

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
) December 15, 2008
) 2:15 P.M.
)

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

APPEARANCES

For the Plaintiff: **RONALD S. GOLDSER, ESQ.**
LEWIS J. SAUL, ESQ.
DAVID CIALKOWSKI, ESQ.

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

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Proceedings recorded by mechanical stenography;
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2:15 P.M.

(In open court.)

THE COURT: You may be seated. Sorry to keep you waiting. This is civil case number 08-1943, In Re: Levaquin Products Liability Litigation.

Counsel, do you want to note your appearances today for the record?

MR. GOLDSER: Good afternoon, Your Honor. Ron Goldser for the plaintiffs.

MR. CIALKOWSKI: Good afternoon, Your Honor. David Cialkowski for the plaintiffs.

MR. SAUL: Good afternoon, Your Honor. Lewis Saul, S-a-u-l.

THE COURT: Good afternoon to all of you.

MR. DAMES: John Dames, Your Honor, for the defendants.

MR. ROBINSON: Bill Robinson for defendants, Your Honor.

MS. VAN STEENBURGH: Tracy Van Steenburgh for the defendants.

MS. AMPULSKI: And Jennifer Ampulski.

THE COURT: Good afternoon to each of you. Again, I apologize for the delay. We are in the middle of a jury trial, and also we're working with a member of Congress on something, and we all know their schedules have

1 to be maintained so --

2 MR. DAMES: We managed to entertain ourselves,
3 Your Honor.

4 THE COURT: That's good. We could have brought
5 the jury back in. You could have done some more
6 questioning for me and got that part done faster. Anyway,
7 let's proceed here. We may have to cut this a little
8 short. Just if there is anything else we need, we can
9 always follow up on the telephone.

10 Mr. Goldser?

11 MR. GOLDSER: Thank you, Your Honor. We're
12 mindful of your jury trial. We thought we would cut
13 through and just go to the issues. There are four issues
14 that I see on the agenda that need your assistance. Item
15 number 2, the bellwether trial and discovery plan; 3A, the
16 motion regarding the Seeger protective order; item 3B, the
17 motion to amend pretrial order one; and item 5 regarding
18 pretrial order number 3.

19 As I see it, and defense will certainly correct
20 me if they disagree, I believe that the motion to amend
21 pretrial order number one which addresses the question of
22 taking depositions of treating doctors on a certain list of
23 cases will be decided once you decide the bellwether trial
24 and discovery plan.

25 If you agree with plaintiffs' proposal as to the

1 list of cases that should be included, then the motion to
2 amend pretrial order number one will be denied because
3 that's as to cases that won't be on the list. If you buy
4 their plan for the bellwether trial, it includes the cases
5 as to which they want to take discovery or their motion to
6 amend pretrial order one, and so that motion will then be
7 granted, so I see it as being subsumed within.

8 I'm prepared to talk about the bellwether trial
9 issues. Mr. Cialkowski will talk about the Seeger motion,
10 and we can talk about pretrial order number 3 today or not,
11 depending on the time. I would rather get that done
12 because it's kind of a plaintiffs' organizational
13 governance order, but it's not critical to moving forward
14 with the discovery of the case.

15 We would like it to make sure that our house is
16 in order and start dealing with billable time and the like,
17 but really the discovery, the bellwether trial issue and
18 the Seeger protective order are the ones that we really
19 ought to focus on today. If I can dive in, then, to the
20 bellwether trial plan --

21 THE COURT: Is that okay with everyone over
22 there?

23 MR. DAMES: Yes, Your Honor. Actually, I agree
24 with his points that if you decide, your decision on the
25 bellwether trial plan will --

1 THE COURT: Go ahead, Mr. Goldser.

2 MR. GOLDSER: It was actually surprised and
3 delighted when I saw defendants ' plan that was filed.
4 They're proposing 16 cases. We're proposing 8. I think
5 those are the numbers. I might be off by one or two. Of
6 those, 16 they include our 8. So happily we have agreed on
7 at least eight cases that should be included in the
8 bellwether trial and discovery plan.

9 So it comes down to whether we want to add their
10 additional cases. Their additional cases are what we have
11 called amongst ourselves trial group number one, and by
12 that we mean the first cases that were filed
13 chronologically in this litigation in this court when it
14 was started two years ago.

15 They were originally filed cases in this
16 district, but they are all, I believe, except for two of
17 them which are included in our plan, they're nonMinnesota
18 residents. And so that really begs the issue that I raised
19 at our last discovery or status conference which was, does
20 this Court want to entertain discovery on cases that it may
21 or may not try.

22 You will have to face the lexicon issue. You
23 will have to face the venue transfer issue if you buy off
24 on the defendants' bellwether trial claims. If you want to
25 face those issues, all right. Let's face them. We can

1 decide it. We can decide that now. That will hold us up
2 in moving the case forward while we go through that
3 process, but let's decide it, or if you would prefer that
4 we just address the eight cases that we all agree should be
5 included in the bellwether trial and discovery plan, let's
6 go with those.

7 There is no lexicon issue. There is no venue
8 issue, and we can move forward without any side-track
9 problems. It turns out that there is a ninth case that
10 fits into the category of Minnesota resident, Minnesota
11 trial, beyond the eight that I had originally mentioned.
12 We had overlooked it. Plaintiff's last name is Mroz,
13 M-r-o-z.

14 We would be happy to include that one as well
15 because if our theory, if we want to be consistent with our
16 theory, that one should be included.

17 THE COURT: Is that on the defendants' list, too?

18 MR. GOLDSER: Yes, that was on the defendants'
19 list. So there are nine cases that we see as Minnesota
20 resident, Minnesota filed, no venue, no lexicon. Let's
21 have at it, and at that point we then get into the question
22 of deadlines. If you lay the deadlines of our respective
23 plans side by side, they're frankly not terribly different.
24 The one big difference at the end of it all is proposed
25 trial date.

1 Initially, we had proposed an April 2010 trial
2 ready date because that's what was given to us by Judge
3 Boylan back before the MDL was formed, and we were really
4 pointing towards that trying to get ready for that. We
5 would like to hold that date if we can. If we work
6 backwards from there, our schedule tends to fit a little
7 bit better. An awful lot of what the defendants propose in
8 terms of schedule nevertheless does overlap and dovetail
9 with that.

10 We may have a bit of a problem in meeting the
11 initial portion of either one of the proposals, and that
12 has to do with the proposed deadline for plaintiff fact
13 sheets. We don't have an agreed upon plaintiff fact sheet
14 yet, although we're close, but trying to get that done
15 either by January 16th or February 2nd is going to be
16 really pushing it with the holidays. February 15th,
17 probably.

18 I know others are in charge of that and are
19 leaning on their work loads, but we'll come close to that
20 kind of deadline in order to make that happen. The other
21 thing that we realized, and it's not specifically included
22 in either of our proposals, there is a deadline for
23 dispositive motions. We propose January of 2010.
24 Defendants propose April of 2010.

25 I should think that well before that time, the

1 Court would like, and we would all like, I would think, to
2 address the preemption motion, and that is certainly
3 potentially a dispositive motion, although I will tell you
4 now and tell you many times that we think we will win that
5 motion in light of the discovery, regardless of what the
6 Supreme Court does in *Wyeth*, but I would think you would
7 want that one scheduled earlier than January or April of
8 2010.

9 THE COURT: Earlier but after the Supreme Court
10 rules.

11 MR. GOLDSER: Oh, absolutely.

12 MR. DAMES: We all agree on that.

13 MR. GOLDSER: Well, the Supreme Court came down
14 with their light cigarette decision today. It was a
15 five/four plaintiffs' victory. I think it tells us a lot
16 about where they're going, but that is a little
17 editorializing that I may live to eat my words some day.

18 THE COURT: You can always do a redaction on the
19 transcript.

20 MR. GOLDSER: We spent a lot of time while you
21 were gone talking about redaction. You weren't listening
22 to us on these microphones?

23 THE COURT: No. I wish I would have been.

24 MR. GOLDSER: We had a good time with that. In
25 any event, I have, if you would like, a small spread sheet

1 that lays out side by side our proposal, our proposed
2 schedule versus the defendants' proposed schedule in terms
3 of dates.

4 THE COURT: That would be helpful.

5 MR. GOLDSER: For want of time, perhaps we can
6 just leave to you and you can pick the dates for us and
7 tell us what we need to do and by when. I think that
8 covers what I need to cover on the bellwether trial issue.

9 MR. DAMES: Thank you, Your Honor.

10 THE COURT: Mr. Dames?

11 MR. DAMES: I, too, will be brief. I think the
12 big, the biggest difference obviously in the beginning is
13 we have selected 16 cases. 6 of the 16 are nonMinnesota
14 plaintiffs. They are not, however, they don't present the
15 Court with a lexicon issue. Those cases were all filed in
16 this court originally, so I do think that -- and they are
17 also the ripest. They were the first filed.

18 So in terms of selecting ultimately the selection
19 process as it's outlined in defendants' proposal would be,
20 we would select two. Plaintiffs would select two, and it
21 would be a process governed by the Court and the parties.
22 Obviously the Court, we can decide on that process
23 specifically later, but each side would select two.

24 We believe it is more appropriate to include a
25 slightly larger sample of cases in order to be able to

1 select the two cases ultimately on each side for a
2 bellwether trial. Some cases are going to fall by the
3 wayside, and you know, either will be, might be disposed of
4 other ways by the end of discovery.

5 Already one of the cases, Voss we have heard may
6 be dismissed because Mr. Voss died, so it seems to make the
7 most sense to us.

8 THE COURT: The additional six cases are cases
9 that involve trials that we could have here?

10 MR. DAMES: Yes. Depending on the Court's venue
11 ruling. We have venue motions, and the Court has ruled on
12 venue in this, in this instance already. It may govern the
13 other cases as well as the one the Court has ruled on, but
14 I think we will obviously, I mean it will depend on the
15 Court's ruling.

16 THE COURT: They were filed here, cases of
17 nonMinnesotans?

18 MR. DAMES: Of nonMinnesotans.

19 THE COURT: Right.

20 MR. DAMES: Now, the other thing with those six
21 cases being the first filed, we already have some medical
22 information on those cases so that we could begin a little
23 bit more swiftly with those in terms of developing the case
24 specific information.

25 The -- I do slightly disagree on the importance,

1 the differences in the schedules because I do believe that
2 the defendants' schedule with the trial in August 2010 is
3 actually a realistic position because we're already hearing
4 that even when it comes to the fact sheets, and none of
5 course have been completed because a fact sheet hasn't been
6 distributed and approved, we're going to start already with
7 a delay on the schedules submitted to the Court because we
8 won't have the fact sheets prepared and answered.

9 So I just, I think our schedule for purposes of
10 having motions heard before the Court before the cases come
11 to trial, it just has a slightly more orderly, less rushed
12 process, perhaps, and one perhaps less susceptible to
13 continual amendment as we go along.

14 THE COURT: What would be the impact of your plan
15 of moving the plaintiff fact sheet back to the 15th of
16 February?

17 MR. DAMES: Well, it certainly would delay
18 getting the medical records and taking the depositions. I
19 mean, everything is going to flow out of the fact sheets,
20 and if we delay the fact sheets one month --

21 THE COURT: Can we catch up at some point in
22 time? I'm looking at the schedule here, and I'm trying to
23 figure out if we could adhere to the August trial ready
24 date but move the plaintiff fact sheet deadline back to
25 February 15th, is that a doable?

1 MR. DAMES: It's doable. That's doable.

2 THE COURT: Mr. Goldser, what do you think about
3 that?

4 MR. GOLDSER: Are you talking about the plaintiff
5 proposed schedule?

6 THE COURT: The defendants' schedule but moving
7 the plaintiff fact sheet deadline back to February 15th,
8 and then some of the dates would have to be moved then
9 slightly.

10 MR. GOLDSER: I don't think you have to move any
11 of the other dates if you move the plaintiff fact sheet
12 back.

13 THE COURT: I guess the defendant one is 30 days
14 after, so we don't have a specific date there.

15 MR. DAMES: Right.

16 THE COURT: But then we could resume the schedule
17 with the remaining dates there?

18 MR. GOLDSER: A fact discovery deadline of
19 September 1st is eminently doable. We think it's doable
20 before then.

21 THE COURT: Preemption, when that arises, I mean,
22 is that going to take time away from the rest of these
23 issues in order to resolve, or what do you think? What's
24 your assessment of that?

25 MR. DAMES: I suspect it won't. I suspect when

1 it comes to the preemption briefs that the Court will
2 ultimately get, I don't -- I hate to sound facetious about
3 it, but I don't think it's going to be Mr. Robinson and I
4 writing that brief.

5 I think what it will depend on, and of course, I
6 don't know how the Supreme Court is going to rule or what
7 factual distinctions will be able to be made. I think it
8 will come at a time when we have done the fact discovery
9 perhaps in order to connect it up to whatever the Court has
10 ruled.

11 THE COURT: I guess we're all hoping it's going
12 relatively clear and not a fairly narrow fact based
13 analysis, but it might be.

14 MR. DAMES: It might be, in which case we
15 wouldn't have to wait that long. Could we keep that
16 perhaps fluid, depending on what the decision is --

17 THE COURT: Sure.

18 MR. DAMES: -- because then we could plug in the
19 date based on the clarity of the decision.

20 THE COURT: That would make some sense. I think
21 that makes sense. While we're focused on this,
22 Mr. Goldser, if we move, is February 15th a doable date for
23 a plaintiff fact sheet?

24 MR. GOLDSER: Yes, Your Honor.

25 THE COURT: Okay. And if we did that and we used

1 the defendants' schedule, are there particular dates in
2 there that you would propose changing that is in the
3 defendant list, assuming we adhere to the August 2nd, 2010,
4 trial ready date?

5 MR. GOLDSER: The only issue that I had concern
6 with, and I can't remember why, but you will see I have a
7 note is the defendant rebuttal expert depositions. And I
8 can't remember why I have a particularized concern with
9 that, and nothing jumps out at me as I'm looking at it now.
10 So I think that schedule probably works fine, Your Honor.

11 THE COURT: Okay.

12 MR. DAMES: The date is for both sides. It's the
13 same date. It's a --

14 MR. GOLDSER: I don't know.

15 MR. DAMES: Okay.

16 MR. GOLDSER: I don't know.

17 THE COURT: Okay. They start converging there as
18 we get a little later and at least closer, the dates. It
19 seems to me that that, both of them provide an orderly
20 process, but I think you're right. It's too much to expect
21 early fact sheet preparation at this point in time. I
22 would like to make sure those get done correctly so we
23 don't have problems there.

24 So if we went to the February 15th date and
25 followed the defendants' schedule, which seems to make

1 sense to the Court especially since we will in all
2 likelihood take time out for the preemption issue.

3 MR. DAMES: Okay, Your Honor.

4 THE COURT: I think that makes sense. Let's do
5 it that way. Okay?

6 MR. DAMES: Thank you, Your Honor.

7 MR. GOLDSER: Just a couple comments on the case
8 selection process.

9 THE COURT: Yes.

10 MR. GOLDSER: We are going to have nine cases
11 that we do agree on that should be evaluated first for
12 bellwether trial purposes. I can't remember the specifics
13 of too many of the other cases, but I remember initially in
14 *Baycol* we were looking at six, having chose one for trial.
15 If we're going to choose two or four out of the discovery
16 of nine, we should be able to find two to four cases out of
17 nine that are viable.

18 We still will have to face the 1404 venue
19 question, if not a lexicon question. I know the Court has
20 ruled on this issue in another similar case in the not too
21 distant past, but nevertheless I don't want to presuppose
22 what the Court is going to do with the venue motion.

23 The nonMinnesota resident cases will, of course,
24 require additional around the country discovery, and we're
25 doing plenty of that already, so we will have an additional

1 burden there, if it is indeed a burden. Why not do these
2 nine first, and if for some reason they're not enough or
3 not good enough, then we can add to them.

4 THE COURT: With respect to the other six that
5 have been raised, obviously we have a venue issue to
6 resolve on those, and there are some additional expenses, I
7 guess, involved with them. As to the particular cases, you
8 probably haven't examined the cases of late.

9 Do you have any objections to including them from
10 the standpoint of the facts involved in the case, unusual
11 cases, different cases, anything like that? I guess that
12 would be the Court's concern.

13 MR. GOLDSER: I'm afraid I didn't look at it from
14 that perspective. I will tell you what I know of the nine,
15 they have a nice cohesiveness to them, at least excluding
16 the last of the nine which I don't know as well, but of the
17 first eight, almost seven out of the eight are over age 60.
18 As you will hear as this case goes on, the age of 60 is a
19 significant break point in epidemiology.

20 Six out of those eight are respiratory underlying
21 illnesses, which is an important illness factor. Two are
22 urinary tract. Of those six respiratory, five are with
23 concomitant corticosteroids. Steroids are an important
24 confounding factor, and they're all Achilles tendon, and
25 they're all Achilles tendon rupture cases.

1 So not having gotten beyond that level of depth
2 with those cases, they all fit a really good fact pattern
3 mold of what will be a consistent set of issues that the
4 Court will have to come to grips with. I know, for
5 example, the Mississippi state court trial case is a
6 shoulder rupture.

7 There is a different set of issues there because
8 all the epidemiology is about Achilles tendons. Now we
9 think it applies, but that's another hurdle that we will
10 have to get over. I'm not sure that we want to cross that
11 many hurdles if we can avoid them. Let's get a good, tight
12 set of cases.

13 THE COURT: Mr. Dames?

14 MR. DAMES: Your Honor, the six cases are --
15 again, I'm halting because we know so little about them
16 that these representations may be corrected as we get the
17 discovery concluded, but those six, the additional six are
18 really no different. They form, again, a group of people
19 who are older.

20 They essentially are claims of tendon rupture.
21 There is nothing particularly different about them based on
22 what we know than on the nine or ten, whichever the number
23 ultimately is, of the Minnesota residents. Part of the
24 reason why we wanted a larger sample is because as we learn
25 more we may be able to find distinctions we don't have a

1 clue about right now.

2 To give you one brief example, there is one of
3 the cases that is a Minnesota case. The plaintiff claims a
4 tendon rupture from the, apparently from the use of both
5 steroids and Levaquin, but what I have been able to review
6 so far of the medical records is that the order, the
7 progression of her illness while she was using levo
8 developed a tendonitis and then later used a steroid and
9 got the rupture.

10 And her own impression and the impression of her
11 doctors was that the rupture was caused by the steroid. I
12 am not saying whether that is ultimately true or not, but
13 the point is, that fact pattern is interesting and somewhat
14 distinctive than some of the other fact patterns, and we
15 may learn that what the plaintiff knows, and in that case
16 the plaintiff was aware apparently of tendonitis being
17 affiliated or related to Levaquin that she took herself
18 off.

19 So those individualized fact patterns are going
20 to be important. The bare bones explanations that we hear
21 in the courts so far, although illustrative, aren't really
22 that informative. I think a larger sample will help work
23 its way to the selection of the proper bellwether cases.

24 THE COURT: Let's do it this way: Mr. Goldser,
25 could you take a look at these additional cases that have

1 been proposed by the defense, and if there is any case in
2 there that you have a particular objection to as not
3 following a similar pattern, can you send me a letter
4 within three days?

5 MR. GOLDSER: I can, Your Honor.

6 THE COURT: And then if there is any response,
7 again, within a three-day period, I would like to get this
8 resolved right away, but I would like to have the benefit
9 of you looking more closely at these cases.

10 Okay?

11 MR. GOLDSER: I would be happy to do so.

12 THE COURT: Okay. Then we can get this resolved
13 and get that process underway.

14 MR. GOLDSER: Okay.

15 THE COURT: Okay. What else do we have here?

16 MR. GOLDSER: The motion to, for protective order
17 on the Seeger deposition, that's defendants' motion.

18 THE COURT: Okay. Go ahead, Mr. Robinson.

19 MR. ROBINSON: Thank you, Your Honor. I'll also
20 try to be very brief, Your Honor. Essentially we
21 understand that Dr. Seeger is going to be deposed. We have
22 retained him as an expert witness in this case, and I think
23 the question before the Court is whether he could or should
24 be deposed as a fact witness in advance of that.

25 Dr. Seeger works for a company called Ingenix.

1 Ingenix was retained by Johnson and Johnson in 2001 to do a
2 United States broad based epidemiology study specifically
3 looking at tendon ruptures and the use of levofloxacin, use
4 of corticosteroids and other risk factors. That study was
5 finished in 2003, provided to the regulatory authorities
6 around the world, and it was published actually in 2006.

7 Our, plaintiffs have requested his fact
8 deposition as I understand it at this time, and as they
9 state on page 14 of their opposition, To obtain information
10 about the component parts of the study, the underlying
11 data, the study protocol, structure of the study,
12 determination of the end points, analysis of the data.

13 I would suggest to the Court that at this time
14 that type of factual information has been provided or will
15 be provided in the following forms: The defendants have
16 produced their documents related to this study, all the
17 protocols, the draft protocols, e-mails dealing with these
18 type issues and why the decisions were made.

19 Some of those have already been used as exhibits
20 in the depositions taken to date. In addition, the
21 plaintiffs issued a subpoena to Ingenix, and Ingenix has
22 responded with all of their documents and all of the raw
23 data, I understand, on the study.

24 In addition to that, the two primary employees of
25 Johnson and Johnson who were involved in that study,

1 Dr. Gary Noel, who is a medical doctor and Dr. Dan Fife,
2 who is an epidemiologist, are scheduled for depositions in
3 January and are certainly prepared to answer any factual
4 questions about the study, et cetera, how it was done.

5 They were very heavily involved in the design of
6 the protocol of the study. They were not involved in the
7 actual conduct of the study. I would propose to the Court
8 that we save Dr. Seeger having to be deposed twice in this
9 litigation because we will be naming him and providing an
10 expert report on his opinions at the appropriate time under
11 the scheduling order.

12 The other option, if the Court would determine to
13 allow Dr. Seeger's factual deposition to go forward at this
14 time as we requested in our papers, we would ask that the
15 magistrate judge be available by telephone to listen in to
16 the deposition and to rule on questions of opinion versus
17 fact testimony because as the Court knows when you're
18 dealing with experts in this type of field, it's often very
19 difficult to determine what is a fact question and what is
20 an opinion question.

21 Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Robinson.

23 MR. CIALKOWSKI: Thank you, Counsel.

24 THE COURT: Mr. Cialkowski?

25 MR. CIALKOWSKI: Thank you, Your Honor. One

1 thing that Mr. Robinson just said was suggesting that the
2 Court could possibly listen in to the deposition and
3 determine the difference between opinion and fact
4 testimony. Well, that's not really the question here. The
5 question is, can he be deposed on his knowledge of facts
6 and opinions prior to litigation, being retained as an
7 expert in the litigation. So it's not really a matter of
8 opinion versus fact here.

9 It's really a matter of what, can he be deposed
10 as an ordinary witness in the regular course of discovery,
11 and clearly, he can. The, the critical part of this is who
12 Dr. Seeger is, and I know we've gotten some discovery from
13 Ingenix, but a deposition is a whole world apart when
14 you're talking about discovery from documents.

15 While documents do have information on them, they
16 don't seam anything together to tell the story of what
17 happened. Dr. Seeger conducted this study. He was the
18 lead author of the paper that was disseminated to the
19 authorities in Europe and then eventually published in
20 2006, as counsel has mentioned.

21 He is one of the, if not the, key witnesses of
22 common evidence in this MDL, and it turns out in the case
23 law that it's, while, you know, the defendant, defendants
24 want to talk about practicality, it turns out that it's
25 pretty abnormal to deny a deposition in the first place,

1 and then to deny a deposition of this import is really
2 unheard of.

3 THE COURT: Can you distinguish his testimony
4 between factual and his anticipated expert testimony?

5 MR. CIALKOWSKI: Well, yes. Expert testimony for
6 purposes of trial would be anything that would be contained
7 in the expert report and relevant to that.

8 THE COURT: Which presumably has not been
9 developed yet.

10 MR. CIALKOWSKI: Has not been developed.
11 Plaintiffs have no idea what they are going to say. We
12 don't care at this point what is going to be said for
13 purposes of taking Dr. Seeger's deposition, and so it's
14 very difficult to conceive of what questions we could ask
15 at this point that would be off limits, unless we're
16 clearing asking about things that happened post retention,
17 which was around I think November of 2007 where we wouldn't
18 be getting into that stuff.

19 There is case law we cited in our brief --

20 THE COURT: So you're proposing facts based on
21 the preretention era?

22 MR. CIALKOWSKI: Facts and opinion, Your Honor.

23 THE COURT: And opinions.

24 MR. CIALKOWSKI: And that's, you know, straight
25 ordinary witness testimony, facts and opinions of experts

1 that are retained subsequent to the initiation of
2 litigation.

3 THE COURT: What happens later on if he is
4 retained as an expert and writes an expert opinion and
5 there is something that is arguably contradictory as
6 something that he says during the deposition at this point
7 in time?

8 What happens with that? Play that out for me.

9 MR. CIALKOWSKI: Well, I suppose that he would be
10 subject, like everybody else is, to the rules of evidence,
11 and the rule is if you have a transcript that says
12 something and then you're going to be deposed again about
13 something else and it's somehow inconsistent, that's
14 impeachable, I would imagine.

15 I can't imagine why it wouldn't be, but I don't
16 really see it as a problem outside of the rules of evidence
17 in making that evidentiary call. You know, in a lot of --
18 from a further legal standpoint, the defendants don't even
19 really have standing to bring this argument, and I know we
20 like, we want to encourage practicality and things like
21 that, but the standard really is undue burden, and they
22 haven't shown any sort of undue burden.

23 In fact, one of their previewed experts,
24 Dr. Kahn, has been deposed twice already and not even in
25 his capacity as a testifying expert yet, and that second

1 deposition just took place last week. We didn't receive
2 any objection or any motion whatsoever with regard to that
3 witness.

4 THE COURT: So you would agree that the
5 deposition, if it goes forward now, would be limited to
6 preretention fact and opinion discovery?

7 MR. CIALKOWSKI: Absolutely, Your Honor, and
8 that's really all we have to say.

9 THE COURT: Mr. Robinson?

10 MR. ROBINSON: Yes, sir. Very briefly, Your
11 Honor, Dr. Kahn has been deposed twice, but he's our
12 employee or former employee, and he has been deposed, and
13 he probably will be named as an expert witness and provide
14 a report and be deposed again before this is over.

15 With respect to Dr. Seeger, we're learning, as we
16 all are in this learning curve, about the epidemiology
17 issues, and we have not even asked Dr. Seeger to formulate
18 opinions yet in this litigation. What I'm concerned about
19 is obviously some of his opinions that he is going to be
20 giving in this case in writing down the road are going to
21 be related to the study he did.

22 And when I was first contacted about this, I
23 understood, and if I misunderstood, I'm wrong. I
24 understood that they wanted a factual deposition of
25 Dr. Seeger at this point in time, and my response was, you

1 really don't need it right now because you're going to get
2 all these facts and all the documents and all the other
3 depositions, so why do we have to depose Dr. Seeger twice?

4 And if you look through the plaintiffs'
5 opposition as to the kinds of information they want, and I
6 won't take the Court's time today to go through each one of
7 those individually, but those factual issues are all
8 addressed by the documents that have been produced by the
9 defendants and by Ingenix.

10 And obviously we have three company witnesses who
11 are going to be deposed on this issue. One possibility for
12 the Court is to wait until those three depositions are
13 done, and if there is any additional factual information
14 that they have not been able to get, revisit this issue.

15 Thank you, Your Honor.

16 THE COURT: Anything else?

17 MR. CIALKOWSKI: May I have a moment, Your Honor?

18 THE COURT: Sure. Absolutely.

19 Go ahead, Mr. Saul.

20 MR. SAUL: I just stepped up here. I'm not sure
21 if you are going to rule in our favor or not, but I want
22 the Court to know that this is the most important
23 deposition that we need to take. Dr. Seeger was the chief,
24 the chief physician who designed the study. To just be
25 perfectly frank with the Court, it's plaintiffs' opinion

1 that this study essentially was a ginned up study, and it
2 was a basis for all the warnings that occurred thereafter
3 regarding Levaquin.

4 We want to ask Dr. Seeger why he picked the
5 people he picked to be in the study, the algorithms in the
6 study, what his opinion -- for instance an opinion question
7 would be, why did you pick these people. That's an opinion
8 question. It's factual, but it's opinion, too.

9 We're not going to ask him any opinion about the
10 ultimate facts in the case. There is an ultimate opinion
11 about Levaquin, but we're going to ask his opinion about
12 the study specifically, and this is the most important
13 deposition to us. And we would like to take it, and we
14 would like to take it as soon as possible.

15 Thank you.

16 THE COURT: Do you have anything else?

17 MR. CIALKOWSKI: No, Your Honor. Thank you.

18 THE COURT: Okay. I think this deposition can go
19 forward now, but I think I would limit it to preretention
20 facts and testimony that is related to the design of the
21 study. I would like to try to avoid drawing him into what
22 likely will be later expert opinions in the case.

23 You know, I really would like to try to avoid a
24 situation where if he is retained as an expert and he
25 issues a report, and all of a sudden, well, you said

1 something different in that deposition we took a long time
2 ago. If it's directly related to the subjects that are, I
3 think, ripe for addressing right now in a deposition,
4 that's one thing.

5 If it's related more to ultimate expert opinions
6 on the matters at issue in this case, then I would have
7 some concern about that because I don't want to unduly
8 restrict him in advance of his coming up with his expert
9 opinions for the trial, but as to preretention related
10 issues as to how the study was designed, these questions
11 which I think were articulated well by the plaintiffs, I
12 think that can go forward now.

13 Mr. Goldser?

14 MR. GOLDSER: It would probably be helpful either
15 obviously if we can get a transcript today, I don't know
16 whether you're going to enter a written order. Let me
17 specifically express my concern in what you just phrased.

18 Propose this question to the doctor: Dr. Seeger,
19 in 2003 when you wrote the draft of the study, what
20 conclusions did you reach from the data that you were
21 evaluating? Is that question something that is fair game
22 for this deposition?

23 THE COURT: Arguable. Let's see.

24 Mr. Robinson?

25 MR. ROBINSON: I think the conclusions were

1 stated pretty clearly in the paper, and I think he could
2 answer that question.

3 THE COURT: Let's try to focus it on the study
4 and not on any ultimate opinions about the case, and I
5 think we can get this done now. It may result in a second
6 deposition later for Mr. Seeger. That's unfortunate that
7 it's two, but I understand the need for getting some of
8 this information and understanding the written
9 documentation at this stage of the case.

10 MR. GOLDSER: Just so the record is clear, what I
11 plan to do is to ask questions, what did you do and why did
12 you do it and what did you conclude from it at that time.

13 THE COURT: That makes sense. Right. Okay. We
14 wanted to also address PTO one.

15 MR. GOLDSER: Pretrial order three. There is, as
16 I recall, three issues that were outstanding in that. Oh,
17 whether defendants should be required to give notice of any
18 proposed settlement in a Levaquin tendon injury case, what
19 the definition of work product should be, and defendant in
20 their letter raised a third question, whether there should
21 be a specific percentage amount assessment included in the
22 order at this point.

23 I don't know how much the Court is aware of how
24 hot an issue this assessment and work product question has
25 become in mass torts, particularly in pharmaceuticals and

1 medical device cases. It certainly was with other members
2 of this court, and we want to make sure we forestall it.

3 I have made clear, I hope, in my letter back to
4 the Court. Right now we don't have any problems on our
5 side. We don't anticipate any problems on our side, but we
6 want to make sure we forestall any problems on our side,
7 and that's why we want to have the Court's attention on
8 this.

9 The most important of those issues from my
10 perspective is the question of notice. If there is a case
11 out there in the world or if there are multiple cases out
12 there in the world that we don't know about, and right now
13 we've talked about two state court filed cases, but there
14 may be others that are not filed that are somehow in
15 negotiation.

16 Maybe if those cases settled next week, our work
17 product may or may not have much to do with that
18 settlement, but if a year and a half from now we have
19 gotten a good order from this Court from our perspective on
20 preemption and we have beaten summary judgment and there is
21 a whole raft of cases out there that do settle, we don't
22 know about them, I think those settlements do result from
23 work product.

24 So as a starting point, notice of those kind of
25 cases if there are any is important to us. That's what

1 we're asking for in our proposed pretrial number three.

2 Now, maybe the Court has jurisdiction over those cases down
3 the road. Maybe the Court does not have jurisdiction.

4 Don't want you to have to cross that road right now because
5 that's thorny in and of itself, and if we can avoid an
6 issue, that's my philosophy.

7 THE COURT: You want to provide for the notice.

8 MR. GOLDSER: Want to provide for the notice. If
9 there are other lawyers out there who want to use our work
10 product, before we give it out we want to be protected. We
11 had a big argument about what is work product in some of
12 the other cases, and I want to try and define that.

13 In our proposed pretrial order number three we
14 defined it, and in my conversation with Ms. Van Steenburgh
15 it was, what if we give out documents to somebody in a
16 completely unrelated case that happen to be the same
17 documents as in this case, obviously that's not a problem.
18 They have given those documents independently.

19 They don't have any organizational structure that
20 we have placed on them, any review, any document depository
21 access. We are not worried about that. If they give out
22 our depositions, I am worried about that because that
23 evidence is our thought processes. So we're taking on a
24 slightly broader definition of work product than you might
25 think of as the privileged definition of work product.

1 Finally as to an assessment amount, been through
2 this debate a lot lately. You know, if we settle hundreds
3 of cases tomorrow, the amount of time that the PSC has put
4 in is vastly different than if we settle these cases two
5 years from now, and so a smaller assessment might be
6 appropriate today and a much larger assessment appropriate
7 two years from now.

8 If we put in a number right now that locks us
9 into something, that may or may not be appropriate down the
10 road. I think defendants' perspective is, gosh, if we need
11 to hold some money back, we need to know how much it's
12 going to be. The notice question resolves that. If and
13 when this comes up, we need to decide the issue of what is
14 appropriate and whether the Court has jurisdiction at that
15 time.

16 Thanks.

17 THE COURT: Ms. Van Steenburgh?

18 MS. VAN STEENBURGH: Thank you, Your Honor. With
19 respect to the notice issue, we don't have a problem with
20 any cases that are filed with this Court, that are being
21 transferred to this Court or the plaintiffs enter into an
22 agreement with someone who is not subject to the Court's
23 jurisdiction by which they get work product and they have
24 an assessment.

25 And if the plaintiffs want to give us a list of

1 people with whom they have made an agreement, certainly if
2 we enter into some kind of settlement, we can check it
3 against that list to make sure that that person is going to
4 have an assessment withheld, but there may be
5 nonparticipating, nonMDL cases or claims where there is no
6 work product, and it maybe hamper our abilities to defend
7 the case economically or to be able to settle the case.

8 If we are suddenly in the middle of negotiations
9 and we say by the way we're going to have to withhold an
10 undetermined amount which we don't know yet, we may not be
11 able to get the case settled. We may not be able to get a
12 claim settled. There may be some kind of cases that are
13 going to have to be filed.

14 The jurisdiction issues, Mr. Goldser says those
15 are not before the Court now, but I think they are in some
16 ways. The Court's jurisdiction is as to those cases and
17 controversy before it and as part of this MDL, and if there
18 is a state court order -- in silzone, this is exactly what
19 we had in the order. If there is a state court order
20 mandating participation or if there was voluntary
21 participation, all of those people came under the umbrella.

22 What we do not want to have to do is give notice
23 every time, divulge confidential information, provide the
24 Court and the plaintiffs with information that may
25 necessarily hamper our abilities either to defend the cases

1 or settle the cases.

2 So as a solution, our proposal would be, it would
3 be all of the cases that are already contained within the
4 proposed order, and perhaps another provision could be
5 added as to those attorneys who voluntarily agree to an
6 assessment, in which case -- and I have an actual example
7 that just came out this morning. I got a copy of a
8 pretrial order in the *In Re: Gadolinium Based Contrast*
9 *Agents Products Liability Litigation* out of the Northern
10 District of Ohio.

11 And that is exactly what was done there. All of
12 the cases that were transferred in or those voluntarily
13 participating, in fact they attached an agreement of
14 voluntary participation. In that situation the plaintiffs
15 gave a list of all of the participating attorneys. The
16 defendants checked it against it and then were able to do
17 the assessment. That's what I would say about the notice
18 part of it.

19 THE COURT: What about a case in Nevada or
20 someplace that settles two years from now, and the
21 depositions in this case are utilized to some extent, maybe
22 to a great extent, but otherwise there is no voluntary
23 participation or no involvement. What happens in a case
24 like that?

25 Isn't there some value to what the plaintiffs

1 here have provided?

2 MS. VAN STEENBURGH: I think there is value if
3 the plaintiffs have provided what we normally think of as
4 work product, deposition summaries, deposition excerpts,
5 excerpts of documents from a database, the kinds of things
6 that contain mental impressions or how you organize a case.

7 I don't think deposition transcripts or filed
8 expert reports or even the documents should encompass that,
9 partly for the reasons I stated in the letter, which there
10 are facts that are contained. Those are not work product.

11 Also as a practical matter, I just actually had
12 this with the Robins firm. We were involved in a case, and
13 we shortcut discovery by my being able to provide
14 deposition transcripts to the plaintiffs' attorney who
15 reviewed those.

16 It took care of almost all of the witnesses that
17 he would have otherwise deposed, and we were able to
18 resolve the case on a much quicker and more economical
19 basis. Again, in this most recent pretrial, there is a
20 list of what is considered to be work product, and Judge
21 Davis did that as well on the *Baycol* common benefit fund
22 order.

23 In this order out of the Northern District of
24 Ohio, sure enough, deposition transcripts, expert reports
25 and documents are excluded from work product. I would say

1 as a basic concept of work product that the deposition
2 transcripts themselves should be excluded. So in your
3 Nevada example, I would not include that as a case there
4 for which there should be an assessment.

5 With respect to the actual amount, I think there
6 is some confusion here. PTO 3 is to create a mechanism for
7 funding for the plaintiffs. It is not a -- and eventually
8 be a method of payment, but for the defendants' purposes,
9 we need to know what that assessment is.

10 If the percentage changes later, that's fine, but
11 if we are going to settle a case, we want to know how much
12 the hold-back is now. Whether it's 1,000 or what the value
13 is or \$100,000 worth of work is something the plaintiffs
14 can determine from that benefit fund, but this is just the
15 mechanism for creating it.

16 And you're asking us to withhold that money from
17 a settlement and deposit that into the fund, and again, it
18 can be changed later, but we need to know what that amount
19 is going to be for the purpose of settlement.

20 THE COURT: There is no problem from time to time
21 as the case moves forward to changing that?

22 MS. VAN STEENBURGH: No, I don't think there will
23 be a problem.

24 THE COURT: Mr. Goldser?

25 MR. GOLDSER: There sure can be political

1 problems from the plaintiffs' side to change that number.
2 The ground swell of energy that resulted from trying to
3 change the assessment at the end of *Guidant* because of the
4 initial withhold, because that's all it was, was humongous.

5 I mean, it did overflow into Judge Frank's
6 courtroom. I remember it vividly. The arguments were
7 vociferous, and the hostility that it created in the
8 plaintiffs' bar was unfortunate, and so to try to change
9 those numbers is a very difficult thing to do.

10 I think Mr. Saul wanted to make some comments on
11 this as well, if he may.

12 MR. SAUL: I will be very brief, Your Honor.
13 Another problem that can occur here, and this is a problem
14 that I'm worried about. I have been doing this back to the
15 Dalkon Shield days with Mr. Robinson. What can occur here
16 and what occurred with Orthoevra, which is the same company
17 we're dealing with here, let's say there is one case.

18 The plaintiffs' attorney agrees to pay whatever
19 the assessment is. They have 50 other cases in their
20 so-called inventory. They go and they settle them with the
21 defendants based upon our work product, and defendant keeps
22 that aside. They can make a better deal if they don't have
23 to pay an assessment, and they don't tell us, and the other
24 plaintiffs' firm settles 50 cases, and it's really unfair
25 for all of us that are doing the work and bearing the risk

1 and expense.

2 Thank you.

3 THE COURT: Ms. Van Steenburgh or --

4 MS. VAN STEENBURGH: Thanks, Your Honor. One,
5 with respect to what Mr. Saul said, I think it's up to the
6 plaintiffs. Get a participation agreement from that
7 attorney. We have got a template for one right here. If
8 they have a whole bunch of other ones, then they are bound
9 by their own agreement with the PSC that they are going to
10 include all of their inventory.

11 With respect to the amount, I haven't done an
12 exhaustive survey, but I have seen percentages anywhere
13 from four up to nine. I think that, you know, if there is
14 some concern that it is gargantuan to begin with, a lower
15 amount, especially given the scope of the litigation as we
16 know it now, would certainly be appropriate, and I don't
17 think that really is a big issue.

18 MR. DAMES: Can I?

19 THE COURT: Sure.

20 MR. DAMES: I just want to add a comment on work
21 product and the definition of it and whether depositions
22 would be part of a work product by plaintiffs' counsel. As
23 an example, we had provided depositions that were requested
24 by Mr. Goldser of depositions taken in the patent
25 litigation involving Levaquin.

1 I assume there is no quantum meruit claim being
2 made by the plaintiffs' attorneys in that litigation or
3 that that somehow can be construed as work product. It is
4 pretty routine in this kind of litigation to provide the
5 depositions, the prior depositions of one's employees, and
6 I don't understand how work product can be, even construct
7 a work product argument on that kind of an issue because
8 the depositions are public.

9 I mean, work product is something that does beget
10 confidentiality. So in any case, we do this. We have been
11 requested in this case to do it. I don't see how that
12 somehow becomes the work product of the plaintiffs'
13 counsel.

14 Thank you, Your Honor.

15 THE COURT: Anybody else over here?

16 MR. GOLDSER: No, Your Honor.

17 THE COURT: I need to think this through a little
18 bit more than I'm able to right now with my jurors all
19 standing out in the hallway waiting to come back in, so I'm
20 going to take this under advisement and get to it right
21 away. I understand we need to get this resolved and taken
22 care of.

23 The arguments were well done on both sides, so I
24 understand the issue.

25 MR. GOLDSER: Thank you, Your Honor.

1 THE COURT: There is a few other items that were
2 on the, on the agenda. Can we maybe the first week of
3 January do a brief telephone conference with those and
4 anything else we have pending at that point in time, and
5 then we can set our next status conference at that time?

6 MR. GOLDSER: They were reports of status. They
7 can wait until the next status conference. There is
8 nothing for you to decide on other than just give you
9 information.

10 THE COURT: Sometime in the mid to latter part of
11 January sound fine?

12 MR. DAMES: Sounds fine.

13 THE COURT: We need to make sure we still have
14 another cold weather here.

15 MR. ROBINSON: We love it, Your Honor.

16 THE COURT: You know, the advantage is that it's
17 good at killing mosquitoes.

18 MR. ROBINSON: Although I was up here for an
19 eight-week trial in Judge Doty's court many years ago, and
20 it was mosquito season, so you have your fair share.

21 THE COURT: We do. We can't possibly kill them
22 all off, but Holly will be in touch. We will set up a time
23 that works for everybody in the latter part of January.

24 Okay? Thank you, everyone.

25 MR. GOLDSER: Thank you.

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MR. ROBINSON: Thank you, Your Honor.

MR. DAMES: Thank you.

THE COURT: The Court is in recess.

(Court was adjourned.)

* * *

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

Certified by: s/ Kristine Mousseau, CRR-RPR
Kristine Mousseau, CRR-RPR