

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Minneapolis, Minnesota
May 20, 2013
12:44 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.**

For the Defendants: **TRACY J. VAN STEENBURGH, ESQ.**
JOHN WINTER, ESQ.

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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12:44 P.M.

(In open court.)

THE COURT: You may be seated. Good afternoon. This is multi district litigation case number 08-1943, In Re: Levaquin Products Liability Litigation. We have a status conference today.

Counsel, would you note your appearances?

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

THE COURT: Mr. Goldser.

MR. SULLIVAN: Good afternoon, Your Honor. Corey Sullivan for plaintiffs.

THE COURT: Mr. Sullivan, good afternoon.

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

THE COURT: Ms. Van Steenburgh.

MR. WINTER: Good afternoon, Your Honor. John Winter for defendants.

THE COURT: Mr. Winter, good afternoon.

Who do we have on the phone today?

MR. FITZGERALD: Good afternoon, Your Honor. It's Kevin Fitzgerald for the plaintiffs. I think I may be the only one.

THE COURT: All right. Anyone else besides

1 Mr. Fitzgerald on the telephone? All right. You've got
2 the phone to yourself, Mr. Fitzgerald.

3 MR. FITZGERALD: Thank you.

4 THE COURT: We have a number of matters on the
5 agenda today.

6 Mr. Goldser or Ms. Van Steenburgh?

7 MS. VAN STEENBURGH: It's Ms. Van Steenburgh
8 today, Your Honor.

9 THE COURT: All right.

10 MS. VAN STEENBURGH: At least to start, and I'm
11 going to start with the federal and state case count, but
12 to help you make sense of all the different numbers, I'm
13 going to include some other items, the number in the
14 settlement, forum non conveniens.

15 We can talk about some of those other categories
16 more specifically, but just to give you an idea of the
17 numbers, I thought it would help to know which categories
18 they go in. We have a total of 1,970 cases pending in the
19 MDL. Total plaintiffs are 1892. So we have settled 1182
20 cases. We have dismissed 92.

21 There are offers or negotiations going on for
22 about 153 cases, and to round out that number, there are
23 470 cases that are subject to forum non conveniens and
24 about 145 that are subject to remand. Now, within those
25 categories, and we can talk a little bit more specifically.

1 For example, the remand number is a little less because
2 about 45 of those cases are in the pending offer, so, you
3 know, the remand will be about 100.

4 The forum non conveniens cases, the bulk of
5 those, like 430 some, are the Carey & Danis firm, and there
6 has been a consent with respect to the transfer of those,
7 and depending on the outcome of the motion that we have
8 today, that number will go up or down a little bit, but we
9 have prepared a breakdown for the Court so that the Court
10 knows where all those cases would be transferred.

11 We have also done the same thing for the remands
12 so that the Court knows which jurisdictions those will go
13 to. So I won't go into all the detail now, but as the
14 Court may be interested, we have some more information as
15 to when, where and how, but that's the status of the
16 federal court cases. So you will be seeing a lot of
17 dismissals coming up as we get most of these cases that
18 have been settled ready for being dismissed.

19 With respect to the federal and state
20 coordination in New Jersey, there are 2,126 cases filed,
21 only of which there are 1228 that are active. 898 of them
22 have been settled or dismissed outright. So they're making
23 progress in New Jersey as well, but a lot of those are
24 still sitting, waiting for dismissal.

25 When I talked to Mr. Essig earlier, and he's not

1 on the phone today, I don't know exactly what is going on
2 in other states.

3 Mr. Winter?

4 MR. WINTER: I think there are four cases pending
5 in different jurisdictions.

6 THE COURT: None of them have a trial date right
7 now?

8 MR. WINTER: No, Your Honor.

9 THE COURT: All right.

10 MS. VAN STEENBURGH: So I think it's a very small
11 number. So that is what is going on in those states, and
12 maybe while we are -- we could jump to the fourth item
13 while we're talking about New Jersey. Do you know what the
14 status, either John or Ron, could talk about the status of
15 the amended PTO 3?

16 MR. WINTER: Your Honor, there was supposed to be
17 a conference I believe last Friday regarding the PTO 3
18 analogous order in New Jersey. Judge Higbee has
19 rescheduled that conference for one day this week.

20 I understand Judge Higbee and the lawyers in New
21 Jersey have met to go over questions the judge has about
22 the procedures in the order, and my understanding is the
23 lawyers were going to report to Judge Higbee the answers to
24 her questions.

25 THE COURT: All right.

1 MR. GOLDSER: And the one item I heard, Your
2 Honor, was actually several weeks ago. There were several
3 minor language issues that didn't strike me as
4 overwhelmingly important. There was one slightly more
5 substantive issue that Judge Higbee was asking that there
6 be an auditor to review the case costs.

7 I'm not sure that we were given much of an
8 alternative to that, so it sounds like an auditor may well
9 happen. It troubles me that we are going to spend limited
10 resources dividing up a very small sum of money, and then
11 we have to have an auditor, but Judge Higbee is apparently
12 wanting to have an auditor, and if that's what she wants,
13 we will provide that.

14 THE COURT: Do you know whether there are limits
15 on the amount that the auditor can charge?

16 MR. GOLDSER: I don't know that there will be in
17 the order. I certainly understand, and I expect to have a
18 conversation about that to make sure that we don't use up
19 all the money dealing with audit services. We certainly
20 don't want to do that.

21 THE COURT: Well, in any conference, you can
22 express my concern that if -- I don't have any particular
23 objection to an auditor. That's always I think a good
24 idea, but I'm also familiar with the kinds of costs that
25 auditors can add to a process fairly quickly.

1 MR. GOLDSER: Indeed, and when we had revised the
2 PTO 3 for Your Honor, we agreed on a six-person committee,
3 six-person plaintiffs' lawyers, three federal, three New
4 Jersey, with ultimate decision-making authority by Your
5 Honor and Judge Higbee, thus sort of obviating an auditor,
6 but it appears that she would prefer to have an auditor in
7 between, at least at this point.

8 That's one of the issues, and we had, last I knew
9 we had amended the order to provide for an auditor. I'm
10 not clear what additional issues, if any, there are at this
11 point in time.

12 THE COURT: The hearing is now set for sometime
13 this week?

14 MR. WINTER: I believe that's true, Your Honor.

15 THE COURT: All right. Okay.

16 MS. VAN STEENBURGH: Your Honor, I would like to
17 go back to number three, which is the status of settlement,
18 just for a second to let you know that we have not only
19 settled a lot of cases, but we are in the process of
20 settling more and also to let you know that Magistrate
21 Judge Boylan is involved.

22 We have at least one set of cases where the
23 plaintiff's attorney has contacted him, and so he is
24 working as an administrator to assist in that regard. So I
25 think that's moving along quite well.

1 THE COURT: Good.

2 MS. VAN STEENBURGH: Most of the large inventory,
3 save for the one Carey & Danis firm, have been resolved. I
4 was going to say, and we are still reviewing some cases as
5 they come in, but we're pretty much at the end in terms of
6 people needed to get their cases to us to review, and we
7 aren't going to be accepting very many more.

8 If we get one or two, fine, but otherwise, they
9 they're going to get remanded because it is getting to be a
10 long and involved process now.

11 MR. GOLDSER: For your information, Judge Boylan
12 called me last week, wondering what the status of the
13 settlement process was. We had a lovely conversation. I
14 had asked him whether he wanted to review settlement
15 allocations one by one or whether he wanted them in larger
16 groups.

17 He preferred the larger groups so that he could
18 be consistent in approving allocations. Some of that will
19 be driven by time issues. I know there is one firm that
20 has got about 15 cases that they would like to get their
21 allocations done and the money distributed. At least in
22 the short run, he has asked that that firm wait to get more
23 in so that, again, he has a larger sample size.

24 Ultimately, depends on the time, and we will see
25 where that goes, but among other things, he is willing to

1 do that, and that's the program that he has requested
2 occur.

3 THE COURT: All right. Good.

4 MS. VAN STEENBURGH: I think that takes us down
5 to the fifth item, which is the motion to dismiss the 23
6 cases relative to the Carey & Danis. Should I go ahead?

7 THE COURT: Go ahead.

8 MS. VAN STEENBURGH: All right. As the Court
9 recalls, last time we were here we talked about two sets of
10 cases. One that involved no submission of the deficient
11 PFSs at all. So we were able to resolve that set of 23
12 with the Carey & Danis firm, and there was a consent to
13 submit those, and I think that order has been submitted to
14 the Court.

15 Then there is an additional 23 cases where there
16 was information that was provided to us but the PFS
17 remained deficient, and there are 23 cases now before the
18 Court where we would ask that the Court dismiss those on
19 the basis that two deficiency letters have been sent. A
20 PFS came to us that was completely deficient and that those
21 should be dismissed.

22 And just as an example, Your Honor --

23 THE COURT: You said 23, correct?

24 MS. VAN STEENBURGH: 23, yes. And that should be
25 attached -- I'm not sure what -- it's Exhibit A to our

1 motion that we brought for today, and we did put notes on
2 there so the Court knows very well what's the situation
3 with the PFS.

4 And just so I can highlight that for the Court,
5 15 of those cases there were no medical records at all that
6 were provided, and it seems to me that the plaintiffs, and
7 as you well know, Your Honor, no medical records or in six
8 of the cases, there were less than 20 pages of medical
9 records.

10 The Court has been through three trials with us.
11 I mean, the medical records are quite critical, and they
12 really do provide all of the specifics with respect to the
13 case, and that there are no medical records, when in fact
14 one of the document requests asked for medical records,
15 tells us that these are wholly deficient.

16 We can't tell anything from these PFSs at all,
17 and they have had several opportunities to provide that
18 information to us. Five of the PFSs that we have on our
19 list do not have a date when Levaquin was ingested. How we
20 can try to figure out what the warning is that's operative
21 here, when we know what has happened with that patient,
22 whether there have been other instances where they have
23 taken Levaquin, we just need to have that information, and
24 not even to put that in the PFS, it's inexcusable.

25 That's what this case is all about is when

1 someone took Levaquin. With respect to the other ones, we
2 have two of them. One has 46 pages and the other 69 pages.
3 Again, those medical records, we need more than that
4 information if we're going to analyze and move forward with
5 these cases.

6 The last thing I will say, Your Honor, is the
7 Carey & Danis firm has the majority of cases, and they have
8 submitted PFSs in the past with all of this information, so
9 they know exactly how this works. They know what they're
10 supposed to do. They know what the requirements were for
11 the PFS and the document requests.

12 And so in these 23 cases, despite two requests
13 and deficiency letters, we find that the PFSs are just
14 almost unintelligible in terms of evaluation, and we would
15 ask that the Court dismiss these cases.

16 THE COURT: Is the proposed dismissal with or
17 without prejudice?

18 MS. VAN STEENBURGH: Without prejudice.

19 THE COURT: Mr. Sullivan?

20 MR. SULLIVAN: Thank you, Your Honor. The first
21 note I would like to make is a procedural one, and this is
22 one that we raised with defense counsel via e-mail. They
23 only provided us twelve days prior to today's hearing to
24 respond to their motion, which is a violation of the local
25 rules.

1 Moving on to substantive issues with their
2 motion, in their motion, they state that the purpose of
3 fact sheets is to allow the defense counsel, defendants, to
4 begin an evaluation of the cases. However, in all but a
5 very few instances, as Ms. Van Steenburgh pointed out, they
6 don't assert that our answers within the fact sheets are
7 deficient.

8 The vast majority of our deficiencies, as they
9 have been stated to us via the motion, are for inadequate
10 document production. However, some of them, as
11 Ms. Van Steenburgh noted, have substantial number of
12 records turned over. And to the extent that the defense
13 counsel believe our document production has been deficient,
14 we give them authorization to order the records that they
15 would like, and in this case, documentation of injury is
16 fairly easy.

17 You simply need a proof of injury, course of
18 treatment and proof of ingestion, and through our answers,
19 we have given defendants all the relevant healthcare
20 providers. So because we have turned over information
21 relevant to an evaluation of the cases, as they state is
22 the purpose of the fact sheet in their motion, and we've
23 given them authorization to shore up the gaps that they
24 perceive to be in our document production, we feel they
25 should not be dismissed.

1 And I do recognize that there may be a handful of
2 situations where the answers within the interrogatory
3 responses are not sufficient. We can deal with those on a
4 case-by-case basis with defense counsel, if they would
5 contact us and go through those issues.

6 THE COURT: So these are all bona fide cases?

7 MR. SULLIVAN: They're cases where there is a
8 Levaquin injury.

9 THE COURT: Are there any of these cases that you
10 feel are just, you don't have the records and the records
11 don't support moving forward, or haven't you reached that
12 point yet?

13 MR. SULLIVAN: I think we can sit down with
14 defense counsel and go through the cases one by one. Yeah,
15 we could reach an agreement on a substantial number of
16 them.

17 THE COURT: How would dismissal now without
18 prejudice affect you?

19 MR. SULLIVAN: Well, it would force us to re-file
20 the cases that we felt were worth moving towards trial
21 with.

22 THE COURT: All right. Thank you.

23 MR. SULLIVAN: Thank you.

24 THE COURT: Ms. Van Steenburgh?

25 MS. VAN STEENBURGH: Just a couple of comments,

1 Your Honor. I did contact Mr. Carey's office, when we knew
2 that the status conference was coming up, to talk about a
3 briefing schedule and never heard from them. And last
4 Friday, I sent an e-mail to Mr. Carey and Mr. Sullivan
5 saying, are you going to put in a response, and I got an
6 e-mail from Mr. Carey saying, well, you didn't follow the
7 local rules, but besides that, we're not going to put in a
8 response. We are just going to show up. So I think that
9 is an argument without much substance.

10 The other thing I was going to say is, this is
11 their case. The fact that they give us an authorization to
12 go get the medical records, the PFS is in lieu of
13 interrogatories. The document request is in lieu of
14 documents. This is their case.

15 If they're going to try to prove their case up on
16 a two-page medical document, it's not our burden to go out
17 and prove up their case for them. They were supposed to
18 provide us with the information, and to say here, you can
19 have an authorization and go at it and figure out whether
20 we have a case or not doesn't seem like it's appropriate.

21 Look, we have gone through a lot of the Carey &
22 Danis cases. These are the ones where there just is not
23 enough support to even be able to look at them, not even
24 know what is going on with Levaquin in terms of ingestion.
25 So we think all of these should be subject to dismissal.

1 THE COURT: All right. Anything else,
2 Mr. Sullivan?

3 MR. SULLIVAN: No, Your Honor.

4 THE COURT: Mr. Goldser, do you have anything?

5 MR. GOLDSER: No, Your Honor.

6 THE COURT: Mr. Winter?

7 MR. WINTER: No, Your Honor.

8 THE COURT: Mr. Fitzgerald, anything you would
9 like to say?

10 MR. FITZGERALD: No, not from me, Your Honor.
11 Thank you.

12 THE COURT: All right. Well, I'll consider this
13 matter, and it seems to me probably the best conclusion
14 here is to dismiss the cases without prejudice. There may
15 be a few of them that have some merit and some value, and
16 they can be re-filed, but I think we have dealt with this
17 for quite a long time now, and it's probably best to move
18 along.

19 Mr. Goldser?

20 MR. GOLDSER: I would only ask for Mr. Sullivan's
21 sake that you enter an order of dismissal without
22 prejudice, stay it for 30 days to give them the opportunity
23 to re-file so that there are no questions of statutes of
24 limitations for any cases that get re-filed.

25 THE COURT: All right. I'll consider that.

1 MR. GOLDSER: Thank you.

2 THE COURT: All right. What next,
3 Ms. Van Steenburgh?

4 MS. VAN STEENBURGH: Just a couple more things,
5 Your Honor. I just thought it would be helpful to you. On
6 the cases for remand, we haven't provided the Court with
7 the full remand order yet because we have a few more that
8 we are adding. We thought it would be better to have all
9 of them on there at once.

10 Just for your purposes, the ones that we have on
11 our list now, it looks like the largest number of cases for
12 remand, and the numbers aren't that big, California would
13 be about nine, and Illinois has six. Otherwise, it's
14 one's, two's and three's in different jurisdictions for
15 remand. So it's not a huge concentration in any one
16 jurisdiction for purposes of remand.

17 So once we get to the final where we know whether
18 some of these people are going to accept offers or not, we
19 will either add them to the remand list or not, and then we
20 will provide the Court with a suggestion of remand with the
21 list of cases.

22 THE COURT: I think it would be helpful to do it
23 all at once.

24 MS. VAN STEENBURGH: That's what I figured.

25 THE COURT: That's a good idea.

1 MS. VAN STEENBURGH: Okay. There are about 50
2 cases out there, though, kind of in the ether, and
3 Mr. Goldser has said if we give him the names of the firms,
4 he will try to track those down as well. So either those
5 will go on remand or settlement.

6 With respect to the forum non cases, the majority
7 of those are the Carey & Danis cases, and the largest
8 concentration are in Illinois, 74 cases; and Missouri, 61
9 cases; followed by Texas, 33 cases; California, 27;
10 New York, 26; and Mississippi, 26. Otherwise, most of them
11 are in the, you know, 10, 12, at the most, range. So those
12 are the largest concentrations.

13 I don't have them broken down by Eastern
14 District, Western or that. We can actually look into that
15 for the Court, but at least to give you an idea as to where
16 the largest concentration of those are going to go back.

17 THE COURT: All right.

18 MS. VAN STEENBURGH: So once the Court has
19 decided this motion on the PFSSs, I guess we can take those
20 out of the list, and then we will submit to the Court a
21 stipulation for dismissal -- I mean a stipulation for
22 transfer, and we'll append an attachment with all of the
23 different cases and where they should be transferred so
24 that the Court has something to go by.

25 I think we will probably do it in some kind of

1 spread sheet so the Court knows where each case originated
2 and where it should come from.

3 THE COURT: That would be helpful.

4 MR. GOLDSER: I do have a concern about the forum
5 non transfers. The forum non transfer is something that
6 this Court has the power to make a determination on. It's
7 not automatic. Remand is something different. We have
8 been giving 30 days' notice for objections to forum non in
9 the event that somebody would like to argue that the case
10 should stay here or that the case should go to some
11 jurisdiction other than the plaintiff's home residence or
12 something like that.

13 And because of the nature of a 1404 and a motion
14 with this Court's ability to move cases around like that, I
15 would like to have that 30-day notice. We have been giving
16 notice to the lawyers individually. I don't know that
17 there have been any objections yet, but you never know.

18 MS. VAN STEENBURGH: Might I say, Your Honor,
19 there is a distinction. There are 432 cases that belong to
20 the Carey & Danis firm. So those are under consent to
21 stipulation. So it would be around 50 cases, and I don't
22 have any objection to, you know, the 30-day stay if
23 somebody wants to object to that. We haven't seen anything
24 come through.

25 MR. GOLDSER: I'm not aware of any.

1 THE COURT: Right. I think it would be helpful
2 to have that in there.

3 MS. VAN STEENBURGH: With the Carey & Danis cases
4 we will do that as a separate stipulation and order as
5 compared to the other ones.

6 MR. GOLDSER: I'm glad there would be a
7 formalized stipulation because my conversations with
8 Mr. Sullivan, it wasn't entirely clear to me that there was
9 a stipulation, but I'm sure that Ms. Van Steenburgh and
10 Mr. Sullivan can work that out.

11 MS. VAN STEENBURGH: I have an e-mail from
12 Mr. Carey I think would be useful in that regard.

13 MR. GOLDSER: I'm not getting in the middle of
14 this one.

15 MS. VAN STEENBURGH: Other than that, Your Honor,
16 I have nothing further on the agenda, and I don't know if
17 there is anything else that --

18 THE COURT: Mr. Winter, anything?

19 MR. WINTER: No, Your Honor.

20 THE COURT: Mr. Goldser?

21 MR. GOLDSER: I have nothing else, Your Honor.

22 THE COURT: All right. We are still looking at
23 within the next month or two or three?

24 MS. VAN STEENBURGH: Yeah. It is taking a little
25 bit longer just because there are so many cases. I would

1 have loved to have said the end of June, but I think it's
2 more going to be in the July time frame.

3 THE COURT: All right. Should we set another
4 date?

5 MS. VAN STEENBURGH: I think that would be
6 helpful. It helps keep everybody moving along.

7 THE COURT: Let's see. What about the week of
8 June 17th? I'll be here with a trial going on.

9 MS. VAN STEENBURGH: That will be fine, Your
10 Honor.

11 MR. GOLDSER: I haven't figured out how to move
12 around in this calendar very well. That looks fine, Your
13 Honor.

14 THE COURT: Wednesday, the 19th, same time,
15 12:30?

16 MS. VAN STEENBURGH: Sure.

17 THE COURT: All right. Let's set it for then.
18 All right.

19 Anything else? If not, thank you for gathering
20 today and good report. I will take the motion to dismiss
21 for the deficient PFSs under advisement, and we will issue
22 a written order shortly on that.

23 Thank you.

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

25 MR. GOLDSER: Thank you, Your Honor.

1 MR. WINTER: Thank you.

2 MR. SULLIVAN: Thank you, Your Honor.

3 THE CLERK: All rise.

4 * * *

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

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

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