

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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IN RE: ) 2:12-md-02342-CMR  
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ZOLOFT (SERTRALINE ) November 18, 2014  
HYDROCHLORIDE) PRODUCTS )  
LIABILITY LITIGATION ) 2:04 p.m.-3:58 p.m.  
J. RETTENMAIER USA LP ) Philadelphia, PA

ORAL ARGUMENT ON PLAINTIFFS MOTION TO  
IDENTIFY AND PRESENT A NEW GENERAL  
CAUSATION EXPERT  
BEFORE THE HONORABLE CYNTHIA M. RUFÉ  
UNITED STATES DISTRICT COURT JUDGE

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1 P R O C E E D I N G S

2 (Call to Court)

3 THE COURT: Good afternoon, everyone.

4 ALL: Good afternoon, Your Honor.

5 THE COURT: Please be seated. We have  
6 a good crowd today. There's much at stake here.  
7 We're here to hear oral argument, and the oral  
8 argument is on the Plaintiff's Steering committee in  
9 Zolofit MDL for leave. It's a motion for leave to  
10 identify and present a new general causation expert,  
11 that expert being Richard Rufe.

12 Are you ready to proceed?

13 MS. NAST: We are, Your Honor. The  
14 Steering Committee asked Michael Fishbein, as the  
15 Court is aware, to present argument for us.

16 THE COURT: Very well, thank you.

17 And behalf of the defense, who will  
18 argue for Pfizer?

19 MR. CHEFFO: I will, Your Honor. Good  
20 morning -- good afternoon.

21 THE COURT: Good afternoon. All right.  
22 If other motions that have been filed, such as  
23 Pfizer's motion for summary judgment and plaintiff's  
24 motion for partial reconsideration should also  
25 naturally be introduced into the argument, we will

1 follow up on that.

2 I find that these issues are so  
3 interrelated, that I would like to decide everything  
4 together. And that is something that I wanted to do  
5 about six months ago in terms of hearing it together.  
6 But I won't ask you to argue those motions  
7 specifically. At least they've been filed, and I can  
8 understand what they are premised on.

9 And throughout all of them are, of  
10 course, the assertions by each side that dismissals  
11 with or without prejudice may or may not be  
12 appropriate. That is undoubtedly going to be part of  
13 the argument today.

14 So I expect that and welcome it. So  
15 let's start with you, Mr. Fishbein.

16 MR. FISHBEIN: Thank you, Your Honor,  
17 good afternoon.

18 THE COURT: Good afternoon.

19 MR. FISHBEIN: Your Honor, as you are  
20 well aware, this multi-district litigation currently  
21 involves approximately 600 plaintiffs, who allege a  
22 variety of injuries associated with their use of the  
23 SSRI known as Zoloft. About half of the plaintiffs  
24 here, a little better than half, allege cardiovascular  
25 injuries of one sort or another. The remaining

1 plaintiffs allege a variety of other injuries, include  
2 neural tube defects, limb defects, cleft lip, cleft  
3 palate, et cetera.

4           This Court adopted what I would call an  
5 initial case management plan that had essentially  
6 three components. First of all, Your Honor directed  
7 discovery on common liability issues across the board;  
8 secondly, the selection of early trial or beltweather  
9 (ph) cases, known in this litigation as trial pool  
10 cases; and third, the presentation and determination  
11 of Daubert challenges to general causation testimony.  
12 And then the filing of dispositive motions in quote --  
13 I'm quoting from your pretrial orders now, in the  
14 trial pool cases. That's pretrial order No. 39 at 3,  
15 and pretrial order No. 63 at 2.

16           The PSC timely complied with the  
17 Court's orders, particularly insofar as the  
18 designation of general causation experts were  
19 concerned. Principally we're concerned here with the  
20 presentation of Dr. Brerard's testimony who's an  
21 expert in perinatal pharmacoepidemiology. There were  
22 also three other experts identified. And Dr.  
23 Brerard's opinion covered every defect in the  
24 litigation. She claimed that the scientific evidence  
25 supported causation, a causal connection between the

1 use of Zoloft and every birth defect present in this  
2 litigation. And she based her opinion broadly on  
3 studies of defects in all organ systems, where the  
4 studies differ in terms of outcomes widely by system,  
5 studies involving SSRIs as a class, and studies  
6 involving SSRIs other than Zoloft.

7           After an extensive Daubert hearing,  
8 Your Honor, you concluded that Dr. Brerard could not  
9 offer her opinions on causation, and that her  
10 testimony was not scientifically credible or reliable.

11           THE COURT: Because?

12           MR. FISHBEIN: For a variety of  
13 reasons, Your Honor. There were a number of reasons.

14           So number one, you articulated what I  
15 view is a legal standard that required consistent  
16 replicated statistically significant studies, which  
17 were not present for anything as far as any of the  
18 birth defects, other than (indiscernible) defects in  
19 the heart.

20           Secondly, you found, and I think this  
21 is probably more significant as --

22           THE COURT: In that lack of replication  
23 is what the PSE is basing its motion to reconsider on?

24           MR. FISHBEIN: We're basing our motion  
25 for reconsideration on the fact that a standard

1 requires replicated statistically significant studies,  
2 as a matter of law, is not correct.

3 Yes, there has to be replication in our  
4 view. In fact, if you look at Jewell's (ph) report  
5 here, replication is really a very important component  
6 of his report. But it is not essential that the  
7 studies under the law be statistically significant at  
8 all, but here we are dealing with statistically  
9 significant studies, at least in part.

10 But essentially, on this point, Your  
11 Honor, you ruled as a matter of law you needed  
12 statistically significant studies that were  
13 replicated. And as we view and rejected the sort of  
14 Rothland (ph) methodology that Dr. Brerard patterned  
15 her testimony after, when the Third Circuit in Deluca  
16 (ph) seemed to have accepted that methodology as being  
17 an appropriate methodology, and that was actually  
18 before Daubert. And when the Supreme Court in the  
19 Matrix decision, essentially said we don't require  
20 statistically significance to make causation judgments  
21 about the relationship between exposure to a drug, and  
22 injury.

23 So as a matter of law, Your Honor, we  
24 think you simply got that wrong. Now, does that mean  
25 that you have to undo your entire Brerard decision?

1 No, it does not mean that. Because there were a  
2 number of other grounds in your decision, Your Honor,  
3 that would sustain the outcome of excluding Dr.  
4 Brerard without having to rely on what we view as an  
5 erroneous conclusion of law.

6 For example, and I won't go through the  
7 whole opinion -- or the whole -- Dr. Brerard's whole  
8 opinion, not your opinion, Your Honor, one of the  
9 things, one of the critical failures that I think you  
10 pointed out in your opinion about Dr. Brerard was that  
11 she had cherry picked. That she had selected the best  
12 studies in favor of her opinion and excluded studies  
13 that seemed not to support her opinion, and didn't  
14 adequately explain why she did that, and didn't  
15 adequately account for bias in the studies, didn't  
16 adequately account for confounding in the studies, et  
17 cetera, et cetera.

18 So I suppose on this particular point,  
19 Your Honor, and I didn't intend to argue this motion  
20 today --

21 THE COURT: I know you didn't, but --

22 MR. FISHBEIN: -- but I'm in it.

23 THE COURT: -- I warned everybody that  
24 would come up.

25 MR. FISHBEIN: But I'm in it. I would

1 say, Your Honor, that on -- with respect to that  
2 motion, I would invoke the ghost of Mo LaVine (ph), I  
3 don't know if you know who Mo LaVine was, but he was a  
4 very famous --

5 THE COURT: No.

6 MR. FISHBEIN: -- trial lawyer. And  
7 when I first started practicing law, I used to go to  
8 Jenkins and listen to tapes of his closings. And one  
9 of my favorite lines that he used is, he told juries,  
10 "not only must you be right, but you must be right for  
11 the right reasons."

12 And I think that that's a great sort of  
13 summary of what we try to do in the law as lawyers,  
14 judges, and juries, to get it right, and to get it  
15 right for the right reasons.

16 So we are simply suggesting that with  
17 respect and the reason why we filed a motion for  
18 partial reconsideration was because we think you got  
19 that principle of law wrong. We'd like to be  
20 operating in this litigation with a correct rule of  
21 law for assessing the admissibility, reliability of  
22 expert testimony.

23 And we are not suggesting that that  
24 means you have to change your decision about Dr.  
25 Brerard. You may say okay, I agree with you,



1 plaintiffs.

2 THE COURT: In the order of a motion to  
3 clarify.

4 MR. FISHBEIN: Right, I agree with you.  
5 Maybe I got that wrong, but it doesn't matter. You  
6 might say it does matter, I don't know, that's really  
7 up to you. As we know, Daubert's an exercise of  
8 discretion on the part of the trial judge. But that's  
9 really what we're about.

10 And the reason that it's important is  
11 because even if Pfizer achieves its fondest wish and  
12 gets summary judgment, and all the existing 600 cases  
13 that are pending before you, and I don't see how  
14 that's constitutionally possible for a variety of  
15 reasons, but even if they get their wish, they fish  
16 their wish, that's not the end of this litigation.

17 Because there are -- the drug is still  
18 on the market, science is constantly evolving, there  
19 will certainly be plaintiffs who continue to file  
20 these cases. And unless you disassemble the NDL, they  
21 will certainly come back here, and they may very well  
22 come back here with a report from a Dr. Jewell or a  
23 Dr. A, or a Dr. B, or Dr. C.

24 And inevitably or another judge or  
25 judges are going to have to deal with the same

1 question. This is MDL litigation, it's not binary  
2 litigation, it's red car versus blue car, I decide,  
3 you go home, that's it, we go onto a different case.

4 And because this drug is still on the  
5 market, and because the scientific evidence, the  
6 scientific work here is clearly in full swing, I mean,  
7 there are new studies coming out, I won't say every  
8 day, but frequently. It's a matter of intense  
9 interest to the scientific community. This litigation  
10 is going to be --

11 THE COURT: And it always has been.

12 MR. FISHBEIN: And it always has been.  
13 And it looks like it's continuing, it's not something  
14 that the scientific field has said, God, we're done  
15 with this, we've got the answer. They don't feel they  
16 have the answer, which is why these studies are going  
17 on.

18 And because of that, we think it's  
19 essential that we all get it right, we use the correct  
20 legal standard, and then we judge whether or not each  
21 expert has met that standard, and you make these other  
22 judgments about whether they've accounted for all the  
23 things you have to account for when you're an expert.

24 THE COURT: It would be lovely to think  
25 that when a judge makes a decision and tries to get it

1 right, that if she is appealed and reversed by a  
2 circuit or the United States Supreme Court or even  
3 affirmed, that somehow or other, everybody is trying  
4 to get it right, and I believe that's true.

5 MR. FISHBEIN: I do, too, Your Honor.

6 THE COURT: But the world of science is  
7 different than the world of law.

8 MR. FISHBEIN: And we can only -- all  
9 we can do as lawyers and judges is follow the science.  
10 And the law, it seems to me, has to follow the  
11 science. So --

12 THE COURT: But then what happens to  
13 finality?

14 MR. FISHBEIN: Finality is --

15 THE COURT: People seek finality that's  
16 why they want their legal disputes to be adjudicated.

17 MR. FISHBEIN: And obviously when a  
18 legal dispute has to be adjudicated, it has to be  
19 adjudicated at a given point in time. So if I file a  
20 -- I'll go back to red car versus blue car. I file my  
21 lawsuit, and the case proceeds, it's got to be tried.  
22 We're not going to let it sit there like my  
23 grandmother used to say, lay there like a  
24 (indiscernible) for you know 20 years, you have to  
25 try. You have to try based on what is there. And I

1 think Daubert decisions have to be based on what is  
2 there.

3 So if we were talking about, you know -  
4 -

5 THE COURT: Well, what happens when  
6 what is there isn't adequately communicated on the or  
7 through the standards of Daubert and is presented but  
8 presented based on unsound methodology, not unsound  
9 science, unsound methodology?

10 MR. FISHBEIN: I understand, Your  
11 Honor. And so that, you know, if you're in a trial  
12 and that happens, it's over, right, and your remedy is  
13 in the court of appeals. But we're not at a trial  
14 yet, at least in MDL terms, this case, I hate to say  
15 this, but it's in its relative infancy.

16 I mean, if you look at the MDL  
17 docket --

18 THE COURT: There are many of us that  
19 don't think of this stage of an MDL as being infant.

20 MR. FISHBEIN: I understand that, Your  
21 Honor, but all I'm saying is that, these cases are  
22 frequently long haul cases. And I would say about  
23 two-thirds of the product liability MDL cases that are  
24 out there are older than this one, and about half of  
25 them are -- were filed in 2010 or older.

1           So -- and you have a future where  
2 you're going to have cases forever. So in that  
3 context, with no case on trial, it seems to me that it  
4 is appropriate to do what we've done here, and say,  
5 okay --

6           THE COURT: Mr. Fishbein, just one  
7 thing I have to actually correct you on --

8           MR. FISHBEIN: Okay.

9           THE COURT: -- I'm really interested in  
10 your arguments, but there were to be trials in January  
11 --

12           MR. FISHBEIN: I understand that, Your  
13 Honor.

14           THE COURT: -- and they were only to be  
15 selected by me in April, but we held off because of  
16 the Daubert considerations. And we knew that it would  
17 be unfair to pick trials, and name cases for trial and  
18 work them up if this six months, almost six months of  
19 relitigation and argument and giving full  
20 consideration to all sides were to take place.

21           And so any time I read in any of the  
22 briefing there are no trials scheduled anyway, that's  
23 a misnomer and it's misleading. Because everything we  
24 did was guided by the same schedule that you started  
25 out today reciting.

1 MR. FISHBEIN: Absolutely, Your Honor,  
2 granted.

3 THE COURT: Okay.

4 MR. FISHBEIN: So if --

5 THE COURT: That's the stage where we  
6 were.

7 MR. FISHBEIN: Absolutely. And so I  
8 would say, if the Court was inclined to prioritize the  
9 -- I would say the orderly disposition of cases, and  
10 say that maintaining that schedule and getting those  
11 cases tried is of paramount importance, then I would  
12 say that -- and it's too late to come in to ask for a  
13 new generic or a general (indiscernible) expert in  
14 those cases.

15 I would say, okay, your schedule  
16 contemplated that there'd be case dispositive motions  
17 in those cases, in the beltweather cases; they were  
18 the ones set for trial. If you're disinclined to  
19 allow a new expert in those cases, then you'll enter  
20 summary judgment in those cases and let them go up.

21 But it would be improper, I think,  
22 under the Third Circuit's TMI opinion, among other  
23 things, to say that even though nobody else was  
24 scheduled for trial, those were beltweather cases,  
25 we're going to take the Daubert proceeding, and apply

1 it to them across the board, regardless of whether  
2 they came into this case at the time of the case  
3 management orders, at the time Dr. Brerard's report  
4 was identified, at the time of the Daubert hearing, or  
5 thereafter, it deprives those plaintiffs, essentially  
6 would turn this case into an issues class action.

7 It almost presupposes that you assert  
8 it by entering case management orders, that say for  
9 the filing of dispositive motions in what turns out I  
10 think there's six beltweather cases, I think that's  
11 right, maybe eight, that we're going to turn this  
12 unbeknownst to anybody to an across the board  
13 disposition of all the cases.

14 THE COURT: I think what I'm trying to  
15 point out, and I think you agree with this, is that in  
16 an MDL, things aren't all that clear.

17 MR. FISHBEIN: That's for sure, Your  
18 Honor.

19 THE COURT: Because the cases weren't  
20 selected, we had a trial scheduled, but the cases  
21 weren't selected.

22 MR. FISHBEIN: And I think that's also  
23 -- I know that's true, and from what I understand,  
24 there were six in the trial pool to be essentially  
25 selected for trial, out of -- six or eight, out of 25

1 initial discovery pool cases.

2 So, boy, have I gotten far astray from  
3 my argument.

4 THE COURT: No, I am through  
5 interrupting you.

6 MR. FISHBEIN: No, that's quite all  
7 right, Your Honor.

8 THE COURT: Back to your plan.

9 MR. FISHBEIN: We were just talking  
10 before we started that we love the Third Circuit  
11 method of arguing, where you basically make no  
12 argument, you just answer questions. I welcome that,  
13 Your Honor.

14 THE COURT: Having sat with the Third  
15 Circuit several times, four times, and experiencing  
16 that as an appellate judge, designated as a visiting  
17 judge, it alarmed me, because I wanted to hear from --  
18 but that is certainly the methodology of some of them.

19 MR. FISHBEIN: Certainly is, and I must  
20 be getting either the right panels or the wrong  
21 panels, because I can't remember the last time I  
22 actually was able to make an argument up there. But  
23 that's okay, I mean, as far as I'm concerned, the most  
24 valuable thing I can do here is answer whatever  
25 questions the Court has, that's for me.



1           So, at any rate, that takes me back to  
2 sort of where I was, which was that when we read your  
3 opinion on Dr. Brerard, there were two things that we  
4 noticed that led us to filing this motion for leave to  
5 identify a new expert. One was your statement that  
6 there's -- there appeared to be some evidence that we  
7 have marshaled using correct methodology to support a  
8 causal link between cardiovascular birth defects,  
9 septal defects in particular, and exposure to Zoloft,  
10 and the second thing was, your reference to evidence  
11 of a class effect perhaps emerging in the future,  
12 recognizing that science is ongoing.

13           So that brings us to our actual motion  
14 for leave to identify Dr. Jewell as a new general  
15 causation expert, and our suggestion that plaintiffs  
16 here who do not cardiovascular defects, and who may  
17 otherwise be unable to prove causation should have the  
18 right to discontinue their cases without prejudice, to  
19 refiling them, if and as when the emergency science  
20 supports that kind of filing.

21           Pfizer obviously opposes this, and that  
22 brings us here today. So I'd like to discuss first  
23 our motion for leave to introduce a new expert out of  
24 time.

25           Of course, the Court is aware that it's

1 black letter law that district court -- I'm quoting  
2 here, has considerable discretion in matters regarding  
3 expert discovery and case management. And where the  
4 issue is whether to allow the out of time designation  
5 of a new expert, the exercise of that discretion is  
6 actually governed by two separate rules. The first is  
7 Rule 37(c), which provides for exclusion of evidence  
8 as a discovery sanction where it's offered out of  
9 time, and that turns on whether the failure to proffer  
10 the evidence timely was substantially justified or is  
11 harmless.

12 More particularly we're here -- we're  
13 concerned here with Rule 16(b)(4) which says -- which  
14 relates to whether a pretrial schedule should be  
15 amended to extend the time to permit disclosure of a  
16 witness. And that turns on whether there's good cause  
17 to do so.

18 Whether we look at Rule 37(c) or Rule  
19 16(b)(4), the same standard applies, and the Third  
20 Circuit has said repeatedly that there's a five part  
21 test that applies to determine to decide this question  
22 of whether untimely designated expert witness  
23 testimony should be permitted.

24 In effect, what the Third Circuit has  
25 said, is that, this five part test determines whether

1 or not here's good cause. The defendants were  
2 somewhat critical in their briefs for not saying --  
3 not arguing that there was good cause, but I would  
4 respond to that by simply saying, that by arguing that  
5 we meet the five part test, we've effectively argued  
6 that there's good cause, if you meet the test, you've  
7 demonstrated; if you don't meet the test, you don't.

8 So I'll go through the five factors  
9 unless --

10 THE COURT: Well, I'd like to hear you  
11 address the prejudice to Pfizer.

12 MR. FISHBEIN: Okay.

13 THE COURT: That they have claimed.

14 MR. FISHBEIN: Well, the first is, the  
15 first aspect of addressing prejudice that they've  
16 claimed is if you look at the actual quotation of what  
17 the five factors are, it says, the prejudice or  
18 surprise, in fact, of the party against whom the  
19 excluded witnesses would've testified and the ability  
20 of that party to cure the prejudice.

21 So does prejudice mean surprise in  
22 fact, and I think the cases suggest that it does, we  
23 don't have to worry about surprise in fact here.  
24 We've come to the court, we've -- this is not a case  
25 like I think the Dee Marine (ph) case, where we've

1 offered new evidence in the middle of the trial, and  
2 the opponent goes, oh, my God, I wasn't prepared for  
3 this, how am I going to deal with it.

4 So I don't think we're deal with  
5 surprise, in fact, here. Now, prejudice, I guess the  
6 prejudice to their claim is that they spent money on -  
7 - money, time, effort, et cetera, on preparing for and  
8 hearing testimony by Dr. Brerard and now we're saying  
9 effectively that that was just a waste of time, and  
10 they're prejudiced in that fashion.

11 THE COURT: Well, certainly Dr. Brerard  
12 went after everything.

13 MR. FISHBEIN: She did. And --

14 THE COURT: And with the exclusion of  
15 her testimony and the attempted substitution of Dr.  
16 Jewell's report and opinion, he narrows it down to  
17 cardiac.

18 MR. FISHBEIN: Correct.

19 THE COURT: Okay. Why couldn't that  
20 have been done in the beginning? How could it not  
21 have been known to the plaintiffs in this MDL that  
22 there were categories here, and that perhaps we should  
23 be addressing the issues in categories, without  
24 certifying any one category or another, it's a  
25 discovery tool, it's a case management tool to do

1 that, and you go with your strongest.

2 MR. FISHBEIN: I think that would've  
3 been a great idea, Your Honor, to focus on that,  
4 especially since cardiac cases were the -- account for  
5 most of the cases.

6 I believe all of the trial pool cases  
7 were cardiac cases. And in hindsight, it certainly  
8 seems like that would've been a better way to proceed.  
9 But the fact that we --

10 THE COURT: I don't know that that  
11 would've cured the methodology problems, but -- with  
12 Dr. Brerard's --

13 MR. FISHBEIN: With Dr. Brerard --

14 THE COURT: -- presentations.

15 MR. FISHBEIN: -- well, if she had  
16 testified differently it might have, but she didn't.  
17 I mean, if she used the same methodology, we'd still  
18 have the same problems.

19 THE COURT: Her report came first  
20 before her testimony and it was --

21 MR. FISHBEIN: I agree.

22 THE COURT: -- pretty obvious.

23 MR. FISHBEIN: So -- but the question  
24 is, is there prejudice here. So if -- so I would  
25 submit two things. First of all, that the Daubert

1 proceeding was not a waste of time. Three of the four  
2 experts that the PSE presented, Your Honor found could  
3 testify at least on biological plausibility.

4           You found that Dr. Brerard couldn't  
5 testify across the board, and for half the cases,  
6 nobody's really challenging that right now. And so to  
7 that extent, Pfizer sort of got the benefit of their  
8 hearing. I mean, they established that.

9           What's going to -- how that plays out  
10 in the course of this litigation is I suppose up in  
11 the air, but at least at present, based on the present  
12 science, it's pretty clear that plaintiffs with those  
13 injuries can't proceed in this court.

14           So we're talking about only cardiac  
15 injuries, and now we're talking about a report by Dr.  
16 Jewell who says that there is good science to support  
17 causation in the cardiac cases.

18           And the fact of the matter is, sort of  
19 a back way of getting at it, that Dr. Jewell's been  
20 identified in state cases to offer that opinion, and  
21 inevitably as new cases come into this MDL, Dr. -- I'm  
22 sorry, Dr. Jewell -- as new cases come in the MDL, I  
23 would imagine that one or more plaintiffs are going to  
24 identify him as their expert.

25           And however far the reach of your

1 decision, your Daubert decision, I can't see how  
2 constitutionally it could reach people who are not  
3 currently plaintiffs in front of the Court. So if a  
4 new plaintiff comes in, and says, I have an expert  
5 here, I'd like to present him, it's Dr. Jewell, I  
6 presume we're going to go through this exercise with  
7 Dr. Jewell. We'd have to.

8           And in a sense, we're acknowledging  
9 that, we're bringing it up front. I would think  
10 Pfizer would be happy to have the opportunity now to  
11 have a federal judge to decide the question of whether  
12 or not there's a causal relationship between exposure  
13 to Zolofit and cardiovascular injuries, based on Dr.  
14 Jewell's testimony, and have it decided sooner, rather  
15 than later.

16           And I would think that would be a  
17 benefit, a tremendous benefit to the litigation. And  
18 if there is, in fact, if you were to decide, Your  
19 Honor, after hearing from Dr. Jewell and from Pfizer  
20 and their experts, you know what, I believe there is  
21 enough here to allow a jury to hear this testimony.  
22 Then is it -- does it make sense, Your Honor, to say,  
23 but despite that, we're going to dismiss with  
24 prejudice the claims of everybody else who filed a  
25 cardiovascular case because of the deficiencies in Dr.

1 Brerard's report.

2           And that brings -- I guess, brings me  
3 to the question in deciding a motion like this, the  
4 question is really whether or not the Court wants to  
5 prioritize the interest in efficient judicial  
6 administration, or the interest in getting it right  
7 for the right reasons, going back to Mo LaVine  
8 argument.

9           And I would say that on this particular  
10 point, the Third Circuit law is very clear that in  
11 making decisions like this, the Court should  
12 prioritize the interest in getting to a correct  
13 Murance (ph) decision based on the best available  
14 testimony over the interest in efficient judicial  
15 administration.

16           Because we're a judicial system, we're  
17 not the Phillies or the Fliers or the casino or --  
18 where the rules are, you come in, you put your money  
19 down, and you win the bet, you lose the bet, you go  
20 home. Here, we're concerned with the answer, we're  
21 concerned with whether there is causation, whether  
22 there is sufficient evidence of causation. And if  
23 there is, allowing people to go forward and present  
24 their cases.

25           And if there's not, and if you decide



1 after hearing Dr. Jewells that there's not, then it  
2 makes more sense to sort of let this litigation shut  
3 itself down.

4 THE COURT: Any help you could offer  
5 the Court in understanding how Dr. Beckamond's (ph)  
6 was withdrawn from his deposition and not presented?

7 MR. FISHBEIN: It's my -- I can't  
8 really give you an accurate answer to that, Your  
9 Honor. I wasn't around when it happened.

10 THE COURT: It's, as I suspect, a  
11 strategic decision. He did talk more about the class  
12 as opposed to Zoloft, and that presents a number of  
13 issues of case management and -- but I've reviewed  
14 that report, it was submitted, and I just recently  
15 reviewed it, because I'd like to understand that.

16 This can't be a game of strategy, this  
17 has to be for the right reasons, as you say.

18 MR. FISHBEIN: I absolutely agree with  
19 that, Your Honor.

20 THE COURT: And if we're going forward  
21 trying to get the best evidence in front of the Court  
22 --

23 MR. FISHBEIN: I don't think that the -  
24 -

25 THE COURT: -- what happened here?

1 MR. FISHBEIN: -- decision to withdraw  
2 him from what I understand was done to withhold  
3 information from the Court, it was done because I  
4 believe that the conclusion was that --

5 THE COURT: I'm not attributing bad  
6 faith, I'm not. Strategy is not bad faith. So you  
7 don't even have to say that, deliberate or not, every  
8 act is intentional, that means it's deliberate, it  
9 doesn't mean it's from an evil position. I don't go  
10 there. I just like to understand how it is that the  
11 Court wasn't presented with possibly more evidence to  
12 lighten the loan on Dr. Brerard's shoulders?

13 MR. FISHBEIN: You know, Your Honor, as  
14 I say, I wasn't part of those decisions, so I don't  
15 have that much knowledge about it, but with looking at  
16 this case, having come in late, it seems to me that  
17 the PST, excuse me, placed in hindsight undue reliance  
18 on Dr. Brerard's credentials, and her, you know, their  
19 belief that her testimony was right, was influenced by  
20 her credentials, which were superb, instead of  
21 focusing so much on, and sometimes we do this, we fall  
22 in love with the CV, instead of evaluating the  
23 person's witness.

24 And instead of focusing on -- academics  
25 are much better academics than they are at being

1 witnesses, and being able to thoroughly explain their  
2 opinions in ways that carry weight with the Court.

3 THE COURT: Or express it in writing.  
4 But I have to say that that very explanation causes a  
5 great deal of reaction because it is Dr. Brerard's  
6 primary opinion and testimony that the defense is  
7 preparing to counter at the Daubert hearings.

8 MR. FISHBEIN: No question about it,  
9 Your Honor.

10 THE COURT: And millions of dollars  
11 were spent on those hearings by both sides, millions  
12 of dollars. And how many of those events are  
13 necessary before we can get it right?

14 So I think there's a problem there,  
15 because that could happen again, and then what.

16 MR. FISHBEIN: Your Honor, that then  
17 brings you into the cases, as I said, the Third  
18 Circuit has said pretty clearly and repeatedly that --  
19 I just want to get this quote right, "The exclusion of  
20 critical evidence on the grounds that it was not  
21 disclosed in a timely basis, is an extreme sanction,  
22 not normally to be posed absent a showing a willful  
23 deception or flavored disregard."

24 Okay. So the preference is for getting  
25 things decided on the merits based on the best

1 available evidence. But the Court has also said  
2 pretty clearly that doesn't mean that a district judge  
3 has to endure repeated episodes, or repeated tries, or  
4 late designations, and non-designations and obviously  
5 you have the right to control your courtroom.

6           And so if there was a repeat, obviously  
7 I would have a much more difficult time making this  
8 argument. And while it's certainly true that  
9 everybody spent a lot of money on -- and believe, I  
10 don't minimize the amount of energy that the parties  
11 and time and resources that the parties put into that  
12 hearing, but I do think that one thing that may put it  
13 a little bit into perspective is that if it were a  
14 full blown trial on the merits, everybody would've  
15 spent that and more. And the result would not have  
16 been exportable to anything, except that case.

17           Here, we're trying to do something that  
18 is -- so the impact of that would've been on one case,  
19 the expense would've been on one case. Here, we're  
20 trying to do something that applies to a very big,  
21 very complicated MDL. And in that sort of larger  
22 setting, I think it is not unreasonable to say, all  
23 right, I'll -- on this issue, I'll hear from your new  
24 expert, I'm going to have to hear from him anyway,  
25 sooner or later some Judge is. I'll hear from him,

1 and make a decision.

2 And I think actually if that were to  
3 happen, all of us would be better off, because we  
4 wouldn't have this thing about, well, you know, okay,  
5 Dr. Brerard didn't do it, but maybe somebody else can  
6 do it, maybe, maybe, maybe. We will have, I suppose,  
7 closure on a key issue. We've got half closure  
8 already on half the cases. And that's not an  
9 unimpressive accomplishment, and it's not --

10 THE COURT: I don't sense that there's  
11 closure on any case.

12 MR. FISHBEIN: Right now, I don't think  
13 there is. What we're suggesting, of course, is if we  
14 simply offer Dr. Jewell, if we offer Dr. Jewell as a  
15 generic quisation (ph) expert on the cardiovascular  
16 cases, the question is, what happens with the other  
17 cases.

18 And we've said that people should be  
19 free, if they wish to, to dismiss them without  
20 prejudice. The statute of limitations has not run on  
21 those cases, and the science is active and emerging,  
22 and if, as and when the science supports those claims  
23 and those plaintiffs are not precluded by any existing  
24 law from bringing their cases, why should they be able  
25 to bring them again.

1           So, in that sense, closure is probably  
2 not attainable, because we're not in control of the  
3 science. The scientists are in control of the  
4 science, and as the science changes, the issues that  
5 you decide on day one may have to be redecided two  
6 years from now, or three years from now, or four years  
7 from now. And that's the nature of the beast I think.  
8 I don't see any way around that in an MDL like this.

9           THE COURT: Well, you've addressed non-  
10 prejudice because you maintain that Pfizer's going to  
11 have to deal with Dr. Jewell anyway in the state  
12 courts, not necessarily in the federal courts.

13           MR. FISHBEIN: Not necessarily, but  
14 here's kind of a hypothetical that I'd offer the  
15 Court, somebody that wasn't here, and still isn't  
16 here, files a case alleging that they had a  
17 cardiovascular injury, a birth defect, and they file  
18 it in state court, gets removed to federal court.

19           Now, it's possible that the MDL will  
20 stop, it hasn't been my experience, so if you're still  
21 the MDL judge, the case will get tagged and sent along  
22 to you and --

23           THE COURT: It's possible that an MDL  
24 can be older than a judge, it is possible, but it  
25 doesn't happen very often, and not these days. We're

1 looking at --

2 MR. FISHBEIN: I get stuck with the  
3 ones that are --

4 THE COURT: -- those -- we're looking  
5 at those very carefully and just having returned from  
6 the annual MDL conference, it is of utmost importance  
7 to many of our leaders and some of us that cases not  
8 go on to infinity, because they can. But we have  
9 minor plaintiffs here who haven't run their statute,  
10 according to most state laws.

11 MR. FISHBEIN: I suggest, Your Honor,  
12 that these MDL cases often get so complicated that  
13 they do tend to protract themselves, despite every --  
14 I mean, for example, in Diatrose (ph) we settled the  
15 case on a class basis, less than two years after the  
16 case was transferred, and it's still going on. And it  
17 was going on in a big way from 1997 through about  
18 2009. It's the nature of the beast that these are  
19 complicated cases, and unless you can find a way to  
20 get global resolution, they do tend to go on. I think  
21 it would be great for all litigants if that didn't  
22 happen.

23 And if you're talking about an MDLs  
24 where you have an allegedly offending product like  
25 Zoloft that's still on the market, I don't see how --

1 I mean, there's going to be new cases filed, I  
2 suppose, as long as it's still on the market, until  
3 people are convinced that there's no -- you know, the  
4 science doesn't support them and will never support  
5 them. And it's too early to say whether that's going  
6 to happen.

7 I mean, only -- you know, since the  
8 Daubert hearing, there were four studies that came  
9 out, that I would say favor the plaintiffs. Is that  
10 going to continue? I don't know. And I don't see how  
11 any of us could know, but as I said before, the law  
12 has to -- and, of course, (indiscernible) MDL and just  
13 say, okay, if there's one off cases that keep being  
14 filed, filed in the districts that they're filed in,  
15 and then (indiscernible) the case.

16 THE COURT: Well, I'm not at that  
17 point. I want everybody to understand that. That  
18 would be the last thing that an MDL judge would do to  
19 close up shop when cases are unresolved. So we have a  
20 lot to do before then. So this is your good cause.

21 MR. FISHBEIN: So good cause, Your  
22 Honor, well, the good cause is we -- as it is in all  
23 these cases, our claimants, this is important  
24 testimony and you should hear it, and ultimately if  
25 you agree, the jury should hear it. And we believe



1 that we satisfy the five factor test that describes  
2 the existence of good cause. Primarily because of  
3 what the Third Circuit said, the importance of the  
4 evidence, and the absence of what you see in some  
5 Third Circuit cases like the diet drug case, the Akryn  
6 (ph) case, the TMI case, where there was this kind of  
7 repeated inability to comply with deadlines, missed  
8 deadlines, not one trial adjournment, but multiple  
9 trial adjournments, inability to, you know, telling  
10 the Court you're not going to introduce expert  
11 testimony on issue X, and then coming in and saying, I  
12 changed my mind after all of that.

13 Those kinds of things aren't here. So  
14 you don't have any of that conduct the Third Circuit  
15 has said, you know, is sufficient to say, no, it's  
16 over. And what you do have is I think important  
17 testimony that the Court could benefit from.

18 I am so --

19 THE COURT: If your motion were to be  
20 granted, when does the -- is it the plaintiff's  
21 position that the first case could be ready for trial  
22 at any particular time? How long does the process  
23 take from the moment I should grant, if not appeal,  
24 your motion?

25 MR. FISHBEIN: I would think there's no

1 reason it can't be quickly. Now, what does quickly  
2 mean? Quickly means that Dr. Jewell has to get his  
3 final report with exhibits out, let's say that takes a  
4 week to ten days; Pfizer gets a shot to depose him,  
5 they could depose him as quickly as they wanted to  
6 depose him.

7 THE COURT: Isn't Pfizer entitled to  
8 have their own expert?

9 MR. FISHBEIN: I was getting to that,  
10 Your Honor. Pfizer is entitled to have their own  
11 expert.

12 THE COURT: I don't think they do a  
13 deposition without doing that first. So that will  
14 take them however long they need that to take, and  
15 then we're good to go.

16 So I can't completely answer the  
17 question because I, you know, because I can't speak  
18 for Pfizer, Your Honor, but I do think it could be  
19 done rather quickly.

20 THE COURT: No, I just asked what the  
21 plaintiff's expectations would be.

22 MR. FISHBEIN: Our expectations/hope  
23 would be to do it quickly, but we don't want this  
24 lingering any longer than the Court does, or than  
25 Pfizer does.

1 THE COURT: And only moving forward  
2 with cardiac cases?

3 MR. FISHBEIN: Moving forward with Dr.  
4 Jewell, yes. Now, I don't know what any individual  
5 plaintiff is going to do out there, without a generic  
6 witness on anything other than cardiac cases, I don't  
7 know what they can do. But as I said before, there  
8 may be plaintiffs who have a right to come in here and  
9 say, you know, PSE didn't deal with my defect, or I  
10 don't like the way they dealt with it, I want to  
11 present testimony on that, but we're really --

12 THE COURT: But here's the problem,  
13 they did try to deal with all of the defects that have  
14 been alleged in one fell swoop.

15 MR. FISHBEIN: Absolutely, Your Honor.

16 THE COURT: So it's not that it was  
17 never before the Court prior to when this new  
18 plaintiff comes in to the MDL.

19 MR. FISHBEIN: Was before the Court.  
20 And the question is, whether what the Court did with  
21 that can be utilized to enter judgment against a  
22 plaintiff who wasn't, for example, a trial full  
23 plaintiff. And all I would say, because we haven't  
24 briefed the summary judgment motion, Your Honor, is if  
25 you want some edification on that, to take a look at

1 In Re TMI, 193 F.3d beginning at page 725.

2 THE COURT: Can you distinguish  
3 honestly the Agent Orange case and the preeminent  
4 Judge Weinstein's decision to allow dismissals without  
5 prejudice for minors?

6 MR. FISHBEIN: Can I distinguish it?

7 THE COURT: Yes. Because this was his  
8 decision was pre-Daubert, wasn't it?

9 MR. FISHBEIN: His decision was pre-  
10 Daubert.

11 THE COURT: Didn't Daubert change the  
12 landscape of procedure?

13 MR. FISHBEIN: Well, I think in that  
14 sense, no, and I would say that because it was clear  
15 from his decision that he was not going to permit  
16 those plaintiffs to offer evidence that they had  
17 suffered birth defects as a result of their exposure  
18 to Agent Orange.

19 So whatever the standard was before  
20 Daubert, and I think we have stricter standards --

21 THE COURT: Because he hadn't ruled yet  
22 on that, it's also different. He hadn't actually  
23 ruled on the Daubert issues. It was -- he heard the  
24 hearing, but hadn't ruled yet, and there were a number  
25 of dismissals without prejudice, right?

1                   MR. FISHBEIN: I don't recall whether  
2 he'd ruled yet or not. I -- but it was pretty clear  
3 that he was going that way. And then, of course, you  
4 had that Third Circuit case which didn't involve  
5 minors, but I think it involves the same principle,  
6 which is the Peolie (ph) case, where the Court said as  
7 motion for summary judgment filed in that case against  
8 certain plaintiffs because they didn't have personal  
9 injuries, and the Third Circuit said, okay, but that  
10 doesn't mean that the district court should have  
11 granted summary judgment against them on their  
12 personal injury claims, because they were likely to  
13 have late injuries that wouldn't express themselves  
14 until downstream.

15                   And so summary judgment should never  
16 have been entered against them. Their cases should  
17 have been dismissed without prejudice to refiling if,  
18 as and when their late -- their potentially late  
19 injuries emerged as real injuries.

20                   And, you know, I think that that --  
21 those two cases as a pair express the principle that  
22 where your right of recovery reasonably depends on  
23 some future event, your claim should be dismissed  
24 without prejudice rather than subject to summary  
25 judgment, so that you can bring it, if, as and when

1 you develop the -- you know, the event transpires that  
2 gives you a right of action.

3 And so that's really all we're asking  
4 here. We're not asking for these plaintiffs to be  
5 able to go run into state court, and file the same  
6 claims with no change in science, we're not asking for  
7 that at all, we've been very clear, that we'd be  
8 perfectly happy under Rule 41 the Court can impose  
9 conditions on dismissal without prejudice.

10 You could say you must refile in  
11 federal court, if they're dismissed without prejudice,  
12 and you can't file in state court. We've also said  
13 that we believe if -- to the extent that those  
14 plaintiffs are legally bound by your Daubert decision,  
15 they continue to be legally bound even if they're  
16 dismissed without prejudice. There's a number of  
17 cases that apply that sort of collateral estoppel  
18 principle to cases that are dismissed without  
19 prejudice.

20 So it seems to me that the argument in  
21 favor of dismissing those claims without prejudice to  
22 refile later on is really unsellable on the  
23 precedent.

24 THE COURT: Anything else?

25 MR. FISHBEIN: Well, I had a whole

1 argument prepared here, Your Honor, but I think I'm  
2 going to close by asking whether you have any more  
3 questions, because I'd be happy to answer them. I'm  
4 so far afield from the presentation --

5 THE COURT: I think I know the answer  
6 to this question, though, and that is, if the motion  
7 is granted, do -- does the plaintiff anticipate,  
8 plaintiffs anticipate a whole another round of Daubert  
9 hearings?

10 MR. FISHBEIN: The motion for Dr.  
11 Jewell?

12 THE COURT: And/or.

13 MR. FISHBEIN: And/or the --

14 THE COURT: I'm asking, what do you  
15 expect to happen?

16 MR. FISHBEIN: Well, I don't think you  
17 have to have Daubert hearings on them, but I imagine  
18 the defense would want them, and we would contemplate  
19 that the defense would get them. And I think that  
20 makes more sense than -- although you don't  
21 necessarily have to have a hearing. I mean, you might  
22 decide -- you might want to decide on the briefs, it  
23 depends on it plays out, how the briefing plays out.

24 But if it can't be decided on the  
25 briefs, then I think doing it as a hearing as opposed

1 to convening a trial, and then deciding in the middle  
2 of trial whether or not to allow the witness to  
3 testify doesn't make much sense to me. So I guess  
4 it's a long way of saying, yes, we anticipate --

5 THE COURT: You can't get to trial  
6 without dealing with --

7 MR. FISHBEIN: A Daubert proceeding.

8 THE COURT: -- specific causation and  
9 summary judgment motions, so you can't just go to  
10 trial.

11 MR. FISHBEIN: I agree with that.

12 THE COURT: It's either going to be  
13 Daubert on the brief or Daubert in a hearing.

14 MR. FISHBEIN: I agree.

15 THE COURT: It's a question of how  
16 extensive are these Daubert hearings that are  
17 contemplated, if Dr. Jewell should be allowed to enter  
18 now as plaintiff's general causation expert.

19 MR. FISHBEIN: Well, I would think it's  
20 not four plaintiff's witnesses and I can't say how  
21 many witnesses the defense should have, but it would  
22 seem to me that this hearing could quite easily be one  
23 plaintiff's witness, one defense witness, over and  
24 done.

25 THE COURT: Nothing much in litigation



1 is over and done as easily as that.

2 MR. FISHBEIN: Well, the hearing is  
3 over and done is what I'm saying.

4 THE COURT: As well as good counsel  
5 have always tried to streamline and be efficient, I  
6 don't think I can predict what happened that way.

7 MR. FISHBEIN: Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Fishbein.  
9 Mr. Cheffo.

10 MR. CHEFFO: May I proceed, Your Honor?

11 THE COURT: I've saved some questions  
12 for you.

13 MR. CHEFFO: I'm sure you have, Your  
14 Honor. I have -- I just have some -- we put some  
15 slides up here, Your Honor, and I was going to give  
16 them to you and your clerks if that's okay. I think I  
17 have actually three copies.

18 Good afternoon now, Your Honor.

19 THE COURT: Good afternoon.

20 MR. CHEFFO: I hope I will address the  
21 questions that Your Honor or at least the issues that  
22 Your Honor posed earlier, but like Mr. Fishbein, I  
23 certainly welcome any questions the Court will have.

24 Notwithstanding the plaintiff's efforts  
25 here to convince this Court to grant what's really

1 extraordinary and unprecedented relief that they seek,  
2 the Courts across the country have followed a well-  
3 worn path that we've laid out in our briefs, and  
4 really no court has ever allowed the type of relief or  
5 procedures that the plaintiffs have encouraged this  
6 Court to take here today.

7 Under the law of the Third Circuit, the  
8 Supreme Court, other federal courts where the  
9 plaintiffs lack admissible and sufficient expert  
10 evidence of causation because their experts have been  
11 excluded, summary judgment follows.

12 And to raise two issues, Your Honor, I  
13 will be talking about the summary judgment issue, and  
14 I will also probably be talking about the motion to  
15 reconsideration, as it relates to the issues here.  
16 You know, I take Your Honor's guidance, we're not  
17 arguing summary judgment per se --

18 THE COURT: Right.

19 MR. CHEFFO: -- nor are we -- we  
20 haven't even filed our opposition to the motion to  
21 reconsideration, which was filed six days ago, but  
22 certainly I think as Your Honor highlighted, there are  
23 certain issues that I think are important, because  
24 they do dovetail in some of the points that I'd like  
25 to raise today.

1           So -- can you go back, Jonathan? The  
2 two issues I think that we're going to address broadly  
3 is the motion to add a new expert, and then the post  
4 summary judgment dismissal without prejudice request.

5           And the pathway, the well-worn path  
6 that we have identified is not something novel, it's  
7 not something new, it essentially is fully consistent  
8 with the kind of overwhelming and crushing case law,  
9 but it's also fully consistent with what the federal  
10 judicial center has told us, and certainly as Your  
11 Honor well knows, that the federal judicial center  
12 provides guidance for courts like Your Honor in  
13 evaluating really the steps that you should take when  
14 you've done what you have done which is to engage in a  
15 kind of unbelievably fulsome Daubert evidentiary  
16 expert process.

17           And it says, use Daubert to assess the  
18 validity of science at issue, and enter summary  
19 judgment if the science is not properly established.  
20 That's exactly probably where I'll start today, and  
21 probably where I'll finish today.

22           But I did want to take a minute or two,  
23 the plaintiffs identified in their opening brief  
24 certain timeframes, and I think it's actually helpful  
25 to go back and talk very briefly as to how we got from

1 April 2012, it seems like it was yesterday, but as  
2 Your Honor said, this isn't the beginning of this  
3 litigation, we've been here for quite some time, and a  
4 lot of water has passed under the MDL bridge here.

5 I'd like to highlight really at a high  
6 level what we've done and focus specifically on the  
7 Daubert and scheduling issues.

8 So -- apologies, it's a little smile,  
9 but you have it I think in the slides, Your Honor.

10 THE COURT: I have it in the hard copy.

11 MR. CHEFFO: You know, from the very  
12 beginning of the NBO, Your Honor did a number of  
13 things. You said, you know, I've appointed  
14 experienced counsel on both sides, I'm here for you,  
15 if you need guidance, and you always have been; and  
16 you also said, I'd like you to see if you can work out  
17 between the parties, and often with Mr. Cherill's (ph)  
18 help, some of the core issues. And it was somewhat,  
19 you know, unprecedented I think is that we were able  
20 to have many of the core kind of nuts and bolts type  
21 issues worked out on consent, as Your Honor, whether  
22 they be protective orders and that was very helpful,  
23 and that saved certainly a lot of time, effort and  
24 money.

25 But one of the probably most important

1 things that we talked about was a CMO, was a PTO,  
2 which essentially laid out how we were going to get  
3 from, you know, April of 2012 moving forward. And any  
4 time you have an agreed PTO or CMO, you have to assume  
5 that there's compromises, certain things the  
6 plaintiffs wanted, certain things that were important  
7 to Pfizer, and obviously Your Honor had to look at it  
8 and decide, you know, does this make sense.

9           And I think it did then, I think it  
10 does now. But it's important as we kind of figure out  
11 the path that we have traveled, to really look at how  
12 much time and effort and all the opportunities there  
13 were.

14           So we had a PTO that I think we agreed  
15 to in November of 2012, really as a result of the  
16 parties, certainly not Your Honor, we needed a little  
17 more time, and I think in February of 2013, we  
18 submitted -- sorry -- we submitted a proposed PTO  
19 which Your Honor, you know, reviewed certainly and  
20 approved, and it gave us a pathway.

21           And it said in July, the PSE will  
22 submit -- and this is very important, we'll submit  
23 general causation expert reports on the birth defect  
24 categories, they intend to prosecute in this  
25 litigation. All right. We had a very large PSE and

1 they were required, as we know they did, because they  
2 had kind of a host of birth defects that they had  
3 dealt with in their reports. But they had the six  
4 months after that in order to submit any expert  
5 testimony that they want.

6 The PSE was also concerned at the time  
7 that to the extent that there were folks outside the  
8 PSE or other plaintiffs, Your Honor will recall, they  
9 said, well, you know, we don't want to bind anybody.  
10 So if anybody wants to submit a new report, either on  
11 other injuries, whether be asthma or ADD, or  
12 presumably even on the injuries that the PSE had dealt  
13 with, if they didn't think that the PSE had done a  
14 good enough job, there was a period of time. As we  
15 know, those dates came and went, no one, in fact, did  
16 submit those.

17 Then the PSE had also wanted an  
18 opportunity to have rebuttal reports, and as we know,  
19 that's in the schedule and that date came and went  
20 without any rebuttal reports, and it also provided for  
21 certain Pfizer to submit its reports.

22 So in July of 2013, what happened, the  
23 plaintiffs submitted six reports with seven experts.  
24 One of the reports as Your Honor may recall had two  
25 authors on it.

1           We, in September, submitted eight  
2 expert reports from eight experts on the general  
3 causation issues. There were no rebuttals. The  
4 plaintiffs waived that right to file rebuttal reports.  
5 And then we proceeded with depositions, as was the  
6 pattern that we had set out.

7           And from the seven plaintiff experts,  
8 three of them were withdrawn. Your Honor discussed  
9 earlier with Mr. Fishbein, Dr. Veckaman's (ph), and  
10 you know what's particularly important I think about  
11 Dr. Veckaman's is that he also had expressed  
12 epidemiology decisions. And, you know, in July of  
13 2013, Dr. Veckaman submitted his report, kind of was  
14 in play if you will, up until October 29th. And  
15 October 29th was two days before his deposition.

16           Now, it's possible that they thought he  
17 was duplicative, probably more likely that they  
18 thought his testimony was going to be inconsistent  
19 with Dr. Brerard, or maybe there's some other reason  
20 that we're not aware of.

21           But whatever it is, for purposes of  
22 today, certainly the plaintiffs had, you know, a  
23 constellation of experts, they went out and prepared a  
24 report and actually got the report. But yet they made  
25 a considered decision to take down and withdrawn Dr.

1 Veckaman as an expert.

2           So we went on, we deposed their -- the  
3 four remaining experts. We didn't hear anything about  
4 rebuttals or need for new experts, and they went on  
5 and deposed our experts. And then we had a very  
6 aggressive schedule for briefing, which we briefed  
7 over the holidays, which led us to a February reply  
8 deadline, which I believe we met; we may have been off  
9 by a day or two.

10           But the point here is that -- and then  
11 Your Honor frankly, as has been the case throughout  
12 this litigation, you know, didn't waste a lot of time,  
13 this isn't the only litigation that Your Honor had.  
14 You basically scheduled a hearing on this issue, I  
15 think you had asked us then how long will it take, and  
16 we told you probably two days maybe, three days, and  
17 famous last words by the parties, but in fact, it was  
18 seven days, four experts, all four testified; we had  
19 two experts, you know, certainly no rush on Your  
20 Honor's part.

21           And then you'll see we have listed  
22 here, there was two times where Pfizer had asked for  
23 leave to submit some supplement authority, as Your  
24 Honor may remember. And then after all of that,  
25 approximately a full year later with, you know,



1 probably literally hundreds of lawyers on both sides  
2 working on this, and millions of dollars, and it still  
3 took a year, because that's how complicated and how  
4 much effort this took for everyone, Your Honor issued  
5 two decisions which have been widely regarded in both  
6 the legal and medical communities as examples of  
7 judicial excellence.

8 THE COURT: Well, I wouldn't know that.

9 MR. CHEFFO: Well, I -- you can take my  
10 word for it, Your Honor.

11 And then what happens? Well then, we  
12 get to essentially a few months ago, and plaintiffs  
13 say for the first time ever, we want a Daubert do  
14 over. And I will just say, just so that doesn't sound  
15 like the do over term, it's actually a Seventh Circuit  
16 -- they've used the Daubert do over, we didn't make it  
17 up, I wish I had.

18 And as we said in our briefs, what the  
19 plaintiffs are now asking for, after this incredibly  
20 exhaustive extensive laborious process, important  
21 process, but a laborious process it's a heads I win,  
22 tails we flip again. And they're trying to create the  
23 illusion I think both here and frankly in  
24 jurisdictions around the country, that somehow there's  
25 uncertainty about this. That somehow this decision

1 really didn't mean, and this process really didn't  
2 mean what it says. But it would be fundamentally  
3 unfair to essentially allow this one way street, this  
4 heads I win, tails we flip again approach, and it'd be  
5 unfair for a number of reasons.

6 First, there's a bit of irony in the  
7 plaintiff's position right now. You'll remember I  
8 eluded to the fact that we filed two motions for  
9 supplemental authority, which Your Honor did grant it  
10 -- did deny at the time. But what the plaintiffs said  
11 and they cited fairness and equity at the time, that  
12 it would be equitable to have the Daubert record  
13 closed.

14 They also asked the Court to deny what  
15 they characterized as Pfizer's request to effectively  
16 reopen the record. This is just a month after or so  
17 after the hearing. And the Court did agree at that  
18 point, either for those reasons, or for other reasons  
19 of Your Honor, but did close the record. And now they  
20 want to create an entirely new Daubert record with an  
21 entirely new expert.

22 It also would be fundamentally unfair  
23 because of the enormous time and effort and money.  
24 Now, you know, we can talk about that, and it sounds  
25 something, you know, ethereal, but I think, you know,

1 Your Honor asked some questions, you do recognize that  
2 this is really on both sides, you know, companies like  
3 Pfizer certainly could do things with that money other  
4 than litigate. It's important that we did, but I  
5 don't think we could minimize the amount of time and  
6 effort and resources.

7                   And fundamentally the reason why, and I  
8 think Your Honor knows, is Pfizer spent those time,  
9 effort, and resources, is because they believe very  
10 strongly it was from the first day that we were before  
11 Your Honor, believe very strongly that this is an  
12 important medicine for folks to have on the market,  
13 and they very significantly disagreed with the  
14 plaintiffs' positions.

15                   And I think the third reason why this  
16 Daubert do over is just kind of inconsistent with the  
17 case law, it's inconsistent with the federal rules,  
18 and it's inconsistent with frankly fundamental  
19 fairness and finality, is that, you know, you have one  
20 of the best kind of group of PSEs with their lawyers,  
21 and certainly one of the best advocates in Mr.  
22 Fishbein, but when asked really about good cause, I  
23 mean, the good cause here really is that they made a  
24 tactical mistake, or made a tactical choice. And the  
25 second kind of real element of good cause that they

1 suggests, is that they don't like the Daubert  
2 decision. And really that's not what anyone would  
3 suggest is good cause.

4           So the plaintiffs are asking this Court  
5 to break new ground in conflict with the federal  
6 appellate authority, derogation of the principles of  
7 fairness and finality, that are really long been  
8 recognized, not just in the Daubert context, but in  
9 virtually every context.

10           And what's really, you know, I think  
11 telling here, is that the plaintiffs notwithstanding  
12 all of the kind of -- the arguments, haven't  
13 identified a single case, not even one, that's ever  
14 done what they want this Court to do, which is allow a  
15 new expert, who allegedly has a different methodology  
16 than their previous expert, simply because there was  
17 an adverse Daubert ruling.

18           Now, there's a reason why they can't  
19 find any cases, and there's a reason why no courts do  
20 this, or have ever done this. It's because it's not  
21 right, it's not fair, and it would be inconsistent as  
22 I'll talk about in a few minutes, the kind of  
23 overwhelming and crushing amount of case law, that  
24 says that these type of kind of tactical  
25 determinations are just not sanctioned in the federal

1 courts.

2           The Weis-Graham (ph) case, which is a  
3 Supreme Court case from 2000 we cited in our brief,  
4 and I think it's notable the plaintiffs don't even  
5 mention this case in their briefs, it's a unanimous  
6 Supreme Court. And the Court says, it's implausible  
7 to suggest post-Daubert that parties will initially  
8 present less than their best expert evidence, and the  
9 expectation of a second chance should their first  
10 chance fail. That sounds familiar.

11           And, in fact, we know here that  
12 plaintiffs did present their experts. I don't think  
13 anyone could fault this group of plaintiffs for not  
14 taking their best try. And, in fact, they don't  
15 dispute at any point that they had more than enough  
16 time.

17           We know that there was no -- this is  
18 not a situation like in some of these cases where  
19 someone asks for more time, or blew a deadline, none  
20 of those issues are here. This is not a situation  
21 where they were under the gun, or they didn't feel  
22 like they had adequate time or resources to come up  
23 with their experts.

24           At the Daubert hearing, the plaintiffs  
25 repeatedly proclaimed that their experts have

1 dedicated their professional life to try and find a  
2 cause and cure of birth defects. We heard time and  
3 again at the hearing that Dr. Brerard and the other  
4 three experts wake up every day to study birth  
5 defects. And they told the Court that this was the  
6 best group of experts in one place, in one courtroom.

7           They said these four experts, and every  
8 one of them are uniquely independently qualified to  
9 speak about the issues in this case, and whether or  
10 not SSRIs or Zolofts (sic) cause birth defects.

11           So it's somewhat difficult to credit  
12 how they could come in today and say, well, you know,  
13 we really didn't -- we need another chance, we didn't  
14 have, you know, our A team on the field. And it's  
15 implausible to suggest that this group, and I say  
16 that, with all due respect that I mean, would do  
17 anything other than put their A team on the field.

18           But now that the Court has excluded  
19 kind of the best experts and the brightest expert on  
20 the A team, they want a complete do over with Dr.  
21 Jewell, even though apparently he was not even on the  
22 initial cut, and was certainly well known to many of  
23 the plaintiffs' firms here, as their go to litigation  
24 expert in other litigations.

25           So I'm not going to cover all the

1 cases, but I do want to highlight for Your Honor some  
2 of I think more persuasive cases on this first point,  
3 which is this Daubert do over issue.

4 I want to start with the Third Circuit.  
5 The Third Circuit has held that plaintiffs are not  
6 entitled to an open-ended never ending opportunity to  
7 meet a Daubert challenge. I think, and I tried to  
8 write it down, so I don't want to mischaracterize what  
9 Mr. Fishbein said.

10 But I think he said, it's the nature of  
11 the beast that MDLs go on forever, or something to  
12 that effect. And, you know, I don't -- I'm not  
13 sitting in on the same kind of meetings that Your  
14 Honor are with the JPML panel, but I don't think that  
15 that's how they would characterize what they think a  
16 model is. And to the extent that there are examples  
17 of MDLs that have gone on for ten or more years,  
18 again, I think what we view those are, the judiciary  
19 views those, as lessons to avoid, not models to try  
20 and follow.

21 And I think the Third Circuit would  
22 similarly view that the concept of open-ended, never-  
23 ending opportunities is kind of anathema to exactly  
24 what we want to achieve in litigation.

25 And in TMI, the Third Circuit rejected

1 the argument that a plaintiff is entitled to proffer a  
2 replacement expert, who offers an opinion based on a  
3 different methodology from an original expert who was  
4 excluded under Daubert.

5           So plaintiffs have cited the TMI case,  
6 but you know, for purposes of today, I mean, this is  
7 exactly on point, this is exactly the case that we  
8 have right here, because that's what plaintiffs are  
9 asking for. They want to seek to proffer Dr. Jewell  
10 who they say offers an opinion based on a totally  
11 different methodology from Dr. Brerard's, but then  
12 they tell us in their brief that it's largely based on  
13 the same record, though. It's not exactly clear that  
14 it's an exact record, or it's a different record.

15           And, in fact, and I'll cover this point  
16 in a minute, I think it's still unclear to me, and I  
17 don't know if it's unclear to Your Honor, in response  
18 to some of the questions whether the plaintiffs really  
19 are just pursuing the cardiac claims, or kind of  
20 leaving a footnote for not, so I didn't really hear a  
21 direct answer to that question, maybe that's something  
22 that the plaintiffs can tell us.

23           Because on the one hand, they said that  
24 this is closure for half, but then it seemed to think  
25 that there may be, you know, yet other surprises in



1 store if the Court were to go down this path.

2 So are the circuits following the Weis-  
3 Graham and consistent with the Third Circuit have also  
4 rejected this type of do over late expert testimony  
5 after a party has lost the Daubert ruling.

6 The Seventh Circuit, same issue.  
7 Courts are not required to give plaintiffs a do over,  
8 that's where we got that language, after excluding an  
9 expert under Daubert, and does not abuse his  
10 discretion and deny a request for a do over.

11 The Seventh Circuit has also held that  
12 litigation, the litigation process does not include a  
13 dress rehearsal or practice run for the parties. The  
14 Sixth Circuit has held that a Daubert do over would be  
15 contrary to all rules of fairness and proper  
16 procedure, that's the Pride (ph) case.

17 And plaintiffs here, it appears, have  
18 kind of erroneously conflated the concept of fairness  
19 with plaintiffs winning or being able to essentially  
20 void a dispositive result. But that's not fairness.  
21 I mean, fairness is basically having an opportunity  
22 for litigants to have experienced counsel present to  
23 an experienced neutral arbiter; i.e., Your Honor,  
24 their best case, and for Your Honor to make a decision  
25 that's not binding on one side, but not the other, but

1 that binds both parties equally.

2 Because I can assure you that, and I  
3 think no one would disagree, if Your Honor had reached  
4 a different determination and said that they'd met  
5 their Daubert standard, and the next day, we had tried  
6 to challenge it and said we need new experts, you  
7 know, there would have been no support for that  
8 either.

9 So it can't be a situation that we  
10 start back in July, they're supposed to identify all  
11 of the claims in the entire litigation for all of the  
12 plaintiffs, we go through a year of proceeding, we  
13 brief it, we have hearings, and then at the end of  
14 that, people say, well, we want a new expert, and by  
15 the way, you know, we're not even sure that that binds  
16 anybody in this litigation. That would be the first  
17 time that that's ever happened in an MDL, and it's not  
18 the way MDL process works.

19 The Sixth Circuit has also told us that  
20 fairness does not require a do over before the Court  
21 may consider a summary judgment motion.

22 THE COURT: Well then, let me ask  
23 you --

24 MR. CHEFFO: Yes.

25 THE COURT: -- what is there in the MDL

1 context to both sides, and to all sides? Because you  
2 know that you have state cases filed all over the  
3 country, I don't know off hand how many are still  
4 filed --

5 MR. CHEFFO: Not many.

6 THE COURT: -- but if there's 50 of  
7 them, you have the opportunity to defend those in each  
8 of their jurisdictions, state jurisdictions. And in  
9 those cases, no doubt, there will be named experts who  
10 will be different than the ones that were named and  
11 testified here, so you will be litigating.

12 MR. CHEFFO: Well, I guess there's a  
13 few things, Your Honor. So -- and I think this does  
14 dovetail into the motion for reconsideration, but let  
15 me put that to aside and see if I can answer Your  
16 Honor's question.

17 There's no question that there are  
18 state court cases, okay. But I would say a few  
19 things, there aren't that many of them, and I'm -- you  
20 know, I'm not up here inviting, you know, bring it on  
21 to the plaintiff's bar, but the point is, there are a  
22 few cases in California, there are a few cases in St.  
23 Louis, I think there's a few cases in the PCCP, and  
24 there are now I think just a handful of cases in West  
25 Virginia, because the West Virginia mass litigation

1 panel just determined -- they decided in our favor a  
2 form non-motion, and essentially Mr. Itkins (ph) cases  
3 I believe were basically dismissed.

4 So -- but to Your Honor's point --

5 THE COURT: They've not been filed  
6 anywhere yet.

7 MR. CHEFFO: Well, not yet. I think  
8 he's going to appeal those cases. But there's a few  
9 things, I mean, we cannot conflate. Again, just like  
10 we can't conflate the idea of fairness with plaintiffs  
11 winning, we cannot lose sight of the fact that, Your  
12 Honor, there's a number of ways that the MDL can and  
13 should lead.

14 One is, you know, in some cases, it's  
15 to get through the process and have Delawweather (ph)  
16 cases. But in others, it's to do exactly what Your  
17 Honor did, which many state courts may not have the  
18 resources to do, and you invited them to participate,  
19 which is to let the parties put on their best  
20 evidence, and make a decision based on that as a  
21 neutral arbiter, which Your Honor did.

22 And that in and of itself, is wildly  
23 instructive, I believe, it's not binding. It's not  
24 binding. But, I mean, is it instructive. Does Your  
25 Honor know that certainly state courts are going to be

1 interested in at least reading it. So I would say if  
2 Your Honor were to do what we suggest should be done  
3 based on the decision, then I think that that would be  
4 very instructive, both in the federal cases, and the  
5 state court cases.

6 And I would also say that, you know,  
7 this is a situation where the plaintiffs are saying  
8 there's going to be other experts, but there's still  
9 some of the same lawyers who are still here, who are  
10 in Missouri, still are proffering Dr. Brerard as an  
11 expert.

12 I mean, we had an agreement that the  
13 entire record would be used. They haven't withdrawn  
14 Dr. Brerard there, and so that's why I would suggest  
15 that, you know, there may be some kind of tactical  
16 reasons, in terms of some of these motions for  
17 reconsideration. Because to the extent that there can  
18 be kind of an illusion created that this Court is not  
19 quite comfortable with the decision, or that Your  
20 Honor might reconsider, it keeps -- this level of  
21 uncertainty that is being, in my view at least, and  
22 the state courts created, works in favor of trying to  
23 kind of proliferate the litigation, whereas I think  
24 that there may always be cases, who knows.

25 But I think that to the extent that

1 Your Honor provides guidance, it will be very  
2 important for those cases, and if we, the parties need  
3 to litigate those cases, they will. But, you know,  
4 again even in the state courts, you're hearing today  
5 that well, we heard you, and there's no evidence of,  
6 you know, or we don't think there's appropriate  
7 scientific support for non-cardiac cases.

8           Some of those cases at least as of  
9 today are still being prosecuted, and that's why it's  
10 very important for Your Honor to issue a final  
11 decision because I think that again, I want to be very  
12 clear, because they'll take this transcript and, you  
13 know, say, Mark said binding, and that's not what I'm  
14 saying and Your Honor knows that.

15           But I think to suggest that a state  
16 court judge, you know, based on the same record  
17 wouldn't be interested at least in hearing what Your  
18 Honor has to say, and perhaps as what the Third  
19 Circuit would have to say, I think is wrong.

20           THE COURT: But there will be cases  
21 filed after my rulings, and Third Circuit possibly  
22 rulings are available, and there's no binding  
23 precedent there, if they haven't been filed yet. And  
24 when these new cases are filed, if they are, you will  
25 still be litigating them all over the country.

1 MR. CHEFFO: I would say this, Your  
2 Honor, so I -- you know, like Your Honor, like me,  
3 like the plaintiffs, I don't have a crystal ball.  
4 Okay. So to the extent that there are some one-off  
5 cases that are filed, sure, they will get litigated at  
6 some point. But that's not a reason not to basically  
7 make a decisive ruling on the cases that are before  
8 you.

9 You know, we've heard a lot about  
10 minors, and you know, as you --

11 THE COURT: Well, of course not,  
12 because I've made a decisive ruling, and I'm trying to  
13 make more decisive rulings one way or the other. It's  
14 really a question of, this discussion I am listening  
15 to, Mark, Mr. Cheffo, is that is this really  
16 disrupting the orderly and efficient trial in the MDL,  
17 are you prejudiced, and is there any surprise? Not  
18 really, I don't think so, you all know what everybody  
19 is saying out there in the scientific world.

20 But we're trying to get to good cause  
21 here, that the plaintiff is proffering, and I want to  
22 really know, how are you harmed.

23 MR. CHEFFO: Okay.

24 THE COURT: How is Pfizer harmed, and  
25 isn't it just as problematic not to grant the right to

1 have Dr. Jewell come in?

2 MR. CHEFFO: No, because I mean a few  
3 things -- can you go to our good cause slide, Your  
4 Honor?

5 First of all, it's highly speculative  
6 to suggest that Doctor -- that there's going to be  
7 even any other cases filed. You know, there haven't  
8 been a flood of cases. It's highly speculative to  
9 think that people are going to spend the time, effort,  
10 and money after Your Honor's ruling, and it's highly  
11 speculative to think that Dr. Jewell is going to be  
12 proffered. But even if we assume that's the case, we  
13 have the cases that are -- currently subject  
14 themselves.

15 So the prejudice, the prejudice is, you  
16 know, I think it works against folks when they -- you  
17 know, when I hear these arguments the statute hasn't  
18 run, right. So to me, we have again, really some of  
19 the best lawyers, presumably each and every one of  
20 them talked with the families, made a considered  
21 decision to file a case.

22 They did that with no requirement that  
23 there was a statute of limitations. And they did that  
24 for a number of reasons, presumably because they  
25 believe in their claims, and they wanted to seek some



1 type of compensation or redress. So they subjected  
2 themselves to the litigation process, so it's not  
3 unfair to have them bound by it.

4 THE COURT: No question --

5 MR. CHEFFO: I'm sorry?

6 THE COURT: -- I understand that, but  
7 what I really wanted to hear from you on this issue  
8 is, the cases that aren't waiting in the wings to be  
9 filed, the cases that may develop because not only is  
10 there a statute of limitations that is binding anyone  
11 right now except if you turn 18, you have another two  
12 years in most jurisdictions to file.

13 But the ones that have latent injuries  
14 that may not understand it, that may, because Zolofit  
15 is still prescribed, develop something else. Those  
16 are the cases that need as much definition from this  
17 MDL as any of them that are presently formulated or  
18 filed.

19 And how can that definition be accessed  
20 if what you have with an epidemiologist is what we  
21 consider to be faulty methodology, not qualifications,  
22 not bad science, faulty methodology in putting that  
23 science together.

24 MR. CHEFFO: Okay. Your Honor, I  
25 think --

1 THE COURT: That seems to me to leave a  
2 lot of holes to punch through for the plaintiffs in  
3 other litigation, maybe not here. That's the issue.

4 MR. CHEFFO: Right. And I think that's  
5 right. I mean, we're not, you know, by any stretch I  
6 don't believe trying to overreach here. So, you know,  
7 a lot of this is speculation, you know, in my view,  
8 normally plaintiffs file the cases that they believe  
9 should be filed, and that's why we have several  
10 hundred cases filed here.

11 So I think there's two issues, right.  
12 To the extent what may happen in the future, none of  
13 us know what can happen, and I don't think we're  
14 dealing with latent issues, right, because these are  
15 birth defects, it's not like the Peolie case, where  
16 someone said, you know, at some point I may -- that's  
17 why that case is really not applicable here.

18 This is a situation that, you know,  
19 presumably, you know, people know if they have --  
20 their children have a significant birth defect. Now  
21 -- and I don't -- and I think, you know, to the extent  
22 that there is another case that's filed at some point  
23 down the future, this happens again in every  
24 litigation.

25 I mean, the next sea of litigation, you

1 know, which basically is again, in so many ways, just  
2 like this case or what happened, there was an expert  
3 Judge Fisher decided that it didn't meet the Daubert  
4 standard, that was on one day. You know what happened  
5 the next day, and Your Honor does know, summary  
6 judgment granted.

7                   Because all that Judge could do and all  
8 any judge could do is to decide the issues and the  
9 cases based on the science before it.

10                   Now, it's the same issue, right, we can  
11 have a dialogue, you know, what happens if many years  
12 from --

13                   THE COURT: We don't know what, because  
14 I'm afraid that -- and this is not a criticism of my  
15 colleague, but the opinion of that MDL court wasn't  
16 necessarily extensive. It was a conclusory opinion  
17 suitable to the occasion.

18                   MR. CHEFFO: And it may -- you know,  
19 again I --

20                   THE COURT: And they must have a record  
21 upon which they had developed testimony and argument.

22                   MR. CHEFFO: Exactly. One would assume  
23 after a long period of time with, you know, kind of  
24 good lawyers in the circuit court, that court like any  
25 court knows that it's probably going to go -- I think

1 it was the Ninth Circuit there, but the real point  
2 being, which you know, I think Your Honor is raising,  
3 this concept of finality.

4 And, you know, any time you're going to  
5 deal with issues in product liability or mass tort  
6 issues, there's always a chance that someone may file  
7 a lawsuit later on, but that's not a reason to -- you  
8 know, to address the issues and have finality here.

9 And I also -- see, and I start from  
10 just a different presumption on this, Your Honor. I  
11 think that to the extent that it's potentially an  
12 open question (sic) that's kind of an open issue, that  
13 could potentially lead to additional litigations.

14 To the extent courts and many of them  
15 have done this, and they basically have made a Daubert  
16 decision, dismissed cases with summary judgment. That  
17 is a way that the plaintiffs kind of self-select cases  
18 and filter them. If they think that there are cases  
19 that can -- that are outside that decision, then there  
20 may be a few cases filed. But that's typically not  
21 what happens.

22 Typically what happens is, once a  
23 federal court has looked at these issues that, you  
24 know, it's very instructive for the parties, so I  
25 don't know exactly what's going to happen. But it

1 certainly is not a reason not to address the hundreds  
2 of cases that are before Your Honor.

3           And I would say, if I could just go  
4 back, please, to the good cause point. So we know  
5 that the plaintiffs knew and consulted with Dr. Jewell  
6 prior to the deadline. Again, he's been known to many  
7 of these firms for a long time. They withdrew Dr.  
8 Veckaman's who was going to comment on epidemiology  
9 two days prior to his decision (sic). At no point,  
10 did plaintiffs ever seek an extension of time, they  
11 didn't seek rebuttal experts, and probably the last  
12 two points are maybe some of the -- I think the most  
13 compelling on this point, they didn't seek to add an  
14 expert.

15           Now, if you think about it, Your Honor,  
16 there's probably at least a dozen times, probably if I  
17 was trying to, you know, kind of guild it a bit, I  
18 could say twenty, but you know, in terms of when the  
19 plaintiffs could have realized that they needed Dr.  
20 Jewell, first of all, there's a deadline they  
21 designated their experts.

22           Then they saw our expert reports, never  
23 asked for an extension, never asked for anybody else.  
24 And then there was a supplemental period of time where  
25 they could have said, okay, here's what Pfizer's

1 experts say, let's put in a new supplemental; didn't  
2 see Dr. Jewell.

3 Then we had the depositions, and as  
4 Your Honor knows, clearly the testimony at the Daubert  
5 hearing wasn't verbatim from the deposition, but it  
6 wasn't wholly divorced from his deposition testimony.  
7 So after her deposition, it shouldn't have been a  
8 surprise that there were issues with Dr. Brerard.

9 But was -- did we ever hear that we  
10 needed Dr. Jewell? No. Then we filed our summary  
11 judgment briefs, then they opposed; then we had reply  
12 briefs. At no point in any of those, did the  
13 plaintiffs say, hey, we need a little more time, we  
14 think we have a hole with Dr. Brerard, Dr. Jewell can  
15 save the day here.

16 And then we had seven days of Daubert  
17 hearings, where Dr. Brerard was on the stand for a day  
18 or more, and at no point did the plaintiffs say, wait  
19 a minute, we see we're concerned here, we need Dr.  
20 Jewell.

21 In between this time, they actually  
22 then designated Dr. Jewell -- Dr. Brerard in some of  
23 the state court litigation. Then ironically, when we  
24 said we want to put in a few new experts, they didn't  
25 say -- a few new -- I'm sorry, supplemental authority,

1 the response wasn't, well, if you're going to do that,  
2 let's add Dr. Jewell here before we know where Judge  
3 Rufe is going to go with this. They said no/no, the  
4 record is closed, we're standing on that record.

5           And the first time we hear about Dr.  
6 Jewell is after your decision. And even then, it was  
7 kind of months after maybe we're going to reconsider.  
8 And I would suggest that in terms of surprise, no  
9 one's surprised about the science, or about Dr.  
10 Jewell's -- I'm sorry, conflating or Dr. Brerard's  
11 testimony.

12           But I can say with full conviction and  
13 as an officer of the court, that I was surprised that  
14 the plaintiffs would suggest that it was -- you know,  
15 we should've known, that if we went through this  
16 entire process for a year if they didn't get the  
17 result that they wanted, they were going to try and  
18 find a new expert, so sure, I think that is a  
19 surprise.

20           And I think what's also very compelling  
21 here, is six days ago, the plaintiffs filed a motion  
22 for reconsideration. And I'm not often surprised or  
23 often stunned, but I was surprised and stunned.  
24 Because what I've understood the plaintiffs to be  
25 saying all along here is, Your Honor, you know, you

1 issued this Daubert decision, we get it, we hear you,  
2 it's well done, everyone understands that this is a  
3 cogent decision, and we're not going try and do over  
4 with Dr. Brerard, but we think, we plaintiffs think  
5 that we have a pathway, we're going to narrow our  
6 focus, we're going to find a new expert, and that  
7 expert is going to testify consistent with the  
8 methodology that you required in your Daubert  
9 decision.

10 I mean, that was essentially the hook  
11 as to why we were even here today. But then six days  
12 ago, the plaintiffs file a motion which I'm sure Your  
13 Honor has read, where they take a -- it's kind of a  
14 full on assault at the entire underlying Daubert.  
15 They call it partial, but I'm not really sure what  
16 part of it they haven't attached.

17 And they say that the holding is  
18 contrary to the United States Supreme Court, the Third  
19 Circuit, other federal precedent, and Your Honor  
20 apparently didn't comply or didn't understand the  
21 Bradford Hill criteria.

22 And then they also suggest that aside  
23 from being inconsistent with the controlling matrix,  
24 Deluca opinions, and with Hills' teaching, the Court  
25 also misapprehended the trial court's decision in Wade



1 Row (ph).

2 So the entire principle of give us a  
3 new chance here because we can comply with Daubert is  
4 essentially now out the window. And what they've now,  
5 I think, told us is either way, they're going to  
6 appeal this in some form or fashion, and this goes  
7 directly to the point that I think some of the  
8 questions Your Honor asked, about kind of where are we  
9 going from here, and where are we getting to finality.

10 Because, you know, no one was -- what's  
11 interesting is, the plaintiffs weren't even required  
12 to file this motion for reconsideration. I mean, they  
13 could've preserved their rights. But they made it  
14 very clear where they're going in this litigation.  
15 And were Your Honor to now allow Dr. Jewell, where  
16 does that leave us?

17 Well, the plaintiffs say, we'll do it  
18 quickly. Really? I mean, so Dr. Jewell is going to  
19 come in and testify and we're going to have a hearing,  
20 but under what standard? Because apparently they  
21 think that the entire standard that you spent a year  
22 trying to articulate for us and for the rest of the  
23 country in this decision is completely erroneous, so  
24 we're going to have an entire hearing under a standard  
25 that apparently they want you to totally reconsider,

1 and I guess under their standard, they're saying,  
2 well, maybe you even got it wrong as to Dr. Brerard,  
3 so she would fit into that standard again because we  
4 haven't heard exactly where Dr. Brerard fits into  
5 this.

6 So my point is, what we're going to  
7 have here if this is allowed, is piecemeal litigation  
8 with no finality and no end in sight, and just lack of  
9 clarity and a lack of certainty.

10 And I think on the finality point --  
11 sorry, Your Honor, I mixed myself up here. This is  
12 slide 29, Jonathan? Thank you.

13 The Supreme Courts held that it's just  
14 as important that there should be a place to end, as  
15 there should be a place to begin litigation. And in  
16 *Celetex*, the Supreme Court held that the summary  
17 judgment procedures properly regarded not as a  
18 disfavored procedural shortcut, but rather as an  
19 integral part of the federal rules as a whole, which  
20 are designed to secure the just, speedy, and  
21 inexpensive determination of every action.

22 And *Daubert*, which was itself a birth  
23 defect case, Your Honor, the Supreme Court said there  
24 are important differences, and I'm going to read this  
25 slowly because I think this is squarely at odds with

1 what the plaintiffs just told us in their opening  
2 statements a few minutes ago.

3           There are important differences between  
4 the quest for truth in the courtroom and the quest for  
5 truth in the laboratory. Scientific conclusions are  
6 subject to perpetual revision, whereas the law must  
7 resolve disputes finally and quickly.

8           And the principle of finality was  
9 expressed by the Third Circuit in TMI, the parties are  
10 not entitled to open-ending, never ending opportunity  
11 to meet the Daubert challenge.

12           So on this section, Your Honor, I would  
13 just say this, the plaintiffs are not entitled to a  
14 second bite at the Daubert apple, you should request  
15 -- you should deny their request for a Daubert do  
16 over, because one is there is no just cause, it's  
17 highly, highly prejudicial, and it will not in any way  
18 accomplish the goals that we know Your Honor wants to  
19 accomplish, is to achieve a final result.

20           So I was going to move for just a few  
21 minutes into the dismissal with prejudice area, unless  
22 Your Honor has some questions.

23           THE COURT: No, I'm fine.

24           MR. CHEFFO: So the courts have held,  
25 and we cited them in our brief, that dismissal without

1 prejudice is a dispute -- or isn't an abuse of  
2 discretion particularly here after the procedural  
3 posture and summary judgment motion is on file.

4           So it's not a tool to avoid eminent  
5 judgment on the pleadings, the overwhelming case law  
6 talks about that. We did talk earlier about Judge  
7 Fisher's decision, putting aside, you know, we're not  
8 here to talk about the underlying decision of whether  
9 her Daubert decision was right or wrong, but what I  
10 think is instructive, and this happens every day, Your  
11 Honor, if -- you know, in every single case, there's  
12 really nothing different about an MDL in this regard,  
13 if you have a case and someone either misses their  
14 expert deadline, or decides it can't (indiscernible)  
15 or have a Daubert hearing, it's A then B.

16           What Pfizer is suggesting here is not  
17 some kind of new procedure. It's what every court  
18 does, and I think what Judge Fisher did appropriately  
19 in the next day. And the plaintiffs really haven't  
20 cited a single case that says that dismissal without  
21 prejudice after an adverse Daubert ruling is  
22 appropriate.

23           The diet drug case, also I think is  
24 instructive on this point. In diet drugs, the MBO  
25 court denied a request to designate a new causation

1 expert, a summary judgment motion was filed. While  
2 that was pending, a motion to dismiss without  
3 prejudice was filed. And the motion to dismiss was  
4 denied, and the MBO court entered summary judgment for  
5 the defendant. And what did the Third Circuit do, the  
6 Third Circuit affirmed, other courts have done exactly  
7 the same.

8 Grover, in the Sixth Circuit it's also  
9 on point. There, the Court did exactly -- I shouldn't  
10 say exactly, the Court did what I understand the  
11 plaintiffs are asking for Your Honor to do here. The  
12 Court essentially speculated that the law might change  
13 in the future in favor of the minor plaintiff, and the  
14 district court in Grover allowed voluntary dismissal  
15 without prejudice.

16 What did the Sixth Circuit do? The  
17 Sixth Circuit reversed holding this to be an abuse of  
18 discretion. And the Sixth Circuit said, "At the point  
19 when the law clearly dictates a result for the  
20 defendant, it's unfair to subject him to continued  
21 exposure to potential liability by dismissing the case  
22 without prejudice."

23 And we just heard today, I mean, that's  
24 exactly -- frankly, exactly what the plaintiffs are  
25 suggesting, and they say, well, there could be cases

1 in 20 and 30 years, and it's the nature of the beast  
2 that there's never going to be an end to this. And  
3 that's not what any circuit or district court, or  
4 certainly the Supreme Court has suggested, is a proper  
5 path to follow.

6 THE COURT: Mr. Cheffo, in this case,  
7 if I should deny the Jewell motion, as I call it, and  
8 you proffer the summary judgment and dismissals which  
9 cases or do you mean all cases presently filed in the  
10 MDL directly or as tag alongs, are subject to the  
11 dismissal with prejudice?

12 MR. CHEFFO: Absolutely, Your Honor.  
13 So putting aside cases not in the MDL, I don't think  
14 we're ever trying to bind cases that aren't on file,  
15 but all the cases in the MDL would be subject to this.  
16 Again, you know, if we take a step back, all right we  
17 have July 2013, a date, the plaintiffs are supposed to  
18 -- the PSE, not just the plaintiffs, put forth all of  
19 the evidence.

20 And as we talked about, if in fact, Dr.  
21 Brerard was allowed, do you think there'd be any  
22 argument that when we came to each individual case,  
23 and if Pfizer came forward and said, oh, we want to  
24 talk again about general causation again. I think  
25 Your Honor would say like most courts say, well, wait

1 a minute, that's why we had a general causation  
2 hearing that bound the entire group of plaintiffs.

3 So it's no different here. So to  
4 answer your question directly, Your Honor, the  
5 plaintiffs put forth their best scientific evidence to  
6 cover all of the injuries for all of the plaintiffs  
7 currently in the MDL.

8 Your Honor will recall that there was a  
9 good period of time, right, that Your Honor let out,  
10 and I'm not sure there was an opposition, and if it  
11 was or it wasn't, the strongest opposition, let out  
12 folks were able to dismiss without prejudice, right.  
13 And a lot of people availed themselves of that.

14 But not after, not after they waited  
15 for a Daubert decision and a summary judgment motion.  
16 So having essentially subjected themselves one and all  
17 to Your Honor's jurisdiction, and Your Honor's full  
18 and fair opportunity and determinations, it is not  
19 unfair, in fact, it's the just thing, that they be  
20 bound just like Pfizer would be bound as to those  
21 individual plaintiffs no matter which way Your Honor  
22 went.

23 So, yes, every case in the MDL if they  
24 don't have expert testimony should be dismissed on  
25 summary judgment with prejudice.

1 THE COURT: So the answer is, all of  
2 the cases that are presently before the Court?

3 MR. CHEFFO: Without scientific  
4 support, a case cannot proceed, whether it's one case  
5 or 600 cases, so, yes. And, you know, not to harken  
6 back to Judge Fisher, other than to say it's one of  
7 the most recent issues, but there were 2, 300 I  
8 believe plaintiffs in that case, exactly the same  
9 thing.

10 There was a general causation expert  
11 who was to speak for all of them. I think it was a he  
12 in that case, didn't pass muster, according to Judge  
13 Fisher. And Judge Fisher then said, I'm granting  
14 summary judgment as to all of them, not as to one or  
15 two, or different, as to all of them, because they all  
16 essentially as I think one of the circuit courts had  
17 said, they all put their eggs in the basket of these  
18 experts. And it's a very well -- you know, regarded  
19 panel of experts, and certainly lawyers here, and they  
20 took their best shot, and it's not unfair to have  
21 everybody have the consequences one way or the other.

22 And I've been going a while, Your  
23 Honor, I think you've been very indulgent, so I'm  
24 going to try and wrap up, you know, obviously unless  
25 you have some questions. But I would just say this.



1 In terms of the science may change, as I said earlier,  
2 the plaintiffs elected to bring these suits when they  
3 did, they didn't seek to dismiss them. Frankly even  
4 up until the point of your decision, I mean, I don't  
5 know what Your Honor would have done, you certainly  
6 don't have to tell us at this point, but even  
7 throughout this entire process, they didn't ask for  
8 dismissals without prejudice. The only time we heard  
9 about that was, you know, kind of after the decision.

10 I think there is a big difference in  
11 terms of finality of what would happen there. And  
12 courts have -- I mean, there aren't tons of cases on  
13 this point, but to the extent that the plaintiffs have  
14 argued that there's something different about minors,  
15 the Sixth Circuit did address this issue, and in the  
16 Elkins case, and the district court entered summary  
17 judgment, even though the Sixth Circuit did not rule  
18 out the possibility that at some future date, the  
19 medication may be proven to cause birth defects in  
20 humans.

21 So we have a circuit court case  
22 directly on point that did exactly what we believe  
23 this Court should do. And I'm going to just really  
24 close with two final points.

25 You know, I think the cases that the

1 plaintiffs have cited, the Peolie case, you know, we  
2 talked about, it really has no applicability here.  
3 It's a situation where people said, you know, I have  
4 no injuries, maybe at some point I should get -- I  
5 could get some injury -- I could be injured, or find  
6 out that if it's manifest latent -- a latent injury.

7           And the Court said, well, because there  
8 is no claim under those circumstances, we're going to  
9 allow you to dismiss. So it's very, very different.

10           I think Agent Orange also is extremely  
11 different, as Your Honor is obviously familiar with  
12 that decision. First of all, the voluntary dismissal  
13 occurred before the Court's ruling, not after. The  
14 Supreme Court did change the landscape in the Celetex  
15 case, by basically saying that Rule 56(c) mandates the  
16 entry of summary judgment, when a party has failed to  
17 establish an essential element of their claim. That  
18 was not in existence 30 years ago, when Judge  
19 Weinstein issued his decision.

20           And, you know, what's also I think  
21 compelling that in the 30 years since Agent Orange,  
22 the plaintiffs have failed to identify a single case  
23 following the reasoning of allowing people to dismiss  
24 kind of without prejudice after Celetex, yet we've  
25 cited scores of cases that say just the opposite.

1           So I think on both scores, Your Honor,  
2 Your Honor should not allow this Daubert do over. It  
3 would be just fundamentally unfair, and I think it  
4 would be inconsistent with all of the case law. And I  
5 think, though, having had a full and fair opportunity  
6 Your Honor should not allow plaintiffs to dismiss  
7 without prejudice, there should be with prejudice  
8 dismissals, and those should come at the summary  
9 judgment stage.

10           And the plaintiffs should do what  
11 they've essentially signaled to Your Honor that  
12 they're going to do anyway, which is to take their  
13 reconsideration motion, turn it into an appeal to the  
14 Third Circuit, and file that appeal. Thank you, Your  
15 Honor.

16           THE COURT: Thank you, Mr. Cheffo.  
17           Mr. Fishbein, would you like a brief  
18 rebuttal?

19           MR. FISHBEIN: Yes, Your Honor.

20           Mr. Cheffo and I obviously disagree  
21 about quite a bit here, and I'm not going to rehash  
22 points that I made during my opening.

23           I want to just address three or four  
24 specific points. The first is, Mr. Cheffo said  
25 there's no case that is allowed what we're asking for

1 here. And, in fact, the Third Circuit has allowed it  
2 in terms of both of the issues.

3 In the Z.F. Merator (ph) case, was a  
4 case where the district court excluded a damages  
5 competition by an expert on Daubert grounds, and then  
6 would not permit amendment of the case, and the Third  
7 Circuit held that was an abuse of discretion.

8 In the Sommers (ph) case, the Tenth  
9 Circuit said the district court abused its discretion  
10 finding the plaintiff failed to show good cause to  
11 modify a scheduling order, to allow plaintiff to add  
12 an expert after the original expert was disqualified  
13 under Daubert.

14 In the Rembrent (ph) case, the Tenth  
15 Circuit again ruled it was an abuse of discretion to  
16 deny plaintiffs the ability to offer a new expert,  
17 when their expert had been foreclosed because of  
18 Daubert considerations.

19 And then there's a variety of district  
20 court cases that have essentially permitted plaintiffs  
21 to designate new experts out of time after their  
22 original experts were foreclosed under Daubert.

23 We cited in our brief, the Boyd (ph)  
24 case in Mississippi, the Kruger (ph) case for the  
25 District of Ohio, and the Porter McClott (ph) case in

1 the District of Colorado. So --

2 THE COURT: Plus, you will agree that  
3 in Merator, liability was not the issue any longer.

4 MR. FISHBEIN: Correct.

5 THE COURT: It was damages, and the  
6 Court in issuing a ruling on injunctive relief didn't  
7 have any valid damages expert testimony to rely on.  
8 It's not quite the same.

9 MR. FISHBEIN: No, not quite the same,  
10 but close enough, and that's accompanied I think with  
11 some very clear instructions by the Third Circuit  
12 repeatedly that, you know, absent bad faith, the  
13 inclination of the Court is to permit the evidence,  
14 rather than to exclude it, because of the disruption  
15 in the trial scheduling, absent bad faith, or absent  
16 repeated failures to cure.

17 The Weis-Graham case has also been  
18 cited by Mr. Cheffo repeatedly, that's a Supreme Court  
19 case, it's inapposite here. It's got some -- a little  
20 snippet of language in there that's helpful to  
21 defendants, but in that case, the Supreme Court was  
22 confronted with a situation in which on appeal, the  
23 Eighth Circuit had decided that the district court has  
24 excluded case dispositive testimony.

25 And the issue on appeal was whether or

1 not the Eighth Circuit was correct in simply reversing  
2 or whether it should have reversed and remanded for a  
3 new trial, or whether it should have reversed and  
4 remanded for the district court, to determine whether  
5 there should be a new trial.

6           And what the Supreme Court held in that  
7 case is that under Federal Rule of Civil Procedure 50,  
8 it was up to the informed discretion of the Court of  
9 Appeals to decide which remedy to choose. And in the  
10 context of ruling of that, they said, it is -- this is  
11 what Mr. Cheffo quotes, but there's more, "It is  
12 implausible to suggest post Daubert that parties will  
13 initially present less than their best expert  
14 evidence, in the expectation of a second chance should  
15 the first try fail."

16           And then it went on, "We, therefore,  
17 find unconvincing Weis-Graham's fears that allowing  
18 courts of appeal to direct the entry of judgment for  
19 defense will punish plaintiffs who could have shored  
20 up their cases by other means, had they known their  
21 expert testimony would be found inadmissible.

22           "In this case, for example, although  
23 Weis-Graham was on notice every step of the way, that  
24 Marley (ph) was challenging his experts, he made no  
25 attempt to add or substitute other evidence."

1           So the courts that have looked at Weis-  
2     Graham in the setting we're talking about, which is  
3     not a post-verdict decision by an appellate court as  
4     to what to do with an evidence that was admitted  
5     improperly, but whether to allow, as a matter of  
6     pretrial procedure and control of discovery, whether  
7     to allow somebody to offer a new expert out of time,  
8     the cases that have looked at that have said, for  
9     example, the Porter McClaud (ph) case said, "The  
10    Supreme Court's language in Weis-Graham does not  
11    supplant the four part analysis applicable in this  
12    circuit for determining whether to allow the amendment  
13    of a pretrial order."

14           Same result in the Yeargan (ph) case,  
15    2011 West Law 5553717 at \*2, same thing in the  
16    District of Minnesota, the Great Lakes KS case (ph),  
17    all of them have said, this -- you know, the issue of  
18    whether or not to permit an expert who's to be  
19    designated out of time is governed by Rule 16, not  
20    Rule 50, and Weis-Graham doesn't apply.

21           Another court also -- well, not another  
22    court, but the Great Lakes court pointed out that in  
23    Weis-Graham, the Court was actually contemplated that  
24    people before they get to the court of appeals will be  
25    given the opportunity to proffer better testimony,

1 admissible testimony before the case gets to verdict.

2           So you could say, well, you know, Weis-  
3 Graham's got something for everybody in it. It's got  
4 that little snippet Mr. Cheffo cited, and it's also  
5 got that snippet about allowing people the opportunity  
6 before the verdict comes in, to offer admissible  
7 testimony and to correct errors.

8           So I think Weis-Graham actually cuts  
9 more our way than it does the defense.

10           The -- another point I'd like to make  
11 was in the citation of TMI, this idea that plaintiffs  
12 should have -- plaintiffs should not be given a never  
13 ending opportunity to offer expert testimony. And in  
14 TMI, the case was 11 years old, the case had been  
15 adjourned more than a dozen, at least a half a dozen  
16 times, maybe a dozen times, to permit amended expert  
17 reports, new expert reports. The trial had been put  
18 off a number of times, and that's certainly not what  
19 we're dealing with here.

20           In the diet drug case, if I recall  
21 correctly, Judge Bartle (ph) was dealing with some --  
22 with a plaintiff who said I'm not going to offer  
23 certain expert testimony, and then it turned out that  
24 they did offer expert testimony, then it turned out  
25 that that expert when he testified said I never agreed



1 to offer that testimony, that testimony's wrong. And  
2 then the plaintiff who said he wasn't going to offer  
3 anybody else, tried to offer somebody else, and you  
4 know, enough is enough. But that's not what the Court  
5 is dealing with here.

6 The Court is dealing here with a  
7 relatively clean issue about whether it should permit  
8 in the absence of bad faith, in the absence of  
9 untimely designations and the absence of all of the  
10 kind of nonsense that you saw in those two cases, this  
11 evidence should come in.

12 And I guess the final point I wanted to  
13 make is that Mr. Cheffo's characterization of our  
14 motion for reconsideration I think is just wrong. We  
15 don't -- this is not a broad attack on Your Honor's  
16 Daubert ruling.

17 As I explained during my opening  
18 remarks, the Court had a number of bases for excluding  
19 Dr. Brerard's testimony, cherry picking was one, using  
20 information from other SSRIs was another. Using  
21 information on SSRIs as a class was another.

22 Our motion does not deal with any of  
23 those. Our motion deals with the correct legal  
24 standard for assessing whether or not, for assessing  
25 what an expert has to prove. And as a legal matter we

1 say, that that ignored the decision of the Third  
2 Circuit in the Deluca case, and ignored the decision  
3 in the Supreme Court in the Matrix case, and I think  
4 we could be criticized, Your Honor, knowing or  
5 believing that you made a mistake in the law, and just  
6 sitting back, going through this, and then popping up  
7 some place and saying, you know what, Judge, we also  
8 have this point to make.

9 I think it was -- would've been  
10 irresponsible for us to do that. It is a genuine  
11 belief. It doesn't necessarily mean we're right, it  
12 doesn't necessarily mean Mr. Cheffo's right, but I do  
13 think that it's important to have that out on the  
14 table for the Court's consideration as part and  
15 parcel.

16 THE COURT: Well, it is always  
17 important to get clarity, isn't it? And with a motion  
18 for reconsideration, page 2 actually was about the  
19 quote referencing Wade-Gro (ph), but you may have  
20 taken it out of context, because the legal rulings are  
21 stated in the order and the conclusions, and it may be  
22 a misapprehension of what she did wrong, as opposed to  
23 what the standard is.

24 When you decide something because of  
25 unreliable methodology, as its presented in testimony

1 and in the opinion that she had written, it doesn't  
2 mean that it's an opportunity to rule on the correct  
3 standard. And we didn't take that opportunity and  
4 didn't mean to anyway.

5 MR. FISHBEIN: So, Your Honor, I  
6 understand what you're saying, and maybe it's just a  
7 question of us --

8 THE COURT: Priority.

9 MR. FISHBEIN: -- in this proceeding --

10 THE COURT: It's a question of  
11 priority.

12 MR. FISHBEIN: -- and if that's the  
13 case, then I'm particularly glad we filed the motion.

14 THE COURT: Well, I am always glad to  
15 have an opportunity to reconsider, sometimes there's  
16 actually something there. But I'm going to wait until  
17 the briefing is in, and then see if there isn't  
18 something that needs to be clarified, because that  
19 would only be fair. But not in any effort to, and I  
20 don't blame the defendants for suspecting this, to set  
21 up the next move.

22 MR. FISHBEIN: Well, Your Honor --

23 THE COURT: The next move being a new  
24 expert or somehow the testimony of the presently  
25 proffered expert, because it's not about, it's not

1 about that. My ruling was on methodology or the lack  
2 thereof.

3 MR. FISHBEIN: I understand that, Your  
4 Honor, and I have to say as somebody that participated  
5 in the decision to file this, we were truly just  
6 trying to get clarity on this, because we thought if  
7 this was a legal standard the Court was relying on, it  
8 would appear to be right, but if it's something else,  
9 then I guess we're happy to hear that. But there was  
10 no -- I thought it would be --

11 THE COURT: We'll all have a chance to  
12 clarify that.

13 MR. FISHBEIN: It would be -- I  
14 wouldn't want to be up here arguing for the  
15 admissibility of a new expert, knowing in the back of  
16 my mind that I had questions about what your ruling  
17 was from a legal standpoint and not putting that out  
18 on the table. And I think that that -- the defense  
19 deserves that, and so do you, Your Honor.

20 THE COURT: Well, I think I do deserve  
21 that, and I thank you for bringing it to my attention,  
22 but I'm not certain that it needs to be clarified --

23 MR. FISHBEIN: Okay.

24 THE COURT: -- but I'll look at it when  
25 the briefings done.

1 Speaking of which -- thank you, Mr.  
2 Fishbein.

3 MR. FISHBEIN: Thank you, Your Honor.

4 THE COURT: How soon can I have  
5 responses to the motion to reconsider? I know you  
6 have time, but --

7 MS. NAST: We have dates set of --

8 THE COURT: I know you have dates set  
9 from my ruling.

10 MS. NAST: You want us to do it faster?

11 THE COURT: I'm talking about modifying  
12 paragraph 5 of my pretrial order, No. 76.

13 MS. NAST: 76. Okay.

14 MR. CHEFFO: Our response, Your Honor,  
15 so I would say this, I would say two weeks, and I  
16 think that we dovetailed the -- you know, thereabouts,  
17 if there's (indiscernible) holiday or something, but I  
18 think the opposition to the motion to reconsider and  
19 the summary judgment would tether in terms of dates,  
20 so I would suggest that we file our opposition to the  
21 reconsideration in two weeks, the plaintiffs file  
22 their opposition to summary judgment in two weeks, and  
23 then -- because they are -- you know, under the way  
24 it's scheduled right now, we have -- they're not  
25 considering one or the other, and I think it is

1 important because as we've heard today, that at least  
2 Your Honor has the benefit of valuing all of these  
3 issues at the same time.

4 THE COURT: They have to be decided  
5 together.

6 MS. NAST: The only thing that we need  
7 clarified and the two weeks/two weeks is fine, it's  
8 just a few days less on the (indiscernible) and that's  
9 fine.

10 THE COURT: Okay.

11 MS. NAST: But the paragraph 5 and  
12 paragraph 6 are both triggered off the -- the parties  
13 shall file opposition memorandum of law to the motion  
14 for summary judgment and for partial reconsideration  
15 December 18, 2014, or 15 days after the Court rules.

16 THE COURT: And that's the part I wish  
17 to --

18 MS. NAST: You want to eliminate.

19 THE COURT: -- modify, yes. And if  
20 that is -- unless there's a strenuous objection, I  
21 really do think we need to have a full comprehensive  
22 definitive ruling on all of these matters.

23 MS. NAST: May we have a few minutes to  
24 just discuss that a moment, Your Honor?

25 THE COURT: Yes.

1 MS. NAST: Five minutes.

2 THE COURT: Yes. And if this record is  
3 closed, did you wish to have surrebuttal argument?

4 MR. CHEFFO: I mean, really, just the  
5 only one, I would just say is in the Merator case, you  
6 know, I think I would stand on our briefs on all the  
7 other cases. I would just highlight (indiscernible)  
8 one of these is that the Third Circuit characterized  
9 that case as a procedural morass, it was a bifurcated  
10 issue, it was an anti-trust case, which the Court  
11 talked about having some public policy issues, it  
12 would leave, you know, proven wrong because of  
13 reliability, but probably the reason why I even wanted  
14 to spend 30 seconds on this, because what happened  
15 there, right, was you had the same expert using the  
16 same record, and it sounds like Your Honor read that  
17 case closely, and using the same data. The only issue  
18 was there was some data point in the calculation that  
19 the Court determined, as I understood it, was not  
20 appropriate.

21 So the party, the plaintiff in that  
22 case said, well, we can redo this math, it's kind of  
23 just a calculation, we'll take that one out, and it's  
24 just a calculation -- it's a mathematical, you know --

25 THE COURT: Believe me, I have done

1 that in construction cases after I've entered my  
2 rulings --

3 MR. CHEFFO: Sure.

4 THE COURT: -- and while that has a way  
5 of not clarifying things for many, many more months  
6 it's still the same expert, recalculating based on my  
7 rulings.

8 MR. CHEFFO: Exactly. And to the  
9 extent that the plaintiffs have spent, you know, tons  
10 of their time and paper on this issue, you know, we  
11 would just suggest that it's really nothing to do with  
12 the type of situation that Your Honor has here.

13 THE COURT: Okay.

14 MR. CHEFFO: Thank you, Your Honor.

15 THE COURT: Thank you. That's the end  
16 of the argument. Thank you very much, and why don't  
17 we adjourn and still remain available for discussions  
18 about the briefing date. Okay. I appreciate that.  
19 Thank you so much.

20 (Proceedings concluded at 3:57 PM)

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

I, Sheila G. Orms, the court approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



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