

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
NEW ORLEANS, LOUISIANA

IN RE: VIOXX PRODUCTS * Docket MDL 1657-L
LIABILITY LITIGATION *
 * July 19, 2005
 *
 * 9:30 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 Defendants: Stone Pigman Walther Wittmann
BY: PHILLIP A. WITTMANN, ESQ.
546 Carondelet Street
New Orleans, Louisiana 70130

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

Proceedings recorded by mechanical stenography, transcript
produced by computer.

PROCEEDINGS

(July 19, 2005)

1 THE DEPUTY CLERK: Everyone rise.

2 THE COURT: Be seated, please. Good morning, Ladies
3 and Gentlemen. Call the case, please.

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

5 THE COURT: Counsel make their appearance for the
6 record, please.

7 MR. HERMAN: May it please the Court. Good morning,
8 Judge Fallon. Russ Herman of Herman, Herman, Katz & Cotlar in
9 New Orleans for the plaintiffs.

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

12 THE COURT: I understand we have some people on the
13 phone, also. Who do I have on the phone?

14 MS. SOTOODEH: Pamela Sotoodeh with Ken Moll in
15 Chicago.

16 MR. GARRISON: Paul Garrison with Hollis & Wright in
17 Birmingham.

18 MS. DALL: René Dall in Birmingham.

19 MS. MISMASH: Nancy Mismash with Debry & Associates
20 in Salt Lake City, Utah.

21 THE COURT: We are here today for our monthly status
22 report. I met with counsel preliminarily and I have an agenda.
23 We will take them in order. First is LexisNexis File & Serve.
24
25

1 I met with those individuals, as I indicated I would the last
2 time, and hopefully the matters have been worked out. Any
3 report on that?

4 MR. WITTMANN: Yes, Your Honor. Before we get to
5 that, if I could just give you the basic case statistics for
6 everyone in attendance today so we will know where we are. As
7 of July 11 we had 1,005 cases in MDL 1657, although some of
8 them haven't been served yet. That's an increase of about 100
9 since our June status conference. There are over 800 cases
10 served and pending in federal courts that have not yet made it
11 into the MDL, but are on the way. That also is an increase of
12 about 100. So a little over 1,800 cases will be in the MDL.

13 In addition, there are roughly the same number
14 of cases pending in state courts, other than in California and
15 New Jersey, so about 170 pending in other state courts. There
16 are about 2,100 Vioxx cases pending in the New Jersey
17 coordinated proceeding, which represents an increase of about
18 200 from our June report. There are about 200 cases pending in
19 California state court involving over 1,200 plaintiffs. That's
20 an increase of roughly about 20. There's been one additional
21 class action filed, so now we have 119 pending class actions.
22 The class action master complaints in the MDL are due to be
23 filed on August 1.

24 Your Honor, on the first item on the agenda,
25 LexisNexis, I asked Dorothy Wimberly of our firm to give a

1 report to the Court and the people in attendance because she
2 has been working more closely with the LexisNexis people than
3 anybody on our side of the case. She is prepared to do that,
4 if I may introduce her to the Court.

5 THE COURT: Yes.

6 MS. WIMBERLY: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MS. WIMBERLY: Since Your Honor met with counsel and
9 the representatives of LexisNexis, at least from the defense
10 perspective, we have seen a great improvement. We have had a
11 much quicker turnaround by LexisNexis on loading the cases as
12 we have sent them to them. Effective last Friday, LexisNexis
13 turned on a feature called Case and Party Management, which we
14 are very hopeful will assist all of the attorneys in being able
15 to manage their cases. It will enable any registered attorney
16 to go in and make a change within their case, for example, if
17 another attorney enrolls as counsel or additional counsel of
18 record, if there's a substitution, if there's a withdrawal. In
19 order to do that, they have got to provide the supporting
20 documentation to LexisNexis in order to keep the record correct
21 and clear. We would encourage all counsel who are in that
22 situation, who have had any sort of substitution, enrollment,
23 or withdrawal, to please go in and check their cases with
24 LexisNexis on line and go into Case and Party Management.

25 We are also hopeful that in the very near future

1 this will allow registered users to add a new case. Thus, if a
2 registered plaintiffs' counsel files a new case, they would
3 have the ability to upload that case in the first instance
4 without it having to go through liaison counsel. It would
5 provide a quicker turnaround on everything. We feel this will
6 also be very helpful to defense counsel because at the point in
7 time that many of the cases are actually uploaded to LexisNexis
8 there is no defense counsel of record, which has made it
9 impossible for defense counsel to upload their answer. We are
10 quite hopeful on that.

11 We have asked LexisNexis to draft up a one-page
12 tip sheet, which they would first share with liaison counsel to
13 make certain that we all agree on its terms and then to post
14 that and circulate that to everyone. From a defense
15 perspective, we have definitely had a timing improvement and we
16 are hopeful this new feature will make it more manageable.

17 THE COURT: How about from the plaintiffs'
18 standpoint, any input?

19 MR. HERMAN: We are in good shape, Your Honor.

20 THE COURT: Keep me posted. If you have any
21 difficulty on that, I want to get involved in it because it's
22 critical that everybody have notice and we keep things moving.
23 That's an important part of the case. The next item is trial
24 settings.

25 MR. HERMAN: Your Honor, we have a number of cases

1 set. The jury has been selected and opening statements have
2 been given in Texas in the Ernst case and the case is
3 proceeding. The Humeston case is set for trial in New Jersey
4 on September 12, the Guerra case in Texas on September 19, the
5 Zajicek case in Texas on September 26 -- although there's been
6 an agreement to continue this trial date until 2006 -- and the
7 Tomlin case is set for trial in Florida. We'll defer any other
8 comments. There's a remand issue about a Texas case further on
9 in the report, Your Honor.

10 THE COURT: Selection of early trial dates. I met
11 with counsel. The Court is available the week of November 28
12 to begin trying cases in this litigation. Counsel are to give
13 me some input as to which cases are to be tried. I'm looking
14 for heart attack cases and perhaps stroke cases. The parties
15 will pick the cases. If necessary, I'll get involved and pick
16 the cases, but hopefully they will do so, keeping an eye on
17 cases that are ready for trial and that are instructive and
18 will help guide the litigation. These early cases won't be the
19 final word on this type of litigation because it is moving and
20 it is developing and more material is coming in. Hopefully,
21 those early trials will be helpful for counsel in at least
22 getting a fix on issues and also will help them in future
23 trials. The next item is the class actions. Any report on
24 that?

25 MR. HERMAN: The class action committee of the PSC

1 has continued to meet. Master complaints are being formulated.
2 We have given advance notice to Your Honor and to defense
3 counsel that certain issues will not be included in the class
4 complaints. We'll be able to make a further report at the next
5 scheduled conference, Your Honor.

6 THE COURT: Master discovery directed to Merck is the
7 next item.

8 MR. WITTMANN: Yes, Your Honor. Since our last
9 status conference with Your Honor, we have been trying to do
10 what the Court said we should do, which is to trim the
11 discovery requests to get it down to nonduplicative document
12 requests. There's been ongoing negotiations between
13 Mr. Barnett on behalf of the defendants' steering committee and
14 David Buchanan meeting on behalf of the plaintiffs' steering
15 committee. I think they have achieved a lot already. They
16 continue to work together to try and get this to a point where
17 there will be a fixed set of master requests that we can deal
18 with, eliminating any duplicative requests.

19 The production of documents by Merck is going to
20 be ongoing and starting on a rolling basis. We are not waiting
21 to get the final piece in place before we start producing
22 documents. We are going to produce them on a rolling basis.
23 We are trying to prioritize the documents produced in
24 accordance with what the plaintiffs tell us they need to get
25 produced first. I would just tell the Court I think we are

1 working well with the defense steering committee in trying to
2 accomplish what they are trying to accomplish with the document
3 production. So far, it's going very smoothly.

4 THE COURT: Give me some input from the plaintiffs'
5 standpoint. Anything from plaintiffs?

6 MR. HERMAN: No. The parties have been talking and
7 we are waiting to receive some final document that could be
8 submitted to the Court.

9 THE COURT: When can that be done? Give me some
10 input there. Can you do that in 10 days?

11 MR. HERMAN: Yes. We have provided the defense with
12 our position and they will respond, and that certainly ought to
13 be able to be done within 10 days.

14 THE COURT: Get with me within 10 days and let me
15 know what the situation is.

16 MR. WITTMANN: Just so I'm clear, do you want a
17 report within 10 days as to where we are?

18 THE COURT: Right. Also, if there's any document
19 that needs to be signed or finalized, I want that taken care
20 of.

21 MR. WITTMANN: Would you also want to know if there
22 are any disputes outstanding at that point, as well?

23 THE COURT: That's exactly right.

24 MR. HERMAN: We do need the specific objections of
25 defendants and specific requests, as well as the agreement as

1 to what they are going to produce.

2 THE COURT: If you have that, then I will resolve
3 them. I will be ruling on an objections, so we will have all
4 that taken care of before the next meeting. The Vioxx
5 professional representatives. I talked with the parties on
6 this issue. It seems to me that there are two issues involved.
7 One issue is the numbers of people. The second issue is the
8 concern that the defendants raise with regard to the potential
9 for having the remand issues more complicated by the production
10 of this material.

11 With regard to defendants providing the names
12 and addresses of the individuals, I don't see where that is a
13 burdensome aspect to the defendants. They should be able to
14 produce that with computers very quickly. It seems to me it's
15 relevant, because of the issues of learned intermediary and
16 other issues that are legitimate defenses in a case of this
17 sort, and the plaintiffs have to have an opportunity to know
18 who the representatives are and take their depositions, if need
19 be, and so forth. With the issue of complication of remand, I
20 will be considering that and looking at how that can be done.

21 My first suggestion to the parties today was to
22 see if it can be trimmed down to Vioxx issues and Vioxx
23 representatives, whether that would trim it down in any way.
24 If a shorter list can't be gotten together, I will be
25 considering the production of the longer list and a method of

1 producing it so that remand issues will not be complicated.
2 I'll get with the parties again within 10 days. Let me hear
3 from you on that and I'll deal with that.

4 MR. HERMAN: Your Honor, since discussing this
5 matter, I have an immediate suggestion. I would ask that the
6 defendants produce that list with names and addresses and the
7 dates of employment immediately in camera under seal, then
8 lawyers may apply, upon notice and for good cause, to access
9 those materials. I'm particularly concerned about class action
10 issues in cases that have been removed here where that
11 information is going to be fundamental in discovery,
12 particularly as to the learned intermediary issue, et cetera.
13 There's no reason that we can think of why a button can't be
14 pressed and the list, at least, provided immediately under
15 seal.

16 THE COURT: I'll take that into consideration. I'll
17 talk with the defendants and you tomorrow on a conference call.
18 We will discuss that and I will resolve that issue. Deposition
19 scheduling is the next item.

20 MR. HERMAN: Yes. The PSC requested production of
21 the FACTS database. Your Honor set that matter for hearing on
22 August 2 at 1:30. The defendants have an expert and a
23 representative. They will be taken in New Orleans on July 29
24 in the afternoon and the day of July 30. Plaintiffs' expert
25 has been named and plaintiffs' expert will be taken in

1 New Orleans on August 1.

2 THE COURT: Plaintiff profile form and Merck profile
3 form.

4 MR. HERMAN: We have agreed, Your Honor, on the two
5 forms. Mr. Wittmann and I will be jointly providing you --
6 hopefully this afternoon -- with the timing issue as to when
7 the defendants have to respond to plaintiff profile forms and a
8 new schedule for production of plaintiff profile forms. We
9 have advised the Court that we have a disagreement, which
10 Your Honor will resolve, as regards the sharing of plaintiff
11 profile forms by Merck with other defendants named in the MDL.

12 THE COURT: Each of you give me a very short letter
13 stating your positions and I will resolve that issue.

14 MR. WITTMANN: Well, I think we can give you one
15 letter with respect to the order itself. The only issue is
16 whether there would be a provision in the order that Mr. Herman
17 referred to as to the use of the profile forms by Merck, but
18 the order itself would be an agreed-on order with that one
19 exception.

20 THE COURT: Just give me a very short letter telling
21 me each of your positions on that and I will resolve it. The
22 medical records from healthcare providers.

23 MR. HERMAN: There's no controversy as regards that
24 issue and a Pretrial Order has already been issued governing
25 the provision for medical records.

1 THE COURT: The next item is contact with plaintiffs'
2 healthcare providers. I did a minute entry. I have an opinion
3 coming out hopefully today or tomorrow. Plaintiffs'
4 depository.

5 MR. HERMAN: It's up and running, Your Honor. For
6 example, we have received from the FDA at least two of their
7 first page of production documents. I've been able to review
8 them and turn them around within very short periods of time.
9 We do have reviewers and coders who are actively participating
10 in the depository.

11 THE COURT: An item I didn't cover was the Pretrial
12 Order governing individual cases.

13 MR. WITTMANN: That's in place.

14 MR. HERMAN: It's VI.

15 THE COURT: Right. The PSC request for production of
16 FACTS database, we talked about that. Discovery directed to
17 the FDA.

18 MR. HERMAN: Yes. The discovery with respect to the
19 FDA, Your Honor, Mr. Wittmann and I have signed off on a
20 confidentiality order. That was negotiated by Mr. Rafferty of
21 the PSC and representatives of the U.S. Attorney's Office. The
22 FDA has proceeded to copy the documents we want. They are
23 awaiting the confidentiality order, which we jointly presented
24 to Your Honor this morning.

25 THE COURT: As I said last time, I appreciate the

1 FDA's cooperation. It makes it easier to handle a case of this
2 sort if they do what they have done in this particular case. I
3 commend them on that.

4 MR. HERMAN: The U.S. Attorney's Office from the
5 Eastern District has also been most helpful in facilitating
6 these matters, Your Honor.

7 THE COURT: I do recognize them. They have been a
8 key element in this case, as well as other cases that I have
9 handled. Discovery directed to third parties.

10 MR. HERMAN: We have issued 13 subpoenas to
11 nonparties and notices. Mr. Tisi of the PSC has been in charge
12 of this particular issue, and we expect to issue additional
13 discovery very shortly.

14 THE COURT: Now we can go back to XVI and that's the
15 remand issue.

16 MR. HERMAN: I have one comment about that from the
17 PSC's point of view that I want to make very clear to the Court
18 and on the record. The PSC should not be understood to have
19 taken a position that physicians should not be joined as
20 defendants. In fact, our position is that where there is
21 evidence that the physician was misled, the physician probably
22 should not be joined. Where there is evidence that a physician
23 has committed medical negligence, then a physician should be
24 joined. It's up to each individual lawyer to make that
25 investigation and that determination. There seems to have been

1 some misunderstanding that the PSC has advocated not joining
2 healthcare providers or others who may be at fault and that
3 certainly isn't our position, nor is it our prerogative to give
4 that type of recommendation. As to remand issues, the Garza
5 case representatives are here in the courtroom, and I
6 understand Your Honor will be taking that matter up.

7 THE COURT: Right. I'll be meeting with the
8 attorneys in the Garza case, together with the defendants, to
9 discuss the status of that particular case. On remand issues,
10 also, last time I asked the state liaison committee to get
11 together a list so I could look at them. Ms. Barrios, do you
12 have any report?

13 MS. BARRIOS: Yes, Your Honor. We received a copy of
14 your order on Friday. Friday afternoon I was in communication
15 with Mr. Wittmann and Mr. Marvin. They said they would
16 cooperate with us by providing us with a master list of the
17 motions to remand that they had. We reached out to our fellow
18 plaintiffs' attorneys through the Cox-2 inhibitor list server
19 on ATLA. That went out broadcast yesterday. My office has
20 been bombarded with people who have written in to tell me about
21 their motions to remand. I have two of my staff in the
22 courtroom who would like to meet with the Clerk's Office to
23 review the capability of PACER to be able to provide this
24 information to us, as well. There seem to be, Your Honor,
25 several sources and we are trying to give you the most

1 comprehensive list available. We think by the time of the next
2 status conference we should have that for you. We will group
3 it by state, as you requested.

4 THE COURT: Gene, can you get together with
5 Ms. Barrios?

6 MR. SMITH: Yes.

7 MR. HERMAN: The PSC has requested if there are any
8 meetings or communications as between the state liaison
9 committee and the defense that the PSC be advised.

10 THE COURT: Yes. I would like the PSC to have a
11 representatives so we can coordinate this matter. It's
12 significant and important that everybody know what's going on.
13 Mr. Becnel.

14 MR. BECNEL: Yes, Your Honor. Last week one of my
15 cases from Oregon filed in state court under a deadline by that
16 state's law and was removed to federal court. Do I file the
17 remand motion directly with you now on that case?

18 THE COURT: Sure.

19 MR. BECNEL: It's in the pipeline. Can I just file
20 it when it gets here?

21 THE COURT: Yes. When it gets here, just do that.
22 That's fine. Tolling agreements.

23 MR. WITTMANN: Yes, Your Honor. Tolling agreements
24 are alive and well. My partner, Tony DiLeo, has been handling
25 those in our firm and can give you a complete report where we

1 stand with that.

2 MR. DILEO: Good morning, Judge. Tony DiLeo on
3 behalf of Merck. On June 9 the plaintiffs' liaison counsel and
4 defense liaison counsel jointly submitted to the Court the
5 notice of the tolling agreement and the tolling agreement
6 itself with the forms, Exhibits A, B, and C. These were also
7 served via LexisNexis and are available on the Court's web
8 site.

9 Pursuant to the tolling agreement protocol,
10 Mr. Wittmann, as defense liaison counsel, is to receive a
11 one-page form called Exhibit C, which provides very basic
12 information. As of last night, we have received 422 of those
13 Exhibit C forms. Most of these have been submitted fairly
14 recently. I would say within the past three weeks or so. Once
15 we receive those Exhibit C forms, we confirm to plaintiffs'
16 counsel by letter that we do have them and we notify them of
17 the 30-day time limit for them to provide Exhibits A and B.

18 Exhibit A, of course, is the plaintiffs' profile
19 form. Exhibit B are the authorizations for release of
20 documents. Exhibits A and B are due within 30 days after
21 Exhibit C arrives, and as of this time we received seven of the
22 Exhibits A and B. Within three business days after we get
23 those exhibits, defense liaison counsel, Mr. Wittmann, is
24 required to confirm receipt, which we have done.

25 The only issue that we have had has been minor.

1 Where documents have been voluminous, because the tolling
2 agreement requires fax or e-mail, we have been asked, "Will you
3 accept FederalExpress," and we have agreed to that. All and
4 all, I would say that the tolling agreement process is
5 proceeding very smoothly. That is my report, unless the Court
6 has questions.

7 THE COURT: That's fine. There are some states --
8 Louisiana being the only one that I know of -- where tolling
9 agreements may be problematic. It's a question in civil law
10 whether or not you can toll a statute of limitations or
11 prescription, but that's the second issue. Tolling agreements
12 make sense to me from both sides. I do appreciate both sides
13 looking at this. It makes it easier on the litigant and also
14 easier on the lawyer. They don't have to put up funds. At the
15 same time, the defendant gets some benefit out of it, also. I
16 think it's a win for both sides to have tolling agreements
17 whenever possible. Louisiana master complaint.

18 MR. HERMAN: Mr. Meunier for the PSC and Mr. Wittmann
19 have been discussing a Louisiana master complaint. They are
20 very close to agreement to a master complaint similar to
21 Achord, but not identical, with a short-form plaintiff profile
22 form. Mr. Meunier and Mr. Arceneaux, on behalf of the PSC,
23 will be drafting the master complaint and then coordinating
24 with Ms. Cabraser and Mr. Levin, who have the responsibility
25 for the class action master complaint.

1 THE COURT: Fine. That's the Louisiana answer to
2 tolling agreements.

3 MR. WITTMANN: Yes, Your Honor. The efforts that
4 Mr. Meunier and I have been working on is to get an order in
5 place from the Court that will permit the naming of multiple
6 plaintiffs in one complaint, whether it's a master complaint or
7 whether it's simply a joinder. We haven't really firmed that
8 up yet. The idea is to allow Louisiana plaintiffs to be put in
9 the same position as non-Louisiana plaintiffs with respect to
10 tolling agreement. We are tracking exactly the same provisions
11 in the tolling agreement and will put those in place in these
12 joint Louisiana actions so that we can have the Louisiana
13 people get the same benefit that the tolling agreement provides
14 for people in other states, Your Honor.

15 THE COURT: All right. I talked to state liaison
16 counsel already on the issue of the grouping of the remand
17 matters. Direct filing into the MDL.

18 MR. HERMAN: Yes. That process, Your Honor, is on
19 track and a number of cases are filed. We have had
20 communications that other attorneys throughout the country want
21 to file direct. They have been given access, of course, to the
22 web site, which tells them how to do it. We have made
23 ourselves available to discuss with them any problems they have
24 about understanding the service waiver in filing in the MDL.

25 THE COURT: I understand from the Clerk's Office that

1 we have been getting a number of filings directly. Several
2 hundred of them have come in so far.

3 MR. RADOSTA: We are averaging about 7 or 10, Judge,
4 in the last three weeks.

5 THE COURT: Pro se claimants.

6 MR. HERMAN: We have provided Your Honor with a
7 memoranda of four pro se claimants who have attempted to retain
8 counsel and have been unable to. Your Honor preliminarily has,
9 I think, determined that the PSC should provide plaintiffs
10 assistance. Mr. Seeger and Mr. Birchfield, who are the co-lead
11 counsel, will undertake to determine who on the PSC will be in
12 charge of that.

13 THE COURT: These are the individuals who are
14 presently incarcerated in various prisons in the United States
15 and not able to be present here today. They need
16 representation and do not have it. The easiest way of my
17 keeping in touch with that aspect of the case is to have
18 plaintiffs' liaison counsel represent those individuals so I
19 can have them before the Court in that fashion.

20 MR. HERMAN: There are a much larger number of
21 individuals who are out there who have indicated they are
22 pro se who have not responded back to us that they have been
23 unable to get counsel.

24 THE COURT: I have the MDL assessment before me. Is
25 there any discussion on that, any problems?

1 MR. BIRCHFIELD: Your Honor, good morning. In
2 Pretrial Order 6 the Court created the PSC and you charged us
3 with the duties and responsibilities for managing and advancing
4 this litigation. Since that time, we have made great strides
5 in that direction. We have established subcommittees that are
6 very active now and working on various aspects of the
7 litigation. We have established a depository here in
8 New Orleans, as well as the one in New York and in Montgomery.

9 We have undertaken additional discovery,
10 including third-party discovery that has been outlined for you
11 this morning. We have also taken depositions. Before this
12 litigation was started in the MDL, several members of the PSC
13 had spent several years involved in this litigation. We have
14 taken those depositions, the discovery has been completed, and
15 we are building on that foundation in order to move this
16 litigation forward in the most efficient manner possible.

17 A tremendous amount of work has been done, but a
18 lot remains to be done. We are doing a tremendous amount of
19 work to move it forward expeditiously. In Pretrial Order 6,
20 the mechanism that you outlined called for the attorneys
21 working with the PSC and at the PSC's direction to submit their
22 time records with the expectation they would be compensated for
23 that time and for the expenses that inure to the benefit of all
24 the plaintiffs. We think now is the appropriate time for the
25 Court to establish that fund.

1 The proposal that we have filed with the Court
2 includes three options. The first option we call the full
3 participation option, and it calls for a two percent assessment
4 for attorney's fees plus one percent for costs. This option is
5 designed to foster cooperation and coordination between the
6 lawyers that are litigating cases in the MDL in federal courts
7 and those that are in state court litigation. I'm not aware of
8 any pharmaceutical MDLs with an assessment that low, but that's
9 designed to foster that cooperation.

10 We are committed to producing an excellent work
11 product here, and to show that commitment we think that it's
12 imperative that those that are doing the work -- the PSC
13 members, the members of the committees that we have set up, the
14 state liaison committee -- all show their commitment by
15 participating in this full participation option. We think by
16 doing that it fosters coordination and cooperation and not
17 competition among the various jurisdictions.

18 THE COURT: It's your intent that all of the cases,
19 including those held by the PSC, will be assessed that amount?

20 MR. BIRCHFIELD: Yes, Your Honor. That's our
21 proposal, that it is voluntary, only by agreement. Attorneys
22 that will sign this agreement, they agree to participate with
23 the MDL regardless of whether they are litigating in state
24 court or they have unfiled cases or case on the tolling
25 agreement. We want to have this proposal available for a

1 limited period. We want to encourage participation and
2 cooperation early in this litigation. We want to make this
3 option available for 90 days from the time the Court enters
4 that order.

5 The second option is a traditional assessment
6 option and, really, we envision that applying to lawyers who
7 get cases late. They would receive the MDL work product. The
8 assessment for those cases that are pending in federal court
9 would be six percent and four percent for those that are in
10 state court.

11 The third option is what we call the limited
12 waiver option, and that is for lawyers who have cases both in
13 federal court and in state court and they wish to use the MDL
14 work product only for their federal court cases and not in
15 their state court cases. The assessment there would be six
16 percent.

17 Your Honor, as was mentioned earlier, the first
18 Vioxx case is under way right now in Texas. There are a number
19 of additional cases that are set for trial in the upcoming
20 months, including one hopefully here in the MDL within the next
21 four to five months, so we think that the time is appropriate
22 for the Court to establish a fund. We would ask that you enter
23 an order establishing a fund and employing the proposal that we
24 submitted to the Court.

25 THE COURT: Any comments?

1 MR. HILL: Does the order apply to a member of the
2 state liaison committee who does not expect to share in common
3 benefit, is not intended to submit time or expense records for
4 reimbursement?

5 MR. BIRCHFIELD: The proposal that we have submitted
6 would apply to all members of the state liaison committee, the
7 PSC, all committee members that are working in the litigation,
8 and the idea is to show our commitment to the work product and
9 to create a situation where there's not competition among the
10 jurisdictions, but a spirit of cooperation. We think this
11 proposal achieves that objective.

12 THE COURT: All right.

13 MR. BECNEL: Your Honor, I would like to commend the
14 plaintiffs' committee on this because it will definitely bring
15 all of the cases with full cooperation. The only request I
16 make of the Court is if I sign on -- which I will -- for me and
17 all of my referral lawyers from around the country -- and some
18 of them are still getting cases in, as I'm sure everybody in
19 the PLC is still getting cases in. If I don't do it within 90
20 days, am I out, or if I can sign a general that everything I
21 get from here until the end of the case is under this two
22 percent, one percent -- I would like to have the Court enter an
23 order that you can put it all in now and not have to be worried
24 about whether it's a six-month-down-the-road case or a
25 two-year-down-the-road case.

1 MR. BIRCHFIELD: Your Honor, there's no objection.

2 THE COURT: I see the point. That's what I would
3 anticipate. Also, there's got to be some flexibility in the
4 90-day situation. There's got to be some situations where
5 people either didn't get notice or a case didn't come in or
6 something of that sort that they ought to be grandfathered in
7 in some way, but I will be looking at that.

8 MR. BIRCHFIELD: Thank you.

9 THE COURT: Thank you. Anything further from
10 anybody?

11 MR. HERMAN: Just a comment. Mr. Ranier is chair of
12 our insurance committee. We anticipate by the next meeting to
13 have made a determination as to whether to join or not join
14 insurers under the direct action statute, Louisiana cases, and
15 what additional discovery we would request. We have asked the
16 defense to provide us some additional copies of some of the
17 dec. sheets that they have previously provided because they are
18 not legible. Our marketing discovery committee Mark Robinson
19 chairs is ready to go as soon as the FACTS issue and the
20 detailer issues are determined.

21 THE COURT: Any other issues that we need to focus
22 on?

23 MR. WITTMANN: Not from our side, Your Honor.

24 THE COURT: The next status conference will be
25 August 25 at 9:30 a.m. I will meet with liaison counsel at

1 8:00 in the morning. Thank you very much. Court will stand in
2 recess.

3 THE DEPUTY CLERK: Everyone rise.

4 (WHEREUPON, the Court was in recess.)

5 * * *

6 CERTIFICATE

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

13

14

15

16

Toni Doyle Tusa, CCR
Official Court Reporter

17

18

19

20

21

22

23

24

25