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3:10 P.M.

**(In chambers via telephone.)**

THE COURT: Do we have everyone on?

MR. GOLDSER: Judge, this is Ron Goldser. I think so. Lewis Saul and Kevin Fitzgerald and I am on our side. I think Dave Cialkowski was going to join. I'm not sure if he is on the phone.

MS. VAN STEENBURGH: For defense, Your Honor, Tracy Van Steenburgh and Jim Irwin.

MR. IRWIN: Hello, Judge.

THE COURT: Good afternoon. Okay. Very well. Holly, is everything set there?

THE CLERK: Yes, Kristine is here. We're set to go.

THE COURT: Okay. Very good. I think we've already got attorneys noted for this telephone conference. Let's see.

Who is going to begin?

MR. GOLDSER: Well, I have the bad habit of doing so, Your Honor, this is Ron Goldser, so I will proceed.

THE COURT: You can continue your bad habits.

MR. GOLDSER: Yes. That's right. Seems to be customary. We have three things to talk about today. One is an independent medical exam of Dr. Zizic. Second is a

1 recent physical therapy evaluation done by Mr. Straka's  
2 prior treating physical therapist, Rickie Walkden, and the  
3 third is taking some depositions of sales representatives.

4 MS. VAN STEENBURGH: And, Your Honor -- I'm sorry  
5 to interrupt, Ron -- as long as we're reeling them off,  
6 perhaps we could add two others. One is the deposition of  
7 Mr. Kahn that you guys have asked for again.

8 MR. GOLDSER: Okay.

9 MS. VAN STEENBURGH: And also I just wanted to  
10 provide the judge with a piece of information which I can  
11 do later, too. Okay.

12 MR. GOLDSER: That's fine. The medical  
13 background, Judge, is this: Back in I think it was in  
14 November, Mr. Straka was continuing to have trouble with  
15 his ankles, particularly his left ankle. In addition to  
16 the fact that he doesn't have an ability to push off on his  
17 left ankle, left foot, which is indicative of an Achilles  
18 tendon problem, he has absolutely no strength.

19 If he were to try and rotate or turn your ankle  
20 to the left, imagine you're trying to -- you have a book  
21 sitting down by your foot on the outside of your left foot  
22 right by your little toe, and you try to turn your foot to  
23 the outside and push that book away. He has absolutely  
24 zero strength to be able to do that.

25 We're talking about not only the Achilles tendon

1 in this case, but we're talking about two other ankle  
2 tendons called the peroneus longus, p-e-r-o-n-e-u-s, and  
3 the peroneus brevis, b-r-e-v-i-s. And Dr. Zizic opined  
4 that those were injured as a result of Levaquin back at the  
5 time of his initial case specific report here in the Straka  
6 case.

7 In November when Mr. Straka went back to see  
8 Dr. Coetzee about these ongoing problems, Dr. Coetzee made  
9 several findings. One of the things that he did was, he  
10 found absolutely no strength on the, that lateral movement  
11 on the peroneus longus and peroneus brevis tendons, the one  
12 where you push the book away with your little toe.

13 He ordered up an EMG, electromyography, thinking  
14 that the issue was a neurological one. The EMG came back  
15 recently, and I sent a copy of it on to defense today, and,  
16 Judge, it sounds like you may not be in Minneapolis today,  
17 and you may or may not have seen it on your e-mail, but I  
18 sent a copy to the Court as well.

19 It says, as I understand it and as I have had it  
20 interpreted to me, that the EMG did not show a neurological  
21 problem as the cause of the peroneus longus and the  
22 peroneus brevis tendons and that there may well be a  
23 mechanical problem resulting from injury to those tendons.

24 So we have a very important medical test, the  
25 EMG, that it is crucial to have interpreted because it goes

1 a long way, we think, to proving that the peroneal tendon  
2 problems are not nerve related and may also be Levaquin  
3 related, and that's one of the most significant issues that  
4 is going on with Mr. Straka right now.

5 Rickie Walkden, the prior physical therapist, we  
6 took her deposition in Winnipeg where she moved. She used  
7 to practice down here. She moved up to Winnipeg, and, you  
8 know, when we did that after it was over, she told me that  
9 she frequently comes down to the Twin Cities because she  
10 has lots of friends here whom she still visits on a regular  
11 basis.

12 And I told her, you know, if you're ever coming  
13 into town, let me know, and so she did, and she came to  
14 town. I thought after these issues with Dr. Coetzee came  
15 up, it would be prudent to have her see Mr. Straka in  
16 follow-up because she is going to be testifying in the  
17 case, and even though she lives in Winnipeg, she will be  
18 coming live to trial.

19 And as is always useful, she would and the Court  
20 and the jury would benefit from having the most updated  
21 information. So she has seen Mr. Straka already. The  
22 report came today. I provided it to counsel. Dr. Zizic  
23 has planned on doing an IME or a follow-up exam to follow  
24 up on the things that he noted in his already existing case  
25 specific report, plus this EMG.

1           We noted, as you may recall at the time of the  
2           last status conference, that he was going to be doing that  
3           and that we would provide a follow-up report from Dr. Zizic  
4           within days after the conclusion of that report, and then  
5           we would certainly make him go for any follow-up inquiry if  
6           the defense wants it.

7           I have not talked to Ms. Walkden about follow-up  
8           depositions. My guess is we could probably arrange to do  
9           that probably by telephone it. It wouldn't take very long  
10          to do if the defense is interested in doing any follow-up.  
11          As you can see, there is significant new medical  
12          information that is out there that is important to be  
13          accurate about.

14          Right now where we sit at the present time is, we  
15          have Dr. Coetzee's testimony from after the visit with  
16          Mr. Straka, ordering an EMG, and it stops there. And it  
17          wouldn't be appropriate to just stop there for purposes of  
18          understanding Mr. Straka's medical condition because the  
19          information would be incomplete. Either we use all of  
20          it --

21                 THE COURT: Mr. Goldser?

22                 MR. GOLDSER: Yes.

23                 THE COURT: I am just back on the call now. I  
24                 got dropped for some reason. This is not a great  
25                 conference call approach. Usually I call through the

1 office, and it patches me in. I had to call directly, and  
2 it just doesn't work very well. So I missed about the last  
3 maybe two minutes of what you said.

4 MR. GOLDSER: Okay. I'm not sure where that was.

5 THE COURT: You were just finishing or you were  
6 talking about the ankle and the examination in November.  
7 You just finished talking about how it was difficult to  
8 push to the side with the ankle, and you named the two  
9 other tendons that were affected.

10 MR. GOLDSER: Well, Judge, I expect I covered a  
11 lot of ground in two minutes, and I'm happy to repeat it,  
12 so let me do that. So we have not only the Achilles  
13 tendon, but we have got these two other tendons, the  
14 peroneus longus and peroneus brevis, that are indicated in  
15 this case.

16 Dr. Coetzee saw Mr. Straka in November, ordered  
17 an EMG. We got the results from the EMG back today. Our  
18 understanding is the EMG does not show nerve damage. We're  
19 interpreting that as being, showing that there is a  
20 functional problem with those two tendons, a significant  
21 portion of the injury that's involved in this case.

22 Rickie Walkden, the physical therapist, saw  
23 Mr. Straka. I'm not sure that you heard. She comes to  
24 Minneapolis frequently and will be coming live to trial.  
25 She had an opportunity to see Mr. Straka when she was in

1 town and did a follow-up exam of him in the normal course  
2 of her physical therapy practice, provided a report which  
3 we sent today.

4 And Dr. Zizic is going to be doing an IME to  
5 follow up with his report and this EMG when Dr. Zizic comes  
6 to town on December 15th. I said that both would be made  
7 available for follow-up inquiry to the defense if  
8 requested.

9 Rickie Walkden lives in Winnipeg, so it would be  
10 short. So it probably behooves us to do that by telephone.  
11 We could do Dr. Zizic live or by telephone. From my  
12 perspective right now, the information that we have is  
13 limited to Dr. Coetzee's recent visit and his requesting an  
14 EMG.

15 And so I think we need to have either the  
16 entirety of the story of what has happened with Dr. Coetzee  
17 and an EMG and the follow-up visits and understanding it  
18 completely or we have none of it and Dr. Coetzee doesn't  
19 testify at all. I note that Dr. Coetzee has been listed as  
20 a witness on the defense exhibit list, not plaintiff, and  
21 that the defense has talked about using his deposition  
22 testimony.

23 He is local. He is within the subpoena power of  
24 the Court, so I don't understand how his deposition would  
25 be used. We would insist that Dr. Coetzee come live for

1 his testimony, but that's an aside. What we would be able  
2 to do is have Dr. Zizic provide an updated --

3 MR. FITZGERALD: Ron, I'm sorry to interrupt you.  
4 I just wanted to make sure the Court is still on the phone  
5 because it sounded like we lost somebody.

6 MR. GOLDSER: I'm not hearing the click-off, so  
7 thank you again.

8 MR. SAUL: Judge?

9 MR. GOLDSER: I'm getting better at this each  
10 time I do it.

11 MR. SAUL: Tracy, now you can make your argument  
12 right now.

13 THE CLERK: Judge, are you back?

14 THE COURT: I'm back.

15 This is terrible, Holly.

16 MS. VAN STEENBURGH: Would this make more sense  
17 to wait -- are you going to be back on Monday?

18 THE COURT: No.

19 MS. VAN STEENBURGH: Oh, okay. Never mind.

20 THE COURT: No. I won't be back on Monday.

21 Let's just try it now.

22 MS. VAN STEENBURGH: Okay.

23 THE COURT: Normally I just call in through the  
24 office, and that works much better, and I'm not sure why it  
25 can't be done this time, but anyway --

1 MR. GOLDSER: The bottom line is, Judge,  
2 Dr. Zizic will do an independent exam and be available for  
3 follow-up inquiry. Rickie Walkden has done a follow-up  
4 exam and is available for follow-up inquiry, and we would  
5 like to be able to present the entirety of the story what  
6 has happened with Mr. Straka's recent medical history.

7 I'll stop there. I guess I prefer to deal with  
8 this issue, and then we can move on to some of the other  
9 ones.

10 MS. VAN STEENBURGH: Your Honor, this is Tracy  
11 Van Steenburgh, and I will take up this issue. As I  
12 understand what Mr. Goldser is saying is that Mr. Straka  
13 went to see Dr. Coetzee as a result of the litigation in  
14 this case, and he had not seen Dr. Coetzee for three years,  
15 wanted an exam from Dr. Coetzee.

16 My understanding is, he wasn't particularly happy  
17 with the results. One of the things that Dr. Coetzee  
18 suggested was an EMG, and now the plaintiffs are saying  
19 that they want an expert report from the physical  
20 therapist, who just happened to come to Minneapolis in the  
21 normal course of her physical therapy practice, which we  
22 don't really understand.

23 She has never been identified as an expert. She  
24 has never provided a report. We were never told she was  
25 coming to do a physical exam of Mr. Straka. We understand

1 she was here to see friends, according to Mr. Goldser, and  
2 then he had her call him, and he set it up so that she  
3 would do a physical exam.

4 She has had her deposition taken. She already  
5 has opined to the extent within her physical therapy fact  
6 knowledge. She has never been identified as an expert, and  
7 we would object to her having done this medical exam or  
8 physical therapy exam of Mr. Straka and would object to any  
9 testimony in that regard.

10 With respect to the EMG, I'm not quite sure what  
11 is going on here. What Mr. Goldser said is, you need  
12 someone to interpret that. I don't know if he is  
13 suggesting that Dr. Zizic who is a rheumatologist is now  
14 going to interpret a neurological exam. If in fact there  
15 is a neurological exam, I don't know why the Noran Clinic  
16 can't do that.

17 Dr. Zizic prepared his report and submitted a  
18 case specific report on October 26th of this year. Now  
19 Mr. Goldser says, well, Dr. Zizic is planning to do a  
20 follow-up on his report. We have challenged two of  
21 Dr. Zizic's opinions, relying on Dr. Zizic's testimony and  
22 his report, and his IME idea comes a little late and seems  
23 very untimely and prejudicial to the defendants.

24 Dr. Zizic has never indicated and the plaintiffs  
25 never indicated that they wanted Dr. Zizic to do an IME.

1 We suspect that because Dr. Coetzee didn't provide them the  
2 information they wanted, they want a separate exam, and  
3 Dr. Zizic is the person that they want to have do it.

4 We're supposed to start trial on January 3rd, so  
5 for Dr. Zizic to do an IME on the 15th and then we have to  
6 get his report for however long that takes, then take  
7 another deposition of him and prepare for trial doesn't  
8 really seem like a very timely or fair procedure for the  
9 plaintiffs to go through now.

10 Had they wanted him to do an IME, just as they  
11 have always said to us, you have to ask the Court. You  
12 have to notice it to the Court and make an argument for why  
13 the IME should go forward, and instead what they have done  
14 is, they have just decided Dr. Zizic is going to go ahead  
15 and do that and will give us the opportunity apparently to  
16 talk to Dr. Zizic either on cross-examination or right  
17 before he goes to trial.

18 So we would object to both Dr. Zizic doing the  
19 IME and furnishing a supplemental report based upon the  
20 IME. We would object to Dr. Zizic being able to testify  
21 about the interpretation of the EMG that we have never been  
22 apprised as to whether he is qualified to do so, and we  
23 would also object to any further testimony by Ms. Walkden  
24 on her physical examination that she did on November 12th  
25 of 2011, which we just found out about today when the

1 plaintiff's counsel sent the report to us and to the Court.

2 MR. GOLDSER: Judge, are you still there?

3 THE COURT: Yeah. Go ahead. I'm here.

4 MR. GOLDSER: Okay. Ms. Van Steenburgh's  
5 speculation on motives is wholly inappropriate. The fact  
6 remains -- the facts are the facts. Mr. Straka did see  
7 Dr. Coetzee. Dr. Coetzee did order this EMG. The EMG is  
8 out there. It is not to be ignored. The question is, how  
9 do we deal with it.

10 Certainly, Dr. Zizic who does rheumatology and  
11 deals with these kinds of issues is qualified to interpret  
12 an EMG. That's a silly argument. There is no question  
13 that he can do that. So we can do, we can handle this  
14 issue a couple of ways. You know, Dr. Zizic comes to  
15 Court. He testifies.

16 I get Mr. Straka to stand up in front of the  
17 jury, take off his shoes, walk across the room, do the  
18 kinds of Thompson tests and other tests that are typically  
19 done under these circumstances, and Dr. Zizic can  
20 demonstrate on Mr. Straka right in front of the jury, right  
21 then, right there, without prior notice to defense, without  
22 a prior report to the defense, and without any ability to  
23 cross-examine Dr. Zizic on his findings.

24 We can do it right in the courtroom, and I can't  
25 imagine that that would be denied to us. That kind of

1 stuff happens in every personal injury trial I know of. So  
2 if the defense wants it in advance, we're willing to give  
3 it to them. If the defense wants to see it for the first  
4 time in the courtroom, that I suppose is their prerogative.

5 I should think they would want to have advance  
6 notice in order to be prepared to do this, but it's really  
7 very simple. He's going to do some essential testing to  
8 determine what the strength is in the ankle, to determine  
9 the strength of the Achilles tendon, to determine the  
10 strength of the peroneal tendons, to put that in the  
11 context of the EMG report that was recently done.

12 I will certainly acknowledge that Dr. Coetzee is  
13 a busy local practicing orthopedist. It's fairly typical  
14 of such doctors. Doesn't like litigation. Doesn't like to  
15 come to court. He's not going to be particularly happy and  
16 forthcoming and explanatory in what is going on with all of  
17 this stuff when he is called. You can just see that from  
18 his body language at the time he was deposed.

19 So plaintiff has the right to call the witnesses  
20 they want to call to explain the medical condition, and we  
21 have chosen Dr. Zizic who explains these things well, as  
22 the Court knows, and we want him to be able to explain the  
23 current medical condition.

24 Rickie Walkden is not being called as an expert  
25 witness. She is being called as a treating physical

1 therapist. She will be called as a treating physical  
2 therapist to talk about what she saw up through the last  
3 time she saw Mr. Straka. I think it was December of '06.  
4 I can't imagine of any reason in the world why if she were  
5 treating him and she saw him recently for treatment, which  
6 is what she did, that she would be precluded from  
7 testifying.

8 If that's the rule, that a recent evaluation is  
9 precluded, then Dr. Coetzee should be precluded from  
10 testifying, too. So, you know, it's as I said before.  
11 Either we have it all in or none.

12 THE COURT: Did Dr. Zizic look at this issue in  
13 October, Mr. Goldser?

14 MR. GOLDSER: Yes. He looked at the peroneus  
15 longus and peroneus brevis issue in October. He reported  
16 on it. He was examined on it in his deposition.

17 THE COURT: And what has changed now is this EMG?

18 MR. GOLDSER: Essentially, that's right.

19 THE COURT: And so you want Dr. Zizic to examine  
20 him in light of the EMG?

21 MR. GOLDSER: That's right.

22 THE COURT: Ms. Van Steenburgh?

23 MS. VAN STEENBURGH: A couple of things, Your  
24 Honor. That's not what Dr. Zizic said, nor did Mr. Goldser  
25 tell me that. They said that they wanted him to do a

1 functional examination, an independent medical examination  
2 prior to any EMG coming out, and I can go back and look at  
3 Dr. Zizic's testimony, but the first time I heard about  
4 this was at Dr. Zizic's deposition.

5 He said, oh, well, now in light of Dr. Coetzee's  
6 testimony, I want to do a physical examination of  
7 Mr. Straka. Okay. Did we just lose somebody?

8 MR. SAUL: This is Lewis. We got cut off and we  
9 are back on. We have been gone for about a minute.

10 MS. VAN STEENBURGH: So we're hearing something a  
11 little different now, that Dr. Zizic is not just going to  
12 interpret an EMG. He needs to do a complete physical exam  
13 of the plaintiff, which is what we heard a while back. He  
14 could have made that decision since he had an opinion  
15 regarding these two tendons when he did his case specific  
16 report, and we had never gotten any notice of that.

17 And this seems to be a bit of a moving ball, that  
18 at least today I'm hearing it's in light of the EMG. What  
19 I heard during his deposition in November was that he  
20 wanted to do a medical examination to determine his  
21 functionality. So I'm not quite sure what it is that  
22 Dr. Zizic is supposed to be doing, and so that would be our  
23 objection, and it really is untimely, Your Honor.

24 They could have had Dr. Zizic do a physical  
25 examination long before now, and we are coming up on trial.

1 Certainly it is going to be a bit absurd if Dr. Zizic does  
2 an examination of Mr. Straka at trial and then Dr. Coetzee  
3 comes in and does the same thing at trial. That would  
4 make, I mean, that just is not a particularly --

5 Certainly those kinds of things should be done  
6 before trial rather than having someone undergo an  
7 independent medical examination in front of the jury. I've  
8 never seen that done. Ron says that happens all the time  
9 in personal injury cases, but I have never seen that done.  
10 So we would object to that, Your Honor.

11 MR. GOLDSER: Judge, you may recall that defense  
12 used Dr. Cederberg in the Christensen case last time  
13 around, and the timing of his independent medical  
14 examination was not terribly different. I think there was  
15 an additional week beyond which that we're talking about  
16 here for the defense to get Dr. Cederberg to see the  
17 patient, to issue a report and to be deposed.

18 So we're talking about the same general time  
19 frame that the defense asked for and got the last time  
20 around.

21 MS. VAN STEENBURGH: Your Honor, if I might?

22 MR. GOLDSER: To be sure, it makes absolute sense  
23 when Dr. Zizic is seeing Mr. Straka for him to do a full  
24 evaluation. I mean, I acknowledge that Dr. Coetzee says  
25 Mr. Straka has, has full push-off strength in his left

1 ankle, and we were perplexed by that because he doesn't.

2 Rickie Walkden finds that he doesn't. I don't  
3 know what Dr. Zizic is going to find when he does that  
4 examination, but push-off strength in his Achilles tendon  
5 is also an issue.

6 If the defense is going to be able to offer an  
7 opinion from a treating doctor who saw him within the last  
8 few weeks, why did they get to do that and we don't?

9 MS. VAN STEENBURGH: A couple things, Your Honor,  
10 if I might. The Christensen trial was quite different. We  
11 alerted the other side to Dr. Cederberg and our intent to  
12 do an IME long before what we're getting now with  
13 Dr. Zizic.

14 As you recall in the Schedin case, because we  
15 weren't as timely in our request, the Court denied our  
16 request for an IME in that particular case. Dr. Zizic has  
17 testified in those two cases and never saw fit to do an IME  
18 and suddenly wants to do an IME in this particular case.

19 Dr. Coetzee was not our choice. Dr. Coetzee was  
20 someone that Mr. Straka went to see just recently, and as  
21 part of the deposition because we, he had seen Dr. Coetzee  
22 three years ago, we learned that he had just seen him, and  
23 as part of the deposition of a treating physician we, of  
24 course, covered the last treatment.

25 So this is not something that because it's

1 suddenly coming up as part of the litigation. The  
2 plaintiff's treating physician was someone that he chose,  
3 and he chose to return to just last month for additional  
4 care and treatment.

5 So I think the situation is quite different with  
6 respect to Dr. Zizic than we had in Christensen and is  
7 quite different in terms of the treating physician  
8 situation here with Dr. Coetzee.

9 THE COURT: Is it Ms. Walkden, Mr. Goldser?

10 MR. GOLDSER: Yes.

11 THE COURT: Ms. Van Steenburgh, if she is not  
12 being called as an expert, why can't she testify as to her  
13 examination in November?

14 MS. VAN STEENBURGH: Because, well, I guess  
15 things have changed. Mr. Straka has not seen her since  
16 2006. As Mr. Goldser just represented to the Court, she  
17 said, well, I come here and see friends every once in a  
18 while. I can give you a call.

19 She called Mr. Goldser, and Mr. Goldser asks her  
20 to go see Mr. Straka and do an examination. That is not  
21 part and parcel of her usual physical therapy practice,  
22 despite Mr. Goldser's characterization. She is now being  
23 retained or requested by plaintiff's counsel to do a  
24 physical examination of the plaintiff.

25 It was not part of her usual course and practice

1 by all accounts.

2 THE COURT: Mr. Goldser?

3 MR. GOLDSER: I grant you that Ms. Walkden did  
4 not see Mr. Straka in her office, but the examination that  
5 she did was part and parcel of her normal physical therapy  
6 practice. She did not do anything different from anything  
7 she has ever done that's outside the scope of her  
8 abilities, and she did a follow-up with Mr. Straka just in  
9 the same way that Dr. Coetzee would have done a follow-up  
10 with Mr. Straka. They're no different.

11 MS. VAN STEENBURGH: If I might, Your Honor, the  
12 last thing I would say is, this is very different. She has  
13 not been seeing him. She is not treating him as part of  
14 the course of the practice. I'm not even sure she is  
15 licensed in Minnesota anymore to do this kind of physical  
16 therapy examination, and it's a very different situation.

17 This is clearly something that is similar to an  
18 IME, that the plaintiffs have asked to do an independent  
19 physical therapy examination by someone that has seen  
20 Mr. Straka in the past, but we certainly should have been  
21 alerted to this, and certainly this should have been  
22 brought, I believe, at least, to the attention of the Court  
23 that they were going to have Mr. Straka undergo at  
24 counsel's request an additional physical examination by  
25 Ms. Walkden.

1 THE COURT: Well, as to these two issues, I think  
2 the Dr. Zizic independent medical examination, it's too  
3 late in the game. I think he will have to testify as he  
4 sees fit in court. I don't see a problem with Ms. Walkden  
5 offering testimony. Mr. Goldser has represented that this  
6 is part of her normal practice, and I think at this point I  
7 have to take that as accurate, and we'll go ahead, and  
8 we'll permit that.

9 And if you need a follow-up deposition of her, I  
10 would permit that. She's not an expert. Let's go forward  
11 with that.

12 What's the next issue? The sales  
13 representatives, you said, Ms. Van Steenburgh?

14 MS. VAN STEENBURGH: Yes.

15 MR. GOLDSER: One other item on that, Your Honor.  
16 Do you have any trouble with Dr. Zizic testifying about an  
17 interpretation of the EMG?

18 THE COURT: Well, that's part of the record now.  
19 I think that that's, that's appropriate for him to do that.  
20 We're just going to have to see what he testifies to.

21 MR. GOLDSER: Okay.

22 THE COURT: But I don't think an independent  
23 medical examination at this late stage with an amended  
24 report and then a follow-up deposition, I don't think we  
25 have time for that.

1 MR. GOLDSER: Okay. Sales representatives, we  
2 wanted an opportunity to talk to one or two sales  
3 representatives who saw Dr. Baniriah, the prescribing  
4 doctor, in the 2001 to 2003 time frame. There are a couple  
5 of call notes for those sales representatives. We were  
6 talking about, we talked about this the last time in the  
7 status conference.

8 These would essentially be preservation for trial  
9 depositions, assuming these folks can be located and made  
10 available to talk about those call notes, and I'm hoping to  
11 hear from Ms. Van Steenburgh that she knows where they are  
12 and that they would be made available. They're not  
13 discovery depositions. They're preservation for trial  
14 depositions.

15 MS. VAN STEENBURGH: Your Honor, we would object.

16 THE COURT: And how many did you say?

17 MR. GOLDSER: Two. One, at least one. Maybe  
18 two.

19 MS. VAN STEENBURGH: Well, we have been told  
20 three.

21 THE COURT: Ms. Van Steenburgh?

22 MS. VAN STEENBURGH: I'm sorry, Your Honor. We  
23 were told three. There were two former employees and one  
24 current employee that are on the list of witnesses that  
25 plaintiffs have provided to us. So this might be changing

1 things if Mr. Goldser is now saying two in terms of the  
2 number.

3 It doesn't change our objection. The plaintiffs  
4 have had the call notes for this provider since October of  
5 2009. They know who these people are. During discovery,  
6 they could have taken the depositions or located these  
7 people and contacted them, and now we are about to start  
8 trial, and we were informed that they want to go ahead and  
9 take the depositions of these sales representatives.

10 We don't know where they are, either. They're  
11 former representatives. One has been gone from the company  
12 since 2003 and I think the other one since 2007, and we  
13 think there has been ample opportunity for plaintiff to  
14 pursue this line of discovery and investigation during the  
15 time period that we were doing discovery in this case.

16 And to come up on December 12th and say we want  
17 to locate these people, we want you to provide us with, you  
18 know, information as to where they are so that we can go  
19 take their trial preservation depositions seems untimely  
20 and unduly prejudicial as we're getting ready for trial in  
21 this case, and we would object to plaintiffs trying to go  
22 ahead and do those depositions at this late stage.

23 THE COURT: Well, you said that two of them who  
24 are not part of the company anymore are not locatable, is  
25 that correct?

1 MS. VAN STEENBURGH: I don't, currently, I don't  
2 know if they're locatable. I don't have information as to  
3 where they are. It isn't something the company has as  
4 current information, so we haven't located them.

5 THE COURT: And have you tried to find them, or  
6 is that something you haven't done at this point?

7 MS. VAN STEENBURGH: No. We have tried to find  
8 them, and we're still in the process of trying to find  
9 them.

10 THE COURT: And the third is still an employee of  
11 the company?

12 MS. VAN STEENBURGH: Yes, the third one is still  
13 an employee.

14 THE COURT: And so obviously you do know where he  
15 is or she.

16 MS. VAN STEENBURGH: We do know where the third  
17 one is, but my understanding is, he is no longer of  
18 interest to the plaintiffs.

19 THE COURT: Mr. Goldser?

20 MR. GOLDSER: I need to double check which are  
21 the two that are important, whether one of them is an  
22 employee. I don't remember that off the top of my head,  
23 but as I recall, there were just two that we were  
24 interested in.

25 MS. VAN STEENBURGH: To the extent that the

1 active employee is Mr. Brian Smith, Mr. Goldser, that's the  
2 active employee.

3 MR. GOLDSER: Thank you.

4 THE COURT: Well, if the active employee is of  
5 interest and you want to take his deposition, I would  
6 permit that. The other two, unless the address and  
7 location is readily available without any difficult search,  
8 I don't think that that's appropriate at this late stage.

9 MR. GOLDSER: I take it, Judge, you're asking the  
10 defense to go look for those addresses?

11 THE COURT: Well, if the addresses are available  
12 to them without an undue search, for example, if the  
13 company maintains a current address for them, I don't  
14 expect that they would have to go out and hunt for them  
15 without any idea where they are.

16 I think this is solely dependent on whether the  
17 company has current information on these former employees  
18 or not. If they do not, I think it's, that's a lot of work  
19 for the late stage during trial preparation.

20 MR. GOLDSER: Okay. We will advise, we will  
21 advise defense immediately whether Mr. Smith is of  
22 interest, and we will get that arranged if he is, and we  
23 will look forward to hearing from them if the addresses for  
24 the other two are readily available.

25 MS. VAN STEENBURGH: We will check on that, Your

1 Honor, for sure.

2 THE COURT: Okay. And Mr. Kahn, is that next?

3 MS. VAN STEENBURGH: Yes. I would like to turn  
4 it over to Mr. Irwin, and I can chime in, but Mr. Irwin is  
5 going to address this issue.

6 MR. GOLDSER: It may make sense for Lewis or  
7 Kevin to talk about the request that is being made because  
8 it is a request that we're making that the defense is  
9 responding to and objecting to.

10 MR. FITZGERALD: Sure, Ron. Your Honor, this is  
11 Kevin. I would be happy to do that, Your Honor, if you  
12 would like me to do so?

13 THE COURT: Go ahead.

14 MR. FITZGERALD: Your Honor, we have requested  
15 the opportunity to redepose Dr. Kahn. As the Court will  
16 recall, we requested that the Court conduct an in camera  
17 review of a number of personnel files for corporate  
18 employees that had testified at prior trials, including  
19 Dr. Kahn.

20 The Court conducted that review and on November  
21 23rd entered an order which described a number of  
22 categories of documents from Dr. Kahn's personnel file that  
23 the defendants were to produce to plaintiffs. We've gotten  
24 those documents in two installments.

25 The first was a small set of Kahn performance

1 documents, which we received in late November, and then  
2 December 2nd, the same day that we requested to redepose  
3 Dr. Kahn, we received an additional 80 pages' worth of  
4 documents from Dr. Kahn's personnel file.

5 And based on these new documents that were not  
6 made available to us at prior depositions for Dr. Kahn, we  
7 are asking the defendants to make him available for an  
8 additional deposition prior to the Straka trial. These are  
9 documents that we should have had to examine him about at  
10 prior depositions, but did not.

11 So we are requesting that the defense make  
12 Dr. Kahn available for another deposition.

13 THE COURT: This deposition would be solely on  
14 the documents that were just made available?

15 MR. FITZGERALD: That's correct, Your Honor.  
16 That would be, the scope of the deposition would be limited  
17 to the documents that we recently received but did not have  
18 at prior depositions.

19 THE COURT: Okay. Mr. Irwin?

20 MR. IRWIN: Thank you, Judge. I guess every now  
21 and then we have to say no. Dr. Kahn has been deposed  
22 three times already: Once on May 7, 2008; once on December  
23 10, 2008; and then again on January 10, 2010 -- pardon  
24 me -- January 12, 2010. That's three depositions for three  
25 days.

1           He has testified three times at trials. What was  
2           recently produced was 81, as Kevin said, 81 pages of  
3           documents. These were the materials that were produced  
4           when you took a second look at it, Your Honor, and required  
5           that they be produced.

6           Let me take you through those 81 pages, and I'll  
7           just take you through them in categories because I think  
8           it's fair after litigation has gotten mature like this and  
9           after millions of pages have been produced and after  
10          depositions of the same man have been taken three times  
11          that it's not reasonable to expect that every time some new  
12          paper is produced we're going to do another deposition.

13          And so, for example, these recent 81 pages that  
14          were produced from his personnel file, 56 of those pages  
15          are just serial CVs. They're just a record of his  
16          education as they have evolved over the years. They have  
17          of course the current CVs, and so much of that is  
18          duplicative and repetitive. So 56 of the 81 pages are CVs.

19          Of the other 25 pages, only three of those pages  
20          were authored by him. Two of the pages are a 1994 request  
21          for more staffing in his department. One of those pages is  
22          an, and I'll give you the date in a minute, is where I  
23          think he has authored some of his goals for purposes of a  
24          promotion evaluation.

25          And it starts, it starts when you carve out the

1 56 pages of CVs, the next thing you see is six pages of a  
2 1996 document where he was nominated for an award called  
3 The Rising to Star Power Success Story, and he was given  
4 the award for his accomplishments.

5 Then there is a 1996 letter congratulating him  
6 for his effort to get the SNDA for Floxin in pelvic  
7 inflammatory disease, one page. Then there is a one-page  
8 letter, a one-page document, announcing his retirement  
9 after a distinguished career.

10 Then there is a three-page document in 2003 that  
11 describes another award given to him. This is The Optimus  
12 Award. This had to do was with a clinical trial that he,  
13 that he initiated. It was described in the award, again  
14 which he did not author, but this trial was especially  
15 challenging like a mountain that has never been climbed  
16 before.

17 Then there is the two-page document in 1994 where  
18 he requests additional staffing. Then there are three  
19 pages in 1993 that talk about his promotion -- pardon me --  
20 his salary increase. Excuse me. Then there is one page  
21 that is in 1998. It almost looks to me like it may be a  
22 piece from a CV. It talks about his education and  
23 experience.

24 Then there are six pages of a performance  
25 management review, which is actually two copies of a

1 three-page document, so it's duplicative. This is a  
2 performance management review from January of 2003, and  
3 then finally, there is what looks to be like another  
4 performance review consisting of two pages in 1999, and it  
5 is that document where it looks to me like part of it is  
6 written by him because it is typewritten in the first  
7 person, but I can't be sure.

8 So, Judge, that is what we're talking about, 25  
9 pages of those kinds of materials after several years of  
10 litigation and three depositions and millions of pages  
11 produced, and we're looking at a January 3 trial date.  
12 We're looking at Christmas holidays.

13 We're looking at getting our witnesses ready.  
14 We're looking at additional depositions that we just talked  
15 about, and in the big picture, every now and then, we think  
16 good judgment suggests that you don't take a deposition  
17 every time new paper is produced. If there was something  
18 here that really leapt out at one and suggests uh-huh,  
19 there is something here that really is striking that really  
20 requires a deposition under these late circumstances, that  
21 would be one thing.

22 But there really is nothing here that is of any  
23 significance. So we would respectfully ask that our time  
24 could be better used and so could Dr. Kahn's time be better  
25 used in preparing for trial.

1 THE COURT: So, Mr. Fitzgerald, what in  
2 particular is unclear in the documents?

3 MR. GOLDSER: I just heard somebody click off,  
4 Judge. I wonder if it was them.

5 THE COURT: It might have been. My question,  
6 which you all probably heard was, what in particular in  
7 these documents is unclear requiring a deposition?

8 MR. GOLDSER: Right. And I have not been  
9 masterminding this issue, so I'm not sure that I'm in a  
10 position to answer that. I'm hoping that Kevin and Lewis  
11 will be back on the phone here in a minute to be able to  
12 answer that one.

13 THE COURT: Okay.

14 MR. GOLDSER: I know Ms. Van Steenburgh -- I know  
15 Ms. Van Steenburgh had something that she wanted to raise  
16 as well. Perhaps we can move on to that and hold off on  
17 the Dr. Kahn issue for a moment to see if Lewis and Kevin  
18 get back on.

19 MR. FITZGERALD: Hi, Ron.

20 My apologies, Your Honor, we are obviously having  
21 some phone difficulties on our end as well. Sorry for  
22 dropping off there for a moment.

23 If I might add to Mr. Irwin's comments?

24 THE COURT: Go right ahead.

25 MR. FITZGERALD: Sure. Your Honor, from our

1 perspective, the Court has already ruled that the documents  
2 do have significance to this case and are relevant. These  
3 are documents that you have ordered the defense to produce  
4 that we did not have at prior depositions of Dr. Kahn.

5 These documents include a number of references to  
6 Dr. Kahn's involvement in sales and marketing aspects with  
7 Levaquin, including and just by way of one example, a  
8 description of an achievement that Dr. Kahn had where he  
9 was described as crafting the two quinolone strategy for  
10 marketing Floxin below the belt and Levaquin above the  
11 belt.

12 That's just one example of, we think, many sales  
13 and marketing type references in these documents, and as  
14 Your Honor will recall at past trials, Dr. Kahn has taken  
15 great lengths to distance himself from the sales and  
16 marketing aspects of this case, and we think these  
17 documents are relevant.

18 And we think the Court agreed in Your Honor  
19 ordering these documents to be produced. We are agreeable  
20 to limiting the scope of this deposition to only the  
21 documents that have been recently produced. We think we  
22 can get this deposition done in a quick fashion, and we're  
23 asking to redepose Dr. Kahn before the Straka trial.

24 THE COURT: Anything else, Mr. Irwin?

25 MR. IRWIN: Yes, Your Honor. For example, this

1 performance management review, which was written by  
2 management talks about, for example, strategy in  
3 collaboration with marketing, develop written documents  
4 setting forth Levaquin brand strategy and life cycle plan.

5 You know, I don't know what Kevin specifically  
6 has in mind about that, but he can ask Dr. Kahn about that,  
7 and Dr. Kahn can explain that at trial. They have talked  
8 about marketing with Dr. Kahn before at these depositions.  
9 They have cross-examined him at trial with respect to  
10 marketing questions and his involvement, either directly or  
11 peripherally in marketing, and they can do all of that.

12 We don't quarrel with Your Honor's determination  
13 that these documents are discoverable. That's not the  
14 issue here. The question is whether at the end of this  
15 many, many years of doing this and multiple depositions and  
16 on the eve of trial whether the urgency of these documents  
17 rise to such a level that we need to take the fourth  
18 deposition of Dr. Kahn when we're less than a month away  
19 from trial and when we're looking at the Christmas holidays  
20 and trying to get ready.

21 That's really the question, and there is nothing  
22 in here that is that urgent, we would respectfully suggest.

23 THE COURT: Anything else, Mr. Fitzgerald?

24 MR. FITZGERALD: The only thing, Your Honor, that  
25 I would add would be that we did request this deposition a

1 week ago, and, you know, we did so as soon as possible  
2 after receiving these additional documents. So there has  
3 been no delay in requesting this deposition. We've had  
4 that request outstanding for a week, and we do think there  
5 is time that we can get this deposition done in quick order  
6 prior to the trial.

7 MS. VAN STEENBURGH: Your Honor, may I say  
8 something? This is Tracy Van Steenburgh.

9 THE COURT: Sure.

10 MS. VAN STEENBURGH: Mr. Fitzgerald -- thank you.  
11 Mr. Fitzgerald did send an e-mail last week, and we tried  
12 to have a meet and confer regarding what it was that they  
13 were looking to take the deposition on, how long it would  
14 take and all of that, and we never got any response.  
15 Unfortunately, that's why we're here today.

16 So it isn't that the defense has been diddling on  
17 this, Your Honor.

18 THE COURT: Okay. Well, I think a very limited  
19 deposition of Dr. Kahn regarding simply relevant  
20 information in these documents is in order, and I will  
21 permit that. I repeat, though, that this is very limited,  
22 and it is not to go into matters unrelated to the  
23 information in these particular documents that have just  
24 been disclosed.

25 MR. IRWIN: Judge, can I request -- excuse me. I

1 didn't mean to interrupt.

2 THE COURT: Go ahead.

3 MR. IRWIN: I apologize, Judge. Might I suggest  
4 that in an effort to conserve everybody's time to prepare  
5 for this trial that we bring in Dr. Kahn a day early before  
6 he testifies in January, and they can depose him for 30  
7 minutes or an hour or whatever. I can't imagine this would  
8 take more than an hour, the day before.

9 I would respectfully request consideration for  
10 that or alternatively a telephone deposition so that we all  
11 don't have to get on airplanes to go do all of this now for  
12 a 30 minute or 45 minute deposition.

13 THE COURT: Can this be done by telephone,  
14 Mr. Fitzgerald?

15 MR. FITZGERALD: Your Honor, we really prefer not  
16 to do that. We prefer to do this in person. We do have a  
17 New York office, my firm does, and Dr. Kahn lives in  
18 Washington Crossing, Pennsylvania, which is nearby the  
19 Johnson & Johnson facilities in New Jersey where Drinker  
20 Biddle has offices, multiple offices, where we have had  
21 past depositions, and I think that would be very convenient  
22 for Dr. Kahn.

23 We would like to examine the witness in person  
24 and request that we be afforded the opportunity to do so.

25 MR. IRWIN: Your Honor, it's only a handful of

1 pages. We would respectfully request --

2 THE COURT: What about, what about doing it a  
3 little bit later when he comes in for trial?

4 MR. FITZGERALD: Your Honor, it would be a  
5 situation where it's, you know, right up against the trial  
6 date. It would make things more difficult for us,  
7 certainly, and we would appreciate the opportunity to be  
8 able to depose him on these limited documents. It's a  
9 limited scope deposition. We do understand that.

10 We would like to do that in person with the  
11 witness, and we think we can, you know, do that in New  
12 Jersey, which is convenient for the witness and has been  
13 convenient for, you know, past depositions, and it will  
14 afford us the opportunity to do, prepare for the trial  
15 rather than having to do this deposition right up against  
16 the trial date.

17 MR. IRWIN: Your Honor --

18 THE COURT: Let's go -- yeah. Go ahead.

19 MR. IRWIN: I'm sorry, Judge.

20 THE COURT: Go ahead.

21 MR. IRWIN: This will be the last thing I say on  
22 the subject. It's -- we're also talking about the  
23 convenience of counsel. I don't know who will be defending  
24 this deposition. It is -- I, as you know, have been the  
25 person handling this witness. I handled him at the last

1 trial, and I will do so at this coming trial.

2 It is very hard for me, I can tell you, to get  
3 from New Orleans up to New Jersey and back, particularly  
4 this time of year. I would hope that we could agree that  
5 this would be a telephone deposition with these few numbers  
6 of pieces of paper, if they want to do it before trial.  
7 And if they don't want to do --

8 If they want to do it live, then I think, and  
9 this is not unusual in trials. Nobody likes it, but it's  
10 not unusual, that they take his deposition live the day  
11 before he comes up.

12 I think those are two reasonable choices, a  
13 telephone deposition during this time period if they want  
14 it earlier, or if they want him live, a, a live deposition  
15 the day before he testifies up in Minnesota.

16 MR. FITZGERALD: Your Honor, we have a  
17 proposition that may work for everyone. Earlier this week,  
18 we took the first day of the deposition of Neil Minton, who  
19 is a former Johnson & Johnson employee. That deposition  
20 has been held open and will be continued before the trial  
21 date.

22 A member of Mr. Irwin's firm, Doug Moore, was  
23 present at that deposition. He has indicated that he has  
24 questioning of the witness to be done prior to trial. So  
25 we will be reconvening that deposition in New Jersey at the

1 Drinker Biddle offices in Princeton, which would be a  
2 convenient location for Dr. Kahn, seeing as that he lives  
3 in the Princeton vicinity, and we see no problem in  
4 scheduling both of these depositions for the same time.

5 We would be happy to do that. I think that would  
6 be convenient for counsel, especially considering, you  
7 know, counsel from Mr. Irwin's office will be traveling  
8 back to New Jersey to finish the deposition of Dr. Minton.

9 MR. IRWIN: Your Honor, I had not planned on  
10 being there, and I don't know what Dr. Kahn's situation is.  
11 Again, I would urge that if they want a deposition before  
12 trial that they do it by phone, and if they want it live  
13 that they do it the day before he testifies in January.

14 THE COURT: Well, I think given the  
15 circumstances, I think this should go ahead in person in  
16 New Jersey. I recognize it's a little late, but the  
17 documents were late, and I think that plaintiffs deserve a  
18 chance to ask about these documents and these documents  
19 alone, so --

20 MR. IRWIN: Your Honor --

21 THE COURT: -- if this can be combined with  
22 Minton, great. If it can't, let's go forward this way.

23 MR. FITZGERALD: Thank you, Your Honor.

24 MR. IRWIN: Can we have an agreement that this  
25 would last no more than an hour?

1 THE COURT: Do you know how long it will last,  
2 Mr. Fitzgerald?

3 MR. FITZGERALD: Very tough to tell, Your Honor.  
4 I couldn't make a representation to the Court that would be  
5 accurate at this point. We would certainly limit the scope  
6 of the deposition to the more newly produced documents, but  
7 I don't have a sense, as I sit here right now, how long  
8 that deposition will take.

9 THE COURT: Let's just do it as quickly as we  
10 possibly can.

11 Ms. Van Steenburgh, you had some information?

12 MS. VAN STEENBURGH: Yes. One thing I would let  
13 you know, Your Honor, is that, and I wanted to let the  
14 other side know as long as we were talking about this,  
15 because you are in the process I believe of reviewing some  
16 documents for Mr. Minton or Dr. Minton, and we have just  
17 received from archives some additional personnel records  
18 for him.

19 So those will be sent over to your chambers, and  
20 I didn't want you to preliminarily rule without knowing  
21 that there will be a few more documents coming your way.

22 THE COURT: Do you know when they will be here?

23 MS. VAN STEENBURGH: We should have them to you  
24 on Monday.

25 THE COURT: Okay. That sounds good. Okay.

1 Anything else for today?

2 MR. GOLDSER: Judge, Ron Goldser. Do you have  
3 any further information on the criminal trials that are  
4 scheduled in January?

5 THE COURT: One of the two trials is now  
6 scheduled for December 20th. We had some speedy trial  
7 issues in that case, so that will be over with one way or  
8 the other. The other one I haven't gotten an update, the  
9 shorter one.

10 Holly, do we have any update on that one?

11 THE CLERK: No. I'm still waiting for an update  
12 as far as the plea agreement that might be going through,  
13 so there is a potential that that one will go away.

14 THE COURT: They are discussing a plea agreement,  
15 and that was the shorter one, the two day one anyway. So  
16 I'm guessing that if they're discussing a plea agreement,  
17 it's probably likely to happen, but I don't have a final on  
18 that one. The other one is now out of the way.

19 MR. GOLDSER: Okay. Thank you very much for  
20 that.

21 THE COURT: Okay. Anything else?

22 MS. VAN STEENBURGH: Not for the defense, Your  
23 Honor.

24 THE COURT: Okay.

25 MR. IRWIN: Thank you very much, Judge.

1 MR. FITZGERALD: Thank you, Your Honor.

2 MR. SAUL: Thank you.

3 MR. GOLDSER: Thank you.

4 THE COURT: Thank you, Counsel. I will talk to  
5 you all soon.

6 MS. VAN STEENBURGH: Good bye.

7 MR. GOLDSER: All right.

8 \* \* \*

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

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

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