

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)
In Re: Levaquin Products)
Liability Litigation,) File No. 08-md-1943
) (JRT/AJB)
)
)
) Minneapolis, Minnesota
) April 12, 2011
) 1:37 P.M.
) **In Chambers**

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

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**
LEWIS J. SAUL, ESQ.
DAVID CIALKOWSKI, ESQ.
KRISTIAN RASMUSSEN, ESQ.
ALYSSA DANIELS, ESQ.

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

Court Reporters: **KRISTINE MOUSSEAU, CRR-RPR**
1005 United States Courthouse
300 Fourth Street South
Minneapolis, Minnesota 55415
(612) 664-5106

Proceedings recorded by mechanical stenography;
transcript produced by computer.

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1:37 P.M.

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(In chambers via telephone)

THE COURT: Good afternoon, everyone. Everyone hear me okay?

MR. GOLDSER: Yes, we can today.

THE COURT: Okay. Good. Trying out this new phone system, so we will make sure it works, hopefully.

This is MDL Number 08-1943, In Re: Levaquin Products Liability Litigation.

Counsel, note appearances, first for the plaintiffs.

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

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

MR. CIALKOWSKI: David Cialkowski, Your Honor, for plaintiffs.

MR. RASMUSSEN: Kristian Rasmussen and Alyssa Daniels for plaintiffs.

THE COURT: Okay. For the defense?

MS. VAN STEENBURGH: Tracy Van Steenburgh, Your Honor. That's it.

THE COURT: Okay. Good. Good afternoon, everyone. Let's discuss the two issues that were reserved for discussion today on confidentiality. Who wants to

1 begin?

2 MR. GOLDSER: Your Honor, this is Ron Goldser.
3 I'm not sure whether you would prefer to begin with the
4 trial exhibit issue or the punitive damages order
5 publication issue.

6 Do you have a preference?

7 THE COURT: Start with the trial exhibits.

8 MR. GOLDSER: Okay. I will. What is at issue,
9 Judge, are 397 exhibits that were admitted into evidence at
10 the trial. What is not at issue are exhibits that were
11 listed on exhibit lists that were not offered or that were
12 not admitted, so we only have 397 exhibits that we are
13 worried about.

14 Of those 397, 115 were admitted in a bulk
15 offering that was made at the close of the trial. The 115
16 documents are at issue today. The balance of the admitted
17 exhibits, 282, if my math is correct, are not at issue.
18 Defense concedes those were offered, admitted and used in
19 open court and are therefore open to the public.

20 So the only thing we have left at this point are
21 115 exhibits that were offered in the bulk admission, and I
22 guess before I go further, I would just like to get
23 defense's concurrence that that's what we're talking about.

24 MS. VAN STEENBURGH: Our number is 125.

25 MR. GOLDSER: Okay. But conceptually you agree

1 with me that it's the bulk offer?

2 MS. VAN STEENBURGH: Yes, it is the documents
3 that were brought to our attention on day eight of the
4 trial as being in some banker's boxes, and we were asked to
5 agree to admission of all those documents. Correct.

6 MR. GOLDSER: All right. Judge, obviously our
7 counts differ a little bit, but to give you a flavor of
8 what's in those documents, our review of those documents,
9 of the bulk offer documents, shows that all but 28 of them
10 were used and discussed or quoted in some way or another in
11 a deposition during the course of this litigation.

12 And as the Court will recall from the hearing,
13 and I'll tell you it was in September of 2010 when we
14 talked about those documents and their use, I believe it
15 was in the punitive damages hearing, those documents once
16 they were discussed in a deposition lost their
17 confidentiality at that point in time.

18 So we believe that there may be at most 28
19 documents or thereabouts that are really at issue which
20 were admitted in the bulk offer and never used in
21 deposition. So this is a very small group of documents now
22 that is even at issue.

23 And, by the way, of those 28, I believe several
24 of them are medical records of John Schedin. So, you know,
25 we don't have any particular need to disclose those to the

1 public, and we don't think those are germane. So it gets
2 even smaller as a group that's really at issue. So that's
3 what we're arguing about.

4 Now, if I might take you back to the beginning
5 when the confidentiality order was first generated, it was
6 before the MDL was formed, and there was a stipulation that
7 was entered into in the first six cases that were filed and
8 consolidated by the Court in front of Your Honor, and we
9 had an amended stipulation, an amended stipulated
10 confidentiality agreement.

11 And in that agreement in paragraph 8 it reads,
12 "If any party intends to offer a protected document into
13 evidence, that party shall notify the party asserting
14 confidentiality, and the party asserting confidentiality
15 shall," mandatory shall, "so notify the Court, and the
16 Court will then consider what steps, if any, should be
17 taken to protect the confidential information. The party
18 offering such evidence shall have no responsibility to
19 notify the Court as to the claim of confidentiality."

20 Obviously, we put these documents on our exhibit
21 list, so we notified defense. The burden therefore shifted
22 to the defense to undertake a mandatory obligation to
23 notify the Court as to the confidential information.

24 Fast forward to the argument on October 6th of
25 2010, and the issues of confidentiality came up again at

1 that point, and I will cite to the transcript starting on
2 page, I believe it is, page 17 -- 17. The Court asks:

3 "What do you anticipate at trial? Say several of
4 these documents, if they're still subject to the protective
5 order, need to be used either by you or by the plaintiffs?
6 What are you anticipating?"

7 Ms. Van Steenburgh responds: "One of the things
8 that I've thought about, what we are going to try to do is
9 cull down with the plaintiff to see if there are any joint
10 exhibits, so if there are joint exhibits and any of them
11 are confidential documents, we would have to establish a
12 procedure that we would try to work out with the plaintiffs
13 for keeping those confidential. Either those would be
14 confidential during testimony and there would be no one in
15 the courtroom at the time, or we could work out some other
16 mechanism."

17 Let me fast forward to the trial and note that
18 assuming that the OCR'ing of the trial transcript is
19 accurate, the word "confidential" appears throughout the
20 course of the entire trial once, and that's because it was
21 a word used in a document and the document was being
22 quoted.

23 Suffice it to say that under the confidentiality
24 order and under defense's representation to the Court in
25 October, there was no effort undertaken whatsoever to

1 create a mechanism to maintain confidentiality of the
2 documents. There was no discussion with plaintiffs about
3 maintaining confidentiality of any of the trial documents.

4 Fast forward to January 28th -- I'm sorry. Fast
5 forward to the trial. At the time of trial when the
6 documents were offered into evidence, and I believe that
7 was at pages 2792 to 2794 of the transcript. When those
8 documents were offered, there were various objections made
9 about some of the substance and what have you.

10 However, there was never, not once, an objection
11 at that time made as to any issue concerning
12 confidentiality. Those documents were received over the
13 defense's objections, but not over the defense's objections
14 as to confidentiality. There was no effort made to
15 preserve confidentiality at that time.

16 Fast forward to January 28th when we sought to
17 have the Court's punitive damages order first open to the
18 public. Ms. Van Steenburgh and I had a conversation prior
19 to commencement of the formal court status at that point in
20 time.

21 I put a statement on the record in which I said
22 essentially, and I'm not going to quote it today, that our
23 understanding is that all documents admitted into evidence
24 were public and available to the press.

25 Ms. Van Steenburgh did not contradict that or

1 certainly did not make a distinction between documents that
2 were used in open court versus documents that were admitted
3 but not discussed with a witness in open court, which
4 brings us to the present time in which there is now some
5 sort of distinction that is being made between documents
6 used in open court and documents that were not used in open
7 court.

8 The distinction has never been made before, but
9 if nothing else, every one of those 397 documents were
10 taken into the jury room. Every one of those 397 documents
11 was available for the jury to see without any restriction,
12 without any confidentiality issues.

13 Every one of those documents was available for
14 use in closing argument, and indeed as I understand the
15 circumstances, Ms. Van Steenburgh called it to my attention
16 the other day, some of the documents were in fact used in
17 Mr. Watts's closing argument, although I don't offhand know
18 which ones they were.

19 So at the end of all of this, we have a very
20 small quantity of documents that may retain
21 confidentiality, and if they do, it's after defense has not
22 followed the stipulated confidentiality agreement, has not
23 followed their representation to the Court in October, has
24 not made any objections or any other effort to preserve
25 that confidentiality, and only now at the 11th hour and

1 59th minute are they trying to preserve and protect several
2 documents that should otherwise be made open and available
3 to the public.

4 That's all I have.

5 THE COURT: Ms. Van Steenburgh?

6 MS. VAN STEENBURGH: Well, I'm sure you won't be
7 surprised, Your Honor, to hear that there is more to the
8 story than that. Aside from the counting issue, I think
9 Mr. Goldser misses a couple of points.

10 First of all, with respect to the bulk offer,
11 when -- I'll take the Court back. When we were preparing
12 our exhibit lists, we offered to meet and confer with the
13 plaintiffs on several occasions to try to iron out any
14 objections.

15 All we got were list upon list upon list,
16 approximately 1500 exhibits, and it would change daily. We
17 would get different spread sheets, and we never did get a
18 meet and confer with respect to any of the exhibits that
19 were on plaintiff's list.

20 We went into trial, and it was not until day
21 eight there were documents that were introduced through
22 witnesses. Sometimes foundation was laid. Sometimes not,
23 but there were documents that were admitted, and there was
24 a context.

25 On day eight, we were presented with at least 125

1 documents in three banker's boxes, and we were told we want
2 to admit all of these as bulk documents, do you have any
3 objections? We did have an objection, and Mr. Goldser
4 failed to tell the Court that there is in the transcript at
5 page 1706 and 1707 objections made by Mr. Essig.

6 He objected to the bulk nature of these. First
7 of all, we objected on the grounds that there was no
8 foundation laid for any of these documents, that they were
9 not going to be introduced through any witness, so there
10 would be no foundation through any witness and that there
11 would be no context.

12 Second of all, Mr. Essig did point out to the
13 Court that we believed wholeheartedly that this was an
14 attempt to get around the protective order and to go ahead
15 and get all of these documents admitted so that the
16 plaintiffs could turn them over to the press.

17 And the Court asked us to talk about that over
18 the weekend, and that issue was not revisited, although we
19 did object and we did bring it to the Court's attention at
20 that time. What ended up happening is, the Court's request
21 is that we went through and looked at substantive
22 evidentiary objections at that time and talked to the Court
23 about those.

24 But we did preserve the objection that we thought
25 that these were an attempt by the plaintiffs at the last

1 minute to do a bulk dump, to try to get those admitted so
2 they could get around the issue of confidentiality because
3 they had no intention of introducing them and following the
4 rules of evidence to use any kind of foundation to get
5 those admitted.

6 So that is the basis for which we are objecting
7 now, Your Honor, is that if there are documents that were
8 properly presented through a witness and were authenticated
9 and admitted through foundation that was laid through the
10 witness, you're right, we don't have a problem.

11 It's the same position that we took, and we'll
12 get to this on the punitive damages motion, which is if
13 there is a context, there is a witness, there is a
14 document, that makes a lot of sense.

15 This in our view is an end run around the rules
16 of evidence and around the protective order and was an
17 attempt by the plaintiffs to try to get these publicized
18 without going through the steps that were necessary, and
19 Mr. Goldser's representation now that by putting them on
20 the witness list that was notice that we were supposed to
21 challenge them under the confidentiality order is the first
22 time that I've heard that, and we have not heard anything
23 other from him with respect to the issue of
24 confidentiality.

25 So we would maintain our objection that we

1 provided to the Court at trial, and we agree. Those that
2 were admitted into evidence through witnesses we would go
3 ahead and indicate that those are certainly public
4 documents, but we would request that the Court not allow
5 those that were admitted in bulk to be released and used by
6 the plaintiffs as they will in order to get around the
7 order.

8 Thank you, Your Honor.

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

10 Mr. Goldser, do you have anything else on this?

11 MR. GOLDSER: Briefly. Ms. Van Steenburgh should
12 not speculate as to plaintiff's motives. If a document is
13 admissible into evidence, it is admissible into evidence,
14 and if it were not admissible into evidence, it would have
15 been objected to on that basis, and it would have been
16 excluded.

17 So the fact that it is admissible is an outcome
18 in its own right and has nothing to do with whether or not
19 plaintiffs had an ulterior motive to make a bulk set of
20 documents available to the press. For the record, that was
21 not our intention, but even regardless, even if it was,
22 that is neither here nor there.

23 The documents were admitted. They were used by
24 the jury and by counsel in closing argument. They were
25 available to anybody who wanted to come in and look at

1 those documents, had those documents been sitting still in
2 the clerk's office.

3 You'll recall, Your Honor, that this issue came
4 up when the Bloomberg folks wanted to come down to chambers
5 and look at the documents in chambers, and since the
6 documents had already left and come back to my office,
7 that's how the issue got raised, but if those documents had
8 been in the clerk's office as admitted exhibits, they would
9 have been open for anybody and everybody to see because
10 they were admitted into evidence.

11 Our motives are not relevant to this discussion.
12 That's all I have.

13 THE COURT: Okay. Anything else,
14 Ms. Van Steenburgh?

15 MS. VAN STEENBURGH: Just two points, Your Honor.
16 One, we don't have to talk about motives because we're here
17 because the plaintiffs are asking to release these
18 documents to Bloomberg and the New York Times. Neither of
19 those entities has made a third-party attempt to intervene,
20 we don't believe.

21 And I've been in plenty of MDL's where that has
22 happened, and that hasn't happened here. The plaintiffs
23 are asking for the public release so they can give them to
24 Bloomberg, so we don't have to talk about motives.

25 Beyond that, Your Honor, I really do have to

1 protest on the grounds that not one of these documents, I
2 have never been in a trial where there has been a document
3 dump where there has never been a witness and any
4 foundation laid through which the documents have been
5 received into evidence.

6 And so the very fact that there was no foundation
7 and that in fact these just came in, as I told Mr. Goldser
8 the other day when we were trying to talk about this, I
9 don't know why there were witnesses in the trial, then.
10 There should have just been documents and the attorneys
11 arguing, I suppose, or releasing those documents.

12 So we do have -- we still maintain our
13 evidentiary foundation argument. I realize that the Court
14 did allow those documents to be admitted pursuant to other
15 substantive reasons, but I at least wanted to point that
16 out to the Court.

17 MR. SAUL: Your Honor, Lewis Saul, just one
18 comment. Ms. Van Steenburgh does not address the issue
19 that the vast majority of these documents that were entered
20 into en masse at the end were not, that they were used
21 during depositions, and they lost their confidentiality.

22 So the vast majority of these have no protection
23 under the confidentiality order any longer. I think Ron,
24 Mr. Goldser, said that there were 20 or so left that were
25 questionable, and some of those were our plaintiff's

1 medical records.

2 MS. VAN STEENBURGH: If I might, Your Honor. I
3 have not ever been in a trial where a document admitted as
4 part of a deposition suddenly becomes admissible in trial
5 without some kind of foundational basis for admitting that
6 document. That's a new rule.

7 According to what I am hearing now is, if it were
8 a document that was introduced in some deposition, whether
9 that deposition was used in trial or not, suddenly that
10 becomes admissible evidence that is -- there is no basis
11 upon which to object? That doesn't make any sense to me.

12 So we would maintain that, and I don't know about
13 the 28 documents, and I don't know why they're not
14 releasing Mr. Schedin's medical records, but for whatever
15 reason, I would have to look at the distinction between the
16 28 and the remaining documents that they're making the
17 claim to.

18 MR. GOLDSER: Your Honor, Ron Goldser.
19 Ms. Van Steenburgh misses the point. When we were in court
20 before, I believe it was the punitive damages motion, we
21 wanted to use certain documents in open court. Defense
22 protested that they were still confidential.

23 I argued that they had been quoted in deposition
24 and that the depositions were not retained as confidential.
25 The Court allowed those documents to be used, and the

1 confidentiality was waived.

2 The argument is the same here. It's not about
3 admissibility of those documents. It's about
4 confidentiality of those documents. Once they were used
5 and quoted in a deposition which was not retained as
6 confidential, the documents lost their confidentiality.

7 I'm just relying on the Court's prior ruling last
8 fall to assert that claim as to many of the bulk offered
9 documents.

10 MS. VAN STEENBURGH: And, again, Your Honor,
11 without belaboring the point, I think that Mr. Goldser is
12 also missing the point, which is that these were introduced
13 in an attempt to get around the order and to introduce
14 documents into evidence without following the rules of
15 evidence, without having any kind of foundation, no
16 witness, just three boxes of documents that should be now
17 released to the public and interpreted as the plaintiffs
18 want to without the benefit of any kind of testimony from a
19 witness.

20 So with that, I will finish.

21 THE COURT: Okay. Let's turn to the other issue,
22 the punitive damages order and publication.

23 Who is first?

24 MR. CIALKOWSKI: Your Honor, Dave Cialkowski for
25 the plaintiffs.

1 THE COURT: Okay.

2 MR. CIALKOWSKI: I noted in the transcript
3 January 28th that you had asked the parties to address the,
4 some of the documents that were cited in the Court's order
5 on punitive damages and discuss their confidentiality. I
6 think in the briefing that was pretty well picked through,
7 and I won't repeat what's been in the briefing.

8 In the defendants' presentation in the briefing,
9 they did raise the issue that we had not addressed three or
10 four documents, and we can go through those one by one if
11 you would like today, but I think the more important thing
12 is to clarify what we're really asking for.

13 And what we're asking for is to unseal the
14 Court's opinion, a little bit different issue than what we
15 have been discussing for the last half hour or so with
16 regard to the exhibits. We're not asking that the
17 underlying exhibits be unsealed, but the Court's opinion.

18 And when you view the Court's reasoning in the
19 opinion, it's clear that the information that the Court
20 relies upon is not confidential. The bigger point is that
21 I think even if the information in the opinion were
22 protected, the Court's reliance on it in the judicial
23 opinion removes the information from the realm of
24 protection because the Court's reasoning belongs to the
25 public, and that kind of dovetails with an argument that

1 the defendants made in their opposition brief.

2 This is a nondispositive motion, so we didn't
3 have the benefit of a reply, but one of the arguments that
4 they make that I would like to address here is that they
5 say that there is no public right of access to the Court's
6 opinion because an order permitting an amendment is not an
7 adjudication on the merits.

8 We submit that there is simply no authority for
9 the proposition that adjudication on the merits is required
10 to publish an opinion -- not publish an opinion, but unseal
11 an opinion, and defendants don't provide any.

12 And to the contrary, I would like to cite two
13 cases in response to the defendants' argument. The first
14 is *PepsiCo versus Redmond*. That citation is 46 F.3d 29.
15 That's out of the Seventh Circuit from 1995. The second is
16 *Doe versus ExxonMobil*, 570, F.Supp.2d 49, and that's out of
17 the District Court for the District of Columbia, 2008.

18 In *PepsiCo*, the defendant had requested that the
19 District Court's order be sealed in the appellate record.
20 Judge Easterbrook was the motion judge on that motion, and
21 he denied the motion. He stated, Judicial proceedings held
22 and evidence taken on -- and evidence taken on the way to a
23 final decision are also presumptively in the public domain.

24 He went on to say that opinions are not the
25 litigants' property. They belong to the public which

1 underwrites the judicial system that produces them, and
2 finally, he -- he also mentioned that he could not imagine,
3 though only barely, a sealed opinion and order in cases
4 involving issues of national security.

5 In the *Doe* case, the Court there had denied a
6 motion to redact portions of a judicial opinion, and there
7 the Court found that the presumption in favor of public
8 access to judicial records, quote, "Is especially strong
9 for judicial opinion. While other portions of the record
10 often have a private character, the Court's decrees, its
11 judgments, its orders are the quintessential business of
12 the public's institutions."

13 The Court went on to say that the approval of a
14 protective order which allows the parties to file certain
15 documents under seal does not mean that references to
16 protected information in documents in a judicial opinion
17 must be redacted.

18 Your Honor, we submit that the issue goes far
19 beyond simply the potential confidentiality, and I say
20 potential because we're only talking about labeling of
21 protection pursuant to the protective order. That
22 potential is -- cannot be sustained once the Court applies
23 its reasoning to paper and relies on that reasoning to
24 issue its opinion.

25 The defendant makes, the defendants make a couple

1 of other arguments that I can briefly respond to. The
2 first is that the choice of law issue could be unsealed,
3 but the analysis of the evidence has no precedential value.
4 We would submit that applying the law to fact is the
5 essence of precedent, Your Honor.

6 And the fact that we're simply applying the
7 standards of what a punitive damages amendment would
8 require to the facts of the case doesn't make it any less
9 precedential than the choice of law issue, and finally, the
10 defendant argues that there is no purpose to unseal the
11 order other than to prejudice the defendants because there
12 was no opportunity to rebut plaintiff's evidence.

13 And what the defendant, I believe, was referring
14 to was the punitive damages standard itself which doesn't
15 require or requires the plaintiffs only to submit their
16 evidence, and then the Court doesn't necessarily consider
17 new evidence presented by the defendants.

18 However, the Court clearly acknowledges that
19 standard in the brief and makes it clear to any reader of
20 the opinion when it said, "In evaluating Schedin's motion,
21 the Court makes no credibility rulings and does not
22 consider any challenge by cross-examination or otherwise to
23 the plaintiff's proof."

24 That's at page 12 of your order, and furthermore,
25 I would just like to say that on pages 21 to 24, the Court

1 bends over backwards to acknowledge the defendants'
2 arguments and evidentiary challenges, emphasizing that the
3 Court was not making any factual findings.

4 Finally, Your Honor, the defendant raised the
5 issues of Exhibit 25, Exhibits 48 through 49 and
6 Exhibit 73. We have not discussed that in the briefing,
7 and I wonder if this is a good pausing point to determine
8 whether we really need to actually go through those
9 documents one at a time, given that I think what the
10 defendants are asking here in terms of keeping this order
11 under seal is far afield of what the law requires to begin
12 with.

13 THE COURT: Well, let's turn to
14 Ms. Van Steenburgh.

15 MS. VAN STEENBURGH: Thank you, Your Honor. From
16 what I'm hearing from Mr. Cialkowski, they've abandoned
17 their original argument which is the basis for their
18 initial brief after the Court requested that they brief
19 this issue, which was the choice of law was a significant
20 legal issue that the public needed to be aware of, and I'm
21 not hearing that now.

22 What I'm hearing is that the entire order should
23 be released, and what I'm also hearing without specific
24 reference is that the eleven documents to which the Court
25 refers in its order, none of which were admitted at trial,

1 none of which were even introduced by the plaintiffs at
2 trial, would also be released because I understand that
3 Mr. Cialkowski would like to talk about some of the ones
4 that he didn't refer to in his initial brief.

5 But there are eleven documents that were cited by
6 the Court, quoted by the Court in some instances, that were
7 never used by the plaintiffs, nor sought to be admitted
8 during the trial. So the -- there seems to be a kind of a
9 double standard.

10 While all of those things that are admitted
11 should be allowed -- but, by the way, there are a few in
12 your order that we also want to have you release and
13 unseal. I do have to echo, I understand -- I don't know
14 the cases that Mr. Cialkowski cited. He didn't send
15 anything to me or indicate that he was going to be citing
16 to cases or relying on cases.

17 The *PepsiCo* case sounds to me a bit like there
18 was an order by the District Court that was up on appeal,
19 and there was some question there as to whether it should
20 be sealed, and I don't know the particulars of that case,
21 nor do I know the *Doe* case such that I would be able to
22 comment on either one of those.

23 I do think, though, that it is significant there
24 is no adjudication on the merits, that the only question
25 was whether to allow an amendment to add punitive damages

1 to the complaint and that it was based only upon evidence
2 submitted by the plaintiff.

3 One of the points that we made to the Court
4 previously, and I won't belabor it is, yes, as a matter of
5 fact, when those exhibits were introduced at trial, there
6 was a proper context in which to put those exhibits through
7 witnesses, which, again, our argument as to those that came
8 in on a bulk document admission are a problem because of
9 foundational grounds, but foundation was laid. The witness
10 could testify. There was a context around that.

11 The punitive damages memo and motion do not allow
12 that. They cite to confidential documents, and finally, as
13 Mr. Cialkowski pointed out, we do think this is not an
14 adjudication on the merits. Those cases, Judge Frank,
15 others have said, you know, when you have a summary
16 judgment motion, you have an opportunity to present your
17 evidence.

18 That is an opportunity for the order to be
19 published, but this is not the situation in this case,
20 especially when it involves confidential documents. And we
21 would ask the Court, we don't see any purpose in it at this
22 point, releasing that document, and I didn't hear any
23 compelling argument, at least in my estimation, from
24 Mr. Cialkowski as to what benefit there is to this
25 particular order now that the trial is over.

1 So we would ask that the Court keep that order
2 and not release it to the public, nor the documents that
3 are cited in the order.

4 THE COURT: Mr. Cialkowski, anything else?

5 MR. CIALKOWSKI: Your Honor, it just seems like
6 we still have a little bit of a disconnect. Just to be
7 clear, we're not asking to unseal the exhibits. We're
8 asking only to unseal the order, and that the, you know,
9 the standard for sealing an order or redacting an order is
10 issues of national security, crime victims.

11 These are the kinds of things that are discussed
12 in the cases that I just cited. Once the Court reduces its
13 reasoning to an order, it belongs to the public, and it
14 doesn't belong to the parties anymore, and it doesn't
15 belong to the Court, frankly. I mean that's really what
16 we're talking about.

17 We're not talking about what benefit it could be
18 to the litigation or other litigants here in the context of
19 this MDL, although that's reason enough to unseal the
20 order. What we're talking about is very basic civics and,
21 you know, that's basically our argument.

22 THE COURT: Okay. Anything else, anyone?

23 Okay. I want to take a look at some of these
24 cases, so I'm going to take the matter under advisement,
25 but we will do a written order shortly on it so that we get

1 this resolved.

2 Anything else we should discuss today?

3 MR. GOLDSER: Your Honor, we can take up the
4 subject of trial scheduling in Christensen for a little
5 bit, if you would like. We're starting to work through
6 some of these issues, and we might alert you to some of the
7 things that are going on here, if you have a few minutes to
8 hear about them.

9 THE COURT: I do. Go ahead.

10 MR. GOLDSER: All right. Well, first off, the
11 plaintiffs are prepared to go forward on May 31st with the
12 Christensen case. So any representations or concerns about
13 that to the contrary at the last hearing are now resolved,
14 and we're ready to, as Judge Bechtold in Philadelphia said,
15 saddle up. We are getting ready to try the case, so we are
16 getting ready to do that.

17 We have to provide some fact witnesses to the
18 defense and make sure we can identify which ones we're more
19 likely to call than not so that they can depose them.
20 Defense is going to make a motion for an IME, which we're
21 probably going to oppose in its entirety and certainly as
22 to time and place. So that will be coming for you shortly.

23 We have an issue about Mr. Christensen and
24 several doctors appearing personally in trial. We have
25 made the decision that although the Court has ordered the

1 Christensen case to go forward, we're not going to force
2 him to come to the trial because of his health, assuming
3 that we had the ability to have him testify via deposition.

4 We've had a back and forth today between counsel
5 about Rule 32, the use of depositions at trial, and Rule
6 45, the subpoena power of the Court. What is interesting
7 is, the subpoena power extends to the entire district, but
8 the deposition rule says that any testimony taken from
9 somebody who is more than 100 miles away can be used via
10 deposition.

11 MS. VAN STEENBURGH: Actually, sorry to
12 interrupt. Ron, it also talks about the subpoena in Rule
13 32 as well so --

14 MR. GOLDSER: We have a bit of an issue there
15 about whether Mr. Christensen and Dr. Clark and Dr. Donohue
16 must be compelled to come to trial or whether we can use
17 depositions for them, which would be plaintiff's desire.

18 We have filed today a short form punitive damages
19 motion so that the record is clear in Christensen that we
20 want to amend the Christensen complaint for punitive
21 damages.

22 MS. VAN STEENBURGH: May I interrupt?

23 MR. GOLDSER: Yes.

24 MS. VAN STEENBURGH: Are you going to be filing a
25 memorandum?

1 MR. GOLDSER: Not -- nothing further than what
2 you have there.

3 MS. VAN STEENBURGH: Okay. Thank you.

4 MR. GOLDSER: Okay. We will exchange our experts
5 shortly, although I've identified for the defense who the
6 plaintiff experts are. The defendants will get back to us
7 shortly. We want to not repeat motion practice that was
8 undertaken in Schedin but simply incorporate as much of
9 that that we think is relevant into this trial.

10 And obviously we will need the Court's assistance
11 to make sure that everybody is clear on what is being
12 incorporated and what is new. We will want to do that.
13 The same thing with regard to exhibits and deposition cuts.
14 Hopefully, we won't change too terribly much and won't have
15 to reargue the same offers and objections that were made
16 before. We can simply incorporate all of that by
17 reference.

18 We will need to review jury instructions, special
19 verdict form and the questionnaire to make sure we don't
20 want any changes, but my guess is that the changes we
21 request, if any, will be small, and then we have a
22 discovery document request out on sales representatives
23 regarding the Christensen sales representatives.

24 You may remember some time ago we raised the
25 issue of personnel files for sales representatives, and

1 that lay dormant for a while, but now that we know which
2 case and which sales reps, we have renewed that request,
3 and hopefully we can resolve that ourselves, but that's
4 under discussion.

5 So that's the nature of the, of the issues and
6 the discussions we've had since the last status conference.
7 I'm sure Tracy will have some comments, and, Your Honor, if
8 you have any feedback for us, we would welcome it.

9 THE COURT: Ms. Van Steenburgh?

10 MS. VAN STEENBURGH: Well, that's a long list
11 there, Your Honor. Some of it is accurate in terms of what
12 Mr. Goldser and I have talked about. Yes, they do have to
13 give us some fact witnesses. Yes, we're going to seek an
14 IME.

15 Yes, Mr. Goldser and I have been talking about
16 whether he is going to present his case via depositions of
17 the plaintiff, Dr. Clark and Dr. Donohue. With respect to
18 punitive damages, the reason I asked about the memorandum
19 is that there is a slightly different basis for this one
20 than the other one. I think we are going to want to put in
21 a response.

22 There was no hearing set, so we will be in touch
23 with Holly to set something up on that. With respect to
24 experts, we are talking about that in terms of whether
25 there will be any different experts or different case

1 specific, anything like that. So we're working with
2 Mr. Goldser on that.

3 And with respect to the motion practice, of
4 course, it's our interest to be as efficient as possible.
5 We suspect that there will be different motions. This is a
6 different case. The facts are different, and so we think
7 there will be some new motions in limine, and we'll work
8 with Mr. Goldser as to whether he is going to stand on some
9 of the ones that he had before.

10 We will work with the other side on the exhibits
11 and depositions. We will certainly not agree to a bulk
12 document admission, and we will be talking with them as
13 well. We do think that the jury instructions, there may be
14 some tweaking, and we want to do something different with
15 the verdict form.

16 As the Court recalls from the last trial, even
17 the jury raised an issue with that, so we will want to do
18 something with that, and on the discovery issue that has
19 been raised and has been brought to our attention, we are
20 talking about that. We will get back to Mr. Goldser, both
21 with respect to the personnel files and an inquiry
22 regarding some sales aid documents that he and Mr. Saul
23 have asked me about.

24 So we are working through that.

25 MR. SAUL: Your Honor, this is Lewis Saul

1 speaking.

2 THE COURT: Yes.

3 MR. SAUL: As Mr. Goldser said, we're prepared to
4 go forward with Christensen, but because of his health, we
5 would like him to be at trial, but he just can't come, but
6 we're going to go forward without him.

7 And we would like a ruling today so we can
8 prepare properly for trial that we can videotape his
9 testimony and use it at trial, his as well as his
10 physician.

11 MS. VAN STEENBURGH: Well, Your Honor, we'll
12 certainly talk with the other side about that and how we
13 want to, how they want to proceed, and I want to take a
14 look at what the rule is. There is some law out there
15 relative to whether a plaintiff can have his own deposition
16 taken and presented at trial and not attend the trial.

17 So we're not prepared to argue that or resolve
18 that today.

19 MR. SAUL: Your Honor, I'm not -- I'm just
20 asking. The Court understands the difficulty we have with
21 the case, and the Court has the authority under the rule --
22 I don't have it in front of me -- to order in the interests
23 of justice that essentially that a witness can be presented
24 in any fashion that the Court orders.

25 And we're asking for an order today so we can

1 properly prepare for this most difficult trial for us to
2 allow Mr. Christensen to appear by video deposition, as
3 well as his prescribing physician.

4 MS. VAN STEENBURGH: Your Honor, I would protest
5 this motion. This was kind of sprung on me. I wasn't
6 aware that this was going to be made today. Mr. Goldser
7 just shot me an e-mail this morning, asking about Rule 32
8 and Rule 45.

9 I would certainly like to have some time, and I
10 would like to consult with my colleagues in terms of our
11 position rather than having to respond to a motion by
12 Mr. Saul today, if possible.

13 THE COURT: I will hold off. I would like to
14 hear from the defense on this issue, but let's address this
15 as quickly as possible, Ms. Van Steenburgh.

16 MS. VAN STEENBURGH: Okay.

17 THE COURT: Make sure we have enough time if
18 we're going to go ahead and do that.

19 MS. VAN STEENBURGH: Absolutely.

20 THE COURT: It sounds fine. I will get out -- I
21 don't know if we have done that already -- a memorandum
22 that sets forth the times by which everything should be
23 filed. I'm not sure if we have done that in this case. We
24 probably haven't, so we will look at that.

25 What's the status in New Jersey? Is that going

1 ahead in June, or has that been moved again?

2 MR. GOLDSER: That has been moved to September,
3 Your Honor. I learned that yesterday and immediately sent
4 an e-mail in to Holly. I gather that the loop did not get
5 closed.

6 But the trial is going to start August 29th with
7 jury selection, and it's not clear whether the testimony
8 will start right away or the following week, but it has
9 been moved.

10 THE COURT: Okay. That probably affects our
11 September trial setting that we had earlier talked about.

12 MR. GOLDSER: It may.

13 MS. VAN STEENBURGH: And, Your Honor, with
14 respect to that, Mr. Goldser and I talked about perhaps
15 approaching you to discuss a November trial setting, and in
16 the meantime, we would like to move ahead with getting the
17 discovery finished in the three Minnesota cases in Phase II
18 and the other Phase II discovery so that we have a pool so
19 that we are ready to go.

20 And we can also make any 1404 motion at, you
21 know, the appropriate time. So we would like to move ahead
22 with that discovery as well.

23 MR. GOLDSER: And my response back to Tracy was
24 that, yes, we should do that, but let's start after this
25 trial is over, which is May, and that's seven weeks away.

1 MS. VAN STEENBURGH: What we would like to do is
2 get the doctors at least scheduled because if we don't
3 start until May, you're going to get doctors with summer
4 vacations who won't be available until September or
5 October.

6 So we don't have to take them, but I would like
7 to get things rolling if I could.

8 THE COURT: I think that's a good suggestion to
9 start scheduling. I don't anticipate a lot of substantive
10 work on Phase II while we're getting ready for the second
11 trial, but it --

12 MS. VAN STEENBURGH: Right.

13 THE COURT: -- it should be ready to begin in
14 earnest after that because I will want to have that case,
15 the third one if we are going to a third one, as soon as
16 possible after New Jersey is done.

17 MS. VAN STEENBURGH: Okay.

18 THE COURT: Okay. Very good. Anything else for
19 today?

20 MR. GOLDSER: I don't think so, Your Honor.
21 Thank you for hearing us out.

22 THE COURT: Okay. Sounds good. Thank you,
23 everyone.

24 MR. GOLDSER: Thank you.

25 MS. VAN STEENBURGH: Thank you.

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MR. SAUL: Thank you, Your Honor.

* * *

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