

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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 In Re: Levaquin Products)
 Liability Litigation,) File No. 08-md-1943
) (JRT/AJB)
)
)
) Minneapolis, Minnesota
) September 4, 2008
) 2:26 P.M.
)

BEFORE THE HONORABLE **JOHN R. TUNHEIM**
 UNITED STATES DISTRICT COURT JUDGE
 (STATUS CONFERENCE)

APPEARANCES

For the Plaintiff: **RONALD S. GOLDSER, ESQ.**
CHARLES ZIMMERMAN, ESQ.
LEWIS J. SAUL, ESQ.
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TROY GIATRAS, ESQ.
BRIAN McCORMICK, ESQ.

For the Defendant: **JAMES DAMES, ESQ.**
WILLIAM H. ROBINSON, JR., ESQ.
TRACY J. VAN STEENBURGH, ESQ.
MICHAEL HUTCHENS, ESQ.

JOHN O'SHAUGHNESSY, ESQ.
 (Johnson & Johnson in-house
 counsel)

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Proceedings recorded by mechanical stenography;
 transcript produced by computer.

2:26 P.M.

(In open court.)

THE COURT: You may be seated, everyone. Good afternoon, and I apologize for keeping you all here waiting. Just for the record, this is civil case number 08-1943, In Re: Levaquin Products Liability Litigation. I got an unanticipated temporary restraining order, and sometimes those have to be taken care of. So I apologize for making you wait for an hour and a half.

Let's have counsel note their appearances. First, for the plaintiffs?

MR. GOLDSER: Good afternoon, Your Honor, Ron Goldser from Zimmerman Reed.

THE COURT: Mr. Goldser.

MR. SAUL: Good afternoon, Your Honor. Louis Saul from Louis Saul & Associates for the plaintiffs.

MR. ZIMMERMAN: Good afternoon, Your Honor. Charles Zimmerman, Zimmerman Reed, for the plaintiffs.

THE COURT: Good afternoon.

MR. GIATRAS: Troy Giatras, Your Honor, from the Giatras Law Firm, state of West Virginia.

MR. MCCORMICK: Brian McCormick, Your Honor, Philadelphia, Pennsylvania.

MS. FLAHERTY: Good afternoon, Your Honor. Yvonne Flaherty from Lockridge Grindel Nauen.

1 MS. HAUER: Stacy Hauer. Good afternoon, Your
2 Honor.

3 MR. BINSTOCK: Good afternoon, Your Honor. Bob
4 Binstock of Reich & Binstock.

5 MR. GARRISON: Lew Garrison from Alabama, Your
6 Honor.

7 THE COURT: Good afternoon to all of you. Thank
8 you for coming.

9 For the defense?

10 MR. DAMES: Good afternoon, Your Honor. John
11 Dames, Chicago.

12 MS. VAN STEENBURGH: Good afternoon, Your Honor.
13 Tracy Van Steenburgh from the Halleland Lewis firm.

14 MR. HUTCHENS: Mike Hutchens, Your Honor, from
15 Meagher & Geer.

16 MR. O'SHAUGHNESSY: Good afternoon, Your Honor.
17 John O'Shaughnessy for Johnson & Johnson.

18 MR. ROBINSON: Good afternoon, Your Honor. Bill
19 Robinson from Alexandria, Virginia.

20 THE COURT: Good afternoon to all of you. It is
21 good to have you all here. This is our first in-court
22 status conference in this matter. We have a jointly
23 proposed agenda for the status conference. Let's see.

24 The number of cases is what we're going to
25 discuss first. I guess we've got the defense reporting

1 first. Maybe you both want to report. Do we have an idea
2 at this point how many cases we have?

3 MR. DAMES: Well, the record that I have is of 30
4 separate plaintiffs. We have two cases that we're aware of
5 that have been filed but not been served, and there are
6 two, Your Honor, state court cases.

7 THE COURT: Okay.

8 MR. GOLDSER: Your Honor, the purpose of
9 plaintiffs' reporting was to let you know what is out there
10 that is not filed. Most of the plaintiffs' lawyers who
11 have cases are here in the room today, although there are a
12 few that we're aware of that are not with us at this point
13 in time.

14 We estimate that, we're looking through lots of
15 questionnaires. Some people will have claims. Some people
16 will not. At the end of all of that process, we anticipate
17 there will be somewhere between 200 and 500 actual tendon
18 rupture cases that are filed, and to broaden the scope a
19 little bit, we talked very briefly I think on the
20 conference call about the scope of this MDL.

21 The cases I just referred to are tendonopathy and
22 tendon rupture cases. We have seen in some of the things
23 that have crossed our radar liver toxicity cases,
24 peripheral neuropathy types of cases. It's not clear yet
25 where they're going to go, whether they will be filed,

1 whether they are legitimate or whether we will do them and
2 they will be part of this MDL.

3 I just note that for your attention to note there
4 are other kinds of claims that are out there.

5 THE COURT: Okay. Very well. Thank you,
6 Mr. Goldser.

7 Anything else from the defense on that?

8 MR. DAMES: We have had preliminary discussions
9 with plaintiffs' counsel. We were requested as to whether
10 or not we would object to the inclusion of nontendon cases
11 in the MDL, and we would. We think that would confuse the
12 issue, frankly, and it just would create a new focus to the
13 litigation which presently does not exist, but other than
14 that, we have probably nothing much to add.

15 THE COURT: Sounds like an issue that is down the
16 road from a solution.

17 MR. DAMES: Yes, sir, it does.

18 THE COURT: Okay. We will keep that on the list.
19 Okay. The pretrial order number one, Mr. Goldser?

20 MR. GOLDSER: Thank you, Your Honor, yes. We had
21 proposed to you a jointly agreed proposed pretrial order
22 number one. Among other things it was going to set the
23 status conference, so I know that the forum that has been
24 given to you will have to be modified. It is fairly
25 standard stuff.

1 It's been drawn not only from the manual but from
2 some of the other orders in products liability mass tort
3 cases and from this district, most recently Judge Kyle in
4 the *Medtronics* lead case. We have proposed a plaintiffs'
5 steering committee. Most everybody who is proposed to be
6 on the steering committee is here today, with the exception
7 of John Walsh who was unable to make it, I'm sorry to say,
8 and Mike Hugo who has since the proposal of this order has
9 asked us to withdraw his name. He has decided he doesn't
10 want to be as active on this case as being on the steering
11 committee would warrant.

12 So all of my friends and colleagues who are here
13 have submitted applications to you. You should have all of
14 their materials, and we would request that the structure
15 that we have all agreed upon amongst ourselves be adopted
16 by the Court. Mr. Zimmerman anticipates a role, which we
17 hope will happen sooner rather than that later, that he
18 would be involved in whatever settlement discussions occur,
19 alternative dispute resolution. That will be his role in
20 the case.

21 We know that there are a couple of other lawyers
22 that are out there that have cases. The way we have
23 proposed the language gives us room to come back to the
24 Court and ask that additional people be joined. We would
25 rather have everybody under the tent than outside the tent

1 within our group so that some of the difficult issues that
2 happen just within the plaintiffs' group, anybody is under
3 the jurisdiction of the Court and are all together.

4 THE COURT: I think President Johnson said
5 something about the tent issue in a memorable quote. I
6 won't state it for the record.

7 Did the defense have any objections to anything
8 contained in the proposed pretrial order number one?

9 MR. DAMES: No, we did not, Your Honor.

10 THE COURT: One question that I had. Mr. Saul, I
11 noticed. Did you have some issues involving this
12 particular drug at some point in time? I just was curious
13 about that.

14 MR. SAUL: I did.

15 THE COURT: Is that how this all began? Maybe
16 you can tell me just a little bit about that just so that
17 I'm fully aware.

18 MR. SAUL: I took Levaquin. I'm a long distance
19 runner. I had some tendon issues. My office had been
20 handling a case. I called my doctor, and she didn't know
21 anything about the issues. My office did. They told me
22 stop taking the drug. I did. My tendon didn't rupture,
23 and one thing led to another, and that's where we are
24 today.

25 THE COURT: I see. Okay. So you don't

1 anticipate being a witness on any of the cases, I gather?

2 MR. SAUL: I do not.

3 THE COURT: Or the defense perhaps doesn't
4 anticipate deposing you in this matter.

5 MR. DAMES: We would like to claim some credit
6 for saving his life.

7 THE COURT: Okay. Well, the Court finds that the
8 pretrial order looks fine. The Court has done some review
9 of all of the materials and some additional, you know,
10 placing some calls relative to attorneys, and the Court is
11 satisfied.

12 Is there anything that you need to change,
13 Mr. Goldser, before we grant this order?

14 MR. GOLDSER: The only thing I would like to call
15 to your attention, and I apologize for the fact that the
16 pages are not numbered, but paragraph F, as in Judge Frank,
17 multiple plaintiffs filing on one complaint, the way the
18 order is phrased is that the issue of whether multiple
19 plaintiffs may initiate an action in an MDL in one
20 complaint should be addressed here on the first status
21 conference.

22 You have briefs on that subject before you.
23 There is not imminently any urgent need for people to file
24 multi plaintiff complaints, but I know that this issue
25 comes up at the beginning of most mass torts at this point

1 in time. Most judges, as our brief indicated, are allowing
2 it.

3 Judge Fallon admittedly said two, two and a half
4 years down the road, it seemed to create some difficulties,
5 although he didn't identify what those were, and of course
6 we do have already filed in this court multiple plaintiff
7 complaints. So the issue is not a hot one right now, but
8 we certainly would like an answer to whether it is
9 appropriate to do or not do, and I think you have it fully
10 briefed before you.

11 THE COURT: Yeah. If there is any additional
12 argument either side would like to make, let's do that
13 right now. Is there anything else that you have on it, or
14 maybe you wish to respond to the defense because I
15 understand from reading their materials that they are
16 opposing it.

17 MR. GOLDSER: They are opposing it. I think the
18 cases that are cited by both of us really do speak for
19 themselves. You can read them just as well as I can tell
20 you about them, and they will educate you as to which
21 direction this goes. I could argue a lot, but I don't
22 think I need to.

23 THE COURT: Mr. Dames?

24 MR. DAMES: I'm frankly mildly surprised because
25 we had a discussion about the agenda yesterday in which we

1 were informed that this item would not be pursued by
2 plaintiffs. I was hoping and assuming that there was some
3 persuasive appeal in our brief when they made the decision.
4 So I am a little surprised that it remains a live issue,
5 but my understanding was, there was no intent to file
6 multiple plaintiff complaints at this time in the future.

7 And so we thought we were going to let this lie
8 dormant as an argument. I do agree that the briefs do
9 thoroughly describe the issue. I, of course, disagree with
10 the characterization that the courts have been generally
11 inclined to it. I think experience has shown their growing
12 skepticism in that.

13 I'm not sure it's ripe to decide, if that is
14 their intent, otherwise I leave it in your hands, Your
15 Honor, but I was a little surprised.

16 THE COURT: Well, what I would normally do here
17 is take a look at the cases and then make a decision, issue
18 probably a relatively short written order given the nature
19 of the request, unless you think that we should address
20 this at a later time.

21 MR. GOLDSER: I don't think there is an imminent
22 wave of multiple plaintiff complaints coming down the road,
23 and if Mr. Dames and I kind of misunderstood each other, it
24 probably is the first time, but undoubtedly won't be the
25 last.

1 I think what I was trying to convey is that it is
2 not an urgent matter, and so that perhaps we didn't need to
3 push the Court hard for a ruling because we have a lot of
4 this coming. Yes, we would like an answer to the question
5 when the Court deems it appropriate to do so.

6 THE COURT: Okay. I would like to read the
7 cases. I've read the briefs or the letter briefs that have
8 been submitted, and I thought they were very helpful. They
9 sketched out the arguments on each side very well, and I
10 would like to check the cases before issuing a ruling. I
11 will tell you I'm inclined to deny the request.

12 That's my initial feeling, but I do want to
13 review the cases carefully before reaching that decision
14 which we will do probably sometime in the next three weeks,
15 before the next status conference.

16 MR. GOLDSER: If you do go that direction, Your
17 Honor, my only request would be that given the fact that we
18 have some complaints that are already filed that way that
19 we not have to unbundle them and separate them at this
20 point in time. That could be dealt with if and when remand
21 is appropriate.

22 THE COURT: I think that's a fair assessment of
23 the ones already filed.

24 MR. DAMES: Thank you.

25 THE COURT: Okay. Let's see. Okay. So Mr. Hugo

1 would not be part of the steering committee anymore?

2 MR. GOLDSER: That's right.

3 THE COURT: Why don't you, Mr. Goldser, submit a
4 new draft of this taking out Mr. Hugo. I think he is
5 listed as part of the plaintiffs' steering committee and
6 then whatever, any additional changes anyone believes is
7 necessary.

8 MR. GOLDSER: We'll do so.

9 THE COURT: And the Court will get it filed as
10 quickly as possible.

11 MR. GOLDSER: All right. Thank you.

12 THE COURT: Okay. Additional pretrial orders.
13 We're anticipating a deposition protocol?

14 MR. GOLDSER: Yes, Your Honor. We are
15 circulating one. We have started working on it. There
16 are, I learned today, there are apparently a couple of
17 small issues that remain. Mr. Robinson will be talking to
18 Mr. Saul in my absence during the course of September, and
19 hopefully in that time will be able to iron out those last
20 few details.

21 Again, that's a fairly standard order issued at
22 the beginning of mass tort MDL's at this point. We have
23 drawn from most of the other orders that we have seen.
24 There are a couple of minor issues, but we should be able
25 to work those out.

1 THE COURT: Since there have been a few cases
2 that have been around for a while, has some discovery been
3 done that is applicable for the other cases?

4 MR. GOLDSER: Absolutely.

5 THE COURT: I thought there might be.

6 MR. GOLDSER: There are six depositions. I was
7 going to cover this later, but I can do it now. There are
8 six depositions. A million plus pages of documents have
9 been produced. There are several outstanding requests.
10 There are some third parties out there who have been
11 identified and who have produced documents, and these
12 depositions will be taken and who will produce documents.

13 I mean there is one pending subpoena out there
14 for a third party. There is an awful lot of stuff done and
15 out there. We're down the road a good piece so far.

16 THE COURT: I thought that might be the case.
17 Okay. We'll look forward to getting that draft when it's
18 ready. Plaintiffs' common benefit fee and cost sharing
19 order, what's the status of that?

20 MR. GOLDSER: Let me take a big picture and step
21 back for a second. This agenda was crafted with an eye
22 towards the usual things that happen, in my experience,
23 with status conferences in mass tort MDL's. One of the
24 orders that often gets entered early in this stage is how
25 does the plaintiffs' side organize itself as far as money

1 is concerned. There are usually a couple of things there.

2 One, how do we all write checks from a common
3 fund to pay for the expenses, the expert witness
4 depositions and the like; and the other is, how do you then
5 make sure that all the cases that are in this litigation,
6 filed cases in the MDL, filed cases in state court or
7 unfiled cases in lawyers' inventories, that from our
8 perspective hopefully get resolved successfully and paid
9 money, how do you deal with the question of common benefit
10 attorneys' fees?

11 You may well be aware that the common benefit
12 attorneys' fees issue is a pretty hot one in the
13 plaintiffs' bar at this point in time. Judge Frank issued
14 an order in *Guidant*. There is an order in *Vioxx* by Judge
15 Fallon. I note this item on the agenda to say that we're
16 aware of the issue.

17 We had a discussion today on the plaintiffs' side
18 about whether such an order should be issued at this point
19 and if so what it should look like. We're not yet ready to
20 present to the Court our position, but I want you to know
21 that this is an issue we're taking up. We hope to have an
22 answer for you in short order.

23 If we decide that we want to present an order at
24 this point in time that we think is appropriate, we will do
25 so. Obviously, we will present it to defense, and then it

1 will be for the Court's decision. If we decide that we
2 choose not to, we will tell you that, and we will tell you
3 why.

4 THE COURT: Sounds good. Thank you. Okay.
5 We've talked about the multiple plaintiff complaint issue.
6 We've got a section on the agenda for anticipated motions.

7 Mr. Goldser?

8 MR. GOLDSER: We spoke on the phone several weeks
9 ago about the potential motion to compel the documents on
10 Floxin. Again to step back, this is a failure to warn
11 claim. We believe that Levaquin and the antibiotic should
12 have had a more serious warning than some of the other
13 drugs in its class.

14 In order to prove that that's true, we have to
15 prove that Levaquin is worse than the other drugs. To show
16 that, we have to do epidemiology. A lot of the
17 epidemiology comes from Levaquin's predecessor drug, which
18 is Floxin. So from our perspective, documents concerning
19 Floxin are particularly relevant to this case, toxicology,
20 pharmacology, the tendon toxicity properties of Floxin.

21 We have had a friendly but stern argument about
22 that with defense. They're very nice about it, but they're
23 very firm: No, we're not going to give you Floxin
24 documents only.

25 We have taken a step back from the precipice of

1 filing a motion to compel to think about, what is it that
2 we really need in this context? What is it that we already
3 have that will satisfy what we need, and therefore what
4 motion to compel, if any, do we have to bring? And that
5 invokes the expertise of our scientists and our experts.

6 They are looking at what materials are out there
7 already within the public literature and things that are
8 already available to them. They're going to tell us
9 whether they have what they need to tell you that Floxin
10 and Levaquin are sufficiently similar to allow the
11 epidemiology of Floxin to apply.

12 So I'm going to back off from the motion to
13 compel on Floxin at this point until we decide whether we
14 really need to cross that threshold. I put it on the
15 agenda so you know the current status, having talked about
16 it.

17 THE COURT: Okay. That's helpful.

18 Mr. Dames, did you have anything about that that
19 you wanted to say today?

20 MR. DAMES: I don't disagree -- I think that's a
21 fair enough summary. I just wanted to clarify that
22 documents have been produced, and part of the discussion
23 about Floxin was that there have been comparative
24 information between Floxin and Levaquin that have been
25 produced.

1 So it is, he was careful to point out,
2 Mr. Goldser, that it was the Floxin only documents that
3 formed the kernel of the contention between us, but I do
4 think that there is a certain amount of room, and we may be
5 able to work out something that is agreeable to both sides.
6 I can't guarantee that, but they do have Floxin documents.

7 It's just simply that they aren't the Floxin only
8 documents that, however they are described. So we, the
9 point is, they are trying to make a comparison between the
10 two drugs. The comparative information we have suggested
11 has been produced.

12 THE COURT: Okay. All right. Thanks.

13 MR. DAMES: All right.

14 THE COURT: Okay. Preemption, are we going to
15 have a preemption motion?

16 MR. DAMES: Yes, startlingly. It obviously is a
17 little premature. That is an issue that is going to be
18 considered and decided by the Supreme Court. Also, I think
19 it's going to be helpful to this Court to see the record
20 that will be laid in this litigation factually as we go
21 along that will form the basis of the preemption motion as
22 well.

23 MR. GOLDSER: Again, to anticipate the motion,
24 the way I see it, the *Levine* case is being argued in the
25 Supreme Court November 4th.

1 THE COURT: November 4th?

2 MR. GOLDSER: November 4th, and I anticipate,
3 knowing the Supreme Court as well as I do, that a decision
4 will be forthcoming in February or perhaps March. I mean,
5 I could easily be wrong, but if that's true, we are
6 working, or at least I am anticipating, that kind of time
7 frame for document production, deposition taking, expert
8 work on our side so that we would be ready to respond to a
9 preemption motion brought not long after the *Levine* case
10 comes down.

11 There is a lot of preemption case law now on drug
12 preemption specifically, as opposed to medical device
13 preemption, which is a different question. Who knows what
14 the Supreme Court is going to do, but if they follow the
15 line of thinking that we have been seeing in a lot of
16 cases, and there have been a whole bunch of them in the
17 last couple months, if they follow that anywhere close to
18 that, we have been working in anticipation of that being
19 the law.

20 We think we have a very strong factual basis to
21 show that these claims are not preemptive at all, none of
22 them, and we would be able to go forward fairly quickly
23 after *Levine* comes down, unless the Supreme Court does
24 something completely unaccepted. That fits into our whole
25 scheduling order process. So we have preemption briefed in

1 the spring and argued and hopefully decided late spring,
2 early summer, and then we can really move on towards
3 experts and trial.

4 THE COURT: I would like to be ready to move
5 relatively quickly on that once the Supreme Court issues
6 its ruling. I think that would help guide the rest of the
7 case. It just seems to be the right order in which to
8 resolve matters.

9 MR. GOLDSER: All right.

10 THE COURT: Okay? Very well. Let's see.

11 Master complaint, Mr. Goldser?

12 MR. GOLDSER: Your Honor, again this is on the
13 agenda because it's a common issue that comes up in MDL's,
14 but for us, as we talked about it, it really begged the
15 bigger question of the vision of the case in its entirety.
16 So master complaint dovetails into case specific discovery.
17 It dovetails into bellwether trials and the overall plan
18 for the case.

19 So if I might put a couple of the items together,
20 even in this context, and then it kind of comes back to
21 that notion of a master complaint and tell you our vision
22 of the case overall. We see that this Court will obviously
23 have some jurisdiction to try cases. There are Minnesota
24 plaintiffs filed directly in this court.

25 You have jurisdiction to try cases, lexicon

1 notwithstanding. There are nonMinnesota plaintiffs who
2 have filed cases directly in this court. You have
3 jurisdiction to try them, although they are going to be
4 subject to a renewed 1404 venue transfer motion, which you
5 will decide. Maybe they will move. Maybe they won't move.

6 If you decide to move them and you send them back
7 to the states from whence they came, you may also decide at
8 that point that you want to be the trial judge and sit by
9 designation in those states. So the scope of our plan is,
10 we want to try some cases. The easiest way and the
11 narrowest way to avoid all issues is to have Minnesota
12 plaintiffs whose cases are filed directly in this court,
13 and then you don't deal at all with venue transfer issues.
14 You don't deal at all with lexicon issues.

15 We could get those cases up and running. We
16 could do the individual case specific discovery, including
17 depositions and treating doctor depositions and focus on
18 those cases. We could then bring any dispositive type
19 motions, including preemption.

20 In the specific context of those cases, we could
21 amend those complaints so that we would have not a master
22 complaint for all of the cases but a very well-crafted
23 complaint in an individual case that you could then address
24 for whatever dispositive motions, including preemption. So
25 you can see how the master complaint issue is the tip of

1 the iceberg for the overall vision of the case.

2 We could do that in a lot of different ways, and
3 really a lot of what I just said depends on your vision of
4 how this case gets handled. I don't know if you would like
5 to share any of that with us here and now, but it will help
6 us move forward to figure out what cases go and how we do
7 individual discovery.

8 THE COURT: I think we should have that front and
9 central on the agenda for our next meeting, so I will have
10 a chance to think about it after understanding a little bit
11 more about the case, but I do think a good planning session
12 is in order, and we should do it sooner rather than later.

13 MR. GOLDSER: One of the things that we could do
14 and we're prepared very shortly to file a statement of the
15 case as pretrial order number one requires, laying out the
16 factual basis for our side. We could also provide to you a
17 proposed plan for the case between now and the next status
18 conference, and defense could as well.

19 We could say, here are the cases that we want a
20 trial, just kind of categorically as opposed to by name.
21 Here is how we envision individual discovery. Here's how
22 we envision taking doctor's depositions. Here's how we
23 envision dealing with amending the complaint.

24 And we could focus the litigation from my point
25 of view, from plaintiffs' point of view, on those cases

1 specifically, as opposed to taking the universe of all
2 plaintiffs out there and doing individual case specific
3 discovery willy-nilly in all of them, and we could provide
4 that to you in a plan at the next status conference.

5 THE COURT: Mr. Dames?

6 MR. DAMES: Your Honor, I guess I'm a little lost
7 in that my understanding was, again, that the plaintiffs
8 were not going to pursue a master complaint, but be that as
9 it may, and the Court's views will obviously be
10 determinative, it is far too early without taking
11 discovery, case specific discovery, discovery of the
12 plaintiffs in these cases, to make the determination, I
13 believe, how to proceed, which cases to select for trial,
14 you know.

15 The whole significance and meaning of bellwether
16 absent specific factual fleshing out of the cases makes it
17 very -- it's too abstract at this point in time, and so our
18 concern, my concern, is that we need to move away from the
19 abstract shaping before we have enough information about
20 the individual cases.

21 This litigation is certainly quite manageable as
22 it exists right now so that we don't have to be intimidated
23 by the level of work that is required to go into the
24 factual issues that each case will present.

25 THE COURT: When would you envision setting,

1 agreeing on a plan to move forward? How much time do you
2 think is necessary to more fully flesh out the issues that
3 are present in the case other than to make those
4 recommendations?

5 MR. DAMES: To tell you the truth, Your Honor, I
6 don't know because part of that is going to relate to how
7 we come to terms with the scheduling order, which we are
8 going to be doing. So some of it is going to be posited
9 after we have received medical records on the plaintiffs
10 and we have a handle on what treating and prescribing
11 physician information is available to us and we will want
12 to pursue.

13 The important part of every case that we need to
14 know about it is, how was the decision to prescribe the
15 drug to that plaintiff made? What was the information
16 available at the time that decision was entered into and
17 what medical facts exist as to each plaintiff to give us a
18 clue as to what might have been the cause of that
19 plaintiff's condition and also the value of giving the drug
20 to that particular plaintiff.

21 The benefits of the drug are certainly also very
22 case specific for that plaintiff. So we need to pursue
23 that line of inquiry, and I think it's going to be
24 important, but it's not going to take us forever, that's
25 for certain.

1 MR. GOLDSER: I think Mr. Dames is right in part
2 and wrong in part.

3 MR. DAMES: Well, I have it half right.

4 MR. GOLDSER: Here is the part he's wrong about,
5 and that is, you've got to do the lexicon and venue
6 transfer analysis first because that is going to limit the
7 playing field. If the defense says we're not going to
8 waive lexicon, then there is a certain number of cases that
9 this Court has jurisdiction to try, and we should focus on
10 the case specific discovery on those cases.

11 If the defense says, we're going to seek to
12 transfer venue of the nonMinnesota resident plaintiffs that
13 have been filed directly in this court, then that may limit
14 the scope of cases this Court has jurisdiction to try.
15 That becomes your decision. Will I transfer venue, and if
16 I do, will I then sit by designation in another
17 jurisdiction?

18 If you will keep the cases here and we will keep
19 them, then we have nonMinnesota residents filed directly
20 here over whom you have jurisdiction to try cases. At that
21 point in time, we're going to know the scope of possible
22 bellwether cases. If that's ten cases, he's right. There
23 is not a lot of burden to discover ten cases. If that's
24 300 cases, that's a big burden.

25 I think we need to narrow that scope before we

1 can then get into what is the scope of discovery, how many
2 cases are we going to select, how do we select cases for
3 bellwether. So we have to cross the lexicon and venue
4 transfer and sitting by designation questions to narrow the
5 playing field first.

6 THE COURT: That makes sense. Okay. Good.

7 Answers to complaints, what's the status there?

8 MR. GOLDSER: We agreed on the phone yesterday
9 that any complaint which has been filed and served as to
10 which an answer has not yet been served will be answered by
11 October 1st.

12 MR. ROBINSON: For the cases that have been
13 served. There are a couple of those cases that haven't
14 been served yet.

15 MR. GOLDSER: Right.

16 MR. ROBINSON: Right.

17 MR. GOLDSER: And then any case that has been
18 served would be the normal 20 days after service.

19 MR. ROBINSON: After service.

20 THE COURT: Okay. Good. Discovery status matter
21 here, is there anything else on that? I know that you're
22 going to be proposing an order here but --

23 MR. GOLDSER: Yes, a couple of things. As
24 indicated, we have done a lot, and we have proposed a
25 number of depositions, identified people for deposition.

1 We hope to take those in November, December, which as
2 Mr. Robinson is likely correct, will slop over into January
3 and February. We're moving on that. We will get the
4 discovery protocol.

5 The one issue that is here is, we are working on
6 plaintiff and defendant fact sheets. We have developed a
7 defendant fact sheet, although we have not provided to
8 defense yet. They are working on a plaintiff fact sheet.
9 They have not provided it to us. We believe both of those
10 fact sheets are appropriate.

11 I think all pharmaceutical and device cases that
12 I know of recently do them both, including the defendant
13 fact sheets, and so we want to make sure that everybody is
14 on the same page, that we are going forward with both sets
15 of fact sheets. I did catch some drift in one of the
16 communications from the defendant that perhaps they're
17 thinking that defendant fact sheets are not appropriate.

18 I want to make sure the record is clear about
19 whether they are or not. We think they are. We think
20 they're necessary. We think they're appropriate, and if
21 they oppose that, I think I need to hear that.

22 MS. VAN STEENBURGH: Your Honor, I will speak to
23 that issue.

24 THE COURT: Ms. Van Steenburgh.

25 MS. VAN STEENBURGH: Our current thinking is,

1 defendant fact sheets are not appropriate. We don't really
2 see why we would need them in these cases. What we have
3 heard thus far is information about individual sales reps
4 and calls on some of the treating physicians. All of that
5 information has already been provided in documents.

6 If there is more to it than that, we certainly
7 will talk with the plaintiffs' counsel about that.

8 Mr. Goldser indicated that they are developing a defendant
9 fact sheet. We would be happy to take a look at it. I
10 just want to make the record clear. Right now we don't see
11 a need for that, but we are happy to talk a little bit
12 further about that.

13 MR. GOLDSER: This is in Mr. Binstock's arena.

14 THE COURT: Go ahead, sir.

15 MR. BINSTOCK: Your Honor, it is going to be very
16 similar to the fact sheet that was prepared in *Ortho Evra*,
17 which is basically asking information as we provided, the
18 names of the doctors for our clients, for them to provide
19 us with the sales reps, the marketing, that type of
20 information that their people gave to these doctors. That
21 is going to be a critical issue on these matters.

22 So it's something they have seen before. I mean,
23 it's going to be very similar to *Ortho Evra*, and I would be
24 happy to give them a copy. It would be important for us to
25 have that information.

1 MS. VAN STEENBURGH: The only thing I would say
2 is, it's a little different situation. We produced a large
3 database with all call notes, all the other information
4 that would otherwise be gathered. So again, we don't have
5 to debate it here. We can talk a little bit, but to put
6 everybody on notice, right now we're objecting to that.

7 MR. BINSTOCK: For our purposes, just instead of
8 us having to ask for massive paper, we're asking for a
9 specific plaintiff, their doctor, what information their
10 sales rep provided that doctor. It is going to make life a
11 lot easier for us, just like it will be for them when we
12 provide our answers to our plaintiffs' fact sheets.

13 THE COURT: Mr. Robinson?

14 MR. ROBINSON: There has been a lot of discovery
15 in the last year or 14 months on these cases. There have
16 been written interrogatories propounded, both on a case
17 specific level and generic case level. Those have been
18 answered. In response to requests for production, we have
19 produced over a million pages of documents in searchable
20 context.

21 We have also produced three databases that have
22 been requested by the plaintiffs, and we have produced five
23 witnesses thus far that have been requested, and they have
24 requested another five, and we're working on those. And
25 that's kind of where we are from our perspective on the

1 status of the discovery.

2 THE COURT: Okay.

3 MR. BINSTOCK: I'm hoping we will be able to work
4 something out. When I was talking about *Ortho Evra*, that
5 was of course a Johnson & Johnson situation, and they
6 answered those. I think it would make things a lot easier
7 for both sides. We are going to do our fact sheets for
8 them.

9 We would like to have them do the same for us so
10 we can identify these sales reps easily without having to
11 go through reams of paper. We will get you a copy.

12 MR. GOLDSER: One example, Your Honor. When a
13 MedWatch report is filed, when those have been given to us,
14 and they have been given to us, they have been given to us
15 redacted so that we cannot identify the patient's name. So
16 they can claim they have given us Joe Smith's MedWatch
17 form, but I don't know what it is because the names were
18 redacted.

19 So the defendant's fact sheet at least will get
20 us the MedWatch form that is attached to Joe Smith. I'm
21 not sure about the call notes database, but we may have
22 similar problems with that, but I don't know that yet for
23 sure.

24 THE COURT: Well, we will resolve this if
25 necessary. I encourage the parties to keep talking about

1 this. I will state as a general matter that generally I
2 think defendant and plaintiff fact sheets are helpful, but
3 as we get into this, if there continues to be a dispute,
4 the Court would be happy to resolve that as quickly as
5 possible.

6 Let's see. Anything else on discovery,
7 Mr. Goldser.

8 MR. GOLDSER: Yes, Your Honor, under paragraph
9 8E, discovery conferences. Before the MDL was formed,
10 Magistrate Judge Boylan was involved in some of the
11 individual cases. We had a process set up where we had a
12 regular monthly conversation with him, Thursday mornings at
13 8:30 on the telephone, to resolve any outstanding discovery
14 problems.

15 I don't know if that's your practice. If you
16 would like to make that your practice or if you have other
17 means by which you would like us to resolve some of this
18 formally other than a court appearance or a status
19 conference, some of these ongoing discovery issues.

20 THE COURT: In the previous practice, did you do
21 this each month, and were there issues each month to
22 resolve?

23 MR. GOLDSER: It was scheduled each month, and,
24 no, there were not issues each month. It was sporadic. We
25 cancelled in advance so the Court had the opportunity to

1 make that time available to others.

2 THE COURT: As I think I stated on the telephone
3 when we had our first conference, it's my intent to handle
4 all pretrial related matters. I think that's, I consider
5 that my obligation as the transferee judge in this case.

6 However, I have told Magistrate Judge Boylan that
7 I do intend to ask him to address particular discovery
8 matters that come up from time to time that perhaps are
9 more involved and perhaps might utilize his knowledge of
10 the case from his earlier work. So I think setting up a
11 regular time for a conference call is certainly just fine
12 with me.

13 We can do that, or we can, we can handle
14 discovery matters at our regular conferences like this, so
15 whatever the parties think works the best.

16 MR. GOLDSER: The third choice is ad hoc. When
17 something comes up, we call chambers and say we have an
18 issue that needs a one-day turn-around, a one-week
19 turn-around, and we can find out what your availability is.
20 I frankly suspect, given the cooperative nature that we
21 have had so far, that the latter may serve us the best
22 because issues just arise as they arise and not on a
23 regular timed basis.

24 THE COURT: All right. Sometimes that's more
25 handy, to be able to just get matters resolved more quickly

1 rather than waiting for the monthly call.

2 Mr. Dames, do you have a thought on this?

3 MR. DAMES: I was going to suggest that a
4 conference such as the one being held today would be a
5 perfect -- I mean, I prefer that approach. I don't foresee
6 any emergencies. It's possible that some might occur, but
7 I genuinely don't. One thing I like about this approach
8 is, we agree on an agenda, and that helps shape the issues
9 to be addressed by the Court.

10 It gives us some ability, perhaps, to brief
11 whatever needs to be briefed for the Court. I just happen
12 to like the sense of organization that this brings to
13 whatever disputes we may have.

14 THE COURT: This process is what I'm more
15 accustomed to handling in the prior MDL. Let's proceed
16 with that. If it looks like we need more regularly
17 organized discovery telephone conferences, we can add those
18 at any time, but let's presume that -- excuse me. We will
19 take up discovery matters at these conferences on a regular
20 basis, and we will have them at least in the initial stages
21 on a very regular basis.

22 MR. DAMES: Thank you, Your Honor.

23 MR. GOLDSER: The next item is listed as experts.
24 Again, that's just to have it on the agenda as a topic that
25 we will regularly discuss. We have been working with a

1 number of experts on our side. We think we pretty much
2 identified the categories of experts that we want.

3 I don't anticipate expert reports coming due
4 until after the preemption motion, although we may have a
5 preemption expert whose report would be part of that motion
6 and as to whom there will be the necessary usual expert
7 discovery in that context. I can't imagine that the
8 science experts and epidemiology and toxicology and what
9 have you will be necessary for preemption.

10 They might be, and if they are, obviously we will
11 raise that as part of our response, and we may need to
12 address expert discovery before preemption for preemption
13 purposes only, but we are working on them. We've got a
14 good group of experts who are informing us, but most of
15 that I think comes after preemption.

16 THE COURT: Okay. Anything else here? We've got
17 individual case issues. We talked a little bit about the
18 possibility of bellwether trials.

19 MR. GOLDSER: I think we will present to you a
20 plan or proposed plan on how to deal with individual cases,
21 bellwethers, the whole lexicon and venue transfer question
22 so you have our perspective on how all the cases
23 individually should be handled, how bellwethers should fit
24 into that, and I would hope we would have that for you
25 prior to the next status conference so you can give us the

1 benefit of your thoughts, and we can move that issue
2 forward.

3 THE COURT: Good.

4 MR. DAMES: We're certainly prepared to do the
5 same, Your Honor. I suspect we will be obviously
6 communicating before that, so perhaps there will be a level
7 of agreement that can be reached to present to the Court.

8 THE COURT: Sounds good.

9 MR. GOLDSER: The next item, proposed scheduling
10 order, really dovetails with the plan. Once we have
11 identified what kinds of cases that we are going to do in
12 the way of discovery, we can work on our timing schedule.
13 I have talked a little bit about preemption and its timing.

14 You should note that in the scheduling order that
15 exists now, there is a proposed January 2010 trial date. I
16 think we can still meet that as a trial date. Frankly, we
17 might even be able to do something sooner than that, and if
18 we could, that would make us happy. That's what is on the
19 agenda with the scheduling order as it currently exists,
20 and we would like to be able to hold to that.

21 THE COURT: Good.

22 MR. DAMES: We discussed the trial date briefly,
23 and you know, there is nothing that particularly leaps to
24 my mind to suggest that that is unattainable, but the other
25 portions of the scheduling order will probably need to be

1 adjusted without necessarily in any way altering the trial
2 date.

3 THE COURT: I think that makes some sense given
4 the change in the breadth and scope of the cases.

5 MR. GOLDSER: And then the last thing that we
6 have on the agenda is, when are we going to meet next?

7 MR. DAMES: That is always the most important
8 part of the agenda.

9 THE COURT: It is. Well, you are gone the rest
10 of September, I take it?

11 MR. GOLDSER: I am. Thank you for remembering.
12 I hope you had a good trip now that you're back.

13 THE COURT: That's why we drag everybody into
14 town in the middle of at least these 30 or so thousand
15 visitors that we have in St. Paul and Minneapolis. If you
16 can get out of town today, it might be better than trying
17 to leave tomorrow.

18 MR. GOLDSER: I'm leaving tomorrow. Oh, well.

19 THE COURT: What's your suggestion? Normally,
20 once we really get into these cases, I will probably want
21 to have a scheduled monthly conference. Some months we may
22 just do it by telephone, if there is not a lot to discuss,
23 and that certainly is a fine alternative. It saves a lot
24 of travel costs, but my experience is that there are a lot
25 of issues that come up at the early stages, and a plan for

1 monthly status conferences at the beginning usually works
2 the best.

3 So we should perhaps be looking at some point in
4 October, do you think? Does that work for everybody? Is
5 that an appropriate time, or should we focus on, say, the
6 first of November?

7 MR. GOLDSER: I think we can do something in
8 October, and if you wouldn't mind satisfying my needs to
9 get my feet back under me, the middle of October, and I
10 guess I'm looking at Thursday the 16th or Friday the 17th.
11 That's just my suggestion. I don't know how it works for
12 everybody.

13 MR. DAMES: Could I just request the Friday
14 instead of the Thursday? I unfortunately teach a class on
15 Thursday afternoons.

16 THE COURT: Let's see.

17 MR. DAMES: And if it is Friday, a little earlier
18 would be better than later, not that we're anxious to get
19 out of town, of course.

20 THE COURT: Sure. Friday the 17th looks like it
21 works fine for me.

22 Holly, does that look okay, do you think?

23 Earlier would be better. I have a ceremony that
24 I have to preside over in the middle of the afternoon. So
25 probably at eleven o'clock timing that day or perhaps at

1 ten?

2 MR. GOLDSER: From our perspective, Judge, and
3 what we have learned about plane schedules, many of our
4 steering committee members who may or may not choose to
5 attend all future status conferences find themselves able
6 to get here by about 11:30.

7 THE COURT: 11:30?

8 MR. GOLDSER: So I don't know if one o'clock is
9 possible, given what you just said, but that would work
10 better for us.

11 THE COURT: I would have to be leaving by about
12 2:15. So slightly earlier than 1:00 might be best. It's a
13 marriage ceremony that I have to preside over, so it's
14 important to at least a couple of people that I be on time.

15 But if we start -- well, why don't we just say,
16 we could set it for 12:15. That should enable everyone to
17 get here. We will wait if someone is delayed getting from
18 the airport, but that should get us done within a couple of
19 hours I would think.

20 MR. GOLDSER: I should think so. Thank you for
21 accommodating us over lunch. I hope your staff is not
22 going to be angry at us.

23 THE COURT: I would probably only have trouble
24 with the court reporter.

25 MR. GOLDSER: Well, that completes the matters

1 that we had proposed for the agenda today. I don't know if
2 the Court had anything else or if my colleagues have
3 anything that we have omitted.

4 THE COURT: Anyone else?

5 Additional plaintiffs' lawyers who are here,
6 anything anyone would like to raise?

7 MR. GIATRAS: No, Your Honor.

8 THE COURT: Okay. Great to have you all here,
9 and it will be especially nice to have you all here in
10 January.

11 Anything from any of the other defense lawyers?

12 MS. VAN STEENBURGH: No, Your Honor.

13 THE COURT: Okay. Well, we are looking forward
14 to moving this matter along just as quickly as possible. I
15 am glad to have all of you here, and we will be in recess.

16 I do expect that I will take up the issue of the
17 complaints and issue an order probably in two to three
18 weeks on that.

19 MS. VAN STEENBURGH: Thank you, Your Honor.

20 MR. GOLDSER: Thank you, Your Honor.

21 THE COURT: We will be in recess. Thank you.

22 **(Court was adjourned.)**

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

Certified by: _____
Kristine Mousseau, CRR-RPR