

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Levaquin Products)	
Liability Litigation,)	File No. 08-md-1943
)	(JRT/AJB)
)	
)	
)	Minneapolis, Minnesota
)	October 25, 2011
)	1:40 P.M.
)	

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

APPEARANCES

For the Plaintiff:	RONALD S. GOLDSER, ESQ. DAVID CIALKOWSKI, ESQ.
Via Phone:	LEWIS J. SAUL, ESQ. KEVIN FITZGERALD, ESQ. ED COLEMAN, ESQ. KRISTIAN RASMUSSEN, ESQ. ROBERT BINSTOCK, ESQ. MATTHEW ANDERSON, ESQ. ELLIOT OLSEN, ESQ. JILLIAN REDDING, ESQ.
For the Defendants:	JAMES IRWIN, ESQ. TRACY J. VAN STEENBURGH, ESQ.
Via Phone:	WILLIAM ESSIG, 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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1:40 P.M.

(In open court.)

THE COURT: You may be seated. Good afternoon.
This is MDL number 08-1943, In Re: Levaquin or Levaquin
Products Liability Litigation.

Let's have counsel note appearances this
afternoon.

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

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

THE COURT: Good afternoon to both of you.
And then for the defense present in the
courtroom?

MS. VAN STEENBURGH: Tracy Van Steenburgh, Your
Honor, for the defense.

MR. IRWIN: Good afternoon, Judge. Jim Irwin for
the defendants.

THE COURT: Good afternoon to both of you.
Now, for the plaintiffs who are on the phone?

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

MR. RASMUSSEN: Good afternoon, Your Honor.
Kristian Rasmussen, counsel for plaintiffs.

1 MR. FITZGERALD: Good afternoon, Your Honor.

2 This is Kevin Fitzgerald for the plaintiffs.

3 MR. COLEMAN: This is Ed Coleman for the
4 plaintiffs.

5 MR. ANDERSON: This is Matt Anderson for the
6 plaintiffs.

7 MR. BINSTOCK: Bob Binstock for the plaintiff.

8 MR. OLSON: This is Elliot Olsen on behalf of the
9 plaintiff.

10 MS. REDDING: Jillian Redding on behalf of the
11 plaintiff.

12 THE COURT: Okay. Anyone else for the plaintiffs
13 on the phone?

14 Okay. For the defense on the phone?

15 MR. ESSIG: Good afternoon, Your Honor. Bill
16 Essig on behalf of defendants.

17 THE COURT: Okay. Anyone else for the
18 defendants?

19 Okay. Let's proceed. Mr. Goldser?

20 MR. GOLDSER: Thank you, Your Honor. I'm happy
21 to say that I think our agenda is fairly short as we are
22 starting to work diligently through everything, getting
23 ready for the next trial on January 3rd.

24 We start with the usual census count. Mr. Dames
25 is nowhere to be heard. I'm trusting it's Mr. Essig who

1 has got the numbers today on the phone for us.

2 MR. ESSIG: Yes, Your Honor, just briefly. There
3 is as of October 14th, there were 1483 cases pending in the
4 MDL. There are 58 other federal cases that are pending
5 transfer. If you're interested in other jurisdictions,
6 Your Honor, similar data as of October 17th, there are 1942
7 cases in the New Jersey state mass tort.

8 THE COURT: And do we have an up-to-date number
9 on the state of Illinois?

10 MR. ESSIG: Yes, Your Honor. That's narrowed a
11 little bit since our last conference. My understanding is
12 that there are five cases in St. Claire County, some of
13 which may have multiple plaintiffs, but a lot of the
14 multiple plaintiff cases have been, the plaintiffs have
15 been voluntarily dismissed recently.

16 THE COURT: Okay. Anything else on the census?

17 MR. GOLDSER: I don't think so, Your Honor.

18 THE COURT: Thank you, Mr. Essig.

19 MR. ESSIG: You're welcome, Your Honor.

20 MR. GOLDSER: In terms of federal/state
21 coordination, the Court is aware that there was a jury
22 verdict in New Jersey, and it was a defense verdict with
23 regard to both Mr. Beare and Mr. Gaffney. I am not sure
24 that I have anything particular to report on that, having
25 been out of touch with the folks in New Jersey while I was

1 gone.

2 So unless Mr. Saul would like to make any
3 comments or defense counsel, I'm not sure that there is
4 anything else to say in New Jersey.

5 THE COURT: Any comments anyone has about the New
6 Jersey case? How long did it last? It was two plaintiffs,
7 right?

8 MR. GOLDSER: Two plaintiffs. I think it was
9 about six weeks.

10 THE COURT: Six weeks, so about double our time?

11 MR. GOLDSER: It was. Days were a little
12 shorter. Judge Higbee tended to work half days Fridays,
13 and there were a couple of dark days in there, as I recall.
14 I don't know that they ran a clock and some of the
15 witnesses tended to be a little bit longer than ours, than
16 ours were.

17 MS. VAN STEENBURGH: Nothing further than that,
18 Your Honor.

19 THE COURT: Mr. Saul, did you have anything on
20 the New Jersey trial?

21 MR. SAUL: No, Your Honor.

22 THE COURT: Okay. Okay.

23 MR. GOLDSER: I've also not been in touch with
24 Mr. Carey, the PSC member who is in Illinois, to learn if
25 there is any new developments in terms of trial dates or

1 any progress in Illinois. I have not heard anything about
2 that.

3 THE COURT: In New Jersey, has there been any
4 dates set for any other actions?

5 MR. GOLDSER: I don't believe there has been a
6 date set. There are a couple of status conferences coming
7 up in the not too distant future where next trial issues
8 will be likely discussed at that point in time, but I don't
9 believe there has been any dates set for that yet.

10 MS. VAN STEENBURGH: I don't have my notes with
11 me as to the next status conference. My understanding is
12 that the next trial will be also a two plaintiff trial is
13 the word that we have heard.

14 THE COURT: And no timing yet, sense of timing
15 yet?

16 MS. VAN STEENBURGH: No. I believe, though, that
17 they have, I believe they have picked the two. There is a
18 female and a male.

19 MR. GOLDSER: I believe they may have been.
20 Whether or not that remains unchanged in light of the
21 verdict, I don't know. Whether there will be arguments to
22 talk about different case selection in light of the
23 verdict, that I don't know.

24 THE COURT: Okay.

25 MR. GOLDSER: I'm sure that will be coming clear

1 in the next couple weeks. The next item on the agenda,
2 again I'm not sure there is much to talk about here, but
3 through Your Honor's good auspices, Judge Boylan has
4 scheduled a settlement conference. We had some conflicts
5 on the first day that was selected.

6 We now have November 29th to spend with
7 Magistrate Judge Boylan. I'm sure we won't have any good
8 news to report at the end of that day on the overall status
9 of the litigation, but hopefully we can get the process
10 started and find out whether there is any hope of a global
11 resolution for these cases of some kind, or alternatively
12 it might take five minutes, and one party or the other will
13 say not time or won't do it, but we'll know.

14 THE COURT: Okay.

15 MR. GOLDSER: So that brings us to the Straka
16 trial and a number of items are on the agenda. I'm not
17 sure that, again, they are large or significant items for
18 today's conversation. We're working through scheduling a
19 number of depositions.

20 We have a deposition date for Mr. Straka's
21 continued deposition. We had agreed to move back the date
22 for disclosure of experts until tomorrow. That will
23 happen, and we're already starting to talk about deposition
24 dates for experts. The order says it was supposed to be
25 done by next Friday.

1 I don't think we're going to make that, but we're
2 working on dates to keep it as tight as we can. There are
3 some new experts. Defense has a new regulatory expert.
4 Plaintiff has a new human factors expert. As to
5 plaintiff's side, that means we will have an additional
6 expert testifying at trial, which really gets into the next
7 issue, time allocation for trial.

8 THE COURT: Is this in addition to current
9 experts?

10 MR. GOLDSER: Yes, I expect so. I expect so.

11 THE COURT: And, of course, the defense,
12 correct --

13 MS. VAN STEENBURGH: Yes.

14 THE COURT: -- did not have one before?

15 MS. VAN STEENBURGH: Right.

16 MR. GOLDSER: It's the defense that has a new FDA
17 regulatory expert.

18 THE COURT: Right.

19 MR. GOLDSER: And so we'll likely have deposition
20 and *Daubert* motion practice over those.

21 MS. VAN STEENBURGH: I'm the one that put this on
22 the agenda, Your Honor. The reason I did is not because
23 each of us has a new expert. We're going to have double
24 the number of witnesses this trial. We could have up to 28
25 to 30, and I just wanted to at least bring it to the

1 Court's attention.

2 The plaintiffs have quite a few healthcare
3 providers they want to have testify, and if they are all
4 going to be called live, it's just going to take a little
5 longer, so I wanted everybody to make sure that we were
6 thinking about this. If the plaintiffs want the same
7 amount of time, we certainly can do it that way, but I just
8 wanted to bring it to the Court's attention that we could
9 have that many more witnesses that will testify this time
10 around.

11 MR. GOLDSER: I was, in fact, just getting there.

12 MS. VAN STEENBURGH: I'm sorry.

13 MR. GOLDSER: No problem. That's accurate. I
14 mean, there are a number of additional medical care
15 witnesses for Mr. Straka, and the other thing that --

16 THE COURT: Because he had more individuals
17 treating him, is that why?

18 MR. GOLDSER: There were a number of individuals
19 treating him. We have the prescribing doctor, who is in
20 Arizona. We have the follow-up doctor, who saw him back to
21 Arizona who is not his regular doctor. We then have his
22 regular doctor, who has relevant testimony. We have
23 orthopedists to come forward with certainly relevant
24 orthopedic information. We may have a physical therapist
25 to talk about disability issues.

1 That's the list. Whether they will all be
2 necessary remains to be seen, but it's entirely possible
3 that they would be, and that also raises another question.
4 I'm not sure where I heard some of this information, but
5 we're scheduled to start on January 3rd. It's my
6 understanding the Court has a couple of criminal trials
7 coming up in January.

8 And I'm wondering whether the Court's allocation
9 of time for us in light of potentially a longer trial this
10 time around is going to be an issue.

11 THE COURT. Well, I think those are criminal
12 trials that required a date in part because of speedy trial
13 considerations, in part because sometimes defendants need a
14 trial date in order to decide what to do, whether to enter
15 a guilty plea or not, and I'm not anticipating any conflict
16 with this trial by criminal trials, even though there are
17 some dates that are set during that period of time.

18 MR. GOLDSER: Okay. All right. Well, we have
19 gone three weeks typically with the first couple of trials.
20 You might want to think about the potential for four this
21 time with the additional witnesses. If we can get done
22 sooner than that, that would be nice.

23 THE COURT: Do you, do you want to confer about
24 hours, any particular hours' limit? The Court, of course,
25 in the first two trials imposed an hours' limit. I think

1 the plaintiffs had slightly more than the defense, and in
2 both trials, we came in under that amount on both sides. I
3 think that's always for a longer trial very helpful for
4 case management purposes, but I would want to hear from
5 each side what they think they might need, given the
6 additional witnesses.

7 MR. GOLDSER: My recollection was the numbers
8 were 35 for plaintiff and 31 for defense.

9 THE COURT: They were.

10 MR. GOLDSER: And we actually cut it a little
11 closer in the second trial than we did the first on our
12 side, and I would anticipate asking for additional hours
13 beyond that given these witnesses. How much I don't yet
14 know.

15 THE COURT: Okay. Well, why don't you both
16 confer about that, and we can talk about that at an
17 upcoming status conference.

18 MR. GOLDSER: Okay.

19 THE COURT: It's not something we need to decide
20 very early in this process. We can keep that until a
21 little bit later, but I would like to set some time limits.

22 MR. GOLDSER: Of course. The third item under
23 the Straka trial, response to request for Wells data, there
24 is information from Dr. Wells about whether he did or did
25 not do certain calculations and kept records of those

1 calculations.

2 Some information was provided in the New Jersey
3 trial. I'm not entirely clear on its origin. I'm finding
4 out what it was, where it came from, when it was developed.
5 We have provided it here. I mean, that's clear, but
6 Ms. Van Steenburgh has some questions about it, and I am
7 chasing down the answers to that and hope to have answers
8 for her in short order on those.

9 On items D and E, dismissal of entities and
10 dismissal of claims, while I think it is likely that we
11 will be going forward with the same defendants and the same
12 claims, I have not yet had enough time since I returned to
13 make sure that is true. I do want to think that through a
14 little bit longer before we formally respond to that.

15 We certainly will answer those questions in short
16 order so that defendants can prepare. There was one
17 other -- I'm sorry.

18 MS. VAN STEENBURGH: And the only reason that
19 it's on there is that as we bring certain motions, it makes
20 it streamlined if the claims are -- we know which one the
21 claims are and there is a judgment on the pleadings.

22 THE COURT: Let's try to get this clarified in
23 the next couple of weeks. Is that possible?

24 MR. GOLDSER: Certainly. Absolutely. One item
25 that we're sort of back and forth on whether it should or

1 should not be on the agenda has to do with provision of the
2 original package inserts.

3 An affidavit that was provided by corporate
4 counsel John O'Shaughnessey in the New Jersey litigation,
5 the availability of the actual package inserts in their
6 folded up form rather than using copies or blowups or what
7 have you, and we're having a bit of a debate about whether
8 these things exist or don't exist.

9 It's been a bit of a struggle, and we're hearing
10 from plaintiffs' side, we're hearing a variety of stories
11 that Mr. O'Shaughnessey says one thing. Counsel in New
12 Jersey said from my understanding, secondhand, something
13 else. We want very much to have original package inserts
14 in the folded up form that come in the packages rather than
15 using eight and a half by eleven, or worse than that,
16 blowups because if we're talking about the adequacy of
17 warning and you start thinking about the best evidence
18 rule, and blowups is not the best evidence. It's so easy
19 to take it out of context.

20 But before we even get into the issue of whether
21 or not the package insert in its original form is the only
22 thing that is usable, we need to know whether they exist,
23 whether they don't exist, which ones exist. Apparently,
24 there are some now from 2007 that may exist. We have been
25 told there is a whole inventory of them that was available

1 in New Jersey, and I'm just not clear on what is there,
2 what is out there.

3 THE COURT: Did we have one of the originals in
4 the first trial?

5 MR. GOLDSER: We did. We had one of the
6 originals in the first trial. It was not, to my
7 recollection, the one of the relevant time period, so we
8 used it as an exemplar, but I think what we ought to have
9 is the one that comes from the relevant time period so that
10 when you talk about, what did the doctor see and have
11 available at the time, you're not showing the blowup.
12 You're not showing an eight and a half by eleven. You're
13 showing an actual fold up package insert that that doctor
14 gets in his office when he gets samples or when the sales
15 rep comes by.

16 So it's hard for us to understand and believe
17 that these things don't exist since they're FDA types of
18 documents which have to be maintained, but that's the
19 issue, as I understand it, and --

20 THE COURT: And what did they use in New Jersey?
21 You're not sure.

22 MR. SAUL: Your Honor, this is Lewis Saul. I
23 think I have quite a bit of information on this issue if I
24 might speak.

25 THE COURT: Go ahead, Mr. Saul.

1 MR. SAUL: Thank you, Your Honor. At the last
2 status conference, we brought this issue up to Your Honor,
3 and we got the transcript today from that hearing, and your
4 ruling was as follows: It seems to me that the plaintiffs
5 in this multi district litigation should receive precisely
6 what was disclosed in the New Jersey trial by way of
7 package inserts and explanations concerning the search, and
8 we'll take it from there after that.

9 After that ruling, Your Honor, I asked
10 Ms. Van Steenburgh for a copy of the O'Shaughnessey
11 document, the affidavit. Mr. O'Shaughnessey is in-house
12 counsel for Johnson & Johnson, and not until -- she said
13 that she didn't know whether she was going to just give it
14 to the Court or provide it to us, and only this morning we
15 got a copy of it.

16 In the meantime, we had called the New Jersey
17 court and talked to Judge Higbee's law clerk, who informed
18 us, although the judge ordered the O'Shaughnessey affidavit
19 be given to Judge Higbee, it never had been. We did get a
20 copy of that affidavit today or that declaration today, and
21 it is -- does not say what was represented in the last
22 hearing.

23 In the last hearing it was represented to you,
24 Your Honor, that there were only three package inserts from
25 2007. Well, what occurred, if I might, and I don't know if

1 you want this briefed in a formal motion, but on September
2 8th, Judge Higbee told the defendants, and I'm quoting, By
3 Monday I want the package inserts here, and I think you
4 should be able to get them. If you can't get them, I need
5 a certification. I can't make you produce what you don't
6 have, but they darn well better make a good effort to find
7 them because I'm going to be really upset if I find that
8 they existed and they weren't produced.

9 By the way, Your Honor, these were in our
10 original requests for production of documents four years
11 ago, and we have been after them ever since, many times.
12 The next day, Judge Higbee reiterated, The bottom line is,
13 they have been told to get them, and I think they probably
14 have them somewhere. I've made that clear. I want a
15 diligent search, and if they exist, they better be
16 produced, and that's it.

17 Three days later, Susan Sharko, who is from
18 Drinker Biddle, told the Court -- and she was trial
19 counsel, one of the two trial counsel -- that she had the
20 affidavit from O'Shaughnessey, and Judge Higbee said she
21 wanted a copy of it. Later that day, Susan Sharko brings
22 the original package insert issues up again.

23 Quote, So as a result of making all these calls
24 to people who received a number of original copies for
25 various years, as I told Mr. Alonso this morning, we made

1 an inventory of them. We have those copies in court. We
2 will have them in court every day, and they will be
3 available to him, and all he has to do is tell us which one
4 he wants to see.

5 The Court: So we have the originals?

6 Ms. Sharko: We have an original for a number of
7 them, and I will give them to you.

8 This goes on and on, and I can provide the
9 transcripts. The 2004 package insert was used by the
10 district manager in one of the cases that was tried in New
11 Jersey. The 2006 label, Ms. Sharko told the Court, already
12 plaintiffs' counsel had that. We have that in the
13 transcript as well.

14 So we know they have these package inserts. They
15 never produced over four or five years, and they did
16 produce them when they were made to produce them in New
17 Jersey. This is an extremely troublesome area because both
18 in New Jersey, and you will recall in *Christensen*, they
19 used not the package insert, but they used some facsimile
20 of the same.

21 And they used this blowup with these big green
22 marks saying tendon, tendon rupture, and they used them,
23 and that's what they used in New Jersey, too, rather than
24 giving us the package insert. And their entire defense
25 rests upon the learned intermediary, and to use a document

1 that was not the original document when they had them in
2 their possession for the last four years is wholly
3 inappropriate.

4 And we would ask the Court to immediately order
5 them to give us these original transcripts -- the inserts.
6 I'm sorry. I'm done. Thank you.

7 THE COURT: Thank you, Mr. Saul.

8 MS. VAN STEENBURGH: Your Honor, we have tried to
9 track this issue down, and I've been writing as Mr. Saul
10 has been speaking. I wasn't at the New Jersey trial. I
11 don't think Mr. Saul was actually at the New Jersey trial.
12 It was his client whose case was being tried.

13 We did talk at the last status conference, and my
14 understanding was that in the New Jersey case there was a
15 request for the original package inserts, and the judge
16 said, see what you can do to find them, and they did. And
17 the certification was offered to the judge and to
18 Mr. Alonso, the plaintiffs' attorney.

19 So when Mr. Saul said, I didn't have it, I don't
20 know where it is, you know, it's his client. It's his
21 co-counsel. That he didn't have it, fine. I didn't know
22 if it was given to the co-counsel. I thought it was just
23 given to Judge Higbee, and I said let's wait. If it were
24 only provided to the judge, I'm only going to do that in
25 the MDL as well.

1 I received word last night that it was actually
2 produced to the plaintiffs' attorney, so I sent it to
3 Mr. Saul this morning so there was an equal footing. With
4 respect to what those package inserts were, my
5 understanding at the time of our last telephone conference
6 was, and I read Mr. O'Shaughnessey's certification, that
7 they had tracked down the 2007 original package inserts.

8 I have since been informed that they have tracked
9 down others. It is not like they keep them in some box
10 someplace and they have these that you can willy-nilly get
11 these package inserts. Frankly, most of them are destroyed
12 so that people do not confuse package inserts from year to
13 year, but they were able to dig up some of them, and I have
14 a list.

15 And Mr. Carol, who was with the defense, did
16 bring some in apparently in a Redwell, and I don't mean to
17 make too light of it, but it's almost like he is handcuffed
18 to these. He doesn't want to let them out of his sight
19 because these are the only ones they have been able to find
20 in the company.

21 Certainly, we would be happy to have Mr. Saul
22 look at them. We will bring them to court. I would not
23 want to release them and give them to the plaintiffs since
24 those are the only documents that exist, but I think it is
25 a bit of a tempest in a teapot in some ways because this

1 is -- they want to hold up how small -- they're all the
2 same size. They are folded the same way.

3 The content is what matters here. Whether it
4 says tendinopathy 12 times or 14, it's going to be the same
5 thing in the original package insert as it is in the copy.

6 THE COURT: Which package inserts are at issue in
7 the Straka trial, do we know?

8 MS. VAN STEENBURGH: I believe it's the 2005.

9 THE COURT: Is that one of the originals that has
10 been found?

11 MS. VAN STEENBURGH: Yes, they did find an
12 original. So we have one of those.

13 THE COURT: Is there just one package insert at
14 issue, Mr. Goldser, here?

15 MR. GOLDSER: The injury was, the prescription
16 date was I believe March 20th of 2006, and I'm not sure
17 precisely which package insert would be at issue at that
18 point in time, but whichever one is --

19 THE COURT: 2005 might be the one.

20 MS. VAN STEENBURGH: August 2005 was the date of
21 the 2005, so I'm assuming that is the one.

22 THE COURT: And there is only one that would be
23 at issue?

24 MR. GOLDSER: I believe that's right.

25 THE COURT: Given the nature of the injury here,

1 so if we have that one available. So it seems to me that,
2 you know, copies of that, exact copies should be made so
3 that you have the exact copy, and the original should be
4 available for trial.

5 MS. VAN STEENBURGH: That's fine.

6 THE COURT: Does that make sense, Mr. Goldser?

7 MR. GOLDSER: It does to me.

8 Lewis, do you have any further comments on that
9 thought?

10 MR. SAUL: I think that all the package inserts
11 that were available before and after, we have the one with
12 the black box warning, but we wanted to show the
13 progression of changes as well. So it seems to me that the
14 other package inserts, if they have them, are available as
15 well, the 2002 and the 1997, I think.

16 MR. GOLDSER: You know, actually, I think Lewis
17 may be right about that because if what we're talking about
18 is the history of knowledge that has been developed by a
19 physician and it's coming from these package inserts, what
20 they say --

21 THE COURT: I don't have a problem with that.
22 Perhaps, you know, a photocopy of each of them should be
23 made available right away, and then all the originals
24 should be here at trial just in case they're needed or in
25 case they become relevant for the testimony.

1 Does that make sense, Ms. Van Steenburgh?

2 MS. VAN STEENBURGH: As long as we can maintain
3 them in our possession, Your Honor, that would be
4 acceptable to us.

5 THE COURT: I think that is understandable given
6 the difficulty in finding the originals, but they should be
7 exact copies, and as long as there is a representation that
8 all originals will be maintained and available for use
9 during the trial so the jury can have a chance to see the
10 original, and we're not going to misplace it, of course.

11 MR. GOLDSER: Okay.

12 MS. VAN STEENBURGH: The only other comment I
13 would make, Your Honor, and this is kind of a moot point
14 now. Mr. Saul said this is has been a request that has
15 been longstanding. I scoured the requests and the
16 interrogatories. No requests. I just wanted to point that
17 out.

18 MR. GOLDSER: The other discovery item that
19 exists relevant to Straka is actually item number 6 on the
20 agenda, further review of the personnel files of Drs. Kahn,
21 Yee and Noel. Excuse me. Your Honor will remember that
22 you were given a portion of the Kahn personnel file. You
23 released I think all but one page of it, and we found and
24 find that to be very useful information.

25 I have been concerned from the outset in this

1 litigation that defendant gets to be gatekeeper and
2 determining -- the decider of what is relevant and what is
3 not relevant. We've had lots of arguments, friendly or
4 otherwise, in this case, and I'm not even in a position to
5 argue whether they're right or they're wrong about these
6 files.

7 I suspect the remainder of these files are not
8 large so that the burden of reviewing them would not be
9 onerous. I would like to ask that all of those files, the
10 complete files, be provided to the Court in camera to
11 determine whether there are other materials in them that
12 are germane to this litigation.

13 MS. VAN STEENBURGH: When this issue came up,
14 Your Honor, we operated in good faith. We looked at the
15 specific question, which was the sales and marketing
16 information. We did as the Court requested. I'm happy to
17 turn those over, if the Court wants to look at them.

18 There is nothing in Yee. Nothing in Noel, and we
19 only took out duplicates in Kahn, and you have reviewed
20 otherwise everything, but if counsel doesn't trust us and
21 the Court wants to have a review based on their request, I
22 have no problem with it. It is what it is.

23 THE COURT: What is the volume of the files?

24 MS. VAN STEENBURGH: The files aren't that big.

25 THE COURT: Why don't you submit them in camera?

1 We will be happy to take a quick look at them and see
2 whether there is anything that the Court thinks might be
3 potentially relevant.

4 MS. VAN STEENBURGH: Okay.

5 MR. GOLDSER: Thank you, Your Honor. We
6 appreciate that, and then the final item is number 5 from
7 pretrial order number 12, the selection of ongoing cases
8 for discovery and potential bellwether trial. You set a
9 deadline I think of November 14th for a meet and confer.

10 Defense counsel was kind enough to provide me
11 with a spread sheet as we walked in today. We're going to
12 take a look at that. We're starting a discussion process
13 on what is appropriate, what is not appropriate. Perhaps
14 the settlement conference will have some bearing on where
15 we go with that. Perhaps not, but the process has started.

16 THE COURT: Okay. If you think that's too early,
17 I would be happy to change that date. If you want to move,
18 push it off -- I tried to get it early enough so that we
19 have some sense of the number of potential cases before we
20 jump into the Straka trial, but I mean, I'm happy to move
21 that date around. It's not essential to the Court.

22 MR. GOLDSER: Sure. What has been provided is a
23 list of roughly 24 cases that are Minnesota
24 resident/Minnesota filed, and from that we're trying to
25 start winnowing those right at the beginning to see if we

1 can work with a manageable number, start doing some
2 discovery from there.

3 But as I understand it, the actual discovery
4 process won't commence until after Straka is over, so we
5 might be able to come up with a list. It has started, but
6 if you wanted to know the general size of what we're
7 looking at, it is two dozen, and it will be reduced down
8 from there to some amount that we ultimately agree on or
9 the Court decides for us.

10 THE COURT: I'll leave the date at November 14th.
11 If the parties think, either side thinks that should be
12 changed, just let me know.

13 MR. GOLDSER: I believe that concludes everything
14 that is on the agenda that has been filed for today.

15 THE COURT: Ms. Van Steenburgh?

16 MS. VAN STEENBURGH: I have one other item, Your
17 Honor, that has come up. It's housekeeping that I have
18 been asked to bring to your attention. Apparently as part
19 of the appeal in *Schedin*, we are going to file a couple of
20 transcripts that were part of the Court record, but it
21 turns out that the transcripts were filed only in the MDL
22 and not in Mr. Schedin's case.

23 The Clerk of Court here says that without the
24 Court's permission or order or direction from the Court,
25 the Clerk won't put a copy in Mr. Schedin's file. So I

1 wanted to bring this up today. There were three
2 transcripts. They were *Daubert* motion hearings: One on
3 October 6th of 2010. That was the Seeger/Layde *Daubert*
4 motion; one on October 14 of 2010, the Holmes *Daubert*
5 motion; and one on October 22 of 2010, that was the Blume
6 and Waymack *Daubert* motion.

7 I don't know how necessary they are to the whole
8 appeal, but we have been asked to include those as a
9 possible transcript so the Eighth Circuit can review those.

10 THE COURT: I guess there is two possibilities.
11 One, I could just order the clerk to file them or to file
12 them in the *Schedin* file or you can do it.

13 COURT REPORTER: I will take care of it.

14 MS. VAN STEENBURGH: Okay. I think they were
15 just put in the MDL file because they are generic, but
16 because they applied to *Schedin* --

17 THE COURT: We'll take care of that filing.

18 MS. VAN STEENBURGH: All right. Thank you very
19 much.

20 THE COURT: Okay. Okay. Anything else for
21 today?

22 MR. GOLDSER: Nothing from me, Your Honor.

23 Mr. Saul, is there anything that you need to
24 raise?

25 MR. SAUL: Nothing else, Your Honor.

1 THE COURT: Anyone else on the telephone have
2 anything to raise or any questions or comments?

3 Okay. Mr. Cialkowski, anything?

4 MR. CIALKOWSKI: No, Your Honor.

5 THE COURT: Mr. Irwin?

6 MR. IRWIN: No, thank you, Judge.

7 THE COURT: How about you, Ms. Van Steenburgh?

8 MS. VAN STEENBURGH: Nothing, Your Honor. Thank
9 you.

10 THE COURT: Very well. Should we set another
11 status conference for some time perhaps in December? Does
12 that make sense, or should we have one earlier? What's
13 your anticipation of the issues that may come up in
14 preparation for trial?

15 MR. IRWIN: Scheduling-wise, could we consider
16 doing it, say, late in the afternoon after our settlement
17 conference with Magistrate Boylan, which is the 29th since
18 we will all be over here?

19 THE COURT: Let's see. Let's tentatively set
20 that. I do have a trial scheduled beginning on that Monday
21 in our courthouse in Fergus Falls, and of course, you're
22 all welcome to come up there for a status conference.

23 MR. IRWIN: I have never been there, Your Honor.

24 THE COURT: It's a trip back in time, but let's
25 set it for, we could set, say, four o'clock that afternoon

1 on the 29th tentatively, and if we need to change it, we
2 will let you know. It's possible that the length of that
3 trial may get that pushed off until after the Levaquin
4 trial, and if so, I would probably be here doing a bench
5 trial.

6 So it will work out just fine.

7 MR. IRWIN: Thank you, Judge.

8 THE COURT: Okay.

9 MR. GOLDSER: And I note on pretrial order 12,
10 the scheduling order, that by that date November 29th, we
11 will have had the punitive damages motion fully briefed.

12 THE COURT: Okay.

13 MR. GOLDSER: But nothing else appears to be
14 fully briefed by that time for any arguments, so we may
15 want to consider the next status conference after the 29th
16 to be one consistent with the briefing of some of the
17 motions.

18 THE COURT: That sounds good. Good idea,
19 Mr. Goldser.

20 Okay. If there is nothing else, we will be in
21 recess, and thank you, everyone. We look forward to seeing
22 you in a month or so.

23 MR. GOLDSER: Thank you, Your Honor.

24 MR. IRWIN: Thank you.

25 MS. VAN STEENBURGH: Thank you, Your Honor.

1 MR. SAUL: Thank you.

2 THE COURT: The Court is in recess.

3 THE CLERK: All rise.

4 * * *

5 I, Kristine Mousseau, certify that the foregoing
6 is a correct transcript from the record of proceedings in
7 the above-entitled matter.

8

9

10

11 Certified by: s/ Kristine Mousseau, CRR-RPR
12 Kristine Mousseau, CRR-RPR

13

14

15

16

17

18

19

20

21

22

23

24

25