

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
) March 16, 2011
) 2:10 P.M.
)

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE AND A JURY
(STATUS CONFERENCE VIA TELEPHONE)

APPEARANCES

For the Plaintiffs:

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DAVID CIALKOWSKI, ESQ.
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TINA OLSON, ESQ.
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WILLIAM BROSS, ESQ.
JOE JOHNSON, ESQ.

For the Defendants:

JOHN DAMES, ESQ.
JAMES IRWIN, ESQ.
SCOTT SMITH, ESQ.
TRACY J. VAN STEENBURGH, ESQ.

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2:10 P.M.

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(In chambers.)

THE COURT: Good afternoon, everyone. We have, I think we've got everyone's name down. Has anyone joined the call since Holly took the roll? Okay. Let's begin. This is multi district litigation number 08-1943, In Re: Levaquin Products Liability Litigation.

We have a status conference today, March 16th. Let's see.

Mr. Saul, are you leading us in the absence of Mr. Goldser?

MR. SAUL: Yes, I will, Your Honor.

THE COURT: Go right ahead.

MR. SAUL: The first item on the agenda, Your Honor, is the status of the New Jersey trial. As Your Honor knows, there is a consolidated trial schedule for April 11th to commence on April 11th in New Jersey. It appears that that date will not hold because Judge Higbee is in the middle of an Accutane trial.

The plaintiffs' case is still on, and it appears that it's going to continue past that time. Co-lead counsel in New Jersey is talking with co-lead counsel for defendants in New Jersey to try to come up with an agreeable date. Then they're going to submit something to the Court, but at this time we don't know what date that

1 will be.

2 So as of now, although there is officially a
3 trial scheduled for April 11th, we think that it won't go
4 forward on that date.

5 THE COURT: Does anyone know how long a delay it
6 might be?

7 MR. SAUL: I don't.

8 MR. DAMES: It could be extended, Your Honor.
9 This is John Dames. I'm sorry.

10 THE COURT: Yeah.

11 MR. DAMES: I just, I just received an e-mail a
12 short while ago in which some, literally the dates that are
13 being discussed between counsel can extend into the summer
14 and even beyond, so I don't know. This is totally informed
15 only based on a single e-mail.

16 So it could be entirely rumor, but it seems to me
17 to be a very flexible span of time in which this trial
18 could be reassigned, and of course, we will have to be
19 concerned about any possible conflicts with the MDL trial,
20 and I suspect we're just going to have to keep you
21 informed, Your Honor, as soon as we know with any greater
22 specificity when that New Jersey case might begin.

23 MR. SAUL: Your Honor, Lewis Saul again. My
24 understanding is that there is going to be a joint letter
25 submitted to the Court early next week suggesting dates, so

1 we probably will know something next week.

2 THE COURT: Okay. So this may impact our end of
3 May trial date?

4 MR. SAUL: Seems that way.

5 MS. VAN STEENBURGH: Well, Your Honor, this is
6 Tracy Van Steenburgh. I think our view is, at least for
7 now, we should keep that trial date on because if this
8 other one gets pushed off significantly, we could still
9 have this as a date because we could get a case ready to
10 try by then.

11 THE COURT: Well, just keep me posted on it, and
12 I would like to keep the date since we have it blocked off
13 here, and all of us have blocked it off for quite some
14 time, but just let me know what happens there. I'll try to
15 be in touch with Judge Higbee to see if there is anything
16 else that I can discover as well.

17 Okay. As to the plaintiff for the second
18 bellwether trial, there are some issues here?

19 MR. SAUL: Yes, Your Honor. Lewis Saul again.
20 We submitted to the Court, there is three, there is four
21 potential bellwethers. One is Sharon Johnson. The second
22 one is Richard Kirkes. The third is Eugene Martinka, and
23 the fourth is Calvin Christensen. I believe that the
24 defendants have agreed that Kirkes cannot go forward based
25 upon the documents that we have already submitted.

1 There are, the other two cases are Martinka and
2 Christensen, and we believe that we have submitted
3 appropriate and adequate documentation to the Court to
4 establish that they cannot appear at trial. I believe the
5 defendants would like to take some more discovery.

6 But plaintiffs' position is that based upon the
7 affidavits of the particular plaintiffs and the physicians
8 that there is really no need to take these depositions
9 because they can't, they basically can't participate in
10 their defense or in their prosecution of the case.

11 THE COURT: Let's see. Ms. Van Steenburgh, are
12 you addressing this?

13 MS. VAN STEENBURGH: Yes, I can address this,
14 Your Honor. We are taking what has been submitted relative
15 to Mr. Kirkes at face value, and it seems to be that there
16 is substantial reason to believe that he would not be
17 capable of assisting with his own defense.

18 I think that the submissions for both Martinka
19 and Christensen are equivocal on that issue, and we would
20 request that the Court allow us to do a little discovery to
21 establish that. We've talked to Mr. Saul, and he's aware
22 that with respect to those two gentlemen, we believe that
23 we need to determine whether in fact they are in a position
24 to appear at trial and effectively assist their counsel.

25 So we would ask the Court to allow us to take the

1 depositions of those two treating physicians and also of
2 Mr. Martinka and Mr. Christensen who each submitted
3 affidavits. We could get this accomplished within the next
4 two weeks and then pick one of those two cases as the next
5 bellwether case, so we don't think this would take very
6 long to accomplish.

7 THE COURT: Now by depositions, are you talking
8 about short depositions that are limited to their current
9 medical condition?

10 MS. VAN STEENBURGH: Yes, primarily. Yes,
11 looking at what their current medical condition is,
12 although there is some indication based upon the affidavits
13 as to the deterioration of the medical condition, so it's
14 not as of today but kind of what has happened since they
15 were deposed that would put them in a position where they
16 would not be able to participate in trial.

17 But, yes, it's limited to their medical condition
18 and their ability to assist their counsel.

19 MR. SAUL: Your Honor, Lewis Saul again. Again,
20 what defense counsel is asking is not only to take the
21 deposition of the physicians but to take the depositions of
22 the clients who can't, by affidavits, who can't really
23 appear, cannot drive and cannot attend the trial. They
24 want to take their depositions.

25 In addition you will see C under second

1 bellwether trial, they want to conduct IME. So what they
2 want to do, the next thing that they're going to ask for is
3 to not only take the deposition of these plaintiffs again,
4 80 some-year-old plaintiffs who are on oxygen and can't
5 drive, not only do that, not only take their deposition,
6 have them go to an IME and continue with these two cases in
7 which we just don't feel that -- honestly, the clients may
8 dismiss their cases if they're forced to be at trial with
9 these medical conditions.

10 And we don't think that that's fair, and we also
11 don't think it's fair to have these as bellwether
12 plaintiffs if what we're doing is trying to test the waters
13 here.

14 MS. VAN STEENBURGH: Your Honor, may I speak to
15 that?

16 THE COURT: You may. Go ahead.

17 MS. VAN STEENBURGH: I think that as to the issue
18 about deposing the plaintiffs, they put this into issue by
19 submitting their own affidavits. I believe the Court has
20 said that the plaintiffs' counsel needed to only provide
21 some kind of indication from the treating physician, but
22 they have gone ahead and put these affidavits in from the
23 plaintiffs, so I think that's fair.

24 With respect to the IME, it is not a request --
25 frankly, that got put on the agenda so that we were not

1 remiss in reminding the Court that we would be at some
2 point asking for an IME. We did not have that happen in
3 Schedin, and we think that that's important.

4 I'm not suggesting that we want to do that all at
5 the same time. I just didn't want that to get lost in the
6 shuffle, that there will be -- that we would have an
7 opportunity, and it was actually put on the agenda for
8 purposes of asking the Court whether we needed to make a
9 motion prior to making arrangements for that or whether we
10 could assume that an IME would occur.

11 So I don't want to mix those two up. This has
12 only to do with the, with the pursuing these and seeing if
13 these two plaintiffs can in fact participate, and, you
14 know, as to whether the plaintiffs dismiss or not, we
15 didn't pick these plaintiffs as plaintiffs. I mean, these,
16 the plaintiffs' attorneys, these are part of their
17 bellwether cases.

18 So we are using the pool that was made available,
19 and we all chose from this. So in terms of what happens
20 here forward, we don't have a lot of control. It is our
21 choice now to pick a bellwether case, and we have narrowed
22 it down, and we would like to accomplish this so we can get
23 the next one on the calendar.

24 THE COURT: Anything else, Mr. Saul?

25 MR. SAUL: Just one point. These cases were

1 filed five years ago for elderly folks, and it's no one's
2 fault that their medical condition has deteriorated.
3 Regarding the IME, the point is that not only is the person
4 going to have to participate at trial, not only do they
5 want to take the person's deposition, but they're going to
6 ask the Court to send the person to an IME.

7 We can see how this is going to be very, very
8 difficult to proceed with these plaintiffs as bellwethers.
9 There is another bellwether that is available. We didn't
10 chose the person. The person is actually under 60, which
11 makes the case much more difficult for us, as Your Honor
12 knows from the epi evidence at the last trial.

13 And we suggested the Court choose that one
14 plaintiff because they're available and for the next trial
15 that the defendants get their choice. We're not choosing
16 Johnson. It's just that that's the only one that is left.

17 MR. IRWIN: Your Honor, this is Jim Irwin. May I
18 speak to this point briefly?

19 THE COURT: You may.

20 MR. IRWIN: Thank you, sir. Looking at a couple,
21 I'm looking at the doctors' reports on Mr. Christensen and
22 on Mr. Martinka. One of them is Dr. Clark, who is the
23 doctor who provided the report on Mr. Christensen. Both he
24 and Dr. Knowles, who provided the report on Martinka,
25 anticipated that both of these individuals would have to

1 participate in a three-week trial away from home for that
2 entire period.

3 Dr. Knowles assumed that Mr. Martinka would have
4 to be in court for three to four weeks, anywhere from seven
5 to ten hours a day, and one can understand why the doctors
6 would want to be conservative about this, but I seem to
7 recall that when we had our last conference, I think Your
8 Honor observed that it might not be necessary for a
9 plaintiff who needs to assist counsel and needs to
10 understand the case to be there every day for a trial.

11 In many cases, in many cases that we have all
12 participated in, plaintiffs have not necessarily been in
13 court every single day. It would seem to me that the
14 reasonable test is whether these individuals can
15 effectively assist their counsel and understand the case,
16 and that does not necessarily mean that they have to be in
17 a three- or four-week trial seven or eight hours a day.

18 Those are my comments about the two doctors and
19 why I think it would be helpful to explore that with those
20 doctors, and then with, particularly with respect to
21 Mr. Christensen, Your Honor, when we look at his
22 declaration, the main comment in his declaration, the main
23 concern in his declaration relates to the fact that his
24 oxygen bottle only lasts five hours and that he would have
25 to get a larger oxygen bottle or have to have substitute

1 oxygen bottles.

2 And that does not sound like something that is
3 particularly something that could not be managed during a
4 trial. So we think those are appropriate things to
5 explore, and we would like the opportunity to do that so it
6 would preserve our opportunity to effectively have a
7 selection here.

8 MR. SAUL: Your Honor, if I might just respond to
9 those comments?

10 THE COURT: Go ahead.

11 MR. SAUL: Regarding doctor -- this is Lewis Saul
12 again -- Dr. Terrence Knowles regarding Martinka, you will
13 see the date of the report is February 3rd, 2011. The date
14 of Mr. Martinka's declaration is March 9th, and if you go
15 to paragraph 8, it says, On February 23rd, 2011, I fell in
16 the bathroom of my residence at Orchid Hills. I was taken
17 by ambulance to New Ulm Medical Center for treatment.

18 While at New Ulm Medical Center, I had a piece of
19 glass surgically removed from my foot. I remained as an
20 inpatient at New Ulm Medical Center until February 28th,
21 '11. On February 28th, '11 I was transferred to Divine
22 Providence Nursing Home in Sleepy Eye, Minnesota, for
23 ongoing therapy. I remain an inpatient at Divine
24 Providence Nursing Home at this time.

25 And they want to go to the nursing home and take

1 his deposition to see if he can appear at trial. It just
2 seems, it just doesn't seem right to me.

3 Regarding the other plaintiff, Mr. Christensen,
4 it's not just the oxygen. If you go to his declaration, he
5 says, We have not traveled overnight away from home for two
6 years because of our medical conditions. Our daughter
7 lives 200 miles away in Iowa, and we are not able to travel
8 to see her.

9 If he is telling the truth, the man cannot
10 travel. So it's not just the oxygen. He's an elderly man.
11 Both him and his wife are on oxygen. The case was filed
12 five years ago, and it's simply, I don't think it's fair to
13 put them up for another deposition and then an IME, in
14 addition. One is in a nursing home, and one can't drive
15 away from his home.

16 THE COURT: Anything else from the defendant?

17 MS. VAN STEENBURGH: No, Your Honor.

18 THE COURT: Okay. Well, we need to get this
19 resolved one way or the other. I mean, I think it's
20 appropriate to remove Mr. Kirkes from the group. I don't
21 think he's competent at this point in time. The others do
22 have pending trials. They have, they are, they were
23 selected as potential bellwether cases.

24 I think we just need to get to the bottom of the
25 question of whether they are able to be here for part of

1 the trial and assist the plaintiffs' counsel in presenting
2 the case or not, so I'm inclined to allow this limited
3 discovery. I would like to have it taken care of really
4 quickly, within the next two to three weeks if at all
5 possible so that we can zero in and identify who the next
6 plaintiff is going to be. I really don't want any more
7 delay on this.

8 So I'm inclined to permit the discovery as
9 outlined by Ms. Van Steenburgh.

10 MS. VAN STEENBURGH: We'll get it set up, Your
11 Honor.

12 THE COURT: It could be that it might be
13 appropriate to try to do the doctors first, and that may
14 answer the question, and then we may be, it may not be
15 necessary to depose the plaintiffs on these points, but
16 that's just a suggestion.

17 But I would like to get this done quickly so that
18 we can get resolved whether we're going to have one of the
19 two of them as the next plaintiff or Ms. Johnson. Okay?

20 MS. VAN STEENBURGH: Okay.

21 MR. SAUL: Yes, Your Honor.

22 THE COURT: At this point, I'm not going to
23 address the independent medical exam. Let's see who we've
24 got as the next plaintiff first. Okay?

25 MS. VAN STEENBURGH: Yes.

1 THE COURT: Okay. Post trial motions?

2 MR. SAUL: Why don't I turn that over to the
3 defendants, Your Honor, because I assume that they will be
4 filing some motions.

5 THE COURT: Sounds good.

6 MS. VAN STEENBURGH: This is Tracy
7 Van Steenburgh. The only reason this is on the agenda,
8 Your Honor, is that we had talked about this at the last
9 status conference before the Court had issued its order on
10 our Rule 50 motion, and we talked about whether we needed
11 to set a briefing schedule.

12 And we wanted to advise the Court that we need no
13 more time than is allowed under the rule for submitting our
14 motions, and that is our intent. So that was all we wanted
15 to inform the Court as to our need for a briefing schedule
16 is in accordance with the rules.

17 THE COURT: Do you know when the motions and
18 memoranda will be filed?

19 MS. VAN STEENBURGH: I think it's 28 days under
20 the rules, so within 28 days of the date of judgment which
21 was I think the 8th, so should be by the end of the month,
22 yeah, by the 30th or something.

23 THE COURT: Okay. Sounds good.

24 MS. VAN STEENBURGH: First week of April, yeah,
25 first week of April.

1 THE COURT: Okay. Anything else on post trial
2 motions?

3 MR. SAUL: No, Your Honor.

4 MS. VAN STEENBURGH: Well, the only question I
5 had, Your Honor, is at one point, and I only wanted to
6 raise the issue, the plaintiffs had said, well, we would
7 like to see what they had to say and then we'll let you
8 know how much time we need.

9 And we wanted to at least raise that issue that
10 we -- it seems a little unfair, I guess is what it is.
11 Well, we'll see what your briefs say and then we will think
12 about that for a while and then we'll decide how much we
13 need and we'll ask the Court, and this will go on for a
14 long period of time.

15 So I had asked Mr. Saul. I don't know. Maybe he
16 and Mr. Goldser haven't talked about this, but we would
17 like to see if we can get this nailed down now so that we
18 can anticipate what kind of briefing schedule we're going
19 to have on these. I don't know if Mr. Saul is prepared to
20 talk about that or not.

21 MR. SAUL: You know, Mr. Goldser is out of the
22 country, and honestly, this is the first I've heard about
23 it, so I don't have much to say.

24 THE COURT: Well, I will presume that the normal
25 briefing schedule will apply. If there is a good reason

1 for extending it, I will consider it, but I would like to
2 get these taken care of as quickly as possible, too.

3 Okay. Phase II case discovery?

4 MR. SAUL: Yes, Your Honor. I'm not sure the
5 number of plaintiffs, 20 some plaintiffs -- oh, no.
6 Actually, Kevin just showed me, 34 plaintiffs in Phase II
7 for possible discovery.

8 Your Honor may recall maybe two years ago, I'm
9 just estimating the date, that we raised the issue of
10 *Lexicon* and 1404(a) forum nonconvenience transfers, and we
11 asked the defendants if they were willing to waive *Lexicon*
12 and their 1404(a) transfer motions. They said no.

13 We don't know what their position is now, but if
14 they're going to file 1404(a) transfer motions, we would
15 urge the Court to require them to do so immediately so we
16 know whether or not those cases would be subject to Phase
17 II discovery.

18 We also need to know whether they're waiving
19 *Lexicon*. If they're not, then that very well may cut down
20 the pool to three Minnesota plaintiffs, but I think it's
21 really fair for the Court and us to know what their
22 position is there and if they're going to file 1404(a)
23 transfers that they should do so now before we decide on
24 Phase II discovery.

25 We also are still waiting. We got a note just

1 right before this hearing that they're producing 30 some
2 defendant fact sheets, but there is, I don't know, maybe
3 100 more outstanding or more, and they're not even current
4 on those that were required to be filled out, you know,
5 some of them months, some of them many months ago.

6 And so we feel it's a little bit premature to go
7 forward, but if we are to proceed and they aren't going to
8 waive *Lexicon* and/or 1404(a) transfers, we would ask the
9 Court to order them to file those if they intend to file
10 them.

11 MS. VAN STEENBURGH: Your Honor, I can address
12 this, if I might.

13 THE COURT: Go ahead.

14 MS. VAN STEENBURGH: Well, I think there are two
15 issues here, the Phase II discovery versus the DFS, defense
16 fact sheet issue while I'll address separately. With
17 respect to the Phase II, there are three Minnesota cases.
18 I believe there are some others that would be possibly
19 subject to 1404, and the remainder of the total of 35 would
20 be subject to remand.

21 A long time ago the Court entertained 1404
22 motions at the outset of this litigation and said that it
23 would not render an order now and that you wanted some
24 discovery to go forward.

25 Regardless of what had happened, we think that

1 discovery should go forward with respect to those. I mean
2 we want to make a determination as to whether transfer
3 really makes sense. In any case, I mean discovery has to
4 happen at some point. One deposition gets taken.

5 So we think it makes more sense to do discovery
6 with respect to those plaintiffs that might be subject to a
7 1404 transfer motion before having to make that motion. If
8 that isn't the case, then another option that it seems like
9 we could follow is to go ahead and do the discovery on the
10 three Minnesota plaintiffs that are in Phase II and then
11 march forward with the rest of the Minnesota plaintiffs
12 that are in Phase III because there are other Minnesota
13 filed, Minnesota resident plaintiffs who could go through,
14 we could do the discovery on those and have a greater pool
15 for bellwether cases.

16 So those would be the suggestions that we make.
17 We do not want to give up our right to consider a 1404
18 transfer notion, nor the right to a remand and give up on
19 *Lexicon* at this point in time. The only other thing I want
20 to say is with respect to the DFS's, the reason the e-mail
21 went out to Mr. Saul today, obviously we take our
22 obligations seriously, and the Court has said you need to
23 get moving on these.

24 We are going to be doing 40 to 50 a week, I
25 believe, and this is the first batch that is coming around

1 so that we could get caught up, and we're doing them in
2 order so that all the Phase II ones, if there are any left,
3 I think most of those are current, are done first and then
4 march through Phase III.

5 So that went out, and they're all going out
6 electronically, so he should have those shortly.

7 THE COURT: Mr. Saul, anything?

8 MR. SAUL: Yes, Your Honor. You know, we're all
9 quite busy preparing for this, both the New Jersey trial
10 and the Minnesota trial, and it seems to me to distract us
11 from that task at this point would not be in anyone's best
12 interests.

13 However, if discovery is to proceed and the
14 defendants refuse to waive *Lexicon* and 1404, then I think
15 that the suggestion of at least doing the three Minnesota
16 plaintiffs next I suppose that we wouldn't oppose that.

17 THE COURT: Is there any other parsing we can do
18 to reduce the 34? It sounds like it's probably 34 or 3.

19 MS. VAN STEENBURGH: Your Honor, this is Tracy
20 Van Steenburgh. I do think we are looking into, and we
21 have requested, plaintiffs to make a determination as to
22 whether those plaintiffs who either were -- there are some
23 who were deceased when the lawsuit was commenced or have
24 since passed away, whether they're going to maintain those.

25 I believe there are five or six of those, and

1 we're also looking into whether some of those Phase II
2 cases might be subject to dismissal on statute of
3 limitations grounds. So there might be fewer than, you
4 know, 35. There is a number in between, and we haven't
5 fully explored the statute of limitations issue, but we are
6 researching and taking a look at that issue.

7 But we may need to do discovery on some of those
8 to actually make that determination because depending on
9 the law that is involved, there could be a discovery issue
10 in terms of when the person discovered the injury or the
11 connection, so we would want to do discovery to see if we
12 could actually move those cases along as well.

13 MR. SAUL: Lewis Saul, Your Honor.

14 THE COURT: Yes.

15 MR. SAUL: If I might suggest, why don't we move
16 forward with the three Minnesota cases and then revisit it
17 at the next appropriate time, at another appropriate time?

18 THE COURT: Let's do it this way: Let's start
19 right away on the three Minnesota cases that are among the
20 34 and at our next status conference, if it's possible to
21 have it done by then, perhaps at least you can have a
22 preliminary report, Ms. Van Steenburgh, concerning plans
23 for the remaining 31, and that would include, if
24 preliminary discovery concerning these other matters are
25 necessary, which I would probably permit to be done right

1 away, or if we want to move some of them into full blown
2 discovery along with the three Minnesotans.

3 MS. VAN STEENBURGH: Okay.

4 THE COURT: Can we do it that way?

5 MS. VAN STEENBURGH: Sure. Just so you know,
6 Your Honor, I think there isn't going to be a whole lot
7 that has to be done with the three remaining Phase II
8 because we got started with those, and some of those are
9 halfway through discovery. So they shouldn't take very
10 long to get those three done.

11 THE COURT: Okay. Well, my goal would be at the
12 next status conference or the one after that, whenever we
13 can get to it, to just devise a plan for the remaining 31,
14 and the defendants' intentions regarding the 31 would be
15 helpful to know.

16 MS. VAN STEENBURGH: Okay.

17 MR. SAUL: Yes, Your Honor.

18 THE COURT: Okay. Good. Schedin trial exhibits,
19 what is the issue here?

20 MR. SAUL: Your Honor, we received or I think
21 Mr. Goldser's office received a call from the Court saying
22 that Your Honor wanted to address that issue, that we -- we
23 thought this came from the Court.

24 THE COURT: It was a request from Bloomberg, but
25 where did it come from?

1 MR. SAUL: I'm not sure I understand the
2 question. Where did the -- oh, we filed a motion to, you
3 know, to release your order regarding punitive damages, and
4 the defendants opposed it based upon that there were
5 certain documents that were stamped confidential that were
6 not entered into evidence at the trial, and the motion is
7 still pending.

8 THE COURT: I think this issue probably came from
9 Mr. Goldser. It was raised with us here at an e-mail
10 initially about which trial exhibits were publicly
11 available, and rather than answering it, the inquiry, I
12 thought we should discuss it at a telephone conference. So
13 I think that's where it's come from. Maybe we should --

14 MR. SAUL: Okay. David Cialkowski from
15 Mr. Goldser's office is here to address that issue.

16 THE COURT: Okay.

17 MR. CIALKOWSKI: Good afternoon, Your Honor.
18 Yeah, and in preparation for this call, the only thing that
19 I was able to look at was the briefing on the issue of the
20 Court, the Court's order in the punitive damages motion.

21 As I am unfamiliar with Bloomberg's request, but
22 it would seem to me that, you know, the trial exhibits are
23 no longer confidential due to the fact that the protective
24 order specifically says that the, the protective order
25 shall not apply to the use of confidential information at

1 the trial of this matter and that the Court will determine
2 appropriate measures to preserve the confidentiality of
3 confidential information used at the trial at the
4 appropriate time.

5 The defendants at trial didn't request any
6 specific measures to preserve that confidentiality at
7 trial, and the Court didn't provide any such measures. I
8 believe the courtroom was never sealed for the taking in of
9 any evidence or documents or witnesses. So we would argue
10 that at this point that confidentiality has expired for all
11 those exhibits introduced at trial, and those are now,
12 should be able to be viewed by the public.

13 And I'm also prepared to discuss the briefing on
14 the punitive damages order as well, if the Court wants
15 that.

16 THE COURT: Well, let's talk --

17 MR. SAUL: If I might add something here. Lewis
18 Saul again. There are simply four or eight documents that
19 weren't introduced at trial, and defendants' position was
20 your order should not be published because there is mention
21 of that, those documents in your order, and we fully
22 briefed that.

23 And I don't want to reiterate it unless the Court
24 wants us to, but the matter is fully briefed.

25 THE COURT: Well, as to the trial exhibits, from

1 the defendants' side?

2 MS. VAN STEENBURGH: Your Honor, this is Tracy
3 Van Steenburgh. I don't know if there are two things going
4 on here. We did not, we weren't a recipient of
5 Mr. Goldser's e-mail, so I'm not sure exactly what it is
6 that he was seeking.

7 You know, we did have the issue as to the release
8 of documents that were used to support plaintiffs' motion
9 to amend to add punitive damages, and at the January 28th
10 status conference the Court said, Mr. Goldser, you've got
11 to figure out what is in my order and what maybe was not
12 included, and each side briefed that and submitted that to
13 the Court.

14 I'm not prepared to argue that today. I haven't
15 re-reviewed that because I didn't know that would be the
16 subject of this issue, but we certainly can look at that.
17 I thought the question was whether the trial exhibits that
18 were admitted during the trial were going to be subject to
19 release to Bloomberg, and if that's the issue, you know, we
20 do have some issues with that because there are different
21 categories.

22 There are those that were introduced and admitted
23 through witnesses. There are those that were just on the
24 plaintiffs' witness list or on the Plaintiffs' exhibit list
25 that never were introduced and admitted, and then there is

1 a third category which were the three or four boxes of
2 documents that the plaintiffs sought to have admitted not
3 through any witness, and so they were never subject to any
4 foundational requirements under the rules of evidence, and
5 those came in.

6 So I don't know if that is the category of
7 documents we're talking about here with respect to
8 Bloomberg or if we're back talking about those documents
9 that were specific to the motion to add punitive damages as
10 part of the complaint.

11 MR. SAUL: Lewis Saul, Your Honor. You know,
12 this is Ron Goldser's issue, and I feel somewhat
13 uncomfortable entering into discussions about this in that
14 I'm not prepared to speak to it. Can we put this off?

15 THE COURT: Yeah. Why don't we wait until Ron is
16 back unless, Mr. Dames, you can contact him over in your
17 neighborhood over there.

18 MR. DAMES: He's probably close by, Your Honor.

19 MS. VAN STEENBURGH: He's on the camel, and John
20 is in the gondola.

21 MR. DAMES: I hate to always create these
22 humorous asides, but I have been enjoying Mr. Saul's
23 presentation so much that I remained silent.

24 MR. SAUL: Thank you, John.

25 THE COURT: We do have two separate issues here.

1 We did not tee up the punitive damages order issue for this
2 telephone conference. The other one was put on the agenda
3 simply because it was raised as an inquiry by Mr. Goldser.
4 I think he was just trying to confirm that trial exhibits
5 were public, and I said let's have a discussion on that
6 first.

7 So let's defer both of these issues until our
8 next telephone conference when Mr. Goldser is back. Okay?

9 MR. SAUL: Yes, Your Honor.

10 THE COURT: Okay. Anything else we should
11 discuss today?

12 MR. SAUL: Nothing from plaintiffs.

13 MS. VAN STEENBURGH: Nothing from the defense,
14 Your Honor.

15 THE COURT: Do we want to set up another time
16 right now? We probably should.

17 Mr. Dames, when are you back in the States?

18 MR. DAMES: I'm back in on the 21st, Your Honor.

19 THE COURT: Do we know about Mr. Goldser?

20 MR. SAUL: He is back next Tuesday.

21 MR. DAMES: I tried to exactly coincide with his
22 vacation.

23 THE COURT: Maybe we probably can get by with a
24 telephone conference on the next one unless, unless people
25 want to show up in person. I'm still, because of the

1 possibility of the New Jersey trial, I'm conscious about
2 not hauling everybody in here and taking extra time because
3 I know everyone is busy.

4 Maybe we should try to set up a time in three
5 weeks. Does that sound right? We might have the, the
6 additional discovery on the two plaintiffs done by then,
7 and we can discuss that issue.

8 MR. DAMES: Are you speaking of the first week of
9 April, Your Honor?

10 THE COURT: Yeah. We can do it that week or the
11 first part of the following week.

12 MR. SAUL: Your Honor, I will be out of the
13 country, although I'm not sure I'm needed, from probably
14 the 10th, if the trial doesn't go in New Jersey. You know
15 the trial is scheduled for the 11th. We don't think it
16 will go.

17 If it doesn't, I will be out of the country for
18 about a week. So I would prefer to do it on Friday the 8th
19 or before.

20 THE COURT: How about, I mean, what about
21 Wednesday the 6th? Is that a day we can do a telephone
22 conference?

23 MR. SAUL: Fine for plaintiffs.

24 MR. DAMES: Fine with me.

25 MR. IRWIN: It's good for Irwin.

1 MS. VAN STEENBURGH: Yeah.

2 THE COURT: Okay. Why don't we do that? Why
3 don't we do probably the same time on, two o'clock central
4 on the 6th of April. Let's set it for that. We can adjust
5 it if need be. Okay?

6 MS. VAN STEENBURGH: Okay.

7 THE COURT: Okay. Very good. Anything else for
8 today?

9 MS. VAN STEENBURGH: No, Your Honor.

10 MR. SAUL: No, Your Honor.

11 THE COURT: Okay. Thanks very much. We will
12 talk to you all soon.

13 MR. SAUL: Thank you.

14 MS. VAN STEENBURGH: Thank you.

15 THE COURT: Bye.

16 * * *

17 I, Kristine Mousseau, certify that the foregoing
18 is a correct transcript from the record of proceedings in
19 the above-entitled matter.

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23 Certified by: s/ Kristine Mousseau, CRR-RPR
24 Kristine Mousseau, CRR-RPR

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