

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: Levaquin Products)
Liability Litigation,) File No. 08-md-1943
) (JRT/AJB)
)
)
) Minneapolis, Minnesota
) March 2, 2011
) 11:50 A.M.
)

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

APPEARANCES

For the Plaintiffs:

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For the Defendants:

JOHN DAMES, ESQ.
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1 MR. BINSTOCK: Bob Binstock, Your Honor.

2 THE COURT: Okay.

3 MR. LEDGARD: Good afternoon, Your Honor. Don
4 Ledgard.

5 MR. RASMUSSEN: Good afternoon, Your Honor.
6 Kristian Rasmussen with Alyssa Daniels.

7 MS. PRICE: Good afternoon, Your Honor. Diane
8 Price.

9 MR. BROSS: Good afternoon, Your Honor. William
10 Bross.

11 THE COURT: Okay. Anyone else? How about for
12 defendants?

13 MR. DAMES: John Dames, Your Honor.

14 MR. IRWIN: James Irwin, Your Honor.

15 MS. VAN STEENBURGH: Oh, sorry. Tracy
16 Van Steenburgh, Your Honor.

17 MR. SMITH: Scott Smith, Your Honor.

18 MS. VAN STEENBURGH: That's it.

19 THE COURT: That's it? Okay. Very good. Thanks
20 for doing this by telephone today. I thought that we could
21 probably handle that, and I'm out of town as well, but we
22 do have the hearing being reported, so we'll have a
23 transcript of it.

24 Mr. Goldser, do you want to begin?

25 MR. GOLDSER: Thank you, Your Honor. Kristine,

1 this is Ron Goldser. I will try to reintroduce myself, but
2 I imagine you'll recognize my voice most of the time these
3 days.

4 Your Honor, I trust you have a copy of the
5 proposed agenda?

6 THE COURT: I do.

7 MR. GOLDSER: Wonderful. As usual we start with
8 the number of cases commenced and anticipated. I don't
9 have anything new to report from plaintiffs' perspective,
10 from the last status conference.

11 I wonder whether Mr. Dames has any updated
12 statistics.

13 MR. DAMES: I can give you the latest statistics.
14 The total served MDL cases are now at 990. We have three
15 cases that are pending transfer to the MDL, and then the
16 total number of Levaquin cases served everywhere as of
17 February 25th is 2,546.

18 The total New Jersey served cases is now 1,512,
19 and other state court served cases are 41.

20 THE COURT: Okay. Those are served, correct?

21 MR. DAMES: Right, Your Honor.

22 THE COURT: Okay. Thanks for the report. The
23 trial date in New Jersey is now set. Is that a date
24 certain of April 11th?

25 MR. DAMES: April 11th.

1 THE COURT: And is it one case or more?

2 MR. GOLDSER: It's now two cases consolidated,
3 both older individuals, both male, both upper respiratory
4 infections, both Achilles tendon rupture, one with
5 steroids, one without steroids. One of the cases is
6 Mr. Saul's case. The other belongs to Mike London, who is
7 one of plaintiffs' liaison counsel in the state of New
8 Jersey.

9 In addition, Judge Higbee has identified the
10 subsequent two cases to be tried, although a date has not
11 been set for that yet. Those are both younger individuals.
12 The first case is a Masprianni. I believe that's spelled
13 M-a-s-p-r-i-a-n-n-i. That case I believe is the Lanier Law
14 Firm's case.

15 The other is Gilmore, G-i-l-m-o-r-e, and that is
16 my case. We imagine those cases will come up for trial in
17 the fall sometime. I think I have said those are both
18 younger individuals.

19 THE COURT: Okay. Mr. Dames, did you have
20 anything to report about the trial, anything?

21 MR. DAMES: Nothing in addition to that, Your
22 Honor. The April 11 trial date is a date certain. I'm
23 told, however, that there is a trial ongoing before Judge
24 Higbee, an Accutane trial, so obviously our date will
25 depend on the availability of Judge Higbee based on the, on

1 that other Accutane trial.

2 THE COURT: What are we anticipating for the
3 number of weeks for that trial?

4 MR. DAMES: I think that she is anticipating
5 around three weeks.

6 THE COURT: Okay.

7 MR. GOLDSER: This is Ron Goldser. I've heard
8 differently. I've heard it's going to be more likely four
9 to five weeks.

10 MR. DAMES: I'm sorry. I stand corrected, Your
11 Honor. Maybe that was my estimate.

12 THE COURT: Four to five weeks?

13 MR. DAMES: Four to five weeks.

14 MR. GOLDSER: That's what I've heard. Plaintiffs
15 have provided their expert reports. The defense has not
16 yet provided their expert reports. Experts will be deposed
17 in the coming weeks. There are several new experts, but at
18 least from plaintiffs' perspective, there are three out of
19 the five experts from the MDL are going to be testifying in
20 New Jersey. That's Dr. Wells, Dr. Blume, and I'm missing
21 one.

22 MR. DAMES: Zizic.

23 MR. GOLDSER: Dr. Zizic. Thank you. There is a
24 different epidemiologist and toxicologist, potentially.
25 Both Dr. Smith and Dr. Bisson have been identified in New

1 Jersey, but there is an additional expert in both those
2 categories in New Jersey, and it's not clear whether one or
3 both in each category will yet testify, but there is an
4 awful lot of overlap between the MDL trial and the New
5 Jersey trial as it appears at this point. You never know
6 whether, how it will unfold.

7 THE COURT: Sure. Okay.

8 So, Mr. Dames, are you involved in the trial
9 there?

10 MR. DAMES: Yes, Your Honor.

11 THE COURT: Okay. And -- okay. Are we, are we
12 okay with the tentative date that we set for our next trial
13 at the end of May, or is this schedule going to impact
14 that?

15 MR. DAMES: Your Honor, it's probably something
16 we need to keep tabs on because it depends on whether there
17 is any slippage in the New Jersey trial date. If there is,
18 I think it may impact the May 31 trial date. If there
19 isn't much slippage, it shouldn't.

20 MR. GOLDSER: And I --

21 THE COURT: If it does, if it does go for five
22 weeks and it starts April 11th, that means we're looking at
23 not much time between the end of that and the start of our
24 second trial.

25 MR. GOLDSER: Your Honor, this is Ron Goldser.

1 I, too, have been concerned about that. I know we don't
2 want to let our trial slip into the summer, but please note
3 that Mr. Saul has the Gaffney case up for a trial in the
4 New Jersey court and that of the five remaining bellwethers
5 that are on the initial cut, all five are also Mr. Saul's
6 clients.

7 And so he will obviously want to have a major
8 role in the preparation of whatever case is selected for
9 our second trial. So I do have concern about the
10 sequencing. That's not to say that I want to move it back
11 at this stage, but I just want to note the concern.

12 THE COURT: Well, we need to keep a close eye on
13 that. Okay. Anything in the other jurisdictions that have
14 Levaquin cases?

15 MR. GOLDSER: Your Honor, as Mr. Dames mentioned
16 last time, there is a California case that I believe has a
17 trial date, and I don't know much about that one, and I'm
18 wondering if that trial date is still out there or what the
19 current status of that case is.

20 MR. DAMES: It is still a September 12 trial
21 date, although it is likely to change, and I'm basing that
22 on communications from plaintiffs' counsel expressing his
23 desire for that.

24 THE COURT: Okay. That's only one that has a
25 trial date?

1 MR. DAMES: That is the only one, Your Honor.

2 MR. GOLDSER: And, John, is it going to be a week
3 or two, or is it going to be more extended than that?

4 MR. DAMES: You know, it's a hard call, Ron, but
5 I don't believe it would be a week or two. I think it
6 would be a little longer than that.

7 MR. GOLDSER: Okay.

8 THE COURT: And remind me again where is that
9 case?

10 MR. DAMES: San Mateo County, California.

11 THE COURT: San Mateo, okay.

12 MR. GOLDSER: I believe that also involves a
13 medical malpractice aspect as well as a product aspect, as
14 I understand it.

15 THE COURT: A single plaintiff?

16 MR. GOLDSER: Yes.

17 MR. DAMES: Single plaintiff.

18 THE COURT: Okay. What's next, Mr. Goldser?

19 MR. GOLDSER: Next item is to talk about the
20 Schedin case and where we are with that. There are two sub
21 items on the agenda. One is entry of judgment, which is a
22 continuing request from the defense and then scheduling
23 post trial motions. You know, obviously, there is a
24 trigger with the entry of judgment that will get us going
25 on post trial motions.

1 I do have a concern about the amount of time that
2 has transpired from the trial until the present.
3 Obviously, defense had the opportunity to work on those
4 post trial motions in the interim. Whether they have or
5 not, I don't know, but we're certainly going to want to
6 make sure that on the plaintiffs' side we have adequate
7 time to respond to them.

8 And so I'm not sure when judgment is going to be
9 entered or when we want to get started on the post trial
10 motions, but those two things do kind of arise in the same
11 breadth.

12 THE COURT: How quickly, Mr. Dames, are you ready
13 to file post trial motions?

14 MR. DAMES: Well, I mean, I think as soon as we
15 are, how can I put it? Whenever the deadline comes after
16 the entry of judgment, we will be ready.

17 THE COURT: Okay.

18 MR. DAMES: That's all. That's enough, I guess,
19 on that topic from me, Your Honor. We will be ready.

20 THE COURT: Okay. Well, I would anticipate
21 filing that -- other than the need for time to respond?

22 MR. GOLDSER: I'm sorry, Your Honor. You may
23 have broken up. With that a question towards plaintiffs?

24 THE COURT: Yeah, it was a question towards
25 plaintiffs. I understand your concern about sufficient

1 time, and we probably should just, once judgment is
2 entered, just set up a briefing schedule that is
3 appropriate for both sides. I'm happy to do that. I know
4 everyone is busy with preparing for other trials and
5 everything.

6 So I just want to make sure that we have enough
7 time for everyone to respond, so we will take care of that
8 issue. Did you have any other concerns about Schedin?

9 MR. GOLDSER: No, Your Honor. I just want to see
10 the post trial motions, and then I can give you a better
11 idea how long we need to respond.

12 THE COURT: Okay. Sounds good. If you need --

13 MR. DAMES: Could I -- I'm sorry, Your Honor, if
14 I could just interject. I guess I would prefer not to have
15 the schedule set after Ron sees our motions. We should
16 have, whatever the schedule should be should be set in
17 advance would be the way I would prefer it, subject to what
18 the local rule is.

19 So I would like to, I don't know if it would be
20 best to do it before the entry of judgment, propose a
21 schedule to the Court or at the time that judgment is
22 entered that we can propose a schedule.

23 THE COURT: Well, you know, normally unless there
24 is a request we would simply follow the local rule. In
25 terms of how much time you want, Mr. Dames, after entry of

1 judgment, what would be your anticipation?

2 MR. DAMES: You know, I would anticipate
3 following the local rule, but can you let me have an
4 opportunity to -- I can get back to the Court on that very
5 quickly. I should just consult with my co-counsel on a
6 specific time line then, Your Honor.

7 THE COURT: That sounds fine.

8 MR. DAMES: Since the laboring oar will not be
9 mine, I probably should communicate.

10 THE COURT: Probably would be wise.

11 MR. DAMES: That's right.

12 THE COURT: Okay. We'll get that, we'll get the
13 judgment entered, and then let's just hear whatever
14 proposal each side has, and we'll enter an order setting up
15 the briefing schedule.

16 Okay. Anything else on that, on Schedin?

17 MR. GOLDSER: No, Your Honor.

18 MR. DAMES: No.

19 THE COURT: Okay. On to second bellwether trial,
20 I just, I have been meaning to get out an order on
21 Karkoska. I just don't think that is a case that is
22 triable for a whole wide range of reasons at this point, so
23 I will enter an order removing that from the list of
24 bellwether eligible cases that we decided upon early, which
25 means there are how many remaining in that group? Does

1 either side know?

2 MR. GOLDSER: There would be four, Martinka,
3 Kirkes, Christensen and Sharon Johnson.

4 THE COURT: Is there any reason to add any cases
5 to that or not at this stage? I mean, I assume that that
6 might disrupt discovery, but maybe not. I should hear from
7 both sides of this.

8 MR. GOLDSER: Well, Your Honor, I think the whole
9 bellwether trial notion is a slightly bigger subject than
10 how do you choose from among these four. First off, among
11 these four, I want to alert the Court, as we talked about
12 last time, three of them are not in the position to attend
13 trial.

14 They have medical issues, and we can document
15 these to the extent necessary, but they are not in a
16 position to attend the trial, and for bellwether purposes,
17 we believe it imperative that the plaintiff be personally
18 present, and that may be a different story when we get down
19 to trying cases that are nonbellwether, but the import of
20 bellwether trials is so much greater than trying an
21 individual case that we think it crucial that the
22 plaintiffs individually be present.

23 So Martinka, Kirkes and Christensen have
24 problems. That leaves only in our view Sharon Johnson as
25 an available single plaintiff to try the second bellwether

1 trial, but it then really begs the question of what do you
2 do about Phase II and the Phase II cases, and we have been
3 exchanging some information and looking at these cases, at
4 least we have on our side, since the last status
5 conference.

6 And what I can tell you about the Phase II cases
7 is there are, I believe, 35 of them. Of those 35, 18 were
8 original filings in the District of Minnesota. That is,
9 the other 17 were transferred to this court through the MDL
10 transfer process and are subject to *Lexicon*. So there are
11 18 cases that this Court has authority to try.

12 Of those 18, 3 of them are Minnesota resident,
13 Minnesota filings. That would be Basil Mroz, spelled,
14 M-r-o-z; Doug Olson, O-l-s-o-n; and Cliff Straka, S, as in
15 Sam, t-r-a-k-a. That means that there are 15 cases that
16 are original filings in Minnesota that are subject to
17 1404(a) venue motions.

18 The defense is very eager to get discovery
19 started in all of those cases. I understand that. From
20 our perspective, we're still heavily involved in and
21 invested in the bellwether trial process. If we're going
22 to have 15 cases that are transferred out to other
23 jurisdictions on a 1404(a) venue motion, I think those are
24 no longer triable cases for bellwether purposes.

25 So I would like to know whether those are germane

1 to the pool of cases from which subsequent trials can be
2 had. So I think it incumbent upon us to get going with the
3 1404(a) venue motions on those 15 cases and see if they're
4 part of the trial pool or not and then determine what the
5 appropriate discovery protocol should be with those.

6 So I think we have one case clearly triable for
7 the second bellwether, and I know the Court has indicated
8 that we will try only one case, that's Johnson, and then we
9 need to start thinking about the next round of cases from
10 which I don't believe Martinka, Kirkes and Christensen
11 should be selected, and we have the others, either 3 or 18,
12 from which trial can be selected for round two.

13 If I remember correctly, and I did not
14 double-check the transcript, the Court was interested in
15 trying multiple plaintiffs the next time around, and I
16 thought I remembered an interest in trying up to five or
17 six simultaneously, which of course would be our interest.

18 If we're not going to settle this case, we're
19 going to have to figure out a way to try lots of cases
20 together, and frankly I was imagining a scenario where we
21 would try hundreds of cases all in one trial so that we
22 could get through them all in a timely manner, given the
23 age of some of these clients, but that's way down the road,
24 and I'll address the way down the road stuff here in a few
25 minutes.

1 MR. DAMES: Are you done, Ron? I'm sorry.

2 MR. GOLDSER: We think Johnson needs to go next
3 because Kirkes, Martinka and Christensen can't. We need to
4 identify the pool of cases for Phase II.

5 MR. DAMES: Your Honor?

6 THE COURT: Yes.

7 MR. DAMES: I almost, again, I almost don't know
8 where to begin because there is so much thrown in what Ron
9 has said, much of which I believe to be inaccurate. But
10 number one, we, as I understood the Court's, our last
11 discussion before the Court that we had suggested, and I
12 thought the Court had exhibited a certain amount of
13 sympathy for this position, if not outright agreement, is
14 we get to select the next case to be tried as a bellwether
15 case.

16 So we came to the Court, and we had selected and
17 we said explicitly that we wanted Karkoska to be tried
18 next. Now, I understand that there was a discussion with
19 plaintiffs' counsel about the specific circumstances of the
20 Karkoska case and why that would be inappropriate to be the
21 next case selection.

22 I would, however, Your Honor, like an opportunity
23 to understand the basis for that exclusion so that either
24 we would try to suggest or urge upon the Court a reason why
25 that should not be done, that that still should proceed,

1 and attempt at least to understand enough about the
2 circumstances to determine whether we would lodge a formal
3 objection as to how that process worked.

4 Secondly, if Karkoska will not be tried, I would
5 like to have some sort of response about what happens to
6 that case. That is if we are simply going to create a
7 shelf, almost a registry ala asbestos of cases that will
8 not be tried and will not be adjudicated, I want to know
9 about that, I want to know why, and I want to be able to
10 address that issue.

11 Secondly, what we have seen with Mr. Goldser's
12 presentation is all of a sudden three more cases are
13 unilaterally declared to be inappropriate to be tried,
14 cases which were in fact selected by Mr. Goldser and the
15 plaintiffs as part of the bellwether pool. Now suddenly
16 from their pool of cases, they are saying to us that three
17 of them are inappropriate.

18 Again, I think that's something we need to
19 address. I strongly disagree that those three cases should
20 be shelved because of the condition of the plaintiffs,
21 particularly since we don't know, other than Mr. Goldser's
22 statement what the condition is, why they could not appear
23 at trial, whether appearing at trial or not should be a
24 factor that would remove them from the bellwether
25 selection.

1 So there are serious issues about those, and
2 frankly, I would argue and urge upon the Court to consider
3 that perhaps further evaluation of the cases had led them
4 to believe that those cases would not be as favorable as
5 they were initially believed to be when they were selected,
6 but we need to formally address that.

7 And certainly as I understood the Court's last
8 comments on the matter, we still look to a single trial,
9 not a trial of five or six or as Mr. Goldser somewhat
10 casually said 100 to be selected. So I'm worried about
11 losing focus in our bellwether process and having a little
12 bit of a shell game going on that as soon as we begin to
13 select and have our selection be slotted for trial, it is
14 removed for reasons that we don't fully understand and
15 haven't discovered.

16 Now, I think the Phase II discussion is, other
17 than discovery, may be premature. Clearly, we intend to
18 try to have a program, as we suggested to the Court before,
19 on remands. We want to have a target, a goal, as to when
20 remands would be appropriately laid out, and we certainly,
21 and we've told the Court this before, want to have a
22 program where we would present motions for the 1404(a)
23 transfers to the Court.

24 But I don't see why that issue should affect the
25 selection of the next case for trial, which I believe is

1 appropriately our own and a single case and among the
2 bellwether pool of cases that were previously identified.
3 I tried to match mouthful for mouthful, and I hope I came
4 close.

5 MR. GOLDSER: You came close, John. If I may,
6 Your Honor?

7 THE COURT: Go ahead, Mr. Goldser.

8 MR. GOLDSER: One of the problems with trying the
9 cases of older folks is that they're older, and as time has
10 gone on, the health conditions of Messrs. Martinka, Kirkes
11 and Christensen have declined. And in particular, and
12 maybe Mr. Fitzgerald can give you more detail. Mr. Kirkes
13 had a terrible fall about a month or so ago, and I don't
14 recall whether it was a fall or a stroke.

15 But in any event, he had a serious injury, and I
16 believe it was a head injury, to the point where he is in
17 assisted living at this point and is just not able to maybe
18 even comprehend what is going on about the facts and
19 circumstances of this case. You know, that has to do with
20 his being elderly, and if you would like more detail, I
21 will have Mr. Fitzgerald chime in.

22 Mr. Martinka and Mr. Christensen are both I
23 believe on oxygen, have severe limitations in their ability
24 to travel and be out of town for extended periods of time
25 in order to participate in the trial and be here, and their

1 doctors have so indicated to us, and we can provide those
2 writings whenever the Court and counsel would like, but we
3 have asked their doctors, is it appropriate for
4 Mr. Martinka and Mr. Christensen to be present for the
5 trial.

6 Now I'm happy -- well, I'm not happy, but I
7 understand that the Court is allowing the defense to choose
8 the second trial, and if all four of these cases were
9 available, you know, they would get to choose, but as I
10 have said, the one limitation that we feel pretty strongly
11 about is that the individual plaintiff should be present
12 for a bellwether case.

13 When we're going to try multiple cases at some
14 point down the road, you know, it's going to be a little
15 easier to have some plaintiffs present and some not. When
16 you have got one case and one plaintiff and one -- and it's
17 a bellwether case, to risk the notion that a jury will
18 decide the case based on the absence of the plaintiff and
19 instructions to the contrary notwithstanding, this apparent
20 disinterest by not being there is very troublesome from our
21 perspective to get a fair value on the case on its merits,
22 as opposed to some extraneous factor.

23 I understand the next trial will be one
24 plaintiff, but the trial after that will be multiple
25 plaintiffs, from what I understand the Court said the last

1 time, and that's what I am referring to as five or six. If
2 Martinka and Kirkes and Christensen can't go as solos now,
3 maybe they're back in the pool to a greater or lesser
4 extent in multiple plaintiffs, you know, the next time
5 around, but the next time around we're going to need to dip
6 into the Phase II group to have viable plaintiffs for
7 trial, and I want to know what that group looks like, which
8 is why I'm suggesting the venue motion should go now.

9 MS. VAN STEENBURGH: Your Honor, this is Tracy
10 Van Steenburgh, if I could just make a couple of comments?

11 THE COURT: Certainly.

12 MS. VAN STEENBURGH: Mine is directed more on the
13 Phase II. What I hear Mr. Goldser saying is that some of
14 his clients are getting older, which is really an argument
15 in favor of doing discovery on the Phase II cases. We need
16 to move these cases along.

17 The other comment on that is that there are 35
18 cases. However, five of the plaintiffs are deceased, and I
19 have asked Mr. Goldser what he is going to do with those
20 cases, and I have not heard. We also believe that several
21 of those cases may be subject to dismissal on statute of
22 limitations grounds, which is another reason to do the
23 discovery so that we can determine whether in fact that is
24 the case.

25 You know, and finally, on the issue of the

1 transfer, very early on in this litigation before it became
2 an MDL, there were 1404 motions made, and I don't have the
3 transcript in front of me, but the Court denied those
4 motions saying, you know what, I want to have more
5 discovery done. I want to have the parties do more
6 discovery.

7 So at this point, it doesn't make any sense to
8 tee those motions up again when no discovery has been done
9 on those cases, that we should go ahead and do the
10 discovery and then if necessary, and if we want to go
11 ahead, we can do the 1404 motions at a later date.

12 But all of the arguments that Mr. Goldser makes
13 with respect to Phase II really militate in favor of
14 getting going on discovery and moving these cases forward.
15 So that is kind of my observation based on what he said.

16 THE COURT: Mr. Goldser, anything else?

17 MR. GOLDSER: Only this, Your Honor:

18 Ms. Van Steenburgh is right to the extent that you're
19 talking about discovery in all cases in the MDL, but I
20 disagree with her to the extent that Phase II is about
21 choosing bellwether cases as opposed to getting cases ready
22 for remand. If we're talking about evaluating Phase II
23 cases with bellwether cases, I disagree.

24 If we're talking about evaluating Phase II cases
25 and getting them ready for remand, then of course we should

1 be discovering them all and getting them ready for remand,
2 but I don't think we're anywhere close to remand. I think
3 there are a lot of obligations that both parties have to
4 getting cases ready for remand, not the least of which is
5 engaging in some sort of resolution process, which I
6 believe is suggested by the Manual For Complex Litigation
7 prior to remand of any case.

8 So that's got to be part of any program of
9 remand, but I don't know whether we're ready for that or
10 not. I think we should be. I think the conversation
11 should start, but, you know, that's got to be part of any
12 remand program, which is why that when you start talking
13 about Phase II, you've got to have your end game in mind
14 with regard to remand or resolution and work backwards from
15 there and figure out which of the cases you're going to
16 discover for bellwethers and which of the cases you're
17 going to discover for remand/ (inaudible). I'm done.

18 MS. VAN STEENBURGH: Your Honor, this is Tracy
19 Van Steenburgh, and my only comment with respect to the
20 remand is at our last status conference, this issue was
21 raised, and the Court said counsel for the parties should
22 get together and start thinking about that. I will be
23 honest.

24 Neither of either side has gotten their heads
25 together on this, but we are interested in putting that

1 together. So we will move forward and talk to Mr. Goldser
2 about these ideas for how you start getting these cases
3 remanded to their original jurisdiction.

4 THE COURT: Okay. And include in that discussion
5 the discovery process that we're going to follow for Phase
6 II?

7 MS. VAN STEENBURGH: If the Court so desires we
8 could, yes.

9 THE COURT: I think that should be discussed as
10 part of this as well. I mean, part of the problem is, if
11 we are going to have up to five plaintiffs in a trial in
12 the fall, we need more names, and therefore more discovery
13 needs to take place on some of the cases that are among the
14 35.

15 I think were there three that are Minnesota
16 jurisdictional cases, is that correct? Is that what you
17 said, Mr. Goldser?

18 MR. GOLDSER: That's correct, Your Honor.

19 THE COURT: With the few numbers that are
20 remaining from our initial group.

21 Mr. Goldser, on the three individuals that you
22 say are not in condition for a trial, it seems to me that
23 they may be able to be there for a part of the trial. Is
24 that not the case? It sounds like all three would not be
25 able to sit through a two- to three-week trial, but they

1 may be able to be there for a part of it or for whatever
2 testimony they have to provide, is that correct?

3 MR. GOLDSER: My understanding is that Mr. Kirkes
4 would not be able to come at all, although I'm not
5 up-to-date on his medical condition, and I am not certain
6 about whether Mr. Martinka's doctor or Mr. Christensen's
7 doctor would allow them to travel to the Cities and stay
8 over for a briefer period. I have not asked that question.

9 THE COURT: Well, it seems to me we should start
10 investigating these matters right away. You know, I don't,
11 I mean, I understand that it may be preferable to have them
12 present for the entire trial. It seems at this stage when
13 we need cases for the bellwether trial, the next one coming
14 up, it may be that we may not be able to afford the luxury
15 of having someone who can be there for the entire trial,
16 and that certainly can be explained to the jury, and we
17 certainly can, if the individual can be there for their
18 testimony, they can observe health problems and understand
19 why someone can't sit through an entire trial.

20 MR. SAUL: Your Honor, Lewis Saul.

21 THE COURT: Yes.

22 MR. SAUL: Maybe Mr. Fitzgerald can tell you the
23 physical condition of the other two. My understanding is
24 they're not able to attend the trial at all.

25 But, Kevin, can you, can you inform?

1 MR. FITZGERALD: Sure. With respect to Kirkes,
2 he, the gentleman that Ron mentioned, he fell down the
3 stairs recently. He was found after a couple days
4 unresponsive. He's currently living in an assisted living
5 facility. He will not be leaving that facility. He has
6 dementia, and for those reasons he will not be able to
7 attend the trial at all.

8 With respect to Martinka, Mr. Martinka also is
9 living in an assisted living facility. He is essentially
10 not able to walk. He has a wheelchair that he uses to get
11 around, and his, you know, his primary care physician, due
12 to his inability to walk around and his inability, he has
13 COPD and that's advanced, and his primary care doctor
14 thinks it would be very difficult for him to travel to
15 Minneapolis and attend the trial and then stay at a hotel,
16 things of that nature.

17 Mr. Christensen also is older, in his eighties.
18 He has COPD. He's on oxygen regularly throughout the day
19 and at night, and for those reasons, his primary care
20 doctor is also concerned about him traveling. He would
21 have to, if he were to attend the whole trial, it would be
22 very difficult because he would have to find, you know, a
23 supply for oxygen in Minneapolis.

24 And again staying in a hotel and things of that
25 nature are very difficult for somebody with COPD, and his

1 primary care doctor has indicated that he doesn't think
2 that traveling to Minneapolis and attending a trial is in
3 his better health interests.

4 MR. DAMES: One minute, Tracy. Your Honor, this
5 is something that we, of course, need to take some
6 discovery of these physicians, but simply from the
7 rendition that I have just heard, these are conditions that
8 preexisted -- these are long-standing conditions. The
9 COPD, for example, in Christensen has been a long-standing
10 issue with that gentleman, and in fact it's part of the
11 comorbidity picture presented by that plaintiff.

12 So I'm not sure how much of this is new. I'm not
13 certain it even should make any difference in the selection
14 of the case at trial or not, but certainly we would need to
15 be able to depose those physicians on this issue so that we
16 can properly address the fitness of that candidate as a
17 bellwether, next bellwether case selection.

18 MR. SAUL: Your Honor, Lewis Saul. These cases
19 were filed about five years ago. These plaintiffs are in
20 their late seventies and eighties, so when we say that this
21 condition was present five years ago, I think that that's
22 not an appropriate, an appropriate representation because
23 if they were, they're to the point of traveling very well
24 may be impossible or cause serious physical injury to these
25 plaintiffs.

1 We all know as we brought up in the early stages
2 of this case that these were an elderly group of
3 plaintiffs. In fact, as Mr. Dames pointed out or Tracy
4 pointed out, five of them have already died during the
5 pendency of these proceedings, and I don't, I don't think
6 that you need discovery, if we can produce a letter from
7 one of their physicians saying they can't do it.

8 I mean, do you want to try to cross-examine them
9 and say maybe if they came in an ambulance, you know,
10 whatever you're going to ask in a deposition to try to
11 prove that these elderly, very sick people can come to
12 trial. I don't think we need discovery. It's unfortunate.
13 There is one case left to try now.

14 It's necessary because of the defendants, you
15 gave them the ability to pick this first case. If they
16 have greater picks in the second consolidated trial, that
17 would be fair, but these folks can't attend trial.

18 MS. VAN STEENBURGH: Your Honor? Tracy
19 Van Steenburgh, I just wanted to, and I don't want to
20 belabor the point. I took Mr. Martinka's deposition. He
21 was in a wheelchair at that time. It was either last
22 summer or the summer before, so that's nothing new. He has
23 been in assisted living, based upon the records we see, for
24 quite a few years.

25 Mr. Christensen, I took his deposition. He was

1 on oxygen, as was his wife, when I took their depositions,
2 so that's not new, and they have had COPD for a long time.
3 So, you know, we do need to investigate this because this
4 is not anything new.

5 I saw these people and I deposed them, and there
6 was nothing about it, unless there is something about their
7 condition that has changed, and I think we have a right to
8 find that out. Now, Mr. Kirkes, falling down the stairs, I
9 don't know anything about that. That clearly is a new
10 development.

11 MR. GOLDSER: Ron Goldser. I have a proposed
12 solution. It is clear we haven't talked about Sharon
13 Johnson and that she is able and available for the next
14 single, individual trial and could attend. If we were
15 going to try five or six in September, we then have six
16 cases that are left as Minnesota resident, Minnesota
17 filing.

18 Martinka, Kirkes, Christensen, Mroz, Olson and
19 Straka, why not trial all of those or as many of those as
20 remain together in the fall, and that way defense gets all
21 of the cases that are out there in one big package, and we
22 don't have to worry about doing discovery on whether or not
23 Martinka, Kirkes and Christensen can attend.

24 We'll recognize that some of the plaintiffs in a
25 consolidated trial cannot attend, but that's less

1 prejudicial when you've got some of them there, and we
2 could try the cases in absentia for those who cannot make
3 it or who can only make it for a small portion of the
4 trial. That solves all the problems.

5 MR. DAMES: John Dames, Your Honor, if I may.

6 THE COURT: Sure.

7 MR. DAMES: This is essentially about attempting
8 to deny defendants their choice of the next trial.
9 Basically we have the right, I thought, to select the next
10 case for trial, and now as it turns out, suddenly the cases
11 that were being considered by the defendants have all been
12 taken off the table by the plaintiffs with the suggestion
13 that Sharon Johnson be a case that should be tried. That
14 is yet another plaintiffs' selection, followed by a
15 consolidated trial in the fall, as per their suggestion,
16 and that somehow solves the defendants' problems.

17 I strongly disagree. We should have the right to
18 select the next case for trial. If that person is unable
19 for some reason medically incapable of attending, medically
20 incapable of responding appropriately in the litigation,
21 that is something we need to determine and confirm.

22 But we have the right, I think, to select the
23 next case. Having made that selection, then we should
24 address with the discovery of the primary care physician
25 the fitness of that person to attend and respond to the

1 issues of the litigation. I don't think we can -- they're
2 attempting to both deny us the selection and the -- to deny
3 us the discovery to confirm whether or not the statements
4 that they are making to the Court have a medical basis.

5 And I think we need to be able to do the
6 discovery to confirm whether those statements are accurate,
7 and we still need to be able to proceed with a case that we
8 have selected, not that has been preselected for us by
9 them.

10 MR. SAUL: Your Honor, this is Lewis Saul. First
11 of all, we are not choosing the -- Johnson. She is the
12 only one left who can attend trial, so it's not fair to say
13 that we're choosing Johnson.

14 Secondly, we asked the defendant in the event
15 that Karkoska is not chosen as a bellwether, who was your
16 next choice. They will not tell us. Tell us who it is,
17 and then do discovery with the physicians from that
18 particular case, if the Court so orders. Why don't you
19 just tell us now who your next choice is?

20 THE COURT: Well, here. Let's proceed ahead in
21 this manner. I would like to have -- we have three
22 plaintiffs who are, claim at least representations by
23 counsel that they are unable to attend trial. I would like
24 to have within ten days reports or letters from their
25 doctors that assess their ability to attend trial and to

1 comprehend what is going on.

2 At that point once those letters are obtained or
3 reports are obtained, we will discuss the matter. If the
4 defense feels that additional discovery is necessary, I
5 likely will order it at that point in time if there is a
6 good reason for it. It may be obvious who is available and
7 who is not upon the basis of the letters, and we can skip
8 that step, but let's have that done within ten days from
9 now so that we can get this matter moving forward.

10 If a plaintiff is simply unable to comprehend
11 what is going on, they're not going to provide much
12 assistance for counsel, that would be very difficult for
13 them to be a plaintiff in a trial, but if they're simply
14 handicapped in some respect, such as oxygen, perhaps not
15 able to attend the trial every day, I don't see that as a
16 factor which should eliminate them from consideration for
17 the next trial.

18 Let's do that. Let's handle that in that manner.
19 Mr. Goldser or Mr. Saul or Mr. Fitzgerald, can you take
20 care of making sure we get these reports in within ten
21 days?

22 MR. GOLDSER: Yes, Your Honor.

23 MR. SAUL: Certainly, Your Honor.

24 MR. FITZGERALD: Yes, Your Honor.

25 THE COURT: And then we'll address it at that

1 point in time. I would like to get this name identified
2 just as quickly as we possibly can.

3 Okay. Counsel then will start discussing Phase
4 II discovery, venue transfers issues if we're going to
5 address that soon. I would like you to start talking about
6 these issues as well. Okay?

7 MR. GOLDSER: Very well, Your Honor.

8 THE COURT: Okay. Anything else we need to talk
9 about today?

10 MR. GOLDSER: The other items on the agenda were
11 discovery issues. I had a place holder out there for sales
12 representative personnel files. We will get to -- we have
13 not yet resolved that, but I think where we are on that is,
14 we have got a pretty good idea of what needs to be
15 produced.

16 It's just for whom it needs to be produced, and I
17 think that depends on where we go with bellwether trial
18 discovery and Phase II trial discovery. So we will figure
19 out which cases that's relevant for. You know, I think as
20 I understand it, we have got a pretty good handle on what
21 needs to be produced. So that's what I see on that issue.

22 Tracy, did you want to add anything on that
23 subject?

24 MS. VAN STEENBURGH: Only that, Your Honor, we
25 have reached no agreements on this. We have a pending

1 question in to Mr. Goldser, and he did say this was just a
2 place holder because he agreed that there had been no
3 agreements in terms of a final meet and confer. So we will
4 continue down that path. I just want to make that clear
5 that we haven't agreed.

6 MR. GOLDSER: We have defendant fact sheets as an
7 issue, Your Honor. There are a number of plaintiff fact
8 sheets that have been returned, for which there are no
9 defendant fact sheets. I believe there have been 485
10 plaintiff fact sheets provided, for which there have been
11 something like 185 defendant fact sheets returned, and the
12 remaining 300 or so are overdue. I have just provided that
13 list with a request that those be completed to defense
14 counsel.

15 I trust they're working on that and that those
16 will be provided in short order. We do have a concern
17 about one of the issues raised on the answer which has to
18 do with advertising, and the answer is that there has been
19 national advertising, but frankly, we haven't had a meet
20 and confer on that subject, and we should have that
21 conversation before we bring it to the Court's attention if
22 we can't resolve it. I will move on to plaintiff fact
23 sheets in a second.

24 Tracy, anything on that?

25 MS. VAN STEENBURGH: You're right. We haven't

1 had a meet and confer, so we have nothing really to say
2 about the advertising issue.

3 MR. SAUL: Your Honor, Lewis Saul here again. In
4 New Jersey I'm liaison counsel between the MDL in New
5 Jersey, and I get every defendant fact sheet. As I
6 understand it, these fact sheets were ordered in New Jersey
7 about a year ago.

8 They're absolutely current, and it's the same
9 firms in New Jersey that are here, but yet we are deficient
10 with 300 plaintiff -- defendant fact sheets, and they're
11 totally current in New Jersey, and it just doesn't seem
12 right. We need the defendants' fact sheets before we can
13 go forward with these cases.

14 THE COURT: Yes. I agree with you on that.
15 Let's see. What's the delay on this, on the fact sheets?

16 MS. VAN STEENBURGH: There are two things, Your
17 Honor. One, there is a counter balance. There are close
18 to 100 plaintiff fact sheets that have not been provided to
19 us, so it's a little difficult to provide defense fact
20 sheets when we are not yet in receipt of plaintiff fact
21 sheets.

22 With respect to some of the other defense fact
23 sheets, there was a, they are now being done a rolling
24 provision. There was a third-party vendor issue with
25 respect to some of them in terms of getting some of the

1 information, but I have checked with the firm that has been
2 preparing all these, and we should be doing these in large
3 batches.

4 While they were waiting for this information, the
5 same firm was also preparing all of the New Jersey ones.
6 So I think that there has been a lot of activity going on
7 and that some of that was diverted to New Jersey while we
8 were in trial on the MDL, but I assure Your Honor that any
9 glitches have been corrected, and those should be rolling
10 out in very large batches.

11 And with respect to the ones that are missing
12 because we don't have plaintiff fact sheets, we have
13 provided all of the names to the plaintiffs' attorneys as
14 to those, and we have sent deficiency letters to all of the
15 firms who have not supplied us with plaintiff fact sheets,
16 so hopefully those will be rolling in as well.

17 MR. GOLDSER: Your Honor, from plaintiffs'
18 perspective, the numbers I gave you were based on
19 plaintiffs' fact sheets which have already been provided
20 for which the defendant fact sheets are overdue. The 100
21 or so plaintiff fact sheets that have not been provided, I
22 just received that list yesterday.

23 I was not aware that there was a large number
24 outstanding, nor did I know which cases they were involved
25 in. I have been asking Ms. Van Steenburgh to identify for

1 me the plaintiffs' counsel on each of those cases. She
2 does not have the ready facility, as I understand it, to do
3 that.

4 So having just gotten the names, I have to figure
5 out which law firms they are, and we will be in contact
6 with those firms to find out what is going on with those
7 plaintiff fact sheets. If the cases need to be dismissed,
8 we will get them dismissed. If the facts are due, we will
9 get them due.

10 I just found out about this yesterday. So we are
11 on it. We are going to have to do our own digging. So be
12 it. We will do it.

13 MS. VAN STEENBURGH: Suffice it to say, Your
14 Honor, both sides are working on the issue, and we will
15 move this along.

16 THE COURT: Okay. That would be great. I would
17 like to get that off our agenda quickly here. What I would
18 like to do is set up either an in-person or by telephone.
19 I know we're approaching the New Jersey trial date, so I
20 don't want to make people travel unnecessarily.

21 So maybe we can get together by telephone, but I
22 would like to do it within two weeks. The week of the 14th
23 of March is probably best for me. Well, I can probably do
24 it in Washington earlier the following week, but it would
25 probably be best if we could do it say the 16th, two weeks

1 from today.

2 If we wait too much longer, we're getting close
3 to the New Jersey start, and I want to keep on track with
4 these issues. Is the 16th of March, is there any problem
5 with a telephone conference on that date?

6 MR. GOLDSER: Your Honor, Ron Goldser. I'm out
7 of the country from the 10th through the 23rd. I'm sure
8 Mr. Saul can handle it in my absence.

9 THE COURT: Okay. Mr. Dames?

10 MR. DAMES: I am out of the country, however not
11 the same place Ron is, and so the -- although we will both
12 be within view of the Mediterranean apparently. I will be
13 coming back on the 22nd. You know, Your Honor, depending
14 on the time, if it's telephonic, I could certainly call in.

15 THE COURT: Yeah. Just I want to keep on this
16 issue because I really would like to handle this just as
17 quickly as we can. I mean, propose a date. I'm fine. I
18 can do it from Washington as well where I'm going to be for
19 most of the week of the 21st.

20 MR. DAMES: Well, if the Court wants to adhere to
21 the 16th, I would simply call in, and obviously Tracy will
22 be here and Jim Irwin. He hasn't said anything, but I
23 suspect he will be around as well, so we could do it then.

24 THE COURT: Mr. Goldser, can you call in from
25 wherever you are on that date?

1 MR. GOLDSER: Were you addressing me, Your Honor?

2 THE COURT: Yeah.

3 MR. GOLDSER: Unfortunately I don't think I'm
4 going to be in a place where there is telephone service.
5 I'm going to be in the desert of Africa.

6 THE COURT: You never know. There is phone
7 service all over the place these days.

8 MR. GOLDSER: I understand.

9 THE COURT: That's fine. I mean, we can probably
10 do it without you, but I do want to specifically address
11 the issue of the plaintiff for the next case.

12 MR. DAMES: Yeah.

13 THE COURT: Yeah.

14 MR. SAUL: Your Honor, Lewis Saul. I am prepared
15 to handle this. It's all right.

16 THE COURT: Okay. Fine. Let's plan on the 16th,
17 and let's say -- let's see. Let me look at -- probably a
18 two o'clock central, would that work?

19 MR. DAMES: Sure.

20 MS. VAN STEENBURGH: Yes.

21 THE COURT: Are you going to be seven hours
22 ahead, Mr. Dames?

23 MR. DAMES: Correct, Your Honor. That would be
24 just fine.

25 THE COURT: Okay. Let's plan on that. If either

1 side thinks we need to have it in-person, just let us know,
2 otherwise we will presume it will be a telephone conference
3 again.

4 MR. GOLDSER: Okay.

5 THE COURT: Okay?

6 MR. DAMES: Thank you, Your Honor.

7 THE COURT: Okay. Great.

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

9 THE COURT: We will talk to everyone in two
10 weeks.

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.

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

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