

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX SS.

SUPERIOR COURT  
CIVIL ACTION  
NO. 95-7378

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COMMONWEALTH OF MASSACHUSETTS, \*

Plaintiff \*

\*

vs.

\*

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PHILIP MORRIS INCORPORATED, R.J. \*

REYNOLDS TOBACCO COMPANY, BROWN & \*

WILLIAMSON TOBACCO CORPORATION, \*

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

TOBACCO COMPANY, NEW ENGLAND \*

WHOLESALE TOBACCO CO., INC., \*

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

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

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

Defendants \*

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BEFORE: SOSMAN, J.

Thursday  
July 16, 1998  
Cambridge, Massachusetts

Patricia Bellusci  
Official Court Reporter

APPEARANCES:

GEORGE K. WEBER and THOMAS SOBOL, Assistant Attorneys  
General for the Commonwealth

MARSHALL SIMONDS, THOMAS GRIFFIN and PAUL E. NEMSER, ESQS.,  
for Philip Morris

PETER J. BIERSTEKER and THEODORE M. GROSSMAN, ESQS.,  
for R.J. Reynolds

Thursday  
July 16, 1998  
Cambridge, Massachusetts

(10:07 a.m.)

THE CLERK: May I call the case, your Honor?

THE COURT: Please.

THE CLERK: Docket number 95-7378, Commonwealth of Massachusetts versus Philip Morris, Inc., et. als. The Honorable Martha Sosman presiding.

Will counsel please identify themselves for the record?

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

MR. SIMONDS: Marshall Simonds, counsel for Philip Morris. And I'd like to introduce two new counsel, Ted Grossman from Jones, Day, counsel for RJR; and Peter Biersteker, also from Jones, Day, Washington Office, counsel for RJR.

MR. NEMSER: Paul Nemser, counsel for Philip Morris.

MR. WEBER: George Weber, Assistant Attorney General.

MR. SOBOL: Thomas Sobol, Special Assistant Attorney General.

THE COURT: The first item on the agenda is an update with regard to the Commonwealth's damages model. I've received some materials from the defendants, and then the Commonwealth's position. I have not yet been able to get through all of the various attachments and exhibits, but at least the subject matter of what's in the Commonwealth's status report, the narrative portion, I have had a chance to review.

Where do we start?

MR. SIMONDS: If you'd like, the defendants will begin, your Honor?

THE COURT: Certainly.

MR. SIMONDS: We have furnished the Court with two abbreviated pieces of material, abbreviated in part because of time constraints, and in part because of the fact that we were trying to provide information to the Court that was responsive to models that were being delivered even as we were trying to analyze them.

I want to begin with the very simplest differences that I think are not in dispute. And I assume the Court has read the transcript pages which provide the background and the context --

THE COURT: I've read them or I remembered them. Your description of them was

consistent, quite frankly, with my own recollection of that.

MR. SIMONDS: I'm confident it was. And I don't plan to spend time on telling the Court what the Court is already familiar with.

I do want to mention first off, that prior to that argument which I happened to initiate at the hearing in early November, we had in fact, and during the lengthy period of collecting documents, made the issue of the model and their damage calculations, an early demand. As early as February of '97, we had requested information in a document requests.

In June of '97, when we were trying to prioritize the documents that were critical, we made the request again. And I think as you know, through the fall, when we were coming to the CMO issues and the schedule, we again were saying the timing of our discovery and the adequacy of the time for our discovery means that it's critically important that we get this information about the model and have it for an adequate time.

So that I think that there is no surprise involved for the Court or for any party in discovering that when we are confronted with what we have today, what we think is grossly inadequate time, we believe it has a very important adverse affect on our ability to defend ourselves.

Now, having said that, let me make several obvious comments. One is, the report that was filed was filed by six academic figures associated with Harvard or Cambridge-based organizations, called the Cambridge Team, none of whom have been involved in any of the tobacco litigation around the country that I'm aware of.

We have had three of those people, Dr. Epstein, Dr. Cutler, I believe, and Dr. Newhouse, identified as experts who will testify. None of those people have been deposed, examined, reviewed or evaluated in any of the other litigation. We have submitted an affidavit by the econometrician mathematician, who will be our principal expert and advisor, William Wecker.

We have asked Dr. Wecker, in the limited time he had available, to focus not on what he thinks about their model in a substantive way, but what the time problems are for the analysis of the model. And his evaluation is set forth in the affidavit, which I have to say, unfortunately, is not yet signed but we will provide a signature page, and I so represent to you. We had to deal with Dr. Wecker on a boat off the coast of Alaska in order to get this

affidavit reviewed, and that's why it was so late reaching the Court.

However, the points that Dr. Wecker made are in the affidavit, and we can go through them, and perhaps it's useful to go through them and emphasize them.

THE COURT: Well, I've reviewed his affidavit, and there are a couple of things that are not in that affidavit that I should perhaps just ask you directly about.

How much -- I mean, he talks about how many man-hours he had to use between himself and his staff working on these issues in other cases. But he does not translate that into how many weeks, months, years that amounted to in those cases. Nor does he give me an estimate of how long it will take him on this case, he thinks.

I mean, five thousand man-hours is a meaningless figure until you know how many people that five thousand hours is being spent by. If it's one person, that's a lot. If it's a 150 people in his office, that's another. I have no idea what five thousand hours means in his world.

MR. SIMONDS: Let me try a preliminary answer to that. And that answer is that at least at the time we tried to obtain this affidavit, we could not get an adequate answer to that question for the reason that Dr. Wecker has not yet received, nor have we received, the software programs which permit him to understand the methodology to identify the steps that he must go through in replicating the calculations. We haven't got that yet.

In, for example, Oklahoma, which happens to be a Ness, Motley state as well, the expert there, a man named Harrison, provided basically a table of contents and a memorandum that said, Here are the working tools I used to sort the data and input it and make the evaluations.

They included sensitivity analyses. They included a discussion of methodology. We don't have that. We have asked for it. We expect we will get it, but we don't have it yet.

Without looking at that at this stage, there's inadequate knowledge on the part of Dr. Wecker to give an accurate answer.

THE COURT: Can you answer the historical question? When he refers to having spent six thousand hours analyzing the data on one of these cases, and another five thousand hours on another, what did that translate into?

MR. SIMONDS: Let me give one more answer, and see if it can be more specific.

The plaintiff's experts, by their own

statement, worked from early March to --

THE COURT: I want to know what Dr. Wecker means when he says it takes five thousand man-hours to review it?

MR. SIMONDS: Dr. Wecker's advise to us, estimated, is that it will take him at least as long as it took the plaintiffs. And the reason for that is that he not only has to duplicate, replicate, evaluate their work, but also develop his own alternative and critique; in fact, develop what amounts to a different model in order to prepare a report that lets us join issue on this critical aspect of the case.

THE COURT: All right. How much time did he spend on the other cases?

MR. BIERSTEKER: I may be able to respond to that, your Honor.

Peter Biersteker from Jones, Day. I've worked with Dr. Wecker in a number of jurisdictions. I can tell you he's got approximately ten professionals in his office. It's not 150 people.

In Mississippi and in Texas, Mississippi I know for certain, I think we had a period of about four or five months from the time we got the disclosures by the plaintiff until we had to submit our own expert reports and make our experts available for deposition.

The time period in which we had to respond in Minnesota was shorter than that. We had approximately two months from the time we got the final complete disclosures from the plaintiff until the defense experts had to respond. However, the Minnesota model that was presented in that case used the same data set and was very similar to, in some respects, the models that were employed in Mississippi and in Texas. And so, we were able to respond more quickly in that event. But it still was five thousand hours in order to do the Minnesota work.

We managed to do it in two months. We were very lucky we were able to finish it. We had longer in Mississippi. And I think it will take at least as much time here if not more because of the very significant differences in what the model presents here compared to what it presented in the other cases.

THE COURT: Anything further?

MR. SIMONDS: Would it assist the Court if I went through the differences that are identified in Dr. Wecker's affidavit? Or have you already absorbed that?

THE COURT: Well, I've reviewed them, but I have also reviewed the Commonwealth's

version that these differences are not differences that are new. The Commonwealth says some of them are differences because people like Dr. Wecker in other cases have told us you should be using this survey instead of that survey. In other words, they're saying, to the extent that we've done things that are different, we've done things that have already been thought about, looked into, talked about, and in some instances recommended by the defendants themselves, that's not novel. It seems to me it's a product of your own expert's prior critique that they say they are now taking into account.

MR. SIMONDS: The representations on the plaintiffs was that they expected to use substantially the same experts and the same model with a tweaking for Massachusetts.

At the time they made that representation, there was available to them knowledge of the critiques that had been made. So they were aware that they had been critiqued. Those critiques which they relate to provide their excuse for changing the model.

I'm not here to quarrel with you that they weren't entitled to go to a different model if they wanted to. They are permitted to try their case in the way they believe most effective and that's not the ground for our complaint.

Our complaint is that they made a conscious choice to change the model in ways that extended the time that we needed to respond, very substantially. They made that decision months ago.

You may recall that my partner, Mr. Parsigian, was arguing on the issue of recipient discovery, referring to the 1987 NMES database. That was within, I think, less than a month, but maybe a little more than a month ago, in this court. Not a word from the plaintiffs that NMES was no longer a part of this case. They weren't going with that model.

They made the decision to change. They spent a long time preparing it. They had to delay a month getting information in. They haven't yet gotten the information to us that we need, the critical information to understand what their experts did. And they rebut it by saying, well, we criticized their earlier model.

It is true that there were some criticisms. What is not true is that those criticisms were based on a review and evaluation of the data their experts are relying on. Dr. Wecker has not gone through, for example, NHIS.

THE COURT: But to the extent that what

the Commonwealth's experts are doing is essentially following up on a suggestion made by the defendants themselves, that it is at least a suggestion that the defendants and the defendants' experts have thought about, are familiar with, maybe haven't nailed it down in every final precise calculation and thought, but they're the ones who have come up with the idea that, Gee, maybe you should take into account this additional factor.

MR. SIMONDS: Your Honor, let me interrupt you --

THE COURT: There's novelty in the sense of an approach, a concept, a database that no one's ever thought of or come up with before as opposed to, we haven't seen this precise thing actually done, but we have thought through, at least conceptually, what might be involved before, and it's a database that at least we are familiar with, even if we haven't actually cranked numbers through it before, there's a big difference.

MR. SIMONDS: Let me make a response to that at two levels. First off, my quick reading of the filing which we got at the end of the day yesterday from the Commonwealth is that there was an attorney's rebuttal that asserts that we had certain information and used certain information and so forth. I believe that information is, in material ways, very incorrect.

But secondly, even assuming that in a critique of an earlier model in another state alternative data sources were pointed to, that did not involve any expert, Dr. Wecker or anyone else, in taking that data, anticipating how an opposing witness might use it, extracting the data, evaluating it and studying it.

What happens when you get a model like this is that you have to understand what assumptions, what data extraction process, what use of particular data, what weighing of data was done by the expert. You have to understand how they did it. That requires that you replicate it.

What you replicate is what they did; not what you might have speculated about or looked at before. And we have never - Dr. Wecker has never used a substantial number of the databases that are involved in this four-part model.

It is brand-new information. He doesn't have the databases. He has not studied them. The fact that he critiqued somebody for not considering an alternative database should not be read by the Court as a decision that we have evaluated it and we've been laying in wait to use

it.

You can't do that in this econometric model. You have to wait for the model to come out so you can understand what it is they're going to use; how they're going to use it; how they're going to weight it and what they're going to do with it. That in part is why it took so long, even though we were going with the same basic model, when you move from Mississippi and Texas to Minnesota.

This is a very complicated business and it is critical to the trial of this case. It is not something that we can do within this time limit because we ought to be familiar with it, or we knew the databases were out there, or somebody took a peek at one. We have not done that study. We have to do that study and we have to replicate their model before we can understand what the challenge is; what we're attacking. The earlier criticisms did not permit that.

THE COURT: Let me ask you what your bottom line is looking at the case management order itself, what changes in any of these dates are you now asking for based on this, what you say is his problem?

MR. BIERSTEKER: Your Honor, if I might just add a little bit. Peter Biersteker again.

The state is partially correct when they say that what they appear to have done responds in part to the criticisms that defendants have had elsewhere. For example, in none of the prior models was exercise a factor that was taken into account in trying to determine what portion of the health care expenditures made by the state were due to smoking as opposed to something else that people did.

And the state's model here does take exercise into account. But the defendants never recommended that the state use the National Health Interview Survey, a database that we have not used in econometric modeling in the past.

The defendants did not suggest that the state use the National Nursing Home Survey, which we had never even heard about before, when they try to do their model for nursing homes.

The defendants did not suggest to the state that they use the National Maternal Infant and Health Survey, which we had never heard about until the state submitted its report in this case. Those were not suggestions we made.

The defendants did not suggest that the State of Massachusetts, or any other state, compare utilization rates: how many times somebody went to the doctor, how many times they

went to the hospital, and how long they stayed when they went as opposed to how much money they spent.

All the prior analyses that were done with these econometric models focused on the dollars spent as opposed to the utilization made. I think that change that the State of Massachusetts made is an affirmatively bad change and it's not one that the defendants suggested.

So in answer to your question, it seems to me that in substantial part, this model is the creation of the plaintiff's own experts and not done in response to criticisms that the defendants had anticipated, that the defendants had earlier articulated, or were made at the suggestion of defendants and that the defendants are --

THE COURT: I understand. There are very differing views about this. But I'm looking at page 6 and 7 of the case management order. What changes to which of these dates are you asking for based on this situation?

MR. BIERSTEKER: Well, your Honor, for two reasons, I think that I would like to extend the date on which defendants have to make their disclosures under the case management order with respect to the model, and that's the only date that I would propose that we change.

THE COURT: Okay. And what are you saying you need to change that to?

MR. BIERSTEKER: I would like three months, your Honor, or more, from the time that the State of Massachusetts delivers to the defendants all of the information that we need in order to do our work. That still hasn't happened. We still don't have the computer codes and formulas that they used. We still don't have all the data. We're still missing information. A lot of material has come over the transom over the last couple of days, but we still don't have it all.

Now, from the time that we get it all, I would ask that we get three months. And I don't know when the State intends to deliver all of it. My understanding is that they hope to do so very shortly. But from that time, we should have, at a minimum, three months in order to present the reports from the defense experts on the model issues. That's what we need.

THE COURT: All right. Let me hear from the Commonwealth.

MR. SOBOL: Good morning, your Honor.

I'd like to make one particular point which I think is illustrative of the balance of

the argument. I do want to go a little bit into what it is that our experts actually did so that you can understand that it's building upon reactions from prior critiques in other cases.

But going to the heart of the matter, which is, how much time do the defendants really need, and what have been their responses to you on that particular question here today?

Mr. Biersteker reported to you that it only took the same gentleman, Mr. Wecker, with his staff, two months to deal with the Minnesota report. And his indication to you here today was, though, that was possible because the Minnesota report was very similar to what had gone on before, which is why they were able to deal with it in two months.

That's not, however, what Mr. Wecker has testified to in his affidavit. Because in his affidavit, what he says at paragraph six, third line from the bottom, was that the "Minnesota statistical models and data analyses were substantially different from the models presented in Mississippi and in Texas."

So it seems to me that the expert is saying that I was confronted by something substantially different, but was able, nevertheless, to get this accomplished within, according to Mr. Biersteker, a two-month period; Mr. Biersteker trying to accomplish something different with you, indicates however, no, Minnesota was really, in his words, very similar to what had gone on before. So I think they don't necessarily say the same thing, depending upon what result they obviously want to be able to accomplish.

The points raised by Mr. Simonds are essentially these. First, that they had tried to raise the issue of the damages model and issues at an early point in time, and that's true. They did raise the issue of receiving discovery last year, and in fact they got it. They got a huge amount of MMIS data tapes late last summer.

But what's remarkable is that apparently they didn't do anything with that with Mr. Wecker from that period of time all the way until today because Mr. Wecker has testified under oath in his affidavit that he's not familiar with the MMIS; that he hasn't dealt with it. So you have to wonder, well, you know, what was he doing in that period of time? Was there any real effort by the defendants on their own part to gear-up; to have Mr. Wecker and his staff ready, come the summer of 1998, for Massachusetts, so that they could deal with the time frame constraints of the

CMO. It does not appear that that's the case; that Mr. Wecker is sitting around waiting in earnest to get going.

Another point raised by Mr. Simonds was in fact that for the past month since they've had the methods report, until even today, Mr. Wecker hasn't been asked to start the work of doing the job of analyzing this. Instead, what he has been asked to do is deal with the time problem. In other words, help them prepare for delay; not help them prepare the case.

In addition, your Honor, there is -- it's important to point out this. The defendants have received everything from the Cambridge team, including not only their analyses, which is why I apologize that I had to burden your Honor with the fairly voluminous submission, but obviously it's important in deliberating on this issue to know what they have gotten, at least in terms of the summary reports, which I've provided you.

But in addition to that, all of the data sets that they have relied upon have been provided to the defendants. The analyses appear as appendices and that kind of thing, so that it would enable Mr. Wecker and his staff to be able to respond to the Cambridge team's work.

There is some work ahead. There is some level of intelligence, understanding expertise, that we have assumed that the defendants' experts have. So, for instance, we assume that if we send them something like -- and this is an analogy -- an ASCII disc that has some information on it, that they have their own software program, like Microsoft Word, or WordPerfect, or something like that, to run it.

Well, econometricians, day in and day out, deal with databases. They're confronted with the database. In order to run a regression, they pick up their regression software and they run their regression software.

Now, it would be a little bit silly to think that Mr. Wecker and his staff aren't capable of running regressions, or they need to be given the software of the Cambridge team in order to be able to do that, and they need to be taught how to type in the letter T, and the letter H, and the letter E to be able to replicate what it is that the Cambridge team did. That's essentially what they ask when you talk about econometricians facing that kind of activity.

The data sets, too, are not from Pluto. These are data sets that are very familiar to health care economics, the NHIS. It's been around

for many many years. It's one of the most common used data sets. Anyone who is involved in the area of health care economics, knows of it, hears of it, deals with it. And in fact, contrary to repeated representations to you here today, Mr. Wecker himself has testified under oath, in State Attorney General tobacco litigation, that he has received the NHIS data set, and he has listed the NHIS data set as one of the bases upon which he has critiqued other state tobacco experts.

The backup to that is not in the materials that have been filed before you. However, if your Honor wishes, I can provide the affidavits or the photocopies of the transcript of the deposition pages in which Mr. Wecker discloses that plain fact.

That is not novel of course, my indicating that Mr. Wecker is familiar with the NHIS. It shouldn't come to anybody's surprise. He has been working on at least six State Attorney General tobacco litigations, and was previously involved working for the tobacco industry, and he's going to be an expert in the area of health care economics, of course he's familiar with it. He couldn't help but be.

The issue regarding the defendants need to wait. Essentially they haven't needed to wait. They, the defendants, repeatedly have insisted for the past year, on the front-loading of information from the Commonwealth. And if we look at the three particular areas where information gets crunched here, you'll see that the Commonwealth has done everything it can to make whatever the defendants wanted available, available.

First, there can be no question that anybody is quibbling about the defendants ability to respond to prevalence, smoking prevalence: how many people smoke in Massachusetts. Those data sets are all well-recognized. There can't be any mystery. There's no mysteries in any of these reports. And then we have to figure out how many people have smoked, and historically, how many people have smoked. There's no issue there. There should be no big issue.

And even if, by the way, the defendants were starting from square one today, I think your Honor, if you looked at the tables that are set forth in the Cambridge team report, it is immediately and intuitively obvious how it is that the numbers get arrived at, and how any person performing math would reach those numbers. So the issue of prevalence is not a matter.

Second, the issue of expenditures, how

much money has the state, through the Medicaid system, spent. Well, that has occurred in three -- excuse me, two basic areas: the electronic data tapes that have been provided to the defendants many many months ago; and in the form of HCFA-64 or other HCFA information which has been provided in hard copy long before, or at least before the filing of these reports. So the expenditure information is available.

And then the third area is, how it is that one derives, SAFs, smoking-attributable fractions, from a variety of different data sets. And their data sets, again, the one relied on here by the Cambridge team on the inclusive approach, is the NHIS, of which they are familiar. It is essentially another data set that an econometrician would look at and say, All right, what do I have to spread along my X column. How many, you know, people, do I have along my Y column in order to establish my matrix and to be able to plug in and run my regressions.

And in order to replicate it, that's what any econometrician would do, is they would set up their spreadsheet and they would run similar kinds of regressions to see if they could replicate the numbers.

The SAFs on the disease-specific approach are, what are the smoking attributable fractions for, for instance, lung cancer, how many lung cancer diseases we'd want to attribute to cigarette smoking. Well, that's straight out of the Surgeon General's Report. There's no mysteries there being given either.

Now, there are ways to quibble around the edges. For instance, in each one of the states that economists have approached this issue, there are areas where the data ends up having to be either state-specific or dealt with anew. For instance, the area of low-birth-weight babies.

Well, in the Massachusetts model ultimately the Cambridge team's very conservative approach, which essentially follows the same disease specific approach, comes with such a very conservative number of about \$20 million, that it's only one percent of the total dollar number that we're talking about here. So that really would fall in the area of tweaking, trying to figure out a number that would be associated with low-birth-weight babies, and essentially following the disease-specific approach.

So essentially, to make a long story short, from the Commonwealth's point of view, the defendants' experts approach the project that is in front of them in the following posture.

They have experts who, according to his own testimony, for at least three of the states, he and his team have already spent 11,000 hours studying Medicaid damage expert opinion testimony in State Attorney General tobacco litigation. That's to the exclusion of any of the other time and effort Mr. Wecker has spent in his career being an econometrician, or working for the tobacco industry, either outside of the litigation context, or inside of one. So they start essentially having gone around the track three-quarters in terms of what they need to know.

What else do they start with? They start with the fact that they've had the Medicaid Claims Paid data tapes for ten months. They start with the notion that they are able to, and have, weighed one way or the other, as a utilization as opposed to an expenditure based SAF, good or bad, what are the general theories there. What are the general strengths and weakness of the NHIS database as opposed to the NMES database. What are their strengths and weaknesses on a theoretical basis as to any database that people have used that's essentially known and fairly easy to address.

So what's the real work then that they have in front of them? Well, on the inclusive approach, they're probably going to want to replicate what was done, so they take the data that's been provided to them; they run a regression to be able to see if they can mimic the results, and then they're going to want to spend four, five weeks, poking it and pulling it to see if there are ways, according to their own, of doing a sensitivity analysis to be able to point out anomalies, trying to find out if there were three or four bike accidents that were within a certain grouping, that kind of thing.

Their real work of what they want to do is just to find the anomalies on that side. And what do they have in front of them on the disease-specific approach?

Well, again, if they really feel constrained to replicate what the Cambridge team did, then what they will do is want to run through the MMIS data tapes, not the 15 years that our experts did, but the five most recent years because we're dealing with a time period substantially smaller than what we did before. And they'll have to run that through.

That's why ultimately the Commonwealth, when we come before you today, we try to have a balanced position. On the one hand we recognize

that we've already asked the indulgence of this court for some additional time to make sure that the data crunching that was undertaken by this group, who is new to tobacco litigation, but was able to accomplish the task of understanding everything out there, and then coming up with their responses to the defendants concerns. And undertaking all the work in four and half months, being brand new, that would -- our position is that while we should recognize that there should be some extension, because we took three and a half weeks, or almost four weeks longer to get the file report in, that any further additional time, if it's to be granted, should be granted not for any of the reasons that have been given to you here today.

If there are other reasons that we haven't been given: Mr. Wecker is too busy representing so many different states that his staff is too, you know, inundated with time, or that the professionals simply just need more time to be able to deal with this for any variety of personal or other legitimate concerns, then that would be a different matter.

The Commonwealth's position is simply that a reasonable similar time to the defendants essentially running the same two months from the time that we gave them the last report, which was July 11th, is appropriate, but for the reasons stated, no additional time is necessary because this is exactly what the parties anticipated.

THE COURT: What is your response? What items do you think, if any, the Commonwealth still needs to turn over?

MR. SOBOL: I don't think that there is anything that needs to be turned over. I need to check with my associate regarding one particular small database that I believe has been provided to the defendants. If it hasn't been provided to the defendants, it's a matter of a day or two.

I also don't know, because I haven't had time to check, whether this is a database, which I highly believe it is likely, that the defendants have had all along anyway. It's a well-known, recognized database. We've been providing them recognized databases anyway. So with the exception of that, the answer is, no.

Now, if the defendants have anything in particular else that they need, for instance, if it turns out Mr. Wecker doesn't have software to run regressions, and he needs our software package, well, then I guess we'll give it to him. And if he doesn't know how to run that software package with this data, well, if they ask us

that, I guess we'll have to teach him that. But those are the kinds of details that we're really being asked here for.

I have reviewed with three of our experts, Mr. Wecker's report, and they candidly do not understand how it is that an econometrician can take a well-known, recognized health care database, see the regressions that have been run by our group, and not run the regressions themselves. Because our experts say when we ran the regressions, we didn't have to go back and get trained by Glenn Harrison or Len Miller or Vince Miller, or anybody else, how to run a regression or to get their software package to see what they've done before. This is what we do day in and day out, is run regressions.

So the specific answer is that maybe one minor one that I need to check with my associate, but apart from that, our understanding is that they have everything.

MR. SIMONDS: Your Honor, there are a couple of specifics that Mr. Sobol spoke to that relate to facts which Mr. Biersteker is more familiar with than I am because of his prior involvement, and I want to ask him to respond.

THE COURT: Yes.

MR. SIMONDS: In particular, I have in mind the MMIS familiarity issue for Dr. Wecker, and I also have in mind this latest business that somehow the state seems to think that we need to be educated on how to run a regression, whereas I think --

THE COURT: Maybe if either you or Mr. Biersteker articulate what are these items that you say are missing that you need before your people can even get started?

MR. SIMONDS: Let's see if we can address that.

Let me say this, this delivery of data sets which Mr. Sobol calls for, it was quarter of six last night when one of those data sets arrived in our office, and it was about six o'clock the night before that an earlier data set arrived. So that the notion that these data sets have been all provided, if in fact they have been, is a notion that was extremely current. I mean, if that is a complete delivery of the data sets they relied on, it just happened.

THE COURT: Mr. Biersteker?

COURT REPORTER: Could you speak a little louder, please.

MR. BIERSTEKER: I'll do my best.  
Sorry.

A couple of things. One, what we are

missing and what I didn't hear the Commonwealth say they were going to give us, but it had been my impression prior to this that they would, were the actual computer programs used by their experts. And let me explain that.

It isn't that our experts need to go to school to learn how to do regression analyses. They know how to do that. But as many econometricians and statisticians, health care economists as there are, there can be that many different regression equations.

Now, they've given us the stack, sort of description, a verbal description of what it is that they have done. And they have described it in sort of a generic way. But the devil is in the details. The devil is in the details.

And we want to see how they get from step one to step two, to step three, all the way to the end, so that we can analyze the logic which is contained in their computer programs so that we can exactly replicate the results so that we know that we're doing the same thing and --

THE COURT: All right. Let me -- I hear Mr. Sobol saying that is standard regression analysis software. Is it something else? I mean, the man has his own. Why doesn't he try running it on his own and see if he comes up with anything different?

MR. BIERSTEKER: Your Honor --

THE COURT: If he comes up with something different, then I can understand he really wants to look at the Commonwealth's, but has he tried running it with his own?

MR. BIERSTEKER: Well, we have just received it, number one. And number two -- and it keeps changing -- we've only gotten the data. We still don't have all the data on which to run it, or perhaps don't have all the data. It's my understanding we're still missing one data set, and we only got some of them last night at about six o'clock. So, no, we haven't undertaken that effort.

But what I'm saying is, it's a fundamental misconception to think it's like WordPerfect, which is the analogy that the plaintiff's used.

The plaintiff's experts wrote their own computer programs. They didn't go down to CompUSA and buy a regression package off the shelf and plug it into their computer, and voila, let it run on the data. They had to write their own computer programs. They've written them. There's no reason on God's green earth why the Commonwealth cannot give those computer programs

to us.

And I tell you, the replication, even just the pure mechanical replication, taking their computer program and applying it to the data, is not something you can do with the snap of your fingers. It just isn't. That has been our experience.

And the notion that they've now told us everything we need to know to understand how they did what they did, is laughable. They had five Harvard economists and statisticians working on this for four and a half hours -- four and a half months, rather. If they had to spend that much time putting it together, how do they expect us to recreate the whole thing based upon a very cursory written description.

I'm asking for the formulas. I'm asking for the computer programs. We've gotten them in every other state. We're entitled to the them here, and there's no good reason why they can't give them to us. That's the first thing.

The second thing as to the MMIS data. We have had the MMIS data for a period of time. We have done some analyses of the MMIS data. But the State of Massachusetts has done a fundamentally different analysis using that data than has been done elsewhere. This is set out in Dr. Wecker's affidavit at paragraph 19. We have not gone back and tried to do that. There's mountains of this data. Mountains of it. Hundreds, if not thousands of the standard sort of computer disks that you use in your PC contain this data. It requires a whole lot of effort. It requires, in some instances, special hardware, bigger computers in order to be able to do it. It's a very time consuming process, and they have ambushed us, having said they're going to give us a *deja vu* model, they come out now with something that is very very different than something that we have seen elsewhere. And they expect us to have done the analyses. We're responding to them. We look at what they did. And we try to take a look at it, and we try to make sure that they did what they said they did, right. We try to look at sensitivity analysis.

And now, let me get to what I think is the bottom line, unless there is another question that your Honor has, but what I think is the bottom line. I don't see that we're all that far apart. I heard the Commonwealth -- the Commonwealth says in its submission on page 8, in footnote 9, that it is reasonable to expect that defendants replication of the disease-specific results -- he's not even talking about the

inclusive model -- just the disease-specific results could be accomplished in one month. All right?

But we also have to replicate the other analyses that they've done, the inclusive approach that they did not address. So you can add some more time for us to replicate those results.

And then, I just heard the Commonwealth say it's going to take four or five additional weeks on top of that to do sensitivity analyses. You bet you. It's going to take that long to do it. And after we finish those sensitivity analyses, all we have done is analyze what the state has done, and poked some holes in it. And then we're going to do our affirmative analyses, and lo and behold, where do you end up if you add three weeks onto that? At three months, exactly what I asked for.

We're not that far apart. We're not crying wolf.

THE COURT: The difference is you're asking for three months from a date that isn't yet ticking under your version. There's the rub. There's the rub. I mean, there is not a big difference in fact between what's in the case management order, tack on for your side a comparable extension to what the Commonwealth's asked for, there's not a lot of difference between that and three months, if the three months is ticking now.

It's this notion that it's going to be three months from the date you say you're satisfied you've got everything, and I must say, I do have a suspicion that if I bought into that theory, I could hear for the next several months how you really just still don't have everything.

I need a date certain, and if there are things that you say you are missing, identify them, the Commonwealth will be required to get them to you. And if they don't and you need a change on a deadline because of it, we can then talk about that. But it's the open-ended quality of three months from when we think we have everything that is the problem.

Pick a date. Let's pick a date certain.

MR. BIERSTEKER: Well --

THE COURT: It seems to me, indeed with these dates we're talking about, that it should not have any impact on any other dates that remain in the case management order. This is an independent problem.

MR. BIERSTEKER: I agree as to that last statement. It should not affect any other dates.

And the information is generally -- that we want -- is generally described in paragraph 3 of Dr. Wecker's affidavit. We want their State's experts' final and complete damage estimates. I understand, at least, and I'd like to hear them say, that what we've gotten is final and complete and they're not going to change it anymore. It's not a moving target. It's fixed.

I would like to get all the data. I understand that we're missing one data set. I don't know when the state can give it to us. We'll check that and we'll make sure. But as soon as they can get it to us, we'll have the clock start ticking.

The other thing we need --

THE COURT: I'm not going to wait to have the clock start ticking. I'm going to set a date today that is the date.

MR. BIERSTEKER: I'm trying to describe what it is we need. We need the formulas and computer programs that their experts wrote and actually ran to get the bottom-line number that appears in their reports.

We need, if there are manuals that come with the data sets that define what the different fields are in the data, in other words, when the data says smoking, what does that mean? You know, there's a definition contained in the data set that will tell you what that means, and we need those definitions to the extent that we haven't gotten them.

And finally, if the state has done sensitivity analyses of their own, if they've tested the validity and reliability or statistical significance of the results that they got, we would like to get that information as well. They haven't talked about that in their reports. I haven't seen any of that information, and we certainly don't have the computer programs that relate to it.

We've got orders from other courts that spell out very clearly exactly the different things that need to be produced, and I'll be happy to supply those to the Court if you think it will be helpful. But that basically is the information, the information contained in paragraph three of Dr. Wecker's affidavit which generally describes what we need. And now the clock can start, as soon as the state tells us they can get us that, that's fine. And whatever that date is.

THE COURT: As I've told you, that's not the approach I'm going to take. I'm not going to have the clock not starting ticking awaiting the

outcome of further arguments about whether you've been given this or that. We're going to set a date specific by which your stuff is due back, your expert designations and disclosures in the form of summary narratives and exhibits. I'm going to adjust the date in that column on the case management order.

MR. SOBOL: May I be heard, your Honor?

THE COURT: Yes.

MR. SOBOL: First, I agree, your Honor, that it isn't necessary to have a date for that. I think we've learned in this litigation that there are no such things sleep or weekends anyway, so if we have the specific requests and, you know, we just basically work around the clock to be able to get it to the defendants and try to do it as soon as we possibly can. So I think that any date would actually be longer than it would actually take us to be able to do it, so long as we have the information, that's the way that we try to handle these things.

In terms of what a specific date would be, I have a comment and then a suggestion. Working in this area is somewhat like having to go to prison, and I'm just asking that the defendants' sentence run concurrent not consecutive. When they're doing their work, they should have to be running concurrent sentences, doing -- walking and chewing gum at the same time, rather than trying to spread it out over an entire three month period.

I just spoke with Mr. Weber. Our view coming in here today was that the Commonwealth thought that a comparable one month extension would be appropriate, which would be from August 16th or thereabouts, to September 16th. And we'd like to modify that to try to be magnanimous and move this along. If the defendant's date instead would be September 30, I'm assuming that's not a weekend day off the top of my head, that provides them six weeks essentially to be able to do this. And if there's anything specific that they don't have right now, they can call me this afternoon and we'll be working over the weekend to get it to them. That's our request in any event, your Honor.

And Mr. Weber has indicated, and I think it's important, we offered to give them anything that they want. I mean, if they want something in hard copy, they want some of the software, they want a meeting, or they need to know some more information, whatever it is that they want, so long as it's not, you know, attorney-client privilege, they'll get it.

THE COURT: Yes?

MR. BIERSTEKER: Provided that the Commonwealth can deliver the materials we talked about, and in particular, the computer materials that their experts wrote and used in the next two weeks, September 30th would be agreeable to us, your Honor.

THE COURT: Well, what I will do, I will simply amend this date to -- let me double-check the calendar. September 30th is a Tuesday. I'll simply change this date to September 30th. I'm not making that date at this point contingent on any particular thing. If there is a problem --

MR. BIERSTEKER: Your Honor, I'm sorry. I don't mean to interrupt. For a guy who does damages stuff, I can't subtract very well and I got my calendar mixed up. They propose September 30th, and I am in a time warp, I guess, and missed the fact that that's really only two and a half months.

I would very much ask for -- if we get October 15th, that's only, basically, three months from today and it has no time built in it for us to get the materials we want, which the State has not made a commitment to get other than to -- in a specified period of time.

Assuming the State can deliver it one week from now, I think October 15th is the date that we would ask for instead of September 30. I apologize.

THE COURT: Okay. October 15th is a Wednesday. Since after all, I notice this, after all, is a disclosure to which the Commonwealth does not owe any response. It's purely at that point a matter of trial preparation, and these, after all, defendants' experts, would not be taking the stand until fairly late in the proceedings, I would anticipate, next winter. So October 15th.

But, again, just because I keep hearing this from the defendants, this, well, October 15 is alright if, I am not setting any such specific conditions or contingencies. I am simply changing this date. That's all I am doing. And if somebody thinks they need to extend that date further, explain why, but there's not going to be -- I am not going to entertain a, "well, that date was set on the condition that they get us the following things in one week, and they didn't get it to us for a week and a half, and therefore" -- I'm not setting any specific conditions. I'm just changing the date.

So it's October 15. All right, now --

MR. GRIFFIN: Your Honor, could I bring

up one other date issue that I just want to alert your Honor to.

There is another date you'll see on the case management order time table, which is, September 15, if I recall, for summary judgment motions.

It is clear to me that one of the summary judgment issues will be the use of the model, or whether there is something by way of a summary judgment issue we can present to your Honor that deals with whether that model can and should be used. So my thought is not to move September 15th on summary judgment. Every other issue that we can present will be presented on September 15. The question is, we may need to ratchet back for one carry-over issue, which is, if there is a summary judgment issue presented on the model, that date has to follow October 15th.

THE COURT: Well, I disagree with that.

It seems to me the issue on summary judgment, any issue on summary judgment, does not require - does not require the kind of, you know, checking out every last little thing that you might criticize or talk about, because the standard on summary judgment is so favorable to the non-moving party.

It seems to me that if there are such gross, glaring problems with the Commonwealth's model that they would literally result in summary judgment in favor of defendants, those are the kinds of big conceptual glaring defects that Dr. Wecker ought to be able to identify for you in time to make that conceptual argument in a brief filed September 15th.

That does not require him to find every, you know, every little thing where they might have over calculated this, or under calculated that. It's, is the model so grossly defective that it just, you know, isn't even admissible or that it comes out to zero as damages. I mean, is there something so appalling about it.

It seems to me, errors that big, errors that big, Dr. Wecker ought to be able to identify in time for the September 15 filing, understanding these people are going to spend another month before disclosing their version and all of their other criticisms or problems or things they found when they've played with it. But that's very different from a summary judgment standard.

MR. SIMONDS: Your Honor, on that issue, can I ask for the Court to consider a refinement of the position you just stated?

I think, in talking about this before we came here, the defendants are agreed that

whatever issues that are appropriate for summary judgment that can be invoked under the model as we know it should be dealt with without any extension of scheduling.

If, however, as we analyze the model, there are factual issues that call for an additional summary judgment motion that cannot be made until the analysis is complete, we would like to reserve the right to argue that issue to the Court and to look for a later date for that portion of the summary judgment briefing and argument. And we think it not unlikely that that kind of an issue will arise and be appropriate for consideration by the Court; not because of egregious errors, but because of the need to understand the model in order to appropriately brief the summary judgment arguments.

THE COURT: On summary judgments where the purpose of that argument I will have to weigh everything in favor of the -- in favor of the Commonwealth, it would seem to me it would take some, as I say, glaring error, some defect of a type that would make the entire thing collapse, not just, well, it's a gross overestimate, or it's a -- you know, they failed to take this into account so it needs to come down for that, but something that would make the entire thing collapse. And, again, where Dr. Wecker has looked at a number of these issues before, he ought to be able to identify those for you in time for your September 15th filings. So I do not intend to make any amendment or adjustment to the September 15 date at this point.

MR. SIMONDS: Your Honor?

THE COURT: Yes.

MR. SIMONDS: Can we have a date designated by the Court for the additional production from the Commonwealth?

THE COURT: No. I am not, because I do not hear clearly what that difference or dispute is. And discovery problems, you're supposed to meet and confer before I entertain them. I'm not going to set a date in advance of any time that the parties themselves have sat down to hammer out what additional items it is you say you need.

Mr. Sobol says, identify it and we'll provide it to you even if we think you don't really need it.

MR. SIMONDS: If I understand the argument that has occurred before the Court this morning, we look like we're ships passing in the night. Mr. Sobol has identified WordPerfect and our ability to run regression analysis, and Mr. Biersteker has identified the software program

and formulas, and definitions, and manuals that these particular experts used. That's the basic stuff we're missing.

THE COURT: Well, I understand that's your position, but discovery problems like that are supposed to be subject to meet and confer before I take them up. And I don't intend to take them up this morning in the absence of that having taken place. So I'm not -- that's why I'm not setting some interim date about this production.

Okay. Anything further before we move on to the next agenda item, which I gather are other discovery issues, and there was going to be an update about where we stand on those.

Yes, Mr. Griffin?

MR. GRIFFIN: Agenda item number 2, your Honor, a brief report as the agenda calls for.

Last week, Friday, July 10th, there was a meet and confer of counsel to deal with various issues. Included were two issues: the expert discovery questions, and questions about the Commonwealth's request to admit as to the authentication of its documents.

I would simply report, in the course of that meeting, both sides identified issues that were of common concern, and figured out a tentative approach to how to deal with them so that we don't need to take your time today. And just let me just describe what it is we talked about and what we're going to do about them just so you have a heads-up.

On the issue of expert witness discovery issues, it was identified that both sides had concerns that needed to be addressed about whether there was a need for expert witness depositions, who they should be, what they should be, whether we need not replicate what's already been done unless there's something new vis a vis an expert who has previously testified or been deposed in another case.

There are a bevy of new experts that we'll have to deal with. We have decided that issue needs to be addressed. The issue of closure of expert witness position's has to be addressed. Everybody is hedging that they need time to supplement, will supplement as needed, but the risk to both sides is that the failure to close doesn't allow us to come to grips with what it is we're going to be dealing with at trial.

Having identified that as a common issue, we have decided to set up what's worked for us in the past in terms of moving ahead on the Court's business, which are subcommittees, a

defined group of counsel to deal forthwith with that issue, come to grips with it, and see what common ground we can work out in terms of dealing with the issues.

On the second issue that we identified on June 30th to raise with your Honor today was the question about responding to the Commonwealth's request to admit, authentication of documents. We've got 12,000 documents which we are supposed to respond vis a vis authentication.

I think everybody agrees, both sides, because both sides have the same interest, to come to some common ground, short-listing what's really important. And again, we have tried the tried-and-true method, which has helped us get to the protective order, the CMO and whatever, which is, to set up a subcommittee; both sides will identify who will be on these committees and will deal with those specific issues, not only authentication of documents, perhaps, but a preview of how to use documents at trial, by what computerized technological approaches.

So rather than have to report any more than that, I think we're basically at work and we'll report to your Honor as soon as we can, if we can, come to agreement on issues; if we can't come to agreement, that we present it to you in the appropriate way under the CMO.

THE COURT: Along those lines, another issue that I wanted to raise today in light of some of the discussion we had last time, and that I would like taken into account in dealing with this issue of both document authentication and organizing things in terms of exhibits. I have become deeply concerned that the way we were dealing with the privilege claims has become chaotic, and is problematic for me, and I think for the parties, and will become disastrous at trial.

Part of it, I think, for everybody concerned, including myself, is that privilege claims which are normally a discovery problem are, in this case, largely a motion in limine problem because events have overtaken us, documents or the vast bulk of them that were in dispute on privilege issues are now in the Commonwealth's hands anyway, and it's a question only of admissibility at trial, not use during discovery, or not discovery itself. And I am concerned that we are becoming side-tracked with what are essentially motion in limine problems at a time when the parties themselves still have important true discovery issues that they both need to address and will need my attention on.

I am also very concerned that by taking the documents in the piecemeal way that the Commonwealth has been submitting them to me, we have -- I mean, at even the most fundamental logistical level, problems. They're all being given the same numbering. And I can see coming up at trial, oh, no, the judge ruled that number 48 was this; or, oh, no, that was number 48 of the set we heard in July, not the set we heard in August. I mean, chaos. We are building up to terrible levels of chaos.

It does seem to me, where it is a motion in limine issue, and yet it will take more time than the time we have allotted for the true motions in limine at the very end in December and January, that what we ought to be doing is indeed setting a time where this is a matter of an exhibit list, and I'm working off of, and everybody is working off of, an exhibit list that is on one comprehensive list, one comprehensive chart, and that they come in to me -- I know it's going to be a huge volume. I'll have to do nothing but that for quite some time. But it lets us all do it once; let's me see all the documents in context, a clearer chart where everybody knows what's been done, what hasn't been done.

On some of the documents, we also have the problem, particularly if I find that the Commonwealth has made a prima facie showing of crime-fraud, that then shifts over and there's a need for rebuttal, or we're doing rebuttal at the same time we're doing other things, I think it gets very very confusing.

It's very hard for me, also, to be sure in my own mind that I'm being consistent about some of the balancing that has to go into an analysis of whether a particular document is predominately non-legal advice as opposed to predominately legal advice. That's a standard that, whether I'm setting it correctly or incorrectly, I ought to at least be setting it consistently across the different categories of documents.

And taking a look, a brief look at the next set that the Commonwealth had sent in, it's, you know, it's documents that are in some ways similar to ones that I've already seen and ruled on, and I'm trying to handle it consistently, I can't do it piecemeal.

I think we need an exhibit list, and I think the parties had mentioned the possibility of a kind of a, you know, an exhibit list, that's then a chart where we keep score of, you know, what the parties' positions are, what rulings I

have already made, what still needs to be dealt with on the defendants' rebuttal, and we get final.

Some of the things also are coming in and people are telling me on the day that it's being heard, oh, we're withdrawing our privilege claim on that; or, oh, the Commonwealth isn't seeking it anymore; that these things could be much better mapped out with a lot less confusion if we were working off of one, comprehensive trial exhibit list.

And I -- this possibility sort of surfaced late in our proceedings last time, and I obviously can't expect, and wouldn't expect, the parties to be prepared to talk about that or think about that in detail today, but I think we should formulate such a plan for what's a realistic time frame for the Commonwealth to be providing an exhibit list, and then what the columns on that chart need to look like so that we then, from that exhibit list, work through whatever the various objections are and my rulings.

My own initial impression would be, we would need to be in that position by sometime towards the mid to late fall in order for me to accomplish that task, and have that chart, as it were, and all its columns, filled out enough in advance of the actual trial date so that it's -- the work is all done sufficiently in advance of February 1st.

But it would seem to me that rather than proceed in the piecemeal fashion, and proceed, you know, next week to just keep going in the way we were going last time, that perhaps when we get together next week, the parties can have thought a little bit about a time frame for that task, what's involved in it, how the chart should be designed for the benefit of all concerned, including myself, and approach it that way.

I think it can be done and I would commit to doing it without pushing back the trial date at all. Rather, it would just be an acknowledgment on my part that when that chart and its enormous stack of documents come to me to review those issues, for all practical purposes, I would say from that point on I'll be devoting having to devote full-time to this case. But that's going to happen sometime in the late fall anyway, I suspect, at the rate we're going. It's just a matter of when. And that issue could be built into that.

I need to go to my Chief Justice about that. But as I say, I won't expect people to

respond off the cuff today to that, but could we put that on the agenda for next week, rather than the review of yet another set of documents that are numbered one through fifty-something, identical sort of numbering of what we're already dealing with.

I would also recommend, by the way, that that chart include what it is we've already done, in other words, columns that can already be filled out based on what we've already done, will be filled out. I'm not going to redo the work that's already been done, but I think putting it onto one comprehensive master list is necessary and appropriate. And so, if people would address their thoughts on that and some suggestions about that approach next week, I'd appreciate it.

And we'll add that in the case management order as to when we're going to be handling those because they truly have been converted into motions in limine.

MR. SIMONDS: As Mr. Griffin reported, at the July 10 meet and confer, we did address the issue of trying to get an exhibit list that was manageable. I infer, I think clearly from what the Court has said, that the place where that list ought to begin is with those documents that are basically defense documents that the Commonwealth wishes to use against the defense, and that defense has some claim that requires your review of.

Ultimately, presumably, the exhibit list that we deal with at a final pretrial level will deal with all exhibits that are to be used on any issue by either side with whatever stipulations as to authenticity or admissibility we could work out. But I presume the Court is focused at the moment on the issue of how you deal with the privilege, work product, crime-fraud issues.

THE COURT: That's what I'm focusing on. But I must say, I think that it's a more meaningful exercise if we are looking at essentially a true and complete exhibit list that simply, you know, if one of the items on that exhibit list has an outstanding contest about privilege, that's something that I've got to address.

There may be items, probably a lot of items on that exhibit list where there isn't a privilege problem, maybe there's some other kind of problem, maybe there's no problem. But with the number of documents we're going to be talking about, the number of lawyers who are going to be involved in trying this case, the length of time it's going to take to try this case even if

everything is going beautifully, we need an exceptionally well organized approach to the handling of exhibits.

And I am looking at not simply putting the burden on the Commonwealth: okay, Commonwealth, you've got to come up with your exhibit list and whatnot, but everybody's got to come up with exhibit lists so that we have a master list on which problems, as we deal with them, get checked off.

The most obvious, and it looks like the biggest and most time consuming problem we have, is the privilege issue, is the privilege issue. But your thinking about these logistical problems as you wrestle with the authentication problem as well, and this is -- I really think I need to shift gears and deal with the privilege problems about the documents that the Commonwealth already has as motion in limine problems, because that's what are.

There are still some privilege problems about things that have not yet been discovered, and some of the Jones-Day issues, the witness interviews and some of those things, that's where I think my attention needs to be right now, because that's discovery, that's true discovery; that's things that one side wants and the other side doesn't have; they have a disagreement, we need to get that resolved. And I want to focus on those, but put this into a comprehensive exhibit list and the dealing of all motions in limine or other problems with regard to the admissibility of those exhibits.

I'm not, as I say, I'm not asking people to commit to a format or sequence today, but it does seem to fit into what Mr. Griffin was talking about.

Anyway, give some serious thought to that so that we can discuss it hopefully, intelligently, next week, because it will take some time for the parties to put this together. And it's got to be put together in enough time to resolve these privilege problems between that date and the February 1 trial date. We'll work backwards from the February 1 trial date and make sure it gets done soon enough.

Yes, Mr. Weber?

MR. WEBER: Your Honor, I believe we've scheduled two days next week.

THE COURT: Correct.

MR. WEBER: So which day --

THE COURT: I would -- we had scheduled two days, but I must say, that was at the time on the assumption that I was going to be reviewing

another hundred documents. I don't know what else the parties anticipate for next week's agenda. I know some of the problems or issues about the Jones-Day, the R&D Memo, and the Fact Team Memo issues, the parties asked to do those next week and not today. I want to obviously talk about this issue that we've just talked about.

I don't know what else you have on the agenda, whether it will in fact amount to two days. If it does, I'm still holding those two days for you. I haven't given them away. But --

MR. GRIFFIN: Your Honor, I had not anticipated any other business besides those two for the next two days, thinking that that 52 documents, plus whatever carry-over documents remained from July 1, would more than fill up the two days.

THE COURT: That certainly would fill up two days, but I don't think that's a useful expenditure of my time or the parties' time. It will create as much confusion as it solves to continue proceeding that way. That was my impression, having been through it last time, quite frankly.

MR. WEBER: You Honor, can I recommend the second of the two days on the theory that it would give us a little bit more time to work through these issues?

THE COURT: I have no problem with that.

MR. GRIFFIN: I assume that the people who would have been here anyway on Thursday and Friday, can make it on Friday instead of Thursday. So unless someone shouts that that's inappropriate, I think we can live with certainly Friday as a single day next week.

THE COURT: Let's assume then that it's just Friday. If something remarkable happens so that people think that we have an agenda that's going to take more than one day, Thursday, you know, let me know and we'll start Thursday instead. But absent something fairly dramatic happening, it sounds like Friday should be ample.

MR. SIMONDS: Your Honor, can I return to the model with just one question?

I believe we have received an assurance from the Commonwealth that the model as submitted, and there were several compartments that it came in, is now complete, and that there is no contemplated supplementation still to come? That is obviously an important issue in terms of the time table we've set, and I'm therefore requesting a representation by the Commonwealth that we are in fact dealing with the end result of their model.

THE COURT: Well, subject to what the parties are themselves talking about about so-called finality on expert is sued. I gather the Commonwealth has turned over its: this is what we intend to present. And that's been done. Obviously, however, after they get back all of Dr. Wecker's criticisms and problems, there is going to be some ability to augment their expert disclosures to perhaps respond to some of those, and that awaits your disclosures, but everything short of that, I understand has been done, am I correct, Mr. Sobol?

MR. SIMONDS: That's what I'm asking about, your Honor.

MR. SOBOL: Yes, your Honor. You are correct. There is also the other issue that the damages go up to the date of judgment, so there's also the need of addressing that.

THE COURT: Okay.

I think that is all for today. The other thing, I don't think we need to put it on for next week, but something that I think we certainly ought to be thinking about, or starting to think about by the time we're getting together in August is, I hate to say it this early, but it's true, I have to start thinking about some of the logistical issues surrounding trial because, as you know, this court needs some lead time: the summoning in of extra jurors, space, logistical constraints, are not something that I can do without substantial lead time working with both my Chief Justice, court reporters, the jury commissioner, and whatnot, and we need to start mapping out some of those things to make sure that I have time to try and get the logistics up to your expectations by February 1. So by August we need to start dealing with mapping out, literally, trial logistics on some of these things.

MR. SOBOL: Your Honor, could you identify what you perceive to be some of the issues?

THE COURT: Well, one of the big ones early on is indeed jurors and the impanelment, just in terms of sheer numbers, i.e., what's the best approximation of starting on February 1st? How many jurors will we go through in a day, because the jury commissioner is going to need to send out extra summonses and he needs to do that, I think, three months in advance. So I need to be refining that so that I can put that in motion by some time in the fall to make sure that we have enough jurors coming in each day during impanelment.

And those of you who have been through

impanelement in other states can shed a lot of light on how it was done; what worked; what didn't work; what that experience was, just so that I can at least refine something about timing and numbers for purposes of the jury commissioner.

Simple space constraints are significant given the number of attorneys that are going to be involved, and courtroom space, and any ancillary space that might be needed by the parties themselves to handle the volume of attorneys, witnesses, consultants, etcetera, that you all need.

The other important logistical issue is court reporters. What is it that the parties are expecting, wanting, in terms of transcripts? If, for example, if the parties are wanting literally daily copy for every single day of this trial, that is something that court reporters need to know about long in advance to map something that labor intensive out.

I guess perhaps what it is in August I want is something of your anticipated needs, what you're going to be looking for in terms of those issues.

What do you want in terms of the logistics of how we handle the documents, again, just to make sure that -- those of you who are not from Massachusetts perhaps don't realize what some of our logistical constraints are here, but the Massachusetts lawyers will be very familiar with that. So it's as much a laundry list of your expectations and your needs so that I'm not confronted with something that's a perfectly legitimate request on your part without enough time to -- we literally have some courtrooms in this Commonwealth that do not have alternating current. I mean this is how -- so when we talk logistics, sometimes we talk logistics at a very fundamental level, and I want to make sure that we can do the best we can on such things.

So because of the lead time, I might need to address those kinds of issues. We do need to start thinking about them by late summer and as we get even into the early fall. So those are the kinds of things that we ought to start, at least in a preliminary way, talking about by next month I think.

All right, I'll see you next Friday.

[Court adjourns 11:29 a.m.]

CERTIFICATE

I, Patricia Bellusci, do hereby certify that the foregoing transcript, pages 3 through 75, is a complete, accurate and true record of my voice recorded tapes taken in the aforementioned matter to the best of my skill and ability.

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Patricia Bellusci  
Official Court Reporter

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