

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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IN RE: LEVAQUIN PRODUCTS
LIABILITY LITIGATION

Civil No.: 08-1943 (JRT)

TRANSCRIPT
OF
PROCEEDINGS
(STATUS CONFERENCE)

The above-entitled matter came on for hearing before Judge John R. Tunheim, on March 20th, 2009, at the United States District Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, commencing at approximately 2:10 p.m.

CALIFORNIA CSR NO.: 8674
ILLINOIS CSR NO.: 084-004202
IOWA CSR NO.: 495
RMR NO.: 065111

1 THE COURT: Civil Case Number 08-1943, In re:
2 LEVAQUIN PRODUCTS LIABILITY LITIGATION.

3 Let's have counsel note appearances for the
4 record of today's hearing, first, for the plaintiffs.

5 MR. GOLDSER: Good afternoon, your Honor.
6 Ron Goldser for the plaintiffs' steering committee.

7 THE COURT: Mr. Goldser.

8 MR. SAUL: I'm Lewis Saul for the plaintiffs'
9 steering committee. S-a-u-l. Good afternoon.

10 THE COURT: Good afternoon, Mr. Saul.
11 For the the defendants.

12 MR. DAMES: John Dames on behalf of Johnson &
13 Johnson, your Honor.

14 MR. ROBINSON: Bill Robinson for the
15 defendants, your Honor.

16 MS. VAN STEENBURGH: Tracy Van Steenburgh on
17 behalf of the defendants, your Honor.

18 MS. AMPULSKI: Jennifer Ampulski on behalf of
19 the defendants, your Honor.

20 THE COURT: Good afternoon to all of you.
21 We have a number of matters this afternoon,
22 Mr. Goldser.

23 MR. GOLDSER: We do, your Honor. There are a
24 number on the agenda. I'm happy to say that they will likely
25 go -- we will go through them quickly. I know we also have

1 -- I believe it's Alyssa Daniels from Alabama on the phone
2 with us. Delighted to have her with us by phone. We've not
3 heretofore had telephone access to the status conference. If
4 we're going to do that -- and that would be just fine -- we
5 ought to let everybody know so that everybody can call in.
6 Is it your Honor's pleasure to make this available for future
7 status conferences?

8 THE COURT: Well, what do you think? Any
9 issues here that anyone has?

10 MR. DAMES: We have no objection to it, your
11 Honor.

12 MR. SAUL: If 30 or so folks -- and this MDL
13 will get larger -- want to call in at one time, it's going to
14 -- this was difficult enough to get one counsel on the phone.
15 It think it makes, procedurally, no sense.

16 THE COURT: Well, I think that for now we'll
17 attempt it and see -- we may have to scale back if it gets to
18 be too difficult procedurally. And I appreciate the concern,
19 Mr. Saul. I don't anticipate having someone make any
20 argument over the telephone unless there's some kind of
21 emergency, or something like that. But certainly listening
22 in is fine with the Court for now. We'll see how it goes.
23 If it's a problem, we'll deal with that later.

24 MR. GOLDSER: And one way of handling it
25 technologically is to provide a dial-in number. And those

1 who want to dial in can dial in. The problem that has arisen
2 is when somebody puts their phone on hold and you get Muzak,
3 and all those kinds of things.

4 THE COURT: Right.

5 MR. GOLDSER: But, as you say, if we'd like to
6 try it, that's just one way of dealing with the number of
7 people calling in.

8 MR. DAMES: We may find we're less entertaining
9 than we think.

10 THE COURT: Well, sometimes there's a problem
11 if someone is walking around with their cell phone, too, and
12 you get car noises and everything in the background.

13 MR. GOLDSER: Right. And Blackberries, and all
14 the rest.

15 THE COURT: The use of the mute button
16 generally takes care of that and they can listen in. Let's
17 try it. We'll see. If it doesn't work, it doesn't work.

18 MR. GOLDSER: Okay. The agenda -- as I said,
19 we've got a lot to report to the Court on. The good news is
20 that we've been very busy since we last saw you. The better
21 news is that we don't have a lot for your Honor to decide
22 because we've been able to work out most of our differences.
23 And that's really the overview of the status conference
24 today. By the count that I have, I see that there are 64
25 cases that have been transferred to the MDL at this point in

1 time. I don't know if that's consistent with your
2 information.

3 MR. DAMES: It's not. We have more.

4 MR. GOLDSER: Oh, good.

5 MR. DAMES: All together, your Honor, we have
6 92 plaintiffs. And I've noted we've got 83 cases.

7 THE COURT: Eighty-three?

8 MR. DAMES: Eighty-three. Now, not all of
9 those -- there's several of those that have not yet been
10 transferred to the MDL.

11 THE COURT: That are in the process somewhere?

12 MR. DAMES: I believe they're in the process.
13 State court cases, our numbers are three that involve tendon
14 ruptures.

15 THE COURT: Okay.

16 MR. DAMES: Now, did you want to address the
17 potential --

18 MR. GOLDSER: Yes, I do.

19 MR. DAMES: Okay. I'll let you go first with
20 it.

21 MR. GOLDSER: Okay.

22 MR. DAMES: Sorry.

23 MR. GOLDSER: The state court cases, there's
24 one in New Jersey that was filed by Mr. Saul and
25 Mr. McCormick of the plaintiffs' steering committee; there's

1 one in Missouri by a lawyer that I've been in touch with;
2 there's one in Mississippi by a lawyer that I've been in
3 touch with. The Mississippi lawyer has indicated a desire to
4 coordinate with us; the Missouri lawyer has tentatively. But
5 he just filed his case. So I think those cases will go along
6 with what we're doing. I don't think there will be issues
7 there, that I know of.

8 THE COURT: Tell me, on the three cases, are
9 they assigned to particular judges yet or are they in more of
10 a general assignment system? The reason I'm wondering is I
11 generally like to at least send a letter to a judge,
12 indicating what we're doing here, and indicating that they're
13 free to contact us at any time to find out what's going on.

14 MR. GOLDSER: From Mr. Saul's nod of the head,
15 the New Jersey case is so assigned. I believe the
16 Mississippi case is also so assigned. The Missouri case was
17 just filed and, so, I rather doubt that has occurred yet.

18 THE COURT: Mr. Saul.

19 MR. SAUL: In the New Jersey case, we just
20 entered into a stipulation with the defendant, that all the
21 discovery that has been taken in the MDL will be used in the
22 New Jersey case. We also understand that there are going to
23 be multiple other cases being filed. There may be a
24 consolidation down the road in New Jersey. And we would hope
25 for this Court to coordinate with the state court judge, if

1 that does occur. Thank you.

2 THE COURT: Okay. Very well.

3 MR. GOLDSER: There is a a consolidation
4 procedure within the state court system in New Jersey. You
5 may well be familiar with that. It's not unlike an MDL
6 consolidation. Usually one judge gets assigned to that.
7 That has not started yet. Those cases have not even been
8 filed.

9 THE COURT: Is that a large number, Mr. Saul,
10 the cases that may be filed in state court in New Jersey?

11 MR. SAUL: If rumor is correct there will be a
12 reasonably large number of cases filed.

13 THE COURT: It's still in the category of
14 rumor, however; is that correct?

15 MR. SAUL: It is.

16 MR. GOLDSER: It is.

17 THE COURT: Okay. But your number of cases
18 that you've counted, Mr. Dames, is 83 --

19 MR. DAMES: Yes, your Honor.

20 THE COURT: -- that are either transferred --

21 MR. DAMES: I was just fanning the rumors.

22 THE COURT: -- or in the possibility -- or --
23 in the prospect of being transferred.

24 MR. DAMES: Yes. And now I should add that
25 these state court cases -- to my knowledge, none of them are

1 removable or we would have removed them. The latest Missouri
2 case includes several doctors, I believe, as co-defendants.

3 THE COURT: I see. Okay. Very good.

4 MR. GOLDSER: The next item on the agenda is
5 categorized "Motions Pending and Contemplated." You do have
6 before you a motion to compel contention interrogatories
7 today. And, of course, we've talked before about the
8 preemption motion. I'm sure your Honor is well aware that
9 the *Wyeth v. Levine* decision has now come down from the
10 Supreme Court. I'm not sure that we have much to say about
11 that. We can certainly tell you what our thoughts are on it.
12 But I would imagine the Court would be curious to know what
13 defendants' plans are on that.

14 Do you want us to argue the contention
15 interrogatories?

16 THE COURT: Yes, let's talk about that for a
17 little bit. Why don't you go ahead.

18 MR. GOLDSER: Okay. In my experience in mass
19 torts there are two styles of defendants' discovery
20 responses, one is to be very obstreperous and difficult and
21 not give anything. I have a difficult time with those
22 lawyers. The fights are just yeoman. The other is the style
23 that my friends from across the aisle have adopted and that
24 is to give us everything. And that's sort of denominated, at
25 least by the plaintiffs' bar, as burying something in plain

1 view. We have a million, two pages. We have depositions
2 that have been given pretty readily. We've been given the
3 call-notes database. We've been given the adverse-event
4 database. And all, you know, pretty readily given to us.
5 But the way it's been given to us is, "Here." Just "Here,
6 all you like." I was trying to think of an analogy -- and I
7 don't know why this came to mind -- maybe it's because I've
8 just done my taxes -- but to me it struck me as something
9 akin to Bill Gates giving his accountant a shoe box of
10 receipts and say, "Here, do my taxes." You know, "You figure
11 it out." I don't think that's the way discovery is supposed
12 to proceed. That theme has kind of been percolating under
13 the surface even before the MDL, back even when Judge Boylan
14 was having our monthly discovery conferences. We had
15 complained to him about that, that the production of
16 documents was not appropriate. He found that it was done in
17 the ordinary course of business based on the representations
18 that the defense had made at that point in time. We have
19 found difficulties. Now, we've pointed out some
20 difficulties. We've asked, "Where is the attachment that's
21 described in this e-mail?" "It's not the next document
22 over." "We can't find it." And to their credit, defense has
23 been very kind and cooperative to give us the things that
24 we've asked for every time we've asked. But the problem is
25 if what we're supposed to do is electronically deal with

1 these documents and search them, you can't search something
2 that's not there, and you don't know that it's not there. So
3 that's kind of a theme that's been going through this.

4 Now, what we have specifically and narrowly
5 before you today are these contentions interrogatories. We've
6 talked to you briefly before about the difference between
7 Levaquin (Levofloxacin) and its predecessor drug Floxin, or
8 Ofloxacin. And just by way of a little science, the
9 Ofloxacin molecule -- it's an antibiotic -- does similar
10 things but not identical to Levaquin. And it is what's
11 called a "racemic mixture," or a "racemate." And that means
12 it's got two sides to the molecule, a left-hand side and a
13 right-hand side. And they are mirror images of each other.
14 And usually in those kinds of settings, it is one of the
15 sides that is the active side and the other that's inert.
16 You're probably familiar with Prilosec and Nexium, those
17 drugs for gastroesophageal reflux. Prilosec is the racemic
18 mixture. Nexium is the active side of that racemic mixture.
19 They cut off part of it. So you've seen this. This happens
20 out in the drug world. Well, that's what we have here.
21 Floxin was the initial drug. It had both sides of the
22 molecule. They loped off the "D" side, the dextro side,
23 which is the right-hand side, and left the "L" side, the
24 left-hand side, which is the active side. Now, the question
25 for us has to do with the epidemiology of the "L" side and

1 whether you can show by that epidemiology that there is a
2 generically, causally related relationship between Achilles
3 tendon rupture and Levaquin. Well, there's a long history of
4 epidemiology on Floxin. It dates back -- actually, it goes
5 back to 1994 and '95, when some of the earlier articles that
6 I found were published. There's a gentleman in the
7 Netherlands by the name of Dr. Van der Linden who published,
8 first, in 1999, did a study on Floxin. You know, this is a
9 failure-to-warn case. And, so, what's at issue is what did
10 they know and when did they know it; or, what should they
11 have known or what should they have done about it. And with
12 this history of epidemiology showing a relationship between
13 the class of drugs -- of which Floxin and Levaquin are one --
14 it's a class called "fluoroquinolones" -- that there's a
15 relationship between the class of drugs and Achilles tendon
16 rupture and, in particular, a greater relationship -- a
17 greater propensity between Floxin and Achilles tendon
18 rupture. You know, our position is that epidemiology should
19 trigger, at the very least, notice to the company to do
20 studies or, even beyond that, because of that epidemiology,
21 be predictive of what's going to happen in Levaquin. And,
22 so, we then have to get behind that and ask the question is
23 Floxin sufficiently similar to Levaquin so that the
24 epidemiology of Floxin can be used in predicting the
25 epidemiology of Levaquin. And in order do that, we then go

1 to the toxicology and pharmacology of Floxin versus Levaquin.
2 So we need to know. My experts -- my toxicologist needs to
3 know, my pharmacologist needs to know, my epidemiologist
4 needs to know. Is defendant going to contend that Floxin and
5 Levaquin are sufficiently different with regard to toxicology
6 and epidemiology and pharmacology so that you can't make that
7 leap. And if the answer is "Yes," tell me what facts you
8 used to support that. Those were our contention
9 interrogatories. "Do you contend." And Questions 3 through
10 8 are the ones that are at issue. And the answers in all of
11 those questions were, Yes, we do contend. But here, here are
12 all the documents. They're all in plain view. You go figure
13 out what it is are the facts that we believe that we have to
14 support that. I don't think I have to do that. I don't
15 think I have to go through, as our brief described, three
16 truckloads' full of the New Drug Application documents in
17 order to find that needle in that haystack, particularly,
18 particularly because when a drug company submits a New Drug
19 Application, they have done the toxicology and they have done
20 the pharmacology and they have people, theoretically, in
21 their staff who can that question about whether Floxin and
22 Levaquin are sufficiently similar to be able to do that. So
23 it's not like they've got to go do their search through these
24 documents. I would hope that they have people to do that.
25 Now, curiously enough, on the other side of that coin, I

1 asked them who's their expert -- this was sometime ago when
2 this issue was percolating -- who is that they're going to
3 have testify about that issue. And they named Dr. James
4 Kahn, one of their in-house medical people. The primary
5 infectious disease doc., who is in charge of this. And he
6 was going to be the guy that they identified who was going to
7 testify about the similarities and differences on a
8 toxicology and pharmacology level. Well, I've had two days'
9 worth of deposition with Dr. Kahn. And he says, "I don't
10 know. That's beyond my skill." I asked him some very
11 detailed molecular biology and biochemistry questions about
12 the molecules, that I've been taught by my experts, that they
13 want to know, and he said, "I don't know." So I'm then left
14 with, okay, if your in-house guy can't tell you, the one you
15 propose should be able to tell us, then let me put it in the
16 form of an interrogatory, and you go to the company and you
17 tell us what the basis is that you should have in your
18 records and you should have within the knowledge and
19 framework of your company that justifies your contention.
20 The defendants say that has to wait. That has to wait for
21 our expert reports. Okay? Well, their experts are not
22 in-house experts. It will be curious to me that Johnson &
23 Johnson doesn't have people who know the answer to this.
24 That's troublesome to me as a consumer of drugs in the United
25 States. But be that as it may, if it has to wait for the

1 production of their experts, their expert reports come after
2 my expert reports. So how do my experts get, then, to be
3 able to opine on this issue without understanding what it is
4 Johnson & Johnson says is the difference between Floxin and
5 Levaquin on those levels.

6 THE COURT: But isn't that potentially a
7 purpose of the rebuttal expert reports which are provided for
8 in the pretrial order?

9 MR. GOLDSER: Yes, it is that potential. And I
10 thought about that, and I looked at the timing of that. And
11 we have a deposition -- and I don't remember this precisely
12 -- and I think I have this right, but I might not -- we have
13 -- October 15th is our deadline for providing our experts.
14 November 15th is the deadline for providing the defense
15 experts' reports. We then do depositions and those have to
16 happen within a fairly short period of time after that. The
17 bottom line is I don't have a whole lot of time for my
18 experts, then, to go back and do or redo their reports and go
19 back to the beginning. Right now I do have that time. And
20 they can do it in the normal course of their business. And
21 they can give it thought and consideration and proper study
22 as opposed to having to do it in a hurry. So, yes, the
23 possibility exists of rebuttals. But then we're going to
24 redo all the depositions again because my experts may come up
25 with an entirely new set of opinions based on what they

1 finally learn in the expert reports that are given to us.
2 You're right, Judge, that is a mechanism to solve this
3 problem. I agree. I looked at that. But I don't think it's
4 the right one. And I don't think that a defendant can avoid
5 answering interrogatories by pushing it off until a later
6 date, and saying, You go look at the three truckloads of
7 documents. We've given them all to you. You find that
8 needle, when we had the expertise, theoretically -- "we," the
9 defendant -- had the expertise, theoretically, to just tell
10 you.

11 THE COURT: So it is the case that all the
12 information has been provided and it's just voluminous stacks
13 of information or is there information that the defendants
14 have which they have not disclosed to you at this point?

15 MR. GOLDSER: I'm not sure I know the answer to
16 that question. It could be that the information's provided.
17 They've given us opportunity to review the New Drug
18 Application. We're trying to ferret out to see what the
19 answers are to these contention interrogatories, as best we
20 can, by going through the three truckloads of documents. But
21 can the defendants tell us what their theory is by which
22 Ofloxacin and Levofloxacin are similar toxicologically and
23 pharmacologically. I think it would be a whole lot more
24 efficient for them to just tell us than for them to make us
25 go through those truckloads.

1 THE COURT: How does the patent litigation in
2 West Virginia relate to this?

3 MR. GOLDSER: I haven't looked at the patent
4 materials in a while, but there was a contention that
5 Levaquin was the same thing as Floxin. I'm not sure that the
6 expert reports that I have read in that litigation -- and I
7 have read them -- I'm not sure that they answered that
8 question. They come close, but not quite to the level that I
9 suspect we're going to need when I see the Daubert motion
10 coming that we haven't done our homework. That's all I have
11 on this motion.

12 THE COURT: Thank you, Mr. Goldser.

13 MR. GOLDSER: All right.

14 THE COURT: Mr. Robinson.

15 MR. ROBINSON: Thank you, your Honor. Your
16 Honor, first I have to respectfully disagree with my
17 colleague's characterization that we have buried documents in
18 plain view. We have produced documents in an organized
19 manner. He's mentioned the New Drug Application. They've
20 looked at it three times now. And each time we've provided a
21 detailed index to them, which outlines the various studies
22 and publications within sections, like clinical pharmacology,
23 microbiology. It's listed; there are page references. It is
24 the same index we would have to use to go find that
25 information for our experts or for ourselves.

1 As to Dr. Kahn, Dr. Kahn is a medical doctor,
2 he is an MD. He was never held out to be a pharmacologist, a
3 pharmacokineticist, a toxicologist. And if there was a
4 miscommunication on that point, I would stand corrected. But
5 he was a medical doctor. He does not hold special expertise
6 in these other fields.

7 Now, your Honor, I think the question here is
8 not a question of answering these or not answering these
9 interrogatories. They ask us interrogatories -- very
10 scientifically, detailed interrogatories about these three
11 molecules that Mr. Goldser described. And we answered the
12 basic interrogatory. The basic interrogatory was what is
13 your contention and we answered those. We did not object to
14 those. The second part of that interrogatory was not produce
15 the documents or identify the documents that relate to this
16 contention, it was: State all the facts that support this
17 contention. And that's what we have a disagreement about.
18 And we believe that that falls clearly within the area of
19 expert testimony and it should be postponed until the experts
20 provide their reports because, essentially, if we have to
21 answer that second half of that interrogatory, we would have
22 to go to our experts, our experts in pharmacokinetics, our
23 experts in pharmacodynamics, our experts in toxicology, our
24 experts in microbiology, in order to have them tell us from
25 their review of materials what the answers are. We have

1 provided to them the basic materials with which they're
2 experts can obtain the same information, knowing now what our
3 contentions are. We've done that in three ways, your Honor,
4 first -- I mentioned the NDA. We have produced the NDA. And
5 as we noted in our briefs we filed with the Court, this
6 compound -- neither of these compounds, Ofloxacin or
7 Levofloxacin, were developed by this company. They were
8 developed in Japan by a company named Daiichi, and J & J
9 licenses the molecule and has a right to make it and sell it
10 with FDA approval here in the United States. So the
11 preclinical work that they're asking about -- that is, the
12 preclinical pharmacology, pharmacokinetics, pharmacodynamics,
13 the microbiology, all of that -- are really in the Japanese
14 documents. Now, those Japanese documents are -- or -- test
15 reports are contained in the NDA, because those documents all
16 had to be submitted to the FDA in this country in order to
17 obtain approval for marketing the product here. And we have
18 provided the NDA and we have provided the index which, as I
19 said earlier, outlines the various studies and publications
20 related to each of these topic areas. The second way we have
21 met the burden is, at the plaintiffs' request, we produced
22 the materials from the patent case in 2003 in West Virginia.
23 The very fundamental issue which Mr. Goldser outlined to
24 you -- that is, that Ofloxacin and Levofloxacin are very,
25 very similar drugs, and the experience with one ought to be

1 predictive of the experience of the other -- that was the
2 fundamental underlying issue in the West Virginia case. It
3 was a patent case as to whether you could even patent
4 Levofloxacin because the allegation was it's the same product
5 as Ofloxacin. There was a tremendous amount of expert
6 testimony in that case dealing specifically with these issues
7 -- the pharmacokinetics, pharmacodynamics, microbiology, et
8 cetera. We have given them a disk with the trial testimony
9 and expert reports and exhibits of the experts who testified
10 on both sides of the litigation in West Virginia. I pulled a
11 reference to one of the documents just to give the Court an
12 example. It is Defendants' Exhibit 42 from the West Virginia
13 patent litigation. It's a summary report. It's called
14 "Single Dose Oral Toxicity Study in Mice, Comparison with
15 DR3354." DR3354 is a developmental code name for
16 Levofloxacin and Ofloxacin. There it is, a comparison of
17 toxicity between the two drugs in mice. That's one example
18 of the kinds of things we have given them. That production
19 included the exhibits to the West Virginia experts, as well
20 as their trial testimony and cross-examination of them in the
21 trial. You asked Mr. Goldser the question whether we had
22 produced the information from which their experts can obtain
23 this. We have. And we've produced it in the manner in which
24 it is kept in the ordinary course of business and, in
25 addition to that, we have produced the materials from the

1 prior litigation in which the same subjects were discussed.
2 So we would ask the Court to deny the motion as stated today,
3 to permit our experts to file their reports outlining this
4 with their exhibits, and, then, at that time, Mr. Goldser
5 will have all of that information. And his experts in the
6 interim have access to the same information.

7 THE COURT: What about Mr. Goldser's point that
8 there may be a real crunch in time here if all this awaits
9 the submission of the defendants' expert reports in November
10 and we may have a doubling up on depositions and some of the
11 sorts of case management concerns that he addressed.

12 MR. ROBINSON: Well, your Honor, I don't see
13 that they would have a problem. If they go out and hire a
14 pharmacokineticist, and they provide him all of this
15 information that has been made available to them, they can
16 analyze it and determine from -- their experts can do the
17 same analysis ours would. And they would have that
18 information. And, then, after they depose our experts, if we
19 did raise new or different issues, they would presumably be
20 permitted to file supplemental reports and do supplemental
21 discovery at that time. I don't know that there would be any
22 time constraints on the initial October filing as a result --
23 I mean, they've had this information -- they've had the
24 patent information from West Virginia since last October. I
25 think they've looked at the NDA three times now and,

1 obviously, we'll make it available again if that's their
2 request.

3 Thank you, your Honor.

4 THE COURT: Mr. Saul.

5 MR. SAUL: There is an issue that I feel is
6 incumbent upon me to bring to the Court's attention, and it's
7 been underlying the litigation for approximately two years,
8 and it's being brought up both by plaintiffs and defendants.
9 From plaintiffs' standpoint, we have a serious discovery
10 dispute that we've tried not to bring to the Court's
11 attention until we've worked it out with the defendants.
12 We've been given, your Honor, about, I don't know, a million,
13 million and a half documents, and basically the defendants
14 decided when and how they were going to give it to us. And
15 they gave it to us over a year period. We finally got it
16 onto our computer and bought the appropriate program to
17 search the documents. We can't search them, we can't figure
18 out where they're from, who they relate to, attachments on
19 there. Every document was marked confidential. There were
20 750 redactions, approximately, in every document that was
21 marked confidential. We went to Judge Boylan early on in the
22 litigation, explained the problem. Defendants said: We're
23 producing these as we produce them in the ordinary course of
24 business. We really can't figure out what's there. So we
25 asked the defendants -- we filed a 30(b)(6) motion to get the

1 person who put the documents together, and the defendants
2 said: We did. The law office -- our law office put them
3 together, and we said: Well, how are we going to -- who are
4 we going to depose? They said: Well, you can't depose us.
5 We put them together and we produced --

6 MR. ROBINSON: Your Honor --

7 MR. SAUL: Let me finish. You can't depose us.
8 They said: Well, you can ask our law clerks and lawyers who
9 put them together questions, but you can't do it under oath.
10 You can't do it under oath. So we said: Okay. We'll do
11 that. But one of the basis for the arguments today is that
12 was one of the three things that counsel suggested that we
13 had. We are having great difficulty in doing the discovery
14 and understanding the documents that were produced. And we
15 expect that at one point here, again, we'll have to bring a
16 motion because we just can't understand the way these
17 documents were produced. I thought I'd bring that to the
18 Court's attention.

19 THE COURT: Are there indexes to the documents
20 that you can access?

21 MR. SAUL: There are not. And we actually went
22 through this with Judge Boylan, and they said -- we said:
23 Well, how did you produce this? They said: Well, we chose
24 14 -- we didn't understand how they did this. They said: We
25 chose 14 search words or 15 or 20 and then we searched the

1 documents by these search words, and we said: Well, tell us
2 the search words. And they told us the search words. And
3 the judge said: Well, we can choose some search words. So
4 we chose some search words. And, then, I'm not exactly sure
5 -- and I don't want to misrepresent what anyone said to whom.
6 They said: Well, we really didn't do it that way by search
7 words. So now we're back to the beginning. They're claiming
8 they produced these in the ordinary course of business when,
9 in fact, the lawyers and the paralegals from the law firm did
10 it. And, so, they couldn't be produced in the ordinary
11 course of business because they were taken from documents and
12 put into a computer system. And honestly, we're baffled.
13 And we're going to have to bring this -- we're going to try
14 to do this in the way they suggested. But to suggest that
15 they've given us the document as one of the three prongs of
16 their test is -- I just have to -- I have to disagree with
17 that. Thank you.

18 THE COURT: Mr. Robinson.

19 MR. ROBINSON: Although this is not part of the
20 motion today, your Honor, I feel compelled to address
21 Mr. Saul's points. We have collected these documents and
22 produced these documents in almost exactly the same kind of
23 format we have used in other multidistrict litigation in
24 other parts of the country. The other lawyers in those cases
25 have no problems in accessing the documents. There are

1 indices to show what's contained on each disk. They were
2 produced as they were kept in the normal course of business.
3 We didn't reshuffle them. I'm not going to put all this in
4 front of the Court today. I have a stack of correspondence
5 -- multipage, detailed letters explaining to Mr. Saul and
6 Mr. Goldser exactly how we collected documents, how we chose
7 and used the search terms, who we collected from. We have
8 tried at every opportunity to answer every question. We have
9 offered them technical help with their computer programs to
10 help them access the documents. And if, in fact, that should
11 come to motion, we would be prepared to address it. But
12 we've been doing nothing different here than we've done
13 elsewhere and it seems to have worked elsewhere.

14 Thank you, your Honor.

15 THE COURT: Well, on this point I would just
16 encourage the two sides to work closely together.

17 I understand your point, Mr. Saul. If we have
18 to address the matter in a motion, we certainly will do that.
19 But I encourage as much information as possible to be given
20 so that the rather voluminous stack of documents can be
21 adequately accessed and understood by the plaintiff.

22 As to the motion before the Court today, at
23 this time I'm going to deny the motion. I think it's a
24 little early, at least in the handling of the larger case, to
25 order answers of contention interrogatories. We do have the

1 issue anticipated by the ability to file the rebuttal expert
2 reports. If there is a time crunch that is caused by this, I
3 will provide relief to the plaintiffs there. That is
4 certainly a very legitimate concern, and I want to try to
5 avoid that, to the extent we possibly can. I do think that
6 this information will become clear with the production of
7 the expert reports that the defense will be producing. And I
8 think that we can surely address this later if the issue
9 remains unclear at a point where it becomes more critical in
10 the case. I'll deny the motion for now. But it certainly is
11 a motion that can be brought back to the Court if there
12 continues to be problems.

13 Go ahead, Mr. Goldser.

14 MR. GOLDSER: Thank you, your Honor. I
15 appreciate your hearing and considering the motion.

16 If I might suggest that we jump ahead to items
17 3(c) and 3(d) on the agenda --

18 THE COURT: Certainly.

19 MR. GOLDSER: -- under "Status of Discovery,
20 Document Redactions, Discussions Concerning Method Document
21 Production." That was a little bit of the exchange that
22 Mr. Saul and Mr. Robinson just had. And I'd like to just
23 kind of give you my overview on it. It's fairly similar, but
24 -- anyway. The problem of the document production is pretty
25 much as Mr. Saul described. We do want to get a better

1 understanding of how the documents were produced so that we
2 can use them better, search them better, understand the
3 organizational structure of them better. I do remain
4 confused about whether search terms were used or were not
5 used. But we'll get to the bottom of that. And I think
6 Mr. Robinson's offer to come to his office and sit down with
7 people on his staff and put them sort of in a witness chair
8 -- in my discussions with Mr. Robinson, I'm pretty sure I
9 made clear -- and correct me if I'm wrong -- that we'll even
10 have a court reporter there. And we'll do it as if it were a
11 deposition, albeit not under oath.

12 THE COURT: Not under oath.

13 MR. GOLDSER: And that's fine. But, you know,
14 as officers of the court, I'm sure they won't be misleading
15 in any fashion. They'll tell us what we need to know.

16 THE COURT: Mr. Robinson, is there a single
17 person that might be the best point of contact here or is
18 this --

19 MR. ROBINSON: The reason we want to do this --
20 I'm sorry, your Honor.

21 THE COURT: Go ahead.

22 MR. ROBINSON: The reason we want to do this in
23 Richmond is that's where my document group resides and the
24 people who do this are there. They actually went into the
25 offices of the people in New Jersey, took their computers and

1 copied their hard drives, and did things like that. But all
2 that's in Richmond. I'm concerned if we bring one person to
3 Minnesota, or somewhere, that that person might not have the
4 answers, and we might have other people available in Richmond
5 that could answer the question.

6 THE COURT: It seems to me that would be a good
7 idea, to do that in Richmond, but then perhaps designate the
8 appropriate person as the follow-up for follow-up questions,
9 if that works.

10 MR. ROBINSON: Sure.

11 MR. GOLDSER: And we'll do that. And I
12 appreciate the suggestion that Mr. Robinson made. After we
13 served the 30(b)(6) Deposition Notice, he filed objections.
14 As we were getting ready to bring the motion, it was his
15 suggestion -- and I'm glad he made it. And we'll take him up
16 on his offer because, you know, while it may not be, from our
17 side, a perfect solution, it certainly is more timely than
18 any other solution that we might be able to extract from the
19 Court sometime down the road after we brief it, and all the
20 rest of that stuff. So we'll do that. And I hope that that
21 will get us what we need to know. And if it doesn't, at the
22 very least, it will refine the issues so that if there is a
23 motion that we need to bring to the Court's attention for
24 decision, we'll be in a better position to elucidate that.

25 THE COURT: Do you know when that meeting is

1 going to take place? Do you have a time frame yet?

2 MR. GOLDSER: We were talking within the next
3 couple weeks.

4 MR. ROBINSON: Yeah. We're going to look for
5 early -- I've asked people in Richmond for dates in early
6 April.

7 MR. GOLDSER: We're going to do it soon.

8 THE COURT: Good.

9 MR. GOLDSER: Along the same lines, the
10 document redactions, I think the number is 735 documents that
11 have redactions in them. It's not clear to me why those
12 documents were redacted or what's there. I believe we have
13 some examples where Johnson & Johnson produced a document and
14 a third-party defendant produced the same document without
15 the redactions -- I believe this is the case. I'm not
16 entirely sure I have my hands on this -- but if that's true,
17 you can lay them out side by side and see what the redaction
18 was and go, "Why?" It didn't make a whole lot of sense.
19 And, so, we're in the process of collecting up as much of
20 this as we can. Obviously we need to have a meet and confer
21 with the defense. We will do that. We'll present this to
22 them to see where this goes. And, again, if we can resolve
23 that problem, short of the Court's involvement, we will.

24 THE COURT: Are these primarily work product or
25 attorney-client privilege documents?

1 MR. ROBINSON: No. Your Honor, we would do
2 redactions based on patient confidentiality identifiers. We
3 do redactions based on financial data. We do redactions for
4 other reasons. As I've explained to Mr. Goldser, when you're
5 producing close to two million pages of documents and you've
6 got 735 documents with some redactions, you may make a few
7 mistakes here and there. And from Day 1, when he brought
8 this issue to me, I said, "If you have a problem or a
9 question about any redaction, bring it to me, we'll pull the
10 unredacted copy, and if we made an error, we will produce the
11 unredacted copy to you."

12 MR. GOLDSER: But, you see, that illustrates
13 the philosophical difference, friendly though it is, that we
14 have, and that is the burden falls, then, on us to pull out a
15 document that's redacted and challenge it. And we have to go
16 through that 735 times. And we don't know what's underlying
17 it and we don't know how to challenge it. It's one of the
18 classic "I don't know what I don't know" scenarios. And I
19 don't think the burden falls on us to justify confidentiality
20 under the law or under the order that exists in this case, be
21 it a confidential document in full or a redaction in part of
22 a document. I think the burden is on the defense. I don't
23 think we have to go to them and say, "This document's a
24 problem." I don't think we have to go to them and say,
25 "Where is the attachment to this e-mail?" I think the ball's

1 in their court. I think it's incumbent upon them to produce
2 this stuff without our having to go do that. It's not an
3 issue for you today. This is where we are. It's still
4 friendly, I'm happy to say. But it is a bit of a hard spot,
5 this whole philosophical "Who's got the burden here."

6 THE COURT: Are the redactions categorical in
7 the sense that "This group is financial information," "This
8 group is confidential patient information," so at least the
9 broad, general topics can be disclosed in that respect?

10 MR. ROBINSON: Well, there are just very broad,
11 general topics which the redactors use as their guidelines
12 for that kind of information. We understand that the burden
13 of showing that a redaction is proper is on us. What I've
14 suggested as a practical matter to Mr. Goldser is, you know,
15 some documents may not be important at all in this
16 litigation. But if he has a document that's important, where
17 the redaction, from just looking at it, he feels is something
18 he wants to ask about, he can call me, give me the document
19 number. I can pull the unredacted document and, on the
20 phone, I can tell him what the redacted material is and why
21 we've redacted it. And, then, if we have an argument, we
22 have an argument. If we're wrong, I'll give him the
23 unredacted document. It's more of a practical approach than
24 -- we realize we have the burden.

25 THE COURT: Right.

1 MR. GOLDSER: Well, again, no issue before you.
2 I just wanted to highlight it. And while we're at it, I
3 suppose item 3(e), the defendant fact sheet, falls into a
4 similar vein. I'm happy to say in the short run we've been
5 able to work out the problem. But the defendant fact sheet,
6 as a general matter, has a response in that says: If you
7 want to know about the call information that our sales reps
8 made on this doctor, go look it up in the database -- the
9 call-notes database. We've been having one heck of a time
10 with the call-notes database, making it work. And, yes, they
11 have offered technical assistance. And we've been trying to
12 work it out on our own so that we don't need to share with
13 them our thoughts and our work product and have them come
14 into our office or do it over the phone so that they can
15 understand what it is we're trying to ferret out of these
16 things. I mean, I appreciate the offer, but I've got to give
17 up something for that. Happily in the short run for the
18 bellwether cases I've asked Mr. Robinson whether he would
19 produce the call notes in paper form rather than have us
20 ferret them out of database -- which we've been not able to
21 do -- and he has agreed to do that. But you can see
22 illustrative of the problem here -- again, my view, hidden in
23 play view, here's the call-notes database. We can't make it
24 work. We can't get the stuff out of there. So, again, not
25 an issue for you. Informative. But you can see what's

1 percolating a little bit under the surface here. Maybe we
2 can work this out. I hope we can. We have to date.

3 THE COURT: Well, if the database doesn't work,
4 you're unable to access it appropriately, then something's
5 got to change to make sure that you are able to access it.
6 Hopefully we can get that fixed.

7 MR. ROBINSON: We've checked the database. It
8 works. We don't know what their technical problem is. It's
9 the same database we've produced in other litigation through
10 the same vendor. And we've offered technical assistance to
11 help them. But the database -- there's nothing wrong with
12 the database.

13 MR. GOLDSER: We'll keep working on it. In the
14 meantime, the short-run problem of the bellwether cases and
15 what's in the database, they'll produce on paper. That
16 solves that in the short run. So, happily, we have that one
17 solved.

18 THE COURT: Okay. Good.

19 MR. GOLDSER: Then if we can go back up to
20 where we left off under "Motions," "Preemption in Wyeth," I
21 guess I get to sit down for this one.

22 THE COURT: Okay. You're not intending to
23 bring a motion on this one, I take it.

24 MR. GOLDSER: I don't think so.

25 THE COURT: Okay.

1 MR. DAMES: We spend so much time together,
2 maybe I've persuaded him. Your Honor, we don't -- you know,
3 in the short term, we're not going to be filing a motion -- a
4 preemption motion, primarily because it's going to depend
5 ultimately on the claims plaintiffs make. Once those are
6 defined, we'll be able to determine whether or not under the
7 language in the Supreme Court decision, whether, under those
8 terms, we have an appropriate motion to bring. It's
9 conceivable on some issues we do. It's just clear that under
10 the decision there's not a blanket preemption defense. You'd
11 have to look at issue by issue. So we'll be prepared to do
12 that, obviously, at the time when we know something more
13 about plaintiffs' claims and the expert reports have been
14 delivered.

15 THE COURT: Okay. Thank you.

16 MR. DAMES: Thank you, your Honor. I'm sorry,
17 I can't restrain myself, but I -- which is probably clear to
18 you by now. My read of the disputes that have taken place
19 concerning the discovery issues, from my perspective -- which
20 is maybe over the years, the kinds of litigations that I've
21 handled on behalf of pharmaceutical companies -- I guess I'd
22 like to stress the remarkable level of productivity we've
23 reached rather than the issue by issue. There's a little bit
24 of wanting to remind the Court that there might be potential
25 issues that the Court might have to address. But so far we

1 have managed to work through the issues, primarily because
2 the level of agreement we have is they are entitled -- I
3 mean, there are rules to which they are entitled to get the
4 information. If there are difficulties in retrieving the
5 information, we do our best to try to work through those. I
6 don't know. I mean, I keep thinking that this is pretty
7 remarkable so far. I guess I sort of want to defend
8 ourselves a little bit on it. But thank you, your Honor.

9 THE COURT: No. I think over all things have
10 gone quite well so far. And I applaud both sides. I mean,
11 every case has these areas of tension. We'll do our best to
12 try to minimize those.

13 MR. GOLDSER: And I certainly agree with that.
14 Mr. Dames and Mr. Robinson have been delightful to work with
15 throughout the course of this litigation. I certainly expect
16 that to continue. You know, when they walk into the room at
17 the deposition, I am genuinely glad to see them, so far.

18 MR. DAMES: So far.

19 MR. GOLDSER: So far.

20 MR. ROBINSON: Your check's in the mail.

21 MR. GOLDSER: Oh. All right.

22 MR. DAMES: Mr. Saul will issue a rebuttal
23 shortly.

24 MR. GOLDSER: This is evidence of the joviality
25 among us. And we've been able to do this and still represent

1 our clients with the great zeal that they're entitled to.

2 In the context of preemption in *Wyeth*, my
3 recollection of the scheduling order is that there is a
4 deadline for summary judgment motions and I think that's
5 April 10th. You know, they're going to be hard put to make
6 that deadline if they're going to wait until after the close
7 of all of the experts. I'm delighted to hear that we're not
8 going to face a blanket 12(b)(6) style preemption motion, and
9 glad to know that at least we read the decision that far into
10 it the same way. And that's, from our clients' perspective,
11 a good thing.

12 What remains, then, on our agenda for today is
13 just a little bit of what's going on with the rest of
14 discovery, the things that we have done and where we're
15 headed. We've been taking depositions. We schedule them
16 regularly. We've been taking two days with many people.
17 That's been cooperative. We have exceeded the seven hours
18 that's in the order on some people. That's been cooperative.
19 We are starting to get into some third parties where that
20 issue may or may not become an issue. Don't know. You can
21 see we have listed a number of third parties that we're
22 dealing with so far. We've taken an Aventis deposition --
23 which will be continued. We've taken several Ingenix
24 witnesses; one to be continued, one concluded. We expect to
25 be deposing some folks from Daiichi at some point not too far

1 down the road.

2 THE COURT: How large a group is it from
3 Daiichi that you anticipate?

4 MR. GOLDSER: I don't know. I just had my
5 first contact with a lawyer in New York representing Daiichi.
6 They wanted some time to get back to us in our inquiries to
7 them. I'm hoping to hear from them within the next 30 days
8 about materials that I hope they're going to produce as
9 opposed to just objecting. We haven't yet identified how
10 many there are. Without cutting myself off, I would think
11 it's fewer than five. I mean, it's not going to be a
12 humongous number. We are reviewing audio-visual sales
13 materials -- I believe that's been scheduled -- that's been
14 offered to us. We have been provided the patent trial
15 documents. One of the steering committee members is charged
16 with making sure that what we've been asked for has been
17 given to us. I'm waiting for the report back on that. I'm
18 hoping that's been complete, but I'm not certain in my mind
19 yet that that's complete. I'm sure Mr. Robinson believes
20 that it is. I just want to be reassured by my own people
21 that that's true.

22 We are moving along. We are on schedule. We
23 have a request for case-specific depositions of doctors in
24 eight out of the bellwether trials. Just got that -- I saw
25 it today. We're working on getting them and the plaintiffs'

1 depositions scheduled so that we can move forward and be
2 ready for bellwether trials. That was only eight out of the
3 14, but my understanding is that once we've finished these
4 eight, the other ones will be done as well. So it's not like
5 they're trying to segway off eight, to say, "Hey, these eight
6 are ready. Let's choose from them." I'm sure that's not the
7 case. We'll get through all of them so that we can choose
8 all of them for trials.

9 THE COURT: Excellent.

10 MR. GOLDSER: And I think that concludes the
11 agenda. I'm not sure that we have anything else to report.

12 THE COURT: Did you have anything else,
13 Mr. Dames? Or Mr. Robinson?

14 MR. DAMES: I don't think so, your Honor.

15 THE COURT: Ms. Van Steenburgh, we haven't
16 heard from you today.

17 MS. VAN STEENBURGH: No, nothing from me, your
18 Honor.

19 MR. ROBINSON: No, your Honor. We've finished.

20 THE COURT: Okay. Should we set another time
21 for a status conference? Surely, if there's nothing to
22 discuss, we could pull it off. But maybe we could set one
23 for a month or five weeks down the way. Does that sound
24 okay?

25 MR. GOLDSER: That sounds fine.

1 MR. DAMES: Fine.

2 THE COURT: I don't want to disrupt depositions
3 if they're going on during that period of time.

4 MR. GOLDSER: We have Dr. Seeger's deposition.
5 You'll remember you ruled on that at the last status
6 conference, your Honor. That's scheduled for April 16th. So
7 that week will be pretty tough. The following week looks
8 fairly open to me.

9 THE COURT: The week of the 27th?

10 MR. GOLDSETH: April 27th?

11 THE COURT: Tuesday, the 28th, perhaps. Is
12 that a date that might be workable?

13 MR. GOLDSER: If it's in the afternoon.

14 THE COURT: Yes, afternoon on the 28th?

15 MR. ROBINSON: It's okay, your Honor.

16 THE COURT: Say at two o'clock on the 28th.
17 Let's set that. And if it develops into a problem, I
18 honestly have no problem changing the time. I'd like to get
19 it on the calendar so people can plan for it. But certainly
20 things come up and it's certainly okay to move it. If you're
21 really in the middle of depositions and there are no issues,
22 you know, we can do a telephone conference, or something like
23 that as well, just for a brief update. But we'll plan on
24 getting together.

25 MR. GOLDSER: Should we let the plaintiffs' Bar

1 know that they're able to dial in by phone to us?

2 THE COURT: Yes. Tell them we'll try it for
3 several of these conferences to see if it works. If it
4 becomes too clumsy or procedurally difficult, we may stop
5 doing it and just have someone dial in if they are supposed
6 to be making an argument and they can't make it here, or
7 something like that. That would be the alternative. But
8 let's try it. It might be a good feature if we can -- and
9 we'll provide a dial-in number.

10 We can do that, can't we, Holly?

11 CALENDAR CLERK: Yes, we can.

12 THE COURT: So that we don't have to have the
13 individual -- you know, put someone on hold and all of that.
14 It's just easier to use the conferencing capability. Okay.

15 Anything else for today? Okay. Thank you all
16 very much.

17 MR. ROBINSON: Thank you, Judge.

18 THE COURT: We'll be in recess. We'll see you
19 all at the next hearing, if not before.

20 MR. GOLDSER: Thank you, your Honor.

21 THE CLERK: All rise.

22 (Court stood in recess at approximately 3:05
23 p.m., on March 20th, 2009).

24

25

1 STATE OF MINNESOTA)

2)ss.

3 COUNTY OF HENNEPIN)

4

5 I, Ronald J. Moen, Official Shorthand Reporter, CSR,
6 RMR, and a Notary Public in and for the County of Hennepin,
in the State of Minnesota, do hereby certify:

7 That the said proceeding was taken before me as an
8 Official Shorthand Reporter, CSR, RMR, and a Notary Public at
the said time and place and was taken down in shorthand
writing by me;

9 That said proceeding was thereafter under my direction
10 transcribed into computer-assisted transcription, and that
the foregoing transcript constitutes a full, true and correct
11 report of the transcript of proceedings which then and there
took place;

12 That I am a disinterested third person to the said
13 action;

14 That the cost of the original has been split equally
15 between the parties who ordered the transcript of
proceedings, and that all parties who ordered copies have
16 been charged at the same rate for such copies.

17 That I reported pages 1 through 41.

18 IN WITNESS THEREOF, I have hereto subscribed my hand
this 2nd day of April, 2009.

19

20 s/ Ronald J. Moen
21 RONALD J. MOEN,
Official Court Reporter,
CSR, RMR

22

23

24

25