

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE: LEVAQUIN PRODUCTS
LIABILITY LITIGATION

MDL No. 08-1943 (JRT)

This Document Relates to:

CALVIN CHRISTENSEN,

Civil No. 07-3960 (JRT)

Plaintiff,

v.

ORDER

JOHNSON & JOHNSON and ORTHO-
MCNEIL-JANSSEN
PHARMACEUTICALS, INC.,

Defendants.

Ronald S. Goldser and David M. Cialkowski, **ZIMMERMAN REED, PLLP**, 651 Nicollet Mall, Suite 501, Minneapolis, MN 55402-4123; and Lewis J. Saul and Kevin M. Fitzgerald, **LEWIS SAUL & ASSOCIATES**, 183 Middle Street, Suite 200, Portland, ME 04101, co-lead counsel for plaintiff Christensen.

James B. Irwin, V, **IRWIN, FRITCHIE, URQUHART & MOORE, LLC**, 400 Poydras Street, Suite 2700, New Orleans, LA 70130; Tracy J. Van Steenburgh and Dana M. Lenahan, **NILAN JOHNSON LEWIS, PA**, 400 One Financial Plaza, 120 South Sixth Street, Minneapolis, MN 55402; William V. Essig, **DRINKER BIDDLE & REATH LLP**, 191 North Wacker Drive, Suite 3700, Chicago, IL 60606-1698, lead counsel for defendants.

Before the Court are numerous objections brought by plaintiff and defendants regarding designations of video deposition testimony for trial. The Court sustains those objections outlined below. All other objections are overruled.

BACKGROUND

This MDL, *In re: Levaquin Products Liability Litigation*, currently consists of 1197 cases involving the drug Levaquin. Levaquin is an antibiotic developed, manufactured, and marketed by defendants Johnson & Johnson and Ortho-McNeil-Janssen Pharmaceuticals Inc. (collectively, “defendants”). Plaintiff Calvin Christensen was prescribed Levaquin in May 2006 while hospitalized for pneumonia. Shortly thereafter, he suffered a rupture of his right Achilles tendon, requiring surgical repair. He claims the rupture was the result of taking Levaquin. He has sued defendants for failure to sufficiently warn of the dangers he faced in taking the drug. Christensen’s case is the second bellwether trial in this MDL.

ANALYSIS

I. CARLA CANABARRO

Carla Canabarro, a medical doctor, was the global safety officer for Aventis Pharmaceuticals (“Aventis”), the European agency that marketed both ofloxacin and levofloxacin in Europe. Plaintiff offers testimony describing actions taken by Johnson & Johnson and Aventis in response to the developing information regarding the tendon-toxicity of the drugs. Defendants’ objections are primarily to Canabarro offering expert testimony despite not being designated as an expert witness. However, even if Canabarro could have been designated an expert based on her knowledge, skill, experience, training, and education, *see* Fed. R. Evid. 703, she is being called as a fact witness. The Eighth Circuit recognizes that witnesses who might qualify as experts may testify as fact

witnesses. *See Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 258 (8th Cir. 1985) (“Although we recognize the difficulty of separating statements about actions taken as in-house experts from what would essentially be expert opinion testimony regarding the [issues], the better course would have been to hear the testimony As it was, Anheuser-Busch was apparently precluded from presenting some admissible evidence.”); *see also Long v. Cottrell, Inc.*, 265 F.3d 663, 668 (8th Cir. 2001) (“Even if [the witness] should have been precluded from offering expert opinion testimony, such preclusion would not affect his ability to testify as a fact witness.”).

Additionally, defendants object that some of Canabarro’s testimony calls for opinions and speculation. Given her role at Aventis during the relevant time period the Court finds her testimony relevant, and to the extent Canabarro is asked for her opinions, the Court finds they are “rationally based on [her] perception[s]” Fed. R. Evid. 701(a). The Court finds Canabarro’s testimony admissible and overrules defendants’ objections.

Defendants also object to the introduction of certain documents related to Canabarro’s testimony. While Canabarro may lack personal knowledge of some of the documents, for example the emails from Chuen Yee (Pl.’s Ex. 309), her opinions on the content of those emails could be helpful to a trier of fact and therefore are permissible under Rule 701(b). As to those documents for which Canabarro cannot lay the proper foundation, plaintiff will have to utilize another witness if he wishes the documents themselves to be entered into evidence. *See* Fed. R. Evid. 602. As a result, defendants’ objections to the designations of Carla Canabarro are overruled.

II. WANJU DAI

Wanju Dai is a physician-epidemiologist and the head of pharmacology at Aventis. Defendants lodge several objections to the relevancy of portions of his testimony. The majority of defendants' objections relate directly to a previous motion in limine denied by the Court on the admissibility of regulatory actions and proposed label changes in foreign countries. (Docket No. 208.) To the extent that defendants object to testimony related to foreign regulatory action, those objections are similarly overruled.

Defendants object to testimony related to several documents for which Dai may lack personal knowledge. However, given his role at Johnson & Johnson, the Court finds his testimony on the documents is properly based on his perceptions of those documents and rationally related to facts at issue, and therefore admissible. *See* Fed. R. Evid. 701. Plaintiff will need to introduce documents into evidence through witnesses who can lay a proper foundation where Dai cannot do so. To the extent that defendants object to certain documents on the basis of hearsay, the emails and reports Dai discusses all qualify as business records and are therefore exceptions to the hearsay rule. (*See, e.g.*, Dai Depo. at 60:5-8 (“Q: So you received this document with attachments in the usual course of your business at Aventis, correct? A: Correct.”)); Fed. R. Evid. 803(6). These objections are thus overruled.

Defendants object to a portion of Dai's testimony where he is asked whether “Johnson & Johnson had superior brain power than those at Aventis?” (Dai Depo. at

22:18-25.) The Court agrees with defendants that this question is irrelevant and unduly prejudicial. *See* Fed. R. Evid. 401, 403. Therefore, the Court sustains the objection.

Plaintiff lodges several objections to counter designations offered by defendants. The substance of these objections are relevance, foundation, and hearsay. However, the testimony relates to emails sent by Dai in the regular course of business. This not only provides the necessary foundation, but also makes the evidence arguably not hearsay. *See* Fed. R. Evid. 801(d)(2)(D) (admissions of an employee within the scope of performance not hearsay). These emails also qualify as business records, an exception to the hearsay rules. *See* Fed. R. Evid. 803(6). The Court further finds the proffered designations relevant. Plaintiff's objections are overruled.

III. JAMES KAHN

Plaintiff offers the testimony of James Kahn, a medical doctor formerly employed by Johnson & Johnson who has subsequently continued working as an independent consultant for Johnson & Johnson and its subsidiaries. The Court evaluates three objections of merit. First, defendants object to a series of question related to Levaquin and renal function. (Kahn Depo. at 245:7-246:23.) The Court see no relevance to discussion of renal function in this litigation and sustains the objections. Second and third, defendants object to two separate portions of the deposition where Kahn is offered emails and other documents and professes no personal knowledge of them. (*Id.* At 503:23-25, 517:23-25.) The Court sustains these objections pursuant to Federal Rule of

Evidence 602. All other objections are similar to the objections lodged for Canabarro and Dai and are overruled based on the same reasoning.

ORDER

Based on the foregoing, and the records, files, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' objections to the deposition testimony of Carla Canabarro are **OVERRULED**.

2. Defendants' objection to Dai's Deposition at 22:18-25 is **SUSTAINED**. All other objections are **OVERRULED**.

3. Defendants' objections to Kahn's Deposition at 245:7-246:23, 503:23-25, and 517:23-25 are **SUSTAINED**. All other objections are **OVERRULED**.

DATED: June 7, 2011
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
United States District Judge