

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK: PART 48

-----X
IN RE OPIOID LITIGATION,

Index #
400000/2017

Plaintiffs,

-against-

Conference

PER COURT ORDER,

Defendants.
-----X

July 19, 2018
Central Islip, New York

B E F O R E:

HON. JERRY GARGUILO
Justice of the Supreme Court

A P P E A R A N C E S:

SIMMONS HANLY CONROY, LLC.
Attorney(s) for Plaintiffs
112 Madison Avenue
New York, New York 10016

BY: PAUL J. HANLY, JR., ESQ.
SARAH BURNS, ESQ.

NAPOLI SHKOLNIK, PLLC.
Attorney(s) for Plaintiffs
400 Broadhollow Road
Melville, New York 11747

BY: PAUL J. NAPOLI, ESQ.
HUNTER J. SHKOLNIK, ESQ.
SALVATORE C. BADALA, ESQ.

Appearances Cont:

DECHERT, LLP.
Attorney for Purdue
1095 Avenue of the Americas
New York, New York 10036

BY: MARK S. CHEFFO, ESQ.

O'MELVENY & MYERS, LLP.
Attorneys for J&J Jansen
400 South Hope Street
Los Angeles, California, 90071

BY: CHARLES C. LIFLAND, ESQ.

KIRKLAND & ELLIS, LLP.
Attorneys for Allergan
655 Fifteenth Street, NW
Washington, D.C. 20005

BY: JENNIFER G. LEVY, ESQ.

ARNOLD & PORTER KAYE SCHOLER, LLP.
Attorney for Endo
250 West 55th Street
New York, New York 10019

BY: JONATHAN L. STERN, ESQ.

1 THE CLERK: This is number 1 on the conference
2 calendar in the matter In Re Opioid Litigation, index number
3 400000 of 2017.

4 Counsel, could I have your appearances, please?

5 MR. HANLY: Paul Hanly, Simmons Hanly Conroy for a
6 number of plaintiffs, Your Honor.

7 THE COURT: Good morning, Mr. Hanly.

8 MR. NAPOLI: Paul Napoli, Napoli Shklonik.

9 THE COURT: Good morning, Mr. Napoli.

10 MR. SHKOLNIK: Hunter Shkolnik, Napoli Shkolnik.

11 THE COURT: Good morning, Mr. Shkolnik.

12 MS. BURNS: Sarah Burns, Simmons Hanly Conroy.

13 THE COURT: Good morning, Miss Burns.

14 MR. BADALA: Salvatore Badala, Napoli Shkolnik.
15 Good morning, Your Honor.

16 THE COURT: Good morning, Mr. Badala.

17 MR. CHEFFO: Good morning, Your Honor. Mark Cheffo
18 for Purdue.

19 THE COURT: Good morning.

20 MR. LIFLAND: Charles Lifland for J&J Jansen.

21 MS. LEVY: Good morning, Your Honor. Jennifer Levy
22 for Allergan.

23 THE COURT: Good morning.

24 MR. STERN: Good morning. Jonathan Stern for Endo.

25 THE COURT: Thank you. I'm going to be asking

1 today that we get some things done. At the end of the day
2 we will be talking about a preliminary conference order.

3 First matter of business will be the preparation of
4 service of the appropriate answers. I believe we agreed
5 early on in the conference that there would be three
6 answers; one on behalf of the manufactures, one on behalf of
7 the distributors, and one on behalf of the individuals. If
8 there is a change in that plan discuss the change in that,
9 if there are alterations you, of course, will notify the
10 Court, but there is a couple things I want to go over before
11 we get to that.

12 You are probably aware that the Court has been --
13 has communicated with Judge Polster out of Ohio on several
14 occasions. In fact, Judge Polster scheduled a conference
15 call with Federal judges throughout the country, and I was
16 invited to participate, and the Court did indeed
17 participate. During the course of that last conference call
18 Judge Polster indicated that moving forward on the Federal
19 level he had anticipated -- was suggested, don't pass out
20 when I tell you this, 800 depositions, which he's tried to
21 whittle down to 400 depositions. We, of course, anticipate
22 subsequent motions in this case. As all of you know the
23 Court has rendered decisions on the petitions to dismiss on
24 behalf of some of the manufacturers and, of course, some of
25 the distributors. We do anticipate, and I'm sure all of you

1 anticipate, subsequent motions, dispositive motions as
2 discovery progresses.

3 What I heard with Judge Polster, as well as what
4 other judges had to say, I think you will all agree that as
5 a group we can anticipate a logistical challenge. I was
6 going to use the word nightmare, but I don't think that was
7 good. I will call it a logistical challenge that certainly
8 this Court has never confronted. I can't imagine during my
9 40 plus years between practice and the bench, I don't think
10 I've ever seen anything like this. If one makes the
11 assumption, and it's just an assumption, not a fact, that a
12 significant number of defendants will be around when it's
13 time to try these cases, logistically speaking, assume
14 nobody is out of the case, you have to have a facility that
15 can accommodate 25, 30 defense tables. Voir dire in such
16 cases, which we send back, assuming -- let's assume a case
17 goes back to very rural county, voir dire alone in such a
18 case -- a two doctor med mal case takes two weeks to select
19 a jury. Voir dire may make a month, maybe two months.
20 Opening statements given the population that could be
21 anticipated when these cases go to trial, opening statements
22 might take a month.

23 This Court a few years ago rendered a decision that
24 was affirmed on appeal and we cited Mr. Justice Breitel who
25 once wrote, "it is ancient and undisputed law that courts

1 have an inherent power over the control of their calendars,
2 and disposition of business before them, including the Order
3 in which disposition will be made of that business," and the
4 citation is Plachte, P-L-A-C-H-T-E, versus Bancroft, Inc., 3
5 A.D.2d 437, 161 N.Y.S.2d 892 (1957).

6 Thereafter, the Appellate Division had recited the
7 following in an opinion, and I will give you citation. "It
8 is our view that courts of record (Judiciary Law § 2) are
9 vested with inherent powers, which are neither derived from
10 nor dependent upon expressed statutory authority, and which
11 permits such courts to do all things reasonably necessary
12 for the administration of justice within the scope of their
13 jurisdiction. This so-called 'Inherent Powers Doctrine' has
14 been described as follows: Under the inherent powers
15 doctrine a court has all powers reasonably required to
16 enable a court to perform efficiently its judicial functions
17 to protect its dignity, independence, and integrity, and
18 make its lawful actions effective. These powers are
19 inherent in the sense that they exist because the Court
20 exists; the Court is, therefore, it has the powers
21 reasonably required to act as an efficient court." That's
22 like a reference to *Hamlet*, "to be or not to be," I think.
23 "Inherent judicial powers derived not from Legislative grant
24 of specific constitution provision, but from the fact it is
25 a court which has been created, and a court requires certain

1 incidental powers in the nature of things. Citing Carrigan,
2 Inherent Powers of the Court, National College of the State
3 Judiciary, Reno, Nevada, 1973, decided in Matter of People
4 v. Little, 89 Misc.2d 742, affirmed 60 A.D.2D 797.

5 Why did I bring this up? It's only fair that I
6 tell you what the Court is considering, and I'm not here to
7 surprise anybody or catch anybody off guard, but the Court
8 is considering a protocol moving forward. Of course we will
9 require answers. There has been stipulations executed by
10 all parties on the service of answers. I directed those
11 stipulations be indeed enforced and answers be prepared and
12 filed.

13 This is what the Court is considering. I, as
14 noted, this litigation is pending all over the country.
15 Hundreds if not a thousands actions are out there. The
16 judicial system, counsel, and the parties, have yet to get a
17 snapshot or blueprint of what a trial is going to look like.
18 What this Court is considering and I'm going to ask all of
19 you to submit position papers. I don't want briefs. You
20 can cite cases, of course. Position papers on what the
21 Court is going to suggest.

22 The Court is looking to separately try, at the very
23 least, the Suffolk case, and if there is indeed a consent on
24 the issue of venue, because you are all aware as to what the
25 commission of this Court is as concerns venue, the Nassau

1 case. The Court is suggesting, in essence it's the Court's
2 intent on the preliminary conference stage to have an
3 accelerated discovery schedule as to those two cases, and,
4 of course, there will be another preliminary conference
5 order that deals with the balance of the cases.

6 The Court believes that all of you, your clients,
7 and the public are entitled to observe the prosecution, the
8 defense, the defense, and prosecution of these cases if, in
9 fact, the cases survive the subsequent dispositive motions,
10 which, as I indicated earlier, we anticipate throughout the
11 course of discovery.

12 Based upon my conversation and participation in a
13 conference call it appears likely that if that protocol is
14 indeed the rule of the Court we can reduce the amount of
15 necessary discovery. I've had a chance to inspect your
16 discovery demands and your objections, which were dutifully
17 filed subsequent to our very first conference.

18 A trial -- the Court anticipates the accelerated
19 trials would be against one manufacturer, one distributor,
20 and I think out of necessity the three individuals have to
21 be before the Court because based upon the discovery demands
22 and a review of the complaint it appears to the Court that
23 the allegations the plaintiffs make involve the three
24 physician individuals. I think there is three that still
25 remain in the case. That would be deemed a separate trial

1 and pursuant to the CPLR and pursuant to the wisdom of
2 Mr. Justice Breitel.

3 You are all aware that the court, State Court does
4 not have the assets available to the Federal Court. So the
5 Court intends to appoint for all purposes three, you
6 probably call them masters but they are not under State Law.
7 They would be referees for the purpose of discovery. The
8 three names I'm going to suggest to you, and again anybody,
9 any of your clients or yourselves have an issue be it a
10 conflict issue or whatever, you will, in fact, notify each
11 other and the Court and we will address that.

12 Thomas McNamara was recently the chairman of the
13 Commercial Litigation Committee out of Nassau County. His
14 experience and credentials are remarkable.

15 Harvey Besunder. Mr. Besunder is past president of
16 the Suffolk County Bar Association. He is a lawyer with
17 extensive commercial experience, litigation experience.
18 Mr. Besunder, I believe, sits or sat on the Character and
19 Fitness Committee, Judicial Screening Committee, and several
20 other committees. As I noted Mr. Besunder is also a past
21 president of the Suffolk County Bar Association.

22 Another past president of the Suffolk County Bar
23 Association John Juliano, an experienced litigator, past
24 president of Suffolk County Bar Association, I believe
25 current chairman of Judicial Screening, I believe co-chair

1 of the Character and Fitness Committee.

2 I've contacted all three of these people and
3 indicated with their consent I would float their names to
4 all of you.

5 So what we will do today, and, of course, I will
6 hear at this time anything anybody has to say. What you
7 will do today is you will draft a preliminary conference
8 order, and what I'm looking to avoid is a suggestion that
9 Judge, we're going to go back to our offices and going to
10 exchange emails and faxes and documents to come up with a
11 preliminary conference order and by the way an end date for
12 the service of the answers, and then I'm going to schedule
13 very shortly another conference with the -- there are no
14 distributors here today; is that correct?

15 MR. NAPOLI: They are here today, Your Honor.

16 THE COURT: You came today. Then you don't have to
17 come back.

18 The manufacturer and distributor that the Court is
19 suggesting, at this point it's a suggestion, we haven't
20 gotten to a direction just yet, Purdue, McKessen, and the
21 three physicians.

22 Although I'm in the business of asking questions,
23 I'll field questions right now if there be any.

24 By the way, we do anticipate, I haven't seen the
25 answers yet, if, in fact, there are cross-claims then, of

1 course, the Court has to reconsider its plan because
2 cross-claims may complicate the proceeding.

3 You have something to do today. We are going to
4 need a master preliminary conference order that will be in
5 place in the event that the accelerated schedule this Court
6 is suggesting can't be done, and then I'll give you some
7 time, because I'm sure Purdue, McKessen, and the counsel for
8 the physicians, I'm not sure, you're duty-bound to disclose
9 the Court's intentions to your clients. I'll schedule
10 something where we can reduce the suggestions to an order.

11 Anybody need the floor?

12 MR. NAPOLI: I just have one suggestion, Your
13 Honor. I think that is very helpful. Thank you.

14 My suggestion is that for Nassau and Suffolk,
15 because this is what is currently going on, those 800
16 depositions you talked about, our offices are part of that
17 process in the MDL conducting those depositions even today.
18 My suggestion is that for Nassau and Suffolk the preliminary
19 conference order cover all defendants and distributors and
20 at some point in time we pick who the two, the one
21 manufacturer and one distributor targets are, and the reason
22 for that is twofold. One, that by doing that it's gonna be
23 in coordination with the MDL at same time. Two, some of the
24 defendants may decide to settle not knowing whose going to
25 actually be selected for trial. We've seen that in other

1 litigation be very fruitful.

2 THE COURT: Mr. Napoli, from your mouth to God's
3 ears. You think anybody given the breathe of this
4 litigation nationwide is in a position to get themselves
5 marked settled anyplace at -- let's say before the spring of
6 2019?

7 MR. NAPOLI: Yes.

8 THE COURT: Your reputation proceeds you. You are
9 a very optimistic person. I appreciate that.

10 MR. NAPOLI: You know, in many litigations where I
11 thought there would never be a settlement, at times there
12 are. There are varying degrees of taking on responsibility
13 from various defendants. Some are in different situations
14 than others. So there always the possibility some may fall
15 out. Maybe they will be there. At least the discovery will
16 be over, so that if Your Honor says it's Purdue and McKessen
17 and Purdue and McKessen when they see the whites of the
18 eyes, the witnesses on the jury stand decide possibly to
19 settle, then we can tee up immediately possibly the next
20 defendant.

21 THE COURT: I'll take that under consideration.

22 MR. CHEFFO: Thank you, Your Honor. Mark Cheffo
23 for Purdue. I'm serving two roles for a minute.

24 THE COURT: I know one. What is the other one?

25 MR. CHEFFO: I am gonna speak on behalf of the

1 manufacturers and I think to some of the distributors, but I
2 am also going to step out of that role in a minute and talk
3 about specifically Purdue. I don't think there is anything
4 inconsistent with what I will say, but I'm not authorized
5 necessarily to speak broadly except on limited kind of
6 areas.

7 Your Honor has obviously given this a lot of
8 thought and I think I speak for everyone, we I appreciate it
9 because there is a lot of work here.

10 I would just highlight a few things, which I'm a
11 little more glass half full than perhaps some of the numbers
12 that you raised.

13 Two things. One is just housekeeping. My
14 understanding is we have an understanding amongst the
15 manufacturers to provide answers and some dates and we can
16 do that individually just because I think that's easier.
17 Rest assured that's in the process. That will get done. We
18 heard Your Honor and I think there is dates and schedules
19 and stipulations. So that should be easy for the Court.

20 The second issue is the coordination. I'm
21 certainly not going to tell the Court that there is not a
22 huge amount of work to do, there is. The goal though with
23 respect to what's happening in the MDL would be to
24 cross-notice a lot of those depositions. So for example, my
25 client, let's assume there was a head of marketing or sales,

1 that person doesn't need to testify 700 times. They testify
2 once in the MDL, cross-notice same lawyers.

3 That's not going to be necessarily the case for the
4 counties. So there is a disproportion issue. In other
5 words, in the MDL we have waves -- calling them wave 1
6 cases, it's Cuyahoga County, Summit County, and Cleveland.
7 If we go and take the medical examiner's deposition in
8 Cleveland, I can't say it could never have any applications
9 in Suffolk, but you understand the point. It's going to be
10 different. You would want to talk to somebody likely who
11 had experience and information here. So I think there are
12 going to be somewhat disproportionate issues.

13 I actually think that a lot of this is gonna -- to
14 some extent I think I agree with Mr. Napoli on two points.
15 One is we certainly -- we expected to come here and have
16 Your Honor say we need a plan, need to focus on that, want
17 proposals. I think I very much take Your Honor's idea that
18 we should maybe take some time and submit proposals about
19 case management. I personally thinks it's premature to
20 start setting trial dates, figuring out right now exactly
21 which defendants are going to be in a case, which are not
22 going to be in a case, how it's going to get scheduled. I
23 think in terms of coordination a lot of this is being done.

24 In the MDL cases there are, at least right now,
25 those three cases have over 20 defendants in them in each

1 one of those cases. There is a way that Judge Polster has
2 thought about approaching this. I think those details, from
3 our perspective what is going to be very important is we
4 take the point, right, that there could be a first a track,
5 my word not Your Honor's.

6 THE COURT: I like that word.

7 MR. CHEFFO: That you may say we recognize this
8 under the Court's jurisdictional authority. You are in many
9 ways like an MDL judge here. In Federal Courts the Federal
10 MDL judges can't try all the cases absent permission. They
11 can only try the cases that are within their district, and
12 that's similar to here. Your Honor can, I think, without
13 any additional authority, my understanding at least, is
14 certainly try the Suffolk County case, and as to everything
15 on consent you get consent you can do that, but to the
16 extent that the Court's role is to also not have a situation
17 that X county upstate or Nassau or New York City or Kings
18 County, or whatever is not prepared. We also think it's
19 important to have a very fulsome track too, which is going
20 on at the same time where we are getting discovery, because
21 if something happens, case is resolved or there is a verdict
22 we think it's important to also have discovery done in those
23 other cases. It may be on a different schedule.

24 In other words, if you have a certain date out
25 here, you may not have to have everything run coordinate. I

1 don't think it makes sense to just to focus on the
2 defendants and just Nassau and Suffolk. We think that if
3 the plaintiffs have filed all these cases all over the State
4 that we should be pursuing discovery, so those cases, if
5 they need to be, will be prepared, and Your Honor will try
6 them or send them back.

7 I guess what I would finally say, Your Honor may
8 have questions and thoughts, is that I would encourage the
9 Court to give the parties an opportunity to get together,
10 you now have given us some food for thought, we haven't
11 obviously talked about all of this. We are interested in
12 streamlining. We are absolutely interested in coordination.
13 It would be kind of whacky, right, if we weren't. We do
14 think that there are some differences and important issues
15 that we need to get in terms of discovery from the
16 plaintiffs who brought these serious lawsuits against our
17 clients, but right now we think or I think it would be
18 premature to basically start saying here is the first case,
19 here is the second case.

20 And, I guess, the final point I would say, Your
21 Honor, if Your Honor was inclined to do that and said yes,
22 Mr. Cheffo, I hear you but I'd still like it, I think,
23 frankly, we would need more than right now to do. I haven't
24 had a chance to even talk to my client, figure it out --

25 THE COURT: Mr. Cheffo, you articulated what I'm

1 suggesting. I'm suggesting that a discovery schedule, a
2 broad-based discovery schedule be prepared as to everybody.
3 You talk about track 1 and track 2.

4 I'm also suggesting -- not suggesting. I'm
5 directing that when we adjourn today you confer with each
6 other and with your principals as to the Court's idea of
7 taking Nassau and Suffolk, designating a manufacturer, a
8 distributor, and, of course, unless I'm wrong I believe the
9 individuals are part of all those cases, and the
10 individuals, and put that case only its own track, can be
11 concurrent with the master track so to speak, because these
12 cases eventually have to see the light of day, and I'm not
13 assuming, I'm not prejudging as to whether or not the
14 plaintiff will meet its burden on the motions I anticipate,
15 the summary judgment motions I anticipate as discovery
16 progresses.

17 You raise an interesting point. The medical
18 examiner in Cleveland is an expert. He testifies. You can
19 sit down.

20 MR. CHEFFO: I have one other point but I will wait
21 till Your Honor's finished.

22 THE COURT: He testifies as to a medical issue and
23 opinion. You folks are walking around with that testimony.
24 That testimony one way or another might be, could be,
25 probably could be used to confront any other expert in this

1 Court. It happens, happens all the time.

2 When do you see -- when do you see these cases,
3 when I say getting off the ground, there comes a time
4 pursuant to this Court's commission it was asked to get
5 these cases trial ready and send them to where they came,
6 including, as you know, New York City cases are here now
7 too. Given what's going on in the Federal MDL, what is
8 going on here, what's going on in Pennsylvania, West
9 Virginia, Tennessee, and we even had a judge from Nevada,
10 Federal judge from Nevada on the conference call. I'm not
11 holding you to this, we are having a conversation. When do
12 you see these cases being or a case being up and ready for
13 trial?

14 MR. CHEFFO: That's a good question.

15 THE COURT: Not Federal but in New York State.

16 MR. CHEFFO: I'll try and answer that, but I would
17 just point, Judge, to some extent, as I said before, you
18 know I live and practice in this State. I know Your Honor
19 is not bound by it but we also can't put on blinders, Judge
20 Polster does have a similar situation at least as to his
21 three counties and there is a lot happening.

22 Here is what I would say. Obviously Your Honor
23 knows that there are discussions that are going on, all
24 parties are participating, obviously I'm not at liberty to
25 talk about the details. Judge Polster has been very public

1 about saying there should be a resolution track. What I can
2 tell you comfortably in open court is that there are ongoing
3 discussion and meetings in order to try to figure out if
4 there is pathway.

5 I can't represent to Your Honor that they will be
6 successful but I also am not in a position they will
7 absolutely fail. That is the first thing.

8 Second is what I think that these cases will be --
9 if Your Honor basically said, you know, a note of issue date
10 in 18 months, you then have all the coordination. You are
11 asking me off the cuff what I think would be certainly not
12 unreasonable in a very sophisticated case like this. I
13 think with all the discovery that we would be in benefit of
14 in the MDL and specific discovery in New York I think that
15 would important.

16 The other thing I think would be important for Your
17 Honor, I'm gonna step out of my role for a second and just
18 talk Purdue. I don't say this because there is any conflict
19 with any of other defendants but I would just say this for
20 Purdue. One of the questions I would have and the Court
21 would have, what is kind of the ultimate point of a trial
22 against one distributor, one manufacturer, and three
23 doctors? Most of you read their complaints and now ruled on
24 the decision. A lot of these claims, at least as I
25 understand them, I don't adopt them, but they are -- there

1 is a broad-based kind of either conspiracy or creation of a
2 public nuisance and there is lots of different complaints
3 and allegations amongst a bunch differences; from an
4 evidentiary issue, from a proof perspective, from a client
5 like mine who has two percent of the market. We go through
6 the whole process and then we have a trial and there is a
7 verdict either for us or plaintiffs. Does that advance the
8 ball? I raise that rhetorically.

9 THE COURT: Does that produce a blueprint or a
10 snapshot for litigation throughout the country?

11 MR. CHEFFO: Again, I personally think --

12 THE COURT: You can disagree with me.

13 MR. CHEFFO: I think no, it doesn't.

14 THE COURT: I welcome that.

15 MR. CHEFFO: I think no. I also think that there
16 is a lot that we would have to do. Here is why I think it's
17 hard to make these decisions right now.

18 THE COURT: That's why I suggested you talk about
19 it.

20 MR. CHEFFO: Yes, Your Honor. I think things like
21 summary judgment, we may come back to you and talk to you
22 about issues. We're certainly well aware in New York there
23 is no general rules, no expert depositions, Frye hearings
24 and standards. To the extent that the plaintiffs are gonna
25 talking about a model, we may want to come to you and say we

1 actually want to have some depositions on that. There may
2 be some issues that you decide were more appropriate for
3 summary judgment that we then raise on summary judgment.

4 At that point once the legal issues are framed,
5 once discovery is more fulsome, once we have a snapshot
6 because what I think will happen absent some resolution or
7 dispositive motion, Judge Polster made it pretty clear that
8 he is gonna try this case on or about February. You will
9 certainly have a lot of information.

10 I'm not in any way suggesting Your Honor stay these
11 cases and just wait and see. What I am suggesting is we can
12 absolutely do a lot of work in the next six months on the
13 discovery and process and then I think -- we will put this
14 in writing. I'll talk to my colleagues. Then I think we
15 will have a much clearer pathway as to how we will move in
16 the next 12 months after that.

17 THE COURT: The answer to my question is 18 months.

18 MR. CHEFFO: If you are asking me what I think, I
19 could have said three years and I think probably still be
20 fine. Understanding where the Court probably would want to
21 go in your comments, I would say if you did a note of issue
22 date in 18 months, I think that would encompass -- look what
23 we've seen is, I don't want to get into the gory details.
24 The Court set a very aggressive schedule. Mr. Hanly is
25 co-lead, I think he would agree with this, and Mr. Napoli is

1 very much involved and his colleagues, it's frankly a
2 crushing discovery schedule, and having something that does
3 not allow the parties to fully prepare for trial doesn't
4 serve anybody's issue interest, doesn't serve the Court or
5 interest of justice frankly.

6 So in terms of all the things that have to happen,
7 all the depositions, expert designations, dispositive
8 motions, right, perhaps interlocutory appeals in the Second
9 Department, then expert presentations, and all the pretrial
10 work. I personally don't think it will take a month for
11 openings. Your point is well taken. I think it could be
12 some period of time but even though issues, right, once we
13 got a little more granularity I think how the case if it
14 were to be tried can be done. Whether it's done, some
15 courts talked about time limitations, a whole host of issues
16 that with Your Honor's guidance and the parties input when
17 we got there and you were actually ready to set a trial
18 date, I think you would get cooperation from both sides how
19 to do it efficiently, but to me that's putting the cart
20 before the horse because right now we don't know what claims
21 are really going to survive summary judgment.

22 THE COURT: I appreciate your comment. I
23 appreciate you informing the Court that there are
24 discussions without being specific going on. I think the
25 experience of the Court and probably every litigator in this

1 room is nothing encourages fruitful discussions more than an
2 eye toward eight people sitting in that box anticipating
3 that that's down the road.

4 We, of course, agree with Judge Polster that
5 discussions should continue but we also -- this Court also
6 has its commission. Its commission is get these cases done
7 and I intend to fulfill that commission before I'm up for
8 certification two and a half years down the road.

9 Sir.

10 By the way when Mr. Cheffo changes hats he takes
11 two steps to his left.

12 MR. CHEFFO: I block the distributors.

13 MR. HANLY: He comes closer to me, Judge.

14 MR. ROMAN: Neil Roman for McKessen. I had not
15 planned to speak. Now I'm speaking for the fairly obvious
16 reason. I join in everything that Mr. Cheffo said and I
17 think that the other distributors agree as well, I'm not
18 speaking for any of them. I do ask for one issue of
19 clarification.

20 THE COURT: Sure.

21 MR. ROMAN: When you single out Purdue and
22 McKessen, was that an order, was it a direction --

23 THE COURT: Time out. There is no order today.
24 The only order I'm going to sign today, you will prepare
25 today, is a master -- you have your date that answers have

1 to be filed. Answers will be filed, the issue will be
2 joined. In two decisions, the manufacturer decision and the
3 distributor, the last two decisions that came out, this
4 Court set forth the cause of action, the elements of each
5 cause of action almost in textbook form. So everybody knows
6 what the legal issue and what the -- and everybody has an
7 idea what the factual foundation is going to be in
8 connection with the prosecution and defense. I also assume
9 that everybody in the bottom half of this caption agrees
10 with everything that Mr. Cheffo had suggested, has said, I
11 know that.

12 MR. ROMAN: I guess, Your Honor, my question is
13 consulting with my client, who by the way is on the West
14 Coast where it's 7:30 in the morning, do I tell them that
15 there will a separate case we are being invited to
16 participate? Is this an option for us?

17 THE COURT: I thought what I said was I didn't want
18 to surprise anybody with what the Court is considering. So
19 I've disclosed exactly what this Court is considering.
20 There is no surprises here. It's not the way we operate.
21 You have to think about it. Both sides have to have consult
22 with their principals and they have to get back to me. What
23 I'm suggesting is a position paper as to whether it's
24 viable, not viable, whether it's practical, whether it's
25 impractical, and if anybody suggests it's illegal or against

1 the law I want to know too.

2 MR. ROMAN: Thank you, Your Honor.

3 MR. CHEFFO: Your Honor, Paul Hanly. I am co-lead
4 counsel with Mr. Napoli. I'm appointed by Your Honor. I'm
5 also co-lead counsel in the MDL appointed by Judge Polster.
6 I represent Suffolk County, City of New York, and a number
7 of other counties here in New York. I just wanted to make a
8 couple of comments.

9 First of all, obviously I have not consulted with
10 any of my clients about the Court's suggestions, but just
11 speaking as a trial lawyer involved in these kinds of cases
12 for many years, I believe with a great deal of certainty
13 that my clients would be very, very receptive to the Court's
14 concept, including the concept of trying against one
15 defendant and one distributor.

16 Having said that I agree whole-heartedly with Mr.
17 Napoli that that should not stay in any way or slow down in
18 any way discovery against the other defendants.

19 THE COURT: I agree.

20 MR. HANLY: With respect to the issue of whether
21 the Court's suggestion of this sort of trial creating a
22 blueprint or a bellwether, if you will, for the rest of the
23 cases in New York and indeed the rest of the country. I
24 would say that I disagree respectfully with Mr. Cheffo. I
25 think that this would create a pattern, a blueprint, and

1 that jurists around the country would follow this Court's
2 lead, as I believe they are going to follow this Court's
3 lead with respect to decisions on the motions to dismiss.

4 MR. SHKOLNIK: Your Honor, if I may just respond.
5 Hunter Shkolnik, Napoli Shkolnik. I'm also appointed by
6 Judge Polster at the MDL and have been living the 800 or
7 whatever number deposition nightmare that's coming on with
8 Mr. Cheffo and the rest of our colleagues on the other side.

9 What we are seeing is certainly something none of
10 us have ever experienced in our careers, and I'm speaking
11 for most of the lawyers here. We have been involved in some
12 of the biggest litigations that have come to date. What is
13 remarkable is with the efforts of the special masters and
14 Judge Polster we will have, and I use the vernacular, we
15 will have in the can hundreds and potentially 800
16 depositions by the end of September into October. We have
17 teams --

18 THE COURT: Of this year?

19 MR. SHKOLNIK: Yes. We have teams working day and
20 night. We've added, for our firm alone and no surprise
21 because we fight over document production as to my client
22 Cuyahoga County, we've added 25 lawyers just for that and
23 I'm certainly don't want to speak for Mr. Hanly's firm, I'm
24 quite sure they have added teams of lawyers as well. We
25 have lawyers and I would say conservatively a couple hundred

1 lawyers doing depositions on multi tracks every single day
2 as have been going on starting last week of every defendant.
3 By the end of September, maybe the end of October if things
4 don't work out perfectly we are going to have all of these
5 depositions done and they've already started cross-noticing
6 the Suffolk County case. It was last week the notices
7 started coming. So the same lawyers are taking the same
8 depositions. We will have them all done by some time at the
9 end of October moving into our expert already, which in all
10 likelihood be the same expert teams with some variations
11 going on shortly after that.

12 So in terms of the decision of which defendant,
13 whether it's McKessen or Cardinal or somebody else or
14 whether it's Purdue or some other manufacturer, to delay the
15 specific track trial for this one-on-one trial you are
16 suggesting, to wait until say October when we know where
17 most of this has shaken out and if there is any potential
18 settlements. It's not a surprise. There is a lot of
19 discussions in that regard as to certain defendants, as to
20 all defendants, some subset, in three months if we start our
21 discovery now it is conceivable that we will have everything
22 in the can except for the complete Nassau or Suffolk damages
23 by the end of October and we can start ramping up teams for
24 Nassau or Suffolk because we know the model already. We
25 know who they want to depose. We know the departments. We

1 are already working with our client to cull this material
2 and you would be amazed we are be able to do it. Little
3 bumps in the road but I think we worked it out, and I
4 commend Mr. Cheffo for it because he's been riding us pretty
5 hard to get this type of material for our county clients.

6 So we think we could try the case at the end of
7 next summer for Nassau or Suffolk in the model which you are
8 suggesting, but to decide which one of the defendants I
9 think we will be able to make our suggestions to the Court
10 towards the end of the summer into September, but we don't
11 stop, we go side by side in discovery with the MDL full bore
12 starting today because it's being done anyway.

13 THE COURT: Mr. Cheffo, maybe I misunderstood you.
14 You indicated that Judge Polster has a quote, bellwether,
15 trial anticipated by February.

16 MR. CHEFFO: March.

17 THE COURT: 2019.

18 MR. CHEFFO: I think I said February in my brain
19 this morning. It's March.

20 THE COURT: February or March, around there?

21 MR. CHEFFO: It is.

22 THE COURT: So 800 depositions ain't around the
23 corner.

24 MR. CHEFFO: Let's me say this, there is no
25 question, he's the judge and he has currently set a

1 discovery cut off for all of this at the end of August. He
2 set a March trial date. Again, what I would say to you in
3 candor is I agree there is no question that both sides,
4 every lawyer involved in that litigation is working very
5 hard. However, I think where I am generally glass half full
6 I think it's overly optimistic to basically leave the
7 impression that things are going very smooth and everything
8 will be done by the end August or October. I think that
9 people are trying. There is good faith but everyday it
10 seems there is a 10-page letter to the special masters on
11 what needs to be done.

12 It's my point that, again, no one is going to work,
13 not at all. My point is this, is that these are very --
14 there is two points. These are very complicated cases.
15 However, with appropriate time and sophisticated lawyers and
16 resources they can get worked up and my confidence in the
17 MDL, whenever that trial takes place, and if the Court
18 continues the March date we'll all be ready and if he
19 extends some time we will be ready and the same thing would
20 happen with Your Honor. You know, I don't think the Court
21 should think that everything is going to be done.

22 My second point is this, is that we have very
23 skilled lawyers on the other side. We do work, as you can
24 see, cooperatively. Our perception of this is a little bit
25 of an all-you-can-eat buffet on the plaintiffs' side. They

1 want every document from the defendants and they want every
2 person. We produced literally 10 million pages, just my
3 client, but when we try to get the documents from the other
4 side you heard a few things, we're going to hear it's very
5 hard, these are municipalities, that's all true, some are
6 paper documents, people have left. It's not impossible.
7 You need a reasonable schedule. This is not a two-car car
8 accident. There is gonna be a lot information, documents,
9 e-data.

10 My second point is as much as you heard from the
11 plaintiffs that we need to focus on all of defendants, I
12 don't want the judge to lose sight and I think you already
13 adopted this that we need discovery of the other
14 municipalities, albeit not on the same track. We can have a
15 different track. We don't -- we have Broome County or
16 Columbia County, it's important to us to have that
17 discovery, a fulsome discovery for two reasons. One is that
18 if this case were to resolve or get dismissed or frankly
19 trial verdict, we don't want to wait another two years for
20 the Court to have to work up Columbia County and secondarily
21 there is gonna be information that we think will be
22 important for the reasons you articulated. If a medical
23 examiner in Columbia County has something to say about X, Y,
24 and Z that may well bear upon the issues in this trial.

25 We want to make clear that we are focussed on the

1 schedule that Your Honor will set. We are gonna participate
2 in good faith. We are gonna coordinate. It's not easy.
3 It's going to take some time. We also have to have a
4 bilateral discovery process with the State -- with the
5 municipalities.

6 THE COURT: If what Mr. Shkolnik suggested is
7 accurate, that everything will be in a can, let's say, by
8 November of this year, maybe the -- if everything is, in
9 fact, in the can by November -- October, November of this
10 year then the significant issue that's native and germane to
11 the New York court would be the computation, the
12 presentation and substantiation and legal cause and cause in
13 fact of damages.

14 MR. CHEFFO: Yes.

15 THE COURT: If everything is in the can.

16 MR. CHEFFO: It's not. That's the problem.

17 THE COURT: I heard.

18 MR. CHEFFO: I understand. He's a good advocate.
19 That's like me saying I tried a case five years ago and
20 everything is in the can and going to come before Your
21 Honor. The only case before Judge Polster is Cuyahoga
22 County, Summit County, and Cleveland and it's not just about
23 damages. There is issues of liability, causation --

24 THE COURT: Of course those issues are there.

25 MR. CHEFFO: -- statute of limitations.

1 THE COURT: If everything, whether it's in the can
2 or not, that's collectively up to all of you to get there,
3 but if it's in a can -- this Court presides over the
4 asbestos calendar, mesothelioma and lung cancer calendar
5 stemming from the asbestos litigation. What they do, most
6 of you may be aware, what they do is recycle depositions of
7 engineers, architects, construction people from someplace
8 and they adopt them here on stipulation. I think what I'm
9 hearing from Mr. Shkolnik is -- you are shaking your head.

10 MR. CHEFFO: No.

11 THE COURT: Not you.

12 MR. CHEFFO: Let me just be clear. I think there
13 is -- there is some alignment here. For example, let's
14 assume that we have, will just pick on Purdue, a sales and
15 marketing head, he or she is deposed in the MDL, they worked
16 the years 2001 to 2010. They cross-notice, they asked their
17 questions. That is in the can. We would come to you if
18 they come back and said we want to ask -- we did a national
19 deposition, we want to have something different. We would
20 say no that's the benefit of doing 800 cases. There are
21 absolutely a number of issues. It will mostly be defense
22 facing. In other words, we only have that one person who
23 filled that role for the eight-year period so we would use
24 that deposition.

25 What's not going to be in the can is very specific

1 discovery that we need of each municipality. You heard
2 about -- we have about 300 or more depositions that we are
3 going to be taking just of the municipalities in those
4 three.

5 THE COURT: In New York or nationwide?

6 MR. CHEFFO: That's just in Cuyahoga, Summit, and
7 so we are going to need to have the coordinates. When you
8 heard there is 400 depositions, that's of the defense group,
9 right, but -- and those are going to be, I think largely, of
10 depositions that won't need to be taken again. That's the
11 goal. That's what Judge Polster said. That's what we want.
12 I think that's what the plaintiffs want. Even within that
13 there are going to be some people who is a district manager
14 in Ohio that not have application here, but you also have to
15 then focus, I'm going to step over now to Mr. Lifland, still
16 in role here, have the other side of the V, which is all of
17 the discovery that we take of them and that's going to be
18 hundreds and hundreds of depositions and that's not in the
19 can and that's not just about damages.

20 THE COURT: Miss Levy, you shook your head when I
21 suggested about the recycling of depositions.

22 MS. LEVY: Jennifer Levy for Allergan.

23 I'm shaking my head because I don't want this Court
24 to be left with the misimpression that we agree with
25 Mr. Shkolnik's position that everything will be in the can

1 by end of October, maybe a little bit later. We don't. In
2 fact, in that courtroom we know it's not appropriate to
3 litigate here, but defendants are not getting the discovery
4 that we need from the State, full stop, and there are bitter
5 letters sent to the Court.

6 THE COURT: From the State. You said you are not
7 getting discovery from the State?

8 MS. LEVY: I'm sorry, in the county and City of
9 Cleveland. Regardless of the number of lawyers and I fully
10 agree with Mr. Shkolnik that everybody is working very, very
11 hard and more lawyers are being added for every defendant,
12 but despite that the schedule in that case despite
13 everybody's best effort is not proving to be workable and we
14 don't agree that we will have what we need in the can in
15 that case.

16 THE COURT: Is everybody's job easier here today
17 given that you have an aggressive discovery order from Judge
18 Polster. You have a Federal Court, that's the date. The
19 date is the date, no excuses. Since that order is in place
20 isn't your job easier here today in terms of simply taking
21 that MDL order, modifying it, just modifying so it fits New
22 York.

23 MR. NAPOLI: Your Honor, I have a modified approach
24 that I think might satisfy both. I think Judge Polster
25 recognized that it's probably impossible to do discovery of

1 all the plaintiffs exactly for what Mr. Cheffo said, that
2 there will be 300 depositions of three counties in total,
3 and so my modified approach in just focussing on bellwether
4 would be to pick two downstate, Nassau and Suffolk and
5 possibly two upstate, Saratoga and Erie. I was prepared
6 coming here and ask for that. So you can get a sense of the
7 different jurisdiction without trying to burden the
8 plaintiffs with doing discovery on the plaintiff side on
9 every single case, and I wanted to -- as we ever talking I
10 made a -- there rang a bell in my mind about a past
11 experience. We had filed MDB (sic) cases years ago with
12 some defense counsel appearing and it ended up in front of
13 Judge Washarski (phonetic) in Nassau County and he had
14 gotten an order, I believe, I will go back and look,
15 modified to get all of the Suffolk County cases transferred
16 to him, I think not only for discovery but also for trial.

17 When the original order for the Office the Court
18 Administration was put in place and late '90s early 2000 it
19 was for coordination, but I don't think there is anything
20 that precludes this Court from calling the Office of Court
21 Administration or parties writing letters and then them
22 ordering that will both trials, since there is convenience
23 since we are so close having both Nassau and Suffolk tried
24 here or even Erie and Saratoga go tried here, as you said
25 it's in the inherent powers of the court to determine their

1 only calendar, and I think that goes as well for the full
2 Office of Court Administration with Judge DeFiore making a
3 decision everything should be tried here.

4 The difference in the MDL than what happened here
5 in New York is that those are from different states. Here
6 we're included within the jurisdiction in the same state and
7 the court can very easily transfer the cases here for trial,
8 just like in asbestos where they have NYCAL and Bronx,
9 Brooklyn, and Queens are all tried in New York County not in
10 the Bronx or not in Brooklyn. So it's something to keep in
11 mind.

12 One other thing, we are counsel to Cuyahoga, we are
13 preparing for that trial in March in Ohio. We know being
14 involved that that's gonna help decide Ohio law. It's very
15 different than New York law. So I don't think it's going to
16 be a blueprint in the sense of what is going to happen in
17 New York just because something happens necessarily in Ohio.
18 I'm sure if we win the defendant is going to be right back
19 here New York is very different than Ohio law and vice versa
20 if they win they are gonna come you should follow Ohio law
21 because it may be more lenient or less lenient than New York
22 law.

23 We think that under the standards and goals that it
24 would be appropriate. I think standards and goals in this
25 case would be up in May of next year because Suffolk was

1 filed in 2016. We were filed in 2017, November, but we
2 would suggest a September trial would give us time between
3 the March trial and September to prepare further, have
4 motions in front of Your Honor, and then come over. So we
5 will get the benefit the blueprint potentially if that's
6 what Mr. Cheffo wants, and still have the pressure that a
7 trial gives to defendants and the parties to try to come to
8 a resolution.

9 THE COURT: How detailed do you anticipate, just
10 curiosity, expert testimony vis-a-vis medicine?

11 MR. HANLY: Via the medicine. Mr. Shkolnik would
12 be better to answer that question.

13 MR. SHKOLNIK: Your Honor, in terms of medicine I
14 think we are not gonna see the usual trial with a lot of
15 medical doctors. I'm not suggesting for the defendants. I
16 think you are going to be looking at health policy experts,
17 you are going to be looking at health economist and the
18 like. This is not simple science but it's not our usual
19 let's bring in a doctor to tell us what causation of an
20 injury.

21 There is going to be complex experts but the
22 experts are gonna be established in models which are gonna
23 be challenged in Federal Court and they are either gonna be
24 proved or disproved. Whether or not Frye would make it
25 lower here and that's a side issue but the models are going

1 to be all worked up. We are already preparing for our
2 counties we represent here if they go to trial to get them
3 worked up in the same models, and I suspect we will have the
4 same expert teams or similar expert teams that are being
5 worked up at MDL once again in the can ready to go here.

6 I agree with Mr. Cheffo. He has taken a lot of
7 discovery of my client Cuyahoga County. There are four
8 plaintiffs in that case. It's Akron, City of Akron, Summit
9 County, City of Cleveland, and Cuyahoga County. There is
10 400 depositions for four parties and certainly there is a
11 lot of work to be done and we're not suggesting they don't
12 get those depositions if you set a trial date in the next
13 fall. We're prepared. We have more lawyers. They have
14 more lawyers. We make our clients work, we download the
15 data, and get our experts worked up as well.

16 THE COURT: What we are doing then is whether it's
17 track 1 or track 2, the all-encompassing track, meaning
18 every case that's been sent here for coordination will have
19 a track. That track, my suggestion is, that you modify the
20 MDL order out of the Federal Court in Ohio, modify that,
21 adopt it or adapt it to what face here and when have an
22 order.

23 MR. SHKOLNIK: Yes.

24 THE COURT: You got started earlier in Ohio than
25 you did here so of course you will.

1 MR. HANLY: Push it.

2 THE COURT: Push that back. Mr. Cheffo, that
3 should satisfy your concerns that we have a separate track
4 that's state wide. You will go back, as I suggested, talk
5 to your principals and you will discuss and present position
6 papers to the Court in about a week. Court is away at the
7 judicial conference next week. Something for the Court to
8 chew on.

9 MR. CHEFFO: I just want to make sure, I think I
10 understand, if you don't mind, just indulge me if I repeat
11 that. We are going basically to come back, you look at
12 the -- what was done in the MDL as a model and that will
13 apply to all the counties and present that also and take
14 back your thinking with respect to a more limited trial with
15 respect to one defendant, and provide a position paper on
16 that.

17 THE COURT: Exactly.

18 MR. CHEFFO: Okay.

19 THE COURT: Unless there is anything else I will
20 close the record. You have some work to do here. I'm here
21 if there say problem. Thank you once again.

22 MR. NAPOLI: Can we have another conference date,
23 Your Honor, to make sure that order gets done?

24 *(CONTINUED ON NEXT PAGE.)*

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: I intend to do that. You will confer with my clerk, he will confer with me, and you will give us a conference date that is convenient. Thank you.

MR. NAPOLI: Thank you, Your Honor.

* * * * *

I, Eric M. Fuchsman, Senior Court Reporter, hereby certify that the foregoing is a true and accurate transcript of the proceedings.

ERIC M. FUCHSMAN
Senior Court Reporter
(Original signed in blue)



This document was created with the Win2PDF "print to PDF" printer available at <http://www.win2pdf.com>

This version of Win2PDF 10 is for evaluation and non-commercial use only.

This page will not be added after purchasing Win2PDF.

<http://www.win2pdf.com/purchase/>