

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

IN RE: ROUNDUP PRODUCTS )  
LIABILITY LITIGATION. ) NO. 16-md-02741 VC  
 )  
 )  
 )

San Francisco, California  
Wednesday, March 3, 2021

TRANSCRIPT OF ZOOM VIDEO CONFERENCE PROCEEDINGS

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23  
24  
25

1 Wednesday - March 3, 2021

1:05 p.m.

2 P R O C E E D I N G S

3 ---o0o---

4 **THE CLERK:** Calling Case Number 16-MD-2741,  
5 In Re Roundup Products Liability Litigation.

6 Counsel for the plaintiffs, please state your appearances  
7 for the record.

8 **MS. GREENWALD:** Robin Greenwald for the plaintiff  
9 steering committee.

10 **THE COURT:** Hello.

11 **MS. WAGSTAFF:** Good afternoon, Your Honor. Aimee  
12 Wagstaff for the plaintiffs.

13 **THE COURT:** Good afternoon.

14 **MR. MILLER:** Good afternoon, Your Honor. Michael  
15 Miller for plaintiffs steering committee.

16 **THE COURT:** Hello.

17 **THE CLERK:** For defendant?

18 **MR. HOFFMAN:** I'm William Hoffman for Monsanto,  
19 Your Honor.

20 **THE COURT:** Hello.

21 **THE CLERK:** And for the objectors?

22 **MR. LAMKEN:** Good afternoon. Jeff Lamken for the  
23 Category 1 objectors.

24 **THE COURT:** Welcome to the party.

25 **MR. LAMKEN:** Thank you.

1           **MR. PAREKH:** Good afternoon, Your Honor. Behram  
2 Parekh on behalf of the Category 2 objectors.

3           **THE COURT:** Hello.

4           **MS. EPHRON:** Afternoon. Melissa Ephron on behalf of  
5 the Category 3 objectors.

6           **THE COURT:** Hello.

7           **MR. CITRON:** Good afternoon, Your Honor. This is Eric  
8 Citron appearing on behalf of the Napoli firm.

9           **THE COURT:** I had some trouble hearing you.

10          **MR. CITRON:** Good afternoon, Your Honor. Is it  
11 working any better now?

12          **THE COURT:** Yes.

13          **MR. CITRON:** This is Eric Citron appearing on behalf  
14 of the Napoli firm.

15          **THE COURT:** Hi. You didn't want to have a category  
16 number?

17          **MR. CITRON:** Yeah, I guess not.

18          **THE COURT:** Okay.

19          **MR. CITRON:** I missed the category memo, I think.

20          **THE COURT:** We'll call you Category Zero.

21          **MR. CITRON:** That's not my dog.

22          **THE CLERK:** That's Category 4.

23                                   (Laughter.)

24          **THE COURT:** All right. So I have a couple of basic  
25 factual questions, just to start off, that I think are mostly

1 for lead counsel, although some of them may be for Mr. Hoffman.

2 **THE CLERK:** Hold on, Judge.

3 **THE COURT:** I guess the first series of --

4 **THE CLERK:** Before you get started, there's a little  
5 bit of feedback. So I'm going to ask that if anybody is not  
6 speaking, please turn your microphones off until it's time for  
7 you to speak.

8 Thank you.

9 **THE COURT:** Okay. I think the first set of questions  
10 are about the participation agreement. If you're a lawyer and  
11 you have a case in the MDL, do you have to sign the  
12 participation agreement?

13 **MS. GREENWALD:** No. Your Honor, I'm sorry.  
14 Your Honor, you do not need to sign the participation agreement  
15 if you're in the MDL. You have full rights to the materials as  
16 an MDL attorney.

17 **THE COURT:** Okay. And then what if you're a lawyer  
18 and you have a case in the MDL and you have other state court  
19 cases? Do you have to sign the participation agreement in  
20 order to be allowed to use the MDL work product in the state  
21 court cases?

22 **MS. GREENWALD:** So usually that appears in the context  
23 of the case management orders in the state courts.

24 So, for example, in Missouri, there's a provision in case  
25 management orders that discovery in the multidistrict

1 litigation and in the JCCP are considered discovery in those  
2 cases.

3 And then some of the orders that Your Honor has put forth  
4 in the MDL are incorporated by reference, such as protective  
5 orders, ESI orders, because the discovery done in the MDL is  
6 actually used in the state court cases. Monsanto --

7 **THE COURT:** Right.

8 **MS. GREENWALD:** -- doesn't reproduce all of the  
9 documents.

10 **THE COURT:** Right. But as far as trying to figure out  
11 who has to sign this participation agreement and who has signed  
12 the participation agreement, it sounds like what you're  
13 saying -- and correct me if I'm misunderstanding -- if you are  
14 a lawyer with a case in the MDL, you don't sign the  
15 participation agreement, and the fact that you also have state  
16 court cases doesn't cause you to sign the participation  
17 agreement.

18 So, in other words, lawyers that have cases both in the  
19 MDL and state court have not signed this participation  
20 agreement. Is that correct?

21 **MS. GREENWALD:** So -- yes.

22 So maybe I should step back a little bit, Your Honor, and  
23 say that we, as a leadership, made a decision early on not to  
24 restrict use of MDL material to lawyers who needed it,  
25 particularly in the MDL.

1           So, for example, there are lawyers in some of the wave  
2 cases that wanted access to expert materials, documents, other  
3 discovery who either didn't want to sign the participation  
4 agreement or just didn't sign the participation agreement, and  
5 we didn't restrict or tether their right to have that material  
6 on the signature of the participation agreement.

7           **THE COURT:** I understand.

8           **MS. GREENWALD:** Could we have? We probably could  
9 have. But we did not do that in this case.

10          **THE COURT:** I understand. So, but let me just make  
11 sure I understand. I'm trying to figure out who --

12          **MS. GREENWALD:** Right.

13          **THE COURT:** -- has signed -- I'm trying to identify  
14 the different universes of lawyers -- right? -- or different  
15 categories of lawyer within this universe.

16          **MS. GREENWALD:** Correct.

17          **THE COURT:** So there's lawyers that have cases in the  
18 MDL. They have had access to all the material, and they have  
19 not signed the participation agreement. They've not needed to  
20 sign the participation agreement.

21          **MS. GREENWALD:** I do think maybe a couple of people in  
22 the MDL have signed it who have some cases. In fact, I'm  
23 almost certain a couple have. Whether they had to or not is  
24 another question. But some have signed them.

25          **THE COURT:** Okay. And as a general matter, there was

1 nothing separate that a lawyer with an MDL case had to do if  
2 they also had state court cases?

3 **MS. GREENWALD:** Correct.

4 **THE COURT:** Okay. So the lawyers who signed the  
5 participation agreement, are those lawyers that had state court  
6 cases but no case in the MDL?

7 **MS. GREENWALD:** I believe that some of the lawyers who  
8 signed the participation agreement did not have cases in the  
9 MDL.

10 So Ms. Wagstaff is on, and I know she has all of the  
11 participation agreements. She was the repository for the  
12 participation agreements.

13 So I'm pretty sure that of the lawyers who have signed  
14 participation agreements, some have only cases in the state  
15 courts, but most of them have at least one or more cases in the  
16 MDL.

17 Aimee, am I right about that? Is there any other  
18 category?

19 **MS. WAGSTAFF:** Your Honor, I think that Ms. Greenwald  
20 is correct.

21 And there's -- there's no uniform bright line as to who  
22 signed the actual participation agreement, especially as we  
23 were going and, as you can recall back in 2019, the frantic  
24 pace that we were at, and you probably read in Mr. Miller's  
25 declaration how he had all of these trials going.



1           We would send out a participation agreement when we  
2 remembered, quite frankly, and then they would sign it. And we  
3 would follow up as we remembered, is sort of how it went. We  
4 were going so fast that, you know, we would look back. And we  
5 never withheld information because somebody didn't sign it.  
6 And sometimes we were too busy to remember to follow up to get  
7 it signed.

8           So there's no real pattern as to who --

9           **THE COURT:** Okay. That's helpful and understandable  
10 under the circumstances.

11           Do you know how many lawyers signed the participation  
12 agreement?

13           **MS. GREENWALD:** I think we have nine. Right? We had  
14 nine. Maybe a few more have come in recently.

15           **MS. WAGSTAFF:** I think it may be a few more than that.  
16 But if that's important to the Court to get an exact number, I  
17 can text my paralegal.

18           **THE COURT:** No. I think a rough estimate is perfectly  
19 fine.

20           **MS. WAGSTAFF:** I would say around 10 to 15 is a rough  
21 estimate.

22           **THE COURT:** Okay. And then, so it sounds like what  
23 you're saying regarding the participation agreement is that  
24 there's no real correlation between the lawyers who signed the  
25 participation agreement and the lawyers who received access to

1 work product from the MDL or from -- or from lead counsel,  
2 generally.

3 **MS. GREENWALD:** That's correct, Your Honor.

4 The one thing we did always insist on was that they sign  
5 the confidentiality agreement because obviously there's  
6 documents within the common benefit work product that are  
7 confidential and they're still confidential. And we wanted to  
8 make sure people understood that requirement; so we were  
9 vigilant on that.

10 **THE COURT:** Okay.

11 **MS. GREENWALD:** But as Aimee said, we were not  
12 vigilant on the participation agreement in recognition of the  
13 fact we never wanted clients not to have the benefit of our  
14 work for the work that their lawyers were doing for them.

15 **MS. WAGSTAFF:** And, Your Honor, as a practical matter,  
16 it usually wasn't the highest on the totem pole requesting the  
17 information. And so, often, they would have the authority to  
18 sign the protective order but they would tell us they need to  
19 get back to us on whether they would sign the participation  
20 agreement. Time would go by. We would forget to follow up.  
21 You know, we were all going a hundred miles an hour, and that's  
22 sort of how it happened in the real world.

23 **THE COURT:** Fair enough.

24 And then you mentioned that maybe 10 to 15 lawyers signed  
25 the participation agreement. And I don't really know if it

1 matters, but do you happen to know how many cases we're talking  
2 about that were handled by lawyers who signed the participation  
3 agreement?

4 **MS. WAGSTAFF:** Over -- we're talking in the thousands.  
5 I mean, I would -- "I don't know" is the answer, although my  
6 best guess would be, if you added up those particular law  
7 firms, I wouldn't be surprised if it was 15- to 20,000 cases.

8 **THE COURT:** Okay.

9 **MS. WAGSTAFF:** Again, I don't know for certain because  
10 some cases are on tolling agreements and I haven't followed  
11 those cases -- those law firms' dockets as closely as my own.

12 **THE COURT:** Okay. And then this might be for  
13 Monsanto, but obviously, we had Pretrial Order Number 12 which  
14 authorized the establishment of a holdback fund, or whatever  
15 you want to call it; but it never set the percentage -- it  
16 never set the percentage of people's recoveries that would be  
17 held back.

18 And now, fast-forward several years later, Monsanto's been  
19 entering into these settlement agreements with various lawyers  
20 and their clients. What's been happening with that money?

21 **MR. HOFFMAN:** So some money has changed hands in some  
22 of the agreements into qualified settlement funds, but my  
23 understanding is that no payments have been made to claimants  
24 yet. And the arrangement that we've had in those agreements is  
25 that it will be the responsibility of plaintiffs' counsel to

1 execute on any amended order.

2 So my understanding is there's no escrow fund that has  
3 been established at this point. I could be wrong about that,  
4 but Ms. Greenwald or Mr. Miller or Ms. Wagstaff will correct  
5 me. But we've not had any list of participating cases that  
6 we've seen.

7 **THE COURT:** So just to make sure I understand, you're  
8 saying some money has changed hands, but it hasn't reached the  
9 hands of plaintiffs with whom you have settled?

10 **MR. HOFFMAN:** That's correct.

11 **THE COURT:** So where is the money?

12 **MR. HOFFMAN:** It goes into, essentially, a staging  
13 area, a qualified settlement fund that is set up for this  
14 purpose by agreement of a defendant and the settling plaintiff  
15 firm. The firm will have a qualified settlement fund from  
16 which it will eventually distribute funds.

17 **THE COURT:** So these different -- you've reached  
18 settlements with these different firms.

19 **MR. HOFFMAN:** And each one has a qualified settlement  
20 fund.

21 **THE COURT:** Their clients -- each firm has a separate  
22 fund?

23 **MR. HOFFMAN:** That's correct.

24 **THE COURT:** I see.

25 **MS. WAGSTAFF:** And, Your Honor, an important fact also

1 is, the money from the qualified settlement funds hasn't  
2 reached the claimants but it also hasn't reached the lawyers.

3 **MS. GREENWALD:** And one thing I wanted to add also,  
4 Your Honor, maybe it would be of benefit to you, is that my  
5 understanding is that settlement agreements have a provision  
6 that the plaintiffs' firm settling the cases understand that  
7 they are obligated to comply with whatever holdback order  
8 Your Honor issues.

9 Again, Mr. Hoffman can confirm that I'm right about that,  
10 but that's what I understand.

11 **THE COURT:** Mr. Hoffman?

12 **MR. HOFFMAN:** Well, all of these agreements are  
13 subject to confidentiality; but at least with respect to  
14 leadership, those provisions are in the agreements. And, of  
15 course, logic would suggest that they should be in all of them,  
16 given where the fund is. So I think that's --

17 **THE COURT:** What do you mean "given where the fund  
18 is"? What does that mean?

19 **MR. HOFFMAN:** Given where the escrow fund associated  
20 with Pretrial Order 12 sits, which is not there yet.

21 I apologize for the ambiguity.

22 **THE COURT:** Okay. I think I understand the answers to  
23 those questions.

24 Now I'll ask plaintiffs. I want to try to pin you down on  
25 who you think should be subject to a holdback, the different

1 categories of cases for which there should be a holdback. And  
2 I'm going to write them down --

3 **MS. GREENWALD:** Okay.

4 **THE COURT:** -- as you tell them to me, because it's  
5 not totally clear from your papers what categories of cases you  
6 think should be subject to a holdback for a common benefit  
7 fund.

8 So --

9 **MS. GREENWALD:** Okay.

10 **THE COURT:** -- the easy one is any cases that are part  
11 of this MDL. Right?

12 **MS. GREENWALD:** Correct.

13 **THE COURT:** So that's number one.

14 **MS. GREENWALD:** Right.

15 **THE COURT:** And we should really be speaking of them  
16 in terms of cases, not in terms of lawyers.

17 So any cases that are part of the MDL is number one.  
18 Right?

19 **MS. GREENWALD:** So, Your Honor -- I'm sorry.

20 **THE COURT:** No. Sorry. Go ahead.

21 **MS. GREENWALD:** I was going to say, I think that the  
22 common benefit doctrine actually does focus on the attorney and  
23 so does PTO 12, actually. So any attorney who has one or more  
24 cases in the MDL.

25 **THE COURT:** Okay. I'm asking you to think of it in

1 terms of cases.

2 **MS. GREENWALD:** Okay. Okay. All right.

3 **THE COURT:** So, and the question is, we've got --  
4 because you're not asking for a holdback of an attorney's fees.  
5 You're asking for a holdback of a percentage of a plaintiff's  
6 recovery. Correct?

7 **MS. GREENWALD:** No. We're asking for a holdback of  
8 attorneys' fees. The 8.25 percent, 8 percent of the  
9 8.25 percent is from the attorney's contingency fee. It is not  
10 from the client.

11 **THE COURT:** But wait a minute. But you're asking for  
12 8.25 percent of -- okay. Let's say a plaintiff settles for  
13 \$100,000. Okay? You're asking for 8,250 of those dollars to  
14 go into a common benefit fund. Right?

15 **MS. GREENWALD:** Correct.

16 **THE COURT:** Okay.

17 **MS. GREENWALD:** And 8,000 of that would come from the  
18 attorney's fee.

19 **THE COURT:** Right.

20 **MS. GREENWALD:** \$250 would come from the client share  
21 of the recovery.

22 **THE COURT:** But it's a percentage of the total  
23 settlement.

24 **MS. GREENWALD:** Correct.

25 **THE COURT:** Okay. So any cases that are part of the

1 MDL is number one. Right?

2 **MS. GREENWALD:** Right.

3 **THE COURT:** Number two is any cases where the lawyer  
4 representing the plaintiff in state court or anywhere -- any  
5 case where the lawyer representing the plaintiff has signed the  
6 participation agreement. Right?

7 **MS. GREENWALD:** Correct.

8 **THE COURT:** Okay. So there are about 4,000 cases in  
9 the MDL. So all of those cases would be covered by the  
10 holdback order. And a settlement in any of those cases,  
11 8.25 percent of that settlement would have to go into the  
12 common benefit fund.

13 And then for any lawyer -- let's say a lawyer has 10,000  
14 state court cases in North Carolina, an additional 10,000  
15 prospective plaintiffs in North Carolina who they represent but  
16 the cases haven't been filed yet. That's 20,000 cases.

17 **MS. GREENWALD:** Right.

18 **THE COURT:** And any settlement for any of those 20,000  
19 cases, there would need to be an 8 percent holdback,  
20 8.25 percent holdback based on the fact that the lawyer who  
21 represents those 20,000 people signed the participation  
22 agreement?

23 **MS. GREENWALD:** Correct.

24 **THE COURT:** Okay. And then, so other than cases that  
25 are part of the MDL and cases where the plaintiff is



1 represented by a lawyer who signed the participation agreement,  
2 what other types of cases do you say should be subject to a  
3 holdback order from this MDL?

4 **MS. GREENWALD:** So certainly, under PTO 12 -- and  
5 we --

6 **THE COURT:** We'll get to --

7 **MS. GREENWALD:** Okay.

8 **THE COURT:** We'll get to PTO 12 --

9 **MS. GREENWALD:** So any --

10 **THE COURT:** -- in a moment.

11 **MS. GREENWALD:** All right.

12 **THE COURT:** I'm just trying to get clarity --

13 **MS. GREENWALD:** Categories.

14 **THE COURT:** -- on what you are asking for now.

15 What are you asking for in this motion? What cases are  
16 you arguing should be subject to a holdback order in this  
17 motion that you filed?

18 **MS. GREENWALD:** I think in the motion we're asking for  
19 now, we would say all cases that are settling or are soon to be  
20 subject to a settlement agreement should be subject to the  
21 holdback order.

22 **THE COURT:** So any lawsuit or prospective lawsuit  
23 against Monsanto for Roundup, whether in federal or state  
24 court, whether the lawyer signed an agreement or not, every  
25 single lawsuit in the country should be subject to a holdback

1 order that I issue so that every single lawsuit in the country,  
2 8.25 percent of the settlement has to go in the fund.

3 **MS. GREENWALD:** I would even -- I would add one other  
4 category to that, and that would also include unfiled --

5 **THE COURT:** Is it possible to have another category?  
6 Is there --

7 **MS. GREENWALD:** There is. There's a lot of unfiled  
8 cases.

9 **THE COURT:** Yeah. That's what I -- yeah, right.

10 **MS. GREENWALD:** I didn't hear -- I didn't hear you --

11 **THE COURT:** I said plaintiff --

12 **MS. GREENWALD:** -- say "unfiled."

13 **THE COURT:** -- plaintiff or prospective plaintiff.

14 **MS. GREENWALD:** Okay. I'm sorry. I didn't -- I  
15 didn't -- yes. So that would be --

16 **MS. WAGSTAFF:** I was going to say, Your Honor, I would  
17 change your phrasing just a little bit. Instead of making it  
18 as broad as you just said, I would add the category of cases  
19 where lawyers -- where their lawyer has a case in the MDL. I  
20 would make that a subcategory.

21 And then another category I would make cases where their  
22 lawyer has benefited from the common benefit work product. And  
23 if that happens to be all of the cases, we can't help that.

24 But there could -- someone could make an argument, that  
25 I think is beyond the scope of this call, that they didn't

1 benefit from the common benefit work product. But I would not  
2 just throw it out there and say "every case forever and ever  
3 and ever" because I think there could be cases where they  
4 didn't benefit from the common benefit work product. I just  
5 don't really know at this moment, as I sit here, who those  
6 would be.

7 So I would say another subcategory would be cases where  
8 the lawyers have -- where they're represented by a lawyer with  
9 a case in the MDL, and then the other one is cases where their  
10 lawyers benefited from our work product.

11 **THE COURT:** Okay. So let's start over again.

12 So number one is any case in the MDL.

13 **MS. GREENWALD:** Right.

14 **THE COURT:** Number two is any case -- shall we say  
15 "claim" so that it covers both cases that are filed and cases  
16 that are not yet filed?

17 **MS. GREENWALD:** Sure, that's fine.

18 **THE COURT:** Any case in the MDL.

19 Any case or claim not in the MDL where the person's lawyer  
20 signed the participation agreement. Right?

21 **MS. GREENWALD:** Correct.

22 **THE COURT:** That's Category 2.

23 **MS. GREENWALD:** Correct.

24 **THE COURT:** And Category Number 3 is any case or  
25 claim -- even if the lawyer didn't sign the participation

1 agreement and even if the case is not in the MDL, any case or  
2 claim where the lawyer and the client benefited from  
3 MDL work product.

4 **MS. GREENWALD:** Correct. That's where I was going  
5 when I was saying that it would really be any case at this  
6 juncture, because at this juncture, Your Honor, any lawyer or  
7 any cases or claims that are receiving a settlement offer from  
8 Monsanto necessarily had to have benefited from the  
9 MDL work product. Monsanto never even made a settlement offer  
10 in any of the three trials -- Pilliod, Hardeman, or Johnson --  
11 at any point. And so --

12 **THE COURT:** So the -- hold on a second. We can --

13 **MS. GREENWALD:** Okay.

14 **THE COURT:** -- get to argument, but I just want to  
15 sort of define some of our terms --

16 **MS. GREENWALD:** Okay.

17 **THE COURT:** -- here.

18 And so -- but so -- and so you're defining  
19 "MDL work product" very broadly. You're saying it's not some  
20 database of information that is being kept as work product  
21 developed by the lead counsel.

22 **MS. GREENWALD:** Correct.

23 **THE COURT:** You're saying any -- any -- anybody who is  
24 receiving a payment, anybody who is -- any case, any claim  
25 where a plaintiff or a prospective plaintiff receives a payment

1 from Monsanto, they are, by definition, benefiting from  
2 MDL work product because MDL work product, according to your  
3 definition, is the hard work that you did at trial, setting the  
4 stage for these other people to obtain a payment from Monsanto  
5 once Monsanto cried uncle.

6 **MS. GREENWALD:** Can I add to that, Your Honor? And I  
7 would say --

8 **THE COURT:** Well, before you add to it, is what I'm  
9 saying --

10 **MS. GREENWALD:** The answer is yes. Yes, the answer is  
11 yes, with the addition that the appointment of  
12 Special Master Feinberg as settlement master was a key moment  
13 in changing from litigation to settlement discussions. That  
14 was a pivotal point in this litigation. There had been three  
15 successful trials and no discussions of settlement, at least to  
16 our knowledge, certainly not with leadership.

17 **THE COURT:** Again, I'm just trying to get --

18 **MS. GREENWALD:** No. But that --

19 **THE COURT:** -- definitions here.

20 **MS. GREENWALD:** But that --

21 **THE COURT:** So you're --

22 **MS. GREENWALD:** -- that is an important point.

23 **THE COURT:** So you're -- so the categories, any case  
24 or claim where the lawyer and the client benefited from  
25 MDL work product.

1           And "MDL work product" is defined broadly to include any  
2 materials that they might have gotten access to from your  
3 database, expert materials or deposition transcripts or  
4 whatever. It also includes the coattails that they rode in on  
5 as a result of your success- -- the successful results that you  
6 achieved. And it also includes the benefit of having  
7 Ken Feinberg being appointed by me to settle the MDL cases, and  
8 he also was hired by you all to settle all the other cases.

9           Is that --

10           **MS. GREENWALD:** Right. So, yes, with the caveat that  
11 it's not -- I don't want the Court to think that we're saying  
12 that because we took a deposition or we made a motion or we  
13 hired an expert, that, by definition, forever subjects all  
14 cases in the future to a common benefit holdback. That's  
15 not -- we're not trying to have a broad, sweeping scope of  
16 20 years any time anyone uses anything in this MDL.

17           We're saying at this juncture, given the status of  
18 99.99 percent of the Roundup cases, the 125,000 or so that  
19 Monsanto represents are out there, either filed or unfiled,  
20 that the small number of cases that were worked up are what  
21 triggered this Court and Monsanto, frankly, to come to the  
22 bargaining table not only with leadership, but with, I think,  
23 virtually most of the lawyers out there.

24           While all those lawyers -- not "all those lawyers."

25           **THE COURT:** You don't need to --

1           **MS. GREENWALD:** Many --

2           **THE COURT:** Let me just interrupt.

3           You don't need to argue that. I mean, that's obvious.

4           **MS. GREENWALD:** I just --

5           **THE COURT:** That is absolutely true. There's no  
6 question about that, that you winning -- and, by the way, you  
7 guys, did you do the Johnson trial and the Pilliod trial too?

8           **MS. GREENWALD:** The Miller Firm had both Johnson and  
9 the Pilliods along -- and they tried that case along with the  
10 Baum Hedlund firm.

11           And then, as you know, Hardeman was before you with  
12 Ms. Wagstaff and Ms. Moore.

13           **THE COURT:** Okay.

14           **MS. GREENWALD:** So every trial has been leadership.

15           **THE COURT:** Right.

16           I don't think there's any question that the reason all of  
17 these cases have settled is because you won those trials.  
18 Like, that's not -- you spilled a lot of ink about that, but  
19 that's sort of obvious. But I think that's only the sort of  
20 starting point to figuring out what the right answer is in  
21 connection with a common benefit fund.

22           Now, do you perceive -- do you perceive your request as a  
23 request to expand the universe of cases subject to a holdback  
24 from PTO 12, or do you interpret PTO 12 as contemplating a  
25 holdback for all of those cases?

1           **MS. GREENWALD:** That's the question I've thought about  
2 most before coming here today.

3           I'm going to say it's mostly in PTO 12 with one caveat.

4           **THE COURT:** Okay.

5           **MS. GREENWALD:** So I believe that PTO 12 is clear that  
6 all cases are subject to an assessment.

7           In your categories, Your Honor, frankly, the one if you  
8 have a case in the MDL, then all of those lawyer's cases, filed  
9 or unfiled, are subject to an assessment under PTO 12.

10          Certainly, under PTO 12, your second category of people  
11 who signed a participation agreement, those lawyers' both filed  
12 and unfiled cases are subject to a holdback assessment under  
13 your PTO 12.

14          I believe anyone who used the services of Ken Feinberg to  
15 settle their cases would fall within the ambit of your PTO 12.

16          The one area where I think there's --

17          **THE COURT:** Why?

18          **MS. GREENWALD:** Well, because in PTO 12, it says  
19 (reading):

20                 "This Order . . . applies to all plaintiffs or  
21 other claimants from other non-MDL 2741 proceedings  
22 and their counsel who voluntarily submit to  
23 this Court's jurisdiction . . . ."

24          And so I would say --

25          **THE COURT:** So by entering -- I mean, but I -- I mean,



1 didn't I appoint Ken Feinberg to be the -- to settle the cases  
2 in the MDL? I mean, of course he was perfectly free to broker  
3 settlements for other cases, and you all were perfectly free to  
4 use him to do so and to pay him to do so. But I mean, I  
5 appointed him -- and this is probably a small point, but I  
6 mean, I think it's worth mentioning that I don't think I ever  
7 appointed him to settle all the cases nationwide.

8 I mean, that was his choice and your choice to get him  
9 involved in that. Right?

10 **MS. GREENWALD:** That would be very difficult to do  
11 because most lawyers represent clients in both categories.  
12 Right? So most lawyers have some cases in the MDL, some  
13 unfiled cases, and then a number of cases in various state  
14 courts. And so it would be a peculiar -- it would be, I think,  
15 unprecedented -- I can't think of any situation where you would  
16 go to Monsanto and say: I'm only -- go to Mr. Feinberg and  
17 say: Please help me settle the 25 percent of my cases which  
18 are in the MDL. I'm going to ignore my other 75 percent of my  
19 clients.

20 That isn't the way mass tort works.

21 **THE COURT:** Well, right. But as a matter of my  
22 authority, though. Right? I mean, I know that I have the  
23 authority to appoint Ken Feinberg to settle the cases before  
24 me. But do I have the authority to appoint Ken Feinberg to  
25 settle a pending state court case in North Carolina? I mean, I

1 can order you and Monsanto to go meet with Ken Feinberg,  
2 the court-appointed mediator.

3 **MS. GREENWALD:** Right.

4 **THE COURT:** Can I order -- could I appoint a  
5 mediator -- as the MDL judge, could I appoint a mediator and  
6 order the lawyer who is representing a plaintiff in a  
7 North Carolina state court to go meet with him and try to  
8 settle their case?

9 **MS. GREENWALD:** No, I don't think -- no, I don't think  
10 you could.

11 But if that lawyer then comes into this Court's ambit and  
12 says, "I would like Mr. Feinberg to help me settle my cases  
13 with Monsanto. I need help. I need the services of  
14 Mr. Feinberg to help me negotiate with Monsanto," I believe  
15 that lawyer then takes action to voluntarily submit to  
16 this Court's jurisdiction because you had established  
17 Mr. Feinberg as the settlement master for the Roundup  
18 litigation.

19 And in so doing, if a lawyer comes in and says,  
20 "Mr. Feinberg" -- by the way, who's paid by the leadership for  
21 all of these services he's been providing. If you come in and  
22 say, "I would like Mr. Feinberg to help me settle my entire  
23 docket of cases," I believe that lawyer is submitting to the  
24 jurisdiction of this Court.

25 **THE COURT:** Okay. And I interrupted you when you were

1 talking about --

2 **MS. GREENWALD:** That's okay.

3 **THE COURT:** -- paragraph 4, and I think you --

4 **MS. GREENWALD:** Right.

5 **THE COURT:** -- were starting to say that --

6 **MS. GREENWALD:** Right. So the one area that I think  
7 is gray.

8 **THE COURT:** Yeah.

9 **MS. GREENWALD:** Right. So the gray area is the lawyer  
10 who has no cases in the multidistrict litigation at all, not  
11 even one case filed here, no participation agreement, no  
12 association with lawyers in the MDL, and has not used in any  
13 kind of meaningful way MDL work product.

14 **THE COURT:** What does that mean, "association with  
15 lawyers in the MDL"?

16 **MS. GREENWALD:** So a number of -- a number -- so I  
17 mean, there's ways to be part of an MDL and ways there's not.  
18 And I think one result that would be so unfortunate is to have  
19 gamesmanship --

20 **THE COURT:** Let's try to hold off on arguing about  
21 what --

22 **MS. GREENWALD:** Okay.

23 **THE COURT:** -- would be unfortunate and what wouldn't  
24 be unfortunate, and just let's try and figure out what is  
25 covered by PTO 12.

1           **MS. GREENWALD:** So, for example, if you have a lawyer  
2 who has a case in the MDL and there's a lawyer who has cases  
3 only in state court but that lawyer also is co-counseling with  
4 a lawyer in a case in the MDL, many courts have found that that  
5 lawyer is part of the MDL by the association of that  
6 co-counseling of a case with the MDL case, and therefore that  
7 person does have -- that attorney does have a nexus to the MDL.

8           **THE COURT:** By co-counseling with a lawyer who has an  
9 MDL case, they're co-counseling in the MDL case or they're  
10 co-counseling in a state court case?

11           **MS. GREENWALD:** In an MDL case.

12           So, for example, assume, hypothetically, that there's a  
13 lawyer who has only state court cases, but that lawyer has been  
14 asked to participate in one of the wave cases by an MDL lawyer.

15           **THE COURT:** Okay.

16           **MS. GREENWALD:** And that lawyer has a fee agreement  
17 with that lawyer to help litigate that wave case.

18           That lawyer, under many of the decisions in holdback  
19 orders, would be considered a lawyer who's participating in the  
20 MDL.

21           **THE COURT:** And that's the gray -- but that's gray as  
22 it relates --

23           **MS. GREENWALD:** No, I don't think it is. I don't  
24 think that one is.

25           I think it's the lawyer who doesn't have any of those. So

1 it's the state court lawyer who does not have any --

2 **THE COURT:** Wait. Hold on. Before we get to this  
3 next category, I'm now fixated on this lawyer who --

4 **MS. GREENWALD:** Okay.

5 **THE COURT:** -- associated with counsel in an MDL case.  
6 Where is the language in the PTO that applies to that?

7 **MS. GREENWALD:** Well, you'd be submitting to the  
8 jurisdiction of this Court. You'd be -- you'd be co-counseling  
9 in a wave case. You'd be participating in filing expert  
10 reports. You would be complying with all the -- all the  
11 procedures that you've put in place for wave cases.

12 **THE COURT:** So are you saying that -- are you  
13 contemplating a lawyer who is helping with the MDL but hasn't  
14 made an appearance? Is that what you're talking about?

15 **MS. GREENWALD:** It could be. It could be.

16 I mean, we've seen it more the other way. We focus on  
17 that with some objectors who have -- are partici- -- in fact,  
18 we've mentioned -- so, for example, one of the objectors, the  
19 Gibbs firm, is litigating a case with one of the Wave 2 cases,  
20 I believe. And so -- but I don't know whether that firm has  
21 filed an appearance in that case. I really don't know.

22 **THE COURT:** Okay. So let me just see if I -- so let  
23 me see if I understand this category before you move on to --

24 **MS. GREENWALD:** Okay.

25 **THE COURT:** -- the other category.

1           So let's say I am a plaintiff, I have NHL, and I live in  
2 North Carolina. And I've hired a lawyer, and that lawyer is  
3 representing me in state court in North Carolina. Okay?

4           **MS. GREENWALD:** Okay.

5           **THE COURT:** Suing Monsanto for causing my NHL.

6           And then let's say the case moves along, drags along  
7 slowly, as they tend to do. And then my lawyer happens to get  
8 involved in one of the MDL cases and assists some other lawyer,  
9 who already had that MDL case, in working the case up for  
10 trial.

11          **MS. GREENWALD:** Right.

12          **THE COURT:** As a result of that lawyer doing that, the  
13 MDL judge has the authority to order an 8.25 percent holdback  
14 of any recovery that I obtain in my North Carolina state court  
15 case?

16          **MS. GREENWALD:** Well, again, it's not coming out of  
17 the client's pocket.

18          **THE COURT:** As a result of my lawyer separately, like,  
19 joining some MDL case and providing assistance and working up  
20 an MDL case for trial?

21          **MS. GREENWALD:** Right, because I don't think that's  
22 any different than a lawyer who has one case in the MDL.

23           So under PTO 12, if you have one case in the MDL, PTO 12  
24 says that that lawyer's filed and unfiled cases, whether  
25 they're filed in state or federal court, are subject to the

1 holdback.

2 **THE COURT:** Maybe that's a problem with PTO 12.

3 **MS. GREENWALD:** Well, Your Honor, that's pretty common  
4 in pretty much all of the common benefit orders that have come  
5 down the pike since PTO 12.

6 **THE COURT:** But maybe that's a problem with the common  
7 benefit orders.

8 **MS. GREENWALD:** But --

9 **THE COURT:** I will say that we're in a little bit of a  
10 state of confusion right now, and I take primary responsibility  
11 for that.

12 This language in PTO 12 was submitted to me early on in  
13 the case. If I recall correctly, both Monsanto and the lead  
14 counsel agreed on this language that we're talking about right  
15 now in paragraph 4. And I have to say that I adopted it  
16 uncritically and put it into Pretrial Order 12.

17 And I apologize for not drilling down harder on this  
18 language and thinking through the issues more carefully when I  
19 adopted -- or when I was considering the language, because  
20 I think that -- first of all, the language of paragraph 4 in  
21 PTO 12 is very badly written. I mean, it's virtually  
22 incomprehensible. And, number two, I think that this  
23 discussion sort of highlights how broadly PTO 12 tries to reach  
24 and how many cases PTO 12 purports to affect.

25 And so maybe now is the time to get into the discussion

1 about it. Let me give you my tentative view about it, about  
2 PTO 12. And I know you were about to describe some even  
3 further removed category of cases, but I'm not sure that --  
4 that PTO ought to apply to, but I'm not a hundred percent sure  
5 it's necessary to do that because I think -- I think there are  
6 three questions that an MDL judge has to ask, three questions  
7 that I should have asked before deciding whether there should  
8 be a holdback and a common benefit fund and before deciding on  
9 the scope of the holdback order and the common benefit fund.

10 The first question, I think, is: Do I have jurisdiction  
11 to apply the holdback order to this particular category of  
12 cases or claims? And I think there are some cases and claims  
13 that an MDL judge probably has jurisdiction to apply a holdback  
14 order to and there are some categories of cases and claims that  
15 an MDL judge does not have jurisdiction to apply a holdback  
16 order to.

17 I think -- and when I say -- I think I should say now,  
18 just to be clear, when I use the word "jurisdiction," I tend to  
19 agree with Judge Furman's analysis of the jurisdictional issue.  
20 And I noticed, as I was reading his opinion, he kept saying:  
21 It's not a jurisdictional question, at least not subject matter  
22 jurisdiction.

23 **MS. GREENWALD:** Right.

24 **THE COURT:** And I think he's probably right that it's  
25 not subject matter jurisdiction. But I think -- and I see



1 Mr. Citron sort of half agreeing with me or maybe disagreeing  
2 with me with his head movements. But I think that -- I think  
3 that it is a jurisdictional question. It's a question of  
4 whether the Court has the authority to reach its tentacles out  
5 so far to cover some case in state court or some unfiled claim.

6 I'm not sure it's right to call it subject matter  
7 jurisdiction. I mean, when I think of subject matter  
8 jurisdiction, I think of diversity jurisdiction and federal  
9 question jurisdiction and whether there's a case or controversy  
10 within the meaning of Article III.

11 And, of course, there is here a case or controversy within  
12 the meaning of Article III. There are, like, 4,000 cases or  
13 controversies within the meaning of Article III that we have as  
14 part of this MDL.

15 So I'm not sure that it's right to call it subject matter  
16 jurisdiction, but I do think that it's a question about the MDL  
17 court's jurisdiction or authority to reach so far into other  
18 disputes and order the parties to those disputes to do certain  
19 things.

20 So we can get back -- and, Mr. Citron, I would be happy to  
21 hear from you on that at some point. Am I pronouncing your  
22 last name correctly?

23 **MR. CITRON:** (Nods head.)

24 **THE COURT:** Yes? Okay.

25 But anyway, so I think when I say "jurisdiction," what I

1 mean is the Court has to conduct the kind of inquiry that is  
2 called for by the *Vincent* case in the Ninth Circuit and the  
3 *Heartland* case in the Ninth Circuit and that case in the -- the  
4 *Rice* case in the Eighth Circuit and then the older one from the  
5 Fourth Circuit whose name I can't remember. That's the first  
6 thing is, you have to ask yourself, as those cases require us  
7 to do, do I have the authority to reach so far into those other  
8 cases or those other disputes?

9       And my tentative view is that the authority of the MDL  
10 judge is far more limited than what seems to be contemplated by  
11 Pretrial Order 12 and by many of the other pretrial orders  
12 that -- holdback orders that judges have entered in MDLs.

13       I think, unfortunately, when you get one of these big  
14 cases and both sides agree to the language of a proposed order  
15 and nobody's coming in and objecting -- I'm not making excuses  
16 because, as I said, I should have looked at it more critically.  
17 But the reality of litigation is that judges are busy enough  
18 that when both sides agree on language, they're sort of less  
19 inclined to look at it really critically.

20       And I think that probably in these MDLs, judges aren't  
21 thinking carefully enough about the reach of their authority,  
22 the scope of their authority on the front end, and that  
23 certainly was the case with me.

24       So my tentative view is that I only have the authority to  
25 require -- I mean, I think I basically agree with Mr. Citron on

1 this, that I only have the authority to require a holdback for  
2 actual cases in the MDL and maybe, maybe cases filed by lawyers  
3 who signed the participation agreement. Maybe I have the  
4 jurisdiction or authority to require a holdback for those  
5 cases.

6 The other cases, I tend to believe that MDL courts do not  
7 have the authority to require a holdback. It's outside the  
8 scope of their jurisdiction or their reach or whatever term you  
9 want to attach to it.

10 So that's the first question.

11 The second question is from sort of a parallel line of  
12 cases -- right? -- this *Alyeska* footnote and the cases that  
13 have derived from that -- right? -- and the common benefit fund  
14 cases that came before *Alyeska*.

15 But those cases talk about whether a common benefit fund  
16 is appropriate and whether the universe of people to whom the  
17 common benefit fund would apply is identifiable and whether  
18 it's -- whether the benefit that they received is measurable  
19 and all that kind of stuff.

20 I think you have to ask whether a common benefit fund is  
21 appropriate under that line of cases. And I think that at  
22 least as it relates to the cases that are part of the MDL, that  
23 probably is appropriate. Perhaps it's also appropriate as to  
24 the -- as to the cases where the lawyer signed a participation  
25 agreement, although, again, I'm not so sure about that.

1           And then the third thing you have to do is the Court still  
2 has to decide, in the exercise of its own discretion, whether a  
3 common benefit fund is appropriate and whether a holdback is  
4 appropriate and, if so, how much the holdback should be.

5           And then, I guess number four, if the Court decides that  
6 there should be a common benefit fund, then, number four,  
7 the Court will have to figure out at the end of the day how  
8 that fund should be allocated.

9           And on that, on number three and four -- I mean, maybe  
10 four is premature now. I think it probably is. But on  
11 number three, whether a common benefit fund should be  
12 established, just as a matter of discretion and equity, I guess  
13 my inclination is that, again, perhaps for the cases that are  
14 part of the MDL, although I still have some questions about  
15 that, and probably not for the cases where lawyers signed a  
16 participation agreement but the cases are not part of the MDL  
17 because --

18           And the reason for that has sort of already been brought  
19 out in this discussion. The use of the participation agreement  
20 was not particularly systematic, and under the circumstances,  
21 it doesn't seem to make any sense to require a plaintiff whose  
22 lawyer happened to sign the participation agreement to be  
23 subject to a holdback, whereas a plaintiff whose lawyer  
24 happened not to sign the participation agreement not be subject  
25 to a holdback. That doesn't seem particularly equitable.

1           And so I think it probably -- my tentative view is that it  
2 probably makes sense to only give serious consideration to a  
3 holdback for the cases that are part of the MDL.

4           And like I said, I have some further questions about that.  
5 Maybe I'll throw them out there now, just so that I don't  
6 forget.

7           I think if you go back and you look at the origins of the  
8 common benefit fund doctrine, if you look back at all these old  
9 cases from, like, the first half of the 20th century, what you  
10 will generally see, or maybe always see, is that the concern is  
11 that the person who goes first -- like the lead plaintiff --  
12 the lead plaintiff who achieves, as a result of their  
13 successful litigation, a common benefit for a defined group of  
14 people, for an identifiable group of people, the concern that  
15 the courts have -- at least as far as the origins of the  
16 doctrine go, the concerns that the courts have are: We don't  
17 want this lead plaintiff who accomplished the result to pay for  
18 her own attorneys' fees. Right?

19           We don't want Ms. Sprague -- is that her name? Sprague?  
20 "SPROG." "SPRAIG." I don't know how you pronounce it. We  
21 don't want Ms. Sprague to, in that case from, like, 1950 or  
22 whatever it was, we don't want her to pay for her own  
23 attorneys' fees because if she has to pay for her own  
24 attorney's fees, what she's essentially paying for is the  
25 benefit -- she's incurring fees for the benefit of herself and

1 equally for those 14 other people who had those deposits in the  
2 bank. Right? And so we want to make her whole. Right? We  
3 want to make sure that we make Ms. Sprague whole, and so we're  
4 going to use a common benefit fund to spread the cost of her  
5 attorneys' fees, her fees that she incurred, around.

6 At some point -- and maybe it's with the advent of the  
7 MDL -- it seems like the purpose of the common benefit fund  
8 kind of morphed. Right? It was no longer so much about making  
9 sure that the lead plaintiff was made whole and didn't have to  
10 pay attorneys' fees for a benefit that -- full attorneys' fees  
11 for a benefit for other people. Right? It became more about  
12 obsessing about free riders and not wanting free riders to get  
13 any unfair -- any sort of unfair benefit from the work of the  
14 leader -- right? -- the work of the lead counsel.

15 And it also morphed, by the way, at some point -- and,  
16 again, perhaps with the advent of the MDL. It morphed from  
17 worrying about the plaintiff, the lead plaintiff having to pay  
18 fees for the benefit of other people to worrying about the lead  
19 lawyer -- right? -- doing too much work that benefits other  
20 plaintiffs.

21 And I guess in terms of whether I should exercise -- and  
22 I think -- so maybe -- so, anyway, to the extent that we're  
23 applying this common benefit fund doctrine to MDLs, the one  
24 that originated back in the day, it's almost an entirely  
25 different doctrine now than it used to be. And I question

1 whether it's sort of strayed too far from its origins perhaps.  
2 But in any event, maybe that train has left the station.

3 But I think that one important lesson from the doctrine is  
4 that one of the major things we should be concerned with is,  
5 the plaintiff and the lawyer who are taking the lead, are they  
6 not getting fair compensation for the work that they did.

7 Right? I mean, in Ms. Sprague's case, she would have had to  
8 pay her own lawyers' fees, own attorneys' fees if there hadn't  
9 been this contribution from these other beneficiaries.

10 Here, is there any real concern that the lawyers who did  
11 the lead work, the front work -- right? -- and I know it's not  
12 just the lead counsel. I know that there are lead counsel and  
13 there are a number of other firms who also did heavy lifting --  
14 right? -- in furtherance of these trial victories and in  
15 furtherance of moving the MDL along.

16 But is it really -- is there any real concern that these  
17 lawyers have not been adequately compensated for the work that  
18 they did? I'm not really sure that there is.

19 And if there's no real concern that the lawyers in this  
20 MDL have not been adequately compensated for the work that they  
21 did, then why should there be a holdback order at all? Why  
22 does there need to be a holdback order and a common benefit  
23 fund at all?

24 That would be, I think, a question of -- I think you could  
25 get into an interesting academic discussion of whether the

1 common benefit fund doctrine has steered too far from its  
2 origins and whether a court even has the authority to order a  
3 common benefit fund in a situation like this, where the counsel  
4 that did the work has already been adequately compensated.

5 That might be an interesting question. I'm not sure we  
6 need to worry about that because I think -- I think it's a  
7 pretty common practice now to have these common benefit funds  
8 and there sort of seems to be a consensus that it's okay to do.

9 But I still think there's a question of exercising --  
10 the Court exercising its discretion to decide whether a common  
11 benefit fund is appropriate under the circumstances. And I do  
12 wonder -- I'm not sure I have complete information; so I'm not  
13 sure the question can be answered. But I do wonder if it would  
14 be appropriate as a matter of discretion to establish a common  
15 benefit fund at all in this case in light of my assumption that  
16 the lawyers who did the front -- all the front work have been  
17 more than adequately compensated already.

18 So that was, I realize, a very long and winding and  
19 probably confusing expression of my tentative thoughts. And  
20 I guess I'll sort of leave it to -- why don't we start with the  
21 first issue.

22 I mean, my first tentative conclusion for Ms. Greenwald or  
23 whoever is dealing with it is, I don't think that an MDL court  
24 has the authority to go beyond a holdback order for cases that  
25 are actually in the MDL and possibly cases where there's a



1 participation -- where the lawyer signed a participation  
2 agreement.

3 **MS. GREENWALD:** So, Your Honor, we obviously believe  
4 you do have that authority. You have your equitable powers.

5 So maybe I can step back a bit.

6 **THE COURT:** But a court's equitable powers only go so  
7 far. So that begs the question.

8 **MS. GREENWALD:** Understood. Understood. But you have  
9 a litigation here where, basically, six law firms and firms  
10 working with them -- so maybe it's 20 in total. We don't have  
11 an exact number because, of course, there hasn't been an  
12 opportunity yet for people to apply -- literally carried the  
13 bags for 125,000 cases.

14 So when you look at the chart -- which I don't know how to  
15 share a screen very well, but this is in our brief on page 7 --  
16 I think this chart really answers it all.

17 Up until there were the *Daubert* decision and the  
18 verdicts -- the verdict in the Johnson case, there were cases  
19 pretty much filed only by leadership and a few other people  
20 working with leadership. It was a small --

21 **THE COURT:** Let me just interrupt you because I  
22 don't -- I don't want to take -- I don't want to make this  
23 hearing any longer than it's going to be.

24 You took the lead and other law firms took the lead. You  
25 filed these cases. You put yourself out on an island. You

1 worked very hard. You spent a lot of money. You got  
2 incredible results. And then lots of people started filing  
3 cases, and they all received -- they all got their settlements  
4 because you achieved such a good result. There's no question  
5 about that, and you don't need to convince me of that.

6 The thing you need to convince me of is -- the point that  
7 you make is beside the point when it comes to the question of  
8 what is the power of an MDL judge to order a plaintiff in a  
9 state court case or some plaintiff who hasn't filed a case to  
10 pay a percentage of their recovery into a fund. That's  
11 really -- the point you make about how much of a benefit  
12 everybody got from your hard work is really not relevant to  
13 that.

14 **MS. GREENWALD:** I mean, I think that Judge Furman, in  
15 all three of his decisions, addresses that answer in depth. He  
16 explains how lawyers who lead litigations, both in state and  
17 federal court -- here, the same lawyers were doing both, which  
18 was one of the unique aspects of this litigation because there  
19 were only a very few firms working in this case. And we wanted  
20 to put maximum pressure on Monsanto, and they wouldn't waive  
21 *Lexecon*, so we wanted to make sure we had pressure in state  
22 cases as well to get trials. So we were in both places working  
23 full-time getting these cases litigated and ready for trial.

24 And frankly, those 50 or so clients who we worked up for  
25 trial, in fact, bear the burden of expenses here. They didn't

1 all get jury verdicts, by the way. They're in these  
2 settlements like everybody else, except for the few people who  
3 got trial dates.

4 And so it's not that different from the early litigation.  
5 But what's changed is the concept of mass torts. And so to not  
6 tax lawyers who literally sit on the sidelines, advertise,  
7 warehouse cases, and do nothing until we deliver a settlement  
8 to them, basically at their door, would be to incentivize  
9 lawyers to do nothing in the future. Don't practice law.  
10 Advertise, get cases, put them in your docket, and wait for the  
11 lawyers who are doing the litigation to bring it home.

12 And, you know, the objectors --

13 **THE COURT:** That happens now with common benefit  
14 funds. I mean, this case is a good example. Right?

15 I issued PTO 12. Anybody who was paying attention was on  
16 notice of the likelihood of a common benefit fund and spoke --  
17 had questions as to what the scope would be.

18 And I could have given you exactly what you wanted in  
19 PTO 12. Right? I could have said: We're going to start the  
20 holdback now, and we're going to set up the fund now, and  
21 anybody who settles is going to have to pay in 8.25 percent or  
22 10 percent or 12 percent. And there still would have been TV  
23 lawyers running their ads and acquiring clients and sitting  
24 there and waiting for the settlement to come in.

25 I mean, you're acting like adoption of a common benefit

1 fund is going to prevent that from happening in the future or  
2 something. I mean, that is a reality of mass tort litigation.

3 **MS. GREENWALD:** But I don't think it matters that  
4 there wasn't -- you issued a holdback order back then. I think  
5 it disincentivizes lawyers in the future from dedicating their  
6 time and efforts into a case, particularly a case like this,  
7 which was a complex case.

8 **THE COURT:** Let me ask. The problem is, you're  
9 talking about a policy issue now, and you're talking about an  
10 issue that I could take into account in the exercise of my  
11 discretion. But I don't see how it's relevant to the authority  
12 of a federal court to reach a particular distance to particular  
13 parties.

14 I mean, the MDL process does not give us -- does not  
15 expand our jurisdiction. It does not give us greater power  
16 than we already have to manage our cases. It's just that we  
17 have to manage this big clump of MDL cases. But it doesn't --

18 I mean, by your logic, let's say that you brought just one  
19 case. Okay? Let's say there was no MDL. There's no MDL. You  
20 brought a single case against Bayer, or Monsanto, alleging that  
21 Roundup caused cancer in your client. And you spent -- worked  
22 really hard and you spent a lot of money and you won the case  
23 and you won a 50-gazillion-dollar verdict.

24 **MS. GREENWALD:** Mm-hmm.

25 **THE COURT:** And then TV lawyers start advertising.

1 And a TV lawyer in North Carolina -- I don't know why I keep  
2 using North Carolina. But a TV lawyer in North Carolina starts  
3 advertising on late-night cable in North Carolina and gets  
4 10,000 clients and enters into negotiations with Monsanto to  
5 settle the cases on behalf of the 10,000 clients.

6 On your theory, because you had a trial in my court, I  
7 could order the 10,000 clients in North Carolina -- I would  
8 have the authority, the jurisdiction, the power -- whatever you  
9 want to call it -- to order the 10,000 clients in  
10 North Carolina to hold back 8 percent of their recovery to make  
11 sure that you, the person who did the trial in my courtroom,  
12 get adequately compensated.

13 **MS. GREENWALD:** I don't think that's at all what  
14 multidistrict litigation is all about. That --

15 **THE COURT:** Do you think that I have the authority to  
16 do that on my example that I --

17 **MS. GREENWALD:** No, I don't. That's not a  
18 multidistrict litigation where the Court appoints a group of  
19 people, leadership, to litigate the entirety of a mass tort.  
20 You take on --

21 **THE COURT:** No, no, no. See, this is one of the big  
22 problems with your argument and with, I think, a lot of people  
23 who operate too frequently in the MDL world.

24 It's not -- I was not assigned to resolve every tort claim  
25 in the country. I was assigned to adjudicate every federal

1 case, every federal tort case involving Roundup. And frankly,  
2 the federal cases are dwarfed by the state cases. There are,  
3 like, 4,000 federal cases and -- what? I don't know -- 200,000  
4 state cases.

5 And I am not responsible -- the MDL judge is not  
6 responsible for those cases, not responsible for rounding up  
7 those cases, not responsible for adjudicating those cases, not  
8 responsible for making sure what happens in those cases, and  
9 not responsible for ordering people to do things in those  
10 cases.

11 And it's this sort of federal supremacy mentality that has  
12 kind of seeped into the MDL world that I think is causing these  
13 kinds of arguments to be sort of accepted. But I just don't --  
14 I don't think that's right.

15 I don't think I have -- just like in my example about the  
16 10,000 North Carolina cases after I've tried a single case,  
17 just as I don't have the authority to order a holdback in those  
18 10,000 North Carolina cases, I don't have the authority to  
19 order a holdback in the 10,000 North Carolina state cases that  
20 exist now against Monsanto.

21 **MS. GREENWALD:** But you don't -- those parties --  
22 those lawyers aren't before you in that hypothetical.

23 So in this hypothetical -- in our case here, if you have a  
24 case --

25 **THE COURT:** It doesn't matter that the lawyers are

1 behind me. It's the clients. It's the cases that you're  
2 asking me to assert jurisdiction over, and it's the recovery of  
3 the client that you're asking me to require a chunk be taken  
4 out of.

5 **MS. GREENWALD:** Your Honor, it's not coming from the  
6 client. It is a hundred percent not coming from the client.

7 Going back to your hypothetical initially, if you have a  
8 \$100,000 settlement and there's an 8 percent holdback, that  
9 would be \$8,000 that comes out of the attorney's contingency  
10 fee. So what that lawyer --

11 **THE COURT:** But what you're asking me to do is issue  
12 an order that says: If somebody sues in state court and they  
13 win a judgment -- let's say they win a million dollars in state  
14 court. You're asking me to order that 8 percent of that  
15 million dollar judgment be taken out and held back. And you're  
16 further asking me to say that it needs to come from the  
17 lawyer's portion.

18 But you are asking me to issue an order that affects a  
19 judgment that was obtained in state court.

20 **MS. GREENWALD:** So, okay. Right now, we're not  
21 even -- so the hypothetical of someone down the road who tries  
22 a case in state court and hires experts and does all the  
23 discovery and does all the work, that's not before us now.

24 What's before us now are all these cases --

25 **THE COURT:** Do you think that I have the authority to

1 do that?

2 **MS. GREENWALD:** I think that lawyer can come to you  
3 and say that that is an inequitable application to his or her  
4 case because that lawyer --

5 **THE COURT:** But you think I have the authority to do  
6 it?

7 **MS. GREENWALD:** I think you --

8 **THE COURT:** You think a federal court has the  
9 jurisdiction to go reach into that judgment, that state court  
10 judgment, and require that a portion of the judgment be held  
11 back?

12 **MS. GREENWALD:** I think that -- if that lawyer used  
13 common benefit work, the answer is yes, maybe.

14 **THE COURT:** But I thought you said that even if the  
15 lawyer didn't use common benefit --

16 **MS. GREENWALD:** No, no, no, no, no, no. If a  
17 lawyer --

18 **THE COURT:** Your broad definition of "common benefit  
19 work" is that you achieved a good result and they --

20 **MS. GREENWALD:** No, no. Common benefit work is the  
21 experts we worked up in this case.

22 **THE COURT:** Wait a minute. But that's not what you  
23 said at the beginning of this hearing. You said that common  
24 benefit work was anybody who benefited from the work; anybody  
25 who either used the materials or got a recovery of any sort as



1 a result of your groundbreaking work.

2 **MS. GREENWALD:** Right. But how can anyone sit across  
3 a table from Monsanto right now in negotiations and ask for any  
4 money for their clients if they can't say: The science is on  
5 our side. The law is on our side. Monsanto's liable because  
6 of all the depositions that were taken, because of all the  
7 documents that were gone through.

8 In order to have a level playing field with Monsanto in  
9 any negotiation at all, you have to have access to all the work  
10 we put together. You have to.

11 **THE COURT:** But what does that have to do with my  
12 authority to -- forget about the state court judgment. Let's  
13 just stick with settlements, because I don't want to confuse  
14 things unnecessarily.

15 I just don't understand what any of that has to -- these  
16 are all policy arguments you're making. But what does that  
17 have to do with my authority to reach out to North Carolina and  
18 require a plaintiff in North Carolina who filed a lawsuit, who  
19 has no connection to the MDL and gets a settlement from  
20 Monsanto, to pay 8 percent of that into a fund for this MDL?

21 **MS. GREENWALD:** Okay. So that's the one I said PTO 12  
22 does not necessarily touch.

23 But can I change that hypothetical and have that --

24 **THE COURT:** Sure.

25 **MS. GREENWALD:** -- North Carolina lawyer have one case

1 in your MDL?

2 You have authority --

3 **THE COURT:** I don't understand why that -- I don't  
4 understand --

5 **MS. GREENWALD:** Because that lawyer --

6 **THE COURT:** -- why that matters.

7 **MS. GREENWALD:** You have authority over that lawyer,  
8 and that lawyer -- so a lawyer who's in the MDL, who benefits  
9 from all the common benefit work, they don't just apply that  
10 knowledge and that information to that one client.

11 As a lawyer, you know what you know, and you have an  
12 obligation to represent all your clients zealously. So there's  
13 no way I, as an MDL lawyer -- or as a person, not an MDL  
14 lawyer, but I've signed a participation agreement --

15 **THE COURT:** But that happens in the legal system all  
16 the time.

17 I mean, I think back to my work in the City Attorney's  
18 Office, and we worked on marriage equality starting in the  
19 early years. And we worked up expert witnesses. We developed  
20 research. We worked up strategy. And we like to think, at  
21 least, that other people who were fighting for marriage  
22 equality around the country benefited from our hard work in  
23 preparing the experts. And they used some of our experts and  
24 stuff like that. So they benefited from the work that we did.

25 That happens all the time in the legal system. The first

1 person wins a case, and then the other person rides the  
2 coattails.

3 But it doesn't -- all of the stuff that you're talking  
4 about really does not seem to me go to the authority of a  
5 federal court to require parties in other cases to do things.

6 And just the fact that a plaintiff who filed a lawsuit in  
7 North Carolina state court happens to be using the same lawyer  
8 as a plaintiff who filed a federal case in the MDL doesn't give  
9 me authority to order the plaintiff in North Carolina to do  
10 something with their recovery.

11 **MS. GREENWALD:** So, Your Honor, I mean, for example,  
12 the Third Circuit in *Avandia* reached out and taxed and accessed  
13 cases that were on file, the lawyers who appeared before the  
14 MDL.

15 **THE COURT:** But that was only lawyers who signed -- I  
16 mean, that sort of gets us into the question of participation  
17 agreement. Right? Because in *Avandia*, it was only lawyers  
18 who -- it was only clients whose lawyer signed the  
19 participation agreement and agreed that their clients' cases  
20 would be subject to the holdback order in the MDL.

21 **MS. GREENWALD:** Well, but -- yes. But there was also  
22 the other case -- there was a couple of *Avandia* cases -- where  
23 the lawyer did not sign a participation agreement, but he  
24 associated, actually, with Michael Baum and some other lawyers  
25 to ask them to come in and try the case with him. And that

1 pulled him into the common benefit assessment.

2 **THE COURT:** I don't remember reading that in the --

3 **MS. GREENWALD:** That's the one that's 658 Fed  
4 Appendix 29. It's in our brief.

5 It's -- the reality is, is that in dozens -- I know you're  
6 not -- you are looking at this from a fresh lens, but it would  
7 turn the common benefit doctrine on its head as it exists  
8 today.

9 I mean, mass torts -- you mentioned *Heartland* earlier,  
10 which I just want to spend a moment contrasting the *Heartland*  
11 situation from what we have here. I mean, in *Heartland*, it was  
12 a single-event case. It's not a mass tort. The lawyer who had  
13 those two cases, one unfiled, one filed -- every court that's  
14 talked about it -- was a stranger to the litigation. That  
15 lawyer settled three months after the MDL formed the discovery  
16 committee in the MDL. And so you're not -- it's not a case  
17 like this where nothing happened --

18 **THE COURT:** But the --

19 **MS. GREENWALD:** -- until everything --

20 **THE COURT:** -- *Heartland* case --

21 **MS. GREENWALD:** -- everything was wrapped with a bow.

22 **THE COURT:** But that's not what the *Heartland* case was  
23 concerned with, and that's not what the *Vincent* case was  
24 concerned with or the *Rice* case.

25 The concern that those courts had is: Does a federal MDL

1 court that has jurisdiction over this clump of federal cases,  
2 does it have the jurisdiction to reach out and require  
3 parties -- people who are not parties to the litigation do  
4 stuff to benefit the plaintiffs in the litigation and the  
5 lawyers in the litigation?

6 **MS. GREENWALD:** But the lawyer in *Heartland* had  
7 nothing to do with the MDL. He had no cases in the MDL. He  
8 had a case filed in Alaska in state court, and the other one  
9 wasn't filed at all.

10 **THE COURT:** Right.

11 **MS. GREENWALD:** And he --

12 **THE COURT:** But the Court in *Heartland* was not focused  
13 on whether the lawyer had a connection. The Court was focused  
14 on whether the plaintiffs or claimants in those other cases had  
15 any connection to the MDL.

16 And that's the point. It's not -- you cannot exercise  
17 jurisdiction over a plaintiff through a lawyer who's  
18 representing some other client in your case.

19 **MS. GREENWALD:** Again, this holdback is not coming out  
20 of the client's compensation.

21 **THE COURT:** But it's exercising jurisdiction over that  
22 case. Right? It's exercising jurisdiction -- it's reaching  
23 out and exercising power over that dispute. And it's a dispute  
24 over which the MDL court, I'm feeling quite confident and more  
25 confident as we have this discussion, does not have the power

1 over.

2 **MS. GREENWALD:** So the result would be, if the Court  
3 finds that only cases in the MDL are subject to a holdback, in  
4 future MDLs, lawyers will put one case in the MDL so they can  
5 get the benefit of all the work that the MDL leadership does  
6 and put every other case they have in state court. It's  
7 basically an invitation --

8 **THE COURT:** First of all --

9 **MS. GREENWALD:** -- to avoid MDLs.

10 **THE COURT:** Well, no. First of all, I'm confident  
11 that you people are smart enough to figure out how to deal with  
12 that; for example, an agreement that only this -- the work  
13 product can only be used in the federal MDL cases and it can't  
14 be used in some other lawyer's state court cases. The other  
15 answer is get a common benefit fund in the state court cases.

16 I mean, it's interesting. You're talking about all of the  
17 benefit that you conferred upon everybody as a result of  
18 winning three trials. Right? Two of those trials were in  
19 state court.

20 **MS. GREENWALD:** That's correct.

21 **THE COURT:** One trial was in San Francisco  
22 Superior Court. The other trial was in Alameda County  
23 Superior Court.

24 There are all these cases in California, in the California  
25 court system, and they're all being adjudicated by one judge.

1 So what is to stop you from going to Judge Smith in Alameda  
2 County, who, as I understand it, controls all -- is  
3 adjudicating all of the California cases, and get a common  
4 benefit fund -- ask her to establish a common benefit fund, if  
5 she believes it's appropriate to do so?

6 **MS. GREENWALD:** That might be true there, but that  
7 wouldn't be true for the many, many more cases that are in  
8 Missouri, where there is no such thing as a JCCP.

9 And so, for example, in the county, while there are  
10 administrative judges, the courts -- the cases are assigned to  
11 whatever judge is assigned to the case when it is filed. And  
12 so there is no centralization.

13 I actually asked our local counsel before this conference  
14 today whether he has any precedent that he knows of in Missouri  
15 where either the county state court or the city state court has  
16 addressed and awarded a common benefit, and he said no, not in  
17 any --

18 **THE COURT:** Maybe the answer is no. Maybe they  
19 haven't figured out how to do it because these judges in these  
20 MDL cases are doing what I did in PTO 12 and overreaching, and  
21 so there's no -- people don't feel the need to establish one in  
22 the state courts.

23 But all of these things that you're talking about are  
24 serious policy issues, and I imagine that people could have  
25 reasonable disagreements about the solution to those policy

1 issues.

2 But federal courts are courts of limited jurisdiction, and  
3 they can't just reach anywhere and order anybody to do  
4 anything.

5 And what you're -- see, you're not looking at it from the  
6 standpoint of the power of the federal district court. You're  
7 looking at it from a more practical standpoint, which is  
8 understandable.

9 You're saying: Okay, here's this practical problem. We  
10 have these tort cases all over the country, this mass tort.  
11 They're in federal court. They're in state court. They're in  
12 all these different states. And we need to figure out a way to  
13 corral them and get them dealt with in as -- from the  
14 perspective of leadership counsel, as efficiently and  
15 effectively as possible.

16 And I understand that. But all of the problems that  
17 you're raising are problems about dealing with litigation  
18 efficiently, but they don't really -- they're not really  
19 arguments for an expansion of the federal court's power; or to  
20 the extent that they are an argument for expansion of the  
21 federal court's power, you've got to go to Congress and ask  
22 Congress to expand the power of the Federal District Courts,  
23 which would be perfectly fine with me, by the way.

24 But as it stands now, I just don't think -- I don't think  
25 I have the power to reach out to those other cases.



1           **MS. GREENWALD:** So a couple more things, and then I  
2 might -- so you mentioned a couple of other cases, the *Rice*  
3 case. Again, there were two independent settlement procedures  
4 going on, one in the state court, one in the federal court.  
5 They conducted separate discovery in those cases. They  
6 prepared separate cases for trial. Those were two very  
7 distinct cases.

8           And then --

9           **THE COURT:** That happened here too. Right? I mean,  
10 there were two cases that went to trial in state court.

11           **MS. GREENWALD:** Right. But the discovery that was  
12 used in every single solitary case, whether in Missouri,  
13 California, or wherever, was predominantly what was done in  
14 this MDL.

15           Again, the order that's an attachment to our -- an exhibit  
16 to our affidavit, that provision appears, to my knowledge, in  
17 every Missouri case that has a case management order; that the  
18 discovery in the multidistrict litigation is deemed discovery  
19 in that state case. And so it is incorporated into those  
20 cases.

21           And so, essentially -- I mean, I realize, Your Honor, I'm  
22 a sinking ship here trying to convince you to the contrary.  
23 But I mean, even in *GM*, I know Judge Furman did not assess  
24 state court cases, but he assessed the unfiled cases of lawyers  
25 who were before him. And he did not -- he said specifically

1 that he was not saying that he didn't have jurisdiction to  
2 assess the state court cases, but that he was leaving that to  
3 the state court judges, because there was very close  
4 coordination in *GM* between the state court judges and  
5 Judge Furman. I think they had, like, weekly calls or biweekly  
6 calls. They participated in various procedures together, much  
7 like you did with the JCCP in *Daubert*. And I know you invited  
8 other judges to attend that as well. That happened throughout  
9 the *GM* case.

10 And so there are all these judges out there, quite  
11 honestly, then that are acting extrajudicious because there are  
12 dozens and dozens and dozens of case management orders and  
13 assessments and holdbacks right now -- in fact, by objectors  
14 here. The recent *3M* order is Mr. Lanier, the Gibbs firm, and  
15 the Watts firm. And they have written a broad, broad, broad  
16 holdback that was just signed by the Court.

17 Same in the talc case, which is Beasley Allen. The  
18 same -- much broader than your case management order.  
19 Remarkably broader. In fact, it says right in the order that  
20 any case that benefited from MDL work product is subject to the  
21 assessment. And it has a two-tier assessment, basically  
22 strong-arming lawyers into getting into a participation  
23 agreement early on, which we did not do, which is if you sign a  
24 participation agreement now, your assessment will only be  
25 9 percent; but if you don't and I later find, when you settle

1 your case or you try your case, that you actually benefited  
2 from MDL work product, your assessment is now 15 percent.

3 Those have been issued in the last few months.

4 **THE COURT:** So part of it -- I mean, obviously, I  
5 haven't scrutinized all those orders in detail. But you say  
6 anybody who benefits from common benefit work.

7 I mean, I think that this sort of bleeds into the issue of  
8 the participation agreement. I mean, I think to the extent you  
9 have an order that says "Any lawyer who's participating in this  
10 MDL or has a case in this MDL" -- right? -- "or who signs a  
11 participation agreement sort of agreeing to use the work  
12 product that's created by this MDL in exchange for agreeing to  
13 be subject to a holdback order," that's -- that's one thing. I  
14 mean, maybe that's okay. Like I said, I'm not really -- I'm  
15 less -- I'm sort of not really sure about the participation  
16 agreement issue.

17 But let's assume that that -- let's assume that the Court  
18 has jurisdiction to do that. Let's assume that the Court has  
19 jurisdiction to say there's a holdback for anybody who -- any  
20 of the cases in the MDL and for any lawyer who has state cases  
21 but wants to sign a participation agreement and use the  
22 MDL work product and agrees to be subject to a holdback order  
23 in exchange for that. I think that's probably fine.

24 Again, if it is subject matter jurisdiction -- and  
25 Mr. Citron raises this point in his brief. If it is subject

1 matter jurisdiction, then that may not be fine. But I'm not  
2 sure that subject matter jurisdiction is the right way to think  
3 of it.

4 **MS. GREENWALD:** But it's really exercising authority  
5 over the lawyers. Right? So the MDL judges are saying: If  
6 you are -- if you are going to -- if you are going to use  
7 MDL work product, you are going to be assessed a holdback; and  
8 it's going to be staggered, depending on whether you're going  
9 to do it voluntarily or I have to do fact finding later to see  
10 if you actually used it or not.

11 And I don't -- if it's jurisdictional, Your Honor, it  
12 shouldn't matter if someone signs it. In fact, there's cases  
13 out there that talk about how it's not the participation  
14 agreement itself that gives the Court authority, but it's  
15 the Court's order.

16 So lawyers can sign anything they want between lawyers.  
17 It's just a contract. In fact, I can't remember the name of  
18 the case and I apologize, but there's a whole discussion about  
19 that would be a breach of contract --

20 **THE COURT:** It's the *Rice* --

21 **MS. GREENWALD:** *Rice*. Okay.

22 **THE COURT:** -- the *Rice* case, I think.

23 **MS. GREENWALD:** But what matters is whether that  
24 participation agreement, the substance of it is incorporated  
25 into a court order. And if it is --

1           **THE COURT:** Right. Right. And so I agree with what  
2 you're saying or I think I agree with what you're saying; that  
3 if there's a court order that says anybody who's subject to  
4 this participation agreement, who voluntarily signs the  
5 participation agreement, voluntarily submits to the  
6 jurisdiction of the Court as it relates to this issue is  
7 subject to a holdback, I think that's probably fine. Right?

8           But, of course, you're saying that my power, the power of  
9 the MDL court reaches much further than that, to people who  
10 simply got a settlement in state court because of the fact that  
11 trials were won in California. And I just don't see how I  
12 could possibly have the authority to order somebody to hold  
13 back --

14           **MS. GREENWALD:** I mean, I know that -- I don't want to  
15 belabor this because I don't want to dominate the entire time.  
16 But, for example, I can read what was written most recently in  
17 the talc litigation.

18           The fourth category that the order applies to is  
19 (reading):

20           "All cases and/or claims of any ovarian cancer  
21 clients of any counsel who received, used, or  
22 benefited from the common benefit work product."

23           **THE COURT:** But my question is: How much care --  
24 looks like Ms. Wagstaff got kicked out.

25                           (Pause in proceedings.)

1           **THE COURT:** Probably not the first time you've been  
2 kicked out of court.

3           My question, Ms. Greenwald, about the order you just read  
4 to me, was that one of those orders that was put together by  
5 counsel at the beginning of an MDL that the judge signed?

6           **MS. GREENWALD:** No. This is a recent order by the  
7 chief judge of the District of New Jersey. It was signed on, I  
8 want to say, September or October of -- I'm looking for the  
9 date.

10          **THE COURT:** I mean, my question is --

11          **MS. GREENWALD:** And the one in --

12          **THE COURT:** -- how much --

13          **MS. GREENWALD:** I'm sorry.

14          **THE COURT:** Are these orders opposed? Are they  
15 unopposed? How much consideration are the judges giving to the  
16 scope of their power when they're signing these proposed orders  
17 that are put in front of them by both sides?

18          **MS. GREENWALD:** I mean, the time to oppose those  
19 motions -- those orders are when they're issued. And to my  
20 knowledge, there aren't any objections in talc. I can't  
21 promise you that because I don't work on talc litigation; so I  
22 would defer to someone on the phone, one of my colleagues who  
23 might be in talc.

24          But the reality is that courts across the country,  
25 district courts across the country commonly and routinely issue

1 orders like this where they hold that they're putting together  
2 a small group of lawyers who are going --

3 **THE COURT:** I understand.

4 **MS. GREENWALD:** And I know I've said that a hundred  
5 times, and I don't mean to repeat myself.

6 **THE COURT:** I mean, the fact that something is  
7 repeatedly done in an MDL doesn't mean that courts have the  
8 authority to do it. I think that this may be an example of  
9 sort of MDLs gone wild.

10 **MS. GREENWALD:** One last thing, Your Honor, and then  
11 I --

12 **THE COURT:** Sure.

13 **MS. GREENWALD:** The pocket guide for transferee judges  
14 actually states what you cannot assess, and sort of by default,  
15 it would show what you can. I'm just trying to -- I want to  
16 find it so I can try to be organized here.

17 Here. It says --

18 **THE COURT:** You cited the pocket guide in your brief,  
19 and I saw that.

20 **MS. GREENWALD:** This is a different provision that I  
21 read last night. I was reading it again.

22 **THE COURT:** Okay.

23 **MS. GREENWALD:** It says (reading):

24 "Contributions cannot be imposed by a transferee  
25 judge on attorneys who have no cases in the MDL and

1           who do not use federal discovery material."

2           So implicitly, the pocket guide certainly anticipates that  
3           district courts have authority to assess common benefit  
4           holdbacks in cases where there is -- the lawyer does have a  
5           case or more in the MDL and/or used federal discovery  
6           materials.

7                   **THE COURT:** Okay. I think what we should do -- why  
8           don't we do this. Why don't we take a short break because  
9           we've been going for an hour and a half and the court reporter  
10          could use a break.

11          And then maybe I could hear from the -- I don't want to  
12          take too much time with the objectors on this issue, but maybe  
13          I could hear briefly from the objectors on the stuff that we've  
14          discussed so far.

15          And then, after that, maybe we can turn to whether, as a  
16          matter of discretion, I should order a common benefit fund and  
17          a holdback and, if so, who it should apply to, whether it  
18          should just be the cases in the MDL or whether it should  
19          include cases represented by lawyers who signed the  
20          participation agreement.

21          So why don't we resume at 2:45.

22                   **THE CLERK:** Court's in recess.

23                                (Recess taken at 2:37 p.m.)

24                                (Proceedings resumed at 2:50 p.m.)

25                   **THE COURT:** Okay. Do any of the objectors have



1 anything they want to say about this authority power issue?

2 **MR. PAREKH:** Your Honor, Behram Parekh on behalf of  
3 the objectors who have cases in front of the MDL but did not  
4 sign the participation agreement and have other cases that are  
5 not in front of the MDL.

6 Just very briefly, Your Honor, I think Your Honor is  
7 absolutely correct in terms of the reach of the federal court's  
8 authority.

9 And I think the issue in terms of whether or not this  
10 refers to subject matter jurisdiction -- and this may be  
11 arcane, and I probably shouldn't even be going here -- but the  
12 Fourth Circuit in *Showa Denko*, I think, actually gets it right  
13 in terms of why this is a matter of subject matter  
14 jurisdiction. And the reason that it gets it right is that  
15 it's not just a case or controversy that brings you the subject  
16 matter jurisdiction, but it's a case or controversy between a  
17 set of parties.

18 And here, the only parties in front of Your Honor are the  
19 people who are actually in the MDL litigation and have a client  
20 in the MDL litigation. That client is a party, Monsanto is a  
21 party, and the case or controversy is between that client and  
22 Monsanto.

23 **THE COURT:** But -- I mean, I agree with much of what  
24 you just said, but courts have the power to order parties  
25 not -- people who are not parties to the litigation to do stuff

1 all the time as part of the exercise of their jurisdiction over  
2 the case.

3 And so I guess to me, I have subject matter jurisdiction  
4 over these 4,000 cases, or whatever they are. And the question  
5 is: How much power do I have, can I exercise in furtherance of  
6 my adjudication of these 4,000 cases?

7 So I'm not exactly sure why it's a question of subject  
8 matter jurisdiction as opposed to just my authority to reach  
9 out and do X or Y or Z. I mean, at some point it's beyond my  
10 authority. Right?

11 I have the authority to order Facebook to respond to a  
12 subpoena of somebody's posts in a case, a witness's posts or a  
13 party's -- plaintiff's posts, or whatever. I have the  
14 authority to do that because it has a sufficient nexus with the  
15 case that I'm adjudicating. But I don't have the authority to  
16 order Facebook to stop running election ads.

17 And I don't know if it's a question of subject matter  
18 jurisdiction or if it's -- like, the better way to think of it  
19 and the better way to label it is just outside my authority.

20 **MR. PAREKH:** I think that's true. But, I mean, for  
21 example, the subpoena power authority is authority that is  
22 explicitly conferred on the Court, and I think that's where the  
23 sort of limit lies.

24 There's no legislation, there's no congressional act,  
25 there's no constitutional provision that gives the Court

1 Article III authority to reach people who are not in front of  
2 it other than through an explicit grant, such as the subpoena  
3 power.

4 I do admit this is probably more arcane than we need to  
5 get to, and I apologize.

6 **THE COURT:** Then why -- I mean, I used Ms. Sprague as  
7 an example of one of those old common benefit fund cases. Why  
8 was it appropriate for -- I guess -- what I was going to ask  
9 is: Why was it appropriate for the Court to order Ms. Sprague  
10 to receive money to which these other people had a rightful  
11 claim? Right?

12 But I guess the answer is that there was a pot of money in  
13 the bank and it was a dispute between Ms. Sprague and the bank,  
14 and the Court had the authority to order that as a remedy.

15 **MR. PAREKH:** Exactly, Your Honor.

16 And I think the *Vincent* case really sort of makes that  
17 distinction as well. It's different when you're talking about  
18 a common fund because the Court has authority over the *res* in  
19 the common fund. And so anybody who accesses that common fund,  
20 the Court then has authority over.

21 Here, there is no common fund. The plaintiffs didn't --  
22 the lead counsel didn't establish a common fund. And I think  
23 that is a huge and significant distinction in between  
24 the Court's authority over people who have access to it or not.

25 And to address one of Ms. Greenwald's issues in terms

1 of --

2 **THE COURT:** Can I just ask you before you -- I'm sorry  
3 to interrupt, but I just want to ask you: Does it matter for  
4 purposes of this case, for purposes of any of the objectors  
5 here, whether it is labeled subject matter jurisdiction or some  
6 other kind of jurisdiction or just, like, authority? Does it  
7 matter?

8 **MR. PAREKH:** It doesn't, Your Honor. I apologize. It  
9 was just sort of my own personal interest.

10 **THE COURT:** Yeah. No. I mean, I've been kind of  
11 obsessing about it too. But anyway, go ahead.

12 **MR. PAREKH:** And to address one of Ms. Greenwald's  
13 concerns about if Your Honor does do what we're asking for  
14 here, how will that affect future litigations? Won't these  
15 unscrupulous lawyers supposedly advertise, keep 10,000 cases,  
16 and then do nothing with them?

17 Well, you know, the solution is to do what happens in a  
18 lot of these MDLs and reach a global settlement agreement with  
19 a common fund. No one questions, when a common fund is  
20 created, that those lawyers have an ability to assess the  
21 common fund for a common benefit.

22 And, you know, that didn't happen here, and I think that's  
23 where all of this controversy stems from.

24 **THE COURT:** Okay. Anybody else from the objectors  
25 have anything they want to say?

1           **MS. EPHRON:** Yes, Your Honor. Melissa Ephron for  
2 Category 3 objectors.

3           I wanted to address the participation agreement. In terms  
4 of the participation agreement, we did not voluntarily sign the  
5 agreement simply to sign the agreement. For us, it was made a  
6 condition precedent to receiving work product.

7           And for the first time today CLC is saying that they were  
8 so unorganized that they didn't have certain people sign the  
9 participation agreement and they, nonetheless, gave the work  
10 product, while others did sign the participation agreement.

11           It would be grossly unfair to penalize the firms that did  
12 sign the participation agreement and actually complied with an  
13 assessment as a result.

14           **THE COURT:** Okay. I understand that point.

15           Anybody else?

16           **MR. CITRON:** Judge, Eric Citron.

17           I just wanted to offer one point of clarification that  
18 I think would be helpful, which is that I do think what is  
19 going on here -- and this -- and the right way to think about  
20 it is a jurisdictional issue, but not necessarily a subject  
21 matter jurisdictional one.

22           You know, like if you were asked to decide a really  
23 interesting case that I was arguing in another courtroom in the  
24 Northern District of California before another judge, you  
25 couldn't do that. It's not within your jurisdiction just

1 because I'm a lawyer in front of you. It is, of course, within  
2 the federal subject matter jurisdiction. It's just not your  
3 case or controversy to decide at that moment.

4 **THE COURT:** I think that's a very good way to think  
5 about it. I mean, and then does it matter -- does the word --  
6 my clerks and I were discussing during the break that the word  
7 "jurisdiction" sort of carries -- it has sort of intense  
8 connotation. Right? I mean, is there a difference between  
9 calling it jurisdiction -- in your hypo, in your example that  
10 you just gave, is it that I lack jurisdiction, or is it better  
11 to label it "authority" or "power," that I lack authority to  
12 decide that case next door?

13 **MR. CITRON:** I think --

14 **THE COURT:** Judge Breyer, by the way, would be very  
15 disappointed to hear that I lacked the authority to decide his  
16 case.

17 (Laughter.)

18 **THE COURT:** Go ahead.

19 **MR. CITRON:** I think it is a question of jurisdiction  
20 in the sense that what's not going on is that you've got the  
21 merits wrong or that there isn't legal authority that supports  
22 the order. You know, is a court doing something to a thing  
23 that is not its thing to decide.

24 And so an appellate court could say: You didn't have the  
25 power to do that even with the consent of the parties, for

1 example.

2 In that sense, I do think it is jurisdictional, but I  
3 wouldn't refer to it by the knee-jerk reference to subject  
4 matter jurisdiction because I think it's just a little bit  
5 beside the point whether it could be within the federal subject  
6 matter jurisdiction or not.

7 One issue is you may end up asked to decide things that  
8 wouldn't be within federal subject matter jurisdiction.

9 And what I think is actually going on here are disputes  
10 that are well addressed by contract law and that you're being  
11 invited, essentially, to decide either contract or  
12 quasi-contract cases that may or may not be federal and  
13 certainly aren't before you. And I think --

14 **THE COURT:** Are you talking about -- are you referring  
15 to the lawyers -- are you referring to the clients whose  
16 lawyers signed the participation agreement?

17 **MR. CITRON:** So with respect to clients who signed --  
18 lawyers who signed, that presents, quite obviously, I think, as  
19 a good contract case, you know.

20 But what Ms. Greenwald I think is seeking is an  
21 *in personam* judgment against the person who signed that  
22 agreement so that she can recover some money from them.

23 **THE COURT:** Well, but that --

24 **MR. CITRON:** And that requires --

25 **THE COURT:** I mean, I've got this case. Right? And

1 I've got these lawyers who are par- -- I've got these lawyers  
2 who are participating in the case, and I've got these other  
3 lawyers who are coming in, saying: I have state court cases  
4 and I want to use the work product that's generated from this  
5 federal case. And in exchange for the work product, I'm  
6 willing to -- the work product that was generated as part of  
7 this case, I'm willing to subject myself to the authority of  
8 the judge who's adjudicating this case.

9 It seems to me there's a much closer nexus between this  
10 case and the case of the client who's represented by that  
11 lawyer who signed the agreement.

12 Now, there's a question about whether -- I mean, the  
13 client better know that the lawyer signed that agreement to --

14 **MR. CITRON:** Yeah.

15 **THE COURT:** -- agree to give up that client's -- I  
16 think that's a potentially big problem -- right? -- is that:  
17 Are these lawyers really telling their clients that they've  
18 agreed to withholding of 8 percent of their recovery?

19 But putting that aside, if a lawyer signs the agreement  
20 and says, "Give me the work product from this federal case that  
21 this judge is presiding over in exchange for my agreement to be  
22 subject to this judge's holdback order," that's a pretty  
23 close -- don't you think that's a pretty close nexus to the  
24 case such that it makes it different from your hypo?

25 **MR. CITRON:** Yes.



1           **THE COURT:** I'm deciding the case that was assigned to  
2 a judge down the hall?

3           **MR. CITRON:** Yes, I think it is different. I think we  
4 would consider that -- or I think it would be right to consider  
5 that appropriately within what's called the ancillary  
6 jurisdiction of the Court.

7           So the Court sometimes has the power to decide ancillary  
8 disputes that are close enough -- related closely enough to the  
9 matter before it that it doesn't exceed its jurisdiction by  
10 deciding them. This certainly feels like that.

11           I still think the thing you identified as a real concern  
12 is a good reason to conceptualize these as *in personam* actions  
13 against attorneys and not an effort to assess a state court  
14 case, because if that state court plaintiff says, "Hey that  
15 guy's" -- "I didn't agree to this. This isn't fair. It's  
16 raising the costs. It's going to impose some other cost on  
17 me," you could be -- you could be being asked to go too far.

18           **THE COURT:** In other words, maybe the better way to do  
19 these things is to say: You have a contractual obligation --  
20 if you want to agree -- if you want to use work product in this  
21 MDL, you have a contractual obligation to transmit to us  
22 X percent of your fees that you get from the case.

23           And so you're not actually, like, exercising authority  
24 over or issuing an order that governs the transfer of money  
25 from Monsanto to the plaintiff in North Carolina. You're

1 issuing an order that governs the economic relationship between  
2 the lawyer who's using the federal work product and the -- and  
3 the plaintiffs' lawyers in this case and Monsanto, I guess.

4 **MR. CITRON:** I think that's right.

5 And I think all I'm saying further to that is that the  
6 source of substantive law that's likely to decide when this is  
7 fair or what the appropriate price is, is all contract law.

8 In the ordinary course, it's probably better to let a  
9 state court with, you know, common law equity jurisdiction and  
10 familiarity with the principles decide that case in the first  
11 instance. There might be circumstances where it's in the  
12 interest of the MDL to exercise ancillary jurisdiction when  
13 it's available.

14 But in the absence of both a voluntary agreement and a  
15 court order embodying it, I can't find any source of federal  
16 jurisdiction -- or jurisdiction in this Court over those  
17 controversies.

18 **THE COURT:** Okay. Anything else?

19 **MS. EPHRON:** Your Honor, if I may, Melissa Ephron  
20 again for Category 3 objectors.

21 If we're going to pivot this idea of the Court's reach on  
22 the basis of a contract, then we really need to look at the  
23 *Avandia* case and the *GM* case.

24 In both of those cases, perhaps, yes, there was a valid,  
25 enforceable contract with all the material terms there,

1 including the amount of the holdback. In *Avandia*, it's  
2 express; and in *GM*, it's express.

3 In our case, the participation agreement is entirely  
4 silent about the amount of the holdback --

5 **THE COURT:** Okay. But let me stop you there for a  
6 second and just -- it seems like there are two questions or at  
7 least two questions I have to answer as it relates to people in  
8 your category.

9 So you all signed -- or you represent lawyers who signed  
10 the participation agreement. Is that right?

11 **MS. EPHRON:** Yes, Your Honor.

12 **THE COURT:** Okay. So the first question is whether I  
13 have the -- in this case, whether I have the power, in light of  
14 the fact that you signed the agreement, whether I have the  
15 power to order you to order a holdback for your cases.

16 And then the second and separate question is whether, even  
17 if I have the power, should I do it under these circumstances?

18 Which one -- which issue are you speaking to right now?

19 **MS. EPHRON:** The former, whether you have the power.

20 **THE COURT:** Okay. And why shouldn't I have the power  
21 to do that, given that you signed the participation agreement  
22 and agreed to subject yourself to my orders regarding holdbacks  
23 and regarding common benefit fund?

24 **MS. EPHRON:** The basis for that is, we're saying the  
25 participation agreement, in essence, creates a contract. But

1 when you have a material term missing from the contract --  
2 here, the amount of the participation -- the amount of that  
3 holdback -- it's going to belie the existence of the contract.  
4 It's a basic idea of contract law that you need to have the  
5 material terms there.

6 In our case, unlike in *Avandia*, unlike in *GM*, the  
7 percentage of the holdback is demarcated as yet to be  
8 determined. That's a material term. It's absent. There's no  
9 contract.

10 **THE COURT:** But the language of the participation  
11 agreement says (reading):

12 "This agreement incorporates by reference any  
13 order of the Court regarding assessments and  
14 incorporates fully all defined terms from such  
15 orders. Participating counsel represents that it has  
16 read PTO 12 and voluntarily agrees to be bound by its  
17 terms set forth more specifically in this  
18 participation agreement."

19 So you have -- you read PTO 12. You knew that it hadn't  
20 set the percentage yet. You agreed to be bound not only by PTO  
21 12, but by the order that was coming up sometime in the future  
22 that would set a percentage. How is that not a contract?

23 **MS. EPHRON:** As it stands right now, a material term  
24 is missing, the amount of the holdback. That's a material  
25 term. If a material term is missing -- and it still is

1 missing -- there's no contract.

2 **THE COURT:** Okay. Anything else?

3 **MS. EPHRON:** Not as to that former point.

4 **THE COURT:** Okay. Anything else to any other point?

5 **MS. EPHRON:** Yes, Your Honor.

6 **MR. MILLER:** Your Honor, at the appropriate time, we'd  
7 like to respond.

8 **THE COURT:** Okay, Mr. Miller.

9 **MR. MILLER:** Thank you, Your Honor.

10 **THE COURT:** Go ahead, Ms. Ephron.

11 **MR. MILLER:** On this very issue about --

12 **THE COURT:** No, no, no, no, no. She was not done.  
13 She was getting ready to speak.

14 **MR. MILLER:** Oh, excuse me. I'm sorry. I apologize.

15 **MS. EPHRON:** As to your second question of whether CLC  
16 is entitled to compensation at all, our position is that they  
17 are not on the basis that they've already been adequately  
18 compensated through two means: their own premium settlement  
19 values and through their fee splits.

20 First, CLC has already been adequately compensated through  
21 their own premium settlement values.

22 **THE COURT:** I'm sorry. This is a long hearing. I  
23 don't need to hear you repeat stuff that you've already written  
24 in your brief.

25 So do you have anything that you want to add based on this

1 discussion?

2           **MS. EPHRON:** Simply that CLC is already receiving  
3 quite a lot, an estimated \$2 billion from settling their own  
4 dockets at a premium. And they're also receiving compensation  
5 through fee splits that they'll be getting from referred cases.  
6 They've already been adequately compensated multiple times  
7 over. There's simply no reason for them to receive further  
8 compensation when they settled their cases for a premium at the  
9 expense of others, and there's also no global settlement in  
10 this circumstance.

11           **THE COURT:** Okay. So maybe we could turn -- I'm happy  
12 for you all on the plaintiff -- on the lead counsel side to  
13 respond to anything that you want to respond to.

14           But I want to sort of start moving to the question of,  
15 assuming I have the authority only to -- I want you to assume,  
16 for purposes of this discussion, that I will continue to  
17 believe that I only have the authority to order a holdback for  
18 cases in the MDL and potentially cases where the lawyer  
19 signed -- whose lawyer signed the participation agreement. And  
20 I want you to further assume that even if I'm wrong about the  
21 limitations on my authority, that I would exercise my  
22 discretion to decline to order a holdback as to anything except  
23 for those two groups, potentially those two groups.

24           What -- should I -- should I establish a -- should I order  
25 a holdback at all? And, if so, I guess the subquestion is:

1 Can't I be pretty confident that the lawyers who did the  
2 up-front work in this case have already been adequately  
3 compensated?

4 But if you wanted to respond to something that somebody  
5 else said, you should feel free to do so.

6 **MR. MILLER:** If I could, Your Honor.

7 Yes, I think the Court clearly has jurisdiction over the  
8 participating attorneys. The Third Circuit told us that in  
9 *In Re Avandia*. They said the district court had jurisdiction  
10 to adjudicate whether this particular firm breached the  
11 attorney participation agreement and thereby violated Pretrial  
12 Order, in that case, Number 70.

13 So that clearly applies to the firms that signed the  
14 participation agreement. And the fact that we have been paid  
15 for representing our own clients totally misses the point.

16 This is the common benefit doctrine. It goes back to the  
17 1880s.

18 **THE COURT:** Right. And the common benefit doctrine  
19 back in the 1880s and the 1890s and the 1940s and 1960s was all  
20 about making sure that people like you and your clients were  
21 adequately compensated for their attorneys' fees.

22 So it doesn't totally miss the point to focus on whether  
23 you were adequately compensated. That's actually how the  
24 doctrine originated. And it's only recently, with the advent  
25 of the MDLs, that it's sort of turned into this focus on free

1 riders as opposed to making sure that the leaders, the people  
2 who are out front, are compensated adequately.

3 So it's not beside the point at all. It's an important  
4 factor in the analysis.

5 **MR. MILLER:** All right, Your Honor. Fair enough. We  
6 have been compensated. We are lawyers who try to run a  
7 for-profit law firm. Sometimes we don't. Sometimes --

8 **THE COURT:** Let me ask you this: Do you believe that  
9 anybody who did the up-front work -- I mean, maybe the answer  
10 is you don't know because you haven't -- there haven't -- not  
11 everybody has come forward and asked for compensation. But do  
12 you believe that anybody who did the up-front work has not been  
13 adequately compensated for the work that they've done?

14 **MR. MILLER:** I think the answer is I don't know,  
15 Your Honor.

16 **THE COURT:** Do you believe that you have not been  
17 adequately compensated for the work that you've done?

18 **MR. MILLER:** I have not made any common benefit fee at  
19 all in this case.

20 **THE COURT:** I'm just asking you, do you believe --  
21 because the purpose of the common benefit fund is for the  
22 people who did the up-front work. And the people who did most  
23 of the up-front work are, of course, lead counsel. And your  
24 firm is lead counsel and Ms. Greenwald's firm and  
25 Ms. Wagstaff's firm.



1           So do you believe that anybody in lead counsel has not  
2 been adequately compensated for the work that they've done in  
3 these cases?

4           **MR. MILLER:** I don't even know how to answer that. I  
5 really don't.

6           Ms. Wagstaff?

7           **THE COURT:** It's with a "yes" or "no." Have you been  
8 compensated less or more than your lodestar, for example?

9           **MR. MILLER:** I really can't -- I don't know. I mean,  
10 we intend to -- we will be compensated on our contingency fees  
11 for the work we have done for our clients; that is true.

12           **THE COURT:** Okay. And is that adequate for all the  
13 work that you've done in these cases?

14           **MR. MILLER:** If Your Honor denies the common benefit  
15 motion, it's going to have to be. I don't know what else to  
16 say, honestly.

17           **THE COURT:** Well, part of whether there should be a  
18 common benefit fund -- and then, if there is, part of the  
19 allocation -- is whether you've been adequately compensated.  
20 So why can't you answer that question?

21           **MR. MILLER:** I'm trying to answer as honestly as I  
22 can. I think we're going to be adequately compensated from our  
23 individual clients on our contingency fees. But I don't  
24 think -- if Your Honor is inclined to not give us a common  
25 benefit, obviously we're not going to get compensated

1 adequately, or not at all, on the common benefit. So that's  
2 the answer.

3 **THE COURT:** The question is whether you've been  
4 adequately compensated for all the work that you've done.  
5 Right? I mean, that's -- again, that's the -- that's sort of  
6 the origin of the common benefit doctrine, is we want to make  
7 sure the people out front are adequately compensated; they're  
8 not deprived of money as a result of their initial efforts.

9 And I'm assuming that your unwillingness to say that you  
10 have not been adequately compensated for all the work that  
11 you've done in these cases means that you've been adequately  
12 compensated for all the work that you've done in these cases.

13 **MR. MILLER:** I don't know how to answer. I really  
14 don't.

15 **THE COURT:** I don't know what to do with that answer.

16 Does anybody else want to take a crack at answering that  
17 question?

18 **MS. GREENWALD:** I can try. Oh, do you want to do it?

19 **MS. WAGSTAFF:** You can go first, Robin, or I can go.

20 **MS. GREENWALD:** You go. You go. I've dominated.

21 **MS. WAGSTAFF:** So to date, none of us have really been  
22 compensated, I would say. We have signed master settlement  
23 agreements which have participate rates. And as Mr. Hoffman  
24 started this discussion, the money is in the QSF. So we --

25 **THE COURT:** Yeah, but considering what you stand to

1 recover, will that --

2 **MS. WAGSTAFF:** Right. And so I would say -- I would  
3 say, as far as the lodestar, I'm not sure that I've done that  
4 actual analysis, to be honest with you.

5 I will say this: that Monsanto has had a finite pot of  
6 money that they have been willing to settle for this tort, and  
7 so our clients did lose money, I think, on settlements based on  
8 the infusion of hundreds of thousands of cases.

9 So if you look at it from that point of view, our  
10 clients -- and then, in essence, because our fees are tied to  
11 our clients, you know, we -- lost money based on the  
12 infusion -- based on our success. I mean, it's a simple way to  
13 look at it.

14 **THE COURT:** Based on all the TV lawyers coming in  
15 after you --

16 **MS. WAGSTAFF:** Yeah. I mean, it's anyone on this  
17 call. There's 144 people on this call. Anyone who's talked to  
18 Monsanto has heard that they had a finite pot of money to  
19 settle these cases.

20 So, I mean, the argument is, you know, if you add up the  
21 gross number, that it seems like a lot of money; but if you  
22 think about what each one of our clients will get, our clients  
23 did suffer because of the infusion of TV lawyers' marketing.  
24 There is no doubt about that.

25 **THE COURT:** Okay. Anything else you all want to say

1 about whether I should order a holdback at all and, if so,  
2 whether it should include the cases of the lawyers who signed  
3 participation agreements?

4 **MS. WAGSTAFF:** Your Honor, I would like to comment on  
5 something Mr. Citron and you said that I actually agreed with,  
6 considering this to be sort of a contractual discussion and  
7 how, you know, at the beginning of this hearing, we were  
8 talking about you assessing the recovery of the client, sort of  
9 the top of it, and then, by the time you and Mr. Citron were  
10 talking, you were talking about the attorney to attorney.

11 I think that if you go down that path, which I agree with  
12 that thinking, it would be very easy for the courts to leave  
13 the 0.25 percent from the clients and not assess the clients on  
14 cases you believe you do not have authority to assess.

15 What I mean by that is, if there is an MDL lawyer -- you  
16 can use me, for example -- and I have a case in St. Louis, you  
17 could assess me my fees as a contractually either express or  
18 implied contract with the MDL lawyers, you could assess me my  
19 8 percent and not assess the client. Say the 8 percent  
20 applies --

21 **THE COURT:** It's not your 8 percent. It's --

22 **MS. WAGSTAFF:** At some point it becomes my 8 percent  
23 because we have a contractual agreement.

24 **THE COURT:** Well, but it's 8 percent of the total  
25 recovery. So it would be probably, like, 15 percent of your

1 fees. Right?

2 **MS. WAGSTAFF:** Correct. I mean, I don't know. It  
3 depends on what agreement they have with --

4 **THE COURT:** Yeah, assuming, like, a 40 percent.

5 **MS. WAGSTAFF:** But that is one way, again, to look at  
6 it, is that, you know, you do have authority and jurisdiction  
7 over the lawyers who voluntarily choose to appear in front of  
8 your court, and you can split that and say that you're not  
9 going to assess the clients on their expenses, because at some  
10 point, the gross recovery does split into two pieces and it  
11 does become attorney fees and client --

12 **THE COURT:** But why should it be a holdback from the  
13 transaction between Monsanto and the plaintiff in the Missouri  
14 case? Right? I mean, why should it be a holdback from that  
15 transaction as opposed to just a contractual obligation on the  
16 part of the lawyer -- on the part of you, the lawyer, to pay --  
17 on the part of the lawyer in Missouri to pay lead counsel?

18 **MS. WAGSTAFF:** You mean -- so I guess I'm not  
19 following what you're saying. You mean why now -- because  
20 we're using me as an example.

21 **THE COURT:** Yeah. Sorry. That got confusing. But  
22 let's make -- let's keep you as the lead counsel in the MDL,  
23 okay --

24 **MS. WAGSTAFF:** Okay. That's easy.

25 **THE COURT:** -- in the example.

1           And let's say you have a lawyer who has signed a  
2 participation agreement and has agreed to pay you part of their  
3 fees in exchange for work product. Right?

4           If anything, shouldn't my order be the attorney -- once  
5 the attorney gets their portion of the attorneys' fees in the  
6 state court -- in the Missouri case, they should be required to  
7 pay a percentage of those fees to you?

8           **MS. WAGSTAFF:** It could be that, Your Honor.

9           **THE COURT:** As opposed to a holdback on the  
10 transaction between Monsanto and the plaintiff in Missouri.

11           **MS. WAGSTAFF:** It could be -- it could be that,  
12 Your Honor.

13           I think that holdback is just sort of the way that it has  
14 been done in the past.

15           **THE COURT:** It's obviously much more efficient to do  
16 it that way.

17           **MS. WAGSTAFF:** Well, and it's much more efficient,  
18 too, because the money -- I mean, I don't know how to say this  
19 very nicely; but once the money goes out of the barn, sometimes  
20 it's hard to get it back in.

21           And so right now -- let's go back to the beginning. Let's  
22 say I settle the case for \$100,000 and it's in a QSF. There's  
23 going to come a point when that money needs to be --

24           **THE COURT:** What's QSF?

25           **MS. WAGSTAFF:** A qualified settlement fund.

1           **THE COURT:** Okay.

2           **MS. WAGSTAFF:** It's what we talked about at the  
3 beginning. Every law firm has a qualified settlement fund --

4           **THE COURT:** Right.

5           **MS. WAGSTAFF:** -- once they settle and enter into an  
6 MSA.

7           And so that money is sitting in there. There will be a  
8 point when we agree with Mr. Hoffman and his team that the  
9 money needs to be disbursed. There will be a point, hopefully  
10 sooner rather than later. Okay?

11           So there's this pot of money sitting in the Andrus  
12 Wagstaff QSF. At some point in the future, we're going to have  
13 to disburse that money. And it's at that point, when the money  
14 gets disbursed out of the QSF -- so let's go back to your  
15 \$100,000 example. So we would have, let's assume, a 40 percent  
16 contingency fee. And just take case expenses out of it for  
17 ease of this example.

18           That 100,000 claim, you would send \$40,000 from the QSF to  
19 my law firm, and you would send \$60,000 to the client. Right?

20           And so it's at that distribution point when the holdback  
21 happens. And at that distribution point, you've already sort  
22 of made the split from the hundred percent recovery -- \$100,000  
23 recovery to fees and client award. And so at that point, the  
24 \$40,000 going to my law firm would be assessed \$8,000.

25           And so the 8- -- so the QSF administrator would be ordered

1 to send at that point -- once the split has been made into fees  
2 and expenses -- so you're not really assessing the overall  
3 canopy of the recovery. You're assessing, okay, and then once  
4 that split happens, and then you would say your \$250 would be  
5 assessed to the client's 60,000. Right? So they would get  
6 \$59,750, would go to the client under that example.

7 Are you following me?

8 **THE COURT:** I am, yeah.

9 **MS. WAGSTAFF:** Okay. And so at that point, if there  
10 are cases in state court or cases of -- for sure MDL lawyers  
11 who have state court cases that you wanted to assess, you could  
12 assess them at that point, because there will always be that  
13 point, that moment before it leaves the QSF when it becomes  
14 attorney fees and client awards.

15 And as a practical matter, each client signs a  
16 distribution statement, agreeing to the amounts and all of  
17 these other things. And so while it is just a big pot of money  
18 now, it's not always like that.

19 **THE COURT:** That makes sense.

20 Let me ask you a couple -- you or whoever wants to answer  
21 them a couple other questions.

22 And we're in a realm now of talking about exercise of  
23 discretion, not what the MDL court has the power to do, but  
24 exercise of discretion.

25 Would it be fair under the current circumstances to



1 require a holdback, or whatever you want to call it, of the  
2 people whose lawyers signed the participation agreement and not  
3 require a holdback of the people whose lawyers didn't sign the  
4 participation agreement, either because they refused to sign it  
5 or they didn't get around to it or whatever? It seems a little  
6 bit unfair.

7 **MS. WAGSTAFF:** So I mean, I can take a stab at this,  
8 if you want, unless --

9 **THE COURT:** Sure.

10 **MS. GREENWALD:** Go ahead. Go ahead, Aimee.

11 **MS. WAGSTAFF:** So my thought would be that it would --  
12 that there's no doubt that the people who voluntarily submit to  
13 the participation agreement should be subjected to this.

14 For Ms. Ephron to argue that her law firm is somehow  
15 surprised or taken -- taken aback by the legal ramifications of  
16 signing a participation agreement seems a little bit  
17 disingenuous.

18 But by the same token, I believe that all of the lawyers  
19 who use common benefit work product -- for example -- and you  
20 may not know this -- we have a document depository. It's  
21 called Crivella West, whatever. That's the name of it. And  
22 Monsanto has just produced documents one time to that  
23 depository. And we house deposition transcripts and other  
24 things there, and we have work product there. And that's sort  
25 of where we did all of our document searches.

1           There was a law firm last -- or a couple weeks ago who  
2 asked me for access to that, and I sent them the participation  
3 order, and they said, "We don't want to sign that," presumably  
4 because they knew what was going on here and they thought maybe  
5 they wouldn't be subjected to it, and we gave them access to  
6 it.

7           I think that anyone who has access to these -- to our work  
8 product should be assessed. And I don't think it's unfair for  
9 the people who took the extra step to not be assessed. I mean,  
10 for anyone who really believes that this contract or this  
11 participation agreement had no legal consequence, I don't think  
12 is accurate.

13           **THE COURT:** Yeah, I agree with you on that point.

14           I guess my question is more, this is messy. And you've  
15 got this universe of people who obtained access to this work  
16 product, whether they ended up -- we don't know whether they  
17 ended up needing to use it -- right? -- before they reached  
18 their settlements. But they, at a minimum, obtained access to  
19 it. We don't know if they ended up needing to use it. We  
20 don't know if they actually benefited from the work product as  
21 opposed to just the fact that Monsanto lost three trials. And  
22 it seems very likely that the lawyers who did the up-front work  
23 have been more than adequately compensated for their time and  
24 expenses.

25           So in light of all that messiness and in light of the fact

1 that the lawyers who did the up-front work are likely to have  
2 been more than adequately compensated for their time, maybe we  
3 should just skip it, at least as it relates to the lawyers who  
4 signed the participation agreement but did not have cases in  
5 the MDL, particularly given that there is a more tenuous nexus  
6 to those people and those clients than there is to the cases  
7 that we're actually in the MDL.

8 **MS. WAGSTAFF:** And, Your Honor, I would -- I would  
9 argue that the case -- that the definition of "a case in the  
10 MDL" is not as simple as one might hope and that a person who  
11 has a fee interest in cases in the MDL qualifies as a lawyer in  
12 the MDL.

13 **THE COURT:** What does that mean, "a fee interest in  
14 the MDL"?

15 **MS. WAGSTAFF:** So lawyer- -- this goes back to the  
16 earlier conversation with co-counseling. But lawyers often  
17 have fee interests in a lot of other people's cases. So the  
18 40 percent -- the 40 percent lawyer fee is not usually enjoyed  
19 by one law firm.

20 So when you looked at Mr. Miller's declaration,  
21 Ms. Greenwald's declaration, and my declaration and you saw  
22 that in our -- I don't remember the numbers off the top of my  
23 head, Your Honor. I'm sorry. But it was something like  
24 125 law firms, or something, are participating in our  
25 settlement agreement. Those are lawyers and law firms that

1 have fee interests in the cases that we have.

2 So when you consider -- when everyone keeps throwing  
3 around these numbers that are not accurate on the fees that  
4 leadership has made, oftentimes a percentage of any law firm's  
5 fees go to other law firms.

6 And so you can't -- it would be a wrong assumption to  
7 assume that Weitz & Luxenberg, Miller Law Firm, or  
8 Andrus Wagstaff enjoyed all 40 percent of our fees in every  
9 case we had. That's just not even close to accurate. And  
10 everyone on this call knows that, that's a mass tort lawyer.

11 **THE COURT:** But all of that is to say, I mean, to the  
12 extent that -- so now we're talking about lawyers who have a  
13 fee interest in an MDL case who haven't appeared in the MDL  
14 case? And so we're going to try and go and figure out who has  
15 a fee interest in each MDL case and assess all of their state  
16 cases based on the fact that they had a fee interest in the MDL  
17 case? Is that what you're --

18 **MS. WAGSTAFF:** I would propose that you appoint  
19 Special Master Feinberg to make some of those decisions of  
20 which -- of who qualifies for having used common benefit work  
21 product and things of that nature. I don't know that I would  
22 ever be able to know that, or I don't know that you would ever  
23 be able to know that.

24 **THE COURT:** Isn't it -- I mean, so all this talk about  
25 use of work product, isn't it kind of a fiction? I mean, at

1 least in this case.

2 I mean, the main reason that you have been arguing that we  
3 need a common benefit fund is to disincent- -- or I don't  
4 know -- to adjust the incentives as it relates to lawyers who  
5 just sit on the sidelines and do nothing. Right? Most of the  
6 focus in these common benefit -- in the arguments you're making  
7 for a common benefit fund is about making sure that the  
8 do-nothings don't get some sort of unfair windfall or something  
9 like that. But the do-nothings aren't using MDL work product.  
10 They're just sitting there on the sidelines.

11 And whether somebody is a do-nothing or they're not a  
12 do-nothing, isn't the reality that most of the people who have  
13 gotten settlements from Monsanto, they haven't really done much  
14 in their cases, and the settlement value that they got bears no  
15 relationship to whether they had access to your work product or  
16 not?

17 **MS. WAGSTAFF:** This is a purely philosophical question  
18 now because I have no idea what other people settled for.

19 There are firms that did a lot of work in their cases.  
20 There's a lot of -- there are some firms in St. Louis that did  
21 a lot of work in their cases. There are some -- there are --  
22 you know, there are some non-leadership firms that tried a  
23 case.

24 My co-counsel in the Hardeman case before you is not on  
25 leadership, and she did a lot of work in this case.

1           So there are firms that did that. And you would have to  
2 ask Monsanto, who I would render would not want to tell you  
3 their settlement strategy, whether or not if they have access  
4 to our work product, it makes a difference.

5           But the thought that Monsanto would be settling their  
6 cases at all if they didn't have our work product seems a  
7 little unfair to leadership.

8           **THE COURT:** Well, but I mean, we know that Monsanto  
9 has settled cases with lawyers who didn't have your work  
10 product. Right? I mean, we have, like, the TV lawyers who are  
11 just keeping clients on the sideline, never had access to your  
12 work product. Right?

13           **MS. WAGSTAFF:** They have access to our work product.  
14 I mean, our work product -- we have our work product that is,  
15 you know, the Crivella West, where you have to affirmatively  
16 ask us for it. But also, we've put our work product out to the  
17 world. And it's on ECF, and it's -- I mean, your *Daubert*  
18 order, for example, if I'm correct, all the *Daubert* briefing,  
19 you know, our expert reports were attached as exhibits. You  
20 and the former JCCP judge held seven days of, you know, pretty  
21 intense *Daubert* testimony. Trial testimony is out there. All  
22 of that stuff is publicly available.

23           **THE COURT:** That's not stuff that -- I mean, as long  
24 as you've been adequately compensated for the work that you  
25 have done, why should we care whether other people are

1 benefiting from stuff that's publicly available on the docket?  
2 I mean, that's not -- I mean, again, that's our legal system.  
3 Right?

4 We all benefit from stuff that we find on dockets and  
5 stuff that we find on Westlaw and transcripts of hearings and  
6 things like that and complaints that were filed. I mean, when  
7 did the lawyers from a previous case who filed that stuff need  
8 to be compensated by lawyers who benefited from it later on?

9 **MS. WAGSTAFF:** Well, that's the common benefit  
10 doctrine sort of as it plays in. I mean, this isn't a  
11 single-event case, or this isn't a case that has, you know,  
12 five or six cases. These lawyers knew that we were doing the  
13 work. They knew that we were generating the general causation  
14 arguments. They knew that once, you know, the risk was gone,  
15 that they could come in.

16 It's an entirely different model than a single-event case  
17 or even your case on -- your example on marriage equality.  
18 I think it's very different.

19 **THE COURT:** Okay. Is there anything else that the  
20 plaintiffs want to say on all of this?

21 **MS. GREENWALD:** Your Honor, I just want to -- if I can  
22 just raise one issue about sort of making someone whole.

23 So as you know, 0.25 percent of the holdback request  
24 relates to expenses. And, of course, frankly, that was based  
25 on what we anticipated to be the assessment of cases that are

1 in PTO 12, which is clearly larger than what I'm hearing you  
2 say today.

3 And so that is a place where clients, individually, are  
4 going to be harmed because, as we mentioned in our brief, we  
5 worked up about 50 plaintiffs for trial. And that means that  
6 we had experts, specific causation experts for each one of  
7 those. Monsanto deposed them, their families. They did home  
8 inspections. They deposed their treating doctors, et cetera.  
9 I won't go on too much.

10 **THE COURT:** When you say you worked up 50 cases for  
11 trial, how many of those were in state court and how many of  
12 those were in federal court?

13 **MS. GREENWALD:** They're all in state court, except for  
14 ones that -- well, we know that there's Stevick and Hardeman  
15 and then the one --

16 **THE COURT:** Why is it my -- so all of the ones in  
17 state court -- you're talking about all your clients who worked  
18 up all these cases for trial in state court. Why is that any  
19 of my business?

20 Why don't you go to the state court to try to -- if you  
21 think that somebody got an -- is getting an unfair benefit from  
22 all of the work and all of the expenses that your clients  
23 incurred in state court, why is it my business to compensate --  
24 figure out and compensate it?

25 **MS. GREENWALD:** Because for the same reason that --



1           **THE COURT:** Their cases are not in my court.

2           **MS. GREENWALD:** But the lawyers -- some of the lawyers  
3 who worked on those cases -- and remember, the MDL strategy,  
4 our leadership strategy was to put maximum pressure on Monsanto  
5 in multiple courts. That is what we did in order to get trial  
6 dates and to bring this case to a point of settlement.

7           And so, again, I mean, under the theories of equity and  
8 common benefit doctrines, it would allow courts -- the Court,  
9 at least in connection with the participation agreement, to  
10 assess a percentage on at least MDL clients, and then other  
11 clients that those lawyers have, for purposes of the expenses  
12 of the litigation.

13           Otherwise, there's no question that clients for whom we  
14 and some other lawyers -- it's not just us -- prepared trials  
15 will bear the unfair burden of those litigation costs.

16           And that was all done for the common good of every single,  
17 solitary plaintiff in this case, all 140,000 or 125,000, half  
18 of which have never even been filed. But those trial dates is  
19 what the pressure point was that made Monsanto come to the  
20 table. And we all know that. Everybody knows that.

21           **THE COURT:** Yeah. I know I said three hours ago  
22 everybody knows that.

23           **MS. GREENWALD:** I know. I know.

24           But those clients aren't being made whole if there's not a  
25 broad enough brush for assessments.

1           **THE COURT:** Okay. Anybody else have any last word  
2 they want to throw in?

3           **MS. EPHRON:** Your Honor, if I may, as to the  
4 Category 3 objectors, a lot of us have not settled. In fact,  
5 Trammell, PC, Ingersoll Dreyer, we have cases that are set for  
6 trial this summer, because we haven't --

7           (Court reporter interrupts for clarification of record.)

8           **MS. EPHRON:** I just wanted to say that many of the  
9 Category 3 firms have not settled. We've been unable to settle  
10 because of the values at play.

11           Nobody is paying for our experts. We're paying for them  
12 ourselves. Nobody is paying for our clients' depositions or  
13 their families' or their treaters' depositions. We're paying  
14 for those ourselves. In fact, we have two cases set for trial  
15 this summer and more preference hearings. In fact, we have one  
16 next week.

17           So we haven't settled. And to say that everybody in this  
18 litigation has benefited from leadership settlement is simply  
19 inaccurate.

20           **THE COURT:** And so what is your point as it relates to  
21 this motion?

22           **MS. EPHRON:** My point simply is that it's -- to say  
23 that, you know, we are riding on coattails and we've simply sat  
24 idly by is inaccurate. That's incredibly inaccurate for many  
25 of the objectors here.

1           **THE COURT:** Right. But that can be sorted out after,  
2 when a decision is made as to how to distribute the proceeds  
3 from the common benefit fund.

4           **MS. EPHRON:** Yes.

5           **THE COURT:** The fact that some lawyers have not been  
6 sitting idly by doesn't seem particularly relevant to whether a  
7 common benefit fund should be established. It seems relevant  
8 to who should get what percentage of the money from that fund  
9 at the end of the day.

10          **MS. EPHRON:** That is correct.

11          **THE COURT:** Okay. Anything else?

12           Give me one second. I'm going to take just a two-minute  
13 break, and then I'm going to come back and wrap it up.

14                   (Recess taken at 3:42 p.m.)

15                   (Proceedings resumed at 3:44 p.m.)

16          **THE COURT:** I was reminded of one more question when I  
17 was just chatting with my law clerk. It might be -- I seem to  
18 remember this coming up in Mr. Citron's brief.

19           So I don't know. Maybe I'll ask you. I think it was you  
20 who argued that -- you were talking about the *Avandia* case out  
21 of the Third Circuit, the unpublished opinion. And you were  
22 talking about the participation agreement and how, for there to  
23 be, quote/unquote, jurisdiction -- I'm very sorry. One second.  
24 I had a 3:45 appointment. I didn't think the hearing would go  
25 on this long. Let me be right back.

1           **MR. CITRON:** Okay.

2                           (Recess taken at 3:45 p.m.)

3                           (Proceedings resumed at 3:46 p.m.)

4           **THE COURT:** You were arguing in your brief, I think,  
5 that two things have to happen for the Court to exercise  
6 authority over the recovery of someone whose lawyer signed a  
7 participation agreement. The lawyer has to sign a  
8 participation agreement. That's number one. And number two is  
9 that the agreement has to be, quote/unquote, incorporated into  
10 a court's order.

11           And I don't really -- when I was reading *Avandia*, I didn't  
12 really understand what it meant for an order to be  
13 incorporated -- excuse me -- for a participation agreement to  
14 be incorporated into an order, nor did I understand the magic  
15 of incorporating.

16           I mean, number one, I don't know what "incorporating"  
17 means. But the way we did it in PTO 12, why isn't that enough?  
18 Because the order says if you're an attorney and you sign a  
19 participation agreement with lead counsel, you're going to be  
20 subject to PTO 12 and you're going to be subject to a holdback.  
21 And then their participation agreement contains an  
22 acknowledgment by the lawyer that says -- that says: I've read  
23 PTO 12, and I agree to be bound by the Court's orders regarding  
24 holdbacks.

25           To the extent that something more is required to

1 incorporate it, I don't know what that is. And if something  
2 more is required, I don't know why that would matter.

3 So if you or anybody else wishes to speak to that  
4 question, that was the one kind of hanging question that I had.

5 **MR. CITRON:** Sure. I think it might be helpful to  
6 explain the point.

7 I really do think that the best practice is to adjudicate  
8 these controversies between attorneys as causes of action  
9 against the people you're trying to get the money from. And  
10 that's probably true even if it's going to be decided in the  
11 ancillary jurisdiction of your court.

12 Someone should file a complaint, say what source of law  
13 they're using, whether it's California state law or some other  
14 source of law. Otherwise, we're going to have a hard time  
15 figuring out what the principles are that resolve the kinds of  
16 disputes we've been hearing today between some of the  
17 attorneys.

18 I think, though, when an agreement has been incorporated  
19 into a court order, then you can essentially ask the Court by  
20 motion to enforce its order against the person who's bound by  
21 it. That's the --

22 **THE COURT:** The Court construes it, and it's the law  
23 of the Court. Correct?

24 **MR. CITRON:** Correct. So --

25 **THE COURT:** MDL --

1           **MR. CITRON:** -- that's the magic -- oh, I'm sorry.

2           **THE COURT:** No, no. Go ahead.

3           **MR. CITRON:** So that's the magic of incorporation if  
4 there's a plausible argument to be made that what's been  
5 violated is not a contract, which requires a contract cause of  
6 action --

7           **THE COURT:** But then, so then --

8           **MR. CITRON:** -- but the Court --

9           **THE COURT:** Okay. I get that. But what is -- I mean,  
10 so then what is incorporation, and why isn't it incorporated  
11 here? I mean, it seems kind of incorporated to me here.

12           **MR. CITRON:** Yeah. I think my main objection to  
13 viewing it as incorporated here -- and I'm not sure how strong  
14 it is. It doesn't apply to us; so I'm not sure I'm the best  
15 person to speak to it.

16           But, you know, as you noted, the language in that section  
17 of the PTO about who it applies to is awfully murky. It  
18 includes a narrow category and then a broader category that  
19 includes the narrow one and then an even broader category that  
20 includes all of those too. That's a weird way to define  
21 something. And the first time I read it, I actually thought it  
22 was just intended to cover people who had affirmatively signed  
23 the agreement, you know.

24           **THE COURT:** Me too. And then I read it ten more  
25 times, and each time I had a different interpretation.



1           **THE COURT:** All right. I guess this might take a  
2 little bit to put together a ruling.

3           Just let me ask -- let me ask the plaintiffs one more  
4 question. This is a mechanical question.

5           It sounds like from this discussion -- if I were to  
6 conclude, for example, that the only cases that should be  
7 subject to a holdback, whether as a matter of power or as a  
8 matter of discretion or both, if I conclude that the only cases  
9 that should be subject to a holdback are cases in the MDL, the  
10 4,000 cases or however many there are in the MDL, it sounds  
11 like there's not necessarily any urgency for me to order that  
12 and order the percentage quickly.

13          Like, I can just -- I'm going to need to take my time to  
14 write an order about all this other stuff -- write a ruling  
15 about all this other stuff, and I can just include that in that  
16 ruling that I issue a few weeks from now or something like  
17 that. Is that right?

18           **MS. GREENWALD:** So I think --

19           **THE COURT:** I'm not --

20           **MS. GREENWALD:** I'm sorry. I didn't mean to --

21           **THE COURT:** No. Go ahead.

22           **MS. GREENWALD:** I think that's a question that maybe  
23 you have to ask Monsanto, because we don't know any settlements  
24 but our own. And so we might know for ourselves when money's  
25 about to go from the qualified settlement funds into the hands



1 of clients and into the hands of lawyers, but we don't know  
2 that for others. So there could be cases in the MDL where  
3 lawyers only have a couple cases and there isn't even a QSF. I  
4 don't know.

5 And so I'm going to put William on the spot and see if  
6 maybe he can answer that better than we can as to timing.

7 **MR. HOFFMAN:** I think several weeks is fine,  
8 Your Honor. None of the QSFs are likely to fund out to  
9 claimants in that time frame. And if there's an individual  
10 case in the MDL that's settled in that time frame, which is  
11 possible, we'll figure out a way to deal with it so that  
12 there's no risk to anyone.

13 **THE COURT:** Well, could I just -- would there be any  
14 problem with me saying that no payout should be made until I  
15 issue my order on the -- no payouts should be made in the MDL  
16 cases until I issue my order on holdback?

17 **MR. HOFFMAN:** I have no objection to that --

18 **THE COURT:** Is it necessary?

19 **MR. HOFFMAN:** -- Your Honor.

20 **THE COURT:** You have no objection, but is it  
21 necessary?

22 **MR. HOFFMAN:** I don't think so at this point.

23 **THE COURT:** Okay.

24 **MR. HOFFMAN:** Perhaps if you haven't issued your  
25 ruling and a case -- an individual claimant's situation becomes

1 ripe, we can approach you about that.

2           **THE COURT:** I would appreciate that. Why don't we do  
3 it that way.

4           **MR. HOFFMAN:** Okay. That's fine.

5           **THE COURT:** You let us know if you need something from  
6 us, because I think it would be better if -- like I said, it  
7 may take me a little while. But I think we shouldn't have  
8 money going into lawyers' hands in MDL cases without  
9 establishing the holdback, assuming I decide -- I want to make  
10 clear, I'm still undecided as to whether there should be a  
11 holdback even in the MDL cases, but I want to think about that  
12 some more.

13           **MR. HOFFMAN:** We'll take care of it, Your Honor.

14           **THE COURT:** And then let me make sure. Just searching  
15 my brain to see if I have anything else.

16           Okay. I'll circle back if I end up having any other  
17 questions.

18           Thanks very much.

19           **ALL:** Thank you, Your Honor.

20                       (Proceedings adjourned at 3:55 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Friday, March 5, 2021

*Ana Dub*

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Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG  
Official United States Reporter