

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products
Liability Litigation, File No. 08-md-1943
(JRT/AJB)

Minneapolis, Minnesota
April 23, 2013
12:30 P.M.

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**
COREY SULLIVAN, ESQ.

Via telephone: **KEVIN FITZGERALD, ESQ.**
ED COLEMAN, ESQ.
YVONNE FLAHERTY, ESQ.
PAIGE BOLDT, ESQ.
WILLIAM BROSS, ESQ.
JOSEPH SOFFEY, ESQ.

For the Defendants: **TRACY J. VAN STEENBURGH, ESQ.**
JAN BERNIER, ESQ.

Via telephone: **WILLIAM ESSIG, ESQ.**

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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12:30 P.M.

(In open court.)

THE COURT: You may be seated. Good afternoon.

MR. GOLDSER: Good afternoon, Your Honor.

MS. VAN STEENBURGH: Good afternoon, Your Honor.

THE COURT: This is multi district litigation
number 08-1943, In Re: Levaquin Products Liability
Litigation.

Counsel, would you note your appearances for this
status conference?

MR. GOLDSER: Good afternoon, Your Honor. Ron
Goldser for the plaintiffs.

THE COURT: Good afternoon, Mr. Goldser.

MR. SULLIVAN: Corey Sullivan for the plaintiffs,
Your Honor.

THE COURT: Good afternoon, Mr. Sullivan.

MS. VAN STEENBURGH: Good afternoon, Your Honor.
Tracy Van Steenburgh on behalf of defendants.

MS. BERNIER: Good afternoon. Jan Bernier on
behalf of defendants.

THE COURT: Good afternoon. Very well.

Do we have anyone on the phone today?

MS. FLAHERTY: Yes. Good afternoon, Your Honor.
Yvonne Flaherty from Lockridge Grindal Nauen.

1 MR. FITZGERALD: Hello, Your Honor. This is
2 Kevin Fitzgerald for plaintiffs.

3 MR. COLEMAN: Good afternoon, Your Honor. This
4 is Ed Coleman for plaintiffs.

5 MR. BROSS: Good afternoon. This is Bill Bross
6 with Heninger Garrison Davis for plaintiffs.

7 MS. BOLDT: Good afternoon. This is Paige Boldt
8 for plaintiffs.

9 THE COURT: All right. Anybody else?

10 MR. ESSIG: Good afternoon, Your Honor. Bill
11 Essig on behalf of defendants.

12 THE COURT: All right. Thank you, everyone.
13 Let's proceed to our agenda for today. Who is going to
14 proceed?

15 Ms. Van Steenburgh?

16 MS. VAN STEENBURGH: I will, Your Honor. Before
17 we get to the agenda, I did want to do one other
18 preliminary thing, and that is that Dana Lenahan sends her
19 regards. She has decided to take a job in a different
20 arena, still doing legal work, but she has gone in-house
21 and is going to be supervising medical device claims.

22 So she wanted to let everyone know she gives her
23 regards.

24 THE COURT: Wish her well from all of us.

25 MS. VAN STEENBURGH: Thank you. With respect to

1 the first item, I'm going to justify Mr. Essig's appearance
2 on the phone and have him provide the Court with the
3 federal and state cases in the MDL and the case counts.

4 Bill, would you do the honors?

5 MR. ESSIG: Thanks, Tracy. Sure.

6 Judge, the case counts have not changed much
7 since last time. Our count, there are 1916 pending cases
8 currently in the MDL. We had a few individual cases
9 dismissed since our last status.

10 Outside of the MDL, there remain a handful of
11 cases outside of New Jersey. There are still three in
12 state court in Illinois, the two Carey & Danis cases in
13 St. Clair County that were discussed last time. There is
14 still one case here in Cook County as well. There is also
15 a straggler tendon case in state court in Allegheny County,
16 Pennsylvania, which is Pittsburgh, and there is not much
17 activity in that one.

18 Then as for New Jersey, my understanding right
19 now is that there are roughly 1287 cases that remain active
20 there, and they have had approximately 837 dismissals --
21 I'm sorry. They've had -- I'm reading this wrong.

22 They've had roughly 379 dismissals entered to
23 date in New Jersey. There are another 458 cases that are
24 settled in principle there that the settlement and
25 dismissals are not yet final, and that's the current case

1 counts, Your Honor.

2 THE COURT: All right. Thank you, Bill.

3 MS. VAN STEENBURGH: Well, that brings us to the
4 coordination. I think that there really isn't anything
5 more to say. Mr. Essig has said what the case counts are
6 in New Jersey and other jurisdictions, so then that kind of
7 rounds us to the status of settlement here, Your Honor, and
8 we're really making progress.

9 The total cases that remain that are not settled,
10 the number is 773, and it's actually a lot less when you
11 carve out a couple of exceptions. There are 64 cases that
12 currently sit on the list for remand, although we'll get to
13 that later. That may go down a little bit, and then we
14 also carve out of that the 450 Carey & Danis cases.

15 So that leaves about 265 cases that have not been
16 settled. You'll be happy to hear that 196 of those are in
17 settlement discussion, so we are moving quickly to really
18 reduce the numbers, I think. So that leaves us, and of
19 course I asked someone in my office, that's about 69 cases,
20 and what is happening with those?

21 And it was like, well, those are the one op cases
22 that we have to kind of still get our arms around a little
23 bit, but the numbers are going down, and we are in the
24 process of finishing settlement. I think Mr. Goldser has
25 indicated that with respect to some of their cases, the

1 Court will see a lot of stipulations for dismissal coming
2 through quite soon, so we will be able to start putting
3 those cases to bed.

4 THE COURT: All right. Thank you.

5 MR. GOLDSER: Good afternoon, Your Honor. On the
6 Phase I cases for the six firms that I'm part of, we are
7 collecting releases. We are collecting stipulations of
8 dismissal. You should see, as I say, a fair number of
9 those in the not too distant future.

10 Nobody has filed any motions to withdraw yet.
11 I'm still trying to get my arms around the numbers on
12 those. I'm not sure if you have any particular form that
13 you would like to see these motions come in. We've kind of
14 touched on that at the end of the last few status
15 conferences with your staff, but nobody has quite addressed
16 it directly with you yet.

17 Do you have any thoughts for us on that subject?

18 THE COURT: No, I hadn't thought about it. At
19 this point I probably don't. How many are we thinking
20 about?

21 MR. GOLDSER: I don't yet know. I don't yet
22 know. I mean, they could be very simple pro forma motions
23 saying case is not settled. Pursuant to the MSA, we're
24 obligated to withdraw. Here is the name and home address
25 of the plaintiff for whom we are withdrawing.

1 We could do it simply that way, but I suspect it
2 will take a motion in each case individually, and then with
3 that, you'll then face the question of remand or transfer,
4 venue transfer, or keeping them here as the case may be,
5 and so there will be some of those cases coming down the
6 pike for the Court.

7 THE COURT: How soon?

8 MR. GOLDSER: I think we're still looking at 30
9 to 60 days, but that would be the time frame.

10 THE COURT: Okay. If you, if it's, becomes
11 imminent, why don't you let us know in advance, and perhaps
12 we can give it some thought at that point in time.

13 MR. GOLDSER: Okay. That would be good. Thank
14 you.

15 MS. VAN STEENBURGH: One other thing, Your Honor,
16 in that regard, I will talk to Mr. Goldser, too. We have
17 an idea that maybe we could streamline it by putting
18 everything in one place and then having it filed in the
19 separate files or something like that. So I think we can
20 maybe work with plaintiffs to do that.

21 Status of the amended PTO in New Jersey, I guess
22 you want to pop up again.

23 MR. GOLDSER: Sure. I have been advised that the
24 pretrial order number 3, the New Jersey counterpart to
25 that, has been presented to Judge Higbee at a status

1 conference that happened I think it was last week. She has
2 given counsel an additional two weeks to object if there
3 are any. We don't expect any.

4 THE COURT: Two weeks from last week?

5 MR. GOLDSER: Yes, I believe that's true. So
6 we're certainly hopeful that there will be no objections
7 and that the order will finally be entered in New Jersey.

8 THE COURT: Are you aware of any objections at
9 this point in time?

10 MR. GOLDSER: I am not.

11 THE COURT: Do you think everyone is on board?

12 MR. GOLDSER: I believe everyone is on board.

13 THE COURT: Okay.

14 MR. GOLDSER: I certainly hope that is true.

15 THE COURT: Keep your fingers crossed?

16 MR. GOLDSER: For sure, and they are very close
17 to the transmittal of money, as I understand it, in New
18 Jersey as well. With regard to the PTO 3 here, I know the
19 Court had entered a prior version of it.

20 As we were working through the process and we
21 started receiving some deposits for the account, for the
22 common expense fund, the bank has asked to add one line, I
23 think it's on page two at the end of paragraph A right
24 above the paragraph number 1. That's their language, their
25 requested language.

1 I believe I had submitted it to you. It looks
2 like you may well have that in front of you at this point.
3 That's the bank's requested language. We don't have a
4 problem with that. My understanding, Johnson & Johnson
5 doesn't have a problem with that. It doesn't affect
6 anybody except making sure the bank has coverage for what
7 they feel they need.

8 I'm not sure that they need it, but they feel
9 they need it. So rather than fight that fight, we will
10 just allow it to happen subject, of course, to your
11 approval.

12 THE COURT: All right. I understand. I mean, I
13 don't think it's needed, either, but -- so I have no
14 problem adding that to the order, so I will file an amended
15 order today.

16 MR. GOLDSER: Thank you kindly.

17 THE COURT: Okay.

18 MS. VAN STEENBURGH: Your Honor, items number 5
19 and 6 on the agenda relate to an issue that arose during
20 the last status conference, and that has to do with some of
21 the Carey & Danis cases where there were deficient PFSs.
22 I'm happy to tell you that number 5 has been resolved.

23 Mr. Sullivan and I talked right before the status
24 conference. There were 25 cases -- as the Court recalls at
25 the last status conference, the Carey & Danis firm was

1 given 30 days to provide updated PFSs. We did receive some
2 on April 12th. We did not receive PFSs in 25 cases.

3 Now, in conferring with Mr. Sullivan, we think
4 the number might be 23, but nonetheless, we are in
5 agreement that we will submit an order to the Court with
6 those cases listed and the case file numbers and have the
7 Court sign an order dismissing the cases with prejudice
8 so --

9 THE COURT: The 23?

10 MS. VAN STEENBURGH: The 23 cases, yes. So I
11 will give that to Mr. Carey and Mr. Sullivan to --

12 MR. SOFFEY: If you want to be a lawyer, be a
13 lawyer. I have so many things to take care of here.

14 THE COURT: Whoever is talking on the phone,
15 could you place the phone on mute for us, please.

16 MR. SOFFEY: Say again, please?

17 THE COURT: Whoever was talking on the phone, if
18 you could place the phone on mute for us, please, that
19 would be very helpful.

20 MR. SOFFEY: Place the phone on what was that,
21 though? You for? You for?

22 THE COURT: On mute.

23 MR. SOFFEY: Oh, mute.

24 THE COURT: So that you can talk with whoever is
25 in the background.

1 MR. SOFFEY: All right.

2 MS. VAN STEENBURGH: So to finish, Your Honor, we
3 will be submitting an order, and those cases will be
4 dismissed. Item number 6 has to do with a set of PFSs that
5 we, we the defendants, believe still remain deficient, and
6 so we are going to go ahead and put a motion on with the
7 Court, provide the issues as to what the deficiencies are
8 and then set that on for hearing.

9 Obviously, we won't do that today, but
10 Mr. Sullivan and I agree that we will formally brief that.

11 THE COURT: How many cases fall in that category?

12 MS. VAN STEENBURGH: There are 23 cases that fall
13 into that.

14 THE COURT: 23 there? Okay.

15 MS. VAN STEENBURGH: Yes.

16 MR. SULLIVAN: Your Honor, just as to item number
17 5, Tracy indicated that we have agreed to dismiss those 23
18 cases. We would ask that the Court dismiss those cases
19 without prejudice because this isn't necessarily a decision
20 as to the merits. It's a failure of, procedural hurdle,
21 and we would just ask the Court dismiss those without
22 prejudice.

23 MS. VAN STEENBURGH: We have no objection, Your
24 Honor.

25 THE COURT: All right. That's fine. And that

1 will be submitted shortly?

2 MS. VAN STEENBURGH: Yes.

3 THE COURT: Okay. All right.

4 MS. VAN STEENBURGH: Hopefully by the end of the
5 week.

6 THE COURT: All right. And then we will set up a
7 hearing as soon as the issue is briefed then on the other.

8 MS. VAN STEENBURGH: Okay.

9 THE COURT: On the deficiencies. Okay?

10 MS. VAN STEENBURGH: Great. Item number 7 are
11 the cases for remand and the proposed suggestion for
12 remand. We have been working diligently to figure out how
13 many cases are getting onto the remand list, and I came
14 prepared today with a list of 64.

15 However, Mr. Goldser indicated that a couple of
16 the cases should come off the list because it looks like we
17 may be able to resolve those. So this is a bit of a moving
18 target, but we think the numbers have stayed pretty
19 constant. There will be approximately 60 to 65 cases that
20 will be remanded.

21 We have provided, and I provided to opposing
22 counsel, a final suggestion of remand order, and I am going
23 to make a revision at Mr. Goldser's request, which would be
24 that there be a provision there allowing 30 days for
25 purposes of objection to remand if in fact someone seeks to

1 object to that remand. So we will finalize that and get
2 that to the Court as well and provide the Court with our
3 list of cases for remand.

4 Anything that you had?

5 MR. GOLDSER: No. Just to make the record
6 complete, I've looked at this list. It seems to me that
7 most of these cases are either not in negotiation to my
8 knowledge or have reached a point where negotiations are at
9 an impasse. There are a few on there that are in
10 negotiation.

11 I know that as we have sent out notice sort of
12 proactively to people who might be in this wave of remand,
13 I got a number of inquiries, do I object, when do I object,
14 how do I object. So when you did the last order giving
15 people 30 days' notice, I started getting inquiries. I
16 will get more this time.

17 I would like them to have the opportunity for
18 plaintiffs' lawyers themselves to make their decisions
19 about remand as opposed to my making it for them.

20 THE COURT: Mm-hmm.

21 MR. GOLDSER: That's their purview. So the 30
22 days' notice is appropriate.

23 THE COURT: All right. Sounds good.

24 MS. VAN STEENBURGH: So cases for transfer under
25 28 U.S.C. 1404, there are very few, other than the Carey &

1 Danis cases. There are 436 of those cases, and I did
2 receive an e-mail from Mr. Carey, and he has agreed to
3 consent to the transfer of all the cases. We haven't done
4 anything in terms of preparing an order relative to that
5 consent yet because a couple of or a few of them with
6 respect to the deficient PFS cases also are forum non
7 conveniens cases.

8 We may end up doing those in two stages so that
9 we have consent with respect to the ones that have the
10 complete PFSs, and we will get that in progress, and when
11 we resolve the issue of the PFSs, we can tack on the rest
12 of them.

13 THE COURT: All right.

14 MS. VAN STEENBURGH: But we will provide the
15 Court with a proposed order. I actually solicit the
16 Court's view on this. One thing that might make it easier
17 for the Court is if we organize them in part by
18 jurisdiction where they will be transferred, if the Court
19 does decide to go ahead and transfer all of them, so the
20 Court has some idea as to how many will be sent to certain
21 jurisdictions and can alert anyone if there is going to be
22 an inundation of cases all at one time.

23 THE COURT: All right.

24 MS. VAN STEENBURGH: So we will try to do that.
25 Other than that, I think that we are really on track to

1 finish this MDL, and we're still shooting for June to try
2 to get everything done, and so far we're on track as far as
3 I can tell.

4 So I have nothing more for this agenda. I don't
5 know if Mr. Goldser does or not.

6 MR. GOLDSER: I do not, Your Honor.

7 THE COURT: All right. Very well. Let's set
8 another date just to have another date on the calendar. If
9 folks want to change it, that is certainly fine, but I
10 think it's helpful to keep us on track.

11 What about the week after Memorial Day? Is that
12 a busy week or an okay week? Busy?

13 MS. VAN STEENBURGH: I have a graduating senior.
14 It's going to be a busy week for me.

15 THE COURT: That's fine. I think I will be here
16 on Monday the 20th. The rest of the week it doesn't look
17 like I will be here. The previous week I will be here
18 Monday through Wednesday. So 13th through 15th or the 20th
19 are dates.

20 MR. GOLDSER: I think we should give ourselves
21 adequate time to work through the continuing settlement
22 process. I don't see any reason to hurry this next
23 conference.

24 THE COURT: We can move it out into the first
25 week in June. That is a little up in the air right now for

1 me but --

2 MS. VAN STEENBURGH: The only reason to maybe
3 have it on the 20th is if the Court wants to use that time
4 for the motion on the deficient PFSS, I would rather do
5 that sooner rather than later.

6 THE COURT: That's true.

7 MS. VAN STEENBURGH: I would prefer the earlier
8 date, and it could be very short obviously.

9 THE COURT: We can do the same time, 12:30 on
10 Monday the 20th.

11 Okay with you, Mr. Goldser?

12 MR. GOLDSER: That works for me, Your Honor.

13 THE COURT: All right. Good. Let's put it on
14 the calendar, and if in the briefing of this motion there
15 is any delays, we can put it off. I'm fine with doing
16 that, but I think it is a good suggestion to get it on as
17 quickly as we can.

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

19 THE COURT: All right. Anything else for today?

20 MS. VAN STEENBURGH: No.

21 MR. GOLDSER: I don't know if anyone on the phone
22 has any business for the Court.

23 THE COURT: Anyone on the phone?

24 Mr. Fitzgerald, do you have anything? I don't
25 think we have him. Anyone else? Ms. Flaherty?

1 MS. FLAHERTY: No. Thank you, Your Honor. I'm
2 good.

3 THE COURT: Okay. Mr. Essig, do you have
4 anything?

5 MR. ESSIG: No. Thank you, Your Honor.

6 THE COURT: Anyone else who is left on the phone?

7 MR. SOFFEY: No, nothing.

8 MR. BROSS: No, Your Honor. Thank you.

9 THE COURT: All right. With that, we will be in
10 recess, and thank you, everyone. We will file the second
11 amended or, yeah, second amended pretrial order 3 this
12 afternoon and look forward to receiving the rest of the
13 materials.

14 MR. GOLDSER: Thank you, Your Honor.

15 THE COURT: We will be in recess.

16 THE CLERK: All rise.

17 * * *

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

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