



**P R O C E E D I N G S**

**VIA TELEPHONE CONFERENCE**

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THE COURT: Hello. How is everyone today?

MR. GOLDSER: Just fine, Your Honor. Good  
afternoon.

THE COURT: Who is on the phone? Who is on the  
conference today?

MR. GOLDSER: This is Ron Goldser.

MR. DAMES: It's John Dames. I have Bill Essig  
with me. Go ahead, Tracy.

MS. VAN STEENBURGH: Tracy Van Steenburgh for  
defendants.

THE COURT: Okay.

MR. ROBINSON: Bill Robinson and Bill Essig are  
also on the line, Your Honor.

THE COURT: Okay. Very well. Let me know if you  
can't hear me. I don't have great reception. I'm in  
Moorhead. But I seem to be in a spot that has given me at  
least a chance to call in.

Who is there, Mr. Dames or Ms. Van Steenburgh?

MR. DAMES: You broke up just at the point of your  
question, Your Honor. What is it that you asked?

THE COURT: I just asked to have someone summarize  
the situation. Mr. Dames, do you want to do that?

MR. DAMES: Sure.

1           MR. SAUL: This is Lewis Saul. I just joined.  
2 I'm sorry, Your Honor.

3           MR. DAMES: We have filed a motion to bar Cheryl  
4 Blume from testifying as an expert in the case because of  
5 the statements she made in her deposition that were  
6 contradicted by the statements made by Keith Altman at his  
7 deposition.

8           After that motion was filed, which I think was  
9 Monday, I received word yesterday and a copy of a motion for  
10 Rule 11 sanctions, which Ron plans to file against us. I  
11 mean, he is doing it pursuant to the procedure of sending us  
12 the motion first.

13           So right now we are at -- I mean, you know, we  
14 have a hearing date on the motion, and we have the date when  
15 Ron's brief is due to respond to our motion to exclude.

16           THE COURT: What is that date?

17           MR. DAMES: October 21, Your Honor.

18           MR. ROBINSON: That's the hearing Your Honor.

19           (Court reporter interrupted and asked for  
20 identification of the speaker.)

21           MR. ROBINSON: Bill Robinson for the defendants,  
22 Your Honor. The hearing date was set as October 21.

23           THE COURT: Okay. And that's on the motion to  
24 exclude?

25           MR. DAMES: Correct.

1           THE COURT: And so, Mr. Goldser, you haven't had a  
2 chance to respond to this yet, correct?

3           MR. GOLDSER: In part, Your Honor. We, as  
4 Mr. Dames correctly said, served yesterday a motion for Rule  
5 11 sanctions. Pursuant to the rule, I was not to file that  
6 with the Court, give you a courtesy copy or even notify you  
7 that that motion had been filed. So Mr. Dames has now let  
8 that cat out of the bag.

9           I have included in that motion many of the things  
10 that we would say in response to the motion to exclude, but  
11 it's not a complete response. It's only directed to the  
12 vexatious and distracting nature of the motion to exclude.

13           A couple of the things, though, that are important  
14 for you to know in that context, Your Honor; the motion the  
15 defense filed had two parts. The first part was a discovery  
16 part, a motion to compel the production of a database that  
17 came to light first when Keith Altman testified. And I will  
18 say to the Court, for defense counsel, and for the record  
19 that was the first time I became aware of the existence of  
20 this database.

21           During the course of that deposition -- and, by  
22 the way, defense counsel have never served a notice of  
23 taking Altman's deposition, but we appeared because we had  
24 agreed to the date. Had that notice been served, Altman  
25 would have brought the database with him and Mr. Winter, who

1 failed to serve the notice and was taking inquiry, could  
2 have asked Mr. Altman about the database and much of this  
3 problem could have been solved on the spot. But there was  
4 no notice, no request for the document, and no ability to do  
5 that.

6 During the course of the deposition, there was no  
7 request that plaintiff provide a copy of this database. The  
8 first that we knew of the actual request for the document  
9 for the database was in this motion to exclude, which is to  
10 say that as a motion to compel there was no Rule 37 meet and  
11 confer that occurred prior to the filing of this motion.

12 So we have all kinds of problems with the database  
13 provision issue procedurally. Despite that, having received  
14 this motion at 5:00 on Tuesday afternoon, at 11:00 a.m. this  
15 morning I provided to the defense counsel by e-mail a full  
16 copy of exactly what it is Altman provided to Blume that is  
17 in dispute.

18 So the first part of the defense motion, the  
19 motion to compel, is now moot, which leaves only on the  
20 Court's docket the question of alleged perjury. In force in  
21 the Rule 11 sanctions motion is an analysis of this perjury,  
22 and essentially several things; each of the statements that  
23 is alleged to be perjurious is, in fact, true. But even if  
24 it was not true, there is no way that these allegations of  
25 perjury arise to the level that is required for a showing of

1 perjury under the federal perjury statute.

2 So the other thing that Your Honor needs to know  
3 is that Cheryl Blume has testified against the  
4 pharmaceutical industry in times past, as I'm sure you have  
5 become aware in reviewing the *Daubert* motions that are on  
6 the agenda for next week. And the attacks on Cheryl Blume  
7 have escalated over time. They have become increasingly  
8 personal. They have become increasingly vitriolic. They  
9 have become increasingly extreme.

10 And what this motion is, it seems to me,  
11 particularly given the lack of following the procedural  
12 rules for a motion to compel, is not designed to further the  
13 purposes that are alleged because defendant never really  
14 wanted to have this database to begin with. They don't have  
15 any experts to interpret it. There is no expert on their  
16 side who has ever offered any opinions about anything  
17 statistical whatsoever. Why and how they could use it is  
18 beyond me.

19 This is a personal vendetta, not just by these  
20 defense counsel, Mr. Winter in particular, but by the entire  
21 pharmaceutical defense bar to impede and malign the  
22 character and credibility of Cheryl Blume. And it is with  
23 that in mind and with knowing that that's the purpose or  
24 believing that's the purpose I should say, I believe that  
25 this motion is entirely out of balance.

1           I think the Court looking at the motion, without  
 2 more, on its face can dismiss on a Rule 12(b)(6) type of  
 3 basis this motion because it doesn't come close to arising  
 4 to the level of perjury as is alleged. And I would very  
 5 much like to knock this motion out of the box immediately  
 6 because it has no place in this litigation.

7           As Your Honor knows, we have enjoyed a very good  
 8 relationship with Mr. Dames and Mr. Robinson. I'm sad that  
 9 it has been soured by the presence of Mr. Winter, who was  
 10 behind this motion. He came late to this litigation, and I  
 11 would prefer not to see him again, but that's not my choice.  
 12 I would like to renew and resume the relationship I have had  
 13 with John and Bill because it has been good, and cordial,  
 14 and civil albeit zealous. But I can't do that in the face  
 15 of this motion and with Mr. Winter and his presence in this  
 16 litigation.

17           We could get a response done fairly soon, but  
 18 there are legal issues that are being researched by others  
 19 at the present time. I would just as soon see the Court  
 20 order a motion right now to dismiss it, but I'm not sure you  
 21 are willing to do that, Your Honor.

22           MR. DAMES: Your Honor, apparently, Ron wanted to  
 23 argue the motion now. I thought your question was a  
 24 procedural one, but let me explain. Cheryl Blume asked  
 25 for -- this is what she denied at her deposition: She asked

1 Mr. Altman to prepare a comparative rate analysis between  
2 Levaquin and Cipro and Floxin. If you will remember, Cheryl  
3 Blume, her expert report was extended an additional six  
4 months in order for her to prepare her report. She had an  
5 ample opportunity to do so.

6 Mr. Altman prepares the comparative rate analysis  
7 for her and sends it to Cheryl Blume. At her deposition she  
8 denies that she had such a comparative rate analysis, and  
9 that she asked for such a comparative rate analysis, and  
10 that was it at her deposition. She even offered an  
11 explanation why she didn't ask for it, and that was because  
12 it had been done by the public citizen in the citizen's  
13 petition which, by the way, was in 2005.

14 Well, as it turns out when Mr. Altman was deposed  
15 -- and if you will remember, Your Honor, he was not produced  
16 voluntarily. We had an argument before the Court because  
17 the plaintiffs did not want to produce him and have us take  
18 his deposition. The Court granted us that right.

19 In his deposition, Mr. Altman made it clear and  
20 there was very specific testimony that he was asked by  
21 Cheryl Blume to do that analysis. He did it. He sent it to  
22 her.

23 He also noted that the information on the disk,  
24 which we apparently had, would have included that except it  
25 had to have been extracted. So we now have information that

1 was part of PTO 5 part of Cheryl Blume's notice was deleted  
2 from the material that was provided to us. And we also know  
3 now that Cheryl Blume had that information and decided not  
4 to produce it in her own deposition pursuant to the notice.

5 So we are confronted with a statement by Cheryl  
6 Blume which is emphatically not true. So that is the basis  
7 of the motion. We would never have discovered this had it  
8 not been for the Court's permitting us to take the  
9 deposition of Mr. Altman. It had been a barren record as to  
10 the comparative rate analysis done by Cheryl Blume.

11 There is another thing about this. As the Court  
12 is well aware, based on the argument on the motion for  
13 punitive damages, the lynchpin of plaintiff's case is the  
14 comparative risk of Levaquin versus Cipro. So that the  
15 analysis she requested was, in fact, the core of plaintiff's  
16 case, hardly something that you would forget, omit, or  
17 believe was unimportant.

18 Now, Cheryl Blume's opinion was carefully tailored  
19 to omit any reference to any comparative rate analysis as  
20 part of her opinion concerning the different toxicities of  
21 the drugs. She decided to rely on other information for  
22 that part of her opinion. Nonetheless, we have that data,  
23 that analysis that was done that was not produced.

24 And, frankly, when a witness does not tell you the  
25 truth about what was done, the most logical, the most direct

1 step, which we believe we did correctly, was to move for the  
2 exclusion of the witness. This is not a trivial issue.  
3 It's a significant issue.

4 And I don't want the Court to believe that somehow  
5 Mr. Winter, who is an impeccable lawyer, somehow Mr. Winter  
6 came in and ruffled everyone's feathers. I'm sorry if that  
7 -- that perception is incorrect. What has happened is that  
8 Cheryl Blume and the whole issue of Cheryl Blume has roiled  
9 the waters.

10 We did not in our motion make any allegations  
11 about anybody else, about any other facts, about any  
12 possible reasons why we came to this past. We have focused  
13 simply and directly upon Cheryl Blume's testimony and the  
14 clear error in that testimony.

15 And rather than bring it up for the first time at  
16 trial and try to surprise everybody, and unfortunately  
17 including the Court, we did so now so that the relief that  
18 we requested can be given, and the ground rules can be laid  
19 down, and the Court to have full notice of what has  
20 occurred.

21 THE COURT: Anything else, Mr. Goldser?

22 MR. GOLDSER: Yes, sir, Your Honor, several  
23 things. When the motion was first served, I immediately,  
24 within 15 minutes I think it was, of receipt offered not  
25 only to provide the missing database that had never been

1 before requested, but also to make Blume and Altman  
2 available for whatever further deposition that defense would  
3 like.

4 Now that the database has been produced, I can  
5 tell you, and I can tell defense counsel if they don't know  
6 already, that we would be happy to have this data included  
7 as part of this litigation because it supports plaintiff's  
8 claim. It is exactly as Mr. Dames said, that she did not  
9 rely on it. And the reason that she did not rely on it was  
10 she was previously advised by counsel in other litigation,  
11 prior litigation, that when there is published materials,  
12 such as the citizen's petition, that she should rely on that  
13 rather than doing her own number crunching. She did receive  
14 it from Keith Altman at some point in time, but between the  
15 time that she received (sic) it and the time -- I'm sorry,  
16 between the time that she asked for it, which she does as a  
17 matter of course and had forgotten she had done in this  
18 case, and the time she received it, she became aware of the  
19 public citizen material and put aside this data. And so  
20 that's why it doesn't appear in her report. That's why she  
21 didn't rely on it. That's why she has forgotten entirely  
22 about it.

23 And I think if you listen carefully to Mr. Dames'  
24 recitation and read carefully their brief, you can see that  
25 there is nothing untrue about anything that she has said.

1 And certainly if there has been any withholding, at the  
2 worst it's accidental. It certainly isn't intentional and  
3 designed to deceive. It would only be designed to deceive  
4 if this data were harmful to her position, but it is helpful  
5 to her position.

6 The remedy for all of this is hardly exclusion.  
7 The remedy is to provide the database and to follow through  
8 on discovery to whatever extent is appropriate as a result  
9 of the provision of the database.

10 Exclusion is an extreme remedy, particularly when  
11 perjury -- such a serious charge of perjury can't even be  
12 proven. It is a most extreme accusation. And unless it is  
13 rebutted and withdrawn, it will follow her for the rest of  
14 her career, and that's not fair or appropriate under these  
15 circumstances. That kind of charge is only designed to keep  
16 her from testifying not only in this case but from any other  
17 pharmaceutical case that she appears in. And that's not  
18 fair and that's not appropriate.

19 MR. SAUL: Your Honor, this is Lewis Saul  
20 speaking. Just briefly, what I suggested was that we  
21 provide the defendant -- I was not part of any of this,  
22 though. I just read the brief and talked with Ron. But my  
23 suggestion was we provide the database to the defendants,  
24 Cheryl Blume revises -- she amends her report and speaks to  
25 the issue, the defendants depose Dr. Blume, and then if they

1 wish to file their motions again after deposing her and  
2 after viewing the data, then they file it again. But in the  
3 interim period, this is devastating to her career and to the  
4 doctor, and it's inappropriate. I thought that what I  
5 suggested would be a good compromise.

6 THE COURT: Okay. Anyone else? It seems to me  
7 that we should address before it gets to briefs from the  
8 plaintiffs that -- we have the 21st?

9 MR. DAMES: Correct, Your Honor. I think we  
10 already have a time for the responsive briefs set.

11 THE COURT: Okay. Well, I think it probably makes  
12 sense then, does it not, to defer any question about  
13 Ms. Blume until that hearing, the motion at issue?

14 MR. DAMES: That would be our request.

15 MR. GOLDSER: Your Honor, you are talking about  
16 all the Daubert motions concerning Ms. Blume?

17 THE COURT: Yes.

18 MR. GOLDSER: I see these as completely different  
19 and unrelated issues. There are so many other issues that  
20 have traditional legitimacy, as opposed to a motion of this  
21 kind, that I don't see why we can't go forward with the  
22 first part of the Blume *Daubert* motion on the 6th as we had  
23 originally planned.

24 THE COURT: What's the other side think about  
25 that?

1 MR. DAMES: Your Honor, if Your Honor prefers to  
2 proceed that way, we won't object to that. It seems perhaps  
3 slightly less logical, but I think we can certainly do it  
4 that way.

5 THE COURT: Well, we've got plenty to deal with  
6 this week with all the Daubert motions that are on. I don't  
7 mind putting all of these off until the 21st so I can think  
8 about Ms. Blume entirely in one sitting here. I think we  
9 will put it off until the 21st. Or if for some reason we  
10 can get it on the calendar earlier, if briefing is done, we  
11 can move it up because we have the time in there. That is,  
12 obviously, a high priority. Let's leave it for the 21st.  
13 We'll get the briefs and we'll defer the Blume-related  
14 issues until that day. Okay?

15 MR. DAMES: Okay, Your Honor.

16 MR. GOLDSER: Sure, Your Honor.

17 THE COURT: Okay. Anything else for today?

18 MR. ROBINSON: I'm sorry, Your Honor. This is  
19 Bill Robinson. Just to clarify, so we all understand, it's  
20 only the Blume motions that are reserved until the 21st?  
21 All the other Daubert motions will go forward on the 6th?

22 THE COURT: Yes.

23 MR. ROBINSON: Thank you, Your Honor.

24 THE COURT: Okay. Very well. We will look  
25 forward to seeing everyone next week, and we will take up

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Ms. Blume on the 21st or earlier if it's possible.

MR. DAMES: Okay. Thank you.

THE COURT: Thank you. Goodbye.

(Telephone conference ended at 3:35 p.m.)

\* \* \*

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

Certified by: s/Debra Beauvais  
Debra Beauvais, RPR-CRR