

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products
Liability Litigation,

File No. 08-md-1943
(JRT/AJB)

Minneapolis, Minnesota
August 28, 2013
11:20 A.M.

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

APPEARANCES:

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**
COREY SULLIVAN, ESQ.

Via telephone: **THOMAS KNIGHT, ESQ.**
ADAM EVANS, ESQ.
LEE HOLLIS, ESQ.
DOUGLAS WHIPPLE, ESQ.

For the Defendants: **TRACY VAN STEENBURGH, ESQ.**
CORTNEY SYLVESTER, ESQ.

Via telephone: **WILLIAM ESSIG, ESQ.**

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11:20 A.M.

2

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(In open court.)

4

THE COURT: You may be seated. Good morning,

5

everyone. This is multi district litigation number

6

08-1943, In Re: Levaquin Products Liability Litigation.

7

Let's have counsel note appearances. First

8

present for the plaintiffs?

9

MR. GOLDSER: Good morning, Your Honor. Ron

10

Goldser for plaintiffs.

11

MR. SULLIVAN: Good morning, Your Honor. Corey

12

Sullivan for plaintiffs.

13

THE COURT: Good morning to both of you.

14

For the defendants present?

15

MS. VAN STEENBURGH: Good morning, Your Honor.

16

Tracy Van Steenburgh on behalf of defendants.

17

MR. SYLVESTER: And Cort Sylvester on behalf of

18

defendants as well.

19

MS. MYRFIELD: Brenda Myrfield on behalf of

20

defendants.

21

THE COURT: All right. Very well. Good morning

22

to each of you.

23

On the phone we have who?

24

MR. KNIGHT: Thomas Knight from Alabama.

25

MR. HOLLIS: Lee Hollis.

1 MR. WHIPPLE: Douglas Whipple.

2 MR. EVANS: And Adam Evans.

3 THE COURT: All right. Anyone else on the phone?

4 Okay. Let's move to our agenda for the day.

5 Ms. Van Steenburgh?

6 MS. VAN STEENBURGH: I will do the honors, Your
7 Honor. First of all on the agenda, the federal and state
8 cases in the MDL, I will get to what is going on here
9 obviously in a moment, but just for purposes of reporting
10 in New Jersey, the number of cases filed there, 2,225 of
11 which now 1,037 have been dismissed.

12 There are still over a thousand active cases.
13 However, the activity there seems to be little to none.
14 The latest report is that they are talking now about maybe
15 trying another case(s). I don't know if it is case, cases.
16 There is no trial date. Judge Higbee seems to be pretty
17 busy with some other things right now, so there is not a
18 lot going on in New Jersey at the moment.

19 With respect to what is going on here, I would
20 like to combine a couple of the agenda items, numbers 2, 4
21 and 6, because I'm going to go through the numbers, and I
22 think that will help you get a handle on what's left once I
23 do that.

24 So we have a total of 1,823 cases in the MDL. As
25 of this status conference, 750 have been dismissed, and I

1 have 50 more that are to be dismissed or they're under
2 review and we think they will be dismissed. So I would
3 round that up to 800 within the next couple of weeks will
4 have been dismissed.

5 THE COURT: And that's out of the 1823?

6 MS. VAN STEENBURGH: Out of the 1823.

7 THE COURT: Okay.

8 MS. VAN STEENBURGH: So that takes us down to
9 about 1022. We have 77 that are subject to remand under
10 the proposed remand order that we have submitted to the
11 Court, and then we have 45 that will be subject to a motion
12 that Mr. Sylvester will argue on forum non conveniens
13 grounds.

14 Either 42 of them are subject to the motion and
15 we have 5 consents. So that takes us down to about 900
16 cases once we have those accounted for. 261 cases are pro
17 se now, and I think that Mr. Goldser has submitted an order
18 to the Court with respect to the pro se cases.

19 We don't have any new ones from the last time
20 that we appeared before the Court.

21 THE COURT: 261 now are subject to the motion?

22 MS. VAN STEENBURGH: Are subject to the motion.

23 Sorry. Then with respect to the remaining cases, those
24 kind of all fall into the category of Carey Danis cases.

25 We have 165 of those that are subject to a previously filed

1 agreement between the parties to transfer under a consent
2 to transfer under Section 1404.

3 Then we have 185 that are subject to a motion
4 that we have filed with the Court today, and I'll get to
5 that in a second, and then we have 44 more of their cases
6 that we have determined are sufficient in terms of a PFS,
7 and we just have to agree and get the consent with respect
8 to transfer of those cases.

9 So we have a little over 200, then, of the
10 Carey & Danis cases that will have consent to transfer
11 under 1404 and then 185 that are subject to our motion to
12 dismiss that we will argue today, Your Honor. So those, I
13 mean, that kind of brings us up-to-date.

14 We ended up with, as I like to say to Brenda who
15 has been keeping all the numbers, so I bring her to keep me
16 honest about all of this. There are a little over 200
17 cases that aren't in the numbers I've given you. That's
18 because those cases are moving from one category to
19 another, and they haven't landed in a particular place.

20 So the numbers that I have given you today are
21 ones that have landed in a category and should be disposed
22 of, either dismissal or motion or that kind of thing, and
23 there are some that are in flux, either because there are
24 offers out there or they will be settled or dismissed or
25 they will be rejected and fall into a forum non conveniens

1 category, but we are whittling it down and will be able to
2 finalize those hopefully by the next status.

3 So I don't know if you have anything to add to
4 that?

5 MR. GOLDSER: The only thing that is of my
6 concern, Your Honor, is the pro se order. I think we have
7 that. It should be in final for you. I don't know if the
8 Court has any questions about it at this point, but I think
9 we're just awaiting your review and comments and perhaps
10 signature on that order.

11 THE COURT: The exhibit that is to be attached,
12 Exhibit B or Exhibit A, I'm not sure, one of the two
13 whatever this exhibit is, has a number of cases from
14 Mr. Binstock's firm. There has been no motion filed, and
15 there are a number of cases on here where, Mr. Goldser, you
16 have filed a motion to withdraw, but Mr. Saul is still on
17 the case.

18 So in either of those situations, are they
19 individuals who the ultimate result of this would be pro
20 se?

21 MR. GOLDSER: With regard to the cases that
22 Mr. Saul is on with us, we have been playing a little ping
23 pong with that motion, but we will be getting those motions
24 filed promptly. So that will be resolved, and as far as
25 Mr. Binstock is concerned, I can let him know to get his

1 motions filed.

2 THE COURT: Okay.

3 MS. VAN STEENBURGH: With respect to one item, it
4 reminded me, Your Honor. Mr. Binstock I think did file a
5 motion with respect to one case where the plaintiff, who is
6 now pro se, has asked to mediate or participate in a
7 settlement conference with Judge Boylan, so we are in the
8 process of doing that.

9 So I don't know what is going to happen with that
10 case, but he is pushing that case along to do that, but
11 that is the only one I know that is currently in front of
12 Judge Boylan.

13 THE COURT: Okay. So it really, I mean, until
14 those motions are filed, at least the complete list here,
15 is not something that we can send out. I was also with the
16 draft order, it says, you know, those plaintiffs who do
17 intend to litigate their claims, the Court will begin
18 taking steps to coordinate and oversee such litigation
19 going forward.

20 I'm not sure that is going to be very clear to
21 individuals. I'm not sure that is very accurate, either.
22 I'm not sure how, I mean, it probably -- I mean, obviously
23 there are, there are individuals on this list who have not
24 been in communication with you, may no longer wish to
25 pursue their claims, and we should identify them as quickly

1 as possible and get their cases dismissed.

2 Those who want to, I am reluctant to grant a
3 motion to unleash them on the Court, basically, and try to
4 get something resolved. I mean I think ultimately, that
5 applies to some of these other cases that fall into these
6 other categories.

7 I mean ultimately I think we need to take a few
8 more steps in this case to figure out which cases need to
9 be dismissed because they just don't have any value or they
10 don't fall within any of the parameters, those cases that
11 need to be settled, whether they settle according to the
12 parameters or they settle for a more nominal amount or
13 ultimately they just get dismissed on the merits.

14 I'm uncomfortable with, you know, sending large
15 numbers of cases back to original districts just because
16 they are cases where either nothing has been done on them,
17 or secondly, they are cases that the defense believes are
18 not cases that warrant settlement, and of what value are we
19 adding to the process by simply sending them back to the
20 transfer district to have them deal with precisely the same
21 issue?

22 So that's my concern about a whole number of
23 categories, the cases that are part of motions to withdraw,
24 cases that are part of motions to transfer, forum non
25 conveniens, cases for remand back to the transfer district.

1 In a sense it seems to me, and I don't know the details of
2 these cases. I'm not partial to the details of these
3 cases.

4 I don't know why they're ending up in these
5 categories, but it seems to me that nearly every case, if
6 not all, can go into the category of either categories of
7 dismissal, no longer wishing to prosecute, dismissal on the
8 merits because they're not cases that warrant a settlement
9 or a settlement according to the parameters.

10 I know there is a number that are being
11 considered for that still, or a settlement that fits into a
12 more nominal category, that they have some value but very
13 little. It seems to me that those are buckets we could put
14 just about everything into, and if I'm missing something
15 here, please tell me because that's kind of how I'm
16 envisioning going forward here.

17 MS. VAN STEENBURGH: Well, let me respond to one
18 thing, Your Honor. I think -- and, Brenda, you might be
19 able to help me out on this.

20 The 77 that are in the remand category, when we
21 were here last time, it was 89, and several of those,
22 obviously, 12 either have been settled or dismissed. I
23 believe most of those have been ones where we tried to
24 settle and the settlement has been rejected. So we have
25 put them on the remand list.

1 The only question I have, and you can correct me
2 if I'm wrong, are there some where no one has ever even
3 responded to us?

4 MS. MYRFIELD: Several. I don't have that number
5 in front of me, but there is also 36 that we haven't
6 reviewed that are currently in the case inventory.

7 MS. VAN STEENBURGH: Of the 77, 36 of them we
8 have reached out, but no one has ever given us any
9 information to review their cases for purposes of trying to
10 assess.

11 THE COURT: So no fact sheets?

12 MS. MYRFIELD: No. We just haven't been given
13 that inventory or asked to review it.

14 MS. VAN STEENBURGH: Oh, we haven't been asked to
15 review that. Even though we have reached out, they just
16 haven't responded to that, so we can try that again.

17 THE COURT: I mean, it seems to me on these where
18 we are receiving no answers or you are receiving no
19 answers, the Court should be involved with an order to show
20 cause and set a deadline, and if there is no response by a
21 reasonable date, I'll dismiss the cases because it can't go
22 on forever not responding, and it would be important to get
23 that done.

24 MS. VAN STEENBURGH: So it looks like we have,
25 yeah, 36 cases for which we were not given case inventory

1 lists to review. What we will do is, we will reach out to
2 them again and indicate to them that we will be proposing
3 or submitting to the Court a proposed order to show cause
4 if they don't do something with their cases.

5 THE COURT: With a relatively short deadline
6 since you're in touch with them. It sounds like you're
7 being in touch with them for the first time.

8 MS. VAN STEENBURGH: That's right.

9 THE COURT: And if there is no response by a
10 certain date, I will just dismiss those cases.

11 MS. VAN STEENBURGH: Okay. Then on the ones that
12 are subject to the 1404 motion that we're bringing today,
13 the 42, those -- and actually Cort can respond to that. I
14 think we have reached out to all if not -- most all of
15 them?

16 MR. SYLVESTER: Virtually all.

17 MS. VAN STEENBURGH: To say, look, do you want to
18 pursue your case in Minnesota and stay in Minnesota or you
19 consent to transfer, and I'll let you respond to that in
20 terms of whether we have heard from them or what we have
21 done with those.

22 MR. SYLVESTER: Well, in the vast majority of
23 cases, there have been offers on the table to settle that
24 have been rejected. Contact was made to renew discussions
25 on the settlement, request a position on consenting to

1 transfer or opposing transfer.

2 And I would say approximately 25 percent of the
3 cases on the list we've received some communication back
4 from plaintiff's counsel, either discussing the stipulation
5 or in very rare cases either consenting to a voluntary
6 dismissal or accepting the settlement offer that was on the
7 table.

8 MS. VAN STEENBURGH: So what we have left is what
9 is in front of you today.

10 MR. SYLVESTER: Right.

11 THE COURT: And those are ones where you've
12 gotten no response after perhaps some initial discussion or
13 rejection and then no response after that?

14 MR. SYLVESTER: No response after the renewed
15 attempt to contact and discuss both the outstanding
16 settlement offer or rejected settlement offer and the
17 transfer proposal, correct.

18 MR. WHIPPLE: Your Honor, this is Douglas
19 Whipple. May I be heard as someone who represents one
20 client in that category, please?

21 THE COURT: Yes, Mr. Whipple. Go ahead.

22 MR. WHIPPLE: Thank you very much. I'm glad I
23 was listening into this agenda because I was very intrigued
24 by your comments, and they're encouraging. We were engaged
25 in the negotiation process with the other side, and we

1 made --

2 They made an offer. We made a counter, and that
3 was back in May, and we, when we responded, it was with
4 several pages of analysis and documentation to support our
5 position. I hasten to add, we're only a few thousand
6 dollars apart by the 2nd of July, and I apologize if I'm
7 misquoting the defense attorneys, but I believe it is
8 consistent with what I just heard a moment ago.

9 They indicated that our counter was rejected.
10 There would be no more negotiations and that we had one of
11 two choices: Choice A, to acquiesce in the transfer back
12 to Ohio, and choice B is if we didn't acquiesce, we will
13 end up trying the case in Minnesota.

14 Well, that's not much of a choice. Between the
15 two, obviously Ohio is the better of the two, but I never
16 understood that having sat through this process for a
17 couple of years now that this whole thing would fall apart
18 because we're a few thousand dollars apart and they didn't
19 have any interest in a substantive response to the
20 substantial evidence that we submitted in support of our
21 position.

22 So although I have not filed a written objection
23 to the transfer back to Ohio, because if it's Ohio or
24 Minnesota, I certainly want to try it in Ohio, I really
25 expected that this MDL would result in a resolution of

1 cases such as mine so that neither party would have to go
2 through the delay, the expense and the inconvenience after
3 we have done so much work so far in Minnesota.

4 Thank you.

5 MS. VAN STEENBURGH: Well, Your Honor,
6 Mr. Whipple is correct that we did try to negotiate
7 actually a long time ago, and then it was renewed again,
8 and frankly, we disagree with the analysis.

9 We have been very faithful to the procedure that
10 we have done with all of the cases in terms of analyzing
11 them and using the same parameters. We took a stand with
12 Magistrate Judge Boylan and said we will not, just because
13 there is one person who wants something different, we are
14 going to be consistent in terms of how we treat all of the
15 cases.

16 So with all due respect to Mr. Whipple, his case
17 is not any different than any others in terms of the
18 criteria and how we evaluated the case. So given that,
19 there wasn't much choice. Certainly we can move forward to
20 try that particular case, and maybe discovery will turn up
21 something different, but it is not --

22 We don't view this MDL as a place for people to
23 put their cases and then have their cases just suddenly
24 settle for whatever they want. We certainly have gone
25 through this and analyzed this, and so that is a particular

1 instance where we believe that we cannot reach a resolution
2 based on what's been on the demand. I mean, we did make a
3 reasonable offer in our view.

4 THE COURT: Is your offer still on the table in
5 that case?

6 MS. VAN STEENBURGH: I think we made it for up to
7 a certain amount. Sorry. They tend to blur in terms of
8 the number of cases I have been handling lately.

9 THE COURT: I'm sure.

10 MS. VAN STEENBURGH: So I would have to look at
11 that one.

12 MR. WHIPPLE: Your Honor, I was under the
13 impression it was withdrawn, but I never assumed that it
14 wouldn't be renewed if we asked for it.

15 MS. VAN STEENBURGH: Well --

16 MR. WHIPPLE: That wasn't the issue. Whether it
17 was withdrawn or still on the table is not the issue
18 because we're still not interested in accepting the offer,
19 even if it were renewed.

20 MS. VAN STEENBURGH: I guess that answers that.

21 THE COURT: All right.

22 MR. WHIPPLE: And if I may also briefly, I don't
23 want to hold everybody else up about my case, but our
24 response was in an understanding and appreciation of the
25 parameters. We simply thought we had sufficient evidence

1 to show that our case should fall into a different category
2 than the one to which it had been designated by the
3 defense.

4 THE COURT: Yeah. I understand your position,
5 Mr. Whipple. So I appreciate your saying that. We've got
6 another category of cases that if they're not settled and
7 there is not a basis to move to dismiss them, they've got
8 to be tried, here or somewhere else, and that may fall into
9 that bucket, and that's fine.

10 MR. WHIPPLE: If it is to be tried, I prefer it
11 be tried in Ohio.

12 THE COURT: All right.

13 MS. VAN STEENBURGH: So with respect to those,
14 Your Honor, so let's just step back for a minute. With
15 respect to the remand cases, we will certainly make our
16 best efforts with those 36 and maybe any additional ones to
17 see if we can whittle those down.

18 With respect to the 42 that are subject to the
19 motion today, you know, Mr. Sylvester is prepared to argue
20 the motion. Obviously, Mr. Whipple is now consenting, at
21 least where his case is concerned. And we can certainly
22 reach out to see if there is anything further we can do
23 with those.

24 Really, the biggest category are the Carey &
25 Danis cases. Since we had 165 where we had filed a

1 stipulation to transfer, and maybe there is something that
2 needs to be done with respect to the re-analysis by that
3 firm in terms of the 165, whether there is merit to going
4 forward and having those transferred to the respective
5 jurisdiction.

6 THE COURT: Are those cases that there has been
7 anything done on at all?

8 MS. VAN STEENBURGH: (Moves head in negative
9 manner.)

10 THE COURT: Nothing?

11 MS. VAN STEENBURGH: Nothing other than the PFS.
12 We have some medical records.

13 THE COURT: But you do have the back statements
14 for those?

15 MS. VAN STEENBURGH: Yes. The remaining ones,
16 there are 185 that are subject to today's motion, and
17 that's because we found out we didn't have PFSs or they
18 were deficient. So I will just give you the short version
19 of our motion today, and I did talk to Mr. Sullivan, so I
20 want to at least explain to the Court where we stand with
21 that.

22 There are 185 of their cases that we discovered
23 either we didn't have a PFS or it was wholly deficient and
24 we couldn't analyze any of those cases. So we reached an
25 agreement after the last status conference whereby there

1 would be a deadline by which the firm would provide to us
2 those cases for which it would provide a PFS or an updated
3 PFS and then a second deadline by which that PFS or updated
4 PFS was due.

5 Both deadlines passed with no word from the
6 Carey & Danis firm, and the last date was Friday the 16th
7 of August, and we waited until the following Tuesday to
8 bring our motion that is here today.

9 This morning I talked to Mr. Sullivan who said
10 that they are prepared to dismiss 141 of those cases, I
11 believe, and that they believe 44 more of those 185 may
12 have merit and that they want to be able to contact their
13 clients to say here's your last chance to do something with
14 this.

15 I said that we would bring it to your attention.
16 I couldn't agree to that in terms of what my client has
17 suggested to me is the appropriate approach here, given all
18 of the second chances that we have already given that firm
19 to get everything prepared and to keep this moving and not
20 delay this.

21 So our position remains that we think all of
22 those cases, since they didn't live up to the agreement and
23 get us any information, should be dismissed. So that's 185
24 right there that could be easily dismissed, and I certainly
25 will let Mr. Sullivan make his pitch to the Court in terms

1 of why he thinks at least those 44 should not.

2 THE COURT: Mr. Sullivan? Why don't you come
3 over to the lectern.

4 MR. SULLIVAN: First off, those cases aren't
5 cases where nothing has been done, so we have turned over
6 the fact sheets. They have come up with deficiencies. We
7 had an agreement after the last hearing. They would send
8 over a list. We would parse down that list, and we would
9 tell them which ones we would give stips on and which ones
10 we wanted to update or wanted to talk to them about.

11 We were going through that process, communicating
12 back and forth, and then they said, well, you know, give us
13 your stips and we're going to file motions on the remainder
14 anyway. So I hear the words "bona fide." I hear you talk
15 about buckets of cases, and that's essentially what we've
16 done on these 185.

17 There is 46 of them that we think are criteria
18 cases that for fairly technical reasons, lack of
19 authorization, lack of verification page, they want to get
20 rid of. I asked for a 30-day, let me send a last chance
21 letter to these clients and say get your stuff back in.

22 THE COURT: There is the 44?

23 MR. SULLIVAN: It was 46. She said 44. It's
24 actually 46.

25 THE COURT: Okay.

1 MR. SULLIVAN: And then if they don't comply, if
2 they don't, you know, want to pursue their case, there is
3 not much more that we can do with those, and that's really
4 all I'm asking for.

5 THE COURT: And how many are in the category of
6 your stipulating to dismissal?

7 MR. SULLIVAN: 46 minus 185.

8 THE COURT: So 139?

9 MR. SULLIVAN: Yeah.

10 THE COURT: Okay. And what of the, there is
11 other Carey & Danis cases. What about the ones that are
12 subject to the transfer motion?

13 MR. SULLIVAN: I think we have those squared away
14 in terms of what defense needs in those cases.

15 MR. SYLVESTER: I don't believe there are any
16 Carey & Danis cases on that schedule.

17 THE COURT: None on that schedule?

18 MS. VAN STEENBURGH: You're right, Your Honor.
19 This is the 165 that we had signed a stipulation to consent
20 to transfer. So we haven't done anything with those since
21 we signed the stipulation, and I don't know if you guys
22 have gone through those to see if there are any that you
23 want to dismiss out of that.

24 MR. SULLIVAN: We can certainly look into that
25 process if you think it would be, you know, beneficial or

1 helpful to you.

2 THE COURT: You know, before we transfer a case,
3 I mean, you know, I want to make sure if we're going to
4 transfer a case back to a transferring district that it's a
5 case that is, that has some degree of merit. Maybe the
6 parties can't settle them because there is a disagreement
7 as to the value.

8 That's perfectly fine. There are disagreements
9 like that, rather than a case that no one has really looked
10 at very thoroughly before sending it back. It sounds like
11 Mr. Whipple's case is an appropriate one to transfer back
12 to Ohio for trial there for a resolution in some way
13 because they have gone through the process, and there has
14 been an attempt to settle, and that has been rejected.

15 But these 165, I think they require process over
16 a relatively limited period of time. It may be that many
17 of them will be dismissed because there is nothing there.

18 MR. SULLIVAN: It's actually 165 plus 45 or 44
19 that Brenda is waiting for just a sign-off on.

20 THE COURT: Plus 44?

21 MS. VAN STEENBURGH: About 200.

22 THE COURT: About 200? Okay. What do you need
23 to do on those cases to make a decision whether there are
24 cases that have some value or not?

25 MR. SULLIVAN: Assuming that we've got everything

1 in on them, you know, it would just be then looking at, are
2 they, you know, criteria cases or bona fides cases. We can
3 do that. We can, we can do that exercise. I think it
4 would probably be beneficial.

5 THE COURT: Well, we should be able to narrow
6 that down fairly significantly. I imagine in that
7 grouping, which is about 200, there are probably quite a
8 number of those that may be subject to dismissal.

9 MR. SULLIVAN: There could be, and it could turn
10 out that they're all bona fides. I'm not --

11 THE COURT: Sure.

12 MR. SULLIVAN: I don't have that date in front of
13 me as we stand here.

14 THE COURT: So does that involve examining the
15 case and then being in contact with the client? Is that
16 what is involved there?

17 MR. SULLIVAN: It would, yeah. Sort of how this
18 process has played out, examining a case if it's a bona
19 fide and there is not the desire to prosecute, they are
20 given a sort of last chance. If it's not a bona fide, then
21 I don't see why we wouldn't be able to give a stip on it,
22 but --

23 THE COURT: The podium does go up and down.

24 Okay. So I can enter an order today dismissing
25 the 139 that you have stipulations on if I have just the

1 list. We can get that done today. The 46 that you believe
2 have merit, I'll give you 30 days to be in touch with the
3 clients on that. Any one that the clients do not get back
4 to you within that period of time I would be prepared to
5 dismiss because I will assume that after all of this that
6 they just, they don't want to pursue it.

7 As to the other, the remaining cases that, the
8 165 plus the 44, let's take a 60-day period to analyze
9 those. I'm expecting at the end of that 60 days to enter
10 an order dismissing those cases that don't have merit and
11 that if you believe that some of the cases have merit,
12 you've got to get all the documents in so that they can be
13 analyzed by the defense, so there is a lot of work to do on
14 those.

15 Maybe there is not much. I don't know. I mean,
16 it's hard to tell, but I want to get that done within the
17 next 60 days. Okay?

18 MR. SULLIVAN: That's very fair. Thank you, Your
19 Honor.

20 THE COURT: All right. Are there any other
21 category of Carey & Danis cases? I don't think so, but I'm
22 not sure.

23 MS. VAN STEENBURGH: No. There are a few Carey &
24 Danis cases that are part of that remand list, so we can
25 certainly ask them to re-review those 13 cases to see if

1 any of those would be subject to dismissal as well. So we
2 will get a list for those.

3 Then I think what we will do is, if Mr. Sullivan
4 will get us a list of the 139, we will prepare the
5 stipulation on that and get that to the Court immediately.

6 THE COURT: Okay.

7 MS. VAN STEENBURGH: So those are all of the
8 Carey & Danis cases that we had any issues with. Other
9 than that, Your Honor, the only thing really left on our
10 agenda today was the motion to transfer the 42, which would
11 include Mr. Whipple's case.

12 And I don't know if you want to hear anything
13 more about that, but Mr. Sylvester is prepared to give you
14 information on that, if you need it.

15 THE COURT: Now, I just want to make sure I
16 understand what makes up this group of 42. Obviously
17 Mr. Whipple's case is one which the Court would find is
18 appropriate for transfer to Ohio for trial and further
19 proceedings.

20 Are all of the cases on forum non conveniens, are
21 they cases in which the settlement process has worked its
22 way out and you can't reach an agreement?

23 MR. SYLVESTER: I believe that's true for all but
24 possibly one to three of the cases. The vast majority are
25 cases on which an offer was made and either explicitly

1 rejected or no response was received. The vast majority of
2 those cases we've made subsequent inquiries to opposing
3 counsel and either have been confirmed that the offer is
4 not accepted or have received no response to the follow-up
5 inquiry.

6 There might be, my recollection of the list is
7 that there were perhaps, as I say, one to three of those
8 cases where there had been no successful contact with
9 plaintiffs' counsel handling those individual cases at all.

10 One that comes to mind, off the top of my head,
11 was I believe the Clayton Briggs matter out in Colorado
12 where the plaintiff's counsel had not -- we have had no
13 contact with that plaintiff's counsel in quite some time.

14 There may have been one or two other cases that
15 were in a similar situation, but the vast majority of them
16 I believe fall into the additional category that the Court
17 identified in earlier comments on these cases, that is they
18 are cases where the settlement process has been attempted,
19 and it appears at this point based upon the response to the
20 offer that they are cases that can't currently be settled
21 and so need to be put into position to be prepared for
22 trial.

23 THE COURT: So my question on those is whether it
24 would be advisable to, for the Court to issue, again today
25 or tomorrow, an order to show cause why these cases should

1 not be transferred to the transfer district, in light of
2 the fact that the settlement discussions were not
3 successful.

4 My thinking is that if we go through that process
5 and have a relatively short time deadline, a 30-day, you
6 may well get more of these cases settled if they know that
7 this is the result, they're going back to whichever
8 district it is. Seems to me I would be more satisfied with
9 that because then I think I will have satisfied my
10 obligation as an MDL judge to do whatever possible here to
11 get these matters resolved.

12 MS. VAN STEENBURGH: May I interrupt from
13 Mr. Sylvester?

14 THE COURT: Yes.

15 MS. VAN STEENBURGH: Your Honor, I think that's a
16 great idea for all of them except the Hollis cases. We
17 have had a discussion. Why don't you go ahead?

18 MR. SYLVESTER: Well, I believe it would be seven
19 cases that the Court might not want to take that approach
20 on. Four of them are Mr. Hollis's cases where they have
21 opposed the motion for transfer based upon the lack of a
22 defense fact sheet. There are actually five cases where
23 they filed an opposition.

24 One of those we determined, the Martha Gregory
25 case, the defense fact sheet had in fact been served. So

1 our suggestion would be to take that one out of this
2 category.

3 The four where they are waiting for a defense
4 fact sheet, we will produce one of those. Those should
5 probably be taken out of that category, no show cause
6 order. The other three that should probably be removed
7 from that category are three of Mr. McCallister's cases.
8 It is Grames, Gemeinhard and Denise McDonough.

9 Yesterday, we received stipulations consenting to
10 the transfer of those cases. Those stipulations have not
11 been filed yet, but we will file those. And what I can do
12 is prepare a revised proposed order conforming to the
13 Court's suggestion that instead of ordering the transfer of
14 the remaining actions that a show cause order be issued
15 with regard to those.

16 And then I will take those cases off of that list
17 so that they're out of the proposed order. Otherwise, I
18 think we would be in agreement that that would be an
19 appropriate way to proceed.

20 MS. VAN STEENBURGH: And I will tell the Court
21 that I personally negotiated and tried to settle with
22 McCallister cases, and they rejected them and consented to
23 the transfer, so there is nothing more to be done with
24 those.

25 THE COURT: For those, I mean that's perfectly

1 fine. I will sign an order transferring those cases, and
2 it's clear that we have gone through the, you know, all the
3 steps, but the others, if you prepare the order to show
4 cause, make a 30-day limit on it, then we'll get that filed
5 right away.

6 MR. SYLVESTER: Okay. I will submit that revised
7 proposed order as soon as possible, along with the
8 stipulations regarding Mr. McCallister's cases.

9 THE COURT: We will have to resolve the Hollis
10 ones separately, then.

11 MS. VAN STEENBURGH: Right. When Mr. Hollis, who
12 is on the phone, and I talked, we agreed that we would ask
13 the Court to stay any transfer order pending their receipt
14 of the DFS, and then we are going to talk again, and if we
15 can't reach a resolution, then we will let you know where
16 we are with that.

17 THE COURT: Let's just take them off the list of
18 this order right now, and we will keep them in a separate
19 category. All right. Okay. That sounds like a good
20 approach there.

21 Let's see. What else do we have to --

22 MR. GOLDSER: Can we return to the pro se cases?

23 THE COURT: We can.

24 MR. GOLDSER: Thank you. Thank you, Your Honor.

25 Right now I'm using the label "pro se" just as a label.

1 THE COURT: Yeah, I understand.

2 MR. GOLDSER: If we forget about the pro se part
3 of this or the withdrawal part of this, we have 261 cases
4 where plaintiffs' counsel has determined that the cases
5 have little to no merit. It would be my expectation, as I
6 may have expressed to you in the past, that the vast
7 majority of those, if not all of them, would decline to
8 respond to an order to show cause and would ultimately be
9 dismissed for non prosecution.

10 I understand your concern about the motions to
11 withdraw not being filed. I've alerted Mr. Binstock. I've
12 alerted my office already to get those motions filed, but
13 they may even not be necessary. If we were to craft an
14 order to show cause to that group, without labeling them
15 pro se or whatever, directing that each of the plaintiffs
16 respond within a period of time that they wished to proceed
17 or their case will be dismissed, without regard to the pro
18 se label, I think you can address those cases.

19 I think you can get the answer of how many, if
20 any, want to proceed, and we can cut that number down
21 substantially.

22 THE COURT: I think that's a better approach,
23 Mr. Goldser. Then I won't have to wait for Mr. Saul or
24 Mr. Binstock to file the motions.

25 MR. GOLDSER: Right.

1 THE COURT: Or we wouldn't have to pare it down,
2 the list. We could keep everyone on the list. They are
3 all cases in which you or whoever is representing the
4 plaintiff have determined that they are cases of little
5 value, is that correct?

6 MR. GOLDSER: That's my recollection, yes.

7 MS. VAN STEENBURGH: I --

8 THE COURT: Ms. Van Steenburgh?

9 MS. VAN STEENBURGH: I would slightly disagree
10 with that. We're aware that in a couple of cases there
11 have been an attempt to settle, to have that plaintiff
12 settle, and that plaintiff has said, I reject the
13 settlement offer.

14 And so then the attorney has said, well, how do
15 you want to proceed? I'll proceed on my own. It's not
16 that they don't have merit, necessarily, that -- you know,
17 and we know of a couple of cases, unfortunately, where the
18 person is deceased and we have not been able to locate
19 somebody who actually represents them. So we've got a few
20 odd ball ones.

21 It's not all that they don't have merit. There
22 is some strange cases out there.

23 MR. GOLDSER: Ultimately, the proposed procedure
24 will ferret those folks out.

25 THE COURT: Sure.

1 MR. GOLDSER: They will need to respond and say I
2 do wish to proceed. For example, I recall it was either 30
3 or 60 days ago there was a letter filed on ECF by a pro se
4 person, I have it with me, who said please don't dismiss my
5 case.

6 He lives in Arizona. He says I can't afford to
7 travel. What do we do with those folks? It was with that
8 in mind that I added the language about the Court will
9 issue subsequent orders.

10 THE COURT: Mm-hmm.

11 MR. GOLDSER: We don't need that language at this
12 point. We can deal with that later when we see if there
13 are people who wish to continue on.

14 THE COURT: We just need to find out which
15 individuals in this category want to continue, and then at
16 that point I think we can address what we need to do to
17 make that possible.

18 MR. GOLDSER: I think that's right.

19 THE COURT: Getting the number pared down I think
20 will be helpful. All right.

21 Can you draft that order, Mr. Goldser?

22 MR. GOLDSER: Sure. I'll take the draft that we
23 have been working from, modify it, and I will get it to you
24 this week.

25 THE COURT: Mm-hmm, all right. Okay.

1 Ms. Van Steenburgh?

2 MS. VAN STEENBURGH: I don't think there is
3 anything else, Your Honor. We pretty much covered
4 everything on the agenda.

5 THE COURT: All right. That sounds good.
6 Ms. Miltich tells me that there are a number of plaintiffs
7 where there have been motions to withdraw that have been
8 filed that are not on this list, Mr. Goldser.

9 MR. GOLDSER: Okay.

10 THE COURT: So --

11 MR. GOLDSER: If the Court would be so kind as to
12 let me know who they are, we will add them to the list.

13 THE COURT: Yeah. You can let him know. That
14 would be fine.

15 MR. GOLDSER: Thank you.

16 THE COURT: All right. Okay. Should we set
17 another date?

18 MR. GOLDSER: Sure.

19 THE COURT: All right. We are, a month from now,
20 is that appropriate timing, the week of the 23rd?

21 MR. GOLDSER: Your Honor may recall I'm gone all
22 of September. I return October 4th. So I would like a
23 week to get my feet back on the ground.

24 THE COURT: That sounds okay.

25 MR. GOLDSER: Unless, of course, you're more than

1 welcome to proceed without me.

2 THE COURT: No. We want you there, Mr. Goldser,
3 so --

4 Heather, do you have the calendar up?

5 THE CLERK: I do, Your Honor.

6 THE COURT: The week of October 4th -- when are
7 you back, Mr. Goldser?

8 MR. GOLDSER: I'm back Friday, October 4th, so
9 late the following week would be fine.

10 MS. VAN STEENBURGH: I'll have to -- we have our
11 firm retreat the 9th, 10th and 11th out of town.

12 THE COURT: Okay.

13 MS. VAN STEENBURGH: If there is something 7, 8.
14 To get you back on your feet, if there is something on the
15 8th. That kind of narrows us down, unfortunately.

16 MR. GOLDSER: Your Honor, I note October 14th is
17 Columbus Day.

18 THE COURT: It is, yeah. The 15th?

19 MS. VAN STEENBURGH: Looks good.

20 THE COURT: All right. Let's at least
21 tentatively set it for the 15th at eleven o'clock. We may
22 have a jury trial starting that day. I'm not sure. If we
23 do, we might have it at the end of the day then or perhaps
24 even first thing the next day, but we will see.

25 MS. VAN STEENBURGH: Okay.

1 MR. GOLDSER: Very well.

2 THE COURT: All right. Sounds good. I will look
3 forward to getting these documents you all are preparing,
4 and we will get them out right away and keep this process
5 moving.

6 Thank you.

7 MR. GOLDSER: Thank you, Your Honor.

8 MS. VAN STEENBURGH: Thank you.

9 THE COURT: The Court is in recess, and thank you
10 to those on the phone who have joined us.

11 THE CLERK: All rise.

12 * * *

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

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

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