

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX SS.

SUPERIOR COURT  
CIVIL ACTION  
NO. 95-7378

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COMMONWEALTH OF MASSACHUSETTS, \*

Plaintiff \*

\*

vs.

\*

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PHILIP MORRIS INCORPORATED, R.J. \*

REYNOLDS TOBACCO COMPANY, BROWN & \*

WILLIAMSON TOBACCO CORPORATION, \*

B.A.T. INDUSTRIES P.L.C., LORILLARD \*

TOBACCO COMPANY, NEW ENGLAND \*

WHOLESALE TOBACCO CO., INC., \*

ALBERT H. NOTINI & SONS, INC., THE \*

COUNCIL FOR TOBACCO RESEARCH-U.S.A., \*

INC., and THE TOBACCO INSTITUTE, INC. \*

Defendants \*

\*\*\*\*\*

BEFORE: SOSMAN, J.

Thursday  
August 20, 1998  
Cambridge, Massachusetts

Patricia Bellusci  
Official Court Reporter

APPEARANCES:

GEORGE K. WEBER, REBECCA McINTYRE  
Assistant Attorneys General, for the Commonwealth

THOMAS SOBOL, JEFFREY WOOLF and NANCY REINER, Special  
Assistant Attorneys General, for the Commonwealth

MARSHALL SIMONDS and CERISE LIM-EPSTEIN, ESQS.,  
for Philip Morris

RICHARD ZIELINSKI, ESQ., for Lorillard

MICHAEL KOMAR, ESQ., for B.A.T. Industries

PETER C. KOBER, ESQ., for R. J. Reynolds

THOMAS PEISCH, ESQ., for CTR

Thursday  
August 20, 1998  
Cambridge, Massachusett

(10:05 a.m.)

THE CLERK: Your Honor, this is Superior Court case number 95-7378, Commonwealth of Massachusetts versus Philip Morris, Incorporated, et. als. It's here for a status conference, your Honor.

Counsel, do you want to introduce yourselves, please.

MR. SIMONDS: Your Honor, Marshall Simonds -- Goodwin, Procter & Hoar -- counsel for Philip Morris, and temporary substitute counsel for liaison, Mr. Griffin, who is not able to be here this morning.

MS. EPSTEIN: Cerise Lim-Epstein, counsel for Philip Morris. Good morning, your Honor.

MR. WEBER: Good morning, your Honor. George Weber, Assistant Attorney General.

MS. McINTYRE: Rebecca McIntyre, Assistant Attorney General.

MS. REINER: Nancy Reiner, Special Assistant Attorney General.

MS. SOBOL: Thomas Sobol, Special Assistant.

THE COURT: The first item on the agenda, status report on expert witness discovery.

MR. SIMONDS: If your Honor, please, the representative of the defendants who is in a position to speak to that is Richard Zielinski, counsel for Lorillard. Richard had an argument in front of the S.J.C. first thing this morning and is on his way here. So my request is that we perhaps delay that until he gets here.

THE COURT: All right.

Next is the master trial exhibit list.

MR. SIMONDS: Yes, your Honor. If you'd like the defendants to start, I'll address that.

I think the Court has received memoranda from both sides. There were a series of meet and confers in an effort to resolve disputes, and I think we've made substantial progress.

We have some differences which I believe represent principal differences on the part of the defendant that relate to the appropriate efficient preparation of the case, and I'll try to address those.

Initially the defendants wanted a sequential, rather than a simultaneous production, in which each production by the defendants, followed by a period of weeks, a

production by the Commonwealth so that we could absorb and think about responding. We modified that position to say we in effect know that there are certain documents we're going to want, and we can produce those.

So we agreed to a series of three dates, beginning tomorrow, for simultaneous production. And we're prepared to proceed with that unless we get an order from the Court countermanding it today, and we don't seek such an order.

We have agreed on, I believe, on the fields and the method of identifying the exhibits that will be usable by the Court and usable by the parties, and eliminate, as far as possible, confusion.

We're going to have proposed, and agreed to, three simultaneous productions on August 21st, on September 11th and on October 2nd.

It is the defendants' position that we, as defendants, because we are trying to, by making simultaneous productions, we are trying in large part to anticipate the direction of the plaintiff's case, and we ought to have an opportunity to look at the end result of the plaintiff's exhibit identification and shape our responses in light of that end result rather than to guess at it.

So we have asked for a sequential production at the end, proposing that the Commonwealth complete its production on October 2nd, which they're apparently willing to do. And that we make a final production, which we do not anticipate would be a dump, but which we do believe would be productive of efficiency and a minimum designation rather than an overly inclusive designation, because it lets us respond to documents that have now been completely identified by the plaintiff.

We think that makes sense. We have some problems, that I think the Court will recognize, that the plaintiffs do not have. We have at least four major defendants, four manufacturers. Each manufacturer, in framing its defense, will be to some extent focused not on common issues, but on manufacturer-specific issues dealing with individual company conduct, individual company documents, and individual attacks from the plaintiff on those companies.

It is simply harder to coordinate four defendants than to designate for a single party. That takes more time trying to avoid duplication, avoid overlap, screen documents and go through what I hope will be a disciplined effort to reduce the number of exhibits; not to increase

the number of exhibits.

It means that we need to have time to evaluate those identified by the plaintiffs, think of the response if necessary, cull out duplication, and make a coordinated response. Therefore, we think the October 23rd final response from us, other than damage exhibits, makes sense.

Finally, let me say in that regard, an argument that I think we've made before but I think remains valid, and that is, as the Court saw in some of the privilege areas that we've gone through, it is the defendants' contention that a document offered to show bad conduct by a defendant may require reference to not one -- not the document itself, but several contextual documents, documents that relate in time or relate in subject matter to put the document that is being offered against us in context.

And depending on the number and nature of the so-called company documents that are going to be offered, we will be responding with contextual documents in which there may well be more than one exhibit designated by the defendants to respond to a single exhibit of the plaintiff.

Until we know the exhibits, it's hard to accurately put a maximum number on that, but we have tried to be conservative in our estimates in order to protect ourselves against disappointing the Court and embarrassing ourselves later in setting the total numbers. And the need to have multiple documents to respond to one is one of the major factors that we have in mind.

Finally, let me address briefly the issue of damages exhibits. The memoranda make a point that in the meet and confer, the defendants refused to set a date for the production of damage exhibits. I'd like to put that in context since I was present at at least the principal meet and confer that dealt with this, and it was my proposal that they are shooting at.

My proposal was simply this. When we met on July 16th, the Court directed that we would have until October 15th to respond to the damages' evidence from plaintiffs. While we sought on July 16th for a time period that related to the date within which we received the software or the codes that let us in fact investigate and replicate the calculations of the plaintiff's damage issues, we didn't get that. We just got an October 15th date. The Court did not want to give us what I think you saw as a moving target that was hard to control.

In point of fact, at least with reference to the Cambridge Team, the principal damages' report, we did not get the codes until about August 4th. That's two and a half weeks after June 16th (sic).

When we had the meet and confer, I did not know and did not have current reports either from our damage consultants or from Mr. Biersteker, who was the defendant counsel who principally argued the damages' issue to you on July 16th, as to what the timing and status of our work was.

I'm not here to ask for an extension of that. I simply didn't know. It was my view that I would know by early September, and that negotiating a date in good faith for the designation of damage exhibits ought to be based on some knowledge; not mere speculation or guesswork on my part. And that identifying October 23rd as the date by which we would have our damage exhibits identified, given the fact that the cutoff for the damage analysis was October 15th, and is almost -- I don't know, four or five working days between there in order to evaluate our report and criticism and think about what exhibits we wanted, and I didn't think that was enough.

It seemed to me I ought to wait until September and try to have a meaningful - a negotiation based on factual evidence. That has been characterized as a refusal to give a date. It is not our position that we should refuse a date. It is our position that we don't know now a date that we can offer that we are confident will be when we can meet.

I do observe that in the expert deposition discovery, I believe Mr. Zielinski will report that there is an agreement that we have until November 20 to complete the depositions of the plaintiff's damage experts.

It is clear to me that there needs to be at least some window to identify damage exhibits that trades off knowledge we may get for the first time in those depositions so that an arbitrary date of October 23rd now, for damage exhibits, almost certainly guarantees that we will be back in front of the Court saying we need to reopen this window. And that it makes more sense to give us an additional window of time beyond October 23rd for damage exhibit.

We still contemplate, with the limited exception that both parties are going to become aware of additional documents that they need, that we will come to closure on our document

exhibits by November 6th, and that we will have the list that the Court is looking for filed with essential agreement by November 9th.

The other issue I'd like to address deals with objections. And here, again, we have a disagreement which I'll try to characterize fairly.

We have a disagreement that I think can be characterized as a difference of view of what is appropriate for the efficient preparation of this case for management in the pretrial stages and at trial with reference to exhibits.

And the difference is this. It seems to the defendants that the obligation we owe the Court and our opposing counsel is to identify, insofar as we humanly can, objections to exhibits that we believe can be obviated by early notification, or if not obviated, that we believe can alert the other party to the need to call some additional witness, or provide some additional step in the presentation of evidence in order to make the exhibit admissible.

Initially we thought, and I believe the Court thought, that there was a nightmare of time involved in privilege and work-product issues. I believe the Court's order on waiver has largely wiped that out. I do not believe that the defendants anticipate that we are going to be involved in a lengthy exercise registering privilege and work-product objections. I don't mean that there will be none, but I mean that that has now been reduced to what I think are manageable limits.

I do not believe that we are going to be engaged in a war about authenticity and foundation, although I may be wrong about that because the admissibility of some of this evidence as to authenticity may be hotly contested. But I do believe that we can identify exhibits in that category in the course of this exhibit identification, and should do so.

What I have difficulty persuading any of the defendants to believe is that we can, in a good-faith way, identify objections to relevance, to materiality, to issues such as: is the evidence collateral, or is the evidence so prejudicial that it ought to be excluded, or other judgmental things, maybe various hearsay objections, all of which require that you imagine the context in which the exhibit is offered, and imagine what the arguments are likely to be when the offer is made.

Now, there are some categories of evidence that may well be the subject of motions

in limine and rulings by the Court. But those categories do not need to be identified by individual objections to exhibits. The plaintiff will have goals in his motions in limine to limit whole classifications of evidence, and we will have responsive arguments, and they will be dealt with under the case management order in connection with motions in limine.

Putting the parties through a speculative exercise in trying to identify whether we have one of these other objections seems to me to be a waste of time in two ways. One, the defendants are bound to be over-inclusive as a matter of protecting their clients. We're going to be reluctant to waive any objection that we think might be available to us in whatever circumstances.

So we end up with too many objections, objections that will in fact, probably a majority of the time, not be made, but because we don't have the contextual basis and a circumstance in which we're going to be arguing either at side bar or in a hearing after the finish of a day's trial, we're going to have to over object.

Secondly, we're going to waste an immense amount of time in discussions in which the Commonwealth is saying, Oh, don't worry about that. That won't happen. And the defendants are saying, Hey, we've got to worry about that. It might happen. And the Commonwealth says, We don't intend that. And the defendant says, We don't know what you intend, but it could happen that way and we've got to have our objection.

That's not a productive use of time particularly when, on the most important of these objections, the time involved is going to be the time of trial counsel. It's not going to be the time of some young associate who can be delegated to do this work, because these issues may have a significant impact on the trial. And it means that the senior trial counsel, at least for the defendants -- maybe the Commonwealth can delegate it -- are going to have to be involved in what we truthfully believe is an unproductive exercise that is not going to leave the Court with a guideline that will speed up the Court's consideration of these issues.

So that our position on objections is, we have gone to what we think the appropriate stage is that we think will be useful and will reduce the time and make more efficient the management of the exhibit issues, and we have tried to reserve what we think holds too high a risk of being a waste of time without having a propensatory gain in efficiency at trial.

Now, there may be other details that I should address, but let me stop here.

THE COURT: All right. Mr. Weber?

MR. WEBER: Good morning, your Honor.

I'd like to start with the issue related to objections because I do think that that is a fundamental difference between the parties.

The way the Commonwealth envisions this process going forward is that there will be an exchange of trial -- potential trial exhibits; that the parties then look at those; they meet and confer over objection -- they assert objections related to the documents that they've been given by the other side, and they meet over those and see if they can work out those objections. And if not, that they start in September and in October to come to the Court and say we have problems with these objections where we can't come to agreement over them.

The fundamental difference between our proposal and the defendants' is that that process, under their proposal, I think if you read it closely, won't even begin until late November. And the Commonwealth is concerned that if that's true, and if there is an issue regarding hundreds of documents - even only hundreds, then it will take up an enormous amount of time and jam us on the trial date. And that's the primary concern we have. And that's why we would like the Court to order that there be some meet and confers in September and October at which the parties review the objections that each side have been making toward -- regarding the documents that have been exchanged.

I want to respond specifically also to the point regarding waiver. We have made it explicit to the defendants that what we are looking for is good-faith attempt to identify objections, any objection; not just authenticity. But if you have a relevance objection that you know you're going to make, raise it.

We specifically said that there would be no waiver. If you want later on to raise another objection regarding a document that you didn't, we're not going to object to that. What we want to do is get the process started in October and November so -- excuse me, in September and October, so that we're not facing, you know, the inevitable crunch that comes closer to the trial date.

Moving on, your Honor, to the issue related to the date for the defendants' disclosure of exhibits related to their damages experts. We have proposed October 23rd. That is

months after the initial disclosures, and still at least two and a half months after, if Mr. Simonds is correct, that we provided the last document on August 4th. It's months after they've received the documents and disclosures of our own damage experts. And so, they ought to have a good idea what their -- what sort of exhibits they're going to need in response to our damage experts.

In fact, in our case, your Honor, they're not making their expert damage disclosures until October 15th, and yet, we've agreed that we'll do ours three weeks later on November 6th.

Your Honor, they have more than sufficient time to identify the exhibits that they need related -- in response to our damage experts, and we ask the Court to set a date in October, October 23rd is what we propose, to require them to identify whatever documents they can related to our damage experts.

Again, we have said that if there has to be a trickle of additional documents, we're not going to object. There's no waiver. We expect right up, probably until your Honor's tolerance is worn out, there'll probably be some additional effort to get more exhibits on the trial list, right up to the trial date.

Mr. Simonds indicated that one of the reasons they can't identify exhibits now is because of the deposition schedule. Again, your Honor, our deposition schedule, by the agreement that's going to be announced to you, will allow us to take depositions all the way into January. And so, we're obviously in a much worse position in terms of our ability to identify trial exhibits.

Certainly some documents may come out at the depositions that need to be added to the trial list, but that's specifically provided for in the order that we propose; that is, that we're making a good-faith effort to identify our trial exhibits now. If additional - limited number of additional documents need to be added to the trial list, that can be done. That can be done after the November 9th date that we proposed be the date that we give you the trial list.

So, your Honor, we don't believe that there's any basis for not requiring them now to identify their damage expert -- their responsive documents to our damage experts, or any exhibit based on the fact that depositions may continue. They'll be able to do that as supplements to the trial list.

They've also argued, your Honor, that

they ought to have a fourth and final rebuttal-type opportunity to present exhibits, or to add exhibits to the trial list.

I want to say that we actually proposed that on October 23rd not only do they give us their exhibits related to damages' issues, but that they could also, if they want, submit whatever else they wanted on October 23rd, which would be a full three weeks after our last submission of October 2nd - our last joint submissions of October 2nd.

So if they want a fourth one, fine. Let them have a fourth one on October 23rd, but don't let it be well into November when we'll again be in a position of jamming ourselves on the trial date.

Thank you, your Honor.

THE COURT: Let me take what I think is the toughest one of these first, and I think that is the subject of the objections and how we're going to organize -- My concern is, I must say, I envision the trial itself as being one that will have some very cumbersome logistical problems inherent in it. And I am trying to minimize those, for my sake, the jury's sake, and the parties' sake.

It is going to be very cumbersome to have side bar conferences with the numbers of lawyers involved. We will have extra jurors. I think that I would like to minimize the need for side bar conferences during that trial. In that sense, anything that can be dealt with in advance should be. I think at the very least I owe that to the jurors, not to waste their time dealing with things that could have been done before we disrupted their lives in the major way we are about to do.

So my goal is to have streamlined and dealt with as many objections as possibly can reasonably be identified and dealt with in advance of trial.

Also, to streamline all the logistics involved in the handling of this large volume of exhibits: the need for premarking of exhibits, getting agreed exhibits all marked in advance, and again, we cannot have, with the number of lawyers, the number of exhibits, we can't have that kind of fumbling around. Or at least we need to keep it to the absolute minimum that we possibly can.

And in that sense, I am very eager to get this process of resolving objections, whether it's by agreement of the parties, by stipulations, or by my orders, to do it as early as possible, and yet, do it efficiently. And the

question is - the question is, how?

From my point of view, I also see some merit in having at the earliest possible stage, with regard to be it each exhibit, or each category of exhibits, you know, hopefully many of these will go in groups, where if I see what the whole range of problems are, it helps me identify for me, well, if I am inclined to exclude this on the following grounds anyway, I can focus in on that. And if I decide to exclude it on that ground, I don't have to have fumbled with all the others that might have been either more complicated, more time-consuming. It lets me see what the range is.

And in that sense, I favor an approach that tries, at least, to put those objections that are genuinely being asserted, or are going to be asserted, onto this chart for my review particularly where I would again assume that except for the 39,000 documents, a lot of these exhibits have not only been seen before, and identified as trial exhibits before, but people have seen them in action, so to speak, in the Minnesota trial.

I don't think it is unreasonable to start putting on the table certain categories of objections, including, relevance, hearsay, etcetera, where some of them -- a large number of them, I suspect, have already been identified.

It does become more problematic as we start dealing with the 39,000 documents, as I gather those documents weren't available out in Minnesota until the closing few weeks, and obviously, a lot less was done with them than will probably be done in this trial. And that is uncharted territory for the defendants: how they're going to be used; which ones are going to be used, etcetera.

I don't see why, where you already know that you do have some such objection, it can't be put on the table, particularly with regard to those documents that have already been, you know, long involved in these cases and everybody's well-aware of them; where they are more recently disclosed items and people's thinking is understandably not as refined, I can sympathize with the defendants' need for a little more leeway.

But is there a way of getting the best of both worlds here? Those documents where you do know, look, you know, we already know that we're going to try and block the Commonwealth from putting this in; and we're going to go to the mat on trying to block the Commonwealth from

putting this in. Why don't you spell it all out and let me see it. Because, again, if I agree with you on even just one of the ways you want to keep it out, that's enough for me. I am not going to make multiple layers of backup rulings that I'm excluding this for this reason, and this reason, and that reason. We don't have time for that.

I'd like to see the constellation of objections, because as I say, if I agree with you on any one of them, that allows us to resolve that item and move on.

What's an efficient way to do that? Mr. Simonds?

MR. SIMONDS: Your Honor, could I speak to that for just a moment?

First off, we do have some learning that may be helpful to the Court from the management of this problem in other cases. In this case we have a representation of three-thousand-document limit from the Commonwealth.

Assuming that reputation -- that representation is in fact liable, and that's the, if not exact total, the approximate total we can count on, the issue of identifying exhibits that have previously been objected to and so forth is in fact more manageable. And it may be that where there are documents that have been the subject of a fight, we can be helpful to the Court in terms of reciting the rulings, the objections made and the basis for the rulings.

One of the problems is, and one of the problems that I know the Court is familiar with, is that at least in my experience when I am arguing in advance for the admission or the objections to evidence, I run into a great judicial reluctance to say in the abstract, without having heard the context in which the exhibit is offered, that I'm going to admit it or exclude it.

And I think many of the objections that we're going to be dealing with are objections of that kind. That certainly has been the case in other trials.

One of the ways the courts have dealt with that is some combination of identifying document days, for example, in which the jury is in recess but the Court's order to the parties is to bring before the Court, for argument, a list of exhibits that the party then proffering evidence expects to offer in the next finite period through the next designated witnesses, and argue objections so that the Court is not burdening the jury with endless side bar

conferences.

Sometimes there has been sort of a three-day notice requirement in which each side offering evidence has had to identify, 72 hours in advance of a given witness, the exhibits they expect to offer in order to give lead time to the other side to frame its objections and in order to allow the Court to say, we will adjourn at 3:00 o'clock, or at 4:00 o'clock, and have an hour devoted to this outside the jury at the end of the day.

I'm sure there are other mechanisms that will occur to the Court, but I do not believe that we can solve the issue for the Court in a way that will leave the Court comfortable with its rulings in many of these instances by doing it between now and November.

I simply think it is too much of an exercise in imagination. I urge the Court to consider doing what we can, and then saying, let's let -- as to classes of documents which the Court referred to -- let's let the burden be on the motion in limine process to identify classifications of documents which will be on the list and which will be known by each side as to which we think there are going to be objections of a generic sort, and let's try to address those in in limine arguments before the Court in advance. Let's try and structure the procedures of the trial so we burden neither the Court nor the jury nor the parties by interrupting presentations of evidence unnecessarily. And let's look for other creative ways to address this.

I don't think any attorney on either side has any interest in having the effectiveness of their presentation of evidence interrupted by a -- by this kind of thing, and the jury annoyed or the judge frustrated.

We have no interest, I assure you, the defendants have no interest in causing you irritation in your effort to manage the court and manage the jury. We would like your benign approval by every body language and signal you give, so it is not in our interest to try and make this a difficult process. It is in our interest to try and make it an efficient process because this is immensely time-consuming and expensive.

THE COURT: I'm well aware, as I say, in ordinary trials, there may indeed be judicial reluctance to decide certain things in limine, but that's a very different situation when it's a limited number of documents or shorter trial.

I'm not at all reluctant to at least start grappling with these problems by way of motions in limine. Some of them I will be able to decide, I anticipate. And as far as I'm concerned, even those that I'm not able to decide, if I ultimately agree that I do need to hear, for a particular exhibit or set of exhibits, a context, it alerts me to really, you know, in advance, that I need to focus on that in anticipation of the time that I am actually asked to rule on it at trial. And I think it not only speeds up my ability to deal with it during the trial, but actually improves my appreciation of the particular issue if I'm warned of it going into the trial in advance.

I find motions in limine to be highly educational for me even if I find I cannot resolve the evidentiary problem. And I expect they will be exceptionally helpful to me given the size of the trial and the number of issues that I'm going to be dealing with.

I'm not trying to accelerate the actual briefing on the motions in limine. We have that built into the case management order. But I don't see why we can't start identifying at an earlier point what those motions, at least in general terms, are going to look like, what kinds of things are going to be raised; how many documents are or are not affected. It's really just a scoping out in advance of the full-scale articulation of all the underlying arguments that will come in the motions in limine themselves.

The other thing that I think is driving me to do this earlier, and I think should be of concern to both sides, is, as always, the impact on opening statements. As far as both sides can know in advance, I think these parties need to know in advance of giving their openings whether they're going to get in or not get in some of these very significant documents. And where possible, I would like to put both sides in the position of knowing as much as they can as they frame their opening statements.

In a trial of this length and this complexity, the opening statements are even more important than they would be in the typical trial. And for either side to be announcing things in an opening only to have the rug pulled out from under them by me on an evidentiary ruling two months later, particularly if I could have given them that news three weeks before they made their opening, I think I owe it to the lawyers, to the trial counsel to do as much as I can to let them know what's going to be -- what's

going to be admitted and what's going to be excluded in this complex trial.

I don't see why we cannot start on this master chart, you know, filling in the columns that let the other side know you're taking the position -- you're likely to take the position in your motion in limine when it gets filed that this category is so prejudicial that it outweighs its probative value and I should keep it out, or whatnot.

I'm not requiring people to write the brief in advance, and I'm not preventing people, obviously, from withdrawing or resolving particular objections prior to my actually ruling on them. Obviously, this master chart is going to be undergoing constant amendment based on what the parties' decisions: well, we'll withdraw that document. We won't press it. Or we'll withdraw this objection. Or we're going to agree to the following thing in order to satisfy your objection, so that objection goes off the chart.

This is going to be an ongoing process, and I realize it's unrealistic for me to think that we're going to have this perfect chart, impeccably with every grid box filled out before we impanel one juror. I know I can't do that, but I want to be as close to that as we reasonably can be. And I think the savings during trial will be well worth it for me, for the jurors, and for the trial counsel. I understand this part of the exercise does require trial counsel, but as always, trial counsel's got to come to grips with this sooner or later, and they might as well, I think, start coming to grips with it now.

How can we get these things, you know, start filling in those columns where you can? And I'm not going to cut you off at the knees for some late-breaking brilliant idea that you understandably couldn't have foreseen, particularly if it involves, you know, one of what I call the new 39,000 documents. But if it involves something that was, you know, exhibit 10 out in Minnesota, I'm going to look a little bit askance, but I think I can be flexible enough on that so that people shouldn't fear that I will do that to them at the last minute before trial if there is some understandably, sort of late-breaking objection.

For the same reason I never like a pretrial memorandum that is purely a, you know, cover the waterfront just in case memorandum. I don't intend this chart to be that kind of chart.

But I intend it to be the step that gets us launched on being as organized as we can be prior to this trial. What kind of dates or

mechanism would you recommend for that?

Yes, Mr. Weber?

MR. WEBER: I'd like to address your initial question about how to efficiently move this forward.

What we have in mind is basically this. Tomorrow the sides are going to exchange a portion of their trial exhibit list, and what we have in mind is that the parties each take the list they've been given by the other party, look at the documents, think about what objections they have to those documents, and then take like a month to do that, or several weeks, or whatever's reasonable, whatever people need; meet and confer about whether or not they can come to agreements over the objections that the other side has raised. And if not, then proceed to bring matters to you so that we, for example, if we have -- if we're exchanging tomorrow and we have a meet and confer in September, we can have an initial hearing over a full portion of the trial list in October. And that way -- or at the end of September, and that way we would not be beginning this process in December or, you know, in holiday seasons, or in January. Because it will be way too close to the trial and we'll be doing a thousand things, as this Court well knows takes place before a major trial like this.

So that's the process we envision. And then after the second exchange, which is September 11th, as I recall, we give ourselves another month, or three weeks is what we initially proposed, look at what the other side's given us. Try to meet and confer. And if not, see what needs to be resolved by this Court again. And then the same thing for the final portion of the trial exhibit list.

I mean, both sides have made an effort. They've made a commitment not to -- for there not to be a dumping of documents in the last mutual exchange. The whole idea here, from our perspective, is to get this thing going and get issues flushed out and brought to your Honor so that we're not in the position -- realizing that people's rights are reserved ultimately, that if they come up with some additional objection or something, that with your Honor's agreement, that they would be able to raise that.

The idea is --

THE COURT: Let me just make sure I understand. That does sound to me like you are basically advancing the motion in limine piece very substantially. Now, maybe we should -- maybe I should rethink that, but that is what

you're doing.

MR. WEBER: May I respond to that, your Honor?

THE COURT: Yes.

MR. WEBER: That is why we say that we are not asking anyone to waive objections because we understood that that could be interpreted as moving the motion in limine deadline. But it seems to me that we have months before December 15th, which is the date for the motions in limine, and we ought to be trying to use that time to work out whatever objections we can regarding these documents.

Otherwise, beginning -- your Honor, what if there are objections over thousands of documents? We're talking right now of a universe of nine thousand documents. If there are objections over thousands of documents, and we start after the briefs are submitted some time around December 15th, I think the trial date will be in jeopardy.

THE COURT: Well, it seems to me that, again, to the extent that certain objections can be dealt with as categories, that sort of this problem affects the following eighty documents, then what I'm looking at is the arguments about that problem, and once I sort that out, the following entries get made on the chart as to eighty documents in one ruling. Other things will be, literally, a very labor intensive, document-by-document concern.

I'm trying to get this chart filled out in a way that signals to the parties earlier than January how big this problem is, and signals to me how big it is, so that if there are in fact -- you know, let me take stock of it rather than just have it land on my desk with the motions in limine and make me suddenly realize we can't try this case until May. I am trying to avoid that.

But I think the filling out of the chart is a separate thing from the question of when does it get brought to me.

MR. SIMONDS: Your Honor, I think I agree with the last comment the Court made, and I want to just correct an impression that George Weber may have inadvertently given the Court.

It is not the defendant's position that we should go through a production process beginning tomorrow and ending at the end of October or the first part of November, and then address objections. That was not our proposal.

Our proposal was that we begin trying to address objections with the first production; that we have the entire time period in which to complete that process.

THE COURT: Correct.

MR. SIMONDS: But insofar as possible--

THE COURT: What I want to do is limit what categories of objections need to be identified starting with tomorrow's, and I'm saying, I don't see why those objections that you already know you're going to make, or should reasonably realize you're going to make, can't be identified, leaving open the question of when and in what way do they get presented to me.

If it's manageable to hold it off to what's scheduled for motions in limine, I'd stick to that, because the parties do have a lot else going on this fall. But if there are things that are looking, both that they're big, they're important, they might be time consuming, they have been brought to a head and we could segregate them off and set a schedule for me to start working on them earlier, that let's me see what's coming down the pike.

Why can't you, if you already know, we think this is, you know, impossible, totem-pole hearsay, you already know that, why should you wait until January to tell me? And why should you wait until January to tell the Commonwealth if you already know it?

MR. SIMONDS: Your Honor, let me respond in two ways.

The Court mentioned motions in limine, and it, I think is clear, that both sides as they look at the identification of the exhibits that are disclosed will be able to identify by categories the kind of evidence that they intend to challenge through a motion in limine. And in general, I think you're going to be dealing with motions in limine that consider more than one document; that consider documents that fall within a particular category and that are objected to for sort of a series of reasons that are common to that family of documents.

That issue, category of documents, ought to remain for the Court's consideration in the context of the briefing and motion in limine arguments.

Now, to the extent that we can't identify up front each document that may fit in those categories, we have some overlap. But it seems to me, at a minimum, we ought not to be required to meet and confer, and negotiate and argue, when the argument deals with: We object to all documents that contain this kind of evidence on the grounds that it is inadmissible under Massachusetts law for reasons A, B and C, a category of documents, whether it's hearsay

information that experts can't rely on, or whatever.

Now, as to those documents, the individual objection negotiation really does preempt the motion in limine process which I think makes sense at the point it is staged.

If the Court is going to order us to try and anticipate objections in addition to what we offered as to other kinds of documents, my concern remains what I've said before, that it, I think, will be inefficient. It is -- I do not think, for example, that dealing with documents that can be referenced at openings is going to be a big problem.

I think that we can and will be able to identify before the given trial date what documents we want to rely upon, that they will be in front of you and you will have a chance to give instructions that counsel can take and comply with in making their openings.

I'm not saying --

THE COURT: It's not just the specifics of a document that is itself literally going to be held up during an opening. It's the announcement to the jury: You will hear evidence that beginning in August 1964 --

MR. SIMONDS: I understand.

THE COURT: -- executives at Lorillard did blah-did-e-blah, only to find that all that stuff, for some reason, gets excluded.

I think as much as possible I want to let you know in advance. Now, I do not see why, nor quite frankly, we shouldn't be. I would in fact anticipate that we do need identification; that my ruling on a particular so-called categorical objection changes the column, you know, in the following documents. We do need them identified, you know, we are objecting to this kind of thing, and the following 18 documents are the ones that are at issue in that category. We need that.

Now, we don't need it literally tomorrow, but I think we do need it in advance so that my categorical rulings do not, quite frankly, result in confusion. The whole point is to have them -- have it be clear what exhibits are okay and what exhibits are not okay.

MR. SIMONDS: Your Honor, I truly believe that the Court will have to confront in that context concerns about whether the Court needs the supporting testimony of experts or foundation witnesses in order to make the ruling. We will have gone through a process which ends up very frequently in the Court concluding that we

really need to reserve on this issue for trial.

THE COURT: And I'm sure I will make that conclusion on certain items, and perhaps even on certain very big categories, I will ultimately agree with you. But I think there are some I will be able to rule on, and as I indicated before, the process of alerting me to the problem let's me be aware as the testimony goes along, I can appreciate, Ah, he has said this. That does cure that problem, or it does fall short of what's needed to be shown. Rather than trying to search my notes, my memory afterwards of, Gee, you know, did that witness actually say this or that. I'd rather be warned about it in advance.

So I do want the full range of objections to start being identified as part of this process.

MR. SIMONDS: Does that include in limine subject objections, or can we identify them if we can identify them as in limine matters, to reserve in that sense?

THE COURT: No. It means I want the problem identified and put on the table as soon as it is known that you have it.

MR. SIMONDS: All right.

THE COURT: Now, I have no problem if people deal efficiently, you know, with the chart and with each other by saying, your last production included a whole bunch of this kind of document and we are going to be objecting to that whole category for roughly the following reasons. You don't have to provide them with the brief, but just identify the problem. How compulsive people need to be in terms of how early they start identifying every single document that falls into that category is not of concern.

But I think that that chart does need to be cleaned up to that point by the time I am addressing motions in limine, if not well enough before.

As I say, particularly, it seems to me that the documents that are, you know, already well-known and well-rehearsed, that should not be -- it shouldn't be that impossible for people to put those kinds of objections out front; the documents that never surfaced in Minnesota until the closing weeks; as I say, I understand are in a somewhat different category, and I'll give you leeway and be flexible. But I do think this chart needs to start mapping out the full scope of objections. And if there are efficient ways of flagging them by category rather than doing a busy-work exercise, that's fine. But I do think

the full range of objections should start to be identified for my benefit and for yours.

Now, in terms of the defendants' desire for one sort of final responsive designation on their part, I don't really see a problem with that, I must say. You're asking to do it on October 23rd?

MR. SIMONDS: We asked in our proposal that the final production from the Commonwealth would be October 23rd, and that we would have two weeks until November 6th to respond, your Honor.

The Commonwealth came back and suggested that they would make a final production on October 2nd, I believe.

MR. WEBER: Your Honor, I would like to clarify that. What we said is that both parties can have an exchange on October 2nd. They can have a final one on October 23rd. And then both parties can do any last, limited number of rebuttal documents on November 6th.

THE COURT: What's wrong with that?

MR. SIMONDS: Your Honor, the difference is that we were looking for a final designation by the Commonwealth and a chance to respond to that final designation with our designation. They are proposing a simultaneous rebuttal period which leaves each of us with the same dilemma we had to begin with.

MR. WEBER: Your Honor, that's not correct. We're proposing that we do our final production on the 2nd. They do their final one on the 23rd, and there'll be a rebuttal, a final simultaneous rebuttal.

THE COURT: I must say at that point there won't be anything for the defendants to rebut because they've already done their own unilateral production on the 23rd. It's a question of whether the Commonwealth gets another shot at identifying rebuttal to what the defendants have come forward with in their final -- I mean, maybe I'm misunderstanding. Is it the 23rd that's the problem? Or is it the whole idea that's the problem?

I have no quarrel with the idea that in a sense the defendants do need an opportunity, one opportunity beyond the time that they've gotten all of the documents that the Commonwealth intends to introduce in its case in chief, the defendants need to know what that universe is before - before they should be required to make their final designation.

Any designation thereafter by the Commonwealth should not just be a rebuttal designation but a designation for the

Commonwealth's rebuttal case, it seems to me.

MR. WEBER: Your Honor, here's the problem. On October 23rd will be the first time that they will submit anything on damage experts, and we need to be able to have some opportunity to respond to that.

THE COURT: On damages?

MR. WEBER: On damages, right.

THE COURT: Let's deal with damages separately. On all issues short of damages, is there any problem with --

MR. WEBER: We'll make our final on October 2nd, and they can respond by October 23rd.

MR. SIMONDS: Your Honor, I believe we can live with that schedule on non-damage exhibits as long as the rebuttal on November 6th is not a further response on non-damage issues. In other words, as long as we don't go into another sequential issue.

THE COURT: I would not envision it going into another sequential issue. I mean, it should be, at that point, the Commonwealth would be putting forward on November 6th essentially only those new things that have come up in your stuff on October 23rd.

MR. SIMONDS: And, your Honor, this is separate from the issue of damage exhibits which -- for which we have a problem that I've tried to describe.

THE COURT: Right. Let's deal with damage, the damages problem separately.

All right. For non-damages exhibits, I think that schedule makes sense. And the Commonwealth understands that what it gets to do on November 6th is rebuttal cleanup, limited scope, and indeed should not be a sudden revelation of large numbers of exhibits. I will be concerned if it gets misused in that way.

Now, in terms of the damages exhibits, let me just make sure I understand, the Commonwealth is producing or designating its damages related exhibits, or the last of them, when?

MR. WEBER: Your Honor, in our last production, which is October 2nd.

THE COURT: On October 2nd. Okay.

MR. WEBER: Except that we may have some rebuttal documents on November 6th in response to their production on October 23rd.

THE COURT: Now, it seems to me in terms of the defendants, once your responses on expert discovery are made, which are scheduled to be done on October 15th, that by then you ought to

have a pretty good idea, or shortly thereafter, of what the direct examination of these experts is going to look like, and what kinds of exhibits that you're going to want to be putting forward for that expert to work on.

Now, it may be that from the 15th to the 23rd is a little bit tight. I have no problem pushing that back another week or something, but I don't see that -- you don't need to take the deposition of the Commonwealth's expert to know that your own expert is relying on the such-and-such study and wants to put that in.

MR. SIMONDS: That's correct. We are not arguing that.

THE COURT: All right.

MR. SIMONDS: The issue of deposing the Commonwealth's experts simply is recognition that out of that deposition testimony there may be some additional exhibits identified that are important to us for purposes of presenting our defense to their testimony at trial, but not our own identified damage exhibits that we want to rely upon with our experts.

The problem there, so the Court understands, is that we have what we anticipate are three experts on damages who will be designated and described, and who are working on the October 15 report.

We also, however, have several experts who have been identified already but who will be commenting on components of the damages' case, and whose designation reserves as to damages' testimony to be supplemented at the later day, and some of those experts may also need exhibits to illustrate their testimony. And we simply need enough time to evaluate the reports we've gotten from our consultants, which we do not expect to get until literally the 11th hour, or the 23rd hour on this time table; and then identify and create the exhibits to the extent that we have to create them or identify and source the exhibits.

That's going to take more days than we have between the 15th and the 23rd. We're prepared to do it as fast as possible, but I think that to undertake to do that in less than two working weeks is just unrealistic.

THE COURT: Well, I'll do this. I would set Friday, October 30th for the initial identification of all the defendants basic damage exhibits. Again, understanding that there may be further cleanup, particularly, you know, be it cleanup that's prompted by things that come out of either side's expert depositions. Both sides are going to need some cleanup, but I do think that the defendants' damage exhibits ought to be

put on the table by October 30th.

MR. WEBER: May I address that?

That would give us then six days on the current schedule to come up with rebuttal exhibits to their --

THE COURT: Well, again, I have no problem setting another deadline for the Commonwealth on rebuttal and for its damages exhibits. We're taking them out of some of the constraints on the others, given this.

How much more time do you think you would like to have?

MR. WEBER: Well, your Honor, the problem with that is that that would then mean that the final list to you and the objections to you will not be getting to you until the end of November. And, again, we're troubled that if there are thousands of documents over which there are objections, we're going to begin lengthy, lengthy hearings, which will threaten the trial date.

THE COURT: Well, I would anticipate that problems about documents for experts and damages are going to by and large be covering different problems than the other kinds. It doesn't bother me as long as -- if I have some universe of evidence problems, I'm sure I'll have plenty to keep me busy earlier than this designation, and it's just understood that the problems with the damages exhibits and experts are going to come a little bit later.

MR. WEBER: It's -- we fail to understand why, if they're producing their expert reports on October 15th, that they can't produce their exhibits related to experts within eight days of that. But since your Honor's decided to do October 30th for the experts, I will --

THE COURT: I think it's just a little more leeway. I don't think that threatens the trial date or causes a problem.

MR. SOBOL: Can I speak to Mr. Weber a moment?

THE COURT: Sure.

[Conference between counsel.]

MR. WEBER: Your Honor, we'd ask for November -- some time after Thanksgiving, November 27th, I guess, to respond then to defendants damage experts' exhibits.

MR. SOBOL: If I may, your Honor?

THE COURT: Sure.

MR. SOBOL: I just want to indicate, your Honor, that there is a little bit of a leap of faith. We obviously don't know what we're responding to, and I'm hearing from Mr. Simonds

for the first time that I believe there's more than three damage experts, and obviously I have a Cambridge Team who will be reviewing them, so we're trying to do our best within the shortest period of time.

Mr. Weber's suggestion is right, shortly after Thanksgiving will be helpful, but again, we're sort of shooting in the dark here.

THE COURT: Why don't we make it Monday, November 30th. I would anticipate endless logistical problems trying to get hold of people the day after Thanksgiving. So November 30th.

All right. I know that not everybody's happy with this, but the major problems that have been identified, is it appropriate for me to just put it back to the parties to continue working on the --

MR. SIMONDS: Your Honor, if I may? Just one observation about the November 30 date.

Deposition examination of the plaintiff's damages' experts is to be completed by November 20th. It seems to me that if the proposal that the Commonwealth put forward to the Court a moment ago, that we should identify by October 23rd, and they would respond by November 6, is a proposal they could live with, extending November 6th to November 30th, which is ten days past the time for our completion of their damages depositions, puts us potentially in a strategic disadvantage since we do not know what their responses are to our damages material. They have to confer with their Cambridge Team, as Mr. Sobol just said, and we're going to --

THE COURT: You're giving identification of exhibits; not expert discovery. This is identification of exhibits. You're going to have the Commonwealth's damages exhibits on October 2nd. You've got four weeks to think about that. They've got four weeks to think about, you know, from your experts damages exhibits, has that prompted them to recognize that there's another exhibit they need. This is not expert discovery.

I understand it's related to it, but this is a different exercise.

MR. SIMONDS: Well, my point I think is--

THE COURT: I don't see why -- I don't see why this can't get those exhibits identified in a timely fashion. I think that ought to cover it and still give us two full months then before the start of trial to grapple with problems about each other's damages exhibits.

MR. SIMONDS: Your Honor, I'm not sure I understood the Court's order, but if I did

understand it, they have until November 30th to respond to the damage exhibits.

THE COURT: To identify any additional damages exhibits that they haven't already produced to you and identified for you on October 2nd.

MR. SIMONDS: I understand. I understand, your Honor. My point is this. I anticipate that we will be taking the depositions of the plaintiff's damage experts, and we will be getting testimony that says they are currently consulting with their counsel in the preparation of additional exhibits that are intended to rebut, or to respond to the defendants damages testimony. And that we will have an inability to discover --

THE COURT: Let's take up that problem if it occurs. If something occurs in the Commonwealth's identification of any further damages exhibits on November 30th, if you feel you need to reopen an expert deposition, I'll hear you on that. We'll deal with that problem if it actually arises.

Again, I would anticipate that what the Commonwealth will be producing or identifying, if anything, on November 30th, is going to be relatively limited. They will have made their basic identification of the exhibits their experts intend to talk about in their direct testimony, or refer to or need, they're going to make that identification for you on October 2nd.

MR. SIMONDS: Well, I gather the Court has said that if we can make a showing that there is a reasonable basis for additional deposition discovery because of this problem, we're free to do that.

MR. SIMONDS: If something comes up on November 30th that you couldn't adequately explore, and you didn't know about during an expert deposition, and you literally need to reopen it, we can deal with that. We can deal with that.

MR. SIMONDS: Thank you, your Honor.

THE COURT: I don't think that should drive a change in this schedule.

MR. WEBER: Your Honor, a couple of points of clarification.

The parties had agreed that a list, a tentative trial list, exclusive of damages now, would be submitted on November 9th to your Honor. That is still in place under your --

THE COURT: Yes. Yes. I see no reason to hold off on submitting that to me. That part of it should be done, and then I'll get a second

thing from you after the damages --

MR. WEBER: Your Honor, one other point of clarification.

You had made clear that you want the list to include all objections that a party believes might be relevant, not just authenticity and a limited number of objections.

The question is still out there as to when the parties have to assert those objections, and I think I failed to make clear to the Court that what the Commonwealth has been proposing is that after the part of the list is exchanged to the -- by the parties -- tomorrow we're going to be doing a partial disclosure of our trial exhibits -- we think the parties then some time after that, three weeks we propose, or a month, that there be a meet and confer and the parties disclose what their objections are, and that if they can't then resolve those objections, the parties would have an opportunity to come before your Honor and try to convince your Honor to begin to hear some of these issues rather than wait until the very end of the process, which I believe what defendants are proposing, is that they don't even have to identify their objections until November 20th, is what their proposal submitted to the Court says.

And we just think, your Honor, that that just wastes months and months of time. And we'd ask that you order that the parties, as they -- you know, within a reasonable time after they get a portion of the list, that we be required to identify the objections, meet and confer about those, and report to the Court how we're doing, and perhaps have hearings about some of those objections.

THE COURT: Well, let me make sure I understand. The date on which this grand list, at least of the non-damages materials, is going to be coming into me is November 9th, right? My concern is, quite frankly, that I have it by November 9th.

Now, in order to do that, I mean, in order to have that list be comprehensive and not be including things that are going to turn out to be withdrawn or cured, by definition, the parties have to start putting their concerns on the table and talking about it well in advance of November 9th. Now, whether that's done as sort of a separate period for each disclosure, or whether it's simply done on a rolling basis, doesn't really concern me. But I want a list and a chart that is a real list and a real chart on November 9th; not a posturing chart.

What's the best way to get that?

MR. SIMONDS: Your Honor, what the defendants sought to negotiate and what we represented was that we would begin identifying objections as soon as we received the production; that we would continuously pay attention to the need to identify objections, and that we would do that as soon as reasonably possible, and that we would, in any event, have a closing date by which all objections had to be made.

What we initially negotiated at the first meet and confer was a proposal from the State that we make a production on August 21st, and that within two weeks or before the next production date, we have a meet and confer and deal with all of the objections on those issues.

We said, We don't think we can do that, but we will do it as rapidly as we can, and we are willing, as the need appears, to meet, and meet and confer on these issues, but we don't want to have an automatic schedule.

THE COURT: It is difficult for both sides to grapple with this in advance. You're going to be making your first exchange tomorrow, correct?

MR. SIMONDS: Yes.

THE COURT: You're going to be seeing me in September anyway. I think it's just something -- as far as I'm concerned, the parties should be starting to put their objections on the table as the documents are exchanged and as they are recognized, do a meet and confer as appropriate, and keep me updated. We may need to be meeting a little more often than once a month as we get into the fall anyway. Keep me updated at every status conference. And if one side or the other thinks, you know, Gee, the other side has had our documents for four weeks now. We still haven't heard anything other than authenticity objections, if I have to start setting firm deadlines that are going to close doors on people, I'll do it.

But I am reluctant to do that now. This is a big universe of documents and a difficult thing to coordinate. But I do want, as I say, the chart that I get on November 9th, it covers all categories of objections, and it is itself already been discussed so that the things that -- the objections the parties are going to withdraw, or somebody's going to decide, Well, in light of that objection we're not going to offer that exhibit, so that's taken off the chart, it's cleaned up before I get it on November 9th as to everything except, again, the damages exhibits

will have to be coming in to me later as we just discussed.

Keep me apprised of it as we go along at every status conference because I am concerned.

MR. WEBER: One other point of clarification. I guess we should set a date for the supplemental list, that is, the list that will include damages documents.

THE COURT: Well, if your identification of your rebuttal stuff is going in on November 30th, I would need that list in a cleaned up fashion some time fairly shortly thereafter in December. Because, again, there shouldn't be a lot on your November 30th --

MR. WEBER: December 7th, your Honor, will be fine. December 7th will be fine with the Commonwealth.

THE COURT: I think that sounds appropriate.

MR. SIMONDS: Your Honor, I believe Mr. Zielinski is now here, and I will, if appropriate, relinquish my chair to him for discussion of the expert issue.

MR. ZIELINSKI: Your Honor, thank you for indulging me this morning. I was stuck in the Appeals Court, but I do bring good news.

The parties have met over the course of the last month, subcommittees on both sides. There's been horse-trading. There's been a minimal amount of blood spilled, and I'm happy to report to you that we have agreement on the expert deposition program save for one, and only one, item.

And I would like to hand up to the Court -- we memorialized this, your Honor, in the form of an amendment to the case management order. I think logically it fits there. And I've outlined in normal typescript all those issues on which the parties have reached agreement. And I've highlighted in bold-face type the one issue on which we are at odds. And I have to make one disclosure, and that is, that I think the Commonwealth may advocate, when they speak today, a slightly different proposal than is set forth here as the Commonwealth's position. I have no problem with that.

So what I would suggest, your Honor, if you want to take a minute -- I could walk you through it, but it will take you probably two minutes to skim through it yourself and you'll get the flavor of it, and then I suggest each side get two or three minutes to give their best shot on the one disputed issue. And I think your Honor can probably rule today on it.

[Court examines document.]

THE COURT: All right. Take your shot.  
Go ahead.

MR. ZIELINSKI: Your Honor, let me just address the disputed issue.

As you can see, this order breaks the experts out into various categories: clinician experts have been separately dealt with, agreed. Damages experts, separately dealt with. So the issue is, with regard to all of the remaining experts, the issue, quite frankly is, where do you draw the line between those experts where presumptively the parties would be limited to one day of deposition versus two days. And I have two simple points to make on that.

One, I think wherever that line is drawn, it should be drawn the same way for the Commonwealth's experts as it should be for our experts. And I'll come back to that in a second.

And secondly, we think that the logical place, the place we propose to draw that line, is between experts who have testified previously in Attorney General or Medicaid-reimbursement litigation, cases that are in a sense like this case as opposed to some other litigation that may or may not have similar issues; the scope of testimony may or may not have been the same; the parties may or may not have been the same.

We think it's a clean place to draw the line. And let me tell you how it shakes out, because I think that's relevant.

If you do draw the line that way, and I cannot swear to these numbers, but it's been our best, rough estimate of how the numbers will shake out if you do draw the line there. The Commonwealth designated 25 experts total. Of those, nine are either clinicians or damages experts. So now we're down to 16, which is the category we're now talking about.

Under our proposal, of those 16, 11 of them have previously testified in prior Medicaid-reimbursement litigation, five have not. So under our proposal, we would have 11, one-day presumptive depositions, and five presumptive two-day depositions.

Let's flip over to the defense group. The defense group includes 42 experts. And don't get heart failure because that includes, your Honor, about a dozen industry employees like Alex Spears, the CEO of Lorillard, who is a fact witness but in every case the industry has designated a group of witnesses who may offer opinions on one or another subject.

So of those 42, 12 of those are either clinicians or damages experts separately provided

for. So now we're down to 30. Of those 30, our best estimate is that 23 of those have previously testified in Attorney General or Medicaid litigation, and 7 have not. So on the defense group of experts, the Commonwealth presumptively would have 23, one-day; and 7, two-day depositions.

I mention that because I think your Honor should understand, if you draw the line where I suggest you draw it, I think there's rough equity and rough fairness.

Now, the last point I want to make, I want to just anticipate what I know the Commonwealth will say, and has said, as to why the line should be drawn differently for the Commonwealth than it should be for us. And the point they've made is that, you know, you guys have seen these other experts before. You, defendants, have had face-time, was the expression that's been used, with these witnesses that we haven't.

Well, it is true that the defendants, Lorillard, Philip Morris, Reynolds, have been parties to other Medicaid-reimbursement litigation where the Commonwealth has not, but if you think about what that point really means about face-time with the witnesses, both sides have access to the transcripts and can read them equally in all of the cases. So that's not the issue.

And the issue really is, I suggest, it makes no difference whether our clients have been parties to those reimbursement cases. The real practical issue is, are the trial lawyers who are going to conduct the trial of this case, and who are going to examine the witnesses in court, have they actually seen and had time with these witnesses before. And on that issue, I suggest it's no different for the Commonwealth than us. And this is the reason.

Mr. Motley, who is one of lead trial counsel for the Commonwealth, has been involved in all of these reimbursement cases that have gotten up to trial save for the Minnesota case. Of the 23 experts on our side who have testified in reimbursement litigation, Mr. Motley has been counsel of record in cases that involved 21 of those 23 witnesses.

So the Commonwealth has in its arsenal, able trial counsel who has seen and had face-time with the witness. On our side, I'm not going to stand here and tell you we don't have access to the lawyers who took those depositions, but I can tell you at the same point, Mr. Mahony, Gael

Mahony and I are trial counsel for Lorillard; as I stand here today, these witnesses are nothing more than names on a list. I think it's not substantially different for Mr. Simonds of Goodwin, Procter, who's going to be lead trial counsel for Philip Morris.

So in terms of the issue that really matters, I suggest the parties are on even footing and the line should be drawn in the same place. That's all I have.

MS. McINTYRE: Good morning, your Honor.

This -- it is very unfortunate that we are here today at all. There was a very complex negotiation over several weeks, and on August 11th, the Commonwealth walked out of the last meet and confer with the understanding that the parties had reached agreement on all issues.

So what Mr. Zielinski represents as being one outstanding issue was never, in the Commonwealth's view, an outstanding issue. But the defendants at the last minute backed out. They changed their minds.

And what Mr. Zielinski hasn't told you is that the reason why they've had second thoughts about this provision is because there are two experts disclosed by the Commonwealth that they think they want two days with. Expert Sargent and Hughes. Those defendants -- those experts, defendants have already deposed in tobacco litigation. Those experts did not appear in Medicaid reimbursement litigation.

Now, the Commonwealth --

THE COURT: What is the subject matter of their expertise? These names are truly meaningless to me at this point, unfortunately.

MS. McINTYRE: I believe they relate to the issue of nicotine and nicotine dependence, both of them.

MR. ZIELINSKI: I think that's true as to Dr. Hughes. Dr. Sargent is youth -- deals with marketing to youth.

MR. SIMONDS: Your Honor, just to provide the information, Dr. Sargent, from Dartmouth, who is one of the experts, is an expert on the issue of, basically, youth smoking and the relationship between tobacco advertising and youth smoking. Hughes is an expert on the addiction issues.

Dr. Sargent testified in a case involving the City of Burlington, Vermont, an injunction trial, relating to a proposed city ordinance limiting advertising for cigarettes. That trial happened just a few weeks ago. And he

was examined by a local attorney in Vermont representing two convenience stores. No tobacco company was a party to that case, and no tobacco company lawyer conducted that examination, although I do not represent to the Court that we were uninformed about it. The tobacco companies were in fact aware of it.

THE COURT: Okay. Go ahead.

MS. McINTYRE: Despite what Mr. Simonds has told you, we wouldn't be here at all today if defendants had not, at the last minute, backed out of the agreement and tried to renegotiate terms that were in place because of complex, good-faith negotiation by both sides.

At any rate, the Commonwealth, in an effort to not have to bring this to the Court, made a further proposal, recognizing that defendants were trying to back out because of their interest in having the opportunity at least to have Sargent and Hughes for one additional day.

And so, as an effort to compromise, the Commonwealth agreed, or offered, to allow defendants an additional day with both of those experts, and in return, to allow the Commonwealth to have a presumptive additional day with any six of the experts that fell into the same category: the non-damages experts, the non-clinicians.

And that proposal, that last-minute proposal is not reflected in the document that Mr. Zielinski gave to you.

THE COURT: Who, if anybody, is there out there that you want to now depose for two days instead of one?

MS. McINTYRE: Excuse me, your Honor?

THE COURT: If I let the defendants basically have two days with these two experts, Hughes and Sargent, who is it you now want two days with?

MS. McINTYRE: Well, they have disclosed 42 experts. We have disclosed 23. There are a lot of experts that fall into this category, and particularly experts, there are four historians that they have disclosed - experts that have not been -- frankly, that are going to be critical in -- to their defense and that we want, at least presumptively, the opportunity to see for another day. We may not need another day, but we think it's only fair given that the two experts that they want to see another day, they've already seen.

And in an effort -- again, we thought we had an agreement earlier, but we once again tried to see if we could resolve their concern.

THE COURT: This, I must say, is getting very petty. Give me the names of the people that fall into this category that you want to have the leeway to go for two days with?

MS. McINTYRE: Well, your Honor, I don't have a list of the names. There are, I believe -- we got the disclosures on Monday, I think at the end of the day. So I don't have the names of the experts that fall into that category, principally because they have not identified, like, who are their clinicians.

THE COURT: You think there are six of them?

MS. McINTYRE: Oh, no. I think there are -- they haven't disclosed damages experts yet. So there are 42 non-damages experts, and I believe Mr. Zielinski reported there were seven clinicians.

MR. ZIELINSKI: Six, your Honor.

MS. McINTYRE: Six. I'm sorry.

And there are probably a number that-- I believe that there's, I think, thirty he said fell into this category.

Mr. Zielinski can correct me if I'm wrong, but I believe he said there were about thirty in this category?

MR. ZIELINSKI: Twenty-three, by our count, your Honor, who have previously testified in other Attorney General litigation, and seven who have not, who they would get -- which includes several of our historians, which under my proposal they get their two days.

THE COURT: Okay. I'm losing track. This is very -- who's not --

MR. ZIELINSKI: Believe me, I've lost track at times myself.

THE COURT: Give me the breakdown of the 42 again. You've got 23 previously deposed in Medicaid Attorney General cases?

MR. ZIELINSKI: Correct.

THE COURT: So 23 are done.

MR. ZIELINSKI: And seven who have not. So which under my proposal, they would get two days with each of those, and that includes at least two of our historian experts.

THE COURT: All right. And the remaining twelve are who, or come into what category?

MR. ZIELINSKI: They're either clinicians, or in the category of damages experts. I can tell you that -- maybe someone from Philip Morris should speak to this issue, but as I look down the list, whether we have called them officially our damages experts, I see the names of our damages experts in my column. So

there are a group of six that we've carved out and put in the damages category which are separately provided for. So they'll get multiple days with those witnesses.

And one final point, to complicate it even further, a large number of this group of people who have previously testified for us have been designated in Oklahoma and Washington, and as we speak, there are depositions of some of these people -- more depositions going on that they can either participate in, if they cross notice it, or they'll have the benefit of those transcripts.

MR. SIMONDS: If, your Honor, please, just to clarify on the damages experts. There are six listed under the damages. Three of them, Dr. Viscusi, Gary Clarke, and Dr. Jesilow, are what I would call fringe damage experts.

Dr. Viscusi has testified and been deposed in numerous cases, and that testimony has been produced as part of his designation. In fact, he is from Harvard and he will be deposed in another case, I believe, later this month or the first of next month, here.

Gary Clarke and Paul Jesilow are both new witnesses, and both are two-day candidates for examination. They testify on Medicaid administration and on Medicaid fraud issues, and there is a reservation that they may supplement their testimony to be specific about damage components once we know our damage reports.

THE COURT: Who is it you're looking for two days on? I'm having trouble understanding what it is --

MS. McINTYRE: Your Honor, the Commonwealth is just in a slightly different position. We have just received their disclosures. We haven't had an opportunity to digest them thoroughly because there were so many experts disclosed.

And also, the Commonwealth has never seen any of these people before, and yet, we are willing to limit ourselves to one day for the majority of those experts that have been deposed in other Attorney General litigation. We're asking for the limited opportunity to choose six of them, if we decide that we need it, to have an additional day.

And, again, the state cases are not all identical, and we don't know whether the substance of the disclosures are going to be the same in this case as they were in other cases where these defense experts appeared.

THE COURT: So, in other words, beyond

the seven where you would already automatically get two days, you're saying of the remaining 35, you want the option to pick six; not on any particular subject, but just --

MS. McINTYRE: Just in case we feel we need another day. And of course, the parties are going to make best-faith efforts to limit -- to not see an expert for a minute longer than we need to. But we just want the opportunity.

THE COURT: This is getting incredibly petty. What's the problem with that?

MR. ZIELINSKI: If I were to stand here and try to tell you that that's going to croak us, I'd be a fool. But let me say this, Judge. The order that we've given you has carve outs in it for good cause shown, exceptions, supplements. I don't see why they should be given sort of an up-front freebie of six extra witnesses. I think they can deal with it the same way we can deal with it on the discussion you just had with Mr. Simonds.

If something new comes up, if they need more time, they can ask us in the first instance, or your Honor to give them more time. But I think starting out, the playing field should be level for both sides. And beyond that, whatever your Honor rules, I assure you we will make work.

THE COURT: I think that the most recent compromise that the Commonwealth has proposed is reasonable. It's not unfair. The fact that you have designated a much larger universe of witnesses does create some problems, and a little bit of flexibility to deal with that larger number, if need be.

I do not anticipate that this will be abused by either side. I would, obviously -- Hughes and Sargent, you may have your two days with them. That's part of the compromise -- that seems perfectly reasonable to me.

MR. ZIELINSKI: Would you accept one friendly amendment then, your Honor, since you have ruled on that. Could we carve out the company employee experts, the CEOs of these companies who have been repeatedly deposed, and will appear for deposition in this case, but of the six that they pick, at least the CEOs of the defendant companies not be included in that group?

THE COURT: Well, since these are only the expert depositions, and I assume the CEOs have already been deposed as fact witnesses, I must say, it's hard for me to imagine the Commonwealth squandering one of its precious second days of experts on someone whose status as

an expert witness is relatively minimal anyway.

MS. McINTYRE: I don't see that there's any reason for Mr. Zielinski to request the carve out. I don't think the Commonwealth wants to squander its days either.

THE COURT: Okay. Let's just go with this.

The Commonwealth gets six at its option. Obviously, this is not an opening of the door to redepose a fact witness on more facts. These are true expert depositions.

Okay. You had only two remaining items on the agenda, and there are a couple of things I need to go over with you.

The Commonwealth's request for international judicial assistance, other than the mechanics of needing me to sign off on it, is there anything else you need me to do today?

MR. SOBOL: There isn't, your Honor. I just want to apprise you, I did speak with counsel for B.A.T. Industries. We've made one modest change to the request, which I'd like to hand to your Honor. If there are going to be any additional changes by your Honor to the text of the request that goes to the English court, then what I'll need to do is actually make this change on the word processor back in my office and return it to you.

Let me tell you what the change is. The Commonwealth had requested twelve hours for the deposition of Sir Patrick Sheehy (phonetic), and six hours, I believe of the deposition of the other three gentlemen. In speaking with counsel for the defendants, we wanted to make clear that there was also time made in the request from this court to the English Court for the availability of cross-examination by the defendants. So we've talked about how much time.

That will also be going because we wanted to make sure the English court doesn't have any more ministerial, persnickety issues that it may have. So to make a long story short, we changed the request last night. There was another modest change to it today. And later on today I would like to deliver it to you, in a complete and final form --

THE COURT: I'll wait for that then.

MR. SOBOL: And if I'd just simply request, your Honor, I'll be presenting two to you, your Honor, for your execution: one to be returned back to my office as an original that we'll send to the U.K. and the other to file.

MR. KOMAR: Your Honor, Mike Komar for B.A.T. Industries.

That's acceptable for my client. There's just one point I want to clarify for the record. In the application that Mr. Sobol wants the Court to sign, there's schedule A that identifies a number of areas which the Commonwealth thinks is relevant to its allegations. And I just want to make clear that these are the Commonwealth's allegations and by the Court signing this, it's in no way making findings of fact, or endorsing any of these allegations. The Commonwealth is simply seeking to examine the witnesses about these allegations.

THE COURT: I understand.

MR. KOMAR: Thank you.

THE COURT: Okay. So I'll look for a clean version of that.

THE COURT: We need to schedule -- the next item was the schedule with regard to the Commonwealth's Motion to Compel. I just got that motion itself the other day, so I assume the defendants got it at the same time.

MR. ZIELINSKI: We got it, your Honor, as the doors were closing in my office last Friday afternoon. And if I could be heard very briefly, your Honor? I will tell you that I'm not kidding you when I will tell you that I was shocked when I got that motion, your Honor. And what I am going to propose to your Honor is that you give us the opportunity to try to persuade you, in a very short period of time, like seven days, why you ought not even to hear that motion, because it is untimely on several different grounds, and I'd be happy to give you a heads-up today if you want of what those grounds are.

But we just think it's too late. We didn't expect it. We were shocked to get it. It's described by the Commonwealth as kind of a narrow motion. Everything in this case has taken on a certain sort of unreality, but I have never seen the likes of a motion, or had to respond to one, like that.

If it is going to have to be responded to, it's going to have to be responded to separately on behalf of at least the four manufacturing defendants because the story is different with respect to each one of them. So I would ask your Honor to give us seven days, a week from tomorrow, to file with your Honor a short brief on why we think this motion is untimely and should not be heard and why you shouldn't entertain it.

If your Honor can rule on that on the papers, I think, very quickly; if your Honor is not persuaded, then maybe give us ten days from

the time you rule to respond substantively and individually on the merits. That is our proposal.

THE COURT: Obviously without ruling on such a request itself, the merits of it, is there any problem with just giving you the opportunity to first say their peace on why they think they don't have to respond to it at all, I will indeed be happy to have that, rule on the papers. And if they prevail, that's the end of it; if they don't, we set a very rapid schedule for their substantive responses on the merits of the motion.

MR. SOBOL: I think the latter remark that your Honor made I think is the appropriate one. If the defendants want to try to prevent any reasonable discovery from the Commonwealth at all on this issue, then fine, so be it. Obviously, by providing simply a day or a day and a half to be able to at least respond to the histrionics that are apparently coming your way regarding unfairness and all the rest of that, then you can make a decision whether or not you want to hear us.

THE COURT: Let's set a schedule then for that narrow briefing on that.

How much time do you need, Mr. Zielinski?

MR. ZIELINSKI: We can get you our brief by next Friday, August 28th.

THE COURT: Okay.

MR. SOBOL: And if we could have until some time that next Wednesday because I assume we won't get it until late on Friday, and therefore, we'll deal with it on Monday and Tuesday.

THE COURT: So then we're up to September 2nd. Okay.

MR. SOBOL: I would make a request, your Honor, that if it turns out that you decide you want to hear the motion, if at the same time you can indicate to the defendants when you'd like a response on the merits. Obviously, the motion is a Motion to Compel, so it contemplates the entry of orders that require the production and all the rest of that, so we're getting into the fall by definition --

THE COURT: I realize that. What I then will do, I will look to have those briefs then. I will attempt to rule on the papers, and as I say, again, just give you a bottom line as rapidly as possible, and with that bottom line, if there's going to be further proceedings, a deadline for the defendants' brief.

Now, two other items that I have. One, the last time I had told you that I owed you at

least the bottom line of my decision, preliminary decision, on some of the Upjohn and attorney-client privilege issues with regard to the R.J.R. interviews. I don't know if there's someone here from R.J.R. I trust there is somebody. I don't intend to provide argument time on it again, but just that that's the one party that's affected by this.

In a shorthand way, let me give you both my bottom line ruling and my reasoning.

I am satisfied after reviewing the parties' materials, their cases, their -- the various charts you made of where these Upjohn issues stood in various jurisdictions, I am satisfied that the majority opinion in Upjohn has now become sufficiently a majority view around the country that it should be followed, and would be followed, be it in Massachusetts or in North Carolina. I don't think for these purposes I need to resolve which state. I'd be inclined to think that it is still Massachusetts rules of privilege that would govern this evidentiary issue, but for this purpose I don't think it makes any difference.

I think Upjohn, whether you literally call it a trend, or whether you simply call it a majority view, is at least a majority view. I'm satisfied that it would be adopted and followed in both Massachusetts and North Carolina. I note from the prior submissions that it has already been adopted and followed by at least one of my colleagues, although I'm not bound by that in this court, I obviously respect it, and so, I am satisfied, therefore, that the various interviews that are referenced in the two Jones-Day memos, the interviews that were taken of people who were current employees of R.J.R. at the time of the interviews are protected by attorney-client privilege, and there's no further inquiry about any need to produce those.

As I think I indicated at the time of the argument, I am not satisfied that the concurring opinion of the Chief Justice with regard to former employees enjoys the same status. There is no indication to me that that has become, or is likely to become, a majority view. It's certainly not likely to become so in the sweeping way that it is referenced in the Chief Justice's concurring opinion.

There has been isolated, occasional acceptance of that view. Most of it, I note from the cases you submitted, with very little discussion or analysis as to why only a couple of the cases actually seem to grapple with some of the difficult problems and ramifications of

treating former employees as people whose interviews are going to be protected by attorney-client privilege. And there has been outright rejection of it in other cases.

I also note, looking at the cases that have followed that, the Chief Justice's view, that some of those cases themselves do present some rather unusual circumstances, either because the person involved was someone who was of exceptionally high rank with his former employer, or circumstances where the witness, him or herself, might mistakenly think that the attorney was his or her own attorney, especially if the circumstances are where that witness's own individual liability and culpability might be at issue, that there would be some concern about protecting that witness's legitimate, although perhaps mistaken impression, that he or she was confiding their own culpability in someone who was their own attorney.

Of the materials submitted by the defendants; in fact, the two fairly comprehensive reviews of the subject that they point to for acceptance of Upjohn, the current version of the proposed Uniform Rules of Evidence, and the American Law Institute Restatement of the Law concerning lawyers, neither of those accept the sweeping view that former employees are all automatically dragged into the status of client for purposes of attorney-client privilege.

And both of those represent, in my view, bodies that have looked very carefully at the complex ramifications of this issue. The Uniform Rules of Evidence define a representative of a client as a person who's making the communication, quote, while acting in the scope of employment for the client, a definition that would certainly not include, not normally include, former employees.

In my experience, most corporations would reject the idea that statements made by those former employees, at a time when they were no longer employed, they would reject the idea that those were admissions binding on the corporation. They would normally argue vehemently to me that such employees were no longer within the scope of their employment, could not bind the corporation.

I cannot envision a corporation stepping forward and accepting respondeat superior liability if, for example, one of those former employees got into an auto accident on the way to speak with the attorney. They would never argue to me that they are liable for that auto accident; that that former employee was now --

was acting in the scope of their employment.

And it seems to me that when they're no longer acting in the scope of their employment, they should no longer be viewed as clients. The Uniform Rules of Evidence seem to adopt that view.

The proposed final draft of the Restatement of the Law concerning lawyers takes a somewhat more sophisticated and complex view, but their view also does not adopt some sweeping pronouncement that all former employee's communications with the corporation's lawyer are going to be treated as attorney-client privilege.

That proposed draft would protect communications between an attorney and a, quote, agent of the organization. They do cross reference the possibility that there are some former agents that might be covered by that. They do so only where there is, quote, a continuing legal obligation to the principal organization to furnish the information to the organization's lawyer. That is not a concept that would automatically include every former employee. Rather, it would be an exceptional and a somewhat unusual circumstance.

The Reporters notes to that Restatement themselves criticize the rationale that calling this attorney-client privilege would help the attorney gather information and give better advice.

Now, the Reporters notes note, as I think my reaction was at the last hearing, I note that that argument, quote, conflates the lawyer work-product immunity and the attorney-client privilege, close quote.

The attorney-client privilege does not extend to a particular witness just because that witness is important or useful. An attorney's dealings with a witness who is not a client are dealt with under work-product analysis and appropriate protections are afforded by that analysis.

Again, I think I articulated some of these concerns at the last hearing, but I remain concerned by some of the disturbing ramifications of calling former employees, persons whose interviews are going to be covered by an attorney-client privilege.

A current employee can be required by an employer to both talk with an attorney and can be required by the current employer not to divulge what gets said.

So, the employer controls who talks to the lawyers amongst their employees, and of

course, as the ultimate client, controls issues of waiver of attorney-client privilege. When you take waiver problems and start analyzing them in the context of former employees, I think it is a recipe for disastrous consequences in some circumstances.

Former employees are not normally under their former employer's direction and control. They can't be forced to go cooperate and talk with the corporation's lawyer. And so, if they talk with the corporation's lawyer, they do so voluntarily, and they should be allowed to do so on their own terms, deciding what they're going to disclose; what they're not going to disclose; and also, whether they're going to then go communicate that to someone else afterwards. It should not be within the hands of their former employer to keep them silent.

I do not see how you can have former employees giving interviews voluntarily, and then being involuntarily muzzled because it is not up to them, or would not be up to them if this is attorney-client privilege, whether they get to waive that privilege.

If this is attorney-client privilege, there will be many perhaps inadvertent waivers by the witness him or herself, which appears to be the problem that happened in the Amarin Plastics case. Should the other side's lawyer get into trouble just because a former employee witness volunteers the fact that he told something to the other side's lawyer? Which is what appears to have happened in Amarin Plastics.

I think not. If one witness that's talked to his former employer's corporate lawyer, and then is also contacted, perfectly legitimately by the other side; tells the other side, Well, I'm telling you just what I told the other lawyer, is that a waiver? Is that a violation of the attorney-client privilege? Is the lawyer who receives that casual remark now going to be disciplined for interfering with the other side's attorney-client privilege? I think not; should not. If you treat it as work product, you don't get into these problems. And work product provides adequate protection.

Again, there may be some unusual circumstances as cropped up in some of the cases the parties cited that might justify treating a particular individual former employee as the equivalent of a client, for, as I say, either perhaps some witnesses of exceptionally high ranking with the former employer that maybe did have some ongoing fiduciary obligation, or is an

individual employee whose own potential individual interests maybe need to be protected. But no such showing has been made at this point. We haven't gotten into the witness-by-witness issue.

So as far as the former employees are concerned, those people who were already former employees of R.J.R. at the time of their interviews, I think we do need to shift to the work-product analysis.

Now, if, as we take that witness-by-witness, R.J. Reynolds wants to come forward and identify some of those individual witnesses that might, for example, come within the draft Restatement view of the people who had a continuing obligation because it's some unusual circumstance, I might be willing to entertain that. But, as I say, I do not view that as a sweeping pronouncement that every former employee has such an obligation.

So substantial need needs to be addressed, and we need to map out a time frame to do that. We now also will have the benefit of that chart from R.J.R. about who these people are and what their status was at the time of the interview so we'll know what we're dealing with.

I note from just my own causal perusal of that chart, most of these witnesses are alive. Many of them appear to be available. Many of them appear to have been deposed already. And I also note that the Commonwealth already has what are, in all likelihood, the critical highlights from their interviews as set forth in the two Jones-Day memos themselves.

Given both the depth and the extraordinary candor of those two memos, it does strike me as somewhat unlikely that some significant, highly probative, and/or highly damaging item that was contained in the interview itself that didn't make it into either or both of those memos, but that's of course possible.

So I leave it up to the Commonwealth -- I think the burden is now on the Commonwealth to show a substantial need, and I think that does need to be shown on a witness-by-witness basis; not any across-the-board theory that I'm aware of. Substantial need to me means, a substantial need for the interview of that particular witness, and in the context of, what is that witness's availability, etcetera, etcetera.

Now, what kind of time frame is the Commonwealth looking for to come forward and make that showing, and the defendants opportunity to respond to it?

MR. WOOLF: Your Honor, if we're going to have another status conference towards the

third week in September; then we would have it by then.

If we're going to have one sooner, I'd need to know exactly when it's going to be to decide whether we'd be able to make it at an earlier September date.

THE COURT: Well, you're hoping to have the argument on it by the September conference?

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

THE COURT: Okay. Yeah, I think that's fair. If the conference is late enough in September, that an exchange can be worked out.

MR. KOBER: I guess it just depends on what the scheduling actually is. That shouldn't be a problem.

THE COURT: Okay. We'll just take that into account in setting the September date.

The only other item I wanted to raise with people, and this also affects the September date and the September agenda, as I indicated earlier, I do need to -- we do need to start having a discussion of certain trial mechanics and logistics issues; most especially issues about jurors and the summoning in of jurors.

The Jury Commissioner needs at least several months' lead time to get out those -- that higher number of juror summonses. And since I anticipate we're not just like some cases where they need extra jurors being summoned in for, you know, a couple of days, I anticipate this could be a protracted and difficult impanelment, and I've got to tell the Jury Commissioner to gear up and be bringing in a lot of extra jurors for perhaps quite some time.

And that is a process that I need to be putting in place this fall, so we need to start talking about that absolutely at the next September conference.

MR. SIMONDS: Your Honor, the defendants have devoted some thought to that issue, and we have made at least a preliminary proposal to the Commonwealth, which we're waiting for a response on. But it has been the subject of planning, and we think it would be appropriate to have this as an agenda item for the September conference.

THE COURT: That's what I want to make sure. Because I think I need to be consulting with my Chief and getting our requests in to the Jury Commissioner by October if the Jury Commissioner's going to have a supply of jurors in the pool available for us starting February 1, I think he needs at least that much lead time.

So to the extent -- there are other -- as I indicated earlier, a lot of other trial

mechanics that we need to start talking about as well, but that one is becoming quite critical in my view because of the Jury Commissioner's needs.

As most of you also know, the Chief Justice starts setting up a schedule for the following year starting in the fall, so I am eager also to put before him issues about our anticipated logistical needs for the case. So let's definitely devote some time to that issue and put that on the September agenda.

I think that's the only thing I have on my list. We just need to choose the September date. Or anything else?

MR. PEISCH: Your Honor, there is one other matter. I'm Thomas Peisch, counsel for CTR.

We have had discussions with the government about their responses to six interrogatories that we have served. I think those meet and confers have resulted in an agreement by the terms of which the Commonwealth will shortly be responding. In view of the impending summary judgment deadlines, we would like to set aside some court time with you on the afternoon of the 8th of September in the event that the responses do not conclude the agreement and resolve the dispute that has arisen.

This was as a result of a meeting we had last week with Mr. Weber and a couple of his colleagues, and confirmed in a letter. My hope is that court involvement in this will not be necessary, but we would like to ask you to hear us on the afternoon of the 8th if need be.

MR. WEBER: We agree to that, your Honor, if you're available on the afternoon of the 8th.

THE COURT: Let me ask you this, what parties or lawyers would need to argue it, because I am going to be out in Worcester County by Tuesday, September 8th. I can hear you here the Friday before Labor Day weekend, but by Tuesday, I am in the First Criminal Session out in Worcester.

MR. WEBER: We'll be happy to go to Worcester.

THE COURT: It's just the two of you basically?

MR. PEISCH: Just the two of us.

THE COURT: As opposed to -- I mean, you're all welcome to come out to Worcester, but I assume that I wouldn't have this --

MR. PEISCH: I'm told Worcester is beautiful in September.

THE COURT: It is lovely out there, a very civilized, gentele place. You'll enjoy it.

That's fine. As I say, I'm in the First

Criminal Session out in Worcester. I'll be hearing bail reviews probably by then, so this can be combined with no problem.

Okay. I'll make a note of that.

Please warn me, obviously, in advance.

You'll know by some time late the prior week whether you really need me?

MR. PEISCH: Yes, your Honor.

MR. WEBER: That's correct.

THE COURT: All right. So we need a date for the latter part of September.

Are there particular dates the parties have already looked at as being convenient?

MR. WEBER: September 24th, your Honor. I think the parties just agreed, perhaps?

MR. SIMONDS: My only concern, your Honor, deals with the Motion to Compel Production of Documents. I think the 17th is too early to complete briefing and have that on, so I think if that's going to be an issue, the 24th is probably the safer date.

THE COURT: And the 24th also gives a little more leeway to get the R.J. Reynolds' witness issues.

MR. KOBER: Yes, your Honor. If we could have a date certain by which the Commonwealth is supposed to serve us with its memorandum, and then if we could have two weeks to respond to it, please?

MR. WOOLF: Your Honor, if I may? With respect to -- if we're talking about four weeks from now, or five weeks from now, and then backup three weeks before that for the Commonwealth to submit the fact-intensive information on the former employees, that kind of leverages us. If we're going to do that time frame, giving R.J.R. two weeks to respond to the list of their own employees, then September 24th is a problem.

I don't see why R.J.R. can't respond within a week so we have R.J.R. two weeks before, and then R.J.R. will get its response to the Court a week before the hearing. Otherwise we're cutting it close with the holidays as well, coming into that time frame.

THE COURT: Well, as long as I get things from R.J.R. at least a few days in advance of the hearing, I'll be ready to talk about it.

Could we just work backwards. Let's say, I would want R.J.R.'s response by the 21st. Any reason why you can't get your materials to them by September 9th?

MR. WOOLF: September 9th? I think that's not --

THE COURT: It's just shy of three

weeks.

MR. WOOLF: My problem, your Honor, is I just came back from vacation to be at this hearing, and I'm going to be out until the fourth week, and so, I've got a two-day mediation the 10th and the 11th.

The week of the 14th is going to be a lot more feasible.

THE COURT: I think that may end up making it -- I understand your concern, but I think that may make it unrealistic for us to address this on the 24th, that's my only concern.

MR. KOBER: I think so, too.

THE COURT: I must say, as I think I indicated, I think we're going to be accelerating the pace of these conferences as we get certainly by October, in any event, because we've got an awful lot of things coming up. So in other words, I think --

MR. KOBER: It looks like October.

MR. WOOLF: If we're going to have another hearing early October, then that would be a more realistic date.

THE COURT: I think it's reasonable. And I'm only out in Worcester for the one month. By October, November, December, I'm back in the Boston-Cambridge area, so we can schedule specific dates for hearings.

MR. KOBER: Given that flexibility then, if we could have two weeks for whatever it is the Commonwealth has, because we're going to have to go through some analysis, obviously, of what they say. And it's not that easy for us either.

THE COURT: That's fine. That's fine.

MR. SIMONDS: Your Honor, as to agenda items for the 24th, can I just be sure on the agenda that we will be updating the Court on the exhibit production issue.

I would like to suggest, with the Court's approval, that we not submit in advance memoranda reporting the status, but that we discuss the status report, and if the Court wants a written position, we do it afterward. That saves work.

THE COURT: I don't see the need for busy work. Talk about it and be prepared to report to me and update me on how it's going. But, no, I don't need written submissions on that at this point.

So the next status conference, there'll be that update.

MR. SIMONDS: Will it be here, and at 10:00 a.m., your Honor?

THE COURT: We will endeavor to find a

Cambridge courtroom for you at 10:00 a.m., yeah.

So at this point, the two agenda items that we know are on, are the update on the exhibit production; discussion of trial mechanics, especially jurors. Anything else that's anticipated right now that we should already be previewing?

MR. WEBER: There's nothing else, your Honor.

THE COURT: All right.

Now, that's for September 24th. That means, under the case management order, that I do need an agenda in my hands by no later than Monday the 21st. I double-checked this. That is what the case management order provides for. I do need it even if the parties think it's a relatively short agenda on some of these conferences, I need to know that.

So as far as I am concerned, if I don't get an agenda by September 21st -- and, again, I am out in Worcester -- I will assume we don't have anything to talk about on the 24th and we won't have a conference. I need to know at least three days in advance what is and is not on the agenda.

I realize people have been on vacation, and Mr. Griffin's been on vacation, and it's been difficult. But I've been getting agendas a lot later than three days before, particularly when I'm coming in here from Worcester, I need some notion of what's on.

MR. SIMONDS: In defense of Mr. Griffin, let me say, your Honor, he was in Jackson Hole, Wyoming --

THE COURT: On a well-deserved vacation.

MR. SIMONDS: He returned at 9:30, received a call from the clerk and discovered that he was already in the Court's ill graces by virtue of not having the agenda, and we responded. I'm sorry. That will not happen again.

THE COURT: I do not address this to Mr. Griffin in particular. I address it to everybody. It's the responsibility of all liaison counsel, and all parties, to get that agenda to me, and I do need it. And I need it within the time frames put forward in the case management order.

So, I will expect that to be received out in Worcester by no later than the 21st.

Okay. Anything else for today?

MS. McINTYRE: Your Honor, just one last question.

Do you want the parties to submit a proposed order on the expert depositions for your signature, or does your Honor intend to do

something?

THE COURT: Well, where you have put it forward as a proposed amendment to the case management order, I think that's a format you had worked out --

MR. ZIELINSKI: We'll get it to you by the end of the day.

THE COURT: And I'll just endorse that and that becomes an amendment to the CMO.

MS. McINTYRE: That's fine. Thank you.

THE COURT: Okay.

[Court adjourns 12:15 p.m.]

#### C E R T I F I C A T E

I, Patricia Bellusci, do hereby certify that the foregoing transcript, pages 3 through 112, is a complete, accurate and true record of my voice recorded tapes taken in the aforementioned matter to the best of my skill and ability.

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Patricia Bellusci  
Official Court Reporter

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