UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	2:12-md-02342-CMR
	)	
ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS	)	November 18, 2014
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. RUFE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

Plaintiff's Steering Committee Co-Lead Counsel:	DIANNE NAST, ESQ. Rodanast P.C. 801 Estelle Drive Lancaster, PA 17601
	MICHAEL FISHBEIN, ESQ. Levin Fishbein Sedran & Berman 510 Walnut St. Suite 500 Pennsylvania, PA 19106
Defendants' Lead and Liaison Counsel:	MARK CHEFFO, ESQ. Skadden Arps Slate Meagher & Flom LLP Four Times Square New York, NY 10036
ESR Operator:	ERICA PRATT

Veritext National Court Reporting Company
Mid-Atlantic Region
1801 Market Street - Suite 1800
Philadelphia, PA 19103
1-888-777-6690

P R O C E E D I N G S

(Call to Court)

THE COURT: Good afternoon, everyone.

ALL: Good afternoon, Your Honor.

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

Are you ready to proceed?

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

THE COURT: Very well, thank you.

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

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

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

follow up on that.

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

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

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

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

THE COURT: Good afternoon.

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

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

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

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

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

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

THE COURT: Because?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: No.

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

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

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

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

plaintiffs.

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

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

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

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

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

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

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

THE COURT: And it always has been.

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

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

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

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

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

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

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

THE COURT: But then what happens to finality?

MR. FISHBEIN: Finality is --

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

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

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

So if we were talking about, you know -

-

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

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

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

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

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

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

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

MR. FISHBEIN: Okay.

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

MR. FISHBEIN: I understand that, Your Honor.

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

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

MR. FISHBEIN: Absolutely, Your Honor, granted.

THE COURT: Okay.

MR. FISHBEIN: So if --

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

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

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

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

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

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

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

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

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

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

initial discovery pool cases.

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

THE COURT: No, I am through interrupting you.

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

THE COURT: Back to your plan.

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

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

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

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

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

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

Of course, the Court is aware that it's

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

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

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

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

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

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

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

MR. FISHBEIN: Okay.

THE COURT: That they have claimed.

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

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

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

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

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

MR. FISHBEIN: She did. And --

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

MR. FISHBEIN: Correct.

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

that, and you go with your strongest.

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

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

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

MR. FISHBEIN: With Dr. Brerard --

THE COURT: -- presentations.

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

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

MR. FISHBEIN: I agree.

THE COURT: -- pretty obvious.

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

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

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

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

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

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

And however far the reach of your

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

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

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

Brerard's report.

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

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

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

And if there's not, and if you decide

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

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

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

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

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

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

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

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

THE COURT: -- what happened here?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and make a decision.

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

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

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

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

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

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

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

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

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

looking at --

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

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

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

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

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

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

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

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

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

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

I am so --

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

MR. FISHBEIN: I would think there's no

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

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

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

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

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

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

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

THE COURT: And only moving forward with cardiac cases?

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

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

MR. FISHBEIN: Absolutely, Your Honor.

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

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

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

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

MR. FISHBEIN: Can I distinguish it?

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

MR. FISHBEIN: His decision was pre-Daubert.

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

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

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

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

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

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

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

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

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

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

So it seems to me that the argument in favor of dismissing those claims without prejudice to refiling later on is really unsellable on the precedent.

THE COURT: Anything else?

MR. FISHBEIN: Well, I had a whole

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

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

MR. FISHBEIN: The motion for Dr. Jewell?

THE COURT: And/or.

MR. FISHBEIN: And/or the --

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

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

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

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

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

MR. FISHBEIN: A Daubert proceeding.

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

MR. FISHBEIN: I agree with that.

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

MR. FISHBEIN: I agree.

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

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

THE COURT: Nothing much in litigation

is over and done as easily as that.

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

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

MR. FISHBEIN: Thank you, Your Honor.

THE COURT: Thank you, Mr. Fishbein.

Mr. Cheffo.

MR. CHEFFO: May I proceed, Your Honor?

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

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

Good afternoon now, Your Honor.

THE COURT: Good afternoon.

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

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

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

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

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

THE COURT: Right.

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

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

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

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

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

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

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

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

THE COURT: I have it in the hard copy.

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

But one of the probably most important

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

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

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

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

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

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

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

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

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

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

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

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

Veckaman as an expert.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

courts.

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

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

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

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

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

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

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

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

So I'm not going to cover all the

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

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

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

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

And in TMI, the Third Circuit rejected

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

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

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

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

store if the Court were to go down this path.

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

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

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

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

that binds both parties equally.

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

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

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

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

MR. CHEFFO: Yes.

THE COURT: -- what is there in the MDL

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

MR. CHEFFO: Not many.

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

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

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

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

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

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

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

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

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

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

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

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

But I think that to the extent that

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

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

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

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

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

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

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

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

MR. CHEFFO: Okay.

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

have Dr. Jewell come in?

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

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

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

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

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

THE COURT: No question --

MR. CHEFFO: I'm sorry?

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

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

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

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

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

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

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

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

I mean, the next sea of litigation, you

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Row (ph).

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: No, I'm fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

You know, I think the cases that the

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

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

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

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

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

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

THE COURT: Thank you, Mr. Cheffo.

Mr. Fishbein, would you like a brief rebuttal?

MR. FISHBEIN: Yes, Your Honor.

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

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

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

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

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

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

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

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

the District of Colorado. So --

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

MR. FISHBEIN: Correct.

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

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

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

And the issue on appeal was whether or

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

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

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

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

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

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

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

admissible testimony before the case gets to verdict.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Priority.

MR. FISHBEIN: -- in this proceeding --

THE COURT: It's a question of priority.

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

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

MR. FISHBEIN: Well, Your Honor --

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

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

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

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

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

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

MR. FISHBEIN: Okay.

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

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

MR. FISHBEIN: Thank you, Your Honor.

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

MS. NAST: We have dates set of --

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

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

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

MS. NAST: 76. Okay.

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

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

THE COURT: They have to be decided together.

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

THE COURT: Okay.

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

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

MS. NAST: You want to eliminate.

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

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

THE COURT: Yes.

MS. NAST: Five minutes.

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

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

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

THE COURT: Believe me, I have done

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

MR. CHEFFO: Sure.

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

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

THE COURT: Okay.

MR. CHEFFO: Thank you, Your Honor.

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

(Proceedings concluded at 3:57 PM)

* * * * *

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.

Signature of Approved Transcriber DATE