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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re: Fluoroquinolone	)	File No. 15MD2642
Products Liability Litigation	)	(JRT)
	)	
	)	
	)	Minneapolis, Minnesota
	)	May 21, 2020
	)	3:23 P.M.
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	)	
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BEFORE THE HONORABLE CHIEF JUDGE JOHN R. TUNHEIM  
UNITED STATES DISTRICT COURT  
**(STATUS CONFERENCE VIA VIDEO CONFERENCE)**

Court Reporter: KRISTINE MOUSSEAU, CRR-RPR  
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Minneapolis, MN 55415

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

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1 3:23 P.M.

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3 (In open court via video conference.)

4 THE COURT: Good afternoon, everyone. Okay. We  
5 are MDL, Multi District Litigation, Number 15-2642, In Re:  
6 Fluoroquinolone Products Liability Litigation. Let's have  
7 counsel note appearances this afternoon for this status  
8 conference.

9 Let's have the plaintiffs first, please.

10 MS. FLAHERTY: Good afternoon, Your Honor --

11 MR. NIDEL: Chris Nidel on behalf of the  
12 plaintiffs.

13 THE COURT: Okay. I'm sorry. Go ahead,  
14 Ms. Flaherty.

15 MS. FLAHERTY: Good afternoon, Your Honor.  
16 Yvonne Flaherty for plaintiffs.

17 MR. ROBINS: Good afternoon, Your Honor. Bill  
18 Robins for plaintiffs.

19 THE COURT: Mr. Nidel, we've got you.

20 MR. NIDEL: Yep.

21 THE COURT: Anyone else?

22 MR. SOLOW: I think Mr. Richards is on, but on  
23 mute.

24 THE COURT: All right.

25 MR. ROBINS: Bill Robins, Your Honor. I'm not

1 sure if you heard me.

2 THE COURT: Okay.

3 MR. RICHARDS: Thank you, Mr. Solow. Yes. Jason  
4 Richards for the plaintiff.

5 THE COURT: All right. I think that's all. Is  
6 that all for the plaintiffs? All right.

7 How about for defendants?

8 MR. SOLOW: Good afternoon, Your Honor. Andrew  
9 Solow for the Bayer and Merck defendants.

10 THE COURT: Mr. Solow. Anyone else?

11 MS. BERNIER: Good afternoon, Your Honor. Jan  
12 McLean Bernier on behalf of the Janssen defendants.

13 THE COURT: All right.

14 MR. SUFFERN: I'm sorry, Your Honor. My name is  
15 Michael Suffern, and I represent Teva Canada, Ltd., and  
16 Cobalt Laboratories LLC in an action called Akman.

17 THE COURT: All right. Thank you. Thank you for  
18 joining us.

19 MR. SUFFERN: Thank you.

20 THE COURT: All right. What do we have to  
21 discuss this afternoon? Let's see.

22 Mr. Robins, do you want to begin?

23 MR. ROBINS: Sure, Your Honor. Probably just  
24 turn it over to Ms. Flaherty to give a little bit of an  
25 update on the status of the litigation, but we're prepared

1 to address -- we understand from Your Honor's office that  
2 there has been a handful of people that have been  
3 contacting the Court about the status of lien resolution  
4 and some issues related to that, so I was going to address  
5 that issue, and I thought maybe I would let Ms. Flaherty  
6 just address more generally the status of the docket.

7 THE COURT: That sounds good.

8 Ms. Flaherty?

9 MS. FLAHERTY: Thank you. Well, since we last  
10 met a lot obviously has happened in the world, but the  
11 cases have been moving along with respect to Johnson &  
12 Johnson and Janssen cases. It is my understanding that 22  
13 claims remain.

14 Twelve of those cases are in some stage of  
15 discussions and negotiations, and there are approximately  
16 ten pro se claimants that remain. Ms. Bernier and myself  
17 have had some conferences to try to take steps to  
18 facilitate ways to manage the pro se claimants, and I think  
19 that process is going relatively well, but I will let her  
20 speak to that as well.

21 As to the Bayer claimants we are down to three  
22 cases is my understanding. One of those cases has not yet  
23 been served, and I'm sure Mr. Solow may have additional  
24 updates as to those cases.

25 THE COURT: All right. Let's, Ms. Bernier, do

1 you want to speak on this point?

2 MS. BERNIER: Sure, Your Honor. Ms. Flaherty is  
3 right. I have to say thank you to her. She has helped a  
4 lot with the pro se cases, trying to get documents for us  
5 and act as a gateway for some of the pro se plaintiffs who  
6 those cases are moving in large part. Her assistance has  
7 helped a lot.

8 The other twelve cases that we have remaining,  
9 some of them are settled. They're waiting to be funded.  
10 The rest of them are in some form of negotiations.  
11 Mr. Richards and I have spoken about one of their cases  
12 where I understand there is a bankruptcy filing that is  
13 holding things up.

14 Mr. Robins and Baron & Budd have a few cases.  
15 They get e-mails from me fairly regularly about remaining  
16 cases, but we are down to 22, which is less than the last  
17 status conference, so we're hopeful that the rest of these  
18 will be resolved.

19 THE COURT: What kind of process are you  
20 following with the ten pro se plaintiffs who are still in  
21 the case?

22 MS. BERNIER: Your order helped a lot in getting  
23 us updated plaintiff fact sheets from five of those  
24 plaintiffs. The other five, we didn't hear from two of  
25 them. They asked for extensions. We gave them extensions

1 to respond.

2 I haven't received anything. We're following up  
3 with them to try to figure out where their documents are.  
4 In one of those cases, the wife is a first line healthcare  
5 worker. We're happy to give her an extension given her job  
6 to try to get us documents. The other one we just simply  
7 haven't heard from.

8 Three of the claimants we can't find. They  
9 haven't responded to anything. So for those three, we  
10 think that an order to show cause may be the next step.

11 THE COURT: Okay.

12 MS. BERNIER: For the other five, we have in some  
13 cases a host of documents {indiscernible due to audio  
14 malfunction} and then we will be --

15 THE CLERK: Jan, you're breaking up.

16 MS. BERNIER: Oh, I'm sorry.

17 THE COURT: Just the last two sentences.

18 MS. BERNIER: So as far as the cases where we  
19 received documents, we're in the process of reviewing those  
20 so we can negotiate settlements in those cases hopefully.

21 THE COURT: Are you proposing today that we, the  
22 Court issue an order to show cause on the three that you  
23 can't find?

24 MS. BERNIER: No, not -- not necessarily, Your  
25 Honor. Yvonne and I had planned to speak after the

1 conference, too, and I'm open to hearing if she has heard  
2 from those plaintiffs. So we will make the motion if  
3 necessary, but not today, if that's okay with Your Honor.

4 THE COURT: That's fine. Just fine. Just let us  
5 know if you're ready for that as I think that process has  
6 worked fairly well.

7 MS. BERNIER: Thank you, Your Honor.

8 THE COURT: We've got an echo going here. Hang  
9 on just a second. There we go. The mysteries of Zoom.

10 All right. Let's, Mr. Solow, did you have, did  
11 you want to talk about the three Bayer cases?

12 MR. SOLOW: Give you a quick update. We have  
13 three cases remaining, one of which is unfiled still.  
14 We've got the Chauvin case, which was subject to a prior  
15 order of the Court. Plaintiff Chauvin has until July 6th  
16 to serve expert reports in that case, so we'll see where  
17 we're at after July 6th.

18 The Butkiewicz case, we have gotten a  
19 case-specific and a liability expert report in that case as  
20 well. Interestingly, in that case they are now proceeding  
21 under innovator liability law. According to their short  
22 form complaint, there was no product identification of our  
23 product.

24 The next steps under PTO 18 are, we need to work  
25 out a discovery schedule. I think, Your Honor, though, we

1 will be moving to dismiss based on lack of innovator  
2 liability under Illinois law. I have reached out to  
3 plaintiffs' counsel and indicated to him if he wants to  
4 speak with us before we go ahead and incur the costs of  
5 that motion practice, but we are communicating. I don't  
6 believe he is on the line.

7 And then the last case, Your Honor, is also a  
8 generic use only case out of Florida. Again, there is no  
9 innovator liability law under Florida. At least that's our  
10 position. We have informed plaintiffs' counsel, asked for  
11 a dismissal, and that case still hasn't been served. That  
12 about takes care of our inventory.

13 I will note, Your Honor, we talked last time,  
14 Mr. Johnny Reed, our last meeting pro se, has entered a  
15 settlement program. We are just waiting for his final  
16 release to clear that through the Medicare lien process.

17 THE COURT: That's great. Thank you.

18 MR. SOLOW: Your Honor, I should also note, the  
19 Blansette case, the other pro se case, Mr. Blansette after  
20 you dismissed his case has filed an appeal with the Court  
21 of Appeals and then has asked for an extension to file his  
22 brief, which was granted. So we're just waiting on that.

23 THE COURT: All right. Okay. Good. That sounds  
24 like good progress is being made.

25 Yeah, Mr. Robins, you were going to talk about

1 the e-mails that we're getting.

2 MR. ROBINS: Yes, Your Honor. I actually was  
3 provided with the most recent e-mail which involved the  
4 Morris case, and that's Mr. Richards' client, so he can  
5 talk a little bit more about the specifics of that, and  
6 then I understand there is two others, and I spoke to  
7 Ms. Flaherty about it this morning.

8 We are going to just reach out to chambers and  
9 see if we can get a copy of those e-mails to just  
10 understand the particulars of it. This is an issue that  
11 we're dealing with across a multitude of mass tort  
12 settlement programs right now, you know, with Archer and,  
13 you know, I'm sure other, you know, groups are dealing with  
14 this as well just because of COVID.

15 And, you know, just dealing with getting in touch  
16 with the right people and getting these cases processed has  
17 proved a little bit challenging over the last couple of  
18 months. And my understanding, at least with respect to the  
19 Morris case, is that the case has cleared Medicare, but  
20 there is a private lienholder that is still out there that  
21 they're working with to try to resolve.

22 And, you know, we were thinking that, you know,  
23 one solution may be, and I don't know if it's a similar  
24 situation with these other two cases, that, you know,  
25 perhaps the way to deal with this is to segregate what we

1 know is the particular gross amount on the lien and get the  
2 money set aside while those negotiations are ongoing and  
3 then at least allow Archer to get some money to these  
4 plaintiffs while that's happening.

5 As I understand it, that's a, you know, it's a  
6 private lien issue, not Medicare/Medicaid with that  
7 particular plaintiff, but Mr. Richards could talk about it.  
8 I think Archer is doing the best they can under the  
9 circumstances right now, and I understand people are  
10 getting a little impatient with the process, but it's not a  
11 matter of them being ignored.

12 It's just a matter of dealing with the right  
13 people and, you know, then having to engage in negotiation  
14 and finding the right people to do that. So it has just  
15 gotten a little bit of slow progress on a few of these.

16 I will say that, you know, globally there has  
17 been tremendous progress, you know, given the number of  
18 cases and the fact that, you know, most people are getting  
19 through the system okay.

20 Mr. Richards, do you want to talk just for a  
21 second about Morris, if that's okay with Your Honor?

22 THE COURT: Yes. That's fine.

23 MR. RICHARDS: Okay. Yeah. I represent Kristina  
24 Morris. I did not know that she was going to reach out to  
25 the Court. I would have advised her not to do that, but

1 she is just obviously frustrated with the process because  
2 it's taken a while for her, and Bill, Mr. Robins, is right.  
3 She has a private lien. It's a decent amount of money. At  
4 least it's been noted by the private lien carrier.

5 Archer does not believe that the asserted amount  
6 is correct, so they have disputed that amount, and that's  
7 where the holdup is. They're waiting on a response from  
8 the private carrier. Medicare has been finalized, so there  
9 is no holdup there. So that's really where we are, and I  
10 agree with Mr. Robins' proposal.

11 I think it makes sense to hold back a portion to  
12 cover any private lien but release the rest of the QSF  
13 moneys as appropriate to allow Ms. Morris to, you know, to  
14 get some funds for her needs. It's been about a year, and  
15 she is obviously frustrated as we all are, so Mr. Robins is  
16 right.

17 THE COURT: Yeah. I think that's a good idea,  
18 Mr. Robins and Mr. Richards. Is there anything we need to  
19 do to make that happen, or can Archer do that?

20 MR. ROBINS: I feel like they can. I looked back  
21 over the MSA, and I think that they have the authority or  
22 the ability to do that, you know, since Medicare and  
23 Medicaid has been taken care of. I know with Mr. Richards'  
24 firm in particular, and a lot of firms are this way, Your  
25 Honor, is that, you know, they don't like to piecemeal even

1 when it's a private lien because just the complication of  
2 once you release money to the plaintiff, it's hard to get  
3 it back, you know, in the thing.

4 But, you know, while this is not an insignificant  
5 amount of money, it's a relatively small percentage of the  
6 global amount, as I understand it, and so I think in this  
7 one instance, you know, it probably would make sense to do  
8 that.

9 THE COURT: Okay.

10 MR. ROBINS: It would be, of course, up to the  
11 other plaintiffs, you know, firms that are involved in  
12 these other two cases, you know. Just a matter of policy  
13 they don't want to do that.

14 I wanted to be transparent about this, Mr. Solow  
15 is on the phone, so that there is not a misunderstanding  
16 with Bayer on this, either, in terms of this if this is  
17 going to happen. So I think we just need to, you know,  
18 make sure, you know, nobody has an objection to proceeding  
19 in this way.

20 But I do feel like it would be a way, you know,  
21 to perhaps at least lessen the traffic to Your Honor, at  
22 least on these plaintiffs, to get them moving out of the  
23 system. It has been a while obviously, and no one  
24 anticipated that we would have this now, you know, what's  
25 going on months long period of added delay.

1 So that's what we would suggest.

2 THE COURT: All right. I think that's a good  
3 idea. Let's try to facilitate that so that she gets  
4 something, anyway, and if you need my help on it, just let  
5 me know.

6 MR. RICHARDS: Thank you, Your Honor.

7 THE COURT: Okay. Anything else we need to  
8 discuss today or should discuss today?

9 MR. NIDEL: Your Honor, this is Chris Nidel.

10 THE COURT: Yes.

11 MR. NIDEL: I'm counsel in a case, and defense  
12 counsel is on the call as well. It's the Akman case, and  
13 it's a case that was removed to the MDL when Bayer was a  
14 party. Bayer has been settled out. It's now a case  
15 against Cobalt and I guess Teva, generic manufacturers of  
16 the drug that was taken by the plaintiff.

17 Basically I'm in a position where I'm trying to  
18 get the case moving with discovery. What I would like to  
19 have is the case remanded back to the district court. It  
20 was originally filed in the District of DC, and I'm happy  
21 to make a formal motion if that's what the Court requires,  
22 but I'm just looking for some guidance on how to get that  
23 case back to the DC District Court where it was filed.

24 THE COURT: All right. Anyone have any comments  
25 on this that's on the phone?

1 MR. SUFFERN: Yes, Your Honor. My name is  
2 Michael Suffern, and I represent Teva Canada, Ltd., and  
3 Cobalt Laboratories, Inc., in the Akman case. Mr. Nidel  
4 and I have had some discussions about the case.

5 Before COVID he asked me if I would discuss with  
6 my clients whether they had any interest in some kind of a  
7 resolution, and I have, but I have not yet gotten an  
8 answer, and I know I need to follow up with Mr. Nidel on  
9 that.

10 But I think that, you know, it's, if it's  
11 anything other than a nominal amount, I think that rather  
12 having you -- I think that the answer will be that the case  
13 is unlikely to be resolved and as opposed to having the  
14 case remanded, we think the appropriate course would be for  
15 us to file a motion for judgment on the pleadings primarily  
16 on the grounds of federal preemption.

17 It is an abbreviated new drug application  
18 product, and we believe it's subject to dismissal as a  
19 matter of law pursuant to the *Mensing* and *Bartlett* cases of  
20 the United States Supreme Court law, and we believe Your  
21 Honor's court is the appropriate court to have that motion  
22 heard.

23 And if we're not able to reach some kind of a  
24 resolution, we would be in a position to file that motion,  
25 you know, in the relatively near term.

1 THE COURT: Okay. Well, why don't we do this:  
2 Why don't we take a period of time to see if the matter can  
3 be resolved informally. It sounds like it might not be  
4 able to be resolved, but if it can, let's take a 30-day  
5 period from today and see if the parties can resolve it.

6 If not, after the 30 days then I think I better  
7 get some motions in here, either a motion to dismiss or a  
8 motion to remand or both, and we can do a hearing on that  
9 and resolve both matters fairly quickly, but let's take a  
10 30-day period to see if you can resolve it. Okay?

11 MR. SUFFERN: Yes, Your Honor.

12 MR. NIDEL: Yes, Your Honor.

13 THE COURT: That sounds good. If it can't be  
14 resolved, just let us know by letter, and we will expect  
15 the motions, and we will take them up right away, and we  
16 can give you some dates for filing.

17 All right. Anything else for today? Thank you  
18 for gathering by Zoom today. This is helpful and no one  
19 has to travel, and so it works fine for the Court. We're  
20 doing just about everything using Zoom now, including  
21 criminal hearings.

22 So we're getting fairly well accustomed to it,  
23 but let's -- we won't set another date today, but I will be  
24 thinking about probably having another update probably in a  
25 couple of months or so. Okay?

1 MR. ROBINS: Thanks very much, Your Honor.

2 MR. SOLOW: Thank you, Your Honor.

3 MS. BERNIER: Thank you, Your Honor.

4 THE COURT: We will look at -- Heather will be in  
5 touch in probably the latter part of July.

6 MS. FLAHERTY: Thank you.

7 THE COURT: Okay. Thank you, everyone. We will  
8 be in recess.

9 **(Court was adjourned.)**

10 \* \* \*

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

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

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