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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS * Docket MDL 1657-L
LIABILITY LITIGATION *
 * September 6, 2007
 *
 * 9:00 a.m.
* * * * *

STATUS CONFERENCE BEFORE THE
HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Herman Herman Katz & Cotlar
 BY: RUSS M. HERMAN, ESQ.
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For the Defendant: Stone Pigman Walther Wittmann
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PROCEEDINGS

(September 6, 2007)

1
2
3 **THE DEPUTY CLERK:** All rise.

4 **THE COURT:** Be seated, please. Good morning, ladies
5 and gentlemen. Call the case, please.

6 **THE DEPUTY CLERK:** MDL 1657 in re: Vioxx.

7 **THE COURT:** Counsel make their appearance for the
8 record.

9 **MR. HERMAN:** May it please the Court, good morning,
10 Judge Fallon. Russ Herman for the designated plaintiffs
11 steering committee.

12 **MR. WITTMANN:** Good morning, Your Honor, Phillip
13 Wittmann for Merck.

14 **THE COURT:** Okay. We're here today for our monthly
15 status conference. I met with the liaison committee in advance
16 of the meeting to discuss any issues that they might anticipate
17 in the meeting here today. They gave me a joint report and I
18 added some things to it and made some comments to them. We'll
19 take it in order as given.

20 First, the state court trial settings. Anything
21 on that?

22 **MR. WITTMANN:** There have been some changes from
23 what's reported in the joint reports, Your Honor. The *Kozic*
24 case is still set for September 17th in Tampa, Florida. But
25 the *Appell/Arrigal* case that was set on October 9th in the

1 California Coordinated proceeding has been pushed back to
2 January, 2008. The *Donohoo* case that was set on
3 October 29th in Madison County, Illinois has been pushed back
4 to April 7th, 2008. The November 26th trial date for the
5 California Coordinated proceeding has been at this point
6 scrubbed.

7 Finally, the *Record* case, that's the name of
8 plaintiff, has been set for the December 2007/January 2008
9 docket in Palm Beach County, Florida.

10 **THE COURT:** Okay. Further proceedings in the Early
11 Trial Cases in this matter?

12 **MR. HERMAN:** We have nothing further to report, Your
13 Honor.

14 **THE COURT:** Okay. As I mentioned last time, both
15 this court, as well as the state courts, have been focusing on
16 the so-called MI cases, myocardial infarction cases. I think
17 another grouping of cases that need some attention are the
18 stroke cases. The stroke cases, it seems to me, forensically,
19 the plaintiffs can present a case in that type of disability,
20 that type of injury, but the science is more complicated and
21 more rigorous and the going from the standpoint of proof may be
22 more difficult.

23 Because of that, I'm thinking of allowing the
24 plaintiffs to select the cases this time rather than going back
25 and forth. I would look for about five or six cases to be

1 picked and then I'll meet with the parties and then we'll talk
2 about dates to try those cases.

3 I would hope that the cases would be bellwether
4 cases. That is to say there's no sense in trying the same type
5 of case six times or five times. It would be helpful to have a
6 mixture of injury cases, death cases, before label change,
7 after label change, things of that sort, groupings, so that we
8 can then see what the juries feel about that particular issue.
9 So I'll be talking to you more about it as we end up this year,
10 but that's my initial thinking on handling them.

11 Class actions, number 3?

12 **MR. HERMAN:** Yes, Your Honor. I regret to report
13 that this morning the New Jersey Supreme Court issued a
14 per curiam decision denying and reversing on the issue of class
15 cert, and we'll be looking at that decision closely for its
16 implications. It's been remanded.

17 **THE COURT:** Okay. I've received word of that. It's
18 a per curiam as I understand it.

19 **MR. HERMAN:** Yes, Your Honor.

20 **THE COURT:** Discovery directed to Merck is the fourth
21 item.

22 **MR. HERMAN:** Yes, Your Honor. Your Honor, we have a
23 date for Merck to produce documents that have been
24 de-privileged. On September 15th, 2007, Merck's
25 representatives and representatives of the PSC will be

1 discussing any Merck-requested extensions of that deadline. I
2 do understand that Merck has committed to provide at least 30
3 days in advance any de-privileged documents that relate to de
4 bene esse depositions.

5 As to the other issues under discussion, we
6 expect to meet with Merck's representatives on Tuesday and
7 report back to the Court regarding, number one, the process and
8 the progress they're making towards production, what they're
9 going to produce or can produce by the 15th, what priorities of
10 producing the rest, and any of the documents that Merck still
11 maintains it needs to proceed further on appeal.

12 **THE COURT:** The privilege issues in MDL cases present
13 really humongous challenges, so to speak. Some method has to
14 be devised for dealing with it. In this particular case, for
15 example, we've had some 30,000 documents which involved 500,000
16 pages in which privilege is claimed.

17 The court's really not staffed to deal with that
18 type of problem. I tried to deal with it. The Circuit
19 suggested that I take a different approach. The different
20 approach I picked was to pick a well known, well voiced person
21 in privilege, a professor, and he got into it.

22 The two things that I focused on in the opinion
23 as issued, hopefully, that may make some contribution to the
24 discussion is the importance of packaging and also the use of
25 sampling. Packaging in these particular situations, and I'm

1 talking primarily with the discovery, where long strings of
2 e-mails were sent out to ten departments, each of the
3 department heads gets CC'd on the e-mail.

4 When the documents are gathered, they're
5 gathered by the department. So each department presents to
6 their attorneys two, three or four boxes, but it's the same
7 e-mail. But this e-mail is strewn throughout 80, 90, 100 boxes
8 and it's very difficult to deal with.

9 So my thinking is that in the future packaging
10 ought to be focused on; and also instead of looking at every
11 single document, some representative group, some sampling
12 process has to be devised so that courts or outside masters can
13 look at a representative sample of material rather than go
14 through all of the documents so it can be done in a quicker way
15 and, hopefully, less expensive than incurred in this particular
16 matter.

17 I also think that the secret may well be in the
18 beginning of the litigation where the attorneys are brought
19 together and focus is made on the privilege log and the
20 contents of the privilege log, again, what must and should go
21 under the privilege log, and any supporting affidavits to
22 justify the particular privilege log is devised and tailored to
23 the documents of this particular case or that particular case.
24 Hopefully, that will help us in the future.

25 Discovery directed to Merck, we've done that.

1 Discovery directed to third parties.

2 **MR. HERMAN:** Yes, Your Honor. The PSC considered
3 that among predominate issues in this MDL was the pursuit
4 aggressively of the privilege issue; and, secondly, the
5 manufacturer's association, the chemical association form, the
6 association of drug manufacturers, chambers of commerce have
7 come in the last number of years with preemption in various
8 ways.

9 We certainly did not want decisions about
10 preemption of drug products made in a vacuum. Particularly
11 after the FDA unilaterally on its own motion decided that
12 certain matters would be preempted.

13 We have pursued by deposition notices issued to
14 Governor Haley Barbour, Governor Daniels, the National
15 Governors Association, the National Conference of State
16 Legislators, The American Legislative Exchange Council, and The
17 Council of State Governors various discovery motions and
18 requests. To date, all of those third parties and entities,
19 including the governors, have indicated that they know nothing
20 about any approval given to the FDA about interference with
21 state rights that would cause a preemption.

22 We intend to pursue that matter. We've asked
23 Merck to stipulate that the documents that have been filed in
24 the record are not only authentic, but they're admissible for
25 all purposes, with the hopes that perhaps some of the

1 depositions can be avoided.

2 It's our intention to make sure that the record
3 is complete for any appellate court, or indeed the U.S. Supreme
4 Court, on this issue of the FDA's unilateral action in this
5 field. It's a very, very serious matter. In the event that
6 Merck does not agree to stipulate to the admissibility of these
7 documents, then it's our intention to proceed immediately to
8 depose the parties.

9 **MR. WITTMANN:** We have the request for stipulation
10 under consideration, Your Honor, and we'll get back to
11 Mr. Herman shortly.

12 **THE COURT:** Okay. Deposition scheduling is the sixth
13 item.

14 **MR. HERMAN:** There has been an agreement reached on
15 the rescheduling of the de bene esse depositions for which we
16 appreciate Merck's consideration in moving the deposition dates
17 to November in order to accommodate preparation on behalf of
18 our folks. We understand that with respect to de-privileged
19 documents requested in connection with those depositions, we'll
20 receive those 30 days in advance of the depositions.

21 **THE COURT:** Plaintiff profile and Merck profile
22 forms.

23 **MR. WITTMANN:** Your Honor, with respect to the
24 plaintiff profile form, we're still having some difficulties in
25 that some plaintiff's counsel don't believe they have to submit

1 a complete PPF. To date, what we refer to as the basic
2 ingredients of the profile form, the principal core criteria
3 and that's all we're getting, and they think that satisfies
4 their obligation.

5 Providing the core criteria triggers Merck's
6 obligation to furnish the Merck profile form, but it doesn't
7 relieve the plaintiff from providing the rest of the data
8 called for by the plaintiff's profile form.

9 We're going to submit to the PSC in the next
10 week or so a proposal to amend Pretrial Order 18C to make that
11 clear as to what's required, what triggers the Merck profile
12 form, and what obligations remain on the plaintiff's orders to
13 complete a profile form for their client. So, hopefully, that
14 will help clear up some of that.

15 **THE COURT:** Let's work on that. The whole purpose of
16 the profile form, both from Merck and from the plaintiffs, is
17 to streamline discovery so that we don't have long strings of
18 interrogatories followed by motions to produce and things of
19 that nature.

20 In a case where you're dealing with thousands
21 and thousands and hundreds of thousands of claims, you have to
22 look for short circuits, and this is a way, the profile form.
23 But it only works if the parties give the information that's
24 requested on the profile form. So instead of having long
25 strings of interrogatories, we have profile forms. But they

1 need to be filled out by both sides to make this matter work.

2 So I understand the parties will get together
3 and give me a draft of their suggestions as to how the pretrial
4 order dealing with that can be sharpened a bit.

5 **MR. HERMAN:** Your Honor, there's another concomitant
6 issue. To make reference to the Oldfather law firm of
7 Louisville, Kentucky's letter to Ms. Wimberly of Stone Pigman
8 dated August 31st, 2007. In connection with the material that
9 Phil Wittmann will send us for review, Mr. Seeger and
10 Mr. Birchfield and I will review that material on Monday and
11 get immediately back to Mr. Wittmann and to the Court as to the
12 sequence.

13 In other words, the core material being provided
14 by plaintiffs and response by Merck with its fact sheet, the
15 completion then of a plaintiff fact sheet, if it hasn't been
16 completed; and then some special circumstances in which folks
17 have alleged permanent continuing disability and/or loss of
18 wages or income, how those authorizations will be handled.

19 So if we can get the material from Mr. Wittmann
20 by Monday, we'll consider it and act on it immediately and that
21 should help to resolve these issues.

22 **THE COURT:** Okay. Anything on the state/federal
23 court coordination, state liaison committee?

24 **MS. BARRIOS:** Thank you, Your Honor. Dawn Barrios
25 for the state liaison committee. We continue, Your Honor, to

1 work very closely with the PSC on many issues in the Vioxx
2 litigation. Particularly on coordinating the de bene esse
3 depositions and the remand issues.

4 On behalf of the plaintiffs in the *Flippin* case,
5 as well as the state liaison committee, we express our
6 appreciation to the Court for the manner in which you so
7 quickly acted on my request at the last status conference.
8 Mr. Tommy Jacks from Texas is here to argue the *Flippin* motion
9 today, if that is Your Honor's wish.

10 I noticed, Your Honor, in the joint report
11 issued by the parties yesterday there's a notation that the PSC
12 will complete its trial package by the end of this month. That
13 to me was most joyous news, as I'm sure it is to many
14 plaintiffs attorneys across the country who have remand orders
15 pending.

16 We ask, Your Honor, that in light of the fact
17 that the PSC is going to complete its trial package this month,
18 that you begin to work with us in establishing a procedure to
19 look at each remand case. You had indicated at one time you
20 would do them in waves, perhaps by various issues, perhaps by
21 states.

22 We stand ready, willing, and able to reconfigure
23 the CDs that we produce to you in any manner that is most
24 amenable to Your Honor so that you can address the issue in
25 waves or in large groups so you don't have to rule on every

1 case.

2 **THE COURT:** That's what I'll do. After the package
3 is prepared, I'd like to meet with you in chambers and deal
4 with how we go about it. Because that's the two areas that I'm
5 going to focus on in the immediate future, the motions to
6 remand and the doctors' motions to dismiss.

7 I have a number of doctors' motions, about 15 so
8 far, and maybe twice or three times that, that I expect from
9 states. The doctors take the position that they have been sued
10 prematurely. First, that if a suit is anticipated that the
11 claim has to be presented in some administrative format. Then,
12 depending upon the administrative body's opinion, then suit can
13 be filed or cannot be filed, depending upon what it is. I've
14 got to focus on those.

15 So that issue and the motions to remand are the
16 ones that I'm dealing with next. I'll be meeting with you
17 within a month to discuss procedures for it.

18 **MS. BARRIOS:** Thank you, Your Honor. The doctors
19 issue bleeds over into the remand. Because there's many remand
20 motions that doctors have filed because they want the case
21 remanded. They have to keep reporting it with their insurance
22 carrier.

23 **THE COURT:** Right. Well, that's both remand with the
24 doctors, as well as dismissal with the doctors.

25 **MS. BARRIOS:** Yes, Your Honor.

1 **THE COURT:** Some of the doctors really don't want to
2 be remanded, they simply want to be dismissed. They say that
3 there's no claim against them because no suit can be filed
4 against them until the administrative procedure has taken
5 place.

6 But there are some doctors where both the
7 pharmacy and doctors have been sued and they've been sued
8 properly, and those matters have to be focused on.

9 **MS. BARRIOS:** Yes, Your Honor. Again, I'll give your
10 law clerk the CDs this month.

11 **THE COURT:** Okay.

12 **MR. HERMAN:** May it please the Court, I've spoken
13 this morning with Ms. Barrios. I also had the opportunity to
14 speak with Mr. Jacks, who's here in person. He's a
15 distinguished counselor from Texas.

16 I've explained the position that we've
17 undertaken, the PSC's primary responsibility in addition to
18 discovery is to prepare a trial package so that any lawyer in
19 the country can economically utilize the basic materials that
20 have been developed to try a case without having to spend half
21 a million dollars per case.

22 Mr. Meunier and Mr. Coffman have chaired that
23 committee. Jerry is going to make a presentation to
24 Chris Seeger, Andy and I on Monday for our input. Then, Your
25 Honor, we will call Your Honor and ask for an in camera

1 conference with Your Honor where the entire PSC and a
2 representative of the state liaison committee will view, as
3 well as Your Honor, the trial package. That trial package will
4 be ready for distribution this month and we believe that it is
5 a corollary to any consideration to remand.

6 We would like, in the event Your Honor remands
7 cases, to be able to say to lawyers, here's a trial package.
8 We've made great progress in that and, hopefully, we can report
9 to Your Honor on Monday and you can give us a date to come in.

10 **THE COURT:** My thinking on the reason that I've held
11 the remand motions is because as long as those individuals are
12 in the suit in this case, then any documentation, any
13 discovery, any preparation, since they've been a part of it, it
14 can be used in their case. When they're not a part of it, it
15 has some disconnect. There's some argument that can be made
16 that they weren't even a part of the case and now material is
17 being used in their case.

18 So I've been trying to keep them around for that
19 purpose also. That's the end game for them before they get
20 remanded. If they get remanded, they go back with a package to
21 be able to try their case immediately.

22 **MR. HERMAN:** We would also indicate, since the record
23 is public, that with regard to any de-privileged documents we
24 receive with regard to de bene esse depositions and the summary
25 of those depositions, those will be supplemented to any trial

1 package should the trial package be released before those are
2 complete. We do anticipate the trial package being released
3 before we have completely analyzed the privileged documents and
4 the de bene esse depositions.

5 Also, I've advised Mr. Jacks that Your Honor has
6 a trial today and he's indicated that, at your pleasure, he's
7 available and ready, willing, and able to argue his remand
8 motion or to defer it if Your Honor chooses to do so.

9 **THE COURT:** All right. I know I hate to ask you to
10 come back a second time, but --

11 **MR. HERMAN:** Mr. Jacks.

12 **MR. JACKS:** Your Honor, I'll do whatever works for
13 the Court.

14 **THE COURT:** All right. I understand the issue --

15 **MR. JACKS:** Sure.

16 **THE COURT:** -- but if it's convenient with your
17 schedule, I'd like to get with you some other time and have you
18 argue it.

19 **MR. JACKS:** Absolutely. Thank you, Your Honor.

20 **THE COURT:** Thank you very much.

21 Pro se claimants.

22 **MR. HERMAN:** We have one new pro se claimant who's
23 requested access to depository documents and Mr. Davis is
24 working with that pro se claimant.

25 **THE COURT:** IMS data.

1 **MR. HERMAN:** Nothing to report at this time, Your
2 Honor.

3 **THE COURT:** Merck's motion for summary judgment.

4 **MR. HERMAN:** Yes, Your Honor. From the plaintiffs'
5 point of view, we would really request that that record be
6 complete before Your Honor rules on summary judgment. We'd
7 like to get the FDA preemption materials in the record so that
8 in the event that whichever way Your Honor rules, if the matter
9 goes up to the Fifth Circuit they have the full picture of the
10 FDA issue.

11 **THE COURT:** Thank you.

12 **MR. WITTMANN:** Your Honor, it's all briefed as far as
13 the defendants are concerned and we're ready to go ahead at
14 this point except to respond to additional materials that are
15 submitted by the plaintiffs.

16 **MR. LEVIN:** Arnold Levin. It's easy for Phil to say
17 that. There's a 1292(b) motion pending and there was a 56(f)
18 affidavit filed with regard to the discovery from the governors
19 in the various state associations, along with the summary
20 judgment motions. Your Honor's opinion in a footnote developed
21 that 56(f) affidavit situation.

22 We are now involved in discovery on that and we
23 would like that discovery complete before 1292(b) is closed.

24 **THE COURT:** I'm going to allow that to take place.

25 **MR. BEISNER:** Your Honor, if I may? John Beisner for

1 Merck. Let me just say again, I think that this discovery
2 that's in progress is a red herring. Basically, the only issue
3 here is that the FDA in rule-making records said that they
4 consulted with the states. All of the documentation that has
5 been put forward so far indicates that that happened.

6 They didn't reach out to all the people they
7 said they reached out to. That's been confirmed. Now, some
8 said, I've got no comments, and decided not to comment. Others
9 filed voluminous letters. It's just confirmed what the
10 record -- what was said. There's no headline here that's been
11 discovered, and the documentation has been gathered.

12 But it's entirely irrelevant to the issues
13 before the Court, as we've said previously, because this is not
14 something that the plaintiffs have standing to assert here.
15 This is merely a matter within the executive branch. So I
16 think you've probably heard enough.

17 **MR. LEVIN:** From you.

18 **MR. BEISNER:** I mean, I've stood here all morning as
19 people have stood up saying there's some big headline here --

20 **MR. LEVIN:** Your Honor, I've never been called a red
21 herring before. Your Honor, the FDA had an obligation under an
22 executive order to determine when encroaching upon state's
23 rights what the states felt about it. They led everybody to
24 believe in the rule that they have done that.

25 Merck wants deference to the FDA. You can't

1 give much deference to the FDA under the deference doctrine if
2 they were speaking to blank walls and led everybody to believe
3 that all agencies agreed except one, and that's not the case
4 and that's what we're developing, sir.

5 **THE COURT:** Okay. I understand it. Just keep me
6 advised of what's happening on the discovery aspect of that.

7 Tolling agreements.

8 **MR. HERMAN:** Nothing new to report, Your Honor.

9 **THE COURT:** That's a tool that I think has been
10 helpful if it doesn't get out of whack or get out of line.
11 It's an opportunity to at least hold cases in abeyance until
12 necessary that they be filed. I don't feel that that's created
13 any problems at this time anyway.

14 Issues related to Pretrial Order 9, that's 12 or
15 13.

16 **MR. HERMAN:** Your Honor, we have no further
17 discussion of that. We understand that California's reached
18 agreement and, hopefully, that will be consummated within the
19 next two weeks.

20 **THE COURT:** All right. The Vioxx statistic
21 information.

22 **MR. WITTMANN:** As of June 30th, 2007, Merck had been
23 served and named as a defendant in approximately 26,950
24 lawsuits, which include approximately 45,225 plaintiff groups
25 alleging personal injuries from the use of Vioxx, and also

1 named in approximately 266 punitive class actions.

2 8,575 of those lawsuits representing some 23,450
3 plaintiff groups are in the MDL or stated to be in the MDL, and
4 approximately 16,400 lawsuits are included in the coordinated
5 proceeding in New Jersey.

6 In addition, as of June 30th, 2007, some 14,450
7 claimants had entered into tolling agreements with the company.
8 In addition, the claims of some 4,620 plaintiff groups had been
9 dismissed as of June 30th; and of those, there have been more
10 than 1,170 plaintiff groups whose claims were dismissed with
11 prejudice, and more than 3,450 plaintiff groups dismissed
12 without prejudice.

13 **THE COURT:** Insurance, item 15.

14 **MR. HERMAN:** No pending issue on the insurance, Your
15 Honor.

16 **THE COURT:** No pending motion to discuss specific
17 discovery.

18 **MR. HERMAN:** Nothing pending on that. We're still in
19 discussions.

20 **THE COURT:** What about the Oxford/VICTOR?

21 **MR. HERMAN:** Only one issue, and that is Merck has
22 agreed that it has requested from Oxford the additional data
23 and when it's received that we'll receive it. Hopefully, we'll
24 have that within the next two weeks.

25 **THE COURT:** We talked about the *Flippin* motion. The

1 *Coker* motion to vacate.

2 MR. HERMAN: That matter is submitted on briefs, Your
3 Honor.

4 THE COURT: All right. We talked about the MDL
5 package.

6 MR. HERMAN: That's correct, Your Honor.

7 THE COURT: The next status conference will be
8 October the 11th.

9 MR. HERMAN: October the 11th, Your Honor.

10 THE COURT: 9:00.

11 MR. HERMAN: 9:00.

12 THE COURT: I'll meet with the parties at 8:30.

13 MR. HERMAN: Thank you, Your Honor.

14 THE COURT: Anything further?

15 MR. WITTMANN: Your Honor, we have rules to dismiss
16 set for today. In light of your trial, you may want to push
17 that until next time.

18 THE COURT: No, we'll do it.

19 MR. WITTMANN: We also need to clear up some of the
20 rules from last time.

21 THE COURT: Okay.

22 MR. WITTMANN: Ms. Wimberly is going to undertake to
23 do that.

24 THE COURT: All right.

25 MS. WIMBERLY: Your Honor, first I wanted to run

1 through the five rules that were left from the last status
2 conference. There were just a few matters that were continued
3 over.

4 With respect to what we've termed the Laminack
5 rule, which was record document 11541, that was the rule that
6 was argued and for which Buffy Martinez appeared from the
7 Laminack firm. All of the cases except for five were resolved
8 on July 27th. Your Honor gave those five plaintiffs ten days
9 within which to submit their PPFs, failing which their cases
10 would be dismissed with prejudice.

11 Two of those plaintiffs, in fact, submitted
12 their PPFs and that is Ms. Reser and Ms. Shaw. That is the
13 *Reser* case, 06-6989; and the *Shaw* case, 06-6988. So those
14 matters are moot, and Merck has filed a notice of withdrawal of
15 the rule as to those two plaintiffs.

16 The remaining three plaintiffs did not submit
17 anything. We would ask that those three case be dismissed with
18 prejudice. That would be the *Davis versus Merck* case, 06-7029;
19 *Hill versus Merck*, 06-7062; and *Stevenson versus Merck* 06-6537.

20 **THE COURT:** Okay.

21 **MR. DAVIS:** Your Honor, from the plaintiffs liaison
22 counsel standpoint, these were all addressed with the Court by
23 the PLC last month and we have nothing further to add.

24 **THE COURT:** As I mentioned last month with regard to
25 the *Kim Davis* case, the first original PPF was due

1 December 13th, 2006. The deficiency notice was sent out
2 January 31st, 2007, no response. The second one was
3 March 20th, 2007, no response. The third one May 23rd, 2007.
4 Since there has been no response and no one here today, I will
5 dismiss the case with prejudice.

6 Ernestine Hill is the next one. Ms. Hill's
7 original PPF was due December 12th. The date of the first
8 notice was January 31st, 2007, no response. March 20th, 2007,
9 no response, was the second one. The third notice was
10 May 23rd, 2007, still no response. The Court will dismiss that
11 case with prejudice.

12 Nancy Stevenson. The PPF was due December 11th,
13 2006. The first notice was sent on January 31st, 2007. The
14 second notice was sent on March 20th, 2007. The last notice
15 was sent on May 23rd, 2007. No response to all of those
16 notices. I'll dismiss that case with prejudice.

17 **MS. WIMBERLY:** Thank you, Your Honor.

18 The next rule was what we termed the Ashcraft
19 rule. It was record document 11545. That rule was resolved on
20 July 27th with respect to all but one plaintiff. That was in
21 Ms. Betty Peterson's case, Case Number 06-4249.

22 The Court may recall that Holly Wheeler from the
23 Blizzard firm appeared and requested an additional ten days.
24 She didn't really anticipate receiving the information. I
25 believe it had been a noncooperative plaintiff, but asked for

1 that additional ten days. Nothing has been received and we
2 would ask that Ms. Peterson's case be dismissed with prejudice.

3 **THE COURT:** The notice was due originally on
4 10/25/06, no response. The second one was due 12/19/06, no
5 response. The third notice 3/1/07, and then the ten days as I
6 mentioned, no response. The Court will dismiss that.

7 Mr. Blizzard, you wanted to respond?

8 **MR. BLIZZARD:** Just to say, Your Honor, that
9 Ms. Wheeler was correct in her prediction.

10 **THE COURT:** Thank you very much, and I appreciate you
11 being here. You do your best with these cases. You work, as
12 you have done, very well with the case. You've represented the
13 person. You've done a good job for them. But they also have
14 some responsibility to you and they have just not kept that
15 responsibility.

16 They, apparently, want to abandon their case so
17 we'll let them do so and I'll dismiss it with prejudice.

18 **MS. WIMBERLY:** The third rule was what we referred to
19 as the Heidrick rule and that appears in the record as record
20 document number 11546. Again --

21 **THE COURT:** 46 or 47?

22 **MS. WIMBERLY:** Pardon?

23 **THE COURT:** 46 or 47?

24 **MS. WIMBERLY:** 46. There was only one unresolved
25 case that was continued over from the hearing on July 27th.

1 That was the *Jimenez versus Merck* case, 06-7001. A PPF was
2 submitted and Merck has filed a notice of withdrawal as to its
3 rule related to Mr. Jimenez, so that entire rule is now moot.

4 **THE COURT:** Okay.

5 **MS. WIMBERLY:** Next was what we termed the grossly
6 deficient rule, and that was the Anderson rule. It appeared as
7 record document 11547. The great majority of those cases were
8 resolved at the prior hearing and we have subsequently filed
9 notices of withdrawal with respect to a number of cases that
10 had not been done.

11 I'll go through these in order. The plaintiff
12 was Tony Petite on behalf of Audrey Doyle Petite, Case Number
13 05-4762. Mr. Petite had a submitted a PPF, but had not
14 accompanied that with certification or authorizations. We had
15 since received those and that is satisfied.

16 Similarly, with respect to Geraldine Prudhomme,
17 also a plaintiff in 05-4762, that has been resolved. Next was
18 Rico Powell, plaintiff in Case Number 05-4759. Another case
19 where we received the PPF, but no signed certification or
20 authorizations.

21 Your Honor, I cannot find where notice was sent
22 to Mr. Matthews relating to this. We still have not received
23 that. So I would ask the Court to give Mr. Matthews ten days
24 and I will send a notice to him this afternoon and just ask
25 that it be continued for ten days, and if they're not received

1 within that time period that the case be dismissed.

2 **THE COURT:** I'll continue it for ten days.

3 **MS. WIMBERLY:** We have a similar issue with respect
4 to -- I'm sorry. That's it on no certifications or
5 authorizations. We also received and filed withdrawals with
6 respect to certain plaintiffs in this case. We have filed a
7 withdrawal with respect to -- and I think I misspoke on
8 Geraldine Prudhomme, 05-4762. That is satisfied. We've
9 withdrawn the rule.

10 **Bremella Etienne, Case Number 05-4762. That was**
11 **satisfied and we have filed a withdrawal of the rule.**
12 **Similarly, for Wallace Horton, 05-4762. That is satisfied and**
13 **we've withdrawn the rule. For Ms. Abigail Glapion, 05-4762,**
14 **PPF was received and the rule was withdrawn.**

15 **Miranda Baker, Case Number 05-4326. Mr. Flynn**
16 **is here on that. But for the record, Your Honor, there's no**
17 **argument needed. The PPF was received and it's satisfactory,**
18 **and we have either filed or will be filing a motion to withdraw**
19 **the rule as it relates to that.**

20 **THE COURT:** Okay.

21 **MS. WIMBERLY:** One other plaintiff that Mr. Flynn
22 represents, Sarah Robinson, 05-2580. We have reached an
23 agreement and we will be filing a stipulation of dismissal
24 without prejudice with respect to Ms. Robinson. So that is
25 moot.

1 Elenor Williams, 05-4323. A sufficient PPF was
2 received and we have withdrawn. We have two additional cases
3 for which no one, I don't believe, is present. They were
4 Mr. Becnel's cases. The Court may recall these were two cases
5 that Mr. Becnel had moved to withdraw as counsel in because of
6 nonresponsive clients.

7 **THE COURT:** Right.

8 **MS. WIMBERLY:** The Court denied that motion. The
9 rule was continued for 30 days with respect to those -- his two
10 clients. That is Frances Palmer, 05-4443; and Leonce Davis,
11 04-2937. We have received nothing since we were here on
12 July 27th. No PPF, no opposition, nothing.

13 **THE COURT:** With regard to the *Palmer* matter, the PPF
14 was due 1/18/06, no response. The first discovery request was
15 6/19/06, no response. The second, 8/14/06, no response. There
16 was no response today. I'll dismiss the case with prejudice.

17 The second one, *Leonce Davis*, the PPF was due
18 12/07/05. The first notice was 3/31/06, no response. The
19 second notice was 8/14/06, no response. I'll dismiss that case
20 with prejudice.

21 **MR. HERMAN:** Your Honor, would you note, for the
22 record, that the plaintiffs steering committee continues to
23 object to dismissals with prejudice.

24 **THE COURT:** So noted.

25 **MR. HERMAN:** Thank you, Your Honor.

1 **MS. WIMBERLY:** That brings us to the final rule that
2 was set on the docket on July 27th. All of the cases subject
3 to that rule were cases in which Mr. Flynn represented those
4 clients. Those were divided, as the Court may recall, into
5 four groupings of plaintiffs A, B, C and D.

6 With respect to the clients or plaintiffs on
7 Group A, the Court gave them 60 days to submit PPFs. So we are
8 not yet at that point and that is not ripe for discussion
9 today.

10 With respect to clients on -- plaintiffs on
11 Exhibits B, C and D, virtually all of those matters have been
12 resolved. In fact, we're really only left with two cases where
13 we have not received a PPF, and nine cases where we believe the
14 PPF that we, in fact, received is deficient. So I don't know
15 if Your Honor wants me to read the names of all of the cases,
16 or if I can strictly address the nine cases that are still at
17 issue.

18 **THE COURT:** Why don't you do the nine that are still
19 at issue.

20 **MS. WIMBERLY:** All right. The first is Larry Geary,
21 who is a plaintiff in the *Thelma Zimmerman versus Merck* case,
22 06-1972. We have not received a PPF. We've received a PPF
23 from a Barry Geary. But Barry Geary is from Kentucky and is in
24 the *Dodson* case, not the *Zimmerman* case. I don't know if this
25 is a housekeeping issue or what, and perhaps Mr. Flynn can

1 address that.

2 **MR. FLYNN:** Actually, this is the first I've heard of
3 it. I mean, we've been working the last few weeks with Merck's
4 counsel in e-mails back and forth, and I thought we were just
5 down to nine. I wasn't aware that there were two PPFs missing.
6 I mean, the attorneys in New Jersey have not let me know this.
7 Which two?

8 **MS. WIMBERLY:** Geary and Scott.

9 **MR. FLYNN:** We did -- well, that's grossly deficient.
10 Elisha Scott, her PPF is submitted. It's under the name --
11 it's Elisha Scott for Ruth Jones. Ruth Jones is, in fact, the
12 plaintiff. So that's a confusion there. It's a housekeeping
13 matter.

14 **THE COURT:** All right.

15 **MR. FLYNN:** Larry Geary had no PPF. I don't know who
16 Larry Geary is. I think there's some confusion there.

17 **THE COURT:** Why don't you-all get together on this
18 and see if you can work that out. I'll pass it for ten days.

19 **MS. WIMBERLY:** Let me address Elisha Scott.
20 According to our records, Elisha Scott, who is represented by
21 Mr. Flynn, is a plaintiff in the *Fredrick Geiger* case, which is
22 06-6654. We have received a PPF for Ruth Jones from Georgia,
23 who was actually a Vioxx user in the *Durant versus Merck* case.

24 It's our understanding that Ruth Jones from
25 Kansas, who is the representative of Ms. Scott in *Geiger*, has

1 not provided a PPF. Again, Your Honor, I'll get with Mr. Flynn
2 and we can report back in ten days.

3 **THE COURT:** Okay.

4 **MS. WIMBERLY:** We're starting to run into some
5 confusion with names with --

6 **THE COURT:** Yes.

7 **MS. WIMBERLY:** We have then what we consider to be
8 nine deficient PPFs. These are cases where no PPF had been
9 received and where we now have received a PPF, but we believe
10 that they're grossly deficient. I'll go through them one at a
11 a time.

12 The first is Darrel Christ, Case Number 06-3384.
13 There's an incomplete injury date, no Vioxx usage dates, and
14 incomplete information in sections 5F and section 7. Again,
15 Your Honor, I don't know whether you want us to address these
16 at this time, or whether you want to handle this more in a
17 meet-and-confer --

18 **THE COURT:** It seems to me that you-all ought to get
19 together and see if it's deficient. I'm concerned about the
20 claimants that don't even answer, who don't say anything.
21 After two, or three, or four notices, it seems to me they ought
22 to be dismissed with prejudice.

23 But when they have cooperated and given some
24 information, I really look to the lawyers to see if it can be
25 worked out. If not, then you need to come to me and get me on

1 the phone and we'll talk about what's necessary and what needs
2 to be done.

3 **MR. FLYNN:** Just for our position, all these fact
4 sheets have the court criteria, in addition to other
5 information. For example, Darrel Christ, just example one, has
6 date of injury, as I said -- I actually did an opposition with
7 all these attached. The basic point of this is the lawyers --
8 I was told these were grossly deficient at 2:00 yesterday.

9 They were submitted by August 8th. I will give
10 them whatever they want. Because as I told them, we need
11 information, too.

12 **THE COURT:** That's the way I see it.

13 **MS. WIMBERLY:** Your Honor, what I'd like to do then
14 is roll this over for 30 days, and that will be with respect to
15 the two parties that there seems to be some name confusion.
16 Then for Mr. Christ, also for Ronald Lenhardt, who is a
17 plaintiff in *Harris versus Merck*, Case Number 05-2580; Betty
18 Jean Shepherd, who is a plaintiff in the *Hugo versus Merck*
19 case, 06-797; Roger Walker, who is also a plaintiff in the *Hugo*
20 case, 06-797; Tammy McCullough, who is a plaintiff in the
21 *Robert Layman* case, 06-3372; Geraldine Moore, 05-4611; Melvin
22 Henry, who is a plaintiff in the *Joseph Rasor* case, 06-3368;
23 Shirley Miller, who is a plaintiff in the *Carol Thomas* case,
24 05-2570.

25 So that would be everything resolved on items B,

1 C and D to the July rule except for those eleven, and then all
2 of the plaintiffs identified on Exhibit A who have 60 days or
3 actually until the next status conference.

4 **THE COURT:** Right.

5 **MR. FLYNN:** Could I just say one thing? Because I
6 talked to a lot of plaintiffs about this issue, because I know
7 you're going to redo what's core criteria, which is great. If
8 it's possible, if you could also include to encourage both
9 sides to work together before coming down here.

10 Because I feel like I've heard from the Merck
11 attorney if there's one plaintiff supplement on that sheet, you
12 know, we're going to drag you down and on and on and on. And
13 their Merck profile forms periodically -- I mean, contain --
14 Merck will supplement. I think sometimes there's some games
15 going on and, hopefully, that is the exception. Because the
16 plaintiffs are on the same page.

17 If we don't have proof of ingestion and proof of
18 all the injuries, our case is shot and we're putting money into
19 it and it's a waste.

20 **THE COURT:** That's precisely the way I see it, and
21 you can blame it on the court. But get the material. It's
22 important for you to your case; and it's important, obviously,
23 for Merck's case. It's important for you to get the Merck
24 material; and you can't get the Merck material until you
25 provide them with information.

1 So it seems to me, if we have a log jam, we've
2 got to bust the log jam. I would hope that counsel would be
3 able to get together and work out these things. If you can't,
4 then I'll work them out.

5 **MR. FLYNN:** Okay.

6 **MS. WIMBERLY:** Your Honor that, bring us to the rule
7 that was filed on August 14th and is actually set for today.
8 The first item on that rule relates to Barbara Hull, and that
9 is Case Number 06-6175.

10 **THE COURT:** Do you have a document number on that?

11 **MS. WIMBERLY:** The docket number, no, Your Honor, I'm
12 sorry, I don't. It's the current rule.

13 **THE COURT:** Okay. I got it. 12024, I think.

14 **MS. WIMBERLY:** Ms. Hull is represented by
15 Ed Blizzard. I don't know if -- he needed to leave. We've
16 reached an agreement with him. This is another one of those
17 cases similar to Ms. Peterson and he has asked for ten
18 additional days to submit a PPF, failing which the case be
19 dismissed with prejudice.

20 I'd just like to make a record, though, as far
21 as the due date and so on. The PPF was due on December 5th of
22 2006. The first notice was sent on January 31st, 2007. The
23 second letter was sent July 28th, 2007 -- I'm sorry, June 28th,
24 2007. No PPF has been received.

25 **MR. DAVIS:** I've spoken to Ed Blizzard. He's asked

1 me to speak for him. There was an agreement that was reached
2 whereby he would have ten days to provide further responses and
3 asked that this matter be postponed.

4 **THE COURT:** Let it be passed for ten days.

5 **MS. WIMBERLY:** Your Honor, next up is the PPF of
6 Diane Forbes, plaintiff in the *Peggie Craig* case, 06-3136.
7 Actually, the next fairly large group, who are all represented
8 by Mr. Flynn, I can take kind of globally.

9 Ms. Forbes; Sheldon Wolfe, who's also a
10 plaintiff in the *Craig* case, 06-3136; Miki Rhea, plaintiff in
11 the *Lacey versus Merck* case, 06-1976; Donald Kroenlein,
12 plaintiff in the *Allen versus Merck* case, 06-1987; Edna Sample,
13 plaintiff in the *Allen* case, 06-1897; Hertha Holmes, plaintiff
14 in the *Butler versus Merck* case, 06-1973; Jennie Hunter,
15 plaintiff in the *Butler* case, 06-1973.

16 The parties have agreed that a stipulation of
17 dismissal without prejudice will be filed and that will be
18 forthcoming in the next ten days.

19 **THE COURT:** All right.

20 **MS. WIMBERLY:** Seven more of Mr. Flynn's cases. The
21 Sharon Joyner Clark, who is a plaintiff in *Lacey*, 06-1976;
22 Donald Satterfield, plaintiff in *Lacey*, 06-1976; Virginia
23 Wilkerson, plaintiff in *Craig versus Merck*, 06-3136; Betty
24 Gant, 06-792, Theo Udell, plaintiff in the *Gant* case, 06-792;
25 Ellis Boring, plaintiff in the *Latham* case, 06-793; Joan

1 Williams, plaintiff in *Latham*, 06-793. PPFs have been received
2 for these plaintiffs and Merck yesterday filed a notice of
3 withdrawal. So the rule is moot as to those seven plaintiffs.

4 There are two additional PPFs that kind of fall
5 into the same category as those that we've just discussed
6 relating to deficiencies. That is Juanita Rodgers, in the
7 *Latham* case, 06-793; Norma Morris in the *Gant* case, 06-792. I
8 would suggest to the Court that we work with Mr. Flynn and roll
9 that over for 30 days.

10 THE COURT: Okay.

11 MS. WIMBERLY: That leaves one additional of
12 Mr. Flynn's cases. I don't know if it's something we have
13 missed or he has missed. It is Terry Aikens, plaintiff in the
14 *Lacey* case, 06-1976. We have no record of receiving a PPF.

15 MR. FLYNN: What happened with that is, and I sent a
16 letter to the counsel, is we're just going to stipulate because
17 it's a non-CV case. There's no fact sheet due.

18 MS. WIMBERLY: That's right. You did do that.
19 You're absolutely correct. So you will be filing the
20 exhibits --

21 MR. FLYNN: Yes.

22 MS. WIMBERLY: -- that the court did?

23 MR. FLYNN: We will do a stipulation as non-CV, no
24 fact sheets due.

25 THE COURT: All right.

1 **MS. WIMBERLY:** Your Honor, that takes care of all of
2 Mr. Flynn's case. Which brings us to the next case, which is
3 Gary Pittman, 06-422. The PPF was due on April 12th of 2006.
4 The first notice was sent on August 15th, 2006. The second
5 notice was sent on September 28th, 2006. We have no record of
6 receiving any response or PPF.

7 **MR. DAVIS:** With respect to the Gary Pittman matter,
8 our office, plaintiffs liaison counsel's office, on
9 August 21st, 2007 sent an e-mail to counsel, Mr. Johnson,
10 advising him that a rule had been set with respect to this
11 claimant, advising them of the hearing date and asked them to
12 respond, as we have done with many of these and the others that
13 have previously come before the court.

14 Thereafter, on August 28th, 2007, our office
15 called David Johnson, left a message and asked him to return
16 the call. We have heard nothing since.

17 **THE COURT:** I'll dismiss that with prejudice.

18 **MR. DAVIS:** Again, Your Honor, with these, as with
19 the others, the PLC and PSC would oppose the motion.

20 **THE COURT:** Right.

21 **MS. WIMBERLY:** Next up is Carlton Birdine, plaintiff
22 in the *Bajon* case, 06-3865. The PPF was due on October 27th of
23 '06. The first notice was sent on February 21st, '07. The
24 second notice on May 4th of '07, and we have received no
25 response.

1 **MR. DAVIS:** With respect to the *Birdine* matter, on
2 August 21st, 2007, our office sent an e-mail to counsel,
3 Don Edgar, advising him of the motion, advising him of the
4 hearing date, suggesting that they file a response.

5 Thereafter, on August 28th, there was a
6 telephone call from our office to an individual named James at
7 Mr. Edgar's office. They were aware of the matter, advised the
8 client was not able to be found and that they have done all
9 that they can.

10 **THE COURT:** I'll dismiss it with prejudice.

11 **MS. WIMBERLY:** Next up is the Thomas Dover, or
12 actually Doris Dover for Thomas Dover in the *Calcavecchia* case,
13 06-7081. The PPF was originally due on December 13th, '06.
14 The first notice was sent February 21, '07. The second notice
15 on May 8, '07, and we have received no response.

16 **MR. DAVIS:** With respect to the *Dover* matter, liaison
17 counsel's office sent an e-mail on August 21, 2007, to Michael
18 Gallagher, who we understood was counsel, advising him of the
19 rule, asking him to take some action, as we have done just as
20 the other e-mails, which the Court's aware.

21 Thereafter, on August 23rd, 2007, our office had
22 a telephone conference with Shawna in Mr. Gallagher's office,
23 and we understood that they were getting a plaintiff profile
24 and that they had been in communication with Ms. Wimberly.

25 **MS. WIMBERLY:** We actually had a phone conversation,

1 Your Honor, and I believe I was asked whether if they submitted
2 a PPF prior to the date of the rule if we would withdraw the
3 rule. And as we have with everyone else who has, we indicated
4 we would, but we needed to receive the PPF prior to the rule;
5 and I've not received a PPF, nor has anyone at Hughes Hubbard
6 Reed.

7 **THE COURT:** Dismiss the case with prejudice.

8 **MS. WIMBERLY:** Next up is Geneva Stewart for Travis
9 Stewart. Again that is the *Calcavecchia* case, 06-7081.
10 Originally due December 13th, '06. First notice sent
11 February 21st, '07. Second notice sent May 8th '07. And this
12 is another one of Mr. Gallagher's cases. I had the same
13 conversation with his assistant or secretary and, again, no
14 PPF.

15 **MR. DAVIS:** With respect to this matter, that is the
16 *Stewart* case, the same communications took place on the *Dover*
17 case as with the *Stewart* case since it was the same case.

18 **THE COURT:** I'll dismiss it.

19 **MS. WIMBERLY:** Next up was the *Marjorie Davis* case
20 for Richard William Davis, 06-333. We withdrew that, filed a
21 notice of withdrawal. We received a PPF. So that is moot as
22 to *Davis*.

23 Next up is Margaret Witzke, 05-2295. The PPF
24 was originally due on January 14th, '06. First notice was sent
25 December 14th, '06. Second notice was sent May 4th, '07, and

1 we've received no response.

2 **MR. DAVIS:** With respect to the *Witzke* matter, on
3 August 22nd, 2007, we sent the e-mail that we customarily send.
4 We had some communications with this firm. Most recently on
5 August 28th, there was a discussion with Mindy in that office
6 and that they were aware of the rule and were not opposing it.

7 **THE COURT:** Dismissed with prejudice.

8 **MS. WIMBERLY:** Next is the *Nancy Debiasio* case,
9 06-3071. The PPF was originally due August 29th, '06. The
10 first notice sent February 21st, '07. The second notice sent
11 May 4th, 07, and we've received no response.

12 **MR. DAVIS:** With respect to the *Debiasio* matter, on
13 August 21, our office forwarded the e-mail that we customarily
14 send. The most recent communication was August 31st, 2007. We
15 received correspondence from the law office of Jason L. McCoy
16 advising that Nancy Debiasio has decided not to pursue the
17 case.

18 **THE COURT:** It will be dismissed with prejudice.

19 **MS. WIMBERLY:** Next up is Christine Powell, plaintiff
20 in the *Layman versus Merck* case, 06-3372. We received a PPF
21 for Ms. Powell and we have filed a notice of withdrawal of the
22 rule as it relates to her. So it is moot.

23 Next is Victoria Lane Foster, plaintiff in the
24 *Anderson* case, 06-2407. The PPF was originally due on
25 July 19th 06. The first notice was sent February 21st, '07.

1 The second notice sent May 4th, '07. We've received no
2 response.

3 **MR. DAVIS:** On August 21st, 2007, our office sent an
4 e-mail to Keith Kebodeaux, K-E-B-O-D-E-A-U-X, counsel for the
5 plaintiff, advising him of the matter. Thereafter, on
6 August 28th, we spoke to Mr. Kebodeaux's assistant and left a
7 message about the rule and we have not heard from him since.

8 **THE COURT:** It will be dismissed with prejudice.

9 **MS. WIMBERLY:** Next is Norma Langham, also a
10 plaintiff in the *Anderson* case, 06-2407. The PPF was
11 originally due July 19th, '06. The first notice was sent
12 February 21st, '07. The second notice on May 4th, '07.
13 Ms. Langham is also represented by the Kebodeaux firm.

14 **MR. DAVIS:** We have had the same communication
15 regarding the *Langham* matter as we did in the prior *Foster*
16 matter.

17 **THE COURT:** That will be dismissed with prejudice.

18 **MS. WIMBERLY:** Next up is Gerald Bolds, 06-6277.
19 Originally due on December 6th, '06. First notice,
20 February 21st, '07. Second notice, May 8th, '07, and we've
21 received no response.

22 **MR. DAVIS:** With respect to the *Bolds* matter, on
23 August 21st, 2007, our office sent an e-mail to
24 Richard Laminack and Buffy Martinez advising them of the
25 matter. Thereafter, on August 28th, we called, left a message

1 about the rule, asked to have Ms. Martinez return the call and
2 have not heard anything further.

3 **MR. HERMAN:** Your Honor, may I approach just one
4 minute?

5 **THE COURT:** Sure.

6 **(OFF THE RECORD)**

7 **MR. HERMAN:** May it please the Court, I have other
8 business assigned by the court with respect to another MDL that
9 I've got to get to. I do want to make this statement. I think
10 that it's incumbent upon the profession that they not waste the
11 Court's time. I think in the future, having sat through this
12 process, I'm going to ask Ms. Wimberly to give me a list with
13 the lawyers' names and addresses in globo so that I can
14 communicate with them.

15 I think that we can get these lawyers just to
16 address immediately whether they're going to oppose these
17 motions or not so as to not burden the Court, as the Court is
18 burdened with this process.

19 **THE COURT:** All right. We're almost through,
20 Ms. Wimberly, let's do it this way.

21 **MS. WIMBERLY:** Next is the Josephine Frias,
22 F-R-I-A-S, plaintiff in 06-8823. The PPF was originally due on
23 January 3rd, '07. First notice was sent on March 22nd, '07.
24 The second notice on May 8th, '07. Yesterday I received via
25 mail, and I don't know whether the court has received this or

1 whether it was filed of record, a response where the person
2 complains that they don't have the PPF form and couldn't find
3 it, and we wouldn't give it to them, and they didn't know how
4 to find it on the Internet or the court's Web site.

5 **MR. DAVIS:** Your Honor, if I may. Just as a matter
6 of housekeeping, I don't believe that the court ruled on the
7 prior one, the *Bolds* matter.

8 **THE COURT:** I dismissed the *Bolds* matter with
9 prejudice.

10 **MR. DAVIS:** With respect to the *Frias* matter, on
11 August 22nd, 2007, we attempted to locate an e-mail address for
12 this firm. We didn't have one. Apparently, the forms that
13 were necessary had not been completed. However, we called and
14 left a message about the rule and asked that firm to return the
15 call.

16 On August 28th, another call was attempted and
17 we also called a cell phone and asked for a return call. On
18 August 29th, there were several calls made to and from this
19 particular attorney. He wanted, as we understand it, the
20 defendants to fax a PPF form because his secretary couldn't
21 locate it on the Internet.

22 We also understood that he filed an opposition
23 to the rule. I know at some point within the last week or so I
24 personally spoke to Mr. Swanson and his office and I suggested
25 that they come to the court's Web site. I also suggested that

1 they speak to Ms. Wimberly if they needed any assistance and
2 that they would be able to help, but that the court had set up
3 procedures so that counsel could easily prepare a profile form.

4 Then on August 30th, my office again spoke to
5 Mr. Swanson's assistant, gave her all the information for the
6 Web site. I do not know what's happened since then.

7 **MS. WIMBERLY:** He asked in his opposition for an
8 extension of time to complete a PPF.

9 **THE COURT:** Let's pass this one for 30 days. If not,
10 then we'll dismiss it.

11 **MS. WIMBERLY:** Did the Court receive a copy of his
12 opposition? I'll provide one to Jeremy afterwards.

13 **THE COURT:** Anything further? The *Mary Walker* case?

14 **MS. WIMBERLY:** Mary Walker, who is a plaintiff in the
15 *Tammy Bailey* case, 06-5987. The PPF was originally due
16 November 29th, '06. Notice sent February 20th, '07. Second
17 notice sent May 4th, '07. Opposition was filed and they
18 indicated they would serve the PPF by today. As of last night,
19 we have not received the PPF.

20 **THE COURT:** Plaintiff says that she's elderly,
21 infirm, and wishes to pursue her claim. Her husband's helping
22 her with it. Isn't that what was reported last time? Any
23 information on that?

24 **MR. DAVIS:** Your Honor, on August 21st, 2007, we sent
25 e-mail notification to Chris Ide, I-D-E, counsel in this

1 matter. On August 28th, our office spoke to Mr. Ide and he was
2 aware of the rule, advised that he was having difficulty
3 locating the client.

4 Thereafter, the next day, on August 29th, there
5 was an opposition rule received. We have not had communication
6 further. We do know that the attorney was addressing it. I
7 would suggest that maybe we pass that.

8 **THE COURT:** Pass this one until the next meeting.

9 **MS. WIMBERLY:** All right. Next up is Brenda Lewis in
10 the *Brenda Lewis* case, 05-532. The PPF was originally due
11 December 15th 2005. First notice sent January 26th, '06.
12 Second notice sent June 28th '07, and we've received no
13 response.

14 **MR. DAVIS:** On August 28th, our office sent the
15 typical e-mail that we send. On August 28th, we called and
16 spoke to Thomas Pearson's office, who's counsel for the
17 plaintiff. They advised that they thought they had gotten out
18 of the case and that they were going to contact Ms. Wimberly or
19 defense liaison counsel with respect to how to proceed. We
20 have not had communication since.

21 **MS. WIMBERLY:** Your Honor, this is kind of a strange
22 situation, if I recall this one correctly, where they thought
23 they got out of the case, but they never filed a motion to
24 withdraw, and there's actually somebody else who never enrolled
25 and no one had ever signed up for Lexis Nexis.

1 They had, in fact, received the rule because we
2 sent the rule and the applicable exhibits in the court's order
3 by mail to all of the counsel.

4 **THE COURT:** I'll dismiss this case with prejudice.

5 **MS. WIMBERLY:** And one final, Joseph Moore -- oh,
6 *Trahan*. Yes, Your Honor. *Trahan*, Rosie Trahan, Charles
7 Trahan, and Rosie Trahan in the *Trahan* case, 06-11310. The PPF
8 was originally due on March 7th, '07. First notice was sent on
9 April 25th, '07. Second notice was sent on July 17th, '07.

10 And just by way of refreshing the Court's
11 memory, you may recall this case back from April or May when
12 Ms. Barrios raised it with the Court. This was the attorney
13 from Mississippi who was taking the position that as long as he
14 had a remand motion pending, he didn't have to file a PPF.

15 Your Honor, made it quite clear on the record
16 that unless and until the case was remanded that you had
17 jurisdiction and that the parties were compelled to provide
18 PPFs and you suggested that we file a rule, which is what we
19 did following this.

20 We did, in fact, receive an objection. We
21 received a PPF that we considered to be grossly deficient. We
22 also received a motion to remand, which the Court has continued
23 without date. In light of the fact that this deals with a
24 deficiency, we can address the deficiency with Mr. Trahan; and
25 now that his motion to remand has been continued without date,

1 hopefully, he will work to fully complete his PPF.

2 We can continue it for 30 days.

3 **THE COURT:** Any problem with continuing it for 30
4 days?

5 **MR. WELSH:** Your Honor, Vic Welsh with the law firm
6 of Pittman, Germany, Roberts & Welsh. We're hear to argue the
7 rule today. Obviously, we're at the pleasure of the Court. I
8 think the Court understands our position.

9 **THE COURT:** I understand the motion to remand. But
10 as long as I have the case, I'm going to require that the
11 material be submitted on both sides. You have a right to get
12 hers, and she has a right to get your material.

13 **MR. WELSH:** Your Honor, and I understand that is the
14 position of Merck, that we're required to provide this
15 information to the court. I do have a presentation that I
16 would like to make to the Court opposing that rule and would
17 ask if the Court has the opportunity and the time to hear that
18 today.

19 **THE COURT:** Sure. I'll listen to you.

20 **MR. WELSH:** If the Court wants to continue the rule
21 for 30 days, I'll be happy to come back in 30 days and present
22 it. I understand from --

23 **THE COURT:** Either way. I'll do it either way. If
24 you need to -- I don't want you to make two trips.

25 **MR. WELSH:** Again, I'm at the pleasure of the Court,

1 Your Honor.

2 **THE COURT:** Where are you from?

3 **MR. WELSH:** Jackson, Mississippi.

4 **THE COURT:** Do you want to argue the remand, or do
5 you want to argue --

6 **MR. WELSH:** Your Honor, I want to argue the rule that
7 has been submitted by Merck with regard to the relief that's
8 being requested, the relief being requested is dismissal with
9 prejudice, and whether or not Merck is entitled to make that
10 request to the court at this time without establishing --
11 without meeting its burden of establishing subject matter
12 jurisdiction.

13 **THE COURT:** Okay. I'll listen to you.

14 **MR. WELSH:** May I hand my card to the court reporter,
15 your Honor? I have not appeared before the Court before.

16 **THE COURT:** Yes.

17 **MR. WELSH:** May it please the Court. The manual for
18 complex litigation clearly indicates that MDL orders and rules
19 apply only to cases filed in or removable to federal court.
20 Although not mentioned specifically, this is because the court
21 must have subject matter jurisdiction before its orders and
22 rules can apply to the parties.

23 Merck has recognized this as recently as last --
24 in the last couple of weeks in the Northern District of
25 Mississippi when it sent a letter to Judge Allen Pepper, who

1 was the federal district court judge in the *Coker* case, and the
2 Court is familiar with the history of that case. That's the
3 case where Judge Pepper remanded the case to state court in
4 Mississippi at a time when there was a conditional transfer
5 order, I think it was CTO-108, which had been filed with the
6 Eastern District of Louisiana clerk.

7 In that letter of August 17th, Merck indicated
8 to Judge Pepper that his remand order was void because the
9 court lacked the subject matter jurisdiction. So, certainly,
10 Merck recognizes that principle.

11 **THE COURT:** They lacked subject matter jurisdiction
12 in that case because the court had it. The transferring court
13 had it.

14 **MR. WELSH:** That is exactly correct, Your Honor.
15 That is exactly correct.

16 **THE COURT:** I'm the transferring court in this case.

17 **MR. WELSH:** Yes, sir, Your Honor, you are the
18 transferring court in this case. And before the Court can
19 entertain Merck's request for dismissal with prejudice, Merck
20 has got to meet its burden of establishing subject matter
21 jurisdiction in this court. It has not done that. It has not
22 made any attempt to do that, and I would submit to the Court
23 that it cannot do that.

24 **THE COURT:** Okay.

25 **MR. WELSH:** So the threshold question before this

1 Court can entertain Merck's request to dismiss with prejudice
2 is whether or not Merck has met its burden of establishing
3 subject matter jurisdiction. The Fifth Circuit case law on
4 this issue is legion. It establishes that Merck has a burden
5 to prove removal -- because this is a case removed from the
6 state court in Mississippi, Merck has the burden of proving
7 removal jurisdiction.

8 Your Honor is very aware of these cases. The
9 last four remand rulings from Your Honor, in three of those,
10 the Court has granted remand. As recently as the *Turner versus*
11 *Murphy Oil* decision on August 20th, the Court recognized that
12 it is the defendant who has the burden of proving removal
13 jurisdiction, that the burden is heavy, and that any doubts
14 regarding jurisdictions should be resolved in favor of the
15 state courts and against federal jurisdiction.

16 And the court also in another recent case, I
17 think, Your Honor, that case was *Cook versus USF&G*. It was a
18 July 2007 opinion. Your Honor recognized the federal court's
19 obligation to consider jurisdiction on an ongoing basis to the
20 extent that the court can bring the matter up sua sponte.

21 This is consistent with recent Fifth Circuit
22 pronouncements in the *Gasch versus Hartford* case where the
23 Fifth Circuit indicated that subject matter jurisdiction should
24 always be policed and should be considered initially by the
25 court before entering any orders in the case. To summarize,

1 before this court can grant Merck's motion, which is a request
2 to dismiss my client's case with prejudice, Merck must
3 establish subject matter jurisdiction. It has not, and it
4 cannot.

5 Our motion to remand was filed in Federal
6 District Court in Mississippi in November of 2006. It was
7 refiled in this case. Merck has yet to file a response to our
8 motion to remand. Merck has made no effort to meet its burden
9 to establish subject matter jurisdiction. In fact, Your Honor,
10 Merck cannot meet its burden of establishing subject matter
11 jurisdiction to request the ultimate sanction of dismissal.

12 Again, referencing previous opinions of this
13 court, the three recent opinions of this court from this
14 summer, the court has cited the Fifth Circuit case law that
15 clearly indicates that if there's a possibility of a claim
16 against the in-state defendant, then the court does not have
17 subject matter jurisdiction.

18 In this case, the answers of the in-state
19 defendant and Merck clearly indicate that the plaintiffs have
20 stated a claim against the in-state sales representative. Her
21 name is Darlene Roberson. One of the affirmative defenses
22 asserted by the Merck sales representative in this case is the
23 learned intermediary doctrine. It was also asserted by Merck.

24 Paraphrasing from those affirmative defenses,
25 Ms. Roberson indicated in her answer that to the extent that

1 any of the plaintiff's claims were based upon failure to warn,
2 then the claims were barred by the learned intermediary
3 doctrine because the duty to warn was discharged in warnings
4 that Merck gave to the prescribing physicians.

5 The fact that the sales representative asserted
6 that affirmative defense is critical to the jurisdictional
7 issue because it is an indication that the sales representative
8 recognizes both a duty to warn and an obligation to discharge
9 that duty. This is absolutely consistent with Mississippi case
10 law on this point. We've cited these cases to the court in our
11 opposition to Merck's rule. I'll just go over them briefly.

12 **THE COURT:** You need not. I read it. I understand
13 the issue.

14 **MR. WELSH:** Your Honor, I want to bring to the
15 Court's attention the *Coker* case. I'm going to go ahead and
16 fast forward to what is not in our response.

17 **THE COURT:** Okay.

18 **MR. WELSH:** The *Coker* case was decided in August by
19 Judge Pepper. In that case he remanded the matter back to
20 state court, finding that the plaintiffs had asserted a cause
21 of action against the Merck sales rep. I understand that there
22 are motions pending before Your Honor to vacate that remand
23 order based on the fact that Judge Pepper, the district court
24 judge in Mississippi, did not have subject matter jurisdiction
25 to enter the ruling.

1 I mention that case only for this reason: Your
2 Honor is aware that we don't have to prove absolutely that we
3 have a claim against Ms. Roberson, the sales representative.
4 The plaintiffs only need to prove the possibility of a claim.
5 Obviously, the possibility of a claim does exist by virtue of
6 the fact that a federal district court in Mississippi has
7 issued that remand order.

8 Your Honor, just to, again, to fast forward to
9 address a couple of matters not in our brief. Or I do want to
10 address one matter in our brief. The Ninth Circuit has already
11 considered this in the PPA litigation.

12 In that case the Ninth Circuit reversed the
13 district court judge's dismissal of a case with prejudice when
14 the plaintiffs asked the court to rule on a remand motion prior
15 to complying with two case management orders in that case, one
16 of which dealt with discovery and one of which dealt with
17 segregating the cases. All those cases were returned to
18 Mississippi by the Ninth Circuit Court of Appeals.

19 Finally, Your Honor, there is one factor that I
20 would ask the Court to consider before invoking the ultimate
21 sanction of dismissal, and those are the alternatives. We did,
22 in fact, file a motion with the court requesting that the court
23 enter a suggestion of remand, transferring this case back to
24 the U.S. District Court in Mississippi to allow the U.S.
25 District Court in Mississippi to consider the remand motion

1 that we have filed asking the federal court to send the case
2 back to state court.

3 I've been here. I've not been here for the
4 entire hearing this morning, Your Honor. Obviously, this
5 court's MDL plate is full. Before dismissing this case with
6 prejudice, I would ask the Court to simply consider whether or
7 not it would be possibly more efficient to allow this case to
8 go back to the U.S. District Court in Mississippi to allow the
9 U.S. District Court judge in Mississippi to consider the remand
10 motion that's been filed.

11 One last point, Your Honor, this is not a case
12 that a plaintiffs attorney or the plaintiff is going to walk
13 away from. It is a legitimate case. We have filed with the
14 court in our response to Merck's rule, medical records
15 confirming that my client took the drug Vioxx for over 19
16 months before she had a myocardial infarction and had coronary
17 bypass surgery.

18 We do have a PPF form that we are ready to file.
19 We've attached -- it is not complete, but we have attached a
20 PPF as Exhibit 1 to our response to Merck's rule. It has not
21 been signed and has been partially redacted. We are ready to
22 file that PPF form if the Court rules it has jurisdiction to
23 hear this matter. We would ask that the Court hold Merck to
24 its burden of establishing subject matter jurisdiction before
25 it dismisses Ms. Trahan's case with prejudice.

1 **THE COURT:** I have jurisdiction over this matter
2 under 1407. The court has been designated as the MDL court.
3 The purpose of the MDL proceeding is to coordinate discovery.
4 That's what the court is doing. It has jurisdiction. I'm not
5 going to dismiss your case. I see that you've been giving some
6 information with your PPF.

7 But I'm going to pass this matter for 30 days,
8 direct you to answer the PPF, and meet with the defendants and
9 get the PPF information. When you get that information, I'll
10 expect the defendants to also give the plaintiff the
11 information that Merck is required to do so.

12 Then in due time, I'll focus on the motion to
13 remand. I see that as two different issues. I'm not focusing
14 on remand at this time. Therefore, I still have the case
15 before me as the MDL judge. Under the MDL 1407 provision, my
16 job is to coordinate discovery. That's what I'm doing now, and
17 this is a portion of the discovery that the MDL court has
18 conducted.

19 So I instruct you to meet with the defendants
20 and attempt to work out the profile form. If it is not worked
21 out, then I'll rule on it.

22 **MS. WIMBERLY:** Thank you, Your Honor. That was my
23 suggestion to begin with, that we address the deficiencies.

24 The last matter is Joseph Moore, who is a
25 plaintiff in the *Evelyn Thomas* case, 05-2017. The PPF was

1 originally due on December 30th, '05. The first notice was
2 sent February 22nd, '06. Second notice September 28th, '06,
3 and we've received no response.

4 **MR. DAVIS:** Your Honor, on August 22nd, my office
5 sent the e-mail notification that we customarily send. On the
6 22nd of August, we spoke to Richard Rosenblum, plaintiff
7 counsel. He was aware of the rule, and he wasn't going to
8 oppose the rule.

9 **THE COURT:** Okay. It will be dismissed with
10 prejudice.

11 **MS. WIMBERLY:** Your Honor, that takes care of -- I
12 did not mention a few of the plaintiffs because dismissals and
13 withdrawals had already been filed, but I can run through those
14 if the Court wants me to.

15 **THE COURT:** If we've already done it, then I don't
16 require you to.

17 **MS. WIMBERLY:** Then I think we're fine on that.

18 **MR. DAVIS:** Your Honor, we thank you for your time.
19 We apologize it took so long.

20 **THE COURT:** I've considered the public interest in
21 dismissing these cases. I've also considered the expeditious
22 resolution of the litigation. I've considered the court's need
23 to manage its docket, which is significant in this MDL
24 proceeding, which I have by virtue of 1407.

25 I've also considered the risk of prejudice to

1 the defendants. I've given every opportunity to each side to
2 respond to the Court's urgings and motions and I haven't
3 received a response. I've taken all of that into consideration
4 and dismiss the cases accordingly.

5 Thank you very much.

6 MS. WIMBERLY: Thank you, Your Honor.

7 THE COURT: The court will stand in recess.

8 THE DEPUTY CLERK: All rise.

9 (WHEREUPON, the Court was adjourned.)

10 *****

11 CERTIFICATE

12 I, Jodi Simcox, RMR, Official Court Reporter for the
13 United States District Court, Eastern District of Louisiana, do
14 hereby certify that the foregoing is a true and correct
15 transcript, to the best of my ability and understanding, from
16 the record of the proceedings in the above-entitled and
17 numbered matter.

18
19
20 _____
21 Jodi Simcox, RMR
22 Official Court Reporter
23
24
25