

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

-----

In Re: Levaquin Products	)	
Liability Litigation,	)	File No. 08-md-1943
	)	(JRT/AJB)
	)	
	)	Minneapolis, Minnesota
	)	July 17, 2012
	)	9:15 A.M.
	)	

-----

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

APPEARANCES

For the Plaintiffs:

**CHARLES ZIMMERMAN ESQ.**  
**RONALD S. GOLDSER, ESQ.**  
**GENEVIEVE ZIMMERMAN, ESQ.**  
**REED FLATHMANN, ESQ.**

Via telephone:

**LEWIS J. SAUL, ESQ.**  
**KEVIN FITZGERALD, ESQ.**  
**ED COLEMAN, ESQ.**  
**KRISTIAN RASMUSSEN, ESQ.**

For the Defendants:

**TRACY J. VAN STEENBURGH, ESQ.**  
**JOHN WINTER, ESQ.**

Via telephone:

**JAMES IRWIN, ESQ.**  
**WILLIAM ESSIG, ESQ.**

Court Reporter:

**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

9:15 A.M.

(In open court.)

THE COURT: You may be seated. Good morning, everyone. This is civil case number 08-1943, In Re: Levaquin Products Liability Litigation.

Counsel present please note appearances starting with the plaintiffs.

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

MR. ZIMMERMAN: Good morning, Your Honor. Charles Zimmerman for plaintiffs.

THE COURT: Good morning.

MS. GENEVIEVE ZIMMERMAN: Good morning, Your Honor. Genevieve Zimmerman.

MR. FLATHMANN: Good morning, Your Honor. Reed Flathmann for the plaintiffs.

THE COURT: Good morning to all of you.

MS. VAN STEENBURGH: Good morning, Your Honor, Tracy Van Steenburgh for defendants.

MR. WINTER: Good morning, Your Honor. John Winter for defendants.

THE COURT: Good morning to both of you. Now on the phone for plaintiffs?

MR. SAUL: Yes. Good morning, Your Honor. Lewis

1 Saul.

2 MR. RASMUSSEN: Good morning, Your Honor.

3 Kristian Rasmussen.

4 THE COURT: Okay.

5 MR. COLEMAN: Good morning, Your Honor. Ed

6 Coleman.

7 THE COURT: Okay. Anyone else for plaintiffs on

8 the phone? Okay. How about for the defendants on the

9 phone?

10 MR. IRWIN: Good morning, Your Honor. Jim Irwin.

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

12 as well.

13 THE COURT: All right. Very well. Good morning

14 to all of you, and thank you for joining us by

15 teleconference. If there is anything that you can't hear

16 clearly, please let us know. We will have it repeated

17 directly into the microphone. We have a status conference

18 today and some matters to discuss.

19 Mr. Goldser, I'll call on you first.

20 MR. GOLDSER: Thank you, Your Honor. I believe

21 Kevin Fitzgerald was or is or will be on the phone with us.

22 I'm not sure where he went, but I know he had called in

23 before, and I was surprised not to hear his voice.

24 As usual, we have to start off with the count of

25 cases, and I don't know if Ms. Van Steenburgh or Ms. Essig

1 has that.

2 MR. ESSIG: Good morning, Your Honor. The counts  
3 that we have currently are in the MDL. We believe there  
4 are 1779 open cases and 58 cases that have been dismissed  
5 to date in the MDL. Our understanding from the New Jersey  
6 mass tort that there are currently 1563 open cases and 211  
7 cases have been dismissed in New Jersey to date.

8 As for other cases in state courts, there are I  
9 believe five tendon cases that are open in various  
10 jurisdictions, two of which are in Illinois in St. Claire  
11 County, that currently have a fall trial date, but there  
12 are motions for summary judgment pending in both of those  
13 cases.

14 And there are, I believe, three other state court  
15 cases pending.

16 THE COURT: All right. Any other information on  
17 cases that anyone has?

18 MR. GOLDSER: Well, item number 2 on the agenda,  
19 federal/state coordination, there are not presently to my  
20 knowledge any additional trials scheduled in New Jersey.  
21 There is some discovery that is going on. I know I have  
22 got several cases that depositions are scheduled.

23 I know Judge Higbee has had a number of different  
24 other mass tort trials, and status conferences have been  
25 postponed on a fairly frequent basis, and I've lost track

1 of when the next one is scheduled.

2 I don't know if you know?

3 MR. WINTER: Thursday.

4 THE COURT: Status conference on Thursday in New  
5 Jersey?

6 MR. WINTER: Yes, Your Honor.

7 MR. GOLDSER: There is nothing imminent there.  
8 As Mr. Essig reported, there is the trial scheduled in  
9 Illinois in September. There are two cases. The summary  
10 judgment motions, to my knowledge, have been briefed and  
11 argued and are under advisement.

12 THE COURT: Tell me. Is there a plan to set  
13 another trial date in New Jersey, or is it just not known,  
14 Mr. Winter?

15 MR. WINTER: I believe there will be discussion  
16 Thursday about the next trial date.

17 THE COURT: Okay. All right. Thank you.

18 All right. Go ahead, Mr. Goldser.

19 MR. GOLDSER: Then the next item on the agenda is  
20 the Rule 60 motion regarding the Schedin case, and I  
21 believe that's the defendants' motion.

22 THE COURT: Very well.

23 Ms. Van Steenburgh?

24 MS. VAN STEENBURGH: Mr. Winter is going to  
25 argue. I'm going to set up the Power Point here.

1 THE COURT: All right. That's helpful. We were  
2 getting a little feedback in the courtroom.

3 **(Off-the-record discussion.)**

4 MR. WINTER: Do you have it on your screen, Your  
5 Honor?

6 THE COURT: Yes, I do.

7 MR. WINTER: May I proceed, Your Honor?

8 THE COURT: You may proceed, Mr. Winter.

9 MR. WINTER: Thank you, Your Honor. About 18  
10 months ago, Your Honor, we argued a motion involving one of  
11 plaintiffs' experts in a slightly different procedural  
12 posture, Cheryl Blume, and I'm not going to revisit that  
13 argument, Your Honor, nor am I going to reargue with you  
14 what we thought should have been done there, but it is  
15 abundantly clear what you did after that argument.

16 You were very clear as to what should have  
17 happened. There was a deposition notice. There is Rule  
18 26, and there is Case Management Order Number 5. They were  
19 violated, and you were very precise in saying that that  
20 information should have been produced.

21 And in aid of that, you actually allowed us to  
22 take a deposition of the person who created the data,  
23 Mr. Altman, and everyone was on notice as to how experts  
24 should act in disclosing information in this case. That  
25 did not happen with Dr. Wells, and it can't be disputed

1 that it did not happen, and we're going to spend a few  
2 minutes going through how we on the defense side tried to  
3 get information, and I'm going to tell you, Judge, we and  
4 you were misled.

5 There is no difference between Dr. Wells' data  
6 that was not produced until January of 2012 and the Cheryl  
7 Blume data that was belatedly produced in October just  
8 before we argued the motion to exclude her, and it's  
9 instructive, Judge, because what you said is we now on the  
10 defense side have the data, and it's fair game for  
11 Dr. Blume, Ms. Blume -- I usually will say Ms. Blume -- to  
12 talk about it.

13 We can cross-examine it. You didn't even  
14 preclude that from evidence, but you said we could then  
15 bring out what actually happened, and you know, judges are  
16 sometimes like umpires, and we learn what your strike zone  
17 is. And you are, with respect, Your Honor, your strike  
18 zone is a little bit bigger than other federal court  
19 judges, but you're fair.

20 You call it the same for both sides, and people  
21 learn from that, and that's the way it should be. Now, you  
22 said Blume, fair game both sides. What happened in  
23 Schedin? Zero. Not even the stuff that she produced the  
24 first time was the subject of any direct or cross, and we  
25 did not do anything with Mr. Altman's testimony, and that

1 became the rule memorialized in Christensen.

2 We had a back and forth. They moved to exclude  
3 Mr. Altman. You said fair game for both sides. Now, what  
4 is pernicious here, Judge, is you'll see how much Dr. Wells  
5 figured in Schedin. I'm going to show you a little bit  
6 slides from Mr. Watts's closing argument, and it's his  
7 punitive damage closing argument, and we can talk about his  
8 closing argument on the compensatory damage side.

9 Dr. Wells figured prominently in the punitive  
10 damage closing. I have to tell you, Judge, I had forgotten  
11 how much Dr. Wells was part of their closing argument.  
12 Why? Cornell trained, biostatistician. You know, he's the  
13 expert. He doesn't have a stake in this, and he honestly  
14 looked at the information, and he was shocked to learn what  
15 Dr. Seeger did and this misconduct with the algorithm.

16 You sat through several trials, Judge. The  
17 algorithm is the launching point for them to say  
18 conspiracy, fraud, misrepresentation, inherently evil, to  
19 quote Mr. Watts.

20 Obfuscation -- I can't even pronounce it --  
21 manipulation and profits, OMP. That's what he argues, and  
22 he used Dr. Wells, and why? Dr. Wells says, I can't  
23 understand this algorithm because if you look at the data,  
24 you put in the elderly, Levaquin is worse.

25 I mean, you heard it, and it's based on

1 Dr. Wells's analysis that Bisson says it, that Zizic says  
2 it, that anyone on their side says it, and they, you know,  
3 they tortured Dr. Seeger. They tried to torture every one  
4 of our witnesses with Dr. Wells's conclusions.

5 And it's here on the screen because it's  
6 paragraph 32. He says, I went back. I looked at the 1748  
7 data set. And just to quickly repeat it, that's when they  
8 went through the Ingenix, and they found this is the first  
9 group of tendon ruptures that met the broad definition.

10 And he then takes the 119 Medicare patients that  
11 they found later on, puts them together, and that's before  
12 the operation of the algorithm, and he says here, look, in  
13 paragraph 32, Levaquin was higher because we know by  
14 operation of the algorithm it turns out Levaquin is less  
15 than one. It's not statistically significant. There is  
16 not an increased risk.

17 But what he had done at the time he did this  
18 report, and it's in our papers. You can't dispute it. He  
19 had done the same calculation for ciprofloxacin, and it's  
20 higher. So if we had that information during the Schedin  
21 trial, that would have been powerful evidence. It is  
22 powerful evidence that the algorithm didn't change the  
23 analysis, let alone the fact that someone does both those  
24 calculations and omits one of them from the report because  
25 if you look at paragraph 28, there was a little

1 manipulation there, and we didn't get that data right away,  
2 but he had this, this was Levaquin, this is ciprofloxacin.

3 Judge, the cross-examination going forward on  
4 this point is going to be respectfully -- I know  
5 Mr. Irwin -- is going to be devastating. They can't call  
6 Dr. Wells again. Now, if you didn't have Dr. Wells in  
7 Schedin, we have to look at what the Rule 60 standards are  
8 here. That *Rosebud* case from the Eighth Circuit is  
9 clearly, clearly on point and dispositive, we suggest to  
10 you, Judge.

11 Here's what you said about Cheryl Blume. We  
12 excerpt your order, and what's important about that, Judge,  
13 is, we all know when you make a rule, any federal judge  
14 issues an order, it has to be followed, and it has  
15 application not only to Cheryl Blume but the way we all  
16 conduct ourselves.

17 Now, with complete candor to you, if I did what  
18 they did in not disclosing Dr. Wells after you issue your  
19 Cheryl Blume order, I was trained in the Southern District  
20 of New York. I would be in a lot of trouble because I am  
21 supposed to respect and follow orders and understand when a  
22 judge issues orders, it has application, and I need to be  
23 candid.

24 I need to say Judge Tunheim, we objected to  
25 something at Dr. Wells's deposition. You have now issued

1 your Cheryl Blume order. We have our objection, but we  
2 want everyone to know what we did, and then you make a  
3 ruling. You don't do what happened here. You see the  
4 order. You know, because you will see, they knew this  
5 calculation because we will get to it when Dr. Wells is  
6 questioned. Why did you not produce it. Work product.  
7 That's what I was told.

8 You can take judicial notice, Judge. When  
9 someone says I was told to withhold it on work product  
10 grounds, an attorney said you don't produce it.  
11 Dr. Wells's testimony went to every critical issue that was  
12 not specifically related to Mr. Schedin. Anything relating  
13 to the conduct of defendants in Schedin was all focused on  
14 the algorithm, the Ingenix study and why it was this  
15 dastardly thing.

16 I'm just going to, Judge, this is the punitive  
17 damage closing by Mr. Watts. We didn't change anything,  
18 and it goes on and on and on. (Indicating) here is a  
19 handwritten chart that Mr. Watts prepared based on what  
20 Dr. Wells had testified to, and he cross-examined several  
21 of our witnesses with it, and it's a little fuzzy, Judge.  
22 I'm sorry.

23 But it takes the top number, the 1748,  
24 application of the algorithm, add the 119. What we didn't  
25 get is the calculation that goes at the top of that

1 handwritten chart, which shows that ciprofloxacin, when you  
2 add the elderly, when you look at the totality is higher.  
3 And, you know, they tried comparative toxicity. You saw  
4 those 18 slides, the summer of discontent. We're concerned  
5 about comparative. We're concerned that Levaquin is worse.

6 They had the data that said no, that's not true,  
7 and they didn't produce it. This is still the punitive  
8 damage closing. I tried to count last night, Judge, so I'm  
9 not entirely sure of this. I think in their punitive  
10 damage closing, the witness with the most slides on their  
11 side was Dr. Wells.

12 And he was, to paraphrase Mr. Watts, you know,  
13 I'm from Texas, and you put lipstick on a pig, that was  
14 right after he talked about Dr. Wells and the algorithm.  
15 The emperor has no clothes, all after talking about  
16 Dr. Wells and what he said about the algorithm, how he  
17 couldn't understand why we did it.

18 It is front and center hindsight such an  
19 egregious thing to have done because we were defenseless on  
20 that. We gave you a good case, Judge, we thought. We're  
21 still in his punitive damage closing. We gave you I think  
22 a good case from a judge in Florida, that *Rembrandt* case,  
23 and that, that is very important because there in the  
24 middle of cross-examination, an expert confessed that he  
25 had cheated.

1           Now, the party with that expert said, well,  
2           cross-examination, it was withering, and it was bad, so  
3           they weren't prejudiced. But the reality is, we weren't  
4           prepared as well as we could be. We had *Daubert* motions to  
5           make.

6           Now, Judge, in hindsight you're going to have to  
7           really think through what Dr. Wells could ever testify to  
8           prospectively because he has data which completely  
9           contradicts his opinions, and that has to be sorted out.  
10          There is lots of things that would be entirely different in  
11          this case if we had had that before, let alone the fact it  
12          was deliberately withheld.

13          The case law is pretty clear as to what the  
14          standards are here. I don't think that's in debate, but I  
15          think the *M F Realty* case is very important here, Judge,  
16          because yes, it's a high standard. We acknowledge that,  
17          but you can't let someone do something that creates, to use  
18          the Eighth Circuit's word, a vehicle for injustice.

19          And a grave injustice was done, and we say that  
20          to you because we're many years into a litigation, and  
21          we're going back to the first trial, and that's, you know,  
22          no one is happy about this. But this was grossly unfair,  
23          and the consequence we really think is a new trial. To use  
24          school yard language, that's not on us, Judge. We had  
25          nothing to do with that.

1 THE COURT: Could you describe, Mr. Winter,  
2 exactly what the, for lack of a better term, the newly  
3 discovered evidence is and put it into the framework of the  
4 standards that we are looking at?

5 MR. WINTER: Sure.

6 THE COURT: Can you describe it exactly?

7 MR. WINTER: Yes. Dr. Wells took the data from  
8 Ingenix that we provided, and he had the Medicare group,  
9 and he had the original Ingenix group. He did a series of  
10 calculations. One of those calculations was, he added the  
11 119 Medicare patients to the 1748 from the initial Ingenix  
12 evaluation, and he then calculated the risk of tendon  
13 rupture as defined by the study for patients taking  
14 Levaquin.

15 So before application of the algorithm, he looked  
16 at the data, and he came up with a number. It's in  
17 photograph 32. It's 1.6, I believe. It's stated in his  
18 report. At the same time that he did that calculation, he  
19 did the same calculation in the same group of two data sets  
20 for ciprofloxacin, and that data which he had at the time  
21 he prepared the report -- he did the calculation, so it's  
22 not like some third party -- the number for ciprofloxacin,  
23 Judge, is 1.7 something, so it's her higher than Levaquin,  
24 and even the confidence intervals are tighter.

25 We have those numbers. They're in the papers.

1 So rather than say, which he did for paragraph 28, I did an  
2 analysis on Levaquin in the data set, and I did a analysis  
3 on ciprofloxacin. Here are the numbers. When he got the  
4 wrong number for their side, he didn't put it in his  
5 report, nor was it produced in the deposition notice that  
6 was served back in 2009.

7 That's why the Cheryl Blume point is important  
8 here, Judge, because it is one thing not to put it in the  
9 report. Okay. That's a bad fact. I don't want to put it  
10 in my report, but the failure to have disclosed it  
11 prevented us from --

12 THE COURT: From impeaching him?

13 MR. WINTER: -- from impeaching him, from making  
14 a *Daubert* motion, from lots of other things, Judge. It's  
15 more than impeachment. I mean, impeachment is important  
16 here, but it's not solely for impeachment purposes, and  
17 it's not solely for Dr. Wells because, as you saw, lots of  
18 witnesses relied on Dr. Wells's opinion that the use of the  
19 algorithm was intended to make Levaquin look better than  
20 ciprofloxacin, and the fact of the matter is, that is not  
21 true.

22 When Dr. Wells did the calculation before the  
23 application of the algorithm to either the 1748 or the  
24 Medicare data set, ciprofloxacin was higher.

25 THE COURT: But in the defendants' case, there

1 was relatively substantial evidence that the levo toxic  
2 rate was not higher than the Cipro rate, right?

3 MR. WINTER: That is the conclusion of Ingenix.  
4 That's definitely --

5 THE COURT: And defendants' experts testified in  
6 that manner, correct?

7 MR. WINTER: That's definitely true, Judge.

8 THE COURT: So then why wouldn't Dr. Wells'  
9 testimony, again looking at it from the lens of looking  
10 back under Rule 60, why wouldn't that have been cumulative?

11 MR. WINTER: Well, it's not cumulative, Judge,  
12 because it is clear admissions on their side. It is one  
13 thing for us to hire an expert to come in and say I think,  
14 you know, the algorithm was okay, and this is, the  
15 conclusion of the Ingenix study is fine.

16 I mean, I'm paraphrasing Dr. Layde, but it is a  
17 completely different matter to be able to say in your  
18 opening statement, they're going to call Dr. Wells. He has  
19 a report. He didn't put in his report the following  
20 calculations, and throughout this trial you're going to  
21 hear them say that the algorithm is bad. Their own expert  
22 will tell you unequivocally, factually that's not correct.

23 Now, Judge, you know how Schedin was tried.  
24 Bless you, Your Honor. So this is not some tangential  
25 point where, yeah, your cross-examination could have been a

1 little better of one witness, and we should have had it  
2 before the opening statement because you had told all of us  
3 that factual calculations that an expert does whether it's  
4 in the report or not in the report should have been  
5 produced for discovery purposes, so all of us knew the  
6 rule.

7 It's not like someone could say, well, I didn't  
8 think about this. I didn't know. I had a objection. That  
9 objection went by the boards, so that's, that's why, Judge,  
10 you -- when you look at this in the totality, the  
11 misconduct here is clear.

12 THE COURT: I'm trying to figure out, Mr. Winter,  
13 why this methodology that he used or this odds ratio was so  
14 special that no one else could have done it and impeached  
15 him with what someone else had done.

16 MR. WINTER: Well, Judge, A, we've given you the  
17 cases that that is not a basis for you to deny the motion.  
18 The fact that we could have done it is not relevant to the  
19 analysis, and I'm blanking on the name of the case, but I  
20 can find it in my slides here. A, that's not the relevant  
21 inquiry, with respect.

22 But B, when their expert does it, we all know  
23 that when we go to trial, we like to use the other side's  
24 evidence because that becomes very powerful. Admissions,  
25 Judge, are keys to cases, and the fact that he did it and

1 then comes -- and then it goes to just the validity of the  
2 algorithm, Judge. So they can't argue, Mr. Watts could not  
3 get up there and argue what he argued if we had known what  
4 Dr. Wells's calculation was.

5 He could argue it, but the -- he can't say that  
6 this outcome would not have been different. Jurors, there  
7 is clear, clear evidence here just by the way he did his  
8 closing argument, relying on Dr. Wells so much. And now as  
9 to our diligence, we have on the slide here from Dr. Wells'  
10 deposition in 2009. We'll get it in a form -- we'll get it  
11 to you.

12 Then, after -- that was before the Schedin trial.  
13 Dr. Wells is deposed again in 2010 because he had some  
14 additional information. At that deposition, Mr. Robinson  
15 asked: Do we have everything? So the question again was  
16 asked, do we have everything? We didn't. We didn't even  
17 have the underlying calculations for paragraph 28 at that  
18 point, but we again then start asking after Schedin.

19 And we're told in May of 2011, any calculation  
20 that Dr. Wells did were on his computer. There is no  
21 record of the calculation. Judge, you can't say anything  
22 other than that representation is just not true because on  
23 January 6th of 2012, it was produced and only after we had  
24 to come to you to get you to order a 90-minute deposition.

25 You know, did we rely on someone's

1 representation? There is no record of the calculation.

2 Yes. So are you going to say shame on us for relying on

3 that representation? Is that, I mean, I don't think you

4 want lawyers in your courtroom to work that way and then

5 find out that when someone says there is no record of

6 something, what we do, Judge, we want to depose Mr. Goldser

7 to see if he is telling the truth back in 2011?

8 We're not suggesting that, Judge, but for someone

9 to say that we weren't diligent I think is going way, way,

10 way past the bounds of what's good faith advocacy, and we

11 keep going here. We didn't like stop asking the questions,

12 and we have to go to this deposition, and we have

13 paraphrased what Dr. Wells said when confronted by

14 Mr. Irwin, what's the deal?

15 He used the word "work product," and that's what

16 I was told. We don't need to do much, Judge, to connect

17 the dots as to what happened there, and not to go back to

18 Cheryl Blume. We did not in Cheryl Blume's motion say what

19 we thought an attorney knew about that.

20 We were -- we looked at this and said, okay, we

21 have Mr. Altman and Cheryl Blume. You can't ignore that

22 now. If you look at what happened with Cheryl Blume,

23 Judge, the law of the case here, the law that you laid down

24 as to what happens when they didn't produce it, have a

25 motion, it's produced. It turns out that the expert

1       couldn't and didn't testify about any of it.

2               She had -- I have my regulatory opinion about  
3       labeling. She said zero about adverse events, even stuff  
4       that was in the first report, and that's the rule that you  
5       imposed, and that was a fair rule after you said to  
6       everyone, you want to have a food fight on everything?  
7       Okay. But if you're not going to have full blown, like you  
8       didn't do this and go into the fact that you withheld it,  
9       then nothing happens.

10              So I think, Judge, it becomes, to answer your  
11       question differently, it's not cumulative because you, if  
12       you would have applied the same rule, and I have every  
13       reason to believe you would do the same thing, Dr. Wells  
14       wouldn't be allowed to talk about half of his testimony for  
15       having withheld this other half.

16              So it's not that one of our experts could have  
17       then said something. They would -- that blasts a huge hole  
18       in their case, so we wouldn't have to put witnesses on to  
19       rebut something. This is not a situation even close to  
20       being cumulative.

21              We have a 60(b)(6) and a 60(b)(3) motion, Judge.  
22       The standards are a little different, and, you know, the --  
23       and there is a good reason for that because, you know, you  
24       don't, you can't reward misconduct. And while none of us  
25       want to redo Schedin, we have to because that result cannot

1 stand.

2 It is, it is completely unjust, to paraphrase the  
3 Eighth Circuit, to not grant us a new trial, and then there  
4 is all sorts of corollaries. We're going to come back to  
5 you on what happens to Dr. Wells in light of his failure to  
6 disclose.

7 So respectfully, Judge, and I know I've looked at  
8 a lot of these transcripts. These motions are called  
9 Mr. Winter motions. I'm okay with that, but, Judge, the  
10 fact is, we know what the rules are. You enter a Case  
11 Management Order. Rule 26 says something. You tell the  
12 parties what to do. We respect your orders, your rules.  
13 We follow them. We assumed our adversaries would.

14 That assumption was grossly misplaced, and we  
15 take this very seriously. We took Cheryl Blume very  
16 seriously, because we don't like to be cheated. We don't  
17 think it should happen. Both sides get a fair trial.  
18 That's the way you work. We were denied a fair trial in  
19 Schedin.

20 Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Winter.

22 Mr. Goldser?

23 MR. GOLDSER: Your Honor, I'm sure that Johnson &  
24 Johnson doesn't like to be cheated and neither do  
25 plaintiffs, but plaintiffs don't like to be personally

1 attacked unjustly, either. They are Mr. Winter motions,  
2 and I don't know what he has got in for me, but he does,  
3 and it was evident from the Blume motion.

4 You'll remember in the Straka trial when  
5 Dr. Wells was on the stand and he was accused, actually I  
6 was accused. I was personally accused in front of a jury  
7 of destroying evidence. Do you remember that? And we had  
8 to find the letter from Ingenix' counsel confirming that  
9 the data that they thought I had personally destroyed was  
10 never produced, and that just sort of dropped like a thud  
11 on Mr. Winter's head. He doesn't mention that this  
12 morning.

13 But these are personal attacks, and they are  
14 unjust, and they are unfounded. Let me give you some  
15 factual history before I get into the law. The  
16 calculation, and there is only one calculation that is at  
17 issue here that really does not go to the heart of the  
18 problems with the Ingenix study.

19 I wish I had the slide that lists about 13  
20 different problems with the Ingenix study, you know, going  
21 from Dr. Seeger destroying evidence himself to the  
22 involvement of J & J to manipulate results, to manipulate  
23 the threshold functions that went into the study, all of  
24 those things.

25 So the materiality of this one particular

1 calculation doesn't throw out all of the evidence about the  
2 Ingenix study, but we have this one calculation. You need  
3 to understand, Your Honor, that Dr. Wells when he wrote his  
4 report did a series of statistical calculations with the  
5 data that was produced by Ingenix, and they're really  
6 fundamental statistics analyses.

7 I think they fit into a statistical category  
8 called chi-squared, and even as an introductory statistics  
9 student, I was able to do chi-square calculations on a  
10 computer in 1972, pretty fundamental, with the data, and  
11 when you get a calculation, and you can do 10 or 100 or  
12 1,000 or 5,000 of these calculations, and you can run them  
13 in a variety of different ways, and they show up on a  
14 computer screen.

15 And you can decide which calculations you think  
16 are important to the issue that you're studying, and you  
17 can use the ones that you think give you the conclusions,  
18 the answers, right or wrong, good or bad. They give you  
19 the answers to the issue that you're raising.

20 If Dr. Wells did this one calculation out of the  
21 many that he did, and I'll come back to the "if" in a  
22 second, it was on his computer screen. It was not  
23 retained. It was not committed to paper. It was not  
24 committed to a computer memory. It was on his computer  
25 screen. He looked at it, and he decided to do with it as

1 he decided to do.

2 There were two paragraphs in his report that were  
3 at issue, paragraph 28 and paragraph 32. This calculation  
4 comes in paragraph 32. The calculations in paragraph 28  
5 were at issue in Dr. Wells's deposition in -- early on. I  
6 forgot the date. December of '09.

7 And what we provided after a discussion were the  
8 key numbers and the underlying data but not the calculation  
9 because it was one of those things. It was on his computer  
10 screen, and he didn't want it. That issue came up in the  
11 New Jersey Beare/Gaffney trial, and the defense wanted to  
12 get that calculation.

13 Well, Dr. Wells reproduced it. He recalculated  
14 it. He did it again, and at that point, he printed off the  
15 computer, and there was a record of it. Until that day,  
16 there was never a record of it, and the defense counsel in  
17 New Jersey didn't actually ask for it, but after that trial  
18 was over, defense counsel in this case asked for that  
19 document because at that point the document existed, and we  
20 provided it.

21 Then we came to paragraph 32 and this Cipro  
22 calculation. First off, you will note in the record and we  
23 cite in the record that Dr. Wells has never testified that  
24 he in fact had done this calculation. He recalled that he  
25 had no specific recollection of having done so. He may

1 have, and maybe I could have thought to do this, but I  
2 wasn't focused on that because what he was doing was  
3 comparing the odds ratio of levofloxacin by itself before  
4 the Medicare data was added and after the Medicare data was  
5 added to determine the impact of the omission of the  
6 elderly data on the odds ratio, because the criticism of  
7 the Ingenix study was that they had omitted the data  
8 concerning the elderly.

9 That was the point. That was the argument that  
10 was the problem with the algorithm. That was what was the  
11 basis of Mr. Watts's argument about punitive damages, the  
12 before and after the elderly was added, not the comparison  
13 of levo and Cipro.

14 So if Dr. Wells had ever done that calculation,  
15 he certainly never retained it in his computer. He never  
16 had a written document of it, and it was something that he  
17 did not choose to put in his report, and even though it was  
18 part of his thought process, it was not in his report and  
19 under CMO 5 and the work product doctrine, it's not  
20 producible.

21 But ultimately because your strike zone is large,  
22 you asked us to recalculate that, and once we were asked to  
23 recalculate that, we did so. Dr. Wells did so, and he  
24 created for the first time a document, and that document  
25 and that calculation, even though the data was available,

1 and the methods were available, the methods of Dr. Wells  
2 were never once criticized in a *Daubert* motion, not in  
3 Schedin, not in Christensen, not in Straka. Even after  
4 they had this information, his methods, the basis of a  
5 *Daubert* motion were never once criticized.

6 Even after they had that stuff, they never  
7 criticized his methods, so we followed your order. We did  
8 what we -- we recreated at their request this calculation.  
9 So that's -- I mean that's the factual history of where  
10 this information comes from, and that's the context of this  
11 information.

12 THE COURT: So you did not specifically object to  
13 production of anything that was in written form. Is that  
14 what you're saying? You may have objected to calculations  
15 that may have been done as a part of the research that  
16 Dr. Wells was doing but was not retained?

17 MR. GOLDSER: That's right.

18 THE COURT: Is that the appropriate distinction?

19 MR. GOLDSER: That certainly is a distinction,  
20 absolutely, and when we were talking about paragraph 28,  
21 and we talked about the due diligence of the defendant,  
22 they had asked him about paragraph 28 in his deposition,  
23 2009 deposition, and the follow-through from that was  
24 exactly as I have told you here.

25 It was a calculation on the computer. We don't

1 have that. It's not a document, but if you need the  
2 underlying material that is in documentary form, data form  
3 that we relied on, we'll give it to you, and that's the  
4 quote that Mr. Winter put up on his Power Point and  
5 misconstrues for you. We gave that to them. We just  
6 didn't give them the calculation because it wasn't a  
7 document.

8 It wasn't something he relied on in his report,  
9 and with the data and a very simple chi-square test, I  
10 don't know why their experts couldn't do it. There is a  
11 footnote in the reply brief that says our experts couldn't  
12 do it. There is no expert affidavit that says they  
13 couldn't do that. It is just a lawyer's footnote that says  
14 their experts couldn't do it.

15 I think you're right. Why couldn't their experts  
16 do this? Why couldn't they have a cross-examination by  
17 their experts to do this? Why couldn't they have a  
18 biostatistician to do this? Why wouldn't they have an  
19 expert biostatistician in any trial yet? I have been  
20 wondering where this expert is that is going to rebut  
21 Dr. Wells. All right. I don't get that.

22 The law on Rule 60, that it could not through the  
23 exercise of due diligence -- that defendants could not  
24 through the exercise of due diligence have discovered the  
25 evidence prior to trial, and first, it has got to be newly

1 discovered. This was not newly discovered. This report  
2 was issued a long, long time ago.

3 In December of 2009, Dr. Wells was first deposed  
4 on this report. It contained paragraph 32. If there was  
5 an issue about a Cipro calculation, it could have been  
6 inquired into at that point in time. The levo calculation  
7 was sitting there. You did this levo calculation. You had  
8 Cipro data. You want to talk about connecting the dots.

9 The question is, did you ever do a calculation  
10 about Cipro, and I think Dr. Wells answered, well, I don't  
11 think I did. I might have, but it certainly wasn't  
12 germane. If there was more to it than that, defense could  
13 have pursued it.

14 After Mr. Winter comes on and decides to engage  
15 in the attacks that he has, and after Mr. Irwin comes on  
16 and decides to change the course of the trial strategy from  
17 what Mr. Dames and Mr. Robinson did in Schedin, all of a  
18 sudden 17 months later this becomes a issue. 17 months  
19 later is when this problem starts to surface because they  
20 decide to make it a issue.

21 What happened between December of '09 and May of  
22 2011? Why couldn't they have raised this issue then?  
23 That's not due diligence. In fact, this Rule 60 motion, if  
24 I recall correctly, was actually filed on the 364th day  
25 after the judgment in Schedin was entered. That's not

1 exactly due diligence, either.

2 So here we are well down the road. Due diligence  
3 was not undertaken. It's not newly discovered evidence.  
4 Is it material? The notion of this calculation being the  
5 be all and end all is again emphasized out of context, just  
6 like the tendon warning, you know, the highlighted tendon  
7 warning in the label, boy, is that out of context. This is  
8 out of context.

9 The litany of problems with the Ingenix study,  
10 why it was wrong and what the underlying motive was of  
11 Johnson & Johnson to get the Ingenix study published and  
12 why it was bad science, it's a long list. You know it.  
13 You've heard it multiple times. This is one piece, to be  
14 sure that, that the pre elderly and post elderly  
15 calculation of the odds ratio was important.

16 Remember, there are two theories that the  
17 plaintiffs have espoused in this litigation. One is the  
18 failure to communicate the changed warning in 2001. This  
19 issue has absolutely nothing to do with that. The other is  
20 the comparative toxicity issue, and if we are proceeding  
21 only to a liability verdict on comparative toxicity,  
22 perhaps this issue is material at that point in time, but  
23 because we didn't proceed on comparative toxicity alone or  
24 certainly in the main, it's not material.

25 You have pointed out that this evidence is

1 cumulative. I won't belabor that. You have also pointed  
2 out that this evidence is solely for purposes of  
3 impeachment. Mr. Winter acknowledges that. Under a Rule  
4 60(b)(2) motion, if the evidence is for purposes of  
5 impeachment, that just doesn't justify the granting of a  
6 motion.

7 Finally, a point that Mr. Winter totally ignores  
8 is that the evidence, had it been available in Schedin,  
9 probably, not possibly, not a scintilla, not a whiff in the  
10 air, probably would produce a different result at trial.

11 Well, you know, in Christensen, it was Mr. Irwin,  
12 and he had the opportunity to cross-examine Dr. Wells  
13 without this evidence because it hadn't been produced at  
14 that point in time, and he won. So the evidence was not  
15 material to winning that trial.

16 In Straka, he had the evidence, and he had the  
17 opportunity to cross-examine Dr. Wells, and Dr. Wells  
18 testified very similar fashion to what I describe here. On  
19 liability where it mattered, where this information was  
20 germane, he lost.

21 Would this evidence probably produce a different  
22 trial in Schedin? I think we have empirical data to say  
23 no. The motion must be denied.

24 THE COURT: Thank you, Mr. Goldser.

25 Did you have anything else?

1 MR. WINTER: Very briefly, Your Honor.

2 THE COURT: Go ahead.

3 MR. WINTER: Your Honor, if you look at the  
4 memorandum we filed with this motion and you look at pages  
5 12 and 13, we excerpted Dr. Wells's testimony in  
6 Christensen on these calculations. Judge, he said, and I'm  
7 on page 13: Did you run the numbers here for Cipro?

8 Yeah, I probably did. I probably did.

9 And that's precisely to the calculation that is  
10 the subject of this motion, and it's in the context of at  
11 the time he did his report in 2009. So the notion that he  
12 didn't do it until some later date, I mean, if I say I  
13 probably did it, that means I probably did it.

14 And then Mr. Irwin is taking discovery  
15 cross-examination in trial because we don't know this, and  
16 then he asks the next set of questions:

17 Where is it?

18 Answer: Oh, probably still in the computer.

19 All right. We're here in Minneapolis. What are  
20 we going to do?

21 Well, it's in Ithaca.

22 In Ithaca, New York, in Cornell?

23 Yes.

24 So as of the trial in Christensen, it is sitting,  
25 if Dr. Wells was telling the truth, on his computer. He

1 had it. Now, we can go back, Judge, to the notices and  
2 what your orders say, but the deposition notice asked for  
3 all data, and then it says, All data or electronic  
4 information you created in this case, and then we can look  
5 at what Rule 26 says.

6 We can look at what Case Management Order 5 says.  
7 If someone wants to tell you, well, it was only on my  
8 computer, I had not printed it out, therefore I don't need  
9 to produce it? I mean, that was just what was suggested to  
10 you.

11 A, that's not complying with your orders about  
12 what you produce, but again, Judge, if you want to set a  
13 rule prospectively that someone can do all sorts of  
14 calculations, have them on their computer and say because I  
15 didn't print them out, I'm not going to produce them even  
16 though the judge has ordered that type of information to be  
17 produced, even though Rule 26 requires experts to produce  
18 that, even if it is not going to be relied on in the  
19 report, he did the calculation. It clearly should have  
20 been produced.

21 I'm not going to go back and argue about how  
22 material it was because the only trial that we didn't win  
23 is Schedin, and Schedin is the only trial where we didn't  
24 have some knowledge or ultimately the information that was  
25 part of the withheld data by Dr. Wells.

1           So applying Mr. Goldser's logic, it's the law of  
2           the case that the outcome probably would have been  
3           different. You look at the *Rosebud* case from the Eighth  
4           Circuit, Judge. They're very clear as to what the analysis  
5           has to be by you, and applying that, there is no question  
6           that a Rule 60 motion should be granted.

7           Thank you, Judge.

8           THE COURT: Thank you, Mr. Winter. Okay. The  
9           Court will take this motion under advisement and will issue  
10          a written order as soon as possible.

11          What else do we have to discuss today,  
12          Mr. Goldser?

13          MR. GOLDSER: Next item on the agenda, Your  
14          Honor, is the forum nonconvenience question. Mr. Saul will  
15          address that on behalf of plaintiffs.

16          Lewis, you still there?

17          MR. SAUL: I am. I think that Tracy and I are  
18          close on working out an agreement. We're not there yet,  
19          and I think that it should be put over until the next  
20          status conference.

21          THE COURT: Ms. Van Steenburgh?

22          MS. VAN STEENBURGH: Yes, Your Honor. We are  
23          working on a order to show cause to see if we can work out  
24          some language that would be helpful to the Court, and I  
25          think we can wait until the next status conference as long

1 as it's not too far away.

2 THE COURT: We will continue that matter.

3 MR. SAUL: Thank you, Your Honor.

4 MR. GOLDSER: The next matter is the motion to  
5 sever plaintiffs in multiple plaintiff complaints. There  
6 are complaints with multiple plaintiffs in them. I believe  
7 that Your Honor issued an order setting a date for  
8 responses. I know that there are a number of plaintiff's  
9 lawyers who have multiple plaintiff complaints who are  
10 planning on filing those responses, and those responses are  
11 due on the 19th, so I believe that's also not ripe for  
12 discussion today.

13 MS. VAN STEENBURGH: I will let you know, Your  
14 Honor, that at least with one of the plaintiffs' firms, I  
15 think there were twelve or fifteen, we have reached an  
16 agreement, and we will be filing stipulation of proposed  
17 order in terms of how they're going to deal with it.

18 We haven't heard from any other of the multiple  
19 plaintiff attorneys yet.

20 THE COURT: How many others are there?

21 MS. VAN STEENBURGH: It's primarily the Carey &  
22 Danis firm. I think they have five complaints where they  
23 have 80 or 90 plaintiffs in their complaint, and I don't  
24 know how they're going to respond. I don't know if  
25 Mr. Goldser knows or not.

1 MR. GOLDSER: I don't know. All I know is that I  
2 think there were six or so firms that were identified on  
3 the exhibit with the motion. We contacted them all and  
4 asked them if they wanted to respond. I've heard back from  
5 I believe all of them saying they would like to.

6 Hopefully they will respond according to the  
7 deadline.

8 THE COURT: Okay. Very well.

9 MR. GOLDSER: The next item is the proposed  
10 amended pretrial order number 3. That's the assessment  
11 order. The good news is that we're still talking to each  
12 other. At least on the plaintiffs' side, there is still a  
13 variety of ideas that are circulating among us that we  
14 haven't quite distilled down yet.

15 And the settlement agreement with New Jersey has  
16 not yet been finalized to my knowledge, nor has money  
17 exchanged hands, nor is that imminent from what I know, but  
18 I have been promised by Mr. London on behalf of the New  
19 Jersey folks that if that changes, we will be alerted and  
20 that if there is something that causes some time pressure,  
21 we will be back to the Court in a timely fashion to resolve  
22 that, but we're still not ready with that one as well.

23 THE COURT: Okay.

24 MR. GOLDSER: The next item is the final pretrial  
25 order and suggestion of remand. You will recall that the

1 last status conference we had submitted competing proposed  
2 orders. I gave the Court a red line version of that order.  
3 There was something like eight or nine issues that were  
4 raised by that red line version.

5 I thought we were going to talk about those  
6 issues individually today, and then last night the defense  
7 filed a brief on some of them, which we haven't had an  
8 opportunity to digest. We would like to be able to respond  
9 to that brief in writing. We would like a couple weeks to  
10 do so, so I have a feeling that the remand order also will  
11 be something that we take up the next time, if the Court  
12 will allow us the opportunity to respond.

13 MS. VAN STEENBURGH: Your Honor, the last status  
14 conference was June 11th, and on the 27th of June, we had a  
15 meet and confer with Mr. Zimmerman and Mr. Goldser and at  
16 that time talked about the issues that we briefed yesterday  
17 and submitted, and we had argued at that time we were going  
18 to submit those so the Court would have our respective  
19 positions on those, and that's why we filed those.

20 Obviously the plaintiffs, there was some  
21 misunderstanding as to what we had resolved with respect to  
22 those issues, but we would like not to let this get delayed  
23 too far because these are critical issues that will go into  
24 the remand order.

25 THE COURT: It's my intention to set a fairly

1 quick time frame for the next status conference so we can  
2 get back to these matters.

3 MR. GOLDSER: Frankly, Your Honor, I don't  
4 remember that we were going to submit something in writing.  
5 If it was said, my attention was diverted on some family  
6 matters, and I just didn't catch that. We will get  
7 something in to you in whatever time frame you would like  
8 us to, but we would like the opportunity to respond to what  
9 they wrote.

10 THE COURT: I think within a couple weeks would  
11 probably be fine.

12 MR. GOLDSER: We'll do that. The last item on  
13 the agenda is the October trial case selection and  
14 discovery plan, and picking a case for trial has been an  
15 interesting proposition. There has been a lot going on on  
16 plaintiffs' side quietly behind the scenes, a lot of due  
17 diligence, evaluating cases and what have you.

18 And frankly, the biggest issue in these cases, as  
19 you know, is the prescribing doctor, and they're not the  
20 easiest folks in the world to reach, and we have been  
21 trying very hard to get through to them. Last night, also  
22 at the eleventh hour, we were able to send out to defense  
23 deposition notices to two doctors, the first of which will  
24 be a week from yesterday, next Monday, in a case called  
25 Thomas Olive, O-l-i-v-e.

1           And then we sent out another one for the  
2           prescribing doctor in a case called Karen Arnold, so  
3           happily, we have been able to get two doctors scheduled,  
4           and we can explore those two cases as potential trial  
5           cases. But, you know, as I was thinking about this issue  
6           and talking with my colleagues on it, there are two other  
7           cases that may be very ripe for trial come October,  
8           depending on what happens between now and then.

9           One is called Schedin and one is called Straka.  
10          You know, if the Eighth Circuit unfortunately reverses and  
11          remands for a new trial or if this Court unfortunately  
12          rules in favor of defendant on the Rule 60 motion, there  
13          would be a new trial in Schedin, and that one is obviously  
14          ready.

15          We obviously don't think we're going to have to  
16          retry Schedin because neither of those events will happen,  
17          but if they do, you know, Schedin would be ready. We  
18          also --

19                 THE COURT: When was the argument at the Circuit?

20                 MR. GOLDSER: It's been some months now. I have  
21          been watching the MSBA reports come across e-mail, and  
22          there have been a lot of Eighth Circuit rulings in the last  
23          couple of weeks, and given, as we talked about before, the  
24          Court's schedule and the law clerks' schedule, we're hoping  
25          that we'll see a decision in Schedin soon but, you know,

1 who knows.

2 The other thing, of course, the other case that  
3 is potentially re-triable and that you have in front of you  
4 and you have control over is Straka. You have a new trial  
5 motion in front of you, and that ruling could be imminent.  
6 That ruling could be awaiting the Eighth Circuit Schedin  
7 decision.

8 I don't know what's in your mind about that, but  
9 if you were inclined to grant that motion, and obviously,  
10 we think you should, Straka could be re-tried in October,  
11 so we have some possibilities. The reason that  
12 Mr. Flathmann is here is that there is one case of his  
13 office that could be started in discovery, so we have that  
14 one.

15 I know that we have two others out of my office  
16 that we're looking at, and I know Mr. Saul is looking at  
17 another one in his office. I have asked all plaintiffs'  
18 lawyers with Minnesota resident/Minnesota filed cases to  
19 evaluate their cases, get in touch with those prescribing  
20 doctors.

21 Given the difficulty that I've had in reaching my  
22 own, I've not surprised that I have not gotten feedback of  
23 doctors they have tried to reach, although I know some have  
24 been very diligent in trying to reach their doctors.

25 That's been the big issue. That's been the big hold-up for

1 us in trying to evaluate which cases make sense to try.

2 It doesn't make sense to put up a case for trial  
3 that is going to be a nonstarter, and we want to make sure  
4 that we have cases that are viable. It's been difficult to  
5 get that far. I know time is awasting, but that's what has  
6 been the hold-up on our side, and we have been working  
7 diligently at it. I don't have as much progress to report  
8 as I would like.

9 MS. VAN STEENBURGH: I am absolutely stunned to  
10 hear this from Mr. Goldser. I have to admit this is the  
11 first I have heard of it. This is the first I have heard  
12 of any of these cases. We were in here on June 11th, and  
13 Mr. Fitzgerald said we will have a list of cases by the end  
14 of the month.

15 Mr. Goldser said right at the beginning of July.  
16 We asked Mr. Goldser and Mr. Zimmerman for the list on the  
17 27th. Oh, yeah. We're looking at that. We will get that  
18 to you. We have not heard anything. I talked to Mr. Saul.  
19 I talked to Mr. Fitzgerald last Monday. Well, where is the  
20 list of cases that we all agreed we would exchange? Oh,  
21 that's Mr. Goldser's job now, and he is out of town for the  
22 whole week.

23 I sent him an e-mail. The e-mail was, I'm out of  
24 the office, and I am going to have no access to my e-mails,  
25 and I will not be talking. Got nothing yesterday, and this

1 is the first we have heard about this, Your Honor, and what  
2 I am also hearing is, they're calling all the prescribing  
3 physicians to talk to them apparently to evaluate what case  
4 they would like to select depending on what that physician  
5 is going to say.

6 I have to say we are going to preview I think a  
7 motion we're going to bring to request that those ex parte  
8 contacts be stopped between the plaintiffs and the  
9 prescribers. It's an unfair rule in Minnesota anyway, but  
10 we abide by it. The defendants can't talk to the doctors.  
11 The plaintiffs can.

12 It is unfair for them to go and talk to the  
13 doctors, try and get their testimony and then come in and  
14 say this is the case that we want for our trial. We went  
15 ahead and picked three cases, one from the Zimmerman Reed  
16 firm, one for the Saul firm and one for the Johnson firm  
17 out of the Minnesota resident/Minnesota filed cases because  
18 we never heard from the plaintiffs, and we're prepared to  
19 go forward with discovery on those.

20 For them to come in today and say, well, we have  
21 some, maybe we don't know, when we're supposed to go to  
22 trial in October is just unacceptable. It's an ambush on  
23 the defendants, and there is more and more delay that we  
24 hear from the plaintiffs because they want to pick a case  
25 that they want depending on what the testimony is going to

1 be.

2 We need to figure out that testimony in discovery  
3 and then pick one of those cases. We think it's unfair,  
4 Your Honor, for them to come in and say, well, we haven't  
5 decided which ones we want. We will let you know when we  
6 finally get that decided. We have three cases. We're  
7 prepared to put those forward to the Court.

8 We're prepared to go forward on discovery on  
9 those cases, and one of those three cases can be the one  
10 teed up for trial in October. They represent a variety of  
11 issues. They are not like the other cases we have tried.  
12 So we have some other issues in the MDL that certainly can  
13 be teed up for a trial.

14 We have been very careful to pick ones that have  
15 a variety of issues that might be of interest for other  
16 cases in the MDL, so we would argue that in fact the Court  
17 should allow those cases to be discovered, and we'll pick  
18 one of those cases going forward in October. October 22 is  
19 coming up like a locomotive, and we need to get going if  
20 we're going to get the case tried.

21 THE COURT: Mr. Goldser, when will you be ready  
22 with your list?

23 MR. GOLDSER: We provided two of the cases  
24 yesterday, so that has already been done. As soon as I  
25 hear back from these doctors --

1 THE COURT: You're referring to the Olive case  
2 and the Arnold case?

3 MR. GOLDSER: That's correct. As soon as I hear  
4 back from these doctors on my two cases, I will advise  
5 defense if either of them is prepared to go. The Charles  
6 Johnson case is by the name of Magnuson, Violet Magnuson.  
7 Mr. Saul, I don't know when he is going to be prepared to  
8 advise about his case, and there is one other case that I'm  
9 aware of that is close to a decision that I will disclose  
10 as soon as I know.

11 As I said, it turns on once I get through to the  
12 doctors. I have been trying so hard to get these doctors,  
13 and it has been very difficult.

14 THE COURT: Well, we've got to have a date that  
15 is firm that we have to have the list of the universe of  
16 possible cases from both sides. It sounds like the defense  
17 has three ready that they are proposing, and we've got to  
18 have a date by which whatever, whatever you have that you  
19 wish, you feel are triable and ready, and then we will have  
20 a process to decide which one, but can this be done by  
21 sometime next week?

22 MR. GOLDSER: Well, give us a date, and we will  
23 disclose whatever we know by that date.

24 THE COURT: Do you have any thoughts on a date?  
25 I would like to move it as quickly as possible.

1 Ms. Van Steenburgh?

2 MS. VAN STEENBURGH: Yeah, by this Friday is what  
3 we would like, Your Honor. I mean, even next week is  
4 getting us far behind in terms of being able to prepare  
5 these cases. There is going to be an awful lot of work.  
6 None of these cases have been discovered in any way, shape  
7 or form yet.

8 THE COURT: Well, why don't we set a week from  
9 today, which is the 24th, and then let's set up a status  
10 conference for relatively soon. That will be obviously a  
11 primary issue on the agenda, to go through the cases that  
12 are on the list and either agree on a case or the Court  
13 will ultimately decide.

14 The earliest we probably could do one is two  
15 weeks from today, which is the 28th. I know we were  
16 looking at that date for this conference. I think that was  
17 a problem for somebody. I can't recall who it was. That  
18 is probably the earliest I could set. I have considerable  
19 time available that day. The 31st. I'm sorry. Tuesday,  
20 the 31st, which is two weeks from today.

21 MR. GOLDSER: I am out of town that day.

22 THE COURT: We could, earlier in the day on  
23 Thursday, August 2nd, we could do that, and then the  
24 alternative to that would be probably the following Monday.  
25 We have quite a bit of time available. That's August 6th.

1 MR. GOLDSER: Either one works for me.

2 MS. VAN STEENBURGH: Fine here, Your Honor.

3 THE COURT: Any other comments, anyone on the  
4 phone?

5 MR. IRWIN: Your Honor, this is Jim Irwin. Do we  
6 have a date yet?

7 THE COURT: We're looking at either Thursday,  
8 August 2nd, which would have to be early in the day or most  
9 anytime on Monday, August 6th.

10 MS. VAN STEENBURGH: We would prefer the 2nd,  
11 Your Honor.

12 MR. IRWIN: Both days are good for me, Judge. I  
13 would prefer the earlier the better, please.

14 THE COURT: The 2nd? Let's go with August 2nd,  
15 then. Let's see. 10:30, would that work? Okay. Let's do  
16 it. We will focus on the selection of the appropriate case  
17 and some of these other matters that are holding close to  
18 resolution here. Okay?

19 Is there anything else, Mr. Goldser?

20 MR. GOLDSER: Not on my agenda, Your Honor.

21 THE COURT: Ms. Van Steenburgh?

22 MS. VAN STEENBURGH: No, Your Honor.

23 THE COURT: Anyone on the phone?

24 MR. SAUL: Nothing for Lewis Saul. Thank you.

25 THE COURT: Mr. Irwin, anything?

1 MR. IRWIN: No. Thank you, Your Honor.

2 THE COURT: Okay. Mr. Zimmerman, did you have  
3 anything?

4 MR. ZIMMERMAN: Unfortunately not, Your Honor.

5 THE COURT: All right. Very well. Thank you,  
6 everyone, for being here today and for joining us on the  
7 telephone, and we will be in recess.

8 Thank you.

9 MR. SAUL: Thank you, Your Honor.

10 THE CLERK: All rise.

11 \* \* \*

12 I, Kristine Mousseau, certify that the foregoing  
13 is a correct transcript from the record of proceedings in  
14 the above-entitled matter.

15

16

17

18 Certified by: s/ Kristine Mousseau, CRR-RPR  
19 Kristine Mousseau, CRR-RPR

20

21

22

23

24

25