of the brand Defendants.

17 *MS. ZOUSMER:* Good afternoon, your Honor, Julia
18 Zousmer on behalf of the brand Defendants.

19 *THE COURT:* Good afternoon, everyone, and thank you
20 for being here.

21 In the Court's order at 4506, the Court indicated that
22 it was holding a conference on the parties' Bellwether
23 proposal, and the Bellwether proposal which had been provided
24 to the Court through the Zantac email address. For the ease of
25 reference and clarity on the record, the Court attached the

1 proposal, and I understand it is just a proposal, to the order
2 so we are clear on what we are talking about, and it's styled
3 Pretrial Order, Bellwether Selection, but for our purposes we
4 will call it the Bellwether proposal.

5 I understand that it was jointly submitted and I
6 appreciate that. As in many matters in this MDL, I want to
7 continue to recognize and applaud counsel for working together
8 when you can, recognizing from time to time that there are
9 differences that arise, but that you really use your earnest
10 efforts to work together so that when you submit proposals to
11 the Court they are, to the best of your ability, a reflection
12 of a joint agreement. Probably much negotiation and compromise
13 and discussions go back and forth, and I realize that isn't
14 always easy.

15 It probably would be easier for you just to submit
16 your own proposals, but I can tell you from the Court's
17 standpoint, I do feel that I get the best of your work when you
18 jointly propose your issues to the Court, whether it is in the
19 Bellwether or any one of the other 60 plus pretrial orders,
20 which I would say, for the most part, have been entered upon
21 consensus of the parties, and I am appreciative of that.

22 So, I wanted to have the hearing today. Some pretrial
23 submissions are more straightforward than others, some are more
24 consequential than others. Clearly this appears to be in the
25 consequential category. I think we would all agree how we go

1 about the Bellwether selection is one of those important
2 decision points inflection points in an MDL. So, my first goal
3 was to make sure that I actually understood what it was that
4 you were proposing to the Court, because it is one thing to put
5 it together, and I can tell it is very detailed and very
6 particular, so I have no doubt in your mind as you were walking
7 through all of the different steps, it was very clear to you
8 what you were doing and what you were saying and how you were
9 conveying it, but from the outsider coming to the table not
10 having been privy to all of those discussions and thought
11 processes, it has taken me several readings to make sure,
12 several charts, all of which I have.

13 You don't have the benefit of seeing them, but I have
14 them all plastered on the plexiglass in front of me, visuals,
15 timelines and trying to get from A to B to C to D.

16 I thought it would be helpful just to give you the
17 latitude to explain it to me in your words so I can hear you
18 explain what you have submitted in writing.

19 I know that I submitted through our special master a
20 few questions that I had, which I was happy to do. I can't
21 promise you they were all the questions, but I think they were
22 the bigger ones, so don't worry. If you can't answer a
23 question, that is fine, too.

24 So, let me let you give your overview. You can choose
25 to have one point person do it or divide it up, however you

1 wish to do it. To the extent that you want to and can
2 incorporate some or all of those questions that I had submitted
3 through our special master to you, that would be terrific, and
4 then I will try to hold off on asking any questions as we go
5 along. Sometimes I can't help myself, but I will try to
6 control myself.

7 Then what I may want to do is then walk through
8 particular parts of the proposal that I had questions on, that
9 I needed a little clarity, that maybe didn't make sense to me
10 in terms of whether it was a timeline or a timeframe, or how
11 you get from one sort of step to the next.

12 So, with that, let me just locate my pen again. We
13 are working in a different courtroom, so I don't have all of my
14 things available to me. Bear with me one moment so I can grab
15 a pen.

16 Let me turn it over to counsel for kind of walking me
17 through the proposal at large.

18 *MR. PULASKI:* If I may, Judge, real quick to begin
19 with, and I will have Mikal get into the details of it, I do
20 appreciate Mr. Bayman, Mr. Petrosinelli, and Ms. Zousmer
21 working with us. We had a very good working relationship, as
22 you can tell. As you stated, this is a very detailed proposal.

23 And I also appreciate the fact that you provided us
24 with those questions that we were able to deal with in advance,
25 which actually led us to make a few changes on some dates and

1 some minor changes, as well as led us to a discussion about one
2 area where there was, I guess, an area of misinterpretation or
3 miscommunication where there were two ways to interpret
4 something, and we are trying to resolve that issue as of now.
5 My understanding is that we will try and get that done within
6 the next 48 hours and have resolution to that issue, and once
7 we are able to resolve that issue, then we would be able to
8 come to an agreement on this proposal at that time.

9 As you said, there are a number of other areas that we
10 can discuss today regarding timelines and everything else in
11 addition to your questions, and I do want to say that we have
12 been working diligently with the Defense on this. After we
13 submitted the proposal to you we continued to work diligently
14 on it because it is a process that is going to be ongoing for
15 the next 12 to 14 months, and we want to make sure we have all
16 of our ducks in a row and that both sides are in agreement with
17 every aspect of this pretrial order as it flows from stage to
18 stage.

19 With that, I will turn this over to Mikal to give you
20 kind of an overview of pretrial order A through Z and how it
21 should function and how we think it should flow.

22 MR. BAYMAN: Your Honor, before Mr. Watts -- I'm
23 sorry, your Honor.

24 THE COURT: I was just going to say thank you. Are
25 you feeling better, Mr. Pulaski? I heard you were not feeling

1 well. Are you feeling better?

2 MR. PULASKI: Mostly recovered. Thank you for asking.

3 THE COURT: Glad to hear it. Mr. Bayman.

4 MR. BAYMAN: Your Honor, just to echo what Mr. Pulaski
5 said, this was a very cooperative process, a lot of hard work
6 by the folks here, by Ms. Zousmer, who really has just an
7 encyclopedic knowledge about the mechanics of this plan and she
8 put a lot of hard work into it, as did Mr. Pulaski, Mr. Watts,
9 myself, and Mr. Petrosinelli, and I agree with Mr. Pulaski,
10 something arose on Friday that we see as an area of
11 disagreement, but we are committed to spending the next 48
12 hours to try to work it out.

13 Otherwise, I think we have come up with a structure
14 that is innovative and creative. Mr. Watts deserves a lot of
15 credit for a lot of that, but we think it is going to produce
16 ultimately a representative trial pool of the cases that are in
17 this MDL.

18 So, I just wanted to reiterate -- agree with what Mr.
19 Pulaski said about all the hard work and all of the
20 collegiality that was involved in the process.

21 THE COURT: Excellent. I appreciate every
22 enforcement, thank you.

23 MR. WATTS: Judge, Mikal Watts for the Plaintiff, and
24 what I thought we would do is, I will give you an overview and
25 then go through the first section and then cede the floor to

1 Ms. Zousmer. We really have been working together, with the
2 assistance of your special master, kind of cleaning up the
3 proposal so that it is more specific and addresses some of your
4 concerns and, of course, we had to move some dates around.

5 From a global perspective, our goal is to have an
6 order that takes us from 130,000 people in the Court's registry
7 to the first four trials, and to do that in a Plaintiffs
8 selection mechanism or process that achieves -- I mean
9 representative Plaintiffs so that when we do get jury verdicts
10 we have all learned from those verdicts as opposed to having
11 wedged in excuses about why it was a Plaintiffs verdict or
12 Defense verdict and that would be an impediment to settlement.

13 The order is structured in several parts. The first
14 part, with respect to page one and two, is our discussion of
15 what constitutes the Bellwether pool, and the first issue, of
16 course, is whether we do that nationwide.

17 As the Court knows, there are cases from all over the
18 United States here, but we pitched an idea to the Defendants
19 that we use Florida as kind of a Bellwether state for purposes
20 of the selection process. There are several reasons for that.

21 Number one, it is one of the largest states in the
22 United States, so it is not like picking from a state with a
23 population like Wyoming or Delaware. You have a very wide
24 berth, if you will, of population and we believe that it stands
25 as a representative state for purposes of using it as the

1 Bellwether pool.

2 And then the second thing, of course, is that it has
3 been our experience in these cases that when you have
4 out-of-state Plaintiffs being asked to participate in an MDL
5 pool in some other state a lot of them are reticent. You have
6 problems from the standpoint of obtaining Lexecon waivers.
7 From my perspective, it is always a problem with the Defense,
8 and I'm sure from the Defense's perspective, it is always a
9 problem with the Plaintiffs.

10 The concept of using Florida Plaintiffs is, A, it is a
11 big enough state that it is representative; and B, it solves
12 all sorts of procedural issues from the standpoint of no
13 Lexecon waiver, and then, of course, your Honor would have no
14 problems from the standpoint of obtaining subpoena power over
15 witnesses that presumably are more likely to be in the State of
16 Florida than anywhere else, so we think that is a big advantage
17 as well.

18 As you go to the second page, Ms. Zousmer has been
19 kind enough, and I have checked her math, to give us the number
20 of Florida Plaintiffs that were in the registry as of the end
21 of September, which is the day before that we promised you the
22 first draft of this. So that nobody is padding the deck, if
23 you will, we just took a snapshot there. I think we are all
24 pretty content about using that snapshot of the different
25 cancers.

1 There is a process with respect to people being
2 willing to bind themselves to the Bellwether selection order,
3 and then, as you know, on December 20th the Plaintiffs will
4 tell you if there are cancers among the top ten that in the MDL
5 are no longer going to be pursued, or perhaps are going to be
6 pursued elsewhere and the like, and that way we are not wasting
7 resources further in the Bellwether discovery process working
8 on Plaintiffs that are not being pressed in the MDL.

9 I will stop there and turn it over to Ms. Zousmer to
10 add any other comments on Section I.

11 *MS. ZOUSMER:* No, Mikal, I think you got it on Section
12 I.

13 *MR. BAYMAN:* One other thing I would add, your Honor,
14 is that we have looked and there have been -- this is not
15 unprecedented, there have been other MDLs that have drawn
16 Bellwether pools from just one state. The Taxitor (phon) MDL
17 in the Eastern District of Louisiana and I believe the Abilify
18 Gambling MDL in Florida are two examples, but as Mr. Watts
19 said, because of the size of the pool in a big state like
20 Florida, in comparing it to what we see overall in the registry
21 in terms of the -- there are some slight differences, but we
22 don't think differences that would be meaningful.

23 So, we think a Florida pool would be a representative
24 pool, and we have been able to use the registry data to make
25 those comparisons, so another advantage to having the registry

1 data was being able to do that data mining and compare and see
2 do we really think -- and both sides did it independently and
3 both sides came to the same conclusion.

4 *MR. PULASKI:* Your Honor, Adam Pulaski for the
5 Plaintiffs. If you don't already have those reports, the
6 global report from Florida only Plaintiffs, I am happy to send
7 that over to Special Master Dodge to get to you if you would
8 like to take a look at it in comparison with the global report
9 from the entire registry.

10 *THE COURT:* Okay. I am going to violate my own rule
11 that I wasn't going to ask questions, but I kind of like what
12 you are doing, which is -- if we break it down by section, so
13 we are in Section I, the Bellwether pool, before we go to
14 Section II, can I ask questions?

15 *MR. WATTS:* Do whatever you want, your Honor.

16 *MS. ZOUSMER:* Yes, your Honor.

17 *THE COURT:* Okay. So, did you finish your discussion
18 on Section 1?

19 *MR. PULASKI:* Yes, your Honor.

20 *MR. WATTS:* Yes.

21 *THE COURT:* Good. So, very helpful. Let me work
22 backwards from the last comment that was made.

23 Did I understand you to say that there is some type of
24 a global report from LMI that shows certain data points that
25 would give all of you, that is Defense and Plaintiff, comfort

1 and assurance in concluding that using Florida
2 Plaintiffs/claimants -- I think you meant to say probably
3 Plaintiffs and claimants in E on page two -- that the Florida
4 Plaintiffs are kind of a representative group of the overall
5 130,000 plus persons in the registry, whether they are filed or
6 unfiled? Is that more or less what I am understanding you to
7 say?

8 *MR. PULASKI:* Yes, your Honor. Adam Pulaski for the
9 Plaintiffs. As Mr. Bayman pointed out, there are some minor
10 differences, and Mr. Watts alluded to that as well, where there
11 may be a one year age -- average age difference, or there may
12 be a cancer type that is off a few percentage points, or
13 something like that.

14 Overall, there was nothing statistically that was a
15 variant in any significant way that caused us any concern or
16 problem and this was completely representative as the larger
17 group as a whole.

18 *THE COURT:* Okay.

19 *MS. ZOUSMER:* I was going to add that really for the
20 most part the data was very representative in terms of duration
21 of use spread and the breakdown of product type and cancer type
22 by age. We had the aggregate CPF reports for both pools and
23 looked at it across all the categories of data, and it really
24 was a very representative pool on all of those key issues.

25 *THE COURT:* Okay. I will take you up on your offer,

1 since I get regular LMI reports anyway, but it sounds like this
2 was sort of a special LMI report that you asked for, or maybe
3 you were looking at it in a way that -- previously I had been
4 looking at the LMI reports not for something of this nature,
5 which would make sense since we hadn't really reached
6 Bellwether selection issues until the submission of this
7 proposal.

8 So, if I could take you up on the offer to provide the
9 special master with what it is that you all looked at to
10 satisfy you that the Florida group is representative of the
11 global group, and again, global would mean persons in the
12 registry, and persons in the registry are comprised of filed
13 Plaintiffs and unfiled claimants.

14 That is very helpful to know, I wasn't aware of that.
15 I wasn't coming at this from the standpoint of picking one
16 state is bad, going with all states is good, although I have
17 done enough research, you would say, you know, to understand
18 that some of the issues that might suggest a potential bad
19 practice, a potential one, would be -- well, a definite bad
20 practice would be not having a representative pool, and one way
21 in which you might not have a representative pool would be
22 pulling from one state.

23 It is not to say all the time that is a bad practice,
24 so I kind of wanted to understand why you thought this was not
25 a bad practice, but in fact was a good practice, and with that

1 included my questions of, you know, to the extent -- I was
2 trying to understand whether it was driven in large part
3 because of Lexecon and waivers and subpoenas, or whether those
4 were kind of attendant benefits, oh, by the way, we are picking
5 Florida Plaintiffs and now we are not going to have waiver
6 issues, subpoena issues.

7 I guess what I am hearing is it is everything. You do
8 feel it is representative because of your comparison with the
9 global, which is one of the outstanding benefits of the
10 registry, quite frankly, among many benefits of the registry,
11 something very novel and being well used by counsel, and in
12 addition to that, we don't have to worry about Lexecon waivers,
13 and the Court doesn't have to worry about its subpoena power.

14 *MR. WATTS:* Yes, Judge. Mikal Watts. There is one
15 other issue that is brought up sometimes at these MDL
16 conferences, and that is, you have a robust history as a
17 Florida State Court judge and are familiar with Florida with
18 substantive law.

19 We also looked at it not from the standpoint of the
20 representative Plaintiff, but is Florida considered an outlier
21 from other states, is it wildly different, and while every
22 state has its differences, it is kind of in the middle from the
23 standpoint of substantive law that would be of assistance from
24 the standpoint of formulating settlement values and the like.

25 Then, of course, Erie determinations or what some

1 Appellate Courts call Erie guesses, so, we have a Florida judge
2 with a great understanding of Florida substantive law making
3 decisions with respect to the cases that are likely going to be
4 decided under Florida substantive law, and I think the Eleventh
5 Circuit would appreciate that as well.

6 *THE COURT:* Okay. All righty. And I think that
7 covers sort of the biggest topic -- the only other things I was
8 going to point out in the first section, the Bellwether pool --
9 so, by my count, more or less -- again, when you have the chart
10 in D, number of Florida Plaintiffs, you mean Plaintiffs and
11 claimants?

12 *MR. WATTS:* I do. Sorry.

13 *THE COURT:* In paragraph E. So it's about 7300 or so?

14 *MR. BAYMAN:* That is correct, your Honor.

15 *MS. ZOUSMER:* That's right.

16 *THE COURT:* When you take the 75 percent of that, you
17 get about 5500?

18 *MS. ZOUSMER:* Yes, that is correct.

19 *THE COURT:* I won't go further into E, because I
20 understand that is one of the areas that you are working on. I
21 am going to skip over any more discussion about paragraph E on
22 page two.

23 When you talk about Bellwether pool in paragraph E,
24 you might want to consider making that a defined term. You
25 have Bellwether trial pool on the third to last line, and then

1 you refer to it as Bellwether pool on the last line of E. I
2 know a lot of times you define --

3 MR. BAYMAN: We caught that, your Honor, when we were
4 working through things this weekend, so we will do that.

5 THE COURT: Okay. Then in paragraph D, I know you
6 define alleged cancers as those cancers that are going to be
7 disclosed by the Plaintiffs per PTO 65 on December 20th, and we
8 will see when we get into paragraph II, the initial discovery
9 pool, there appeared to be a little disconnect with your dates,
10 you doing certain things in November relating to alleged
11 cancer, but alleged cancer is defined in paragraph F as
12 something that we won't know until December 20th, but you are
13 probably already going to get into that.

14 I just violated my rule again because I didn't stick
15 to paragraph one. That is all I have on paragraph I.

16 MR. WATTS: It was a fair comment, and I blame myself.
17 Mr. Zousmer and I were going back and forth before we submitted
18 a first draft and we were moving dates around and we obviously
19 missed --

20 THE COURT: Mr. Watts, you just froze, so we are not
21 hearing you right now. I will wait until you are unfrozen.

22 Ms. Zousmer, were you able to read his mind?

23 MS. ZOUSMER: I think so, on this at least, and that
24 is just to say that we caught it. We moved some dates around
25 and we were going to change the references in the earlier date

1 to say like the alleged cancer categories instead of the
2 defined term, so we will make it generic.

3 *THE COURT:* Okay. You had just frozen, Mr. Watts. I
4 don't know if you could hear us, but we couldn't hear you.
5 Ms. Zousmer just finished your sentence.

6 Unless there was anything further you wanted to say,
7 did you want to move on to paragraph II?

8 *MR. WATTS:* Yes. The changes in paragraph II and III,
9 and there is a date change in paragraph I E as well, are all
10 designed to account for the fact that it has been 25 days since
11 we submitted this, or three weeks, so some of the dates have
12 been moved back, but I am happy to say that we figured that out
13 this weekend, about how to move some of these dates back
14 without moving the ultimate date of when we would propose the
15 Court conduct its first trial.

16 Largely, paragraph II now says that by Friday we'll
17 agree to a form of a signed medical authorization, required
18 authorization. Our randomizer will take place on December the
19 10th. We've agreed to change the number being selected by the
20 randomizer from six to eight percent to account for the
21 exclusion of the Apotex cases that would destroy your
22 jurisdiction, and the numbers work out nicely.

23 The bottom line is that we are going to have at least
24 25 Plaintiffs/claimants in each cancer category, but we may
25 have a pool as large as eight percent of what remains after we

1 get rid of people that are involved with Apotex such that it
2 would destroy your discovery.

3 Then, of course, in paragraphs C and D we have a
4 process where if for any reason it is necessary to replace
5 Plaintiffs/claimants, initially that replacement is done
6 through the Microsoft randomizer so we continue to get a random
7 pool.

8 As we get later into the Bellwether selection process,
9 if Plaintiffs drop out for any reason it becomes more punitive
10 against the Plaintiff, where in effect the Defendants get to
11 select the replacement to persuade us from gerrymandering the
12 pool, if you will, but at least initially, in the initial
13 discovery pool we are going back to the randomizer to select
14 replacement Plaintiffs so that we keep the numbers up before we
15 begin the process of doing the discovery that we need to
16 actually make our decisions.

17 So, in C -- I mean in D, if somebody is going to
18 decide not to participate after we randomly selected on
19 December 10th, the date changes to December 17, they have to
20 say that they are not going to be there, and then you have a
21 replacement. The dates change from December 17 -- it goes from
22 December 17 to the Defendant replacing them by December 22nd,
23 and then on January the 7th and January the 14th -- we will
24 have this all in the new version to you, but this is basically
25 a version of pushing everything back two or three weeks to

1 account for that.

2 So, that gets us to the situation where we are now in
3 the initial discovery pool which starts category III, and at
4 that point, we will start on December 15th, and we'll continue
5 on a rolling basis until January 14th to provide these
6 electronically signed medical authorizations, together with a
7 list of what we call the big five categories, that being the
8 primary health care physician, the gastroenterologist, the
9 Ranitidine prescribing physician, if applicable, the physician
10 diagnosing the alleged cancer, and the treating oncologist.

11 That way somebody with a medical authorization knows
12 where to send them to get the appropriate records. That is
13 going to be done beginning on December 15th and ending by
14 January 14th.

15 Paragraph III B says if there are any deficiencies the
16 Defendants will let us know within five days of getting them,
17 and this is why it is on a rolling basis, so that the
18 Plaintiffs can correct those deficiencies within two weeks
19 after being notified by Ms. Zousmer's group, and in no event
20 later than January 28th.

21 The importance of all of that is that in the original
22 version that you are probably looking at, as we go down to the
23 Bellwether discovery pool, everything starts February 1. So,
24 as long as we got there by February 1, everybody was happy, and
25 those were the dates that we renegotiated and will submit to

1 you in 48 hours when we get this last issue done.

2 Ms. Zousmer.

3 MS. ZOUSMER: I don't have anything to add to that,
4 Mikal, I think we are good.

5 MR. WATTS: Then with -- do you have questions on 2
6 and 3, Judge?

7 THE COURT: Yes, I do.

8 MR. WATTS: Sorry, I didn't mean to run away from you.

9 THE COURT: Let me get my paperwork here. I pasted it
10 up there. Okay.

11 So you are changing the 6 percent to 8 percent, so I
12 had calculated that your 6 percent, based on the earlier
13 numbers, was going to yield, I don't know, about 425, but your
14 8 percent, I guess, is going to be a larger number, and --

15 MR. WATTS: It is not really going to be larger
16 because the new version we're going to send you takes out the
17 people that LMI tells us that Apotex -- pushing Apotex and the
18 Florida situation, so the numbers basically end up where they
19 were, with some stop, but not much.

20 THE COURT: You intend to use the ten cancers, or the
21 alleged cancers? They might be one in the same, but when you
22 talk about 6 percent in each alleged cancer or 25 Plaintiffs
23 per category in any alleged category in which 6 percent of the
24 certified Plaintiffs does not exceed 25 --

25 MR. WATTS: We are going to randomize based on the

1 full ten because it doesn't cost us anything. We may surprise
2 you and make that designation slightly before December 20th.
3 We are not there yet because we don't want to shock all of our
4 experts and say, hey, we changed our mind on your deadline.

5 We understand the small disconnect in these dates, and
6 I would anticipate that we will have a pretty good idea where
7 we are going earlier than that. Of course, we won't sandbag
8 you and hold it until the 20th, because we understand the dates
9 don't line up, but we think we will be able to line them up
10 voluntarily by disclosing those cancers slightly before
11 December 20th.

12 *THE COURT:* So, the idea is if the ten goes to eight,
13 hypothetically, you will have already done your randomizers to
14 all ten, so you just eliminate those two.

15 *MR. WATTS:* Exactly.

16 *THE COURT:* I do note you do use the word "certified"
17 there. In discussions about E you do refer to them as already
18 being certified there.

19 *MR. WATTS:* Right.

20 *THE COURT:* Okay. So, it has to be at least 25
21 Plaintiffs per cancer, but it could be higher. 6 percent or
22 8 percent could be higher, but it has to be at least 25.

23 *MR. WATTS:* It will be higher on some cancers, but it
24 has to be at least 25 on all cancers.

25 *THE COURT:* If it's less than 25, the randomizer --

1 MR. WATTS: Keeps going.

2 THE COURT: -- selects additional cases. It goes back
3 to the group, the Bellwether pool within that cancer, and pulls
4 more to get to 25?

5 MR. WATTS: Exactly.

6 THE COURT: Okay. Okay. So now C, by a certain
7 date -- it now says November 28th, but you are going to change
8 that slightly -- any Plaintiff selected for the initial
9 discovery pool who does not intend to proceed with his or her
10 case or claim and be subject to discovery and deadlines.

11 How are you going to determine -- like, what is that?
12 What does it mean, who does not intend to proceed? How are you
13 going to ascertain that? I mean, in my mind I was thinking of
14 a scenario where maybe an attorney can't reach a client,
15 whether it is a claimant or a Plaintiff, that might be one
16 scenario where somebody doesn't intend to proceed, because the
17 lawyer can't reach the client.

18 Maybe you reach the client and they are ready to pull
19 out, they don't want to have anything more to do with the case.

20 What did you envision as to who do not intend to
21 proceed, and how were you going to learn that? What is the
22 triggering act that sort of -- or acts that tell you that? And
23 it dovetails into my next questions, so I want to understand
24 that first.

25 MR. WATTS: We did two things. Number one, this date

1 is after the certification deadline, so at least 75 percent of
2 your pool will have already certified their willingness to be
3 involved whenever you negotiate that.

4 There is a 25 percent possibility that somebody hasn't
5 certified yet, and we call them up on the 10th, you just got
6 randomly selected, they say I want no part of this.

7 Now, here is the challenge there, by -- and the dates
8 are now December 10 for the randomizer, and then by December 17
9 any Plaintiff that wants out has to say so.

10 So we anticipate that on Friday the 10th, we will have
11 a communications program where everybody who is selected will
12 be immediately notified, all of the law firms that represent
13 those people will be on a communication SWAT team to contact
14 all these people, and those law firms will have the onus of
15 getting a communication from their client that if they don't
16 wish to proceed they have to tell us within a week.

17 But the challenge there, as you see, is it is not an
18 option, you are here, you say you are going to proceed, or you
19 voluntarily dismiss your action with prejudice.

20 And so, they have seven days to tell us that, and
21 then, if that happens, then the Defendants have five days
22 thereafter, it is now on the 22nd, to, in effect, replace the
23 case, and you will notice that the replacement at this point is
24 no longer using the randomizer, okay, and that is meant to
25 dissuade the Plaintiffs' Bar from gerrymandering the pool into

1 something that was representative into something that is not.

2 So, presumably most people who took the time to either
3 file a lawsuit or to fill out the Census Plus form did so
4 because they had been hired by a client to push a Zantac case.

5 So, at this point, it is kind of an amalgam between
6 the certification on the one hand and this deadline on the
7 other where people are voluntarily availing themselves of your
8 jurisdiction for the limited purpose of participating in the
9 Bellwether selection process. We can't have our cake and eat
10 it, too.

11 So, to directly answer your question, within seven
12 days, if you want out you have to say so. If you say so, there
13 is a replacement process, and then they have to, in effect --
14 the randomizer is still used at this point. I misspoke a
15 second ago. But the bottom line is the penalty is not -- it is
16 the randomizer substitute at this point, but the penalty is,
17 the people that quit on us quit with prejudice.

18 *THE COURT:* Right. All right, we have two scenarios.
19 Let's take the lawyer who can reach his or her client and the
20 client is a filed Plaintiff, and the client says to the lawyer
21 I don't want to proceed. I don't want to proceed, what, with
22 my case at all? I'm done? Or I don't want to proceed with
23 being part of the Bellwether process? Or when it says -- I am
24 taking -- it says voluntarily dismiss his or her action with
25 prejudice.

1 The Plaintiff is saying I don't want to proceed with a
2 lawsuit, this is for the filed ones, any longer. Not only do I
3 not want to proceed, I want to, under Rule 41 -- and I am going
4 to ask you what section you are contemplating here -- I am
5 going to dismiss my case with prejudice.

6 What if they don't want to proceed, but they don't
7 want to voluntarily dismiss their case? What is requiring
8 them? And if you are going to say, well, it is the Court
9 order, explain that to me.

10 MR. WATTS: Well, I think the Court has power to
11 enforce compliance with its order. Obviously, part of what
12 each Plaintiff's lawyer would need to do when this order comes
13 out is we need to serve -- not serve, we need to provide it to
14 all of our Plaintiffs, explain to them that part of an MDL's
15 job, and any Federal Court's job, is to manage Plaintiff's
16 litigation. You have Rule 1 rights, you have Rule 16 rights,
17 you have Rule 26 rights, and people who choose not to
18 participate have the right to get dismissed.

19 So, you have the power to enter this order, you have
20 the power to compel compliance with it, and I don't think it is
21 unusual at all for Article III judges, when people are peeling
22 out of the Bellwether selection process, to say there is a
23 consequence to that. You can't just jump out because you don't
24 want to be distracted. We are trying to do something that
25 leads to a settlement for everyone, and not participating in

1 the Bellwether process is your choice, but it comes with the
2 consequence of you are no longer going to participate in the
3 Zantac litigation.

4 *THE COURT:* Or any Zantac litigation, it is over with
5 prejudice.

6 *MR. WATTS:* That is right.

7 *THE COURT:* Do you envision that this would be
8 pursuant to a court order, or is it under 41(a)(1), that it
9 would be just a notice, or (a)(2)? Are you -- and are you
10 envisioning notices or stipulations under (1)(a), (a)(1)(A), or
11 haven't you --

12 *MR. WATTS:* I think that we anticipate that people who
13 just say I don't want to do it, would do a stipulation under
14 (a)(1)(A), but there may be a followup that is needed from your
15 Honor. I assume that the Defendant would make that motion and
16 then we would go further down the rule.

17 So, in other words, I think we are anticipating that
18 under this order, it is a voluntary dismissal under Rule
19 41(a)(1), but I think there are involuntary dismissals under
20 41(b), where a Plaintiff is, in effect, failing to prosecute or
21 complying with the Court order, and therefore the Defendant at
22 that time can move to dismiss the action or any claim against
23 it, and you would have the authority, under Rule 41(b), to
24 involuntarily dismiss such a non-compliant Plaintiff's case.

25 *THE COURT:* Just again, in other words, the dismissal

1 is because they don't want to participate in the Bellwether
2 selection process.

3 MR. WATTS: Right.

4 THE COURT: And so the lawyer calls the client up and
5 says you have been selected to be part of the initial -- you
6 are part of the initial discovery pool, that has obligations,
7 you need to do X, Y, and Z, the client says I don't want to.
8 So the lawyer informs the client then, well, therefore, I, on
9 your behalf, am going to voluntarily dismiss your case. The
10 lawyer would do it.

11 MR. WATTS: And to the extent that the lawyer can't
12 get authority to do that, then we would notify the Court, and
13 then the Defendant would make their motion under Rule 41(b),
14 and the Court would make the decision that it makes pursuant to
15 its inherent power to enforce its court orders.

16 THE COURT: Okay, let's leave C Roman numeral I for a
17 moment and go to Roman numeral II, the unfiled claimants.

18 So, it is only at that point where they are in the
19 initial discovery pool, they have indicated they don't intend
20 to proceed, they are still a claimant, lawyer either can reach
21 claimant or cannot reach claimant. If lawyer reaches claimant,
22 lawyer says to claimant, I am going to file a short form
23 complaint in the MDL on your behalf, and then I am going to
24 immediately file a notice of dismissal if you don't want to
25 proceed with the Bellwether selection process.

1 If the lawyer can't reach the claimant, the lawyer is
2 going to say -- or do nothing, and the Defense is going to have
3 to move for a motion to compel the lawyer who can't reach the
4 client to file a short form complaint to then have the Court
5 dismiss the case? Because the Court wouldn't be able to
6 dismiss anything if they are still an unfiled claimant.

7 *MR. WATTS:* Judge, to be blunt, for the first 15
8 drafts I had without prejudice here because of this
9 jurisdictional conundrum, and here is where I think it comes
10 down:

11 As to the 75 percent of the Plaintiffs that are going
12 to file whatever certification we agree on, then I think that
13 certification is, in effect, promising to comply with the
14 Court's orders with respect to the Bellwether selection
15 process, and I think that would give you the authority to
16 dismiss with prejudice.

17 As to the unfiled claimants who never signed a
18 certification, if they are somehow selected, then I think it is
19 a gray area. I think you have authority over their lawyer, I
20 think you are absolutely right, you can order the lawyer to do
21 X. I think a party could take the position that you don't have
22 jurisdiction over me, but I think that Ms. Zousmer and the
23 Defendants felt like you have the authority, given your ability
24 to manage the case, to do this.

25 So, we acceded to turning that to with prejudice, but

1 I think it is a gray area with respect to people that never
2 signed the certification, but I think you have authority over
3 the lawyers and you can order the lawyer to do X. In effect, I
4 think it would be a situation where, you know, people shouldn't
5 be able to sit in the registry that is a product of this
6 Court's orders, to get the benefits of it, and then to choose
7 to just take their ball and go home without some
8 consequence there. I will let the Defendants talk about it.

9 MR. PULASKI: If I may, your Honor. Those that don't
10 sign the certification that are in the registry, I think having
11 them leave the registry and file their case, or do whatever
12 they are going to do after that, would be the proper way to
13 handle those cases as opposed to having them file a short form
14 complaint.

15 At that point, if they haven't filed a certification,
16 and then dismissing their case, removal from the registry at
17 that time I think would be appropriate for those that, if
18 chosen, didn't want to pursue it, but my understanding is, we
19 are going to be working on those 75 percent that actually do
20 file their certification. So it should be a moot point at that
21 point anyway.

22 MS. ZOUSER: I don't think we are going to have that
23 gray area actually, because the only cases that should be in
24 the pool at that point will have been certified. So, we are
25 only going to draw from the randomizer initially cases that are

1 within that 75 percent certification, so we should be covered
2 on that gray area.

3 *THE COURT:* Is there language -- I know we are staying
4 away from certification to some extent, but we are not because
5 we are actually talking about it, because you are still working
6 on certain things.

7 Do you have certification language? Is this language
8 you have already drafted as to what that language looks like?

9 *MR. PULASKI:* It is an area that we haven't come to an
10 agreement on yet, which is part of the problem, which is why we
11 don't have an agreed proposed order really to give you at this
12 point. That is an area of concern that we are trying to work
13 through, and I think within the next 48 hours, hopefully, we
14 will be able to resolve that issue.

15 We have different drafts that we have gone back and
16 forth on that we hope to get to soon, but until we reach
17 agreement on that, it is in flux.

18 *THE COURT:* So the certification, then, is larger than
19 just that which is explained in E, which is that they will not
20 bring claims against non-diverse Defendants, and thus will file
21 their complaints in the MDL if selected to be in the Bellwether
22 trial. That is sort of how you -- the best I can tell, how you
23 generally discuss certification in E.

24 Are you also saying that part of the certification
25 would also be what you have in C, which is, and they intend to

1 proceed with their claim and be subject to discovery and
2 deadlines set forth in this order? Kind of a two part, and
3 that is why you are saying you are not worried about C being a
4 gray area, because the certification is broad enough to cover
5 not just claims against non-diverse Defendants, but also
6 certifying that you are going to intend to proceed, you kind of
7 capture that pool at that point.

8 *MR. WATTS:* It is almost like authority to enter
9 common benefit orders. There are different ways to touch a
10 State Court case, but it is a voluntary action, or accepting
11 something, and so that is kind of where we are from the
12 standpoint of trying to buff out that gray area via
13 certification.

14 *THE COURT:* Okay.

15 *MR. PULASKI:* If I may, and I know we are on the
16 certification issue. Just minutes before we had talked about
17 changing these dates, and Mikal discussed the fact that we had
18 changed the dates such that we were done by February 1st
19 regardless, and that we were going to start the process, and
20 there was a date of December 10th that we looked at that we are
21 going to start using the randomizer to randomly select the 8
22 percent of each case.

23 As your Honor knows, we have a motion before the Court
24 currently that is pending with respect to an extension of time
25 for expert reports under PTO 65. We will continue to seek

1 relief from the Court on that matter, and want you to know that
2 these dates are built in such that should that date change, it
3 will not affect what is going on here in the Bellwether
4 process.

5 *MR. BAYMAN:* Judge, Andrew Bayman. We have a
6 different view of that. We believe that if you grant that
7 motion and extend, all the dates extend, flow from the
8 extension of the 35 days. I just don't want my silence to be
9 acquiescence here. We have a very different view that if that
10 motion is granted these Bellwether dates have to change.

11 *THE COURT:* Well, I would just say this, you all
12 should discuss that. Obviously that motion hasn't been ruled
13 on because it is not ripe. The Defendants will have a chance
14 to respond and then the Plaintiffs will have a chance to reply,
15 so it is briefing out.

16 I would think you would not want to submit another
17 proposal to me in 48 hours that would be obsolete if the Court
18 granted the motion, or granted it in part. You will have to
19 explain that to the Court. Is it an applicable proposal
20 regardless of the outcome? Is it not applicable if the Court
21 rules one way, but not the other? I would want to know that.

22 It already sounds like you don't necessarily see eye
23 to eye, so let's put that in the category of flagging that
24 issue, and I will let you all talk about it off line.

25 *MR. PULASKI:* I am sure when we discuss over the next

1 48 hours that will be a topic of discussion as well.

2 THE COURT: All right. The first part of C, it sounds
3 like you are kind of drilling down a little bit more, you know,
4 and maybe there will be clarity on -- such that we won't find
5 this to be a gray area.

6 I would say that we should try to avoid gray areas. I
7 think it is good when we can identify gray areas on the front
8 end. Sometimes you can't always -- and there will continue to
9 be instances where you can't anticipate everything and so you
10 are playing catch up on the back end to account for things.
11 There are so many things to think about on the front end it is
12 going to happen, probably already has happened, will continue
13 to happen, but if we have already caught something here as a
14 potential gray area, let's try to make it not gray.

15 I know, we can talk in terms of Court's authority of
16 this, Court's authority of that. If the Court has to exercise
17 authority and feels it can and it should, it will, but let's
18 try to leave as little to ambiguity and grayness if we can,
19 given we have the benefit of all of these discussions, your
20 discussions internally and our discussions today, to try to
21 obviate the need for gray areas to the extent possible.

22 So, that was really the main part of C, and then I
23 understand that any one of them that comes out, the Defendants,
24 at their option, can substitute from the pool, from the same
25 cancer. So they have the ability to do that, that is not a

1 randomizer, and then you have these replacements. If the
2 replacements don't intend to proceed, then same thing -- oh,
3 then -- so, kind of first time Defendants have option to sort
4 of hand pick people and then the second time it is the
5 randomizer?

6 *MR. WATTS:* I think it is the reverse actually -- no,
7 you are right, I am sorry. Yes, the idea is to do one and then
8 the other, yes.

9 *THE COURT:* Okay. Okay. So that takes us through II.

10 Then you were talking about III. So, then, III really
11 has to do with rolling basis, serving signed medical
12 authorizations that you would have already agreed to, I think
13 you said by this Friday, and if there are any deficiencies, the
14 Defendants are to notify leadership, giving Plaintiffs some
15 time to cure the deficiencies in the medical authorization.

16 So when you say a deficiency in a medical
17 authorization, what is an example?

18 *MR. WATTS:* Well, obviously if it is not signed or it
19 is not filled out, that would be a deficiency. I think the
20 primary area is the 1 through 5 on the types of doctors. If
21 they just didn't fill it in, then we need to go back and check
22 on it, or tell Mr. Bayman, hey, there is no Ranitidine
23 prescribing physician, or whatever. For example, with an over
24 the counter there might not be a Ranitidine prescribing
25 physician, but with a prescription there is.

1 There will be some give and take there, and my
2 suspicion would be that Ms. Zousmer's team will have a
3 deficiency team that will notify us, we'll get it out there,
4 and it will be a second check kind of stuff if there are any
5 gaps, but I don't think it is going to be a confrontational
6 thing. I just think it is filling in gaps.

7 *THE COURT:* Okay. That flows into C, which kind of
8 raises that same question we kind of talked around a little bit
9 in II C, the consequences of not timely correcting the
10 deficiency is dismissal with prejudice. But these are not
11 necessarily filed Plaintiffs, right?

12 We are still working with a group that are both filed
13 and unfiled, so there is nothing to account for the kinds of
14 things that you were trying to account for in II C where, if
15 they are unfiled, you file the short form, only to then
16 immediately voluntarily dismiss. So I wasn't sure about that.

17 *MS. ZOUSMER:* The reason we have that, your Honor, is
18 because after the certification up front, then we have the opt
19 in period that we just talked about in II C where we give the
20 selected Plaintiffs or claimants the two-week period to decide,
21 hey, now that I have been selected, do I want to continue with
22 my case or claim or not? If not, they just voluntarily dismiss
23 with prejudice.

24 After that, we need to know that the pool is really
25 the pool, right? As each phase -- as we go through each phase

1 of the process, the dismissals have to be with prejudice in
2 order to avoid sort of gerrymandering the system, as Mr. Watts
3 puts it, and that is why we have that in there like that.

4 *THE COURT:* Right. I'm sorry, maybe I missed
5 something. Are they filed at that point necessarily?

6 *MS. ZOUSMER:* No. I am just explaining why we have
7 the with prejudice --

8 *THE COURT:* I wasn't necessarily questioning with
9 prejudice. I was questioning how you even do anything,
10 dismissal with anything, if they are not filed at that point,
11 like who is doing what to get a dismissal.

12 Is it they are being dismissed from the registry? Is
13 it like dismissing their claim, the actual case? In which
14 case, wouldn't they have to be filed for that to happen? How
15 do they get filed?

16 *MS. ZOUSMER:* It would be the same process as in II C,
17 is my understanding of it. They would file a short form
18 complaint and then that would be dismissed with prejudice.

19 *THE COURT:* Well, if that is the case, it probably
20 should be spelled out like you spelled it out before, but it
21 also sounded like that was that gray area that you all were
22 going to work on anyway. Whatever you worked on for II C, I
23 guess the same thing would apply to III C.

24 *MR. PULASKI:* We will work on that as well, your
25 Honor. That is correct.

1 MR. WATTS: Judge, for the timing issues, we are
2 dealing with medical authorizations that will be negotiated by
3 Friday. We are dealing with people who will have been selected
4 by December 10th, and as to my clients that are selected on
5 December 10th, we are going to be starting right then. It is
6 not like it is a two-week period of time, we have a good
7 stretch of time.

8 There may be some litigation in front of your Honor
9 about whether something was substantially complete after the
10 deficiency, but we think this will be a cooperative process,
11 and the idea is on both sides, not just the Defense side, we
12 want the tools that we need to start ordering medical records.
13 In order to do that we have to have a completed list of
14 providers, and we have to have filled out medical
15 authorizations so that both sides can get going when we get
16 into the Bellwether discovery pool in section IV.

17 THE COURT: That brings me to D. To the extent there
18 are disputes over the completeness or sufficiency of the
19 authorizations, they will be presented and decided by the
20 Court.

21 First of all, again, some of them aren't necessarily
22 filed, so what is the Court's -- you know, is the Court
23 adjudicating disputes both of filed Plaintiffs who are
24 insufficient or incomplete in their medical authorizations, and
25 then through its powers of managing the registry for the

1 claimants?

2 I mean, again, and the consequences of the claimants
3 not complying, you know, how you get them in to be a filed
4 Plaintiff to then be voluntarily -- although here you are
5 really not talking about voluntary dismissals, so it is
6 slightly different than II C. Or are you talking about this as
7 being a voluntary dismissal process, or are you talking about
8 this as being a Court sanctioned order of dismissal because
9 they haven't complied with something?

10 And then wrapped in that question, do you really want
11 to be bringing disputes to the Court, this medical
12 authorization isn't complete, this is insufficient?

13 If this is a fairly concise, straightforward
14 authorization of which you are within a few days of finalizing,
15 wouldn't you be able to among yourselves ascertain exactly what
16 complete and sufficient means? You put it right in the order,
17 this is complete and this isn't, and just leave it at that and
18 not have a whole ancillary dispute process before the Court on
19 completeness and sufficiency of medical authorizations?

20 MR. PULASKI: Your Honor, I am happy to make that
21 change.

22 THE COURT: Okay.

23 MR. WATTS: I don't think you are going to see a lot
24 of this, Judge. The reality is, because of the consequence of
25 what happens, I doubt you are going to see too many lawyers

1 coming in and saying, hey, I want to dismiss because of
2 liability there and things like that. I don't think there is
3 going to be a big dispute about what is a completed, properly
4 filled out authorization, and whether you listed the five
5 physicians that you were required to list or not. I don't
6 think that is going to come up very often at all.

7 If it does, and the consequence is dismissal, that is
8 obviously something that, unless the Plaintiff gives the lawyer
9 authority to do so, we are going to have to come in front of
10 the Court. There has to be a process, but I don't consider it
11 to be something that is going to bog you down at all, I hope.

12 *THE COURT:* Okay. Those were my questions for Roman
13 numeral III.

14 *MR. WATTS:* Your Honor, on Roman numeral IV, this is
15 the Bellwether discovery pool, and again, at this point in time
16 we are down to 25 per cancer or 8 percent of what is left. So
17 we are in the hundreds, not the thousands or the tens of
18 thousands. So, by December 3rd, we will agree on the form of a
19 CPF Bellwether supplement and what happens is, between February
20 1st and April 30th, to the extent possible, the Plaintiffs and
21 the claimants in the initial discovery pool will start serving,
22 via LMI, the CPF Bellwether supplement and this time it is
23 executed under oath.

24 When you think about it from a timing perspective, if
25 we have the randomizer make its initial selection back on

1 December 10th, and we are in the hundreds, and of course there
2 are over 200 law firms with cases in the registry, there will
3 be some that have a number of clients that are in there, but we
4 will get started on December 10th. We won't wait until
5 February 1st, we will start seven weeks before getting this
6 kind of information because we have already agreed on the form
7 of the CPF Bellwether supplement.

8 For example, if a Watts Guerra Plaintiff gets selected
9 by the randomizer on the 10th, job one is to immediately get
10 them notice so they can make the decision whether they are
11 going to participate or throw away their lawsuit. If they
12 participate, then we are going to immediately start step two
13 and fill out the information that is needed to order the
14 records.

15 Then at the same time, and it will be simultaneously,
16 we will start working on whatever the information that is
17 necessary to do the CPF Bellwether supplement under oath.

18 The concept is, our deadline starts on February 1st,
19 and the reason it continues for, in effect, the next three
20 months is, we are trying to true up the information of what the
21 Plaintiff thinks versus what the information is that their
22 records show. This is the Plaintiff's opportunity to, in
23 effect, true up what is -- to true up whatever the questions
24 are. This would be like interrogatory answers that have to be
25 sworn to under oath, and we will do that on a rolling basis

1 between February 1st and April 30th.

2 We will go through that same deficiency process. If
3 there are answers that are not filled in, the Defendants will
4 notify the Plaintiffs, and at the time they notify us we will
5 have 14 days, but in no event later than May 14, 2022, to clean
6 up whatever was deficient.

7 Paragraph 3 of subsection A is, obviously, if we have
8 problems there is the consequence, and replacement Plaintiffs
9 so that we can get the replacement Plaintiffs' sworn to CPF
10 Bellwether supplements by June 3rd.

11 The concept is, before any of the discovery really
12 starts the Plaintiffs and the Defendants have sworn to
13 information from each of the Plaintiffs from which they are
14 selecting potential trial Bellwethers.

15 So, as long as we get that done by June 3rd, with
16 respect to the original selected Plaintiffs and claimants, and
17 the replacement selected Plaintiffs and claimants by June 3rd,
18 then we are in good shape to hit all the deadlines that are
19 coming with respect to what is going to be Subsection B, the
20 vetting for eligibility criteria, which I will get to in a
21 second, and then later on, when the Court gets around to ruling
22 on Daubert, we will be starting to select trial Plaintiffs and
23 the like.

24 If you'd like, I am happy to go into the vetting for
25 eligibility criteria, or stop here at subsection A and answer

1 any questions you have.

2 *THE COURT:* Maybe stop there. I take it you haven't
3 drafted the CPF Bellwether supplement yet.

4 *MR. WATTS:* Not yet.

5 *THE COURT:* Is it what would be comparable to like a
6 Plaintiff's fact sheet? Is that what you are envisioning, this
7 it would be in lieu of -- but it would be at the same time that
8 one would have otherwise in other cases had a Plaintiff fact
9 sheet?

10 *MR. WATTS:* Right. We will have the typical scrum
11 where I want the Plaintiff fact sheet to be three sentences
12 long and they want it to be 25 pages long. We will negotiate
13 that and we will get it to your Honor by December the 3rd, and
14 if we are having any problems, I am sure the special master
15 will let you know.

16 It is important that we get that adjudicated about the
17 time of the randomization, by December 10th, so that we have a
18 CPF Bellwether supplement in form that is approved by the Court
19 so we can start getting it filled out.

20 *THE COURT:* You say it is certified, so certified
21 meaning it has the same -- you are envisioning it would have
22 the same legal effect as, say, a sworn interrogatory?

23 *MR. WATTS:* It will be sworn to, yeah, it will be
24 sworn testimony. We will probably do it via whatever the
25 Federal statute says you can do it, digitally. It will have

1 the same effect, it will be under penalty of perjury.

2 THE COURT: Uh-hum. Okay. And then again, just the
3 same types of questions for paragraphs 3 and 4 of subsection A,
4 you know, the dismiss with prejudice, again I am just sort of
5 trying to make that link between those who are still unfiled at
6 this point, and then sort of the completeness or sufficiency
7 and, you know, wondering -- well, two things.

8 Number one, are you in a position to give greater
9 thought to what that is at this juncture for this type of an
10 order or not? So again, I am flagging issues, I am not going
11 to put you on the spot right now, but these are the things that
12 came to mind to avoid disputes down the road. And then again,
13 to the extent that there are disputes, that they are
14 adjudicated by the Court, that is its own issue.

15 Then secondly, as to those unfiled claimants, you
16 know, the mechanism by which the Court is adjudicating and
17 ultimately contemplated to dismiss with prejudice.

18 I mean, I keep coming back to -- and again, you don't
19 have to answer it, but is there a reason why, when we have
20 gotten to this point, or all these different stages, why you
21 wouldn't want all of these persons in these pools to be filed
22 Plaintiffs at that point?

23 Again, I don't want to put anyone on the spot if it is
24 a contentious issue. Maybe I haven't thought through
25 everything, but I keep coming back to that.

1 MR. PULASKI: If I may, your Honor. At some point
2 down the line they will become filed when we narrow this pool a
3 little further. I think that, pursuant to PTO 15 where it
4 discusses this issue that we thought about early on in March of
5 2020, you know, it discusses a mechanism by which they are
6 dismissed without prejudice, and there is no procedure unless
7 they have to file a claim, so that you then have to dismiss the
8 claim.

9 I think that Ms. Zousmer and Mr. Bayman and I and Mr.
10 Watts will talk about that over the next 48 hours to come up
11 with a solution that alleviates the burden of you having to
12 deal with things that you shouldn't be dealing with, and us
13 being able to resolve things in a more efficient manner so that
14 we can move on through this process a little more easily.

15 THE COURT: I don't have PTO 15 in front of me so I
16 don't know exactly what you are looking at. But also to make
17 sure process and authority and, you know, everything that goes
18 along with that is really buttoned up.

19 MR. WATTS: Sure.

20 THE COURT: It's really buttoned up.

21 MR. WATTS: This is why we need the extra 48 hours.
22 We think we have solutions to a lot of this, but it is not
23 there yet obviously.

24 THE COURT: Okay. All righty. Did you want to move
25 on to B?

1 MR. WATTS: Sure. Frankly, I want to give Mr. Bayman
2 credit for this one. The concept is that at a certain point in
3 time we are going to get the CPF Bellwether supplements, we are
4 going to be getting in medical records, and through no fault of
5 anybody's -- I mean, this is a product that had been on the
6 market for 36 years and memories do fade, so time of usage may
7 be different.

8 Somebody may think that they have been on Zantac since
9 1968, and of course we know that can't possibly be true because
10 it wasn't sold in the United States until 1983. Records may
11 come in and show something where somebody thought they were on
12 Zantac and it turns out they were on Prilosec, these kinds of
13 examples.

14 Mr. Bayman's thoughts to me, and I bought into it,
15 was, why would we want to continue to spend resources doing
16 discovery on somebody who so obviously not lied, just got it
17 wrong, either through faded memory or product ID or the like.

18 The concept is that by March 1, 2022, we will be far
19 enough into the CPF Bellwether process where we have a bunch of
20 answers, we are ordering records, that we are going to start
21 seeing some red flags, it happens in every case, and we will
22 learn some things that we can't even fathom right now.

23 The idea would be we are just trying to get rid of the
24 theater of the absurd, if there are certain Plaintiffs that
25 said X and the records say Y, or it is not possible that the

1 Defendants that are in the case were in fact the providers of
2 the product. It may be that somebody thought that they were on
3 a GSK supplied Zantac the whole time and they were on a
4 generic, these kinds of things.

5 What I think we are both anticipating is a very
6 simplistic elimination factor to get rid of cases that wouldn't
7 make any sense to waste the Court's time to try.

8 I don't want to take a Defense verdict on somebody
9 that said they were taking Boehringer Ingelheim stuff when they
10 weren't, and frankly, Mr. Bayman doesn't want a Plaintiff's
11 verdict on something that went wrong. So, we are throwing this
12 in as almost like a place holder.

13 When we get smarter, looking at all this stuff, we are
14 going to come up with a list of reasons why somebody shouldn't
15 be a Bellwether, and we will agree on it, otherwise it won't be
16 there. But if we have an eligibility criteria, it will be
17 agreed to by March 1st, and then as we continue to get into
18 records and the CPF Bellwether supplements we'll entertain --
19 or we'll enter into a discourse with each other about, hey,
20 Paul Plaintiff over here, or Sally over there, she probably
21 wouldn't be a good Plaintiff because she got her dates wrong or
22 she was on the generic, this or that.

23 So, that is what this is really all about, and the
24 bottom line is that we are anticipating that by August 15 --
25 well, by August 1st, if we can do a joint list of which ones to

1 take out we will do that. If there is a disagreement, we will
2 come to your Honor by August 15th, and the concept is that we
3 can eliminate the outliers that probably aren't going to be
4 representative.

5 *THE COURT:* So, if you can't agree -- you are going to
6 have to agree, first of all, what the eligibility criteria is
7 by March 1, and if you can't agree -- well, you don't provide
8 for if you can't agree on eligibility criteria, you just say
9 you are going to agree. I don't know, I am just -- should
10 there be something that happens if you can't agree? That's
11 number one. Maybe not, maybe.

12 Number two, let's assume you agree; if you then cannot
13 agree on who satisfies the agreed upon eligibility criteria,
14 you each submit your list of those whom you think do not
15 satisfy the eligibility criteria. Plaintiff could have, let's
16 say, ten, Defense could have five, maybe the five overlap, but
17 the Plaintiff have five more, or vice versa. The Court looks
18 at those that the parties don't agree on and makes a decision,
19 yes, satisfies criteria, no, doesn't. If they satisfy, they
20 stay in; if they don't, they are out.

21 *MR. WATTS:* Exactly. In other words, at a certain
22 point we are going to rely upon the good judgment of the Court.
23 Of course, you have the authority anyway to decide whether you
24 want to expend the Court's resources to try this case or that
25 case, but we are asking you to do that before we start the

1 formal discovery process so we don't waste a bunch of time.

2 MR. BAYMAN: Your Honor, if I might, Andrew Bayman.
3 There are other cases that we were contemplating that wouldn't
4 be representative Plaintiffs, someone who got a previous
5 diagnosis of cancer right before taking Zantac, for example.

6 The records will help to inform us of what we are
7 looking at. I don't think all mistakes can be vetted out, but
8 I think this is a way that if we say -- for example, we find
9 out a claim that is clearly barred by the Statute of
10 Limitations or Statute of Repose, this is a way to get rid of
11 those at this point in the process rather than going through
12 expensive discovery on cases that really don't belong.

13 It is not perfect, and as I say, I don't know that you
14 can vet out all mistakes, but I think we can come up with a
15 list of things where we both agree this doesn't make any sense
16 to be in a pool that we are doing discovery.

17 THE COURT: Is it possible that the CPF supplement
18 might be different than the original CPF, and that in and of
19 itself might be they didn't meet the eligibility criteria
20 because they are saying two different things at two different
21 times?

22 MR. BAYMAN: Or they have corrected for what was
23 incorrect in the past when they are under oath, and they have
24 to make that verification.

25 MR. WATTS: I don't think that makes them ineligible,

1 but at the same time, we are trying to clean up the facts, in
2 effect, before we started the process of spending big dollars
3 doing discovery and deciding which claims we want to try.

4 MR. BAYMAN: It might make them ineligible if they
5 took a different product or if they took it at a different
6 time, something like that.

7 MR. WATTS: Agreed.

8 THE COURT: Okay. I think you meant in paragraph four
9 on page seven where it says, Plaintiff will provide LMI the
10 disclosed cancers on December 20, and terminate the records
11 collection process in cases involving Plaintiff's -- is it not
12 alleging?

13 MR. BAYMAN: Yes, your Honor, we caught that this
14 weekend. It is not alleging.

15 MR. PULASKI: Again, your Honor, that date may change
16 depending upon our motion that is before you.

17 THE COURT: Okay.

18 MR. WATTS: Judge, we had some typos in here because
19 my colleagues in Atlanta got a little tipsy after watching the
20 Falcons win, so there were things that were missed.

21 MR. BAYMAN: More like the Braves, your Honor.

22 MR. WATTS: The Braves could have done it, too, that's
23 right.

24 THE COURT: Well, you are getting another shot at it,
25 no worries, this is draft.

1 Okay. So, then you get to paragraph V, Roman numeral
2 V.

3 MR. WATTS: Yes, ma'am. This is the part that starts
4 with your rulings on general causation, Daubert, whenever that
5 may be, and of course we will leaves that to the Court's
6 discretion as to when. That is why we put the summer or fall.
7 I put the summer, they put the fall, and there we are, whenever
8 it happens.

9 THE COURT: Right now, under your current PTO 65,
10 under the only governing order, I want to say it is July 18th
11 that they are ripe. Right?

12 MR. WATTS: Yes.

13 THE COURT: The Court can't do anything before that
14 date, that is for sure, but I guess the Plaintiffs are asking
15 for a later date it sounds like. PTO 65 has the replies due on
16 general causation on July 18th.

17 MR. WATTS: Right. I guess our point is, we didn't
18 want to be so presumptive to tell the Court how fast you have
19 to rule. So the rest of the order hinges -- it is almost like
20 day zero when you do rule and then we go.

21 So, beginning on page seven, paragraph V, we say we
22 anticipate that sometime in the summer or the fall -- of course
23 I'd like the summer, they'd like the fall, but it is what it
24 is -- and then we go and we start setting the order of the
25 permitted cancers.

1 We use the Microsoft randomizer with respect to the
2 cancers that remain to, in effect, sequence the cancers in a
3 certain order. The first two permitted cancers selected by the
4 Microsoft randomizer will be phase one cancers, and the second
5 two will be the phase two cancers.

6 The rest of this order is largely focused on the phase
7 one cancers to get us to trial number 1. We would anticipate
8 that shortly after Daubert there would be some motion practice
9 as to how do we get ready on cases, you know, whatever you want
10 to try.

11 But with respect to phase one, the concept is that the
12 randomizer selects eight Bellwether cases per cancer, and then
13 we have an immediate deselection. Remember I told you at the
14 last hearing we have selection, deselection, selection,
15 deselection, with the randomizer thrown in. The idea here, to
16 use my Vioxx example, is to get rid of the marathon runner and
17 the 295-pound person blaming his heart attack on a pill.

18 So, each side for whatever reason can strike one to
19 get us from eight to six per cancer in phase one, and at that
20 point specific written discovery begins on that date, and then
21 other case specific discovery, i.e. depositions, start the
22 following Monday, we start noticing and the like, we work on
23 schedules.

24 Again, at this point, if a Bellwether trial plan or
25 somebody in the Bellwether trial pool dismisses their case, the

1 Defendants get to pick replacements, so in effect it costs me a
2 strike later on because they will pick the worst one left and
3 I'll try to get rid of that. If I lose a Plaintiff because I
4 let them out or for gamesmanship, or whatever, it is punitive
5 towards the Plaintiff to prevent that from happening.

6 At this point, there is going to be a total of 12
7 Plaintiffs in the Bellwether trial pool so that will be -- by
8 the way, I mean the phase one Bellwether trial pool, six per.
9 At this point, we are going to file an individual complaint
10 using the short form complaint process at this point, and you
11 are supposed to tie your pleading to what is in your CPF
12 Bellwether supplement so that the facts are all lined up, so we
13 have coherence between the facts pled and the facts that we
14 know to be true as sworn to by the Plaintiff.

15 Of course, if they plead something that is
16 inconsistent, they are not allowed to, and so if they do plead
17 something that is inconsistent at this point, the Defendants
18 get to substitute another Plaintiff in this final discovery
19 pool to keep that from happening.

20 That puts the onus on us in the springtime and through
21 the supplemental process to get the facts right so that we are
22 all of one mind before we're selecting as to what the facts
23 are.

24 At that point, when the complaints are done, the
25 Defendants have three weeks to respond to those complaints, and

1 then we have a process where in the middle of the discovery
2 process, 70 days in, each side gets to strike another one.
3 This was also Mr. Bayman's idea and I give him credit for it.

4 If you take some depositions and you find out somebody
5 is a four-time felon, that is not going to be my idea of a good
6 Plaintiffs' pick. If Mr. Bayman takes a deposition and it's
7 the world's best Plaintiff, he may want to strike that person.
8 So, again, we are selecting, deselecting, trying to get to the
9 top of the bell curve.

10 After that deselection of one case per cancer 70 days
11 in, then the remaining cases will constitute the final
12 Bellwether trial pool, and so, the case specific discovery
13 closes 95 days after it starts, and only for good cause shown,
14 and probably on the word of this Court, can you take a
15 deposition after that 90 days.

16 Now, the idea is we get all the phase one discovery
17 done first and then we hit you with a proposed order about how
18 to do phase two, so that we are not waiting on the trial in
19 phase one to get the phase two cases ready. At the same time
20 we have all of the teachings, having gone through the discovery
21 process, and if we need to modify this order with respect to
22 phase two, we will do that, and we will provide you proposals
23 for how to select those phase two cases within 14 days of the
24 close of the phase one cases.

25 *THE COURT:* How many trials are -- phase one cancers

1 are two cancers.

2 MR. WATTS: Yes.

3 THE COURT: And you had six in each, so 12, and then
4 it goes down to --

5 MR. WATTS: Four.

6 THE COURT: Four in each, eight, and then what does it
7 go down to?

8 MR. WATTS: So, here is the thing we decided to kick,
9 and that is, you are going to notice later on with respect to
10 which cases are being tried that there is a parenthetical with
11 an S around the Plaintiffs. I will just set out --

12 THE COURT: What page is that?

13 MR. WATTS: Eleven, paragraph two. The Court will
14 decide which Plaintiff, open paren, S, close paren. That is
15 very purposeful, and just to predict for you -- this is
16 something we don't need to brief for some time -- the
17 Plaintiffs will take the position that you should try multi
18 Plaintiff trials for efficiency's sake, and the Defendants have
19 already said they want to do it one at a time. We are not here
20 to litigate that with you or anything like that.

21 We'll cite to what Judge Rogers is doing with the 3M
22 ear plugs, and of course they will say that's not fair, you
23 will have to decide.

24 The point is, where I have seen this messed up is when
25 people say, hey, Judge, right now we want four Plaintiffs per

1 and we don't know anything about the Plaintiffs, we haven't
2 gone through discovery yet. So, before we decide what is fair,
3 we need to know how the different cases line up, similarities,
4 deficiencies, dissimilarities, and the like, but we are
5 projecting to you our intention to go through a motions
6 practice at some point where I will ask you to try multiple
7 Plaintiffs at once, and they will ask you to do it one at a
8 time, and you will make the call. You shouldn't make that
9 until we have all the discovery done so we know what the
10 similarities of the case are at that time.

11 *THE COURT:* How many eligible --

12 *MR. WATTS:* Four --

13 *THE COURT:* -- Plaintiffs? At that point there will
14 be four in phase one.

15 *MR. WATTS:* Yes.

16 *THE COURT:* You are saying there might be a dispute
17 about Plaintiffs saying try all four -- bring all four,
18 consolidate all four into one trial, and Defendants might say
19 have four separate trials, but we are talking about four
20 Plaintiffs.

21 *MR. WATTS:* That is right.

22 *THE COURT:* And then four in phase two.

23 *MR. WATTS:* No. Remember phase one has two different
24 cancers, so phase one is actually two different trials, and
25 then phase two is trials three and four.

1 MR. PULASKI: Cancers three and four.

2 MS. ZOUSMER: Phase one cancers would be trial one and
3 two.

4 THE COURT: So, phase one cancers are two cancers,
5 four Plaintiffs in each.

6 MR. WATTS: Yes, ma'am.

7 MS. ZOUSMER: Correct.

8 THE COURT: The idea would be, however that is done,
9 that all eight get tried?

10 MR. WATTS: Well, it could be. If you don't buy my
11 argument that you should try them together, you may decide to
12 try one and then go on to a separate cancer. It is up to you.

13 MS. ZOUSMER: From our perspective, we were
14 envisioning a process where you tried one case for cancer one,
15 and then one case for cancer two, and then we go to the next
16 phase.

17 THE COURT: Right. So when you want -- would you want
18 phase two cancers to be ready at the same -- on or about the
19 same time as phase one cancers? How far apart are they in
20 terms of their readiness for trial?

21 MR. WATTS: Let me answer that question for you. You
22 will notice that on page nine, at the end of the discovery on
23 phase one we will provide with you a plan with respect to how
24 to schedule the selection and discovery in phase two.

25 So, the concept would be that phase two discovery is

1 taking place, we say simultaneous with the pretrial schedule
2 for phase one. Somebody may take the position that is
3 spreading law firms with 2,000 lawyers too thin, but we will
4 see where we go when we get there.

5 The bottom line is, you will have to set that
6 schedule. We will see if we can negotiate that where we have
7 one team doing the phase two discovery while the trial team in
8 phase one is getting ready to try the first trial, and the
9 second trial.

10 We had previous versions of this where I wanted to
11 schedule all four trials right now, and ultimately they talked
12 me into a more orderly process where let's go through it first,
13 let's get smart and then we'll propose to you a schedule that
14 allows you to sequence things as you want. Of course, nobody
15 loves the delicious anarchy that is taking place in 3M earplugs
16 right now. The Court is trying to force everybody to some
17 degree of sanity and the Court is trying cases all over the
18 place and the like.

19 After the first trial that may become appropriate, but
20 I am not sure it is appropriate for me to ask you for that
21 right now because we don't know how this is going to shake out.

22 MR. BAYMAN: Your Honor, if I may, at this point, we
23 don't know which Defendants will be in which case. You may not
24 want to try two cases in a row against the same company, for
25 example. There are just a lot of things we don't know right

1 now.

2 MR. WATTS: I agree with Mr. Bayman.

3 MR. BAYMAN: Your Honor, one other point, if I may
4 intervene again, we also don't know as we sit here today --
5 this is pre Daubert, so we don't know what the landscape looks
6 like until after your Daubert rulings. Some of these cancers
7 may not be here.

8 MR. WATTS: Then again, they all may be.

9 THE COURT: Would it make sense, and again this is
10 just a question, to keep Roman numeral VI and VII as sort of
11 separate orders? It seems like everything up until then is all
12 about the Bellwether selection process that brings us to --
13 well, except for -- I guess you talk about case specific
14 discovery in V, and you have a 95-day period for case specific
15 discovery to take place.

16 So it is kind of a selection process plus an amount of
17 time for discovery, and then everything after that is sort of,
18 I guess, what happens after that.

19 Does it, in your view, make sense to project that far
20 out in one order, or to keep those orders separate and maybe
21 the pretrial schedule gets set at a different point a little
22 bit later on when maybe we are armed with more information?

23 MR. PULASKI: Your Honor, we were trying to keep the
24 train on schedule on the track, and these dates for us got us
25 to a point where we could have our trial in a short enough time

1 that -- and a long enough time that allowed for everything to
2 occur, but got us to trial at a date -- at the earliest
3 possible date we could, making sure that everything was done
4 properly.

5 *MR. WATTS:* Judge, Mikal Watts. I will tell you that
6 section VI was carefully analyzed by the parties and the dates
7 all fit perfectly to get the first trial within nine to 12
8 months of Daubert, which is what you told us to do, and we have
9 it starting in July. Of course, if you are going to be on
10 vacation that week, then we need to know that, but I think it
11 is important from the standpoint of the MDL's role in this
12 litigation that we have a firm trial setting now.

13 There are State Court trials that are popping up in
14 May, August, October of next year before this trial happens.
15 They will continue to get set, but if there is going to be any
16 honor among thieves in terms of not setting all sorts of State
17 Court trials on the same day that your Honor is trying the
18 case, we need a date.

19 So, we believe that the July 2023 gives us that hard
20 date so that we can caution our State Court colleagues, don't
21 set these people for trial on the same date. We think that is
22 appropriate.

23 *THE COURT:* In your motion, which I don't want to get
24 into the merits, and we haven't gotten a response yet, but you
25 asked for the Court to push your ripe date back to August for

1 Daubert. So, whether you are talking about July or August for
2 the ripe date, based on your experience with cases of this
3 nature, size, and complexity, what have you seen other Courts
4 do? From the date of Daubert motions being ripe through
5 hearing, through rulings, what amount of time are you seeing
6 for rulings to come out on all Daubert motions?

7 MR. WATTS: I see it in two different ways. You know,
8 the Court could certainly get the Bellwether selection process
9 going by ruling from the bench, if you choose to do so. That
10 happens a lot where somebody says, I am going to let him
11 testify, I am going to let her testify, or I am not going to
12 let this person testify about that.

13 Or if you want to write them all out, my experience
14 has been we haven't seen a lot of delay in this Court in terms
15 of getting rulings, so I am not particularly worried about it,
16 but the ripe date of July to August, for me, has no bearing
17 whatsoever on the ability to get this date.

18 I know my friend, Mr. Bayman, disagrees, but it is
19 really a function of how long you think you will take after all
20 the pleadings are in, the motions, the responses, the replies,
21 for you to make a ruling. But there are all sorts of summary
22 adjudications followed by in-depth rulings later on, and
23 knowing that all this is dependent upon how you rule, but I
24 wouldn't presume -- I do know the case law is clear that how
25 you conduct Daubert, how you choose to rule is completely

1 within your discretion.

2 The problem is that we think whether it is ripe in
3 July or August, as long as you hit these days within a typical
4 amount of time that you have been ruling, it is going to be
5 fine.

6 *THE COURT:* I don't know that there is any typical yet
7 because I haven't had any Daubert rulings, but if you use
8 Motions to Dismiss, you know, they have been different with
9 every round, but again, I don't know that they are analogous.

10 Did you want to say something, Mr. Bayman?

11 *MR. BAYMAN:* Yes, your Honor, thank you. I'd actually
12 like to phone a friend if I can on this one. Could I ask Mr.
13 Petrosinelli, who was going to appear, but we were more in the
14 mechanics of this, but we have been talking about this very
15 issue. I was going to let him address it if I could.

16 *THE COURT:* Everybody can phone one friend.

17 *MR. PETROSINELLI:* I am glad I am the friend Mr.
18 Bayman is phoning. This Joe Petrosinelli, good afternoon, your
19 Honor.

20 The size of this litigation, you have to assume
21 that -- and given the number of cancers that are being pursued,
22 whether it is carved back from ten or not, that there will be
23 substantial Daubert briefs. I think in most Federal MDLs of
24 this size the Court would have evidentiary hearings where the
25 experts would come in and testify and be cross-examined, and

1 then your Honor would need time, so there would be time that
2 would be needed to set that hearing, and then there would need
3 to be time for the Court to reach its decision.

4 To me, just being realistic here, from the time of the
5 ripeness of the motion, which right now is July 19th, to the
6 time that the Court would actually issue decisions,
7 particularly if it is going to be eight cancers or something
8 like that -- your Honor is a prolific writer, but that is going
9 to take some time, I would think. That is why, to us, the PTO
10 65 dates were so critical and were paired with this Bellwether
11 order.

12 So, I think it's going to be a couple of months for
13 sure after the ripeness date of the motion, and that is why, as
14 Mr. Watts said, we didn't know exactly what to put about when
15 to assume it would be done, but I think the fall is much more
16 realistic under the current schedule.

17 If the schedule gets pushed back five weeks, that is
18 another five weeks added, and now you are into the late fall,
19 early winter, which we oppose, and you will get our opposition
20 on that. That is my view, is that this is going to be a major
21 evidentiary proceeding that is going to require a lot of
22 resources and then effort by the Court to rule on what are
23 really going to be separate motions dealing with separate
24 cancers.

25 *THE COURT:* So, I was just looking into, for example,

1 Roundup, I remember one cancer and it was many, many months. I
2 am checking as to when that order came out.

3 *MR. PETROSINELLI:* The last one, your Honor, I did,
4 which was a cancer in a Federal MDL, the Daubert hearing was in
5 October and the ruling came out in January. We had a two-week
6 evidentiary hearing, and then the order came out within two and
7 a half to three months of that. There were the holidays in
8 between there, so that is -- obviously that took out some of
9 the time, but I think that seems realistic to me.

10 *MR. PULASKI:* Your Honor, I don't know -- if and when
11 the time comes there may be ten cancers, there may be eight
12 cancers, there may be nine cancers, but in my experience so far
13 with this Court, and not that you don't need time to make a
14 very well thought out and concerned decision as it relates to
15 this because it is an important decision as it relates to the
16 litigation, I just don't see this pushing off into winter ever.

17 But even with our request for an extension, I still
18 think that we would have time to get through this with our
19 experts and our presentations and your rulings by fall at the
20 latest, but I --

21 *THE COURT:* What is the latest date that the Court
22 would need to issue all of its rulings by which you could
23 adhere to a July 2023 Bellwether trial? By what date would you
24 need the ruling?

25 Because right now you have -- for example, on page ten

1 in VI B you have: If, however, the Court has not ruled on the
2 parties' case specific dispositive and Daubert motions by May
3 19th -- well, of course I won't have ruled on them by May 19th,
4 because they are not even ripe by May 19th.

5 So, I mean, how did you arrive at the July date if it
6 was tethered to if I haven't ruled on them by May?

7 *MR. PETROSINELLI:* Your Honor, those are the case
8 specific Daubert motions. In other words, we are talking about
9 the general causation Daubert motions which is going to be
10 fully briefed by July of 2022, and then -- to answer your
11 question, the assumption would be they really would have to be
12 decided around Septemberish to stick with a July 2023 trial
13 date.

14 Then layered on top of that you would have case
15 specific Daubert motions, and those are the ones that would be
16 briefed and decided by May 19, 2023.

17 *MR. PULASKI:* I think when we were going through those
18 dates we were of the opinion that we could get -- that we may
19 get a decision from your Honor in August or September.

20 *THE COURT:* Now you are asking for ripe dates in
21 August, so that wouldn't be possible, unless you are truly
22 imagining a ruling from the bench. Again, I don't want to get
23 into the merits.

24 *MR. PULASKI:* That is why we have this laid out here
25 in the way we did, which is, as Mikal said, kind of ground

1 zero, or day zero, and we are going from the time of your
2 ruling, and if it is such that we don't have a July trial date,
3 and it turns into a August trial date, well then it turns into
4 an August trial date, and there is nothing that we can do about
5 that.

6 We are hopeful that we can keep the train on track on
7 our side and hopefully we can make presentations to you that
8 are, obviously, with our experts and the Defense experts -- I
9 mean with the Defense work that they are going to do, you will
10 have your information there and you will take the time that you
11 need and, you know, we were all hopeful that we could get it
12 done by August or September. If we can't, we can't, and we
13 will move on.

14 We certainly don't want that to affect your decision
15 process on our motion for extension because every aspect of
16 this trial and this litigation is important, and if certain
17 things get pushed back a little, I still think we can keep the
18 train on track, but if for some reason things get moved, again,
19 we are working from day zero as opposed to a date certain.

20 MR. WATTS: Judge, Mikal Watts, if I could say one
21 other thing. The honest answer is, if you tell us the date you
22 want to try the case, we can make the order work. This was an
23 effort to try to hit nine to 12 months after Daubert. Ms.
24 Zousmer may correct me, but I think we settled at about ten and
25 a half months, I am not exactly sure.

1 The point is that the July 17th date, which is agreed
2 to, that makes the MDL trial the sixth trial. You have the one
3 in Texas in May, the one in Illinois in August, the first
4 Bellwether in California on October 10th, the second Bellwether
5 on February 6th, the third bellwether on May 1st, and the
6 fourth on August 7th.

7 So, my point is, the ability to have a hard date is
8 incredibly important to our ability to not have multiple trials
9 going at the same time, unless you want that to happen, which
10 happens all the time by the way.

11 Our thought is that the July 17th slot is open right
12 now, it fits. If we get to the end of Daubert and we need to
13 have an amended Bellwether order to make that date work, then
14 we will get with you and do that. This is kind of projective,
15 but I do think it would be a mistake for the MDL judge to not
16 have a date out there, in fact I'd rather have four, just so we
17 can get them on the books, but that is your call how you want
18 to do it.

19 This is an order that was designed -- as you said, the
20 Court is anticipating nine to 12 months after Daubert, so we
21 designed it that way. If you want it faster, in my view, we
22 can try this case in April, but that is not going to happen,
23 not here anyway, but whenever you want to try the case, tell us
24 and then we will work backwards and make the dates work.

25 MR. PULASKI: I think just as recently as the Paragrat

1 litigation where a trial date was set early on in the
2 litigation and everyone was working the schedule to fit so that
3 they could get to that trial date on time, like Mikal said, I
4 think that at some point after Daubert, if we need to adjust
5 this Bellwether order so that we can stay on the track and get
6 the case tried in July, and if we have further dates already
7 laid out by this Court, that may also be helpful, but we would
8 be able to stay on track.

9 I think we could work with Mr. Bayman and Mr.
10 Petrosinelli and Ms. Zousmer to get there. We have been able
11 to do that so far and I don't see is not being able to do that
12 if we need to move on the fly.

13 *THE COURT:* I just was -- you know, it's a different
14 case, but Roundup, four months from the motion ripening to the
15 hearing and four months from the hearing to the ruling for one
16 cancer.

17 *MR. PETROSINELLI:* It sounds like they should cut
18 their list down to one cancer.

19 *MR. WATTS:* If you will pay what was paid in Roundup,
20 we will work with you.

21 *THE COURT:* Okay. Well, I think -- let me see if
22 there is anything more -- did you cover everything that you
23 wanted to -- I know that I have the one question that goes to
24 your randomization for phase one and phase two cancers.

25 Had you considered whether certain cancers impact

1 greater numbers of Plaintiffs, as indicated on your page two of
2 your proposal, whether the order of the cancers to be tried
3 should be random as opposed to where certain cancers may impact
4 greater numbers of Plaintiffs?

5 *MR. WATTS:* Judge, the first draft I sent over said
6 exactly that. If this Court were the only jurisdiction trying
7 the cases, that would be a material concern, in other words, if
8 somehow the randomizer picked a cancer that had the smallest
9 number of Plaintiffs.

10 But as long as we know when that randomization occurs
11 that we have a hole in the State/Federal trial schedule, and we
12 need to slot in a pancreatic cancer, for example, we can fill
13 those slots by virtue of which State Court jurisdiction we
14 press the next cross setting for, so we kind of get those in.
15 We would do that, I would anticipate, in coordination with your
16 Honor consulting with her State Court colleagues to utilize the
17 State Courts as an avenue to help in that regard.

18 *MS. ZOUSMER:* Your Honor, the reason that we set them
19 as random was because we anticipate that the parties will have
20 differing views on which cancers to be tried first. So,
21 because of the way the schedule is set up we wanted to
22 eliminate the dispute time, like the back and forth that we
23 probably would have over deciding the order of the cancers,
24 just make it random, and then start case specific discovery
25 right away.

1 So, it is a practical efficient way to keep us on
2 schedule, and there are cases, as Mr. Watts said, outside of
3 the Florida pool so that the prevalence issue -- even if there
4 is a smaller pool in Florida, those cases will still provide
5 learning for the whole MDL, so the cancer types across the
6 board.

7 *THE COURT:* Okay. All right. Anything else that you
8 wanted to cover?

9 *MR. PULASKI:* I think that is it, your Honor.

10 *MR. BAYMAN:* Nothing from the Defense, your Honor.

11 *THE COURT:* Okay.

12 *MR. WATTS:* I would tell the Court that --

13 *THE COURT:* I am sorry, Mr. Watts, could you repeat
14 that? Ms. Stipes didn't hear what you just said.

15 *MR. WATTS:* On page 11, paragraph seven, all case
16 settings, it says: The Court intends to issue subsequent
17 orders setting a date for the second through fourth Bellwether
18 trials.

19 I can tell the Court it is up to you when you want to
20 do that, but if you say, hey, I want to try the first one
21 July 17th, I'd like the next one two months later, and the
22 third one two months after that, the fourth one two months
23 after that, we can work on those orders now.

24 If you want to wait until we go through the process
25 and do that later on in the process, we can do that then as

1 well. It is up to you. To the extent that you think
2 having slots -- not that you couldn't, under the supremacy
3 clause, trample over anybody else's schedule you want to, but
4 if you want to pick those and say, okay, this is good for my
5 schedule and I want to try four cases, tell us what those dates
6 are and we will work on subsequent Bellwether selection orders
7 for those. It doesn't have to be right now, but I'm saying we
8 don't have to wait until the end.

9 *THE COURT:* How long do you think each trial will
10 last?

11 *MR. WATTS:* The first one always lasts longer. We
12 were joking about this a few meetings back. I don't know that
13 there is a way to give you an honest answer unless I can tell
14 you which Plaintiff is picked and how many of the Defendants
15 are in the case.

16 In other words, if I have somebody that took Mr.
17 Sachse's pill and then took Mr. Petrosinelli's pill and then
18 took Mr. Bayman's pill and then ended up taking Mr. Agneshwar's
19 pill, that is a longer trial than if we have somebody whose
20 usage facts just have one or two of them.

21 My experience has been arguing over the admissibility
22 takes a long time, so lots of pretrial, but after that they
23 tend to go really fast. What happened up in Pensacola is a
24 good example. The first trial went four, five weeksish, and
25 now she is knocking them out two at a time.

1 *THE COURT:* You are talking about Judge Rogers in 3M?

2 *MR. WATTS:* I am.

3 *THE COURT:* She is working off of time trials, so they
4 are limited to two weeks.

5 *MR. WATTS:* I am in favor of that after the first
6 Bellwether. I think you can turn these into eight-week
7 monstrosities and get through and get jurors' attitudes. It is
8 going to be dependent on how many Defendants there are, is the
9 honest answer.

10 *THE COURT:* Are the same lawyers trying all of the
11 Bellwether trials or will there be different sets of lawyers
12 for each Bellwether trial?

13 *MR. WATTS:* Are you talking in 3M or here?

14 *THE COURT:* Here.

15 *MR. WATTS:* So, there is flexibility for that to
16 happen. There is also, depending upon -- I work at the will of
17 the Court. If you want separate trial teams, we can make that
18 happen. If you want me in all of them I am happy to do that.
19 We will have lots of lawyers ready to participate in lots of
20 trials if you want that to happen.

21 *THE COURT:* I am just thinking out loud without any
22 sense of how they will play out, but if, hypothetically, the
23 Court set them back to back, presumably whether the same
24 lawyers were trying those cases would have some impact, it
25 might be hard for the same lawyer to come out of one trial on

1 Friday, go back into a new trial on Monday, but maybe the Court
2 can do that more readily.

3 How viable an option is that as it relates to
4 Plaintiff or Defense trial counsel?

5 *MR. WATTS:* I have one that plans on me being in trial
6 the entirety of 2023, trying Zantac cases over and over again.

7 *MR. PULASKI:* Your Honor, I think you will see
8 different lawyers on different trial teams, and while one case
9 is being tried, the other one will be worked up and ready to go
10 and prepared and ready to start immediately thereafter if you
11 are ready to shotgun these and go one after the other.

12 *MS. ZOUSER:* We don't have that information yet, we
13 don't know which Defendants are going to be in the case or what
14 these trials are going to look like. Until we have a better
15 sense of that, I think it would be very difficult to set a
16 schedule of trial after trial after trial and any sort of date
17 that makes sense at this point, honestly.

18 *THE COURT:* Okay. All right. So, your plan is to go
19 back to the drawing board with some of the points we discussed
20 and other ones that you have been working on, and you think you
21 are in a position -- you mentioned the 48 hours. Is that
22 realistic for you? Today is --

23 *MR. PULASKI:* Your Honor, with the additional items
24 that we brought up where there still may be some discrepancies
25 or some confusion -- not confusion, but some things we really

1 need to work out to make things perfectly clear where there is
2 no gray area and everything is black and white, I think a
3 little bit longer than 48 hours would be good so that we don't
4 disappoint the Court and ourselves in not being able to finish
5 this.

6 I would think hope that we could get it done by
7 Friday, which would give us four days to get everything worked
8 out and finished. If we can get it done sooner, we will submit
9 it to you earlier.

10 MR. BAYMAN: Your Honor, for the Defense, I would
11 agree with Mr. Pulaski that this is a longer list than we were
12 anticipating when we gave 48 hours. I think a week is probably
13 more realistic.

14 THE COURT: Well, I want you to take the time that you
15 need, so we can leave it open. I am just trying to think
16 whether you can still be doing some of the things that you were
17 otherwise going to be doing before the order gets entered. For
18 example, I would think you could be working on the agreement on
19 the signed medical authorization, the medical authorization --
20 medical or other authorizations, which was supposed to be
21 October 13, and --

22 MR. PULASKI: Your Honor, we already have an
23 authorization agreement in place for the class aspect of the
24 case, so that should be an easy process for us to --

25 MS. ZOUSER: We are just working on getting

1 agreement.

2 *THE COURT:* Ideally, while you are working on it -- I
3 wouldn't think that working on it and then having the Court
4 enter the order, whether it is the end of this week or next
5 week, should impact any of the dates any further. You have
6 already said the dates you have in this version are slightly
7 changing, but there shouldn't be any reason why they should
8 change any more based on your revising and the Court entering
9 the order, right?

10 *MR. WATTS:* That is right. Monday is not going to
11 move anything.

12 *THE COURT:* The next date you have is November 15th,
13 where at least the 75 percent certify, and then your dates --

14 *MR. WATTS:* That has been changing.

15 *THE COURT:* That is the next date, and then you have
16 the randomizer, the next date. Presumably the order will be
17 entered before all of that, so really the only date that has
18 come and gone is the medical authorization date, right?

19 *MR. WATTS:* Right. Can we submit it to you on Monday
20 and order by Tuesday?

21 *THE COURT:* Okay. All right. Well, go forth. That's
22 all --

23 *MR. BAYMAN:* We will do it as quickly as we can, your
24 Honor.

25 *THE COURT:* Okay. I appreciate it. Thank you,

1 everyone, thanks for your time and all of the work put into it
2 and the effort to explain your thinking to the Court. I
3 appreciate it.

4 MR. PETROSINELLI: Thank you, Judge.

5 MR. WATTS: Thank you, Judge.

6 THE COURT: Have a nice day, everybody, be well.

7 *(Thereupon, the hearing was concluded.)*

8 * * *

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above matter.
11

12 Date: October 26, 2021

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

14 Signature of Court Reporter
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Pauline A. Stipes, Official Federal Reporter

MR. BAYMAN: [18] 3/14 7/21 8/3 11/12 16/13 17/2 33/4 49/1 49/21 50/3 50/12 50/20 58/21 59/2 62/10 70/9 74/9 75/22 MR. PETROSINELLI: [5] 62/16 64/2 65/6 68/16 76/3 MR. PULASKI: [24] 3/10 6/17 8/1 12/3 12/18 13/7 30/8 31/8 32/14 33/24 37/23 39/19 44/25 50/14 56/25 59/22 64/9 65/16 65/23 67/24 70/8 73/6 73/22 74/21 MR. WATTS: [74] 3/13 8/22 12/14 12/19 15/13 16/11 17/15 18/7 21/4 21/7 21/14 21/24 22/14 22/18 22/22 22/25 23/4 23/24 26/9 27/5 27/11 28/2 28/10 29/6 32/7 35/5 35/17 37/25 39/22 40/13 43/3 43/9 43/22 45/18 45/20 45/25 48/20 49/24 50/6 50/17 50/21 51/2 51/11 51/16 55/1 55/4 55/7 55/12 56/11 56/14 56/20 56/22 57/5 57/9 57/20 59/1 59/7 60/4 61/6 66/19 68/18 69/4 70/11 70/14 71/10 72/1 72/4 72/12 72/14 73/4 75/9 75/13 75/18 76/4 MS. ZOUSER: [18] 3/16 11/10 12/15 13/18 16/14 16/17 17/22 21/2 30/21 36/16 37/5 37/15 57/1 57/6 57/12 69/17 73/11 74/24 THE COURT: [97]	18th [2] 51/10 51/16 19 [1] 65/16 1968 [1] 46/9 1983 [1] 46/10 19th [4] 63/5 65/3 65/3 65/4 1st [8] 32/18 40/20 41/5 41/18 42/1 47/17 47/25 67/5 2 2,000 [1] 58/3 20 [1] 50/10 20-md-02924-ROSENBERG [1] 1/3 200 [1] 41/2 20005 [1] 2/2 202-434-5567 [1] 2/3 2020 [1] 45/5 2021 [2] 1/5 76/12 2022 [3] 42/5 46/18 65/10 2023 [5] 60/19 64/23 65/12 65/16 73/6 20th [6] 11/3 17/7 17/12 22/2 22/8 22/11 210-447-0500 [1] 1/18 22nd [2] 19/22 24/22 25 [12] 1/5 18/10 18/24 21/22 21/24 22/20 22/22 22/24 22/25 23/4 40/16 43/12 25 percent [1] 24/4 26 [2] 26/17 76/12 28th [2] 20/20 23/7 2924 [1] 3/3 2925 [1] 1/13 295-pound [1] 52/17 3 30309 [1] 1/21 30th [2] 40/20 42/1 312-995-6333 [1] 1/25 3434 [1] 2/5 35 [1] 33/8 353 [1] 1/24 36 [1] 46/6 3M [4] 55/21 58/15 72/1 72/13 3rd [5] 40/18 42/10 42/15 42/17 43/13 4 404-572-4600 [1] 1/22 41 [6] 26/3 27/8 27/19 27/20 27/23 28/13 425 [1] 21/13 4506 [2] 3/4 3/21 4555 [1] 1/14 4600 [1] 1/22 48 [11] 7/6 8/11 21/1 31/13 33/17 34/1 45/10 45/21 73/21 74/3 74/12 5 5500 [1] 16/17 5567 [1] 2/3 561-803-3434 [1] 2/5 6 6 percent [5] 21/11 21/12 21/22 21/23 22/21	60 [1] 4/19 60654 [1] 1/24 6333 [1] 1/25 65 [5] 17/7 32/25 51/9 51/15 63/10 6th [1] 67/5 7 70 [2] 54/2 54/10 713-664-4555 [1] 1/14 725 [1] 2/2 7300 [1] 16/13 75 percent [6] 16/16 24/1 29/11 30/19 31/1 75/13 77098 [1] 1/14 78257 [1] 1/17 7th [2] 19/23 67/6 8 8 percent [3] 21/11 21/14 22/22 9 90 [1] 54/15 95 [1] 54/13 95-day [1] 59/14 A Abilify [1] 11/17 ability [6] 4/11 29/23 34/25 61/17 67/7 67/8 able [16] 6/24 7/7 7/7 11/24 12/1 17/22 22/9 29/5 30/5 31/14 39/15 45/13 68/8 68/10 68/11 74/4 about [54] 4/2 5/1 7/1 8/7 8/19 9/11 10/24 15/12 15/13 16/13 16/17 16/21 16/23 18/13 21/13 21/22 22/17 30/8 31/5 32/3 32/16 33/24 34/11 35/10 36/16 36/19 38/9 39/5 39/6 39/7 40/3 40/24 43/16 45/4 45/10 47/19 47/23 54/17 56/1 56/17 56/19 57/18 59/12 59/13 61/1 61/12 61/15 62/14 63/14 65/8 66/4 66/24 71/12 72/1 above [1] 76/10 absolutely [1] 29/20 absurd [1] 46/24 acceded [1] 29/25 accepting [1] 32/10 account [6] 18/10 18/20 20/1 34/10 36/13 36/14 achieves [1] 9/8 acquiescence [1] 33/9 across [2] 13/23 70/5 act [1] 23/22 action [4] 24/19 25/24 27/22 32/10 acts [1] 23/22 actual [1] 37/13 actually [10] 5/3 6/25 19/16 30/19 30/23 31/5 35/6 56/24 62/11 63/6 ADAM [4] 1/12 3/11 12/4 13/8 add [4] 11/10 11/13 13/19 21/3
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