

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
) September 10, 2010
) 10:10 A.M.
)

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

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**
LEWIS J. SAUL, ESQ. (Via phone)
CAIA JOHNSON, ESQ.
TROY GIATRAS, ESQ.
ALYSSA DANIELS, ESQ. (Via phone)
JONATHAN MENCEL, ESQ. (Via phone)
MIKE MILLER, ESQ. (Via phone)
RICHARD SCHULTE, ESQ. (Via phone)
ERIC TERRY, ESQ. (Via phone)
TIMOTHY HUITT, ESQ. (Via phone)

For the Defendants: **JOHN DAMES, ESQ.**
WILLIAM H. ROBINSON, JR., ESQ.
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transcript produced by computer.

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10:10 A.M.

(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, this morning, note appearances first for
the plaintiffs and then the defendants and then those who
are on the phone.

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

THE COURT: Mr. Goldser.

MR. GIATRAS: Troy Giatras, Your Honor, on behalf
of the plaintiffs.

MS. JOHNSON: Caia Johnson on behalf of the
plaintiffs.

THE COURT: Good morning to all of you.

For the defense?

MR. DAMES: John Dames on behalf of the
defendants, Your Honor.

MR. ESSIG: Good morning, Your Honor. Bill
Essig.

MR. ROBINSON: Good morning, Your Honor. Bill
Robinson.

MS. VAN STEENBURGH: Hello. Tracy
Van Steenburgh.

1 THE COURT: Good morning to each of you.
2 And then on the telephone we have?
3 MR. SAUL: Good morning, Your Honor. Lewis Saul.
4 THE COURT: Anyone else?
5 MR. MENCEL: Jonathan Mencil, Your Honor.
6 THE COURT: You have to say that again.
7 MR. MENCEL: Jonathan Mencil.
8 THE COURT: Okay. Anyone else on the phone?
9 MS. DANIELS: Alyssa Daniels.
10 MR. TERRY: Eric Terry.
11 MR. SCHULTE: Richard Schulte.
12 THE COURT: Okay. We've got you, Mr. Schulte.
13 We're trying to adjust the sound here so we can get each of
14 you. Why don't you each run through it again so we make
15 sure we have you?
16 MR. SAUL: Yes, Your Honor. Lewis Saul, good
17 morning.
18 THE COURT: Good morning, Mr. Saul.
19 MR. TERRY: Eric Terry. Good morning, Your
20 Honor.
21 THE CLERK: Can you spell your last name?
22 MR. TERRY: T, as in Tom, e-r-r-y.
23 THE CLERK: And it was Eric?
24 MR. TERRY: Yes, ma'am.
25 MR. MILLER: Mike Miller.

1 THE COURT: Okay.

2 MR. HUITT: Tim Huitt.

3 THE COURT: Okay. And, Mr. Schulte, we got you.
4 Anybody else?

5 MR. SCHULTE: Yeah. Richard Schulte.

6 THE COURT: Yeah. Anyone else? Okay. Very
7 well. Let's begin with the agenda.

8 Mr. Goldser, good morning.

9 MR. GOLDSER: Good morning, Your Honor. Always
10 happy to appear and bring you up-to-date on what has been
11 going on. We are, and have been as always, quite busy.

12 Mr. Saul particularly wanted to send his regrets
13 about appearing personally. This is the Jewish holiday,
14 and he cannot travel today. That is why he is appearing by
15 phone.

16 We start off as always with the number of cases
17 pending and anticipated both in this court and in state
18 courts, and I always defer to Mr. Dames on that subject.

19 THE COURT: Very well.

20 Mr. Dames?

21 MR. DAMES: Your Honor, thank you. Your Honor,
22 there are now 798 cases in the MDL. 21 are being
23 transferred, though, so it's still in the process. And in
24 New Jersey, there are 903 served cases, and in other state
25 court cases, we have 29. There is one in California, one

1 in South Carolina, one in New York, 24 cases in Illinois,
2 but they're multiple.

3 And we have discussed this in the past, there are
4 multiple plaintiffs, and one in Mississippi. So 29 cases,
5 and actually with the 24 in Illinois, there are a
6 substantial number of plaintiffs joined in those cases.

7 THE COURT: Okay. Very well. Thank you.

8 MR. GOLDSER: Your Honor, I think it might be
9 useful to understand how many total plaintiffs there are in
10 each of the jurisdictions.

11 Do you have that information?

12 MR. DAMES: Not off the top of -- don't hold me
13 on this, but there are roughly an additional, there are
14 several hundred cases, frankly, that come out of Illinois,
15 plaintiffs that have been joined. They're in the hundreds.
16 Some of them have as many as 80 or 90 plaintiffs in the
17 individual complaint joined.

18 THE COURT: Mm-hmm.

19 MR. ESSIG: Your Honor, I think we're roughly at
20 about 2600 plaintiffs.

21 THE COURT: 2600?

22 MR. DAMES: Overall.

23 THE COURT: Overall? Okay. Great. Thank you.

24 MR. GOLDSER: Your Honor, I was given to believe
25 that the filings in Illinois totaled close to a thousand

1 plaintiffs all told. It may be a result that not all those
2 cases have been served or counted or what have you.

3 Is it about that many?

4 MR. ESSIG: Our counts always reflect the served
5 cases.

6 MR. GOLDSER: So there are, to my understanding,
7 a substantial additional number of cases that are out there
8 that may have been filed, not served, not caught up with
9 defense counsel yet. And as always, we expect that there
10 remain a fairly substantial number of cases that lawyers
11 have in their offices that have not been filed.

12 We have tried to get our arms around that. It
13 has been difficult to get that kind of feedback, but my
14 guess is that with 2600 plaintiffs all told so far, there
15 are easily 3,000 cases around the country, and it's
16 probably closer to four or five thousand.

17 I harken back to our experience when the Guidant
18 defibrillator case settled, we had estimated that there
19 were 4,000 cases around the country with this kind of
20 estimate that I just described, and ultimately 8,000 claims
21 came forward in the settlement. So there are usually a lot
22 lurking out there in the woodworks.

23 I don't know that we are as big as 8,000, but I'm
24 quite confident that there are at least 3,000, so that's
25 probably our frame of reference.

1 THE COURT: Okay.

2 MR. GOLDSER: In terms of, in terms of status, I
3 am not aware of anything in particular going on in the
4 Illinois courts. Mr. Carey hasn't told me that there have
5 been any breaking developments.

6 In New Jersey, there is now a discovery deadline
7 for the bellwether cases of November 15th. Depositions are
8 starting of case specific plaintiffs, doctors. Those are
9 going forward. There hasn't been, to my knowledge, any
10 narrowing down of the eight bellwether cases in New Jersey
11 yet.

12 Four reside in New York. Four reside in New
13 Jersey.

14 THE COURT: And their first trial is now pushed
15 back a bit?

16 MR. GOLDSER: That appears to be so, yes.

17 MR. DAMES: April 4, Your Honor.

18 THE COURT: April 4, okay.

19 MR. GOLDSER: So that's the status, as I
20 understand it, in the other locations, particularly in New
21 Jersey. There is another status conference coming up. I'm
22 not clear, but I don't believe that New Jersey has yet
23 taken any liability depositions on their own. They have
24 participated with us in several.

25 I'm not aware that they have taken any on their

1 own yet. They have got a number that are pending, but none
2 have happened.

3 THE COURT: Okay.

4 MR. GOLDSER: The next topic on the agenda is the
5 list of motions. The first item on the agenda is the
6 privilege log. Your Honor has under advisement a PO from
7 Magistrate Judge Boylan with regard to several documents,
8 so that one is on your desk.

9 The motion to compel production of the Pascale
10 deposition transcript is ready for argument today, and
11 maybe I will pass on that for a second and just talk about
12 the third motion that is on the agenda. Plaintiffs of
13 course have filed their motion for, to amend the complaint
14 for punitive damages. We have made a demand to defendants
15 under I think it is pretrial order number two that the
16 confidentiality designation of all those documents should
17 be removed. That's the requirement of the order.

18 Defendant then is obligated to promptly make a
19 motion to preserve the confidentiality. The burden is
20 theirs to prove that confidentiality should exist on those
21 documents. We have agreed on a filing date for that motion
22 of next Monday I believe, September 13th. I think what is
23 requested here is to work out a schedule for that motion in
24 terms of filing replies and hearing as well. I don't know
25 which you want to take up first.

1 THE COURT: Let's talk about that first. The
2 filing of the motion would be next Monday, did you say,
3 13th.

4 MS. VAN STEENBURGH: Monday, yes.

5 THE COURT: And go ahead.

6 MS. VAN STEENBURGH: We haven't worked out --
7 what we will need is a hearing date either here or if
8 you're going to refer it to Judge Boylan.

9 THE COURT: I would probably hear that here.
10 Response?

11 MR. GOLDSER: Well, we would like two weeks. Not
12 surprisingly, we're in a pretty busy time frame, and I hope
13 two weeks will suffice.

14 THE COURT: The 27th?

15 MR. GOLDSER: The 27th we ought to be able to get
16 something back.

17 THE COURT: Reply?

18 MS. VAN STEENBURGH: Right now we don't
19 anticipate a reply, but we would like to preserve that in
20 case there is something. We certainly could do that within
21 seven days.

22 THE COURT: Sure. In terms of hearing time, we
23 have two hearings coming up. Both are relatively full of
24 issues. Would you want a third hearing then on that
25 sometime in early October?

1 MR. GOLDSER: If you don't feel like you have
2 time to do that on October 6th, then we probably should.

3 THE COURT: Well, I understand there is at least
4 some narrowing of the issues on the 6th of October, the
5 *Daubert* issues, correct?

6 MR. GOLDSER: Some.

7 MS. VAN STEENBURGH: Yes, modestly.

8 THE COURT: Modestly.

9 MS. VAN STEENBURGH: I think the hearing on the
10 punitive damages motion is on the 28th. So the question
11 is, does it matter to you whether that is argued first or
12 whether these are related and we need to have this briefed
13 before you hear that argument. I'm not sure that we do,
14 but I just raise that as an issue.

15 MR. GOLDSER: I don't know that they're related.
16 I think we need to go forward with the motion to amend.
17 Regardless of the Court's ruling on the motion to amend,
18 the withdrawal of the confidentiality designation is
19 important to us, so they're independent.

20 THE COURT: Well, let's see. How much time do we
21 have on the 6th? Well, we have set aside three hours, if
22 necessary, for the *Daubert* hearings. If they're going to
23 take that long, we're going to be at the end of the
24 afternoon.

25 If they're not going to take a full three hours,

1 we could add this issue to that October 6th. What do you
2 think?

3 MR. GOLDSER: Why don't we tentatively do that
4 and see where we are on the 6th?

5 THE COURT: That's fine. We can always set up
6 another time if we need to.

7 MS. VAN STEENBURGH: Your Honor, I know at one
8 point we talked about the 7th being open for Dauberts. I
9 don't know if you would end up doing that the next day if
10 everyone is here, too, if that doesn't work out.

11 THE COURT: I've got a trial going on, plus that
12 morning is when we are now scheduled to interview the
13 finalists for the magistrate judge position, so that is
14 always relatively important.

15 MS. VAN STEENBURGH: We can wait and see how it
16 goes.

17 THE COURT: It might have to be a day the
18 following week. Okay.

19 MR. GOLDSER: Well, then let's return to the
20 motion to compel the production of the Pascale transcript.
21 This is a pretty straightforward motion.

22 THE COURT: This is just the transcript of his
23 deposition, correct?

24 MR. GOLDSER: Yes.

25 THE COURT: And taken over how many days, was it?

1 MR. GOLDSER: I don't think I know. I've never
2 seen the deposition transcript, but I can only imagine it's
3 one.

4 MR. ESSIG: I think it actually was two sessions,
5 Your Honor.

6 THE COURT: Two sessions? Okay. Go ahead.

7 MR. GOLDSER: Pretty straightforward motion, Your
8 Honor. There was a document that was never produced by
9 defendants that I found online in the litigation. It's --
10 it was used in the Carl DeStefanis deposition marked as
11 DeStefanis Exhibit 19. I have another copy of that handy
12 if that would be convenient for you.

13 Bottom line, it talks about sales and marketing
14 themes and mechanisms and emphases in this document. It
15 was discussed in the deposition, as I understand it, of
16 Pascale, and to the extent that Mr. Pascale has commented
17 on the subject matter of this document, I think it's
18 perfectly relevant.

19 I'm amused at the notion that defendant has
20 provided us with millions of pages of documents, many of
21 which are questionably relevant, and they choose to,
22 whether to exclude one more document. I suppose they have
23 to draw the line somewhere.

24 I had previously asked that they give you the
25 deposition to review and see if it's relevant or not

1 relevant. They have offered to do so in their brief. I
2 really don't see any substantive reply about the relevance
3 of this document and the deposition in their brief and why
4 it's not relevant.

5 They just say it simply isn't, and as with the
6 privilege log motion, I don't know what I don't know, so
7 it's hard for me to argue about why the deposition is
8 relevant except as it follows from this one document.

9 THE COURT: Mr. Essig?

10 MR. ESSIG: Thank you, Your Honor. Just briefly,
11 I guess maybe the way we might sum it up is, enough is
12 enough from the client's perspective as to why we didn't
13 think this was a relevant document. It's from an
14 employment case that arose in 2001.

15 This particular sales manager and the particular
16 representative who was the plaintiff in the case, the
17 plaintiffs here have made no showing that he has any
18 connection to any of the physicians who are prescribers in
19 this litigation, so from the standpoint of, I don't think
20 that a party automatically is required to produce documents
21 from all of their litigations when they're not related to
22 the subject matter at hand.

23 We have taken the position that the Pascale
24 deposition and what's in it is just not relevant in this
25 tendon rupture MDL, Your Honor, when it's a deposition

1 relating to an employment discrimination case from ten
2 years ago for a sales rep who didn't call on any of the
3 doctors in the MDL.

4 Thank you.

5 THE COURT: Thank you, Mr. Essig.

6 Anything else, Mr. Goldser?

7 MR. GOLDSER: Just what is likely an unnecessary
8 reminder that discovery has nothing to do with what is
9 admissible but what is likely to lead to admissible
10 evidence, and if we find that there are sales and marketing
11 policies that Mr. Pascale has commented on, that could
12 easily lead us to talking about those policies in
13 connection with marketing to the doctors at issue in these
14 cases.

15 THE COURT: Okay. Thank you, Mr. Goldser. I
16 have reviewed the briefs. I have not had the opportunity
17 to review the deposition itself. I don't really feel
18 that's necessary. I'm going to grant the motion to compel
19 and order production of a copy of the Pascale deposition.

20 I suppose, you know, we could take the time to
21 run through it and check it carefully to determine whether
22 indeed there is discussion in the deposition of policies
23 and procedures for sales staff marketing Levaquin. That
24 clearly is relevant if it's there.

25 If it's not there, then it's probably a waste of

1 time to do this, but let's go ahead and order its
2 production.

3 Mr. Essig?

4 MR. ESSIG: Your Honor, if I may, I might ask if
5 we could have the ability to redact information in the
6 deposition that, you know, is personal to the employment
7 discrimination plaintiff and is not related to sales
8 policies, et cetera.

9 THE COURT: That's fine.

10 MR. ESSIG: Thank you, Your Honor.

11 THE COURT: Okay. Mr. Goldser?

12 MR. GOLDSER: Item 4 on the agenda deals with the
13 September 28th hearing. Our understanding is that the
14 punitive damages motion and the motion for judgment on the
15 pleadings are the items to be heard at that hearing. On
16 the punitive damages motion, the motion has been filed.
17 The response has been filed. Plaintiffs' reply brief is in
18 process.

19 I think we have a small disagreement on its due
20 date. I wanted September 22nd, and Mr. Essig wants it on
21 September 21st. Maybe I can get it to him by noon on
22 September 22nd or something as a compromise, but that is
23 our only dispute.

24 Do you have a strong feeling one way or another?

25 MR. ESSIG: I didn't even realize it was a

1 dispute. Which day do you want?

2 MR. GOLDSER: I want the 22nd.

3 MR. ESSIG: That's fine.

4 MR. GOLDSER: If that's okay with the Court, of
5 course.

6 THE COURT: That sounds fine. In terms of
7 motions for judgment on the pleadings, I was checking the
8 docket. We have five, is that correct?

9 MR. GOLDSER: They're virtually identical motions
10 brought in all the cases, and I thought it was all six.

11 MS. VAN STEENBURGH: I believe it's all six.

12 THE COURT: Okay. I am only showing five here.

13 MS. VAN STEENBURGH: The plaintiffs are all
14 identical.

15 THE COURT: Okay.

16 MR. GOLDSER: Obviously the motion has been
17 brought. Our reply has been filed. Our response has been
18 filed. I think you still have a reply due.

19 MS. VAN STEENBURGH: Our reply is due the 15th of
20 September.

21 MR. GOLDSER: That's what I thought. Otherwise,
22 the pleadings are all in on that, and I know the Court has
23 been working diligently on those motions already. On
24 October 6th we have the *Daubert* motions. Plaintiffs'
25 *Daubert* motions are with regard to Dr. Seeger, Dr. Layde,

1 Dr. Rodricks, Dr. Zhanel. The Waymack motion I believe is
2 also going to be heard on the 6th.

3 Holmes is listed, but we have, that was going to
4 be, that was filed later, you'll recall, Your Honor. That
5 was just filed this past Tuesday.

6 THE COURT: The 8th.

7 MR. GOLDSER: And when we talked at the last
8 hearing, we talked about having a separate subsequent
9 hearing on Dr. Holmes because of the later briefing
10 schedule. Plaintiffs would like to stick to that at this
11 point in time.

12 The defendant has proposed that we move up the
13 briefing schedule on that and have it heard at the same
14 time. We would like to hold back and wait on that one if
15 we could, but otherwise the others, Seeger, Layde,
16 Rodricks, Zhanel and Waymack are all on the agenda for the
17 6th.

18 THE COURT: Okay. Seeger, Layde, Zhanel.

19 MR. GOLDSER: Rodricks.

20 THE COURT: Rodricks.

21 MR. GOLDSER: And Waymack.

22 THE COURT: And Waymack. Okay.

23 MR. GOLDSER: I don't know if you want to know a
24 little bit about what each of those witnesses is offered
25 for?

1 THE COURT: That's fine, no. I will read the
2 briefing on all of that. The Wells and Winkelman ones are
3 off now, is that correct?

4 MR. GOLDSER: Wells and Winkelman are off. Those
5 were defendants' motions. I haven't covered those yet, but
6 those are going to be off.

7 THE COURT: Okay.

8 MR. GOLDSER: On the defendants' motions also to
9 be heard that day, Smith, Zizic, the combination motion on
10 experts talking about the corporate intent and motivation
11 and Blume, those will be heard. Wells and Winkelman are
12 off.

13 And, Tracy, I'm sorry. I didn't look at your
14 proposed order, but the stipulation is simple. On Wells
15 we're withdrawing paragraph 34 of his original report.
16 That's all. Winkelman, we're withdrawing him for use in
17 the Schedin case, but he will be available for later cases.

18 MS. VAN STEENBURGH: We had prepared a
19 combination, started with PTO 10 where indicated withdrawal
20 for those purposes. Once, if you agree and the Court
21 approves and signs it, what we will do is do a notice of
22 withdrawal of those two motions.

23 THE COURT: Okay.

24 MR. GOLDSER: I just need to take one quick look
25 at the proposed order. That's one of the things that

1 escaped my attention this week. I'm sure it's fine.

2 MS. VAN STEENBURGH: I'm sure.

3 THE COURT: Do you want to set a date for Holmes
4 and for any -- go ahead, Mr. Dames.

5 MR. DAMES: Could I just address that a minute,
6 Your Honor? We offered to shorten up our time to respond
7 in order to be able to get to the hearing date with the
8 other *Daubert* motions. We thought that was more important
9 that we hear them all together rather than separate them
10 out.

11 THE COURT: It would be preferable if we can do
12 that. What's the briefing issue here? It was filed on the
13 8th of September.

14 MR. DAMES: The new dates that we proposed to
15 plaintiffs, Mr. Essig?

16 MR. ESSIG: We would shorten our response time,
17 Your Honor, to two weeks. So we would file something on
18 the 22nd, presuming that then to get it to you in time
19 before the hearing. If the plaintiffs, you know, can file
20 on the 29th, that would be a week before the hearing, but
21 obviously we're not averse to it being a little later than
22 that if the Court would be willing to do that.

23 MR. SAUL: Your Honor, Lewis Saul. May I chime
24 in here at some point?

25 THE COURT: You may, Mr. Saul.

1 MR. SAUL: Your Honor, I guess I'm in charge of
2 the Holmes motion, and during the deposition of Dr. Holmes,
3 he was to bring certain documents, some of which were
4 epidemiological studies that he reviewed. The deposition
5 is still open. They have not produced these documents.

6 We filed our brief because of the briefing
7 schedule, but we still don't even have documents. There
8 will be a reply brief necessary. We may ask for some sort
9 of relief from the Court to continue the deposition before
10 having to reply, so I think that this is premature.

11 MR. DAMES: Your Honor, this is the first I've
12 heard of any epidemiological studies not being produced.
13 Dr. Holmes, frankly, is the author of several
14 epidemiological studies on the predisposing factors to the
15 development of tendon rupture. He is an orthopaedic
16 surgeon.

17 They have, of course, have his epidemiological
18 studies, the published reports of his studies. Nothing
19 else was asked about those. The deposition was not left
20 open for those purposes. What remains to be delivered --
21 and Mr. Saul and I have discussed this. This is Mr. Saul's
22 claim as to what remains to be delivered -- are the other
23 cases in which Dr. Holmes testified in.

24 He has produced the list of cases within the last
25 four years he has testified in. Now Mr. Saul would like to

1 have a list of all of the workers' comp proceedings that he
2 has testified in. I have explained to Mr. Saul that if
3 those records are accessible and can be delivered, we will
4 deliver them, but those are for purposes of determining --

5 That's sort of witness bias testimony and
6 impeachment on, have you testified always for plaintiffs or
7 defendants. It was never anything to do with Levaquin or
8 tendon ruptures related to fluoroquinolones. That was
9 where we had left it.

10 The deposition was not left open for those
11 purposes, and in fact, it was terminated, and Mr. Saul
12 terminated it early because we were then going to have
13 Dr. Holmes testify later as to the other plaintiffs. We
14 thought we would shorten it up, have him testify on
15 Mr. Schedin as the first case, and then Dr. Holmes will be
16 brought back to testify as to his opinion on the other
17 plaintiffs. That was the reason why it was cut off the way
18 it was.

19 MR. SAUL: May I briefly respond, Your Honor?

20 THE COURT: You may.

21 MR. SAUL: Dr. Holmes testified that this
22 particular Plaintiff Schedin and five other plaintiffs'
23 injuries were not caused by Levaquin but were caused by
24 corticosteroid use. The issue is, can short term
25 corticosteroid use cause tendon injury?

1 Dr. Holmes testified that based upon these
2 particular articles that they in fact can cause tendon
3 injuries. They were supposed to be produced, anything that
4 he relied upon for his opinion. We have asked for these
5 articles that he was replying upon. John -- Mr. Dames gave
6 me one of those articles or an abstract from one, and he
7 said that he was trying to get the other one.

8 So I think we have a miscommunication here.
9 Those are an integral part of Dr. Holmes's examination.

10 THE COURT: Mr. Goldser, did you have anything to
11 add on this?

12 MR. GOLDSER: No. Mr. Saul has been taking care
13 of this issue.

14 THE COURT: Okay. This is what we're going to
15 do: For today, I am going to add Dr. Holmes motion to the
16 October 6th hearing, and we will rely on the shortened
17 briefing schedule. If we still have a problem as of the
18 28th when we're here for a hearing, plaintiffs can request
19 a continuance of that motion at that point in time.

20 MR. DAMES: I will address Mr. Saul's concerns.
21 I appreciate what he said. There is a published article we
22 did get to him in its entirety. If there is another
23 article that he believes I have that he wants, I will get
24 it to him.

25 THE COURT: Okay.

1 MR. SAUL: Thanks.

2 THE COURT: Let's handle it that way. We can
3 return to the issue on the 28th if we still have a problem.

4 Go ahead, Mr. Goldser.

5 MR. GOLDSER: Paragraph 6 on the agenda addresses
6 the proposed trial order and trial schedule in the Schedin
7 matter. We have a proposed trial order. We had previously
8 sent it to the Court. Again, I have a copy with me for the
9 Court's convenience, if you would like one.

10 THE COURT: I have a copy. Holly has a copy. I
11 have a copy. I am going to make a minor change in the
12 trial schedule. We are going to start on Monday, November
13 15th, one week later. It has been set now.

14 I'm spending most of the week of the 8th hosting
15 all the members of the constitutional court in Kosovo, who
16 I have been working with who will be here for a brief study
17 tour of the United States, and I'm going to be with them.
18 They're also going to be here in Minnesota for a couple of
19 days at the end of the week, so that takes that week out.

20 But November 15th will be firm. The schedule is
21 cleared the next three weeks, although we do have a
22 Thanksgiving issue in the middle of that, but that's fine.
23 We will be able to handle that, so we will start firm
24 Monday the 15th at 9:00 a.m.

25 MR. GOLDSER: A lot of our schedule was built

1 around the idea of getting done before Thanksgiving, so
2 that may loosen up some of these issues. One of them, for
3 example, we spoke about this morning was the exhibit list.
4 We had originally proposed that that be exchanged on the
5 24th of September. We have decided to move that back to
6 October 1st.

7 THE COURT: Well, why don't you submit a new
8 proposed pretrial order with the new date? I see we have a
9 slight difference of opinion on trial time per side.

10 MR. GOLDSER: Right. I was going to go there in
11 a little bit. The notion of 66 hours was 11 trial days at
12 6 hours a day, and of course our question for you is
13 whether that is appropriate from the Court's perspective,
14 whether we can actually achieve six full hours of trial
15 testimony in a courtroom day or whether we need to change
16 that number and therefore probably change the total number
17 of days.

18 With Thanksgiving now being in the middle of the
19 trial, that may ease that question up some.

20 THE COURT: I think that, you know, there is
21 always things that come up, taking grand jury returns which
22 is sitting in the middle of this and those things like
23 that, but I think shooting for an average of six hours a
24 day is appropriate.

25 We may have a few days where we can get a little

1 extra in, and there may be a few that will be a little bit
2 less, but we're going to try to clear the calendar of
3 particularly of summary judgment motions and other motions,
4 civil motions that take additional time through that
5 period.

6 There may be some criminal things, but usually I
7 can handle them off hours or during the lunch hour. So I
8 think that six hours a day is reasonable to plan on. We
9 will look through the calendar and see if there is any
10 major conflict on any particular date, so we will have a
11 fairly detailed schedule prepared that everyone will know
12 the precise times of day each day.

13 MR. GOLDSER: Of course, that whole notion
14 assumes that the Court would like us to run on a trial
15 testimony clock, as is increasingly done in cases of this
16 kind, so that the time we spend on direct examination or
17 cross-examination counts against our total time, or whether
18 you just kind of say, we are going to have three weeks, get
19 it done, folks.

20 We proposed it as each side being on a clock so
21 that we are limited and we are efficient.

22 THE COURT: If both sides are agreeable to the
23 clock, I'm happy to do that. I have done that in a number
24 of cases. It works fairly well, and I think it does make
25 everyone a bit more efficient. Gives you a chance to think

1 about, do I really need to get into that particular area as
2 opposed to, well, I'm not sure, but let's do it anyway.

3 So I think that's a good idea. I think we should
4 try it as long as both sides are agreeable.

5 MR. DAMES: We don't object to that. I think
6 that was originally an idea we suggested to the Court, and
7 I would certainly like to have it applied. I would like to
8 have more than the two hours that Mr. Goldser envisioned
9 for us.

10 THE COURT: He's up from an hour and a half.

11 MR. GOLDSER: They have browbeaten me to get that
12 half an hour. That of course does beg the next question
13 which is, of course, how do you divide that 66? We have
14 the burden of proof. We think we ought to have more than
15 half of that time, and we're proposing a 38/28 split.

16 Defense wants to split it 50/50, which based on
17 the burden of proof I don't think is appropriate. I will
18 let them speak to.

19 MR. DAMES: I certainly don't think the burden of
20 proof applies to the allocation of time. When you try
21 cases, it's often very difficult and time consuming to
22 respond to charges and to clarify, and I think a 50/50
23 allocation is substantially fairer than anything favoring
24 plaintiffs.

25 THE COURT: Why don't you propose the new

1 pretrial order, and then I will make a decision on this at
2 that time. Get it filed.

3 MR. GOLDSER: We will probably propose it just as
4 it appears now, and we do have some additional blanks in
5 the order, like final pretrial conference. I don't know if
6 you want to decide on a date now or give that to us when we
7 propose the order, the time of trial days, what time we
8 start and things like that.

9 THE COURT: Well, typically I try to start at
10 9:00 a.m. That's the typical starting time. If I have to
11 take a plea or something, then we might start at 9:30, but
12 typical day would be nine until noon, and then probably
13 1:00 until 4:30 is what we should put in there.

14 That gives us with a break in the morning and
15 break in the afternoon, that gives us about six hours.
16 Typically, it's not a precise finish at 4:30. If we're
17 done with a witness at 4:20 or if we need 15 more minutes
18 to finish up a witness, that's when we would try to quit.

19 MR. GOLDSER: I think you were about to look and
20 see if you wanted to schedule the final pretrial.

21 THE COURT: Yeah. How far out would the parties
22 like that? A week or week and a half?

23 MR. GOLDSER: Week. You have your folks from
24 Kosovo --

25 THE COURT: I will be gone part of that week, so

1 let's look at the first week in November.

2 MR. DAMES: One of the issues might be, Your
3 Honor, as to when you will hear the motions in limine. If
4 that's the case, I would prefer to have a little bit more
5 time ahead of trial.

6 THE COURT: How many motions in limine are we
7 anticipating?

8 MR. GOLDSER: Really haven't thought about that
9 yet.

10 MR. DAMES: I don't want to expose Ron only. I
11 think we're in the same boat. I suspect being the first
12 case particularly, it should be --

13 THE COURT: It should be well in advance. Yeah.

14 MR. GOLDSER: If defendant proposes to file 250
15 exhibits, I'm sure we'll have 250 motions in limine.

16 THE COURT: Let's see. The first week in
17 November is probably the best. We are at least holding
18 some days to try to squeeze in a criminal trial. I'm not
19 sure whether that will go or not. It's scheduled to be in
20 Fergus Falls, but we're having some scheduling problems up
21 there, which may mean we need to move it here which will
22 give us more time available that week.

23 So perhaps, looks like Wednesday the 3rd would be
24 a good date. We could get an order out on motions in
25 limine in certainly a week or less, so that would give you

1 at least a number of days before trial to have those
2 available.

3 Does that sound like an appropriate schedule?

4 MR. GOLDSER: Sure.

5 THE COURT: Depending on how many. I mean, if
6 it's relatively few, we can probably handle it at the
7 hearing. Let's look at the 3rd of November at -- time
8 preference, morning or afternoon?

9 MR. GOLDSER: Early afternoon works best for
10 people traveling in.

11 THE COURT: Let's do two o'clock, then, on
12 Wednesday the 3rd. Okay?

13 MR. GOLDSER: There were several other things
14 about the pretrial order that I wanted to address. On
15 exhibit lists, we talked a little bit this morning about
16 trimming the exhibit list back, and I'm sure both sides are
17 trying to cut and cull through exhibits and determine what
18 really is relevant.

19 Nevertheless, it's really hard to cut it down to
20 that list of things that you really want to have on your
21 exhibit list. I don't know whether the Court has any
22 feelings about having an overinclusive or a really pared
23 down exhibit list. Of course, our tendency will be to be
24 overinclusive to make sure we have our bases covered.

25 On the other hand, if defendant files a list of

1 1,000 exhibits, I don't want to have the responsibility of
2 having to look through all 1,000 and decide which ones I
3 object to. So I am not quite sure where to go with that.

4 THE COURT: Do you have a view on that,
5 Mr. Dames?

6 MR. DAMES: You know, it's hard to determine
7 right now, Your Honor. We're not going to have a universe
8 of, I mean, we're not going to put all of our documents on
9 the exhibit list. In fact, I think we would probably have
10 a reasoned narrower approach to it.

11 We had proposed, however, some new dates for the
12 exhibit lists, and we thought October 8th to submit the
13 exhibit lists, with objections due on the 22nd, might
14 provide enough time to review what I think will be --

15 MR. GOLDSER: We resolved that. It's going to be
16 October 1st and 15th.

17 MR. DAMES: I'm sorry. October 1st and 15th.

18 MR. GOLDSER: And that's fine.

19 THE COURT: Generally speaking, I would prefer
20 that you pare it down to the extent that you can. If
21 something comes up that you have to respond to, a list, an
22 exhibit that was not on the list needs to be utilized, I
23 don't generally mind that. So therefore a pared down list
24 is better. I think you all will know the universe of
25 exhibits fairly well by trial date, so let me know which

1 ones are objected to and which are not. That's my
2 preference.

3 If you want to be overinclusive, I'm not going to
4 be upset about that.

5 MR. DAMES: I think that's going to work out just
6 fine, frankly, Your Honor.

7 MR. GOLDSER: In the context of what you just
8 said, that raises the second question for me, which is that
9 we have ongoing depositions probably up right to the time
10 of trial, and that will cause to be identified new exhibits
11 and also potentially means deposition designations after
12 the deadlines that are set forth here.

13 I would hope that with as immediate notice as we
14 can provide after discovering those that we're not going to
15 have our hands tied just by the deadlines that are set
16 forth in this order.

17 THE COURT: That's fine.

18 MS. VAN STEENBURGH: Your Honor, and this is what
19 I propose. To those that we can agree to, we will try to
20 do a joint exhibit list, and then we have separate ones,
21 and I think it will pare everything down a lot that way,
22 too.

23 THE COURT: That will be excellent.

24 MR. DAMES: Just one brief concern. There will
25 be depositions that will be occurring clearly throughout

1 the time, even perhaps during trial in New Jersey, which
2 will be perhaps cross noticed here in the federal
3 litigation. So I'm a little concerned about having
4 something pop up right on the eve of trial. I don't know
5 how to address it right now --

6 THE COURT: Mm-hmm.

7 MR. DAMES: -- frankly, but there ought to be
8 some cutoff so that we know the universe of things we will
9 be dealing with at trial, even though there will be other
10 depositions going forward.

11 THE COURT: You're worried about a deposition
12 after the first week of trial and all of a sudden something
13 comes up?

14 MR. DAMES: Yeah, this is maybe not the best
15 example, but we have one of our executives being produced
16 on November 3rd. Someone else will handle it now clearly.
17 There will be someone then I think in mid-November, so this
18 will be an issue that could occur.

19 There could be a rush with a document saying, we
20 just discovered this, and I'm a little concerned how that
21 might work out. I'll try to get together with Ron and
22 figure out a solution to that problem.

23 MR. GOLDSER: The answer is, take it as it comes.
24 If that issue arises, address it when it comes up. If the
25 document is important, we will argue strenuously about it.

1 If it is somewhat less important, we won't.

2 THE COURT: Okay. Well, it's wise to raise the
3 issue now, though.

4 MR. GOLDSER: The next item that I wanted to talk
5 about was voir dire, and quite honestly I don't remember
6 what Your Honor's preference was. You expressed it in our
7 last status conference, but I'm confident from our
8 perspective that counsel would like at least some
9 opportunity to engage in direct voir dire with the Members
10 of the Jury.

11 I can't remember if you said you do permit that
12 or you don't permit that.

13 THE COURT: My normal practice is that I do not.
14 Do you want to do a juror questionnaire in advance?

15 MR. GOLDSER: Yes. That's in the process. We
16 have that on the pretrial order. We will be submitting
17 that.

18 MS. VAN STEENBURGH: What we plan to do, Your
19 Honor, is exchange a jury questionnaire and try to reach as
20 many questions as possible jointly. Then we will submit to
21 you with competing proposals. You can decide what you want
22 to send out, and then if we could have those sent out
23 fairly in advance form and get those back, I think it will
24 cut down on the number of questions that we have to ask the
25 Members of the Jury.

1 THE COURT: My practice will be, I will ask all
2 the questions in open court. When I have someone at
3 side-bar, we will have a follow-up if it's necessary to
4 follow up at side-bar. Generally I will let lawyers ask
5 follow-up questions at side-bar with an individual witness,
6 but my general practice is that here in the courtroom, I
7 will ask all the questions after getting advice and consent
8 from both sides about questions I will ask.

9 MR. GOLDSER: Finally the last item in this
10 context, and perhaps I should have addressed it with my
11 defense colleagues first was, the plan for having a
12 corporate representative in court and available to the
13 extent that such a person must be called upon to testify to
14 lay foundation for documents or what have you, and I don't
15 know what their plan is to bring such a person or whether
16 we need to be sure to have all that done in advance.

17 MR. DAMES: First of all, I don't see the need,
18 and I think it's an odd request to have a representative to
19 then belatedly come in and explain the genuineness of
20 documents. I don't understand it. I don't intend to have
21 a corporate representative here at trial. I don't see the
22 need for it.

23 There has been ample time for discovery. We will
24 be bringing corporate witnesses to testify, certainly.

25 THE COURT: But your intent is to not have one

1 who sits here throughout the entire trial?

2 MR. DAMES: No.

3 THE COURT: That's fine.

4 MR. GOLDSER: That tells me what they're going to
5 do. Finally, the last item on the agenda is scheduling the
6 second bellwether trial date.

7 THE COURT: I think we had talked earlier about
8 sometime in the spring. With the New Jersey delay, that
9 probably -- let's hear the thinking of both sides, and then
10 we will talk about it.

11 MR. GOLDSER: Well, our trial will get done after
12 Thanksgiving. As I understand it from Holly this morning,
13 you have another trial going on right after the first of
14 the year. That's a six-week jury trial. That takes us to
15 mid-February.

16 As I had mentioned before, I have a long planned
17 trip in early March that will probably conflict with the
18 trial in this case if we scheduled for immediately after
19 your six-week trial, which gets us right to April in the
20 New Jersey trial. I don't see it as practical to get a
21 second trial done before New Jersey.

22 THE COURT: What is the New Jersey date?

23 MR. GOLDSER: April 4th.

24 THE COURT: April 4th.

25 MR. GOLDSER: As you know we will be asking the

1 Court to consolidate multiple cases for trial. If we want
2 to set a date, that may be one thing. Picking the actual
3 cases, I don't know that we can, will or should do that
4 until the conclusion of the Schedin case.

5 THE COURT: I agree with your last statement.
6 Do you have thoughts, Mr. Dames?

7 MR. DAMES: I do, Your Honor. I was going to
8 propose a February date now that we have a New Jersey date
9 of April. Again, I hate, and I think it would be
10 inappropriate for me to second guess what Judge Higbee will
11 ultimately do, but it would not be, of course, utterly
12 shocking that that New Jersey trial might be kicked a
13 couple of weeks.

14 I just think that it's possible to have our
15 second trial and not have that entire time period lie
16 fallow. I was also going to propose that Karkoska be the
17 second trial, and I do think that defendants should have
18 the opportunity to select the next case for trial.

19 We would then have before -- I wouldn't -- this
20 is a suggestion clearly, but it would be best to make a
21 determination on the shape of future trials after the
22 plaintiffs and the defendants each have had a trial
23 selection and a trial before Your Honor.

24 THE COURT: I see.

25 Mr. Goldser?

1 MR. GOLDSER: I don't think we're ready to talk
2 in detail at all about what the second trial should be,
3 which case it should be, how many cases there should be or
4 anything like that given that we are on the eve of the
5 first one and we have a lot to learn from this first one.

6 Two issues, when and which ones is very different
7 issues. We might be able to talk about when, but we're
8 nowhere close to being able to talk about which ones.

9 THE COURT: I agree. I think we should let this
10 simmer for a little bit, and it makes both sides'
11 proposals, of course, make some sense.

12 In terms of timing, when is your vacation,
13 Mr. Goldser?

14 MR. GOLDSER: I believe it's March 10th through
15 the 20th.

16 THE COURT: Mr. Dames and Mr. Robinson, will you
17 be involved in the New Jersey trial?

18 MR. DAMES: I will and I'm sure Mr. Robinson will
19 be as well.

20 MR. GOLDSER: Chances are good I will be heavily
21 involved in the New Jersey trial as well.

22 THE COURT: We will try to narrow down the timing
23 for the Insignia trial that we have scheduled. They're
24 saying four to six weeks. I can give them four weeks
25 straight in January, but if it goes to six, I have some

1 scheduling difficulties in early February. So let's keep
2 these issues on the front burner, and we will keep talking
3 about them at the next several status conferences and get
4 it figured out.

5 MR. GOLDSER: Okay. That concludes the agenda
6 for today. We have the next hearing on September 28th. I
7 don't know whether you need or want to schedule an
8 additional status conference with that and the October 6th
9 *Daubert* hearing.

10 THE COURT: I think that -- let's go ahead with
11 the 28th hearing, and if there is any updates we can talk
12 about them there briefly. If you can propose a brief
13 agenda, that would be fine for that day, and we can decide
14 if we need to have another one in mid-October. Okay?

15 MR. GOLDSER: I have nothing from my colleagues
16 present in the courtroom. I don't know if Mr. Saul has
17 anything he would like to add from the telephone.

18 THE COURT: Mr. Saul, anything else?

19 MR. SAUL: I have nothing further, Your Honor.

20 THE COURT: Anyone else on the phone have
21 anything they would like to raise?

22 Okay. Mr. Dames, do you have anything?

23 MR. DAMES: No, Your Honor.

24 THE COURT: Thank you all.

25 MR. GOLDSER: Thank you, Your Honor.

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THE COURT: We will be in recess, and we will see everyone on the 28th. The Court is in recess.

THE CLERK: All rise.

* * *

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