

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re: Levaquin Products  
Liability Litigation,

File No. 08-md-1943  
(JRT/AJB)

Minneapolis, Minnesota  
July 30, 2013  
11:15 A.M.

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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: **BILL BROSS, ESQ.**  
**DOUGLAS SOFFEY, ESQ.**  
**KEVIN FITZGERALD, ESQ.**  
**DOUGLAS WHIPPLE, ESQ.**  
**PAIGE BOLDT, ESQ.**

For the Defendants: **JOHN WINTER, ESQ.**

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Proceedings recorded by mechanical stenography;  
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KRISTINE MOUSSEAU, CRR-RPR  
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11:15 A.M.

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**(In open court.)**

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THE COURT: You may be seated. Good morning,

5

everyone. This is multi-district litigation number

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08-1943, In Re: Levaquin Products Liability Litigation.

7

Counsel, note appearances today. First those who

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are present?

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MR. GOLDSER: Good morning, Your Honor. Ron

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Goldser for plaintiffs.

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MR. SULLIVAN: Good morning, Your Honor. Corey

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Sullivan for plaintiffs.

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THE COURT: Good morning.

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MR. WINTER: Good morning, Your Honor. John

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Winter and Brenda Myrfield for defendants.

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THE COURT: Good morning to both of you.

17

Who do we have on the telephone today?

18

MR. SOFFEY: If I may, I think there is someone

19

else. I will jump in. My name is Douglas Soffey from the

20

law firm of Soffey & Soffey.

21

MR. FITZGERALD: Good afternoon, Your Honor.

22

This is Kevin Fitzgerald from Lewis Saul & Associates.

23

MR. BROSS: Good morning, Your Honor. This is

24

Bill Bross from Heninger Garrison Davis.

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MS. BOLDT: Good morning, Your Honor. This is

1 Paige Boldt from Watts Guerra.

2 THE COURT: All right. Anybody else? Okay.  
3 Let's proceed with the agenda this morning at this status  
4 conference.

5 Mr. Winter?

6 MR. WINTER: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. WINTER: I'm substituting for  
9 Ms. Van Steenburgh today, who sends her regards. If you  
10 would like, Your Honor, let me quickly go through some of  
11 the basic agenda items. I think there are 1850 cases still  
12 pending here in the MDL.

13 Approximately 1,000 of those cases have been  
14 resolved or agreed to be dismissed, and the process of  
15 submitting the agreed upon dismissals with prejudice is  
16 ongoing. The parties have worked out the forms, and we  
17 hope to be submitting stipulations for individual cases and  
18 in the master filing within the next two weeks. If we can  
19 do it sooner, we will.

20 What that leaves, Your Honor, is a few groups of  
21 cases. There are, as best the parties can determine,  
22 approximately 260 cases which will end up being in a pro se  
23 category, in terms of what we understand, motions to  
24 withdraw to be filed and with motions that are already  
25 before you.

1           There are the group of 229 Carey & Danis cases  
2           which are on the agenda, which we will discuss in a few  
3           minutes, and then there are approximately 310 cases, Your  
4           Honor, which would fall into the buckets of either agreed  
5           upon remands or forum non conveniens cases, which I think  
6           ultimately all the parties will agree to in that regard.

7           With respect to that last number, Your Honor,  
8           there is still a group of those cases in which the parties  
9           are still discussing potential resolution, and both  
10          Mr. Goldser and Ms. Van Steenburgh have been following up  
11          with these firms to see what in fact they want to do before  
12          actual remand orders are entered.

13          In terms of other state litigation, nothing has  
14          changed. In the New Jersey litigation, Your Honor, at one  
15          point there were a little bit more than 2100 actions that  
16          were pending. Approximately 1,000 of those cases have been  
17          resolved and are in the process of being dismissed.

18          Judge Higbee did pick another bellwether case in  
19          New Jersey, but a trial in that matter has not been set at  
20          this point, Your Honor. So that is in rough numbers where  
21          the status is.

22          In terms of the status of settlement discussions,  
23          fully executed agreements have been signed by both parties  
24          with respect to all of the larger groups of plaintiffs  
25          cases, including the cases that Mr. Saul's firm is

1 responsible, with as well as the firms that Mr. Goldser and  
2 Mr. Zimmerman were responsible and their associated  
3 inventories.

4 I thought I could say when the checks would be  
5 delivered, but that's something in the next week or so that  
6 those two checks will be delivered. The New Jersey  
7 litigation, that matter has been put to bed, and all the  
8 CMO 3 issues have been taken care of to everyone's  
9 satisfaction. Judge Higbee has her process in place there,  
10 and that is moving forward.

11 As I said, there are still maybe 130 cases here  
12 where resolution discussions have not, you know, run their  
13 full course. There are approximately 40 cases where we  
14 know they have to be remanded. So then if I were to keep  
15 going down this agenda, Your Honor, until you have another  
16 question --

17 THE COURT: Okay.

18 MR. WINTER: -- with respect to the 229 cases  
19 from Carey & Danis that are agenda item 5, Mr. Sullivan and  
20 I had a conversation this morning, Your Honor, because we  
21 got two boxes today of purported fact sheets.

22 It appears that of the 229, 83 of those cases --  
23 and we just have to double-check our math respectively --  
24 83 of those cases, no fact sheet was provided, and once we  
25 confirm the names of those plaintiffs with Mr. Sullivan, we

1 intend to submit an agreed upon dismissal order for those  
2 cases by Friday.

3 With respect to the remaining I think 146 cases,  
4 Your Honor, we pointed out to Mr. Sullivan, just cursory  
5 looking through one box for an hour this morning, what we  
6 perceive to be significant deficiencies, and what we told  
7 Mr. Sullivan we would do is, by Friday of this week, we  
8 would send him a list of those cases with what we think the  
9 deficiencies are.

10 And just by way of example, Your Honor, when we  
11 were doing our review, many of the fact sheets don't have  
12 executed medical authorizations and virtually no  
13 substantive information. I mean, we do get Social Security  
14 number, date of birth, address, law firm address, but  
15 little substantive information and not executed  
16 authorizations, which is pretty substantial.

17 So we are going to give that list to Mr. Sullivan  
18 this Friday. I think he has agreed that one week hence, he  
19 will then tell us whether he wants to continue with what  
20 subpart of the 146 as viable cases or bona fide cases, to  
21 use Your Honor's term, and then within a week thereafter,  
22 supplement.

23 So what we would then do, Your Honor, if  
24 everything works right because everyone should know what we  
25 need to do in terms of fact sheets at this point, after we

1 run that course, takes two weeks, we would then propose to  
2 submit, with Mr. Sullivan's consent, obviously, whatever  
3 agreed upon dismissals exist for those remaining cases, and  
4 if we really have a dispute on the sufficiency of what has  
5 been agreed to be provided and provided, we're going to  
6 have to come back to you on that, but we're cautiously  
7 optimistic that we won't have to do that, Your Honor.

8 So --

9 THE COURT: All right. Good.

10 MR. WINTER: -- unless Your Honor has any further  
11 questions, I think we do need to talk about the pro se  
12 litigants, and I'll turn it over to Mr. Goldser at this  
13 point.

14 THE COURT: Yeah. Go ahead, Mr. Goldser.

15 MR. GOLDSER: Thank you, Your Honor. Just a  
16 couple of thoughts on what Mr. Winter said. It's not clear  
17 to me, and I would imagine Your Honor would be interested,  
18 after all of the remands are done and the forum non  
19 transfers are made how many cases will remain here, and I'm  
20 not sure that we know that yet, but I'm sure you're going  
21 to be interested in that.

22 It seems to me there is going to be a group of  
23 pro se cases that you have to address, which I will talk  
24 about in a second, and any cases that remain that would not  
25 be remanded because they originate in Minnesota or you

1 would otherwise have jurisdiction or somebody objects to  
2 the transfer, but I haven't seen that yet.

3 Do we know whether there are going to be any, any  
4 cases other than the pro ses that are going to stay here?

5 MR. WINTER: I belief, Your Honor, the answer  
6 would be other than the pro ses, no.

7 THE COURT: Okay.

8 MR. WINTER: We have not heard anyone who has  
9 responded to us say we are not consenting to a forum non  
10 conveniens transfer or a remand, and as best we understand,  
11 there is no Minnesota plaintiff left in this MDL unless it  
12 turns out one of the pro se litigants is in fact a  
13 Minnesota plaintiff.

14 MR. GOLDSER: So that would leave then only the  
15 pro ses. The other thing in terms of the remand, I know  
16 that there was circulated a proposed final remand order  
17 with a list of cases. I'm not sure whether that has been  
18 submitted to the Court and if not whether it should be and  
19 at what point in time we're going to submit that.

20 There is a list of cases attached to that. There  
21 is the provision that we have been working with that says  
22 there be 30 days' notice given to the firms in order to  
23 object to remand.

24 What's the status of that order?

25 MR. WINTER: I will fall on the sword, Your



1 Honor. We have agreed to that final remand order, and my  
2 expectation was we were supposed to have jointly submitted  
3 it to you before this morning, but we will have that  
4 rectified this afternoon.

5 MR. GOLDSER: Okay. And the draft that I have  
6 seen is acceptable to plaintiffs' side. There is a list.  
7 People are given 30 days' notice to object or respond. I  
8 know that I have been in touch with a couple of the firms  
9 in particular that still have ongoing settlement  
10 negotiations, and we are talking to all of them about their  
11 settlement status to see if we can get them settled rather  
12 than remanded.

13 THE COURT: What is the problem with the proposed  
14 pro se cases?

15 MR. GOLDSER: Well, I was just turning to that.  
16 I'm not sure that there is a problem. We had submitted to  
17 Your Honor a week or two ago, I think, a proposed order to  
18 show cause process. I think the plan from our perspective,  
19 subject to your approval, would be for you to issue that  
20 order, give the pro ses 30 days to respond by way of saying  
21 yes, I want to continue, or if they don't respond or say  
22 they don't want to continue, the cases would then be  
23 dismissed.

24 I would imagine, although I'm not thrilled about  
25 the prospect, that once you issue that order, it would be

1 incumbent upon plaintiffs' liaison counsel to serve that  
2 order by mail on the last known address of each of the pro  
3 se plaintiffs. Once there would be a response by one or  
4 more people, and we know already that there is one because  
5 there was a letter that was filed on ECF earlier this week  
6 or late last week, I would imagine that you would convene a  
7 status conference for those who want to come in person but  
8 more likely for those on the phone, and we could talk then  
9 about what to do with those cases.

10 Given that none of them remain here, I would  
11 imagine that all those cases would then be remanded as  
12 well. It would be certainly easier from the individual  
13 plaintiff's perspective to drive over to their local  
14 federal courthouse, meet with the court there and discuss  
15 what happens with their cases.

16 How many of those are going to continue forward,  
17 who knows. Usually it's a small number, so we probably  
18 have just a small handful. And we would end up with just a  
19 few left, and they would be one-on-one remands, and the  
20 remand court would address them like any other case.  
21 That's my view of where we go.

22 THE COURT: Why are these in the category of  
23 motions to withdraw? I'm more interested in why that is  
24 the preferred course of action in these cases.

25 MR. GOLDSER: Well, because we don't have

1 permission to dismiss them. When I'm dealing with some of  
2 my clients who were not satisfied with the result, we had a  
3 difference of opinion on whether that case should be  
4 prosecuted. More often than not, it was a different  
5 category. People just didn't respond to the proposed  
6 settlement status.

7 As I think you know, at least with our cases,  
8 there were some people that were proposed to receive a  
9 settlement award and a number of people who were proposed  
10 to receive no settlement award for a variety of reasons.  
11 And it doesn't surprise me that those who fell into the  
12 latter category, that is they weren't going to receive an  
13 award, simply said, okay, threw up their hands, closed  
14 their file and figured that everything would go away.

15 Unfortunately, it doesn't quite work that way.  
16 They did not give me permission to dismiss, so I couldn't  
17 take that step, and I was then forced to withdraw. The  
18 question becomes then how do you process that so that  
19 people know that their case is going to be dismissed in  
20 some fashion or another, and this is the way that we're  
21 proposing:

22 We would withdraw. These folks would be required  
23 to make an appearance to affirmatively say they want to go  
24 forward, and if they do with the Court as they have done  
25 with us, which is nothing, then their case would be

1 dismissed.

2 If you have a better way, I'm all ears.

3 THE COURT: Well, why should the Court grant the  
4 motion to withdraw first before going through that  
5 exercise?

6 MR. GOLDSER: Well, I'm not sure whether it's  
7 critical or not, but you know, if Joe Smith is somebody  
8 with whom I disagree in terms of their proposed settlement  
9 and the Court does not grant my motion to withdraw, then  
10 you issue an order to show cause to Joe Smith and his  
11 attorney, me.

12 I then have to appear and say, Judge, this is  
13 what I know. Joe Smith hasn't contacted me. I don't have  
14 permission to withdraw -- I'm sorry. I don't have  
15 permission to dismiss. Then where are we?

16 THE COURT: Well, you see the problem. If we  
17 have 260 pro se individuals all of whom want to continue  
18 their case, I mean, I'm not going to deal with them.

19 MR. GOLDSER: Sure. I understand.

20 THE COURT: So that runs counter to the whole  
21 process here that we've tried to accomplish in getting this  
22 done. I mean, there has got to be a middle ground  
23 someplace. I mean, if someone doesn't want to continue  
24 their lawsuit and doesn't respond within a certain period  
25 of time, regardless of whether they're represented by

1 counsel, it's a court order telling them that they have to  
2 personally respond.

3 MR. GOLDSER: I would be fine with that. I mean  
4 if the proposal is that we do essentially the same thing  
5 that we're talking about, albeit without a withdrawal order  
6 at that stage of the game, giving the client specific time  
7 to say I want to go forward, responding probably to me as  
8 opposed to the Court, or to their counsel, who would be  
9 then obligated to advise the Court, and if they don't  
10 respond their case would be dismissed for, say, failure to  
11 prosecute, I would imagine that would work.

12 THE COURT: It seems that might be better. That  
13 might give us -- I mean, if we're down to a certain small  
14 group who want to proceed and have an irreconcilable  
15 difference with their counsel, that's a different story,  
16 but you know, the potential of 260 of these individuals  
17 writing letters to the Court that are often lengthy and get  
18 into all kinds of details about how they don't like their  
19 counsel and they should have gotten, you know, a million  
20 dollars or whatever they think they should have gotten,  
21 then it becomes the Court's problem to deal with all these  
22 individuals.

23 MR. GOLDSER: Sure.

24 THE COURT: And so, I mean, it just seems -- it's  
25 not -- the process of allowing the withdrawals first is not

1 something that I want to go through at this stage.

2 MR. GOLDSER: That's fine, but it sounds like you  
3 are willing to issue an order to show cause requiring  
4 people to come forward.

5 THE COURT: Absolutely. I mean, if they're not  
6 responding, that is grounds for dismissal for failure to  
7 prosecute, and we could end those cases relatively quickly.

8 MR. GOLDSER: Okay. Would you like me to revise  
9 the order?

10 THE COURT: Why don't you do that, and we will  
11 get that process going.

12 MR. GOLDSER: Okay. I will do that.

13 THE COURT: All right.

14 MR. GOLDSER: The only other subject that occurs  
15 to me that we haven't talked about is the question of  
16 common costs, and I just thought I would bring you  
17 up-to-date on that. The committee has had one meeting. We  
18 are planning on having another conversation tomorrow.

19 We are in the process of exchanging itemization  
20 of the costs to review them. We have not yet chosen an  
21 auditor, although I expect that will happen in the  
22 immediate short term, and so the process is underway. We  
23 are working on it. I hope we have a resolution sooner  
24 rather than later, but I guess we will find out as we have  
25 more conversation.

1           That's wending its way to conclusion.

2           THE COURT: Okay. And the cases that may well be  
3           subject to remand, you mentioned 310 of them, but some  
4           there is still resolution being discussed, so that's not a  
5           clear number yet. Are those cases -- explain those cases a  
6           little bit to me.

7           Are those cases that there is simply no basis for  
8           settlement or explain them a little more for me.

9           MR. WINTER: Yes, Your Honor. Approximately 160  
10          of those cases are Mr. Sullivan's firm's cases where the  
11          plaintiff fact sheet has, you know, been vetted and fine  
12          and is actually on a list to be remanded.

13          There are approximately 40 cases where settlement  
14          discussions were had robustly, and you know, no meeting of  
15          the minds could occur. The rest of the cases, Your Honor,  
16          are cases where there have been discussions, and both sides  
17          have not yet said we can't have a meeting of the minds.

18          I mean, and I've rounded the numbers a little  
19          bit, Your Honor, but those basically are the buckets, and  
20          then you would have to look at what is left of the 146  
21          Carey cases that, you know, of the 229 to where, you know,  
22          wherever that ends up.

23          THE COURT: Okay. That process will begin,  
24          you're going to send a list by Friday of the deficiencies  
25          in those?

1 MR. WINTER: Yes, Your Honor, and that we should  
2 resolve relatively quickly as to how many of those would be  
3 either dismissed or added to the, you know, remand/forum  
4 non conveniens pile. We have sort of merged those  
5 together, but the result would basically be the same.

6 THE COURT: But some of them may still be settled  
7 that are part of the, at least in the overall bucket of  
8 possible remand cases?

9 MR. WINTER: I believe so, Your Honor. I mean,  
10 you know, sometimes people look at what the result is, and  
11 you know, realize they think they have more time and at  
12 some point they'll get to it. So I think in that 100, I'm  
13 not going to predict to you how many in fact, but we hope a  
14 sufficient number of them do agree.

15 THE COURT: Okay. All right. Anyone else have  
16 anything to raise?

17 Mr. Sullivan, anything?

18 MR. SULLIVAN: I don't have anything to add, Your  
19 Honor.

20 MR. WHIPPLE: Your Honor, this is Douglas  
21 Whipple. I apologize and beg your indulgence. I was under  
22 the impression this was to start at 12:30, and I logged on  
23 at 12:25, and apparently it was already in progress.

24 I only have one case which opposing counsel has  
25 indicated might be subject to a motion to transfer as



1       opposed to a remand, and the reason I logged on was to find  
2       out the status of that. Were motions to transfer already  
3       discussed before I came on the line?

4               THE COURT: Well, we went through all of the  
5       different cases. Which case is it? Is it one that we can  
6       check quickly or not?

7               MR. WHIPPLE: I should think so. My client is  
8       Fannin, F-a-n-n-i-n.

9               THE COURT: Just a moment, Mr. Soffey.

10              MR. SOFFEY: That was not I, Judge. I am Douglas  
11       Soffey. That was Douglas, I believe, Fannin.

12              THE COURT: Oh, I'm sorry. Okay.

13              MR. WHIPPLE: The client is Fannin. My name is  
14       Whipple.

15              MR. SOFFEY: Whipple. Okay.

16              THE WHIPPLE: The client is Fannin.

17              MR. WINTER: Your Honor, Fannin is one of the  
18       cases that -- Fannin is one of the cases that has run its  
19       course in terms of whether or not we're going to have a  
20       meeting of the minds, so that would be on one of the lists  
21       that we would provide to you with the final remand order.

22              MR. WHIPPLE: Is there a distinction between  
23       remand and motion to transfer, or is that just a formality?

24              MR. WINTER: This, Fannin was directly filed  
25       here, so it would be a forum non conveniens unless there is

1 a consent to transfer.

2 THE COURT: It would be required to be  
3 transferred because of its filing here.

4 MR. WHIPPLE: Right. My question then is, Will  
5 that happen by means of a motion being filed, and then we  
6 have an opportunity to respond?

7 THE COURT: It will be subject to a motion to  
8 transfer. That's, that would be required to be filed with  
9 the Court. So you would receive notice of that, and if you  
10 do wish to respond it, you would have an opportunity to do  
11 so.

12 MR. WHIPPLE: All right. And the timetable for  
13 that, how soon -- was that discussed when those motions  
14 would be filed?

15 THE COURT: When would that motion likely be  
16 filed, Mr. Winter?

17 MR. WINTER: We can begin filing those motions in  
18 August. I mean, July would not be -- we will file them in  
19 August.

20 THE COURT: So within the next month.

21 MR. WHIPPLE: Thank you. Thank you, Your Honor.  
22 That's all the questions I had.

23 THE COURT: Okay. Good.

24 Anyone else on the phone?

25 MR. SOFFEY: Your Honor, if the Court would

1       indulge me as well. I would like to know what list my  
2       client's case is on. My client's name is Bouse, B-o-u-s-e.  
3       Perhaps Mr. Winter can tell me.

4               MR. WINTER: Those are cases filed in New York,  
5       Judge. They were filed in New York, transferred here, so  
6       they're subject to remand.

7               THE COURT: Okay. And who was it that was  
8       speaking on the phone just for our record here?

9               MR. SOFFEY: I'm sorry, Judge. Douglas Soffey,  
10      S-o double f, as in Frank, e-y.

11              THE COURT: Okay. So they would be part of the  
12      upcoming motions to transfer that the Court would receive.

13              MR. SOFFEY: Very good, Judge.

14              Thank you, Mr. Winter.

15              MR. GOLDSER: Actually, Judge, on Mr. Soffey's  
16      cases, the proposed remand order back to the MDL panel  
17      includes Mr. Soffey's cases. That order is going to be  
18      submitted this afternoon, including Mr. Soffey's cases.

19              When that order is, if it's approved by the Court  
20      and is signed and filed, it has a provision to object to  
21      the remand back to the MDL panel within 30 days.

22              So, Mr. Soffey, you ought to be looking for that  
23      order to be filed in the immediate near future. Know that  
24      if you object to the remand back to the MDL panel and then  
25      back to the original court of filing, if you object to

1 that, you will have a 30-day period from the filing of  
2 Judge Tunheim's order to file your objection.

3 Otherwise, it will go back to the panel and back  
4 to the court where it was originally filed.

5 MR. SOFFEY: Very good. Thank you, Mr. Winter.

6 THE COURT: All right. Anyone else? Okay.  
7 Let's set up another time if we can. Maybe the end of  
8 August, last week of August okay?

9 MR. WINTER: Your Honor, may I suggest going into  
10 September because if we're going to do this process for the  
11 potential pro se litigants, we may need to build in a  
12 little bit of time so we have a much better idea of what  
13 we're dealing with.

14 So sometime in September probably would be  
15 better, Your Honor, if that's okay with Mr. Goldser?

16 MR. GOLDSER: Judge, I'm out of town the entire  
17 month of September, so September doesn't work real well.  
18 Either the last week of August or perhaps I can have  
19 somebody cover for me, if that's possible, during  
20 September, or it would be the first week in October.

21 THE COURT: Let's at least schedule it in the  
22 last week in August. We can move it if that makes sense.  
23 How about Wednesday, the 28th, 11:00 a.m.?

24 MR. GOLDSER: Works for me.

25 THE COURT: All right.

1 MR. WINTER: Very good, Your Honor.

2 THE COURT: Okay. Very good. All right.

3 Anything else we need to discuss today? If not, thank you,  
4 everyone, and we will be in recess.

5 MR. WHIPPLE: Thank you.

6 THE CLERK: All rise.

7 \* \* \*

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

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

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