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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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IN RE: LEVAQUIN PRODUCTS  
LIABILITY LITIGATION

Civil No.: 08-1943 (JRT)

TRANSCRIPT  
OF  
PROCEEDINGS  
(STATUS CONFERENCE)  
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The above-entitled matter came on for hearing before Judge John R. Tunheim, on October 17th, 2008, at the United States District Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, commencing at approximately 12:40 p.m.

CALIFORNIA CSR NO.: 8674  
ILLINOIS CSR NO.: 084-004202  
IOWA CSR NO.: 495  
RMR NO.: 065111

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APPEARANCES

ZIMMERMAN, REED, 651 Nicollet Mall, Suite 501,  
Minneapolis, Minnesota 55402, by RONALD S. GOLDSER and  
MICHAEL CIALKOWSKI, Attorneys at Law; and

LEWIS SAUL & ASSOCIATES, 75 Rockefeller Plaza,  
New York, New York 10019, by Lewis J. Saul, Attorney at Law,  
appeared as counsel on behalf of Plaintiffs.

DRINKER, BIDDLE & REATH, L.L.P. 191 North  
Wacker Drive, Suite 3700, Chicago, Illinois 60606-1698, by  
JOHN DAMES, Attorney at Law; and

HALLELAND, LEWIS, NILAN & JOHNSON, 220 South  
Sixth Street, Suite 600, Minneapolis, Minnesota 55402, by  
TRACY J. VAN STEENBURGH, Attorney at Law; and

MEAGHER, GEER, 33 South Sixth Street, Suite  
4400, Minneapolis, Minnesota 55402, by MICHAEL HUTCHENS,  
Attorney at Law, appeared as counsel on behalf of Defendants.

ALSO PRESENT: CLARISSA VERMISCHT and KATHY  
INMAN, Zimmerman, Reed.

1 THE COURT: Good afternoon.

2 MR. GOLDSER: Good afternoon, your Honor.

3 MR. DAMES: Good afternoon, your Honor.

4 THE COURT: This is Civil Case Number 08-1943.  
5 We've captioned it IN RE: LEVAQUIN PRODUCTS LIABILITY  
6 LITIGATION.

7 Counsel, would you note your appearances, first  
8 for the plaintiffs.

9 MR. GOLDSER: Good afternoon, your Honor. Ron  
10 Goldser from Zimmerman, Reed. With me, my cast of  
11 characters. You know Lewis Saul --

12 MR. SAUL: Good afternoon, your Honor.

13 MR. GOLDSER: -- from New York and Maine from  
14 the last time. I think you know David Cialkowski from my  
15 office. He's appeared in the St. Jude medical litigation.  
16 And I think you need to meet several of our staff who are so  
17 important to make this case run.

18 THE COURT: Very well.

19 MR. GOLDSER: Meet paralegal Clarissa Vermischt  
20 and with her is Kathy Inman.

21 THE COURT: Good afternoon to both of you.  
22 For the defense?

23 MR. DAMES: John Dames, your Honor. Good  
24 afternoon.

25 THE COURT: Mr. Dames, good to see you.

1 MS. VAN STEENBURGH: Tracy Van Steenburgh.

2 MR. HUTCHENS: Mike Hutchens, your Honor.

3 THE COURT: Good afternoon to all of you.

4 Thank you for gathering today for the status conference,  
5 which we have scheduled. We have a joint agenda that's been  
6 proposed? Anything you'd like to add about that? First,  
7 Mr. Goldser.

8 MR. GOLDSER: I don't think so. I think we can  
9 cover everything based on that agenda.

10 THE COURT: Okay. Mr. Dames.

11 MR. DAMES: I agree.

12 THE COURT: Okay. Number of cases. What's the  
13 latest report there? Do we have --

14 MR. GOLDSER: I think Mr. Dames knows more  
15 about that than I do in terms of filed cases.

16 THE COURT: Okay.

17 MR. DAMES: Probably not. I think the last  
18 count we had was 29, but I -- I think. But I've been  
19 informed that we just had four cases filed yesterday. Ron  
20 has filed them from, I believe, Minnesota, but they were  
21 yesterday afternoon.

22 MR. GOLDSER: And I know there was at least one  
23 other one from Wisconsin. So that there are at least five  
24 others in addition to the 29, that I'm aware of, but there  
25 might be others beyond that that I'm not aware of off the top

1 of my head.

2 THE COURT: I noticed the filings coming  
3 through yesterday. Do we have any count at this point on  
4 state cases or don't -- do we know?

5 MR. DAMES: Two, I believe.

6 THE COURT: Two?

7 MR. DAMES: There is a case in Mississippi and  
8 there is a state court -- oh. Actually, there may be three,  
9 your Honor. I correct myself. I believe there are three  
10 state court cases, one of which is mature, but I don't  
11 believe it involves a tendon rupture. The other two involve  
12 -- it's reasonable to conclude they involve tendon issues in  
13 the case.

14 MR. GOLDSER: Sometimes it's difficult,  
15 unfortunately -- and this will be an issue we'll have to  
16 address as time goes on -- because at times, cases will be  
17 filed and we'll make allegations they could either be  
18 peripheral neuropathy-type pain or tendinitis or tendon  
19 rupture, so... We'll get that clarified down the road. But  
20 it's still simple.

21 THE COURT: Okay. The other two -- Mississippi  
22 you said was one. The other two, do you know where they are?

23 MR. DAMES: There's Mississippi, there is New  
24 Jersey, I believe, and one in New York, which does not  
25 involve the tendon rupture. But I'm saying this off the top

1 of my head. What I'd like to do, and what I propose to do  
2 is, maybe simply with a letter to the court, give you  
3 specific identification of the cases and where they are.  
4 Because I would love to have the court be instantly alerted  
5 to any of the state court actions, because we have to look to  
6 some federal/state court cooperation.

7 THE COURT: That would be very helpful,  
8 Mr. Dames, if I could get that information from you.

9 MR. DAMES: I'll get it to you next week, your  
10 Honor.

11 THE COURT: What I will do is send a letter  
12 right away to those courts' judges, if they have judges  
13 assigned to the cases -- some state courts don't do that. I  
14 recognize that -- just to inform them of what we're doing  
15 here and make sure that they're fully aware. The court's  
16 fully aware, anyway. Counsel probably are.

17 MR. GOLDSER: We were aware of the New Jersey  
18 case because we're involved in that. One of the steering  
19 committee members I believe is involved in the New York case.  
20 We were not aware of the Mississippi case, so we'd like to  
21 know more about that one.

22 THE COURT: Okay. Very well.

23 MR. GOLDSER: And from plaintiffs' perspective,  
24 your Honor, more and more inquiries keep coming into all of  
25 us. The number does seem to be growing slowly but steadily.

1 We've had no particular reason to file a lot of these cases  
2 -- we don't need to inundate the court with those -- but  
3 they're out there and, of course, are part of this whole mix.

4 THE COURT: Okay. Very well. The pretrial  
5 order on procedural issues, the court is close to being ready  
6 to file that. I have a number of changes I'm making to it,  
7 all relatively minor and procedural. As I indicated last  
8 time, my intent was to utilize Magistrate Judge Boylan in the  
9 role of a special master in this case rather than as a  
10 magistrate judge. That, in my view, is the best way to  
11 utilize a magistrate judge in an MDL, given what is expected  
12 of the transferee judge. I've spoken with him, and since he  
13 does have some level of familiarity with the case, it would  
14 be my intent to use him, at least initially, as a special  
15 master for any discovery matters that I need some additional  
16 help with.

17 MR. GOLDSER: You're not looking at a draft  
18 that has references to Magistrate Boylan. Because I know in  
19 one of the initial drafts that we were working off of, we  
20 were anticipating that he would remain involved. But, then,  
21 from the last status conference, you told us to take that  
22 off. And, so, I'd hoped that the draft that you had in front  
23 of you had excluded that provision.

24 THE COURT: Well, we have been excluding it  
25 from -- I don't know if there's another draft that we don't

1 have that you have submitted. We'll take a check just to  
2 make sure. The draft that we're working off of had him still  
3 listed and his initials -- which we've now taken out.

4 MR. GOLDSER: Okay. Then you might be working  
5 with an older draft. I know that Stacy Hauer had transmitted  
6 one while I was out of town. I have that with me. I'm happy  
7 to hand that up. And if you'd like it in WORD format, we're  
8 happy to e-mail it over.

9 THE COURT: Yeah. Why don't you hand it up.  
10 It may be there and we just haven't noticed its arrival.

11 MS. VAN STEENBURGH: Ron, is that the one that  
12 we had looked at and made some changes to?

13 MR. GOLDSER: This is Pretrial Order Number 1.

14 MS. VAN STEENBURGH: Yeah, I know. But we had  
15 looked at one Stacy was proposing and we had made some  
16 changes before.

17 MR. GOLDSER: Oh. Okay. That I don't know  
18 about. That's the last version that we had. That was the  
19 version I thought we had submitted.

20 MS. VAN STEENBURGH: Okay. Your Honor --

21 THE COURT: Have you seen that one, Ms. Van  
22 Steenburgh?

23 MS. VAN STEENBURGH: I'm not sure. There were  
24 a couple provisions that Ms. Hauer had put in that we had  
25 objected to. And she may have taken them out. Would it be

1 all right if we took a look at this afterwards and then we  
2 can confirm whether this is the one or not.

3 THE COURT: Right. That would be fine.

4 MS. VAN STEENBURGH: Okay.

5 THE COURT: And, then, I'll hold off any  
6 finalization of it until I hear from you.

7 MS. VAN STEENBURGH: Very good. Thank you.

8 THE COURT: And, then, if there's anything  
9 you'd like to respond to, just let us know.

10 MR. GOLDSER: Sure. And I don't want to  
11 belabor Pretrial Order Number 1, but, obviously, we've been  
12 operating as a steering committee and as lead counsel and it  
13 would be nice to have the formal authority from the court to  
14 do so.

15 THE COURT: Yeah, I agree. We'll try to get  
16 that filed, then, by early next week. Does that sound  
17 reasonable, Ms. Van Steenburgh?

18 MS. VAN STEENBURGH: Yes, your Honor.

19 THE COURT: Okay. Very well. Additional  
20 Proposed Pretrial Orders? Mr. Goldser.

21 MR. GOLDSER: Yes. Last time we had talked  
22 about a deposition protocol. We have gone back and forth on  
23 this. I have plaintiffs' proposed drafts, but there are  
24 several issues. I'll hand up our drafts. And I can  
25 highlight for you what the issues are, and, then, Mr. Saul

1 from our side will address some of them. But because there  
2 are additions that the defense would like, I think it's  
3 appropriate that Mr. Dames or one of his friends should  
4 address it first.

5 First, on page four of the Proposed Pretrial  
6 Order Number 2, near the top, in paragraph "A," under  
7 EXAMINATION, we have written: "Questioning should ordinarily  
8 be by no more than two attorneys for all plaintiffs in the  
9 MDL." Defense would like to have only one attorney asking  
10 questions. So that's one issue.

11 And the other two issues appear, or don't  
12 appear, as the case may be, on page six, right above  
13 paragraph 9 in the videotape area, the defense would like to  
14 have a provision that says: Two cameras may be used at each  
15 deposition, one on the witness and one on the questioner."  
16 We have omitted that. We don't agree with them. And, then,  
17 also, in paragraph 9 -- again, omitted from paragraph 9 --  
18 there was a limitation on the number of depositions that  
19 plaintiffs could take, but there was no limitation on the  
20 number of depositions that defendant could take. So where we  
21 left off in our conversations on that was that we would agree  
22 to be bound by the general rule of Rule 26, that we won't  
23 take an unreasonable number of depositions or ask for  
24 unreasonable people to be disposed. That's kind of where we  
25 left off. And I don't know if we've agreed to that

1       provi si on.

2                       So those are the three issues -- two  
3       questioners, two cameras, and the limit on the number of  
4       depositions. And I will leave it to Mr. Dames to argue for  
5       the inclusion of those at this point.

6                       THE COURT: Mr. Dames.

7                       MR. DAMES: Thank you, your Honor. The reason  
8       for the two cameras -- and it's a fairly straightforward one  
9       -- is that it recreates, with greater accuracy, the dynamics  
10      that's present in the courtroom. The defendants would  
11      propose -- I mean, you'll see both the questioner and the  
12      deponent. The two cameras provide -- you can do it by split  
13      screen -- but it's something that can be done at trial. It's  
14      not something that the court need worry about in advance of  
15      trial. Also, the second camera would be paid for by the  
16      defendants and all the synchroni zation would be -- the  
17      expense would be borne by the defendants. This procedure has  
18      been followed in some MDLs. They've adopted it. Part of the  
19      -- I have seen it early on -- and the court's probably as  
20      well aware as I am -- when videotapes first started to be  
21      used there wasn't a limitation on keeping the camera on the  
22      wit ness and, so, the -- but there was one camera. It was  
23      kind of rudi mentary. So you would flip back and forth. The  
24      benefit was, of course, you did see the questioner and you  
25      did see the interaction that went on between them -- the

1 greater reality of it -- but it was too jerky because of the  
2 one camera. The two cameras solves that problem, and I think  
3 it could be done with a minimum amount of fuss and in a  
4 reasonable manner.

5 Now, the other issue for us with the single  
6 questioner -- I believe, your Honor, that you have already  
7 ordered that in another litigation -- I think it was in  
8 Silzone, you provided for a single questioner. There can be  
9 instances -- and I will admit that I can understand how  
10 sometimes that might occur -- where the interests of the  
11 plaintiffs might be so divergent that there is a concern that  
12 the questioner will not cover the desires of another  
13 plaintiff in the case. If so, I think that can be approached  
14 to the court so that that exception can be made. But other  
15 than that, I think a single questioner before a deposition is  
16 a reasonable request.

17 We had also asked -- Ron did not mention it  
18 because it's not that big an item, but -- that there be  
19 notice of who the questioner will be 30 days in advance of  
20 the deposition. I would like to have some idea of who that  
21 person will be that would come. Sometimes scheduling issues  
22 may arise, sometimes transmission of document issues may  
23 arise. I'm less concerned with the precise number of days,  
24 that there be some time sufficiently in advance of the  
25 deposition where the questioner will be identified to us.

1 Obviously that's something we would likewise do for the  
2 plaintiffs. But those are the --

3 THE COURT: And how much time are you looking  
4 for there?

5 MR. DAMES: We had suggested 30 days. But I  
6 can understand the fluidity. And, again, you know, conflicts  
7 arise and somebody else has to appear.

8 MR. GOLDSER: That provision -- which is not in  
9 this proposal but should be -- we do agree to. And, your  
10 Honor, what we had agreed to, actually, was 20 days, with the  
11 opportunity to change it no less than five. But at least  
12 you've got a -- the point is they've got a contact point and  
13 that's appropriate.

14 THE COURT: Okay. Then the number of  
15 depositions.

16 MR. DAMES: I think that that -- we had made --  
17 we had had discussions and I think part of it -- that ended  
18 up with this non-specific resolution -- is that it's  
19 difficult to tell how many witnesses at this stage of the  
20 game seem reasonable for a limitation. We had talked of --  
21 you know, frankly, your Honor, I would like to discuss this  
22 somewhat later. Because right now we seem to be proceeding  
23 without any abuse, but if suddenly I'm flooded with  
24 deposition requests for corporate witnesses, I think that  
25 might be an appropriate time to suggest with -- giving you a

1 factual framework as to what seems unreasonable.

2 THE COURT: That makes sense to me.

3 Mr. Goldser, the single questioner issue, it would seem to me  
4 that perhaps most of the depositions would really only need a  
5 single questioner and likely would be someone -- so that only  
6 one person had to prepare to that extent for the deposition.  
7 But I understand situations in which there may be different  
8 interests and you may want to have more than one. Do you  
9 have any thoughts on this issue that the court should take  
10 into account?

11 MR. GOLDSER: Sure. First off, the genesis of  
12 this and the authority that Mr. Robinson -- who,  
13 unfortunately, can't be here today -- was his involvement in  
14 the OrthoEvra litigation. And we tracked down the deposition  
15 protocol order that does have a two-questioner provision in  
16 it. And, so, he was saying, Well, this is what we did in  
17 Ortho. Unfortunately, he must have been thinking about  
18 another case. Because in Ortho there were two questioners.  
19 The rationale that I see from the defense doesn't make a  
20 whole lot of sense to me. Because if we're entitled to a  
21 finite amount of time, it almost doesn't matter how we use  
22 that time. If you're in court and you have a motion to be  
23 argued and there are two parts to that argument, you don't  
24 insist on just one person doing it, you split it up based on  
25 people's expertise and the area of their focus. Thus far,

1 we've taken a few depositions. We've always had two people  
2 at them. Thus far, we've only had one person doing the  
3 questioning. But I don't see why it's any particular harm to  
4 allow the person with an area of expertise on what might be  
5 sales and marketing or it might be the Floxin, Levaquin issue  
6 or it might be the epidemiology part of it, if you've got an  
7 expertise, and this witness can cover several different  
8 areas, why you can't allow us to use the expertise that we've  
9 developed.

10 THE COURT: Okay. Let's handle it this way.  
11 We'll leave the reasonable language for the number of  
12 depositions, and if we have an issue here, we'll address that  
13 later on. Let's allow -- let's utilize two cameras for the  
14 depositions. I do think that's a good idea. It does make a  
15 difference during the trial. It's better for the jury to see  
16 both the questioner and the answerer. And I think with  
17 regard to asking questions during the depositions, the court  
18 is comfortable with a two-questioner limitation. If there's  
19 to be more than two questioners, you would have to have the  
20 permission of the court. Okay?

21 MR. GOLDSER: Thank you, your Honor. The next  
22 deposition is scheduled for November 14th and maybe November  
23 10th. So we ought to be sure that we have the order in place  
24 by then. Should I take this back and redraft it and then  
25 provide it to the court?

1 THE COURT: Why don't you redraft it and  
2 provide defense with a copy and we'll be ready to file it  
3 right away, because I don't see any other issues in here,  
4 although I will read it through carefully just in case I see  
5 something.

6 MR. GOLDSER: Okay.

7 THE COURT: But we surely can get this done --  
8 filed early next week.

9 MR. GOLDSER: I'm mindful of the time  
10 limitations that we have today. The bellwether trial issue is  
11 a big one, so I'd really like to move quickly through a  
12 couple of the other items.

13 Pretrial Order Number 3 is the common benefit,  
14 fee and cost-sharing order. It is primarily a plaintiff-  
15 oriented order that allows us to govern ourselves, as far as  
16 money is concerned. I have provided a copy to the defense.  
17 I have another copy for them. I have not heard any objection  
18 from them. My side is all comfortable with it. And, so,  
19 from the plaintiffs' perspective, we're ready for that order  
20 to be entered, if the court has an opportunity to review it.

21 THE COURT: Any objections that you know of,  
22 Mr. Dames?

23 MR. DAMES: No, your Honor.

24 THE COURT: The court will of course read it  
25 through, but is likely to have that filed right away.

1 MR. GOLDSER: Thank you very much. In terms of  
2 ongoing discovery, I've just highlighted a few things that  
3 are going on. We're going to be reviewing the new drug  
4 application in New Jersey in early November. There are some  
5 issues with INGENIC's, who is the epidemiology company that  
6 did one of the major epidemiology studies. They have  
7 provided some materials, but there's some deficiencies, and  
8 I'm having a little trouble getting them to respond to me.  
9 I'm not sure how I'm going to handle that yet. But that's a  
10 lurking issue, so that may be coming forward. Aventis is a  
11 marketing partner of Johnson & Johnson. They did the  
12 marketing in Europe. There's an important witness from  
13 Aventis. The good news is that she's in the United States  
14 and has been subpoenaed. So far, that process is going along  
15 reasonably smoothly but slowly. So there are some third  
16 parties out there that may end up coming before the court.  
17 There was a patent trial between Johnson & Johnson and Milan  
18 Labs. The issue was whether or not Milan could market a  
19 generic version of Levaquin. In so doing, the claim was that  
20 Levaquin really was not a new drug, it was the same as  
21 Floxin. That case went to trial. We've made a request for  
22 some of those documents. I'm happy to say that the other day  
23 we were able to resolve some differences that had arisen and  
24 the defense has agreed to locate those documents, if they're  
25 available, and provide them. So happily -- that was going to

1 be issue, but it looks like it's solved.

2 THE COURT: Where was that trial?

3 MR. GOLDSER: West Virginia.

4 THE COURT: And it's been completed?

5 MR. GOLDSER: Yes. It was completed several  
6 years back.

7 THE COURT: Years back. Okay.

8 MR. GOLDSER: I'm hoping the documents have not  
9 been destroyed. There are some expert reports, a number of  
10 depositions, trial transcripts, trial exhibits that we're  
11 looking for. And we've been very specific about what we  
12 want.

13 THE COURT: Okay.

14 MR. DAMES: There is an opinion in that case,  
15 your Honor, as well. I probably -- I don't see why I  
16 shouldn't mention it. I mean, J & J won that case, and it  
17 was, in part, based upon the fact that Levaquin was a  
18 different drug, so... But those -- some of that will be  
19 challenged, I guess, anew. But we have come to an agreement.  
20 Mr. Robinson has spoken several times on that issue to Ron.  
21 I guess I should mention he would have loved to have been  
22 here. He's attending a funeral today, so that's...

23 THE COURT: That's fine. That happens.

24 MR. GOLDSER: And I won't belabor why the  
25 opinion in the patent trial does not bear on these issues.

1 Suffice to say that we think it doesn't, but there's a lot of  
2 underlying material that does.

3 THE COURT: It sounds like we may return to  
4 that issue at some point in time.

5 MR. GOLDSER: We may well. We may well.

6 On 4(C) and (D), acquisition of plaintiffs'  
7 medical records and plaintiff and defendant fact sheets,  
8 those issues also tie into the discovery and bellwether trial  
9 plan and proposal. So I think I'd like to go to the overall  
10 scheduling issue and how we get there. And we can address  
11 those items when they fit in. So if I can just launch into  
12 all that.

13 THE COURT: Sure. Go right ahead.

14 MR. GOLDSER: Both parties have provided the  
15 court with their proposals, based on our discussion the last  
16 time. We pretty much put in writing what we described to you  
17 in court the last time, that we think -- that we should be  
18 trying Minnesota resident, Minnesota filed cases as  
19 bellwether cases, and that everything should focus in the way  
20 of case-specific discovery around them. The flip side from  
21 what the defense has proposed is that they would like to do  
22 discovery on all of the cases and then choose which cases are  
23 appropriate for bellwether trials and figure it out later.  
24 I'm not sure that they thought their proposal through very  
25 far. Because if you do the discovery of all of the cases and

1 then you figure out which cases you want to try, you're still  
2 going to cross the lexicon threshold, you're still going to  
3 have to grapple with the venue issue. And, so, we're going  
4 to have to do those sooner or later. Now, there are 30 -- at  
5 least 34 cases in this court, and each case will have a  
6 plaintiff, mostly you will have a spouse, there will be a  
7 treating doctor and there will be a prescribing doctor. So  
8 you'll have four depositions in 30-plus cases, you'll have a  
9 hundred and twenty depositions, plus all the medical records,  
10 et cetera, et cetera, before you even cross the threshold of  
11 thinking about a bellwether trial, at which point you have to  
12 deal with lexicon and venue. I think we should deal with  
13 lexicon and venue up front. Mr. Dames and I chatted a little  
14 bit before court convened today and I asked whether they  
15 would be willing to waive lexicon and try those cases here.  
16 The answer was a polite "No, thank you." On the venue  
17 question, Mr. Dames kind of changed his tune a little bit.  
18 He used to say "No," but now he's saying, "Well, I don't  
19 know." "Maybe I will, maybe I won't." I'll decide that  
20 later." But the reality is you still face the prospect of  
21 more than one venue motion down the road. Rather than having  
22 to fuss with any of that, let's pick cases that we know that  
23 you can try and that we know are going to stay here and that  
24 we can work up and get to trial. There are eight Minnesota  
25 cases; four have been on file for awhile, the other four we

1 filed yesterday. We are now ready to identify them by name.  
2 I can recite the last names now, if anybody's interested, but  
3 we know who they are. Seven out of the eight are men; six  
4 out of the eight are respiratory infections that prompted the  
5 use of Levaquin; two are urological, another very common use  
6 of Levaquin. Of the six upper respiratory, five of them had  
7 concomitant corticosteroids, which is an issue about its  
8 causative impact and how it aggravates tendon ruptures; one  
9 of the respiratory cases does not. All of them -- seven out  
10 of the eight are over age 60, one is under age 60. Sixty is  
11 a dividing line of the epidemiology. They're all Achilles  
12 tendon ruptures. There's no tendinitis. They're all  
13 Achilles tendons. There are no other tendons. So we don't  
14 have to worry about epidemiology across the board about  
15 shoulders or elbows or knees or any other tendons. Most of  
16 the epidemiology is with the Achilles tendon. So the ones we  
17 have picked, you don't have a venue problem, you don't have a  
18 lexicon problem. You do have a broad range of issues that  
19 will help us figure out whether --- what to do with some of  
20 the other cases -- with the steroids, with the age, with the  
21 respiratory, with the urological -- all of those gender  
22 issues, all of those issues are in these eight case that we  
23 have. I think we should go discover those case. I think we  
24 should discover them thoroughly, all the depositions that you  
25 would want to take to work up a case for trial. Within that

1 context, we'd probably want to make sure that the Complaints  
2 are all in the best possible order, so that instead of having  
3 a Master Complaint, we have a high-quality Complaint that is,  
4 other than case-specific facts, identical from case to case.  
5 That way, when the court wants to deal with rulings on things  
6 like preemption or other issues that may arise from the face  
7 of the Complaint, you've got a good-quality common Complaint,  
8 where the issues will be able to be resolved for not only  
9 these cases but for so many of the other cases across the  
10 board. Now, if we end up trying one or more of them, either  
11 individually or in groups -- and that issue we can pass on  
12 for now -- that may or may not lead us to what to do with the  
13 rest of the cases that are filed and the rest of the cases  
14 that are unfilled.

15 I know Mr. Dames has a great interest in  
16 acquiring medical records on all the cases. Now, he hasn't  
17 heard me say this yet, but I agree with him. So one other  
18 thing that's not in our proposal but that I would like to add  
19 is a suggestion that in all the filed cases we do provide a  
20 plaintiff fact sheet and, along with that, we provide prompt  
21 medical authorizations so that medical records can be  
22 collected. I think they should know about what the facts are  
23 in each of the cases, but I don't think we should go so far  
24 in the rest of the cases as to be taking depositions of all  
25 those plaintiffs or their spouses or their significant others

1 or the neighbor and all of the doctors, because that's just  
2 too much to get us through the process of getting cases to  
3 trial in reasonable order. And as Mr. Saul correctly points  
4 out, these are all here. And, so, at least as to discovery  
5 of the Minnesota plaintiffs and the doctors, they'll be  
6 concise and easy to deal with geographically. As far as  
7 Johnson & Johnson is concerned, we've been taking all the  
8 depositions in New Jersey and Philadelphia. So we don't have  
9 to go hither and yon to get all of these cases ready, but we  
10 might if we have a Maine plaintiff or a Florida plaintiff or  
11 a California plaintiff. So it's all very well honed down to  
12 make it very convenient and easy to get these cases to trial.

13 THE COURT: Do you anticipate any other  
14 Minnesota plaintiffs at this point in time?

15 MR. GOLDSER: We have looked through our  
16 inventory to see what we have. We don't think so --  
17 obviously people could come forward. But we don't think so  
18 at this point. There is one Minnesota case that's on file,  
19 William Voss, V-o-s-s. Mr. Voss has died. And under the  
20 statute about what survives -- what causes of action survive  
21 and what causes of action do not survive, we are likely to be  
22 dismissing that case. So that one will come off the list.

23 I think it makes a whole lot of sense to go  
24 down this road, because even with it, the schedule that we  
25 propose, takes us a fairly long way down the road to try and

1 get it all done with the experts that are necessary -- and  
2 we're really talking about generic experts more than case-  
3 specific. Case-specific aren't hard. "Had a tendon  
4 rupture." "Had it when he was on Levaquin." There's really  
5 not much more to a case-specific expert than that. So once  
6 we've gotten all those things -- all those pieces in place,  
7 the next cases, if we want to try more cases, either in this  
8 court or on remand or by this court sitting by designation  
9 elsewhere, will only need the case-specific discovery, just  
10 as if these cases were remanded and the case-specific  
11 discovery went back to the transferor court. I think that  
12 covers it.

13 THE COURT: Thank you, Mr. Goldser.

14 Mr. Dames.

15 MR. DAMES: Thank you, your Honor. We  
16 submitted something to the court on the issue and the  
17 bellwether issue and I don't want to belabor those points too  
18 much. Ron is right about the fact that there's some things  
19 that I -- he claims I haven't thought through, and the reason  
20 that I haven't thought through is sometimes I refuse to think  
21 something through without the information that would assist  
22 me in it. The point that we're trying to make is simple. We  
23 don't -- typically -- MDL, of course, is designed to  
24 facilitate and create consistent pretrial discovery. Once  
25 you've conducted that pretrial discovery and gotten a feel

1 for the way the case is shaped, then you can make a selection  
2 about which cases would be representative that would assist  
3 in the resolution of the entire litigation. We're somewhat  
4 doing this in reverse order, trying to select the cases that  
5 would give us some idea of how -- it's not quite an  
6 estimation hearing -- but I'm almost thinking about something  
7 that gives you an idea of what the cases are about and the  
8 issues that are present and how they would be predictive of  
9 how to handle the entire litigation. We know nothing about  
10 these cases that are proposed. Four of the eight that are  
11 proposed to be among those selected for bellwether were filed  
12 yesterday. So, you know, the recency of that is one  
13 indication of why I'm a little reluctant to suggest that  
14 those cases should be selected as bellwether cases. I don't  
15 know --

16 THE COURT: When can the fact sheets be ready  
17 on the new four?

18 MR. GOLDSER: We don't even have an agreed upon  
19 fact sheet. But I'm sure we could turn around a fact sheet  
20 in 30 days.

21 MR. DAMES: I mean, I certainly would be ready  
22 to make a proposal to the court when the fact sheets are  
23 completed -- or -- a reasonable sample, I mean. I know that  
24 there's -- I've had enough experience with fact sheets that  
25 there will always be some people that don't get them in on

1 time. But to make a proposal and say, "This is what we would  
2 suggest to the court as a counterproposal to the plaintiffs'  
3 suggestion." And, again, Ron is right, we talked before the  
4 hearing, and it was suggested what was our position on the  
5 venue cases that we contest are here improperly. Not the  
6 lexicon issues but the venue issues. And, again, there may  
7 be cases that I believe are representative enough that we  
8 should select as a bellwether trial. And we may well waive  
9 the venue issue in that regard so that we can accomplish that  
10 purpose. So I think the lexicon -- cases that are governed  
11 by lexicon, frankly -- so that can be put to one side, yes.  
12 But other than that, I think we can make a proposal to the  
13 court once we get that information. And it may be that on  
14 some of the cases we'll be in agreement -- which would not be  
15 shocking but be nice.

16 THE COURT: Mr. Goldser, anything else that you  
17 have?

18 MR. GOLDSER: Your Honor, the case has been in  
19 this court for two years, certainly before the MDL. We've  
20 had some trial dates either come or passed upon us. We'd  
21 like to get some of these cases to trial before they get too  
22 old. We're trying to figure out the best way to get them to  
23 trial without a whole lot of other motion practice that gets  
24 in the way of those trials.

25 THE COURT: I think that's -- well, it

1 certainly is -- the court's goal is to get some cases to  
2 trial just as quickly as possible, and I appreciate the  
3 proposals the plaintiffs have made. We might be slightly  
4 premature because I would like to hear the defense  
5 counterproposal. Is it reasonable to expect that, say, in  
6 six weeks?

7 MR. DAMES: I will endeavor to do so, your  
8 Honor.

9 THE COURT: And, then, I would be -- after  
10 hearing any response from the plaintiffs, I would be ready to  
11 make a decision on that at that point in time so that we can  
12 move forward with some form of expedited procedure for a  
13 bellwether case or cases.

14 MR. DAMES: Incidentally, your Honor, the trial  
15 date proposed by Ron earlier, we have no objection to that  
16 trial date. I know you probably heard this before from  
17 defense counsel, but I think it's a reasonable time frame in  
18 which to get the case to trial.

19 THE COURT: And your dispute right now is just  
20 simply over how we do it up until that point?

21 MR. DAMES: Yes.

22 MR. GOLDSER: What would you like to see us do  
23 between now and six weeks from now to facilitate defense  
24 getting information to allow them to make a proposal?

25 THE COURT: Well, I think they need to know a

1 little bit more about the four new cases, probably. I'm not  
2 sure the fact sheets can get in that fast. The other four,  
3 is all the information in on those? The first four.

4 MR. GOLDSER: I'm not entirely clear. But  
5 we'll make sure that whatever medical information that we  
6 have in our possession get to them on all eight as quickly as  
7 we can. And to the extent that there are names of relatives'  
8 physicians for whom we don't have records, we'll get that to  
9 them as well so that they can have at least something to work  
10 with. We'll get medical authorizations to them as well.

11 MR. SAUL: Your Honor, on the earlier filed  
12 cases, the four, we've provided complete medical records to  
13 the defendant and they've had them for well over a year. The  
14 four that were just filed, I believe we have reasonably  
15 complete medical records and we'll get them to them right  
16 away.

17 THE COURT: Well, maybe we can even do this  
18 more quickly than six weeks. I mean, I was anticipating it  
19 might take up to four weeks to get that material. But  
20 whatever you have -- and if it looks like it's sufficient for  
21 you to evaluate, Mr. Dames, then let's just do it right away  
22 and get the response into the court --

23 MR. DAMES: Sure, your Honor. Yes.

24 THE COURT: -- or -- your proposal into the  
25 court. Does that sound okay?

1 MR. GOLDSER: That would be wonderful.

2 THE COURT: Okay. I would like to get this  
3 resolved because it's always -- it's going to guide how we  
4 handle the additional rounds of discovery. So we should have  
5 it done as quickly as possible. Okay. What else should we  
6 talk about today? Mr. Goldser.

7 MR. GOLDSER: I think with that scheduling and  
8 the bellwether trial discussion, we really have covered  
9 everything. I mean, the subject of experts is listed on the  
10 agenda but only because I like to keep the notion of experts  
11 always in front of me because they're so important in these  
12 cases. There are no issues about experts at this point in  
13 time. I think we're done.

14 THE COURT: And I don't -- I mean, I likely do  
15 not need additional argument on the bellwether trial issue,  
16 unless each side would like to talk more about it. We'll set  
17 up another date for a status conference and, if need be, we  
18 can discuss that issue at that point in time. But I really  
19 would like to try to have a fairly detailed plan in place by  
20 December 1st, or so, at the latest, so that we know what the  
21 next six to eight months are going to look like. Does that  
22 sound okay?

23 MR. GOLDSER: That sounds good.

24 MR. DAMES: Sounds good, yes.

25 THE COURT: All right. As far as the next

1 status conference, probably around that time would be the  
2 best time for the court, unless either of you see a need to  
3 do it earlier. I think we've run about six weeks since the  
4 last one. We'll look for a date in, say, the first or second  
5 week of December. Does that sound okay --

6 MR. GOLDSER: That would be fine.

7 THE COURT: -- for the next status conference?

8 MR. DAMES: Sure, yes.

9 THE COURT: And hopefully we'll have this  
10 figured out by then. And by next week to have all three of  
11 the pretrial orders filed and ready to go, so that should be  
12 set. Okay.

13 MR. GOLDSER: You'll give us notice, then, of  
14 the hearing date?

15 THE COURT: Should we look at a date right now  
16 while we have people here? I realize we don't have everybody  
17 here -- we don't have Mr. Robinson -- but we can set a  
18 tentative time and that can, of course, be changed, if it  
19 needs to, to accommodate everyone. What does Wednesday the  
20 10th of December look like?

21 MS. VAN STEENBURGH: Your Honor, I think there  
22 is a conference in New York. You're on the panel this year?

23 THE COURT: It's the day after that.

24 MS. VAN STEENBURGH: Oh. I will be there on  
25 the 10th, so I prefer it not be that date.

1 THE COURT: Ahh, it starts earlier than when  
2 they invited me, huh?

3 MR. GOLDSER: Actually, we have depositions  
4 scheduled in Philadelphia on the 10th.

5 THE COURT: Well, perhaps the first part of the  
6 following week might be a good time, then? It's getting  
7 close to two months, but this is a time when I think that's  
8 appropriate. And you can always have a telephone conference  
9 in the middle if there's a need for it. What does Monday,  
10 Tuesday the 15th and 16th look like?

11 MR. DAMES: Monday's fine for me.

12 MR. GOLDSER: That's fine. I know Mr. Saul  
13 likes to come on a day trip. So if we could do it in the  
14 early afternoon.

15 THE COURT: Sure, that would be fine. Let's  
16 see. We have trial, but -- that's fine. We can schedule it  
17 for one clock. Does that work? Okay. So Monday, December  
18 15th, at one o'clock. Why don't you get back to us right  
19 away if that's a problem for Mr. Robinson.

20 MR. DAMES: I'm reasonably confident it will be  
21 fine.

22 THE COURT: It will be fine. Okay. Good.  
23 Anything else for today?

24 MR. GOLDSER: I don't think so, your Honor.  
25 Thank you very much.

1 THE COURT: Very good. We'll look forward to  
2 receiving the additional comments concerning the pretrial  
3 orders and expect to see them filed by probably Monday or  
4 Tuesday. Court is in recess. Thanks very much, everyone.

5 THE CLERK: All rise.

6 (Court stood in recess at approximately 1:12  
7 p.m., on October 17th, 2008).

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COUNTY OF HENNEPIN)

I, Ronald J. Moen, CSR, RMR, Official Court Reporter for the United District Court, and a Notary Public in and for the County of Hennepin, in the State of Minnesota, do hereby certify:

That the said proceeding was taken before me as a CSR, RMR, and a Notary Public at the said time and place and was taken down in shorthand writing by me;

That said proceeding was thereafter under my direction transcribed into computer-assisted transcription, and that the foregoing transcript constitutes a full, true and correct report of the transcript of proceedings which then and there took place;

That I am a disinterested third person to the said action;

That I reported pages 1 through 33.

IN WITNESS THEREOF, I have hereto subscribed my hand this 5th day of November, 2008.

s/ Ronald J. Moen  
RONALD J. MOEN,  
CSR, RMR