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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

* Docket MDL 1657-L
*
* September 28, 2006
*
* 9:00 a.m.

* * * * *

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

APPEARANCES:

For the Plaintiffs: Herman Herman Katz & Cotlar
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1 MORNING SESSION

2 (September 28, 2006)

3 THE DEPUTY CLERK: Everyone 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. Judge, we
7 do have the conference line on.

8 THE COURT: Counsel, make your appearance for the
9 record, please.

10 MR. WITTMANN: Good morning, Your Honor. Phil
11 Wittmann, liaison counsel for defendants.

12 MR. DAVIS: Good morning, Your Honor. Leonard Davis.
13 My partner, Russ Herman, will be here momentarily.

14 THE COURT: Sorry I'm a little late. We had a
15 conference that took a little longer than I thought with
16 liaison counsel. The first item is Lexis/Nexis File & Serve.
17 Anything on that?

18 MR. HERMAN: No issue, may it please the Court.

19 THE COURT: State court trial settings.

20 MR. WITTMANN: There is one change from what's listed
21 in the joint report, Your Honor. We omitted the date of trial
22 for the Frederick case in Jefferson County, Alabama. The
23 actual date for the setting is April 9, 2007. The rest of the
24 cases that are listed in item II of the joint report are
25 correct.

1 **THE COURT:** The selection of cases for early federal
2 court trial. We have two more cases set for this year. I
3 received the material for the jury questionnaires yesterday
4 from jury. I e-mailed them out so the lawyers in those cases
5 will have that material. I'll be meeting shortly with them to
6 go over that information. What I do, as you know, is rule on
7 the cause challenges, to the extent we can, before the trial
8 starts.

9 **MR. HERMAN:** Your Honor, that's for both Mason on
10 October 30 and Dedrick on November 27?

11 **THE COURT:** Right. The Mason material I received
12 yesterday. The Dedrick material I think I'm going to be
13 receiving shortly and I'll send those out. The parties have
14 gotten together, after the experience in the four cases that we
15 have tried, and worked more on the questionnaire. I think that
16 we have to continue to do that to make the questionnaire as
17 meaningful as we can. Some things you think are important are
18 not and some things that you hadn't thought of become
19 important, so I want to keep that moving. Each time we look at
20 it a little bit more closely.

21 While I'm on that, I have to get with counsel to
22 focus on next year. My thinking is, as you all know, hopefully
23 we have a group of cases that the discovery is proceeding on a
24 faster pace. From that group, I'm going to expect counsel to
25 do the same. We'll pick some cases.

1 I mentioned this morning that I'm trying to
2 focus on some new methods. I want to see whether or not we can
3 do some issue trials. If not, then the question is whether I
4 do multiple-party trials, waves. My concern there is that, as
5 I see the difference between the state trials or courts and
6 even the other courts, they have a group of cases before them
7 and their job is to get rid of those cases. My job is a little
8 different. I'm not going to be able to try all of the cases
9 that are before me. That's just the way it is. So either we
10 finish with discovery and remand them or we have some other way
11 of handling them.

12 The trials that I have before me, I try to make
13 them exemplary. I try to pick the cases with something in mind
14 other than just resolving the case. I don't want to try the
15 next five cases that all look the same because that's not going
16 to be helpful to you. I would like to continue to try cases
17 that fit into the categories that we have defined so that
18 you'll look at them and at least determine whether or not
19 there's any information that's meaningful to you.

20 My job is a little bit more than just moving the
21 cases. My job is to try to give you some information so that
22 you can profit from that information. I'm concerned, if I try
23 10 or 15 together, whether it will be meaningful to you other
24 than getting rid of 15 cases. I don't know whether it will
25 have any information at all for you. I'm trying to weigh that

1 and decide it. I'll be focusing on it. I mention it out loud
2 to you so you can be thinking about it today.

3 Class actions. We are trying to get the air
4 back on. I'm sorry about that.

5 **MR. HERMAN:** Item IV on your agenda, class actions,
6 Your Honor has certification motions, oppositions, and full
7 briefing from both sides before you. We only state that that
8 issue, particularly as it regards American Pipe, impacts other
9 issues such as tolling agreements, et cetera.

10 Discovery directed to Merck. There are
11 essentially three issues, Your Honor. Your Honor has under
12 advisement the privilege log issues.

13 **THE COURT:** I'm getting back on the privilege log.
14 I've been a bit busy the last two weeks. We'll be able to
15 move. I have a little break in my schedule. A case I had
16 scheduled looks like it's not going.

17 **MR. HERMAN:** Without any criticism of the
18 Fifth Circuit or other courts of appeal, but with fair comment
19 about the state of the law itself, there's consternation among
20 lawyers that represent consumers, particularly in product
21 safety matters, that whenever one side meets with courts in
22 camera and the other side is not present, as currently is the
23 law as regards privilege review, it seems inequitable and, in
24 Justice Brandeis' comment, sunshine is the best disinfectant.
25 Nevertheless, we do abide by the Court's ruling.

1 **THE COURT:** What I'm trying to do with that is I have
2 had two, maybe three meetings with a representative who
3 apparently that's what really interests this person -- as much
4 as his family, if not more so -- documents and document
5 discovery. He is very enthused about it and does a good job.
6 I don't mean it critically. I just mean he is really turned on
7 by documents.

8 **UNIDENTIFIED SEPAKER:** He loves his family very much.

9 **THE COURT:** I'm sure he does. I think he loves both
10 his family and document organization and he is very, very good
11 at it. The point is I meet with him, but I also have
12 everything recorded. I have a court reporter with me and also
13 have a magistrate with me so that everything is recorded. It
14 has been very helpful, by the way. He knows those documents
15 very, very well. Discovery directed to the FDA.

16 **MR. HERMAN:** Well, there's two other issues. We
17 served a third set of interrogatories recently. The time for
18 answer isn't upon us. It deals with this critical report
19 requested by the board of directors of Merck. In addition,
20 under item XIX, we are requesting answers specifically to
21 insurance interrogatories 4K, 14, 15, 16, and request for
22 production 19, 20, 21, and 22. We will, of course, meet with
23 the defendants if they have any questions about those
24 responses.

25 **THE COURT:** Let's do that. What's a reasonable time

1 frame? I would like to hear from you on that. If it can't be
2 resolved, you've got to bring it to me and I'll try to resolve
3 it.

4 **MR. HERMAN:** Two weeks, Your Honor.

5 **MR. WITTMANN:** I think two weeks will be fine.

6 **THE COURT:** Get back to me in two weeks. If you have
7 any problems, I'll get into it immediately and resolve them.

8 **MR. HERMAN:** The next is discovery to the FDA.
9 There's no specific discovery, but we have filed a request that
10 we be allowed to discover fact information from the FDA in
11 contest to the motion for summary judgment on preemption which
12 the defendants have filed and which they allege a factual basis
13 for preemption based upon FDA-attributed facts. I merely point
14 that out. There is no discovery directed at the FDA, per se,
15 other than what is in our certificate.

16 **THE COURT:** What about that report that came out last
17 week? Is that something new?

18 **MR. HERMAN:** Yes, Your Honor, there is some
19 discovery. We intend to pursue it. The report Your Honor I
20 believe is referring to is one that overall takes a critical
21 look at the FDA and its procedures.

22 **THE COURT:** They were hired by the FDA as an
23 independent group, as I understand it.

24 **MR. HERMAN:** Yes.

25 **MR. LEVIN:** Arnold Levin. That either reached the

1 docket yesterday or this morning as a supplemental filing of
2 the PSC.

3 **THE COURT:** All right.

4 **MR. HERMAN:** The next issue, Your Honor, is item VII,
5 discovery directed to third parties. The Ogilvy and DDB
6 request for production, et cetera, have been opposed and
7 removed on the basis that Merck contends it needs to review
8 those documents for privilege first. We ask that matter be
9 deferred until the privilege log issues currently before you
10 have been resolved in order to prioritize the issues.

11 There are no issues as to deposition scheduling.
12 The plaintiff profile form and the Merck fact sheet response
13 are of considerable issue to lawyers across the country.
14 There's extraordinary controversy as to whether there's
15 substantial compliance and whether the plaintiffs have provided
16 sufficient information and whether Merck should reply with its
17 fact sheet where there's been substantial compliance. As I
18 understand it, Your Honor has directed plaintiffs and
19 defendants to meet with you specifically about those issues.

20 **THE COURT:** I'll be setting a date within the next
21 week to 10 days. I would like to be able to resolve those, so
22 you need to be in a position to focus me on it. I would like
23 to do it in categories or groups, if possible. If there are
24 particular issues that are relevant to whole groups or all of
25 them, give them to me in issues. If they are not, if they are

1 very specific, give them to me in specific ways.

2 **MR. WITTMANN:** Our opposition memo does that. It
3 sets out the categories we believe are in dispute. If you want
4 anything further after you have reviewed that, let us know.

5 **THE COURT:** No, that's fine. I'll set a date and
6 I'll meet with one or two from each side and go through each of
7 them.

8 **MR. HERMAN:** Your Honor, in Appendix A to our filing,
9 we have given specific instances which we believe were
10 reflected generically. Mr. Davis, who has been organizing and
11 communicating on this issue, will be available to meet whenever
12 Your Honor designates. In terms of state/federal coordination,
13 from the PSC we have no issue, but Ms. Barrios is here.

14 **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios
15 for the state liaison committee. I've presented to counsel for
16 both parties the updated remand CD and I presented it to your
17 law clerk, as well. Everything is going very well with regard
18 to coordination, and we are very pleased to note the remand in
19 the Tallas case earlier this month. Thank you, Your Honor.

20 **THE COURT:** Thank you. Pro se claimants. Anything
21 on those?

22 **MR. HERMAN:** From plaintiffs' point of vantage, we
23 have no issue to bring to the Court.

24 **THE COURT:** What about the foreign class actions?

25 **MR. WITTMANN:** Well, Your Honor, the Court has

1 granted our motion to dismiss the class actions on behalf of
2 the --

3 **THE COURT:** That was Italy and France and we have now
4 several other countries. What's going to be the situation
5 there?

6 **MR. WITTMANN:** They have indicated they are willing
7 to dismiss those cases, as well, Judge. We are going to submit
8 a stipulated order to you shortly.

9 **THE COURT:** The next item is generic trial
10 performance and Rule 702 motions. I met with the parties on
11 June 28, July 6, and July 7. I heard argument and I have ruled
12 on all of the issues that were germane at that time. Anything
13 more?

14 **MR. HERMAN:** Your Honor, as these trials progress,
15 new issues come up and some revisited by trial counsel on both
16 sides. I personally will be meeting, as will Mr. Seeger, with
17 a member of the Smith trial team, meet with Mr. Blizzard and
18 his trial team, and if there are additional issues we'll bring
19 them to the Court immediately.

20 **THE COURT:** Let's keep an eye on that because the
21 thing that the plaintiffs obviously have to be aware of is that
22 the defendants have one team, basically, that are trying all
23 the cases. The plaintiffs have multiple teams that are trying
24 the cases. From the plaintiffs' standpoint, they have to
25 either have some continuity or they have to have some mechanism

1 for meeting immediately and sharing information and sharing
2 ideas. I think that will be helpful so that we have everybody
3 with the same type of information and experience, by and large,
4 even if it's vicarious experience.

5 **MR. HERMAN:** The PSC has looked religiously for a
6 banker the size of Merck's wallet to fund a single trial team
7 and so far, Your Honor, we haven't been able to find one, but
8 we do --

9 **THE COURT:** Well, the issues are different, though.
10 I don't know whether you can have a single trial team for all
11 of the cases because the issues are different, the litigants
12 are different, the plaintiffs are different. I don't know
13 whether you can do that. They're representing one person.
14 You're representing thousands and thousands and thousands of
15 people, so you can't have one lawyer to represent all of those
16 people. What you need to do is to have some mechanism for
17 sharing information and sharing thoughts and experiences.

18 **MR. HERMAN:** Merck's trial team in the MDL has been
19 excellent and they have appeared in every trial. In one sense,
20 the plaintiffs are disadvantaged when the Merck trial team
21 says, "Well, Your Honor, you already decided an issue." What
22 we have done, we have ordered the record in every case, and we
23 are going to list the rulings and provide them to trial teams
24 so that they will know what the Court's prior rulings are.

25 **THE COURT:** Also, when the parties each time give

1 them to me, it's helpful if you have a column that says
2 "Plunkett Trial," the next trial and so forth and my rulings.
3 Therefore, I can look at them and know what I've done and what
4 I haven't done. Now, some of them need to be tweaked each time
5 because it's very fact specific. Some of the rulings are
6 really a 403 ruling and that's always a movable ball. It's not
7 a question of whether it's relevant or not, but it's a question
8 of whether its relevancy is outweighed by other factors.
9 Occasionally that has to be looked at a little bit differently
10 because it's factually sensitive and factually pregnant, but
11 it's helpful to me to know where I went in other cases just as
12 it is helpful to you all. I mention that not by way of any
13 criticism; it's just that it would be helpful if, after each
14 trial is finished, somebody would be briefed immediately so
15 that you get whatever information they have.

16 **MR. HERMAN:** We have undertaken that process and
17 we'll provide the Court and defense counsel with the type of
18 information that shows the prior rulings. IMS data, there's no
19 current issue. Merck has provided Mason and Dedrick fact
20 sheets.

21 Merck's motion for summary judgment, there are a
22 number of layered legal issues. Merck's reply brief is due on
23 October 6, and we will be prepared to argue it when the Court
24 sets it.

25 **THE COURT:** Both of you get together and decide as to

1 when it's appropriate to argue and I'll set it up.

2 **MR. LEVIN:** Your Honor, recently the FDA has filed
3 new amicus briefs in other cases. We filed a 56(f) affidavit,
4 and this particular motion is fact specific as to Arnold and
5 Gomez. Pursuant to our discussions in chambers, it might be
6 advisable to work out some procedure because in this MDL, in
7 the spirit of Barrick v. Van Dusen, where the cases come from
8 the jurisdiction with the law of the jurisdiction, and since
9 not having a crystal ball, but some empirical data of what
10 courts of appeals do over the 40-something years I have been
11 practicing law, some of these cases on a remand in another
12 court and another jurisdiction may reach a different result on
13 a different set of facts. So we have a lot of things to talk
14 about.

15 **MR. WITTMANN:** I'm sure we will cover those in our
16 reply brief.

17 **THE COURT:** The real issue, though, is whether or not
18 it's ripe for oral argument. I will profit from oral argument
19 on this one, so I would like to set it. I will set it
20 specifically on a date that's workable for everybody. I do
21 want to hear you express yourselves. Tolling agreements.

22 **MR. HERMAN:** Yes. We have had a number of
23 discussions about tolling agreements. On September 21, 2006, a
24 PSC representative and a representative of Merck discussed the
25 PSC's concern that if Merck intended that plaintiffs' responses

1 to fact sheets were deficient, Merck might take the position
2 that the tolling agreement was invalid. In some cases, it
3 might mean that a claim was time barred. Merck has agreed, so
4 long as a request for tolling agreement was submitted prior to
5 expiration of an applicable statute of limitations or
6 prescription, if Merck considers that the corresponding fact
7 sheet is deficient, it will give plaintiffs' counsel notice by
8 letter and allow plaintiffs 30 days from receipt of the letter
9 to either cure the deficiency or commence legal proceedings.

10 **THE COURT:** That's fair. I think the spirit of the
11 tolling agreement is just that; it's a tolling agreement. It's
12 not to take advantage of anybody or to ambush them or anything,
13 so that's important. Also, the tolling agreements, there's got
14 to be a time where we get a handle on this litigation. It
15 can't go on forever in the sense that we don't know how many
16 cases and where they are coming from and so forth.

17 There's a period of time, when the litigation is
18 developing, that you don't have a feeling for the numbers, but
19 we should be getting to the time now where we know what the
20 numbers are. As I said previously, we ought to be getting our
21 whole arms around this litigation, see what it is and the
22 extent of it. That may have some effect, too.

23 **MR. HERMAN:** Item XVII. Your Honor has under
24 consideration a motion to clarify.

25 **THE COURT:** I don't see any disadvantage of that. It

1 just seems fair to me. I want everybody to participate and be
2 able to participate in the depositions. At the same time, if
3 it's an expert deposition, then it seems if they participate
4 there's certain expenses that they should be able to partake
5 of, too. It seems to be fair.

6 **MR. HERMAN:** This matter has been posted, et cetera,
7 and we have had no opposition.

8 **THE COURT:** I intend to sign it.

9 **MR. HERMAN:** Your Honor, with respect to statistics
10 as to number of cases filed, we understand that on or about
11 October 20 Merck will file its quarterly 10Q and will list
12 specifically the numbers of cases. We put that on the record
13 so that any concerned individual can access and determine how
14 many individual plaintiff's cases have been filed. They don't
15 include the tolling agreement plaintiffs, but all the other
16 plaintiffs, wherever the cases are filed, will be listed.

17 **MR. WITTMANN:** That's correct.

18 **THE COURT:** While we are on statistics, I don't know
19 if it's available, but I also think it would be helpful if
20 somewhere along the line we got a feel for what's been
21 happening in the MDL by way of motions, by way of depositions,
22 by way of court rulings, or something of this sort, so that
23 people can know what's happening other than people who are
24 doing it. I think that's part of what we ought to be putting
25 on the web site.

1 **MR. HERMAN:** Within the next two weeks, given
2 Your Honor's direction, we will provide Mr. Wittmann's office
3 with our listing of what we believe has happened in the MDL.
4 The defense can supplement it and we can make a joint filing.

5 **MR. WITTMANN:** Your orders are actually going on
6 Lexis/Nexis as they come out.

7 **THE COURT:** I think maybe there should be one place
8 where we just get a scope of what's been happening, numbers of
9 motions filed, rulings, number of cases tried, etc., so that
10 everybody can see, for whatever it's worth, what is happening
11 in the MDL. We don't keep a record of it anymore, but there
12 seem to be a lot of hits on the web site.

13 **MR. HERMAN:** I agree with Your Honor. I think a
14 summary, for example, of how many fact depositions have been
15 taken, how many expert depositions, how many documents have
16 been produced and reviewed would give everyone a sense of the
17 work that both Merck's team and the PSC have accomplished so
18 far.

19 **THE COURT:** After all, we have had this case about 18
20 months or so, less than two years, and you all have done a lot
21 of work in that period of time. I think we ought to know and
22 have it there. Merck insurance.

23 **MR. HERMAN:** I have already addressed item XIX in
24 connection with the discovery outstanding that we are
25 requesting. Item XX, further proceedings. Your Honor has

1 selected the next PSC conference. I believe it's October 27,
2 which is a Friday, at 9:30 a.m.

3 **THE COURT:** I'm told we have a problem with that
4 date. Let me give you another date. What about Friday,
5 October 20; will that work?

6 **MR. WITTMANN:** Could we maybe do it on the 19th?

7 **THE COURT:** The 19th is a problem. I'm speaking at
8 the MDL conference on that date, so I'm not going to be here.

9 **MR. WITTMANN:** How about October 18?

10 **THE COURT:** The MDL has an annual conference and I
11 have to be there. I'll be there from the 16th.

12 **MR. HERMAN:** What about Halloween?

13 **THE COURT:** That's the second day of that Mason case.
14 If we can do it a little further in the week, I can do it then.

15 **MR. HERMAN:** What about the morning of Friday,
16 November 3?

17 **THE DEPUTY CLERK:** November 2?

18 **MR. WITTMANN:** The 2nd of November is okay, Judge.

19 **THE COURT:** We'll do it then. We'll start at 9:00.
20 I will meet you all at 8:30.

21 **MR. HERMAN:** Thursday, November 2.

22 **THE COURT:** Anything else?

23 **MR. HERMAN:** Could I approach about another matter?

24 **MR. WITTMANN:** I have one additional matter,
25 Your Honor.

1 **THE COURT:** Do we need this on the record?

2 **MR. WITTMANN:** Yes. With respect to the last item on
3 the joint status report with respect to the statute of
4 limitations motion, I just wanted to go on the record and let
5 all counsel know that on September 22 we filed a motion for
6 summary judgment in the Boyd Edmonds, Donald Stinson, and
7 Timothy Watson cases raising the statute of limitations defense
8 with respect to states that had a one-year statute of
9 limitations. We intend to file a similar motion on October 3
10 or thereabouts with respect to states that have a two-year
11 statute of limitations to bring those issues up before the
12 Court. We just want to let everyone know that.

13 **MR. LEVIN:** Your Honor, we will be working out a
14 schedule, and perhaps we can handle that in some omnibus way
15 with regard to both the one and two-year statutes at the same
16 time.

17 **THE COURT:** Right. That makes sense. Then I suspect
18 we have three years after that.

19 **MR. WITTMANN:** At some point.

20 **MR. HERMAN:** Your Honor, we need the names and
21 addresses of the plaintiffs' attorneys who have to respond to
22 those motions.

23 **THE COURT:** Let's do that so that I can --

24 **MR. WITTMANN:** We can give them that. Actually, you
25 should have that because the names --

1 **MR. LEVIN:** No, they're not on the certificate.

2 **MR. WITTMANN:** All the plaintiffs' lawyers are in the
3 list of plaintiffs' lawyers you gave me months ago. We'll take
4 care of that, Judge.

5 **MR. SEEGER:** We don't lose days that way. We can get
6 on it right away.

7 **THE COURT:** Anything further on the record?

8 **MR. HERMAN:** Just to remind everyone on the record we
9 now have a comprehensive order in the federal courts as regards
10 mandatory electronic filing.

11 **THE COURT:** Right, we do. We passed that. We are
12 going to go into that. January 1 is going to be the cutoff
13 date, so everybody needs to get up to speed. If you need any
14 training or if you need any consultation, that sort of thing,
15 we can arrange that for. Let me go off the record.

16 (WHEREUPON, the Court was in recess.)

17 * * *

18 **CERTIFICATE**

19 I, Toni Doyle Tusa, CCR, FCRR, Official Court
20 Reporter for the United States District Court, Eastern District
21 of Louisiana, do hereby certify that the foregoing is a true
22 and correct transcript, to the best of my ability and
23 understanding, from the record of the proceedings in the
24 above-entitled and numbered matter.

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Toni Doyle Tusa, CCR, FCRR
Official Court Reporter