IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 Fe ANTITRUST LITIGATION	MDL NO. 13-2472
	NOVEMBER 4, 2013

HEARD BEFORE THE HONORABLE WILLIAM E. SMITH

and

MAGISTRATE JUDGE PATRICIA A. SULLIVAN

(Conference)

ATTENDEES:

Jeffrey Pine, Esq.
Patrick Lynch, Esq.
Maria Deaton, Esq.
Joseph Meltzer, Esq.
Thomas Sobol, Esq.
Kristen Johnson-Parker, Esq.
David Sorensen, Esq.
Michael Kane, Esq.
Neill Clark, Esq.
Elizabeth Arthur, Esq.
J. Douglas Richards, Esq.
Donald J. Migliori, Esq.
Michael Buchman, Esq.
Marvin Miller, Esq.
Lori Fanning, Esq.
William Landry, Esq.
Zarema Arutyunova, Esq.
Paul Eckles, Esq.
Steven Sunshine, Esq.
Paul Kessimian, Esq.
J. Mark Gidley, Esq.
Jack Pace, III, Esq.
John Tarantino, Esq.
Nicole Benjamin, Esq.
Alison Hanstead, Esq.
Christian Jenner, Esq.
Sean Tepe, Esq.
Joseph Leniski, Esq.
Matthew Jerzyk, Esq.
Jeffrey Padwa, Esq.
Natalie Finkelman, Esq.

Court Reporter: Anne M. Clayton, RPR
One Exchange Terrace
Providence, RI 02903

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1 4 NOVEMBER 2013 -- 1:00 P.M.
2 THE COURT: Good afternoon, everybody. I see
3 some familiar faces, mostly not.
4 I'm Judge Smith. I'm the Judge who will be
5 handling this matter, and with me on the right is
6 Magistrate Judge Patricia Sullivan.
7 You've probably met some other folks at the
8 table, but I brought everybody here because I thought
9 it would be good for you to put names with faces. Ryan
10 is our calendar clerk. Probably the person you've been
11 dealing with mostly and will be dealing with, Ryan
12 Jackson. Law Clerk Noah Kaufman. Over here is Tim
13 Baldwin. He is Judge Sullivan's law clerk. And Anne
14 Clayton is the court reporter that you'll see a fair
15 bit of and get transcripts from. And Martha is the
16 calendar clerk for Judge Sullivan. So these are the
17 folks you'll be dealing with a lot in the course of the
18 litigation.
19 We're having this conference recorded by the
20 stenographer more as a note-taking function. This is
21 the equivalent of a chambers conference, but it will be
22 helpful for us to have it recorded and it might be
23 helpful for some of you so if you'd like that, let us
24 know, let Anne know.
25 So it might be useful maybe if we get started by

1 having you go around the room and tell us sort of who
2 you are because we would like to know that and then
3 we'll start in on the agenda that we sent you. And of
4 course, that's a flexible agenda so if there's more
5 you'd like to talk about as we go through each of these
6 points, we're certainly open to it. I have some
7 additional things that have cropped up since we sent
8 that order out to you.
9 So why don't we -- how are you organized here?
10 Plaintiffs over here. Why don't we start over here and
11 have you go down. Obviously, I know Jeff. So who do
12 you represent?
13 MR. PINE: Local counsel for the Plaintiffs,
14 American Sales and Rochester Drug, along with Patrick
15 Lynch and Maria Deaton of my firm.
16 MR. MELTZER: Good afternoon, your Honor.
17 Joseph Meltzer, counsel for the Plaintiffs, American
18 Sales.
19 MR. SOBOL: Tom Sobol with the law firm of
20 Hagens Berman Sobol Shapiro from Cambridge,
21 Massachusetts representing American Sales. And to
22 place that in context as you'll hear the Plaintiffs,
23 there's American Sales and Rochester Drug who are the
24 two direct purchasers in the case or proposed direct
25 purchasers class.

1 MS. JOHNSON-PARKER: Good afternoon, your Honor.
2 Kristen Johnson-Parker, also from Hagens Berman Sobol
3 Shapiro, counsel for American Sales and direct
4 purchasers class.
5 MR. SORENSEN: Good afternoon, your Honor.
6 David Sorensen of the law firm of Berger & Montague in
7 Philadelphia representing Rochester Drug, one of the
8 few direct purchasers class.
9 MR. KANE: Good afternoon, your Honor. Michael
10 Kane, also with Berger & Montague in Philadelphia on
11 behalf of direct purchasers class and Plaintiff,
12 Rochester Drug.
13 MR. CLARK: Good afternoon, your Honor. Neill
14 Clark for Rochester Drug Cooperative with the law firm
15 of Faruqi & Faruqi in Pennsylvania on behalf of
16 Rochester Drug and direct purchaser plaintiffs.
17 MS. ARTHUR: Good afternoon, your Honor.
18 Elizabeth Arthur from Hilliard and Shadowen from
19 Austin, Texas, on behalf of the United Food and
20 Commercial Workers Local 1776 and Participating
21 Employers Health and Welfare Fund. We are also with
22 the end-payor class. And we are one of the proposed
23 class representatives.
24 MR. RICHARDS: Your Honor, Doug Richards from
25 Cohen Milstein, New York office of Cohen Milstein. We

1 are here for the end-payor class, and my firm
2 represents New York Hotel Trades Council, which is one
3 of the proposed class representatives.
4 MR. MIGLIORI: Good afternoon, your Honor.
5 Donald Migliori from Motley Rice here locally in
6 Providence, Rhode Island on behalf of the City of
7 Providence and indirect purchasers class.
8 MR. BUCHMAN: Michael Buchman on behalf of the
9 City of Providence, and I'm with Motley Rice in New
10 York City and part of the end-payor class and one of
11 the proposed class representatives in this case.
12 MR. MILLER: Good afternoon, your Honor. Marvin
13 Miller from Chicago on behalf of Painters District
14 Council 30 Health and Welfare Fund, end-payors, and I
15 would also be one of the class representatives.
16 MS. FANNING: Good afternoon, your Honor. Lori
17 Fanning from Chicago, and I also represent Painters
18 District Council 30 Health and Welfare Fund.
19 MR. LANDRY: Good afternoon, your Honor. This
20 will be the Defendant's group. I'm William Landry with
21 Blish and Cavanagh here in Providence. I'm
22 representing the Lupin Defendants in the American Sales
23 direct purchaser case.
24 MS. ARUTYUNOVA: Good afternoon, your Honor. My
25 name is Zarema Arutyunova from Bingham McCutchen in

1 Washington, D.C. I represent the Lupin Group.
2 MR. ECKLES: Good afternoon, your Honor. Paul
3 Eckles from Skadden, New York office. We represent
4 Actavis.
5 MR. SUNSHINE: Good afternoon, your Honor.
6 Steve Sunshine, Skadden D.C. office, representing
7 Actavis. You'll pardon me in advance if I mispronounce
8 Actavis as Activais. It's a name shift from Watson,
9 which was much easier.
10 MR. KESSIMIAN: Good afternoon, your Honor.
11 Paul Kessimian, local counsel for Actavis.
12 MR. GIDLEY: Good afternoon, your Honor. Mark
13 Gidley on behalf of Defendant, Warner Chilcott, with
14 White & Case in their D.C. office.
15 MR. PACE: Good afternoon, your Honor. Jack
16 Pace from White & Case for Warner Chilcott.
17 MR. TARANTINO: Good afternoon, your Honor.
18 John Tarantino, local counsel for Warner Chilcott. My
19 colleagues, I know you know Nicole Benjamin; and also
20 Alison Hanstead from White & Case; Christian Jenner of
21 Partridge Snow and Hahn also on behalf of Actavis.
22 Sean Tepe on behalf of Actavis.
23 THE COURT: Great.
24 MR. LYNCH: I'm with Jeff Pine. Patrick Lynch.
25 MR. LENISKI: Joe Leniski from Bransetter

1 Stranch & Jennings in Nashville, Tennessee on behalf of
2 Teamsters Local 237 Health and Welfare Fund out of New
3 York.
4 MR. JERZYK: Good afternoon, your Honor.
5 Matthew Jerzyk for the City of Providence.
6 MR. PADWA: Jeffrey Padwa for the City of
7 Providence.
8 MS. FINKELMAN: Good afternoon, your Honor.
9 Natalie Finkelman for United Food and Commercial
10 Workers Local 1776 in Philadelphia.
11 THE COURT: My understanding is that no one is
12 here for the Allied Services Welfare Fund, Electrical
13 Workers 242 and FOP Fort Lauderdale; is that right?
14 Anyone know anything or why they're not here?
15 Nobody has any information? Okay.
16 All right. Well, I think we should jump right
17 in. I appreciate very much the statements that you
18 provided. They've been very helpful to me to read
19 those statements. I know Judge Sullivan found them
20 helpful as well. I thought it might be useful if we
21 had just an oral presentation, a brief oral
22 presentation about the cases if someone's ready to do
23 that. I kind of left it to you to figure out who would
24 take the lead. Have you been volunteered?
25 MR. SORENSEN: Again, I'm David Sorensen on

1 behalf of Plaintiffs. Your Honor, as you know, this is
2 an antitrust case. There are different groups of
3 Plaintiffs, that is who I represent and my colleagues
4 represent direct purchasers, that is the first
5 purchasers of the brand of product at issue in this
6 case from the Defendants mostly wholesale, and bring in
7 as a class being a class of all similar purchasers of
8 Loestrin 24 Fe from Warner Chilcott during the class
9 period.
10 Your Honor, as you know, this case involves
11 brand Internet drugs and the competition that occurs
12 between them and the efforts by Defendants from, in our
13 view, to delay that competition.
14 THE COURT: Let me just -- if you don't mind,
15 I'm going to throw out some random questions. So
16 Rochester Drug is a wholesaler that then sells drugs to
17 the big chains like CVS and Wal-Mart, Walgreens, that
18 sort of thing?
19 MR. SORENSEN: Yes, it resells to retail
20 pharmacies, who have smaller pharmacies in the case of
21 Rochester Drug but, yes, it does resale.
22 THE COURT: So the wholesalers who are in the
23 class that you propose to present, how many -- I don't
24 know anything about the market. So how many such
25 wholesalers?

1 MR. SORENSEN: Your Honor, we don't know for
2 sure until we get data from Defendants about their
3 sales. It can range in recent years from in the low
4 40's to 30 to below 30. Depends on the drug. Over the
5 years, there's been an amount of consolidation in the
6 wholesale industry. In years past, there will be more
7 and some of them purchased by others, others have gone
8 out of business. So it has decreased in size. We
9 won't know the exact number until we get purchase data,
10 sales data from the Defendants and that will show us
11 exactly for that drug how many there are. I would
12 expect it to be in the range I just described.
13 And these cases have been brought for a number
14 of years, having to do with efforts basically by brand
15 companies to delay generic competition. And I think
16 it's important, very important for the Court to
17 understand the underlying economics and system,
18 regulatory system that is in play here.
19 Basically, not to belabor it, but in 1984
20 Congress passed something called the Hatch-Waxman Act.
21 That Act allowed and incentivized generic companies to
22 challenge brand patents and provide quicker and
23 abbreviated drug application for companies to get their
24 generic bioequivalent sales brand drugs approved on the
25 market. That was passed in 1984. What happened after

1 that, the efforts of essentially brand companies to
2 then prevent generic companies from doing that. And
3 why did that happen? Well, as the years have gone on,
4 a pattern has developed which is that within now days
5 of generic entry, where generic is now available,
6 essentially all of the brand sales switch from brand to
7 generic. In the years past it happened more slowly.
8 Now it's happened literally within days. That is, all
9 the prescriptions that used to be filled by the brand
10 virtually overnight start being filled by generic.
11 So the brand company sees that coming and knows
12 that when generic entry starts, they're going to
13 essentially lose all their sales. That happens for a
14 combination of reasons, among them every state in this
15 country have what's called generic substitution laws.
16 That's what allows you when you walk into a pharmacy
17 with a prescription for the pharmacist to essentially
18 give you the generic without having to call your doctor
19 or do anything else. If the generic has been approved
20 by the FDA, the pharmacist can fill your prescription
21 for the brand drug with the generic. Insurers in the
22 country's third-party payors and the entire healthcare
23 system over the last 20 years and beyond that has been
24 geared toward getting generics into the hands of
25 patients faster and faster to save money because

1 they're all cheaper.
2 So what started to happen, this is like in the
3 '90's, going back a bit, is that brand companies
4 knowing that when a generic entered the market they're
5 going to lose all their sales started engaging in
6 efforts to stop that. There are a variety of tactics
7 that brand companies used. Among them that is at issue
8 in this case are commonly called reverse payment or
9 pay-for-delay.
10 What are those? Brands would get notified by a
11 generic that generic has an application pending to
12 bring in the generic version of the brand product.
13 Brands typically sue generics for patent infringement
14 fast enough, within 45 days, get a 30-month stay. It's
15 basically an automatic 30-month equivalent to an
16 injunction simply by suing. They don't have to prove
17 anything. No injunction hearing. If we sue, you get a
18 stay. It's a tremendous incentive for them to sue
19 regardless of whether their case has any merit. Why?
20 They automatically get two-and-a-half years of delay.
21 They lose their brand immediately or two-and-a-half
22 years of protection.
23 THE COURT: That has to be triggered by the
24 generic utilizing that option for that last-minute
25 proceeding, essentially declaring the patent to be

1 invalid which is, if I understand it, considered to be
2 a patent infringement which can be sued upon.
3 MR. SORENSEN: It provides jurisdiction for a
4 patent infringement. It's tied with a paragraph IV
5 certification, which in the statute means that the
6 generic company is saying that the brand patent is
7 invalid and/or their generic does not infringe it.
8 THE COURT: So give me some context of dates in
9 this case. The patent was going to expire when?
10 MR. SORENSEN: The patent I believe was expiring
11 in 2014.
12 THE COURT: January 2014; is that right?
13 MR. SORENSEN: Right. Then the FDA approved
14 Warner Chilcott's product in '06. Watson immediately
15 challenged the patent saying we want to bring in our
16 generic; your patents are invalid and/or we don't
17 infringe, which then turned into patent infringement
18 litigation.
19 THE COURT: Which ultimately settled in 2009?
20 MR. SORENSEN: The pay-for-delay reverse payment
21 is basically this: The patentholder is suing generic
22 for infringement, alleged infringement. They settle in
23 a way that the patentholder provides compensation to
24 generic which pushes the generic's entry date into the
25 future, potentially all the way to the end of the

1 patent term. Without that compensation logically the
2 agreeing entry date that the two agreed to would come
3 early in time, more to the present. That's all that's
4 been agreed. But if generic says I'll wait a year, but
5 I won't wait two years unless you give me something,
6 and that something is compensation, financial
7 compensation, then they're called pay-for-delay because
8 the pay from the brand is delaying date of generic
9 entry.
10 It's also called reverse payment because it's
11 reversing what normally happens in a patent case. In a
12 patent case usually the alleged infringer to settle
13 pays the patentholder if it settles. In this case,
14 it's the patentholder who is paying the alleged
15 infringer. The reverse of what normally happens.
16 THE COURT: If I understand it correctly,
17 there's also a 180-day exclusive right that the generic
18 possesses so that a different generic cannot come on
19 the market for that 180 days following the expiration
20 of the patent. Is that how that works?
21 MR. SORENSEN: Almost. You're referring to 180
22 days exclusivity for the first generic that files for
23 patent certification. It's designed to give generics
24 the incentive to challenge patents because that 180
25 days can be extremely valuable to a generic company.

1 It provides no other company can receive FDA approval
2 for their generic for six months, which is why this is
3 so valuable. If the brand product sold let's say at a
4 dollar a pill, just for ease of math, the profit margin
5 on a brand product is often very large. It's let's
6 call it 90 percent. Takes ten cents to make the
7 chemical, sells for a dollar. First generic can sell
8 it for 90 cents. The brand is making tremendous profit
9 margin, 90 versus 10. Once that 180 days expires,
10 other generics can get approval. The price quickly
11 drops to ten cents.
12 THE COURT: My question is where does the 180
13 days run from? What's that period?
14 MR. SORENSEN: Various triggers but it can run
15 from the first day of market. Marketed and it runs.
16 Then after six months it expires. There are other
17 provisions at play in the case in terms of how that can
18 be forfeited, how generic companies can lose it, which
19 will also be part of this case but it runs from -- one
20 trigger is when you start to market. The first to
21 file. Later filers typically you don't get that.
22 One of the features for pay-for-delay agreements
23 that had been discussed in the case law is what's
24 called a bottling or cork in the bottle. It has
25 various descriptions. Basically since no other

1 generics can get approval until what's called the
2 first-filer exclusivity has been triggered and expires,
3 if the first filer has delayed its entry, if they agree
4 to a reverse payment deal and wait five years to enter,
5 it delays everybody because nobody else can get on the
6 market for five-and-a-half years. That's called cork
7 in the bottle or bottling because it's literally
8 stopping all.
9 So, your Honor, here the basic allegation is
10 that Watson, the first filer, challenges the patent for
11 Warner Chilcott's product oral contraceptive. They
12 litigate for some time. There are no substantive
13 patent rulings and they settle. We challenge that
14 settlement as an unlawful pay-for-delay reverse
15 payment. It has features in it that's somewhat
16 different than some of this, although common in itself.
17 One of the main features, there are others, is what's
18 called a process of a no-authorized generic. I'll
19 explain it. What is that?
20 We talked about the 180-day exclusivity but that
21 does not run against the brand company itself, meaning
22 a brand company like Warner Chilcott is as free to
23 launch or sell its brand product as a generic, take off
24 the brand name, price it like a generic. Brand
25 companies typically don't do that until a generic

1 launches.
2 So if I'm selling a brand product at a dollar, I
3 just keep doing that and then when a generic launches
4 at 90 cents or 80 cents, many brand companies, and
5 Warner Chilcott has done this, many brand companies
6 say, well, we're going to lose more brand sales anyway
7 to the generic, we might as well make some money, some
8 profit by launching our own generic. It's called an
9 authorized generic, meaning the brand company sells it
10 itself, sometimes through a subsidiary, sometimes they
11 license a company. It's the same product as the brand,
12 in this case literally in all sense of the word take
13 off the brand name and sell it as a generic.
14 Why is that important? It's important in this
15 case and other cases that are pending in other courts
16 because the authorized generic competes like a generic,
17 so that when Watson, let's say, wants to launch its
18 generic and be the first one and maybe wants to sell it
19 at that 90-cent level at that first six months, the
20 presence of an authorized generic will tend to push
21 that price down. So you have two generics. Remember I
22 said before after six months the price drops rapidly
23 down to cost. It becomes a commodity. The step in
24 that direction is launch of generic. You have two
25 generics competing during the 180 days, and the price

1 drops and a portion of the sales that would go to the
2 generic are recaptured by the brand, approximately
3 half. This authorized generics have been studied, as a
4 matter of fact this entire industry has been studied a
5 lot. A lot of FTC work, a lot of academic work, at
6 this point a lot of studies. This is an extremely
7 well-studied industry. The dynamics and the examples
8 I'm giving are coming from years of actual data
9 analysis.
10 So what began to happen is that brand companies
11 who would otherwise launch authorized generics which
12 during that six months would bring prices down helping
13 all purchasers, helping competition, have said to
14 generic companies, you know what, you stay off the
15 market, we'll settle our patent case by you staying off
16 the market for two years, three years, five years,
17 whatever it is. And in return we'll pay you by
18 promising not to launch our authorized generic. We
19 could launch it, we would launch it. It would make
20 money for us, the brand talking, but if you stay off
21 the market with your generic until a date we agree to
22 in the future we won't authorize a generic.
23 That promise is part of the Warner Chilcott
24 Watson deal that we challenge. There are other parts
25 of it. That promise is part of the way the brand paid

1 the generic to delay marketing its generic. It's
2 transferring, just as if I hand you a hundred dollar
3 bill, it's transferring millions of dollars that
4 everybody knows is being transferred. There's no
5 mystery about this. People can disagree about the
6 exact number, the price effects and so forth. This is
7 all pretty well studied including by the FTC. The
8 brand is transferring money to the generic and in
9 return the generic is agreeing to stay off the market.
10 While that is happening the brand continues selling at
11 that price, stays at a dollar.
12 Your Honor, this is in the presentation. I'm
13 sure you realize the whole issue of how close we look
14 at reverse payment pay was the subject of a recent
15 Supreme Court opinion.
16 THE COURT: Right. I read it.
17 MR. SORENSEN: The **FTC versus Actavis** case
18 issued in June. Your Honor, a couple of things about
19 that. That case established that cases like this must
20 be governed by the Rule of Reason. The Supreme Court
21 reading it looked at the whole issue of patent
22 settlements and antitrust law, looked at prior
23 precedents and said when we look at patent settlements
24 we analyzed them on the Rule of Reason. There's no
25 blanket immunity to a patent settlement. And they

1 start applying it to this particular case.
2 Hatch-Waxman is a pro-statute designed to recognize
3 generics, and it is potentially being undermined by
4 these kinds of arrangements.
5 Importantly, your Honor, a couple of things.
6 One, in that case the brand and the generic entered
7 into a deal that allowed the generic to come in
8 five-and-a-half years before patent expiration. It
9 doesn't matter there's no immunity because there's no
10 agreement we're talking about that allowed competition
11 a few days, a few years before patent expiration.
12 That's not the patent.
13 What else is going on in the agreement is
14 compensation. In there, it wasn't a straight payment.
15 It wasn't the brand handed the generic money to stay
16 off the market. There were some deals like that kind
17 of in the early years, but even in the Supreme Court
18 they're dealing with what the defendants were alleging
19 was not a payment at all. It was a side deal for other
20 services that the generic was providing but the FTC was
21 alleging that was on a motion to dismiss. So the FTC
22 was alleging these side deals were really a conduit, a
23 way for brand to compensate the generic to stay off the
24 market. If they could prove that, then it was a
25 violation.

1 THE COURT: I'm going to kind of cut you off
2 there. I want to stay on track. We have a lot to
3 cover. I want the Defendants to say their peace. I
4 have two questions I want to ask. Is there anything
5 additional that anyone --
6 MR. RICHARDS: My name is Doug Richards from
7 Cohen and Milstein. I represent end-payors, which is a
8 different class.
9 So rather than retreading ground that
10 Mr. Sorensen has really covered, I'd like to make a
11 couple of basic points about the substance of the case
12 and then a couple of points about how the class relates
13 to mine.
14 First thing is, yes, there's a new thing here
15 with some clarity coming out in the Supreme Court
16 decision in Actavis but you should also be aware
17 there's been litigation about these kinds of deals
18 going on 12, 13 years; and on the Plaintiffs side of
19 the table here, both of these sides you have a number
20 of people who have been working together on these cases
21 for a very long time. We know each other very well.
22 We've litigated many of these cases before. We've
23 learned and know one another and work pretty
24 effectively as a team.
25 This question of how reverse payments work, how

1 pay-for-delay works and what's wrong with it has been
2 one of the hottest, maybe the hottest subject of
3 antitrust scholarship for a long time. In addition to
4 the Actavis case, there's a very good academic paper
5 from Professor Herbert Hovenkamp, Professor Carl
6 Shapiro and Professor Aaron Edlin, the people who on
7 the academic side have been the leading lights of this
8 for a long time called "Activating Actavis," which we
9 recommend to the Court as an academic take on the
10 Supreme Court in Actavis and how it can be applied and
11 how it should be applied to cases going forward.
12 The key thing I think is really essential and is
13 getting lost as there's a lot of complexities in this
14 case is what's wrong with reverse payments. Just to
15 give a hypothetical, I'm not saying this case, I'm
16 trying to give you a hypothetical of what's
17 fundamentally wrong when you have a brand name drug
18 manufacturing a big blockbuster drug, they may be
19 making say $2 billion in sales on that drug. When the
20 generic comes to market, often generic would make $100
21 million in a year to two, brand name profit will
22 plummet to 200. They don't have to think very hard to
23 go from 2 billion to something like 300 million so
24 they've got a moment that comes where they say why are
25 we hurting each other. We could just divide up the --

1 instead of competing with each other, we can divide up
2 the market, keep only the brand on the market, prevent
3 competition and have a bigger part if we can just
4 divide up.
5 That is core of what's really wrong and evil
6 about these cases. What you have is not different from
7 competitors agreeing to divide the market, you get the
8 United States, I get Europe, you get this state, I get
9 that state, or we agree to charge a higher price
10 collectively. What they're doing is instead of
11 competing with one another they're teaming up and
12 keeping the price high in the public and dividing up
13 the additional money they collect as a consequence of
14 doing that. I would submit that's really -- it's
15 called dividing up monopoly rents in antitrust speak.
16 That's fundamentally what's going on in these cases,
17 and you kind of need to see that in order to see past
18 the complexities.
19 So on the substance that's all I'm saying.
20 Mr. Sorensen did a very good job of laying out a lot of
21 basics here.
22 Then you get to the question of the classes.
23 Mr. Sorensen and basically this side of the table
24 represents what are referred to as the direct purchaser
25 class. They're referred to as direct purchasers

1 because there's a Supreme Court case called Illinois
2 Brick that's very controversial that for purposes of
3 federal damages claim under federal antitrust law only
4 the first buyer in the chain, not the people to whom
5 things are later sold. So as I think your Honor
6 pointed out, that class consists of people who resold
7 the drug at a price. And you may find yourself asking,
8 well, how did they go on the other end of sale. The
9 thrust of Illinois Brick was to say that's where we
10 stop the analysis. We're not looking past that. But
11 it was a very controversial decision to which there was
12 a very strong dissent and many, many states disagree
13 with it.
14 And that's really how you get to the other class
15 that I represent, which is the class for damages
16 purposes pursuing state law claims under the laws of
17 the states that disagree with Illinois Brick in that
18 they say the person who should be able to sue for this
19 is the person who pays the higher price at the end of
20 the chain. That's when you hear us describe what class
21 we represent as an end-payor, that's because we are the
22 people who pay the price at the end of the chain, the
23 ultimate end-payor.
24 The directs have their rights under federal law,
25 and we're not asserting damage claims under federal law

1 because we can't. We have our rights under the state
2 laws that disagree with that federal law.
3 So that's essentially what drives the fact that
4 we have two classes here. They're different classes
5 because there can be divergence of interest in how you
6 present your case so it's generally recognized that
7 they should be separate representation from the directs
8 and indirects.
9 THE COURT: Let me interrupt you there just for
10 a second, and I think we might talk more about this
11 later on, but you made the distinction that your state
12 law claims are damage claims but your substantive law
13 claims are federal antitrust.
14 MR. RICHARDS: We can't bring damages claims.
15 So many of the complaints have a federal injunctive
16 claim in them. If you look at damages claims and
17 end-payors --
18 THE COURT: So I guess the question that leads
19 me to ask we're going to talk about later since you
20 brought it up is does that raise choice of law issues
21 that we need to pay attention to or is that a question
22 for much later, late in the litigation, in the trial, I
23 guess.
24 MR. RICHARDS: It's a question that will
25 sometimes come up on motions to dismiss. We would

1 submit that the generally prevailing rule is that
2 people have their claims under the laws of the states
3 where they made their purchase. Sometimes defendants
4 will argue it should be something else. Choice of law
5 sometimes comes up as an issue. Sometimes people will
6 try and argue that because all the conduct of the
7 defendants was focused on the state, that law could be
8 applied nationwide, which is an argument that has some
9 support for it.
10 In general, in most of these cases what the
11 courts have said, you can bring these claims under the
12 law in all the repealer states generally because they
13 repealed Illinois Brick in one way or another. They
14 permit end-payors to sue where federal law doesn't. So
15 these are claims they have asserted to the extent
16 they're damages claims under state law where states
17 have disagreed with the federal law of the Supreme
18 Court in Illinois Brick. There's a really important
19 Supreme Court case that people don't get focus, ARC
20 America. Very important case. What ARC America said
21 is federal antitrust law saying that the direct
22 purchaser gets to sue doesn't preempt the state
23 antitrust law. The state antitrust law that wants
24 end-payors to recover are a separate and entirely
25 distinct body of law.

1 We have our rights to recover whatever damages
2 state law gives us the right to sue for, and they have
3 a right to bring their claim for damages under federal
4 law. It's not an either/or. They're in addition to
5 one another. They're cumulative with one another. The
6 Supreme Court looked at it and addressed it in ARC
7 America.
8 I don't want to take up too much time. The only
9 other point is who the direct purchasers are. The
10 end-payor class basically consists of two subgroups,
11 which generally are not put into separate subclasses.
12 There are the consumers, the people who actually took
13 the drug and paid the price for it. But typically with
14 drugs when you purchase it at the pharmacy counter,
15 consumer pays part of the purchase price but part of
16 the purchase price at that transaction at the drugstore
17 counter is actually paid by their health insurer.
18 So in addition to consumers of whom there are
19 millions, you also have what we refer to as third-party
20 payors as part of the class. And the third-party
21 payors are entities that pay part of that price
22 pursuant to health insurance plans in some way at the
23 pharmacy counter. One of those is the City of
24 Providence, which is here as a class representative for
25 all of the end-payors, but the City of Providence pays

1 part of the purchase price when one of its employees
2 buys a drug at the drugstore counter just like a lot of
3 other health insurers and so on.
4 When you get to notice in these cases, the
5 general number that's thrown around of how many
6 third-party payors there are that eventually get
7 recovery given notice, I think the most common number
8 is 14,000. Kind of a sense of how many there are. You
9 have an end-payor class consists of millions of
10 consumers and something like 14,000 third-party payors
11 who share in the purchase price at the point of sale.
12 THE COURT: That's all very helpful. Let me ask
13 two questions of you folks, then we'll shift over to
14 the other side of the table. One is I'm curious why
15 this case is brought in late 2013 if the patent cases
16 were settled in 2009? And what are the statutes of
17 limitations associated with these kinds of claims?
18 MR. SOBOL: Good afternoon, your Honor. Tom
19 Sobol. I'll take those two questions backwards.
20 So the federal claim under the Clayton Act is a
21 four-year statute of limitations. The application of
22 the four-year statute of limitations has some
23 exceptions to it. The two notable ones are what's
24 called the basic accrual rule. I don't know if I said
25 that correctly, accrual rule, means the claim of a

1 direct purchaser does not accrue until the time the
2 purchaser has actually brought the drug so you would
3 know what it is your damages might be.
4 There's also a second exception to the statute
5 of limitations rule on the federal side called the
6 continuing violation rule, meaning that while you may
7 have a conspiracy to restrain trade that gets attached
8 at one point in time in the past, if there were acts
9 that occurred pursuant to the conspiracy thereafter,
10 then the statute of limitations -- just doing justice
11 to any end-payor group. Each state has their own
12 statute of limitations that are applicable to the state
13 law claims. Those statutes run anywhere between two-
14 and six-year statutes depending on the state and tend
15 to have similar exceptions to them.
16 In a case like this, one of the reasons that
17 there's a period of time that exists between when one
18 knows of the barren existence of the agreement as
19 opposed to when the case actually gets filed are driven
20 essentially by three things. The first thing will be
21 what do you really know about the settlement agreement.
22 As we know, the mere fact of a settlement of a piece of
23 litigation does not mean the settlement was illegal or
24 unlawful. You need to learn whether or not there was a
25 reverse payment, the kind of reverse payment that

1 exists, the size. And that can take some time, number
2 one.
3 The second thing that lurks underneath a lot of
4 what we talked about so far is the whole causation
5 issue.
6 The third is a violation of law. And you prove
7 a violation of the law, then the Plaintiffs could also
8 prove when the generic could have gotten to market if
9 the illegal activity had not occurred. So that itself
10 has two branches. One branch is when would the generic
11 otherwise have received regulatory approval, had gotten
12 its candidate approved if there hadn't been unlawful
13 activity. Second, there's a manufacturing branch when
14 the generic companies have been in a position to
15 manufacture large quantities of the drug in order to be
16 able to launch. Although there might be a mere
17 existence of a violation, you might not have any injury
18 accrue until a period of time after that because you
19 have to be able to prove when it is that the unlawful
20 activity occurred.
21 Also in part the third consideration is that
22 this is a complex industry. And so while you have,
23 with myself being the only exception, some pretty
24 sophisticated Plaintiff lawyers who have been doing
25 this kind of thing for a while, I'll except myself from

1 that group, the reality of trying to understand what
2 has happened before you can bring the case to satisfy
3 Rule 11 is not straightforward. You can't read
4 something from the FTC and think it's unlawful. You've
5 got to do a study.
6 THE COURT: My other question and I'll be asking
7 you folks to comment on it, too, you disagree about it
8 in your preliminary filing is where the patent case has
9 been settled, what is the necessity of litigating the
10 patent in the antitrust case to determine its validity?
11 I found Justice Breyer's discussion of that to be a
12 little Pollyanna-ish, maybe.
13 MR. SOBOL: If I were an Article III judge I
14 might be able to call a Supreme Court judge's opinion
15 Pollyanna-ish. I won't go that far.
16 First, you've identified exactly what the Court
17 majority said in the Actavis decision, that as a
18 straightforward matter in terms of proving the core
19 piece of a violation, if I understand that decision
20 correctly, if you've got a big payment and you can't
21 explain it through some other way to get an excuse for
22 it, it's only cause celeb. It's got to be delaying the
23 generic's entry. Therefore, if the decision is read
24 that way, you wouldn't need to technically have the
25 patent to prove the core piece of the violation. In

1 our thinking, which is not monolithic, there are two
2 roles of the patent case in any event for the case.
3 The first is to set the context of the settlement
4 agreement. In other words, can a jury really
5 understand why a payment might be happening one way or
6 another without at least having some understanding
7 about the patent system, what the patents were all
8 about, what the litigation was all about, and what the
9 positions were of the parties. Can they really
10 understand the settlement outside that context? And
11 the thinking of many us, though I haven't taken a poll,
12 is that they can. You've got to set the context of it.
13 Second, and probably more concretely, is the
14 notion that to prove causation one approach of the
15 Plaintiffs might be to say if there hadn't been a
16 reverse payment in the case but the parties still
17 wanted to settle, what would the settlement have looked
18 like without a payment?
19 So you have two litigants who have a lawsuit.
20 The only thing they have to therefore bargain since the
21 branded company is taking off the table, all right, I'm
22 not going to bribe you, take a later date, the only
23 thing they have in front of them is to now negotiate an
24 entry date for generic that is reflective of the merits
25 or lack of merits of the underlying patent

1 disagreement. And in that context we think, we, not a
2 monolithic, right, we think it relevant that the patent
3 merits will help the jury understand to be able to
4 pick, yeah, if there hadn't been the payoff, then, you
5 know, the branded company basically didn't have a leg
6 to stand on because of this, that or the other thing in
7 terms of the underlying patent litigation like the
8 clinical studies that were used to support it were
9 bogus or the crackpot scientist who was trying to get
10 the patent was misrepresenting the science about this,
11 that and the other thing, right, and they are therefore
12 in a position to handicap, if you will, where the
13 settlement otherwise might have occurred if it hadn't
14 involved a payoff.
15 So it's setting context for the settlement,
16 number one, and also technically on a causation theory
17 if our causation theory is a different form of
18 agreement here's what it will be.
19 MR. RICHARDS: Judge Smith, if I could add a
20 quick point, again sort of a higher level of extraction
21 to what Mr. Sobol has said, the only point I would
22 emphasize is a simpler point. The Supreme Court
23 enactment made this very clear, you don't have to
24 decide whether a patent was valid or invalid. That's
25 not the exercise of determining --

1 THE COURT: The Defendants may disagree with
2 that.
3 MR. RICHARDS: On that question, the Court's
4 opinion is very, very clear. What it says is from a
5 standpoint of determining whether there's a violation,
6 the chance or likelihood, the possibility, the risk
7 that the patent has -- the possibility that the patent
8 might be invalidated is enough to, coupled with one of
9 these payments, to declare the payment unlawful. I
10 would submit that is very, very clear.
11 THE COURT: Let's move to the Defendants' side.
12 MR. SUNSHINE: I'll take the first crack at it.
13 Steve Sunshine for Actavis.
14 Just as I'm sure your Honor is aware, about a
15 month ago Actavis completed its acquisition of Warner
16 Chilcott. No relation to this lawsuit but now under
17 common parentage.
18 As you point out, this is a case about an
19 after-the-fact antitrust challenge to a patent
20 settlement. This is a case about two private parties
21 that were engaged in very serious and intense patent
22 litigation who were able to resolve their differences
23 and now are being challenged after the fact by a series
24 of private Plaintiffs who have said we should have
25 litigated a different outcome, we should have better

1 protected the public interest.
2 We clearly have some problems with that. I
3 think we've already flushed out a few areas where we
4 and the Plaintiffs don't see eye-to-eye on the Actavis
5 decision and its implications. But just to talk
6 generally I'll first talk a bit about the Hatch-Waxman
7 framework to put some context in and the balance
8 created by Hatch-Waxman, and then I'll talk a bit about
9 the Actavis decision itself, what the Court said, what
10 the Court didn't say, some of the different signals
11 that the Court has and where that leads us here in this
12 case and other cases like this.
13 This is not the only challenge going on to
14 settlement post-Actavis, but let me first talk about
15 Hatch-Waxman because there is another side to
16 Hatch-Waxman, and I think it's fair to say that
17 Hatch-Waxman is a balance. It's a policy construct
18 that Congress created more than 30 years ago, and it's
19 a balance between trying to spur innovation and reward
20 branded companies for innovating while at the same time
21 to allow generics to enter the market and become
22 available.
23 One of the things that generics get out of
24 Hatch-Waxman is that generics do not have to do
25 clinical trials. The branded company does. We think

1 about this as a patent case and inventing new molecules
2 but even more about what brand companies do is clinical
3 tests. They have to go through the FDA process, Phase
4 1, Phase 2, Phase 3, where the product has to be deemed
5 safe; it has to be effective. It has to be run through
6 large clinical trials. What Hatch-Waxman does is allow
7 the generic company to piggyback on those clinical
8 trials. Congress is trying to achieve a balance. That
9 statute now is more than 30 years ago. It's been
10 amended on many occasions to tweak it, to adjust it. I
11 think by all accounts stepping back Hatch-Waxman is
12 considered to be a success. How do we know that?
13 Statistic that I've seen is more than 80 percent of
14 prescriptions filled today are generic prescriptions.
15 So generics have been successful.
16 My client is I think the second largest generic
17 company in the United States, has a long history of
18 developing new generics, of challenging patents, of
19 shaving years off the projected patent life but also
20 bringing these products to market. My client is in the
21 business of selling drugs, not in the business of
22 patent litigation.
23 Now, Hatch-Waxman, I think your Honor hit the
24 nail on the head, it creates a constructive act of
25 infringement so an act of infringement is merely

1 sending in the so-called paragraph IV notice. The
2 generic doesn't have to make sales in the market and
3 risk all the usual liabilities that tend to patent
4 infringement. In exchange for that, there's all these
5 different pieces, and I think you heard from
6 Plaintiffs' side there's a 30-month stay. The reason
7 why a 30-month stay was put in was not to randomly
8 disadvantage generics as they tried to bring products
9 to market. It was to create this balance where the
10 branded company would have an opportunity to prepare
11 its case and the branded company in the meantime could
12 be continuing to develop its product, et cetera. So
13 there is this whole balance piece of Hatch-Waxman.
14 In this context the Actavis Supreme Court
15 decision comes into play. That case was decided just
16 three months ago. Before the settlements your Honor
17 pointed out, Actavis was in settlement that we're
18 talking about. That settlement was almost five years
19 ago. There was nary a word from any private plaintiff
20 or certainly any Governmental investigation of any type
21 until the Actavis decision was put before the Supreme
22 Court. And so the question -- since the Actavis
23 decision has been handed down by the Court, by our
24 count there's at least 12 cases pending on the question
25 of under what circumstances can reverse payments be

1 found to be unlawful.
2 I think there is a great lack of clarity in the
3 Supreme Court's decision. I think we can say a few
4 things about the Court's decision. One is we know it's
5 a Rule of Reason analysis. And that means that the way
6 to test the effects of this product, the effects of the
7 agreement are to balance against the restrictions that
8 they cause to competition, net it out and see if
9 there's an actual harm in the competition. There's no
10 presumptions. That part of the case was the FTC's
11 theory. They were asking for presumptive violation or
12 a so-called quick look and the Court rejected it.
13 So what the Court did, and perhaps not to
14 characterize too much what Justice Breyer did, but it
15 was almost a cavalier we'll leave it to the lower
16 courts to figure out. In fact, he said that expressly,
17 figure out how to piece these analyses together and how
18 to make it work.
19 He did offer some guidance, and there are five
20 sets of considerations identified in the opinion.
21 Those sets of considerations are advisory about how to
22 get the elements of a Rule of Reason analysis done.
23 And in no case in any of those elements is there
24 irrebuttable presumption provided by the existence of a
25 large and so-called unjustified payment. I think the

1 Court talks about -- for instance, uses words like a
2 large payment may be a strong indicator, a large
3 payment may provide some balance or some color as to
4 what the patent merits are. But from a Defendant's
5 perspective we would respond, we would answer each
6 piece of those with our own sense of evidence
7 ultimately with the fact that the Plaintiffs have to
8 prove an actual payment, they have to prove that it was
9 large, that it was unjustified, that it actually
10 delayed entry. We heard Mr. Sobol talk about how you
11 prove entry was actually delayed.
12 The other thing that is very important in any
13 Rule of Reason case is there has to be an adverse
14 effect on the decision. The way we do that is we
15 redefine the market. We look at how much power does
16 the Defendant have in the relevant market. The product
17 we're talking about is a woman's health product, an
18 oral contraceptive that has a competitive market.
19 There are many oral contraceptive markets available for
20 sale. And one of the points that the Defendants will
21 argue is that Warner Chilcott had no and has no market
22 power in oral contraceptives.
23 So if we kind of go back to then where does this
24 case leave us now, we have Plaintiffs arguing that this
25 is they call it a pay-for-delay, they talk about

1 exclusion payments, they make a defined term exclusion
2 payment, they talk about paying off the competitors,
3 but let's really cut through the rhetoric and look at
4 what's core of where the allegations of payment are
5 made, because nowhere in the complaint would you see
6 Warner Chilcott handing a bag of cash over to Watson or
7 to Lupin. And all of the allegations of payments are
8 all referenced to other agreements that the parties
9 made and trying to impute value in those agreements
10 that don't relate to the actual agreements themselves.
11 So what do I mean? For example, there is a
12 product that is called Femring, which is a product
13 that's a hormone replacement therapy for menopausal
14 women. The agreement that actually exists between the
15 parties is that Watson, which has its own line of
16 women's health products, details the sales force, takes
17 over that product and actually sells that product in
18 the marketplace. I think the facts are that Watson
19 made something on the order of 40,000 details. That
20 means 40,000 calls on physicians to say, Let me tell
21 you about this product, let me tell you the good of the
22 product. And in exchange for that Watson got 50
23 percent, there's base fee and there's a more
24 complicated fee but basically Watson gets a percentage
25 of those sales.

1 So what you have is a stand-alone agreement.
2 And Defendants will argue and I'm sure Plaintiffs will
3 disagree that it's an at-market deal for the promotion
4 of this product. But what we have is Watson's clearly
5 providing services, detailing, it's promoting. Its
6 financial compensation for that deal depends on the
7 success or failure. If it's good at selling the
8 products, it's making more money. If it does a bad
9 job, it makes less money. So I don't think there can
10 be any dispute that that arrangement is not a sham.
11 It's not just a thinly-covered disguise.
12 Now, we'll have a debate over what's the proper
13 fair market valuation of that, and our position will be
14 that that was at fair market value. But that's what I
15 mean when there's talk about pay-for-delay. We should
16 be very clear that all of the payments that are alleged
17 by Plaintiffs are coming indirectly through other
18 agreements. So that's true for Femcon, that's true for
19 the two products that went to Lupin as an authorized
20 generic, Asacol -- I think it's Femcon in that case.
21 And it's also true for the generic product that Watson
22 is now selling on the market.
23 So these are agreements, each case these
24 additional agreements are actually bringing a new
25 product to market.

1 So the product that Watson got, Generess, is
2 actually competing with Warner Chilcott's Loestrin.
3 These are two very similar oral contraceptives. So
4 this product not only are we talking about trying to
5 get disguise consideration but is also introducing a
6 few products in the market that is competing that
7 customers have to choose which one to buy.
8 I went into too much detail and I apologize for
9 that, but I'm only talking about can they even prove a
10 payment. We haven't even gotten to is it really
11 large --
12 THE COURT: I don't want to cut you off in terms
13 of what you want to talk about in terms of Defendants'
14 position, but it might be a good segue into sort of the
15 next topic on the agenda, which is -- actually a couple
16 of the next topics. Do we have everybody here? I
17 guess that's the first question I have. Are there
18 going to be other cases joined to this? Are there
19 going to be other parties? And one thing that we had a
20 question about is whether there are going to be any
21 so-called opt-out Plaintiffs join in this action. Does
22 anybody have any comment about that?
23 MR. TARANTINO: Before you go there, there's
24 another aspect of the Defendants' case Jack wants to
25 address.

1 THE COURT: I did kind of cut you off a little
2 bit.
3 MR. PACE: Thank you, your Honor. Jack Pace for
4 Warner Chilcott.
5 I'll touch on the opt-out question briefly and
6 Plaintiff or anyone who is aware of the issues can
7 cover it. Often in these cases there are opt-out
8 Plaintiffs, large purchasers who prefer to proceed
9 alone. As Mr. Richards noted earlier on, some of the
10 Plaintiffs lawyers have worked with each other for many
11 years. Some of us on the defense side feel the same
12 way vis-a-vis the Plaintiffs lawyers. A typical
13 pattern is in some of the cases, more recently just a
14 few months or less into a case some of the retail
15 chains filed separate complaints, often the same as the
16 class complaints but sometimes with little variations.
17 So if this case follows that pattern, I guess we
18 wouldn't be surprised to see any direct purchaser, for
19 example, opt-out complaints in the very near future and
20 that could affect things like scheduling and other
21 synchronization.
22 THE COURT: When you're referring to those
23 Plaintiffs would be large retailers, we were thinking
24 the possibility of like a large hospital, for example,
25 or does that happen?

1 MR. SOBOL: If I may. So there are times when
2 on the end-payor's side, the indirect payor's side,
3 there are some large healthcare institutions that have
4 filed their own cases, too. Aetna, Keiser are examples
5 where that has happened. It's relatively rare but it
6 has happened.
7 On the direct purchasers side, as Mr. Pace
8 points out -- appreciate your having brought up the
9 opt-out issue -- depending upon how the case goes,
10 while sometimes you might find some more attractions,
11 too, we don't know, typically by the time we get to
12 this point here we at least have a sense of who the
13 class lawyers are. We have a pretty good group sense.
14 We can't guarantee that this is the direct grouping,
15 that's the indirect side.
16 On the indirect side they have a pretty
17 comfortable feeling that Aetna or Keiser are probably
18 not going to come in at this stage. We probably need a
19 little more water go over the dam before we see
20 somebody come on our side.
21 MR. SORENSEN: On the opt-out side, there are
22 cases, typically Rite-Aid, Walgreens, CVS, large
23 chains, when they bring suit they typically bring suit
24 under assignment from wholesalers, that is they
25 purchase their drugs from wholesalers and they get

1 assignment from their purchasers. Say if CVS buys a
2 thousand units from a wholesaler, they get an
3 assignment agreement between them and their wholesaler
4 for purposes of brining antitrust cases. Those
5 thousand units are assigned to CVS so they can step
6 into the shoes of the purchaser for purposes of
7 antitrust law.
8 That's typically how those cases are framed.
9 When they do bring suit, I'm not speaking for them in
10 this case, often when they bring suit they will present
11 themselves to the court as saying we are not here to
12 delay the case. They'll kind of jump in whenever they
13 jump in and try to, in effect, not have that filing
14 delay.
15 But obviously I'm not speaking for them.
16 They're not here in this room. That has happened with
17 varying degrees of success by the way. It can create
18 issues. I'm not pretending it doesn't, but that's
19 sometimes how they frame themselves.
20 THE COURT: In your experience, it usually
21 happens within a couple of months of this conference?
22 MR. SORENSEN: Yes. Sometimes it's happened --
23 there's a bit of a variation there but typically in
24 that time frame.
25 MR. MILLER: If I might, I'm Marvin Miller.

1 That may be true with regard to the directs. On the
2 indirect side, I think as a footnote to what Mr. Sobol
3 said, the Aetnas and Keisers, some of the other large
4 third-party payors typically come in way down the road
5 near the end of the case. They won't be filing
6 generally their own case within our case.
7 MR. PACE: One other data point, your Honor. In
8 a recent case against Pfizer regarding Effexor,
9 frankly, after a team scheduling conference like this,
10 that caused within a matter of days a number of
11 opt-outs who filed their complaints. We all went home
12 from the initial status conference in that case in the
13 District of New Jersey to find a number of opt-out
14 Plaintiffs had filed just triggered by the publicity
15 surrounding the initial case conference.
16 THE COURT: Okay. You were --
17 MR. PACE: I'll note two simple points. The
18 first one relates to some allegations that are really
19 against Warner Chilcott alone, and mentioning it now
20 really goes to something that I suspect we'll touch on
21 briefly in the need for the case to shape and develop a
22 little bit through the consolidated amended complaints
23 and other things before we have a perfect sense of some
24 matters that will be very important for us all to deal
25 with. But the one issue that didn't come up in some of

1 the discussion so far is that as to Warner Chilcott in
2 particular, there are a number of allegations depending
3 on the complaint that deal with what's sometimes called
4 in the forum of a Section 2 Sherman Act monopolization
5 claim.
6 One way or another all the complaints at least
7 contain factual allegations regarding product hopping
8 by Warner Chilcott or incremental improvement in the
9 Loestrin product. The allegation that is essentially
10 challenging the launch of a new version of Loestrin of
11 Warner Chilcott referred to as the Lo Loestrin, the
12 form dose of Loestrin, which according to the
13 complaints really had no effect or came in two forms.
14 Number one, it was something that generic competitors
15 were forced to keep up with so the Plaintiffs
16 characterize delay generic competition, launch of the
17 new form of product that generics would want to take
18 advantage of substitution to compete with. Then also
19 very simply the complaints against some of the specific
20 claims, some of the factual allegations allege
21 essentially the new products, the lower dose form
22 wasn't sufficiently innovative to avoid the antitrust
23 laws. That's a claim that is in a footnote to
24 Plaintiffs' statement of the case. The Plaintiffs seem
25 to hint that that might change in the final

1 consolidated complaint. That may get moved from
2 Sherman Act Section 2 category to part of a Section 1
3 theory, and I guess we'll wait and see what the
4 consolidated Amended Complaint raises but that's
5 something we mention at the outset because that sounds
6 like it's still going to be part of this case.
7 And I'll note it's not just the Defendants here
8 that characterize that claim as novel. There haven't
9 been many product hopping cases out there. Two of the
10 three pharmaceutical product hopping cases were
11 dismissed on the pleadings. One of the cases pending
12 right now against our client, Warner Chilcott, the
13 judge in the Eastern District of Pennsylvania invited
14 Defendants to file summary judgment briefs. There are
15 other claims unique to Warner Chilcott have to have
16 discovery, you can talk about that on discovery.
17 The last thing I'll note as to settlement
18 claims, to emphasize this is important, maybe this is a
19 segue to get into scheduling, it is important these
20 claims do have an impact on the type of discovery, if
21 any, are required later on down the road.
22 Again, as Mr. Sunshine put well, it's Rule of
23 Reason inquiry that the Supreme Court described, lower
24 courts are just now going through the process of
25 beginning to try to understand which types of

1 settlement agreements are ones that should survive a
2 motion to dismiss and get into discovery and which ones
3 may not.
4 In the beginning of this status conference, we
5 made a lot hypotheticals about settlement agreements,
6 cases that may be -- I think the word was evil
7 settlement agreements, they may have involved
8 blockbuster drugs or large, naked cash payments. And
9 as will become clear in the briefing on the motion to
10 dismiss if it goes as we expect, there was no naked
11 cash payment in this case. It's not one of those
12 cases. And even as to the no-authorized generic deal,
13 again, some courts are grappling with to determine if
14 cases should even go into discovery at all. If the
15 compensation for generic took the form of really the
16 revenue from increased competition, this is the Judge
17 Posner decision we cited in the Asahi Glass and that
18 certainly can't be reverse payment, that is essentially
19 what we're dealing with. These are patent shortening
20 settlements. But I'll stop there and save the rest for
21 discussion of the schedule.
22 THE COURT: Okay. Let's use that as sort of a
23 jumping off point to the question of kind of first
24 phase of scheduling the consolidated complaint and
25 answer for motions to dismiss.

1 Do I take it there's a consensus agreement that
2 a consolidated complaint should be filed in the MDL
3 action, at least one, or should there be two?
4 MR. SOBOL: So at least on Plaintiffs' side, I
5 don't anticipate any disagreement by the Defendants,
6 all the cases can be consolidated for pretrial
7 purposes. There would be two consolidated complaints.
8 One for the end-payor class, one for the direct
9 purchaser class. That's necessary for a variety of
10 reasons to have those two. Although there are
11 obviously some significant similarity of facts and
12 significant similarities in terms of law, there's also
13 some significant differences, too, so we'd have two
14 separate consolidated complaints, one for the indirect
15 and one for the directs.
16 There's some timing -- I think at least the
17 Plaintiffs' proposals were a little bit different, but
18 I think after a little bit of discussion December 6th
19 for the filing of the two consolidated complaints would
20 be in order. And then I think I'll stop talking for a
21 moment before we turn to the issue of the timing and
22 the briefing of motions to dismiss.
23 MR. BUCHMAN: Michael Buchman for the indirect
24 purchaser.
25 I would agree with what Mr. Sobol said, but I

1 would add that I believe based on our discussion with
2 the Defendant that although December 6th, 2013, would
3 be a good date for Plaintiffs to file their separate
4 complaints, the direct purchasers would file their
5 separate complaint, we would file our own separate
6 complaint as is typically done in these types of cases.
7 THE COURT: I take it you all agree.
8 MR. SUNSHINE: We agree. It's very complicated.
9 It's easier to work off of one set. These are cases
10 that at a minimum being highly shaped we can only do
11 that when there's some commonality with what the
12 Plaintiffs have actually alleged.
13 THE COURT: There's an interesting decision
14 written by Judge Sutton in the Sixth Circuit, which
15 I'll confess I haven't fully read which doesn't seem to
16 be all that lengthy but I guess I just became aware of
17 it and I imagine most of you have read it, which talks
18 about the difference between terminology used. There
19 was a master complaint versus cases consolidated for
20 administrative purposes. Do any of you have any views
21 about that?
22 MR. SOBOL: We do, your Honor. So unlike a mass
23 tort kind of situation, if you will, the tradition has
24 been this period that when the parties file a
25 consolidated complaint, those Plaintiffs, those class

1 representatives are filing the case in a docket number
2 in the jurisdiction. Accordingly, I'll speak only for
3 the direct purchasers, but I anticipate the answer is
4 the same for indirect purchasers, when we file our
5 consolidated complaint, the two named Plaintiffs will
6 have filed a case in this Court and expect to go to
7 trial in this Court, therefore not be a lexicon issue,
8 meaning that there's no
9 who-is-going-to-try-which-case-where.
10 So even though, for instance, Rochester Drug
11 originally filed a case elsewhere, because it's going
12 to be a named Plaintiff in a docket number that was
13 originally filed here, we're going forward in a trial
14 in this Court and we get rid of any lexicon issues. Do
15 you all agree with that?
16 MR. BUCHMAN: Mike Buchman, again, for the
17 end-payor Plaintiffs.
18 With regard to the City of Providence case,
19 which was filed in this district, that would be true.
20 Mr. Sobol's statement is correct.
21 With regard to other Plaintiffs' claims, cases
22 that were filed outside the district, they would get
23 MDL'd back to their transfer court to the conclusion of
24 pretrial like discovery. So we would imagine those
25 cases going back to those other districts.

1 THE COURT: So you differ on that point, then, I
2 take it, right?
3 MR. SOBOL: We differ in the sense that we have
4 structured things so we're not differing about an issue
5 of law because we have structured things that are both
6 Plaintiffs are filing here, we don't have the issue
7 that the indirects have decided to choose.
8 THE COURT: Right. I mean, you're deciding
9 basically to waive, if that's the correct word, any
10 lexicon issue filing. You folks are saying, the City
11 of Providence obviously is in this district. You folks
12 are saying your non-Rhode Island cases, you want to
13 invoke lexicon and not waive it. I don't know if
14 "waiver" is the right term but that's what you're
15 saying.
16 MR. BUCHMAN: That's correct, your Honor.
17 THE COURT: But that's an issue we can obviously
18 deal with down the road. My understanding is that a
19 lot of times we get to that point the MDL district
20 judge simply gets designated in a district of wherever
21 and solves your lexicon problem, right?
22 You're nodding. You don't want to say it out
23 loud. All right.
24 And from the Defendants' point of view, anything
25 you want to say about that issue?

1 MR. SUNSHINE: Not from me, your Honor.
2 MR. PACE: No, your Honor.
3 THE COURT: December 6th, then.
4 What comes next? Are we expecting motions to
5 dismiss or Answers or what?
6 MR. PACE: Jack Pace for the Warner Chilcott
7 Defendants.
8 Based on the complaints we've seen so far prior
9 to consolidation and amendment, we have every
10 expectation we would be moving to dismiss. I put it
11 that way because there are some things that need to be
12 decided, things that need to be synchronized, I guess,
13 among the various complaints before we have a perfect
14 sense of what we're dealing with. I mentioned the
15 incremental improvement type claim before and we
16 already saw an indication in the statement of the case
17 that that may change. Maybe diminished issues, maybe
18 be dropped all together, may be part of some overall
19 scheme Section 1 Sherman Act. We're not sure.
20 December 6th the Defendants see how that claim is put.
21 That may have an impact on the various arguments we've
22 made.
23 Similarly, mentioned in the very same footnote
24 is patent fraud and sham litigation claims about Warner
25 Chilcott alone, and those appear I think in the

1 original of 12, nine of the 12 said something about the
2 patent claims being meritless. Three of them
3 characterize the patent suits a sham in some way. So
4 that will need to be synchronized a little bit in the
5 consolidated amended complaints before we really see
6 what our arguments will be in particular.
7 I will note very briefly there are a few
8 differences among the various complaints that need to
9 be sorted out. Three of 12 have Sherman Act Section 2
10 claims. We'll see if those survive. Three of the 12
11 improper orange book listing, the patent was improperly
12 listed in the orange book. We don't know if that will
13 survive the consolidation. One has made a state law
14 monopolization theory. So we'll see. I think it was
15 Teamsters. We'll see if that makes it in there. Just
16 the state law claims generally are something that have
17 a great impact on the motion to dismiss process. These
18 are sometimes in other cases motions to dismiss by
19 score card or grid in the sense that there are so many
20 state law claims that you often have to keep track in
21 that way.
22 Here in the early count there are 90, twenty-two
23 state law protection claims and unjust enrichment
24 claims under the laws of all 50 states. We'll have to
25 see how that all gets synchronized in the process

1 before we know what we're looking at issue by issue.
2 That's what our expectation was in a motion to dismiss.
3 Defendants during the meet-and-confer session
4 last Thursday proposed that the Defendants would have
5 60 days after seeing those new complaints to file our
6 motion to dismiss. That would bring us to February
7 6th, I believe, then the Plaintiffs would have 45 days
8 to respond to that which would get us to March 24th and
9 we would then get 30 days to file reply briefs, which
10 would get us to April 23rd. That was the proposal we
11 made to Plaintiffs during our meet-and-confer session
12 last week, your Honor.
13 MR. SOBOL: If I may.
14 THE COURT: Sure.
15 MR. SOBOL: First, I think that Mr. Pace has
16 done an excellent job cataloging my word that I had for
17 synchronizing.
18 I will say this. In dealing with a scheduling
19 issue, we really are trying to juggle two things. What
20 is going to be a schedule in a motion to dismiss?
21 Implicit in that is are we otherwise sitting around
22 doing nothing. If we're otherwise sitting around doing
23 nothing, then that obviously changes the Plaintiffs'
24 perspective as to how we move ahead with the motion to
25 dismiss schedule because we can -- frankly, the

1 Plaintiffs don't care if the motions to dismiss are
2 decided in 2014 or the day before trial as long it's
3 not critical to the trial.
4 So my answer, therefore, is going to entail both
5 what we really think is going to be involved in the
6 motion to dismiss but also whether or not we're sitting
7 around doing nothing in the meantime or not, which I
8 think is the more critical issue.
9 It's clear that there's going to be a reverse
10 payment claim in all the cases. It's clear the parties
11 understand the standard there is the Rule of Reason.
12 While we're not the best lawyers, we can at least plead
13 the existence of a reverse payment agreement that is
14 large that has no justification that is larger than the
15 avoiding costs of litigation. We can plead causation,
16 the existence of damages and, therefore, we think core
17 start of the case is going to survive a 12(b)(6) no
18 matter whether we give the Defendants two weeks, two
19 months or how ever long to deal with it.
20 There are other aspects of the case, different
21 kinds of claims that might be brought. If they involve
22 fraud in the patent office, they're going to involve
23 the same underlying facts regarding the mischief that
24 was involved in getting these patents in the first
25 place. That provides the context of first payment

1 allegation anyway. And the issue regarding the sham
2 litigation that's brought on the basis of those
3 fraudulent patents, if that's what's pled, it's not
4 going to raise significant different facts.
5 It's correct to note that some the complaints
6 also have a claim that Warner Chilcott is essentially
7 the master of the Tweet, that they move the goalposts
8 around left and right on the generics as you go forward
9 marching forward trying to get a generic on the market.
10 That involves some different issues. But even there
11 the Plaintiffs and Defendants all agree the test is a
12 Rule of Reason test, is the purported innovation which
13 is real and a Tweet to defeat generic competition have
14 greater -- is it more pro-competitive than
15 anti-competitive? So that's going to survive a
16 12(b)(6) as well as it did in the case that Mr. Pace
17 identified.
18 Now, having said all that, if we are going to be
19 doing nothing in the meantime, then we think the
20 schedule should be moved much more quickly. However,
21 we think that we don't need to be doing anything,
22 nothing in the meantime, and there's two very specific
23 things that can be done in the meantime which if
24 they're occurring I would leave it to the Court's
25 discretion or whatever argument Mr. Buchman or

1 Mr. Richards on the end-payors' side in terms of how
2 they want to push the Defendants' response.
3 We think regardless the case should be moved
4 forward on the reverse payments agreement. There are
5 two things that should be produced. First, all of the
6 patent litigation documents. We need the documents
7 that passed between the litigants in the patent
8 litigation because most of that stuff is not on ECF in
9 terms of whether there were depositions or documents.
10 If it is on ECF, half the time it's under seal so we
11 can't read it or deal with it. And it's information
12 that while defense counsel are going to bemoan this at
13 length, we are of the view that if it's documents that
14 passed between the parties in some recent Amylin
15 litigation and the parties are here, it should be the
16 kind of thing that should get produced. That gives us
17 something to be doing in the meantime while we're
18 waiting for weeks for the Defendants to draft the
19 12(b)(6) papers.
20 The second part would be documents passed
21 between the parties leading up to the time to what they
22 consider the reverse payment agreement. So what were
23 the communications back and forth with respect to that.
24 As an example, even the settlement documentation itself
25 we only have redacted copies of, and we should be able

1 to have unredacted copies of the agreement materials
2 and all other communications that passed between the
3 parties, which by definition is not governed by any
4 attorney-client privilege, will be produced.
5 If those two things in our view are happening,
6 from the direct purchasers point of view, we still
7 think that the motions to dismiss should come in at
8 some point earlier but we recognize we're doing those
9 things. And we have a holiday season. Why would we be
10 pounding our chests with timing of issues, a week here
11 or a week there? That's our overall view of things.
12 THE COURT: I think I suppose the other thing
13 that needs to go on is the process for selection of
14 lead counsel, which is next on the agenda. Maybe you
15 all have reached some agreements on that. I don't
16 know. But that's something else that will be taking
17 place.
18 MR. SOBOL: There are two other things that are
19 on your schedule that are things that can be done in
20 the meantime. One is how we identify lead counsel, and
21 then the second is how we address electronic
22 information.
23 As to the lead counsel issue --
24 THE COURT: Let's hold off on that. We'll get
25 to that in a moment. I do have a couple of questions

1 about the -- it seems to me without knowing much at all
2 about this whole business, that once these consolidated
3 complaints are filed, we're going to have various
4 counts to be put in a few different boxes. But the
5 main count I understand is the reverse payment
6 allegation, from that all the way down to what you've
7 identified as 50-state consumer protection counts.
8 So at one level some of this is going to
9 self-select out. The pleadings in the consolidated
10 complaint are going to be made narrower and fewer
11 things to deal with.
12 One thing, though, that I'm not really sure I
13 understand is how can you prevail on a motion to
14 dismiss on the reverse payment allegations without
15 getting into, pretty far into the weeds on the
16 economics of these drugs. How is a judge supposed to
17 be able to tell whether this is an exorbitant payment
18 or one that just reflects the cost of litigation and
19 the risks without having a lot of economic information,
20 what the market is, what the profit margins are and
21 value of the patent and on and on and on? So how do I
22 do that? Can you take a shot at trying to explain. I
23 don't want us wasting time.
24 MR. SUNSHINE: I understand your Honor's
25 question.

1 THE COURT: If I could just interrupt you. I'm
2 sorry to do that. I don't like interrupting people.
3 Maybe you have some experience from these other
4 post-Actavis cases. I think you said there are six or
5 so, I forget the number, cases knocking around district
6 court.
7 MR. SUNSHINE: I think that there's 12 of those
8 cases post-Actavis, a couple of which have been through
9 a motion to dismiss stage. Taking those two cases,
10 part of the cases were denied. One, if this case was
11 narrowly limited to just the so-called reverse payment
12 part of it, I think the question would be a pretty
13 standard question under Twombly and Iqbal whether
14 there's plausibility here of the settlement but the
15 allegation as made makes sense.
16 Right now the complaint said hundreds of
17 millions of dollars passed. And we can give you some
18 actual sales numbers of products that could be
19 judicially recognized. I recognize that may not be an
20 easy burden for us, but I think -- I will say I think
21 that Mr. Sobol and his colleagues should put pen to
22 paper. We should see what they come up with and then
23 we'd be in a much better position to answer you
24 directly.
25 The second part is we can all move pretty

1 quickly. The Plaintiffs picked December 6th they want
2 to do the consolidated complaint. Our clients,
3 Mr. Pace's client, Lupin, they're not organized by
4 these departments. So we're talking about doing
5 discovery multiple times and going fast. Let's move
6 these quickly from the Watson perspective is five years
7 old, Plaintiffs having just found out about this issue.
8 So let's shepherd that case as quickly as we can.
9 Let's do discovery quickly. It's a big case. There's
10 a lot of parties involved.
11 MR. PACE: I will note two things. With respect
12 to settlement agreement claims, this is being thought
13 about, considered by certain courts as noted right now
14 and it's been briefed in a number of courts. In the
15 Lipitor case the judge issued a ruling paring away a
16 large portion of the case and setting the settlement
17 claims for separate briefing. So we'll standby for
18 that. But these are arguments that can be made based
19 on the pleadings and submitting even copies of the
20 settlement agreements themselves to the extent that is
21 something that clarifies, directly contradicts,
22 frankly, the allegations in the complaint.
23 I mentioned the Asahi Glass example just as an
24 illustration, though it applies not only potentially to
25 the no-authorized generic agreement but also the

1 allegation of the world-wide life one may find when one
2 looks at the settlement agreement don't exactly square
3 with the agreement itself. Nonetheless, if that's the
4 argument, the argument is there's compensation there to
5 the generic is just the revenue from early entry,
6 that's something, respectfully, Defendants think can be
7 ruled on the motion to dismiss.
8 As to other parts of the case, the
9 non-settlement agreement parts, what survives a motion
10 to dismiss really will have an impact on the type of
11 discovery we get into, whether the incremental
12 innovation claims survive will determine whether and to
13 what extent the parties really get into documents about
14 the development of the Lo Loestrin product and whether
15 it was sufficiently innovative compared to the prior
16 version.
17 Whether the sham litigation and patent fraud
18 claims are even in the new complaint, let alone survive
19 a motion to dismiss, will determine whether and to what
20 extent the parties need to get into any type of
21 discovery on the invention itself and the prosecution
22 of the patent. Those decisions themselves will
23 determine the number of custodians we have and we would
24 hope not to have to go back to custodians multiple
25 times. The number of interrogatories, the scope of

1 third-party discovery, all of which would be extensive
2 or not depending on different contours of the case.
3 As the consolidated complaints shape the case,
4 the motions to dismiss shape the case and the rulings
5 on the motion to dismiss shape the case. For all those
6 reasons in our initial meet-and-confer with the
7 Plaintiffs, the Defendants proposed a schedule that
8 provided the things we discussed so far, filing of new
9 complaints, briefing on motions to dismiss, we
10 understood there are agreements of payments of interim
11 counsel, then we'll see what we have in terms of the
12 efficient conduct of discovery.
13 THE COURT: So obviously there's disagreement on
14 what goes on during the period that the motions to
15 dismiss are being filed.
16 MR. RICHARDS: Your Honor, I'm concerned --
17 there's a point I think is very important. You're
18 hearing quite correctly there's a lot of consolidation
19 and judgment calls being made in putting the
20 consolidated complaint together about what to include
21 and what not to include. Especially at the end-payor
22 side of the case, it's nearly impossible to make those
23 decisions without lead counsel having been appointed.
24 So the notion that we start a clock on that at the
25 December 6th date without lead counsel appointed --

1 THE COURT: Let's talk about that. My decision
2 is we're going to have a process for that and you tell
3 me what you think is a reasonable amount of time. I
4 mean, I guess what you need to know from me is what
5 kind of application process I'm thinking of, what kind
6 of factors I'm interested in.
7 MR. RICHARDS: I guess more fundamentally I'm
8 saying it's hard to agree on the December 6th date
9 because we don't know when counsel is going to be
10 appointed, then we need time to draft a complaint. The
11 clock needs to begin to run to work out a schedule to
12 know who's on the case.
13 MR. SOBOL: I'll let the indirects finish and
14 jump in.
15 MR. BUCHMAN: Michael Buchman, again, for
16 end-payor Plaintiffs.
17 We have submitted a motion for appointment of
18 co-lead counsel and proposed four firms, and the
19 proposal is based upon an agreement among all counsel
20 that are on file for the end-payor Plaintiffs. There
21 was an order this morning that was entered
22 electronically, a text order denying the motion as moot
23 and we intended to address that issue with the Court if
24 the Court would be willing to discuss that.
25 THE COURT: I denied it as moot because I said

1 in my order we would talk about it here, then you could
2 make your motions after. So I just saw it as jumping
3 the gun a little bit. Tell me -- you wanted to --
4 MR. SOBOL: Speaking for only the direct
5 purchaser class, we had proposed that the four firms
6 who were representing two proposed Plaintiffs be
7 designated as co-lead counsel or an executive
8 committee, and we also proposed that the Lynch firm be
9 liaison counsel. The reason we've done that is the
10 following: The four firms work well together. There
11 is an enormous amount of work that needs to be done in
12 the case. As you can see, we're able to share roles in
13 terms of who is able to do what, that kind of thing.
14 It's efficient, too, and time-tested in the sense that
15 the group of institutional clients that we represent
16 through the class are accustomed to the notion that
17 there's going to be a battery of firms.
18 We also have to dig into our pockets quite a bit
19 in a case like this, as you can imagine, so it's a way
20 to make sure that the firms that are funding this case
21 also have some voice in terms of direction and that
22 kind of thing.
23 The long and the short of it is that unlike some
24 other situations where there are battles between the
25 two Plaintiff lawyers for a petition or a need to

1 perhaps have the Court discipline the Plaintiffs Bar in
2 terms of making us be more efficient if we had like 20
3 firms and we represented some big consumer class, here
4 we represent a group of institutions. The four firms
5 work together well. We would be efficient, and so
6 that's the way we would prefer to go forward.
7 I would also say, by the way, if you exercise
8 your discretion, which judges sometimes do, no, no, I
9 don't care you guys get along, I'm going to do it my
10 way, we don't need to still be reorganized. We're
11 still going to work together probably anyway unless you
12 order us not to, and we're still going to have a
13 complaint done on December 6th even if you don't
14 appoint a co-lead for another year because that's the
15 way we work together on the case. And I wonder whether
16 we should except Mr. Lynch himself from -- maybe an
17 exception, a waiver of the local rule, we're fine with
18 Mr. Pine as well.
19 MR. MELTZER: Joseph Meltzer, direct purchaser
20 class.
21 We jumped the gun as well and filed a motion
22 last week. It was my mistake. It was a little
23 unclear. We were trying to put something on file to
24 the extent it would be appropriate to talk about it
25 today.

1 THE COURT: I have sort of two things about this
2 that I'm interested in discussing. One is that I'm a
3 fan of competition in this whole business, trying to
4 manage attorneys fees and what the ultimate fee
5 application is going to be. A number of years ago I
6 wrote an opinion in a case called Cabletron, which was
7 a Securities transaction in the State of New Hampshire,
8 which explained a lot of reasons about how a judge goes
9 about assessing what a reasonable fee is. In fact, I
10 think your firm or one of your firms, Milberg Weiss
11 firm was in that.
12 MR. SOBOL: No one now.
13 MR. RICHARDS: I was at one time a partner of
14 Milberg Weiss, but we've been gone for several years
15 for reasons you're probably aware.
16 THE COURT: So if everyone works together in the
17 way that you're describing, sort of the question I have
18 is how do I go about applying the element of
19 competition, if you will, injecting that into the
20 process? That's number one. And number two, maybe
21 it's the answer to question number one, I'm interested
22 in aggressive management of your fees in the way that
23 you work. So I'm interested in once we figure out who
24 lead counsel is going to be or if it's all of you
25 working together, one thing I think we're going to be

1 talking about is a process for managing the work and
2 our review of the work that's going on. So we need to
3 kind of figure out how to do that because, you know, as
4 judges meet about these things and talk about these
5 things, that's something that's a consensus that's an
6 effective tool that is often used.
7 MR. RICHARDS: Your Honor, there was a lot of
8 debate within the judiciary and appropriate criteria
9 between lead counsel and competition between lead
10 counsel in the form of a task force in the First
11 Circuit.
12 THE COURT: I read it. Read Cabletron.
13 MR. RICHARDS: I think the basic conclusions
14 that are in that report are consistent with what's
15 embodied in Rule 23, which is criteria of the selection
16 of class counsel and the competition among class
17 counsel that should be relevant, knowledgeable of
18 applicable law, capability of running the case, the
19 kind of things that make the difference between having
20 a successful outcome of the class and an unsuccessful
21 outcome of the class. Keep in mind in these cases no
22 one collects any fees until the Court approves them at
23 the end of the case. It's not as though they
24 completely get away from the court. They're never
25 awarded fees in the first place until the court grants

1 them at the end of the case. You always have the right
2 and ability and demand to approve those fees before
3 anyone collects any of them. And I think the
4 conclusion that was reached in the report, which I
5 think is consistent with the content of Rule 23, is
6 that's the kind of competition this case needs. With
7 that the underlying concept we made our motion for
8 end-payor class to have counsel appointed, I think if
9 you look at the credentials of the four firms we
10 proposed are all qualified, very high in the criteria
11 under Rule 23, and I would submit those are the
12 criteria the Court ought to apply.
13 THE COURT: I think what would be helpful to
14 you, though, even if I agree with everything you said
15 is for you to have some guidance from us as to the
16 kinds of things that we would be unwilling to agree to
17 that you might charge. For example, if you're going to
18 bring four associates to a deposition, I'm not going to
19 approve four associates at a deposition. If you're
20 going to fly a private jet to take a deposition in
21 Cleveland, well, I'm going to approve business class
22 air fare, not a private jet. Those kinds of things. I
23 think we're all a lot better off if those kinds of
24 parameters are understood ahead of time than if it all
25 comes in in a big bill at the end.

1 MR. RICHARDS: And I'm sure none of us would
2 disagree with that. It's fairly routine practice but
3 not always regulation of the court for lead counsel to
4 distribute something to all the lawyers representing
5 the end-payors' class early in the case laying out
6 exactly what kinds of things you're putting your firm
7 on. You don't want people who have a tertiary
8 involvement in the case running up bills either. There
9 are floating around within the private parties that
10 does this the lists and criteria we circulate anyway.
11 If your Honor wants to be involved in a definition of
12 those, we can give you a proposal. We can take one of
13 those and propose it and your Honor can consider to
14 change something in there and add something or add a
15 limitation or not there. It's not as though this
16 process goes around without any of that. It's
17 something we police within our own group.
18 THE COURT: Okay. Anybody else want to comment
19 on that?
20 All right. I'm not sure how we're going to move
21 forward on it, because I didn't envision that you were
22 going to be coming in as a completely unified two
23 groups here so I have to think about what to do with
24 that.
25 MR. SOBOL: Maybe I should make a magnanimous

1 suggestion, your Honor. Why don't each of the directs
2 and indirects make a proposal. If you think it's
3 satisfactory, has the safeguards you think are
4 appropriate or not --
5 THE COURT: You mean individually make a
6 proposal as lead counsel?
7 MR. SOBOL: They should make a proposal how ever
8 they make a proposal. I have a hunch where we're going
9 to end up because I've already indicated to you what
10 our position is. Right? As an example, I think our
11 proposal is insufficient in describing some of the
12 things we think we're more efficient as a group. We
13 need to address that concern you had. Our submission
14 did not deal with what the criteria are of the expense
15 discipline that we're going to exhibit, nor was our
16 submission adequate in terms of showing to you the
17 discipline that we'll show in terms of staffing certain
18 kinds of activities.
19 So with having heard you, I will at least,
20 speaking for myself, I haven't spoken to these guys
21 yet, but I think what we would do is make a proposal
22 addressing your concerns and it will either make the
23 grade or it won't make the grade.
24 Again, to repeat something going back to another
25 subject, from our perspective this is a different track

1 because we can still track dealing with motions to
2 dismiss and discovery and the like while you're doing
3 this other thing in any event.
4 THE COURT: All right. That seems like a
5 reasonable suggestion. Maybe that's what all of you
6 should do.
7 MR. RICHARDS: Again, for the end-payors, your
8 Honor, it's a little more difficult to proceed without
9 having this resolved because as I mentioned before, we
10 have millions of consumers in the class, 14,000
11 third-party payors, any firm can file a new case any
12 time they want to. We've got people filing these cases
13 we've never heard of, don't know anything about --
14 THE COURT: Isn't the easy way for you to do
15 this is to jointly appoint lead counsel through the
16 filing of the consolidated complaint subject to --
17 MR. RICHARDS: It's not unlikely then, but I
18 can't predict what would happen, but it's not unlikely
19 there may be people with cases on file and maybe
20 disagree with what we plan to do with the many
21 decisions defense counsel have identified. We don't
22 know who the lead is.
23 THE COURT: I'm not sure I'm following that.
24 MR. RICHARDS: In putting a consolidated
25 complaint together, we have a great many decisions to

1 make about what to include and what not to include.
2 With so many cases, so many lawyers, so many Plaintiffs
3 for whom someone can sue, you will very often find
4 disagreement among the various people about what form
5 that should take so how do we get to one complaint.
6 It's very, very, very difficult.
7 MR. MIGLIORI: If I may, your Honor, Don
8 Migliori for Motley Rice.
9 One of the things we've done is form an interim
10 committee that's been agreed on on the indirect side.
11 Everybody that's got a complaint in this Court is in
12 agreement with a proposal. If the Court wants to allow
13 for competition for this protective other firm or
14 interest that wants to come in, it can be handled in
15 the context of allowing us to go forward as an interim
16 committee subject to the date of December 6th as the
17 date to see if anyone had gotten involved, then have
18 any kind of competition or opportunity for somebody
19 with a different interest to get involved but to keep
20 ourselves organized, when we're talking instead of a
21 few indirect purchasers, thousands of indirect
22 purchasers, let's go forward with an indirect group
23 subject to Court ability to increase, decrease that
24 control and then on the 6th we reassess and then go
25 forward.

1 As a group, efficiencies are here, understanding
2 of the law in the various states is with this group,
3 and we're not speaking for anybody or I should say that
4 there's nobody before this Court that's speaking as
5 part of this group. So it's all inclusive at this
6 stage on an interim basis, and it alleviates some of
7 the concerns the Court has.
8 THE COURT: Picking up on Mr. Sobol's
9 suggestions, if I understand what he's suggesting, why
10 wouldn't it make sense for you folks to do essentially
11 the same thing he's proposing for the direct purchaser
12 group?
13 MR. RICHARDS: It would be great if we could and
14 we can on behalf of, I think, on behalf of the people
15 who already proposed a leadership group. We can come
16 up, I'm sure, with a single consolidated group for that
17 group. The only real difference between the direct
18 group and end-payor group is they have a fairly small
19 and focused number of Plaintiffs in these cases where
20 as we, any lawyer who wants to come in with a new case
21 can come in, one of the millions of consumer Plaintiffs
22 or the 14,000 third-party payor Plaintiffs.
23 THE COURT: The practical reality is you have a
24 running start. You're experienced in the field.
25 You're going to be following this suggestion. You get

1 appointed as the interim lead group and then you go
2 through the process of giving me some kind of detailed
3 proposal along the same lines as what the direct
4 purchasers are going to provide. We take a look at
5 that. We may have other ideas. Somebody else wants to
6 come along in the meantime and get into the mix with
7 you, then fine. I mean, that's fine. I think you
8 probably have the advantage over them, but maybe we'll
9 all get surprised. We'll just deal with that as it
10 happens.
11 MR. RICHARDS: We can do it on that basis. I
12 have no doubt as a group what the Court proposed can
13 look at that on its own behalf.
14 THE COURT: I imagine that there are some pretty
15 good orders floating around in these other cases where
16 judges have tried to do sort of the things I'm talking
17 about, right?
18 MR. SOBOL: Yes, your Honor.
19 MR. MIGLIORI: We'll make yours state of the
20 art.
21 THE COURT: Right.
22 MR. PACE: Your Honor, may I make one -- I think
23 the Defendants' only concern in this whole process is
24 to the extent that it impacts the filing of
25 consolidated amended complaints. I thought I heard

1 directs and indirects saying something slightly
2 different along the way, that the direct purchasers
3 noting that even if this issue isn't resolved by the
4 time we reached the date we're talking about earlier,
5 December 6th, they might file their complaint and that
6 might not necessarily be the case for indirect
7 purchasers.
8 MR. MILLER: That's a misunderstanding.
9 MR. PACE: All we want to avoid, of course, if
10 there are other Plaintiffs joining and other complaints
11 getting filed after this case, they'll start some sort
12 of staggered process. If that's been resolved, that's
13 our concern.
14 MR. MIGLIORI: We're on the same page.
15 MR. SOBOL: If I may, your Honor, turn back to
16 the motion to dismiss because you had asked a question
17 if there are any post-Actavis decisions that would help
18 you decide this. In the Lipitor case, which is pending
19 in front of Judge Sheridan in Trenton, New Jersey,
20 Judge Sheridan issued a decision denying a motion to
21 dismiss post-Actavis, ruling that there is no cash
22 requirement under Actavis. And he's allowed the
23 Plaintiffs to file an Amended Complaint and go forward
24 to clean things up from some other things he dismissed
25 which are not relevant to the Actavis.

1 Second, the Nexium case that is pending in
2 Boston in front of Judge William Young, he too denied a
3 motion to dismiss, issued a written opinion
4 post-Actavis indicating there's no cash requirement.
5 He also, his opinion deals with the specific issue of a
6 no-authorized generic provision and how a no-authorized
7 generic provision may be the kind of payment that's
8 unlawful under Actavis. So those are the two
9 post-Actavis decisions that are out there.
10 The Asahi case by Judge Posner I believe is a
11 pre-Actavis case. I think you'll see an awful lot of
12 pre-Actavis law there that's been rejected so it's not
13 relevant.
14 Finally, Mr. Pace did note that sometimes
15 there's an attachment of the actual agreements in the
16 motion to dismiss stage. We'd actually like to see
17 what happens here not what happened in another case,
18 Effexor, which is that the defendants refused to give
19 us the unredacted agreements. We went forward with a
20 complaint. A motion to dismiss was filed. And in the
21 motion to dismiss we saw the unredacted complaint.
22 Excuse me, agreements. So here, again, that's another
23 one of the reasons we say that let's walk and chew gum,
24 have some modest discovery that occurs. Motion to
25 dismiss is not going to be dealt with December 6th

1 stage.
2 MR. SUNSHINE: To add to the last comments, we
3 think the Lipitor and Nexium motions to dismiss are
4 actually cases right on point because both of those
5 decisions the Court shaped parts of the case, parts of
6 the case were dismissed and parts of the case were
7 kept, and that's precisely the set of issues we're
8 facing with some of the allegations, frankly,
9 internally consistent with one another. If we have one
10 complaint, we could have a set of responses back; and
11 just as happened in Lipitor and Nexium, your Honor can
12 shape the case and make it efficient going forward.
13 THE COURT: I don't want to argue. I appreciate
14 that and I don't want to get into a back and forth sort
15 of arguing a motion to dismiss here. We will deal with
16 that.
17 I do want to close the loop on the counsel
18 selection issue. What I think the upshot of this
19 discussion we had is we'll get an order out that on an
20 interim basis appoints the committee for each of the
21 groups with the outside of that order being the filing
22 of a consolidated complaint. And that order will
23 contemplate that in the meantime while you're
24 developing a consolidated complaint, you will submit, I
25 suppose, proposals on behalf of each of your respective

1 firms about what you think parameters of going forward
2 should be, ideas you have for cost containment and then
3 we will take a look at that, and working off of that
4 make some decisions about whether we want to continue
5 with the appointment of a committee with certain
6 parameters attached or do we want to do something
7 different. So sort of stage this out.
8 And also just to complete the thought on that,
9 one thing that I think I'm inclined to do is that
10 whatever the outcome of that process is, I think we
11 will likely put into place, and Judge Sullivan and I
12 will talk about how to do this, kind of an ongoing
13 monitoring process of the fees so that we're not
14 dealing with this two years from now. I think that
15 would be effective. It worked really well in a recent
16 death penalty litigation that we had, we monitored fees
17 in that way. As you probably know, fees in death
18 penalty cases can get very, very expensive, too. That
19 worked very, very well, the process we worked on
20 together. We'll probably do something like that,
21 monthly status conferences with Judge Sullivan, monthly
22 reports, something like that. That kind of closes the
23 loop on counsel selection for now.
24 Let's talk about this proposal Mr. Sobol has
25 made several times about getting some exchange of

1 materials going while the motion to dismiss is moving
2 forward. What about the patent litigation documents?
3 MR. BUCHMAN: Your Honor, if I may before you
4 turn to Defendants, I'd like to add a couple of points
5 to what Mr. Sobol said, there are more practical points
6 to bring to the Court's attention. First of all, these
7 documents that were supplied in the underlying patent
8 litigation have already been pulled. They're
9 electronically stored, and there would be absolutely no
10 burden to Defendant other than pushing some buttons and
11 burning them on CDs and turning them over to us with
12 the understanding that even though there's no
13 confidentiality order in place right now they would
14 only be reviewed on an attorneys-eyes-only basis.
15 THE COURT: Thank you.
16 MR. PACE: Your Honor, to begin on the patent
17 litigation materials, two points of clarification
18 maybe. It's not quite as simple as pressing a button
19 and handing over those documents. There's a very, very
20 practical issue and a court procedural issue at least,
21 these are document that, to be sure, were cases our
22 clients were involved in, different patent lawyers
23 handled those cases. These are not things that we
24 necessarily even all have complete access to. Some
25 work would be necessary to collect those documents in

1 the first place, organize them. They weren't
2 necessarily produced in the same way that someone
3 sometimes produces a large antitrust case, a single
4 database. So there is some work and review that would
5 need to be done before the documents are turned over.
6 More fundamentally, there's not even necessarily
7 permission by the parties sitting in the courtroom to
8 turn those documents over necessarily. Those documents
9 Mr. Buchman suggested were produced in that case
10 subject to protective orders and often with very
11 specific controls for who could see the documents
12 inhouse and outside. So until protective orders are in
13 existence, the Defendants don't have the ability to
14 turn over those documents.
15 THE COURT: He's not suggesting they be turned
16 over tomorrow. I think he's simply saying that they're
17 happy to enter a protective order that restricts the
18 documents to attorneys-eyes-only in order to facilitate
19 the process. That's what I understood him to be
20 saying.
21 MR. PACE: I understand. I believe -- this is
22 something we can certainly talk about in more detail
23 but this is something that I think there would still
24 need to be a proposal. There isn't a restriction in
25 the underlying patent cases that would be violating

1 that, even turning over to outside counsel only. This
2 came up in a recent case involving Plaintiff counsel
3 here where the protective order in that scenario
4 involved getting permission from the court even if it
5 was going to be produced an on outside counsel basis.
6 That was in part because some of the materials involved
7 Defendants and other parties who were third parties to
8 subsequent antitrust cases. Maybe that was some of the
9 reasons why there were those heightened protections.
10 So there was a process to go to the patent court to get
11 that permission. If that's what's required, like the
12 other case that's something we were going to keep the
13 Court updated certainly but that's a process so it's
14 not quite as simple as turning over the documents even
15 an on outside counsel basis right away.
16 THE COURT: What about the settlement documents?
17 MR. PACE: The settlement documents strike us as
18 something maybe not necessarily raising the same type
19 of concerns. Again, subject to an agreement for
20 confidentiality and caucusing with the other
21 Defendants, I think it's something we could talk about.
22 THE COURT: It seems to me you've got to give up
23 the settlement documents. In this litigation, you're
24 not going to get away with unredacted settlement
25 documents, I don't think.

1 MR. PACE: Your Honor, I'll agree. I'll note
2 the point Mr. Sobol made about the prior case affects
3 our case. That was a different situation. The Court
4 ruled early on there would be no discovery pending the
5 motion to dismiss whatsoever. Then when the motions to
6 dismiss were filed, I believe those agreement were
7 attached so it happened anyway. I think here we're
8 sort of looking at something different.
9 THE COURT: I'm in favor, without prejudging the
10 merits of the motion to dismiss at all, I am in favor
11 generally speaking with the suggestion of the
12 Plaintiffs' group that we begin the process of exchange
13 and try to get that facilitated as much as possible
14 while the period of the consolidated complaint is
15 getting drafted and you're working on your motion to
16 dismiss. I think it's important to remember that it's
17 your clients that ultimately control whatever they did
18 in the context of the patent litigation, protective
19 orders and the parties were adverse, it's not the
20 patent attorneys that decide whether those things need
21 to remain in place. It's your clients. Your clients
22 are in charge. But I understand there's some logistics
23 to it.
24 What I would suggest is that we set a deadline
25 for you to go back and figure these things out with

1 your clients and counsel and then you have a conference
2 on it and see if you can't work out a time for this
3 exchange of materials to take place. I'm thinking, you
4 know, give you a couple of weeks to get that done and
5 you all have your conference. If you can't get it done
6 in that conference, then Judge Sullivan can intervene
7 at that point to find out what the problems are.
8 MR. SORENSEN: I want to make sure that there's
9 an element of understanding of what both sides are
10 talking about. Sobol was talking about not only
11 settlement agreements but the documents exchanged
12 between the Defendants leading up to the agreements
13 that are not subject to any privilege. By definition,
14 they were exchanged. I didn't hear the Defendants when
15 they were talking about distributing the settlement
16 agreements --
17 THE COURT: I want to just stick with the
18 settlement documents at the moment. All exchange of
19 information leading up to the settlement, that's a big
20 request. That's going to get into some deeper issues
21 of discovery. Not to say it's not doable, but that
22 leads us down the path of electronic discovery. I'd
23 like to start with the low end group here and see what
24 we can get done in a couple of weeks, have you confer
25 on that and get that information exchanged. We do have

1 Thanksgiving coming up. We're talking about you've got
2 to get a consolidated complaint drafted, so let's see
3 what we get done in a couple of weeks then have you
4 confer. Let's see where you are at least with respect
5 to the patent litigation documents, the settlement
6 documents, then that's probably a good segue to talk
7 about the larger issue of discovery.
8 What are we looking at here? Let's just assume
9 for a minute that the motion to dismiss is denied --
10 MR. MILLER: You didn't disclose the date when
11 they're going to file their motion to dismiss.
12 THE COURT: I'm working with the dates you gave
13 me.
14 MR. MILLER: That was a proposal that the
15 Defendant gave to us, so I'm not sure we agreed to it.
16 I didn't think we agreed to go after February to file
17 the motion to dismiss.
18 THE COURT: I misunderstood. I thought you all
19 were in agreement on that.
20 MR. MELTZER: I think Mr. Sobol pointed out
21 before part of our hesitation to agree to that 60-day
22 schedule is to whether we were going to do anything.
23 If we were going to move forward with discovery,
24 exchange patent documents and some of the settlement
25 agreements, I think we're okay with that. I think Tom

1 pointed out earlier he didn't want to quibble with a
2 week or two weeks at least from the direct purchasers
3 side. We're okay with that schedule. We wanted to do
4 some discovery in the individual --
5 MR. SORENSEN: That's our position.
6 MR. BUCHMAN: We agree with that, the indirect.
7 THE COURT: We're okay on this schedule with the
8 process I just outlined about getting the exchange of
9 information. It may go beyond what I said. We'll talk
10 about that now. Let's talk about discovery and what
11 we're looking at.
12 MR. SOBOL: If I may, so they fall -- the
13 discovery buckets if you will, fall in the following
14 categories. There'll obviously be the to-and-fro that
15 precedes the settlement agreements is a liability
16 issue. There will be the need to get produced from the
17 Defendants documents regarding -- or documents and data
18 regarding projections of the consequences of generic
19 entry and similar information, economic information
20 that goes to how it is that generic entry brings down
21 the price and quantities of the drug in this situation.
22 Those are essentially the issues. There will be issues
23 regarding the performance of the agreements following
24 entering into them.
25 As I indicated, one of the issues under the

1 statute of limitations issue, for example, is whether
2 or not there are continuing violations. So what things
3 do they perform on the agreement after that? There is
4 the issue of causation. So there, again, there'll be
5 discovery regarding the generic applications that were
6 filed and whether or not and how are we going to prove
7 whether and, if so, when the generic applications would
8 have been approved by the FDA that typically involved
9 getting correspondence between the would be generic and
10 the FDA among other things. There may be on the main
11 factoring side of causation the thrust case of
12 discovery regarding any questions there are regarding
13 developing launch of quantities of products to go
14 forward.
15 And on class certification, there is the
16 discovery issue of the electronic transaction data. So
17 each of the Defendants will have information regarding
18 what they sold, when they sold it and at what price and
19 to whom they sold it. That's needed on the direct
20 purchasers side and the indirect purchasers side for
21 class certification.
22 Before I turn -- and that information, by the
23 way, also there's some modeling of damages, of course.
24 I'm sure the Defendants will want -- I should also say
25 that in terms of the number of depositions that get

1 taken typically, there are usually some 30(b)(6)
2 depositions that are categorical on these issues
3 against each of the Defendants. Once we're able to
4 identify the people who were the actual negotiators,
5 then you're able to identify who you're going to depose
6 in terms of the negotiators' work.
7 THE COURT: Spell that out for me, what you mean
8 by categorical 30(b)(6)?
9 MR. SOBOL: For instance, one kind of 30(b)(6)
10 we have is a 30(b)(6) on economic issues. So provide
11 the person most knowledgeable regarding your
12 projections of consequence of generic entry in this
13 situation. As to generic companies there might be a
14 30(b)(6) provide the person most knowledgeable
15 regarding communication with the FDA and your ability
16 or not to get FDA approval. There have been 30(b)(6)s
17 on -- both of them are talking to me at the same
18 time -- on for instance, you know, do you have somebody
19 who has the person most knowledgeable regarding the
20 value of the consideration you got for the settlement
21 agreement. That's what I mean by categorical 30(b)(6)s
22 on those kinds of topics. Sometimes we found it cuts
23 through things and gets right to the chase. You tell
24 us who knows the most about the critical issues in the
25 case. Let's take his or her deposition and find out if

1 they really knew something or find out the real person
2 who does. That's what I meant by that.
3 Our direct, the proposal was that fact discovery
4 would go through the next calendar year with class
5 certification during the next calendar year. The
6 expert discovery typically falls into the following
7 categories. Because there are some patent issues here,
8 there will be the need to have a couple of experts that
9 are going to deal with patent issues. If there are
10 clinical issues that we have, we'll have a clinician.
11 If there's a general issue of a patent, we'll have a
12 skilled patent attorney. There's typically an expert
13 or two that deal with causation issues, a regulatory
14 approval expert, a manufacturing expert. There will be
15 an economic expert that deals with market power
16 questions, for instance, and maybe the same with a
17 different economic expert model the damages. Those are
18 some of the broad categories without limiting
19 ourselves.
20 Obviously, I'm trying to give you a sense that
21 the Plaintiffs are likely to have a half a dozen or
22 maybe ten or so experts covering some fairly wide and
23 diverse and arguably complex issues but hopefully we
24 can make simple issues. That goes for a period of
25 time. The Defendants come forward with their experts.

1 We file rebuttal reports. There are depositions that
2 happen in connection with all of that.
3 Is there anything that you guys were whispering
4 in my ear that I forgot?
5 Third-party discovery sometimes but I'm not sure
6 we're going to have that issue. Sometimes we have
7 third-party discovery if, for instance, some of the
8 would-be generics are not a Defendant.
9 If we say there's a case where a generic or two
10 would have entered the market that's not a Defendant in
11 the case, it's not clear to me how much of that or not
12 we're really going to have in this particular
13 situation. So I think that's the broad brush of it.
14 THE COURT: Your proposal is fact discovery
15 closing approximately a year from now and then expert
16 reports moving on from there, end of November, defense
17 experts January?
18 MR. SOBOL: There's a direct and indirect
19 purchaser proposal. I don't have the docket number of
20 the direct purchaser proposal.
21 (Mr. Sobel confers.)
22 THE COURT: What I have is the indirect. I
23 don't have direct.
24 MR. SOBOL: It's fair to say the direct proposal
25 is a couple of months later than the indirect's

1 proposal. We thought that was a more realistic
2 proposal. There's no science to this.
3 I will say this in terms of a schedule. Whether
4 it's 10 months from now or 12 moths from now because of
5 fact discovery, I'm also saying this with some bit of
6 trepidation, from my perspective it's the designated
7 trial date that is going to move people to get things
8 done or not. Experience shows that having that as a
9 target means whether or not people are working on
10 weekends or not working on weekends, whether or not
11 they're efficiently doing things or doing things in a
12 gang. And I know the trial dates can sometimes move,
13 but from my perspective, and I know this is the
14 antithesis of what Mr. Pace and former eloquent gang of
15 lawyers can say on their side of this, by having a
16 trial date it's going to be the most efficient way to
17 keep the lawyers fees down, the most efficient way to
18 keep everything else down and move the case.
19 THE COURT: I don't disagree with that in
20 principal, but I think we'd be really Pollyanna-ish if
21 we set a firm trial date today.
22 MR. SOBOL: Justice Breyer and I have something
23 in common.
24 THE COURT: We can leave that for a little bit.
25 This proposal seems pretty aggressive.

1 MR. MELTZER: I have a clean copy served on the
2 Defendants. We didn't file it. We met late last week.
3 It should say direct issue.
4 THE COURT: What's the Defendants
5 ten-thousand-foot discovery schedule?
6 MR. SUNSHINE: What I just heard was a massive
7 amount of discovery from Defendants virtually covering
8 every aspect of our business. And if we're talking
9 about patent prosecution dating going back to the
10 '90's, files from 2006 and then all the way up to
11 present, and I think Plaintiffs were also talking just
12 about the discovery they want from us, market
13 definition will be an issue here. There will be a fair
14 amount of third-party discovery that we'll need just on
15 that issue alone. As Defendants we haven't put forward
16 a counter-schedule and we thought that was premature
17 given the agenda for this conference. We're happy to
18 give you a response and give you the discovery. The
19 ten-thousand-foot level is an awful lot to accomplish
20 in a short period of time.
21 THE COURT: What do you see as the number of
22 experts you anticipate?
23 MR. SUNSHINE: In these kind of cases, your
24 Honor, our experience has been there are multiple
25 experts. They could be in the five to ten range. One

1 of the reasons why we stress so much to your Honor
2 about deciding the motion to dismiss is the number of
3 issues that can trip in the case which directly affects
4 the number of experts. To give one example, if the new
5 product hopping is in the case or out of the case put
6 in all kinds of issues, FDA approval, is a product
7 providing benefit. As clearly the reverse payment
8 case, then we would have an economist on liability, an
9 economist on damages, an industry expert. So that five
10 to ten number is pretty typical. If the case is bigger
11 and more complicated, we've seen more than that number
12 from each side.
13 MR. PACE: Your Honor, I'd just like to note for
14 the record -- Jake Pace, again.
15 The notes with respect to some discovery that we
16 think will come up and maybe some things that we can do
17 early if we're going to get started, as Mr. Sobol put
18 it keep busy in the meantime, we will be propounding as
19 necessary discovery on the Plaintiffs certainly. We're
20 a firm believer discovery is a two-way street, and
21 we'll probably be using that slogan here and there.
22 There are certain things I think are probably easy for
23 the Plaintiffs to produce very quickly that I think
24 would allow us to assess the case early on. It may
25 simply be one, but at least one of the direct purchaser

1 Plaintiffs is proceeding with the claim based on not
2 necessarily its own purchases but an assignment of
3 another's rights. I think in the American Sales, I was
4 just looking through the American Sales complaint, the
5 earlier version paragraph 20 talks about how American
6 Sales proceeds based on assignment of claims based on
7 purchase from McKesson, the wholesaler. In other
8 words, McKesson in this situation is a direct
9 purchaser, not American Sales. There is an assignment
10 agreement presumably that assigns the claims from
11 McKesson to American Sales. We think that would be one
12 contract that could be produced fairly easy as part of
13 an initial exchange. To the extent any direct
14 purchaser provided an assignment, that is something I
15 think we would want.
16 Similarly, there are purchase data that may
17 exist in ready form from the perspective of the
18 Plaintiff or reimbursement data that may exist on the
19 part of third-party payors and the indirect purchasers.
20 That certainly we'll pursue at the appropriate time.
21 If it turns out that's something that is push-button
22 ready, that can be part of the equal exchange perhaps.
23 Lastly, on third-party discovery, I think we
24 would know -- I agree Mr. Sunshine mentioned there
25 would be market definition questions, reasons why we

1 would be taking discovery of third-party competitors.
2 Oral contraceptives is a highly competitive
3 marketplace. I think there will be issues looking at
4 how some competitors of Defendants viewed the
5 marketplace and adjusted their sales strategy. That
6 would go to the market definition issue. Discovery on
7 third-party competitors would be relevant in analysis
8 of a but-for world and the complaints kind of
9 simplistically say that but for certain conduct
10 generics would have come to market very early and would
11 have taken over the market, generic side of the market
12 completely. It's a hypothetical world that damages
13 would be based on here. You need not look at what
14 other oral contraceptives within or on the market, what
15 else was going on in the real word to see what sales
16 would be. That's a reason why we would anticipate
17 third-party discovery.
18 We would also anticipate significant discovery
19 from wholesalers. Cardinal Health, McKesson and Bergen
20 purchase over 90 percent of direct purchases of any
21 drug. And then to the extent that there are Plaintiffs
22 and cases like this, they proceed often, not always, on
23 assignment.
24 So with large scale purchasers like that who are
25 members of a potential class being proposed here, we

1 would seek discovery from those wholesalers as well.
2 They may go to a number of issues in this case, damages
3 in particular, but also impact are the direct
4 purchasers better off in the but-for world that they're
5 supposing than they actually were in the real world.
6 That's something you would want discovery at every step
7 in the distribution chain to see did somebody pass on
8 the markup or pass on the over-charge.
9 I mention that because it's something that might
10 take time. It wouldn't be surprising to anyone in this
11 room wholesale sometimes in certain states not in this
12 court's jurisdiction sometimes object to third-party
13 discovery just like competitors who are not here. It's
14 a process that will take time and need to be completed
15 before the Defendants could fully respond to class
16 certification motions that we anticipate down the line
17 should we get there.
18 MR. SORENSEN: Your Honor, if I may briefly.
19 THE COURT: Sure.
20 MR. SORENSEN: Some of the areas of potential
21 discovery that you're discussing with respect to absent
22 class members in particular, if it is pursued by
23 subpoena there also may be motion practice with respect
24 to protective orders that both -- Mr. Pace mentions
25 large wholesalers, McKesson, Cardinal Health and Bergen

1 are the three largest wholesalers in the United States.
2 In the last 15 years we've dealt with this extensively
3 in connection with these cases. They each have their
4 own outside counsel or law firms that they are
5 represented by and those counsel will have in past
6 cases filed their own motion for protective order.
7 Sometimes we have also filed as class counsel. We are
8 talking about absent class member discovery, which is
9 typically tightly controlled by district courts.
10 I just wanted to mention that because depending
11 on the scope and exactly what it is the Defendants
12 start to seek, it wouldn't surprise me at all if there
13 were that kind of motion practice that would have to be
14 figured out before actual discovery occurs.
15 And also in terms of relevant market, market
16 power is an issue. From our perspective, it's not
17 nearly as complicated an issue as defense present it to
18 be given the fact that for the most part brand generic
19 drugs, brand sales and price are largely unaffected by
20 the product until their own generic comes in. So you
21 have a product selling at a dollar with a hundred units
22 of sales, that pretty much stays that way or even goes
23 up regardless of what other products are out there
24 under a generic itself. FDA approved, that's what
25 triggers the change so not the general discussion of

1 out-market that occurs in other antitrust cases has
2 very limited application to these kinds of cases and
3 that can be another potential area of disagreement,
4 which can then also lead to various motions for a
5 protective order and so forth. So I just wanted to
6 flag those.
7 THE COURT: What I'd like to do at this point is
8 I'd like to get you into a typical kind of Rule 26
9 meet-and-confer process where you start talking about
10 what it is that you think you're going to need and try
11 to reach agreements as to what you think you can begin
12 to exchange at this point, even though we're in the
13 midst of a motion to dismiss process.
14 There's a process, you've been through this
15 before with each other I take it. So there's probably
16 a lot you know that I don't about material that can
17 begin to get exchanged, identification of some of these
18 folks as 30(b)(6) folks. I'd like to get that going
19 now.
20 I would prefer not to set a full schedule of
21 discovery of the case at this point, because I'd like
22 to see that motion to dismiss process kind of work its
23 way through. But I would like to see you get that
24 discovery, informal discovery process going and maybe
25 even some of the more formal discovery, perhaps

1 beginning with your first sets of interrogatories, kind
2 of formalize it after you have some of this
3 meet-and-confer so we can get that process started.
4 Even though we don't have a formal case management
5 order in place with hard deadlines in it, there's no
6 reason you can't start getting down that road. That's
7 what I'd like to see happen. Put off the harder issues
8 for when we get through the motion to dismiss process,
9 we know what the shape of the complaint is and then
10 we'll get the order in place at that time and really
11 get rolling with discovery.
12 Does that make sense to all of you?
13 MR. SUNSHINE: It does, your Honor.
14 THE COURT: Any reason why you can't start that
15 process?
16 MR. SOBOL: No, your Honor. I assume that would
17 also include your Agenda Item Number 10, the
18 e-discovery.
19 THE COURT: That was actually next on my list.
20 Let's take a five-minute recess.
21 (Short recess.)
22 THE COURT: I wanted to at least give you a
23 chance to catch your flights so we can kind of
24 accelerate through the last items. I think we've
25 covered everything I felt like we needed to cover with

1 respect to scheduling is fine. We'll pick that up at a
2 future conference.
3 One thing that I want to have you just know is I
4 intend to use some kind of a monthly status
5 report/conference with you folks once we get into the
6 groove and that would -- my vision of that, subject to
7 discussing it, maybe change it later is the principal
8 lawyers would be here in person but other folks could
9 participate by phone or listen in by phone. It may be
10 ultimately we can get to a point where we could do this
11 by video conference or by telephone. We'll see. I'm
12 open to how that works out.
13 Another thing I want to get you thinking about
14 is with respect to e-discovery. I don't think we have
15 to go into any depth on that today. It's clear to me
16 this is probably going to involve a lot of e-discovery.
17 The one idea I'm toying with is asking you to designate
18 a 30(b)(6) witness for e-discovery and having
19 Magistrate Judge Sullivan and maybe myself attend that
20 deposition so we get a really early and clear handle on
21 what the e-discovery issues are.
22 So I think it's likely that we're going to want
23 you to do that, to appoint a technical person since
24 you're a 30(b)(6) guy or gal on these issues and we're
25 going to have a judge there. Okay? So that's

1 something you should be thinking about.
2 We talked enough I think about class
3 certification in terms of where it fits into the
4 scheduling, talked a lot about the class or classes so
5 I think we can put off any in-depth discussion about
6 that to a later point.
7 I think we touched on summary judgment enough
8 for today. We talked briefly about choice of law
9 issues. I don't think we need to go into any more
10 depth on that.
11 I think I want to talk to you about the website.
12 We're working on that. I don't think it's up to an
13 external yet, but we've got it on an internal template.
14 It will be up shortly. Everything will be on that
15 website, including orders, transcripts, so forth.
16 I do want to hear about the settlement process
17 and in terms of what your vision is, who will be the
18 mediator, mediators, what you wanted or expect or
19 interested in from the court side. So who wants to
20 start on that.
21 MR. SOBOL: So in our experience there is
22 mediation. Most of these cases get settled; they don't
23 get tried. There's a bunch of issues that everybody
24 has typically happens at a point much later on during
25 the course of the litigation, certainly after the

1 12(b)(6) motions are decided and well into things.
2 Sometimes we select a mediator from outside the Court.
3 If that's the predilection of the Court that's running
4 the case, that's acceptable to the Court, there are
5 some mediators out there that have handled cases like
6 this in the past so they are familiar with some of the
7 issues and don't have to get an education on things.
8 Other times we use people who are brand new as well.
9 Sometimes we do the settlement without any mediators at
10 all because there is -- I mean, these are at least at
11 some level business disputes, if you will, and the
12 lawyers have the ability to communicate with one
13 another.
14 So absent really sort of fairly clear guidance
15 from the Court in terms of the Court wishes to do
16 something differently, typically there's when we're
17 touching base once a month, whatever the Court randomly
18 says are you talking or not, is this the time or not
19 and then when, as and if it is ripe, something happens.
20 I don't mean to be too loose about it because it's not
21 really. The case gets resolved, the case goes away or
22 the case gets settled or perhaps gets tried. That's
23 really the way we handle them.
24 From our perspective, if the Court has a strong
25 desire to do something differently, and that sometimes

1 happens, we are content to move things along and touch
2 base on it periodically during status conferences when
3 we can then find out if it makes sense to do it.
4 THE COURT: You all agree with that?
5 MR. BUCHMAN: We would agree with that in
6 general and we would add one additional point, that
7 there should be at some point a court-ordered mediation
8 day. And we believe, our perspective is that that
9 should occur after the close of discovery and after
10 class certification briefing has been completed because
11 at that point the parties have a complete picture in
12 front of them and can have a meaningful dialogue.
13 We would agree with what Mr. Sobol said, if we
14 can have those discussions earlier, that's fine. That
15 would be wonderful, but there should be one
16 court-ordered day of mediation after discovery and
17 class certification.
18 MR. SUNSHINE: We generally agree with what both
19 of our colleagues from the Plaintiffs' side have said.
20 These cases have settled both through the private
21 process and court-supervised process. Clearly parties
22 seem to have closed the gap on our expectations around
23 this case. But a lot of that may be summary judgment
24 type issues. I think we'll also have a bit of a
25 challenge in the fact that the Actavis decision

1 provides such uncertainty as to what the law is. We
2 had a number of cases pending as we mentioned earlier.
3 So clarity on the development of the law will help
4 shape the parties' expectations.
5 Having said that, I think we're open for
6 discussion on a resolution. It's probably premature.
7 THE COURT: So nobody has any fixed idea about
8 who can be or cannot be involved in the mediation?
9 You're all open on that? I specifically want to know
10 whether you -- and I'm not saying this is going to
11 happen, I just want to know, do you expect that the
12 judges who are involved in this case stay the heck out
13 of everything related to mediation, it would be some
14 outsider who does it, or are you open-minded to the
15 idea we utilize the judges perhaps for that purpose?
16 MR. SOBOL: I should say it more clearly. We've
17 had cases where the Article III judge mediated the
18 settlement in chambers. We've had cases where the
19 Article III judge designates a magistrate judge and
20 settles the case that way. We've had cases where the
21 Article III judge or the magistrate judge formally
22 appoints an outside mediator and that mediator speaks
23 to the court. We've had situations with private
24 mediators and the private mediator does not speak to
25 the Court, and we've had situations --

1 THE COURT: You're open to all of those things.
2 That's all I want to get from you at this point.
3 Okay. So we'll have more conversations about
4 that in the future.
5 THE COURT: All right. Is there anything else
6 that --
7 MR. SORENSEN: Housekeeping, pro hac motions.
8 My understanding is we were going to file them and we
9 were advised to wait for this conference.
10 THE COURT: Right. You need to get those pro
11 hac motions filed. Ryan can speak to that.
12 (Discussion held.)
13 THE COURT: As far as local counsel goes, it
14 seems like you folks have local counsel and the liaison
15 counsel for your group. I guess for you folks, you've
16 got it, too. And I think each of the Defendants have
17 local counsel. We're going to leave things the way
18 they are. I put a waiver of the local counsel rule
19 because I didn't want everybody running out hiring a
20 separate firm for local counsel. It looks to me like
21 everyone is situated where you are for local counsel.
22 Is there anything else that anybody thinks we
23 ought to talk about today before everybody runs to the
24 airport?
25 MR. PADWA: I think there should be an order

1 asking everybody to eat dinner here in Providence.

2 THE COURT: All right. We'll be talking, I'm

3 sure.

4 (Conference concluded at 4:00 p.m.)

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C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Anne M. Clayton

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Anne M. Clayton, RPR

November 26, 2013

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Date