

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS                   \*   Docket MDL 1657-L  
LIABILITY LITIGATION                   \*  
   \*   January 25, 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.  
   820 O'Keefe Avenue  
   New Orleans, Louisiana 70113

For the Defendant:                   Stone Pigman Walther Wittmann  
   BY: PHILLIP A. WITTMANN, ESQ.  
   546 Carondelet Street  
   New Orleans, Louisiana 70130

Official Court Reporter:           Toni Doyle Tusa, CCR, FCRR  
   500 Poydras Street, Room B-406  
   New Orleans, Louisiana 70130  
   (504) 589-7778

Proceedings recorded by mechanical stenography, transcript  
produced by computer.

PROCEEDINGS

(January 25, 2007)

1  
2  
3 THE DEPUTY CLERK: All rise.

4 THE COURT: Be seated, please. Call the case,  
5 please.

6 THE DEPUTY CLERK: MDL 1657, In Re: Vioxx.

7 MR. HERMAN: May it please the Court. Good morning,  
8 Judge Fallon. Russ Herman for the plaintiffs' steering  
9 committee.

10 MR. WITTMANN: Good morning, Your Honor.  
11 Phil Wittmann for Merck.

12 THE COURT: We are here today for our monthly status  
13 conference. We also have some folks on the telephone line  
14 monitoring it. I ask counsel to try to speak in the microphone  
15 so they can hear.

16 I have been presented with a suggested agenda.  
17 The first item on the agenda is state court trial settings.

18 MR. WITTMANN: Your Honor, the trial settings for the  
19 next six months, we have one case in progress right now. The  
20 Hermans case and the Humeston case commenced on January 22 in  
21 Atlantic County, New Jersey. The Schwaller case is set for  
22 trial in Madison County, Illinois on February 20. It should be  
23 under way just about. The Schramm case is set to be tried in  
24 Philadelphia on May 21 of this year. The Slatton case is set  
25 for trial in Alabama, Jefferson County, on June 18.

1                   On January 19 the California Superior Court in  
2 the case involving Lawrence Appell and Rudolph Arrigale  
3 declared a mistrial due to a hung jury. We understand that the  
4 Texas MDL is going to set a case for trial in May of 2007, but  
5 we don't know which one. That's the report on cases that are  
6 currently set.

7                   **THE COURT:** The next item is the early federal court  
8 trials. We have tried five cases in federal court, had six  
9 trials. There's a hearing on a motion for new trial in the  
10 Irvin/Plunkett case. There's also a motion in the  
11 Irvin/Plunkett case that needs to be set. A motion has been  
12 filed in the Barnett case for reconsideration of my position in  
13 that particular case.

14                   With regard to the dates, I ask counsel for  
15 plaintiffs and defendant to get together on a date and check it  
16 out with me. I'm available. Let's make sure you're ready for  
17 it. The same way with the Barnett case. I want to set these  
18 two matters for hearing. We'll do that hopefully at the same  
19 time if you have any oral argument. Let's do that within a  
20 week. Give me the dates, please, and I'll work it in.

21                   Class actions.

22                   **MR. WITTMANN:** On the class actions, Your Honor, I  
23 think you have under advisement Rule 12 motions to dismiss the  
24 master complaints for medical monitoring and the purchase-money  
25 claims.

1           **THE COURT:** Yes, I do. The next item is discovery  
2 directed to Merck.

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

4           **THE OPERATOR:** Pardon the interruption. The  
5 gentleman that is speaking is fading in and out really bad. I  
6 don't know if you are at a microphone. I just wanted you to  
7 know that it is real rattly.

8           **THE COURT:** Sure. Go ahead. Let me hear from the  
9 plaintiff.

10          **MR. HERMAN:** May it please the Court. On discovery  
11 directed to Merck, there are a couple of issues. The first  
12 issue is privileged documents still under advisement by the  
13 Court. We know it's a Herculean task to go through those  
14 documents.

15                   In connection with that, we have got some  
16 depositions that were set that the plaintiffs felt were  
17 conditioned upon getting some privileged information.  
18 Mr. Marvin and I are currently working to resolve that issue  
19 regarding whether these depositions go forward and at what  
20 time. We believe it's important to take that discovery. It  
21 may be that we'll reach some agreement on that before the next  
22 status conference. I'm hopeful that we will. That issue also  
23 is an issue under item VI in the report.

24                   We also have a question of a hearing on  
25 insurance discovery. Defendant Merck has indicated that within

1 a week they'll file a responsive brief. As I understand it,  
2 the insurance matter will be set for hearing on March 1.

3 **THE COURT:** Right. I'll take up the insurance issues  
4 in oral argument following the monthly status conference on  
5 March 1 and also the PPF forms at that time. The day before,  
6 February 28, in the afternoon, I'll deal with the Martin report  
7 and the statute of limitations. When we get into it, if we  
8 need to flip any of those motions, let me know. I set the  
9 afternoon of the 28th and then the day of March is available  
10 for you. Anything more on discovery directed to Merck?

11 **MR. HERMAN:** No, Your Honor.

12 **THE COURT:** What about discovery directed to third  
13 parties?

14 **MR. HERMAN:** Nothing presently, Your Honor.

15 **THE COURT:** Deposition scheduling we talked about.  
16 Last time we had some discussion on the question of state and  
17 federal depositions. Has that been worked out? Anything on  
18 that?

19 **MR. HERMAN:** It has not been worked out yet. I  
20 believe the Texas folks on the plaintiffs' side are talking to  
21 the defense folks.

22 **THE COURT:** You need to speak in the microtone.

23 **MR. HERMAN:** I'm sorry. The plaintiffs and  
24 defendants on both sides in the Texas litigation are discussing  
25 a resolution of that, but haven't reached any. Maybe Dawn can

1 amplify it.

2           **THE COURT:** Dawn, do you have anything on it?

3           **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios  
4 for the state liaison committee. It's my understanding that it  
5 has been worked out. Am I correct?

6           **MR. LEVIN:** No.

7           **MS. BARRIOS:** I had received a copy of a letter.  
8 Obviously I am wrong.

9           **MR. LEVIN:** There is a letter floating around, but  
10 there are issues that that letter presents that have to be  
11 resolved.

12           **THE COURT:** Let's get involved in this, Dawn, and get  
13 back to me in 10 days. We have got to work this out so we can  
14 move it around. If there's a problem, I'll get everybody  
15 together and we'll deal with it.

16                           Plaintiff profile forms and Merck profile forms.  
17 Anything on that?

18           **MR. WITTMANN:** There are a couple things, Judge, on  
19 that that I think people might like to know about. You have  
20 already mentioned one. We have filed a rule to show cause why  
21 certain cases should not be dismissed for failure to file  
22 responses in accordance with Pretrial Order 18C. As you noted,  
23 that's going to be set for hearing on March 1.

24                           There are a couple of other things that we are  
25 in the process of working out. One is setting a deadline. As

1 Your Honor will recall, victims of Hurricane Katrina were  
2 relieved of having to file plaintiff profile forms, and that's  
3 been an ongoing situation. We have discussed with the Court  
4 and with Mr. Herman setting a deadline for those plaintiff  
5 profile forms to be filed. We have agreed we will give  
6 Mr. Herman a list of those cases -- there are about 323 of them  
7 where they are under the order extending the time to file --  
8 and we'll give him a suggested order for filing of those  
9 plaintiff profile forms. We'll do that prior to the next  
10 status conference.

11           The other thing relates to the medical  
12 authorizations. We are getting medical authorizations rejected  
13 by some providers because they're not recent enough. What we  
14 are going to ask the Court to do is enter an order which would  
15 validate profile forms on an ongoing basis for a period of one  
16 year so that our provider -- they will be undated -- can then  
17 date them at any time up to one year from today and can redate  
18 those that have already expired so long as they don't expire  
19 within one year from today. We are going to submit an order to  
20 Mr. Herman reflecting the order we want the Court to enter on  
21 that issue.

22           **THE COURT:** Okay. Get together on it and work out  
23 the details. The thing that I always am concerned about is  
24 just total open-ended matters. Somehow or another, those get  
25 either filed away or they get in other people's hands

1 unintentionally and then the individual has an open-ended  
2 request out there, doesn't know who has it, when they are going  
3 to use it, and so forth and so on. That creates problems.

4 I do think, as a practical matter, you have  
5 difficulty with this many claims and this many cases dealing  
6 with a specific date. They get out of date fast. We'll put in  
7 the year date and then the other monthly date will be flexible.  
8 At least it can be worked out. You all work out the language  
9 that you want.

10 **MR. WITTMANN:** We will, Your Honor. I think it's  
11 helpful to the plaintiffs not to have to keep going back to  
12 their clients to get authorizations.

13 **THE COURT:** I think that's right, and it just delays  
14 things.

15 **MR. HERMAN:** Yes, Your Honor. We appreciate any help  
16 that learned counsel could give the plaintiffs in the details  
17 in this, and we'll work on this. However, there are certain  
18 things that perhaps the PSC can agree to and some they can't  
19 when it relates to individual claimants and their attorneys.  
20 It's going to take some input or validation from individual  
21 attorneys and claimants, but we'll work this out.

22 With regard to the Louisiana plaintiff profile  
23 forms, we need not only the cases that are involved, but also  
24 the attorney name and contact information. I'm sure you'll  
25 provide that.



1           **MR. WITTMANN:** We can do that, Your Honor.

2           **THE COURT:** Let me go back to the first issue. Let's  
3 get it done by the next status conference. If we have  
4 difficulty, then get me involved in it and I'll work it out,  
5 but I would like to get counsel to work it out in the easiest  
6 way. We do have to move on on that because those profile forms  
7 and that type information is necessary for both sides to have.  
8 If we just put it off and put it off, those cases are going to  
9 just be the caboose on a train and that's not going to be  
10 helpful to either side.

11                           Federal/state coordination. Anything on that?

12           **MS. BARRIOS:** Yes, Your Honor. Today is a momentous  
13 day for us because now the remand number is so large we are  
14 moving into our second CD-ROM. Your Honor, for the benefit of  
15 the attorneys listening on the phone, I want to urge on their  
16 behalf because they urge me to move this Court to move on the  
17 motions for remand. It's been more than two years since the  
18 drug has been pulled from the market. Weekly, if not daily, I  
19 receive inquiries on Your Honor's position on the remand  
20 motion. So I would appreciate your addressing this,  
21 particularly for those state attorneys who are not present in  
22 court today. I have provided both counsel with the two CD  
23 ROMs, as I will give your law clerk.

24           **THE COURT:** Okay. I do know that that's of interest  
25 to the clients as well as their counsel. I have been dealing

1 with other issues involved in this case, but it is time that we  
2 focus on that. I'm conscious of it. It's just that there have  
3 been some other issues that we have been focused on.

4 Pro se claimants. Anything on that?

5 **MR. HERMAN:** Your Honor, we have someone who has  
6 called in on the telephone representing himself. Otherwise, on  
7 pro se plaintiffs, we have nothing to report.

8 I do want to go back to one issue on motions.  
9 As I understand it, the argument on the Martin report and  
10 discovery is set for 3:00 on February 28.

11 **THE COURT:** Right. Those two are set for the 28th,  
12 3:00, and then the next day the insurance issues and the PPF  
13 forms will be handled following the monthly status conference,  
14 which will be on March 1.

15 **MR. WITTMANN:** The statute of limitations argument is  
16 set March 1, too, Your Honor.

17 **THE COURT:** I can do it either following the Martin  
18 report or on March 1, whichever is convenient with counsel.  
19 Just let me know first so that I can be ready for it.

20 **MR. HERMAN:** Your Honor, the Vioxx suit statistics  
21 are as they are listed in Joint Report No. 21 and will be  
22 posted on the website. We have Mr. Harrison's request to be  
23 heard in Harrison v. Merck.

24 **THE COURT:** Mr. Harrison, I have your material and I  
25 discussed it a bit last time with you. What I need the PSC to

1 do is to consult with Mr. Harrison and --

2 **MR. HARRISON:** I'm here, Judge.

3 **THE COURT:** I want you to have access to the database  
4 that they have and, also, there's some literature base that you  
5 ought to at least look at. I want you to have enough time to  
6 look at that material, but then I'm going to have to focus on  
7 what we call Daubert issues, that is to say, the science  
8 relating to your claims. It would be easier or best for you if  
9 you had some representation on that. I'm just concerned that  
10 you don't have representation.

11 **MR. HARRISON:** Legal representation has been an  
12 issue, remember.

13 **THE COURT:** Yes, I know that.

14 **MR. HARRISON:** I do, Judge, have a couple of other  
15 items. The line was lost. It's been 10 minutes trying to get  
16 back on. I don't know where you were relative to me. I did  
17 have a couple small items to address the audience with.

18 **THE COURT:** What do you have in mind, Mr. Harrison?

19 **MR. HARRISON:** On the minutes for December 14, they  
20 were too vague for the population of lawyers across the country  
21 that reads these notes to understand that I have an issue of  
22 bone and spine versus heart and cardiovascular. That is like  
23 one of the major reasons I was there, not only because I  
24 couldn't get representation, but it doesn't come through in the  
25 minutes. Then to compound that, the transcripts are separate.

1 Nobody has requested the transcript. The reason why I was  
2 there hasn't really come out in the notes and I'm really  
3 concerned about that. That's going to damage me just trying to  
4 get representation, let alone public awareness.

5 **THE COURT:** Well, we take all of this down,  
6 Mr. Harrison, so what you said is part of the record.

7 **MR. HERMAN:** May it please the Court. Judge Fallon  
8 and Mr. Harrison, I have just polled the PSC, and we  
9 unanimously have agreed that you will have access to the  
10 plaintiffs' depository, which may assist you. We'll be  
11 contacting you on Monday to arrange electronic access to the  
12 discovery, which will include depositions to date, trial  
13 testimony to date, documents Merck has produced, as well as the  
14 literature we have on file.

15 So, following this call, if you will call  
16 Mr. Davis at (504)581-4892 -- (504)581-4892 -- on Monday after  
17 11:00 Eastern Standard Time, we'll arrange for you to have  
18 depository access.

19 **MR. HARRISON:** Excuse me, Judge. That was after this  
20 call or Monday?

21 **THE COURT:** Monday, Mr. Harrison.

22 **MR. HARRISON:** Thank you, Judge. That was one of my  
23 items.

24 **MR. HERMAN:** As Mr. Davis has pointed out, we'll need  
25 a confidentiality agreement relating to these documents that

1 you'll be reviewing.

2           **THE COURT:** Give them a call, Mr. Harrison, so you  
3 can deal with that.

4           **MR. HARRISON:** Yes, sir. That's fine. I appreciate  
5 that very much.

6           **THE COURT:** Let's move on to the next item, then, IMS  
7 data.

8           **MR. WITTMANN:** I don't think there's anything to  
9 report on that, Your Honor.

10           **THE COURT:** Anything on item XI, Merck's motion for  
11 summary judgment?

12           **MR. HERMAN:** I just have to report to the Court that  
13 there are additional materials and decisions that are coming  
14 out that we have forwarded to the Court. We may need some  
15 additional briefing on that issue. We'll talk with  
16 Mr. Wittmann about it before the next conference and advise the  
17 Court.

18           **THE COURT:** Okay. Check the literature, too.  
19 There's some references that I'm beginning to see, so I would  
20 like your views on that.

21           **MR. HERMAN:** I'll talk with Mr. Wittmann and we'll  
22 get back to the Court.

23           **THE COURT:** Tolling agreements.

24           **MR. WITTMANN:** We continue to receive tolling  
25 agreements. They are all, of course, in the MDL. As of

1 November 30, approximately 14,100 tolling agreements have been  
2 entered into between potential plaintiffs and the company.

3 **THE COURT:** Okay. So there are about 8,000-some-odd  
4 cases filed and 14,000 in the MDL; is that right?

5 **MR. WITTMANN:** Total cases filed, Your Honor, are  
6 27,200.

7 **THE COURT:** Right. I understand that, but that's  
8 filed. There are 8,000 or thereabouts filed in the MDL, but  
9 then there's these tolling agreements in addition to the 8,000?

10 **MR. WITTMANN:** That's right. 14,150.

11 **THE COURT:** Did we skip statistics or did we talk  
12 about that already?

13 **MR. WITTMANN:** That's already been talked about.

14 **THE COURT:** Merck insurance.

15 **MR. WITTMANN:** That's going to be coming up for  
16 argument on the 1st.

17 **THE COURT:** Further proceedings is item XVI.

18 **MR. WITTMANN:** That relates to additional trials in  
19 the MDL, Your Honor. We have talked with you about that on  
20 several occasions, and we continue to have ongoing discussions  
21 about that.

22 **THE COURT:** The statute of limitations motion, we  
23 have talked about that. We have talked about Mr. Harrison's  
24 issue.

25 **Discovery relating to the Martin report.**

1           **MR. WITTMANN:** That's all set for February 28,  
2 Your Honor.

3           **THE COURT:** Any new items? Any new matters to  
4 discuss?

5           **MR. WITTMANN:** Just the next status conference, which  
6 this morning you indicated would be March 1.

7           **THE COURT:** March 1. At 8:30 I will meet with  
8 liaison and 9:00 will be the meeting.

9           **MR. WITTMANN:** That covers it all.

10          **THE COURT:** Thank you very much. Court will stand in  
11 recess.

12          **MR. WITTMANN:** Thank you very much, Your Honor.

13          **THE DEPUTY CLERK:** Everyone rise.

14          **MR. HARRISON:** Your Honor, this is Mr. Harrison. I  
15 just have one quick question.

16          **THE COURT:** All right, Mr. Harrison.

17          **MR. HARRISON:** I realize people have to go, but I  
18 wonder if, as time goes on, we may need to develop a set of  
19 engagement rules, so to speak, for the PSC, the DSC, and myself  
20 to make sure we don't trip over each other, and then possibly  
21 have you agree upon those rules?

22          **THE COURT:** Well, you discuss it with them,  
23 Mr. Harrison. If you can't come to any arrangement, then I'll  
24 have to act on it.

25          **MR. HARRISON:** Okay. Thank you, Your Honor.

1           **THE COURT:** Discuss it with them during your  
2 conference. Thank you. Court will stand in recess.

3           **THE DEPUTY CLERK:** Everyone rise.

4           (WHEREUPON the Court was in recess.)

5                               \* \* \*

6                               **CERTIFICATE**

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

13  
14  
15   \_\_\_\_\_  
16   Toni Doyle Tusa, CCR, FCRR  
17   Official Court Reporter  
18  
19  
20  
21  
22  
23  
24  
25