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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

* Docket MDL 1657-L
*
* November 2, 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
BY: RUSS M. HERMAN, ESQ.
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New Orleans, Louisiana 70113

For the Defendants: Stone Pigman Walther Wittmann
BY: PHILLIP A. WITTMANN, ESQ.
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produced by computer.

1 They will be posted on Lexis/Nexis.

2 **THE COURT:** Before you leave that, let me say that,
3 with the state court and the federal court trial settings, one
4 thing I've been giving some thought to is seeing if I can meet
5 with the state court judges and perhaps counsel sometime
6 probably before the end of the year to see if we can look at
7 next year and try to coordinate some of the dates so that when
8 the MDL trial is going on the states are not, and when the
9 states' trials are going the MDL is not, and see if we can deal
10 with some of the logistical problems and make it easier for the
11 courts as well as the litigants. I may be contacting you to
12 see if we can have a brief meeting with the states and with the
13 Court.

14 Class actions.

15 **MR. HERMAN:** Your Honor, with regard to section III,
16 which is cases for early federal court trial, the Barnett
17 matter, Mr. Beck and Mr. Robinson are meeting at the Court's
18 direction to choose a date. With the Court's consent, the
19 plaintiffs' steering committee has been allowed to file an
20 amicus brief in connection with the Barnett motions.

21 With respect to the class actions, Your Honor
22 has that under advisement.

23 **THE COURT:** Right. I've been reviewing them and I'll
24 be focused on them very shortly, at least on the areas that I
25 can focus on, so you'll be hearing from me shortly on that.

1 Discovery directed to Merck.

2 **MR. HERMAN:** With respect to insurance issues, we are
3 reviewing Merck's responses and we'll follow up on that. There
4 is no FDA outstanding production issue. The Ogilvy and DDB
5 third-party matters, in terms of discovery, plaintiffs and
6 defendants have agreed to push those issues off. We are still
7 in discussions.

8 With respect to deposition scheduling,
9 Your Honor has advised both sides, in the Farquhar matter, that
10 the deposition will go forth on November 21 and November 22.
11 If there's a problem, we'll notify the Court.

12 The plaintiff profile form, the Merck profile
13 form controversy, Your Honor has had briefs from both sides as
14 of today.

15 **THE COURT:** I appreciate the parties working together
16 on this and recognize that they have resolved some of the
17 issues, but there are some issues that need the Court's
18 attention. Each side has given me the benefit of their
19 thinking in the form of letters. I received letters yesterday.
20 I'll be focused on them and I'll make a decision on those areas
21 that there is an impasse on.

22 **MR. HERMAN:** The state/federal coordination, state
23 liaison committee. I believe Ms. Barrios is here.

24 **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios
25 for the state liaison committee. I have our usual CD-ROM I

1 would like to give to your law clerk, Jeremy. I have already
2 distributed it to the parties. Your Honor, I will volunteer
3 our efforts to help you coordinate with the state court judges
4 before the end of the year. If you call upon us to do so,
5 we'll be happy to.

6 **THE COURT:** Fine. Thank you very much. One of the
7 other things that perhaps we can deal with is the remand
8 issues. I would like to talk with them about that, too.

9 Pro se claimants.

10 **MR. HERMAN:** No issues today.

11 **MR. WITTMANN:** There's not an issue, but as
12 Your Honor knows we have filed motions to dismiss with respect
13 to plaintiffs who have not complied with filing plaintiff
14 profile forms. We have a number of pro se plaintiffs who have
15 done nothing. We intend to select some of those and start
16 moving because, as Your Honor pointed out, we have to narrow
17 this litigation down.

18 **THE COURT:** My view of that always is that I want to
19 give everybody a lot of opportunities to get back on board. I
20 notify them. I put it on the website. We call them. We do
21 everything we can to get them to do what everybody else has
22 done. You get to the point where if they haven't done it and
23 you give them one, two, three notices and then you rule them
24 into court to show why the case shouldn't be dismissed and they
25 don't show up finally in court, I have to dismiss the case. We

1 can't just have these things hanging. It's not fair to the
2 people who want to proceed with their case.

3 **MR. WITTMANN:** We'll follow the same procedure we did
4 the last time.

5 **THE COURT:** I'll dismiss them with prejudice. I know
6 the plaintiffs take issue with that, but I don't do it
7 willy-nilly. I give them one, two, three opportunities and
8 then we have to move on with it.

9 **MR. HERMAN:** I just have one comment. I feel it's
10 necessary to state, on behalf of the pro se individuals, many
11 of them don't have website access. They don't have electronic
12 ability. We believe that when defendants move for dismissal on
13 any ground they have a burden. Generally, under state law,
14 they would have to have a curator appointed, advertise three
15 times in the newspaper at the last known address, but I just
16 make that comment because I feel it's necessary.

17 **MR. WITTMANN:** They get two written notices,
18 Your Honor, as you know.

19 **THE COURT:** That is a legitimate comment, so let's
20 take special precautions with people who don't have attorneys,
21 and I'll be conscious of it.

22 **MR. WITTMANN:** We'll be happy to have Mr. Herman
23 serve as curator ad hoc.

24 **MR. HERMAN:** Mr. Wittmann has done me many favors
25 over the years and this isn't the least of them, Your Honor.

1 **THE COURT:** Many of the pro se, though, are housed at
2 the expense of various states in this country, so we know where
3 they are living and probably where they will be for some period
4 of time.

5 **MR. HERMAN:** Your Honor, there are no generic trial
6 performance issues before you. We believe on the IMS data
7 there's an agreement. We will be receiving that agreement to
8 review it in the next few days.

9 The preemption argument will take place before
10 Your Honor on November 17. Your Honor has scheduled it for
11 9:00 a.m. As I understand it, if there's a time change, you'll
12 advise.

13 **THE COURT:** Right.

14 **MR. HERMAN:** Tolling agreements. The parties are
15 still discussing the potential agreement that we haven't
16 arrived at as of yet. In terms of the motion for
17 clarification, it is not necessary to do that. There were two
18 people of the PSC in attendance at a meeting last night. We'll
19 liaison with Texas counsel and attempt to work that matter out.

20 **MR. WITTMANN:** Your Honor, the suit statistics are
21 accurately set forth in paragraph XVII of the joint report and
22 there's no change to report there.

23 **THE COURT:** Okay. What's the IMS data? Have we
24 talked about that?

25 **MR. HERMAN:** Yes, Your Honor. The folks representing

1 IMS are considering an agreement that they will send us. We'll
2 report back to the Court after we have received it.

3 **THE COURT:** That's the insurance issue?

4 **MR. HERMAN:** Yes. Well, no. The IMS data has to
5 do --

6 **THE COURT:** I understand. What about insurance?

7 **MR. HERMAN:** On the insurance issue, Merck responded
8 to our interrogatories. We are reviewing those right now. We
9 have issued a 30(b)(6) notice relating to the insurance.

10 Item XIX, Mr. Wittmann and I are conferring
11 regarding the various matters raised in his recent
12 correspondence about further proceedings and the Court's
13 direction. Hopefully we'll meet next week with representatives
14 of Merck to further discuss those issues.

15 **THE COURT:** I know, with regard to proceedings, I
16 have those documents still to go through. I mentioned in
17 chambers I'm aware of that and I'm trying to get to them. I
18 just have had some scheduling problems. I went through them
19 once and it took me a long time. I've been going about 10
20 hours a day for 10, 12 days. The clerk asked me to look at
21 them again and I'm trying to deal with that, but I've been in
22 trial so long for the last six months it's difficult for me to
23 grab big amounts of time to do it. I've been having to work it
24 in in less bites and it's just time consuming, but I'm aware of
25 it and I'm working on it.

1 **MR. HERMAN:** No issue on item XX as to mandatory
2 electronic filing.

3 **MR. WITTMANN:** Except that I think counsel should be
4 aware of the recent order by the chief judge with respect to an
5 automatic 30-day extension.

6 **THE COURT:** We had to do that to try to deal with the
7 backlog of cases. Since Katrina, we have been getting not only
8 a lot of cases filed, but a lot of removals, so we are backed
9 up a little bit downstairs in the clerk's office and we are not
10 able to process them, so we extended the time.

11 **MR. HERMAN:** There is not yet a statute of
12 limitations date for hearing. Some briefs have been filed and
13 more will be coming in, but there's no hearing date as of yet.

14 **MR. WITTMANN:** I think we are going to suggest a
15 briefing schedule and a hearing date, too, Your Honor. We are
16 working with plaintiffs' counsel.

17 **THE COURT:** On another issue with statute of
18 limitations, we really have to try to do our best at this stage
19 to get a handle on this litigation. Some states -- for
20 example, Minnesota -- will go for ten years or five years or
21 whatever it is. We really have to figure out a way of getting
22 a view of the case. Danny, you had something?

23 **MR. BECNEL:** Six years in Minnesota.

24 **THE COURT:** Six years. We can't wait six years in
25 this case. I understand from the defendant's standpoint they

1 need to know what they are looking at, but the plaintiffs have
2 to understand that, too. We have to come up with some creative
3 way of just closing the door, giving everybody an opportunity
4 to join in litigation either here or in state court, but if
5 they don't they are out. One way of doing it is a Lone Pine
6 situation, exempt everybody who is already in the litigation
7 from the Lone Pine, give everybody an opportunity to get into
8 the litigation; and if they don't get into the litigation, give
9 them a period of time to fill out some material Lone Pine and,
10 if not, I'll dismiss the cases. That will put an end to it.
11 That's one way of doing it.

12 I suggest you all meet and come up with some
13 creative way of closing the corral at this stage so we can take
14 a look at this litigation globally.

15 Anything else? There's an issue of Mr. Harrison
16 versus Merck. Is Mr. Harrison in the room? It's a pro se
17 problem.

18 **MR. WITTMANN:** I don't think Mr. Harrison is here.

19 **THE COURT:** No. The record should reflect no one
20 stood up.

21 **MR. DAVIS:** Your Honor, however, he did contact our
22 office. I know that he did want to participate and advised
23 that he may try to do so by telephone.

24 **THE COURT:** If we were in my courtroom, I could
25 access a phone, but we don't have one in this courtroom.

1 **MR. DAVIS:** We did tell him, however, that generally
2 you did have telephone access and that often is allowed by the
3 Court.

4 **MR. HERMAN:** We'll contact him today, Your Honor, and
5 advise him that at the next status conference there will be a
6 telephone available.

7 **THE COURT:** Fine. What's the next date?

8 **MR. HERMAN:** Your Honor, you need to advise us as to
9 when you would like to have it.

10 **THE COURT:** How about December 14? Are you all
11 available then?

12 **MR. WITTMANN:** Preconference at 8:30 and conference
13 at 9:00?

14 **THE COURT:** Right. Will that work? Any other issues
15 that we need to deal with anything from anybody? Thank you
16 very much. Court will stand in recess.

17 **THE DEPUTY CLERK:** All rise.

18 (WHEREUPON, the Court was in recess.)

19 * * *

20 **CERTIFICATE**

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

25 _____
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter