

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: Levaquin Products)
Liability Litigation,) File No. 08-md-1943
) (JRT/AJB)
)
)
) Minneapolis, Minnesota
) October 14, 2010
) 4:50 P.M.
)

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**
LEWIS J. SAUL, ESQ.
KEVIN FITZGERALD, ESQ.

For the Defendants: **JOHN DAMES, ESQ.**
TRACY J. VAN STEENBURGH, ESQ.

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

KRISTINE MOUSSEAU, CRR-RPR
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1 4:50 P.M.

2 (In open court.)

3 THE COURT: You may be seated. Good afternoon.
4 I hope you enjoyed a little presentation of the tax trial.

5 MR. GOLDSER: Very exciting.

6 THE COURT: Well, we're putting in long hours to
7 make sure we're done on time so that we don't conflict with
8 our November 15th trial date.

9 MR. DAMES: You have just renewed our interest in
10 our case by just observing.

11 THE COURT: Okay. We have a number of, three
12 matters, I guess, we set for this afternoon. Do you have
13 an order you would prefer to move in?

14 MR. GOLDSER: Plaintiffs would prefer to just
15 continue on with the *Daubert* motions.

16 THE COURT: Okay.

17 MR. GOLDSER: Along the same line of thought that
18 we left off, so that would be the Holmes *Daubert*, and then
19 we figured we would take the Holmes IME next, and from my
20 perspective since I'm going to be doing the intent punitive
21 damages issue, what we got, of course, was a lovely e-mail
22 from Holly describing what she understood the issue to be,
23 but I would just as soon have the Court tell us what you're
24 thinking about and what you would like to have us address,
25 perhaps when we get to that one.

1 THE COURT: Yeah. I was just thinking. I was
2 not comfortable without hearing a little bit of argument on
3 it. I don't know that I want something in particular, but
4 we can get into it. I may have some questions.

5 I guess we can start with, do you want to start
6 with the motion to exclude Holmes' testimony?

7 MR. GOLDSER: Right. And Mr. Fitzgerald will do
8 that.

9 THE COURT: Very well.

10 MR. GOLDSER: As he is approaching the podium, I
11 do want to remark that I thank you for giving me the oath
12 for the Central District of Illinois. You did not ask me
13 the usual test exam question that this bench usually asks
14 for new admittees, but I want you to know that the answer
15 is proctor.

16 THE COURT: That was a question that was famously
17 piloted by Judge Devitt at some point in time in the past
18 and remarkably confusing to some attorneys along the way.

19 Okay. Let's proceed here so we can get done. I
20 have flights to catch tonight.

21 So, Mr. Fitzgerald?

22 MR. FITZGERALD: Good afternoon, Your Honor.
23 Kevin Fitzgerald for the plaintiffs. Your Honor, I do not
24 have a Power Point today for you, so I have to do it the
25 old-fashioned way. As the Court knows, the plaintiffs have

1 filed a motion to exclude the expert testimony of George
2 Holmes. Plaintiffs contend that the, Dr. Holmes' opinions
3 lack reliability because they were developed for the
4 purposes of litigation and without the degree of care
5 expected of experts in his field.

6 In addition, plaintiffs contend that Dr. Holmes's
7 forming opinions are inadmissible and should be excluded,
8 and those opinions are that Levaquin was the substantial
9 contributing factor to the injuries of each of the case
10 specific or each of the plaintiffs, the six bellwether
11 plaintiffs, that each bellwether plaintiff has recovered
12 fully from their injuries, that the corticosteroids in
13 those plaintiffs that used the concomitant corticosteroid
14 was the cause of that plaintiff's Achilles tendon injury,
15 and finally that there is no association between Achilles
16 tendon rupture and hip fracture.

17 We contend that each of those opinions is
18 inadmissible and should be excluded. As the Court is aware
19 under Rule 702, expert testimony must satisfy three broad
20 prerequisites: The evidence based on scientific knowledge
21 must be useful to the finder of fact, the proposed witness
22 must be qualified, and the proposed evidence must be
23 reliable or trustworthy.

24 The *Daubert* court and other courts have come up
25 with a list of criteria that the courts use to evaluate the

1 reliability of scientific evidence. I won't go through all
2 of those factors, but they do include whether the expert's
3 theory can be tested objectively, whether the testimony
4 concerns research that was conducted independently of the
5 litigation or was developed expressly for the purposes of
6 testifying, and finally whether the expert is being as
7 careful in their pay litigation consulting as they would be
8 in their professional work.

9 Before we turn to the opinions that plaintiffs
10 are seeking to have excluded, I think it's important for
11 the Court to know a little bit about who Dr. Holmes is and
12 who he isn't with respect to this litigation. Dr. Holmes
13 is an orthopedic surgeon. He practices at the Rush
14 University Medical Center in Chicago, Illinois.

15 He also spends a considerable amount of time
16 testifying. At his deposition, Dr. Holmes testified that
17 he had been, he testified in deposition over 100 times in
18 his career. He couldn't recall exactly how many times, but
19 10 to 15 times during 2010 alone.

20 THE COURT: You're just talking about depositions
21 and not in court?

22 MR. FITZGERALD: That was deposition testimony,
23 Your Honor, over 100 times. He wasn't sure, but it was
24 over 100 times.

25 THE COURT: And were they situations in which he

1 was a treating physician or an expert witness, or what?

2 What --

3 MR. FITZGERALD: Primarily an expert witness, and
4 if not all of those times an expert witness.

5 THE COURT: So someone brought in later
6 examination --

7 MR. FITZGERALD: Mainly workers' compensation
8 cases is what he testified.

9 THE COURT: Okay.

10 MR. FITZGERALD: Your Honor, as you know, Rule 26
11 requires the defendants to provide us with a complete list
12 of all of the cases that Dr. Holmes testified either at
13 deposition or trial in the last four years. Unfortunately
14 we still have not gotten that list.

15 When we were at the deposition, we did not get
16 provided that list. We weren't able to cross-examine him
17 on all of the cases that he has testified at in the last
18 four years. Unfortunately, we have requested that list
19 repeatedly from defense counsel.

20 Dr. Holmes is testifying in this case as a case
21 specific expert only. He was not designated as a general
22 causation expert. He did not prepare a general causation
23 expert report in this litigation. Those were due, as the
24 Court is aware, on April 30th. Dr. Holmes is not
25 testifying as a general causation expert for the

1 defendants.

2 I think that's important to know because if you
3 look at the defendants' response to our motion to exclude,
4 they indicate that Dr. Holmes intends to offer generic
5 testimony regarding the physiology of the Achilles tendon,
6 the etiology of Achilles tendon rupture, the diagnosis and
7 treatment of and the rehabilitation and recovery from
8 Achilles tendon rupture.

9 It is our position, Your Honor, that that general
10 causation testimony should not be admitted in this case,
11 that unless it specifically relates to Mr. Schedin's case
12 that that testimony should have been disclosed in a general
13 causation expert report, and that wasn't done. It's not
14 going to assist the jury in understanding the facts at
15 issue in the Schedin case.

16 Dr. Holmes testified at deposition that he is not
17 an expert in epidemiology, toxicology or pharmacology. He
18 has never prescribed Levaquin. He hasn't studied the
19 effects of Levaquin on tendons, and he is also not familiar
20 with the side effects of Levaquin.

21 One of the or one of the factors that the courts
22 use to assess the reliability of an expert is whether they
23 are being as careful in their pay litigation consulting as
24 they are in their professional work. I think it is crystal
25 clear from the totality of the circumstances when you look

1 at how Dr. Holmes prepared his reports, the amount of time
2 that he spent preparing his reports, what he reviewed, what
3 he didn't review prior to rendering the opinions in his
4 case specific expert reports, that it's clear that he did
5 not exercise sufficient care in preparing his reports, and
6 therefore we contend they're not reliable.

7 At his deposition, Dr. Holmes testified that he
8 had put up and through to the point in time when he signed
9 off his case specific expert reports 28 and a quarter
10 hours' worth of time in the case. Three and a quarter
11 hours were spent in conversations with counsel, leaving 25
12 hours that he, when we went specifically through all of his
13 time records, he had indicated that all that time, the 25
14 hours, was spent reviewing the six bellwether plaintiffs'
15 medical records.

16 After a break, he came back. He changed his
17 testimony. He indicated that he had also during that
18 25-hour period reviewed some studies. He wasn't able to
19 say which studies he had reviewed or in fact whether or not
20 he reviewed them before he rendered his opinions in the six
21 case specific expert reports.

22 THE COURT: There is no real standard anywhere,
23 is there, Mr. Fitzgerald, as to how many hours a doctor
24 such as Holmes would have to spend with a patient or a
25 patient's records to prepare?

1 MR. FITZGERALD: Your Honor, I'm not aware of a
2 standard as far as hours is concerned. I think when you
3 look at -- it's not just the amount of time that he has put
4 into reviewing the case. It's the things that he reviewed
5 outside of medical records, the studies that he allegedly
6 reviewed and he did not review.

7 THE COURT: How do you factor in the particular
8 experience of a doctor? Some doctors, I assume, might
9 spend 500 hours trying to figure something out before
10 testifying, and others might know all of that information
11 and might not have to spend as much time. That's what
12 makes that somewhat difficult to assess.

13 MR. FITZGERALD: Your Honor, I understand. When
14 you look at some of the opinions he has expressed in this
15 case, particularly the one that Levaquin is not capable of
16 causing tendon rupture on its own, he's not an
17 epidemiologist. He hasn't reviewed any studies and we feel
18 is not qualified to render that opinion.

19 I understand that, you know, his background is an
20 orthopedic surgeon. He may understand the Achilles tendon
21 issues, how tendons rupture, things of that nature.
22 However, it's a factor that can be considered, I guess,
23 Your Honor.

24 THE COURT: Okay.

25 MR. FITZGERALD: Moving on, if you actually read

1 the case specific expert reports that he prepared, section
2 D contains a list of documents that he reviewed in
3 preparing his report. They include Dr. Zizic's case
4 specific expert reports, Dr. Zizic's general causation
5 expert report, Dr. Zizic's deposition testimony, which was
6 over three days and 600 pages of deposition testimony.

7 All of those things, including actually writing
8 the expert reports themselves, that would all have to be
9 included in that 25-hour period that he spent up until the
10 case specific expert reports were signed on April 30th.
11 It's a remarkable amount of work to accomplish in that
12 25-hour period.

13 When you look at the, how Dr. Holmes testified
14 about what, the actual drafting of the reports, he couldn't
15 remember which report he drafted first. He couldn't
16 remember how much time he spent preparing those, the actual
17 drafting of the reports.

18 He wasn't able to tell us how long he spent
19 reviewing articles regarding fluoroquinolones and their
20 association with tendinopathies, and he was not able to
21 confirm, I think this is very telling, he was not able to
22 confirm that he reviewed any epidemiology studies regarding
23 fluoroquinolones and their association with tendinopathies
24 before he rendered his opinions in his case specific expert
25 reports.

1 As far as the content of those reports, they're
2 essentially verbatim of one another except for the opinion
3 section, which was the final section of each report. For
4 each plaintiff, Dr. Holmes testified that they suffered an
5 Achilles tendon rupture or tear. He also testified that
6 with the exception of Sharon Johnson, each of the
7 bellwether plaintiffs was over the age of 75 when they
8 suffered their Achilles tendon rupture or tear.

9 There are really four opinions that we feel
10 should be excluded, four opinions of Dr. Holmes that should
11 be excluded, the first of which is that Levaquin is not the
12 substantial contributing factor to each of the bellwether
13 plaintiffs' Achilles tendon injuries, and specifically
14 Mr. Schedin's Achilles tendon injury.

15 We think that that particular opinion is,
16 however, rests on two very flawed premises, the first of
17 which is Dr. Holmes's opinion that Levaquin on its own does
18 not cause Achilles tendon rupture. Dr. Holmes is not
19 qualified to render that opinion.

20 He admits that the medical literature supports an
21 association between fluoroquinolones and Achilles tendon
22 rupture. He was unable to confirm during his deposition
23 that he reviewed any epidemiological studies about
24 fluoroquinolones and Achilles tendinopathies before he
25 rendered his opinions in his case specific expert reports.

1 What does that mean? That means that aside from
2 his own personal observations in his clinical practice, he
3 had no basis for making that opinion that Levaquin on its
4 own does not cause Achilles tendon rupture.

5 THE COURT: His view from his own clinical
6 practice was that he hadn't seen an increase in Achilles
7 tendon rupture cases over the period of time that Levaquin
8 had been on the market. Isn't that where he got part of
9 his opinion?

10 MR. FITZGERALD: That is correct, Your Honor.
11 That was his opinion, and we contend that that opinion does
12 not, does not pass the *Daubert* standards. It's not
13 subject -- it can't be objectively tested, for one.

14 It contradicts the wealth of the information
15 regarding fluoroquinolones and Achilles tendon rupture in
16 the medical literature that do support that association,
17 and it also, he is also contradicted by the defense
18 epidemiology expert, Peter Layde. Dr. Layde has testified
19 or opined in this case that fluoroquinolones, including
20 Levaquin, are associated with tendinopathies.

21 THE COURT: Is his -- my recollection from
22 reading the brief is that he acknowledged that medical
23 literature is reporting some kind of a connection, but is
24 it true that he based his opinion on his own clinical
25 experience, or was there something else that he read and

1 based his opinion on?

2 MR. FITZGERALD: That Levaquin alone can cause --

3 THE COURT: Right.

4 MR. FITZGERALD: -- cannot cause tendon rupture?

5 THE COURT: Right.

6 MR. FITZGERALD: He testified he did not review
7 any epidemiology studies on the issue prior to rendering
8 that opinion. His case specific expert reports, they do,
9 as Your Honor noted, include his personal experience that
10 over the time that fluoroquinolones have been on the market
11 he has not himself observed a spike in Achilles tendon
12 ruptures or other issues with the Achilles tendon.

13 Your Honor, the second flawed premise upon which
14 Dr. Holmes bases his opinion that Levaquin is not the
15 substantial contributing factor to each of the bellwether
16 plaintiffs' Achilles tendon injuries is his flawed
17 understanding of what it actually means to be a substantial
18 contributing factor to an injury.

19 Dr. Holmes testified very clearly in his
20 deposition that in order to be a substantial contributing
21 factor, Levaquin must be capable of causing Achilles tendon
22 rupture on its own, in other words, to the exclusion of
23 other comorbidities, other risk factors for Achilles tendon
24 rupture.

25 That is not the standard here in Minnesota. As

1 the Court knows, you can have more than one substantial
2 contributing factor to an injury in Minnesota. We contend
3 that Dr. Holmes's opinion is contrary to law, and as the
4 Court is aware, in your memorandum opinion and order in
5 *Mark Anderson and Killer Whale Holdings LLC versus the*
6 *Dairy Farmers of America, Inc.*, that order was entered on
7 September 30th of this year. Expert opinions that are
8 contrary to law should be excluded.

9 One of the things that Dr. Holmes has not opined
10 in this case is the extent to which Levaquin contributed,
11 along with other risk factors, to causing each of the
12 plaintiffs' injuries. I think that is important for the
13 Court to know as well.

14 Then the next opinion that plaintiffs contend
15 should be excluded is Dr. Holmes's opinion that short term
16 oral corticosteroid use was the cause of Mr. Schedin's
17 Achilles tendon injury. That opinion, Your Honor, should
18 be excluded because there is no support in the medical
19 literature whatsoever that a two and a half day use, which
20 is how long Mr. Schedin used an oral corticosteroid before
21 the onset of his Achilles tendon pain, there is no support
22 for that opinion in the medical literature.

23 Dr. Holmes cites to three studies in his case
24 specific expert reports. Each of those three studies deal
25 or examine injected steroids, rather than oral

1 corticosteroids. He cites to those three studies for the
2 proposition that injected steroids, as well as systemic
3 steroids, can cause Achilles tendinopathies.

4 THE COURT: He's citing to studies here anyway,
5 isn't he?

6 MR. FITZGERALD: Excuse me?

7 THE COURT: He is citing to studies here?

8 MR. FITZGERALD: He did cite to three studies,
9 but each of those three studies examined injected
10 corticosteroids rather than oral corticosteroids, let alone
11 short term use of oral corticosteroids. Those three
12 studies did not examine short term use of oral
13 corticosteroids, and we contend that the medical literature
14 is void of any support that a two and a half day use of an
15 oral corticosteroid can cause an Achilles tendon rupture.

16 THE COURT: Presumably an experienced doctor
17 could be able to tell the difference in the injection
18 method and testify about that. That strikes me as
19 something perhaps more for cross-examination, but go ahead.

20 MR. FITZGERALD: Your Honor, those three studies
21 that Dr. Holmes cites to, we have been -- one of those
22 three studies has been produced to us. We have asked for
23 all three of those studies to be turned over. We still
24 have not gotten either the Gottlieb or the Mahler study
25 from the defendants.

1 In their response brief, the defendants point to
2 the Blanco study. Defense counsel points to the Blanco
3 study as support for oral corticosteroids over the short
4 term causing Achilles tendinopathies. That study was a
5 review of case reports and spontaneous adverse events.

6 The defense epidemiology expert, Peter Layde, has
7 testified that case reports are not sufficient to establish
8 a causal association. That is what defense counsel is
9 suggesting, that the Blanco study supports the notion that
10 oral corticosteroids can cause Achilles tendinopathies.

11 If you actually read the Blanco study, you will
12 note the findings of the authors, and they include that the
13 results from the published case reports on the median time
14 between initiating oral corticosteroid therapy and the
15 development of tendinopathy suggested that it may take
16 several years of oral corticosteroid exposure before there
17 is a clinical effect on tendons.

18 Your Honor, we contend that Dr. Holmes's opinions
19 that short term oral corticosteroid use are so lacking any
20 support in the medical literature that they're not going to
21 be assistant to the triers of fact in this case and that
22 they should be excluded.

23 The third opinion that we are seeking out
24 excluded is Dr. Holmes's opinion that Mr. Schedin recovered
25 as expected for a man of his age and physical health from

1 his Achilles tendon rupture in 2005. That particular
2 opinion is unsupported and inconsistent with Dr. Holmes's
3 own testimony in this case.

4 Dr. Holmes testified that -- first of all,
5 Dr. Holmes did not read Mr. Schedin's deposition transcript
6 prior to rendering his case specific expert report, and
7 Dr. Holmes then testified that if Mr. Schedin had testified
8 that he has continued to have pain or any discomfort or
9 disability in his Achilles tendons that he would take him
10 at his word, and that's exactly what happened in this case.

11 Mr. Schedin has testified that he continues to
12 have ongoing pain and discomfort in both Achilles tendons,
13 and he has testified at his deposition about the limitation
14 that he has in his activities and daily living and current
15 life as a result of those conditions.

16 The final opinion that we're seeking to have
17 excluded, Your Honor, is Dr. Holmes' opinion that, no,
18 there is no association in the medical literature between
19 Achilles tendon rupture and hip fractures. We haven't
20 alleged that Mr. Schedin suffered a hip tractor. He has
21 not suffered a hip fracture.

22 Our case specific and our general causation
23 expert, Dr. Zizic, has testified that specific facts of
24 Mr. Schedin's case, because he still has ongoing problems
25 in his Achilles tendon, because he still has discomfort

1 causing him to have issues walking, he is more susceptible
2 to falls, and as a result of that, he is more susceptible
3 or at increased risk of suffering a hip fracture.

4 The defendants, I think the take-home message
5 from the defendants' response is, because Dr. Holmes is the
6 only orthopedic surgeon testifying in this case that his
7 testimony is assuredly going to assist the triers of fact
8 in this case, and I think that is a veiled attempt to gloss
9 over the serious deficiencies in Dr. Holmes's reports.

10 His opinions were developed for the purposes of
11 litigation. They were not prepared with the appropriate
12 level of care as they should be as a professional in his
13 field. They apply a fundamentally mistaken standard of
14 law. They are contrary to his own testimony, and they are
15 also not supported by anything more than his own say so in
16 certain instances.

17 And therefore, Your Honor, we ask that the Court
18 exclude Dr. Holmes as testifying as an expert in this case.

19 THE COURT: Thank you, Mr. Fitzgerald.

20 MR. FITZGERALD: Thank you.

21 THE COURT: Mr. Dames?

22 MR. DAMES: Thank you, Your Honor. Your Honor, I
23 want to begin with the fact that Dr. Holmes is one of the
24 most eminently qualified of the physicians that have been
25 retained as an expert for either side in this case. He has

1 undergraduate education at Yale, medical school education
2 at Yale. He trained in orthopedic surgery at the Harvard
3 combined orthopedic program in Boston. He, as a faculty
4 member, he was at the University of California in Davis,
5 Thomas Jefferson University School of Medicine in
6 Philadelphia, and since 1992, as our brief points out, he
7 has been at Rush Medical School in Chicago.

8 He is the only witness in this case who will be
9 able to describe and testify about the treatment of tendon
10 ruptures with any authority. Dr. Zizic purports to try as
11 a rheumatologist to explain something about tendon ruptures
12 to be fair, but Dr. Zizic is the only person within the
13 specialty, and this is the topic of the entire litigation,
14 so it seems a little anomalous that he is being attacked as
15 underprepared.

16 The other thing is, he is the only expert witness
17 in this entire litigation that did an independent
18 epidemiological study, more than one, on the predisposing
19 causes of tendon rupture. These studies were published in
20 late 1990 and the other one in 2006 long before he was --
21 both in peer reviewed journals, and was long before he was
22 retained by any party that was relevant to this litigation.

23 That was one of his interests were the causes of
24 tendon rupture, and his opinion as to the role steroids
25 played in Mr. Schedin's tendon rupture and the other

1 possible factors that were responsible potentially for his
2 tendon rupture came from his own published work. It's the
3 steroid exposure is within his own papers.

4 He was there for the deposition and could have
5 been tested on the adequacy of the epidemiological studies
6 he performed, but they refer to a variety of factors,
7 including hypertension, gout, steroid exposure, both local
8 steroid injections and oral.

9 So he has a basis for his opinion. In fact, he's
10 the only one that has the direct evidence that would, that
11 comes from his own work published in a peer reviewed and
12 very reputable medical journal.

13 THE COURT: Does he have particular experience
14 with fluoroquinolones?

15 MR. DAMES: No, but he was well aware, in fact at
16 the time the issue arose, about tendon rupture. He was
17 not, tendon ruptures did not come in as novel knowledge to
18 him in the course of this litigation. He was aware of it,
19 and in fact that was part of the reason why he talked about
20 the fact that with the anthrax scare, he had anticipated or
21 expected to see more tendon issues as a result of the more
22 widespread use of fluoroquinolones that resulted from that.

23 And also, he was aware of that issue long enough
24 and paid enough attention to it to come to some conclusions
25 about the frequency that he would have expected and did not

1 see.

2 Now, his opinion concerning Mr. Schedin is based
3 on his own studies and research on other potential factors
4 for the cause of tendon rupture, but also his analysis of
5 the medical records, and his opinion comes from the fact
6 that Mr. Schedin who had a fluoroquinolone, he had
7 Levaquin, before the incident in question and did not
8 experience a tendon rupture.

9 When he added to it the steroid use the second
10 time around, he developed the tendon rupture, and that
11 formed part of the basis of Dr. Holmes's opinion that that
12 was, that was the different condition between the two
13 events was his use of a steroid.

14 So that coupled, as I said, with his independent
15 research and his, based upon his epidemiological studies
16 and his review of the medical literature and his clinical
17 training and then together with his review of Mr. Schedin's
18 record, he came to the conclusion he did that without the
19 steroid exposure, the Levaquin, without that, the Levaquin
20 use would not have been a cause of tendon rupture. It
21 would not have occurred in this case.

22 He does not deny that fluoroquinolone exposure is
23 a factor in the development of tendon ruptures, so I ought
24 to make that distinction. It is not that he denies the
25 possibility. I mean, even the experts who opine that

1 tendon ruptures are a cause, I mean, that Levaquin is a
2 cause of tendon ruptures, do not claim that tendon ruptures
3 occur, necessarily must be related to Levaquin if you have
4 the two events occurring together.

5 The published report of Van der Linden upon which
6 several of the experts will rely in this litigation talks
7 about only 4 to 6 percent can be attributed to the use of
8 the Levaquin. So even at best, Levaquin would be
9 responsible in a decided small minority of cases when you
10 are exposed to Levaquin and suffer a tendon rupture.

11 So the state of the medical knowledge, his own
12 experience and his own review of the medical records give
13 him ample justification to come to the opinions he did in
14 this case.

15 THE COURT: Well, is it true, Mr. Dames, that
16 part of what is his experience here, his own clinical
17 experience, is simply an absence of evidence?

18 MR. DAMES: Yes, to some extent I would agree
19 with you, Your Honor. The absence of evidence when one has
20 the ability to recognize the occurrence of the evidence. I
21 also have to point out that it does not reside solely in
22 that fact based on his generic judgment because of his own
23 studies on other predisposing factors, but I think in
24 essence you're correct.

25 THE COURT: But with respect to fluoroquinolones

1 and tendon rupture, his evidence is a lack of evidence
2 because he hasn't seen it in his practice?

3 MR. DAMES: Correct. Correct. In fact, there
4 will be a recurring theme in this litigation will be the
5 rarity of exposure of any one of the physicians who appear
6 to the occurrence of tendon rupture from the use of
7 fluoroquinolones.

8 Now, the other -- I ought to add here, Your
9 Honor, that -- it was not contained in the briefs, and it
10 was not part of the *Daubert* challenge, but the idea that
11 his generic testimony concerning tendons, you know, just
12 simply the structure of tendons and the causes that can
13 give rise to tendon issues are somehow invalid in this case
14 because he is a case specific expert, the utility of his
15 opinion.

16 I think, first of all, of course, that was not a
17 challenge that the plaintiffs made to his testimony until
18 today for the first time, but certainly the context of his
19 testimony about Mr. Schedin's condition and his disability
20 or lack thereof would require an explanation to the jury
21 about what are tendons, the nature of tendon disorders. A
22 sort of, a little bit of a background about tendons would I
23 think be the most useful thing the jury could possibly hear
24 in this case.

25 That's really all I have, Your Honor.

1 THE COURT: Just let me ask you one question.

2 MR. DAMES: Sure.

3 THE COURT: This relationship of tendon rupture
4 and hip fracture --

5 MR. DAMES: Oh.

6 THE COURT: -- that has been challenged --

7 MR. DAMES: I'm sorry. I didn't address that.

8 THE COURT: -- can you address that for a moment?

9 MR. DAMES: Sure. That came about because
10 Dr. Zizic, and I've forgotten whether it was his testimony
11 or his report, and I think it probably was his report,
12 referenced a study which he claimed supported the
13 proposition that the use of Levaquin and the tendon
14 ruptures that may arise would cause, would be a factor in
15 the development of hip fractures, hip issues, and he cited
16 an article.

17 We looked at the article. We asked Dr. Holmes
18 that question about whether or not there was any possible
19 relationship between the two and discovered, number one,
20 that the article didn't even mention the issue; and number
21 two, Dr. Holmes denied that there was any such
22 relationship.

23 And the only reason it arose was because of
24 Dr. Zizic's opinion and his reference to this journal
25 article that linked the two together, and it turned out

1 when I examined Dr. Zizic, he admitted there was no such
2 link in the article, and what he really meant was that
3 somehow you might have your balance affected if you had a
4 tendon issue. And although he had no authority for the
5 proposition that there was any link statistically in the
6 literature whatsoever between the two, he kind of backed
7 off from his opinion.

8 But that was what Dr. Holmes's opinion was used
9 for was if I had heard on the stand that there was, that
10 Dr. Zizic was going to claim that the use of Levaquin was
11 somehow going to be related to any hip issues, there wasn't
12 anything, any support in the literature for it, and the
13 very article Zizic relied upon for that proposition didn't
14 mention that.

15 I questioned him specifically, and I said did it
16 have anywhere here that tendon issues or tendon ruptures
17 had any relationship to the hip problems, and he said no,
18 but that's where they came from.

19 THE COURT: Okay. Do we want to address the
20 independent medical examination issue now?

21 Did you have something else, Mr. Fitzgerald?

22 MR. FITZGERALD: One quick point, Your Honor.

23 THE COURT: Okay. That's fine.

24 MR. GOLDSER: While he's approaching the podium,
25 I would like to call the Court's attention to plaintiffs'

1 reply in the Rodricks motion.

2 THE COURT: Rodricks. Okay.

3 MR. GOLDSER: Where we address the issue of the
4 absence of evidence being evidence of absence when a
5 defense, I believe it was defense experts who testified
6 about the absence of evidence, therefore that's evidence of
7 absence. Those experts were excluded, and that's in the
8 Rodricks reply.

9 MS. VAN STEENBURGH: I would beg to differ with
10 the holding in that case in terms of its applicability.

11 THE COURT: Okay.

12 MR. FITZGERALD: Just two quick points, Your
13 Honor.

14 THE COURT: Go ahead.

15 MR. FITZGERALD: Number one, Dr. Holmes has never
16 studied fluoroquinolones. The two studies that Mr. Dames
17 mentioned, they did not investigate short term oral
18 corticosteroid use. I believe only one of those two
19 studies actually looked at corticosteroids. I want to
20 speak, but I believe only one of the two studies looked at
21 corticosteroids.

22 And he was not able to draw any conclusions
23 regarding corticosteroids and any association with
24 tendinopathies, and so if the suggestion is being made that
25 those studies somehow support the notion that short term

1 use of a corticosteroid can cause an Achilles tendinopathy,
2 that's not the case.

3 THE COURT: Okay. Let's move on to the motion
4 for an independent medical exam.

5 MS. VAN STEENBURGH: Your Honor, Tracy
6 Van Steenburgh on behalf of the defendants. We are making
7 a motion to allow defendants to have Dr. Holmes do an IME
8 of Mr. Schedin. Essentially, Mr. Schedin complains that
9 his ability to perform normal daily activities and tasks
10 and the quality of his life has been compromised greatly by
11 virtue of the fact that he took this medication and
12 suffered an Achilles tendon rupture.

13 We would like Dr. Holmes to examine Mr. Schedin
14 for two reasons: To determine the true extent of his
15 physical limitations and also to determine what can be
16 attributed to his having experienced Achilles tendon
17 rupture.

18 You know, it's not, the purpose isn't to figure
19 out the cause. It's to do a medical examination to examine
20 what are the physical issues. Mr. Schedin claims he can't
21 walk well. He needs a leg brace. He has a foot that
22 slides out. He has atrophy in his leg from the leg brace,
23 has trouble going up and down stairs.

24 And a physical examination of Mr. Schedin would
25 assist Mr. Holmes -- Dr. Holmes and also assist the jury

1 with respect to what is truly going on. The plaintiffs
2 have objected to our request for an IME. One of the
3 reasons is they said that the current medical condition of
4 Mr. Schedin really isn't in controversy.

5 And I took a look at Dr. Holmes' deposition, and
6 what they say is that Dr. Holmes agrees that he will take
7 what Mr. Schedin says to be true. What Dr. Holmes said is,
8 if Mr. Schedin says he's in pain, he has no doubt about his
9 sincerity, and that isn't the issue. Certainly he would
10 like to talk to Mr. Schedin about his physical limitations
11 but also observe him and do an examination.

12 Mr. Schedin has suffered from a lot of orthopedic
13 conditions, and so Dr. Holmes as an expert in this area
14 could adequately take a look at the physical limitations
15 that Mr. Schedin may have.

16 THE COURT: Why wasn't this done earlier in the
17 process?

18 MS. VAN STEENBURGH: Well, good question. It was
19 raised earlier, and unfortunately it wasn't memorialized.
20 It is something that we raised with the plaintiffs' counsel
21 quite a few months ago, and although I have to say at this
22 point in time, in some ways it might be an opportune time
23 because it's close to trial and Mr. Schedin is claiming
24 that he still has all of these physical limitations.

25 And so doing an exam now close to trial would

1 actually be of assistance rather than having him have done
2 one many months ago.

3 THE COURT: Wouldn't it lead to a possible
4 request for a re-deposition of Dr. Holmes?

5 MS. VAN STEENBURGH: It could, and we certainly
6 would provide Dr. Holmes for an additional deposition if
7 that were necessary, and we would bring Dr. Holmes here to
8 do that.

9 MR. DAMES: I just wanted to add, Your Honor, I
10 think I mentioned it, but perhaps I didn't, but that would
11 certainly be contemplated by me in any event because I
12 think they have a right to that. They need to know I think
13 based on the medical examinations what he learned, how he
14 observed it, the typical things that would arise out of a
15 medical exam.

16 MS. VAN STEENBURGH: So we certainly would agree
17 to that. We also would agree, we would prefer obviously to
18 have Mr. Schedin travel to Chicago. However, Dr. Holmes
19 would be willing to come to Minneapolis and do the exam
20 here in Minneapolis such that it would not be an
21 inconvenience for Mr. Schedin.

22 We certainly could set that up as quickly as
23 possible. Mr. Schedin lives in the area, so it wouldn't be
24 that he would have to travel very far in order to do that,
25 so we think this could be done fairly quickly. We would

1 get Dr. Holmes here quite quickly. It wouldn't take very
2 long.

3 THE COURT: Explain what you meant by an
4 examination into what other conditions may have contributed
5 to his physical issues? What other conditions? Wasn't
6 that part of what you said was the purpose? I mean,
7 obviously one purpose would be to determine the extent of
8 any physical limitations that he has right now, but I think
9 you also mentioned a further look into potential causes for
10 his conditions?

11 MS. VAN STEENBURGH: I don't know if it's causes
12 for the conditions. The extent to which the limitations he
13 has are the result of Achilles tendon rupture versus some
14 other medical condition that he might have, and that
15 physical examination could reveal whether he has got some
16 other condition that may or may not be connected with the
17 Achilles tendon rupture that Mr. Schedin himself may or may
18 not know.

19 It isn't necessarily that there is some other
20 cause of his Achilles tendon rupture. It's whether his
21 physical limitations may have some other -- whether they're
22 all attributable to Achilles tendon rupture or not.

23 THE COURT: For purposes of his damages claim
24 primarily?

25 MS. VAN STEENBURGH: Right. That's all I have.

1 Thank you, Your Honor.

2 THE COURT: Thank you, Ms. Van Steenburgh.

3 Mr. Saul?

4 MR. SAUL: Good afternoon, Your Honor. May it
5 please the Court.

6 THE COURT: Good afternoon.

7 MR. SAUL: Lewis Saul on behalf of John Schedin.
8 Your Honor, first of all, there was never any request for
9 an IME before this present request. The request was three
10 months after, approximately, the close of discovery, and it
11 was after the defendants filed their expert report. It was
12 after our client was deposed.

13 It was, it was after the -- everything that has
14 occurred. It's laid out in our brief. This is about 15 or
15 16 months after the defendants had the plaintiff's medical
16 records. What the defendants want to do now is come in and
17 reopen the litigation. If we were to reopen the
18 litigation, the rule requires the defendant to file a
19 report.

20 It allows us, we would assume, it allows us to
21 take the deposition. It allows us to file, to file a
22 supplemental *Daubert* challenge. It allows us to file a
23 supplemental report by Dr. Zizic, and it simply could delay
24 the trial for three months, and it's unfair to ask for such
25 a thing at this late date. There is no excusable neglect.

1 There is no reason to do it now.

2 In addition, this is an extraordinary procedure.
3 It's not given as a matter of course. It's not a discovery
4 matter. It's a matter where a party has to ask the Court
5 for permission to conduct such a study because it is
6 intrusive. You're submitting a body to someone who you
7 didn't choose to submit your body to or your mind or
8 whatever to a physician, and it's an extraordinary
9 procedure.

10 In that procedure, the moving party has to tell
11 exactly what tests are going to be conducted for what
12 particular reason in what particular manner. They have
13 done none of those, so we can't really even address what is
14 going to be done here.

15 Secondly, you know, we haven't said this in the
16 brief, and I'm not sure of this, but I think it's correct.
17 Dr. Holmes can't come and practice medicine in the state of
18 Minnesota. That's an unauthorized practice of medicine.
19 He might be able to associate with someone here and conduct
20 a study, but surely he can't come and start practicing
21 medicine in the state.

22 If they wanted someone to conduct such an exam
23 and to be their expert witness, they should have chose
24 someone from here in Minnesota, and there is many competent
25 doctors that can do so.

1 Secondly, Dr. Holmes is not independent. He has
2 already expressed his opinion as to the extent of
3 Mr. Holmes's -- excuse me -- of Mr. Schedin's injuries, the
4 cause of Mr. Schedin's injuries. An independent medical
5 exam is to choose someone who is independent who can advise
6 the Court and basically acts as an officer of the Court to
7 advise the Court about the injuries that are suffered or
8 the allegations thereto.

9 There is a dispute between counsel. The Court
10 should appoint an independent person. What is happening
11 here is, they're trying to use the IME rule in order to get
12 a second bite at the apple. It's just simply
13 inappropriate. It's too late. It's wrong. He is not
14 independent. Defendants have talked about that the
15 condition is not in controversy, but it actually is not.

16 Dr. Holmes testified in his deposition
17 specifically if Mr. Schedin says he is injured, if he is
18 hurt, he can't do things that he could do before, I would
19 take him at his word as I would take any patient. So there
20 is no controversy as to what they're attempting to get an
21 independent medical exam for.

22 And I've already discussed the untimeliness of
23 it. Just to repeat, if we were to do this, this would take
24 months to go through this process, and this is just, this
25 is just a second bite of the apple. Clearly Dr. Holmes

1 missed some things that he wanted to say. He wants to do
2 this IME so he can come back and do a supplemental report
3 and get things in that he missed, things that he missed,
4 Your Honor, and this is another reason why he should be
5 excluded.

6 Mr. Schedin suffered two Achilles tendon
7 ruptures. It was bilateral. Dr. Holmes only caught one of
8 them. He only testified that there was one. He can't
9 testify even about the others, so what they are doing is
10 they are trying to bootstrap Dr. Holmes to come in here so
11 he can talk about the Achilles tendon rupture that he
12 missed.

13 With that, I rest unless you have questions.

14 THE COURT: Thank you.

15 MR. GOLDSER: As always, I have one comment. If
16 the Court is inclined to allow this, this becomes a
17 deposition by Dr. Holmes of John Schedin without a court
18 reporter and without Mr. Schedin being represented in the
19 room.

20 MS. VAN STEENBURGH: No. No. No. If you would
21 like to be there, we would have no objection at all. We
22 would have no objection.

23 MR. DAMES: I mean --

24 THE COURT: Go ahead.

25 MR. DAMES: I have done -- not I have done, but I

1 have had expert witnesses do IMEs before, and usually that
2 exact objection is raised because of the fact that, you
3 know, you don't want the physician asking questions of the
4 plaintiff without having representation there. Totally
5 agree. Sometimes there are terms concerning whether or not
6 it should be memorialized so that it can be played to the
7 jury, but this is a relatively straightforward examination.

8 The reason for it and the reason for it alone is
9 to give us the very latest word on the state of his present
10 medical condition and the extent of disability, if any, and
11 whether it relates to tendon rupture or other issues such
12 as hip issues. There are, there is an evaluation, frankly,
13 that would be good to do, and that really will not have
14 been done, including by unfortunately Mr. Schedin's own
15 personal physicians, as to his current physical condition.

16 THE COURT: Hasn't Dr. Holmes already opined on
17 these matters as part of his earlier examination of the
18 records?

19 MR. DAMES: He has given his opinion based on his
20 review of the medical records, yes.

21 THE COURT: And what about the issue about
22 whether he is truly independent as anticipated by the rule?

23 MR. DAMES: I have never, Your Honor, the only
24 alternative to having a party or retained expert do a
25 physical examination would be of course I would think the

1 Court to appoint an expert to do a physical examination. I
2 have never had, I have never been, I have never seen that
3 be a reason to bar a plaintiffs' expert who is otherwise
4 qualified to do the physical examination perform it.

5 THE COURT: Presumably there is information in
6 Dr., is it, Zizic, in his report that addresses these
7 matters. Wouldn't that be another way where this could be
8 addressed at trial, through cross-examination of Zizic?

9 MR. DAMES: Well, you know, I'm thinking back on
10 Dr. Zizic's, both his -- unlikely because Dr. Zizic is
11 essentially unqualified to give, to render such an opinion
12 on the physical condition of an individual arising out of
13 tendon rupture issues. I don't think -- it is a gap in the
14 case that there is --

15 On the plaintiffs' case, frankly, we would argue
16 that there isn't a person qualified to render such an
17 opinion as to the state of disability of Mr. Schedin. I
18 mean, it's a double-edged sword having him do the physical
19 examination obviously because such evidence will be
20 presented to the jury.

21 THE COURT: How is that evidence coming in,
22 Mr. Goldser, just through Mr. Schedin's testimony as to how
23 he currently operates or what?

24 MR. GOLDSER: I'm sorry? I missed the last
25 point. How Mr. Schedin's condition currently is?

1 THE COURT: His current condition and the alleged
2 continuing ailments that he suffers from.

3 MR. GOLDSER: Sure. Of course, he is going to
4 talk about those.

5 THE COURT: I mean, is that how the evidence is
6 coming in? Is there evidence coming in through a medical
7 doctor?

8 MR. GOLDSER: The evidence will come in through a
9 couple of different sources. One, certainly Mr. Schedin
10 will talk about how his current situation is. Dr. Zizic
11 has been able to review the medical records and can talk
12 about the condition that he found in the medical records
13 for Mr. Schedin as well, and so that will be up to the date
14 of the most current medical records that Dr. Zizic has
15 reviewed for purposes of his report.

16 I don't think that Dr. Smith or Dr. Beecher, his
17 regular physicians, are going to be asked about that, and
18 Dr. Silverman, the orthopedist who saw him, only had
19 information at the time of the tendon rupture. So I don't
20 think he will talk about current condition based on what I
21 know of his testimony.

22 THE COURT: Ms. Van Steenburgh, what about the
23 potential delays encompassed in this?

24 MS. VAN STEENBURGH: The what?

25 THE COURT: The delay possibility?

1 MS. VAN STEENBURGH: I was surprised to hear what
2 Mr. Saul said. Certainly we could set this up immediately
3 and have a report done immediately, and they can take his
4 deposition. I can't imagine that there would be much if
5 any delay to do this, but I haven't talked with Dr. Holmes
6 in terms of his timing with this.

7 MR. DAMES: Obviously we have talked with him
8 about the possibility of doing the IME, and he is certainly
9 aware of the trial date. I mean, we can do the physical
10 examination, my understanding is, very quickly. He also
11 understands he would have to be deposed again based on the
12 physical examination.

13 MS. VAN STEENBURGH: Well, get a report and be
14 deposed. The one other mention, Mr. Saul said something
15 about Dr. Holmes not practicing medicine here. You know,
16 we did this in Mirapex. We had the doctors come here, and
17 everybody agreed that nobody was going to challenge their
18 ability to do a physical exam while they were here.

19 They did them, and it went very smoothly and very
20 easily, and reports were done, and those were defense
21 experts who also do independent medical exams in those
22 cases, and it was, there were separate reports for each of
23 the -- the exam itself and then the causation issues as
24 well.

25 THE COURT: Mr. Saul, did you have anything else

1 or Mr. Goldser?

2 MR. SAUL: No, Your Honor.

3 MR. GOLDSER: I just want to reiterate the need
4 that Dr. Zizic would then, of course, have to go through
5 his own medical examination and report and presumably
6 follow-up deposition and the like because we would not, we
7 would be prejudiced if only Dr. Holmes had the opportunity
8 to do his IME.

9 And so part of the built-in delay is not just
10 one. We're talking about two.

11 MS. VAN STEENBURGH: Actually, we're surprised to
12 hear this. They could have gotten an orthopedic. They
13 could have had Dr. Zizic do whatever Dr. Zizic was going to
14 do. So I think this is a little bit of a red herring in
15 terms of what we really need to be done with respect to any
16 additional exam of Mr. Schedin.

17 MR. DAMES: I don't want to in any way be
18 impliedly arrogant about it, but I wouldn't need to take
19 the deposition of Dr. Zizic after the physical examination
20 he wanted to do and would frankly waive it, if that's the
21 concern would be of the time element based on his physical
22 exam. That's it.

23 THE COURT: Well, let me think about this
24 overnight. I will probably issue a written order in the
25 morning or tomorrow on this matter. How are we doing on

1 time? I don't have too much time left. We do have that
2 other motion.

3 Mr. Dames?

4 MR. DAMES: I'm perfectly willing, Your Honor, to
5 have this heard on the written submissions like I think we
6 originally intended to. It was your concern that we felt
7 we needed to address, and I think that's the real reason
8 why whatever you want to, you might want to focus on,
9 that's fine.

10 THE COURT: Do you have --

11 MR. GOLDSER: I have two comments to make.

12 THE COURT: Why don't you go ahead and make them,
13 and then Mr. Dames can respond if there is anything. I
14 mean, I was just, I was interested in a part of this, the
15 question here about how this interplayed with the punitive
16 damages issue.

17 So go ahead.

18 MR. GOLDSER: Okay. Well, first off, as to the
19 punitive damages issue, in my responsive e-mail to Holly
20 when you raised this question, I asked the Court to take
21 another look at the Power Point that we presented to you on
22 the punitive damages motion because you will see that
23 Dr. Wells' and Dr. Bisson's opinions as challenged in the
24 intent and motivation motion aren't mentioned as part of
25 the punitive damages motion.

1 They're not in the argument that was made, and I
2 got the transcript today and got a chance to look at it
3 before coming over here, and they weren't mentioned in open
4 court. But the thing I would like to emphasize on the
5 underlying motion about intent and motivation, there are
6 really two issues, two competing principles.

7 One is whether an expert is opining that he
8 believes that the defendant had a corporate state of mind.
9 Number one, neither Dr. Bisson nor Dr. Wells says that he
10 has an opinion that the defendant had such a state of mind,
11 and secondly in that context, you need to parse the
12 language that they're challenging, defendant is
13 challenging, very carefully because most of what they
14 challenge doesn't even come close to an opinion about
15 intent or state of mind.

16 But anything that might smack of that is not an
17 opinion that the expert holds about corporate state of mind
18 but really is a scientific opinion about standard of care,
19 which is the way -- which is the way Judge Davis phrases it
20 in the *Baycol* decision. He says that an expert can talk
21 about standard of care but cannot talk about his opinion
22 about state of mind. It's a good dichotomy. We don't talk
23 about state of mind. We do talk about standard of care.

24 All the opinions about standard of care, how the
25 studies were done improperly, how they fell well below the

1 standard of care, and the only statement that comes close
2 to a challenge is the one that Dr. Wells made where he
3 says, one can easily conclude that these studies were set
4 up to achieve a certain result. He doesn't offer his
5 opinion that he believes that.

6 What he says is that after you look at all the
7 possible mechanisms that this study could have been
8 correctly and all the way -- all the ways they fail, one
9 could easily conclude, reach that conclusion. It's the
10 only possible statement that comes anywhere close to their
11 motion.

12 That's all I have.

13 THE COURT: Anything else, Mr. Dames?

14 MR. DAMES: I mean, actually I think the
15 statements that Mr. Goldser made kind of are good examples
16 of the problem that is confronting this. I do think
17 experts can testify and criticize the specifics, for
18 example, this study did not do X, Y and Z, and had it done
19 X, Y and Z, it might have found this or found that, but
20 those are specific epidemiological criticisms.

21 To go beyond that to discuss the why and the
22 reasons why the study may have been done that way in order
23 to achieve a certain result are all clearly in the area
24 that should be barred because they are seeking to opine on
25 the corporate state of mind, the corporate intent, the

1 corporate motivation, topics for which the expert has no
2 particular background to testify about and for which the
3 jury will ultimately have to conclude based on its own,
4 hearing the evidence of the facts underlying it.

5 So I -- there is a particular concern about
6 having retained experts, of course, giving such opinion
7 testimony.

8 THE COURT: Anything else?

9 MR. GOLDSER: Mr. Saul suggests I wasn't entirely
10 clear about, on the punitive damages motion, and that is
11 that there are many grounds for the punitive damages
12 motion. The question of the motivation of the company is
13 only one small part of that, if at all, and there are many
14 other bases for it. So you don't even need to consider
15 this issue.

16 THE COURT: Okay. That's helpful. Thank you.
17 The Court will take the motions under advisement. We'll
18 address the motion for an independent medical exam very
19 quickly. The others as quickly as possible.

20 I think we are back next week on a Friday
21 morning, correct?

22 MS. VAN STEENBURGH: Correct.

23 MR. DAMES: I remember 7:30 was mentioned.

24 MR. GOLDSER: Your Honor, we mentioned last time
25 we have a very pressing discovery matter that is in

1 Mr. Robinson's bailiwick. We have addressed it with him.
2 We may need the Court's attention by phone before this
3 Friday even.

4 THE COURT: Okay.

5 MR. GOLDSER: A number of witnesses whose
6 documents weren't produced should have been produced, and
7 it has come to our attention in just recent times.

8 MR. DAMES: I dislike the little preface to that.
9 We strongly and strenuously disagree with it. The basis
10 for the discovery decisions the Court heard amply at the
11 time of the original omnibus discovery motion.

12 Mr. Robinson even today is laboring to explain so
13 that they can clarify their objections and the reasons why
14 we did what we did and their knowledge of those reasons at
15 the time. So we'll clarify that record, but there is no
16 need to preargue the motion.

17 THE COURT: Okay. We will take that up if
18 necessary whenever next week. Monday and Tuesday, I'm
19 pretty much out of commission in Washington, but I'm here
20 Wednesday through Friday, and you never know. I may
21 welcome a break from that trial that is going on right now.

22 Okay. Have a good flight, those of you who are
23 flying tonight.

24 MR. DAMES: Thank you, Your Honor.

25 THE COURT: And we will see you all in a week.

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MR. GOLDSER: 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