

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products)	
Liability Litigation,)	File No. 08-md-1943
)	(JRT/AJB)
)	
)	
)	Minneapolis, Minnesota
)	November 23, 2009
)	10:40 A.M.
)	

BEFORE THE HONORABLE **JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(PLAINTIFFS' MOTION TO CONSOLIDATE CASES FOR TRIAL)

APPEARANCES

For the Plaintiffs:	RONALD S. GOLDSER, ESQ.
	LEWIS J. SAUL, ESQ.
	KEVIN FITZGERALD, ESQ.
	YVONNE FLAHERTY, ESQ.
	CAIA JOHNSON, ESQ.
For the Defendant:	JOHN DAMES, ESQ.
	WILLIAM H. ROBINSON, JR., ESQ.
	TRACY J. VAN STEENBURGH, ESQ.

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Proceedings recorded by mechanical stenography;
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10:40 A.M.

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(In open court.)

THE COURT: You may be seated. Good morning, everyone. This is civil case number 08-1943, In Re: Levaquin Products Liability Litigation.

Counsel, would you note your appearances today?

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

THE COURT: Mr. Goldser.

MR. SAUL: Good morning, Your Honor. Lewis Saul for plaintiffs.

THE COURT: Good morning, Mr. Saul.

MR. FITZGERALD: Good morning, Your Honor. Kevin Fitzgerald for the plaintiffs.

THE COURT: Good morning to you.

MS. FLAHERTY: Good morning, Your Honor. Yvonne Flaherty for plaintiffs.

THE COURT: Good morning.

MS. JOHNSON: Good morning. Caia Johnson for the plaintiffs.

THE COURT: Good morning to all of you.

For the defense?

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

THE COURT: Mr. Dames.

1 MR. ROBINSON: Good morning, Your Honor. Bill
2 Robinson for the defendants.

3 THE COURT: Mr. Robinson.

4 MS. VAN STEENBURGH: And Tracy Van Steenburgh for
5 the defendants.

6 THE COURT: Good morning, Ms. Van Steenburgh. We
7 are ready to proceed with plaintiffs' motion to
8 consolidate.

9 Mr. Goldser?

10 MR. GOLDSER: Thank you, Your Honor. I believe
11 we actually have some left over items from the last status
12 conference.

13 THE COURT: Okay.

14 MR. GOLDSER: Many of them dovetail together into
15 the motion to consolidate, and the motion itself Mr. Saul
16 will address. I would like to just start with reviewing
17 where we are from the last status conference and talk a
18 little bit about big picture items.

19 THE COURT: Okay.

20 MR. GOLDSER: First off, a couple of the minor
21 things. On Karkosa we had talked about the possibility of
22 resolving that matter by dismissal. That is not going to
23 happen.

24 THE COURT: Okay.

25 MR. GOLDSER: So we will need to set a date for a

1 summary judgment motion. I will tell you at the outset
2 anticipating what I know about the motion, that there will
3 be a Rule 56(f) affidavit that will be submitted in reply.
4 So I'm not sure how productive it will be to have the
5 motion heard, but perhaps it will.

6 THE COURT: Do you want to look at a date right
7 now?

8 MR. GOLDSER: I understand defense would like to
9 do that.

10 THE COURT: How far out do we want to set it?

11 MS. VAN STEENBURGH: We are ready to file.

12 MR. DAMES: The brief is prepared.

13 THE COURT: Okay. So you would file it this
14 week, then, in other words?

15 MR. DAMES: Yes, Your Honor.

16 THE COURT: And then how much?

17 MR. GOLDSER: We have the holidays.

18 THE COURT: Right.

19 MR. GOLDSER: We also are about to commence all
20 of the expert deposition discovery from now until the end
21 of January. So it's going to be a pretty tight time for
22 us.

23 THE COURT: We can certainly give you some extra
24 time for a response. Do you want to try to hear it in
25 December, or should we try for early January?

1 MR. GOLDSER: I would certainly prefer January.

2 THE COURT: Okay. Thursday, the 7th of January?

3 MR. GOLDSER: Actually, that is the only week in
4 January where we don't have expert depositions.

5 THE COURT: Good.

6 MR. DAMES: I guess that means it's good.

7 MR. GOLDSER: Good guess.

8 THE COURT: I have a jury trial scheduled that
9 week. I'm not sure whether it's going to be going or not,
10 and I have a status conference in St. Jude that day.

11 Ms. Van Steenburgh, you can just stay here for
12 the whole day.

13 MR. GOLDSER: Actually, Judge, I'm reminded by
14 Mr. Saul that one of the other agenda items is the
15 deposition of Dr. Baniriah in the Straka case.

16 THE COURT: Right.

17 MR. GOLDSER: And we were just talking about
18 scheduling that for Friday the 8th.

19 THE COURT: Okay.

20 MR. GOLDSER: And that will be in Scottsdale, so
21 people will be on the road for that.

22 MS. VAN STEENBURGH: In the afternoon, though. I
23 mean, we will be traveling in the afternoon. We could do
24 the motion in the morning.

25 THE COURT: We could do this in the morning. Do

1 you want to do it at like nine o'clock?

2 MR. GOLDSER: Okay.

3 MS. VAN STEENBURGH: Okay.

4 THE COURT: Okay. We will do nine o'clock on the
5 7th. Okay?

6 MR. GOLDSER: And that, of course, crosses off
7 the second item on the list, which is the deposition of
8 Dr. Baniriah in the Straka case. We need to confirm with
9 the doctor, but we're told that she is available and pretty
10 open in January. So we have agreed amongst us for the 8th
11 of January.

12 I presume, then, that in terms of response times,
13 we will just follow the rules for response deadlines?

14 THE COURT: That's fine.

15 MR. GOLDSER: I think there are some new rules
16 coming into effect December 1st?

17 THE COURT: Yeah.

18 MR. GOLDSER: For scheduling?

19 THE COURT: They just get rid of the counting
20 problem basically is what it is. So what is it, 21 days?
21 I forget what --

22 THE CLERK: 28 and 8.

23 MR. GOLDSER: I don't remember.

24 THE COURT: Yeah. Go ahead and follow them.

25 MR. GOLDSER: Okay.

1 THE COURT: That's fine. I think there is enough
2 time here.

3 MR. GOLDSER: All right. Then the other agenda
4 item that we kicked over was to discuss a discovery
5 schedule for case specific discovery in Phase I cases and
6 commencing Phase II discovery, and that, as I said, really
7 dovetails in with the motion to consolidate that Mr. Saul
8 will talk about in a minute.

9 I like in my own mind, it's convenient for me to
10 create bookends to processes that have time lines on them.
11 The beginning of the book end, of course, is when the MDL
12 was created and we all landed here. The end of the book
13 end is an open question.

14 Obviously, it would be lovely if we could settle
15 all of these cases, and that is the other end of the book
16 end, but we never planned for that. We planned to go to
17 trial, and so we should operate as if that's the working
18 assumption, and of course, in an MDL trials can happen here
19 to some extent. Remands happen.

20 Many of the cases, of course, were filed directly
21 here. You have jurisdiction over them. Whether you will
22 transfer venue, that all remains to be seen. So you have
23 right now 250 cases or thereabouts. More are coming in
24 every day. You will have a sizable docket to deal with.

25 The question then becomes, How do you handle all

1 of those cases at the end? How many do you keep for trial?
2 How many do you send back? As part of that, How much of
3 the case specific discovery does this Court do and how much
4 of the case specific discovery is done in the remand court?
5 Where is that line drawn?

6 In my experience, MDL courts really have taken
7 broad latitude about that. Some keep the case specific
8 discovery here before remand. Some do all the generic
9 discovery and then send it back. Some do somewhere in the
10 middle. So we don't know what your thinking is and what
11 your plan would be for that, and of course that helps us in
12 framing the Phase II and the Phase I discovery. So a lot
13 of what we're trying to do, we don't know what your
14 thoughts are on that.

15 Then if you step it back a little bit closer to
16 the present time and we talk about the 14 cases that were
17 in the bellwether group one, five of them, of course, have
18 the venue motion. The other nine do not. We, as you know,
19 are proposing three cases for a consolidated trial. The
20 defense wants to have the discovery done on all nine.

21 The other thing we don't know is what's the plan
22 after the first trial. We have an August 2, 2010, trial
23 date. We can try three cases as plaintiffs proposed that
24 day, and then we need to understand what is the Court's
25 perspective on the next trial, or are you going to take

1 cases back to back to back to back like I believe was done
2 in the Mirapex litigation. So we don't really know what
3 your view is on what happens after the first trial.

4 You can well imagine that informs a lot about the
5 motion that is before you today. It informs a lot about
6 what you do about the remaining case specific discovery for
7 Phase I cases for cases that are selected and cases that
8 are not selected.

9 After all, with an MDL, what's our purpose? Our
10 purpose is to do common discovery as the statute says, and
11 as I think we all know, the idea is to get the cases here,
12 consolidate them and hopefully resolve them here if
13 possible, and if we can accomplish all that, that would be
14 great. But if we have to do the discovery, we need to
15 serialize the discovery. We need to serialize the trials.

16 So if you can help us understand what you have in
17 mind for additional trial dates, how much trial time you're
18 willing to give us in August of 2010 to try a case or
19 multiple cases, a lot of things follow from that, which
20 then of course brings us down into the micro question for
21 today, and that is, What do we do with the first set of
22 cases in August 2010?

23 Should it be three? Should it be nine? How many
24 tried at once? How many discovered at once, and I will
25 turn that over then to Mr. Saul.

1 THE COURT: I will say that I'm not likely to
2 remand any case back to another district without the
3 discovery being absolutely complete. That's what I
4 consider to be my responsibility as -- unless there is a
5 venue early on.

6 I mean, that's a different story, where you
7 really have not had time to complete discovery, but in
8 terms of a remand for a trial, I think it's my
9 responsibility as a transferee judge to have that case
10 ready to go to achieve the economies of scale that are
11 involved with multiple cases that are similar going through
12 discovery at the same time.

13 MR. GOLDSER: Sure.

14 THE COURT: And in terms of trial time, the fall
15 is at this stage wide open. So we've got plenty of time
16 next fall, and I'm happy to keep it open if we need a lot
17 of time for trial or constrict it as necessary, but I think
18 we will try to figure these things out in the next month or
19 two as would go forward.

20 MR. GOLDSER: Those are important to know, and
21 thank you for all of that, and, of course, any discovery
22 that happens further down the road will be informed by what
23 we do in the first trial or two trials.

24 So I think we should learn the lessons of those
25 trials to find out what discovery is really important

1 because we have been running all over the place doing lots
2 of stuff, and I should think we would be able to refine
3 that with the education we receive from trying some cases.

4 So I will relinquish to Mr. Saul, if I may.

5 MR. DAMES: Before we get to the argument --

6 THE COURT: Yeah.

7 MR. DAMES: -- can I respond to some of this?

8 THE COURT: Sure. Go ahead, Mr. Dames.

9 MR. DAMES: Thank you, Your Honor. We've had
10 discussions over a very similar set of issues, that is how
11 should we resolve this number of cases and how would we
12 best recommend to the Court to handle the initial set of
13 trials. I would like to make two points in response to
14 what Mr. Goldser just said. Number one, we haven't
15 insisted by any means that we do discovery in the remaining
16 nine cases.

17 We have tried to reach agreement on further
18 narrowing the list of cases to complete the discovery as
19 the initial bellwethers. Our suggestion, as I had
20 mentioned on the telephone conference, was that we, we had
21 two cases which we proposed, and we thought plaintiffs
22 could reduce their five proposed to four, and we would
23 present the Court with six. And those cases we would then
24 proceed to get ready for eventual trial under whatever
25 format the Court ultimately decides.

1 So I don't think it's necessarily the -- it isn't
2 the correct representation of our opinion of our position
3 that we insisted upon certain things. In fact, the
4 narrowing of the cases from the 15 to the 9 was done. We
5 had suggested we would carve out the five that had forum
6 motions, and we didn't insist on an equal number of cases
7 that plaintiff and defendants would propose to the Court,
8 that we would have the same, you know, they would have
9 three, and we would have three.

10 We have tried to be as accommodating as we
11 possibly can to further narrow the cases, while at the same
12 time preserving some choices for the defendants, however
13 narrow they might have been. The other issue is, and I did
14 want to propose this, and I think I mentioned it one other
15 time to the Court.

16 Another solution as to begin the process of
17 trials in these cases is to have a time limit set. Now,
18 whether the Court thinks time limits are desirable after
19 having a single trial of some sort to see how time limits
20 might work, there was a recent experience I've had, and I
21 was not lead counsel in this, but there was a Motrin trial
22 in Chicago done before Judge Holderman, who had just come
23 off of a jury reform commission of some sort. I have
24 forgotten the name for it.

25 But one of the proposals that the panel made was

1 for time limits, and of course, both parties as you would
2 expect kind of screamed about arbitrary time limits on it,
3 and the Court set 15 hours per side from opening statement
4 through closing argument for what was a very, at least a
5 dramatic, if not complicated case, involving a woman taking
6 Motrin who developed Stevens-Johnson Syndrome, which is a
7 horrible skin condition. You lose your skin, and you often
8 go blind, both of which happened to this woman.

9 So it was not a trivial case to have a time limit
10 set. At the end of the day, both sides had time left. The
11 defense had about four hours left. I think the plaintiffs
12 had about three hours left, and I was impressed only
13 because I was skeptical about time limits in the beginning.
14 It was something Judge Grady in the northern district had
15 done in a broader scope years before.

16 Frankly, at the end of the day, it was a very
17 efficient use of resources, and I would like to have that
18 under consideration for the Court down the road as to
19 whether we would suggest it for the first or any subsequent
20 number of cases, but we are not prisoners to the typical
21 trial scenario where you might think three weeks, four
22 weeks per product liability trial. I think that is
23 probably not necessary at all, quite frankly.

24 So I just wanted to posit those couple of things
25 before we got to the argument on the motions themselves,

1 Your Honor.

2 THE COURT: I had one trial two years ago that I
3 set time limits, hour limits on each side, and I kept
4 track. It actually worked very well. I asked everyone
5 what they needed, and they estimated what they needed. And
6 I set that, and I held to that, and it worked very well.
7 Both sides came in a little short of the number.

8 MR. DAMES: Apparently, you're less arbitrary
9 than Judge Holderman. He didn't ask anyone. He simply
10 decided and told us that. That was part of the panic. Of
11 course, present company excepted because this couldn't
12 possibly be us, but too often attorneys are so unfocused,
13 and so trials become just a simple fulfill every item on
14 the checklist that you have going in, and I was, I still
15 am, surprised at how it worked.

16 MS. VAN STEENBURGH: Your Honor, I was just going
17 to add, Judge Rosenbaum put time limits on us last year in
18 the Mirapex trial, and it actually worked. I mean, we all
19 grumbled a little bit, but he gave it in terms of number of
20 days, and then we divided it up amongst ourselves, and I
21 think everybody came in under the time limit. That was in
22 a pharmaceutical case. People were able to get it down.

23 THE COURT: Well, I think it does work, and I am
24 surely not adverse to it. I rather like the technique. I
25 try to divide it up by hours so that if one side takes a

1 lot of time with cross-examination, it cuts into their
2 time, obviously, rather than one side gets a week to
3 present their case and the other side gets a week, and
4 sometimes the cross-examination questions can dig into that
5 time.

6 MR. DAMES: Mr. Robinson wanted to address Phase
7 I and Phase II.

8 THE COURT: Sure. Sure. Go ahead, Mr. Robinson.

9 MR. ROBINSON: Thank you, Your Honor. Just very
10 briefly, for the Court's consideration some factual
11 information about the case numbers and so forth.

12 THE COURT: Mm-hmm.

13 MR. ROBINSON: In the 14 cases in Phase I, we
14 know that five are subject to potential forum nonmotions,
15 and the rest are Minnesota cases. In Phase II, Your Honor,
16 those constitute 28 cases by our count. None of the 28 are
17 Minnesota residents.

18 Of the 28, 17 were filed in other jurisdictions
19 and then transferred here under conditional transfer
20 orders, and 11 of those cases were filed here in Minnesota.
21 And also, Your Honor, by our count, Mr. Goldser mentioned
22 there are about 50 cases or so, whatever.

23 Our count shows that of the total, there are 12
24 Minnesota residents of the 50 cases. We just felt that
25 was, in terms of reaching a decision about where we move

1 forward and when we move forward on the remaining Phase I
2 cases and those 28 Phase II cases, those are facts we
3 wanted to have before the Court.

4 THE COURT: Okay. Thank you.

5 Okay. Mr. Saul or Mr. Goldser, do you have
6 anything else?

7 MR. GOLDSER: I'm not sure what the 50 reference
8 was. I had mentioned that there were 250 cases that you
9 have on your docket.

10 THE COURT: The total number, yeah.

11 MR. ROBINSON: I'm sorry. I thought you were
12 giving a different number.

13 MR. GOLDSER: Oh, okay.

14 MR. ROBINSON: I'm corrected.

15 THE COURT: Okay.

16 MR. SAUL: Good morning, Your Honor. May it
17 please the Court. Lewis Saul on behalf of plaintiffs.
18 We're here today on plaintiffs' motion to consolidate three
19 cases for trial, the first cases to be tried. These are
20 the cases of Richard Kirkes, who is now in his early
21 eighties; John Shedeem, who is now in his early eighties;
22 and Calvin Christianson, who also now is in his early
23 eighties.

24 Each of these three plaintiffs suffered a tendon
25 injury and the tendon being the Achilles tendon. One

1 suffered a tear. One suffered a rupture. I think two of
2 them suffered tears, and one suffered a rupture. The only
3 difference between a tear and a rupture is, it is a
4 complete breaking of the tendon, whereas a tear is a
5 partial break.

6 THE COURT: Are all three still in reasonably
7 good health?

8 MR. SAUL: All three are in reasonably good
9 health and prepared to go to trial.

10 THE COURT: Okay.

11 MR. SAUL: However, on that issue, two of those
12 that would be bellwethers now have passed away during these
13 proceedings, and so it's important from the plaintiffs'
14 standpoint to move these cases to trial as quickly as
15 possible, and frankly, if there is a potential for a global
16 resolution to resolve the cases, because 80 percent by my
17 account involves those elderly, 65 or older.

18 So we have moved because we feel that these three
19 particular plaintiffs are a cohesive group that are
20 representative of a fair number, a majority of those cases
21 that are out there, both here as well as in New Jersey.
22 These cases are particularly suitable for consolidation.
23 There is a number of reasons why they are suitable.

24 One of the reasons is, is because these are
25 signature injuries. I don't think that the defendant --

1 maybe they will dispute this, but I don't think they will
2 dispute that Levaquin causes, and their expert reports even
3 bear this out, that Levaquin causes Achilles tendon
4 rupture. It causes it, and so these are signature
5 injuries.

6 So from the plaintiffs' standpoint, from the
7 plaintiffs' case for each one of these plaintiffs that we
8 have just discussed, that their testimony is going to be
9 their testimony, possibly a spouse, prescribing or treating
10 doctor and someone, an expert, if their treating doctor is
11 unable to testify to the fact that Levaquin causes
12 particular injury and that there were other drugs that
13 could be used. That's it.

14 It's very simple from each plaintiff's case.
15 That's probably a day or two. However, the complexity of
16 this case lies with the general evidence, and let me review
17 for you, Your Honor, what we know to date. The defendants
18 have filed, and this also goes to the issue of the number
19 of days we need for trial, and I would like to address that
20 at the end.

21 We feel that at least for the first trial we're
22 going to need a reasonably long time so the Court becomes
23 familiar with these quite serious issues in the case. The
24 defendant has named at this point six expert witnesses, all
25 of which they intend to call at trial, and they expect to

1 name at least one other expert witness.

2 They have named James Khan, who works for
3 Johnson & Johnson, the defendant, an infectious disease
4 specialist; Peter Layde, an epidemiologist; Dr. Rodricks, a
5 toxicologist; John Seeger, a pharmacoepidemiologist. He's
6 the person from Ingenix who we have talked about quite a
7 bit here.

8 John, Dr. Segreti, an infectious disease
9 specialist; Dr. Zhanel, a microbiologist; plus an FDA
10 expert. That's seven experts that they intend to put on at
11 the time of trial. The plaintiff experts are Dr. Wells,
12 Dr. Bisson, Dr. Smith, Dr. Zizic, and Dr. Blum and possibly
13 another. That's one, two, three, four, five. That's six
14 expert witnesses.

15 These witnesses will each need to testify for
16 every single trial that goes forward. This is the case.
17 Not only will these witnesses need to testify, but there is
18 a number of corporate principals that will be testifying in
19 the case that we will be calling, as well as the defendant
20 will be calling, those in the head of marketing and who
21 conducted studies for Johnson & Johnson and a number of
22 corporate employees, and we will be calling a number of
23 Ingenix folks that worked on this epidemiological study,
24 about five or six other witnesses.

25 So we have generic witnesses, at my count, seven

1 and six are 13, approximately 20 witnesses that will have
2 to testify in each trial. Therefore we believe it's
3 appropriate, particularly in this particular matter, with
4 the age of the plaintiffs, the number of generic witnesses
5 to consolidate at least the first trial with three
6 plaintiffs.

7 The other fear that we have is, if we do back to
8 back trials, which we would urge the Court to do whether
9 they're consolidated or not, that you know that the
10 defendants can settle with the first plaintiff and then
11 settle with the second and settle with the third to avoid
12 trial.

13 That's exactly what happened in *Ortho Evra*, the
14 same defendants and the same procedure that has occurred
15 here, and no case has ever gotten to trial. So we're
16 urging the Court to consolidate these three plaintiffs,
17 Kirkes, Shedeem and Christianson.

18 Now, regarding their specific cases, first of
19 all, Levaquin generally, when you take Levaquin and you
20 have a tendon injury, it usually occurs within 30 days or
21 60 days and can happen up until 180 days. So when the
22 defendant argues in their brief that they have taken ten
23 courses of Levaquin, it's honestly irrelevant to this
24 because the nine courses before are irrelevant because
25 their own experts say that the injury occurs within 60

1 days.

2 Each one of these plaintiffs took the same
3 dosage. Each of them suffered the same injury while on
4 Levaquin or shortly thereafter, and their injury is the
5 same, and for that reason, you know, frankly, the defendant
6 argues that they, they imply that consolidation would be
7 unmanageable and confusing for the jury. That is the
8 principal argument.

9 We feel that, you know, that this premise
10 underestimates the knowledge of the jurors, the ability of
11 the jurors and importantly the ability of the Court to
12 effectively manage these issues at trial. We think they're
13 really simple issues. There won't be confusion among the
14 particular plaintiffs.

15 They have different doctors. They have
16 different -- it's very, very simple, and we just don't see
17 the confusion that the defendant is trying to convince the
18 Court that there will be in this case.

19 I see, personally, these cases as similar to
20 asbestos cases, elderly people that are sick, and
21 mesothelioma cases. These cases have been consolidated
22 regularly, plaintiff cases, for trial. We believe if there
23 was ever a case appropriate for consolidation, this one is
24 appropriate.

25 THE COURT: I think that these cases are

1 generally suspectable to consolidation, and if we have
2 remaining quite a number of cases to try, that is the way
3 we will have to go. I think the bigger question that I'm
4 wrestling with right now is whether the first case should
5 be a consolidated case.

6 Seems to me, second and third, once we have the
7 experience with the jury, we understand what might be
8 difficult, what might not be difficult for them. It's a
9 little easier to understand at that time. I'm not ruling
10 out consolidating the first case.

11 I obviously want to hear from both sides and give
12 this some thought before issuing a ruling, but that's the
13 key question, whether the first one is the right time to
14 consolidate cases or if it's better on the second or third
15 or fourth trials as we go along.

16 MR. SAUL: I understand, Your Honor. Just to be
17 clear on plaintiffs' position, we do believe this should
18 be. Whether they're consolidated or not consolidated, we
19 believe consolidation is the way to go.

20 THE COURT: I agree that you have three
21 plaintiffs who look to be remarkably similar, at least in
22 the nature of their injury and their course of treatment.
23 So I will grant you that. It's a question of whether it's
24 right, whether a case right at the beginning is mature
25 enough for consolidation.

1 MR. SAUL: I understand, Your Honor. We would
2 urge whichever way the Court decides that we have back to
3 back trials. Thank you.

4 THE COURT: Mr. Dames?

5 MR. DAMES: Thank you, Your Honor. Considering
6 the Court's comments, I was going to lead off with the fact
7 that for the beginning, for the first trial, it would make
8 some sense to try a single case. This has been a refrain
9 we have gone through many times here in the status
10 conferences before, and that is that the experience of the
11 first case will further educate us on the potential way of
12 handling the remaining cases.

13 To add further to that thought, we have not
14 conducted discovery of the treating physicians in the
15 course of the initial bellwether selection. There will be
16 much, I think, that will come out of that discovery of the
17 treating physicians as well. There is additional --

18 THE COURT: So no treating physicians have been
19 deposed?

20 MR. DAMES: No treating physicians, Your Honor.
21 The plaintiffs objected to us taking treating physicians'
22 depositions, and in part to accommodate their request, we
23 decided to focus in because we were thinking of case
24 selection on the prescribing physicians' depositions.

25 Their view of the case is that there are

1 remarkable similarities between the cases that they have
2 selected. It depends, of course, on the vantage point that
3 you're looking at in the cases, and the Court is I'm sure
4 anticipating what I'm going to say, but I am going to be
5 very brief.

6 Our view of the cases are what is central to the
7 resolution of the liability issues in the case, what was
8 brought to bear by the prescribing physician when that
9 physician made the decision to prescribe Levaquin. There
10 is some remarkable testimony, I think, that you will hear
11 ultimately in the Karkosa motion in which the physician
12 diagrams what he considers when he prescribes Levaquin.

13 But what is critically important to that are the
14 preexisting medical conditions of the plaintiffs, you know,
15 the comorbidities that were brought to bear, the reasons
16 for the prescription, and each plaintiff is really
17 genuinely dissimilar from the other. This is not a
18 fungible process. This certainly is not asbestos. This
19 requires the evaluation of a physician.

20 The other aspect of the litigation is, I believe
21 that will develop, is plaintiffs' counsel's attempt to
22 suggest that the company through its efforts in its
23 marketing campaigns, through its professional
24 representatives sought to undercut the judgment of the
25 physicians so that they would be caused to prescribe

1 Levaquin when they should not have.

2 That's going to be an individualized assessment.
3 I can go on and on with the attempts to individualize these
4 cases and to describe how the jurors are going to have to
5 evaluate both the individual medical histories and
6 conditions of the plaintiffs and the individualized
7 knowledge brought to bear by the physician in making that
8 very important decision to use Levaquin under those precise
9 circumstances.

10 I think the best argument, either pro or anti
11 this motion, is simply the trial. I am horribly
12 paraphrasing poor Jean-Luc Godard, the French film
13 director, in that the best film criticism is to make
14 another film. In one respect, the best way to illuminate
15 the decision on how to proceed would be to have a trial on
16 an individual basis.

17 And I think the Court would probably have a
18 myriad of views after having had that experience in this
19 precise litigation as to what would fit and what wouldn't
20 fit.

21 On that, I will rest, Your Honor.

22 THE COURT: Thank you, Mr. Dames.

23 MR. DAMES: Thank you. I'm sorry, Your Honor.

24 One last point that Bill does bring to me, and that is that
25 we really should finish the discovery, which is I guess the

1 point I was leading to inartfully with the fact that no
2 treaters have been done. We should finish the discovery
3 and then pick the trial case based on completed discovery.

4 Thank you.

5 THE COURT: Go ahead.

6 MR. GOLDSER: It's always nice to actually listen
7 to the argument instead of making it. It lends a
8 perspective. One thing that strikes me is the notion of
9 what the jury is thinking about and considering as they go
10 through a trial, and you know, they're going to raise
11 questions and have concerns.

12 And the argument is that multiple cases before
13 the jury will just cause multiple problems. I think the
14 converse may very well be true. If you do have differences
15 pointed out between and among the various plaintiffs,
16 comorbidities, preexisting conditions, potential
17 alternative causes, the opportunity to hear testimony about
18 a variety of different people, three people, will not hurt
19 them but will help them understand the nuances to a greater
20 degree.

21 My best example: If you have one bottle of wine,
22 you might think it is very good. Wine is a hobby of mine.
23 My friends here know that. You might think it's very good,
24 but if you have three bottles of wine, and you lay them out
25 side by side and taste them not one after another after

1 another but at the same time, you can really detect the
2 nuances and the differences between and among them, and you
3 get much better information by trying three different
4 bottles of wine all at the same time.

5 So I think multiple cases actually help, won't
6 hurt. The greater the number of trials that we have, that
7 is to say, if we try cases serially, let's say we take the
8 first three, and we try them one after another after
9 another, that means we will have to select fewer cases
10 because we will have fewer cases to prepare. We will be
11 going to trial for multiple weeks. That's nice from our
12 perspective.

13 Conversely, the greater the number of cases that
14 you have consolidated trials, that will then inform the
15 number of cases that you have to select for the early phase
16 of the discovery. So going back to the Phase I discovery
17 process, if we're going to take these cases serially, we
18 can discover them serially, and then that will generate a
19 schedule for us.

20 If we try them consolidated and we have one trial
21 with three plaintiffs initially and the Court is
22 anticipating us having a second trial shortly thereafter,
23 then we will in fact need to pick other cases, and we will
24 have to do those, and I think that there should be a serial
25 discovery schedule.

1 Note that if we do try three cases in one
2 consolidated group, we will have the litany of witnesses
3 that Mr. Saul described. We will have the discovery that
4 is attendant to them. We will have to do the treating
5 physicians.

6 We anticipate now that we are better informed by
7 having some experience on deposing prescribing physicians,
8 and we will be better informed once your order on the
9 motion to compel comes out, assuming that there is
10 additional material forthcoming. We're going to need to
11 take those again.

12 So the volume of what we're going to have to do
13 to get these cases ready for trial, the greater the number
14 of cases, the greater the discovery, and we would certainly
15 like to be able to serialize that in some fashion so that
16 we're just not overwhelmed.

17 I do want to take issue with Mr. Dames' notion
18 about the comorbidities and all of the issues that go into
19 a doctor's prescribing Levaquin. The notion of safer
20 alternative design, another choice, as I'm sure you know
21 under Minnesota law is not a necessary element of
22 plaintiffs' case. It's a nice thing for plaintiffs to
23 present because jurors wonder well, if not this, then what.
24 Even though it's not required, you need to present it.

25 The point is that this whole notion of

1 comorbidities, preexisting conditions, why the drug was
2 prescribed is not a central issue. What is a central issue
3 is once the decision to prescribe has been made, having
4 jumped the hurdle over other drugs, what does the doctor
5 tell the patient about the drug?

6 This is as a failure to warn case. It is not, if
7 the company gave out additional information to these
8 doctors, would they have prescribed the drug? To be sure,
9 one causation issue is, oh, my gosh. If I had only known,
10 I would never have prescribed the drug. That's one way of
11 doing it. If we have doctors saying that, that's great for
12 plaintiffs.

13 Doctors aren't saying that. Some of them do, but
14 not all of them. What doctors are saying is, gee, if I had
15 known, I wouldn't have prescribed corticosteroids on a
16 concomitant basis. Doctors have said that regularly in the
17 depositions, and I might note something that Mr. Saul
18 omitted.

19 The three cases for trial are all concomitant
20 corticosteroid cases, all three of them, so we have that
21 additional common fact. I wouldn't have prescribed
22 concomitant corticosteroids or I would have done a better
23 job of instructing my patient about this issue, to identify
24 it, to notice it and if something happens, get off your
25 leg, call me, come in.

1 We have had some circumstances where the patient
2 would call up and say I've got pain in my tendon, what do I
3 do, and the doctor says, oh, that can't be caused by this.
4 Just keep taking your drug. Well, we take great issue with
5 that.

6 So what I think you will see out of Karkosa is a
7 great litany of, I would have prescribed this drug on an
8 ongoing basis, but that's not the gist of this case, and so
9 the whole notion of preexisting conditions, comorbidities,
10 as a rationale for prescribing the drug does not generate a
11 difference on our failure to warn theory.

12 The failure to warn theory is, if I had known,
13 what would I have done differently? I might have
14 prescribed a different drug. I might not have prescribed
15 corticosteroids. I would have warned my patient and taught
16 my patient in a much different way. So there are multiple
17 causation possibilities here, not just the one that
18 Mr. Dames has raised. Therefore, you have a much broader
19 scope of causation, and the comorbidities issue lessens in
20 its importance.

21 With that then, the notion of these three cases
22 being similar, the comorbidities issue fades into the
23 background I guess is my point, and they can be tried
24 together. I think we would be better served by trying
25 these cases together.

1 While it would be more work if we do try these
2 cases together, I think we should then develop a second
3 list of perhaps three cases whose discovery schedule starts
4 a little bit farther down the road with its own schedule
5 but that is ready for trial not long after these three
6 consolidated cases would be tried as well.

7 That way we can efficiently get through some
8 cases, learn things about these cases, not only with the
9 older men with concomitant corticosteroids, but we can deal
10 with younger people. We can deal with urinary tract issues
11 to the extent those matter. We can deal with people
12 without concomitant corticosteroids and start figuring out
13 what those values bring to us maybe in our second round of
14 cases.

15 Thanks. And Mr. Saul just wants to make sure the
16 record is clear. The current three are all Minnesota
17 residents at the time of their prescription, at the time of
18 their injury, and there is no choice of law issue with
19 those.

20 THE COURT: Mr. Dames, anything else?

21 MR. DAMES: Again, very briefly, Your Honor. My
22 experience in having aggregated trial techniques is that as
23 far as predicting future resolutions of cases, it can muddy
24 the waters rather than clarify them. It is very difficult.

25 For example, in breast implant litigation, there

1 began, the Court may already know, the Texas litigation
2 sort of preceded the MDL litigation, and under the Texas
3 liberal joinder rules, there were consolidated, the cases
4 were consolidated for trial. It resulted in, frankly, for
5 significant plaintiff verdicts.

6 It retarded, quite frankly, the progress of the
7 litigation and the ultimate resolution in many respects
8 until Judge Pointer in the MDL had a single trial case in
9 Birmingham. The resolution, most of the mass torts in
10 which I have been involved have benefitted from having the
11 experience of single trials, and sometimes the aggregated
12 trial techniques did not.

13 It didn't afford the defendants an opportunity to
14 evaluate their cases so they could determine how they
15 wanted to proceed in terms of either settlement or trial.
16 Now, the example, and I guess I will end up with this, the
17 example of having a selection of wines and be able to, it
18 adds to the nuance and the understanding of the subtleties
19 and differences between them, in all due respect to
20 Mr. Goldser's experience, which is vaster than mine, if you
21 are a wine naif, if you know nothing about wines, it
22 probably will confuse you to be given an array of wines to
23 taste. It isn't dissimilar fare.

24 Thank you, Your Honor.

25 THE COURT: Anybody else want to weigh in on the

1 wine issue?

2 MR. ROBINSON: I promise not to talk about wine,
3 Your Honor.

4 THE COURT: Okay.

5 MR. ROBINSON: Very briefly, Your Honor, I think
6 I mentioned in the telephone conference that we had that we
7 were going to propose a case specific discovery schedule
8 for the Phase I cases.

9 THE COURT: Mm-hmm.

10 MR. ROBINSON: I have that. It is simply a
11 proposal at this point for Your Honor's consideration, and
12 it really all hinges, Your Honor, around the requirement by
13 April 15th that dispositive and *Daubert* motions be filed by
14 the defendants or both parties, really.

15 THE COURT: Right.

16 MR. ROBINSON: That is noted on there, and
17 obviously, as I said, this is a suggestion for the Court to
18 get these cases moving. We would also, just to be clear,
19 Your Honor, move the Court to permit us to begin at least
20 the first phase of discovery of the prescribing physicians
21 and the plaintiffs in the Phase II cases.

22 Those are the 28 cases I referred to earlier.
23 They are also mentioned, I believe, in Case Management
24 Order Number 4, and those are the 17 cases that are
25 nonMinnesota cases filed elsewhere, and 11 nonMinnesota

1 plaintiffs filed here.

2 Those cases are filed here, and we think it's
3 imperative to get moving before next year, for sure, on the
4 second round of these cases, the 28 cases. So what we're
5 asking the Court for permission to do is to begin the
6 initial discovery of the plaintiffs and of their
7 prescribing physicians so that we can get some handle on
8 these cases as we move forward.

9 THE COURT: Mm-hmm.

10 MR. ROBINSON: That would be in addition to the
11 discovery we are requesting on the bellwether cases. Thank
12 you.

13 THE COURT: Do you -- you can take some time to
14 respond to this, if you want. I mean, this is, I think,
15 just presented, but what's the plaintiffs' position right
16 now?

17 MR. SAUL: Simply, Your Honor, we feel that we
18 need to concentrate on these bellwether plaintiffs at this
19 time. We perceive 100 depositions, 125 depositions going
20 on over the next six months or so. Phase II, we have got
21 seven cases to try, hopefully, that that will give us a
22 good range of values, and we would hope to be able to have
23 some global resolution.

24 And the problem is that we're a small PSC, and if
25 they scatter us around the country like what occurred with

1 these not -- these nonMinnesota residents, we were running
2 all over the country, so we couldn't concentrate on the
3 cases at hand, and we don't want that. We don't want a
4 replay of that, and we would ask that the Court put Phase
5 II discovery off until after we deal with these
6 bellwethers.

7 THE COURT: The schedule that is at the top of
8 what Mr. Robinson provided here, do you have thoughts on
9 that?

10 MR. SAUL: I actually haven't had a chance to
11 review it yet.

12 MR. GOLDSER: Can we have the opportunity to
13 respond to it, please?

14 THE COURT: Yeah. If you can send a letter in as
15 soon as you can get something ready, that would be helpful.

16 MR. SAUL: Thank you, Your Honor.

17 THE COURT: We will get at this right away.
18 Okay. Anything else for today?

19 Okay. Very well. The Court will take the motion
20 to consolidate under advisement, and I do anticipate
21 issuing an order quite quickly, and I'm also anticipating
22 having the motion to compel order ready next week to be
23 filed, so you should be seeing that shortly.

24 Have a nice Thanksgiving, everybody.

25 MR. GOLDSER: Thank you, Your Honor.

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MR. DAMES: Thank you.

MR. SAUL: Thank you, Your Honor.

THE CLERK: All rise.

(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