

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: Case No. 1:17-md-2804
Cleveland, Ohio
NATIONAL PRESCRIPTION
OPIATE LITIGATION TUESDAY, OCTOBER 23, 2018

TRANSCRIPT OF DISCOVERY CONFERENCE PROCEEDINGS
BEFORE SPECIAL MASTERS
DAVID ROSENBLUM COHEN
and
CATHERINE A. YANNI

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1 (Proceedings commenced at 1:07 p.m.)

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3 SPECIAL MASTER COHEN: Good afternoon,
4 everybody.

13:07:20 5 A lot of people here. Thank you all for coming.

6 So this is a discovery teleconference and conference.
7 We have people on the phone.

8 Does anybody know whether folks on the phone are
9 actually going to be participating in the discussion or do
13:07:38 10 we have most of the people here who are going to be
11 addressing the issues? Anybody know?

12 MS. WELCH: I believe Mark Cheffo from the
13 manufacturers is on the phone and will be participating.

14 SPECIAL MASTER COHEN: All right. So right
13:07:57 15 now, it's muted.

16 Because there are so many folks here, just as though
17 we were on the telephone and the court reporter can't see
18 you, even though she can see you, she doesn't know who you
19 are, so every time that somebody speaks, even if it's the
13:08:11 20 seventh time you've done it, you should probably identify
21 yourself so we can keep the transcript clean.

22 So right now, I have it on mute inbound, and my
23 concern is that if I unmute it, then we're going to get
24 beeps and sounds and so forth.

13:08:24 25 Is there anybody else besides Mark?

1 MR. MOUGEY: Peter Mougey.

2 Anne Kearse is arguing agenda item 4, the expedited
3 depositions, and she is telephonic.

4 SPECIAL MASTER COHEN: Okay. Do you know, as
13:08:40 5 far as Mark Cheffo, whether it's a certain agenda item? I
6 mean, so my thinking is I can unmute it just for that. Or
7 is that not going to be working?

8 MS. WELCH: My guess is items 2 and 3 for
9 sure. I don't know if he will hope to chime in on others.

13:09:01 10 MS. STRONG: And this is Sabrina Strong.

11 I anticipate others may need to chime in as well at
12 times, Special Master Cohen.

13 SPECIAL MASTER COHEN: Yeah. So I just
14 unmuted the phone call.

13:09:09 15 Can you folks hear us I assume on the phone?

16 MS. KEARSE: This is Anne Kearse.

17 I'm on agenda number 4. I'm not sure it will be on
18 this agenda. I did send a letter this morning, but I can
19 address it as an issue to be addressed at item number 4.

13:09:21 20 MS. FUMERTON: And, Special Master Cohen, this
21 is Tara Fumerton on behalf of Walmart.

22 I'm actually out of the country calling in, so I
23 apologize for not being there in person. But if there's any
24 Walmart issues that come up, I may need to speak up.

13:09:41 25 SPECIAL MASTER COHEN: Who is that?

1 MS. FUMERTON: This is Tara Fumerton from
2 Walmart.

3 Can you hear me okay?

4 SPECIAL MASTER COHEN: Yes. It's harder for
13:09:54 5 me to hear you from the system. If you're on the phone,
6 when you're speaking, if you can be a little bit more slow
7 and enunciate, I think it will help us all, especially the
8 court reporter.

9 I'm going to leave you unmuted, which is to say, if
13:10:07 10 you sneeze, we'll hear you.

11 Everybody should mute their phone. If you're on the
12 phone, you should mute your phone unless you're speaking. I
13 think that will help.

14 Okay. So here's the deal, guys.

13:10:20 15 We have an agenda with at least 17 items. I didn't
16 count, but I probably received 50 e-mails or letters in the
17 last 24 hours having to do with these agenda items. I've
18 done my very best to read everything.

19 But I think the way we're going to have to do this is
13:10:44 20 I'm going to have to take some pauses and go into the agenda
21 and pull up a letter just to remind myself of what I've
22 read.

23 So you're going to need to be comfortable with silence
24 a little bit. I'm just going to take a couple minutes here
13:10:56 25 and there and read and get my head into what it contains,

1 and then we'll pick up.

2 Because we're on the record, I'm going to try and
3 rule. I'm going to call balls and strikes the best I can
4 today. To the extent that things need to be pushed off, we
13:11:14 5 can do that.

6 As all of you know, I'm going to be out of the country
7 for a little over two weeks, so I'm pretty much out of the
8 box, and so, it really is -- I'm just going to mute this --
9 it is my goal to rule on as much as I can so that you guys
13:11:32 10 can move forward as best you can.

11 SPECIAL MASTER YANNI: And I'm going to be the
12 substitute teacher, Cathi Yanni.

13 SPECIAL MASTER COHEN: Right. So Special
14 Master Yanni is the person to whom you should address
13:11:44 15 letters, e-mails, and telephone calls in my absence.

16 I'll -- you know, I'm going to try and be available,
17 but given where I'm going and what I'm doing, it's going to
18 be limited.

19 I suppose the easiest way to go through the agenda is
13:12:04 20 just in order, numerical order, unless somebody thinks that
21 there are things that we should address first that maybe
22 will end up mooted some of the things -- some of the other
23 things.

24 Any thoughts there?

13:12:19 25 Otherwise, I'm just going to start down the list.

1 Nobody.

2 Okay. All right. So the first agenda item is -- has
3 to do with discovery of Discount Drug Mart.

4 And Sarah has asked everybody who is going to be
13:12:35 5 speaking to actually get up to the lectern, it actually
6 makes it easier for her.

7 So I guess, Peter, if you'll start on this. I just
8 had a chat with Mr. Johnson to kind of get a feeling for
9 where he is at.

13:12:48 10 Peter, if you could tell me your perspective on where
11 things are and maybe the last time that you chatted with
12 counsel for DDM.

13 MR. MOUGEY: Yes, sir. Peter Mougey.

14 SPECIAL MASTER COHEN: Can you go to the
13:13:03 15 lectern, please?

16 We're going to be here a while, so if anybody wants
17 take off their jacket and get themselves comfortable, feel
18 free.

19 MR. MOUGEY: The last time I had a telephone
13:13:24 20 conversation with DDM, either counsel, was within the last
21 ten days, two weeks.

22 Special Master Cohen, we did, as you directed, had a
23 series of telephone conferences after our initial filings
24 asking for sanctions due to the fact that DDM hasn't
13:13:42 25 responded to any discovery, has produced less than 100

1 documents, hasn't had any written filings in response to the
2 interrogatories, hasn't filed any of the priority responses
3 the last two weeks.

4 We've been pretty much up in arms since the end of
13:14:00 5 July with reminding DDM's counsel and DDM that we have to
6 get moving. Obviously, that's spilling over into our
7 ability to do -- and meet any deadlines.

8 So the last time I spoke to -- and the consistent
9 drumbeat from DDM has been their counsel's in trial, I have
13:14:16 10 deadlines, I'm in federal court in this city or that county,
11 and we're just behind.

12 And after two months, I really don't have any other
13 choice than to come back in front of you and ask that
14 sanctions be imposed against DDM by barring any objections
13:14:35 15 to our discovery, waiving attorney-client privilege, and
16 ordering it to produce responses to our interrogatories
17 before we are so far behind we're never going to be able to
18 catch up.

19 That's the -- the status of where we are right now.
13:14:51 20 So despite repeated, multiple meet and confers, dating all
21 the way back to the end of July, I'm now standing here in
22 the middle of October with the exact same issues that we
23 raised in July.

24 You asked them to put together a proposed schedule of
13:15:08 25 when they're going to catch up. The schedule doesn't even

1 include a date when they're going to produce their first
2 document.

3 I -- I'm always inclined to give the other side the
4 benefit of the doubt, whether it's a week, two weeks, to
13:15:21 5 catch up. Everybody has deadlines. We all have family
6 issues. Totally understand. But it literally has been
7 since the end of July, so we are now in almost our 90th day
8 of asking for meaningful participation in this litigation.

9 And, unfortunately, that has, if it hasn't already to
13:15:38 10 the point of no return, impacted our ability to -- to put on
11 our plaintiffs' cases against DDM.

12 So I'd ask for an order that they have to file
13 responses by this Friday. Special Master Cohen, I think you
14 have been diligent with reminding DDM of its discovery
13:15:58 15 obligations. You've given them multiple warnings, multiple
16 opportunities to catch up. So discovery responses by
17 Friday, waiving attorney-client, waiving any objections to
18 our discovery, and give you and us a meaningful schedule
19 about when, in fact, the document production's going to
13:16:18 20 begin so we can all do our jobs.

21 SPECIAL MASTER COHEN: You want -- when you
22 say responses, are you talking about interrogatories and
23 requests for production?

24 MR. MOUGEY: Yes, sir.

13:16:26 25 SPECIAL MASTER COHEN: Mr. Johnson, you're in

1 the hot seat.

2 MR. JOHNSON: I understand that.

3 Can you hear me okay?

4 SPECIAL MASTER COHEN: I can. Thank you.

13:16:39 5 MR. JOHNSON: Okay. All of that is sort of
6 true. A lot of this -- a lot of the delays -- well, first
7 of all, we were one of the latecomers to this party, and the
8 first time this hit our radar screen was June. So although
9 the plaintiffs here were very prompt in supplying their
13:17:03 10 discovery requests, albeit -- and, actually, we did start on
11 it right away.

12 And a lot of the delays have been my schedule. And
13 I've talked to you about those previously. I just came out
14 of a two-week trial. And I know you're tired of those
13:17:21 15 excuses, and, actually, I'm tired of the schedule myself.

16 So -- but I've done best I can and we can. I've
17 brought some additional people on from the firm to assist
18 me. We are -- we've run -- well, we've run the searches.
19 We have 65,000 documents that have turned up already.

13:17:47 20 We tried to narrow the search terms with the
21 plaintiffs, but they wouldn't agree to any modifications,
22 so -- and so, we knew that this was going to take a long
23 time. We are -- it may be done today, but we are --

24 SPECIAL MASTER COHEN: What may be done today?

13:18:09 25 MR. JOHNSON: -- but we have been running, and

1 I don't know how long it's going to take until it's over,
2 but we have been searching for the additional documents.

3 I believe, according to my IT people and my client's
4 IT people, that we will have all of the documents for review
13:18:25 5 by next week, by Monday. And I believe that's what the
6 reference was, you were asking me in our sidebar what was
7 the 29th, and that's when they were saying we'll have all
8 the documents.

9 We are starting the -- the privilege and relevancy
13:18:44 10 review with a number of people on Monday. I have been --
11 I'm basically through the answers to interrogatories, and
12 I'm most of the way through the requests for production, and
13 I just need to get those to my technical people to produce.

14 We have a while ago, I don't know, at least several
13:19:06 15 weeks ago, we did identify our custodians. Our -- I guess
16 I'm not sure if we actually identified the 30(b)(6)
17 witnesses, but they're one in the same or they're from
18 that --

19 SPECIAL MASTER COHEN: Let me interrupt you
13:19:24 20 and ask some questions.

21 MR. JOHNSON: Sure.

22 SPECIAL MASTER COHEN: How many people are
23 working on this right now with you?

24 MR. JOHNSON: Two of my partners, and my
13:19:33 25 paralegal who is very adept at -- at --

1 SPECIAL MASTER COHEN: You said you just hired
2 a couple folks to help. Who are they?

3 MR. JOHNSON: Well, we didn't hire anybody. I
4 brought on -- oh, I don't have their names. The reviewers
13:19:49 5 you're talking about?

6 SPECIAL MASTER COHEN: I think you said
7 something about bringing two people on.

8 MR. JOHNSON: Yes. That's -- Hans Foster, who
9 is handling the more technical side of this, has hired them.
13:20:02 10 I don't have it with me. I'd have to -- I don't have
11 their names. I do not know them personally.

12 SPECIAL MASTER COHEN: But, I mean, they're
13 contract attorneys for privilege review?

14 MR. JOHNSON: Yes.

13:20:11 15 SPECIAL MASTER COHEN: When are you going to
16 have finished interrogatory responses produced to the
17 plaintiffs?

18 MR. JOHNSON: Can we have until the end of
19 next week?

13:20:19 20 SPECIAL MASTER COHEN: No.

21 MR. JOHNSON: Okay. I -- he's in trial today.
22 He's supposed to be out tomorrow or Thursday, and I don't
23 know -- I don't know the technique for actually producing
24 them.

13:20:38 25 SPECIAL MASTER COHEN: I'm not saying RFPs.

1 I'm just saying the answers to interrogatories.

2 MR. JOHNSON: I'm sorry. I missed that.

3 SPECIAL MASTER COHEN: I'm not saying the
4 requests for production. I'm saying the answers to
13:20:48 5 interrogatories, which I was told two weeks ago by your
6 partner that --

7 MR. JOHNSON: They're essentially done. I
8 think I was waiting for one thing from the client. But we
9 can produce those and then supplement them with the --

13:20:59 10 SPECIAL MASTER COHEN: Roll them out.

11 MR. JOHNSON: Okay. We can do that this week.

12 SPECIAL MASTER COHEN: Requests for
13 production, tell me why I shouldn't say give everything over
14 with clawback so at least the plaintiffs can start looking
13:21:13 15 at them?

16 MR. JOHNSON: Well, I don't know if that's
17 appropriate. I mean, we're certainly --

18 SPECIAL MASTER COHEN: I mean, my problem is
19 that I've been hearing, as Peter has, the same story ever
13:21:28 20 since I got involved over a month ago.

21 MR. JOHNSON: I understand.

22 Two of those weeks I was in trial. I serve as -- as
23 outside general counsel for Discount Drug Mart, and so, I am
24 unfortunately, I guess, a pivotal person.

13:21:46 25 SPECIAL MASTER COHEN: Does DDM have any folks

1 in house who can start working on this, because I think it's
2 undermanned?

3 MR. JOHNSON: Yeah. It's a family-owned
4 company. They've never been involved in anything like this.
13:21:59 5 They do not have any in-house legal. There's one individual
6 that's primarily in the Pharmacy Department that has a law
7 license, but he doesn't -- you know, he doesn't really act
8 as counsel for them.

9 So -- but we have a lot of this. Hans is -- while
13:22:18 10 I've been in trial, Hans has been collecting the various
11 documents from them. We just have to get together and
12 produce the stuff, and we're going to have pretty much
13 mostly everything.

14 We -- we need some time to review -- I don't know what
13:22:36 15 their first priority is, whether it's custodial files or the
16 requests for production of documents, but we should have all
17 that information by next week.

18 And then, as we go through the review, we'll roll it
19 out.

13:22:54 20 SPECIAL MASTER COHEN: All right. So you --

21 MR. JOHNSON: I can't predict how long that
22 will take, unfortunately, to be truthful.

23 MR. MOUGEY: Special Master Cohen, may I say
24 something just quickly?

13:23:14 25 SPECIAL MASTER COHEN: That's fine. Please,

1 at least go to a microphone.

2 MR. MOUGEY: I like your idea of the clawback,
3 and I like your idea of the production. The problem that we
4 have, obviously, is we're at the end of October. We heard
13:23:27 5 from DDM at the end of August in an e-mail to you it's
6 coming within the next two weeks. That was the end of
7 August.

8 If we wait until the privilege review is finished and
9 the doc review is finished with two doc reviewers, it could
13:23:37 10 be 30, 45 days before we start seeing meaningful production,
11 meaning end of November, beginning of December, before we
12 even get it.

13 So, at this point, I think I like the production with
14 the clawback, let's get the documents moving, give us an
13:23:50 15 opportunity to catch up, that's the only way for us to catch
16 up at this point.

17 There is no in-house counsel. The only outside
18 counsel is -- I'm sorry -- Mr. Johnson, and, I mean, that
19 makes the easiest -- that's the easiest solution. That
13:24:06 20 should be able to speed this up and get us back on track to
21 where we can catch up with the document review, in addition
22 to getting the discovery responses, both the interrogatories
23 and the RFPs.

24 SPECIAL MASTER COHEN: Mr. Johnson, here's
13:24:21 25 what I think you need to do. I want you to get answers to

1 interrogatories. If you've got some finished, send them.
2 If there's others you need to work on, then fine. I'd like
3 you to shoot by next Monday to be completely finished with
4 answers to interrogatories, which, I suggest, don't mince
13:24:35 5 words and put a lot of boilerplate in there. They need to
6 be good answers so that we don't have to find ourselves back
7 here as much as possible.

8 With respect to document production --

9 MS. RENDON: Special Master Cohen, could I
13:24:50 10 just interrupt for one second.

11 Is this supposed to be an open-to-the-public hearing?

12 SPECIAL MASTER COHEN: Yes.

13 MS. RENDON: Okay. I -- we just didn't know
14 that, because there are non-lawyers in the room.

13:25:00 15 SPECIAL MASTER COHEN: Yeah. I mean, this --
16 we're in the courtroom and this is open to the public.

17 Thank you for asking.

18 MR. JOHNSON: I don't recall many, if any,
19 objections.

13:25:16 20 SPECIAL MASTER COHEN: Good.

21 MR. JOHNSON: Our answers are pretty
22 straightforward. There's things we don't have, but --

23 SPECIAL MASTER COHEN: You need to start
24 rolling out as quickly as possible document responses.

13:25:32 25 MR. JOHNSON: I will give that the first

1 priority.

2 SPECIAL MASTER COHEN: I mean, my concern is
3 you said they're going to be ready for review the 29th, and
4 we have a deadline of the 31st. I want you to produce -- I
13:25:51 5 want you to produce half of those documents by the 2nd. If
6 you produce them with a clawback, that's fine. But they
7 need to start looking at your documents to see what you've
8 got and who your custodians are and so forth.

9 All right?

13:26:03 10 MR. JOHNSON: That's fine.

11 SPECIAL MASTER COHEN: Okay. I'll ask you and
12 Peter to continue to confer. I really think that this has
13 been a problem, not of hardware or software, but wetware,
14 they call it, which is to say, you know, human bodies
13:26:17 15 working on it. I get that you're busy. Everybody is busy.
16 This needed more people working on it beginning a while
17 back.

18 Okay?

19 MR. JOHNSON: Yes.

13:26:26 20 SPECIAL MASTER COHEN: All right. Thank you
21 very much.

22 MR. JOHNSON: Okay. Thank you.

23 SPECIAL MASTER COHEN: All right. That is not
24 fun. It had to happen.

13:26:47 25 All right. What I was hoping to have received, and I

1 don't think I did, was a list party by party of the
2 custodial issues, and when I say -- I probably did receive
3 it, one from each party. I was hoping to have a master
4 list.

13:27:15 5 So the agenda item number 2, which is the custodian
6 issue, I'm trying to figure -- trying to figure out the best
7 way to attack that issue, and so, I'm happy to hear
8 suggestions.

9 Part of me thinks we should push that to the end and
13:27:34 10 deal with it defendant by defendant or plaintiff by
11 plaintiff. Part of me says we should just do it now. But
12 it's going to be, I think it has to be party by party.

13 Any thoughts?

14 MR. MOUGEY: Peter Mougey.

13:27:50 15 Special Master Cohen, I think it has to be party by
16 party, and the problem is we were continuing to get updates
17 until, I mean, literally a half an hour ago.

18 SPECIAL MASTER COHEN: Right.

19 MR. MOUGEY: So I think a -- a master kind of
13:28:02 20 omnibus list would have been great, but it was moving until
21 today at noon and it was almost impossible.

22 I do think you can break this out into three
23 categories, whether you hear it now or at the end of the day
24 today. One, you have the individual granular factual
13:28:16 25 disputes on individual custodians. You have the Apex

1 custodians. And then, we have attorneys filling compliance
2 roles.

3 I think we can make a couple of those easier. The
4 attorneys filling compliance role, the one issue that's
13:28:30 5 framed up today is Purdue. We received the privilege log I
6 think last night, and our suggestion would be is to push
7 that back, get you some additional examples, and frame that
8 up, whether that be in the next week or two, because I do
9 think it's an important issue that needs to be addressed.
13:28:46 10 But the attorney issue, filling compliance functions, we
11 think we can push that back for a week or two, so that
12 narrows it down significantly.

13 The issue on the Apex custodians, our suggestion was
14 that at this point that each party be prepared to produce
13:29:06 15 five Apex custodians, just their -- the raw e-mail, and that
16 at another week or two down the line, as we continued to
17 receive production and produce to the other side, both the
18 plaintiffs and defendants, and the -- the robust production
19 hopefully either continues or starts in some cases, that
13:29:25 20 we'll be able to put some meat on the bones around the Apex
21 custodians. But at least this keeps things moving, because
22 we didn't want to delay that.

23 So I think if you break them into those three issues,
24 the factual granular disputes we do need to hit one by one,
13:29:42 25 I think there are four or five defendants and a couple of

1 the plaintiffs that we do need to address; otherwise, I
2 think they have been resolved.

3 SPECIAL MASTER COHEN: Anybody else want to
4 chat about this?

13:29:52 5 MR. CHEFFO: David, it's Mark, and tell me if
6 you -- I'm actually going to address the Apex issue, so I
7 agree with Peter, to the extent he wants to move the other
8 issue, that's fine.

9 And -- and the -- here's what I would say. Look, I
13:30:07 10 understand completely that -- that you want to decide
11 things, and we all support that, and I don't want to kind of
12 get -- I don't want to disclose kind of informal
13 conversations that we've all had because I think it's
14 healthy to have those conversations, but what I would
13:30:26 15 suggest, at least for you to consider and maybe some or all
16 of the plaintiffs to consider, is, frankly, is some -- I
17 think there's some view on both sides of this, kind of the
18 V, that, you know, the idea that people should have to
19 produce, you know, kind of what are called Apex, and even
13:30:45 20 that is, frankly not -- I think it's in the eyes of the
21 beholder, but I'll use it for now.

22 To the extent that there are some legitimate Apex
23 issues, traditionally, having to produce custodial files is
24 not what we do. And I understand you have kind of tried to
13:31:00 25 figure out an efficient way of dealing with that.

1 So my proposal is, or at least thought, and I think to
2 some -- I think there's some -- some kind of receptivity to
3 this on both sides of the V, is to maybe give us a little
4 more time to negotiate this issue and see if there's some
13:31:22 5 horse trading that can be done or some accommodation,
6 because I don't think it's an all or nothing issue.

7 But I've heard enough people and talked to enough
8 folks that at least the -- the door is open, to see if we
9 can try and get something done, you know, in the next week
13:31:38 10 or so.

11 But, you know, that's kind of what I would propose.
12 If you want to -- if you want to argue it, then we can do
13 that as well.

14 SPECIAL MASTER COHEN: Well, every time that
13:31:50 15 this topic has come up, I've urged the parties to continue
16 to confer, and it seems like there are, you know, baby
17 steps, but nonetheless steps taken at least with some of the
18 defendants towards additional agreement, even within the
19 last 24 hours.

13:32:03 20 I can tell you that my inclination with regard to the
21 attorneys, having read the submissions from the parties and
22 some of the case law, is that I'm probably not going to
23 order them -- their custodial files be produced.

24 Having said that, you know, I just heard an agreement
13:32:25 25 that we should kick that can down the road for a week or two

1 and that plaintiffs want to produce some additional
2 documents showing why that shouldn't be the ruling. I'm
3 just telling you my current inclination. And so, that's
4 fine. In other words, I'm agreeing with you that we can
13:32:42 5 wait on this, because I think that you are making additional
6 progress.

7 I said I think in my e-mail to the parties also that
8 in addition to my inclination against ordering production of
9 custodial files of in-house attorneys, that I thought that
13:33:01 10 many of the other plaintiffs' asks seem reasonable. The
11 issue is the timing, and, you know, maybe it becomes the
12 case where because defendants are complaining that there's
13 no way that they can meet deadlines, that -- that the
14 deadlines are released as to those additional custodians.

13:33:18 15 And there has to be an understanding that that is
16 going to affect, you know, discovery down the road. You're
17 just going to be taking -- I'm sure that if the plaintiffs
18 have a choice between not getting documents or getting
19 documents and maybe not having them in time for some of the
13:33:34 20 depositions, they'd still prefer the latter course.

21 And, ultimately, it comes down to a question of is it
22 appropriate for those custodial files to be produced in
23 discovery? And my sense was that to many of the ones, not
24 all of them, the plaintiffs were asking, that the answer was
13:33:49 25 yes.

1 So with those observations, I'm asking you to go back
2 to the drawing board and see if you can come to additional
3 agreement.

4 Any comments?

13:34:01 5 MR. CHEFFO: No. I think that's fine, David.

6 And just to be clear, and maybe it's teed up on the
7 agenda with respect to defendants' issues, but I think there
8 is a reciprocal issue here of --

9 SPECIAL MASTER COHEN: I agree.

13:34:13 10 MR. CHEFFO: Right. To interrogatories.

11 That's what I was suggesting. I'm not going to -- I'm not
12 going to match the seat here from what may be, for all of
13 us, the jaws of victory.

14 So if I'm hearing you is that we should continue to
13:34:28 15 talk about if a deal can be made, and, if not, how we would
16 stage this in terms of timing so that we can meet
17 obligations?

18 SPECIAL MASTER COHEN: Correct.

19 And, you know, I've always said that I'm happy for you
13:34:38 20 all to horse trade.

21 MR. ACKERMAN: Special Master Cohen, it's
22 David Ackerman on behalf of the plaintiffs.

23 I hear what Mr. Cheffo is saying. My concern is, to
24 be frank, that we have pushed this can down the road a
13:34:53 25 couple of times.

1 SPECIAL MASTER COHEN: Yeah.

2 MR. ACKERMAN: And that when you have said go
3 back and meet and confer, while there are some parties who
4 have made additional concessions, there are some who have
13:35:03 5 not.

6 And so, to be clear, the message that we've gotten
7 from Purdue has been we have no authority to give you anyone
8 beyond who we've already given you. If that's still the
9 response, then another ten days of meeting and conferring
13:35:18 10 doesn't do us any good with respect to that defendant. It
11 may not be.

12 But I think you should be aware of that because it
13 doesn't make any sense, given the deadlines, given the --
14 the upcoming depositions, for us to wait another ten days to
13:35:34 15 have the same argument that we very well could have today.

16 SPECIAL MASTER COHEN: So, David, can you
17 point me to the most recent correspondence, e-mail from
18 Purdue on that topic? Is it in the agenda?

19 MR. ACKERMAN: I would need to get my agenda,
13:35:50 20 which is on the table.

21 I know that Mr. LaFata sent an e-mail, I want to say,
22 October 20th. In fact, or -- let me -- let me just grab my
23 folder. I think I have it.

24 (Pause in Proceedings)

13:36:21 25 SPECIAL MASTER COHEN: Mark, do you know what

1 it is that I'm asking for?

2 MR. CHEFFO: Yeah. Here's the thing. If
3 people want to speak up, I've had some conversations -- like
4 I said, I don't want to be too coy. But I also -- you know,
13:36:34 5 I think it's important to kind of respect all parties, at
6 least to talk with one another.

7 So I've had communications as late as, you know, two
8 hours ago with people on the defense side and people on the
9 plaintiffs' side.

10 So while I think, you know, David and I may be talking
11 a little bit apples and oranges what kind of the formal
12 position is, what I'm kind of representing is that I think
13 an ability to kind of determine whether we can stage this in
14 a way, or whether there can be any agreements, is something
13:37:07 15 that I think is still a very live issue.

16 So, you know, I think, yeah, if I didn't think there
17 was any chance of discussion or movement, I would just say
18 let's just argue it and you call balls and strikes, but I
19 think there may be.

13:37:24 20 MR. ACKERMAN: So the last communication I
21 have from Purdue with respect to Apex custodians is an
22 October 15th letter from Mr. LaFata.

23 SPECIAL MASTER COHEN: What about non-Apex?

24 MR. ACKERMAN: That's the last communication I
13:37:38 25 have on all custodians, with -- but other than the in-house

1 attorneys, which I think we addressed in some letters that
2 got exchanged last week, which are the ones that you
3 referred to.

4 SPECIAL MASTER COHEN: I'm sorry. You said
13:37:49 5 what was the date?

6 MR. ACKERMAN: So I've got an October 15th
7 letter from Mr. LaFata dealing with all custodians, and then
8 there were some last week, I think there was an
9 October 16th, 17th letter from us, and an October 20th
13:38:03 10 letter from Mr. LaFata dealing only with those in-house
11 attorney legal issues.

12 SPECIAL MASTER COHEN: Right. So skipping the
13 in-house attorney legal issues, was there any additional
14 agreement that happened after the 15th?

13:38:20 15 MR. ACKERMAN: With Purdue, no, there was not.

16 SPECIAL MASTER COHEN: All right. Do you have
17 that letter?

18 MR. ACKERMAN: The October 15th letter?

19 SPECIAL MASTER COHEN: Yes.

13:38:28 20 MR. ACKERMAN: I have a copy right here.

21 SPECIAL MASTER COHEN: Can I see it, please?

22 MR. ACKERMAN: Sure.

23 (Pause in Proceedings)

24 SPECIAL MASTER COHEN: Did I also see, maybe
13:39:25 25 it was an e-mail, Mr. Ackerman, that itself included some

1 e-mails of Dr. Richard Sackler?

2 MR. ACKERMAN: Yes. There was an e-mail that
3 I sent last night. I will be weary because the document
4 attached to that e-mail was labeled as confidential by
13:39:42 5 Purdue.

6 SPECIAL MASTER COHEN: Right. I don't want to
7 discuss it. I want to make sure I'm remembering things
8 correctly.

9 MR. ACKERMAN: Yes.

13:39:55 10 SPECIAL MASTER COHEN: So just to play tennis
11 a little bit, would it be you, Hunter, who would talk about
12 Apex custodians for Cuyahoga County?

13 MR. SHKOLNIK: Hunter Shkolnik on behalf of
14 Cuyahoga County.

13:40:14 15 Special Master Cohen, yes, I'll be the one addressing
16 as to Cuyahoga County.

17 One of the issues, I don't want to sound like a broken
18 record, is we keep getting pressed that Cuyahoga should be
19 producing the Apex files immediately, faster than everything
13:40:29 20 else, and as we said on the phone last time, it should be
21 going both ways. If there's going to be expedited, it
22 should be both ways. If it's not going to be expedited,
23 it's going to take some time.

24 Whether it's 10 days, 15 days, 30 days, whatever it
13:40:44 25 is, we just want to be on parity, because we, as of today,

1 have produced over 10 million pages of documents. We're
2 talking 60-plus custodians. We just want to be on the same
3 footing as the defendants.

4 And with respect to the Apex witnesses, it's no
13:40:59 5 different. You know, we have a CEO. They have a CEO. We
6 have a CFO. They have a CFO. If custodians are going to be
7 produced, we want parity. If we need time -- if they need
8 time, we would like the same amount of time.

9 SPECIAL MASTER COHEN: Peter, I think you said
13:41:15 10 something like -- you had an idea. I think it was something
11 like everybody produces five?

12 MR. MOUGEY: Yes, sir.

13 My concern -- Peter Mougey. My concern is that if we
14 keep kicking this can down the road, we're just -- this is
13:41:30 15 going to spill in -- we're going to have the same
16 conversation in January about not being able to meet the
17 close of depositions.

18 So my thought was that each party agree to produce
19 five, and let's continue to review the documents as they
13:41:42 20 come in. That's not too onerous on anyone. It's actually
21 as burdensome on the plaintiffs as it is on the defendants.
22 Let's get those -- those files moving and get the documents
23 flowing so we can continue framing up the facts.

24 So it would be five from every party, plaintiff and
13:41:59 25 defendant, and a place to start, and then come back in front

1 of you if, in fact, we think we need to deviate from that
2 number in the next few weeks.

3 SPECIAL MASTER COHEN: How do you choose the
4 five?

13:42:09 5 MR. MOUGEY: At this point, I think it would
6 be based on the information that we've received to date, as
7 far as any production to date, based on what --

8 SPECIAL MASTER COHEN: Who chooses I mean?

9 MR. MOUGEY: The opposite party.

13:42:20 10 So the defendants would choose for the plaintiffs, and
11 vice versa, based on what our research indicates. And if
12 there's any specific issue to a specific custodian, somebody
13 can raise it.

14 But other than that, let's -- this is a way to kind of
13:42:34 15 equally share the burden from both sides and keep the
16 documents flowing. And if there's some granular issue that
17 we haven't identified here that would warrant deviation from
18 the five, we can come back in front of you. That would at
19 least keep the ball moving.

13:42:50 20 MR. DAVIS: Special Master Cohen, this is Josh
21 Davis on behalf of Endo.

22 I just want to say, I like the idea that we're trying
23 to figure this issue out. Unfortunately, the idea of
24 picking five doesn't reflect at all at least our
13:43:01 25 negotiations for Endo, and I suspect doesn't reflect the

1 negotiations between plaintiffs and many of the other
2 defendants.

3 That is, right now, of the custodians that are at
4 dispute with plaintiffs, there is only one that could be
13:43:15 5 considered an Apex custodian. I suspect the issue is
6 similar, if not even more different, than -- or fewer Apex
7 custodians at dispute for other defendants.

8 I'm just not sure that picking five gets us anywhere.
9 It seems like it opens up a whole new can of worms, and
13:43:30 10 we're talking about a whole new set of custodians that are
11 not currently on the table.

12 And I think the idea that we can sort of lump all of
13 the defendants together in these negotiations and just say
14 pick five ignores all of the discussions we've had over the
13:43:43 15 past several months, all of the compromises the parties have
16 made, and I think sets us back even further than if you say
17 -- I agree with Mr. Cheffo that, you know, allowing us some
18 additional time -- and I think this was perhaps what Hunter
19 was suggesting, but I'm not entirely sure, I don't want to
13:44:00 20 speak for him -- that if we have just a bit more time, this
21 is probably something we can work out without trying to come
22 up with a sort of one-size-fits-all deal right now.

23 SPECIAL MASTER COHEN: I think I agree with
24 you. Hold on just a minute.

13:44:12 25 MR. CHEFFO: Yeah, this is Mark. And someone

1 has music on --

2 SPECIAL MASTER COHEN: Yeah. Somebody on the
3 phone -- everybody on the phone needs to mute your phone
4 unless your name is Mark Cheffo.

13:44:23 5 MR. CHEFFO: Yeah. I think the person
6 probably got into their music and went on hold. I'll try to
7 talk quickly and loud over that annoying music.

8 I agree, this is not kind of a -- of trying to find a
9 resolution. Just for Purdue, for example, the issues, from
13:44:42 10 what I recall, the Apex, we have the lawyer issue, we have
11 the CEO issue, and we have the board issue.

12 So if we really -- if we don't want to kind of have a
13 discussion about this, I think this is really -- they're
14 going to be very separate, very specific. We've all had
13:44:56 15 different conversations. The law is going to apply perhaps
16 very differently after some of these issues.

17 So, you know, I don't think this is something we just
18 wave our hand, because the idea of producing five, that's
19 basically saying we win, right? You know, heads you win,
13:45:11 20 tails you lose. But there's -- I don't think anybody has
21 more than five. So if you basically -- you know, if you do
22 this, it's basically just saying give the plaintiffs exactly
23 what they want.

24 So I think in this situation, what I would say is the
13:45:22 25 lawyers and just kind of what I would call CEO types, and at

1 least -- and I don't know if others are similarly situated
2 or not, but people like Richard Sackler, we got this e-mail
3 last night, right, as I think David admitted, as to this
4 issue, the Sackler issue, we think we would like an
13:45:45 5 opportunity to look at that and respond.

6 I think we would be uniquely situated here. I don't
7 think you can wave your hand and say -- and do this as
8 broad-based. I think this is really something we should
9 talk about on an individual basis, either now or, you know,
13:45:59 10 schedule a separate call for whenever you think is most
11 efficient.

12 SPECIAL MASTER COHEN: All right. So here's
13 what's going to happen. I'm not -- I'm not -- Mark, I'm
14 going to put you on mute, but I'll take you off again in a
13:46:14 15 second.

16 I'm not going to order anything except that you keep
17 conferring for now. I'm not -- I was thinking maybe we
18 could do less than five. I'm not going to order anything
19 except that you keep conferring for now.

13:46:28 20 I am going to strongly urge Purdue and the plaintiffs,
21 in particular, to find one or two Apex custodians each and
22 hand them over as a starting point. I want you to do that
23 and that will get us going.

24 I'm coming back on November 11th, and what I'd like to
13:46:45 25 see is a lot of progress made, and, if not, then I'm just

1 going to start calling balls and strikes on it and I will do
2 it on an individual basis. And when I say individual basis,
3 I mean on an individual custodian basis and not a -- you
4 know, not any broad-brush rules against all parties or a
13:47:01 5 party but custodian by custodian.

6 I think there's room, clearly, for a trade to be made
7 between Purdue and the plaintiffs, so I'm going to start by
8 asking y'all to -- to try and make some progress on that.
9 And I'm also asking everybody to try and work on this in the
13:47:19 10 next two, three weeks.

11 MR. ACKERMAN: Special Master Cohen, this is
12 David Ackerman.

13 Can I just ask for clarification, because I know that
14 Summit and Akron I believe have already designated council
13:47:30 15 members or other individuals who would be considered Apex
16 custodians.

17 So are you asking them to then designate one or two
18 more on top of the ones we've already designated, whereas
19 defendants who haven't designated any would be starting from
13:47:44 20 zero and going to two?

21 SPECIAL MASTER COHEN: I'm pretty much
22 thinking of Cuyahoga County.

23 MR. CHEFFO: Okay. David, we'll do that.
24 Thank you for that. We'll try and work cooperatively with
13:48:02 25 everybody and see if we can reach a deal.

1 MR. PIFKO: Special Master Cohen, I just --
2 Mark Pifko from Baron & Budd on behalf of Cleveland.

3 I just want to understand -- we've offered eight or
4 nine Apex custodians, all the city council members plus the
13:48:13 5 mayor, and I just want to understand what you're expecting.

6 Do you expect us to produce all those? Or do you want
7 us to walk back on that and only give a few like they're
8 doing? I just want to clarify.

9 SPECIAL MASTER COHEN: Yeah. Walk it back.

13:48:32 10 MR. PIFKO: Thank you.

11 MR. BOEHM: If I may on that point, Special
12 Master Cohen.

13 This is Paul Boehm from Williams & Connolly for
14 Cardinal.

13:48:40 15 Plaintiffs and defendants have already briefed the
16 question of whether or not the depositions of mayors, chief
17 county executives, and city and county council members
18 should be deposed.

19 SPECIAL MASTER COHEN: Correct.

13:48:55 20 MR. BOEHM: Plaintiffs brought an argument as
21 to the mayors and chief executives based on the Apex
22 doctrine.

23 Based on an entirely separate legal doctrine,
24 plaintiffs also argued that city and county council members
13:49:09 25 should not be deposed. The basis of that request was the

1 legislative privilege doctrine. That's not the Apex
2 doctrine.

3 One of the issues that I'm noticing here as we talk
4 about Apex depositions is that there's no precision at all
13:49:23 5 in how that term is being used. That's why this really
6 needs to be to a party by party decision.

7 Plaintiffs are now saying, oh, yeah, we meant to
8 include the city and the county council members, those are
9 Apex deponents as well. There's no justification for that
13:49:37 10 and that's why plaintiffs can argue that when this was
11 already discussed in our letter submissions to you.

12 They've also made claims as to other individuals who
13 they now want to stuff into the bucket of so-called Apex
14 doctrines, including budget, the budget directors of the
13:49:54 15 various jurisdictions. Those individuals weren't even
16 referenced in the letters that were submitted to Special
17 Master Cohen -- to you, Special Master Cohen, when this
18 issue first was addressed.

19 So in terms of walking it back, I understand to the
13:50:06 20 extent we're talking about mayors and the chief county
21 executives, but as to city and county council members, those
22 were not legal arguments that were ever brought, they
23 wouldn't be meritorious.

24 SPECIAL MASTER COHEN: I agree with you. I
13:50:20 25 agree with you.

1 MR. BOEHM: So I think --

2 SPECIAL MASTER COHEN: So when I say walk it
3 back, let me ask, I guess it was Mr. Pifko, you said that
4 you've offered seven or eight depositions of what you termed
13:50:33 5 Apex. So who exactly?

6 MR. PIFKO: Well, to be clear, I didn't offer
7 their depositions, just custodial files, and that was
8 because of your directive on the telephone conference on
9 October 1st, and those are city council members and the
13:50:48 10 mayor.

11 And, I mean, we contend, for all the same reasons that
12 CEO is Apex, they're elected officials, they're high-level
13 people running the city, I don't see a lack of parity there.

14 SPECIAL MASTER COHEN: Well, at the same time
13:51:02 15 I'm trying not to get into the weeds on this, you're kind of
16 asking me to get into the weeds on this. And so, the best I
17 can say is I want you guys to work on this, and I think that
18 at least some of these should clearly be produced within the
19 next week or two from Purdue and from Cuyahoga County.

13:51:19 20 And the question of whether a councilmen is an -- it
21 sounds like you haven't made the argument that a councilmen
22 before is an Apex custodian. You've only asserted the
23 legislative privilege. And, frankly, I don't remember. I'm
24 taking what you say, you know, and I'm giving you credit for
13:51:37 25 that and that's fine.

1 And, you know, for a city, sure, the mayor and the
2 chief financial officer are Apex. I don't know who else is.
3 All I know is I want to see some trading done, okay, and
4 that's as far as I want to go right now.

13:51:51 5 MR. PIFKO: Okay. I didn't make the argument
6 just because it wasn't out there. I assumed they would give
7 us their people. And they're the ones that made the
8 argument. We were trying to be transparent, so --

9 MR. BOEHM: One of the arguments we've made --
13:52:00 10 this is Paul Boehm again, for the record.

11 One of the arguments we've made in light of your
12 ruling that we would need to wait to take the depositions of
13 mayors, of chief county executives, and of city and county
14 council members, is that we need to see documents of other
13:52:17 15 individuals in order to make the determination. We need to
16 see those individuals' documents in order to make that
17 determination.

18 SPECIAL MASTER COHEN: And that ruling stands.

19 MR. BOEHM: And I think that's true with
13:52:25 20 respect to Cuyahoga County's chief budget officer. Now it's
21 called a chief financial officer. But one of the issues
22 that we're having right now with Cuyahoga County, not to
23 skip ahead, is related to this question of which files ought
24 to be produced and when.

13:52:38 25 Dennis Kennedy is the chief budget officer for the

1 county. And plaintiffs are bringing claims alleging damages
2 of public expenditures in a variety of categories. We've
3 got one witness from Cuyahoga County already deposed, Chris
4 Murray, who pointed us specifically to Mr. Kennedy to answer
13:52:55 5 questions that he could not respond to.

6 Cuyahoga County right now is taking the position that
7 -- they didn't take this position in the letter submissions,
8 but they're now taking the positions that even Mr. Kennedy
9 is a so-called Apex witness and we can't have his custodial
13:53:10 10 file either. And we're asking that, pursuant to this issue
11 having already been addressed and the order that you've
12 already issued on this, that his custodial file also be
13 provided to us as we discussed.

14 SPECIAL MASTER COHEN: I'm sorry. Tell me
13:53:23 15 again who you represent.

16 MR. BOEHM: Cardinal.

17 SPECIAL MASTER COHEN: Pardon me?

18 MR. BOEHM: Cardinal.

19 SPECIAL MASTER COHEN: Okay.

13:53:34 20 MR. SHKOLNIK: Let me go back to -- Hunter
21 Shkolnik on behalf of Cuyahoga County.

22 Let me go back to the issue that was first being
23 addressed.

24 We will take your directive and discuss with defense
13:53:42 25 counsel, Purdue, the exchange of custodians of what we call

1 Apex witnesses.

2 As to the issue of whether or not our council members
3 are Apex, that's not an issue that has been agreed with --
4 as counsel suggests. We strongly believe they are no
13:53:57 5 different.

6 And, by the way, when they say the council members,
7 they're not just asking for the current. We've been asked
8 for past, going back decades. So it's -- it's going to have
9 to be a -- it really should be an issue by issue or -- or
13:54:12 10 position by position analysis, which hasn't been done yet as
11 to the county council.

12 With respect to Mr. Kennedy, the issue of whether or
13 not a -- an Apex file should be produced is why we're here
14 today and one of the issues that the defense counsel want to
13:54:30 15 punt for upwards of 30 days, and now, once again, this is
16 the point I was trying to make, we are being pressed at
17 Cuyahoga County that we have to produce and agree to produce
18 custodians of an Apex quickly and agree to these or be
19 ordered to be produced immediately while the defendants are
13:54:46 20 not.

21 Their CFO has been requested, not just Cardinal, but
22 in other defendants here. No one wants to voluntarily
23 produce those. And they're arguing whether or not the CFOs
24 are appropriate. I think these issues should be combined,
13:55:00 25 as you suggested, and we should come back to you on

1 November 11th and -- and tell you where we are.

2 SPECIAL MASTER COHEN: Here's some thoughts.

3 Here's a final thought on this topic.

4 I think it's probably appropriate, Hunter, that the --

13:55:21 5 I don't know what his title is exactly, Mr. Kennedy, the

6 CFO.

7 MR. SHKOLNIK: CFO.

8 SPECIAL MASTER COHEN: I think it's probably

9 appropriate that his custodial file be produced. I think

13:55:31 10 that it should be produced only in exchange. So I'm kind of

11 saying there has to be a trade. Now you guys got to figure

12 out, in baseball terms, what the player who is being traded

13 for is worth.

14 And so, the defendants, as I've suggested, need to

13:55:48 15 figure out which Apex custodians or close to Apex custodians

16 they're going to give up in exchange for that, and that you

17 should be able to do without me while I'm gone.

18 MR. SHKOLNIK: We will.

19 Thank you.

13:56:01 20 SPECIAL MASTER COHEN: All right. Okay. I

21 think that we have just gone through agenda items 2, 3, and

22 4, which are identification of custodians, production of

23 Apex files, and requests for expedited depositions.

24 MS. SCULLION: Special Master Cohen?

13:56:17 25 SPECIAL MASTER COHEN: Yes.

1 MS. SCULLION: Jennifer Scullion for the
2 plaintiffs.

3 With respect to the more granular -- sorry. With
4 respect to the more granular non-Apex, non-lawyer
13:56:26 5 custodians, I know you had questioned whether you want to
6 address those at the end or the beginning. I wasn't sure
7 where you wanted to do those.

8 SPECIAL MASTER COHEN: I guess I think I was
9 hearing from the parties that they thought that there could
13:56:42 10 be continued negotiation.

11 Are you saying you don't believe that's true?

12 MS. SCULLION: My understanding is we are
13 talking about continuing negotiation on the Apex custodians.

14 SPECIAL MASTER COHEN: I was trying to include
13:56:50 15 everybody, but if you -- I'm very serious. If you tell me
16 that you think there's been as much negotiation as there can
17 be and that the parties are at an impasse, we need to start
18 looking at them one by one.

19 MS. SCULLION: I can speak for my negotiations
13:57:03 20 with Endo. We have tried a number of times to make some
21 progress, and I -- I don't think we've been able to make
22 any. I don't see another week making any particular
23 difference. And we've narrowed our custodians down, putting
24 aside the Apex issue for Endo, to just four.

13:57:24 25 SPECIAL MASTER COHEN: Right.

1 MS. SCULLION: And I think we've laid out in
2 detail their personal involvement in critical, central
3 issues in the case. These are the chief medical officers,
4 the VP of sales, the -- the VP for clinical development, the
13:57:44 5 former senior medical officer. There's really no dispute
6 that they were involved in core issues in the case,
7 personally involved.

8 The response we've heard, principally, from Endo has
9 been twofold. One is, well, Endo shouldn't have to give a
13:58:04 10 certain number of custodians more than the plaintiffs have.
11 I think we've explained, if you're looking at this from a
12 numbers perspective --

13 SPECIAL MASTER COHEN: That's a losing
14 argument.

13:58:13 15 Go ahead.

16 MS. SCULLION: It -- because with Endo, they
17 are nowhere near where Janssen or Mallinckrodt is, for
18 example, with 80 custodians. Again, we've really come down
19 to just these four.

13:58:26 20 And the other argument we've heard is that, well,
21 these four, their e-mails, for example, would overlap with
22 other custodians. And, again, we're talking about, these
23 are the sub-Apex individuals, and our expectation is that,
24 number one, to the extent that the e-mails overlap, there's
13:58:44 25 de-duping. We're not concerned about that.

1 We're talking about their higher-level discussions on
2 issue of what Endo was doing with respect to medical
3 guideline influence, what Endo was doing with respect to
4 research and conferences on opioids, what Endo was doing
13:59:03 5 with respect to its distribution arrangement through UPS.

6 SPECIAL MASTER COHEN: When is your last
7 correspondence to me on this topic?

8 MS. SCULLION: Sure. That was this weekend.
9 That was the Saturday update. And we included there the one
13:59:20 10 pager with respect to Endo.

11 SPECIAL MASTER COHEN: Did that come from you?

12 MS. SCULLION: That did come from me, correct.

13 And to be clear, that included both Endo -- Endo,
14 Teva, and Purdue.

13:59:34 15 SPECIAL MASTER COHEN: You said Sunday? Did
16 you say Sunday or Saturday?

17 MS. SCULLION: Saturday.

18 SPECIAL MASTER COHEN: I've got six from you
19 in the last 24 hours.

13:59:41 20 MS. SCULLION: Yes.

21 SPECIAL MASTER COHEN: Saturday at 12:04?

22 MS. SCULLION: Yes. Noon. Correct.

23 SPECIAL MASTER COHEN: In your e-mail to me,
24 there are five custodians that you list?

14:00:12 25 MS. SCULLION: There are five, one of which is

1 Apex. We've only asked for one Apex.

2 SPECIAL MASTER COHEN: Campanelli?

3 MS. SCULLION: Mr. Campanelli is the Apex.

4 SPECIAL MASTER COHEN: Right. So this is
14:00:22 5 where, I think it was just after I received this e-mail, but
6 I don't remember when, that I sent out, I think it was later
7 that evening, that I sent an e-mail out and said, you know,
8 I think that the in-house counsel, I'm not buying. I think
9 that there's too many issues there. And I think that the
14:00:37 10 case law cited by defendants is strong. But that the other
11 ones -- it seems to me there are a lot of the ones you
12 identified that look like they're appropriate custodians.

13 And I have said earlier today, if it's the timing
14 issue, we can figure that out. You know, maybe you get the
14:00:54 15 documents but you're just going to have to go ahead with
16 depositions maybe not having received all of them.

17 I see Endo's counsel wants to have a turn, so why
18 don't you tell me what you think.

19 MR. DAVIS: Yes. Special Master Cohen, this
14:01:08 20 is Josh Davis again for Endo.

21 I think we might be able to make this fairly easy.
22 I've been having conversations with Ms. Scullion up until
23 just walking into this room today.

24 Putting aside Mr. Campanelli, who is wrapped up in the
14:01:19 25 Apex issues, there are four custodians on that list. We've

1 offered to produce two of them in exchange for them to take
2 two off the -- off the list. I think that represents a
3 fairly fair trade here.

4 And we've offered to produce documents from Ron
14:01:37 5 Wickline in exchange for taking off Frank Casty. That was
6 an offer that Ms. Scullion made to us that we agreed to
7 accept.

8 In exchange for them agreeing to withdraw their
9 requests for documents from Bradley Galer, and we would
14:01:50 10 produce documents from Robert Reiter. Mr. Reiter was
11 prioritized at a higher level than Mr. Galer was in our
12 correspondence with plaintiffs. We think that represents a
13 fairly -- a fair compromise here, without having to get into
14 the weeds, of these specific custodians.

14:02:05 15 I would note, though, as we've mentioned to you, we've
16 already produced between 7-, 8-, 9,000 documents from all of
17 these witnesses already, and I think that supports our
18 position that these are duplicative witnesses. Nonetheless,
19 in the interest of compromise, we're willing to add half of
14:02:22 20 the four witnesses, putting aside Mr. Campanelli, that the
21 plaintiffs have requested.

22 MS. SCULLION: Your Honor, we are willing to
23 take Mr. Casty off, but we do request production of Dr.
24 Reiter, Dr. Galer, and Mr. Wickline.

14:02:39 25 Again, Mr. Wickline is actually set to be deposed

1 because he later became a Mallinckrodt employee. He was VP
2 of sales during a critical period.

3 And with Mr. -- sorry -- Dr. Reiter and Dr. Galer,
4 again, each of them were involved, particularly Dr. Reiter,
14:02:58 5 in going outside of Endo to conferences, to speaking with
6 scientists, other physicians, and we -- so we would expect
7 he would have information that others would not.

8 And with respect to Dr. Galer, he was the lead on the
9 new drug application for Opana ER, which is the principal
14:03:21 10 branded opioid at issue here, and that -- so it was not a
11 trade that we thought was a fair trade.

12 SPECIAL MASTER COHEN: All right. I'm
13 ordering the production of custodial files of Reiter, Galer,
14 and Wickline.

14:03:35 15 MS. SCULLION: Thank you, Your Honor.

16 And, Your Honor, would you like to hear with respect
17 to the granular on the others? I think we have Teva.

18 SPECIAL MASTER COHEN: Yeah. Yes. Let's get
19 to it.

14:03:45 20 MS. SCULLION: And Mr. Crawford will address
21 the Teva custodians.

22 One of the issues I do know is of concern is that for,
23 especially for Teva and I think for Allergan and others,
24 documents are only just starting to roll.

14:03:57 25 As you know, Mallinckrodt, there may still be an issue

1 about search terms, so we're mindful that these are the
2 current -- current disputes and this is without prejudice to
3 our ability to identify additional custodians later.

4 Again, obviously, we're mindful of the realities of
14:04:13 5 the schedule, and of, you know, what we already have. But
6 this -- people did want me to remind that this is without
7 prejudice to being able to identify additional custodians.

8 MR. CRAWFORD: Good morning.

9 Mark Crawford for the plaintiffs.

14:04:30 10 (Off-the-record discussion between counsel)

11 MR. CRAWFORD: It is morning. So I normally
12 do this on the phone. So good afternoon. Thank you, Peter.

13 I'll make this really brief.

14 So Teva consists of basically three defendant groups:
14:04:47 15 It's Teva, the entity that sells generic products extending
16 before 2011; Cephalon, which Teva acquired in 2011; and then
17 the Actavis entities, which they acquired in 2016.

18 What we're seeking here, and it's attached to Ms.
19 Scullion's Saturday e-mail, is basically eight custodians
14:05:07 20 additional that we can't agree on. Four of them are sales
21 representatives. We've asked for four Ohio-based sales
22 representatives who we believe detail pill mills and are
23 very relevant in this case.

24 My understanding is the other defendants are already
14:05:22 25 producing sales rep custodial files.

1 SPECIAL MASTER COHEN: Why four?

2 MR. CRAWFORD: Pardon me?

3 SPECIAL MASTER COHEN: Why four?

4 MR. CRAWFORD: Because we were at six and we
14:05:32 5 compromised and came down to two, and these four, we think
6 -- you know, we've identified them specifically now from
7 databases.

8 We know the two that we want to depose right now
9 detailed a pill mill doctor.

14:05:42 10 SPECIAL MASTER COHEN: You can have three.
11 Pick them and tell them.

12 MR. CRAWFORD: Okay. I can --

13 SPECIAL MASTER COHEN: What's next?

14 MR. CRAWFORD: The next is Marianne Geiger,
14:05:51 15 who was customer service at Teva, and she was charged in the
16 DEA compliance realm. When an order was flagged as
17 suspicious, she was -- they had customer service contact --
18 under their procedures, as I understand them, contact the
19 offending party and do the interview.

14:06:10 20 So she has unique information, would report back to
21 their DEA compliance group, who would make a decision. So I
22 think she's pretty critical here in that realm of -- of
23 pursuit there.

24 SPECIAL MASTER COHEN: You said her name is
14:06:24 25 Marianne Ginger?

1 MR. CRAWFORD: Geiger.

2 SPECIAL MASTER COHEN: Geiger. Sorry.

3 Might as well do it one by one.

4 Who will be responding?

14:06:34 5 MR. CRAWFORD: Okay.

6 MS. FEINSTEIN: Hi, Special Master Cohen. My
7 name is Wendy West Feinstein, I'm with Morgan, Lewis, on
8 behalf of the Teva defendants.

9 First, to address the sales reps that Mr. Crawford
14:06:52 10 just referenced.

11 SPECIAL MASTER COHEN: It's already done. I'm
12 past it.

13 MS. FEINSTEIN: Well, with respect to the
14 remaining outstanding witnesses, Ms. Geiger, they've
14:07:02 15 requested her custodial file. We haven't even gotten to the
16 issue of, you know, whether these folks will be deposed.

17 So, you know, we haven't -- there is no dispute about
18 whether or not there would be a deposition. It's -- it's
19 the burden of collecting and reviewing the custodial files.

14:07:18 20 SPECIAL MASTER COHEN: Right.

21 MS. FEINSTEIN: Ms. Geiger's file would be
22 duplicative of several other custodians that we've already
23 agreed to with Mr. Crawford. We've been in discussions with
24 him, very productively, since the summer. And just -- just
14:07:32 25 recently, the plaintiffs in their October 1 letter requested

1 Ms. Geiger, in addition to a number of other custodians,
2 many of whom we've agreed to, in addition to the generic
3 custodians that have been added from the other entities.

4 So Ms. Geiger's custodial file not only would be
14:07:51 5 incredibly burdensome for us to collect at this late date in
6 particular, but also duplicative of other custodians that
7 they've already requested, that we've already agreed to, and
8 that we've already been processing.

9 SPECIAL MASTER COHEN: Let me ask you about
14:08:03 10 burden.

11 Why would it be especially burdensome for you to
12 produce Ms. Geiger's file at this late date?

13 MS. FEINSTEIN: Because we've got the cutoff
14 of October 25.

14:08:11 15 SPECIAL MASTER COHEN: Let's say I gave you
16 another two weeks.

17 MS. FEINSTEIN: We would do whatever the Court
18 requires us to do, obviously, but just with the -- the
19 additional, since -- let me kind of back up.

14:08:24 20 So we've agreed to a total of 62 custodians, 12 of
21 which we've agreed to since October 15th. So we've got a
22 lot of custodians that we've just recently discussed with
23 the plaintiffs, we've recently agreed to produce, and we're
24 processing.

14:08:42 25 So the more we add on to that, the more the burden is

1 on our already, you know, stretched resources. Everybody's
2 stretched at this point.

3 SPECIAL MASTER COHEN: Let me ask you a
4 question that I want everyone to think about it while you
14:08:56 5 think about it and answer it, and this is kind of dialling
6 back.

7 Right now, you know, we're looking at this case and
8 we're looking at these custodians and we're looking at where
9 we are relative to a deadline and so forth. And I have
14:09:11 10 said, and will continue to say in every ruling that I make,
11 that I'm making it at this juncture within the span of the
12 MDL, which may, God forbid, last ten years, and may, God
13 forbid, have ten bellwether trials, right? And I'm calling
14 balls and strikes and trying to be fair, really, as much as
14:09:29 15 I can to both parties and make sure that the burdens are
16 relatively equal and that everybody's getting 80 percent of
17 what they need for this first trial.

18 But in every MDL -- you know, I think of the hip --
19 hip implant MDLs down in front of Judge Kinkeade, which have
14:09:49 20 had I don't know how many trials. With each success at
21 trial, there's more discovery and there's additional
22 discovery done.

23 And so, it could easily be that I say, fine, you don't
24 have to produce Geiger right now, but you're going to have
14:10:03 25 to produce Geiger the next time when the parties have now

1 done more discovery and now can point to documents that are
2 apparently in her custodial file that they now realize must
3 be important because they've had time to live with all of
4 this.

14:10:16 5 And -- and it's going to go both ways. You know,
6 defendants are going to get additional discovery too, and
7 so, part of what I'm trying to weigh in my calculus is does
8 it make sense to just do it now because it's likely that it
9 will have to be done eventually anyway, and so, why not do
14:10:34 10 it now while everybody's doing it?

11 MS. FEINSTEIN: I can appreciate that
12 perspective, Your Honor, but the distinction here is that
13 the rationale for the request for Ms. Geiger's file is that
14 she's got DEA knowledge. There are at least three other
14:10:47 15 custodians for whom we are undergoing the evaluation and
16 production of documents on that very issue. It's likely
17 that some of Ms. Geiger's information will be included in
18 that. She could be deposed in the case as well.

19 And I'll just point you, if you'd like to review my
14:11:09 20 colleague Rebecca Hillyer's letter from October 15, and
21 that's where a lot of detail on these specific custodians
22 are laid out.

23 So I think the duplicative nature, the additional
24 burden to add another custodian on at this point, in
14:11:21 25 addition to the three that you've just ordered, is not

1 proportional to any demonstration of need on the plaintiffs'
2 part in this case at this time. And if at a later date
3 there is a need and it makes sense to add Ms. Geiger as a
4 custodian, we can address it at that point. But under the
14:11:45 5 circumstances at this point, it doesn't make sense to add
6 Ms. Geiger into the mix.

7 MR. CRAWFORD: Your Honor, Special Master,
8 there is a need to get Ms. Geiger's file. She had the
9 direct contact with these employees. I understand they're
14:12:07 10 de-duping documents. We're not going to get duplicates.
11 That gets rid of the duplication.

12 Also, they're supposed to have all of their documents
13 by the 25th. They got reviewers in place. I told them in
14 the past I'm willing to give reasonable extensions for these
14:12:22 15 custodians. She's a critical custodian at this point to
16 round it out that the other ones do not give us. They did
17 not have the personal contact. And most of these orders
18 sailed through, and that's the whole --

19 SPECIAL MASTER COHEN: What do you mean they
14:12:33 20 didn't have the personal contact?

21 MR. CRAWFORD: The way they had it structured
22 is they would flag a suspicious order, this is my
23 understanding, they would have customer service contact
24 directly the customer whose order was flagged, interview
14:12:46 25 them, and then report back what they -- what they found.

1 Now, I just -- I think her custodial file, because she
2 had the personal contact, I want to be sure that I'm getting
3 everything she understands, what her job was, everything
4 that she may have typed up about the interview, and I'm not
14:13:03 5 confident I'm getting that with the DEA people. These
6 orders sailed through based on these interviews and I think
7 she's critical.

8 SPECIAL MASTER COHEN: So can you explain to
9 me, if you know, how Colleen McGinn and Ms. Geiger, what
14:13:18 10 their reporting was and the extent to which they had
11 different obligations, job responsibilities?

12 MR. CRAWFORD: Yeah. My understanding of Ms.
13 McGinn, she was in the DEA Compliance Department. They did
14 not report a single suspicious order prior to 2013. 2013,
14:13:34 15 they had some more structure put in place. My understanding
16 is Ms. Geiger was the one that interviewed the customers and
17 reported back to her in the DEA department and they made the
18 call.

19 SPECIAL MASTER COHEN: Who reported to whom?

14:13:48 20 MR. CRAWFORD: Geiger I think reported to
21 McGinn in that department what she found.

22 And I just want to be sure I'm getting all the
23 interview notes and -- and her understanding of what she's
24 supposed to be talking about and -- and why these are
14:14:04 25 sailing through, and I think she's an important piece of the

1 puzzle.

2 And also, too, these other custodians, these are
3 Actavis/Allergan custodians that they are producing. This
4 will be 24 of them. So these recent ones, I wasn't even in
14:14:24 5 the discussion about it. I just learned about eight today.
6 Those are Allergan custodians. And Teva, for those 24, just
7 -- I assume they just carried on at Teva.

8 And I'm getting a year of e-mails, but those aren't
9 full custodians that are Teva. Those are Allergan
14:14:39 10 negotiated ones. Teva's agreed to produce 38 for Teva and
11 Cephalon. So we have a very reasonable number. I've tried
12 to be reasonable here. We are below what the other
13 defendants are by far.

14 SPECIAL MASTER COHEN: Who -- are there any
14:14:48 15 other folks besides these sales -- the sales -- six sales
16 persons you asked for? We've got three. Ms. Geiger. Who
17 else?

18 MR. CRAWFORD: There's Napoleon Clark, who is
19 a sales and marketing person of generics. We don't have a
14:15:03 20 whole lot of that. We hear a lot of discussion that they
21 don't market generic products, but we need to take -- take
22 their depositions, at least of a couple, and get their
23 custodial files. We think he's very important.

24 SPECIAL MASTER COHEN: Anyone else?

14:15:15 25 MR. CRAWFORD: There are two lawyers, and we

1 understand that's been shelved.

2 SPECIAL MASTER COHEN: Besides in-house
3 counsel.

4 MR. CRAWFORD: Yeah, that's it.

14:15:24 5 SPECIAL MASTER COHEN: That's it?

6 MR. CRAWFORD: That's all we're asking for
7 right now.

8 SPECIAL MASTER COHEN: If you're allowed to
9 get one, between Geiger and Clark, who would you choose?

14:15:31 10 MR. CRAWFORD: Well, if I had to choose one,
11 it would be Geiger.

12 SPECIAL MASTER COHEN: Did you want to add
13 anything else, Ms. Feinstein?

14 MS. FEINSTEIN: Thank you. Yes.

14:15:49 15 Just for consideration, just listening to Mr.
16 Crawford's discussion, and, you know, his -- our discussions
17 between my office and his office have been very productive.

18 But just listening to the discussion now and his
19 presentation to you, it sounds as if he wants to talk to Ms.
14:16:08 20 Geiger, take her deposition, not necessarily scour her
21 documents that are likely duplicative of the other
22 custodians.

23 So, you know, I would suggest that it may not be
24 necessary for her to be a document custodian for purposes of
14:16:24 25 paper discovery but rather subject to examination and

1 deposition.

2 SPECIAL MASTER COHEN: What's the -- what rule
3 are the parties using, I just don't remember, with regard to
4 production of custodial files of deponents?

14:16:39 5 MS. FEINSTEIN: We have -- we have discussed,
6 and Mr. Crawford can step in if I misstate anything about
7 our agreements, but we are producing custodial files for
8 individuals identified as custodians. If the -- if a
9 witness, a deposition witness is also a custodian, we will
14:16:59 10 make sure that that file has either previously been produced
11 or will be produced 14 days in advance.

12 In addition to that, the plaintiffs, pursuant to
13 CMO-1, have a lot of depositions that they can take. So,
14 you know, not all of those deponents will be custodians.
14:17:16 15 So, you know, there may not be custodial files for many, and
16 likely won't be custodial files for many, of the witnesses.

17 SPECIAL MASTER COHEN: Okay. What do you
18 think about the idea of deposing her without getting the
19 custodial files?

14:17:30 20 MR. CRAWFORD: Absolutely not. We need the
21 custodial file to be able to evaluate whether to depose her
22 and to what extent. It's non-duplicative documents we're
23 looking for, not duplicative documents.

24 SPECIAL MASTER COHEN: All right. So I
14:17:42 25 actually think that both Clark and Geiger's, that's what I

1 would choose, but I'm only going to order the production of
2 Geiger.

3 MR. CRAWFORD: All right. Thank you.

4 SPECIAL MASTER COHEN: And I say that without
14:17:53 5 prejudice to trial, too, or sometime down the road, Clark's
6 custodial file being produced as well.

7 I really think that a lot of these folks have relevant
8 and important positions that I would guess suggest they have
9 documents in their custodial file that are relevant and
14:18:12 10 could easily end up as a -- as an exhibit. That's kind of
11 what I'm thinking when I'm making these rulings.

12 And I'm telling you, I try not to broad-brush things,
13 but that has been my general observation as to all of these,
14 so I'm letting you know this is how I'm coming out. If you
14:18:30 15 want me to take a pause and you can take what I've done so
16 far and see if you can make further progress, I'm happy for
17 you to do that.

18 This -- but I'm trying to give you an indication of
19 what I'm thinking and why so that you can use that going
14:18:44 20 forward yourselves.

21 Is that it for Teva?

22 MR. CRAWFORD: There's one additional issue.

23 Custodial file -- what we agreed to initially was
24 because we were under a two-month tight time frame, was a
14:18:58 25 custodial file would be their e-mail files, but a custodial

1 file is generally considered to be much more than that.

2 SPECIAL MASTER COHEN: Right. Right.

3 MR. CRAWFORD: That's the stuff they keep in
4 their office, it's on their hard drive, it's on their user
14:19:09 5 files, and we have reserved, because we tried to be
6 accommodating to Teva, just to get the e-mail files, but
7 always reserve primarily to get the rest.

8 But we have asked for, and we would like to have, just
9 the user files and the hard drive files for the deponents to
14:19:29 10 complete the custodial file so we have the full file. Not
11 even the full. We're not asking even for the hard copy
12 stuff they keep, because they didn't want to go back to them
13 and try to dig that up.

14 I said, okay, I'll just take the user files on the
14:19:43 15 system and I'll take the hard drive, run the search terms
16 through them for just our deponents, and produce that
17 14 days before, or whenever is reasonable, so we can have
18 the full file to review before the deposition.

19 So that's the additional Teva custodial issue out
14:19:58 20 there.

21 SPECIAL MASTER COHEN: Well, is that an issue?
22 It just sounds like you explained to me what you've agreed
23 to avoid it being an issue for now.

24 MR. CRAWFORD: They have not agreed to produce
14:20:09 25 anything beyond their e-mail for the deponents, so I think

1 that's the dispute.

2 MS. FEINSTEIN: Actually, there is one
3 clarification to that.

4 MR. CRAWFORD: Okay.

14:20:18 5 MS. FEINSTEIN: So I think the dispute is very
6 narrow, the remaining dispute. We've agreed, and this is in
7 the October 15 letter I believe, but we have agreed to
8 produce the full custodial file as described by Mr. Crawford
9 for employee custodians.

14:20:34 10 Former employees present an additional -- an
11 additional burden that's just -- that I think my colleague
12 has explained to Mr. Crawford, not only in time, it would
13 really stretch out the process, because to locate those
14 former employee hard drives, for example, and system files
14:20:56 15 would really extend the process.

16 What we've offered to compromise on on this point is
17 to provide to the plaintiffs for current employee custodians
18 the complete file, so the dispute is really just that area
19 then in between.

14:21:11 20 MR. CRAWFORD: I think we can meet and confer
21 on this issue a little bit more.

22 SPECIAL MASTER COHEN: I think you can too.

23 Thank you.

24 MR. CRAWFORD: Thank you.

14:21:18 25 MS. FEINSTEIN: Thank you.

1 SPECIAL MASTER COHEN: What's next?

2 MR. ACKERMAN: I need a copy of my letter back
3 in order to do that. I'd like to address Purdue.

4 SPECIAL MASTER COHEN: And I need to get
14:21:33 5 Cheffo back on the line, which he isn't at the moment. Hold
6 on just one minute.

7 (Pause in Proceedings)

8 SPECIAL MASTER COHEN: Mark, are you still
9 there?

14:22:17 10 MR. CHEFFO: I am. Thank you.

11 MR. ACKERMAN: Again, this is David Ackerman
12 for the plaintiffs.

13 There are two non-Apex, non-lawyer custodial issues
14 with respect to Purdue, and the names are Steven May and Mo
14:22:39 15 Mulcahy. Both are -- Mr. May is a former sales
16 representative. Mr. Mulcahy is a former district manager.

17 Both are individuals for whom we have requested
18 depositions and for whom Purdue has agreed to provide
19 deposition dates, but has not agreed to provide their
14:22:57 20 custodial files.

21 Especially with respect to Mr. May, he is a sales
22 representative who has been quoted publicly regarding the
23 instructions he was given by Purdue management. Those
24 are -- that is testimony that we would like to get on the
14:23:14 25 record.

1 SPECIAL MASTER COHEN: I guess you said
2 former. When was he released from his job?

3 MR. ACKERMAN: I don't know.

4 SPECIAL MASTER COHEN: How many sales reps do
14:23:21 5 you have?

6 MR. ACKERMAN: We have six sales reps from
7 Ohio. We would not question Mr. May regarding his -- his
8 transactional dealings within his territory, but, rather,
9 the question would be with respect to category 1 discovery
14:23:39 10 with respect to the overall messages and instructions that
11 he received regarding that marketing.

12 SPECIAL MASTER COHEN: Okay. And Mr. Mulcahy?

13 MR. ACKERMAN: Mr. Mulcahy is a former
14 district manager. And I apologize that I do not have more
14:23:54 15 information on him other than that.

16 SPECIAL MASTER COHEN: Ohio?

17 MR. ACKERMAN: Is he Ohio? I --

18 MS. SCULLION: Yes.

19 MR. ACKERMAN: Yes, he is Ohio.

14:24:05 20 Thank you.

21 SPECIAL MASTER COHEN: Nothing more on him?

22 MR. ACKERMAN: I have nothing more, other than
23 that he is a district manager in Ohio.

24 SPECIAL MASTER COHEN: Does anybody in the
14:24:12 25 room want to add anything about Mulcahy as to why, in

1 particular, they think a custodial file from him is
2 appropriate?

3 Okay. Who is going to talk about Purdue?

4 MR. CHEFFO: Special Master Cohen, this is
14:24:23 5 Mark, and I think Paul LaFata is actually in the courtroom,
6 so with your indulgence, we would like to sort of tag team
7 just for the reason that he may have a few more details.

8 I think you asked the exact right question, all right,
9 which is of -- and Mr. Ackerman kind of danced around it,
14:24:39 10 but the reality is there's -- you have to have some
11 limitations here in terms of the geographic scope.

12 We now have kind of Ohio-only producing. We have all
13 of the other, you know, municipalities now producing. And
14 now they want to go get sales reps kind of outside even Ohio
14:24:59 15 in connection with this. So I think there's borders that
16 are supposed to be limited to kind of Ohio-related issues.

17 And I -- and as I said, I think to the extent that he
18 can take the deposition, my understanding, and Paul will
19 correct me if I'm wrong, and I think they had conceded this,
14:25:17 20 that we didn't object to that.

21 But the idea that we're now, with everything else
22 going on and all these custodial parts, we still have to go
23 collect custodial files for sales reps, for district
24 managers who were not even kind of in the jurisdiction, I
14:25:32 25 think it's so far field that we're literally never going to

1 get things done and I think it's inappropriate.

2 Let me stop there and see if -- if Paul LaFata has
3 anything else to add on this, because I think he was
4 prepared to talk directly to this.

14:25:45 5 SPECIAL MASTER COHEN: He's waiting for you to
6 finish.

7 MR. CHEFFO: Okay. Good. Then I'm done.

8 MR. LAFATA: Paul LaFata from Dechert for
9 Purdue.

14:25:57 10 So there was a question you asked, Special Master,
11 earlier about the number of requests. I identified this in
12 the October 15th letter that the plaintiffs had requested 11
13 extra files from sales representatives, sales managers, and
14 in the meet and confer process, it was very, you know, in
14:26:14 15 good faith, the plaintiffs had identified those that were
16 the people who called on the most, made the most number of
17 calls. So in this October 15th letter, we just took the top
18 six of those, that's more than half of what they requested,
19 and said we'll agree to those.

14:26:27 20 These two individuals they're talking about now are
21 not ones that they have identified as having made calls. If
22 they did, it certainly wasn't the degree to which those
23 other ones had been making calls. If there is interest --
24 and as Mark said, Mark Cheffo had said, these are former
14:26:42 25 employees. So it's -- if plaintiffs are going to depose

1 them, they're going to depose them.

2 But with respect to the number of files, we've given
3 so many of these sales representatives and sales managers
4 that eventually it becomes overkill. So what we did is we
14:26:56 5 picked the top six they had asked for out of 11 and
6 identified that as a compromise in the October 15 letter.

7 SPECIAL MASTER COHEN: I'm sorry. How many
8 district managers' custodial files is Purdue producing?

9 MR. LAFATA: Special Master Cohen, I don't
14:27:10 10 have that exact number, and maybe Mr. Ackerman has the
11 number. Is it around the neighborhood of two to four,
12 something like that.

13 And some of these on this list, frankly, to me, we've
14 been grouping these together because they often cover a lot
14:27:21 15 of overlapping areas. A district manager may cover multiple
16 representatives. But we've -- we've been -- in addition to
17 these 11, we've given several other district managers
18 besides the ones that the plaintiffs have asked for. This
19 was back during the summertime, so it was already part of
14:27:36 20 the file.

21 SPECIAL MASTER COHEN: I may have asked this,
22 I apologize, is Mulcahy a -- a district manager in the track
23 one jurisdictions?

24 MR. LAFATA: I don't know.

14:27:48 25 MS. SINGER: This is Linda Singer, plaintiffs.

1 I believe so.

2 SPECIAL MASTER COHEN: And there are other
3 track one district managers whose custodial files you're
4 receiving?

14:27:57 5 MR. LAFATA: Yes. We've -- yes.

6 SPECIAL MASTER COHEN: All right. So, again,
7 I've said this before and I'll say it again, and this
8 applies to all discovery rulings I make, I am not going to
9 order the production of the custodial files of either of
14:28:10 10 these two individuals, but they have to be preserved so that
11 if that ruling changes in the span of this MDL, they're
12 still there to be produced.

13 MR. LAFATA: Yes, sir.

14 SPECIAL MASTER COHEN: Who's next?

14:28:24 15 MR. PIFKO: Yes. Special Master Cohen, real
16 quick. I think that -- Mark Pifko from Baron & Budd.

17 From AmerisourceBergen, I think your guidance guides
18 the way, but I made this offer to them over on Friday and
19 they rejected it, and I don't think there's any more to meet
14:28:41 20 and confer, so if you could order this, unless they stand up
21 here and agree.

22 There's five custodians in dispute, three of which
23 they claimed were Apex and two of which were lawyers. In
24 the spirit of compromise, I'm willing to accept the three
14:28:56 25 Apex and drop the lawyers, if you're willing to order that.

1 SPECIAL MASTER COHEN: Can you tell me what
2 letter it was that I may have received that would list them
3 and their positions?

4 MR. PIFKO: I sent you an update on Saturday
14:29:10 5 at noon which attached our portion of the letter on that
6 issue.

7 SPECIAL MASTER COHEN: Just a minute, please.
8 That's only 150 e-mails ago.

9 (Pause in Proceedings)

14:30:12 10 SPECIAL MASTER COHEN: So this is the one that
11 lists Collis, Mauch, and Neu, as well as the two attorneys?

12 MR. PIFKO: Right.

13 So in the spirit of compromise and taking your
14 guidance, I'm willing to give up the two lawyers, which was
14:30:24 15 an offer I made to them on Friday and they rejected.

16 Do you want to hear argument or --

17 SPECIAL MASTER COHEN: I'll hear from opposing
18 counsel first.

19 Thank you.

14:30:37 20 MR. NICHOLAS: Good afternoon. It's Bob
21 Nicholas, Reed Smith, for AmerisourceBergen.

22 First of all, with -- I guess I would have disagreed
23 that there's no room for discussion. It's been my
24 impression, from some of the back channel conversations that
14:30:56 25 I'm aware of and I've participated in, that there are both

1 macro discussions about horse trading and micro discussions.

2 So I think there are, without being specific because I
3 can't really speak for anyone until I can talk for everyone,
4 I think there's room for discussion at a macro level in
14:31:18 5 terms, in particular, of Apex people. There's just horse
6 trading that can be done, you know, at a high -- you know,
7 one side to the other side, not just party by party.

8 I don't think that the compromise that Mr. Pifko is
9 referring to right now is that much of a compromise.

14:31:41 10 They've asked for, most recently, in this most recent round,
11 three Apex people. One is our CEO. Another is the current
12 president of the -- another is the current president of our
13 pharmaceutical distribution company. And the other is the
14 former president of that company.

14:32:06 15 So asking for all three of them, because those are
16 really the three Apex people that they've asked for at this
17 time, is not, in my view, a whole huge compromise. I would
18 like to continue to keep meeting and conferring about these,
19 about all three of them.

14:32:23 20 I can argue individually about each one, if you'd
21 like.

22 SPECIAL MASTER COHEN: Let me ask you what you
23 think about the observation I made earlier about these --
24 that I'm ruling at this juncture in the MDL and that it may
14:32:38 25 be simply a matter of whether it happens now or during the

1 next case?

2 MR. NICHOLAS: I understand that point of
3 view. I'm not prepared to conclude that there will be a
4 next case. I don't know how this is -- you know, I don't
14:32:52 5 know where all of this is going. Maybe I'm stupidly
6 optimistic or something, but I am more -- I think maybe it
7 sounds narrow, but I want to deal with what's in front of us
8 and what's live right now.

9 I don't know what's going to happen, whether there are
14:33:11 10 going to be future cases where these files and custodians
11 and deponents are going to be at -- at issue. Maybe. But
12 we can deal with those when we deal with those. But I'm
13 looking at this right now, and, you know, I would -- that's
14 kind of how I'd like to approach it.

14:33:28 15 SPECIAL MASTER COHEN: I think this dispute
16 falls into the category of the Apex custodians, because I
17 think they all are Apex custodians, different from the ones
18 we just discussed a minute ago, and, therefore, I'm not
19 going to order production of these custodial files at this
14:33:44 20 time. I think it falls within the ruling that there should
21 be some horse trading.

22 And just in the same way that I think that there's
23 probably at least one Apex custodian that Purdue should
24 produce in exchange for getting some custodians, Apex
14:33:59 25 custodians from the plaintiffs, it's probably equally true

1 to you, and I'll leave you to try and work that out over the
2 next week or two.

3 Thank you.

4 MR. NICHOLAS: Thank you.

14:34:09 5 SPECIAL MASTER COHEN: Who's next?

6 MR. WEINBERGER: Good afternoon.

7 Peter Weinberger.

8 Peter Mougey and I are going to handle item number

9 5 --

14:34:26 10 SPECIAL MASTER COHEN: Let me just interrupt

11 you.

12 MR. WEINBERGER: -- which is production

13 charts.

14 Yes, sir.

14:34:31 15 SPECIAL MASTER COHEN: I just want to make

16 sure that we've dealt with everybody with regard to

17 custodial files.

18 MR. MOUGEY: We still have Walgreens, which is

19 Pete's issue also, which we can go back.

14:34:45 20 SPECIAL MASTER COHEN: Okay. Fine.

21 MR. BOEHM: We also have Summit County.

22 SPECIAL MASTER COHEN: You said also Summit

23 County?

24 MR. BOEHM: Summit County.

14:34:54 25 SPECIAL MASTER COHEN: All right. I kind --

1 unless there's a reason we shouldn't, I want to stay on
2 topic.

3 MR. WEINBERGER: Fine.

4 MR. MOUGEY: Peter Mougey on behalf of the
14:35:10 5 plaintiffs regarding Walgreens.

6 We have a problem with the Walgreen production, both
7 geographic scope and a temporal scope, and let's see if I
8 can frame some of these issues up.

9 What has become abundantly clear from the discovery
14:35:30 10 and the first deposition we took, I cut and pasted a portion
11 of that transcript for Your Honor on the October 20th
12 correspondence that we submitted to the Court, the very
13 first deposition we took -- we've asked for 36 custodial
14 files, we've agreed to 21, there's 15 in dispute. Walgreens
14:35:52 15 has asked or offered -- and there was an offer as little as
16 an hour ago -- to give us nine if we take the other six
17 down, and here's why that won't work.

18 The very first depo we take, manager of Pharmaceutical
19 Integrity Department at Walgreens, which began in earnest in
14:36:14 20 2013 as the result of a DEA investigation and settlement
21 agreement, it was one of the criteria that they create and
22 implement a Pharmaceutical Integrity.

23 The very first depo, the western manager of
24 Pharmaceutical Integrity said that we divide duties based on
14:36:33 25 our areas of expertise. The western manager gave the

1 suspicious order reports after 2013 to the DEA. That's the
2 western manager.

3 So, arguably, you can say the western manager was out
4 of the geographic scope, it's only Ohio, but his area was
14:36:52 5 I'm the one that gives the suspicious order reports. I
6 asked him: Well, were, in fact, they not shipped subject to
7 some due diligence?

8 And he said: I don't know the answer to that. All I
9 do is run the reports. And the depo clip that I cut said:
14:37:07 10 You'll have to go ask the distribution centers. And he
11 identified 50, 75, 100 people that had knowledge about the
12 specific distribution centers' shipments.

13 Now, clearly, that's a ton of custodial files.

14 Why are different distribution centers important to
14:37:26 15 the trial track one cases? Jupiter, which is Walgreens'
16 distribution center out of Florida, supplied Schedule II and
17 Schedule III to Summit and Cuyahoga as recently as 2006 and
18 2007.

19 One of the distribution centers in the D.C. area
14:37:48 20 supplied Schedule II and Schedule III to Summit and
21 Cuyahoga.

22 And this gentleman relayed: If we want information
23 about the suspicious orders, we need to go to those specific
24 distribution centers because they're responsible, in
14:38:03 25 addition to others, for performing the due diligence.

1 So all of a sudden, the scope or the mushroom of what
2 we were looking at to date started to expand in the very
3 first deposition.

4 The other issue is a temporal scope or time.
14:38:19 5 Pharmaceutical Integrity began in 2013. Prior to that,
6 different departments and different people were responsible
7 for identifying suspicious orders or orders of interest in
8 performing due diligence. So there was a clean break in
9 2013 where they started on a new kind of route of what they
14:38:37 10 were pulling.

11 And, keep in mind, we only have 21 custodians is what
12 we've asked for, and we've only asked for 15 more. Now,
13 initially, we asked for about 25. We backed down to 15.
14 And we continue to have discussions that, quite frankly, are
14:38:50 15 no longer making any progress.

16 So you have the -- you had the geographic, we can't
17 just cleanly define this as right around in Ohio and the
18 distribution centers.

19 SPECIAL MASTER COHEN: Let me interrupt you
14:39:01 20 just to ask you where the letter is that would list those 15
21 that you're still asking for?

22 MR. MOUGEY: It's the October 20th, 2018.

23 Let me get my agenda. I can give you a page number.

24 (Pause in Proceedings)

14:39:16 25 SPECIAL MASTER COHEN: Are we at like 30B?

1 MR. MOUGEY: Yes. 1131.

2 SPECIAL MASTER COHEN: Go ahead.

3 MR. MOUGEY: And that was -- the first page of
4 that letter is where I gave you the block quote from Mr.
14:39:33 5 Stahmann who was the western manager of Pharmaceutical
6 Integrity.

7 So what we've done, Your Honor, is we have 15
8 additional custodians that are broken down into different
9 departments. One, the distribution centers, and that's who
14:39:48 10 Mr. Stahmann told us was responsible for performing the due
11 diligence. Two we've agreed to. The one that is still
12 disputed is the SAIL coordinator. And the SAIL coordinator,
13 the CII manager, the controlled substance Schedule II, he's
14 the coordinator for Mount Vernon DC. This is one of the
14:40:06 15 ones in dispute.

16 Mount Vernon DC distributed hydro to Cuyahoga and
17 Summit, and that's the individual that we understand was
18 responsible for performing additional due diligence on the
19 orders of interest. So that's one that's in dispute.

14:40:23 20 I'm going to focus on the six. We've asked for 25, we
21 reduced to five after this deposition. We thought that was
22 eminently reasonable when their own witness said go talk to
23 75 people, we asked for 15.

24 SPECIAL MASTER COHEN: Let me interrupt you
14:40:39 25 once more.

1 MR. MOUGEY: Sure.

2 SPECIAL MASTER COHEN: I want to make sure I'm
3 exactly on the same page as you are literally. So I'm
4 looking at an October 12th letter that you sent. And I'm
14:40:48 5 not seeing any quote from -- am I on the wrong letter?

6 MR. MOUGEY: It's October 20th, and it begins
7 at page 1131. It's probably a few pages behind that. I
8 don't have the exact page number that corresponds with the
9 PDF, but --

14:41:07 10 SPECIAL MASTER COHEN: So I'm at page 1131,
11 the October 12th letter.

12 MR. MOUGEY: If you continue to scroll back, I
13 think they should be in chronological order.

14 SPECIAL MASTER COHEN: Scrolling backwards or
14:41:20 15 forwards?

16 MR. MOUGEY: Forwards. Sorry.

17 SPECIAL MASTER COHEN: Towards 1132, 1133?

18 MR. MOUGEY: May I approach and just show you
19 the quote?

14:41:39 20 SPECIAL MASTER COHEN: Yes, please.

21 (Pause in Proceedings)

22 SPECIAL MASTER COHEN: For the record, that's
23 page 1284 of the agenda, the October 23rd, 2018 agenda.

24 MR. MOUGEY: So you see the quote that we put
14:42:36 25 in front of you, and, quite frankly, I was taken aback.

1 This was after refusing to put up these custodians. This is
2 a manager of the western region says -- and I'm asking him
3 about due diligence on suspicious orders, and his -- I said:
4 So you're talking maybe 50, 75, even possibly 100 people
14:42:53 5 that may have specific information about suspicious orders
6 and the due diligence provided or performed on those orders,
7 right?

8 He goes: They would possibly have some knowledge,
9 yes.

14:43:02 10 And it would be your recommendation that we should
11 probably talk to them to find out what kind of information
12 they have on due diligence on suspicious orders, right?

13 Witness: That would be my personal recommendation.

14 And this is a manager of the Pharmaceutical Integrity
14:43:20 15 Department saying I don't have any information. After I
16 identify the order of interest, I burn the report, I send it
17 to the DEA, and I also send it to the distribution centers.
18 I don't know if those distribution centers -- this is their
19 own witness saying: I don't know if they did due diligence.
14:43:37 20 You'll have to ask them.

21 So then we come back to Walgreens and we said, look,
22 we're not going to ask for 75 or 100, but if you give us
23 these 15, and we parse them out to different areas in the
24 company, and as I understand it right now, we have one
14:43:56 25 individual that we've asked for that's in dispute from the

1 distribution centers, that was the -- a SAIL coordinator,
2 and those are in the distribution centers for Mount Vernon
3 DC, and we don't even have a name. All we have is an empty
4 org chart.

14:44:13 5 And that's another issue, and I raised that in my
6 correspondence on Sunday, in that the org charts that we've
7 gotten from Walgreens either, A, just came or, B, cover 2012
8 to current. So prior to 2012, we have almost no documents
9 and no org charts.

14:44:30 10 So what we've been doing for the last 60 days is -- we
11 literally have just a few hundred pages on some of these
12 specific custodians pre-'12 -- we've literally been pouring
13 through LinkedIn trying to find and piece together org
14 charts.

14:44:46 15 SPECIAL MASTER COHEN: Are the folks who you
16 want listed on page four in those charts, four and five of
17 your October 20th letter?

18 MR. MOUGEY: They are, yes, sir.

19 And there's charts that went back and forth as
14:44:59 20 recently as an hour before today.

21 But there's essentially 15 individuals that are in a
22 few different departments that are focused on specifically
23 due diligence, distribution centers, suspicious orders, and
24 policy. So that would give us a total of 36 custodians.

14:45:16 25 You just heard Teva stand up and say that they have

1 60. We're asking for 36. This is the fourth -- third
2 largest distributor in Summit and Cuyahoga County, so --

3 SPECIAL MASTER COHEN: I'm only seeing eight
4 where it says disputed in your chart. I need to know
14:45:33 5 exactly who we're talking about on page four and five of
6 your letter.

7 MR. MOUGEY: The difference -- that's the
8 difference between -- there's 15. We offered 15. They
9 offered six. Nine. I think it depends which hour. And the
14:45:51 10 difference between the two.

11 And standing here right now, I'm not exactly sure from
12 the last hour -- I literally had another offer as we were
13 walking into court today and I had that printed out --

14 SPECIAL MASTER COHEN: Can you go through --
14:46:03 15 I'm just trying to understand who right now there is a
16 dispute, where there is no agreement where Walgreens has
17 said no.

18 MR. MOUGEY: My understanding, and I had my
19 office put this together as we were walking into court,
14:46:14 20 these are the ones in dispute:

21 A SAIL coordinator that we've not been able to put the
22 name on for the Mount Vernon Distribution Center. That's
23 one.

24 SPECIAL MASTER COHEN: Right.

14:46:22 25 MR. MOUGEY: And SAIL is S-A-I-L coordinator

1 from Mount Vernon DC.

2 Ed Lanzetti, who is the Market Loss Prevention
3 director for Florida.

4 SPECIAL MASTER COHEN: Go ahead.

14:46:34 5 MR. MOUGEY: Market Loss Prevention director
6 for Ohio, and that's unknown. We don't know the actual name
7 of the person. I just have an empty box in an org chart.

8 SPECIAL MASTER COHEN: Got it.

9 MR. MOUGEY: That's number three.

14:46:48 10 Number four is Joseph Prignano, he's the director of
11 Pharmacy and Retail, Cleveland/Akron Pharmacy Operations.

12 SPECIAL MASTER COHEN: Let me just go through
13 the rest of them.

14 Jeff Berkowitz.

14:47:02 15 MR. MOUGEY: Jeff Berkowtiz.

16 SPECIAL MASTER COHEN: Kermit Crawford.

17 MR. MOUGEY: Kermit Crawford.

18 SPECIAL MASTER COHEN: Dwayne Pinon.

19 MR. MOUGEY: Yes, sir.

14:47:02 20 SPECIAL MASTER COHEN: And a compliance person
21 from -- it doesn't say where -- regarding diversion and
22 suspicious orders.

23 MR. MOUGEY: Yes, sir.

24 SPECIAL MASTER COHEN: Unknown.

14:47:12 25 MR. MOUGEY: That's compliance persons

1 identified by Walgreens, yet ascertained who those
2 individuals are.

3 SPECIAL MASTER COHEN: Those are all the ones
4 that are in dispute at this moment, correct?

14:47:21 5 MR. MOUGEY: Yes, sir.

6 And these are the same categories of people we've been
7 asking for since July and still don't even have names in
8 some of these categories.

9 The point I want to get across is we're asking for 36,
14:47:32 10 36 custodians. That's not unreasonable given the scope and
11 breadth of Walgreens' operations.

12 And just in one last -- 78 percent of the U.S.
13 population lives within a five-minute drive of a Walgreens.
14 It's huge. They're absolutely huge. There's 7,800 retail
14:47:51 15 operations with dozens of distribution centers. 36
16 custodians is eminently reasonable given some of the numbers
17 you're hearing kicked around, both on the plaintiffs' side
18 and defendants'.

19 MS. SWIFT: Good afternoon, Special Master
14:48:07 20 Cohen.

21 Kate Swift for Walgreens.

22 May I approach?

23 SPECIAL MASTER COHEN: Sure. You guys don't
24 have to ask that. You can just do it.

14:48:17 25 MS. SWIFT: I just handed you a copy of the

1 chart that I e-mailed you this morning with some checkmarks
2 that I made on it as I was listening to Mr. Mougey.

3 The chart is titled: Status of negotiations of
4 Walgreens' custodians, October 22nd, 2018.

14:48:42 5 We have been doing our best to keep these negotiations
6 going. They have, frankly, advanced beyond where what Mr.
7 Mougey just represented to you.

8 My understanding as of last night, when we were
9 together in Chicago for a deposition, is that the plaintiffs
14:49:04 10 have taken Mr. Pinon off the table. He's an in-house
11 lawyer.

12 We have also, as you can see from my chart, offered --
13 we've offered a couple of the people that Mr. Mougey said
14 are still in dispute. These are, you know, real live
14:49:24 15 negotiations.

16 I want to take a step back, though, before going
17 through the individuals that are still in dispute.

18 SPECIAL MASTER COHEN: Here's what I want to
19 do.

14:49:35 20 Let's take a break. Ten minutes. I want you and
21 Peter to talk and figure this out. I think you can probably
22 boil it down.

23 I mean, Pinon is already off the list from the eight
24 that you just mentioned. It sounds like this is very much
14:49:55 25 an active discussion. I do think that you should probably

1 agree to some more, but I will leave it at that.

2 Okay?

3 MS. SWIFT: Happy to do it.

4 SPECIAL MASTER COHEN: So let's take a
14:50:03 5 ten-minute break. It's literally 2:50. We'll be back at
6 3:00.

7 Thank you, all.

8 - - -

9 (Recess taken at 2:50 p.m.)

15:01:34 10 - - -

11 (Court resumed at 3:01 p.m.)

12 - - -

13 SPECIAL MASTER COHEN: Welcome back,
14 everybody.

15:02:01 15 Did you want to begin talking about Summit?

16 MR. BOEHM: Yeah. Sure. I can jump in to do
17 that while we're waiting for the others to return.

18 This is, again, Paul Boehm from Williams & Connolly.

19 I think on this issue I'm speaking on behalf of the
15:02:16 20 defendants collectively; although, others can jump in and
21 clarify or correct anything I say that doesn't match their
22 understanding.

23 I'm speaking on the question of a handful of witnesses
24 for Summit County where we've reached an impasse. The
15:02:32 25 letter that we submitted to you, Special Master Cohen and

1 Special Master Yanni, I hope that you have it too.

2 And welcome. I don't think we've officially welcomed
3 you today. Thank you for being here today.

4 It is an October 20th letter from Sara Roitman.

15:02:47 5 SPECIAL MASTER COHEN: Sara?

6 MR. BOEHM: Sara Roitman from Dechert.

7 SPECIAL MASTER COHEN: Right.

8 MR. BOEHM: That's the letter that identifies
9 the six custodians in four different subject matter
10 categories where we've reached an impasse.

11 Two of the witnesses are in substance abuse services.
12 That's Donna Barrett and Yvette Edwards. There's one
13 witness who is in child services. One witness in the budget
14 and finance category. And then two witnesses who are staff
15 to the Summit County County Council.

16 So I'll start with the substance abuse services
17 witnesses, Donna Barrett and Yvette Edwards. Ms. Barrett is
18 the director of substance abuse for the Department of Public
19 Health for that county. She's the one who manages that
20 program, which are housed in the Community Health
21 Department. And none of the other public health custodians
22 hold that particular position, so that's why we've asked for
23 the production of Ms. Barrett's custodial file.

24 Ms. Edwards, as I understand it, works with Ms.
15:03:54 25 Barrett very closely. She's more hands on the ground,

1 supervising substance abuse services provided to the
2 residents of Summit County through the Summit County Public
3 Health Department.

4 SPECIAL MASTER COHEN: What is it that you
15:04:08 5 expect their files would reveal that you want to see?

6 MR. BOEHM: We expect their files to reveal
7 several different things. One, given that they are
8 responsible for substance abuse services in the county, we
9 ought to see in their files when and how the county was
15:04:24 10 actually addressing opioid abuse and use, in what forms were
11 they doing it, what requests for expenditures were made to
12 the county budget officials, how were -- how were those
13 monies actually spent. This is a category of damages that
14 Summit County is claiming.

15:04:46 15 SPECIAL MASTER COHEN: Why do you think you
16 need Edwards and Barrett? I think -- I agree with you that
17 Barrett's files would likely reveal that information. Why
18 Edwards also?

19 MR. BOEHM: In part, it's because they cover
15:04:57 20 different periods of time. So that's an aspect of it. If
21 we had to choose, Special Master Cohen, I think we'd choose
22 Ms. Barrett, who seems to be the program director for
23 substance abuse services, but Yvette Edwards does cover a
24 slightly different period of time.

15:05:13 25 SPECIAL MASTER COHEN: So you wrote would

1 likely cover a time period not covered by Barrett. What do
2 you -- what do you mean?

3 MR. BOEHM: I don't have the dates, and Tariq
4 might know the exact date, but my understanding is that Ms.
15:05:27 5 Edwards was in this -- in her role at the county Public
6 Health Department during the period of time when Ms. Barrett
7 wasn't. I believe Ms. Barrett joined a bit later.

8 But, Tariq, do you have more on that?

9 MR. NAEEM: Yes. So there is -- sorry. Tariq
15:05:42 10 Naeem for Janssen.

11 The temporal scope of it is a small issue there.
12 There is a little overlap in the middle. Ms. Edwards, I
13 believe, and I may have them backwards, one started in 2014,
14 one in 2015.

15:06:01 15 But the bigger issue is where they are placed
16 vertically in the organization. Summit County actually only
17 started providing substance abuse treatment and prevention
18 services in 2011 when it merged with Akron's Health
19 Department, so we're not talking about the availability of a
15:06:12 20 long period of time for these records.

21 Really, it's a vertical issue in terms of, you know,
22 you have somebody who's higher placed in the organization
23 who would be having organizational type discussions, budget,
24 et cetera, the things that Mr. Boehm was talking about.

15:06:27 25 Ms. Edwards, though, is placed closer to the -- to the

1 people who are actually providing treatment services,
2 prevention services to members of the community, which is
3 something that Summit Public Health does, and so, she would
4 be having the interface with the -- with the community
15:06:42 5 members.

6 And so, it's an issue of determining is -- is all of
7 Summit County spend related to opioid related substance
8 abuse issues or is it alcohol, is it marijuana, et cetera,
9 et cetera, et cetera?

15:06:55 10 And so, that little bit more fine tuned data is
11 critical to defendants' arguments in these cases, and she's
12 really the only person at that level that we've requested
13 that information from.

14 SPECIAL MASTER COHEN: Is there anybody else
15:07:08 15 from -- I'm not quite sure exactly what this entity is --
16 whose custodial files you're receiving?

17 MR. NAEEM: Yeah, there are.

18 There are I think five, five or six total, but if you
19 look at them, they're all placed in different -- they're in
15:07:25 20 different parts of the organization.

21 So there were five certified by plaintiffs' counsel.
22 One was the head of Summit Public Health, which is the
23 organization. We did take her deposition already. She has
24 very broad knowledge regarding the entire department's
15:07:44 25 operations, but -- but less specific knowledge about

1 substance abuse issues, which is just a small part of what
2 Summit Public Health does.

3 There is an epidemiologist they certified who will
4 have very, very narrow knowledge regarding the tracking of
15:08:02 5 data that Summit Public Health does.

6 There was somebody in the budget office who obviously
7 has very, very narrow knowledge that is not covered by the
8 two witnesses we just were talking about.

9 There was somebody in a Department of Clinical
15:08:18 10 Services or Clinical Health, which, you know, vertically is
11 not one of the parts of Summit Public Health that directly
12 provides substance abuse and treatment services.

13 And the --

14 SPECIAL MASTER COHEN: That was Leanne
15:08:34 15 Beavers?

16 MR. NAEEM: I'm sorry?

17 SPECIAL MASTER COHEN: That was Ms. Beavers?

18 MR. NAEEM: Ms. Beavers, yes, is the Clinical
19 Health director --

15:08:38 20 SPECIAL MASTER COHEN: Okay.

21 MR. NAEEM: -- which provides things like
22 immunizations and things like that, which are --

23 SPECIAL MASTER COHEN: You said you did the
24 depo of the head. Is that somebody above Donna Barrett?

15:08:49 25 MR. NAEEM: Yeah. Donna Skoda. So she is the

1 head of Summit Public Health, has been in that position
2 since only 2015.

3 SPECIAL MASTER COHEN: Let's move on.

4 Thank you for that.

15:09:00 5 MR. BOEHM: Thank you, Tariq.

6 So moving to the next category, I'll just go to the
7 two individuals who are staff to the councils. One, Mark
8 Potter is chief of staff to Summit County's Council.

9 In Summit County, we actually have not requested a
15:09:17 10 large number of custodial files from Summit County council
11 members. And we thought that in light of that, a way to
12 kind of substitute for the fact that we're not going to get
13 those custodial files, getting this individual's custodial
14 file would substitute for the lack of custodial files we
15:09:36 15 were going to get from the actual council members.

16 Again, chief of staff who is going to have some
17 interface across the board with members of the Summit County
18 Council.

19 SPECIAL MASTER COHEN: Go ahead.

15:09:49 20 MR. BOEHM: An equivalent person but only for
21 the City of Akron is Mr. Bob Keith. So same points I made
22 for Mr. Potter I would make again for Mr. Keith, only for
23 the City of Akron.

24 SPECIAL MASTER COHEN: Go ahead.

15:10:01 25 MR. BOEHM: With respect to the two remaining

1 on our list, Mr. Donofrio is the former county treasurer, he
2 retired in 2011, so he covers a period of time that we're
3 not otherwise going to have access to; and Ms. Anna Arvay,
4 who is in the Children Services Division but also,
15:10:24 5 importantly, was on the Alcohol, Drug, and Mental Health
6 Board as the chair of the finance committee for Summit
7 County, and that's why we've asked for her custodial file as
8 well.

9 SPECIAL MASTER COHEN: Okay.

15:10:47 10 MR. ACKERMAN: Good afternoon.

11 David Ackerman again, this time for Summit County and
12 Akron.

13 Special Master Cohen, I think it's important to note
14 two things here. First, I want to note the history and the
15:10:57 15 number of custodians that Summit County and Akron have
16 provided.

17 Summit County and Akron certified 102 custodians on
18 September 14th. Defendants then came back and requested an
19 additional 93 custodians. We agreed, Summit County and
15:11:15 20 Akron, to add 11 custodians from their list of 93.
21 Defendants then narrowed their list to 12. From that list
22 of 12, we added another three. So now we're at 14
23 additional custodians. Now defendants have come back and
24 asked for six.

15:11:34 25 It appears every time we agree to custodians,

1 defendants double the number and come back to us again.
2 This is the type of horse trading that Summit County and
3 Akron believed they were engaging in, but were not receiving
4 reciprocal horse trading from defendants. That's the first
15:11:50 5 point.

6 The second point I'd like to make is the difference
7 in -- is to contrast the arguments that defendants are
8 making with respect to Summit County custodians with the
9 arguments they make in defending against the plaintiffs'
15:12:07 10 request for custodians.

11 And in doing so, I want to remind Your Honor that this
12 is Summit County's one shot. While there may be other
13 bellwether cases, Summit County, Akron, Cleveland, Cuyahoga
14 have to litigate their cases based on this record. And so,
15:12:26 15 if the Court is of the opinion that defendants may provide
16 one person from a department but not another, that rule
17 should apply as well to Summit County.

18 With that in mind, let me -- let me address each of
19 the custodians that Mr. Boehm just went through.

15:12:45 20 With respect to the Public Health custodians, Summit
21 County has designated eight custodians from its Public
22 Health Department, including the head who they took the
23 deposition and whose custodial file was produced in advance
24 of that deposition. We do not believe that another two
15:13:05 25 custodians, especially two who have, frankly, not much

1 temporal overlap, are warranted here.

2 Ms. Barrett began with the Summit Public Health
3 Department in 2015. Ms. Edwards was only with Summit Public
4 Health for two years, from 2014 to 2016. We believe Ms.
15:13:26 5 Barrett's file would be duplicative of the other custodians,
6 and we do not believe the addition of Ms. Edwards would be
7 warranted here.

8 With respect to the two chiefs of staff, this is
9 another issue where we are -- both Summit County and Akron
15:13:44 10 have added members of their county council. We added David
11 Hamilton from the Summit County Council. We added Mike
12 Freeman from the Akron City Council. But now defendants
13 say, well, we also want the chief of staff from that
14 council.

15:13:59 15 SPECIAL MASTER COHEN: Maybe I misheard. I
16 thought that opposing counsel had said that nobody on those
17 councils had been marked for custodial production?

18 MR. BOEHM: No. That's not correct.

19 The councils are quite large. We've made a small
15:14:14 20 number of requests for targeted individuals on those
21 councils who have specific responsibility where plaintiffs
22 are alleging damages that are relevant to those
23 responsibilities.

24 SPECIAL MASTER COHEN: Okay.

15:14:25 25 MR. BOEHM: So the point I was making was that

1 there are many council members whose custodial files we're
2 not getting and this would be a substitute for that because
3 these would be individuals who would be interfacing across
4 the board.

15:14:37 5 SPECIAL MASTER COHEN: Okay. Go ahead.

6 MR. ACKERMAN: So, again, we would view the
7 county councils as equivalent, frankly, to a board of
8 directors of a defendant. And if defendants are not willing
9 to give us members of their board of directors, we have
10 already, on behalf of Summit and Akron, given our county
11 council members. We don't believe that it is necessary or
12 appropriate to also add the chiefs of staff.

13 With respect to Ms. Arvay -- I apologize -- Ms. Arvay
14 is at Summit County Children Services. They have eight
15 custodians from Summit County Children Services.

16 There is a point at which in order to prosecute this
17 case we need to draw lines. We have provided -- these
18 aren't to fill gaps. We have provided custodians from each
19 of these areas. They just want more. And there is a point
20 at which Summit County and Akron, having designated 102
21 custodians additionally, now up to about 115, having
22 produced three million pages, none of which are prior
23 productions, but all of which were collected and reviewed
24 for purposes of this litigation, there is a point where the
15:15:54 25 collection of custodians has to reach a reasonable end, and

1 we believe that in agreeing to add 14 custodians from the
2 original list of 93, we've reached that point.

3 Mr. Donofrio is a former treasurer. To the extent
4 that he has information about the budgets, the budgets are
15:16:14 5 public. We're not clear why his custodial file would be
6 necessary to discuss information that what -- what the
7 county spends and how it is spent are public budget
8 documents.

9 SPECIAL MASTER COHEN: Thank you.

10 So, you know, this is a little bit of be careful what
11 you ask for. I almost feel like I should say you can have
12 all these folks if you increase the number of custodians
13 that you're producing by ten percent.

14 MR. BOEHM: Your Honor, I do think there's a
15:16:43 15 little bit of a false equivalency narrative that's going on
16 here, and I want to respond to that in a broad sense and
17 then return back to the specific request, because I do think
18 what's important here is we look at the specific requests.

19 Who are these individuals? What are they doing? Are
15:16:57 20 we already getting documents that are from other custodians
21 that would be redundant? If the answer to those questions
22 is yes, we already are getting those documents, then, fine.

23 And, indeed, I think that with respect there was a
24 little bit -- I'd like to just clarify the process here.
15:17:13 25 It's not right that we waited for them to agree to some and

1 then piled on. I mean, we have a large list, admittedly,
2 and, in part, when we told them about the list, we said
3 right up front we actually don't know all the details about
4 everybody on this list. We think we kind of know where
15:17:29 5 people fit, but we're going to need your help, we're going
6 to need to meet and confer, and you got to tell us if we're
7 wrong.

8 And in some cases, we were wrong. We thought they had
9 a responsibility, we thought they were not redundant, and
15:17:41 10 they told us that we were incorrect and --

11 SPECIAL MASTER COHEN: Here's the problem.

12 My sense is you all have said that to each other.
13 Certainly, the plaintiffs have said the exact same thing to
14 you with respect -- you, the defendants, broadly, and when
15:17:54 15 I'm making these calls, I'm looking at the extent to which
16 they're getting the same kinds of custodians already.

17 And they have far fewer custodians that they're
18 receiving information from in organizations that are much
19 larger. Am I wrong?

15:18:16 20 MR. BOEHM: I think in -- it's important,
21 again, to understand the way the counties are set up and how
22 that's different from maybe how a defendant might be set up.

23 We've been told by multiple witnesses -- and, look,
24 Your Honor, or Special Master Cohen, my view is here we're
15:18:29 25 going to win some, we're going to lose some. That's how

1 it's always been. We've done that with respect to some of
2 the other parties that have been up here. I don't know that
3 when we're talking about plaintiffs it should be different.

4 SPECIAL MASTER COHEN: It isn't different.

15:18:40 5 I'm just trying, as I said from the very beginning, to make
6 it more or less equal for both sides.

7 And when I hear that there are 120 custodians from
8 Summit County already and you're asking for more, as opposed
9 to 50 or 60 from an organization that is much, much, much
15:19:01 10 larger, then I begin to scratch my head and wonder if I am
11 being fair.

12 MR. BOEHM: So a couple points about that.

13 Number one, we are here actually talking about two
14 separate plaintiffs in this litigation. One's Summit
15:19:13 15 County, the other is the City of Akron. And they're
16 represented by the same counsel, so they oftentimes get
17 lumped together. So that's one point, that the cumulative
18 numbers that are being addressed I believe account for two
19 separate plaintiffs in the litigation, not one.

15:19:26 20 Secondly, again, our view is about these particular
21 individuals. When you look at them individual by
22 individual, we're just going to be left without information
23 that we think are important to our defenses in this case,
24 and, frankly, to investigating the claims that are being
15:19:41 25 made.

1 Damages. When did you find out about these issues?
2 How did you find out about them? How did you address them?

3 SPECIAL MASTER COHEN: Well, as to damages, we
4 also have on the agenda the interrogatory number 18 topic.
15:19:53 5 I don't know if that's your topic, but what about that?
6 What about getting the information on damages in particular
7 you want through my ordering that the interrogatories get
8 answered instead of this mechanism?

9 MR. BOEHM: I would be happy to withdraw
15:20:13 10 defendants' request for Mr. Donofrio, who is the former
11 county treasurer, if the Special Master intends to rule in
12 defendants' favor on interrogatory number 18 certainly.
13 That would certainly help.

14 I mean, we're obviously not getting all the custodial
15:20:29 15 file documents, but we understand there's a give and take
16 here and that we're not going to win every last issue.

17 SPECIAL MASTER COHEN: Okay. Anything else?

18 MR. BOEHM: I think Ms. Wu has stood up
19 because she is actually responsible for interrogatory 18.

15:20:47 20 SPECIAL MASTER COHEN: Yeah. I don't want to
21 get to that yet. Thank you. I know they are interrelated.

22 MR. ACKERMAN: The only point that I would
23 make is that the argument that they are not getting
24 information they need is the very same argument that Mr.
15:20:58 25 Crawford made with respect to Teva, that Ms. Scullion made

1 with respect to Endo, that Mr. Mougey is making with
2 respect -- I forget whether it was Walmart or Walgreens and
3 I apologize.

4 But this is -- if we're doing complete files, then
15:21:13 5 we -- then it's got to be complete on both sides; otherwise,
6 Summit County is fighting with one hand tied behind its
7 back.

8 (Pause in Proceedings)

9 SPECIAL MASTER COHEN: Let's jump to
15:22:30 10 interrogatory 18 because I do want to talk about that. I do
11 think that it is going to affect how I decide this other
12 topic.

13 That is agenda item number 9.

14 MR. PIFKO: Special Master Cohen, I e-mailed
15:22:46 15 you I believe yesterday, we're not prepared to talk about
16 it. We haven't responded to that, their letter yet, and we
17 are going to produce additional information, and we believe
18 if they're dissatisfied with the information we produce in
19 our amended response, then we can -- we can tee it up then.
15:23:03 20 But it's not ripe at this point.

21 MS. WU: Special Master Cohen, this is Laura
22 Wu from McKesson and the distributors.

23 I'd ask you to take up this issue today. We served
24 the interrogatory back in June. It's been sitting for
15:23:15 25 months while we've conferred with the plaintiffs repeatedly.

1 We submitted our letter to you on October 15th. We
2 requested that the plaintiffs submit a response so you'd be
3 able to take this issue up today, and as I e-mailed with you
4 last night, we request that you do that now.

15:23:31 5 We are entitled to damages calculations during fact
6 discovery so that we can follow up on the factual bases for
7 the damages assertions of the plaintiffs. Only fact
8 witnesses in this case will have the foundation in order to
9 allow us to test those damages calculations, and, therefore,
15:23:53 10 we need this information now. We can't wait any longer.

11 SPECIAL MASTER COHEN: I'm going to ask you to
12 just take a swing at that. I understand that you are going
13 to amend your responses.

14 MR. PIFKO: David just talked about it, one
15:24:09 15 hand tied behind his back, I definitely feel that way
16 because we really haven't looked at this yet.

17 We do say that as far as the facts, if that's what
18 they're interested in, we're giving the facts. I mean,
19 we're producing the data. We're producing the -- the
15:24:23 20 financial reports. You know, anything -- any facts upon
21 which our damages calculations are based, we're giving it to
22 them.

23 So, you know, they're asking us for more than that.
24 They're asking for the conclusions and what ultimately, you
15:24:36 25 know, we contend would be expert opinions and analysis, that

1 it's premature at this stage in the case.

2 SPECIAL MASTER COHEN: Hunter, did you want to
3 amend that?

4 MS. WU: Special Master Cohen, can I just
15:24:49 5 respond to Mr. Pifko's comment?

6 SPECIAL MASTER COHEN: No. I want to hear
7 from Hunter, and then please respond to them both.

8 Thank you.

9 MR. SHKOLNIK: Hunter Shkolnik on behalf of
15:25:00 10 Cuyahoga County.

11 I would agree with Mr. Pifko that we are still going
12 to provide a formal response, but to suggest that we have
13 not provided the factual basis for which the defendants can
14 start challenging the damages claims is -- is really, really
15:25:18 15 unfair.

16 We can start with the suggestion that we've given them
17 extensive documentation from budget and management
18 specifically on the issues as to what costs are associated
19 with this opioid epidemic.

15:25:31 20 We've also given them medical -- I'm sorry -- costs as
21 well as countywide budgets broken down by year calculations.
22 We've given them the workbooks. They've literally drilled
23 down to every single line item that could possibly be
24 related to the factual basis for the claimed losses for the
15:25:51 25 opioid epidemic. They've already started taking depositions

1 of those individuals.

2 I'll continue. We also have the county council
3 resolutions regarding the specific items and how the county
4 has adopted resolutions or rejected resolutions, as well as
15:26:07 5 the annualized MetroHealth reports, audited financials with
6 respect to each one of those items.

7 We can continue. They've also gone into the county
8 medical examiners, as well as all of the cost bases, as well
9 as all of the costs associated with that office with respect
15:26:25 10 to the deaths and the overdoses as a result of this
11 epidemic.

12 To suggest we have not given them the factual basis
13 for the damages loss in this case is really just
14 unreasonable. Can we give the ultimate conclusion? What is
15:26:39 15 the total numbers that our experts are going to say? We
16 cannot do that right now.

17 We are working with our experts. We will supplement
18 with the -- with the final numbers. But we have given them
19 the factual basis over and over and over again. And that's
15:26:55 20 only just to touch on some of the damages -- sorry -- the
21 dollar amounts associated with the epidemic.

22 MS. WU: Special Master Cohen, interrogatory
23 number 18, distributors' interrogatory number 18 exactly
24 tracks the requirements for initial disclosures in a federal
15:27:14 25 case under Rule 26(a).

1 SPECIAL MASTER COHEN: Yeah. I read your
2 letter.

3 MS. WU: And that requires a computation of
4 damages. To date, no plaintiff has provided any computation
15:27:23 5 of damages in response to interrogatory number 18.

6 I appreciate the list of materials that Mr. Shkolnik
7 identified for us today, and it's true, there's been a lot
8 of paper exchanged in this case. But, to date, no one has
9 been able to identify any line item in the budgets Mr.
15:27:42 10 Shkolnik referenced that relates to opioids directly.

11 In addition, I'd like to just provide an antidote from
12 a recent deposition. The Akron chief EMS officer was
13 deposed, Mr. Natko, last week. During his deposition,
14 defendants inquired about the expenses related to Narcan,
15:28:03 15 which is one of the damages categories that Akron has
16 identified in this litigation. Mr. Natko testified that, in
17 fact, Akron does not pay anything out-of-pocket, does not
18 make any expenditure in order to purchase Narcan, which
19 leaves the defendants puzzling, what is the damages
15:28:22 20 computation for Akron's alleged damages associated with the
21 purchase of Narcan?

22 This is the exact reason that defendants need this
23 discovery now so that we have the opportunity in fact
24 discovery to explore the damages calculations that
15:28:38 25 plaintiffs intend to put forward.

1 And on that point, the law is clear in the Sixth
2 Circuit and across the country that there -- that the expert
3 discovery is no replacement for fact discovery overall and
4 specifically with regard to damages.

15:28:51 5 Plaintiffs come forward saying that it's too
6 burdensome and impossible for them to provide damages
7 calculations now. This interrogatory simply asks plaintiffs
8 to do what every plaintiff in a federal case is obligated to
9 do under Rule 26 at the outset of a litigation and that's to
15:29:12 10 provide damages calculations.

11 SPECIAL MASTER COHEN: All right. Let me go
12 back to where we started.

13 I'm going to order that Ms. Barrett's custodial file
14 be produced. I'm not going to order anybody else's
15:29:27 15 custodial file be produced. That's without prejudice to
16 coming back to me later.

17 In the meantime, I want to see what the plaintiffs do
18 with -- with regard to interrogatory 18. I think that
19 defendants have a very good argument on that point.
15:29:44 20 You've -- you've said that you're going to amend your
21 responses. I think that that's appropriate that you amend
22 your responses, and I think that the Federal Rules of Civil
23 Procedure do require you to give much more than you have.

24 It's my hope that after that, I won't need -- I won't
15:30:02 25 hear from defendants that they need some of these custodians

1 who at this time I am not ordering production.

2 Okay?

3 MS. WU: Special Master, could we ask that we
4 receive those amended responses within a week? We have very
15:30:16 5 important depositions on the calendar upcoming and will need
6 those written amended responses to evaluate the state of the
7 damages case.

8 MR. SHKOLNIK: Would it be possible to have
9 two weeks on that, Special Master Cohen?

10 SPECIAL MASTER COHEN: What kind of depositions do
11 you have?

12 MS. WU: I --

13 SPECIAL MASTER COHEN: And when are they?

14 MR. SHKOLNIK: I don't think as to Cuyahoga
15:30:47 15 there's anyone that's really going to be jeopardized, but I
16 could be wrong on that.

17 MR. BOEHM: I don't -- I'm stepping up, but
18 not because I know the schedule by heart. I do know that
19 there's at least one finance director, I believe it's for
15:31:05 20 Summit County, who's going to be deposed on November 6th.
21 So that's the earliest I can think of just off the top of my
22 head.

23 SPECIAL MASTER COHEN: Can you do it by
24 November 5th?

15:31:18 25 MR. SHKOLNIK: Yes, Special Master.

1 SPECIAL MASTER COHEN: All right.

2 MR. ACKERMAN: Yeah.

3 SPECIAL MASTER COHEN: Thank you, all.

4 MS. WU: Thank you.

15:31:29 5 SPECIAL MASTER COHEN: All right. I think we
6 are all the way back now to where Peter Weinberger stood up.

7 MR. BOEHM: Not yet, Special Master Cohen.

8 Actually, there's agenda item number 4 which we would
9 be skipping over if we -- we went to where Peter was going,
10 I believe.

11 SPECIAL MASTER COHEN: I thought we touched on
12 this?

13 MR. BOEHM: Not quite. Not today.

14 SPECIAL MASTER COHEN: Go ahead.

15:31:50 15 MR. BOEHM: I think last week we had hoped
16 that we would be able to work this out completely and
17 wouldn't have it on the agenda at all. The good news is we
18 have worked this out 99 percent of the way.

19 So we had the 14 --

15:32:02 20 SPECIAL MASTER COHEN: Better than we have
21 done anything else.

22 MR. BOEHM: I agree, it is.

23 We had a list of people for whom we wanted earlier
24 depositions, and I know you're familiar with that, that
15:32:13 25 issue.

1 We've narrowed it down really to three, and I spoke
2 with counsel for Cleveland today and they told me they're
3 going to be getting us earlier dates for two of those three.
4 So that gets us down to one. And this is somebody who
15:32:27 5 Cuyahoga County has said we shouldn't get a deposition of at
6 all, and you're going to hear his name, you've already heard
7 his name today, so I'm going to come back to it. It's Mr.
8 Kennedy, the chief budget person for Cuyahoga County.

9 And I just want to -- so we've already addressed that
15:32:42 10 in the context of his custodial file production. The
11 question that this raises is whether or not we can take his
12 deposition, and, if so, can we take his deposition earlier?
13 This is somebody who we asked for an expedited deposition of
14 because we believe his deposition and his testimony will be
15:32:56 15 informative of the question of whether or not the council
16 members, the mayors, the chief executives for the counties
17 ought to be deposed at all.

18 And the reason we think that is because he has been
19 identified by Chris Murray, the treasurer for Cuyahoga
15:33:12 20 County, as being the one who can answer questions that he
21 couldn't ask, having to do with the claimed damages that
22 come in the form of the increased public expenditures in a
23 variety of categories: Law enforcement, public health,
24 child and family services, and so on.

15:33:26 25 And I know there's been this talk about how, well,

1 he's the budget guy for Cuyahoga County and we got to get
2 the budget guy for somebody else, but I just want to be
3 clear that we're looking at him particularly based on the
4 specific allegations at issue in this case. We ought not be
15:33:42 5 so simplistic that we say this guy has this title, so on the
6 other side we should find somebody with the same title.

7 The question is: Do they have information that is
8 material to the claims and defenses in this case? And in
9 the instance of Mr. Kennedy, I don't think there can be any
15:33:58 10 question about that. He is somebody who has express
11 authority in terms of the requests for expenditures and the
12 actual expenditures by Cuyahoga County when it comes to the
13 claims where they're alleging specific damages in the form
14 of public expenditures.

15:34:16 15 SPECIAL MASTER COHEN: This is just a question
16 of when not whether, right?

17 MR. BOEHM: This is -- well, I think if you
18 ask Mr. Shkolnik, he might say it's a question of whether.
19 But I don't speak for him. I think up until now it has been
15:34:29 20 a question of when.

21 We were surprised to find out that Cuyahoga County's
22 counsel was taking the position that Mr. Kennedy ought not
23 be deposed at all, and I think that's a relatively recent
24 developed position, so I'll let Mr. Shkolnik speak to that.

15:34:43 25 Our position had been under the presumption that we

1 were going to get his deposition at some point, that we
2 ought to get it sooner than later for the reasons that we
3 already explained.

4 MR. SHKOLNIK: Hunter Shkolnik on behalf of
15:34:58 5 Cuyahoga County.

6 After a while, I think we haven't done anything right
7 in this litigation in terms of discovery.

8 I thought the CFO issue was dealt with already,
9 whether it's deposition or custodial file. We're talking
15:35:12 10 about Mr. Kennedy, who is -- who is the CFO of the county.

11 What Mr. Boehm fails to point out is they asked for
12 three. They asked for other expedited depositions, one of
13 whom was supposedly the important witness on financial
14 issues, and that was Maggie Keenan, the actual real person
15:35:34 15 that should be getting deposed, if anything, quickly over
16 anybody else, and that was the director of Office of Budget
17 and Management. We gave that date. They didn't exercise
18 it. They didn't ask us for a new date. We gave it to them
19 on an expedited basis.

15:35:49 20 They have this witness. It's coming up. The issue of
21 whether or not Mr. Kennedy, the CFO, should be deposed or
22 whether his custodial file should be produced is exactly
23 what we were talking about over two hours ago, and I think
24 it should be handled in that context, so that we decide if
15:36:06 25 Cardinal wants to put up their CFO on an expedited basis as

1 well, I'm sure one of my colleagues here will take that
2 deposition, and we'll put them up back to back on the same
3 day.

4 I think we should wait until this whole issue is
15:36:19 5 resolved the way we talked about before.

6 MR. BOEHM: Special Masters Cohen and Yanni, I
7 just need to address again that last point.

8 If our clients were bringing claims against Mr.
9 Shkolnik's clients where we were alleging damages in the
15:36:36 10 form of increased expenditures made by us, I think that,
11 yeah, the person who is responsible for those expenditures
12 and those budgeting will probably need to be deposed.

13 It's a false equivalency to say on one side you've got
14 a party who is bringing claims alleging damages in the form
15:36:52 15 of public expenditures and we don't get to depose the person
16 who is responsible for that, and -- unless on the other side
17 you find somebody with the same title, notwithstanding the
18 actual allegations or defenses at issue in the case.

19 SPECIAL MASTER COHEN: Well, here's the thing.
15:37:05 20 It's a false equivalency, I agree, to the extent that their
21 CFO is equivalent to your CFO. I think that is, to some
22 extent, a false equivalency.

23 I don't think it's a false equivalency to say that the
24 number of custodians that they're producing in the areas
15:37:22 25 that they're producing shouldn't be more or less equal on --

1 on the appropriate topic matters, which may be different
2 across the aisle.

3 It seems to me that if we go back to the reason that
4 we were doing early depositions of folks, it was that we
15:37:42 5 were doing early depositions of folks to see if we got what
6 we needed without deposing the Apex, and I think that he's
7 an Apex, and so, I'm going to say that this is not
8 appropriate at this time.

9 I'm not saying that it can't happen. I'm just saying
15:37:55 10 that I'm not going to order that it happen early.

11 MR. BOEHM: Okay. Thank you.

12 SPECIAL MASTER COHEN: All right. Where are
13 we?

14 MR. MOUGEY: We could bring Walgreens in for a
15:38:09 15 landing.

16 SPECIAL MASTER COHEN: Are you guys smiling at
17 each other or not?

18 MS. SWIFT: Sorry?

19 SPECIAL MASTER COHEN: Are you smiling at each
15:38:20 20 other or not?

21 MS. SWIFT: I was smiling at you, Special
22 Master Cohen.

23 Kate Swift for Walgreens.

24 We made a little bit of headway. Mr. Mougey has
15:38:28 25 agreed to walk away from two of the custodians on the

1 remaining list. He can't tell me right now who those two
2 are, which is fine. I think that means we need to keep
3 talking. I think we very well may be able to reach an
4 agreement.

15:38:42 5 And the only other thing I would say right now is with
6 respect to the types of custodians that the plaintiffs have
7 asked for, we have given them people in every single
8 category. In most cases, more than one. They've asked for
9 distribution center people, we've given them several.
15:38:59 10 They've asked for people in loss prevention and asset
11 protection, which was one of the categories the witness Mr.
12 Mougey referred to testified about. We've given them SAIL
13 coordinators because they've asked for those.

14 SPECIAL MASTER COHEN: Right. You guys have
15:39:14 15 until noon. Get as far as you can, send me an e-mail tell,
16 me what's left, I'll rule.

17 MS. SWIFT: Thank you very much.

18 MR. MOUGEY: May I respond very quickly?

19 SPECIAL MASTER COHEN: No. I got it, I
15:39:25 20 promise.

21 MR. WEINBERGER: I --

22 SPECIAL MASTER COHEN: I went to the dentist
23 this morning and had nitric oxide, so I'm very mellow, guys.
24 I promise I'm not being a hard ass.

15:39:44 25 MR. MOUGEY: I thought you were going to say

1 it was better than this.

2 SPECIAL MASTER COHEN: It actually was in some
3 ways.

4 MR. WEINBERGER: So this topic is fairly
15:39:52 5 simple, but it is so important. So a lot --

6 SPECIAL MASTER COHEN: I'm sorry. What agenda
7 item are we on?

8 MR. WEINBERGER: So production of documents --

9 SPECIAL MASTER COHEN: Go ahead.

15:40:02 10 MR. WEINBERGER: -- item five.

11 SPECIAL MASTER COHEN: Yes.

12 MR. WEINBERGER: Peter Weinberger. Sorry.

13 And it has to do with our charts and it has to do with
14 CMO-7 and it has to do with part -- partly with what we've
15:40:19 15 been talking about today in terms of kicking some of these
16 issues down the road.

17 SPECIAL MASTER COHEN: You said CMO-7. You
18 mean discovery ruling 7?

19 MR. WEINBERGER: No. I'm talking about CMO-7,
15:40:31 20 the deadlines under CMO-7.

21 SPECIAL MASTER COHEN: Okay.

22 MR. WEINBERGER: And we all need to be
23 reminded, plaintiffs and defendants, that we have a deadline
24 two days from now for substantial completion of documents,
15:40:44 25 except with respect to the retail -- retailers and those

1 that were added late to the litigation, and the deadline for
2 that is November 9th.

3 So we devised on our side a number of ways to get
4 reports from the defendants as to where they were with
15:41:06 5 respect to completion of the production of documents over
6 the last six weeks. We've been somewhat successful in
7 getting information, and less successful with respect to
8 some of the defendants.

9 But I think we need to be reminded of the fact, going
15:41:21 10 back to, let's just take the distributors' case and our
11 discovery against the distributors, we, starting on
12 August 17th, in Mr. Farrell's letter, asked for
13 transactional data. We wanted prioritization of tractional
14 data back to 1996, suspicious order reports from the CT-1
15:41:45 15 bellwethers from 1996 to the present, and the controlled
16 substance monitoring program or the suspicious order
17 monitoring system from 2006 to the present, and we devised a
18 chart to try to get information as to where we were on those
19 productions.

15:42:02 20 So now we're two days from what is supposed to be
21 substantial completion and we really don't know where we are
22 in terms of these priority items, let alone complete
23 production, which is what, you know -- I mean, I helped
24 negotiate this and you approved it. CMO-7 was to
15:42:25 25 substantially complete production of documents by

1 October 25th or November 9th.

2 So I'm looking at this from a -- from 30,000-foot
3 perspective. Peter Mougey can maybe add some of the
4 granular statistics.

15:42:43 5 Here's our proposal. October 25th is in two days.
6 With respect to all the defendants, except the retailers and
7 those -- those recently added, we suggest that both sides,
8 this applies to the bellwethers as well as the defendants,
9 report to the Court by Monday, October 29th, what percentage
15:43:09 10 of documents have been produced with a description.

11 And assuming we're going to have a discovery
12 conference with the -- with Special Master Yanni on the next
13 day, if we're going to do on Tuesdays instead of Monday, we
14 can then discuss it at that time as to where we are.

15:43:27 15 Because the whole purpose of CMO-7, and we're
16 starting, you know, depositions in earnest as of
17 November 1st under CMO-7, and then we have less than three
18 months to complete --

19 SPECIAL MASTER COHEN: What do you mean a
15:43:42 20 description?

21 MR. WEINBERGER: Pardon me?

22 SPECIAL MASTER COHEN: You said with a
23 description. What do you mean?

24 MR. WEINBERGER: What -- what still needs to
15:43:48 25 be produced and what are the categories of documents.

1 So let's just take, with respect to the distributors
2 and the priority items, you know, where are we on suspicious
3 orders going back -- reports going back to 1996? Where are
4 we on the transactional data? I mean, that's just an
5 example. But we need specifics, Special Master Cohen.

6 SPECIAL MASTER COHEN: How would you, the
7 plaintiffs, answer the question: What percentage of the
8 documents that are going to be produced have been produced?
9 How would you do that? How do you know how many are going
10 to be produced?

11 MR. WEINBERGER: I'm assuming that knowing
12 that we wanted to prioritize these documents, using these as
13 examples, that they have pulled them and that they are
14 reviewing them and that they have, you know, estimates of
15 numbers and they know what they produced and what they
16 haven't.

17 I don't think that's -- that's not rocket science. I
18 mean, that's -- and, you know, we have to be able to review
19 the documents to prepare for the deposition.

20 Now, you ordered us within a limited amount of time to
21 produce our data on the suspicious orders based upon the
22 ARCOS data and you gave us a limited amount of time to do
23 that. They've had months and months to do this. All we're
24 asking is that all the defendants, with respect to the
25 categories that we've prioritized as well as those that

1 we've requested in our requests for production of documents,
2 report to us what it -- what has been completed and what
3 hasn't.

4 I mean, we -- we both negotiated, both sides
15:45:35 5 negotiated this in good faith, that we would have this done
6 by October 25th so that we can take targeted, effective, and
7 efficient depositions. We're -- you know, we're going to be
8 starting those depositions -- we've been taking depositions,
9 but the depositions in earnest in large numbers are supposed
15:45:58 10 to start immediately.

11 So that's our proposal.

12 SPECIAL MASTER COHEN: Let me -- what is the
13 provision in the CMO? And which CMO?

14 MR. WEINBERGER: So CMO-7 says by October 25th
15:46:23 15 for all parties, except retail pharmacy defendants,
16 production of documents shall be substantially complete.

17 And the date is November 9th with respect to the
18 retail pharmacy defendants and those other defendants that
19 were subsequent or late joined to the litigation.

15:47:02 20 (Pause in Proceedings)

21 SPECIAL MASTER COHEN: I'm just thinking about
22 your proposal and wondering about what you would propose
23 with regard to full completion?

24 MR. WEINBERGER: Well, again, going back to
15:47:38 25 the negotiations that led to this order, I mean, I think it

1 was contemplated that there would be complete production by
2 these dates, realize -- and that substantial meant more than
3 90 percent production.

4 Mr. Cheffo's on the line. He can -- he can confirm
15:47:57 5 that. It certainly didn't mean 50 or 60 percent.

6 MR. CHEFFO: Yeah. This is Mark.

7 So I don't know if anyone else -- you seem like you
8 were directing it more to the distributors, but I don't know
9 if that was by way of an example, and I can't see,
15:48:16 10 obviously, into the courtroom.

11 But here's what I would say. One, the context of
12 reporting and status, you know, doesn't seem whacky to me
13 and basically applies to each side.

14 I think you'd find, I may be wrong, but I think you'd
15:48:32 15 fine that the --

16 SPECIAL MASTER COHEN: Mark, you've got to
17 slow down. It's really hard to hear you. So if you can
18 just talk a little bit more slowly.

19 MR. CHEFFO: Okay. I'll try to be very brief
15:48:53 20 and very slow.

21 What I said was that I don't materially disagree with
22 the concept of a reporting where the parties basically would
23 say, you know, here's what we generally have to do, here's
24 what we're working on, and here's -- I think that the idea
15:49:12 25 of percentages when you don't know the numerator and

1 denominator I think is kind of a little bit of a challenge,
2 it would just be busywork.

3 So if the idea is, you know, for the parties to by the
4 deadline they set try to give a report and say here's what
15:49:31 5 we've done, here's what we're working on, as long as that's
6 done for everyone, including the plaintiffs, then I think,
7 you know, obviously, from our perspective, that's consistent
8 with the spirit of what we -- we entered into.

9 I don't think any of us, though, really want to add
15:49:46 10 lots of, you know, calculations and work, because I do
11 disagree with one thing. If you know you have to search
12 John Smith's custodial file and you haven't done that yet,
13 you haven't collected it, you don't really know what's in it
14 and how percentages and things like that -- let me stop
15:50:07 15 there.

16 MR. WEINBERGER: So, absolutely, this applies
17 to the bellwethers as well as to the defendants, and -- and
18 I didn't hear Mark answer the question, but I really do
19 believe that it was our intent, and I know that we have
15:50:26 20 negotiations as to custodial files that are new custodians,
21 you know, over the last couple weeks, but the fact of the
22 matter is it was the -- the whole reason for the schedule
23 was that we would have, you know, 90 percent of the
24 documents in our possession from the defendants by
15:50:48 25 October 25th, realizing -- and that it wasn't going to be

1 back, you know, back loaded.

2 And, you know, you may recall, Special Master Cohen,
3 that we had those discussions about that kind of language
4 and we agreed that we weren't going to back load, and we --
15:51:07 5 both sides understood that we needed to have documents
6 reviewed and we wanted to target depositions.

7 And part of the reason for all the charts that we were
8 doing was to try to get specific as to where we were on the
9 production of these documents. Well, that hasn't happened.
15:51:25 10 I'm not faulting anybody, any defendant in particular, but
11 we're up against the deadline and we have three months to
12 complete our discovery depositions.

13 And so, we need some finality or some certification
14 ultimately that the production has been completed, and to
15:51:45 15 the extent that there are not -- there are documents that
16 are not produced, they can't ultimately be used, you know,
17 in the trial of this case.

18 SPECIAL MASTER COHEN: Well, let's talk about
19 that for a second.

15:51:56 20 So in some instances that is the cure, that is, to say
21 if they don't produce a document, then they can't use it.
22 If it helps them, then it's a cure.

23 But it sounds like what part of your complaint is or
24 that your worry is or even suspicion is is that you haven't
15:52:17 25 received documents timely, that you're going to get a report

1 that says we've only produced 50 percent, or something like
2 that, of what we think we'll eventually produce, or there
3 are whole areas that we haven't really done much on yet, and
4 those are documents that -- that could be helpful to you.

15:52:35 5 So how does that -- I mean, I'd like to think that
6 maybe there are rules to put in place that act as a carrot
7 and a stick. I'm just not sure that's right all the time.

8 MR. WEINBERGER: I agree wholeheartedly with
9 the concept, and the only thing I can tell you, we'll
15:52:55 10 respond at the time that we find out what the documents are,
11 how far -- how far along they are in producing the documents
12 and what documents they haven't produced, and then we can
13 decide at that time, you know, what our remedy is.

14 But, you know, it doesn't -- this doesn't take away
15:53:12 15 from the fact that part of the reason why we -- both sides
16 agreed to postpone the trial date and to build in this
17 schedule was that we would complete the -- the document
18 production by this date. And, you know, not 50 percent, not
19 40 percent, but substantially, meaning 80 or 90 percent.

15:53:38 20 And I -- I just can't fathom that these sophisticated
21 defendants can't provide us with an estimate within the next
22 couple days of where they are in the production,
23 particularly of the -- well, of everything we've asked for,
24 but particularly those that we've prioritized as set forth
15:54:01 25 in the letter of August 17th.

1 MR. CHEFFO: This is Mark. I apologize. I'm
2 in a bad spot and keep dropping, so I'm just going to say
3 this briefly.

4 SPECIAL MASTER COHEN: Mark --

15:54:14 5 MR. CHEFFO: I don't know there's -- I don't
6 know if Pete knows there's an issue. He's basically saying
7 that he hasn't gotten some visibility into what's there or
8 not, and we're talking about 40, 50 and 80, and I don't know
9 from each defendant what the percentage will be.

15:54:31 10 But where I think and I agree, and where I think the
11 spirit was, is that the sides would use this not as a -- the
12 25th not as a kind of -- that everybody would be working
13 very hard on both sides to get things done. I think it's
14 fair to take stock and say what needs to be done.

15:54:52 15 I think it's also -- you know, on all sides, frankly,
16 there's a lot that we talked about just today where you
17 ordered parties to produce, there's things you ordered three
18 days ago for the defendants to produce, things for the
19 plaintiffs, so this idea of trying to -- you know, it's
15:55:07 20 currently a moving target except there's new information.

21 But where I think we agree is that we do go ahead with
22 depositions, we want information from them, they want
23 information from us, and the parties, basically on both
24 sides, indicate what remains to be done and -- and continue
15:55:25 25 to talk about it, and then, if there's priority issues, we

1 can identify those.

2 And like Pete said, if anybody feels --

3 SPECIAL MASTER COHEN: Hold on a minute,
4 please.

15:55:45 5 MS. STRONG: This is Sabrina Strong
6 representing Janssen.

7 And, first, I want to point out something here. This
8 is the first that I have ever heard of this request. And
9 I've talked to some colleagues over here, and this is the
10 first that any of the folks I've just whispered to in the
11 room has heard of this request.

12 And from my perspective, this has happened multiple
13 times, and I think it's a waste of your time and it's a
14 waste of all of our time. If plaintiffs have a proposal,
15 you heard Mark Cheffo speaking, and I think consistently
16 with the -- with the principal of the defendants, we agree
17 that maybe something can be done here.

18 But, please, we think it's appropriate to approach us
19 outside of your presence so we can talk it through and
20 discuss the issue. Because if we want to get into issues --
21 something that came up in the context of the discovery
22 disputes that we have yet to talk about here today is that
23 we learned that Cleveland, for example, has and is still
24 collecting and reviewing three to four terabytes of data
15:56:44 25 from at least the following network drives: Finance,

1 police, municipal court, fire department, none of which has
2 been produced yet. And, yes, we are two days away from the
3 deadline.

4 So we too believe that there are significant problems
15:56:57 5 with plaintiffs' production and being substantially complete
6 by the 25th. In fact, we asked -- we talked about this in a
7 meet and confer discussion last week in connection with
8 Cleveland and we asked the question: Please let us know
9 when it is that you believe that you will be substantially
15:57:14 10 complete given that the deadline is coming up. We're meet
11 and conferring. That's ongoing. That wasn't teed up to be
12 brought to your attention today.

13 But I say that to take a pause and I think the parties
14 should discuss this outside your presence and bring to you
15:57:27 15 disputes that are properly ripe. There are many other
16 examples of this that we could go into, but it's -- it's
17 frustrating and it's not productive.

18 MR. WEINBERGER: Well, with all due respect,
19 this has been an ongoing conversation. It has been your
15:57:42 20 directive almost every time we have had a discovery
21 conference, you've either in the middle or at the end,
22 you've talked about the fact that we have deadlines that
23 have to be met and you were expecting substantial completion
24 of the document production, multiple times during discovery
15:58:01 25 conferences.

1 So to suggest that we're bringing this up, you know,
2 for the first time and that we need to meet and confer, we
3 have a CMO-7.

4 SPECIAL MASTER COHEN: All right. Here's --

15:58:10 5 MR. WEINBERGER: That's -- that's an order to
6 both sides.

7 SPECIAL MASTER COHEN: Here's what I'm going
8 to suggest. This is what I want you to do. I don't know by
9 when I want you to do it, because I'm not sure exactly what
15:58:31 10 I'm asking, I'm not sure I know how long it would take to do
11 this, and I don't want to set a deadline for anybody that
12 can't be done or that's oppressive.

13 But I think it makes sense, given where we are in the
14 discovery process, for everybody to write down for everybody
15:58:51 15 else how much more they think they have to do. What's left?
16 It doesn't have to be in a percentage. It doesn't have to
17 be this is how many documents we think we're going to end up
18 producing when we're all finished and this is how far along
19 we are.

15:59:06 20 But everybody should write down this is what we still
21 have to do to meet the obligations in discovery to the other
22 side, so that if Cleveland believes that it still has four
23 terabytes worth of data to go through, write it down. This
24 is what we still have to do before we're finished.

15:59:23 25 And probably, I guess I'm just making this up as I go,

1 it should also include a -- an estimate of when that will be
2 done, when it will be finished.

3 Now, it seems to me that that can probably be
4 something that everybody can produce in five days or less.
15:59:42 5 And now I'm kind of looking around the room and asking for
6 folks to tell me what makes sense and whether that's a good
7 idea or if there's a way to improve it.

8 MR. RICE: Joe Rice for the plaintiff.

9 The problem is it's got to be targeted. We've sent
16:00:00 10 letters three or four times over the last two or three
11 months to the defendants giving priority to category of
12 documents that we needed and what we get is everything but
13 those categories. So we need to know what marketing
14 materials they have left to produce. Let's find out what
16:00:16 15 the targeted items are.

16 So your idea is fine as a beginning point, but this
17 can't be we think we've got, you know, 6,000 documents left.
18 It needs to be targeted so we know what we're looking at so
19 we can then address the problem specifically. Just giving
16:00:31 20 us a general number is not going to get us anywhere.

21 MR. MOUGEY: Let me give you an example.

22 Peter Mougey.

23 We have these priority charts we all negotiated. I
24 mean, it's almost -- I mean, it was almost kindergarten, we
16:00:44 25 were negotiating charts to keep track.

1 But now we're to the third week of getting these, and
2 I'll give you two -- this was in Paul's August 17th letter,
3 substantial order monitoring policies and procedures. Just
4 tell us where they are and where you're in the process of
16:00:58 5 producing them.

6 This is Anda. Suspicious -- substantial completion by
7 11-9-2018. So we're still -- this is from August. This was
8 our number one priority, in the top five, files containing
9 due diligence for suspicious orders. The answer,
16:01:14 10 substantial completion by 11-9-2018. Those were our top
11 five and those are the answers we're getting.

12 So all of this infrastructure is in place for, just
13 like Joe just said, detailed reporting, give us the top
14 five, give us the priorities, tell us where they are. Can
16:01:30 15 we start here? Those are the foundational building blocks
16 and those are the answers we're getting in our -- in our
17 charts, and they're not helpful.

18 So we have -- we can do all of these processes, Pete's
19 idea is a good one, but all of this together is what we
16:01:44 20 need. Give us detailed answers. And if ours aren't
21 detailed, let us know and we'll update them. But these
22 answers, hey, we'll give it to you by 11-9, is I don't think
23 what anyone envisioned when we put this together.

24 MS. STRONG: And this is Sabrina Strong again.

16:01:59 25 One of the points I wanted to bring to your attention,

1 again, this goes to why the parties ought to meet and confer
2 and talk about these issues before discussing with you, is
3 that we just learned recently that apparently plaintiffs'
4 vendor Ricoh is unable to upload more than five gigabytes of
16:02:19 5 data.

6 And we are thinking that some of the disconnect
7 between plaintiffs' documents, saying we're concerned you
8 haven't produced X, is really a problem with their vendor,
9 that things haven't been uploaded. And I say this to say
16:02:29 10 that I don't know the answer to this, Special Master Cohen.
11 It's issues that the parties ought to be talking about and
12 discussing and coming up with something that we -- we all
13 want production, so, absolutely, we've got to figure this
14 out because we want their documents just as much as they
16:02:42 15 want ours.

16 So I just -- there are issues here that need to be
17 fleshed out among the parties.

18 MR. MOUGEY: We have given that tracking,
19 document tracking, and this morning is a great example.

16:02:54 20 I --

21 SPECIAL MASTER COHEN: Yeah. I don't need to
22 hear about Ricoh and document tracking and numbers, and I
23 get that, you know, it depends on the day and, literally,
24 Monday is different from Sunday.

16:03:06 25 There will come a point, I promise, where I am going

1 to say if the suspicious order monitoring policies have not
2 been produced, you cannot rely on them. Now maybe it is the
3 case that there aren't any and that's -- and it enures to
4 the plaintiffs' benefit. That time will come, and it's not
16:03:27 5 too far away.

6 And the same thing happens with every other category
7 of information, and that works both ways. It goes against
8 plaintiffs and defendants. What I'm going to suggest is, in
9 fact, that you do confer and you come to an agreement on
16:03:41 10 what kind of report everybody is going to give everybody
11 else, broken down by category, suspicious order reports,
12 transactional data, whatever else it is that was in
13 Farrell's letters as far as what plaintiffs want from
14 defendants with its -- I think it was a dozen different
16:03:57 15 categories of discovery, and the extent to which those have
16 been produced.

17 If I were in town, I'd help you do it. I'd sit in a
18 room with you and we'd figure out exactly what categories
19 and what has to be reported. I'm sure you all can do that.
16:04:17 20 This isn't a new topic at all. But it is time for us to get
21 a very good understanding of what's been finished and what
22 is still to come. And there will be -- there will have to
23 be, there must be eventually some final deadlines and
24 sanctions for not meeting obligations.

16:04:38 25 MR. WEINBERGER: So I think we should, with

1 all due respect, put a deadline on this, put a time frame.

2 SPECIAL MASTER COHEN: I agree.

3 MR. WEINBERGER: So my suggestion is that we
4 meet and confer and that we create this reporting document
16:04:54 5 by Monday. In other words, what's the form look like?

6 SPECIAL MASTER COHEN: So ordered.

7 MR. WEINBERGER: We can meet with Special
8 Master Yanni --

9 SPECIAL MASTER COHEN: So ordered. You got
16:05:04 10 it. Monday.

11 MR. RICE: He said yes.

12 MR. WEINBERGER: Okay. I heard. I heard.

13 SPECIAL MASTER COHEN: Monday is fine. Monday
14 is reasonable. I don't think Monday should be any problem.
16:05:14 15 It's going to be a lot of parties, but you're all going to
16 have to get together and figure out a mechanism to report to
17 each other what you have done and what there is left to do
18 by category.

19 Okay?

16:05:32 20 MR. WEINBERGER: Thank you.

21 SPECIAL MASTER COHEN: The good news is that
22 we're challenging my computer's RAM. I've got so many
23 documents open I can't find them now.

24 MR. WEINBERGER: While you're looking, since
16:06:00 25 everybody's here who I think we'd have to have discussions

1 with, our suggestion is that whenever we close this session,
2 that we sit with the other side and try to come up with a
3 document with these categories.

4 SPECIAL MASTER COHEN: Please remind me of
16:06:17 5 that when we adjourn.

6 (Pause in Proceedings)

7 SPECIAL MASTER COHEN: All right. Are we --
8 where are we? Only up to 6, number 6, dispensing
9 information.

16:06:57 10 As I mentioned before, I've actually written several
11 pages on this but wasn't ready to send it out because I just
12 thought I needed to hear a bit more from the parties.

13 Assume I've read everything, assume I thought hard
14 about it. If you have anything more you want to add, that's
16:07:14 15 fine. And I did want to focus on those -- those two
16 requests for production.

17 MR. PIFKO: Thank you.

18 I mean, I think all my arguments hopefully were
19 clearly stated in our -- in our written submission. I'm
16:07:26 20 happy to answer any questions, and, of course, respond to
21 anything that the defendants want to raise.

22 But I think this data is indisputably relevant. It
23 always has been. It pertains to the red flag issue. It's
24 called for in both the policy and procedure type of requests
16:07:43 25 for productions because it -- knowing about these

1 potentially illegal dispensing practices was part of their
2 suspicious order monitoring programs, and it's certainly
3 called for with respect to documents concerning their
4 registrations, and it's also called for under CMO.

16:08:04 5 This does relate to distribution because, as you saw
6 in some of the U.S. Attorney's quotes I put with some of the
7 press releases, the -- these dispensing violations pertain
8 directly to diversion, so I really don't think this should
9 be a controversial issue. I'm surprised that the other side
16:08:24 10 is mounting such a --

11 SPECIAL MASTER COHEN: So how do you address
12 the defendants', it's not even a position, it's an
13 assertion, which has gone unchallenged as far as I can tell,
14 that there was a very specific prior production provision
16:08:46 15 that was included in the case management order which did not
16 include the word dispensing?

17 And, in fact, there had been a draft provision that
18 talked about dispensing that wasn't a part of the CMO. That
19 seems like a very strong indication that the parties
16:08:58 20 specifically did not believe that prior productions
21 regarding dispensing should be produced.

22 MR. PIFKO: If you look at the provision that
23 they're talking about, it has nothing to do with production
24 from -- it's not about that provision. It was some other
16:09:13 25 issue pertaining to dispensing. And indisputably, again,

1 these types of documents relate to distribution. That's
2 what that provision in the CMO says.

3 SPECIAL MASTER COHEN: But dispensing and
4 distribution are different things in this context. They are
16:09:27 5 different things.

6 MR. PIFKO: But these -- if you don't comply
7 with the red flags test that the DEA has articulated on
8 countless occasions to both manufacturers, pharmacies,
9 distributors, then you're not complying with the suspicious
16:09:42 10 order requirements.

11 It pertains to distributing the products and -- and
12 that's only one thing. That's the CMO. We also have the
13 RFPs, which it clearly pertains to as well. So I think
14 there's a number of ways to get there. We don't have to get
16:10:00 15 there just through the CMO. You can get there through the
16 RFPs.

17 SPECIAL MASTER COHEN: Let's be careful about
18 what we're talking about. There's a difference between some
19 of what you've asked for with regard to dispensing
16:10:12 20 information, which is just a rubric, right, and prior
21 productions regarding dispensing violations, which is very
22 specific.

23 So I'm still trying to understand exactly what you're
24 asking for and exactly what you think is allowed after the
16:10:25 25 CMO said what it said and also after -- I mean, you've read

1 it -- what the defendants cite as your own assertions and
2 responses in the motion to dismiss briefing regarding
3 dispensing and the claims that you're making.

4 MR. PIFKO: When you look at the quote I put
16:10:41 5 in there from Judge Ruiz, he clearly thinks that dispensing
6 is relevant to the case. It's indisputably in there.

7 SPECIAL MASTER COHEN: Partly.

8 MR. PIFKO: It says dispensing.

9 SPECIAL MASTER COHEN: What we're talking
16:10:51 10 about is not zero or all, it's somewhere in between, and I'm
11 trying to figure out where.

12 MR. PIFKO: Okay.

13 SPECIAL MASTER COHEN: I'm thinking that prior
14 productions, maybe not. I'm trying to understand what is.

16:11:01 15 MR. PIFKO: There's -- there's two -- let me
16 articulate -- two I guess somewhat narrow views of what we
17 are requesting here.

18 One would be anything concerning a violation or an
19 alleged violation. If there was an investigation that was
16:11:20 20 just an investigation or it resulted in some sort of
21 settlement or consent order and it concerned dispensing
22 violations and there were documents produced by defendants
23 to the Government, any governmental entity in connection
24 with that dispute, I'm entitled to that.

16:11:34 25 SPECIAL MASTER COHEN: So let me stop you

1 there.

2 Does that not end up including every single document
3 that has anything to do ever that would be in a prior
4 production?

16:11:43 5 MR. PIFKO: No. I don't think so at all.

6 I talked about alleged violations of dispensing
7 conduct. I'm not talking about anything. I mean, you saw
8 some of the examples we're talking about; record keeping,
9 selling prescriptions -- or selling to customers who don't
16:12:00 10 have valid prescriptions, forged prescriptions, failures to
11 report theft, inventory violations, they're all enumerated
12 in these settlement agreements.

13 You're supposed to know your customer. The
14 distributors should have known that about the chain
16:12:18 15 pharmacy, or any pharmacy, and, obviously, the chain
16 pharmacies should have known that about themselves, and
17 failure to recognize that is -- is against the law and part
18 of what contributed to the problem here.

19 I don't see how it's not -- it's facially relevant. I
16:12:34 20 mean, again, you look at the quotes from some of these U.S.
21 Attorneys. If you don't keep accurate records and you don't
22 report theft, you're contributing to diversion. And it's --
23 it's not a controversial issue.

24 SPECIAL MASTER COHEN: What's second?

16:12:50 25 MR. PIFKO: And then -- and so, that's one

1 aspect of it.

2 The second issue is that some of these defendants have
3 said that they monitor dispensing activity in connection
4 with their suspicious order monitoring program.

16:13:07 5 SPECIAL MASTER COHEN: That one you get.

6 MR. PIFKO: Okay. That's a twofold issue.
7 Just -- we need to know what they're monitoring, and then,
8 if they're monitoring it, I need to see what they are. What
9 if I disagree with the outcome of their conclusion? If
16:13:18 10 you're saying that I'm collecting this data and evaluating
11 that to determine if an order is suspicious, I should be
12 entitled to that data to determine if I agree with your
13 evaluation and whether you're complying with your own
14 policy.

16:13:30 15 SPECIAL MASTER COHEN: And I think some of the
16 defendants said they have produced that or they are
17 producing it, that they're producing dispensing data to the
18 extent that it was part of their suspicious order monitoring
19 program.

16:13:41 20 Right, that's what you're talking about?

21 MR. PIFKO: That is that category.

22 But I don't think we're getting all the backup data
23 from all the defendants on that, and we're not getting all
24 the categories from all the defendants on that.

16:13:52 25 SPECIAL MASTER COHEN: Okay.

1 MR. PIFKO: Do you have any questions about
2 the violations again?

3 SPECIAL MASTER COHEN: Not yet. I'll probably
4 come back to it.

16:14:02 5 MR. PIFKO: Okay.

6 MR. LAVELLE: Good afternoon, Special Master.

7 John Lavelle from Morgan, Lewis representing Defendant
8 Rite Aid of Maryland, doing business as Mid-Atlantic
9 Customer Support Center. I'm going to explain why I gave
16:14:18 10 you the full name of my client in a minute.

11 But I think, Special Master, you pointed out what the
12 nub of the problem is here. The premise of this, the
13 request by plaintiffs, is that dispensing and distribution
14 are the same. They're not. The Controlled Substances Act
16:14:36 15 makes clear that they are two very different things. In
16 fact, dispensing is specifically excluded from the
17 definition of what distribution is.

18 The DEA issues licenses for distribution. It also
19 issues licenses for dispensing. They are two different
16:14:53 20 things. And an entity that holds a license for distribution
21 may or may not have a license for dispensing.

22 I mentioned the full name of my client earlier because
23 the reasons that the plaintiffs have sued my client, Rite
24 Aid, Maryland, Mid-Atlantic, is because it is a holder of a
16:15:14 25 distribution license from the DEA and is a distributor into

1 Ohio. It does not dispense in Ohio. In fact, plaintiffs
2 chose not to sue the Rite Aid entity, Rite Aid of Ohio,
3 which has the dispensing licenses in Ohio.

4 Dispensing information isn't relevant to plaintiffs'
16:15:33 5 claims and we know this for two things. One, they sued Rite
6 Aid Mid-Atlantic, which is a distributor. They didn't sue
7 the -- the owner of the dispensing licenses. The same is
8 true for CVS, which is another defendant.

9 And, second, we've asked plaintiffs, and they've said
16:15:48 10 repeatedly to us and to the Court, that they are not
11 pursuing claims for dispensing.

12 SPECIAL MASTER COHEN: Why is that?

13 MR. LAVELLE: Why is that?

14 SPECIAL MASTER COHEN: Yeah.

16:15:58 15 MR. LAVELLE: I don't have any intimate
16 knowledge of what goes on in their discussions, I haven't
17 been invited, but my guess is they do not wish to be -- to
18 be meeting the additional requirements of pursuing claims
19 with respect to dispensing.

16:16:17 20 To the contrary, the claims against my client and
21 against the other pharmacies have been based on the
22 suspicious order monitoring requirement of the Controlled
23 Substances Act. That's what they frame their claim about,
24 that's what's in the complaint, and that's what they have
16:16:32 25 said to the Court that they're pursuing.

1 And, by the way, this reference to the know your
2 customer requirement is just erroneous, and Mr. Pifko
3 himself elicited the testimony from a witness earlier which
4 established that, with input from the DEA, retail chain
16:16:50 5 pharmacies are exempt from the know your customer
6 requirement.

7 And we've produced and are going to continue to
8 produce dispensing information that's directly related to
9 suspicious order monitoring, such as due diligence, to
16:17:01 10 increase the distribution threshold for a particular
11 pharmacy based on dispensing info.

12 But the broader type of discovery that Mr. Pifko seems
13 to be asking for here would impose a disproportionate
14 burden, and, Special Master Cohen, I think --

16:17:14 15 SPECIAL MASTER COHEN: Is it irrelevant?

16 MR. LAVELLE: Well, it isn't relevant, and one
17 of the problems we have here is we don't even know what
18 they're pursuing.

19 The two requests, Special Master, that you asked us to
16:17:26 20 address, we're the ones that presented them to you because
21 we attached them to our opposition.

22 Mr. Pifko's made two submissions so far. He still
23 hasn't identified a single request that was served on any of
24 the chain pharmacies or any of the other defendants that
16:17:40 25 he's seeking to compel. That alone, under the local rules,

1 should be enough to deny this request.

2 But the data that would be relating to dispensing here
3 would potentially be a fishing expedition in an entire new
4 ocean.

16:17:56 5 Specifically with respect to this issue of dispensing
6 violations, first, as, Special Master, you pointed out, it's
7 outside the bounds of CMO #1. It only provided for
8 production of investigations concerning marketing or
9 distribution of opioids. Dispensing is not in there. And
16:18:13 10 that's, of course, consistent with what plaintiffs' claims
11 are.

12 Second, the two specific requests that we put into the
13 record before Your Honor, that are requests for production
14 16 and 17, they don't require production, and that's for two
16:18:26 15 reasons. One, as written, they're not addressed to the Rite
16 Aid pharmacy registrant in Ohio because they're addressed to
17 Rite Aid, Maryland, Mid-Atlantic.

18 Second, this specific 2009 settlement that the -- that
19 Mr. Pifko referenced isn't responsive. It doesn't concern
16:18:43 20 distribution practices. It concerns only dispensing, and it
21 concerns only dispensing in pharmacies in other
22 jurisdictions, not in Ohio.

23 So, Your Honor, we would submit that we tried to
24 discuss this with plaintiffs, we made it clear, I think it's
16:18:58 25 clear from the DOJ's press release that that's what it is,

1 it's just not responsive and it wouldn't advance the ball
2 here.

3 The other pharmacies I believe do want to be heard on
4 this as well, so I will turn over the mic to them.

16:19:13 5 SPECIAL MASTER COHEN: Let me -- I want to go
6 back to the plaintiffs because this is actually confounding
7 to me. I don't understand why the CMO specifically excludes
8 dispensing from prior productions. I don't understand why
9 there are not claims brought against the pharmacies as
16:19:38 10 dispensers as opposed to distributors.

11 There are -- it seems like there are two different
12 kinds of claims that you would make against the
13 distributor/pharmacies or pharmacies qua distributors, and
14 that is that their suspicious order monitoring from the
16:20:00 15 warehouse to the retail pharmacy wasn't working, and also
16 that the last step of where those pills end up, that is,
17 from the pharmacy to the patients, wasn't working.

18 And the -- they apparently have separate claims with
19 separate laws and separate discovery, at least a little bit,
16:20:19 20 and so, I'm just kind of confused.

21 MR. FARRELL: This is Paul Farrell, Jr., on
22 behalf of the plaintiffs.

23 As a preamble to this, the -- the retail distributors
24 and pharmacies are in a little bit of a different bucket
16:20:33 25 than, say, Cardinal Health, McKesson, and AmerisourceBergen.

1 So if you think about what's happened here, if we
2 would go to Cardinal Health and we would say: For all of
3 the pharmacies that you sold to, give us the dispensing
4 data, Cardinal Health would say: We don't have any control
16:20:53 5 or operation over those pharmacies. And that gets into
6 other records that may be protected or privileged. The
7 focus for that is on -- from Cardinal Health to each of the
8 pharmacies.

9 Now, as part of their due diligence, as part of their
16:21:09 10 own discovery responses, what we're seeing is they have an
11 obligation to look at the dispensing data when they make
12 their decisions on whether there is something suspicious.

13 SPECIAL MASTER COHEN: Where does that
14 obligation come from?

16:21:24 15 MR. FARRELL: That obligation comes from the
16 federal regulations and it's set forth in the 30(b)(6)
17 notice responses that are on the record.

18 Now, when you look over at the chain pharmacies, you
19 don't have those problems because they are selling to
16:21:38 20 themselves. They have vertically integrated.

21 So I would posit that if Rite Aid was selling to its
22 own Rite Aid pharmacies and one or more of them got cited by
23 the DEA for dispensing practices, that should be another red
24 flag for the distributor operations that, hey, perhaps we're
16:22:02 25 selling to places that don't have safeguards in place. So

1 it's all a component of the distribution practice.

2 When they took on the obligation, when they took on
3 the benefit of being vertically integrated and saving
4 themselves money, they also took on the obligation to comply
16:22:22 5 with federal law.

6 And so, what we're suggesting is that if, in fact, say
7 Walgreens has a number of stores that are being cited for
8 its dispensing practices --

9 SPECIAL MASTER COHEN: In Ohio, in track one
16:22:35 10 jurisdictions, what are you looking exactly for?

11 MR. FARRELL: We're looking for institutional
12 failures that have resulted in an epic institutional
13 disaster across the country.

14 That's the -- that's what we're trying to identify is
16:22:50 15 we're trying to identify what Judge Polster said back in
16 January: Where did this go wrong? What happened?

17 And so, by looking at the institutional failures, it's
18 at least discovery that allows us to be able to examine what
19 went wrong. Now, whether it's admissible is a completely
16:23:09 20 different story. But for discovery purposes, if Walgreens
21 has multiple pharmacies that are being cited by the DEA and
22 Walgreens is selling to those pharmacies, we think we should
23 be entitled to take a look at that or at least put it in the
24 record.

16:23:27 25 SPECIAL MASTER COHEN: So can you give me --

1 MR. LAVELLE: Special Master, may I respond
2 briefly?

3 SPECIAL MASTER COHEN: Let me ask one more
4 question and then you may.

16:23:35 5 I want you to list for me very precisely under the
6 rubric of dispensing violations what documents you want,
7 examples.

8 MR. MOUGEY: I'll give you some examples.
9 What we're seeing already.

16:23:50 10 Peter Mougey.

11 Some e-mails that have come out with custodians, what
12 we're looking for is red flags on the distribution side of
13 understanding what's your customer, and in some of the
14 retail pharmacies, their own clients, here's what we're
16:24:03 15 seeing.

16 Our pharmacists are scared to walk to their cars
17 because prescriptions that we failed -- refused to fill are
18 waiting in the parking lot. People smoking Oxycontin in the
19 bathroom. Drug deals openly being conducted in the parking
16:24:24 20 lots of the pharmacies. This is being discussed at the
21 pharmacist level, the pharmacy, inside the pharmacy, going
22 up the pharmacy food chain.

23 So what we're looking for, in part, are examples of
24 pharmacists and the techs discussing the systemic problems
16:24:43 25 within the pharmacies openly that are clearly red flags on

1 the distribution side.

2 Now, you mentioned are these in Ohio or trial track
3 one cases? As an example, the document that we gave you
4 this weekend, Walgreens' MOA specifically discusses the
16:25:03 5 Walgreens pharmacies in Florida that there were -- and uses
6 Ohio as an example. Because of the stronger or more
7 stringent state reporting regulations, people were loading
8 up cars and going to Florida and picking them up and
9 bringing them back to Ohio and distributing them on the
16:25:25 10 streets in Ohio. That's specifically mentioned in
11 Walgreens' MOA.

12 So what we're looking for are red flags, suspicious
13 conduct, anything that the distributors performing due
14 diligence -- and you asked Paul about where those duties
16:25:41 15 fall and Paul mentioned the regs. There's also a list on
16 the DEA's website that includes looking at practitioner
17 level, prescription level type data. The data about
18 understanding and knowing your customer goes all the way
19 down to the pharmacy level and what's occurring.

16:25:59 20 That's -- those are examples of what we're looking for
21 and what we're seeing already and what's being discussed
22 inside the pharmacies.

23 MR. PIFKO: And I want to respond to a couple
24 comments he made.

16:26:09 25 First, you asked what we were looking for. I propose

1 this. Why don't we -- we'll tell you the violations, I
2 already cited some of them in our letter, Peter's mentioning
3 one, I've got a Rite Aid settlement agreement, I'll tell you
4 which -- which, you know, violations and settlements that
16:26:26 5 we're interested in. It's not the universe, the entire
6 universe. They're discrete and we can identify them.

7 Second, they mentioned the deposition of
8 AmerisourceBergen an example of why we don't need this
9 information. That completely -- I took the deposition. I
16:26:44 10 know exactly what I was after when I was asking those
11 questions. He's completely misconstruing the outcome of
12 that testimony. AmerisourceBergen exempted chain pharmacies
13 from its due diligence requirements. I find that to be an
14 outrageous failure of their system.

16:27:01 15 And the proof of the failure of that system is all
16 these violations. What, you trust Rite Aid, you trust CVS,
17 you trust Walgreens, so we don't do any due diligence on
18 them? Well, look what they were doing. They're worse than
19 the mom and pop pharmacy that you think has no controls.
16:27:18 20 These pharmacies were filling prescriptions to people with
21 forged prescriptions, no prescriptions, they -- this stuff
22 was stolen out the back and they didn't keep records. It's
23 outrageous.

24 SPECIAL MASTER COHEN: All right. But what is
16:27:28 25 the document that you're looking for?

1 MR. PIFKO: I would like any documents that
2 they produced to any governmental entity in connection with
3 the settlements that I can identify for you. If you want,
4 we can put together a letter and I'll enumerate them for
5 you.

16:27:42

6 SPECIAL MASTER COHEN: I'll need it by 8:00
7 tonight. Is that all right?

8 MR. PIFKO: Yeah. We can do that.

9 SPECIAL MASTER COHEN: Okay.

16:27:48

10 MR. LAVELLE: Special Master, I'm kind of
11 fighting three on one here. I think three plaintiffs
12 lawyers in a row got up to argue. None of them actually
13 answered the questions that you asked.

14 You asked why didn't they pursue dispensing claims in
15 this case, why is it not in CT-1. I don't have the answer
16 to that, but I have a suspicion. My suspicion is it's
17 because they do not want to get into the question of whether
18 individual prescriptions were medically necessary.

16:28:02

19 And that's the road that you go down if you end up
20 opening the -- this -- this area, because you're going to
21 have to drill down and find out for each pharmacy, if you're
22 questioning the dispensing, you've got to look at was this
23 particular prescription medically necessary? What did the
24 doctor have in mind when -- when this patient went to them?
25 It's a can of worms that I think they don't want to get

16:28:34

1 into.

2 And I will say that counsel for CVS and Walgreens have
3 been very patient and they've let me speak first, but they
4 should have an opportunity to address Your Honor as well.

16:28:49 5 SPECIAL MASTER COHEN: Thank you.

6 I just want to remind you, I promise you, I've read
7 everything, and so, you don't need to repeat. You don't
8 need to tell me what I've read.

9 MS. SWIFT: Thanks very much, Special Master.

16:29:01 10 Kate Swift for Walgreens.

11 Plaintiffs have still never identified a single
12 document request that we haven't responded to. They asked
13 for the dispensing policies. We've given them. They asked
14 for documents used in due diligence or evaluation of orders
16:29:14 15 from pharmacies. To the extent those exist, we're producing
16 them.

17 I just heard for the first time what they -- the --
18 the comments that they made about the Walgreens settlement
19 that Mr. Mougey referenced a few minutes ago. That
16:29:32 20 settlement related to distribution. There is a prior
21 production related to it. We produced that prior
22 production.

23 I am unaware of anything that they think we haven't
24 produced that they want and I didn't hear it today.

16:29:45 25 With respect to the two RFPs that you flagged for the

1 parties and asked us to address, Rite Aid RFP number 16 and
2 number 17, only number 16 was served on Walgreens. We
3 responded to it and they never complained about our
4 response, so I'm not sure what else they're looking for from
16:30:10 5 us.

6 That's all I have to say.

7 SPECIAL MASTER COHEN: I'm trying to remember
8 what happened. One of the -- one of the retail pharmacies
9 did and one of them didn't, and I'm not sure -- with
16:30:22 10 pharmacy -- pharmacists' compensation, where are you guys on
11 that?

12 MS. SWIFT: I'm sorry. What's the question?

13 SPECIAL MASTER COHEN: Whether you produced
14 documents related to the compensation of pharmacists.

16:30:35 15 MS. SWIFT: I believe they asked for
16 compensation policies and we did -- we produced the
17 compensation policies that we have.

18 SPECIAL MASTER COHEN: Okay. So you're not
19 the one who didn't produce those?

16:30:43 20 MS. SWIFT: I don't believe so, no.

21 SPECIAL MASTER COHEN: Okay. Thank you.

22 MR. HYNES: Just real quick, Special Master.

23 Paul Hynes for CVS.

24 If -- we don't think the CMO applies here at all, it
16:30:58 25 sounds like you might not either, and to the extent that you

1 think it may, I think there are differences in terms of
2 scope that would make producing this information at this
3 late stage very difficult from a burden perspective.

4 We have thousands of stores across the country and to
16:31:13 5 try to comply with that provision on a nationwide basis
6 would be incredibly difficult right now.

7 SPECIAL MASTER COHEN: What about -- what
8 about those that either have to do with stores in CTO-1 or
9 specifically mention Ohio?

16:31:29 10 MR. HYNES: That would obviously be easier.

11 SPECIAL MASTER COHEN: Thank you.

12 MR. HYNES: Thank you.

13 MR. NICHOLAS: I'm Bob Nicholas,
14 AmerisourceBergen.

16:31:44 15 This isn't our issue. We were kind of sitting there
16 minding our own business, but I don't want --

17 SPECIAL MASTER COHEN: You're in my crosshairs
18 is why you're standing up there.

19 MR. NICHOLAS: I will say this. There is --
16:31:59 20 there is no regulatory requirement that the distributors
21 collect dispensing data, and I'm not sure where that came
22 from, but there is not.

23 And the other thing I want to say is, you know,
24 without getting into a debate about testimony, Mr. Pifko
16:32:20 25 started to characterize testimony he elicited in a

1 deposition I defended. He described it inaccurately.

2 SPECIAL MASTER COHEN: You can stop there.

3 MR. NICHOLAS: For the record, I just -- I
4 have to say it; otherwise, it's hanging out there.

16:32:32 5 SPECIAL MASTER COHEN: Okay.

6 MR. NICHOLAS: So I said I'm not going to
7 argue with him about what was said, but I can't let it go.

8 SPECIAL MASTER COHEN: All right. I think
9 I've heard enough on that topic, especially --

16:32:45 10 MR. HYNES: Paul Hynes for CVS.

11 You said CT-1 or Ohio, and, I mean, that's a big
12 difference just in terms of number of stores, so I just want
13 to clarify, I think there's a difference between CT-1 stores
14 and Ohio stores in terms of burden. I spoke too quickly.

16:33:00 15 SPECIAL MASTER COHEN: Okay. I think you
16 misheard me.

17 MR. PIFKO: If I may, just 30 more seconds.

18 One, CT-1 jurisdictions will not be sufficient because
19 of the migration issue. And like Peter said, we want to
16:33:11 20 show systemic failures. These practices -- just because
21 there was a violation in California doesn't mean they
22 weren't doing the same thing here and they didn't get caught
23 for it.

24 And I just want to add one other thing. When they
16:33:21 25 made the comment that we didn't sue the people, we did sue

1 the parent companies of these and they asked us to dismiss
2 them and we did. And we understood that they weren't going
3 to use that to their advantage in discovery and then try to,
4 you know, say, well, you don't have the right party from us.

16:33:36 5 So we had the parents of these companies and they
6 asked us to dismiss and we did, and for them to now use that
7 is gamesmanship.

8 SPECIAL MASTER COHEN: All right. We need to
9 move on.

16:33:46 10 The next one is very specific, Eric Brantley
11 deposition. I would love for you to tell me that that's
12 resolved, Enu.

13 MR. FULLER: Special Master Cohen, Mike Fuller
14 on behalf of the plaintiffs.

16:34:09 15 And, yes, we have discussed that and they're going to
16 be giving us dates for Mr. Brantley by the end of the week.

17 SPECIAL MASTER COHEN: That's fine. We'll
18 move to the next one. Thank you.

16:34:23 19 Number 8 is production of documents and et cetera from
20 state proceedings.

21 I think I saw an e-mail even this morning that
22 suggested that this was -- that some progress had been made
23 and maybe was even fully resolved.

24 MR. FULLER: Fortunately, or unfortunately,
16:34:36 25 you're still stuck with Mike Fuller for the plaintiffs on

1 this issue too, Your Honor.

2 Yes, we have made some headway. There was three --
3 well, basically, two different issues. One was similar
4 productions going on in state proceedings.

16:34:50 5 As far as the document productions, the defendants
6 have agreed to that up through I think it's January 26th,
7 2019, which is our discovery cutoff.

8 The other issue still remaining is basically sworn
9 testimony, any sort of sworn testimony or declarations has
16:35:10 10 not been agreed to by the defendants.

11 If you'll recall, back early October, this went back
12 and forth in some e-mails. We finally got -- and I e-mailed
13 Your Honor on Sunday trying to get the defendants to
14 respond. We got their positions with that one agreement,
16:35:27 15 the two other nos to the other requests. You were sent an
16 e-mail at about 6:15 this morning from Jennifer on the same
17 issue setting out where we left that.

18 I don't know if you've got it pulled up in front of
19 you or not.

16:35:52 20 SPECIAL MASTER COHEN: This was the redlined
21 one?

22 MR. FULLER: Yeah. The one that has the red
23 in it below, but Jennifer summarized where we are this
24 morning.

16:36:03 25 SPECIAL MASTER COHEN: Right. And I thought

1 that this was a clarification, which I was hoping that you
2 would say was okay.

3 MR. FULLER: No. Well, Jennifer is with the
4 plaintiff, and we were --

16:36:12 5 SPECIAL MASTER COHEN: No. I understand.

6 Category 2 simply seeks copies of sworn statements, et
7 cetera.

8 MR. FULLER: That's correct. And defendants I
9 think still disagree with that.

16:36:21 10 SPECIAL MASTER COHEN: Okay. And Category 3
11 similarly seeks relevant materials in the form of public
12 transcripts, however, in the spirit of compromise, et
13 cetera, so --

14 MR. FULLER: So I think just to try to
16:36:35 15 simplify it and make it succinct, what we're seeking is any
16 sworn statements by any of the defendants' employees going
17 on in the state proceedings.

18 And I know this was an issue that was discussed some
19 with Special Master Yanni in the coordination issue and
16:36:49 20 she's made her ruling on that. Certainly, anything that's
21 not coordinated we wouldn't necessarily have access to.
22 We're asking the defendants to be required to produce it.

23 SPECIAL MASTER COHEN: Okay. Who is going to
24 address this? I'm sorry. I did -- I was confused for a
16:37:08 25 second. Go ahead.

1 MS. STRONG: This is Sabrina Strong.

2 On this issue, I do think there has been progress that
3 has been made, Special Master Cohen, and I -- as you noted,
4 there was some developments this morning. The defendants as
16:37:22 5 a group have not had a chance to really discuss the recent
6 proposal by Jennifer.

7 But at a high level, the concern here is it's really
8 at odds with the cross-noticing protocol and the discussions
9 from our perspective that have happened there. The state
16:37:36 10 AGs have really objected to the coordination efforts here
11 and have prevailed in that regard and that there won't be
12 coordination, at least pursuant to the protocol with the
13 state AGs.

14 Yet, on the other side of the coin, they would like to
16:37:52 15 have anything that happens in the state cases produced for
16 purposes of this litigation, and so, we really think there's
17 a lot of issues here, perverse incentives of what may
18 happen, and really at odds and an end run around the
19 cross-noticing protocol that's been established in this case
16:38:07 20 that Special Master Yanni has been focused on.

21 I do think -- I should just note I do think that
22 there's an opportunity for more discussion among the
23 defendants and the plaintiffs. And you're right, this is
24 very much a live issue. It was first brought to our
16:38:22 25 attention on October 11th with a -- an e-mail request to you

1 and all of us, and I actually took that offline and removed
2 you from the e-mail chain, Special Master Cohen, and asked
3 the plaintiffs what is the specific ask, because it was a
4 Paul Farrell one sentence e-mail making a request and we
16:38:40 5 were not totally clear on what it was.

6 So on the 19th, Jennifer gave us a very clear e-mail
7 and we've gone from there. But if you --

8 SPECIAL MASTER COHEN: If you got one sentence
9 from Farrell, you should consider yourself lucky.

16:38:51 10 MS. STRONG: I should have been cheering.

11 We took it offline to try to get clarity and work
12 through it with them, and we got Jennifer's clearer e-mail
13 about what the request was on the 19th, just a few days ago.

14 So I do think if given a little bit more time on this
16:39:06 15 we may be --

16 SPECIAL MASTER COHEN: I'm thinking that
17 Special Master Yanni may have a question or two.

18 SPECIAL MASTER YANNI: Well, I was going to --
19 does anybody else want to speak? Mr. Skikos?

16:39:16 20 MR. FULLER: We're ready for questions from
21 you, Your Honor.

22 SPECIAL MASTER YANNI: Ready for questions.

23 Aren't we just looking for a specific thing, which is
24 sworn statements?

16:39:27 25 MR. FULLER: That -- so they've already agreed

1 for all other production going on in the state cases.

2 SPECIAL MASTER YANNI: Right.

3 MR. FULLER: The defense have agreed to that,
4 yes. Now the only thing at issue is any sworn testimony,
16:39:40 5 any sworn statements.

6 MS. STRONG: My understanding is that that
7 would include depositions, at least of those folks who are
8 being deposed in this case, and so, we start to think what
9 is the point of that, what -- it really is at odds with the
16:39:54 10 cross-noticing protocol.

11 And, you know, you'd have to get into concerns about
12 how would it be used, would they try and introduce it at a
13 depo and take advantage of the time limits or -- or get an
14 unfair advantage here in terms of time limit issues that the
16:40:09 15 parties have heavily negotiated and that you have weighed in
16 on.

17 So there's a lot of concerns about what's the
18 significance of this and what's the purpose when it's
19 something that otherwise ought not be permitted. And like I
16:40:20 20 said, otherwise, why do we have the cross-noticing protocol?
21 What's that about? That's the method of coordinating with
22 these state cases.

23 MR. SKIKOS: Steve Skikos.

24 So, first, are the fundamental rule that I have with
16:40:40 25 Sara Roitman is that we meet and confer before we do this.

1 But the issue here is testimony, and it's interesting
2 because the production of testimony is not related to the
3 coordination between state and federal courts. It's -- it's
4 testimony. It's not work product. It's not some magic.
16:41:10 5 It's testimony. And the testimony has to be produced.

6 If you're at trial and you have a witness on the stand
7 and the witness is -- has previous testimony, that previous
8 testimony is available to cross-examine that witness. We
9 are trying to build consent for state/federal cooperation.

16:41:31 10 With respect to testimony itself, that is part of what
11 must be produced in order to try to reduce the amount of
12 time that people are being deposed as opposed to increase
13 the amount of time.

14 I do think we can have further discussion about this
16:41:47 15 issue and maybe come back next week, but I will say this:
16 It was never discussed or anticipated or even considered
17 that testimony would somehow be exempted from production in
18 this MDL, and it will have a horrible impact on the state
19 court litigants if they are prohibited or the MDL litigants
16:42:15 20 are prohibited from actually getting testimony from
21 previous -- from -- sworn testimony from witnesses who are
22 going to be testifying in this trial, in these cases.

23 SPECIAL MASTER COHEN: Okay. We have so many
24 things that we still have left to talk about that I think we
16:42:29 25 heard enough on that topic.

1 Special Master Yanni's bailiwick is specifically the
2 state/federal court coordination. I do ask the parties
3 continue to confer about this. I'll tell you that,
4 personally, I think it only makes sense to me that testimony
16:42:48 5 would be available. But that's --

6 SPECIAL MASTER YANNI: And I, as the Special
7 Master who is doing the joint state and federal, I have to
8 agree with Special Master Cohen, testimony should be
9 available.

16:43:06 10 MR. FULLER: So what we'll do, Special
11 Masters, if it's okay with the Court, is we'll push this,
12 we'll continue our talks, and we'll put it on next week's
13 agenda for Special Master Yanni to address?

14 SPECIAL MASTER COHEN: That's fine.

16:43:17 15 SPECIAL MASTER YANNI: Thank you. That's
16 fine.

17 SPECIAL MASTER COHEN: Agenda item number 9 we
18 already discussed. That's interrogatory number 8.

19 (Pause in Proceedings)

16:43:44 20 SPECIAL MASTER COHEN: Agenda item number 10
21 has to do with four different interrogatories from the
22 pharmacies. And, really, it's -- it's the first two that
23 are the key because interrogatories 11, 12, and 13 all
24 depend off of numbers 9 and 10.

16:44:05 25 Is this something -- I think I've gotten the letter,

1 October 18th, from the pharmacies, but did not really
2 receive a response yet from the plaintiffs. I'm trying to
3 understand where we are on this.

4 MR. ACKERMAN: David Ackerman for the
16:44:22 5 plaintiffs.

6 I believe that the letter came in last night. I think
7 it came from Christopher Moriarty, if you are searching your
8 e-mails.

9 SPECIAL MASTER COHEN: Right.

10 MR. ACKERMAN: But I'm not positive about
11 that.

12 SPECIAL MASTER COHEN: If it came in, I read
13 it.

14 (Pause in Proceedings)

15 SPECIAL MASTER COHEN: Why can't this be
16 addressed via third-party discovery directed at MetroHealth?

17 MR. BREWER: Matthew Brewer from Bartlit Beck
18 on behalf of the pharmacy defendants.

19 The problem here, Special Master, is that on numerous
16:45:48 20 occasions you've talked about and warned against mincing
21 words to avoid interrogatories, and that's what we have
22 here.

23 We loosely use the term affiliated with pharmacies and
24 physicians affiliated with the plaintiffs. What we're
16:46:04 25 really referring to are pharmacies that are owned, operated,

1 supported by, or affiliated with the plaintiffs, and,
2 similarly, physicians who practice at or are employed by
3 facilities that are owned, operated, supported by, or
4 affiliated with the plaintiffs.

16:46:18 5 We know that the plaintiffs have control over this
6 information. They haven't denied that. And, in fact, they
7 have the legal right to request the information, to obtain
8 the information. They control how the -- let's take
9 MetroHealth, for example.

16:46:40 10 Cuyahoga County has control over how the hospital is
11 governed. They appoint the board of directors. And just
12 sitting here in today's discussion, when Mr. Shkolnik spoke
13 about the information they're providing in response to
14 distributors' interrogatory number 18, he listed a number of
16:47:02 15 different types of documents that they're providing to help
16 calculate damages, and one of those categories was records
17 from MetroHealth.

18 So we know they have access to the information. They
19 can provide the information. They can't pick and choose
16:47:16 20 what information they want to produce. And the information
21 is clearly relevant to our defenses, and so, that's our
22 request.

23 SPECIAL MASTER COHEN: But you didn't really
24 answer my question, which is: Why can't you get it -- maybe
16:47:29 25 you would prefer to get it the way you just described.

1 Couldn't you get it through third-party discovery directed
2 at MetroHealth?

3 And also, I guess I should ask this question as well,
4 I'm sorry, at least -- at least as to interrogatory number
16:47:43 5 10, identify pharmacies, and possibly interrogatory number
6 9, identify physicians, this seems to me likely that you
7 have that information already or can get it just as easily.

8 MR. BREWER: Well, we can get some pieces of
9 the puzzle, but they have control in a way that we don't.
16:48:04 10 They can request it in a way that we can only request
11 through this discovery process.

12 And so, that's -- with respect to number 9, the --
13 excuse me, yeah, number 9, the physicians, with respect to
14 number 10 -- I mean, 9 and 10 are the basis for all the
16:48:21 15 additional requests.

16 SPECIAL MASTER COHEN: Right.

17 MR. BREWER: We want to know instances of
18 diversion that we don't have access to in the way that they
19 would.

16:48:26 20 SPECIAL MASTER COHEN: What about going
21 directly to MetroHealth?

22 MR. BREWER: We can try to go directly to
23 MetroHealth, but they have an obligation and they have
24 control. I don't know why they can't do it themselves.

16:48:39 25 SPECIAL MASTER COHEN: Okay.

1 MR. SHKOLNIK: On behalf of Cuyahoga again.

2 We do not have control over MetroHealth. MetroHealth
3 has its own separate lawsuit pending here against these
4 defendants. They have their own separate counsel. They are
16:48:57 5 not within our control, within the meaning of being able to
6 obtain all of their data, all of their records, all of their
7 prescriptions.

8 This is a very simple issue. They have counsel who
9 are -- who have made appearances. And as you suggested,
16:49:15 10 Special Master Cohen, a subpoena on them for these items
11 through their counsel I am sure will get them as much
12 information as possible.

13 We at the county do not control the prescribing, the
14 dispensing, or any of those issues for MetroHealth. It is a
16:49:31 15 separate entity. Yes, we do provide a small percentage of
16 money. A \$1.4 billion budget and I think the county
17 provides them somewhere between 30 and \$40 million as a
18 general grant, not to any specific area.

19 We do not control. We do not have the ability to
16:49:50 20 produce this information without going to court and getting
21 an order just like they would have to do at this point in
22 time. They're just -- it's not there for us.

23 SPECIAL MASTER COHEN: What data are you
24 producing that is related to MetroHealth?

16:50:02 25 MR. SHKOLNIK: We have some financial

1 information that deals with the -- the -- specifically, the
2 request was how much money do you give to MetroHealth? And
3 if I understand it, we identified that there is a line item
4 of about 40 -- I think it's 40 million. Mr. Gallucci
16:50:16 5 probably knows the number better than I do. I think it's 40
6 out of 1.4 billion. And we gave them that information,
7 which is what we have.

8 SPECIAL MASTER COHEN: All right. I'm going
9 to deny the motion for plaintiffs to respond to these five
16:50:32 10 interrogatories.

11 I actually have a problem separately with 11, 12, and
12 13. I think it asks for information that I'm not sure
13 anybody could answer, and it's probably, to some extent,
14 particularly in the hands of the defendants anyway, but I
16:50:49 15 just think that the -- that it makes a lot more sense for
16 the defendants to obtain this information directly from
17 MetroHealth. I think you're more likely to get what you
18 need more quickly.

19 MR. SHKOLNIK: Thank you.

16:51:07 20 SPECIAL MASTER COHEN: All right. The next
21 one is agenda item number 11, which has to do with Janssen's
22 responses to interrogatories.

23 MR. ACKERMAN: Thank you, Special Master.

24 David Ackerman for the plaintiffs.

16:51:48 25 I'll note that there was a letter that came in, well,

1 early this morning this time, but I think Janssen's counsel
2 is in California, where they have agreed to answer three of
3 the six interrogatories that are at issue.

4 I think -- I've just spoke with Ms. Strong and they're
16:52:07 5 going to do it on a rolling basis and get it done by
6 November 5th, and we're okay with that as to those three.

7 There are three interrogatories left. The history of
8 this, just to briefly --

9 SPECIAL MASTER COHEN: Sorry. Can you tell me
16:52:20 10 the sender of the letter that came in this morning?

11 MR. ACKERMAN: Seth Baglin I believe.

12 SPECIAL MASTER COHEN: B-A-G?

13 MR. ACKERMAN: B-A-G-L-I-N.

14 SPECIAL MASTER COHEN: Go ahead.

16:52:35 15 Wait. I'm sorry. I got the wrong one. I think he
16 sent two different ones.

17 MR. ACKERMAN: I think it's a letter that is
18 signed by Amy Lucas, but it was -- Seth Baglin was the
19 e-mailer.

16:52:51 20 SPECIAL MASTER COHEN: Go ahead.

21 MR. ACKERMAN: Okay. So there are at this
22 point three interrogatories that are still in dispute.

23 These are interrogatories that plaintiffs pointed out in a
24 July 3rd letter. They relate to the first set of

16:53:08 25 interrogatories that were served in April. We sent a second

1 letter on September 28th when Janssen did not supplement
2 these three interrogatories in the response that we received
3 last night. I can walk through each of them briefly.

4 SPECIAL MASTER COHEN: Which numbers are they?

16:53:24 5 MR. ACKERMAN: Sure. It is interrogatory
6 number 6, interrogatory number 10, and interrogatory number
7 13, which they amended, but we don't believe the amendment
8 met the substance of the interrogatory.

9 Interrogatory number 6 says: Identify each and every
16:53:42 10 time --

11 SPECIAL MASTER COHEN: I got it. You don't
12 have to read it.

13 MR. ACKERMAN: I won't read it then.

14 As you are aware, the plaintiffs have alleged that
16:53:51 15 citing to this Porter and Jick article, which was actually a
16 letter to the editor, is in and of itself a
17 misrepresentation and we want to know when Janssen did it.
18 The only answer that we've received from Janssen is that we
19 can look at publicly available databases. Publicly
16:54:09 20 available databases don't get us an answer to that question.

21 SPECIAL MASTER COHEN: Go ahead.

22 MR. ACKERMAN: Number 10 deals with scientific
23 research that Janssen decided not to publish. The letter
24 that we received last night says for the first time that
16:54:30 25 Janssen doesn't track that information. If that's the

1 answer, we are at least entitled to it in a verified
2 interrogatory.

3 The last one, frankly, and the most -- well, not -- I
4 won't categorize it, but interrogatory number 13, which they
16:54:48 5 have amended, is an interrogatory that asks Janssen: Have
6 you ever placed limits on the amount of opioid products you
7 supplied to distributors, retailers, or endusers because of
8 reports of addiction, abuse, potential diversion,
9 overprescribing, adverse events, or potential suspicious
16:55:07 10 orders?

11 And Janssen didn't answer that interrogatory.
12 Instead, Janssen substituted its own answers, which was:
13 Janssen has abided by the DEA quotas.

14 That's not the question that's asked in the
16:55:20 15 interrogatory. We're entitled to a response as to whether
16 Janssen has placed limits on the amount of opioid products
17 it supplied for those reasons.

18 SPECIAL MASTER COHEN: Okay.

19 MS. STRONG: Sabrina Strong.

16:55:34 20 As to number 6, Special Master Cohen, that's the one
21 dealing with the Porter and Jick article --

22 SPECIAL MASTER COHEN: Right.

23 MS. STRONG: -- that request is extremely
24 broad. It speaks to -- it asks about everybody who has
16:55:48 25 cited that article, whether they worked for Janssen, whether

1 they've been compensated by Janssen in any way, so, in other
2 words, non-Janssen employees. And this isn't something that
3 we track when folks cite articles or don't cite articles.

4 SPECIAL MASTER COHEN: Just a moment.

16:56:02 5 MS. STRONG: We understand -- yes.

6 SPECIAL MASTER COHEN: I'm not sure exactly
7 what I'm reading, but what it says is -- I assume that it's
8 plaintiffs' characterization of its own interrogatory. This
9 interrogatory sought identification of every instance that a
10 Janssen employee cited the publication.

11 MS. STRONG: That's not the request. The
12 request is identify each and every time you, a person
13 employed by you, or a person or entity who received
14 compensation from you cited this article.

16:56:28 15 SPECIAL MASTER COHEN: If it's limited to
16 employee, how does that work for you?

17 MS. STRONG: We don't track what our employees
18 cite. What we have offered to do is that -- we've directed
19 them in the letter -- I don't know if you had an opportunity
20 to read the letter that came in last night, I would expect
21 that you have not, but there's a PubMed database that
22 actually tracks when articles are cited.

23 SPECIAL MASTER COHEN: Right.

24 MS. STRONG: To the extent that -- we've
16:56:49 25 directed them there. If there was materials -- we haven't

1 limited the production in any way. If there's materials in
2 the production that reference it, it would be there. We
3 could search. They could search. But it's equally
4 available to them, as it is to us, but this is not something
16:57:02 5 that we track in any way, so --

6 SPECIAL MASTER COHEN: So have you produced
7 already in discovery all documents where an employee cited
8 Porter and Jick?

9 MS. STRONG: I would imagine that would be
16:57:16 10 encompassed. I haven't asked my team that specific
11 question. But to the extent that it would have been -- the
12 production in this case is quite comprehensive, and so, it
13 would not surprise me if there are references to that, to
14 the extent that it was cited, in the production.

16:57:30 15 SPECIAL MASTER COHEN: All right. If you can
16 confirm you've done that, and then you're done.

17 MS. STRONG: Okay.

18 As to number 10, the scientific research studies that
19 we decided not to publish. The studies, tests, clinical
16:57:51 20 trials, analyses regarding the safety and efficacy of your
21 opioid products that you decided not to publish.

22 Again, that's not something that we track. We would
23 not have eliminated any materials that relate to that in the
24 production. To the extent that there's an indication that
16:58:02 25 something was not published or was published, it's available

1 in the materials that have been produced and they can search
2 for it just as easily as anyone else could search for it,
3 but it isn't something that we track or identify.

4 And there's other arguments here, Special Master
16:58:18 5 Cohen, that go to the proportionality of this request.
6 Something cannot be published for numerous reasons, and the
7 notion to think that it has anything to do with something
8 pertinent to the case is really a bit of a stretch, if
9 you're trying to measure the proportional needs of whose
16:58:37 10 obligation it is to take on this burden to try and search
11 the materials for any glimmer of something that wasn't
12 published.

13 SPECIAL MASTER COHEN: So let's stop before
14 whether it was published. In other words, if the
16:58:52 15 interrogatory asks for any scientific research, tests,
16 trials, analysis regarding the safety and efficacy of
17 Janssen opioids, okay, regardless of when it was published,
18 is that something that you have already produced? I would
19 think probably so.

16:59:06 20 MS. STRONG: Again, given the scope of the
21 production in these cases, I would think that kind of thing
22 would be produced and would be available in the materials
23 that have been produced in this litigation.

24 SPECIAL MASTER COHEN: And then whether it was
16:59:16 25 published, plaintiffs can kind of figure it out?

1 MS. STRONG: Correct.

2 SPECIAL MASTER COHEN: So, again, if you can
3 confirm that your production has already done that much,
4 which is to produce documents relating to scientific
16:59:30 5 research, et cetera, et cetera, regarding Janssen opioids,
6 then I think that you're done.

7 MS. STRONG: Okay. And then, the last is 13.
8 This is placed limits -- let me get to the request.

9 It says: Since 1990, have you ever placed limits on
16:59:47 10 the amount of opioid products you supplied to distributors,
11 retailers, or endusers because of reports of addiction,
12 abuse, potential diversion, overprescribing?

13 On this one, this is a very -- we objected to this
14 question as vague and ambiguous as to what exactly --

17:00:03 15 SPECIAL MASTER COHEN: Not buying it. I'm not
16 really buying that.

17 MS. STRONG: In terms of limits, and so, our
18 reasonable interpretation of this was to turn to the quota
19 data and provide them information about quotas and what
17:00:15 20 we've done to comply with the limitations, assuming that
21 those are some of the reasons why quotas would be imposed on
22 the products.

23 Beyond that, again, I think this goes to the same
24 issue, which is to the extent that there's discussion or
17:00:30 25 documents or materials that speak to a particular response

1 to something, I don't quite know what they mean in terms of
2 limits.

3 What -- what does that mean? What -- and to the
4 extent that there's something in the documents that
17:00:44 5 indicated that there was an incident that happened and
6 that -- and that a limit resulted, that would be in the
7 materials.

8 But I don't know what they're looking for, and so, if
9 they could better articulate what it is that they're looking
17:00:56 10 for, maybe there is something there, or maybe this is
11 appropriate for a deposition.

12 SPECIAL MASTER COHEN: Right. So let me --
13 let me ask plaintiffs.

14 You know, have you ever placed limits on the amount of
17:01:05 15 opioids you supplied? Well, you know, there isn't an
16 infinite amount, even though it may seem that way some days,
17 of opioids that are being given to, you know, supplied to
18 these folks.

19 And, really, again, regardless of reason, okay, were
17:01:22 20 there any limits? Sure. There might have been some limits
21 because we can't make any more than that. There might have
22 been limits because we -- you know, because they couldn't
23 afford more. So this is a little bit vague.

24 But I agree that if there are limits in response to
17:01:38 25 something in particular, that that's something they should

1 produce.

2 MR. ACKERMAN: And that's what the
3 interrogatory says. The interrogatory says: Have you ever
4 placed limits on the amount of opioid products you supplied
17:01:47 5 to distributors, retailers, or endusers because of reports
6 of addiction, abuse, potential diversion, et cetera, et
7 cetera?

8 So it's not have you ever placed limits period. It
9 has -- it's have you placed limits for these particular
17:02:02 10 reasons, all of which, frankly, relate to diversion and
11 relate to the allegations in the plaintiffs' bellwether
12 complaints.

13 With respect to the question of what does limit mean,
14 I think -- I think that word is pretty clear. Have you ever
17:02:18 15 not filled an order? Have you ever decided to ship fewer
16 products than you have in the past? I think -- I think we
17 can use a dictionary definition of the word limit and get to
18 where we need to be.

19 SPECIAL MASTER COHEN: Any response?

17:02:32 20 MS. STRONG: And, again, I mean, this isn't --
21 to think that there's some kind of document saying this is a
22 moment when we're limiting, I think the quotas are really
23 the best indication of the limit of the amount of product
24 that we can produce as a company with respect to any of
17:02:49 25 these products, and so, that's why we're -- you know, to the

1 extent that there was a one-off incident that maybe
2 plaintiffs would perceive as a, quote, limit on something
3 with respect to a particular product, maybe there was a
4 short batch for some reason, I just -- it's an odd request
17:03:05 5 in terms of I don't know how to answer the question.

6 And to the extent that documents speak to it, we
7 certainly would not have limited the documents in any way
8 that would have pulled out materials that they could examine
9 to determine if there's something that they find was a
17:03:19 10 limitation responsive to this request.

11 SPECIAL MASTER COHEN: Explain to me how the
12 quotas work.

13 MS. STRONG: The quotas?

14 SPECIAL MASTER COHEN: Yes.

17:03:28 15 MS. STRONG: So to the extent -- and I'm not a
16 quota expert, but these are quotas that are imposed by the
17 federal government about how much of the molecule can be
18 manufactured by any company.

19 SPECIAL MASTER COHEN: And that quota applies
17:03:42 20 to the amount you manufacture. I'm talking about what a
21 quota to the -- a quota limiting the amount that is sent to
22 any given user, any given client.

23 MS. STRONG: I don't know the details on that,
24 Special Master Cohen.

17:03:56 25 MR. ACKERMAN: I am sure that a bunch of

1 people over here can speak to DEA quotas and can correct me
2 if I am wrong, my understanding is that the DEA quotas are
3 aggregate into what can be distributed wholesale in one
4 year.

17:04:11 5 This is, again, products you supplied to distributors,
6 retailers, or endusers. This is --

7 SPECIAL MASTER COHEN: How about this. How
8 about this.

9 Have you ever reduced amounts? That's really what
17:04:28 10 we're after.

11 MR. ACKERMAN: Yes. For those reasons. This
12 is almost -- this is the flip side of what's been asked of
13 plaintiffs.

14 MS. STRONG: And I would just say, I'm looking
17:04:39 15 at the response that we gave, we cited to an extensive
16 amount of documents that speak to the question of our
17 clients' compliance with the DEA quotas in the response.

18 SPECIAL MASTER COHEN: Yeah. But that's a
19 different quota.

17:05:02 20 It seems to me that you should be able to answer the
21 question: Have you ever reduced amounts of opioid products
22 that you supplied to a given distributor, retailer, or
23 enduser because of et cetera?

24

17:05:16 25 MS. STRONG: Okay. Well, we wouldn't be

1 providing to any enduser.

2 SPECIAL MASTER COHEN: Fine. Retailer or
3 distributor. Have you ever reduced the amount of opioid
4 products that you supplied to a distributor or retailer
17:05:27 5 because of et cetera? I think that's a question you should
6 be able to answer.

7 MS. STRONG: Okay. And it wouldn't be a
8 retailer either. Distributor I think is the --

9 SPECIAL MASTER COHEN: Whatever. Any person
17:05:37 10 to whom you supply, whatever characterization you give them.

11 MS. STRONG: Okay.

12 SPECIAL MASTER COHEN: Okay?

13 MS. STRONG: Understood.

14 SPECIAL MASTER COHEN: All right. Thank you.
17:05:48 15 All right. I believe 12 has been resolved?

16 MR. ACKERMAN: Correct.

17 SPECIAL MASTER COHEN: Thank you.

18 And as long as we're talking about resolved, I believe
19 15 has been resolved too?

17:06:19 20 MS. WELCH: That's our understanding, Your
21 Honor.

22 SPECIAL MASTER COHEN: Thank you.

23 So we have 13, 14, 16, and 17.

24 MR. ACKERMAN: Special Master Cohen, 17 has
17:06:27 25 been resolved.

1 SPECIAL MASTER COHEN: Beautiful. So we have
2 three more.

3 MR. ACKERMAN: We did that at the break.

4 SPECIAL MASTER COHEN: Just because I want to
17:06:37 5 do one that's a little bit more discrete, number 16, with
6 Anda search terms, are folks here to talk on that? Is that
7 going to be on the phone? Anybody here in the room talking
8 about it?

9 Hold on just a minute.

17:06:58 10 Hi, this is Special Master Cohen. I just unmuted the
11 folks on the phone. Is anybody on the phone ready to talk
12 about the question?

13 MR. NOVAK: Yes. Yes. This is Paul Novak on
14 behalf of the plaintiffs, Your Honor.

17:07:11 15 Although, I think the discussion will be fairly brief.
16 We're still conferring on these issues and we'll probably
17 have another session tomorrow.

18 MS. KOSKI: This is Katy Koski on behalf of
19 Anda.

17:07:25 20 I agree. This should be tabled. We have a call set
21 for tomorrow.

22 SPECIAL MASTER COHEN: All right. Would it
23 help you folks if I set a deadline? I mean, it's been on
24 the agenda for over a week. You can tell me no.

17:07:38 25 MR. NOVAK: No. I -- I think a deadline would

1 be fine.

2 (Pause in Proceedings)

3 SPECIAL MASTER COHEN: All right. All right.

4 You know, this is one of the things where -- well, let me
17:07:54 5 just dig into it just a little bit.

6 Is the only issue that's left the question of whether
7 the street names are going to be included in the search
8 terms or is there something more than that?

9 MR. NOVAK: Street names, as well as some of
17:08:10 10 the branded equivalent product names for which I believe
11 Anda only sells generic versions.

12 MS. KOSKI: This is Katy Koski again on behalf
13 of Anda.

14 We did have a discussion about branded product names
17:08:28 15 and we -- that's the area that we did have some substantive
16 discussion about, including branded products that we do, in
17 fact, sell into the CT-1 jurisdictions.

18 The separate issue where we haven't really had any
19 substantive discussion between the parties is with respect
17:08:46 20 to the street names.

21 So I think we're really close on the addition of some
22 of the brand name drugs, but we haven't had any real
23 discussion about the street name issue.

24 SPECIAL MASTER COHEN: Okay. Well, I do think
17:09:03 25 you need to fully resolve this soon. Until you resolve it,

1 you're not doing searches, at least not some searches, and,
2 therefore, productions aren't coming in, and, therefore,
3 documents aren't available for deposition and so on. This
4 needs to be tied up.

17:09:17 5 A couple observations. One is I know that the comment
6 has been made: Why do we have to look for -- excuse me --
7 search names when no one else was asked for street names? I
8 suppose the answer might be that somebody got smart and
9 asked for things that everybody else maybe should have asked
17:09:35 10 for. I'm not sure that that's a reason not to include them.

11 I also observed, as I said before, you know, sometimes
12 you might be better off doing it now because, otherwise, I'm
13 going to have to perhaps conclude that, yeah, maybe that
14 should have been done, and the second time around it gets
17:09:51 15 done. So you're better off just doing it now.

16 Those are -- I'm not telling you that that's the way
17 that you should decide this. I'm just giving you some of my
18 thinking and hopefully it will help you lead to a
19 resolution.

17:10:03 20 In any event, we will decide at the end of this
21 conference when you all are going to meet next with Special
22 Master Yanni, and by that time you're either going to need
23 to fully resolve this or give it to her for resolution.

24 SPECIAL MASTER YANNI: I can give you the
17:10:21 25 answer to that.

1 The conference -- conference with me will be held on
2 October 30th at 2:30 Pacific, which is 5:30 Eastern.

3 MR. NOVAK: Okay. Speaking again for the
4 plaintiffs, I think the Special Master's comments were
17:10:56 5 helpful and I'm hopeful that we'll be able to resolve this
6 shortly, before the 30th in any event.

7 SPECIAL MASTER YANNI: Thank you.

8 SPECIAL MASTER COHEN: All right. I think we
9 have two and a half things left.

17:11:06 10 I'm going to put the phone back on mute.

11 All right. Allergan's responses to plaintiffs'
12 interrogatories, who wants to take a swing at this one?

13 And I'm also curious whether this is ripe. I just
14 don't remember whether I've seen positions from both sides.

17:11:39 15 MS. BAIG: Good afternoon, Special Master.

16 Aelish Baig on behalf of plaintiffs.

17 This is an issue that is continuing from last week.
18 Last week, you will recall that you ordered that the parties
19 meet and confer regarding language that Allergan should use
17:11:52 20 to provide assurances that it is affirmatively looking for
21 discovery information from all Allergan entities that have
22 had -- that have had opioid involvement.

23 So the day after your hearing, we proposed language to
24 Allergan. We sent it over. And the language we proposed
17:12:12 25 would provide essentially those assurances. We heard

1 nothing back regarding our proposed language. We asked
2 again to meet and confer on the issue, didn't hear back
3 until last night when they supplemented all of their
4 discovery responses with their proposed language, which, in
17:12:29 5 our view, is insufficient for these reasons.

6 First, it carves out all of the entities that it sold
7 to Teva, even prior to the 2015 sale. So while Teva can
8 respond certainly to interrogatories post-2015, Teva can't
9 respond to what Allergan and its predecessors' procedures
17:12:52 10 were in place prior to the 2015 sale.

11 Additionally, it states that -- the language that they
12 proposed states that they are not withholding info, but it
13 does not state that they are affirmatively searching for
14 responsive discovery information from the various Allergan
17:13:14 15 entities.

16 Moreover, with respect to the supplemental
17 interrogatory responses that were served last night, those
18 are responses which we have been waiting now for five months
19 because, as you're aware, we were -- they had carved out
17:13:30 20 generics completely from those responses and from all other
21 discovery responses, so we had not yet received any
22 interrogatory or other discovery responses with respect to
23 generics at all.

24 Last night, when we got the supplemental
17:13:44 25 interrogatories, and I have them here for you if you'd like

1 a copy, the substantive response that updates with respect
2 to generics for each and every question basically states,
3 after a boilerplate paragraph of objections that's included
4 each time: Pursuant to Federal Rule of Civil Procedure 33,
17:14:06 5 Allergan Finance LLC refers plaintiffs to its production of
6 products.

7 So after waiting for five months for supplemental
8 interrogatories and other discovery responses, this is just
9 an example, six were served last night, each and every one
17:14:20 10 basically states: See the documents, without even
11 identifying which documents we should be looking to.

12 And I will -- I would also point out that the very
13 first production of generics documents came in last week.
14 It was very limited.

17:14:33 15 And as you know from your discovery ruling number 5,
16 you have previously ruled that simply pointing to business
17 records is not sufficient in terms of an interrogatory
18 response.

19 And if you'd like a copy of it, I can approach and
17:14:47 20 hand it to you.

21 SPECIAL MASTER COHEN: Sure.

22 MS. BAIG: This particular copy just has the
23 statement that I read to you marked in yellow for the
24 response.

17:15:20 25 You will see there language also which is listed in

1 footnote one with respect to the Allergan entities issue.
2 We would simply ask that you order them to include in the --
3 in footnote one the Allergan's entity issues that they are
4 producing herein in response to the discovery requests, all
17:15:41 5 responsive discovery from all Allergan entities that have
6 had any opioid involvement.

7 SPECIAL MASTER COHEN: This one really does
8 make my head hurt. I think maybe my hard drive just got
9 full.

17:15:56 10 Who's going to respond?

11 MS. WELCH: Donna Welch for Allergan Finance,
12 Special Master Cohen.

13 And I think there are two separate issues here. The
14 first is the footnote that you requested that we amend to
17:16:21 15 make clear that we were, in fact, searching for custodial
16 and noncustodial documents, notwithstanding entity, for any
17 Allergan affiliate that might have touched opioids, and we
18 have done that. I'll get into the details of the footnote
19 amendment in just a moment.

17:16:44 20 The second issue is the substantive responses on
21 generics, which I thought we had agreement on, would be
22 tabled until after the 30(b)(6) deposition that is taking
23 place later this week. Apparently, that is not correct.
24 But I'll attempt to address it and to explain again the box
17:17:04 25 that Allergan Finance is in on that issue and what we're

1 attempting to do as quickly as we can to provide the
2 information that plaintiffs want.

3 Ms. Baig has said that in the footnote that we
4 amended, which we believed was fully accurate and
17:17:23 5 comprehensive, that we are carving out the entities we sold.
6 We are certainly not carving out the entities, the Actavis
7 generics entities that were sold, with respect to any
8 documents that relate to those entities that Allergan
9 Finance or any Allergan affiliate may continue to possess.

17:17:46 10 Those are the documents that have been ordered,
11 produced in your discovery ruling 4. They are being made as
12 part of a joint production with Teva on behalf of Allergan
13 Finance and the Actavis generics entities given the
14 duplicate nature of the documents and the requests.

17:18:08 15 So we are not carving out those entities for purposes
16 of production. We have carved out those entities to say we
17 don't represent them, we cannot respond to discovery
18 requests on their behalf.

19 But we have made abundantly clear, as I represented
17:18:29 20 and as we state in the footnote, that when we have gone to
21 look for documents, we are looking at any documents that are
22 currently possessed by any Allergan affiliate that relate to
23 those entities, subject to the agreed upon search terms and
24 custodians. And by agreed upon search terms, I mean the
17:18:52 25 ordered search terms from discovery ruling 4 that had been

1 agreed to by Teva and the plaintiffs.

2 Next, Ms. Baig says that we say we are not withholding
3 documents but we don't say we are affirmatively searching
4 for documents. First, that's incorrect. We state clearly
17:19:16 5 in the footnote that Allergan Finance has searched, has
6 searched, not that we're not withholding, but that we have
7 searched custodial and noncustodial sources regardless of
8 whether those documents or information are owned by Allergan
9 Finance or another Allergan affiliate.

17:19:37 10 We go on: Allergan Finance has not limited its
11 searches to Allergan Finance or employees who are Allergan
12 Finance employees. Indeed, many of the custodians from whom
13 documents and information are being produced were never
14 employed by Allergan Finance.

17:19:55 15 Further, Allergan Finance -- here is where we do say
16 it's not withholding. We hoped that was helpful in addition
17 to what we were searching, that we were also not withholding
18 on that basis, that we are not withholding responsive,
19 non-privileged documents or information from affiliated
17:20:13 20 entities or employees working for affiliated entities,
21 including PLC.

22 SPECIAL MASTER COHEN: All right. I get it.
23 You're good on that. There's -- it would be nice if you
24 said searching and producing, but I'm assuming that that's
17:20:25 25 true, so --

1 MS. WELCH: It's true.

2 SPECIAL MASTER COHEN: Okay. Go ahead.

3 MS. WELCH: With respect to the -- so I think
4 that addresses the footnote.

17:20:33 5 With respect to the substantive responses, again,
6 we're responding to interrogatories that were posed to
7 Allergan Finance. Allergan Finance does not have a
8 businessperson there or a person available to the entity
9 that we can go to to get substantive answers about generics.

17:20:58 10 That is why we said we are working literally day in,
11 day out to prepare a 30(b)(6) witness on the topics that
12 they've given us. That witness is being deposed this week.
13 We hope that will go a long way to or fully resolve the
14 issue.

17:21:18 15 But in terms of substantively responding to the
16 interrogatories, there was no physical way for us to do
17 that, and that's why we sought clarification from you about
18 what you were seeking in your discovery ruling 4. And what
19 we thought it was --

17:21:37 20 SPECIAL MASTER COHEN: Let me just cut this
21 off. We need to get on the other side of this deposition.
22 There's nothing I can do. We've gotten to an equipoise last
23 week. We have to have this deposition first and then we're
24 going to see what happens. I can't think of anything else
17:21:53 25 to do. Maybe it's just because I'm tired, but I think we

1 have to get on the other side of that depo.

2 MS. WELCH: We agree. The witness is being
3 prepared, materials are being prepared with the witness to
4 hand to counsel to help aid in the deposition. We're
17:22:06 5 working hard to do it.

6 SPECIAL MASTER COHEN: Yep. I mean, there's a
7 lot riding on it, but let's --

8 MS. WELCH: Anything further than that is
9 going to have to be based on review of the documents that
17:22:17 10 are being produced, and we're -- we're not in a position to
11 do that today.

12 MS. BAIG: May I have a moment in response?

13 SPECIAL MASTER COHEN: Yep.

14 MS. BAIG: We're fine with -- we're preparing
17:22:29 15 to take the deposition on Friday, and that's fine, we can
16 revisit the entities issue after that deposition.

17 With respect to the interrogatory responses, you know,
18 I would -- I would point out that we don't actually need the
19 deposition in order to get substantive information about
17:22:44 20 generics from Allergan.

21 Right now, each one of those interrogatory responses
22 refuses to provide such information, and -- and it's
23 important information. If we're asking about, for example,
24 scientific research, studies that they relied upon, and
17:23:04 25 they're carving out the Actavis entities -- and I know you

1 want to get to the entities issues later. That's fine.
2 Teva will respond post-merger. But who is responding to
3 that information prior to 2016? Nobody is.

4 And who's telling us what type of involvement Allergan
17:23:22 5 had with the front groups, with the American Pain Foundation
6 prior to 2016? Allergan and its predecessors. Nobody is
7 responding to that because they're punting that off to Teva
8 and Teva will respond post-2016.

9 SPECIAL MASTER COHEN: I'm not denying
17:23:39 10 anything that you've asked for. I'm just saying I think we
11 have to wait until after the depo.

12 MS. BAIG: Understood.

13 Can we get substantive responses to the
14 interrogatories, though, within the next week on the
17:23:51 15 generics issue?

16 MS. WELCH: There's no physical way to do it.

17 SPECIAL MASTER COHEN: Yeah. The answer is
18 no.

19 MS. WELCH: What we --

17:23:59 20 SPECIAL MASTER COHEN: Let's get on the other
21 side of the depo.

22 All right. That was 13.

23 Number 14 is the production of -- and, Sarah, this
24 is -- I'm going to say IQVIA, I-Q-V-I-A. We're all going to
17:24:12 25 talk about IMS and IQVIA data.

1 MR. JANUSH: Good afternoon, Special Master
2 Cohen and Special Master Yanni.

3 This is Evan Janush appearing.

4 So this began as a letter to the defendants following
17:24:28 5 up on an interrogatory that was universally served many
6 months ago seeking sales tracking data, seeking suspicious
7 order monitoring data, electronic data, marketing data,
8 physician perspectives that were tracked by companies like
9 IQVIA.

17:24:49 10 To put this into perspective, IQVIA is the successor
11 to IMS and Quintiles. They are the largest data mining
12 company in the nation, if not in the world. Many of the
13 defendants in this room, and outside of this room, utilize
14 IQVIA and other companies like them.

17:25:07 15 So to start with my letter, my letter on October 11th
16 just sought to kick off, can you confirm for us the -- the
17 years that you have provided your IQVIA data for the drugs
18 that are covered? If you have missing data, if -- if there
19 is missing data, that you'll produce it. And if you can't
17:25:26 20 produce it, that you'll confirm you'll be like Allergan and
21 go back to IQVIA and ask for the data to be produced.

22 And we heard virtually crickets. We got a couple
23 of -- a couple of responses, Mallinckrodt and Purdue, and at
24 2:00 a.m. this morning, after teeing up this issue further
17:25:45 25 with the Court, we got a response from Janssen acknowledging

1 that they are missing years of data and that they will be
2 looking for that data, the prescription level data, and if
3 they can't find it, that they will seek to have it
4 repopulated by their vendor.

17:26:00 5 Now, that only really addresses one part of this
6 equation. That's the granular. Most of these defendants
7 that are responding are addressing prescriber level data.
8 That's not the only thing that I'm seeking to address before
9 this Court. That is just a part of the equation.

17:26:22 10 Special Master Cohen, you've gone to some great
11 lengths to elucidate and advise the folks that are in this
12 room that you understand what marketing means. You get
13 marketing. In fact, you didn't find problems with the
14 plaintiffs' definition of marketing and included a broad
17:26:44 15 definition in your ruling, your discovery ruling number 2.

16 And in that discovery ruling number 2, and in the
17 definition of marketing, you specifically kept the notion of
18 reports. What I am speaking to are the sales reports, the
19 marketing and sales reports nationally that these
17:27:04 20 defendants, many of these defendants, subscribe to.

21 I gave you just the three that I -- that I had from
22 IQVIA, and only portions thereof, that confirm the DDD
23 database, the NSP database, and the National -- the National
24 Sales database. One Key is also mentioned.

17:27:27 25 Why did I do that? Because this is not granular sales

1 data. NSP is a six-year audit. You get the NSP report, you
2 get six years of audit data in that report.

3 Why is that NSP relevant? Which I have not yet seen.
4 I have not seen a six-year data report from any defendant in
17:27:50 5 this litigation. But why is it important?

6 Because it provides contract pricing, including such
7 discounts processed via wholesalers, chargeback
8 transactions. Chargeback transactions, which are at the
9 very epicenter of how did we get here, how did we get to
17:28:10 10 this problem, because we had drug wholesalers contracting
11 with manufacturers, selling a drug -- to sell a drug at a
12 contract price, and then they would sell it for less than
13 that contract price and get a rebate, a chargeback that
14 encouraged them to keep selling that product.

17:28:32 15 Well, who -- who did it better? We don't know. We
16 don't have the NSP data. We know they subscribed to it. We
17 don't have it.

18 DDD. Best thing I can say about the DDD database is
19 the depiction that I gave you from IMS in that very brief
17:28:52 20 pictorial that I sought to just kind of provide a little
21 more detail to the Court with pictures so you're not buying
22 my words. This is what IMS, predecessor to IQVIA, is
23 saying, this is what we did. We populate data that shows
24 every transaction in the stream of pharmaceutical commerce,
17:29:15 25 we populate the report, and these folks bought it, and we

1 don't have it.

2 Now, the defense to that is, well, you have pieces of
3 it in noncustodial productions. I saw that in Janssen's
4 response and I commented back, so hopefully, Special Master,
17:29:32 5 you saw my e-mail in response to that.

6 Getting a slide of what happened in a given region
7 showing we need to target these physicians in the context of
8 a PowerPoint is woefully different than getting the entire
9 report and understanding how manufacturers, how distributors
17:29:56 10 looked at the market.

11 Where were they weak? Where were they strong? Where
12 were physicians' perceptions analyzed? Who got those
13 reports? What physicians to target based on -- based on
14 potential?

17:30:12 15 Don't believe my words. Go on IQVIA's website. Look
16 up One Key. One Key, it's illuminating to read what One Key
17 offers the pharmaceutical defendants.

18 SPECIAL MASTER COHEN: So the point you've
19 been making is that it's relevant and you've asked for it,
17:30:28 20 right?

21 MR. JANUSH: And not received it.

22 SPECIAL MASTER COHEN: Why?

23 MR. JANUSH: That's why I'm here today before
24 Your Honor.

17:30:34 25 SPECIAL MASTER COHEN: All right. So has it

1 been objected to?

2 MR. JANUSH: Well, not that I -- not that I'm
3 aware of as being -- you know, this is --

4 SPECIAL MASTER COHEN: You said you've gotten
17:30:46 5 some of it, pieces parts?

6 MR. JANUSH: What we got was prescriber level
7 data. So what the focus has been on defendants is focusing
8 on what that electronic data means, we're giving you
9 prescriber level data, sales data, except for Mallinckrodt
17:31:00 10 that gave sales to distributors.

11 SPECIAL MASTER COHEN: One of --

12 MR. JANUSH: It's been ignored is what I would
13 posit.

14 SPECIAL MASTER COHEN: One of the
17:31:10 15 communications that I got talked about repopulating and
16 costs.

17 MR. JANUSH: Yes. So, absolutely, if a
18 defendant does not have this -- I had numerous meet and
19 confers with IQVIA, and to be completely forthright so you
17:31:24 20 understand, earlier you asked a question of a -- an attorney
21 up here and your question was: Why wouldn't you just go to
22 the third party? I did. I could show you a laundry list of
23 meet and confers. I could show you multiple e-mails. I can
24 make you a binder until your eyes are more exhausted than
17:31:40 25 you feel right now.

1 But the problem is this: IQVIA, they are correct in
2 one small point, they don't -- they say we don't keep the
3 data once we populate the report. We would have to re-run
4 that data for you --

17:31:57 5 SPECIAL MASTER COHEN: Right.

6 MR. JANUSH: -- and you're not our client.

7 SPECIAL MASTER COHEN: Right.

8 MR. JANUSH: So we won't re-run it for you.

9 But you can go back to the defendant and you can ask them
17:32:05 10 for it, and if they don't have it, they can come back to us,
11 pursuant to their licensing agreement and for a fee, they
12 can repopulate the data.

13 Allergan, to their credit, did just that. They got
14 prescriber level data repopulated. They are, through this
17:32:27 15 date, the only defendant that I'm aware of that has taken
16 that action.

17 SPECIAL MASTER COHEN: All right. I think I
18 get it.

19 Who wants to respond?

17:32:42 20 MS. STRONG: I'll take a stab. It's Sabrina
21 Strong.

22 I do believe that this would benefit from additional
23 meet and confer, Special Master Cohen, because we responded
24 to what we thought the requests were in his recent letter.
17:32:58 25 There were three specific topics. We provided responses and

1 actually believed that the issue would have been resolved
2 pursuant to the responses.

3 We received a response back I think this morning that
4 was very extensive and very much into the details about
17:33:12 5 this, and I think it would be best to have the folks who are
6 in the details on this on the respective teams talking about
7 it.

8 I can tell you at a high level that we produced all of
9 the IMS data that we had. And to the extent -- and it was
17:33:25 10 for a certain period of years. That's all that we were able
11 to find in reasonably accessible sources, and we then we've
12 noted that there may be additional IMS data in custodian
13 files, that's correct.

14 As to the repopulation question, we were not aware
17:33:39 15 that the company would even consider repopulating, but we
16 represented that we would contact the company and engage in
17 a discussion with them about that.

18 One question -- one issue that I do believe is
19 something that will have been to be fleshed out is that
17:33:52 20 company provides information that goes beyond opioids, and
21 we believe it's possible that some of the data that the
22 plaintiff has some insight to from the company may not
23 pertain to opioids. So that's something we'll have to work
24 out, but I think this is something that can be addressed on
17:34:09 25 a one on one basis with each of the defendants and likely

1 resolved.

2 SPECIAL MASTER COHEN: Let me hear from other
3 counsel.

4 MR. JANUSH: My apologies.

17:34:20 5 MS. MAINIGI: Good afternoon, Special Masters
6 Cohen and Yanni.

7 I'm Enu Mainigi on behalf of Cardinal.

8 If you look at the document cited in the agenda next
9 to item 14, which is page 1950, and you also look at, which
17:34:31 10 I don't believe is included and I unfortunately don't have a
11 copy, but the October 11th letter that Mr. Janush refers to
12 here, they are both letters from plaintiffs' committee to
13 manufacturers.

14 This issue has not been raised with Cardinal before.
17:34:49 15 I was surprised last night at 10:45 p.m. to receive an
16 e-mail sweeping Cardinal into this issue. If Mr. Fuller and
17 the plaintiffs' counsel with whom we have our meet and
18 confers and discuss discovery disputes with wishes to come
19 and meet and confer with Cardinal about this issue, we are,
17:35:10 20 of course, all ears and happy to speak with them.

21 But I don't think it is fair to draw in Cardinal and
22 any other defendant who has not been subject to those meet
23 and confer letters and has not been speaking with the
24 plaintiffs about this.

17:35:23 25 SPECIAL MASTER COHEN: So here's what I think

1 needs to happen. I agree that this is a pretty new issue
2 that would benefit from additional meet and confers and
3 discussion with the parties.

4 I think that this topic needs to be a discrete topic
17:35:40 5 that is included in the discussion about letters that the
6 parties are going to share. I'm looking for Pete. This is
7 important, and this needs to be discussed discretely in the
8 letters that talk about where we are on production of these
9 things.

17:36:01 10 MR. JANUSH: May I posit something to the
11 Court?

12 SPECIAL MASTER COHEN: Go ahead.

13 MR. JANUSH: Given the passage of time, given
14 the notion that this is in our interrogatories and that the
17:36:11 15 data that we're seeking is -- should not be unexpected from
16 the defendants, I think it would be beneficial if the Court
17 would be willing to enter some type of determination
18 requiring each defendant to confirm the data vendors that
19 they utilized for such reports, such as the DDD, such as the
17:36:36 20 NSP, such as the National Sales Audit, the NSA, such as the
21 prescription reports where the -- where prescriber habits
22 are identified and populated regionally and nationally so
23 that companies can get a sense of prescriber likes,
24 dislikes, et cetera --

17:36:59 25 SPECIAL MASTER COHEN: So --

1 MR. JANUSH: -- just so that we can move the
2 ball forward.

3 SPECIAL MASTER COHEN: Right. So at the end
4 of your letter, you list -- there are three paragraphs
17:37:07 5 saying plaintiffs seek from each manufacturing defendant, et
6 cetera, right?

7 MR. JANUSH: At the end of my letter, I do
8 list three paragraphs, correct.

9 SPECIAL MASTER COHEN: And the first one is a
17:37:16 10 confirmation that the defendants have produced all of the
11 prescription level and other sales tracking data files?

12 MR. JANUSH: Correct.

13 SPECIAL MASTER COHEN: Right. So what you
14 just suggested is different from any of these three
17:37:26 15 paragraphs, correct?

16 MR. JANUSH: It just provides more detail.
17 Not -- not different. Not fundamentally different at all.
18 If you read the -- the -- a confirmation -- the confirmation
19 that defendants have produced all the prescription level and
17:37:43 20 other sales tracking data files that they acquired, the
21 sales tracking data files are precisely what I'm speaking
22 to.

23 SPECIAL MASTER COHEN: Right. It is so ruled
24 that at the end of your letter, the paragraph numbered 1 is
17:37:59 25 something that all defendants need to do.

1 I think of that as part of the letter that's going to
2 happen already. I just think of that as something that's --
3 I -- that I expect will occur by virtue of the earlier
4 directive.

17:38:15 5 MR. JANUSH: May I move on to subparagraph 2,
6 because I think that that would help cut to the chase a bit
7 at this late date as well?

8 SPECIAL MASTER COHEN: Well, as to 2 and 3,
9 which I have read, I think that that falls close to the part
17:38:28 10 of things where you need to meet and confer. I'm not saying
11 you won't get it. I just want to -- I want you all to meet
12 and confer and talk about this before we address it again.

13 MR. JANUSH: Okay. Thank you, Your Honors,
14 for your time.

17:38:44 15 SPECIAL MASTER COHEN: Okay. I think, Pete,
16 that I asked you to remind me of something that I didn't
17 want to remember at the end of this?

18 MR. WEINBERGER: Yes. Before the room empties
19 out, that you have an opportunity to talk with them about
17:38:56 20 the priorities and --

21 MR. RICE: We wanted to start the meet and
22 confer while everybody's in town.

23 SPECIAL MASTER COHEN: Right. Right. And
24 people are leaving even as we speak.

17:39:04 25 MR. RICE: As soon as you say we'll talk about

1 it later, everybody left.

2 MS. STRONG: There's flights. People have
3 flights.

4 MS. WELCH: Yeah, I have a flight.

17:39:14 5 SPECIAL MASTER COHEN: I'm not going to make
6 anybody miss a flight. Do your best. You all really should
7 hit that hard. We are at the end of a very important
8 period, and the next one begins right after it.

9 And as I said, I don't have many tools left in my
17:39:32 10 toolkit except to spank people, and I really don't want to
11 do it.

12 MR. MOUGEY: Special Master Cohen, the issue
13 about the amended complaints and ARCOS, the number of
14 defendants we're going to have on the deadline by
17:39:43 15 November 15th, I've talked to Enu quickly, it was, what,
16 today's -- just in the last 24, 48 hours, I spoke with Mark
17 Cheffo as well, can we get some mechanism set up to figure
18 out what the next step is, if any, or just --

19 MS. MAINIGI: I'm waiting to hear back from --
17:40:10 20 I sent your request out, Peter, and I'm just waiting to hear
21 back from people with thoughts.

22 MR. MOUGEY: My concern today, Special Master
23 Yanni, you said that we weren't going to get together again
24 until 10-30. If we can't get any resolution, we're two
17:40:25 25 weeks in front of that amended complaint deadline.

1 SPECIAL MASTER COHEN: Is the counsel from
2 Mallinckrodt here still?

3 SPECIAL MASTER YANNI: No.

4 SPECIAL MASTER COHEN: I didn't think so.

17:40:37

5 All right. Everybody, thank you all very much for
6 your patience and long attention spans.

7 Safe travels to you.

8 SPECIAL MASTER YANNI: Thanks, everybody.

9 - - -

10 (Proceedings concluded at 5:40 p.m.)

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C E R T I F I C A T E

15 I certify that the foregoing is a correct transcript
16 of the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

17 /s/ Sarah E. Nageotte 10/24/2018
18 SARAH E. NAGEOTTE, RDR, CRR, CRC DATE

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