IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

NOVARTIS PHARMACEUTICALS CORPORATION, NOVARTIS AG, NOVARTIS PHARMA AG, NOVARTIS INTERNATIONAL PHARMACEUTICALS LTD, and LTS LOHMANN THERAPIE-SYSTEME AG, Plaintiffs,	:	CIVIL ACTION
vs.	:	
PAR PHARMACEUTICAL, INC., Defendant.	:	NO. 11-1077-RGA CONSOLIDATED
NOVARTIS PHARMACEUTICALS CORPORATION, NOVARTIS AG, NOVARTIS PHARMA AG, NOVARTIS INTERNATIONAL PHARMACEUTICALS LTD, and LTS LOHMANN THERAPIE-SYSTEME AG, Plaintiffs	:	CIVIL ACTION
vs.	:	
WATSON LABORATORIES, INC., WATSON PHARMA, INC., and WATSON PHARMACEUTICALS, INC., Defendants.	:	NO. 11-1112-RGA

Wilmington, Delaware
Monday, August 19
2:05 o'clock, p.m.

- - -

BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

Valerie J. Gunning
Official Court Reporter

APPEARANCES:

McCARTER & ENGLISH, LLP
BY: DANIEL M. SILVER, ESQ.

-and-

FITZPATRICK, CELLA, HARPER & SCINTO
BY: NICHOLAS N. KALLAS, ESQ.,
FILKO PRUGO, ESQ.,
CHRISTOPHER LOH, ESQ.,
CHARLOTTE JACOBSEN, ESQ.,
DANIEL J. MINION, ESQ.
(New York, New York)

Counsel for Plaintiffs
Novartis Pharmaceuticals Corporation, Novartis AG, Novartis Pharma AG, Novartis International Pharmaceuticals Ltd, and LTS Lohmann Therapie-Systeme AG

RICHARDS, LAYTON & FINGER, P.A.
BY: STEVEN J. FINEMAN, ESQ.

-and-

LATHAM & WATKINS LLP
BY: DANIEL G. BROWN, ESQ.
(New York, New York)

Counsel for Defendants
Par Pharmaceutical, Inc.

APPEARANCES (Continued):

YOUNG CONAWAY STARGATT & TAYLOR LLP
BY: MELANIE K. SHARP, ESQ.

-and-

ROTHWELL, FIGG, ERNST & MANBECK, P.C.
BY: E. ANTHONY FIGG, ESQ. and
C. NICHOLE, GIFFORD, ESQ.
(Washington, D.C.)

Counsel for Defendants
Watson Laboratories, Inc.,
Watson Pharma, Inc. and Actavis Inc.
(f/k/a Watson Pharmaceuticals, Inc.)

- - -

P R O C E E D I N G S

(Proceedings commenced in the courtroom, beginning at 2:04 p.m.)

THE COURT: Good afternoon. Please be seated. How is everybody today?

(Counsel respond, "Well, your Honor.")

THE COURT: All right. Well, that's good.

All right. So this is the pretrial conference -- hi, Mr. Silver -- I guess in Novartis Pharmaceuticals versus Par and Watson, which I guess is mostly filed under Civil Action No. 11-1077.

And, Mr. Silver, I see Mr. Prugo, but you ought to introduce me to the rest of your group.

MR. SILVER: Yes. Thank you, your Honor. We might have some new faces today and I'm sure they'll be joining us in the future.

So we have Mr. Prugo, Nicholas Kallas, Charlotte Jacobsen, Christopher Loh and

Daniel Minion, all from Fitzpatrick Cella.
Thank you.
THE COURT: Where are you all located?
MR. PRUGO: New York City.
THE COURT: New York City. Okay. Welcome.
All right. Ms. Sharp? You've got Mr. Figg, who I keep running into.
MS. SHARP: I do, your Honor. Melanie Sharp from Young Conaway on behalf of Watson and Actavis. In addition to Mr. Figg, we have Nikki Gifford, also from the Rothwell Figg firm.
THE COURT: All right.
MS. SHARP: I do have a preliminary matter I want to put --
THE COURT: All right. You guys are from D.C.; right?
MR. FIGG: Correct, your Honor.
THE COURT: Go ahead, Ms. Sharp.
MS. SHARP: Counsel for plaintiffs and defendants have agreed that there are certain issues that may come up today as to

which confidentiality would have to be maintained under the protective order. Specifically, issues relating to composition.

There are trade secret issues that are covered under the protective order and, again, they may or may not come up. We're not asking at this point that the Court seal the courtroom, but we don't anticipate a crowd for the pretrial order hearing.

The parties are going to continue to explore this issue to try to determine if we can agree on a way to handle it at trial and then present it to your Honor to find if it would be acceptable to your Honor.

THE COURT: All right. Thank you.

Mr. Fineman? I guess this is Mr. Brown, but I don't know if I've ever seen him before.

MR. FINEMAN: Your Honor, Steve Fineman of Richards, Layton & Finger, on behalf of Par Pharmaceutical.

Your Honor, it is my pleasure to introduce to the Court Daniel Brown of Latham & Watkins.

THE COURT: All right. And good afternoon. I assume, in fact, I have seen a lot of the other people besides Mr. Figg and Mr. Prugo, but they did most of the speaking. That's the reason why I recognize them.

So I've read the pretrial order and I've read the, or the proposed joint pretrial order, and I've read the -- I mean, and I've read the motions in limine. And let me just I guess get a couple things.

I assume, Mr. Prugo, you're the lead counsel at trial for Novartis?

MR. PRUGO: Yes, your Honor, along with my colleague, Mr. Nick Kallas.

THE COURT: All right. And Mr. Figg and Mr. Brown, you're the lead counsel for your respective clients?

MR. FIGG: That's correct, your Honor.

MR. BROWN: Yes, your Honor.

THE COURT: All right. So I was thinking maybe one way, are there various things that are in the pretrial order? We'll just go through. And when I read through, I more or

less thought I knew what I wanted to do about the various things that are in there with possibly one exception, so why don't we just go through and see.

First off, this is just a question that's raised. The 30-month end of the stay, is that roughly February of 2014?

MR. PRUGO: It's late March 2014.

THE COURT: Okay. And I see, and I have no objection to this, but that you decided you don't want to do any closing arguments; right?

MR. FIGG: We didn't see the need, your Honor, unless you would like to hear them.

THE COURT: Well, why don't we -- why doesn't someone remind me to address that around about the end of Tuesday of the trial.

Depending on how much time is being used on one thing or another, I have found it sometimes helpful to have a little bit of summing up while everything is fresh in my mind. On the other hand, if you're busy exhausting yourselves and using up all the time, you know, I'm perfectly happy -- I mean, there's obviously

going to be post-trial briefing and so let's just keep that as something an I have an open mind about, even though essentially I'm much more likely to have it if all of you tell me you want to have it. If there's kind of a split disagreement, well, then, you know, I understand maybe it's not necessary to have it.

So the first actual dispute in the pretrial order was page 6, which was whether or not the list of witnesses would include a good-faith estimate of how long each witness' testimony will be, which is the plaintiffs' proposal. And, you know, my view is these are the kinds of things, these are not controlled by rules. These are controlled by an agreement of the parties, and if parties don't all want to do that, I'm not going to make you do that.

It does strike me that when you are giving a list of witnesses and you are giving exhibits that go with them, the parties can probably make relatively informed guesses that are, you know, roughly the same. So I will go with defendants' proposal there.

On page 8, there's the very

interesting dispute about demonstrative exhibits. And what is I guess the -- what I took from this is that the defendants -- I took it that -- actually, what I took from it was that plaintiffs had a more creative automated litigation support person who could make little cartoons on the spot and that's what the argument was about. Maybe I misunderstood, but it struck me that I like the defendants' proposal slightly better because, as I understand it, basically, defendants are saying that if you are going to add anything to the exhibit other than the kinds of things that you make with the little red pens or that, you know, highlighting, that you do it in advance. And so that's what seemed to me to be the dispute here. So do I have that right?

MR. PRUGO: Actually, I am not sure that's correct.

THE COURT: All right. Well, tell me what the dispute is here.

MR. PRUGO: Sure. What we're proposing is any demonstrative that is made in advance be exchanged.

THE COURT: Okay.

MR. PRUGO: And if you --

THE COURT: I'm sorry.

MR. PRUGO: Sorry.

THE COURT: Is that disagreed?

MR. FIGG: That's not disagreed, your Honor.

THE COURT: Okay.

MR. FIGG: The question is: What is a demonstrative?

MR. PRUGO: And we say a demonstrative is anything that's modified.

THE COURT: Okay. And so that's the -- and so when you say "modified," is it you have a great big blowup that has, I don't know, language from the patent, then you highlight part of it in yellow? That's a demonstrative?

MR. PRUGO: Yes.

THE COURT: Okay.

MR. FINEMAN: Your Honor, I respectfully suggest that if you took five exhibits and you tried to cobble them together and made something out of it, that would be a demonstrative. Where I simply take a document

that's coming in as an exhibit in the same manner and I highlight it, that is not a demonstrative which needs to be shared in advance.

Your Honor was correct. It's an artificial distinction between that which the computer in-court person highlights versus having it prepared the night before with a highlighter. There's no distinction. Distinction without a difference, so those don't need to be exchanged.

MR. PRUGO: They're both demonstratives.

THE COURT: All right.

MR. PRUGO: If I highlight it in the courtroom or I highlight it in advance, it's still a demonstrative exhibit.

THE COURT: All right.

MR. PRUGO: Sorry.

THE COURT: So here's what I think. If you've got some exhibit and it's coming in and all you're doing is highlighting it in yellow or making little balloons that have a few of the words in it or something else that

basically is not a whole lot different than just showing me the exhibit, you don't have to exchange that in advance.

Anything that involves putting two exhibits on the same page or that involves changing words, adding photographs, I don't know what, that's a demonstrative, exchange that in advance.

I'm not actually sure how that fits in with the two proposals, but does that work in terms of understanding?

MR. FIGG: It works for us.

MR. FINEMAN: It works for us, your Honor.

THE COURT: Okay. Thanks.

All right. So then the next thing was paragraph 36 on page 9, where the plaintiff said -- well, there are actually two -- there's a question as to whether to be admitted evidence, exhibits used for cross-examination or impeachment must be identified in advance. And I was trying to think, what kind of exhibit would be used for impeachment and moved into evidence?

MR. PRUGO: One possibility is a reference from a periodical, for instance.

THE COURT: But you mean written by the same person who is testifying?

MR. PRUGO: No. It could be written by somebody else, a third party.

THE COURT: See, I wouldn't regard that as impeachment. That's, you know, different evidence to prove the contrary. So if you are going to do that, you've got to identify that in advance or I guess by 5:30 the day before.

MR. PRUGO: That's what we would like and that's what we proposed, your Honor.

THE COURT: All right. So to me, impeachment is like a prior, the deposition of a witness. You know, if you are going to cross-examine them about it. Typically, those are -- I mean, they're impeachment, so they are not actually moved into evidence. But it strikes me that if you have references or whatever else that might be used during cross-examination, if you are actually moving them into evidence, it strikes me they really

should only be coming in if they have some substantive value. In that case, they ought to be identified in advance.

So I guess I'm going with the plaintiffs' proposal. Okay?

MR. FIGG: Yes. I think I understand your ruling, your Honor. We have some issues in this case about testing that was done.

Testing has been done on both sides, and so there may be a document that would be used to impeach a witness' testimony that the testing was appropriate or was appropriately done. And that could be, as Mr. Prugo said, it could be in the form of a journal article: Did you think about this when you --

THE COURT: If you are going to do something like that, then it should be identified in advance.

MR. FIGG: Okay. I understand. Thank you.

THE COURT: So basically I think I'm going with the plaintiffs' proposal there.

So did I get from paragraphs 37

and 38 in the attached exhibits that the plaintiff plans to call three witnesses live and the defendants plan to call six witnesses live?

MR. PRUGO: That's right. We have three witnesses, your Honor.

MR. FIGG: Watson plans to call two witnesses live.

THE COURT: And you have four, Mr. Brown?

MR. BROWN: We have four, correct.

THE COURT: Okay. All right. And I did see that there were some other people testifying by deposition or whatever, but nine live witnesses seems like a pretty manageable number.

Okay. So paragraph 41, which has to do with I guess the counter-designations of transcripts or videos of the witnesses who will be testifying by deposition. And if I understood the plaintiffs' proposal correctly, it is that you would play, or either party, but it's your proposal the proponent would play what they want to play followed by the other side playing what they want to play?

MR. PRUGO: That's correct, your Honor.

THE COURT: Okay. I don't want to do that. It would make a lot more sense to me, because usually the reason for counter-designations is supposedly context, and if you separate them out, I'm not going to get the context. So I would prefer to have them done, you know, basically played in the order in which they occurred in the deposition with the designations and the counter-designations, and you all can figure out between you for any particular deposition how much time goes to one side, how much time goes to the other side, and provide that information to the courtroom deputy. Okay?

MR. FIGG: Yes, that's fine.

MR. FINEMAN: Fine, your Honor.

THE COURT: Okay. So basically adopting the defendants' proposal there.

Okay. Paragraph 44. I take it the question here is whether or not an expert deposition testimony can be used at trial if the expert has not signed and filed it or signed it.

MR. PRUGO: I think that -- I don't actually believe that the defendants are objecting in that technical ground.

THE COURT: Well --

MR. PRUGO: There's a motion in limine in play and that's probably what this is addressed to.

MR. FINEMAN: Yes.

THE COURT: This has to do with calling the other side's experts.

MR. PRUGO: I imagine it does.

MR. FINEMAN: I think we can address this in a different context. I think we're all on the same page as to what this provision means. I think we can accede to plaintiffs.

THE COURT: Okay.

MR. FINEMAN: As long as we understand that other objections on other grounds --

THE COURT: Well, no. I saw the motion in limine of one side, I forget who, but one side, they want -- you want to use deposition excerpts. Somebody wants to use

deposition excerpts of the other side's experts.

MR. PRUGO: Right.

MR. FINEMAN: Correct.

THE COURT: And just to preview that, I'm going to say no, if they are actually showing up in court. But we can argue it later, but I just wanted to tell you the answer now.

MR. FINEMAN: Good time for me to sit down, your Honor.

THE COURT: Okay. All right. The order of proof. And this is the one where I actually had -- where I thought it might be helpful to just have people explain to me the relevant advantages and disadvantages from their point of view of doing this.

But I assume what this basically has to do with is infringement cases, and the plaintiff wants to do the infringement case against Watson, I guess. Yes, Watson first, and then the infringement case against Par. And so the thought that occurred to me was that literally, there would be quite a bit of redundancy here.

And so I was wondering -- and I

was trying to think, because I've some ANDA trials before, but I've never actually both, had two defendants both contesting infringement, so it has never actually come up for me before.

Mr. Prugo, I take it that's your idea. Why does this make sense?

MR. PRUGO: I think it will be easier for you to follow the testimony. We have two very distinct products with different components and different names. You are going to hear all sorts of chemical names, different adhesives, different names and different structures, and it will just be easier we think to present the evidence and for you to follow the evidence if we do it separate. That's really what it boils down to.

THE COURT: So as I recall of your three witnesses, one of them is the inventor and presumably that person is only being called kind of during the infringement case; right?

MR. PRUGO: Well, actually, it's one of the issues we wanted to address with your Honor. Some judges like the inventor called in the infringement case, others in the invalidity

part, phase of the trial. That would be our preference, if it's okay with you, in terms of the infringement case. It will be two experts, Dr. Davies and Dr. Klibanov.

THE COURT: Then I'm going to hear from Dr. Davies and Dr. Klibanov again on the validity part of the case?

MR. PRUGO: Correct.

THE COURT: So under this --

MR. PRUGO: Actually, only Dr. Klibanov.

THE COURT: But so the way you propose doing it is, and, you know, forget the order here, but Davies testifies, Klibanov testifies. They both get cross-examined. Watson calls anybody it's going to call. Then Davies testifies, Klibanov testifies, they both get cross-examined. Par calls whomever it is going to call. Then we move on to invalidity. And then I'm going to hear from Klibanov. Well, Klibanov a third time?

MR. PRUGO: That's correct, your Honor. Now, obviously, we don't want to be redundant. That does not make sense.

THE COURT: Well, how --

MR. PRUGO: Given that we're on the clock, we'll have to make sure we're not redundant. Again, there are very different products, so the analysis is different.

THE COURT: Well, so how would you -- and Dr. Davies, he did two different kinds of, or he did different testing on the different products? I mean, I guess he did.

MR. PRUGO: That's correct. And actually my colleague just reminded me that Dr. Klibanov doesn't come back for the Par infringement part of the case. So it will be Dr. Davies or Dr. Klibanov, Watson, and Dr. Davies for Par and the inventor and Dr. Klibanov on the invalidity part.

THE COURT: Actually, I'm going to hear from both of them under your thing twice?

MR. PRUGO: Correct.

THE COURT: All right. Go ahead, Mr. Fineman.

MR. FINEMAN: Your Honor, I'm going to pick up where I think you just left off. I think that's not correct. I think you

would hear from Dr. Davies three times.

THE COURT: Well, they say they're not calling him in the invalidity portion of the case.

MR. FINEMAN: Okay. Okay. Then only twice.

Your Honor, basic principles, I think that this is a single trial. Plaintiffs should put on their proofs and then they should rest their case and defendants should put on their rebuttal case, if plaintiffs have satisfied their burden of proof. That's basic principles. Neither defendant should have to put on their noninfringement case until plaintiffs have completed putting on their case-in-chief. That is the first basic principle.

THE COURT: Well, I mean, basically, though, what they are saying is, they've got two separate cases on infringement and so if they go bing, bing, bing, Watson, we're done, then I guess if Watson is going to say, you know, just as a matter of law, they didn't put on enough evidence, assuming that I

overrule that, then they put on their case.

How is that different than what you are saying is basic principles?

MR. FINEMAN: Well, it would be much more efficient, it would seem, and I'm sure that Mr. Brown and Mr. Figg and Ms. Gifford will correct me if I'm wrong, but although there are certainly differences between their proofs and the parties' products, I do believe Dr. Davies did some testing that overlaps between the two. And it certainly seems more efficient to have a witness on the stand once than twice. On the issue of infringement, no matter how you would separate it, it seems that is the more efficient use. We have confidence your Honor will be able to differentiate between the two cases.

THE COURT: I appreciate your saying that, but --

MR. FIGG: May I add one point, your Honor?

THE COURT: Sure. Go ahead.

MR. FIGG: I think I disagree a little bit with Mr. Prugo on the degree of overlap of issues.

One of the issues in this case will be whether the defendants' products are formulated in such a way that they would cause the drug to degrade at all, because if the drug doesn't degrade, then obviously there's nothing that is reducing that degradation.

The position they take against Watson could impact whether the Par product is formulated in such a WAY that it would do that. The position they take on Par could impact whether Watson's product does that. In other words, positions they take against one defendant could end up being inconsistent with positions they are taking against the other defendant.

THE COURT: Even though you would think as the finder of fact, I'd probably hold that against them, wouldn't you?

MR. FIGG: You might do that, but I think we also should be able to hear what the witness has said.

First of all, if the Court adopts this procedure, I think it should be up to the defendants as to which ones should be able to have to put on their defense to this first.

THE COURT: Well, that's a separate issue. We can talk about that.

MR. FIGG: I agree, that's a separate issue. But if that witness is on the witness stand talking about one defendant's product, the other defendant may very well like to cross-examine him on what he said when he was addressing the other party's product, and this separation that the plaintiffs are proposing would not allow that to happen.

THE COURT: Right. Mr. Prugo, do you have anything further to say?

MR. PRUGO: No, your Honor. I just think they're two very distinct products, two different cases. We should be putting them up sequentially and that makes the most sense for the witnesses, and we think in order to understand infringement proofs, it will make the most sense for you as well.

THE COURT: Does everyone agree this is essentially a discretionary sort of decision?

MR. PRUGO: Yes, your Honor.

MR. FIGG: Yes.

MR. BROWN: Yes, your Honor.

THE COURT: Okay. Mr. Fineman is grimacing.

MR. FINEMAN: Your Honor, I'm just thinking about, to answer your question, technically as to whether they need to finish putting on their case-in-chief.

THE COURT: Well, the way -- okay.

Mr. Prugo, couldn't you accomplish essentially the same thing by saying, call Dr. Davies, Klibanov, whichever one -- Davies, I guess you said. All right, Dr. Davies. What's your background, qualifications? Fine. All right. Do you have some opinions about Watson's infringement? Yes. Explain them. All right. Thank you.

Now, do you have some opinions about Par's infringement? Explain them. I mean, isn't that essentially what you are proposing to do, you're just proposing to do with cross-examination in between that, turning to Par?

MR. PRUGO: Almost. You also have to add their witnesses as well, of course. So

it would be Dr. Davies, Dr. Klibanov, for instance, and you would have the respective cross-examinations, close the case, so I think that takes care of that procedural issue that was just raised, and then they put on their case.

So what you get in one sequence, in one shot, is all the evidence on infringement with respect to one product, and then we move on to the next phase of the case. They really are two distinct products, two different cases that happen to be consolidated.

Go to the next case. Have Dr. Davies come up. Obviously, we wouldn't be repetitive. We're not going through his qualifications again, explaining the tests that he ran, you know, if he has already explained what those tests are. Go through the proofs, have them cross-examine Dr. Davies and then have them put on their noninfringement case, keeping in mind that --

THE COURT: Keeping in mind that?

MR. PRUGO: -- they'll have different noninfringement experts.

THE COURT: Right. Right. Right. Right.

MR. FIGG: Your Honor, essentially, what this would mean is that the party going first would not have any opportunity to address infringement positions taken with respect to the second defendant either with cross-examination or with their rebuttal testimony, and this was not the way it was done pretrial. They submitted expert reports. They addressed both parties' products in the expert reports. The defendants submitted counter expert's reports and responded to them. We took a single deposition of all of the experts. We didn't divide it up in the way that's being proposed. I just think this could be prejudicial.

In response to your question, I, frankly, don't know the answer, whether it's discretionary or not. If they present testimony in the second part of their infringement case, and if Watson is required to go first -- if they present testimony in the second part of their infringement case that's prejudicial to Watson

and Watson had no opportunity to either cross-examine their witnesses --

THE COURT: Well, you say prejudicial. I mean, presumably, if it's in the Par case, they can't use it against you.

MR. PRUGO: That's exactly right, your Honor.

MR. FIGG: Well, your Honor has heard it. And then we're going to have motions to strike things in their post-trial brief because they're relying on something they said in the Par case to support --

THE COURT: Well, I mean, again, I think that's something, that if I were to do what they want, yet there may be motions, but if they were citing the Par case for the Watson group, presumably, they would agree at least in theory, you should win.

MR. FIGG: Well, I am trying to think of why they are proposing this, your Honor, and I don't want to talk about motives. But I do --

THE COURT: Well, why not the motive they offered? It's difficult stuff. I'm

not a scientist. Maybe it will help me.

MR. FIGG: I agree the chemistry is going to use terms that will have to be explained, but they'll only have to be explained once if they present this testimony against both defendants in a consolidated way and we respond in a consolidated way.

THE COURT: Yes, Mr. Fineman?

MR. FINEMAN: Your Honor, I'm just going to suggest that, again, I think your Honor was getting there, which was, there really is no difference for them to just do it in a traditional way. In other words, I think your Honor had suggested earlier, they say expert X testifies, testifies, testifies. Okay. Now we're going to turn to the other defendants' product. There's just no reason to deviate from that standard of practice.

THE COURT: But you would agree that under that scenario, basically, all the evidence of the plaintiffs' case in the post-trial briefing, they can use it against both sides?

MR. FINEMAN: I need to think

about that, your Honor. There might be some evidentiary issues either way.

THE COURT: Well, I mean, I guess there could be hearsay or some other kind of thing. Maybe it's an admission by one but not by the other of something.

MR. FINEMAN: That's an example, your Honor. I just don't want to foreclose other things.

THE COURT: Right.

MR. FINEMAN: There are a lot of things I can't think about, your Honor.

THE COURT: All right. Well, it's an interesting suggestion, but, Mr. Prugo, I would like you to just call your witnesses in your infringement case once and put on your infringement case against both defendants at once and then they will have to pick as to -- I don't want them to mix and match their defenses, but they should -- and they've got different experts, so they should then put on their defense. One defendant's defense, the second defendant's defense. All right?

MR. PRUGO: Your Honor, could we

have one person cross-examining one witness at a time and limit it to that?

THE COURT: I don't think we can have -- I think that Dr. -- whoever has testified -- if it is, in fact, the case, as I think you have said it is, or actually, Mr. Fineman said, somebody said, Dr. Klibanov is only testifying against Watson, then presumably he'll only be cross-examined by one person. But if Dr. Davies is testifying against both, he's going to be cross-examined by two. And presumably they will coordinate so they don't have too much repetitive cross-examination, but I don't think you can expect Watson to cross-examine about whether or not Par infringes. Right?

MR. PRUGO: I understand, your Honor, but we're going to consolidate the testimony. I would think we would consolidate the cross-examination as well, but, of course, if you're inclined to allow them to do that...

THE COURT: Well, I mean, the defendants have agreed, Dr. Klibanov, if he's only testifying against Watson, he has only been

cross-examined by Mr. Figg presumably or somebody on Mr. Figg's side; right?

MR. BROWN: Your Honor, in his expert report, Dr. Klibanov did provide opinions in relation to the Par product.

THE COURT: But apparently he's not going to at trial.

Is he going to provide opinions against -- somebody said he wasn't.

MR. PRUGO: They had opinions initially relating to something called oxidation potentials.

THE COURT: That's now out.

MR. PRUGO: They withdrew their opinions in light of Dr. Klibanov and actually the deposition of their expert, so those are out, so I don't think Dr. Klibanov is coming in. He certainly won't be testifying about oxidation potentials.

MR. BROWN: If Dr. Klibanov doesn't testify at all relevant to the Par products, then we won't need to cross-examine him.

THE COURT: I think he has just

represented that he's not going to.

MR. PRUGO: Right. And I just want to be very careful with the word "relevant." I mean, you've heard the argument now that, you know, what one expert says may be important vis-a-vis another, the other side's product, and now where do we draw this relevancy line? That's my concern here, your Honor. That's why I'm asking for one attorney per expert witness.

MR. FINEMAN: Your Honor, I don't think it's fair to have either Par's lead counsel or Watson's lead counsel have to argue and cross-examine the witness for the noninfringement of another company's product.

THE COURT: Right. Well, that's only a problem for you because I think -- this is what I'm inclined to say. Mr. Prugo is all but representing that nothing Dr. Klibanov is going to say is going to be used against Par. If, in fact, that's the representation, then I'm not going to let Par cross-examine Dr. Klibanov. And if later on in the briefing, you know, some associate slips something by Mr. Prugo using Dr.

Klibanov's testimony against, you know, Par, I will expect you to respond appropriately.

MR. PRUGO: That sounds fair, your Honor.

MR. BROWN: That sounds fair.

MR. FIGG: Yes. I think that sort of fits into the general rule that cross should be limited to direct, but with respect to Dr. Davies, I just want to make sure --

THE COURT: Dr. Davies, you can both cross-examine.

MR. FIGG: Okay. Thank you.

THE COURT: And so that also does bring up the topic, which maybe doesn't make so much difference under the circumstances. Is there any particular reason, other than to have order, as to why plaintiffs wanted Watson to go first?

MR. PRUGO: No, your Honor.

THE COURT: All right. So then why don't we do this. In terms of the openings and the cross-examination of Dr. Davies, it ought to be consistent, but I will let Watson and Par figure out in the next two days who is

going to go first and who is going to go second and tell the plaintiffs, because they should know who is going first and who is going second.

MR. FIGG: That's fine with us, your Honor.

THE COURT: Is that something you know right now or do you need to discuss it?

MR. FIGG: Well, it might be useful, if your Honor understood. Dr. Davies, with respect to Watson, all he did was tested the product and presented his test results, and I presume that's all he's going to do on the witness stand here. He didn't offer --

THE COURT: Wait. You're telling me too much information.

MR. FIGG: Well, he did not offer any opinions about the Watson product. He simply did the testing and presented his test results.

THE COURT: Okay.

MR. FIGG: With respect to Par, he actually offered opinions about why he believes --

THE COURT: Well, that's nice, but

why don't you just figure out one side or the other goes first.

MR. FIGG: We can do that.

THE COURT: Okay.

MR. FIGG: We have not done it, but we will.

MR. PRUGO: Do we have a time for Wednesday?

THE COURT: Wednesday.

MR. PRUGO: What time?

THE COURT: How about 5:00 p.m.?

MR. PRUGO: That sounds fine. All this discussion, all this back and forth about who did what and when and who testified about what, that's part of the reason we also wanted to keep the two cases separate. We think you avoid all these debates and all these issues, just put up the cases in sequence. I'm just throwing it up there.

THE COURT: Okay. No harm in trying.

All right. So does that resolve the order of proof issue?

MR. FIGG: Yes your Honor.

MR. PRUGO: Yes, your Honor.

THE COURT: All right. Do defendants have -- do you have experts who are testifying on the same thing? In other words, you've got your noninfringement experts. I understand they're separate.

On the invalidity side, do you -- you know, you've got one expert, I guess, and they've got at least two, I guess. Are they -- not harmonious, but are they addressing different issues?

MR. FIGG: Yes. The defendants have their separate experts on the infringement issue.

THE COURT: Right.

MR. FIGG: And a common expert on invalidity.

THE COURT: Okay. All right. Good. So that means on invalidity, one attorney will be doing the questioning for the defendants; right?

MR. FIGG: Yes, I think that's right.

MR. BROWN: Well, we have more

than one expert that addresses the invalidity issues, but one attorney.

THE COURT: Well, whatever -- Mr. Figg is frowning.

MR. FIGG: I'm just trying to understand. Go ahead.

MR. PRUGO: We'd appreciate clarity as well who the other, the experts are.

MR. FIGG: Oh.

MR. BROWN: Our expert has offered some 112 invalidity positions in the reports.

MR. FIGG: Yes.

THE COURT: Okay. So basically I mean if you have a 112 expert and there's also a 103 expert or 102 expert, or however different experts you have, as long as I don't have two defense experts both saying 112 or 103, there's only one obviousness expert?

MR. BROWN: Correct.

THE COURT: Okay.

MR. BROWN: And one attorney. If Mr. Figg is doing the direct, it will only be Mr. Figg.

THE COURT: Okay. Good. All

right.

So do I have it -- I guess I have one other question, which is, it wasn't clear to me. Par is only supposedly infringing one patent. Watson supposedly is infringing both patents. I couldn't tell a hundred percent.

Is Watson basically stipulating that under the claim construction, it infringes one of the patents and arguing about the other, or what?

MR. FIGG: Your Honor, this brings up a question about claim construction. The claim construction that your Honor adopted for the term antioxidant is the claim construction that plaintiffs presented at the very beginning of this case and when we exchanged terms. And our understanding at that time was derived only from the expert reports that were exchanged. That's the only exchange the parties had. And the plaintiffs' position at that early stage more or less coincided with our position and we didn't really think there was much of a claim construction issue on that.

THE COURT: But, nevertheless, it

got ponied up.

MR. FIGG: Now there is a claim construction, and our understanding of the Court's claim construction is that what we've been calling the broad composition claims, like claim 1 of each of the patents, requires only that something nominally an antioxidant, something called an antioxidant is present in the product, and there is no requirement for a showing that that antioxidant is reducing oxidative degradation of the drug rivastigmine or anything else in that composition. That all that is required is a showing that it's present, and it's present in the amounts that are required by the claim.

THE COURT: Right, because there are some claims it needs to be present and other claims it needs to do something?

MR. FIGG: That's right. And if we have correctly understood your Honor's construction, and we think that's the understanding that the plaintiffs are operating under, then we don't have a basis for saying there's no infringement of those broad

composition claims. On the other hand, the construction that was actually adopted was a substance that reduces oxidative degradation, which sort of implies that there has to be a showing that it is reducing oxidative degradation.

If there is a requirement that there be a showing that there actually is a reduction of oxidative degradation, then we would not agree. We would contest infringement.

THE COURT: All right. And it's a little bit hazy in my mind right now, but isn't what I said something like, you've got some claims where it expressly says it has got to reduce oxidative degradation and there are other claims where it just says an antioxidant? And, you know, one with many principles is, you shouldn't construe different terms to mean the same thing.

MR. FIGG: Well, I don't want to reargue claim construction. There are two sets of claims and the way we believe we understand your Honor's construction is in your opinion you said it would be improper to read into this term

a requirement for any particular amount or effect. And so that's how we have construed your Honor's construction as saying all that's required is the mere presence, no showing that anything is required of that. And, of course, if that is the construction, then we don't have a basis for saying there's no infringement, but we have to have a very strong basis for saying the claims are invalid.

THE COURT: Right. Right. Let me just ask. Mr. Prugo, is your understanding of the order based on the same as what Mr. Figg is saying there?

MR. PRUGO: Essentially, it's correct to say that some claims require proof the antioxidant is actually functioning whereas other claims not require proof that the antioxidant is functioning. And I do think Mr. Figg misspoke, however. There are amount ranges in these claims. There's not just any amount. You have to show that it's there in a particular amount.

THE COURT: All right. Well --

MR. FIGG: Well, may I just

clarify? When I said "amount," I was more or less quoting from your Honor's opinion. And I think what you were saying is the word "antioxidant" doesn't carry with it a requirement for an amount. That's separately provided.

THE COURT: All right.

MR. FIGG: The sentence I'm referring to says, the claims for a method of stabilizing compound A require the antioxidant be present in an amount effective to stabilize compound A. You said that a few minutes ago. Whereas the claims for the composition and some claims for the transdermal device do not explicitly limit the antioxidant's amount or effect. And that's how we arrive at our understanding of what your Honor's order is.

THE COURT: Right. All right. Well, so -- all right. So in these things, it's not good to speak other than in writing because you don't know what nuances might be lost. But basically, so if your interpretation is also Mr. Prugo's interpretation, then basically, why don't you perhaps reduce to a stipulation or

something that the parties agree under the Court's construction that these claims would be infringed, and then, you know, some day down the road if it happens to be the Federal Circuit is looking at it and they don't like the Court's construction, you'll get relief.

MR. PRUGO: Your Honor, we think that makes sense, and we would take it one step further. For the other claims that require showing of the antioxidant's functioning, there's really no serious debate that the other elements in those claims are met. We think it would streamline the litigation tremendously if we also had agreement with respect to those other elements.

THE COURT: Well, you should discuss that between yourselves. I mean, I'm just saying that since -- you know, what I am hearing is essentially that Watson at least doesn't really want to put on evidence -- well, I think what I'm hearing is that they won't have any defense to infringement on these. They're more or less conceding that. They obviously don't concede that the construction is right.

So under the circumstances it seems like it would advance everybody's position to stipulate to that and, you know, put on proof about the other ones, put on the invalidity case. I mean, who knows how it will all come out in the wash? But it seems like that's an issue that it would benefit review later on to resolve by stipulation. But in the end, you know, I can't make you stipulate.

MR. PRUGO: We agree it's the right process, your Honor.

MR. FIGG: I agree, your Honor. We tried to really tee this issue up in our part of the joint, proposed joint pretrial order. In paragraphs -- paragraph 3 of Exhibit 12, we lay out in there with some precision what we understood the Court's claim construction to be and what impact that would have on our position on infringement of those claims.

So we can work out a stipulation that is predicated on that understanding of the claims, Court's claim construction, and as your Honor says, you know, we'll preserve all other rights on appeal.

THE COURT: Okay.

MR. FIGG: Okay.

THE COURT: That sounds good.

All right. So are there any -- so here's where I think we stand otherwise. The only motion that was pending I dealt with on Friday. We've got the motions in limine here, which I am prepared to deal with today.

We ought to talk -- and so the pretrial order said, and I told you before, we had four days for this trial. How many hours was each side -- how many hours of trial are we all expecting to have?

MR. PRUGO: That's really up to you, your Honor. I think we calculated 14 hours a side. So 14 for us and 14 total for the defendants.

THE COURT: Okay. All right. All right. Well, then, we start at 8:30 on -- we'll start at 8:30.

MR. FIGG: Go ahead, your Honor.

THE COURT: I was going to say we'll start at 8:30 on Monday and the general schedule will be 8:30 to 5 Monday through

Thursday. And there will be an hour for lunch. There will be two 15-minute breaks, one in the morning, one in the afternoon, and that should give us seven hours a day.

MR. FIGG: Yes.

THE COURT: And we'll be counting minutes. If we lose a minute or two here, we'll stay until 5:05 and catch them back up. Okay?

MR. FIGG: Yes.

THE COURT: In terms of the -- I take it there are no witness scheduling issues with your various experts, and -- I mean, I'm guessing that for the most part they're basically going to be here the entire time?

MR. PRUGO: Well, your Honor, that is true, but I do have some witness scheduling issues I'd like to address with you.

THE COURT: Okay.

MR. PRUGO: We already touched on one earlier in terms of the inventor. If we have your permission, we'd like to bring the inventor in in the invalidity case, if that's okay.

THE COURT: Well, he's your

witness. You can bring him up whenever you want.

MR. PRUGO: Oh, sure. Some judges -- certainly, Judge sleet, for instance, has a preference as to when you bring the inventor.

THE COURT: Judge who?

MR. PRUGO: Sleet.

THE COURT: Yes, I've heard of him.

MR. PRUGO: He has a preference as to when you bring the inventor. If you are open to us deciding, we are happy to go by that, and we would like to bring him in in the invalidity phase of the case. We think that makes most sense.

THE COURT: Is there an objection by you all?

MR. FIGG: We don't have a problem with that, your Honor. I will say that this particular individual made statements, factual statements during his deposition that we think are relevant to our noninfringement position and our expert will be referring to those statements

that the inventor made. He explained them in his expert report. It's no surprise to the plaintiffs that he is relying on that information. But it's fine with us if we cross-examine that witness on those points when he arrives to testify during their --

THE COURT: All right. It sounds like we're in harmony here. Right, Mr. Prugo?

MR. PRUGO: Certainly in terms of the inventor showing up in the invalidity phase of the case, your Honor.

THE COURT: Okay.

MR. PRUGO: A couple of -- sorry, your Honor. A couple of other --

THE COURT: Sorry. You go ahead.

MR. PRUGO: A couple other logistics in terms of the witnesses.

Are you okay with witnesses being taken out of order? So, for instance, if one expert has done the testing, but another expert is --

THE COURT: I don't care which order they testify in.

MR. PRUGO: That's fine. And

that's okay, even if the first witness is referring to testing that's not yet in evidence?

THE COURT: You know, you're making a promise. I assume you'll keep your promise.

MR. PRUGO: We will. Thank you.

A couple of other logistical issues. Live Note. We understand we need your permission to have Live Note in the courtroom.

THE COURT: Nicole, do they submit a form? Live Note? I don't know. What is Live Note?

MR. PRUGO: It's basically a feed from the Court Reporter to our computer so that we can see what the testimony is.

THE COURT: Well, as far as I'm concerned --

DEPUTY CLERK: We've never had that before.

THE COURT: Hold on a second. Is this something where this would be to all parties?

MR. PRUGO: Yes, indeed. And actually Mr. Figg's experience is the same as

mine. In every case we've done in Delaware, we've had Live Note.

THE COURT: Well, why don't you submit a one-sentence letter or something saying both parties would like to have this and that will remind us to follow up, because the Court Reporter who are doing it are from Hawkins, and I have no objection to doing it, but I don't want to promise things on behalf of people that I'm not a hundred-percent sure about.

MR. PRUGO: Sure. If the Court Reporters can't do it for whatever technical reason, that's fine, your Honor.

THE COURT: But if you've done it with other judges here, I'm sure they will be able to do it.

MR. PRUGO: We have.

THE COURT: And I assume that you probably pay for the privilege, so they like that, too.

MR. PRUGO: Fair enough.

THE COURT: But do send just a one-sentence letter so that we make sure to follow up.

MR. PRUGO: Sure. We will do that, your Honor.

One last logistical issue. In terms of moving documents into evidence, I'm not sure what your preference is, but we would -- our preference would be to have the attorney actually doing the examination formally ask to move a document into evidence when they're ready to do that and that way we can deal with the objections.

THE COURT: Well, is there an objection to doing it like that?

MR. FIGG: I think that's fine, your Honor. If I understand what Mr. Prugo --

THE COURT: He's saying it's the old-fashioned way.

MR. FIGG: So we show the witness the document. Please identify this.

THE COURT: Well, he can skip all of that stuff. He just wants to have -- I mean, if you all have exchanged your stuff and you know that there's no objection, it's just to create a, sort of a, what some people call a realtime record as to what's being introduced

into evidence.

MR. FIGG: Yes.

THE COURT: And I'm fine with that.

MR. FIGG: I am, too. I think Mr. Brown is as well.

MR. BROWN: Yes.

THE COURT: I'm sorry. I figured at that point Mr. Figg was speaking for the both of you.

All right. So we will do that. And just on that note, and maybe this is now standard practice, I've seen it in the last two ANDA cases. In the post-trial briefing, it would be nice to have all the exhibits that are actually referred to in the briefs on a DVD. I assume this is kind of standard at this point, but it's a big help to me in dealing with briefing.

Yes, Mr. Brown?

MR. BROWN: Just, I wanted to revisit an issue we were talking about a second ago, which is the testimony of the inventor that they, the plaintiffs want to call in the

invalidity portion of the case.

THE COURT: Right.

MR. BROWN: I would just note we have identified that individual as a witness for our case-in-chief and I would presume that the normal course of, what's normally done is, when that witness is called, they're called once, and we're able to examine that witness beyond the scope of whatever they put on for direct examination if they said something helpful for our infringement case.

THE COURT: Okay. I think I understand what you are saying is, but for an agreement to call them in their case, you would call them in your case, and therefore you'd like to be able to direct exam beyond the scope of whatever it is they do in their case?

MR. BROWN: Exactly.

THE COURT: All right. Sounds reasonable.

Mr. Prugo?

MR. PRUGO: It does sound reasonable, your Honor.

THE COURT: Okay.

MR. FIGG: And just for the record, that is what I meant when I said he has said things that we think is important in our infringement part of the case.

THE COURT: Okay. Points to Mr. Brown for being clear.

MR. FIGG: For clarifying.

THE COURT: All right. Is there anything else in terms of issues or anything else that we need to discuss other than the motions in limine?

MS. SHARP: Your Honor, a relatively minor point. Do you want witness notebooks?

THE COURT: You know, if you are going to have them shown to me -- I think it's good to have a witness notebook for the witness.

MS. SHARP: I was wondering if the Court was interested in also having binders.

THE COURT: No. For me personally, at this point, if you have a big screen over there, I'm usually looking at it anyhow, so one less binder, I guess. But still it's nice to have a binder, one binder for my

law clerk.

MS. SHARP: Understood. Thank you.

MR. BROWN: One other minor issue, your Honor. In addition to the confidentiality issues of the parties that Ms. Sharp testified earlier, we're calling a third-party witness from 3M Corporation and 3M counsel has told me that they consider portions of that testimony to be confidential and they're going to want to move to close the courtroom during some limited part of that.

THE COURT: Well, you know, I start from this premise, which is just because it's confidential doesn't get you anywhere. You know, talking about trade secret, okay. That might get you somewhere, but just because somebody says it's confidential, if we followed that, we'd close the courtroom Monday morning and not open it again until Thursday.

So what --

MR. BROWN: This individual invented the polymer that's used as the adhesive for the Par product. 3M does consider certain

aspects of that process by which that is made to be highly confidential. I don't want to over-speak for them as to --

THE COURT: Is 3M's counsel going to show up with their witness?

MR. BROWN: They are going to be attending trial. In-house counsel will be attending trial. He can speak more directly as to what their position is when they are here.

THE COURT: All right. So for these purposes, you are going to be representing 3M's interests?

MR. BROWN: I very much hate to say that.

THE COURT: Okay. Well, why don't you talk with 3M and see. You know, it might be if they want something, somebody ought to submit something in writing, you know, before the end of the week, under seal, giving me something that is as brief as possible to read that would let me do good about closing the courtroom because as I know some of you know, I hate closing the courtroom or otherwise designating anything that occurs in court as confidential.

Okay?

MR. BROWN: Understood.

THE COURT: All right. All right.

MR. FIGG: Just by way, on the witness availability issue, I have one thing I would just like to make the Court and plaintiffs aware of. I don't think it's going to be a problem, but it turns out our trial has been scheduled for the opening week of class for one of our witnesses, expert witnesses, who is a teacher, and he has been struggling with not being there for the opening week of class. So what he's going to do is he's going to be here Monday, leave Monday night, teach a class Tuesday morning, come back as soon as he's done with that.

I don't think it's going to be a problem because -- it's Dr. Kibbe. I don't think he's going to be required to testify during that period.

THE COURT: Okay. Well, I mean --

MR. FIGG: But I just wanted to make it clear that, you know, he probably won't be here until --

THE COURT: Where does he teach?

MR. FIGG: He's in Wilkes-Barre, Pennsylvania, so it's not that far away.

THE COURT: Oh.

MR. FIGG: I don't think it's going to cause any disruption at all.

THE COURT: Okay.

MR. FIGG: But I just wanted to --

THE COURT: If we have a hurricane that passes through Northeast Pennsylvania --

MR. FIGG: Yes, something like that.

THE COURT: -- you'll have a record it's beyond your control.

Okay. Anything else on those subjects?

MR. PRUGO: Just on that, on that topic. Obviously, we cannot -- if, for whatever reason, Dr. Kibbe can't show up, we can't put up our validity defenses not having heard what he has to say. I that's the only caveat.

THE COURT: Right.

MR. FIGG: Well, yes --

MR. PRUGO: No, I understand you are saying it's unlikely to be a problem.

MR. FIGG: Yes.

MR. PRUGO: I'm just making it clear, that would be a problem in terms of scheduling the trial.

THE COURT: How long do you all -- the portion of the total time, how much of it do you think is going to be devoted to infringement, how much is going to be devoted to invalidity?

MR. FIGG: Well, roughly, about half and half, I think, because --

THE COURT: Okay.

MR. FIGG: Yes.

THE COURT: Mr. Prugo, what do you think?

MR. PRUGO: Just a guess. I think Mr. Figg is probably right, half and half, but it's really a guess at this point.

THE COURT: Okay. Would Dr. Kibbe be your first invalidity witness?

MR. FIGG: That's right. So our best --

THE COURT: So you don't expect him to be here on Tuesday?

MR. FIGG: Tuesday morning.

THE COURT: Oh, okay.

MR. FIGG: Yes. I don't think we'll get through the infringement case before he's required to show up.

THE COURT: Okay. All right. Well, if it is, then that's kind of found time.

That reminds me of one other thing, which is the last time I had an ANDA trial, and this is my own stupid fault, I sat and listened to some expert witness go through 20 minutes of qualifications. All of these people have resumés or CVs, and so I'm kind of thinking that I'd like to hear about one minute maximum of qualifications.

The first thing you do is introduce the resume and, you know, I haven't yet seen a case where somebody said, well, this guy has a Ph.D. from Stanford and that one got a Ph.D. from MIT and one is better than the other. And it does not seem like you have any disagreement that they're all qualified. You

may not agree that everything that they did meets -- you know, is scientifically reliable. But let's try and keep the, you know, highlight and then move on into the substance. Okay?

MR. FIGG: Yes.

MR. PRUGO: Yes.

THE COURT: All right. That should cut out two hours.

All right. So anything else? All right. Let me tell you what I think about the motions in limine, which is, there was a motion in limine number 1 by the plaintiff, had to do with the relevance of the inventor's testimony to obviousness or nonobviousness and, you know, it seems to me that the testimony is extremely limited in that regard, but also seems to me there's no particular issue for me to decide in advance of trial. So if the inventor is testifying to something that for some reason or other strikes, I guess, the defendants as being -- well, I guess the defendants are the ones who are going to be objecting, he should object, but there's nothing that I can really decide in advance.

On the motion in limine number 2, there seemed to be three objections. One was combination of the '572 patent and the Elmalem E-l-m-a-l-e-m, reference, which, as I understand it defendants admit is not in Dr. Kibbe's report as a combination. I mean, there are references to the '572 in regards to other things. There are references to Elmalem, but they aren't a specific combination that's supposed to make the invention obvious.

I think the defendants knew about plaintiffs' construction of the patent, at least by October 2012, which is when the joint claim chart was, and so Dr. Kibbe not anticipating that the plaintiffs' construction would be adopted, I don't think that is an answer, and I notice also that he was filing rebuttal reports at least as late as February 28th. That's Exhibit 5 to defendants' opposition, so they could have said something if he wanted.

So I don't think the failure to disclose the '572 patent and the Elmalem combination is substantially justified. Federal Rule of Civil Procedure 37(c)(1). Dr. Kibbe

could have supplemented at some time after the claim construction on June 21st, and I gather he hasn't.

There is, I think, prejudice to plaintiffs because they've not deposed Dr. Kibbe on it and their own expert has not addressed it.

I also note the defendants have four other invalidity defenses and lots of obviousness ones besides that, so it seems to me the harm to the -- so it doesn't seem to me that defendants are losing a whole lot by not having that.

So I would grant the motion in limine, what I'm calling motion in limine number 2 as two testimony that the '572 patent and Elmalem make the invention obvious.

On the --

MR. FIGG: Your Honor, if I may, may I?

THE COURT: Yes. Go ahead.

MR. FIGG: If you look at Exhibit 1 attached to the plaintiffs' report, the last sentence of Dr. Kibbe's report that they refer to there expresses the opinion that the

invention would have been obvious over the GB '040 patent together with the '807 and the '572.

THE COURT: Right.

MR. FIGG: So you are not ruling on that part?

THE COURT: No, no, no.

MR. FIGG: Okay.

THE COURT: You can do that.

MR. FIGG: All right.

THE COURT: Just one combination, '572 and Elmalem.

MR. FIGG: I've got you. Thank you.

THE COURT: Okay. On what I've got to refer to here as the new art, which I think is the way plaintiff characterized it in their motion in limine.

Oh, okay. Defendants, I guess, have some transdermal patches that include an antioxidant that are listed in the pretrial order and I saw that four of them were brought up in the cross-examination of Dr. Klibanov, and I think they can cross-examine Dr. Klibanov with the four that they brought up before and

whatever other ones they have now. I mean, it's cross-examination. But I don't think, and I didn't see any representation that they would, that defendants' experts can testify to something that's not in their reports, and I gather these are not in their reports.

So to the extent the request was that defendants not mention these patents, I'm not going to grant that. To the extent that these -- the patentee's transdermal patches. To the extent that the request is -- so I just said to the extent the request is that the transdermal patches not be mentioned, I decline to do that. To the extent that the transdermal patches are something that are not discussed in the defendants' expert reports, they can't discuss them. And I assume they are not in the defendants expert reports. Right?

MR. FIGG: That is correct, your Honor.

THE COURT: Okay. So then on the new motivation, I read that a couple of times and it was in the end hard for me to say in advance what I think on that one, so I'm

essentially going to pass.

Dr. Kibbe and Dr. Sessler can testify to what is in their reports. I am not sure that will support defendants' facts about motivation to combine the GB '040 patent and the '572 patent, but that's not really a motion in limine issue, that's a post-trial finding of fact issue, I think, but I'm not really deciding anything on that one in particular.

MR. FIGG: Your Honor, this is a fairly important point to us in terms of just getting ready for trial, and the -- as we said, we've always felt that plaintiffs' claim construction was a bit of a moving target here, but certainly the effect of the Court's construction of the broad claims is that if there was a reason to put an antioxidant in a rivastigmine pharmaceutical composition, that is now highly relevant to those claims based on the way they have --

THE COURT: Wasn't it always highly relevant?

MR. FIGG: Let me give you an example. The '572 patent describes putting an

antioxidant in a transdermal system for the purpose of stabilizing the polymer, and that was fully explained in Dr. Kibbe's declaration, and he cited that for the simple point that it's not -- that there is prior art that shows that you can put an antioxidant in a transdermal system, and so there's not something inherently unique about a transdermal system to prevent you from doing that.

Now that reference is far more relevant. And Dr. Kibbe said, and if you look at the very end of Exhibit 3 to the plaintiffs' motion, he sort of ended his opinion on this by saying, the patents-in-suit do not claim a composition containing a trace amount of a known oxidant, antioxidant, where the antioxidant is only needed to stabilize the adhesive polymer and not the API.

Well, he believed that to be a true statement when he made it because he didn't think that the plaintiffs were arguing that putting the antioxidant in for that reason -- in fact, Dr. Klibanov went out of his way to argue that the '572 patent is not relevant because the

antioxidant is there to stabilize the polymer and not the API, not the pharmaceutical ingredient.

Well, it's obvious now that what Dr. Kibbe said what the patents-in-suit do not claim, they, in fact, do claim. That's the result of your Honor's claim construction.

And Dr. Sessler pointed out in his report that there is prior art going back for decades describing the use of anti-oxidants in polymer systems. Indeed, the polymer system --

THE COURT: And so I've said you can use that.

MR. FIGG: Okay.

THE COURT: I mean, if it's in his report, you can use it.

MR. PRUGO: I guess that's the key, your Honor.

MR. FIGG: But Dr. Kibbe will also say, here is a -- here is an entirely -- here is a reason for combining an antioxidant in a rivastigmine composition that has nothing to do with stabilizing rivastigmine, because that's the construction the plaintiffs asked for and

got.

THE COURT: Is that in his report?

MR. FIGG: What is in his report is he discussed the '572 reference at length, saying it describes a transdermal formulation --

THE COURT: Yes.

MR. FIGG: -- with an antioxidant in it.

What he said was, the claims don't cover adding an antioxidant to stabilize the polymer, but now we know that his understanding of the claim was incorrect when he wrote that. And so he should not be precluded from saying, offering the opinion that a reason for adding an antioxidant to a transdermal system is because they are there to stabilize the polymers.

THE COURT: Well, and so, I'm sorry. They are there to stabilize the polymers. Is that in his reports?

MR. FIGG: He says they are there to stabilize the polymers in his report. What he didn't say --

THE COURT: What is it you want him to say now?

MR. FIGG: We want him to be able to say, and the way these claims have been construed, that is an alternative reason that these claims are invalid, because as now construed, they cover transdermal systems that contain antioxidants for purposes of stabilizing the polymer.

THE COURT: Mr. Prugo?

MR. PRUGO: What you're hearing, your Honor, is a new opinion. That's the bottom line. The analysis is no different than the analysis I have just set forth with respect to Elmalem and the '572 patent.

They've known about our claim construction for a long time. It's clear they've known about our claim construction. All you have to do is read their motion in limine. If they wanted to get these opinions in, they should have supplemented the expert reports. You can't now spring this on us less than a month before trial.

THE COURT: Well, and, I mean, you know, we are a week from trial and, you know, I think that, in fact, if it's not in their expert

reports, it's not -- it should not come in.

MR. FIGG: Well, your Honor, it should hardly be a surprise to plaintiffs.

THE COURT: Well, but --

MR. FIGG: Well, let --

THE COURT: I'm sorry, but I mean when you say it should hardly be a surprise, the law kind of defines what a surprise is. If it's in the expert report, it's not a surprise. If it's not in the expert report, it's a surprise.

MR. FIGG: Well, your Honor, what was in the expert report was that the '572 patent discloses the use of antioxidants in polymer systems for transdermal devices. Dr. Kibbe said that this demonstrates that there is no teaching away or prohibition against using antioxidants in transdermal devices.

Dr. Sessler said in his report --

THE COURT: Well, wait, wait, wait. So, I mean, if Dr. Kibbe said there's no teaching away, he can say again, there's no teaching away.

MR. FIGG: Yes. But, your Honor, it's very clear that the claim -- your Honor

pointed it out during the claim construction hearing. When plaintiffs asked for and got this construction that basically said, all you have to have to satisfy these claims is that there be an antioxidant present, it doesn't have to be doing anything, I don't think that they could have taken that position without understanding that this prior art that shows antioxidants in transdermal systems was going to be highly relevant to their claims. This is not something that they should feign ignorance about, your Honor.

THE COURT: Well, I don't think they're feigning ignorance. I mean, I think -- you know, when you're writing expert reports before the claim construction is done, you've got to anticipate the various possibilities. And, you know, one of the things is at some point, the expert has to put on paper the claim construction has caused me to have a theory which, because I had no idea the judge was going to go off in such a direction, but now that he has, here's my new -- here's a relevant, here's some relevant information.

MR. FIGG: Dr. Kibbe didn't know the plaintiffs were going to go off in such a direction.

THE COURT: Well, I --

MR. FIGG: And so I really think this is -- this is giving them the advantage of a, of a, frankly, a shifting position during the period that expert reports -- and we explained in our response to their motion the evolution of Dr. Klibanov's report, which is the only thing we had to understand how they thought these claims should be construed.

And it's very clear to us what happened, is that they saw our noninfringement position and they started then asking for a much broader construction.

But Dr. Kibbe gave them every piece of information. Between Dr. Kibbe and Dr. Sessler, they had every piece of information that will be presented at trial on the fact that using antioxidants to stabilize polymer systems was known in the prior art, was known well before their patent applications were filed. The only thing they're complaining about is Dr.

Kibbe, instead of saying the patents don't claim such a composition, they're complaining that he didn't say the patents do such a composition and therefore they are invalid because of that. It's just that final conclusion from the scientific evidence that he and Dr. Sessler presented that this is an alternative reason that these claims as now so broadly construed are invalid.

MR. PRUGO: Your Honor?

THE COURT: Yes?

MR. PRUGO: There's a big difference between what Mr. Figg said Dr. Kibbe said in his report, which is, there's no prohibition against putting an antioxidant in the transdermal patch and then saying, what they're trying to do now is, we make this specific combination between GB '040 and the '562 patent based on knowledge relating to the manufacture of polymers. That's new. It's not in his reports. It's too late.

MR. FIGG: Well, your Honor --

MR. PRUGO: If they wanted to put it in the report, they could have done that a

long time ago.

MR. FIGG: As I pointed out earlier, we looked at Exhibit 1 to their motion. Dr. Kibbe did say that the subject matter of claim 2, and he's talking about the '031 patent here, would have been obvious to a person of ordinary skill in the art in view of the combination of GB '040, the '807 patent and the '572 patent.

THE COURT: And --

MR. FIGG: So he did include the '572 patent in that basis for invalidity.

THE COURT: Well, and I guess this issue boils down to whether -- because, right, he does say that, you know, I understood the objection here. Is the objection here because he does say combination of '040 and '807, or combination of '040, '807, '572? The objection is to his testifying as to why people might have wanted to put these patents together; right?

MR. PRUGO: That's correct, because what they are trying to present is a new motivation to combine.

THE COURT: Right. Right. Okay. That's what I thought.

And there's already one motivation to combine that's in here. Not the one that Mr. Figg is now --

MR. PRUGO: Whatever is in here, we have no problem with, but the new motivation, we just can't accept that they can, at this late stage, bring it into the trial.

THE COURT: All right.

MR. FIGG: Well, your Honor, if I may just add one more thing. Dr. Sessler said in his report with respect to a polymer system that contained an antioxidant fortuitously, because it was part of the polymer system, he said in his expert report that --

THE COURT: This is about the BHT?

MR. FIGG: That was -- no. There are was -- the GB '040 patent, your Honor, contains an example for a transdermal patch.

THE COURT: Okay.

MR. FIGG: There is evidence that one of the additives to the polymer in that, in that example contained an antioxidant.

Dr. Sessler was arguing that that simply shows that antioxidants have routes into these products through the polymer system. He also said in a footnote that, if, of course, the claims merely required the presence of an antioxidant, that would be an anticipatory reference. He said that in his report.

THE COURT: It does not look to me, though maybe I'm wrong, but the part that's attached to this motion in limine is the part that you are relying on right now.

MR. FIGG: Well, I guess I'm responding to the argument that I'm hearing. In other words, it was clear in the expert, in our experts' reports that if these claims were construed to require only that you -- that an antioxidant find its way into a transdermal polymer system, then references like Example 2 of the '040 patent and the '572 patent and the prior art that Dr. Sessler described that has been around for decades of teaching the use of antioxidants in polymer systems would all become highly relevant. It was simply our understanding and our expert's understanding

that that was not the claim construction that was being advocated.

THE COURT: Oh, okay. You know, I'm looking at the wrong set of exhibits. I do see what you are referring to.

MR. PRUGO: Your Honor, I think I can short-circuit this.

THE COURT: Yes?

MR. PRUGO: Dr. Sessler never mentioned the '572 patent. So whatever he said in his report has nothing to do with the motivation to combine GB '040 and the '572 patent. He couldn't have set that forth because he does not mention the '572 patent, not to mention that's an infringement report and there are other issues we have with that particular disclosure. But the bottom line is, he does not talk about the '572 patent.

MR. FIGG: Your Honor, I simply don't -- we have fully disclosed in these expert reports that the '572 patent discloses transdermal systems with an antioxidant in them, because the antioxidant was added to stabilize the polymer. There are several other references

that Dr. Sessler cited that show that antioxidants have been used for decades in polymer systems that are used to make the adhesives in transdermal systems.

Dr. Sessler also testified in his expert report or stated in his expert report that the very example of the '040 patent describing a transdermal system used a component that contained an antioxidant.

So we certainly think that we're entitled to demonstrate that there were sundry ways that an antioxidant would be used in a transdermal system together with an -- with rivastigmine.

What I think they are complaining about is Dr. Kibbe didn't expressly say, you would combine this polymer to make a transdermal system for rivastigmine and therefore it would be obvious to put that in there. But that was certainly not anything that a reasonable person reading this would not have understood. That he was saying that if the claims actually covered that --

THE COURT: All right.

MR. FIGG: -- this would be relevant. I don't want to repeat myself.

THE COURT: Well, no, no. We have reached a point of diminishing return, but that may not be because of you.

Look, I don't want to give you any more work than you already have, but I'm going to -- and my inclination is to do what I said I was going to do.

But, Mr. Figg, I will give you until, you know, midnight -- no. That's mean. Until 6:00 o'clock tomorrow night to, you know, write me a letter and attach whichever, or if it's already in the pretrial order, just cite it some way so that I can easily find it. Just lay out what your argument is as to -- and, you know, highlight some way so it's easy for the brain-impaired to follow as to exactly what the testimony is that you want to offer that is not, you know, in my opinion, explicitly or fairly implicit in the reports. And I will give Mr. Prugo until 6:00 p.m. Wednesday to respond and I will take another look at it. Okay?

MR. FIGG: Of course, your Honor,

but I've been thinking. There may be an alternative way of dealing with this. If we can simply put in the testimony from Dr. Kibbe and Dr. Sessler about what was known in the prior art about the use of antioxidants in polymer systems and polymer systems that are used in transdermal systems, whether or not that prior art renders the claims at issue invalid is actually a question of law for the Court to decide.

THE COURT: Yes, but it certainly helps me to have an expert saying, connecting the dots.

MR. FIGG: I am perfectly willing to forego having Dr. Kibbe sort of finish the sentence and say, therefore, it is my opinion the claim would have been invalid.

THE COURT: Well, this other stuff you are talking about --

MR. FIGG: But we should be able to make that argument in our post-trial brief.

THE COURT: The other stuff that you are talking about, is that in the reports?

MR. FIGG: Yes.

THE COURT: Mr. Prugo, your opinion on that?

MR. PRUGO: If he is -- if Mr. Figg is representing that Dr. Kibbe and Dr. Sessler will say nothing that's not in the report, and my fear is the, what we think is in the report is different, because obviously Mr. Figg thinks some things are implicit versus explicit.

I like the lighter route, your Honor. Let's have them put in a letter what they want him to say and we're happy to brief it because we don't think it's there.

THE COURT: Well, why don't we do this. I have no problem with the two of you -- in fact, I would encourage the two of you to talk about it and maybe there's something else you can come up with, but in the meantime I would like to get a letter from each of you according to the schedule I set so that if I do exclude this, which, after all, is my inclination, it's done with full understanding of what your argument is. Okay?

MR. FIGG: Yes, of course.

THE COURT: All right. Okay. Because this is the way it appears on my page, let me just go to defendants' motion in limine number 1. And I do appreciate the defendants only had one motion in limine. If I could, I would give you an award for that.

And as I indicated, to me -- and I looked at the case, because I couldn't actually believe that it said what the defendants said it said or maybe the plaintiff. I forget. I get things mixed up here.

This is the plaintiff has the defense experts on its witness list and had the designated -- designated some parts of the depositions; right?

MR. BROWN: Yes.

THE COURT: And basically for the five witnesses that we're talking about, the full expectation is that they're all going to be here live and in person; right?

MR. BROWN: Correct, your Honor.

THE COURT: Okay. So, you know, the section of the rule, and I realize there are some canons of construction, but it starts off

with, unavailable witnesses. These people are available and so I just don't think that a Rule 32(a)(4)(B) applies. And if it turns out that the witnesses are not here, which, you know, I understand the only way that would happen is, you know, act of God or something else close to it, you know, then we're in a different ballpark.

So I would grant the defendants' motion in limine. Okay?

MR. PRUGO: Your Honor, just one point on that. That actually is fine so long as we have some leeway in cross-examination to elicit the testimony that we got at the deposition.

THE COURT: I think that's reasonable because I take it -- when you say "some leeway," are you talking about out of order, so to speak, or are you talking about something else?

MR. PRUGO: Well, what I'm referring to specifically is, obviously, there will be a direct, and maybe the information that we got or obtained or elicited during the

deposition does not fall squarely within the boundaries of direct.

THE COURT: So it would be beyond the scope?

MR. PRUGO: That's correct.

THE COURT: They already know what scope you have in mind because you've designated --

MR. PRUGO: We've designated it, yes.

THE COURT: All right. Well, that seems reasonable to me.

Does it seem reasonable to the defendants?

MR. BROWN: I'm not sure, your Honor. In general, I believe, when an expert testifies, material that's beyond the scope of whatever they testified is normally not allowed into evidence.

THE COURT: Well, right, but, in other words, the whole reason that I'm not letting them put in the depositions is because they're going to show up live.

MR. BROWN: Well, as far as them

putting in the depositions of our expert directly, I mean, it seems to me that falls within the rule. They didn't serve an expert report on our expert and tell us they were going to get opinions from our expert.

THE COURT: I don't think they have to do that.

MR. BROWN: Okay. Well, we just reserve our objection.

THE COURT: Okay. All right. Well, I will let you do what you've asked, Mr. Prugo.

MR. PRUGO: Thank you, your Honor.

THE COURT: And, Mr. Brown, if you actually really want to preserve the objection, you'd better object during the trial. Okay?

MR. BROWN: Understood.

THE COURT: All right. So motion in limine number 3. There were two issues here.

So issue number 1 is, do the trace units of BHT function as an antioxidant in Watson's ANDA product? And Dr. Sessler, who is Watson's expert, discussed the relevant effects on the two degradation products. And I didn't

see a discussion of the one-to-one ratio, which was, I think this is referring to the expert report, which was, however, discussed in the deposition.

I don't see that as really being anything more than an elaboration on his opinion, so I'm going to allow him to testify about the one-to-one ratio and the plaintiffs' motion in limine is denied on that point.

On the second point, Dr. Sessler said in his deposition at pages 30 to 31, it's Exhibit 4, I think, that positive peroxide test would not necessarily mean peroxide is present. And I think that gives sufficient notice to plaintiff of Dr. Sessler's trial testimony, so I'm not going to exclude that either.

So I would deny this motion in limine on both of the grounds raised.

Yes, ma'am?

MS. JACOBSEN: Your Honor, Charlotte Jacobsen. Can I just address one point? That is the defendants' statement of facts goes beyond even what is in Dr. Sessler's deposition. And they apply that one-to-one

ratio to testing of Watson's ANDA product. That wasn't identified by Dr. Sessler in his expert report or at the deposition, and so plaintiffs don't know what testing they are referring to or how it applies. We've got no notice of that extension of what was at Dr. Sessler's deposition.

THE COURT: Mr. Figg?

MR. FIGG: What Dr. Sessler said, he was asked about this testing that Watson had done, and plaintiffs' attorney asked Dr. Sessler at his deposition to confirm that that testing showed that this antioxidant was inhibiting degradation of rivastigmine.

And he said, it shows when it's inhibiting degradation of rivastigmine and when it's not inhibiting. And what we have here is this characteristic pattern of the two degradants of rivastigmine that are an indicator of whether an antioxidant is functioning or not.

And Dr. Sessler has taught, and it is in both sides' experts witnesses what that pattern is in plaintiffs' product, because we have --

THE COURT: Plaintiffs' product?

MR. FIGG: Plaintiffs' product and in Watson's product. That is clearly in evidence. And I think, frankly, one should have understood what Dr. Sessler was saying was, what we see here is a ratio of these degradants that is indicative of whether the antioxidant is serving the function of protecting rivastigmine against degradation or not. He wasn't saying that just to be, you know, as a matter of academic curiosity.

THE COURT: All right. So, miss Jacobsen, what is your point now?

MS. JACOBSEN: Sorry, your Honor?

THE COURT: What is your point? Respond to what Mr. Figg just said.

MS. JACOBSEN: Right. Well, the testing that Mr. Figg is referring to, it hasn't been identified in the expert reports or discussed at the deposition. And so we have not had an opportunity to test that with Dr. Sessler.

But --

THE COURT: My impression is that

that was, that he was talking about it as sort of a matter of theory.

MR. FIGG: Yes. But the documents that describe the testing of the products for these degradation products is in evidence for both plaintiff -- it's not in evidence, but they were attached as exhibits and explained in connection both with the plaintiffs' product and with Watson's product. Those documents have been part of this case from the very beginning.

And so what Dr. Sessler was saying is that you can look at that and there is a characteristic pattern which tells us whether it's working or not.

MS. JACOBSEN: Your Honor, if you are not going to let it in, we just ask that our experts have an opportunity to address that testimony at trial and the arguments that were only raised at deposition.

THE COURT: This would be essentially whether the ratio of the degradation products, what the meaning of that is?

MS. JACOBSEN: Right. Whether or

not that is -- whether or not Dr. Sessler is correct in what he's saying in his opinion and also whether or not the test, peroxide test, is an appropriate test.

THE COURT: And so this is responding -- your point is essentially that you would like your experts to be able to respond to what Dr. Sessler said at his deposition?

MS. JACOBSEN: Yes, your Honor.

THE COURT: Keyword there being deposition?

MS. JACOBSEN: Yes, your Honor.

THE COURT: Okay. And, Mr. Figg, what is your response to that?

MR. FIGG: Yes. I don't have a problem. If the question being asked is, can their experts, when they are responding to Dr. Sessler's point, respond to it? Of course, they can.

THE COURT: Okay. Well, it seems like we've achieved harmony. So the motion in limine is still denied, but plaintiff will be able to respond in kind, so to speak.

Okay? So is there anything else

to discuss today?

MR. PRUGO: Yes, your Honor. We were just served with -- and this is by the Par defendants, I'm told, I have not seen it -- a second supplemental Buckton report, expert report.

THE COURT: Second supplemental what?

MR. PRUGO: Dr. Buckton is one of Par's experts.

THE COURT: Okay. I don't think he's an expert who raised himself to my -- he's just a name on a piece of paper right now.

So second supplemental report. Okay. Well, why don't you read it. I guess you all are looking at it electronically. Read it and talk to the plaintiffs, and --

MR. PRUGO: Just flagging the issue.

THE COURT: Okay.

MR. PRUGO: Maybe something we need to address with your Honor.

THE COURT: Well, why don't you address it first with each other.

MR. PRUGO: We certainly will do that.

THE COURT: All right. Anything else?

MS. SHARP: Your Honor, I would only note that as predicted, only the parties were present in the courtroom throughout this hearing.

THE COURT: Okay. And that has to do with the --

MS. SHARP: With our agreement at the outset.

THE COURT: Okay. I take it since I didn't hear anything more, that nothing was said that actually causes anybody any concern?

MR. FIGG: There was reference to the Watson product and what it contains, and it was very brief and might require redaction of one or two sentences from the transcript. I think that's all we --

THE COURT: Okay. Well, why don't -- I'm trying to think, how is this going to go at trial where they are trying to prove infringement, which presumably has something to

do with what's in your product? How are they going to do this in public if what's in your product is a secret?

MR. FIGG: Well, your Honor, that was -- that was the point we were teeing up.

THE COURT: Okay. Well, it's becoming clear to me now. I mean, yes.

Mr. Fineman, were you going to stand up and help me here?

MR. FINEMAN: Yes. I think that the easiest way of handling this when it comes up in these trials, the attorneys on both sides have a very good idea of what this confidential information is.

THE COURT: I'm sure.

MR. FINEMAN: Particularly from the exchange of direct examination exhibits, I think we'll all have a sense of when it's coming. And when it comes, I think it's incumbent upon the party who is doing the examination to raise with the Court that confidential information of the other side -- and I'm using "confidential" to constitute that which requires -- under your Honor's protocol,

that it's coming and request respectfully that it be sealed for that limited duration of the examination. Your Honor can look out in the gallery and see if anyone who shouldn't be here is here.

THE COURT: Typically, there are like 30 people out there. I'm not going to know who is supposed to be here or not.

MR. FINEMAN: I think the parties can assist the Court with that and just close the courtroom and ask those people to leave for that limited duration of examination, and it's incumbent upon the attorneys to say when it's concluded and to be as abbreviated as possible.

THE COURT: All right. Is there a particular rule, the Rules of Civil Procedure that allows me to do this? Anybody?

MS. SHARP: Your Honor, I don't think there's a particular rule, but if it's information which is confidential and protected under trade secret, and the parties agree that it's information -- in addition, the parties agree that it's information that would not go into the public domain, Mr. Fineman has

described the ordinary procedure in these cases.

THE COURT: Okay. And I mean, that does sound like something I've heard before, and I do agree that the way you've prefaced it is kind of a right way to preface is.

Since I gather it's defendants who have information that they are trying to protect, I would find it -- you know, do we know, was there at one point some Court of Appeals case or something else that sort of said how to do this, or is this just everyone knows this is how you do it because it's how we've done it forever?

MS. SHARP: Honestly, I would have to go back and look at that, but this is the way that we've done it for --

THE COURT: Close to forever?

MS. SHARP: Well, I haven't been alive quite that long, but for a couple decades, this is how we've done it.

THE COURT: Okay.

MS. SHARP: Typically, it's very, very limited.

THE COURT: All right. Well, I don't really care, and I don't need anything from the plaintiffs about it, because I assume you don't really -- you don't have much of a dog in this fight; right?

MR. PRUGO: I'm sorry, your Honor? This is certainly not our issue.

I guess the one question I have, the one problem I have listening to this is, I don't know exactly what they are referring to. I don't know what they think is a trade secret. I don't know if we have agreement on what a trade secret is.

THE COURT: Well, okay. So that suggests a certain amount of conversation back and forth because I do appreciate what Mr. Fineman and Ms. Sharp said, the general gist of which is, you should have a pretty good idea of what they have in mind, but maybe it's good to have an exact idea of what they have in mind. And so it would obviously help reach the skids if they, as much as possible, told you exactly what they want to protect.

And I would certainly appreciate,

as far as I'm concerned, you know, Friday at noon would be fine, some letter just telling me not so much the procedure -- well, if there's -- you know, maybe there's nothing to be done other than to just take it as it comes, but if there's something, since you're the ones who are going to be looking to seal the courtroom, if you could give me whatever you could by Friday at noon just saying, you know, ideally, Judge, here's a Third Circuit case that says do this or this kind of procedure, you know, because my natural inclination is not to seal anything unless it's really, really clear to me that I should be doing so, and so it would just help me having read that case, I will have listened to your request with more clarity than I might otherwise do.

And if there's a question about compositions Mr. Figg has raised, the Court Reporter will give you a chance to designate that, and if it is, in fact, basically, you want to redact two lines where the composition was described, certainly, I would be inclined to seal that, or redact it from the public record.

Okay?

Anything else?

MR. PRUGO: Not from plaintiffs, your Honor.

THE COURT: All right.

MR. FIGG: No, your Honor.

MR. BROWN: No, your Honor.

THE COURT: So I will look forward to the letters that we discussed from Mr. Figg and Mr. Prugo, and then from either Ms. Sharp or Mr. Fineman, I don't really care who, Friday at noon. And otherwise, if something comes up, you know, I don't like to say this, but call me if there's a problem because time is running out, or call my Chambers, and if there's something we need to discuss, we will get on the phone and discuss it. Otherwise, the last thing I have for you is, as the Delaware lawyers know, sometimes getting into the courthouse on Monday morning is hard, so I would in all events be here -- you know, allow yourself plenty of time. And you might want to check and see whether there are any other trials going on, because if we've got jurors coming in, you could be waiting

a long time to get in. Okay? Otherwise, we should be ready to go at 8:30 on Monday.

Yes?

MR. SILVER: Your Honor, just one question on that note. Can we arrange with your Honor's Chambers to come into the courtroom late Friday afternoon and get set up to start promptly at 8:30 Monday morning?

THE COURT: All right. Well, my regular courtroom deputy is not with us right this minute, but I understand there's a request in to the courtroom deputy from the defendants, and I don't know what the timing is, but work with her. She'll get you in at some point where you can do what you need to set it up. Okay?

MR. SILVER: Thank you, your Honor.

THE COURT: All right. Thank you very much. We'll be in recess. See you next week.

(Hearing concluded at 3:55 p.m.)

- - -