

No. of Pages: 48

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT

No. 95-7378-J

Before: Sosman, J.

COMMONWEALTH OF MASSACHUSETTS

VS

PHILIP MORRIS, INC., R.J. REYNOLDS TOBACCO COMPANY,  
BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES  
P.L.C. LORILLARD TOBACCO COMPANY, NEW ENGLAND WHOLESale  
TOBACCO COMPANY, INC., ALBERT H. NOTINI & SONS, INC.,  
THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and  
THE TOBACCO INSTITUTE, INC.

---

Thursday, September 24, 1998  
Cambridge, Massachusetts

LYNCH & ASSOCIATES ~ Court Reporting Service  
259 Cross Street ~ Malden, MA 02148  
(781) 321-4029

APPEARANCES:

SCHNEIDER, REILLY, ZABIN & COSTELLO, P.C.  
Jeffrey D. Woolf, Esq.  
Three Center Plaza  
Boston, Massachusetts 02108  
Counsel for the Plaintiff

BROWN, RUDNICK, FREED & GESMER, P.C.  
Nancy B. Reiner, Esq.  
One Financial Center  
Boston, Massachusetts 02111  
Counsel for the Plaintiff

MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL  
George K. Weber, Esq.  
1 Ashburton Place, Anti-Trust Division  
Boston, Massachusetts 02108  
Counsel for the Plaintiff

MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL  
Rebecca McIntyre, Esq.  
1 Ashburton Place  
Boston, Massachusetts, 02108  
Counsel for the Plaintiff

APPEARANCES (Continued)

Richard A. Daynard, Esq.  
Northeastern School of Law  
400 Huntington Avenue  
Boston, Massachusetts 02115

Counsel for the Plaintiff

GOODWIN, PROCTER & HOAR  
Thomas J. Griffin, Jr., Esq.  
Exchange Place  
Boston, Massachusetts 02109  
Counsel for Philip Morris, Inc., Defendant

GOODWIN, PROCTER & HOAR  
Marshall Simonds, Esq.  
Exchange Place  
Boston, Massachusetts 02109-2881  
Counsel for Philip Morris, Inc., Defendant

KIRKLAND & ELLIS  
Marjorie Press Lindblom, Esq.  
153 East 53rd Street  
New York, New York, 10022-4675  
Counsel for Brown & Williamson, Defendant

APPEARANCES (Continued)

HILL & BARLOW  
Gael Mahony, Esq.  
One International Place  
Boston, Massachusetts 02110-2607  
Counsel for Lorillard Tobacco Company, Defendant

PROCEEDINGS

(Court reporter accepted and sworn)

CLERK: Your Honor, may I call the case?  
Middlesex Superior Court docket number 95-7378, the  
Commonwealth of Massachusetts versus Philip Morris,  
Inc., et al. The Honorable Martha Sosman presiding.  
Would Counsel please stand and identify themselves,  
please?

MS. LINDBLOM: Marjorie Lindblom for Brown &

Williamson.

MR. GRIFFIN: Thomas Griffin, counsel for Philip Morris and liaison counsel for the Defendants.

MR. MAHONY: Gael Mahony, counsel for Lorillard.

MR. WEBER: George Weber, Assistant Attorney General for the Commonwealth.

MS. MCINTYRE: Rebecca McIntyre, Assistant Attorney General.

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

THE COURT: I apologize for keeping you waiting. I did have an opportunity to discuss logistical issues with the Regional Administrative Justice, Judge Neel, since I'm borrowing his court room this morning who obviously has concerns about the logistics of this trial as well. I did receive a timely agenda. I thank you for that. And I understand that item number three on the agenda has been postponed or taken off by agreement.

MR. GRIFFIN: That is correct, Your Honor. I so reported to the clerk.

THE COURT: All right. Any other changes or changes in the order you wish to proceed, otherwise we can just start right in with number one.

MR. GRIFFIN: No, Your Honor. If I may, Your Honor, Thomas Griffin for the Defendants. Status report on trial exhibits is agenda item number one. The parties have met the schedule for the exchange of proposed trial exhibits set by Your Honor at the last status conference. On August 21st, the parties had the initial exchange of trial exhibits as scheduled. The second installment of the exchange of trial exhibits went forward as scheduled on September the 11th. So far the Commonwealth has designated approximately two thousand trial exhibits. The Defendants have likewise designated just over two thousand trial exhibits. The next exchange of trial exhibits is scheduled for Friday, October 2nd. The parties are working towards that date. There was a meeting of Counsel on Tuesday of this week, September 22nd, Your Honor, at which there was discussion about, among other things, managing the issues relating to objections as to the trial exhibits and the mechanics of putting together the master trial exhibit list that we're scheduled to present to Your Honor on November 7th. And as a result of that discussion, we have targeted the need to begin to evaluate a process and a procedure for dealing with objections and the mechanics of putting this master list together. And we have targeted several dates for meetings beginning in early October where we begin dealing with each other's documents on a specific basis to try to cope with the issues and try to get to the end point which is to get you the best available trial chart we can by November the 7th. We have targeted a meeting on October the 1st, and additional meetings on October 7th and 8th which may be subject to some change depending on

scheduling. We're going to talk to Your Honor about it on our next status conference. But we're in the process of working through that, and so far we're on track.

THE COURT: Good. Anything further on that item? Yes.

MS. REINER: Just a further issue. Yes, the exhibit exchanges took place and we have one more left. But I wanted to talk to you regarding the management of the trial exhibits as we go through the meet and confers. We were hoping to get the Court's guidance on exactly what you want to see in the trial list that we would submit on November 7th. There seems to be a slight difference of opinion. We would like to make sure that the documents get reviewed, and that we can have admissions noted, and we could learn about categories of documents as to what they'll be used for, whether they'll be used for the truth of the matter asserted, or for a subsidiary issue like an awareness issue, or knowledge of the public, or any other subsidiary issues. Our goal is that by November 7th, we'll spend as much time ironing out these issues, and articulating the admissibility of these specific documents with the Defendants at these meet and confers. And we would like to go through as many documents as is humanly possible so that we can submit to the Court a list of the objections and other outstanding issues.

The Defendants seem to suggest that they didn't want to go document by document, but that really wasn't idea that we would take each of the two thousand documents and note every objection, but more the categories of documents, and we would hope to do that at the meetings. So, briefly, we just wanted the Court's guidance as to the purpose of the meet and confers, and just how much substance you would like in those trial lists that will be submitted on November 7th.

THE COURT: It would be my understanding that if something is listed that the other side should be articulating any objections that it has, but that normally one of the ways to counter such an objection is to then articulate it's only being offered for this more narrow purpose and because of this purpose it's not hearsay, or whatever the argument is. I think it's an unnecessarily burdensome to make the party putting a document on the list in the first place to say, "Here's a document we want to present and why". I think it should just be, "We want to present this for some reason. Is there some objection?" And then perhaps part of what counters the objection is then an articulation, "We're only using this for impeachment." "We're only using this for," whatever we're using it for. I think -- It would strike me as unnecessary busy work to make the party offering the document also, at the outset, start limiting itself to what its uses might be. A discussion of that could well come out during the course of the meet and

confers in the way I've described, which may or may not then resolve the objection. There may be a resolution that as it is used only in that narrow way the objection will be withdrawn, but that if it's used in some other way the objection will be pressed.

Obviously to the extent that objections to or limitations on the use of documents go by category. That is helpful for me as I start tackling the motions in limine themselves, as I see this wonderful list on November 7th. I'm not sure that answers your question, but that's my immediate reaction, at least, to the concern you've articulated.

MS. REINER: Right. Well regarding the issue that you raised about if it was used for one purpose we might object, and we could put that in the list, and say if it's used for the truth of the matter, it would be we object, but if it's used for another purpose we wouldn't, and we identify what the purpose would be.

THE COURT: I mean, that's part of identifying what the objection is, and also part of our articulating from the other side in the meet and confer, here's why we think it's not objectionable, because of the way we intend to use this item. Does that -- Is that sufficient for you to ----

MR. GRIFFIN: I think it gives us the guidelines on our side, Your Honor, in order to make a productive use of these meetings next week. We'll see how it sorts out. I think it's a useful approach.

THE COURT: Okay. And obviously everything that helps organize, categorize, streamline both the master list itself and from that master list the packages, the issues, that I then need to decide is obviously helpful. Okay. That's all on item number one? All right. Item number two.

MR. GRIFFIN: We could split item number two into parts, Your Honor. It reads, "Discussion of trial venue and logistics, including jury issues," which is items you specifically requested we be able to address today. If we could isolate and start with trial venue as an issue, it would be helpful. Your Honor will recall that several status conferences ago we briefly discussed the limitations of this court house for trial of this case and our need to address those issues and needs presented by the limitations of this court house. And in that regard Mr. Mahony, Counsel for Lorillard, has been gathering some information about a possible attractive alternative venue for the trial of the case, which we would solicit your views and reactions to, and if I could, I'd ask Mr. Mahony to report on what he has done for the parties in that regard.

MR. MAHONY: If Your Honor please, Counsel for the Defendants and for the Commonwealth have been exploring the possibility of using one of the courtrooms in the new Federal Court House in Boston for the trial of

this case. We had a meeting, a joint meeting, on Tuesday of this week with Vincent Flanagan, the circuit executive for the First Circuit. Mr. Flanagan, of course, cannot bind the judges, but he gave us the strong impression that the federal judges would be quite receptive to a request for the use of one of their courtrooms in the new building for the trial of this case. We discussed several matters relating to the use of one of those courtrooms, Your Honor. The first item is cost. Mr. Flanagan said the cost would be modest, no more than a pass through of the heating, the electricity, the cleaning costs that would be associated with the use of the courtroom. I'm sure that we can work out some fair sharing of that cost between the Defendants and the Commonwealth, whatever that cost turns out to be.

The principal items that were discussed in our meeting with Mr. Flanagan on Tuesday were first, the subject of transportation to the new court house for the jurors, and secondly, the question of television cameras in the courtroom. Mr. Flanagan explained to us that they have arranged two buses from the Red Line at the South Station that go directly to the new court house. There is another bus that goes directly from the North Station to the court house. In our opinion, there are various ways -- I'm speaking for the Defendants, Your Honor, in which the transportation problem could be dealt with. For example, we might arrange to have a bus that would pick up the jurors at some convenient location here in Middlesex, where they could drive and park, or where they could come to by public transportation. The bus would bring them to the court house and then would bring them back to this location at the end of the day. We believe that there are various ways in which the transportation question can be dealt with. The second question that was discussed was the question raised by Mr. Weber of whether the federal judges would permit television cameras in a courtroom for the trial of a state court case. Mr. Flanagan could not bind the judges, obviously, but he gave us the strong opinion which he has that the federal judges would not approve of television cameras in that new court house, whether or not the case being tried is a federal case or a state court case.

The one remaining subject that we discussed, Your Honor, was the possibility, if the new Federal Court House cannot be used, of using space in the McCormack Building, the old Federal Court House. Mr. Flanagan said that subject could be explored. I think the consensus on both the Defendants' side and the Commonwealth's side, at least among people who were at that meeting, was that it would be far preferable if we could arrange to get a courtroom in the new Federal Court House. But I think the questions that are open, assuming that the invitation comes, as Mr. Flanagan believes it will, the first question, I think, is the question of television cameras

in the courtroom.

THE COURT: All right. It's certainly a possibility well worth exploring. I appreciate the efforts that have been put into it. It certainly would be a setting that would not only provide improved logistics on a whole range of subjects for all of you, but obviously would relieve my court of some of the pressure that would be put on its scarce resources by trying to hold this trial in one of our own spaces. The only -- Before I get to TV cameras, let me tell you, the only down side that I see about moving out of this building that had crossed my mind is that I believe that we now have something we didn't use to have, and that is the availability of childcare for jurors, available for them in this building. Very important, it seems to me, in jurors that are being asked to sit for that long. When we're able to offer them on site childcare. Here's their little brochure, the Clerk just provided me. That is obviously a major plus that helps us get jurors for the case who can tolerate what would otherwise be an unbearable problem, both personal and financial, of trying to make other childcare arrangements, and the convenience and availability of that is a, in my mind, not an insignificant factor as we try to select a jury for this difficult case. I have no idea whether anything comparable exists in the Federal Court House. I suspect it doesn't yet, or in that area. But I make that as at least one -- That's something we do lose by going there, potentially.

In terms of TV cameras, I -- It is my recollection that when the Superior Court was borrowing a -- the courtroom that I used in the old Federal Building, that indeed the federal judges understandably imposed their rules and views about cameras on us at that time, and I would expect they would do the same in their new location, and that they would be entitled to do the same. So I think we should operate on the assumption they're not going to approve that. Is there a problem with that?

MR. WEBER: Your Honor, the Commonwealth believes that the case involves matters of such public health importance that it would be useful for the public to be able to observe the proceedings. I would add simply to what Mr. Mahony said that Mr. Flanagan seemed to believe that even if the Court, the judges, would not permit television cameras in the new court house, that he seemed to believe that there would be a strong possibility that a courtroom on the 15th floor of the old Federal Court House could be made available, and that it would be likely -- it would be likely that there would not be a problem with television cameras in the old Federal Court House.

THE COURT: Well, no ----

MR. WEBER: Obviously this is a matter, we understand, for you to decide ultimately.

THE COURT: As you know, it is anticipated that Suffolk Superior Court is going to be starting to use that space at around the time we're starting this trial. It's not finalized, I gather, but that's the expectation, and that in that -- assuming that to be the case, I -- the use of the old Federal Court House would not, it would seem to me, to pose any problem about admitting TV cameras.

MR. MAHONY: Your Honor, on the first subject that Your Honor raised, we did not raise the subject of childcare facilities. My best guess is that they are available in the new court house, but we can explore that with Mr. Flanagan. I think the -- those type of facilities would not be available in the McCormack Building.

THE COURT: That's correct. They would not be available in the McCormack. They would be available here. If you can find out what along those lines is available in the new building, I would be -- I would want to know that, because I think it could be important.

MR. GRIFFIN: Your Honor, may I just make one point so we're clear? The Defendants have not agreed to the televised coverage of this trial, and that is an issue I think we need to discuss. This is, in terms of the venue it's obviously an important factor, but just so Your Honor doesn't carry away any impression that we have agreed that there should be routine televised coverage, I'd like to consider that as we go.

THE COURT: I must say, I think in our courts under our rules, it's not a matter of what the parties agree to or disagree with. It's my understanding that absent some good reason for keeping them out, television cameras are entitled to come in. That's the way our rules read. Obviously very different from the federal rules. And it's not a matter of my view, of whether I want TV cameras there or don't want them there, or the parties view as to whether they want them there or don't want them there. I believe our rules are that they have a right to be there, unless in my discretion I find that there's some compelling reason to keep them out. That's how I read the rule. So I don't think it's a matter of the parties agreement, but obviously it's an issue of concern if, as I would expect, the situation in the new Federal Court House is going to be that the TV cameras will not be allowed in. Normally if there is going to be any arrangement that is going to, as a practical matter, bar the -- some segment of the press from the court house, I would anticipate that I would be hearing from them, as they would be the ones that would be pressing an alleged right to be there, which they may have. All right. Is there -- If there is anything I can do in terms of either myself or through my Chief Justice, contacting someone, some appropriate person on the federal bench, Chief Justice Tauro or somebody that I

should be communicating with, I'm obviously happy to help do that.

MR. MAHONY: Your Honor, I think when we receive a firm response from Mr. Flanagan, which should be forthcoming next week after these celebration ceremonies have been completed, it might well be appropriate for Your Honor to communicate directly with the Court.

THE COURT: Why don't we leave it this way, then? I would appreciate it if some -- the parties would submit to me just some kind of, in a letter form, or something, an update on what you have learned, including anything you've learned on the subject of childcare, so that Chief Justice Mulligan or some appropriate person can contact our good colleagues in the Federal Court to start talking about it.

MR. MAHONY: We will do that, Your Honor.

THE COURT: Okay.

MR. GRIFFIN: The second piece of agenda item number two, Your Honor, we've referred to as jury issues. Your Honor raised that as an issue you would like to begin discussing and exploring, and for your information we took up the issue of jury selection, jury impanelment, at the Tuesday meeting of counsel that I referred to earlier. One point we agreed on, perhaps quicker than any other issue in the case so far, is that the last thing we want to do is not call enough, and we therefore considered what the number might be that we would proffer to Your Honor, at least in terms of thinking and planning based upon what we know, or what information we have about other experiences and other cases. The goal, I think, conceptually was to be able to sit a panel of 12 jurors with 6 alternates, given the sense of the expected length of the case. We shared information on two cases that were relevant in terms of this kind of issue. First of all, in terms of the duration of the case, we have the Minnesota trial experience to draw on. That trial took 75 or so days over four-plus months to try in Minnesota. It settled before the jury returned, as Your Honor knows. The second case that is of relevance is the Washington Attorney General case, a healthcare reimbursement litigation in the State of Washington that is, I believe, in the final stages of jury selection now. The last I heard was that opening statements were scheduled to begin this coming week in the Washington case. My information was that the jurors in the pool in the Washington case were told that that case could go as long as five months in terms of the issue of hardship or ability to sit for the panel in that case. And the question is, when directed to the jurors on that point, five months sitting, I believe, four days a week in actual trial time, is what I have been informed. It is too early for the parties to this case to be able to identify or be bound by any commitment now as to the expected length of trial, but several months seems to be at least a

benchmark that we thought we ought to work against in terms of that issue. I was informed that the panel that they started with in the Washington case was approximately maybe even over, 500 jurors to start with. That was the initial pool, and approximately 50 percent of those wound up being excused for hardship reasons before we -- they ever got into issues relating to personal disqualification or challenges for cause and the like. Translating that experience into what we might be dealing with here, it seems hardship may be an issue if we're talking about a case of several months. That will present a hardship to people, depending upon how Your Honor chooses to draw the line as to what is or is not an excusable situation. Here we have, I think, a unique factor I can't quite assess with a case of this duration. The likely number of students that may be in the jury pool and we're taking a semester away from them, and how do we cope with that? That may be a particularly unique issue to us.

Another one we talked about was we do have a widely used product that people have strong views about, or that there are either personal experiences or family experience that may well be disqualifying, and we ought to allow a fair percentage of those to be factored in in terms of working back up to what the starting number ought to be. We also talked about excuses for cause and tried to predict what the number of challenges might be as among the parties in a case where we have the eight Defendants and the Commonwealth. And parsing that out, I think we came to a number of round about 500 as a number to begin thinking of in terms of what Your Honor might need to begin planning for in terms of being able to have a pool available in February to get started with this.

We also talked about forming a subcommittee to deal with the matter of a juror questionnaire, which has been used at least in one or two other cases I'm aware of, and we obviously need to tailor that for Massachusetts-specific issues, but that is also in the works, and is some issue we wanted to at least raise with you, the concept of us submitting to you at some appropriate time a questionnaire about issues that we think might be useful in the selection process. But I hope that's helpful, but that's the thought we've been giving to the jury selection and screening process, Your Honor.

THE COURT: Do you have, or can anyone speak to, experience in other impanelments on these cases about how many people did need to be excused for cause, other than a hardship, and 500 is obviously -- it's a useful target to have as a number, but there is also an issue of how many do you go through in a day. We couldn't even fit 500 jurors in here to do them all in one day. It makes a bad situation worse, moreover it seems to me, to bring in people and tell them they have to keep showing up for

several more days until I even reach them to go through their particular questionnaire, or their individual voir dire, whatever we're doing. If you could get a handle on the pace, i.e., assume it's a target of roughly 500. Should I be bringing in 50 a day, 100 a day, to not unnecessarily annoy, aggravate and tie up jurors by calling them on a day, and then, as I say, literally not even reaching their voir dire for some days later. I think the experience here has been where so many people are likely to be excused for hardship that one normally addresses that immediately, and doesn't subject those people to an unnecessary questionnaire or time consuming voir dire if it's sort of pointless. It is also true, and perhaps depending upon where we are doing this, that jurors who are excused from this case for hardship become available to my colleagues on other, shorter trials. In other words, they don't' -- not all 500 necessarily need to be above and beyond the people that are currently being summonsed in. There's a way of making a relatively rapid assessment of who's being excused from the Philip Morris case based on hardship, and those people just go back to the regular jury pool and regular service. Is there any insight on sort of how it was handled in the other cases that have impaneled that would give us any sense of, you know, how many jurors do you process per day, and especially the ones who do survive the hardship hurdle, where the processing and investigation of that juror gets into the questionnaire and the substantive issues. Any sense of ----

MR. GRIFFIN: I did not have the foresight to ask that question. I know that the process in Washington, assuming it's still on track for opening statements this coming week, took approximately three weeks. I believe it was supposed to begin on the 8th of September, and opening arguments, opening statements, will be September 28th or so. That was the target. You can probably do the division, but I don't think that's really a precise way of dealing with a pace question. I did not think to ask that, either, of the experience with the Minnesota counsel, and I can certainly make inquiries about that, and supplement the information available to the Court. If anybody in the courtroom has any information about it, I'm sure they will speak up to that.

THE COURT: Let me also, since this morning is the first I've, you know, been alerted to the possibility of trying the case somewhere else. It might be realistic to think in terms of, say even if we are using the new Federal Court House, that we indeed, as difficult as it might be, impanel here. Again, simply so that this large number of jurors who have been otherwise summonsed in, are available for other uses in the Superior Court and the Cambridge District Court, and then we would relocate to whatever our other site is once we have a jury,

because that, I think, does affect the numbers that I should be giving to the Jury Commissioner. At least off the top of anybody's head, is there any -- Do you see foresee any problem with that approach, that if we're using some other site we nevertheless impanel, find a way to do the logistics of the impanelment physically here in this building?

MS. LINDBLOM: Your Honor, Marjorie Lindblom. On the impanelment issue, I don't have any issue about that. I have a very little information about what happened in some of the other trials, and in Florida, where the jury process was -- had been underway for quite some time before the case settled, it was an individual voir dire system, and it was very lengthy. They were going through at a very slow pace, maybe a dozen a day, or -- My partner is here, who may know a little bit more. If I could ask him, too. This is Todd Gale.

MR. GALE: Good morning, Your Honor. Your Honor, I don't know how many they went through a day in Florida. I know that in the Florida Attorney General's case they were -- they spent about three weeks picking a jury, and not yet impaneled the jury before the case had settled. In Minnesota I know that the judge was calling in jurors in groups of 25. I don't believe that he went through 25 jurors a day, though. My recollection -- I was there but not involved in the jury selection process, and my recollection is they were going between 10 and 15 jurors a day, questioning both from the Court and from the lawyers involved.

MS. LINDBLOM: And in the Minnesota case, I was there for the first day of jury selection, it was a very slow process. The questioning was done to the entire panel first, but the lawyers were doing the questioning. So a lot of it depends ---

THE COURT: Which we do not have here, as you know, so --

MS. LINDBLOM: Right. -- on, you know, on who's doing the questioning and on the Court's inclination on hardship. There was a dispute about, not just hardship, but a dispute about the proper standard for cause, and so all of those things are hard to predict. I did have a question, and Your Honor may already know how the Court would like to do this, but would the Court anticipate questioning a jury box-ful at a time, and then exercising challenges against those people as a group? Would Your Honor anticipate doing individual voir dire, you know, so it's one at a time, with the challenges exercised right then? Some of that matters, too.

THE COURT: Yes. I would certainly be happy to hear what the parties would prefer to do, but my inclination, my inclination, would be, as I say, first just deal with hardship. Excuse all of those people. Then presumably by way of some questionnaire, get the remainder to fill out a questionnaire. Then do an

individual voir dire of those remaining jurors with their questionnaires in front of you, and separate from the rest of the panel. And if I were satisfied that the juror, that juror, should not be dismissed for cause, I would be requiring the parties to exercise their peremptory challenges then and there as to that individual juror. I would not fill the whole box and then start with peremptory challenges. This is what we normally do when there's individual voir dire in other cases, and I think that would be my inclination, but I -- Again, I am certainly receptive to hearing recommendations based on the experience from trying to impanel this kind of case in other states.

MS. LINDBLOM: One thought that I had had is that it might be a good idea to have a short form questionnaire. It's my understanding there are no hardship type questions on the standard juror questionnaire these days because of the one-day, one-trial system, but perhaps we could have kind of a two-level questionnaire, the first one half a dozen questions that go to hardship issues, and only if people get by that first screening or something do they fill out another questionnaire, unless the Court thought it would be easier to do it in large groups.

THE COURT: I think I can do it in a large group with one question.

MS. LINDBLOM: Okay.

THE COURT: And a show of hands on the hardship issue.

MS. LINDBLOM: All right. You've just saved us some work right there.

THE COURT: I think that is -- It's a big problem because a lot of hands are going up, but I think it's -- I think that can be managed. Obviously, it's the design of the questionnaires or questions from me that go to the issues that would affect bias and that sort of thing, that are the very problematic ones in this case. And that's what, obviously, I would want any questionnaires addressed to, and that would be the sole subject of any individual voir dire. I wouldn't be doing that with people who have already not raised their hands on the subject of hardship.

MS. LINDBLOM: And does the Court really think that anyone won't raise their hands? But anyway -- Maybe two ----

THE COURT: Others of my colleagues have impaneled lengthy trials. It can be done. It just takes time, as you've learned in these other states.

MS. LINDBLOM: Certainly we could -- You know, we can get together on this, and obviously work out questionnaires. They have been worked out in other cases. One other question I had, which I'll ask as long as I'm standing, which is does the Court have any firm views about the schedule for trial that would be

followed? For example, would it be five days a week, four and a half days a week, 9:00 to 5:00, 8:00 to 6:00?

THE COURT: Our normal -- As you know, if we're trying full days, which obviously we will do in this case, our norm is 9:00 to 4:00 in those court sessions that we have that do full trial days. I would intend to adhere to that. In all likelihood I would impose a requirement that Counsel and myself get underway at 8:30. So there's built in sort of a half hour to do those issues that always seem to erupt, and I don't want to keep the jurors waiting. But that we would be underway with jurors in the box at 9:00, go until 4:00 with a one hour lunch break, and again, we would have time at the end of the day also to deal -- each day to deal with particular problems. To the extent that we need to -- that we face bigger issues that do require an entire day, half day or more, which in this type of case happens, that those would simply be done on an ad hoc basis as needed, telling the jury, "We don't need you tomorrow. We're letting you go a half day early today, because I have things to go over with the lawyers." I would not automatically propose to build those into the schedule, but just recognize that from time to time during a trial those kinds of interruptions will be necessary and the jury will be told.

MS. LINDBLOM: And one other question going to the jury selection issue. Would the Court anticipate that challenges for cause would be exercised outside the hearing of the jury?

THE COURT: Well ----

MS. LINDBLOM: Or at sidebar anyway?

THE COURT: I must say, when I do that kind of individual voir dire, I usually have all the rest of the panel held somewhere else, so only the juror that's being told they're not on the case is the one that hears that they are being challenged, or even by whom. And therefore, I don't think there's a need to do it at sidebar. Like I say, if I'm satisfied the juror does not need to be dismissed for cause, the question is does the Commonwealth have any -- wish to exercise a challenge? Does any Defendant wish to exercise a challenge, and just do it. If nobody has challenged, then that's a juror, and if anybody has, that juror is the only one that knows, and that juror is -- does not return to the panel to infect the rest of the panel with any discussion about who challenged them. I do it in murder cases that way. I think I can do it in your case that way. So that's how I would handle it.

MR. DAYNARD: Your Honor, Richard Daynard, Special Assistant Attorney General. My understanding about the Washington case, and this comes entirely from news wires type articles, is that the jurors, the jury pool, was asked to submit questionnaires, I think about two weeks ago. I think it was two weeks ago tomorrow,

and that the last week was spent on motions involving, I assume, largely other things, and that this week the Court's intention was to do the voir dire entirely in one week, and that's this week. I guess we'll know pretty soon whether this was successful, and if so how he managed to do it, but if it could be done that way, that would, you know -- That would be a good example. There are obviously bad examples out there, too, that just drag on and on.

THE COURT: Well what I need is by sometime in October I have to be communicating to the Jury Commissioner dates, numbers, how many summonses, extra summonses, need to go out. So I will -- Any updates you have on this experience that will help me refine that instruction I give to the Jury Commissioner would be helpful. But it's -- The notion that it's going to take roughly 500 people to winnow it down to 18 is a useful starting point for me. As I say, any further insight or information you can provide, literally within the next couple weeks, that would help -- help me fashion that -- the logistics of that instruction would be helpful. Okay. Mr. Griffin.

MR. GRIFFIN: Next agenda item, hopping over number three, Your Honor, since we are not dealing today with the motion to compel, is the report on expert discovery.

THE COURT: No other logistical issues that anyone wants to deal with or raise at this time.

MR. GRIFFIN: I don't think there are. The technology we did discuss, and we're grappling with in terms of either side's view of how paperless this case can be, and how low tech it can be, so that some of the older ones of us can still function, and we're still trying to address that.

MR. WEBER: Your Honor, the Commonwealth is still interested in perhaps having the trial in one of the federal court houses, but I would ask is there a person here that we can contact regarding this building, or the buildings in Middlesex, to see if there is any other possible alternative?

THE COURT: Well ----

MR. WEBER: What I am looking for is somebody who knows like how many plugs there are, and you know, can extra power be brought in, that kind of thing -- those kinds of questions.

THE COURT: Off the top of my head, I can't give you that name, but let me try and find that out for you. I think there would be a whole variety of problems in trying to hold the trial here. This is one of our smaller courtrooms. Even our big courtrooms just can't accommodate this number of lawyers, let alone the added equipment demands, extra jurors. If we have to do it, we will find a way, but it will be very cumbersome and difficult. If there is some other site where it could be

done without sacrificing on these other things I would prefer that. But I will at least try to find out who it is you would need to be talking to if we end up ---

MR. WEBER: Yes, I'm just thinking in case everything else doesn't pan out.

THE COURT: Yes. Yes. All right. Item four.

MR. GRIFFIN: Item four, report on expert discovery, Your Honor. We are proceeding in accordance with the schedule for expert witness discovery that Your Honor issued in terms of the amendment to the case management order. Depositions of Plaintiff's experts are on going or are being scheduled in and throughout the month of October. Some have already been taken and scheduled. Issues have arisen on various fronts relating to expert discovery, not surprisingly. Counsel have been conferring on those in an effort to deal with them, identify what they are, and determine how to resolve them if we can. Most recently we had that as one of our agenda items for the discussion at the meeting of counsel this past Tuesday. Now is not the time to involve Your Honor in some of those issues. And the reason for that is, I think Counsel need more time to try to resolve and meet to work these out, and to assess what to do with the problems in the event we can't work them out. And most importantly, to make some decisions about whether we need the Court's intervention and assistance depending upon what the problems are.

Let me briefly categorize what they are because I think in the event we have to come back and see Your Honor, you'll at least know these are the issues that seem to take front and center attention. Supplementation of expert witness disclosure statements. Not surprisingly, both sides have reserved the right to supplement depending upon various events or situations. Both sides, however, also want to come to closure on the expert situation, particularly as we approach and conduct depositions. It is an issue for both sides. We are trying to conceive of ways to deal with it both on a general level, or maybe the best way to deal with it is on an expert by expert level depending upon what the category and speciality or expertise is that it's involved. And that's an on going process.

The second category that has come up in terms of an issue is the duplication or even redundancy of experts. The issue has been flagged. We are going to try to deal with both on specific experts and as a concept in terms of trying to weed out the unnecessary duplication, and to make calls as to who's the number one expert, who isn't, or what the eventualities are that make that judgement impossible. We are trying to deal with that.

For the Defendants there remains an issue with respect to our inability to replicate the data underlying the Commonwealth's damages model which has been a problem

for several weeks. Until we can replicate the data, we can't analyze and deal with the model. It was the subject of discussion at Tuesday's meet and confer, and I think that we came out of that basically at a point where Counsel are committed to try to resolve and identify the what and why of the problem with replication and to try to remedy it as quickly as possible because it has impact down the line. I don't know now what the dimensions of that problem will be or the magnitude of that problem. I think we simply need to do more spade work to get a sense of what we're dealing with in terms of any problems and how to sort them out. These issues are all being discussed and will continue to be discussed next week. One of the things we had in mind is my segway into the next schedule for us, is that Your Honor said at the last time, that now that you're going to be in Middlesex, I think you indicated over the next several months, perhaps we could meet more frequently than once a month. I would seize on that and perhaps what we might do, and we talked about the meet and confer on Tuesday, is pick an earlier date in October than we otherwise have for our regular meetings with a view that that is a date when if some of these expert problems become real problems, they are now, but if we can't resolve them and we need to have the Court's assistance, we could come and see you about that and whatever else needs to be covered by way of the advance agenda. We had actually identified a Thursday, and I would proffer that to Your Honor now, October the 8th as a date. I guess that's two weeks out whereby we could come in and see Your Honor on expert issues to the extent there are some that need Your Honor's attention, and other issues that we can identify and alert you to by way of the advanced agenda. And then probably have a later meeting in the later part of October to deal with additional issues. I can tell you now that Thursday the 22nd, if my arithmetic is right, is a problem for several defense counsel, the 21st, second and third. I would just proffer for your consideration the last Thursday in October as a possible date for the second of our meetings in October, the 29th, as a date. I haven't talked to the Commonwealth about it, but I did get information that the earlier Thursday would a problem for several people. But I think if we can use the 8th, or whatever day is convenient in that ballpark with Your Honor, it might be useful to help us to deal with any expert issues we need to bring to Your Honor's attention.

THE COURT: I'm happy to accommodate you for two dates in October, although it will take a little more juggling than I thought. I have been asked to stay out in Worcester for an extra month. So I won't be in Middlesex full time until November unfortunately, but still your request for two dates in October is manifestly reasonable, and we'll find a way to do that.

I was, I must say, going to be out that first

week in October where I was not going to be anywhere outside of reach. I don't to delay resolution of the problem, but if it could be put off to the Tuesday right after Columbus Day, that's personally a little bit easier for me. I doubt you could move it up as early as the prior Friday. That sounds tough.

MR. GRIFFIN: I think the only date to keep in mind, other than the ones you've just identified, that I have in mind, and that's one of the reasons the 8th was sort of fixed. The Defendants have a date of October 15th to indicate what their disclosures are in response to the Commonwealth's experts on the damages.

THE COURT: Yes.

MR. GRIFFIN: This problem with replication, depending on how we sort it out, we may need to see Your Honor if we can't work it out, or if at working it out we still feel we're in the crunch in terms of making that deadline and we can't work out an extension between us, if we need to talk about an extension time, we may need to see Your Honor to get that resolved before we run into that date. So I'm sure, as I stand here, I'm not sure anybody is sure as they would be standing here now, can we know the dimensions of the problem by next Friday. If we do, let me suggest this. If we do, and as soon as we have some sense of the problem in this regard and have a handle on what it means in terms of impact or adjustment of scheduling or our problems, we'll bring that to Your Honor's attention after conferring with the Commonwealth about it. Maybe we can do something next week. I just don't want to represent to Your Honor that we could. I just -- I don't think anybody knows yet the dimensions and magnitude of what this may be. But if we can work around somehow that that October 15th date, if it becomes a problem, we want to make sure we see you about before we run smack dab into.

THE COURT: Well, let's await further notice on whether -- If things need to be brought to my attention or can be brought to my attention even earlier, the earlier the better is good anyway, if delaying seeing me until that following Tuesday is going to create a problem, I can make the adjustments and see you, at least briefly, on that Thursday the 8th. Personally, I would prefer not.

MR. GRIFFIN: Why don't we all be as flexible as we can on this issue, Your Honor. Maybe one of the things we might do is that week after the Columbus Day holiday, maybe we can pick a date.

MR. WEBER: Maybe the 12th or the 13th, that's Tuesday and Wednesday.

THE COURT: Either of those are fine by me.

MR. GRIFFIN: I'm searching for a reaction.

MR. WEBER: Maybe it's the 13th and 14th.

MR. GRIFFIN: Anybody have a problem with the 13th or 14th? Hearing no negatives, Your Honor, I think

depending upon your calendar, I think we could have the next status conference on either the 13th or the 14th.

THE COURT: Either of those dates are fine.

MR. GRIFFIN: The Wednesday?

THE COURT: Wednesday the 14th is fine. Why don't we do it then, but everybody, if that's the date we pick, there's apt to be that there's maybe a few days of slippage if the upshot of that hearing is going to effect the Defendant's expert disclosures.

MR. GRIFFIN: I think to the extent that we know that, we'll know that sooner than the 14th. I think we'll just have to get in touch with Your Honor and deal with that. But I think -- I wouldn't want to book Your Honor and have Your Honor compromise your plans for the week before until we get a better handle on where we are.

THE COURT: Okay. Just in terms of everybody else's scheduling, Thursday the 29th is fine by me and in fact would be a convenient date.

MS. LINDBLOM: I just realized, Your Honor, that despite having not raised an objection, I remember I had committed to do something late afternoon on the 14th, and I'd have to get back to New York to do it. So the 13th is slightly more convenient for me if it doesn't make any difference to anybody else. But I could also do it if we're going to be finished early.

MR. WEBER: Either date is fine.

THE COURT: I'd just assume make it the 13th, actually, as long as it doesn't pose --

MR. SIMONDS: Your Honor, Mr. Simonds for Philip Morris. If I could interrupt to ask a question? Is the Court schedule such that should the end of next week, the 2nd of October prove to be a date on which we have information we could arrange on short notice to come to Worcester to report to the Court?

THE COURT: Certainly. Absolutely.

MR. SIMONDS: That's a feasible program for the Court to do?

THE COURT: Yes. Yes, it's quite feasible, no problem with that at all. All right, the next item is?

MR. GRIFFIN: I think we can now turn Your Honor to the last item on the agenda which relates to the Defendant's request for leave to file reply briefs on the summary judgement motion. There is no written request in front of you. I just wanted to include this to bring it up. It's largely anticipatory, obviously. But as Your Honor is well aware, there are multiple summary judgment motions that were filed. As it turned out, none were filed by the Commonwealth. Several were filed by various of the Defendants on different issues. The CMO provides that the oppositions to the summary judgement motions are due on the 30th of October, and I think we've already built into the CMO a hearing date on the summary judgment motions of November 17th. The CMO is silent as to the right to serve or file reply briefs. In talking with

those who are much more familiar with the issues raised by those motions, it is in their view highly likely, although we haven't got the oppositions yet, that there will be issues that they would like to at least consider and bring to Your Honor's attention by way of a reply brief. We don't have a particular proposal now about how many reply briefs, whether we can consolidate them. We don't have the oppositions yet, obviously. But I just wanted to raise that as an issue so that we can build in some time to deal with it, Your Honor, on that issue. Once we have the oppositions on the 30th, if we could at least plan and carve some time out for dealing with it, Your Honor, so we could indicate to you what our thoughts were then in a very timely way because we want to obviously deal with this issue and get reply briefs to the extent you permit them comfortably in advance of the November 17th hearing. So it's not a proposal. It's just a flag, an issue we'd like to carve in if we could see Your Honor, or talk with Your Honor as soon as we digest the oppositions and have reactions to any plan and a proposal to try to present that to you so that whatever is permitted and however we chose to organize it, we can get it to Your Honor in time to be useful to you before the hearing on the 17th of November.

THE COURT: Well, I was somewhat surprised to see this item on the agenda. The need for reply briefs is impossible to grapple with when you haven't seen what you're extensively going to reply to. My expectation was that the hearing on these motions would be quite lengthy. And I'll be devoting a day or two to oral argument on these motions, and that with that, the need for a reply brief would seem to me to very limited, at most, narrow, specific, something that was simply to bring to my attention a particular statute or case of particular importance that for some reason had not been put in the initial briefs. So I would not look particularly favorably on requests for reply briefs, or if I did so, they would be with very strict page limits. My recollection of the motions to dismiss and the motions to disqualify, and things of that nature, were that the reply briefs and sur-reply briefs were larger than the initial brief and the opposition, and that is not an experience I wish to repeat. It did not, in my view, add to my understanding of the issues, it simply delayed the time that I was ready to deal with them, and I do not want that to happen either. I have already read all of the memos submitted by the Defendants, not necessarily all of the attached materials, but all the memos. I've already read them once. And I intend to read the Commonwealth's oppositions immediately upon receipt, and be ready for hearing by the 17th at the latest. If in fact, I feel I've been able to digest the Commonwealth's oppositions faster, I'm going to have that hearing even earlier. But again, with the expectation that we'll

spend -- there's a lot of motions, a lot of different parties that are going to want to be heard. I expect I'll spend quite some time in that oral argument. I would, quite frankly, be inclined to say no reply briefs until we have the hearing. If at the oral argument there is some concern from a moving party that they feel they have not adequately articulated in the course of their lengthy oral argument, or some bringing to my attention a particular statute, or a particular case that they really want to submit to me in some written form, we can define that at the hearing. I would be inclined to go that route. Although, obviously, I do want be getting into decisions on the summary judgement motions as rapidly as possible, particularly as they may impact the upcoming trial. We should be heavy into trial preparation at that point. You need to know the answers on these things. So, let's say I frown on the notion of reply briefs, but I would suggest that we just go straight into the oral argument as quickly as I am able to handle it. And if somebody feels they really need an opportunity to brief to me a particular point above and beyond what they've articulated in their initial briefs, their oral argument, we can set a time frame for you to get a particular items into me as of the date of the hearing. And I obviously won't decide that particular motion or that particular segment of the motion in advance of receiving those materials.

MR. GRIFFIN: That's fine, Your Honor. Thank you for the guidance.

THE COURT: Anything else?

MR. GRIFFIN: Not that I have, Your Honor.

MR. WEBER: No, Your Honor.

THE COURT: Okay. I don't think I have anything else on my own agenda. So I will be looking for updated information about the trial venue. I'll be trying to find for you the name of a person who could be talked to about the nitty gritty logistics of this building. And I'll await word on whether you need to see me in Worcester towards late next week. Barring that, I'll see you on October 13th at 10:00 in a courtroom yet to be named in this building.

(Whereupon the hearing was concluded.)

## CERTIFICATE

I, John M. Lynch, Jr., a Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that

the foregoing Record, Pages 1 to 47, inclusive, is a true and accurate transcript of my System Tapes, to the best of my knowledge, skill and ability.

In Witness Whereof, I have hereunto set my hand and Notarial Seal the 24th day of September, 1998.

-----  
John M. Lynch, Jr.  
Notary Public

My Commission expires December 21, 2001.