

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF LOUISIANA
3 NEW ORLEANS, LOUISIANA

4 *****
5 IN RE: VIOXX * MDL NO. 05-1657
6 PRODUCTS LIABILITY LITIGATION *
7 *
8 * SECTION "L"
9 * JUDGE FALLON
10 * MAG. JUDGE KNOWLES
11 * JULY 27, 2007
12 *****

13 APPEARANCES:

14
15 FOR THE PLAINTIFF STEERING
16 COMMITTEE

Russ M. Herman, Esq.
Leonard A. Davis, Esq.
Andy Birchfield, Esq.
Herman, Herman, Katz &
Cotlar, LLP
820 O'Keefe Avenue
New Orleans, LA 70113
(504) 581-4892

19
20 FOR DEFENDANT, MERCK & CO.

Stone, Pigman, Walther,
Wittman, LLC.
Phil Wittman, Esq.
John Beisner, Esq.
and Jessica Miller, Esq.
Dorothy Wimberly, Esq,
546 Carondelet St.
New Orleans, LA 70130-3588
(504) 581-3200

1 Kathryn A. Snapka, Esq.
2 Snapka & Turman LLP
3 P O Box 23017
4 Corpus Christi, TX 78403
5 361-888-7676

6 FOR STATE LIAISON COMMITTEE Dawn Barrios, Esq
7 701 Poydras Street
8 Suite 3650
9 New Orleans, Louisiana 70139

10 FOR THE *PETERSON* CASE Laminack, Pirtle, Martines,
11 L.L.P.
12 By: Buffy K. Martines, Esq.
13 440 Louisiana Suite 1250
14 Houston, TX 77002
15 Phone: 713 292 2750

16 Carey & Danis, LLC
17 Casey Flynn, Esquire
18 8235 Forsyth Blvd. Suite 1100
19 St. Louis, MO 63105
20 (800) 721-2519

21 COURT REPORTER Pinkey Ferdinand,
22 Official Court Reporter
23 500 Poydras Street
24 Room HB-406
25 New Orleans, Louisiana 70130
(504) 589-7781

Proceedings recorded by mechanical stenography, transcript
produced by computer.

1 **(Opening of Court)**

2
3 THE COURT: Be seated, please. Good morning, ladies
4 and gentlemen. Counsel make your appearances for the record.

5 Lets call the case.

6 DEPUTY CLERK: MDL Number 1657 in re: Vioxx.

7 MR. HERMAN: Good morning, Judge Fallon. Russ Herman
8 for the plaintiff's Steering Committee, plaintiffs.

9 MR. WITTMAN: And Phil Wittman representing Merck,
10 Your Honor.

11 THE COURT: Okay, we're here today in connection with
12 our monthly status conference. I have received an agenda from
13 the parties. I met with the committee this morning. We'll take
14 the agenda in the order in which it is prepared.

15 The first item is State Court Trial Settings. Is
16 there anything on that one?

17 MR. WITTMAN: The State Court Trial Settings, Your
18 Honor, are set forth in the joint report. There is one
19 correction I think to be made with respect to the *Zajicek* case
20 over in Texas, and counsel is here for plaintiff on the case to
21 advise us of the current status of the case.

22 MS. SNAPKA: Your Honor, Kathryn Snapka, lead defense
23 counsel in the *Zajicek* case. It's currently set and on the
24 docket for October 22nd, however, some recent circumstances have
25 necessitated moving that trial setting. It looks like it will

1 probably be tried in February with a back up in March.

2 THE COURT: All right. Thank you very much for coming
3 over. And certainly I appreciate that.

4 MR. WITTMAN: The other cases, Your Honor, the *Kozic*
5 case, the *Appell* case, the *Donohoo* case, and the cases in New
6 Jersey are all as reported in the status report.

7 THE COURT: Okay. The next item is Further
8 Proceedings In Earlier Trial Cases, and I have some issues, some
9 motions and several of the cases, the *Barnett* case.

10 MR. WITTMAN: Your Honor, it's our understanding that
11 plaintiffs will file an opposition to our Motion for New Trial
12 on or about August 10th.

13 MR. HERMAN: Your Honor, as I have noted other places
14 in the agenda, since that matter involves a preemption, there
15 are matters pending in the United States on which the Solicitor
16 General of the United States has been requested for input, the
17 Fifth Circuit Court of Appeal and other circuits have as a
18 matter of preemption before it. There is no fact record
19 regarding the governor of Indiana and the governor of
20 Mississippi who allegedly gave information that a pronouncement
21 by the FDA on preemption wouldn't interfere with state's
22 rights.

23 We've noticed the deposition of the governor of
24 Indiana and the governor of Mississippi. As soon as they're
25 served I suppose we'll know what reaction they have.

1 THE COURT: When are they set for?

2 MR. HERMAN: I believe they're noticed on July 27 and
3 set for --

4 MR. WITTMAN: In September, Your Honor.

5 THE COURT: In September.

6 MR. WITTMAN: It certainly does impact the *Barnett*
7 case because in affect what the defendants have asked for in
8 with *Barnett* is a reconsideration of Your Honor's ruling on
9 preemption, so the plaintiffs agree it's a correct ruling.

10 THE COURT: We can either move the hearing date until
11 after the depositions, or if we need to go to hearing date, I'll
12 just hold my response until those depositions are taken.

13 MR. HERMAN Thank you, Your Honor.

14 For my colleague's benefit, I have another quote from
15 Shakespeare. "It is time to fear when tyrants seem to kiss."

16 THE COURT: I'm not quite sure I understand that, but
17 maybe John does.

18 MR. BEISNER: Your Honor, I want to make sure I'm not
19 confused here, frankly.

20 MR. WITTMAN: I'm being kissing my Herman here, but I
21 don't see what the governor of the state of Texas has to do with
22 the *Barnett* motion for new trial.

23 MR. HERMAN: I don't think the governor of Texas does
24 because he was never asked for his opinion. But the fact is, a
25 former lobbyist for FDA -- at the FDA for drug companies is now

1 the governor of Mississippi, and a former CEO of a
2 pharmaceutical company is now the governor of Indiana. And a
3 former congressman from Louisiana is the head of FORMA, and for
4 the FDA to have walked down the aisle, so to speak, in their
5 preemption issue with a former lobbyist for the pharmaceutical
6 companies, and former CEO of a pharmaceutical company, we
7 believe should meet with some inspection, close inspection.

8 THE COURT: All right. Well, I don't know whether it's
9 relevant or not relevant, but apparently he feels that there is
10 relevance and he says Shakespeare does too.

11 MR. BEISNER: John Beisner for Merck.

12 Your Honor, I just want to get clarification on this.
13 I assume that with respect to our request for 1992(B)
14 certification we can be heard on this when that motion is heard
15 as to relevancy.

16 MR. LEVIN: The same issue is there. Arnold Levin.

17 The reason *Barnett* becomes at issue is, *Barnett* will
18 go to the Fifth Circuit. And Your Honor made a rule on
19 preemption without an opinion during the trial so that that
20 preemption issue will go up on *Barnett*. So, yeah, *Barnett*, and
21 the 1292(B) motion should be in tandem.

22 MR. BEISNER: Well, Your Honor, in the *Barnett* case we
23 have not filed a notice of appeal. We don't know if we will
24 take up the preemption issue in that case. That is a pre-VIGOR
25 case, and the motion we made earlier was intentionally focused

1 on a post-VIGOR case. So I think those are separate issues, and
2 the one that we do want to get to cert is the one to which we've
3 made the 1292(B) certification.

4 THE COURT: I'll talk with you about that. With
5 regard to the *Barnett* case and the significance of preemption, I
6 did drop a footnote in my opinion citing the Court to the
7 *Barnett* as well as the *Plunkett* case. This issue has come up in
8 every case that we've tried.

9 MR. HERMAN: Your Honor, I make note that under item 11
10 of the agenda, the defendants bear out summary judgment in
11 *Arnold* and *Gomez* also assert the plaintiff's claim are
12 preempted.

13 THE COURT: Okay, lets go to class actions
14 certifications. I'm moving into that area now. We've done the
15 preemption issue. We've done the privileged issue, and so I've
16 moving into that. As I tell you, I don't have anything in sight
17 at this point, but I'm moving in the of an end game. You've got
18 about as much as you can get from me with the exception of some
19 areas that we haven't focused on, and that is stroke cases. I
20 don't know -- we haven't tried any stroke cases yet, so if that
21 becomes necessary I may be focusing on that the next year and
22 we'll try to carve out five or six stroke cases and try them the
23 next year.

24 MR. WITTMAN: I think we were waiting a date for our
25 argument on the medical monitoring and the purchase claims --

1 THE COURT: Right.

2 MR. WITTMAN: -- on the master complaint.

3 THE COURT: Yes. The next item is Discovery Directed
4 to Merck?

5 MR. HERMAN: Yes, Your Honor. Mr. Seigle points out
6 under class actions that are still before the New Jersey Supreme
7 Court.

8 THE COURT: Yeah, that's really why we were waiting.
9 The particular purpose claim, I understand that the case has
10 been argued now and it's pending, so I think it's going to be
11 out shortly.

12 MR. HERMAN: Your Honor, with respect to discovery
13 directed to Merck and the privilege issues -- and, again, I want
14 to thank Mr. Ropino (phonetic spelling) for the work he's done
15 on behalf of the PFC. The PFC agrees with Merck that the
16 document reviewed procedure by the Special Master was
17 comprehensive and fair; that the review procedures employed work
18 done by the Special Master more than satisfies directives set
19 out by the Fifth Circuit in it's May 26, 2006, ruling and
20 consistent with the April 25th, 2007 order of this Court.

21 The report outlines a detailed methodology, legal
22 basis, fact criteria as a basis for the Special Master's final
23 privilege rulings.

24 Accordingly, the entire report allows the Court to
25 make a more informed legal and fact decision. However, the PFC

1 is in the dark with respect to the rulings on individual
2 documents and requests. Clarification with respect to documents
3 which the Special Master initially deemed not privileged, but
4 ultimately deemed privileged.

5 We believe strongly that Merck overstated and
6 mischaracterized the FDA's alleged pervasive regulation of a
7 pharmaceutical industry as a basis. And we, rather than
8 burdening the Court with further oral statement about that
9 issue, have issued -- submitted a letter to the Court stating
10 what our position is. We've served the defendants. And we do
11 not believe that regulatory matters do not equate to legal
12 matters. For example, Silverman, the head of Merck's Regulatory
13 Affairs Division is not an attorney. We appreciate very much
14 the work done by the Special Master and the Court in this
15 regard.

16 MR. WITTMAN: I just think all those matters would
17 await oral argument following Your Honor's ruling on the Special
18 Master's report.

19 THE COURT: That's fine.

20 MR. WITTMAN: I think Mr. Barrier --

21 THE COURT: Yeah, I have with us today Mr. Brent
22 Barriere, the Special Counsel to the Special Master. Anything
23 on that, Mr. Barriere?

24 MR. BARRIERE: Good morning, Your Honor. Thank you.

25 Two outstanding matters, Your Honor. You may recall

1 that towards the end of June the Court requested that Special
2 Master Rice evaluate the so-called third-party documents. These
3 are documents to which Merck has asserted a privilege that were
4 distributed to two outside public relations firms. Those have
5 been reviewed. Drafts of the opinion have been generated, and I
6 would anticipate that a final opinion will be generated next
7 week and filed with the Court consistent with the procedure's
8 used for last month's opinion.

9 On approximately July 16th, we received correspondence
10 from Mr. Wittman raising issue with respect to whether there had
11 been inconsistent ruling with respect to either like or
12 duplicative documents. We are working through those now and
13 anticipate that a report addressing the specific issues raised
14 in this correspondence will also be issued sometime next week.

15 Thank you, Your Honor.

16 THE COURT: Thank you for your work, and thank
17 Professor Rice.

18 This is an issue the discovery of electronic material
19 is particularly an issue. It's being raised in a lot of the
20 MDLs throughout the country. And all of us have tried -- all of
21 the transferee judges are trying to come up with some kind of
22 process for dealing with this type problem. In this case, for
23 example, we're looking at approximately 500,000 pages. It's
24 difficult from the standpoint of the Court to deal with that
25 amount of material and it's more complex when it is -- involves

1 emails, and strings of emails, that are sent to various
2 departments. And when those type of materials are collated or
3 gathered, they're gathered in boxes generally from each
4 department. And a lot of it is duplicative and it's problematic
5 to deal with. So, we're trying to fashion -- all of us are
6 trying to fashion some sort of protocol, some sort of approach.
7 And so far this has been helpful. It's just -- it's very time
8 consuming and a very expensive process.

9 I don't know the answer. It's not written in stone
10 but at least -- I'm also communicating with my colleagues in
11 other cases and they're interested in the way this process is
12 being played out, so I want everybody to keep an eye on it.

13 Lets go to next item. The item is discovery to --
14 we've talked about the discovery directly to third parties.

15 MR. HERMAN: Yes, Your Honor. The item VI, deposition
16 scheduling. I've met again with Mr. Marvin about 5 or 10
17 minutes ago. We will attempt to resolve between the parties Dr.
18 Rice's spending FCE schedule.

19 THE COURT: I would appreciate both side's efforts in
20 that regard. Let me know if it can be worked out. The Court
21 appreciates your work on that.

22 MR. WITTMAN: Your Honor, the next item on the
23 plaintiff profile form is Merck's profile form. I think Your
24 Honor wants to take it up at the end.

25 THE COURT: Yes, I'll just take that up at the end so

1 that we can deal with all the rest of that. That will take us a
2 little longer than --

3 State/Federal Coordination -- State Liaison.

4 MS. BARRIOS: Good morning, Your Honor. Dawn Barrios
5 with the State Liaison Committee.

6 I have today CD ROMs that I usually bring, and we have
7 three in number. We two that span through CTO Number 105, and I
8 have a third CD for those remand cases which we've spoken about
9 and referred to as "double remand cases."

10 THE COURT: Okay.

11 MS. BARRIOS: Your Honor, I'd like to raise an issue
12 that has been brought to my attention by a Texas attorney, Mr.
13 Tommy Jacks. He is a case that was originally filed in
14 Tennessee. The name of the case is *Flippin* and it is your
15 docket number 05-1797 "L". The remand documents are contained
16 on the CDs, but I would be more than happy to send them to you
17 separately through Jeremy.

18 Mr. Flippin had his heart attack allegedly caused by
19 Vioxx in 2004. In 2005, Mr. Jacks filed the case in Tennessee
20 State Court. It was immediately removed. Filed a Motion for
21 Remand in this court in which he asked for expedited treatment
22 based upon medical and financial reasons. Mr. Flippin was
23 employed as a common laborer at the time of his heart attack
24 because he wasn't able to go to work. After the heart attack he
25 was not provided any health insurance benefits and he lost his

1 salary.

2 He and his wife live on their disability benefits
3 which amount to about \$900 a month. He and his wife's rent is
4 \$300, so they have about \$600 in food stamps to survive on for
5 the month. Mr. Flippin's treating cardiologist signed an
6 affidavit attached to the motion for expedited remand stating
7 that Mr. Flippin needs medications in the range of \$400 a month,
8 and he must have regular treating visits with the cardiologists.

9 This seems to me an egregious situation that's been
10 sitting in the court since 2005, and on behalf of Mr. Jacks and
11 the State Liaison Committee and the PFC, we ask that you turn
12 your attention to this case and those similarly situated.

13 THE COURT: Lets peel that one off and get it to me.

14 MS. BARRIOS: Yes, Your Honor, I'll send that over
15 thorough your law clerk this afternoon.

16 THE COURT: Okay.

17 MS. BARRIOS: Thank you, Your Honor.

18 THE COURT: Thank you. Now, what's the situation in
19 Texas now? Is everything stayed in Texas?

20 MS. SNAPKA: Yes, Your Honor, it's currently stayed.
21 The Judge held a hearing and the matters officially are stayed.

22 THE COURT: So, he wants me to transfer it -- to send
23 it back to Texas so it can be stayed?

24 MS. BARRIOS: No, Your Honor, it's a your Tennessee
25 case.

1 THE COURT: Okay.

2 MS. BARRIOS: Mr. Jacks is just a Texas attorney with
3 the Tennessee case.

4 THE COURT: Okay, I got it. Thanks.

5 MR. HERMAN: May it please the Court, the next issue I
6 believe is Pro Se claimants that Your Honor issued Pretrial
7 Order Number 25. We've had a substantial increase since then in
8 pro se applications to access the PFC depository, et cetera. I
9 do want to -- and we are moving forward with that and within the
10 terms of Your Honor's order.

11 I want to thank Mr. Meunier and Mr. Rafferty and
12 others who have, again, been working diligently on a trial
13 package. And it's in very good, excellent shape, and it should
14 be completed shortly.

15 THE COURT: When it is completed, I'd like to review
16 it at least --

17 MR. HERMAN: Yes, Your Honor, what we'll do is have Mr.
18 Meunier and members of his committee come in with the PFC and
19 we'll present it in closed -- in camera with the Court's
20 direction and the cooperation of defense counsel.

21 THE COURT: IMS data, anything on that item on the
22 agenda?

23 MR. WITTMAN: Nothing new on that, Your Honor.

24 THE COURT: XII is moot. Merck's Motion for Summary
25 Judgment.

1 MR. WITTMAN: We've already discussed that one.

2 THE COURT: Discussed that one. XII is Tolling
3 Agreements. Anything on Tolling Agreements?

4 MR. WITTMAN: We're still waiting for the preparation
5 of the Pretrial Order. We'll let the claimant profile forms be
6 treated as plaintiff profile forms. We're working with the PSC
7 and hopefully we'll get that done.

8 THE COURT: Are we having any difficulty with the
9 tolling plaintiffs submitting profile forms? Is that any
10 difficult problem, no?

11 MR. WITTMAN: Not at this point, Judge.

12 THE COURT: That's something too that I am trying to
13 get a handled on, Tolling Agreements. We have been doing that
14 and some other courts have not.

15 MR. WITTMAN: The Tolling Agreement period is over.

16 THE COURT: Yeah.

17 MR. WITTMAN: That ship has sailed.

18 THE COURT: Yes, I know. I understand that. I just
19 -- you know, that's worked for us in this district. I don't
20 know whether other districts have some difficulty fashioning
21 that or dealing with that, but, I've been dealing with it. I
22 don't see any difficulty or problems. Actually, it seems to me
23 that obviously it helps the plaintiffs, but it seems to me it
24 also helped the defendants along with way. But, if not, then I
25 would revisit that issue too, but maybe not in this case.

1 XIII is Issues Relating to Pretrial Order Number 9.

2 MR. HERMAN: Number 9. Your Honor, on 13 --

3 THE COURT: I'm sorry, 13.

4 MR. HERMAN: California will be issuing an order
5 similar to the Texas order on cross notice. I want to thank
6 everyone that's participated in negotiating this issue. It's
7 been a thorny issue and looks like it's resolved.

8 THE COURT: I appreciate the help that Judge Chaney in
9 California has given us, and also the MDL in Texas.

10 XIV is Vioxx Suit Statistics.

11 MR. WITTMAN: Yes, Your Honor, as of -- those are the
12 dates as of June 30th, and they're correctly set forth in the
13 status report. There were, as of that date, approximately
14 26,950 lawsuits of which are 8,575 in the federal MDL, and
15 approximately 16,400 lawsuits in the court in the New Jersey
16 Superior Court proceeding, and the balance were in California,
17 Texas, and in other courts that Your Honor is familiar with.

18 In addition, there were Tolling Agreements entered
19 into with 14,450 claimants.

20 THE COURT: Yeah, that's the area that I focused on
21 before, so if you add the 8,500 to the 14,000, it changes the
22 picture a little bit. As I mentioned before, if those Tolling
23 claimants eventually have to be filed, you got to get with my
24 Clerk's Office before we file 14,000 documents. I don't want
25 the whole Clerk's Office to quit.

1 MR. WITTMAN: I should also point out, Judge, that the
2 claims of some 4,620 plaintiff groups have been dismissed as of
3 June 30th. And of those more than 1170 plaintiff's claims were
4 dismissed with prejudice, and another 3450 dismissed without
5 prejudice.

6 THE COURT: Yeah, my comments on that, that shouldn't
7 be viewed, certainly not by the plaintiffs, as any failure or
8 problem. A lot of times I know in the Louisiana we have a short
9 statute of limitations, and so individuals are not certain at
10 the outset whether or not they have a claim. They know they
11 have taken the medication and their concern is with the statute,
12 if it's going to prescribe in the next week or two. So they
13 either insist from their lawyer or their lawyer is put in a
14 position where he or she has to file a claim.

15 Nothing happens, thank goodness, for the person and
16 therefore no case materialized. Often times those cases just go
17 away. They had to be filed to protect the interest, but luckily
18 for those individuals nothing has happened to them, so that's
19 the reason for that matter, I mean, intent to file a potential
20 claim.

21 MR. WITTMAN: One other point, Judge, Mr. Herman asked
22 me to point out, that of 8,575 lawsuits pending in the MDL that
23 accounts for about 23,450 plaintiffs, because you know, a number
24 of the lawsuits in the MDL were filed with multiple plaintiffs
25 in the caption -- in the case, so that gives rise to more

1 plaintiffs than there are lawsuits in the MDL. We discussed
2 that this morning.

3 THE COURT: Yes, that's something that I mentioned in
4 chambers today that is concerning me a little bit, and that is
5 that I have allowed the claimants to file jointly, that is to
6 say when a lawyer has 15, 20 claimants in certain instances they
7 have filed one petition and they joined the other 14 people.
8 I've done that because of the short statute of limitations here,
9 and the expense involved. It presents some statistical problems
10 though, particularly at this stage when some of the claimants
11 have not filed profile forms and some of them have, and I'm
12 winding up dismissing two or three of those claimants, but the
13 main case stays open. And so, the clerks office has to go in
14 and find those individual cases and I issue an order dismissing
15 those claimants' cases, but the main case itself stays open.
16 That's logistical problem.

17 Another practical problem is that often times if a
18 lawyer has to prepare a pleading for each individual claimant,
19 more often than not, the lawyer will make sure that this is a
20 valid claim or significant claim before they deal with that and
21 file a lawsuit normally. It's easier to join multiple claimants
22 than it is to file a specific lawsuit for each.

23 So, there are some problems to it that I'm visiting.
24 Other districts are reluctant to allow the joining of claims. I
25 have done it, but I'm revisiting this issue.

1 (Interrupted by automated audio over speaker
2 system/telephone.)

3 MR. HERMAN The next issue is Merck Insurance. Mr.
4 Ranier for the PFC is dealing with that. Further discovery of
5 insurance coverage may be forthcoming sometime in the future.

6 THE COURT: Okay.

7 MR. HERMAN: And the Motion to Conduct Case-Specific
8 Discovery, 250 cases, Merck will respond to that, and there is
9 no issue at this time.

10 With respect to the Oxford/VICTOR data, counsel for
11 Merck has agreed to begin providing additional data within two
12 weeks. I understand that Merck UK has some additional
13 materials, and Oxford has also been requested. Should a problem
14 arise then we will come to Your Honor jointly and request Your
15 Honor's intervention.

16 THE COURT: I read the *New England Journal*. There is
17 an article in it with a lot of footnotes, as many as our Law
18 Review Articles. And sometimes they're just as difficult to
19 read, no difference.

20 MR. HERMAN Your Honor, you still have --

21 THE COURT: The next Status Conference is September
22 5th.

23 MR. HERMAN: Yes, Your Honor. Your Honor, you still
24 have before you the issue of dismissal with respect to Levin.
25 We had one for plaintiffs.

1 MR. WITTMAN: September 6th I thought was the date,
2 Judge.

3 DEPUTY CLERK: They changed it.

4 THE COURT: Was it the 6th or the 5th? The 6th or the
5 5th, folks?

6 MR. LEVIN: I have a problem on the 6th, but I'm not
7 going to cause a problem for everybody else.

8 THE COURT: Okay, the 6th then, September the 6th.

9 DEPUTY CLERK: 9 and 9:30.

10 THE COURT: Yeah. Wait, 8:30 or 9?

11 MR. WITTMAN: Judge, we need to also put in a place
12 for oral argument in connection with our 1292(B) motion.

13 THE COURT: When -- isn't some -- do we have something
14 due from the plaintiff?

15 MR. BEISNER: We do. We agree. We had it noticed for
16 today and we agree with plaintiffs to allow them an extension to
17 complete their briefing. We'll file ours next week. I thought,
18 Your Honor, perhaps Mr. Levin and I could confer and see --

19 THE COURT Why don't you do that and pick a date.

20 MR. BEISNER: -- confer with his office and set a date.

21 MR. LEVIN: Your Honor, we do have the governors'
22 depositions that Russ --

23 THE COURT: Yes, lets talk with -- talk about it.

24 MR. LEVIN: If you can produce the governors we'll be
25 glad to.

1 THE COURT: All right, one item on the agenda.

2 DEPUTY CLERK: Judge?

3 THE COURT: Yes?

4 (Comments at the bench by the Deputy Clerk.)

5 THE COURT: One item on the agenda was the plaintiff
6 profile forms. The purpose of the profile form is several-fold.
7 One is to cut through the discovery, to get the discovery and
8 get the documents presented in an appropriate format as quickly
9 as we can rather than large sets of interrogatories, objections
10 to interrogatories, motions on the interrogatories back and
11 forth; time goes by and nothing gets done. So profile forms
12 have been helpful in this type of litigation, both plaintiff
13 profile forms and defendant profile forms.

14 Each side gets the pertinent documents as fast as it
15 can be delivered so that we can get on with other discovery.
16 That's one aspect of it. The other aspect, and the significant
17 of profile forms is from the standpoint of the litigation as a
18 whole, to be able to get a census of the litigation as a whole
19 to find out how people are claiming MIs, how many people are
20 claiming strokes, how many people are claiming other things,
21 because until the census of the entire litigation is obtained,
22 there is no way of globally dealing with it and globally viewing
23 it. So, I had been interested, and also I've been active in
24 policing the profile claims. I don't Willie-Nilly dismiss
25 cases, I give people the opportunity to provide the material.

1 If they don't provide the material timely, we notice them again
2 and again and again. And after two or three notices, I then
3 order them to show cause why their cases should not be
4 dismissed.

5 If they come and explain why their cases should not be
6 dismissed and they a good reason, I'll give them more time.
7 But, more often than not after all those notices and this
8 notice, many people do not show up. Now, if they don't show up,
9 then I don't have any problem, frankly, dismissing the cases.
10 It's the only thing I can do because I've tried several times to
11 get them to respond, and notwithstanding these efforts, I have
12 not been able to do it.

13 And so that's what we're dealing with, at least today,
14 and there are a number of them.

15 MR. LEVIN: Your Honor, may the PFC be heard on that?

16 THE COURT: Certainly.

17 MR. LEVIN: Your Honor, the PCS -- Arnold Levin. The
18 PFC submitted an *Amicus* brief because the matter had been
19 brought to you as a Motion to Dismiss. But after having heard
20 your comments in court we're not concerned because you're
21 treating that motion in affect as a Motion to Compel and giving
22 leave to comply. Under the circumstances we think there is
23 procedural due process and our position is now moot.

24 THE COURT: Okay.

25 MR. WITTMAN: Well, I agree their position is moot,

1 Your Honor. We have no quarrel with that.

2 THE COURT: Lets take them up in order, the first
3 group.

4 MR. WITTMAN: Your Honor, can we have a brief recess
5 before we start?

6 THE COURT: Yes.

7 MR. WITTMAN: Since we'll going to be here for a
8 while?

9 THE COURT: All right. Lets take 10 minutes. We'll
10 stand in recess --

11 DEPUTY CLERK: Everyone rise.

12 (At which time the proceedings were recessed for a short break.)

13 DEPUTY CLERK: Everyone rise.

14 THE COURT: Folks, be seated, please. Lets take them
15 in some order.

16 MR. WITTMAN: Yes, Your Honor, you had indicated
17 through Jeremy that you wanted to proceed in a particular order.
18 And the first order involves a rule we refer to it as the
19 "Laminack Rule." And I think in that particular case we only
20 had five that was still subject to our rule as of this
21 morning.

22 THE COURT: Yes.

23 MR. WITTMAN: And of those five cases, those -- have
24 indicated through counsel who is here present that they will
25 file profile forms within 10 days. And if they haven't done it

1 within 10 days, they will agree to dismiss these cases with
2 prejudice. And counsel is here this morning to address the
3 court, so I'll refer to her on those -- those cases, by the
4 cases are the Davis cases, the Hill cases, the Reser cases, the
5 Shaw case, and the Stevenson case.

6 THE COURT: Yes, that's the one that I have.

7 MS. MARTINES: Good morning, Buffy Martines, counsel
8 for plaintiffs, Davis, Hill, Reser, Shaw, and Stevenson.

9 THE COURT: Yes.

10 MS. MARTINES: Our firm has a large number of cases in
11 the MDL. These are the five plaintiffs that we have that have
12 not turned in a form.

13 THE COURT: Okay.

14 MS. MARTINES: These plaintiffs are largely
15 non-compliant. One has indicated she no longer wishes to pursue
16 her case, so what we're asking the defendant -- and I believe we
17 have an agreement -- for the Court to allow 10 days for us to
18 notify these plaintiffs that their cases are about to be
19 dismissed, and then --

20 THE COURT: I'll give the 10 days, so -- I want to give
21 everybody enough notice. Everyone who is interested in filing a
22 claim, I'll give them an opportunity to file a claim. But,
23 those not interested, or do not response to countless notices, I
24 have no alternative but to dismiss the cases.

25 MS. MARTINES: I understand, Your Honor, and we thank

1 you for the extension.

2 MR. WITTMAN: What I would ask, Judge, is with respect
3 to these five cases that we continue these until the next Status
4 conference. We'll give a report to the Court at that time. If
5 they've filed, no harm; no foul. If they haven't, then we'll
6 ask for a dismissal with prejudice at that point.

7 THE COURT: Yeah, well, I would like to hear from you
8 all in two weeks on that --

9 MR. WITTMAN: Okay.

10 THE COURT: -- on these cases because if it is going to
11 present a problem, I'd like to know.

12 MR. WITTMAN: Okay.

13 THE COURT: But, I assume it won't and I will dismiss
14 them and take it off the docket. So let me hear from you in two
15 weeks.

16 Okay, the next group of cases.

17 MR. WITTMAN: The next group is the Ashcraft rule.

18 THE COURT: Yes.

19 MR. WITTMAN: And there are still 16 plaintiffs left
20 subject to this rule, Your Honor.

21 THE COURT: There is a motion by plaintiff lawyer to
22 withdraw from representation in a number of those cases, or is
23 it in all of those cases?

24 THE LAW CLERK: Some of them.

25 THE COURT: Some of the case I understand. I've looked

1 that over and I'm going to deny the motion. So those motions
2 that are signed on these cases, this group of cases --

3 MR. WITTMAN: Let me take you from the top, Your
4 Honor, if I may, Judge. Okay.

5 THE COURT: Ashcraft.

6 MR. WITTMAN: Originally, we sought dismissal of 19
7 plaintiffs for failure to provide profile forms.

8 THE COURT: Yes.

9 MR. WITTMAN: After we filed the rule, adequate profile
10 forms were provided for three of the plaintiffs, in the *Hove*
11 case, the *Sequi* case, and *Villafranca* case. And we've file
12 notices of withdrawal in those three cases. We're withdrawing
13 the rule as to *Turner versus Merck*. The plaintiff in that case
14 was represented by Shelly Stiles and Associates. We've learned
15 in trying to contact Mr. Stiles that he is deceased; that his
16 spouse took the file and no one appears to represent the
17 plaintiffs or has any knowledge of the case. Under those
18 circumstances, we're withdrawing as to that cases which leaves
19 us with 15.

20 Then we've got --

21 THE COURT: That one you're withdrawing is Turner,
22 *Dana Turner versus Merck*?

23 MR. WITTMAN: Yes, Your Honor, Dana Turner.

24 THE COURT: Okay, and that's -- lets see.

25 MR. WITTMAN: That's correct.

1 THE COURT: 06-259, so that -- there is no Motion to
2 Dismiss that.

3 MR. WITTMAN: 05-6259.

4 MR. DAVIS: I believe, Your Honor, on that one we've
5 been informed that plaintiff's counsel is deceased.

6 THE COURT: Yes.

7 MR. HERMAN Then, Your Honor, on two cases, *McWaters*
8 *versus Merck* and *Warmann versus Merck*, we're going to continue
9 the rule until the next monthly status conference on those two
10 cases only.

11 With respect to four additional plaintiffs represented
12 by Besley Allen firm, counsel has advised us they have no
13 opposition to the rule with respect to four, those four
14 plaintiffs. That would be Patsy Hardiman, and Hardiman is
15 included in the caption *Ashcraft versus Merck*. A Mildred Mace,
16 also in the *Ashcraft* caption, and those four plaintiffs -- I'm
17 sorry, Paula Howard and Mildred Osborne, those also have no
18 objection to dismissal.

19 THE COURT: That's four cases, right?

20 MR. WITTMAN: Yes, Your Honor.

21 THE COURT: All right, and just for the record, these
22 individuals were noticed. Originally, they -- they're profile
23 forms were to -- were be presented --

24 MR. WITTMAN: December 14.

25 THE COURT: December 14 of '05. Either December 14 of

1 '05 or January 13, '06. The first notice was in August of '06,
2 and no response. The second notice was in March of 07; no
3 response. And after no response, after they're late, and two
4 notices, there are is no response, the Court has no other
5 alternative but to dismiss the cases with prejudice.

6 MR. DAVIS: Your Honor, just so that the record is
7 clear, in accordance with your request and in compliance with
8 your request on this case and in all other cases, Plaintiff
9 Liaison Counsel attempted to communicate, and in fact, in this
10 case did communicate with the specific plaintiff's counsel and
11 advised them of this rule. We just wanted the record to be
12 clear that we were complying. And as you know, as with all
13 other dismissals, the Plaintiff's Steering Committee opposes the
14 dismissals.

15 THE COURT: Right, and opposes them particularly with
16 prejudice.

17 MR. DAVIS: Correct.

18 THE COURT: I do everything I can to get their
19 attention. We, of course, tell them that they have to file
20 within a certain period of time. When they don't, we give them
21 a notice telling them they're late and they have to file within
22 a certain period of time. When they don't, we give them a
23 notices and say we really need it; you need to file within a
24 certain period of time. Then I direct the liaison counsel to
25 contact the lawyers, attempt to contact the lawyers and tell

1 them this is going to happen. When we get nothing, then I set a
2 Rule to Show Cause why it shouldn't be dismissed. Liaison
3 counsel generally calls again saying, it's going be dismissed
4 unless you come up with the forms.

5 Notwithstanding those opportunities, no forms have
6 been presented, so I feel that these people have chosen to
7 abandon their claim. I'll dismiss with prejudice.

8 MR. WITTMAN: Your Honor, there are two cases where the
9 plaintiff's counsel have moved to withdraw apparently for lack
10 of cooperation. That's *Stone versus Merck* 2006-3590 and
11 *Peterson versus Merck*, 06-4249. For each those cases Motions to
12 Dismiss were filed with the court after Merck's rule.

13 Counsel is here for one of those cases and has
14 requested a period of time to clear it up. I think she may want
15 to address the Court.

16 THE COURT: All right.

17 MR. WITTMAN: In the *Peterson* case.

18 MS. WEAVER: That's correct. Good morning, Your
19 Honor, Holly Weaver with Blizzard McCarthy and Nabers here for
20 plaintiff, Betty Peterson. We also have an uncooperative
21 client. We've advised here repeatedly that she needs to provide
22 the information for the profile form. She's been unresponsive,
23 but never the necessary we would just request the additional 10
24 days to so say, this is your absolutely last clans an then we
25 will not be opposing Motion to Dismiss.

1 THE COURT: I'll do that and I'll give you 10 days to
2 dismiss.

3 MS. WEAVER: Thank you, Your Honor.

4 THE COURT: Thank you.

5 MR. WITTMAN: I believe there are some eight cases
6 where plaintiffs who have not submitted plaintiff profile forms
7 and have not filed any opposition. Oh, the *Stone* case you want
8 dismissed. I'm sorry, Your Honor.

9 MR. DAVIS: And, Your, in accordance with your
10 directives on the *Stone* case, on June 30, 2007 our office
11 communicated with counsel, Jonathan Johnson; sent an email and
12 advised him of the rule. Thereafter, we received a response on
13 July 9 from Mr. Johnson that says they have a pending Motion to
14 Withdraw as counsel in this case which has not been opposed and
15 he would -- counsel would request that the court grant that
16 before dismissing.

17 And then on July 10, we received another email from
18 counsel that says that they filed a motion to withdraw long
19 before the rule was filed, and the attorney apparently has no
20 means to contact the client. We bring that to the Court's
21 attention so that the Court is aware of this matter.

22 And then on July the 18th, we wrote again to counsel
23 and advised that they write a letter directly to Your Honor
24 about the pending motion to advise further and that they copy
25 and discuss further the issue with defense counsel. And on July

1 19th, we were advised by counsel that he in fact would do that,
2 Your Honor.

3 THE COURT: All right.

4 MS. WIMBERLY: Your Honor, Dorothy Wimberly for Merck.
5 I actually spoke to Mr. Johnson after he submitted his letter to
6 the Court. I did advise him that Merck in fact opposed the
7 Motion to Withdraw. I cited to him the example of the numerous
8 Michael Hingle cases that Your Honor has similarly withheld
9 ruling on the Motions to Withdraw with the pending rule for
10 non-cooperation and failure to submit, and that we would be
11 asking the Court to handle the Stone similarly by going ahead
12 and entering an order of dismissal with prejudice for failure to
13 submit a PPF and then deny the Motion to Withdraw as moot.

14 THE COURT: I don't feel that Mr. (sic) Stone -- that
15 the attorney for Ms. Stone has done anything improper in this
16 case. He's done everything he possibly can do on it. He's
17 filed a lawsuit assume at the urging of the plaintiff. He did
18 what we should have done. He then tried to obtain information
19 from his client, notwithstanding his efforts; nothing has been
20 forthcoming on the Stone case.

21 The material that initially was due September 25, '06
22 wasn't forthcoming. And then in December 14, '06 a notice was
23 sent saying, you're delinquent, please send the material.
24 Nothing was forthcoming.

25 Then on March the 1st, '07 we said, you have to file

1 the material. You didn't do it in '06; you didn't do it in
2 December '06 and '07, please send it. Nothing is forthcoming.
3 I set this motion today to show cause why it shouldn't be
4 dismissed. Notwithstanding that, the material is not
5 forthcoming.

6 I don't feel it's a fault of the lawyers. It seems to
7 me the lawyer has done everything he or she can do. But I'm --
8 when you're in a case, you're in a case.

9 I'm going to dismiss -- I'm going to deny the Motion
10 to Withdraw and grant the Motion to Dismiss.

11 MR. WITTMAN: Your Honor, that leaves eight cases for
12 plaintiffs who have not submitted PPFs and haven't filed any
13 opposition to our rule. And those cases are the *Villafranca*
14 *versus Merck* case. The PPF was due January 14th, 2006.

15 And *Bryant versus Merck*, the PPF was due February 4,
16 2006. I'm advised that last night we withdraw our motion as to
17 that.

18 THE COURT: Okay.

19 MR. WITTMAN: We'll take them one at that time.

20 *Bryant versus Merck*, the PPF was due February 4, 2006.
21 Deficiency letters were sent on August 15th of 2006; March 1st
22 2007.

23 We've had no response and ask that the case be
24 dismissed.

25 THE COURT: What is that under?

1 MR. WITTMAN: *Bryant versus Merck*, 05-57 --

2 THE COURT: I got it. Okay.

3 MR. DAVIS: With respect to the *Bryant* matter, our
4 office spoke to David Gray, an attorney with Goldberg and
5 Simpson; left a message with his assistant, Shannon. We do not
6 have an email address and have been unable to email this
7 particular firm, but there was an attempt on July the 16th or
8 the 15th -- unfortunately, the date has been cut off by the
9 three-hole punch -- to communicate with this firm and advise
10 them of the pending motion.

11 THE COURT: Okay. The case is dismissed.

12 MR. WITTMAN: *Hundley versus Merck* is next. The PPF
13 was due September 13, 2006. Deficiency letters were sent in
14 December 2006 and March 2007, and we've received no response.

15 MR. DAVIS: On June 30, 2007 our office sent an email
16 to counsel, Patrick Malouf, to advise them of the pending
17 motion. In addition, on July 16th we phoned and left a message
18 for Mr. Malouf in an attempt to advise counsel.

19 THE COURT: The case is dismissed.

20 MR. HERMAN: *Donelson versus Merck*. The PPF was due
21 September 25, 2006. Deficiency letters were sent in December of
22 2006 and March of 2007, and Merck has received no response.

23 MR. DAVIS: On June the 30th our office sent an email,
24 and on July 5 we got a note that the email did not go through to
25 counsel. On July the 15th we left a message for Vince Nowak,

1 and on that same date Mr. Nowak returned the call and advised
2 that he was working on the matter.

3 THE COURT: I'm going to dismiss the case.

4 MR. WITTMAN: *Lopez versus Merck*. The PPF was due
5 October 7, 2006; deficiency letters were sent in December of
6 2006 and March of 2007, and we received no response.

7 MR. DAVIS: On June 30th, our office wrote Jonathan
8 Johnson, advised him of the -- I'm sorry. I apologize. I'm on
9 the wrong one.

10 On July -- I'm sorry, on June 30, our office wrote
11 counsel, Jeff Abers and email and advised him regarding the
12 pending motion. Having heard no response on July 15, 2007, we
13 left a message for counsel, and those are the efforts that we've
14 undertaken.

15 THE COURT: Okay, case dismissed.

16 MR. WITTMAN: Next is *Walker versus Merck*, PPF was due
17 October 23, 2006. Deficiency letter was sent on December 2006
18 and March of 2007, and we received no response.

19 MR. DAVIS: On June 30, 2007, our office sent an email
20 to Thomas Urban, counsel for the plaintiff to advise him of the
21 motion. Having heard nothing on July 15, 2007, we left a
22 message for Mr. Urban. Those are the efforts we've
23 undertaken.

24 THE COURT: Case dismissed.

25 MR. WITTMAN: Next is *Booker versus Merck*. The PPF was

1 due April, 2006. Deficiency letters were sent in August of 2006
2 and September 2006. We received no response.

3 MR. DAVIS: On July 16, 2007, our office sent an email
4 to counsel, David Johnson, to advise of the pending motion.
5 Again, on July the 15th, having sent the email, we telephoned;
6 left a message for him to confirm his knowledge. Those are the
7 efforts that we've undertaken.

8 THE COURT: Case dismissed.

9 MR. WITTMAN: Next is *Curtis versus Merck*. The PPF was
10 due on January 9, 2006. Deficiency letters were sent to counsel
11 in May of 2006 and September of 2006, and we've received no
12 response.

13 MR. DAVIS: On June 30, 2007, our office sent an email
14 to Athan Tsimpedes, T-S-I-M-P-E-D-E-S, counsel for plaintiff to
15 advise him of the pending motion. Also, on July 15, 2007, a
16 called was placed to that attorney to advise him. And on July
17 20, 2007, Ms. Tsimpedes returned the telephone call. And,
18 again, on July 23rd, our office left a message with counsel.

19 THE COURT: Case dismissed.

20 MR. WITTMAN: Your Honor, that completes the cases in
21 the *Ashcraft* rule, and we move on to Rule Number 3 which is the
22 *Heidrick* rule.

23 THE COURT: Right.

24 MR. WITTMAN: We originally asked for dismissal of 21
25 cases in that *Heidrick* case which is on the multiple plaintiff

1 cases, Your Honor, referred to earlier. Not including the
2 caption of the rule, there were four cases that appeared on
3 Exhibit "A" that were detailed the case subject to the rule that
4 were included in error. And even though the case numbers didn't
5 appear in the caption of the rule, we filed a notice to withdraw
6 on the rule as to those four cases to erase any doubt as to this
7 status.

8 After we filed the rule we got adequate PPFs for all
9 but two cases in Heidrick, and that leaves us with two
10 plaintiffs still subject to the rule. First is *Freeman versus*
11 *Merck*. The PPF was due September 13 2006. Deficiency letters
12 were sent in January 2007 and March 2007, and we've received no
13 response.

14 MR. DAVIS: On July 16, 2007, we received an email
15 from Sarah Fendia, F-E-N-D-I-A, on this particular motion
16 thanking us for our telephone call to counsel. And with respect
17 to Hazel Freeman in that email we were advised that that client
18 would not respond to counsel's communications and they have no
19 defense to the Rule to Show Cause.

20 THE COURT: All right, it'll be dismissed.

21 MR. WITTMAN: And then finally in that rule, Your
22 Honor, we have *Jimenez versus Merck*. The PPF in that case -- we
23 ask that you continue the rule until the next monthly status
24 conference due to special circumstances. So, *Jimenez* is not up
25 for dismissal today. We'll take it up at the next monthly

1 status conference.

2 THE COURT: Okay.

3 MR. DAVIS: Just so the record is clear, Your Honor,
4 depending on whether or not it will be taken up, but as long as
5 I have the information, on June 30, 2007, our office
6 communicated with Shelly Sanford, counsel for the claimant. On
7 July 15, 2007 Jeff Larson left a message that he would call us
8 back in respond to our telephone call. We did have a
9 conversation with Mr. Larson and we were advised that they were
10 attempting to locate the client and they would communicate
11 directly with Phil's office regarding the matter.

12 THE COURT: Okay. In any event, that one is passed,
13 huh? Okay.

14 MR. WITTMAN: And that bring us to the fourth rule
15 which is the rule in *Anderson versus Merck*. And, again, there
16 are a number of cases subject to in that same caption, Your
17 Honor. We originally sought dismissal of claims of some 36
18 plaintiffs for providing grossly deficient plaintiff profile
19 form and contravention of Pretrial Order 18(C).

20 After we filed the rule the deficiencies were cured
21 and we got adequate profile forms for 16 plaintiffs, and we
22 filed a Notice of Withdrawal on the rule as to those 16 cases.
23 That leaves with 20 plaintiffs that are still subject to the
24 rule. The only opposition we've gotten is from the firm of
25 Carey & Danis, and I believe -- I know there is someone here

1 from that firm today and prepared to argue the opposition as to
2 his cases that remain subject to the rule. And those cases are
3 the *Adams versus Merck* case, *Harris versus Merck* case, and
4 *Liotto versus Merck* case.

5 Merck filed a reply to that opposition on July 23rd,
6 and Merck contends that the PPF of those three plaintiffs remain
7 grossly deficiency and should result in dismissal with prejudice
8 of the claims.

9 On Wednesday the plaintiffs filed an *Amicus* opposition
10 in this rule. Under the order previously entered by the Court,
11 oppositions are due to be filed on July 16. We intend to reply
12 to that opposition, but we need some time to do so, and we
13 request the rule as it relates to the other 17 cases be
14 continued until the next monthly status conference.

15 But, as to the one that counsel is present for today,
16 if counsel is prepared to go forward we'll go ahead and argue
17 that one today.

18 THE COURT: What are those cases?

19 MR. FLYNN: My name is Casey Flynn. I'm with the law
20 firm of Carey and Danis. And this is for the Anderson rule.

21 THE COURT: Which case Mr. Flynn, are you in?

22 MR. FLYNN: The two that I understand are still left
23 -- this is the Johnny Anderson -- are Miranda Baker and Sarah
24 Robinson. I was told that they withdraw on the other ones. I'm
25 sorry, am I --

1 MR. WITTMAN: No, that's okay.

2 MR. DAVIS: Your Honor, while they're attempting to
3 straighten that out, just so the Court is clear, this is the
4 specific conference call that Arnold Levin and Russ Herman was
5 speaking about earlier today. We did convene a conference call
6 with counsel in this particular rule. We did speak to some of
7 them, including this particular counsel's office.

8 In addition to that, just so that there is some
9 clarity, I know that Arnold Levin and Mr. Wittman spoke earlier
10 today. It was the intent of the PFC that the *Amicus* brief apply
11 to all cases not just this one specifically.

12 THE COURT: Okay.

13 MR. WITTMAN: I told Mr. Levin I couldn't divine his
14 true intention from the written materials that he filed in the
15 record.

16 MR. DAVIS: If we need to file something with the
17 Court to clarify that, we will. If this is sufficient --

18 THE COURT: That's sufficient.

19 MR. DAVIS: Thank you.

20 MR. FLYNN: Okay, I have the case if I could approach.
21 The cases are -- the first one is on Eva Adams. It's Miranda
22 Baker And we provided a plaintiff profile form and the
23 plaintiffs -- with authorization. And the plaintiff profile
24 form identifies the injury, the prescriber, the doctor who
25 prescribed it. Miranda Baker as epilepsy. She has memory

1 problems. I've talked to her. I'm working her, and so that was
2 the best we could do. We gave them the authorizations. That's
3 the best we can do.

4 You know, we have -- we filed like 1900 heart attack
5 and stroke plaintiff profile forms, and so -- and the other one
6 --

7 THE COURT: What's your suggestion on that?

8 MR. FLYNN: Well, if they can just give me 30 more
9 days. But it could be the truth that all I can do is identify
10 who prescribed the Vioxx and who diagnosed the heart attack that
11 she had. I can't give dates of the injury.

12 What happened is, she -- the records are unclear that
13 have come in. Her memory is not doing good. We're doing the
14 best we can with her. Okay?

15 THE COURT: How do we deal with that?

16 MR. WITTMAN: I don't know, Judge. We're talking about
17 core data here that we have to have to even begin to prepare our
18 response.

19 THE COURT: Give me some suggestions. How do we deal
20 with this kind of situation?

21 MR. DAVIS: Your Honor, this is precisely why the PFC
22 filed an *Amicus* brief, because the PFC doesn't believe that
23 these types of issues merit dismissal. And in fact, these are
24 routine type discovery issues that you would have in this case
25 where plaintiff provides as much -- or plaintiff's counsel

1 provides as much information as they can. Then it's a rule to
2 test the sufficiency, so to say. And that's what Merck is
3 attempting to do in many of these rules, and this is a very good
4 example.

5 What counsel has done is come in today and said, I've
6 given you what I can give you. And I think Merck, then if they
7 want to go further with some additional discovery, they can
8 decide to do that in another fashion, but I don't think
9 dismissal is appropriate.

10 THE COURT: Well, the issue is though, if they can't --
11 if that's all there is, then if something appears later on I'm
12 not going to allow it. I mean, once you've said to Merck, this
13 is what there is, I can't have you come in the day before trial
14 or the week before trial and say, oh, here is some material
15 because it's not fair to anybody.

16 MR. WITTMAN: I have no problem, Your Honor, giving
17 counsel another 30 days to try and get something in the *Adams*
18 *versus Merck* case. It's, you know, not unreasonable, but --

19 THE COURT: When you file suit you have to produce
20 certain documents. If you produce the documents -- if you can't
21 produce the documents because there are no documents, I can't
22 make you produce them. Nobody can make you produce them, and
23 I'm not going to dismiss the case if they're no documents.

24 On the other hand, if you say they're no documents,
25 then you can't come up later and say, I found the document.

1 MR. FLYNN: Right. But, what I would say -- and this
2 is the rare exception.

3 THE COURT: Yes, I understand.

4 MR. FLYNN: Sometimes the best you can do is give the
5 profile form, identify the provider, and give the author --

6 THE COURT: And I agree with that. And sometimes
7 that's the situation. If the woman is ill, she can't remember,
8 she doesn't have a family, and you've done all you can, then
9 maybe there is a way of doing an affidavit saying that's all
10 there is. But you need to know that once you do that, that is
11 all there is.

12 MR. FLYNN: I understand. And then the other one --

13 THE COURT: But, I'll give you 30 days to make another
14 swing at it and see what we can do with that.

15 MR. FLYNN: The next one is Sarah Robinson who is on
16 the --

17 MR. WITTMAN: *Harris versus Merck*.

18 MR. FLYNN: She's on the what?

19 MR. WITTMAN: *Harris versus Merck*. Sarah Robinson has
20 dementia and is in a nursing home. We've identified her
21 prescriber of Vioxx. We've identified the nursing home where
22 she's at. It's another one we would like 30 days. And I agree
23 with you, Judge, if it's this problematic -- You know, but
24 again, I'm not an expert or a doctor. Some of these people are
25 -- endured a stroke. She's in a nursing home because of the

1 related injury, but if I can have 30 days on that to do better.

2 THE COURT: I'll do that. Take 30 days. Do you
3 understand the problem that I'm trying to deal with? We've got
4 a couple of problems, as I mentioned. One problem is with this
5 particular case. I can't have the case go on without producing
6 material and then all of a sudden at the 11th hour, or a little
7 before the 11th hour, you come up with material and it throws
8 the whole case off. So, that's not going to happen.

9 And, secondly, everybody has a concern about the
10 number of cases now. We're really starting to focus on this
11 matter globally. And there is no way of focusing on it globally
12 if we don't know how many heart attack cases and how many stroke
13 cases, and what we're dealing with. Nobody is going to be able
14 to deal with it. So, I've got to utilize this procedure to at
15 least get this case within some kind of -- you know, focus for
16 the parties.

17 MR. FLYNN: I understand, Judge. I appreciate the 30
18 days.

19 MR. WITTMAN: Next is the case of *Liotto versus Merck*
20 as to plaintiff, Eleanor Williams.

21 MR. FLYNN: I had a meet-and-confer about this and we
22 re-did her plaintiff profile form. And I was wondering -- they
23 were going to tell you whether they were going to withdraw
24 because I do believe you have all core criteria. I mean, I
25 agreed. We had a meet-and-confer with Merck's counsel. I

1 agreed there wasn't core criteria, and I had -- the core
2 criteria and it's updated and they were going to talk to local
3 counsel.

4 MR. WITTMAN: You want another 30 days on that one
5 too?

6 MR. FLYNN: Or 30 days. I believe it was corrected.
7 I think it does have all core criteria. But, if they don't have
8 that information, if I could get 30 days.

9 MR. WITTMAN: That's fine.

10 THE COURT: Okay. Granted.

11 MR. WITTMAN: Your Honor, we were going to continue the
12 rest of these anyway, but I would note for the record that we
13 received late last night what appear to be adequate profile
14 forms for five additional plaintiffs represented by the Matthews
15 firm, but they were not accompanied by a certification or by any
16 signed authorizations. Those PPFs are in the *Anderson* Case for
17 plaintiffs: Tony Petite, Geraldine Prudhomme, Bremella Etienne,
18 and Wallace Horton.

19 In *Cable versus Merck*, counsel still need to provide
20 the certification and the authorization, but we're going to
21 continue the other cases in the *Anderson* rule until the next
22 status conference.

23 THE COURT: All right. Lets do a letter to the counsel
24 telling him about that. Those things are still due. Send a
25 copy to me.

1 MR. FLYNN: I presume you want defense liaison to do
2 that?

3 THE COURT: Yeah, Defense Liaison Counsel.

4 MR. WITTMAN: We always get all of the tough chores,
5 Your Honor.

6 That brings us to the last group, Your Honor.

7 THE COURT: Okay.

8 MR. WITTMAN: The fifth rule. I'm sorry, Mr. Becnel
9 want to address the Court --

10 THE COURT: Okay.

11 MR. WITTMAN: -- on two of these cases, Judge.

12 THE COURT: Sure.

13 MR. BECNEL: Your Honor, I think Mr. Wittman will tell
14 you I probably have done more of these form than almost anybody.

15 We have three people can can't find. We just can't
16 find them. We met with Lennie in Chicago this week with seven
17 of my lawyers and we have done everything humanly possible to
18 find them. You know, I would rather withdraw because I can't
19 tell you they're not complying. You know, I've been dealing
20 with this because of the flood cases. And you know, we've dealt
21 with just thousands of people we can contact.

22 MR. DAVIS: I wish I had been in Chicago.
23 Unfortunately, I wasn't, but I think we might have spoken about
24 it at some other time.

25 MR. BECNEL: Well, somebody in your office -- no, no,

1 it was -- I'm sorry, it Arnold's partner came talked to me about
2 it, Fred Longer. I was thinking it was you.

3 THE COURT: I'm familiar with the cases. I know that
4 you either personally or your associates do everything to get
5 the material. I haven't had any problem with you delivering the
6 material or contacting the people. There are some people -- but
7 it's a two-way street. The lawyer has the responsibility to
8 keep up with the litigant, but the litigant has a responsibility
9 to keep up with the lawyer. And your litigant can't expect the
10 lawyer to do something that is totally impossible for the lawyer
11 to do. I think this attorney has done everything possible to
12 contact the people. They have failed on their part of it. I'm
13 not going to let you out, but I'm going dismiss the case. It's
14 not your fault, it's their fault.

15 MR. BECNEL: Well, Your Honor, my only problem is, I
16 can't contact them --

17 THE COURT: I understand, but --

18 MR. BECNEL: -- because the address is gone and I
19 would assume it's cases between Mississippi and Texas, and I
20 just can't find them. I don't know -- you know, if I can't give
21 them notice -- it would be different if I would come here and
22 tell you, look, this person doesn't want to cooperate, doesn't
23 want to do anything.

24 MR. DAVIS: Your Honor, that's not an uncommon matter,
25 as you're well aware in the New Orleans/Lake Charles type area.

1 And, I think everyone is aware of that. Sometimes there is
2 difficulty and --

3 THE COURT: What do we do with that? Give me some
4 suggestion. We can just keep these people for --

5 MR. BECNEL: No, I understand that, but I don't want
6 -- you know, I can't even tell you if they're alive or dead. I
7 can tell you anything because they're just -- you know, we have
8 a method because of the -- of levee failures in these cases. I
9 mean --

10 MR. DAVIS: Your Honor?

11 MR. BECNEL: -- to contact. We used everything. We
12 can't get them.

13 MR. DAVIS: Dorothy and I have spoken very briefly and
14 exchanged a couple of ideas. By next status conference we'll
15 have a suggestion for you on these specific New Orleans/Lake
16 Charles-type cases.

17 MR. WITTMAN: I would suggest just continuing these
18 for 30 days since we're continuing the rest of them for 30 days
19 too.

20 THE COURT: We'll do that. We'll do that.

21 MR. BECNEL: I apologize for thinking -- it was Fred
22 talking to me, but I did see his other partner there.

23 THE COURT: He wish he was there too.

24 MR. BECNEL: Huh?

25 THE COURT: He wish he were in Chicago.

1 MR. DAVIS: I were there and I wish I was as tall as
2 Fred.

3 MR. BECNEL: I was thinking it was Lennie; it was
4 Fred. I'm looking at both.

5 Your Honor, I would want to suggest one further thing
6 to the Court, that we've been able to resolve three major MDLs
7 just in the last six weeks. We have different methods of doing
8 it, most of which were based upon Propulsid model, but tweaked a
9 whole lot differently. And I might suggest to the Court that
10 three judges came up independently with unique curb balls on the
11 Propulsid model, and maybe you should talk to them because it
12 might be a method to get this thing moving.

13 THE COURT: Okay.

14 MR. BECNEL: And that's Judge Rosenbaum, Judge Frank.
15 And most recently -- although it's not all resolved -- is the
16 methodology where the actual judges did the mediation himself
17 which was the most unique thing I've ever seen, and continue
18 again next week. But there is program in place to do the whole
19 thing with him. The others were using the Magistrates.

20 THE COURT: Thank you very much.

21 MR. WITTMAN: And now, Your Honor, we're down to the
22 final rule. It's a rule in which we originally sought dismissal
23 of the claims of 176 plaintiffs in numerous cases for failure to
24 provide a plaintiff profile form. All of the plaintiffs in this
25 rule are represented by the firm of Carey and Danis.

1 Subsequent to the filing of the rule we got adequate
2 profile forms for 17 plaintiffs, and we filed notice of
3 withdrawal as to 15 of them. Two of the profile forms were
4 received late last night. We reviewed them and found them to be
5 sufficient. We're going to file withdrawals on those two today.

6 I can give you the cases where we've either have filed
7 or will file a Notice of Withdrawal. They're the case of
8 Merritt Williams who appears in the case of *Bird versus Merck*;
9 Bob Cover who appears in the case of *Burrahm versus Merck*; Helen
10 Clothier who appears in the case of *Ginger Hugo versus Merck*.

11 These are all multiple plaintiff cases, Your Honor.
12 Jimmy Bowman and Richard Snyder who are in the *Ida Lands versus*
13 *Merck* case; Ron Kelm and Alta Scott in the case of *Brian*
14 *Lawrence versus Merck*; Rita Albright and Katherine Braley in the
15 case of *Martha Maxwell versus Merck*; James Scarbrough in the
16 case of McCarthy -- *Elizabeth McCarthy versus Merck*; Thomas
17 Benjamin, Sr. in the case of *Middleton versus Merck*; David
18 Stewart in the case of *Geraldine Moore versus Merck*; Mary Hines
19 in the case of *Mildred Randolph versus Merck*; Mary Horka in the
20 case of *Loretta Roles versus Merck*; and Roberta Sterling -- I'm
21 sorry, Melissa Miska in the case of *Roberta Sterling versus*
22 *Merck*.

23 Now that still leaves us with 161 plaintiffs that are
24 subject to this rule. The plaintiffs have filed an opposition
25 to the rule, and in their opposition they divide their cases

1 into four categories represented by exhibits to the opposition.

2 Exhibit A purportedly represents plaintiffs who did
3 not suffer a CV event as defined in Pretrial 18(C) where
4 plaintiffs refused to enter into the stipulation approved by the
5 Court and the parties and represented by Exhibit C to Pretrial
6 Order 18(C). And they've also refused to submit a PPF. So,
7 we're loggerheads with respect to.

8 MR. FLYNN: That's not true.

9 THE COURT: Well, on Exhibit A, as I understand it --

10 MR. WITTMAN: When counsel says that's not true, I
11 mean, correct me if I'm wrong.

12 MR. FLYNN: We would very much like to submit
13 plaintiff profile forms. And I feel like I've been head-faked.
14 Half of these are non-CV. I've been head-faked in the
15 situation. I wish I were told two years that I have to do a PPF
16 or sign a stipulation, that they're non-CV. I think to sign a
17 stipulation if someone didn't have a heart attach or stroke when
18 heart attacks and strokes can be difficult diagnose, I regard as
19 attorney malpractice. And since they put the stipulation in
20 front of me, and they've been bullying me to sign it, I'm like,
21 well, let me do fact sheets. But the problem is -- I've done
22 about 2000 fact sheets. There is probably about five or --
23 there is 83 or 90 here which are non-CV that I'm going to need
24 time to do fact sheets. But I wish I would have known two years
25 ago that I have to --

1 Pretrial Order 18(C) -- I thought I would be in
2 contravention of Pretrial Order 18(C) if I did fact sheets if
3 that were not a heart attack or stroke, or a death case.

4 THE COURT: All right, lets deal with what we're
5 trying to deal with. What's your suggestion as to how we deal
6 with this? We've got to do one or two things. You either have
7 to say, I've got a heart attack, or if you don't have a heart
8 attack, claim something else.

9 MR. FLYNN: I want to do fact sheets.

10 THE COURT: Okay.

11 MR. FLYNN: And I wish would have -- I wish two years
12 ago -- if I would have known about the stipulation I would have
13 done the fact sheet two years ago. I totally agree, they either
14 need the fact sheet or a stipulation. And I wish I would have
15 known that two years, I would have done the fact sheet two years
16 ago.

17 THE COURT: How many cases are we dealing with?

18 MR. FLYNN: Well, in Exhibit A -- I broke them down
19 into four categories. But, I think there is like 90 here for
20 the rule that we need to do fact sheets on. And if I can get 60
21 days, I can hammer out those fact sheets.

22 THE COURT: Okay. I'll pass it for 60 days.

23 MR. FLYNN: And, again, actually I created three
24 charts.

25 MR. WITTMAN: But, with respect to those, we get a

1 fact sheet for somebody who has claimed a CV event or coronary
2 or heart attack, or whatever in the complaint, but we get a fact
3 sheet which says we didn't really have one, but it's not
4 complaint with 18(C), what are we going to get with respect to
5 these 90 plaintiffs?

6 THE COURT: What's he going to get?

7 MR. FLYNN: He's going to get, based on me looking at
8 the medical records, what I believe is their Vioxx-induced
9 injury. And when I file the complaint, in some cases --

10 THE COURT: You claim everything.

11 MR. FLYNN: Well, no, I claim heart attack or
12 pulmonary embolism, whatever. Then you get some of the medical
13 records back and go, well, maybe that wasn't a heart attack.
14 You know what I'm saying? So, the fact sheet will get me or
15 nurse practitioners in the office what is on the fact sheet they
16 have to certify to.

17 MR. WITTMAN: I guess as long as we can divine from
18 the profile form what injury the plaintiff is claiming, we got
19 no objection.

20 THE COURT: Yeah.

21 MR. DAVIS: And that's precisely why the *Amicus* brief
22 was filed in part because we are honing in as we get into this
23 discovery, which is what it is. These are not Motion to
24 Dismissal issues, these are discovery-type issues.

25 THE COURT: We're a little further along than just the

1 initial discovery at this stage. We've tried six trials. We've
2 had several years to go by the board, so we are at least at this
3 stage seems to me that the plaintiffs ought to know what their
4 claim are. So, lets do it that way.

5 MR. FLYNN: And I would, but what the confusion was as
6 I read Pretrial Order 18(C), you only should do this if there is
7 a heart attach or stroke, or a death case if that Court doesn't
8 want it, that's why I didn't do a fact sheet. I would have done
9 it two years before.

10 MR. WITTMAN: Okay, so we have 60 days. We'll get
11 whatever. That's fine.

12 THE COURT: Okay.

13 MR. WITTMAN: Then, the next group, as I understand it,
14 these are plaintiffs who have now submitted plaintiff profile
15 forms, but --

16 MR. FLYNN: You've identified most of them.

17 MR. WITTMAN: Many of those are grossly deficient.
18 And we think those should be dismissed.

19 MR. FLYNN: All right. I got this rule on July 13th.
20 I submitted 28 fact sheets. Last night I was told that seven
21 were grossly deficient, okay? And if I can have 30 days I will
22 make whatever they say is grossly deficient with core criteria.

23 THE COURT: I'll give you 30 days to finish those
24 seven.

25 MR. WITTMAN: Okay.

1 MR. FLYNN: And then, the next group is actually --
2 we've been having an agreement with Merck that we could
3 stipulate without prejudice. And I anticipated this exhibit to
4 dismiss cases without prejudice because they're not complying
5 with us; they're not good plaintiffs; they're got giving us a
6 fact sheet. But it also probably includes one they deemed --
7 that the problem is, there is close to a hundred names here, and
8 the intent -- the opposition is, we've been agreeing to a
9 stipulation without prejudice.

10 Now, if they want to take the position of "with
11 prejudice", then this Exhibit C doesn't really mean a lot
12 because some of these people may not even have fact sheets that
13 are due because they may be pulmonary embolism blood clots;
14 they're still on Coumadin for the rest of your life, so there is
15 not even a fact sheet due.

16 MR. WITTMAN: But this is a hundred people that
17 haven't done anything. In the whole time we've sent all the
18 notices they haven't executed Exhibit C to Pretrial Order 18(C),
19 they haven't submitted PPFs and now they're coming in and
20 saying, we want to dismiss without prejudice even though nothing
21 has been done over the course of the last two years, and that's
22 not what Pretrial Order 18(C) says.

23 THE COURT: And, frankly, from the standpoint of
24 dismissing without prejudice, at this stage in the game without
25 prejudice is pretty much the same as with prejudice because of

1 the prescription periods.

2 MR. FLYNN: We feel from a malpractice point of view
3 that it protects us.

4 THE COURT: No, I understand, and so you make that
5 argument. I'll give you some time to try to deal with this
6 issues, but I'm going to be dismissing them with prejudice just
7 as I've dismissed the others with prejudice.

8 MR. DAVIS: I just have one question, and I'm not
9 clear. Are those hundred and some-odd cardiovascular event
10 cases under 18(C)?

11 MR. FLYNN: Some of those are non-CV.

12 MR. DAVIS: So there would be no --

13 MR. FLYNN: There is no fact sheet due.

14 THE COURT: Yeah. Just say there is no fact sheet
15 due; it's non-CV. It would just deal with the CV.

16 MR. WITTMAN: If they've claimed a CV in the
17 complaint, what else can we do?

18 MR. FLYNN: But I wanted to still get out of it. But,
19 therefore, I'm going to be hanging to a case that I want to get
20 rid of because it's going to be with prejudice. And that's why
21 if I can get a stipulation without prejudice from them it just
22 -- I want to get rid of cases that I don't necessarily think are
23 that good, but they're no fact sheets due because they're
24 non-CV.

25 MR. WITTMAN: Well, wouldn't have been asking for

1 plaintiff profile form if they had a said in the first place
2 they didn't have a cardiovascular event.

3 MR. FLYNN: No, that's not true. Half of these you
4 know are non-CV. No, no, no by their allegations more -- half
5 of these are non-CV; they know they're non-CV. They're yelling
6 at me to sign the stipulation. I will give you a fact sheet
7 then.

8 I mean, don't take this 270 names as 270 names that
9 we've led CV and have not done a fact sheet. I would say of the
10 270 it's probably 50/50. And since we've filed 2,700 cases, it
11 means 1,900 or 2000 or 2,100 CV cases we've done right, so.

12 MR. WITTMAN: Well, why don't we do this. Since we're
13 giving him 30 days to take care of these other folks, give him
14 30 days to take care of the folks that haven't submitted on this
15 group too.

16 And his final group consist of plaintiffs who now
17 claim they're going to submit a profile form within three weeks,
18 give them days too; and we all come back next time and try to
19 sort this through. Meanwhile, I'll work with counsel to try and
20 reach some accommodations, but I -- you know, we need to know
21 where we're going with these cases.

22 THE COURT: We really do. I need to know where we're
23 going really. I need to know what the cases are. We can just
24 have 2000 filed and nobody know whether they're CVs, non-CVs.
25 They're not turning in forms. We don't even know whether they

1 live in the same place.

2 MR. FLYNN: I feel I'm being grossly misrepresented.
3 From my point of view I get an order. For 1900 of my cases I do
4 a fact sheet because it says CV. The order says, do not do fact
5 sheets for non-CV. They include a hundred of those names in
6 this order. Now I want to do a fact sheet, so --

7 THE COURT: Okay. Lets do it. We'll pass those. I'll
8 see you all then. We'll pass these for 30 days.

9 MR. WITTMAN: 30 days. Thank you, Your Honor. That
10 takes care of the motions.

11 THE COURT: Okay. Anything else?

12 MR. DAVIS: No, that it, Your Honor. Thank you.

13 THE COURT: Let me just say, in connection with all
14 these matters, the ones that I've dismissed, I've considered the
15 public interest and an expeditious resolution of the litigation.
16 I've also considered the Court's need to manage its docket to
17 keep it significant in the MDL litigation. I've also considered
18 the risk and prejudice to the defendants, and also viewed other
19 remedies less drastic.

20 I have no opportunity to -- no alternative but to
21 dismiss the cases, and I've dismissed them with prejudice.

22 MR. WITTMAN: Thank you, Your Honor.

23 MR. DAVIS: Thank you, Your Honor.

24 MR. FLYNN: Thank you.

25 THE COURT: The Court stands in recess.

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

DEPUTY CLERK: Everyone rise.

(At which time the hearing was concluded.)

CERTIFICATE

I, Pinkey Ferdinand, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Pinkey Ferdinand,
Official Court Reporter