

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re: Levaquin Products )  
Liability Litigation, ) File No. 08-md-1943  
) (JRT/AJB)  
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)  
) Minneapolis, Minnesota  
) August 10, 2011  
) 11:09 A.M.  
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BEFORE THE **HONORABLE JOHN R. TUNHEIM**  
UNITED STATES DISTRICT COURT JUDGE AND A JURY  
**(STATUS CONFERENCE and MOTION HEARING)**

APPEARANCES

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For the Defendants: **TRACY J. VAN STEENBURGH, ESQ.**  
**SCOTT SMITH, ESQ.**

Via telephone: **JOHN DAMES, ESQ.**  
**JAMES IRWIN, ESQ.**  
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Proceedings recorded by mechanical stenography;  
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11:09 A.M.

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(In open court.)

THE COURT: You may be seated. Good morning. This is civil case number 08-1943, In Re: Levaquin Products Liability Litigation, the multi district litigation assigned to this Court.

We have a status conference this morning, together with a motion. Let's have counsel note appearances.

First in the courtroom for the plaintiffs?

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

THE COURT: Good morning, Mr. Goldser.

For the defendant?

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

MR. SMITH: Scott Smith, Your Honor.

THE COURT: Good morning to both of you.

So on the phone, we have for the plaintiffs first?

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

MR. FITZGERALD: Good morning, Your Honor. Kevin Fitzgerald.

MR. RASMUSSEN: Kristian Rasmussen, counsel for plaintiffs.

1 MR. TERRY: Good morning, Your Honor. Eric  
2 Terry.

3 THE COURT: Anyone else for the plaintiffs?

4 MS. FULLMER: Yes, Your Honor. Good morning.  
5 This is Brenda Fullmer on behalf of the plaintiffs.

6 THE COURT: Okay. And then for defense, we have,  
7 who else is on the phone?

8 MR. IRWIN: Good morning, Judge. Jim Irwin for  
9 defendants.

10 MR. DAMES: John Dames, Your Honor. Good  
11 morning.

12 THE COURT: Good morning.

13 MR. ESSIG: Bill Essig. Good morning, Your  
14 Honor.

15 THE COURT: Okay. Anyone else? Okay. I think  
16 we're set. Let's go to the items listed on the agenda for  
17 the status conference today.

18 Mr. Goldser.

19 MR. GOLDSER: As usual, we're starting with the  
20 head count of the number of cases in state and federal  
21 court. I don't know if defense counsel here has that or if  
22 Mr. Dames has that on the phone.

23 MS. VAN STEENBURGH: I believe Mr. Dames --

24 MR. DAMES: I actually have it on the phone. The  
25 count in the MDL now is 1314 cases. In New Jersey, there

1 are 1831 cases, and there are 45 other state court cases.  
2 39 of them are in Illinois.

3 THE COURT: Okay.

4 MR. GOLDSER: And I have gotten a report from  
5 Mr. Carey in Illinois saying that they are now actively  
6 involved in discovery in those cases, but there are no  
7 trial dates set yet.

8 THE COURT: The Illinois cases, are they before a  
9 particular judge, or are they all over the place?

10 MR. GOLDSER: I -- go ahead, John.

11 MR. DAMES: I was going to say, they are modestly  
12 scattered. Thirty of them are downstate in St. Clair and  
13 Madison County, and there are a smattering of other  
14 counties. Five of the cases are in Cook, but they are not  
15 centralized before a single state court judge, Your Honor,  
16 if that's what you meant.

17 THE COURT: Yeah. I take it that's not  
18 anticipated under Illinois law?

19 MR. DAMES: Not at this time, no.

20 THE COURT: Okay.

21 MR. GOLDSER: I think in fact they had been at  
22 one point in time, and for reasons I don't recall, they  
23 broke apart. I don't know why that was.

24 THE COURT: Okay.

25 MR. GOLDSER: Federal/state coordination, the New

1 Jersey case of Beare, B-e-a-r-e, and Gaffney,  
2 G-a-f-f-n-e-y, is going forward. Jury selection starts on  
3 I believe it's Monday, August 29th. Jury selection will be  
4 completed that week, and then opening statements, if I  
5 understand correctly, will start the day after Labor Day,  
6 Tuesday, September 6th.

7 This case will get tried. Lead counsel for  
8 plaintiff will be the Parker Waichman firm and the Alonso  
9 and the Douglas & London firm. Nick Warywoda,  
10 W-a-r-y-w-o-d-a, and Mr. Saul and Mr. Fitzgerald and I will  
11 be participating in that trial. I'm sure we will be  
12 spending some time in New Jersey for that as it goes  
13 forward.

14 THE COURT: What is the anticipated length of  
15 that trial?

16 MR. GOLDSER: I know defense counsel who is  
17 Christy Jones from Mississippi, not anyone who has appeared  
18 yet in this courtroom, has a European trip that she needs  
19 to leave on in mid to late October. So we will certainly  
20 be done by then, but I guess the anticipation is that it  
21 will go up to that time period. I think six weeks is not  
22 unlikely.

23 MS. VAN STEENBURGH: Your Honor, may I add  
24 something?

25 THE COURT: Yes.

1 MS. VAN STEENBURGH: And, Mr. Goldser, you can  
2 correct me if I'm wrong. I understand it's going to be a  
3 time trial. I believe the plaintiffs have been given 45  
4 hours, is that correct?

5 MR. GOLDSER: I have not heard that.

6 MS. VAN STEENBURGH: So given that amount of  
7 time, and I'm not sure what the defense is, I would  
8 anticipate, I would think it would be done by the end of  
9 September or the first week in October.

10 THE COURT: She doesn't hold trial every day of  
11 the week, isn't that correct?

12 MR. GOLDSER: I know that her trial days are  
13 shorter. I believe there is some sense that she does not  
14 have trial every day, but I can't say that for certain.

15 THE COURT: Okay.

16 MS. VAN STEENBURGH: My understanding is that the  
17 first week, because it's the holiday, she is going to go  
18 through the first four days of that week and then perhaps  
19 only four days a week the rest of the time because she  
20 takes motions and other things on Friday.

21 So it looks like I would say four days, assuming  
22 five hours, so 20 hours a week of trial time.

23 THE COURT: Okay. Very good.

24 MR. GOLDSER: All right. So I think that takes  
25 us all the way through numbers 1 and 2, which leads to

1 number 3 on the agenda, the 1404 fact discovery motion, if  
2 you want to take that next.

3 THE COURT: With respect, just for the record,  
4 for coordination purposes with New Jersey, the Court has  
5 not sent out to New Jersey specifically copies of the  
6 orders issued here, but they have been advised of the web  
7 site and how to access orders so that they would be  
8 available to Judge Higbee should she choose to look at  
9 them. So that's the coordination there.

10 MR. GOLDSER: Sure. I know several of the  
11 lawyers who are heavily involved in New Jersey have at  
12 least some MDL cases, so they're getting them directly  
13 through ECF. We certainly provide them to plaintiffs'  
14 counsel. We have gone through the *Daubert* motion and the  
15 pretrial motion phase. Many of this Court's orders were  
16 raised during that time.

17 So I'm sure Judge Higbee is well-acquainted with  
18 the most significant orders from here.

19 THE COURT: Okay.

20 MR. GOLDSER: Do you want to take up the 1404  
21 fact discovery motion next since it's next on the agenda?

22 THE COURT: Sure. Let's do that.

23 MR. GOLDSER: Okay.

24 MS. VAN STEENBURGH: Thank you, Your Honor. When  
25 we had our last status conference, one of the issues that

1       came up is the defendants would like to move forward with  
2       some fact discovery on the cases that may be subject to a  
3       transfer under 1404, and the Court instructed counsel to  
4       meet and confer, which we did on the 29th of July, at which  
5       time the plaintiffs' attorneys who had made an earlier  
6       proposal said they would not agree to our proposal to  
7       conduct any discovery in those cases.

8               Our proposal was that we would take the  
9       plaintiff, the prescribing physician and a treating  
10      physician, usually the orthopedic, to establish a factual  
11      predicate for an eventual motion.

12             We are here today on our motion because we were  
13      not able to reach an agreement, and as we indicated in our  
14      motion papers, and I won't go through it all, it's a very  
15      limited request for factual discovery on those cases so  
16      that we can establish a factual predicate if we deem  
17      necessary to bring a motion to transfer.

18             I know the plaintiffs have said this is  
19      premature, and we aren't making a motion to transfer. We  
20      certainly can make that at some other time. What we would  
21      like to do is to go through and do some of the discovery,  
22      and as we have found in both Schedin and the Christensen  
23      cases, the case-specific discovery is important.

24             We have now gone through much of the corporate  
25      discovery, which was one of the reasons or the main reason

1 the Court denied the motion early on before the MDL was  
2 created, and we are in the bellwether phase of the trial,  
3 so that we can continue with those, but also participate on  
4 a limited basis to see what facts are out there that may  
5 establish a need.

6 It may be that those facts will establish some  
7 basis for bringing a summary judgment motion before the  
8 Court. I don't know, but we certainly would like that  
9 opportunity to establish that factual basis.

10 THE COURT: There are three depositions  
11 anticipated for each of how many cases?

12 MS. VAN STEENBURGH: And the number of cases are  
13 as follows: I don't know what the plaintiffs plan to do.  
14 In the Phase II cases, there are six deceased plaintiffs,  
15 and I don't know what they plan to do with those cases at  
16 this point.

17 There are three cases where discovery has been  
18 partially completed, and then there are ten cases where the  
19 plaintiff, the prescribing physician and the treater would  
20 have to be taken. So that's 30, approximately, depositions  
21 over the course of time that would have to be taken in  
22 those 1404 cases.

23 THE COURT: Ten cases times three depositions,  
24 but the depositions are focused on the transfer related  
25 issues --

1 MS. VAN STEENBURGH: Yes.

2 THE COURT: -- or you mentioned summary judgment  
3 as well.

4 MS. VAN STEENBURGH: Well, I think finding out  
5 what the basis for the prescription and those kinds of  
6 things from the prescriber would be important, and we  
7 certainly could accomplish that during -- but it's mainly  
8 to establish what the factual basis is for the claims and  
9 also to determine issues having to do with convenience of  
10 witnesses and where they're located and those kinds of  
11 things that would be subject to the transfer motion.

12 THE COURT: And over what period of time are you  
13 proposing to do this?

14 MS. VAN STEENBURGH: Well, we could do this over  
15 several months. Certainly we would rather do it sooner  
16 than later, but there are some other priorities that  
17 perhaps the Court has in mind with the bellwether cases  
18 coming up for trial and also looking at Phase III Minnesota  
19 filed/Minnesota resident cases.

20 So certainly we could do these and spread them  
21 over time, but we certainly could get them done by the end  
22 of the year, it seems to me, and that's all I have. Thank  
23 you, Your Honor.

24 THE COURT: Thank you.

25 MR. GOLDSER: Thank you, Your Honor. As you know

1 from the briefing, a 1404 motion certainly at this point in  
2 time is pretty much a futility because even if we go  
3 through this process and even if you grant remand, you send  
4 it back to the federal District Court in Tallahassee or  
5 Portland, Maine, or wherever, they're coming right back  
6 here under 1407.

7           So it's not like you're going to be able to move  
8 these cases out of this court and have any change in the  
9 method of processing them whatsoever. So really this  
10 motion is about taking discovery in a certain limited  
11 narrow set of cases, the Phase II cases.

12           I have a great deal of trouble with the notion of  
13 taking a prescribing doctor and a treating doctor solely  
14 for the purposes of determining where they live and whether  
15 it's convenient for them to come to Minnesota to testify at  
16 trial because that's all that is necessary for a venue  
17 motion.

18           You read your order in the Voss case. You read  
19 the venue cases generally. That's all that is necessary.  
20 I mentioned the last time, defendant should have one bite  
21 at a prescribing and treating doctor for a deposition.  
22 That's it. It's an undue burden on the doctors to go back  
23 a second and a third time.

24           It's unfair to plaintiff to have his or her  
25 doctor deposed repeatedly. That doesn't make doctors very

1 happy, and, you know, it tends to color their view towards  
2 the legal system, to say nothing of the duplicated work  
3 load that exists by having to go depose doctors in Fort  
4 Bluff, Arkansas, twice because of this.

5 Yes, at some point Phase II and Phase III  
6 discovery needs to be done. We have got two trials coming  
7 up. We have got the New Jersey trial, and we have got the  
8 trial coming up in this court, and absolutely, we need to  
9 move these cases along, and I want to do that.

10 I venture to say we will be quite occupied from  
11 now until the end of the year doing these two trials, so I  
12 think that this issue should be taken up. I think the  
13 discovery of Phase II and Phase III in general should occur  
14 and that 1404 motions can be made part of that.

15 I think doing discovery just for purposes of 1404  
16 is a very limited and narrow and circumscribed set of  
17 discovery. I had proposed back that if defense wants to  
18 make these motions and wants to make them now for whatever  
19 futile reason, they want to know who our witnesses are and  
20 they want to know where they live, that's what is necessary  
21 for this Court to make a determination about a venue  
22 transfer under 1404, not whether they think they would have  
23 used Levaquin or not based on the knowledge they have or  
24 had.

25 It's got nothing to do with a 1404 motion. So we

1 think the motion is untimely. Discovery needs to go  
2 forward in Phase II and Phase III at the right time. Right  
3 now I think our focus needs to be on these two trials.

4 MR. SAUL: Your Honor, Lewis Saul. May I add  
5 something to Mr. Goldser's argument?

6 THE COURT: You may, Mr. Saul. Go right ahead.

7 MR. SAUL: Thank you. What we suggest to the  
8 defendant if they wish to know which witnesses are  
9 available under *Gulf Oil* to serve us some limited  
10 interrogatories, and we will thoroughly answer them as to  
11 where the witnesses are and their availability to either  
12 come to Minnesota or not to come to Minnesota.

13 THE COURT: Okay. Thank you, Mr. Saul.

14 Go ahead, Ms. Van Steenburgh.

15 MS. VAN STEENBURGH: Thank you, Your Honor. I  
16 don't think -- I think we're getting off the subject.  
17 Mr. Goldser says if we get these transferred, they are  
18 going to come right back. We're not making a motion to  
19 transfer right now. That's not what the issue is.

20 It's not solely determining where they live. We  
21 have to figure out if the local issues override the global  
22 issues that would apply in the case, and actually, it makes  
23 sense now that Mr. Goldser is saying, we should do the full  
24 blown depositions of these people.

25 We could get them out of the way and do them.

1 Phase II, these people have been waiting. This is  
2 discovery that should be done, and so it makes sense to get  
3 this stuff and keep it moving along, and if we need to make  
4 a motion to transfer, if that happens at the time that a  
5 motion for remand happens, that could be the timing as  
6 well.

7 So we certainly should move these cases along and  
8 get them discovered and for purposes of a transfer motion,  
9 as well as for any other purposes at this point in time.

10 THE COURT: Anything else, Mr. Goldser?

11 MR. GOLDSER: I agree, but the time is after the  
12 trials.

13 THE COURT: Anyone on the phone wish to speak on  
14 this?

15 Mr. Dames, anything you would like to add?

16 MR. DAMES: No, Your Honor. The only comment I  
17 guess I can add is that I think what Ms. Van Steenburgh  
18 just said is quite appropriate. We could do this in the  
19 context of doing the full discovery, the depositions once  
20 of the doctors, but we ought to move ahead, in any event.

21 THE COURT: Okay. Thank you, Mr. Dames.

22 Anyone else on the phone?

23 Mr. Goldser, did you have something else on it?

24 MR. GOLDSER: No. I'm just waiting for the next  
25 item on the agenda, Your Honor.

1           THE COURT: Okay. As to the motion, I'm going to  
2 deny it for now. I think there is probably too much on  
3 everyone's plate in the next several months to devote much  
4 attention to this. I do think the suggestion of broader  
5 discovery in these cases is worthwhile.

6           It seems to me that we should turn our attention  
7 to this matter in earnest at the close of the third  
8 bellwether trial and have a plan ready to go at that point  
9 in time.

10           So I will, if necessary, take up the motion again  
11 at that point in time, but I would expect I think the  
12 parties to work out a schedule for moving forward on the  
13 broader discovery, which would include issues relative to  
14 possible transfer at the close of the next trial here in  
15 this court.

16           MR. GOLDSER: Thank you, Your Honor. The next  
17 item on the agenda has to do with the next bellwether  
18 trial. I remember back when you had set it at the last  
19 status conference there was some uncertainty about whether  
20 it would be November 7th or November 14th.

21           Has the Court --

22           THE COURT: That's cleared up now. As of last  
23 week, we've decided that the meeting that I'm a part of  
24 will be the week of November 7th, so I will choose the week  
25 of November 14th to begin the trial. So there is an extra

1 week preparation time there.

2 MR. GOLDSER: All right. And then, of course,  
3 the next question becomes, How do we choose the case or  
4 cases? We had five cases that were on the list. They were  
5 Mroz, Martinka, Straka, Johnson and Olson. I believe we've  
6 narrowed that down to three because the Martinka case will  
7 be dismissed. We haven't filed that yet, but I expect that  
8 will be forthcoming.

9 The Mroz case, plaintiff's counsel is in  
10 Massachusetts, and they have two trial conflicts during  
11 this time period, and so they won't be able to participate.  
12 I sent the trial orders over to Ms. Van Steenburgh about a  
13 week or so ago.

14 Our ensuing discussions have been exclusively  
15 about the remaining three cases, so I infer that they have  
16 acceded to our request to take Mroz off the current list  
17 and that we should focus on Johnson, Olson and Straka.  
18 Mr. Irwin argued the last time, as eloquently as he is  
19 able, which is very eloquent, that those cases should not  
20 be consolidated.

21 I guess we would like to get the Court's sense  
22 about consolidation at this stage and then how we go about  
23 selecting a case or cases for trial from those remaining  
24 three.

25 MS. VAN STEENBURGH: Are you making a -- I'm not

1 sure what you're requesting.

2 MR. GOLDSER: I'm asking if the Court has any  
3 feedback for us on consolidation.

4 THE COURT: I would like your views,  
5 Ms. Van Steenburgh, or anyone else on the defense side in  
6 this matter.

7 MS. VAN STEENBURGH: We're still of the position,  
8 Your Honor, that the cases should not be consolidated for  
9 trial. There are lots of distinctions in terms of facts,  
10 date of prescription, reason for the prescription. I can  
11 go through those in some detail.

12 I think we have explained some of that to the  
13 Court in the past.

14 THE COURT: None of the three -- the Mroz case,  
15 do you have a position on that?

16 MS. VAN STEENBURGH: No. We agree that there is  
17 a trial conflict, so we have agreed with the plaintiffs.

18 THE COURT: Of the three, none of them have  
19 particular distinct similarities, is that correct?

20 MS. VAN STEENBURGH: Correct.

21 MR. GOLDSER: Distinct similarities?

22 THE COURT: Well, that may not have been phrased  
23 appropriately, but if I recall Mr. Irwin's argument last  
24 time, the three had fairly different sets of circumstances,  
25 different ages, different backgrounds. I'm trying to

1 remember precisely the argument.

2 MS. VAN STEENBURGH: Different labels, different  
3 medical conditions, different time periods. Ms. Johnson  
4 was 2002. Mr. Olson was 2005. Mr. Straka was 2006, in  
5 terms of time of the prescriptions. The prescriptions were  
6 for different indications, and so there are lots of  
7 differences.

8 There were different ages as between them, also.

9 THE COURT: But all three are ready, correct?

10 MS. VAN STEENBURGH: There is some remaining  
11 discovery to be done, but, yes, all three could be ready by  
12 November 14.

13 THE COURT: Okay.

14 MR. GOLDSER: If we had all three, Your Honor,  
15 there would be substantial discovery to do. If we cut that  
16 down to one or two, that would certainly lighten the load  
17 and make it easier. You know, there has been some debate  
18 over time about how the Schedin case got chosen. The  
19 defense thinks that plaintiff chose it. We think it was a  
20 negotiated and compromised choice. Defense clearly got to  
21 choose Christensen.

22 We would be willing to do a single plaintiff  
23 trial and accede to the request if we had the right to  
24 choose the next case. It's our turn in any event,  
25 regardless of how you view the Schedin selection, and so we

1 would back off the consolidation if we get to choose the  
2 case.

3 MS. VAN STEENBURGH: Well, this is the first I've  
4 heard of this, so I don't have a ready response to the  
5 Court at this point in time.

6 THE COURT: Let's do it this way. Let's have the  
7 parties in the next ten days or so just submit a letter  
8 just setting forth your thoughts on who would be  
9 appropriate and some thoughts on each of the three. If you  
10 think that any of them would not be appropriate, I would  
11 like to hear that, but I'll decide shortly after that.

12 MS. VAN STEENBURGH: There is one wrinkle with  
13 that. The prescribing physician in the Straka case has not  
14 yet been taken, and we have been trying to get her  
15 deposition, and the plaintiffs keep indicating to us that  
16 they're in contact with her, and they're trying to set it  
17 up, but we haven't gotten confirmation.

18 I have been working on this for the last two or  
19 three weeks. That would be helpful if we could take her  
20 deposition before we sent the letter, and I'm assuming you  
21 have a date for her now?

22 MR. GOLDSER: Mr. Fitzgerald has been handling  
23 this. He can -- I don't know that we have a precise date,  
24 but I think we're at the point where we have available  
25 dates. I'm not sure what they are.

1           So if, Kevin, if you're on the phone, can you  
2           update us on precisely where we are with that doctor?

3           MR. FITZGERALD: Sure, Ron. This is Kevin  
4           Fitzgerald, Your Honor. Good afternoon. We have made  
5           contact with Dr. Baniriah. When I spoke with her  
6           yesterday, she gave me her general availability.

7           I was going to speak with Tracy about this after  
8           the status conference and figure out mutually convenient  
9           dates that work within her schedule and get things on the  
10          calendar. I will say that Dr. Baniriah has three young  
11          kids who just went back to school, she said.

12          So the next couple weeks are potentially tricky  
13          for her, but I think we can get the deposition scheduled  
14          relatively quickly, and I can talk more with Tracy about  
15          that after the status conference.

16          THE COURT: Okay. Well, I would like to -- go  
17          ahead. Sorry.

18          MR. FITZGERALD: I don't have a specific date  
19          from her. I was hoping that she would have that  
20          information for me when I spoke with her. She didn't. She  
21          just gave me her general availability, and so I can  
22          coordinate with Tracy after the conference and find out  
23          dates that work for us and then confirm Dr. Baniriah's  
24          availability on those dates.

25          THE COURT: Okay. So I would think that sometime

1 in the next three to four weeks that would be done, is that  
2 correct?

3 MR. FITZGERALD: I think that's manageable. Yes.

4 THE COURT: Okay. I would like to have this  
5 decision made as quickly as we possibly can. Let's see  
6 what date gets set up, and shortly thereafter is when I  
7 would expect the letters.

8 Can we say within two days of the end of that  
9 deposition?

10 MR. GOLDSER: Here's my concern, Your Honor: We  
11 are now 90 days away from November 14th. We have  
12 apparently some discovery to do to decide which case is  
13 going to get selected. Not only do we have Dr. Baniriah,  
14 but in the Olson case, there is Dr. Kirshbaum, who is a  
15 second prescribing doctor.

16 And I just got a letter back from  
17 Fairview-Southdale. They won't let me talk to  
18 Dr. Kirshbaum directly, even to set up a date. They  
19 require a subpoena, so that's going to take a couple of  
20 weeks to do.

21 I venture to say that if the Court were to give  
22 the plaintiffs the opportunity to choose the case, we would  
23 solve some of these problems. We would choose a case  
24 quickly, like by Friday, and in addition, there is one  
25 other wrinkle to this, and that is, we are adding one

1 generic and case specific, same person, expert in the field  
2 of psychology and economics.

3 He is in the category of what is called a human  
4 factors expert, to talk about risk analysis and risk  
5 understanding, and we're going to need him to write his  
6 report on a generic basis, which is obviously underway, but  
7 he will also need to deal with the case specifics.

8 And until we have the case chosen and discovered  
9 with the prescribing doctors, we can't get his case  
10 specific report. We can't take his deposition. We can't  
11 do that *Daubert* motion. So it behooves us to select this  
12 case quickly, and forgive me for repeating myself. It's  
13 plaintiffs' turn.

14 We can have a choice by Friday, and we can solve  
15 a number of these discovery problems and move this along so  
16 we can be ready for November 14th.

17 MS. VAN STEENBURGH: I have to cry foul, Your  
18 Honor. Since the last status conference we have been  
19 working very hard to get these depositions set up. The  
20 plaintiffs have taken the position, you cannot contact  
21 these doctors. We have to be involved. We have to set  
22 this up.

23 I have told Mr. Fitzgerald repeatedly that we're  
24 going to serve a subpoena on Dr. Baniriah. No, don't do  
25 that. We're contacting her. And now, I hear he finally

1 talks to her yesterday. What I hear is, we are being boxed  
2 out of a choice or looking at the full scope of these three  
3 cases and heading down a path to where plaintiffs want to  
4 be, and I think that that's unfair.

5 So we would like the opportunity to do the  
6 discovery that is necessary to make a choice.

7 THE COURT: Yeah, I tend to agree. I would like  
8 to get these, particularly this deposition, done as quickly  
9 as we possibly can. I think we're at the point where  
10 obviously it would be helpful to have a plaintiff chosen at  
11 this point in time, but we also have tried a couple of  
12 these cases, so it's not like something brand-new is right  
13 around the corner.

14 So let's just get these letters in just as  
15 quickly as we possibly can, and in particular, the doctor  
16 in the Straka -- she is in the Straka matter, is that it?

17 MS. VAN STEENBURGH: Yes, she is.

18 MR. FITZGERALD: Yes, Your Honor.

19 THE COURT: Let's get that done as quickly as  
20 possible. Okay.

21 MR. GOLDSER: I think that pretty much moots the  
22 rest of the issues on the bellwether trial. Until we know  
23 which case is selected, we won't know what our needs are  
24 and how much we have to do, and we will move forward in  
25 getting these two doctors deposed and get the case chosen,

1 and then we can figure out what other discovery needs to  
2 happen in the bellwether trial.

3 And then item 5 on the agenda, Phase III  
4 discovery, I think we have already pretty much addressed  
5 that. That will be included in the plan once we conclude  
6 these trials, which leaves us only with the  
7 remand/mediation item on the agenda, which of course  
8 defendants want to get remanded, and we want to go mediate.

9 So I think we have covered the agenda for today.

10 MS. VAN STEENBURGH: Your Honor, I have a couple  
11 of other items, if we could back up on the agenda.  
12 Actually under 4D, there are a couple of issues that came  
13 up during the meet and confer or that Mr. Goldser has since  
14 notified me of.

15 He would like all of the personnel files for all  
16 of the witnesses who testified on behalf of the company in  
17 the Schedin case and the Christensen case. I don't know if  
18 you want to take this up now or if you want to make a  
19 formal motion, but we have objected to that.

20 I asked Mr. Goldser why it was that he wanted all  
21 of those personnel files, and he said it's good information  
22 for cross-examination. We have now been through two trials  
23 without that information. I'm not sure why it's necessary  
24 for a third trial.

25 THE COURT: So it is the company personnel files

1 for each of the company witnesses?

2 MS. VAN STEENBURGH: Yes, and so that would be 15  
3 different witnesses, because they called many of them  
4 during their case, and then we had a total of four between  
5 the Schedin and Christensen cases. I don't know how they  
6 would be useful for cross-examination for videotaped  
7 witnesses who are not going to be here anyway.

8 So that's eleven witnesses that it doesn't make  
9 sense for, and when I asked him what it was relating to, he  
10 wrote back and said they have relevant performance  
11 information concerning development, sales and marketing of  
12 Levaquin.

13 Well Dr. Yee, Dr. Noel and Dr. Kahn were not in  
14 sales and marketing, so I'm not sure what that would  
15 entail, and Kim Park was the only one that would have  
16 anything to do with any kind of marketing, and I think you  
17 already have her file somewhere else.

18 So that's an issue that is brewing. I don't know  
19 if we want to take that up or if Mr. Goldser wants to take  
20 that up today. The other issue is, he had asked me for all  
21 of the personnel files for any sales representative who  
22 called on any of the prescribing doctors in the three  
23 potential bellwether cases that we are now discovering.

24 There have been depositions already taken of many  
25 of those reps, and we have 22 sales reps, and I'm not sure.

1       What we had agreed to in the past was that once they are  
2       deposed and he picked somebody for trial, we certainly  
3       would give him those records, but to go and dig up 22 sets  
4       of files for people who may never be deposed or never show  
5       up in any case seems a little bit futile to me.

6               MR. GOLDSER: I don't have it in front of me  
7       exactly what I wrote, but either I was misquoted or  
8       misinterpreted or I misstated, but there is a missing piece  
9       in there somewhere.

10              On the employee personnel files for the main  
11       witnesses, I'm interested in the people who will be  
12       appearing live. You know, there is a reason why this is  
13       called the practice of law, and that is, you get better  
14       over time. Just because we didn't use it in the last two  
15       trials doesn't mean that I haven't come across this notion  
16       from sources that suggest it's appropriate.

17              Personnel files have recommendations in them that  
18       describe the successes and areas of improvement that need  
19       to be made, and it's always surprising to me in some of the  
20       reports that I've read in other cases about what kinds of  
21       marketing efforts go into a medical director's file.

22              You know, congratulations. You have positioned  
23       this drug so that we can increase our sales to a billion  
24       dollars. Good job.

25              If that statement is there anywhere, that's a

1       hugely important statement consistent with the theme that  
2       we've had in the case, and it has happened in other cases.  
3       So I'm interested in the live witnesses.

4               THE COURT:   Which are how many in number at this  
5       point in time?

6               MR. GOLDSER:   I think it may be four or five, not  
7       very many.   Certainly Dr. Kahn, Dr. Noel, Dr. Yee,  
8       Ms. Park, and I don't know if Ms. Park's personnel file has  
9       been produced in New Jersey or not.   I don't have it, and  
10       I'm not aware one way or another.

11               I can't recall who else appeared at the last  
12       trial.   Were there others?

13               MS. VAN STEENBURGH:   That's it.

14               MR. GOLDSER:   Okay.   So it's not very many.   On  
15       the sales rep side, I thought I had asked only for the  
16       personnel files of the sales reps whose depositions were  
17       taken, not who called upon.   If I said called upon, then I  
18       misstated myself.   I'm just looking for those whose  
19       depositions were taken.

20               If -- those are the people who are likely to be  
21       called at trial.   If there is a sales representative who  
22       has some relevant information in a personnel file that  
23       could influence our decision on which sales representative  
24       we want to call at trial, and so that's the scope of what  
25       I'm looking for.

1 I'm not looking for all of them, and I don't want  
2 to be limited only to those who are called for trial  
3 because the decision of which ones to call would already  
4 have been made without that information, and I wanted to  
5 make that decision.

6 THE COURT: So how many are in that group?

7 MR. GOLDSER: Once we choose a case or cases for  
8 trial, we are probably narrowing it down to anywhere from  
9 two, if there is one case, to four or five if there are two  
10 cases.

11 MS. VAN STEENBURGH: Your Honor, with respect to  
12 the personnel files, I have the e-mail. It wasn't limited  
13 just to live witnesses, but I will take that  
14 interpretation.

15 If the Court is inclined to go that direction, we  
16 certainly would want to review those records and maybe have  
17 the Court look at those in camera. We do not think that it  
18 would be a good idea to have a fishing expedition. Most of  
19 these witnesses worked for the company for 20 some years  
20 and weren't necessarily involved in Levaquin.

21 So there is a lot of information, and it may not  
22 even be relevant, and if it is in fact as Mr. Goldser  
23 e-mailed me, performance information concerning the  
24 development of sales and marketing, we certainly can narrow  
25 that down, and if we need to have the Court look at that

1 and make a determination, we would do that.

2 Obviously, we would prefer not to do that at all,  
3 but if that is the case, we would ask the Court to take a  
4 look at that. With respect to the sales reps, there have  
5 been seven representatives deposed, four in the Johnson  
6 case, three in the Olson and none in the Straka case.

7 And I -- I think what we had worked out last time  
8 was that we provided the -- and I don't know if you will  
9 be -- I don't even know if they will be able to call all  
10 the reps, because some of them may not live here. So to  
11 give all their personnel files out --

12 I would ask the Court, maybe Mr. Goldser and I  
13 can talk about this further and see if we can work it out.  
14 How's that?

15 THE COURT: I think that would probably be a good  
16 idea. I mean, it seems to me for live witnesses, if there  
17 is aspects of the personnel files that deal with Levaquin,  
18 it may well be relevant to examine before they come back  
19 here as live witnesses again.

20 And the sales reps, particularly ones who are  
21 involved in the case that is chosen, that seems to me  
22 relevant as well, personnel files. Beyond that, we're  
23 maybe going too far.

24 Okay. Anything else we should discuss today?

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

1 MS. VAN STEENBURGH: Nothing else, Your Honor.

2 THE COURT: Anyone who is on the phone have any  
3 issues to raise? Doesn't sound like it.

4 Thank you, those who are still with us, for  
5 joining us on the phone.

6 MR. GOLDSER: Do we want to set a new date?

7 THE COURT: We do. It may be complicated by the  
8 New Jersey trial. Generally speaking, I would be probably  
9 looking at, say, three weeks out, but that is the first  
10 week of that trial, I believe.

11 MS. VAN STEENBURGH: Actually, it's not. I think  
12 the jury is being picked --

13 THE COURT: Is the jury being picked the week of  
14 the 29th?

15 MS. VAN STEENBURGH: And then the opening isn't  
16 until the 6th.

17 THE COURT: We could do the week of the 29th,  
18 another status conference, if that would work.

19 Are you going to be involved in the jury?

20 MR. GOLDSER: I don't think so, Your Honor. The  
21 only time that there will be any voir dire type of activity  
22 would be Wednesday the 31st. So if we were to select the  
23 29th or the 30th, I think we would be available.

24 THE COURT: The 30th? What does that look like  
25 for folks?

1 MS. VAN STEENBURGH: It's good here.

2 MR. DAMES: It's fine at this end, Your Honor.

3 This is John Dames.

4 THE COURT: Okay.

5 MR. GOLDSER: That works for me.

6 THE COURT: We have a few things set that day, it  
7 looks like. It looks like we're open at 3:30 in the  
8 afternoon. We could maybe do a nine o'clock. The middle  
9 part of the day is pretty well set with matters scheduled  
10 already.

11 What's the preference?

12 MR. GOLDSER: I would prefer the morning.

13 THE COURT: Early? Does that work for you?

14 MS. VAN STEENBURGH: That's fine. Yeah.

15 THE COURT: Why don't we set 9:00 a.m., then, on  
16 the 30th? That would be 10:00 Eastern. Do we have anyone  
17 on the West Coast who would want to call in? Is that going  
18 to pose a problem?

19 MR. GOLDSER: I don't think so.

20 THE COURT: Okay. Let's set it at 9:00 a.m. on  
21 the 30th of August.

22 MR. GOLDSER: Okay.

23 MS. VAN STEENBURGH: Very good.

24 THE COURT: Thank you, everyone. We will be in  
25 recess.

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MR. DAMES: Thank you, Your Honor.

MR. GOLDSER: Thank you, Your Honor.

MS. VAN STEENBURGH: Thank you, Your Honor.

THE CLERK: All rise.

\* \* \*

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

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