

1 failure to appear will be punished by a fine,
2 imprisonment, or both.

3 MR. HERMAN:

4 By stipulation, Your Honor.

5 JUDGE FALLON:

6 I will have both of you-all
7 there.

8 We are here for the monthly
9 status report back in Houston. I had hoped we
10 could move back to New Orleans, but we are not
11 there yet. Hopefully we will be there soon.

12 The first item on the agenda is
13 LexisNexis File & Serve.

14 Anything there?

15 MR. HERMAN:

16 May it please the Court, we've
17 had several hundred calls from attorneys who
18 have served the Plaintiff Profile forms, hard
19 copies, on Mr. Coronado. Mr. Wittmann however
20 can't upload to LexisNexis because of the
21 backlog of a large number of cases being filed
22 in MDL. Mr. Wittmann and I have reached
23 agreement that service on Mr. Wittmann and
24 Mr. Coronado of hard copy will suffice for
25 now, and when the clerk's office can handle

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1 the large influx of MDL cases, at that time we
2 will notify Plaintiffs' counsel to upload on
3 LexisNexis.

4 JUDGE FALLON:

5 This is not a Lexis-Nexis
6 problem. This is a logistical problem created
7 by the hurricane?

8 MR. WITTMANN:

9 Yes. With the Clerk's office,
10 Your Honor.

11 JUDGE FALLON:

12 I will talk to the Clerk's office
13 and see whether or not I can expedite the
14 matter.

15 The Clerk's office is moving back
16 to New Orleans. Hopefully they will be
17 established there very shortly. I will talk
18 to them, if I have to, this week.

19 MR. WITTMANN:

20 One other thing in connection
21 with those documents. If from now on people
22 who are filing Exhibit As or Bs or Cs, in
23 connection with the tolling agreements, should
24 send them to our office in New Orleans. We
25 were operating out of our Baton Rouge office

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1 for the past two months, but have transitioned
2 that back to New Orleans effective today. We
3 put a notice to that effect on File & Serve,
4 as well. We wanted everybody here to know we
5 are operating out of the New Orleans office in
6 terms of this case.

7 JUDGE FALLON:

8 Next item is the orders issued as
9 a result of the hurricane.

10 Any comment on that?

11 MR. HERMAN:

12 Various orders have been issued
13 by the presiding judge of the Eastern
14 District, by the governor of Louisiana, and
15 now by the Louisiana Supreme Court as regards
16 statute of limitations or prescription in
17 Louisiana and statutes of repose. The Law
18 Institute has now suggested some amendments to
19 the Louisiana Civil Code, which I think will
20 only be binding on Louisiana cases;
21 nevertheless, counsels have concerns that any
22 of these orders may -- have concerns none of
23 these orders will affect the statute of
24 limitations issues in the MDL.

25 MR. WITTMANN:

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1 I think we agree with that. I
2 think the Louisiana legislature is going to
3 have a session starting November 6th to
4 consider some of these problems. I think the
5 legislature can deal with it effectively.

6 JUDGE FALLON:

7 The third item is State Court
8 trial settings.

9 MR. WITTMANN:

10 Yes, Your Honor.
11 The Humeston case is underway, as
12 you know. The evidence is closed. The case
13 will be argued to the jury tomorrow, and the
14 verdict will be read when it comes. We've got
15 the Zajicek case, if I am pronouncing that
16 right, set for trial March 20th in Jackson
17 County, Texas. The Guerra case is set for
18 trial on April 17th, 2006, in Texas District
19 Court of Hidalgo County, and the Kozic case
20 set for trial in Hillsborough County, Florida.

21 JUDGE FALLON:

22 Let me comment about the cases.
23 I said this several times before, but I will
24 reinforce it this time.
25 This MDL Multi District

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1 Litigation concept is a concept that was
2 created to deal with multi-district cases.
3 This particular case is a multi-district case.
4 Suits filed throughout the country. We have
5 now about 148 class actions filed in every
6 state in the union, and it looks like that the
7 census will bear the prediction of the
8 attorneys that there will be about another
9 hundred thousand claims.
10 The MDL is particularly suited to
11 deal with a case of that type. It's an
12 opportunity for the lawyers to have one
13 proceeding and develop all of the discovery in
14 that particular proceeding. It's good for the
15 litigants. It's good for the plaintiffs and
16 the defendants -- litigants in general.
17 A problem that has developed over
18 the years, which continually poses a challenge
19 to the MDL is to begin trying cases as quickly
20 as possible. In this particular case, I have
21 been able to do that because the case has been
22 filed for several years before the MDL was

23 created.
24 There are many cases that are
25 ready for trial, and they are being migrated

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1 here so that I can begin trying them. We try
2 a case in three or four weeks. The first MDL
3 case will go for trial. I set dates in
4 February, March, April, and May for other
5 cases to go to trial. It's helpful, I think,
6 if the cases go to trial in this forum. If
7 they go to trial in this forum at the end of
8 April; hopefully, we will have an opportunity
9 to sit down on both sides. I will sit with
10 both sides and make some sense out of what the
11 juries have been doing with these cases.
12 Hopefully, out of that discussion will come
13 some programs to resolve the entire litigation
14 without the necessity of trial in every
15 particular case. That's the aim of the MDL,
16 or at least one aim of the MDL. The primary
17 aim, of course, is to create a forum for
18 discovery.
19 In this particular case, we might
20 also have another opportunity, because the
21 cases are not only ready to be discovered;
22 they are ready to be tried. I want to give
23 the parties a forum to do that.
24 We've selected categories of
25 cases that are representative of all of the

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1 entire census of the case. If we now select
2 cases that are representative of each of those
3 categories, we will have some intelligent way
4 of looking at the entire scope of the case. I
5 think that opportunity is not there if you try
6 hundreds of thousands of cases one at a time
7 throughout this country and throughout the
8 State Court system. The parties, the
9 litigants are different. The lawyers are
10 different, and you don't have the opportunity
11 to look at a body of cases which we have in
12 the MDL.
13 So, I know there's an interest
14 always in looking at State Court as an
15 opportunity to try cases, but I suggest to the
16 parties that I am interested in trying to move
17 this case forward in the MDL format.
18 I am concerned that I am getting
19 information from the press and others that
20 indicate that there's a move afoot to work
21 outside of the MDL. I think that is
22 counterproductive to the litigants. I think
23 that is counterproductive to the lawyers, and
24 I am going to be particularly conscious of
25 that happening, and I am going to look at

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1 ways, both informal as well as formal for
2 moving this case through the MDL process so
3 that we can get a prompt resolution of the
4 entire litigation and not have this linger for
5 years. I think the best way of doing that is
6 to try some cases in the MDL, so that's what
7 I'm doing.

8 MR. HERMAN:

9 Your Honor, Mr. Kline and
10 Mr. Balefsky for the Plaintiffs, and
11 Mr. Marvin for the defendants have had some
12 discussions. Any argument on these issues,
13 Your Honor, is reserved following the status
14 conference.

15 JUDGE FALLON:

16 I will take that up following the
17 status conference. Again, as I mentioned just
18 a moment ago, parties met at my direction.
19 They met and selected categories. The
20 categories, the entire census of this
21 litigation, fall into several categories. It
22 makes sense to me now to go forward and pick
23 cases that are representative. First that are
24 ready for trial. I don't want any cases that
25 are not ready for trial. They are not going

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1 to be helpful to us. The purpose of trying
2 the cases is to get information for the
3 parties to deal with. They must be ready, and
4 they must be representative of that category.
5 If they are ready and representative of that
6 category, we should try them and see what
7 juries -- how juries deal with that issue.
8 The first thing is to pick the categories.
9 That's been done.

10 Now we are at the stage of
11 picking the cases. I will talk with the
12 parties at the appropriate time on that issue.
13 The next item is class actions.

14 MR. WITTMANN:

15 On class actions, we've got
16 several motions pending on class actions. The
17 defendants filed a Rule 12 motion to dismiss
18 on the personal injury complaint and the
19 purchase claims complaint. Those have all
20 been fully briefed. Plaintiffs filed a motion
21 to stay of class briefing on the personal
22 injury complaint, and they filed a motion to
23 amend the master class action complaint for
24 medical monitoring and personal injury by
25 adding some class representative.

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1 All of those motions have been
2 fully briefed and are ready to be argued, and
3 Merck requests they be set for argument at the
4 earliest practical date.

5 JUDGE FALLON:

6 Let me hear from the Plaintiffs.

7 MR. KLINE:

8 Mr. Wittmann's only half right.
9 The Rule 12 motion on the personal injury
10 complaint and the purchase claims complaint,
11 the Plaintiffs' response is due November 8th.
12 The other three motions: The motion to strike
13 with regard to headless classes, the motion to
14 stay to mature the tort, and the motion to
15 amend to add plaintiffs for the headless
16 classes are ready for determination, those
17 three.

18 JUDGE FALLON:

19 I will set those by minute entry.
20 I will give you a date.
21 Discovery directed to Merck?
22 MR. HERMAN:
23 Yes, Your Honor.
24 I want to thank Arnold Levin and
25 Liz Cabraser who have done an excellent job in

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1 charge of our Class Action Committee.
2 There are several discovery
3 issues, Your Honor, that are pending. One has
4 to do with prioritization, and we have a
5 letter for counsel opposite we will deliver
6 today setting forth priorities.
7 The privilege log issue is still
8 an issue of contest, even though there are
9 certain issues that have been resolved by meet
10 & confer, and we can take those issues up
11 after the status conference. A proposed order
12 on the Arcoxia and foreign discovery should be
13 in a form to present to Your Honor. The date
14 of production of that discovery is still being
15 discussed, and hopefully that can be resolved
16 today. The other discovery issues are further
17 on the agenda.
18 MR. WITTMANN:
19 I don't have anything to add to
20 that, Judge.
21 That sort of segues into the
22 next, which is the request for the production
23 of FACTS database, which is on target. We
24 said we would produce in accordance with the
25 Court's order, and it's ongoing.

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1 JUDGE FALLON:
2 The next item is Vioxx
3 professional representatives. I made a ruling
4 on that. How's that working?
5 MR. HERMAN:
6 It's working fine. Today I have
7 with me the Bates stamped list. I have
8 assignments for each PSC member. I returned
9 the original list to the Court, along with an
10 assignment list that shows each PSC member's
11 assignment. It's clear to the PSC, and Your
12 Honor made it clear that only PSC members and
13 their staffs will have access to the list
14 which I am distributing, and they may not be
15 disseminated to non-PSC representatives.
16 JUDGE FALLON:
17 That's clearly the intention of
18 the Court.
19 MR. WITTMANN:
20 I am going to submit a clarifying
21 order to Your Honor to make that perfectly
22 clear.
23 JUDGE FALLON:
24 Do that.
25 The discovery directed to the

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1 FDA.
2 Any problems with the FDA?
3 MR. HERMAN:

4 No problem, sir.

5 JUDGE FALLON:

6 I appreciate their cooperation.

7 It's very helpful.

8 MR. HERMAN:

9 Thanks to Mr. Tici and

10 Mr. Rafferty for doing an excellent job.

11 JUDGE FALLON:

12 Discovery directed to third
13 parties.

14 Any issues there?

15 MR. HERMAN:

16 I received a letter.

17 JUDGE FALLON:

18 Discovery directed to third
19 parties?

20 MR. HERMAN:

21 Yes.

22 Mr. Tici received a letter from

23 Victoria L. Vance of the Cleveland Clinic

24 Foundation, in which the Cleveland Clinic

25 Foundation attempts to delay October

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1 depositions to December, well past the
2 beginning of the Irvin case. We have been
3 unable to resolve that, Your Honor, and we
4 would like to issue subpoenas from the MDL,
5 and if the Cleveland Clinic Foundation
6 persists, its general counsel persists in not
7 making the deponents available for deposition,
8 we would like the subpoenas enforced by the
9 MDL Court.

10 JUDGE FALLON:

11 Let me comment on that.

12 I want the parties who notice

13 depositions, particularly noticing doctors'

14 depositions, to first contact the doctors or

15 their representatives, and see whether or not

16 it can be done at a time convenient with their

17 schedule, as well as with your schedule. I am

18 aware they are busy. I am aware they have

19 matters on their agenda, but having done that,

20 if that is not workable, then you should

21 subpoena the doctors at a date and time that

22 is convenient with you. Subpoena them and

23 bring the subpoenas to my attention.

24 I expect the doctors, or anyone,

25 for that matter, but in this case, the

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1 doctors, to be present at the time that is

2 required by the subpoena. If they are not

3 there, I will convene a meeting to show why

4 they should not be held in contempt of Court.

5 I will do it either here in Houston. I will

6 do it in New Orleans, or I will do it at their

7 particular place of residence, wherever that

8 might be.

9 The MDL Court sits throughout the

10 country, and I will do that. If they violate

11 a subpoena, they will have to explain it to me

12 and not to counsel.

13 When a subpoena is issued, it is

14 issued with the full power of the United

15 States Court and the United States Government,
16 and I expect them to be present at the
17 deposition. I'll also send a copy of this
18 comment to the attorney, Ms. Victoria Vance,
19 at the Cleveland Clinic Foundation, 1950
20 Richmond Road, Cleveland, Ohio, 44124.

21 MR. HERMAN:

22 There is one other scheduling
23 matter, which Mr. Wittmann and I will argue
24 after the status conference, regarding the
25 detail of depositions. Mr. Robinson chairs

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1 our committee. Mr. Lanier, Mr. Arsenault are
2 also involved in the detail at issue, and we
3 reserve that argument until after the
4 conference.

5 JUDGE FALLON:

6 Plaintiff Profile forms and
7 Merck's --

8 MR. WITTMANN:

9 As Russ mentioned, there is a
10 delay between the final entry on the written
11 transfer orders and the actual docketing of
12 cases in the MDL. The delayed cases won't
13 have access to File & Serve until docketed
14 into the Court. There have been questions
15 raised when the Plaintiff Profile forms should
16 be filed. I have routinely been saying,
17 "Don't worry about the November 15th date.
18 Just do it on December 15th, and we will be
19 happy." That seems to work, and we will
20 continue to do that.

21 I want to point out to counsel
22 present, and whoever may be on the telephone,
23 if anyone is on the phone this morning, that
24 we are getting some problems with the
25 completeness of both the Plaintiff Profile

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1 forms and the Tolling Agreement forms.
2 For example, in the Plaintiff
3 Profile forms, we have 127 forms we received
4 are just incomplete, based on the standards
5 outlined in Pre-Trial Order 18B. Actually,
6 only about 19 of the Plaintiff Profile forms
7 have the requisite information that Merck
8 needs to do the most basic queries of its
9 databases and systems.

10 Mr. Herman asked to be furnished
11 with a copy of our deficiency letter, and we
12 have been doing that. We sent a deficiency
13 letter to each counsel who got a form that is
14 incomplete or inaccurate for some reason. We
15 will in the future send copies of all of our
16 deficiency letters to Mr. Herman. I want to
17 urge the lawyers filling in these forms to
18 give them attention and fill them in
19 accurately in the first place. We can't do
20 our job of getting the Merck profile forms
21 prepared if we don't have accurate information
22 from the Plaintiffs going in.

23 JUDGE FALLON:

24 I want to give everybody an
25 opportunity to ask any questions, fill out any

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1 forms. If they are not certain, call liaison
2 counsel. Ask them about it. It's important
3 that you get the forms filled out correctly,
4 because that's the first step to this
5 discovery process, at least on that phase of
6 the case. Then Merck has to respond in a
7 certain period of time thereafter, and they
8 are not going to respond until they get the
9 form filled out properly.
10 If after sufficient time,
11 sufficient cajoling and sufficient
12 encouragement, the forms are not filled out, I
13 will entertain a motion to dismiss the
14 particular case for failure to comply with
15 discovery. I won't do that immediately. I'll
16 give an opportunity to the parties to try to
17 work it out to urge them to fill it out and
18 give them an opportunity to fill it out. If
19 it's not filled out properly after a certain
20 period of time, we will instruct the
21 Defendants to file a motion to dismiss that
22 particular case.
23 MR. HERMAN:
24 We appreciate Defendants'
25 willingness to send copies of the deficiency

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1 letters. More importantly than that is if the
2 defense would outline for us the major
3 technical objections and the major substantive
4 so we can concentrate on that and at least
5 provoke some responses as to those major
6 issues.
7 MR. WITTMANN:
8 We can do that.
9 MR. HERMAN:
10 Thank you.
11 JUDGE FALLON:
12 Remand issues.
13 MR. HERMAN:
14 None at this time, Your Honor.
15 JUDGE FALLON:
16 Tolling agreements.
17 MR. HERMAN:
18 As Mr. Wittmann indicated, the
19 extension of time that Mr. Wittmann has agreed
20 to is December 15th, 2005, and if there are
21 any further problems, they can contact
22 Mr. Wittmann in this regards, the Plaintiff
23 Profile forms used in connection with Tolling
24 Agreements.
25 MR. WITTMANN:

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1 That's correct.
2 JUDGE FALLON:
3 The next item is State and
4 Federal coordination with the State Liaison
5 Committee.
6 MS. BARRIOS:
7 Good morning, Your Honor.
8 The State Liaison Committee
9 continues to be in contact with the
10 Plaintiffs' Steering Committee, particularly

11 through Mr. Arsenault, Mr. Levin and Mr.
 12 Davis. We have worked diligently on the
 13 remand project you ordered us to complete, and
 14 I would like to thank all involved with that
 15 project, to members of the State Liaison
 16 Committee -- actually to members of your
 17 staff -- Mr. Wynne has been particularly
 18 helpful, your docket clerk, assisting us in
 19 getting materials from PACER, and several
 20 attorneys who aren't members of the State
 21 Liaison Committee gave us a hand sending us
 22 their remand pleadings.
 23 I have prepared Your Honor today
 24 for the Court, I have given the Plaintiff
 25 liaison counsel and Defense liaison counsel a

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1 copy of a binder. That binder is divided into
 2 states. It lists all of the remand cases; the
 3 ones which have already been decided, the ones
 4 which are pending before Your Honor, and we
 5 broke down the various issues that you might
 6 address those issues when you see fit.
 7 There are various patterns that
 8 emerge from California with the parties naming
 9 McKesson as the defendant, to the usual naming
 10 of doctors, healthcare providers, pharmacists,
 11 sales representatives.
 12 We are also, Your Honor, in the
 13 process of preparing a CD-ROM which will have
 14 it all hyperlinked for you, because of our
 15 temporary offices, we were unable to burn that
 16 for you today, but with your permission, I
 17 will deliver it to your chambers in New
 18 Orleans on Tuesday when you are back, and I
 19 will provide copies to both liaison counsel,
 20 as well.

21 JUDGE FALLON:

22 That will be fine. We will
 23 receive that.

24 MR. HERMAN:

25 Your Honor, I have one comment.

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1 I want to thank Dawn for doing her usual, very
 2 competent job, and Richard Arsenault for
 3 helping her coordinate.
 4 There have been some resignations
 5 from the State Liaison Committee. We would
 6 like the opportunity, Your Honor, for the PSC
 7 to meet after our business today in the jury
 8 room so we can offer Your Honor some potential
 9 names for service on this committee.

10 JUDGE FALLON:

11 when you do that, let me also
 12 say, Ms. Barrios, I appreciate your work on
 13 this matter. I create a State Liaison
 14 Committee, and I am in favor of the concept --
 15 I think that a State Liaison Committee can
 16 play an important part in coordinating the
 17 litigation, the federal litigation with the
 18 states, and when we reach the point where the
 19 matters clarify a bit when we get experience
 20 and are able to look at it, the state cases
 21 can hopefully be resolved short of trying

22 every case. That is my hope. That is what I
23 am working toward.
24 My concern, however, is that
25 people who may not be on the State Liaison

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1 Committee can utilize the work that the State
2 Liaison Committee is doing, and the access
3 that the State Liaison Committee has in the
4 process to either derail or to make
5 problematic the process, the MDL process, and
6 I am concerned about it in this particular
7 case.
8 I don't know at this point
9 whether there is any particular action, but I
10 am hearing a lot of words, that, to me,
11 indicate that there is some potential move
12 afoot to inhibit the MDL process from
13 proceeding in an expeditious manner, and I may
14 have to rethink the position and the role of
15 the State Liaison Committee. I am not there
16 yet.
17 I urge that the plaintiffs submit
18 to me names of individuals who want to
19 participate in the MDL process; not
20 individuals who want to participate outside of
21 the MDL process. If they are willing to
22 participate inside of the MDL process, I
23 welcome them. I will make every effort to
24 make their lives easier in their vineyard.
25 But those who are not, I will

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1 deal with in a different manner.
2 MS. BARRIOS:
3 Those members remaining on the
4 State Liaison Committee are committed to make
5 this the most successful MDL we possibly can.
6 We reach out constantly to other members of
7 the bar. We had obviously been aware of the
8 press report that you reference, and I have
9 met in person and talked on the telephone to
10 the people I think who are the most prominent
11 members of the Texas bar. Each and every one
12 of them is committed to do everything they
13 possibly can to coordinate with the MDL. I
14 have today, Your Honor, a copy of Judge
15 Wilson, who is the Texas MDL judge, his most
16 recent case management order, and that case
17 management order is very telling, because it
18 directs the parties to coordinate with your
19 MDL. He no longer is quashing any depositions
20 that are cross noticed. If there is a Federal
21 MDL deposition that's taken of any deponent, a
22 Texas litigant may not retake that deposition
23 absent Court order. He is falling into place
24 behind Your Honor. He has adopted your MDL
25 Plaintiff Fact sheet requiring that to be used

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1 and all of the authorizations. I commend
2 Judge Wilson as well as the PSC and Mr. Fibich
3 who appeared before Your Honor in the past who
4 noticed counsel for the Texas MDL, and report
5 to you there is a cohesive group of the most
6 prominent Texas attorneys who are still in the

7 same position they were a month ago, and that
8 is to coordinate and assist the Federal MDL in
9 any way possible. They've asked to assist
10 with depositions. They've asked us to
11 coordinate dates of depositions.

12 Mr. Arsenault was present at that meeting, and
13 he pledged to do so between the PSC and the
14 Texas MDL.

15 There are numerous instances in
16 this order, and I would like to hand it to
17 Mr. Wynne to provide it to Your Honor so that
18 you can be assured that the Texas MDL is right
19 behind Your Honor in prosecuting the case.

20 JUDGE FALLON:

21 I appreciate Judge Wilson's
22 willingness to work with the MDL. That's very
23 meaningful to me. I will do everything
24 possible to make his journey in this type case
25 easier for him. We've plowed some ground. We
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1 will make any work product that I have
2 generated or that has been generated in the
3 MDL available to him for his use, and I do
4 appreciate his help in this regard.

5 MS. BARRIOS:

6 Your Honor, the last matter is
7 one of a message that Kathy Snapka, who has
8 the Garza case in the remand pending before
9 you, she is in trial today. She called me
10 last evening to extend her apologies for not
11 being present today and to ask the report to
12 remember the Garza motion before Your Honor.

13 JUDGE FALLON:

14 I have it, and I am working on
15 it.

16 MS. BARRIOS:

17 Thank you, Your Honor.

18 JUDGE FALLON:

19 The next item is proces
20 claimants.

21 MR. HERMAN:

22 There is one more issue on
23 coordination. Ms. Cabraser of the PSC has
24 been contacted by the Canadian counsel,
25 Canadian Court, and will provide Your Honor

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1 with the name of the presiding judge and
2 contact information and also whatever
3 information she has on the attorneys that are
4 proceeding with that.

5 JUDGE FALLON:

6 I would like to get the judge's
7 name and his telephone number, and I will
8 contact him, and I will be happy to work with
9 the Canadian judiciary on this matter.

10 There also have been some cases
11 filed, I understand, in Great Britain and
12 maybe Italy or France. I am not sure we heard
13 from any of those folks yet.
14 Anything on that, Mr. Herman?

15 MR. HERMAN:

16 Liz, why don't you step up.

17 MS. CABRASER:

18 Your Honor, there has been some
19 activity with respect to foreign claimants,
20 both overseas and in the U.S. courts. We are
21 trying to sort that out. I think there were
22 some complaints filed in connection with the
23 New Jersey proceedings. We don't know what
24 the outcome of those will be, and there has
25 been discussion of filing cases in overseas

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1 fora, most notably Great Britain, and perhaps
2 elsewhere. We will make every effort to
3 apprise and report to Your Honor on the status
4 of those proceedings so that any appropriate
5 coordination initiatives can be implemented.

6 JUDGE FALLON:

7 Thank you.

8 MR. HERMAN:

9 with regard to proces claimants,
10 Your Honor, we continue to communicate with
11 and notify the proces claimants of their
12 rights. As is our usual practice, we advise
13 them they should seek counsel, and we have
14 given them the names of the attorneys who have
15 cases pending in the MDL in their particular
16 venue and jurisdiction for contact should they
17 desire to do so. They have also been informed
18 of the Court's website, and that these
19 conferences and status conferences are posted
20 for their information. If we receive a
21 specific request for specific information, we
22 have responded. We have not, however, had --
23 there's been a dearth of request for specific
24 information.

25 JUDGE FALLON:

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1 Anything else we haven't taken
2 up?

3 MR. WITTMANN:

4 No, Your Honor.

5 You might want to announce the
6 date for the next status conference.

7 JUDGE FALLON:

8 What's the --

9 MR. HERMAN:

10 December 1st at 1:00.

11 JUDGE FALLON:

12 December 1st at 1:00 here in
13 Houston.

14 I will be trying the first Vioxx
15 case that week, the first week of the trial,
16 and I will take some time out and hold this
17 meeting. I will begin the general meeting at
18 1:00. I will meet with liaison counsel at
19 12:00.

20 MR. HERMAN:

21 Your Honor, may we have access to
22 the jury room after you conclude your business
23 today?

24 JUDGE FALLON:

25 Certainly.

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1 MR. HERMAN:

2 Your Honor, that ends the status

3 conference. There are several matters for
4 argument.

5 JUDGE FALLON:
6 All right. We will take a
7 five-minute recess.
8 (Brief recess.)

9 JUDGE FALLON:
10 We have three motions to take up.
11 Let's talk about the motion to compel on the
12 privilege log.

13 MR. HERMAN:
14 Your Honor, I asked Richard
15 Arsenault to argue for the PSC. He and Drew
16 Ranier have been involved.

17 MR. ARSENAULT:
18 Your Honor, Richard Arsenault for
19 the PSC.
20 Your Honor, in preparing for this
21 argument, I tried to go through the documents
22 that Your Honor was provided with. We had a
23 meet & confer regarding this in New York
24 several weeks ago. We provided Your Honor
25 with a transcript of that. Following that

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1 there was a Plaintiff report to provide Your
2 Honor with some additional details regarding
3 the dispute. There was a Defendant report.
4 That was followed with our motion to compel,
5 which was followed by the defendant's
6 opposition, our reply to that opposition, and
7 last night we received the Defendant's
8 surreply.
9 We anticipated this problem three
10 months ago. We sent a letter, and that's
11 attached to the transcript that was part of
12 the meet & confer we had in New York. We
13 anticipated this very problem three months
14 ago. We sent -- when I say "we," Mr. Herman
15 sent a detailed letter, some 20 pages
16 anticipating this very problem. I would like
17 to go through three or four of the key issues
18 there.
19 We first brought to their
20 attention we reviewed the logs that had been
21 produced in New Jersey and wanted to bring to
22 their attention those which were problematic.
23 We specifically advised them that if these
24 were going to be produced in the MDL, they
25 would be insufficient. We specifically

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1 indicated that those logs would not satisfy
2 the requirements of Federal Rule of Civil
3 Procedure 26b5, and attached to the letter, we
4 gave some very specific examples of why those
5 would not be in compliance with Rule 26.

6 JUDGE FALLON:
7 They say now they are in the
8 process of doing that.
9 How do you answer that?

10 MR. ARSENAULT:
11 The problem with that, Judge, is
12 we are just weeks away from a trial. We asked
13 for this three months ago. Their offer last

14 evening to -- I think the term is "re-review"
15 or "dedesignate," is much too little and much
16 too late. This is going to be of no
17 assistance to the people trying the case in a
18 few weeks from now. These documents need to
19 be looked at. If they are discoverable, these
20 are items that should have been given,
21 perhaps, to our experts. They could have been
22 used in depositions. They could have been
23 used in connection with Daubert practice.
24 They could have been used in connection with
25 expert reports. It's too little too late.

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1 We pointed out all of the case
2 law with regard to what is required in the
3 initial letter we sent to them three months
4 ago. We sent them examples from Professor
5 Rice's text on the kind of descriptions that
6 you need in these things. I think we've done
7 all we can, and we've briefed this early. If
8 Your Honor has any questions, I will be happy
9 to answer them.

10 JUDGE FALLON:

11 Let me hear from the other side
12 and talk with both of you--all.

13 MR. MARVIN:

14 Let me provide a few points of
15 clarification on the history here. The timing
16 of the letter that Mr. Arsenault was
17 mentioning was the very end of July, and in
18 response to that correspondence, which
19 concerned a number of different discovery
20 issues, not just the privilege log, on August
21 19th, we advised Plaintiffs' counsel we were
22 in the process of re-reviewing the documents
23 that had been listed on the privilege log in
24 the New Jersey litigation, and that as soon as
25 we possibly could, we would be providing a

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1 revised list.
2 In the meantime, we did rely
3 upon, fundamentally, the list used in New
4 Jersey. But bear in mind, this is just
5 discovery gearing up in the MDL proceeding at
6 that point. We relied on the New Jersey list
7 but advising Plaintiffs' counsel that we would
8 be making revisions to that list.

9 JUDGE FALLON:

10 How do you deal with this problem
11 about the case just coming up in a couple of
12 weeks?

13 MR. MARVIN:

14 Well, Your Honor, that is a
15 product of trying to move, I think, toward
16 trial very quickly. I think the way we can
17 deal with it is in the proposal we made last
18 night. We are all going to be running 50
19 miles per hour to get done everything we need
20 to get done for that first trial, but that is
21 part of an accelerated trial process.
22 What we are proposing is that the
23 revised privilege log will be provided to the
24 Court and to opposing counsel on Monday,

25 November 7th. We will begin a rolling

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1 production of the documents that are being
2 released as a result of that re-review next
3 week, and we will complete that production by
4 November 11th.
5 And, Your Honor, I think with
6 respect to, I believe at the last status
7 conference, you mentioned the Court would have
8 an interest in doing a random review of the
9 documents. What we said in our briefing last
10 night is that as soon as the log is in the
11 Court's hands, we will get to the Court within
12 24 hours whatever random selection of
13 documents it wishes to review. We will make
14 the commitment to get that to you very
15 promptly.
16 But this is not a process, Your
17 Honor, of trying to withhold documents or
18 anything. This is a process that we told
19 Plaintiffs we would be going through. We have
20 been trying to deal with this as well as the
21 other priority document productions that
22 Plaintiffs have sought, and admittedly this is
23 a compressed process, but that is our proposal
24 to deal with that.

25 JUDGE FALLON:

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1 So there are two issues before
2 me: One is the general MDL discovery. That
3 is an easier one to deal with than the Irvin
4 case that is coming up in three weeks. That
5 concerns me, because some of those documents
6 may be germane, may be relevant, may be of
7 interest to the Irvin litigants, and I am
8 trying to deal with that aspect. What is the
9 solution to that problem.

10 MR. MARVIN:

11 Your Honor, I think that, as I
12 said, we will begin the production of any
13 additional documents that flow out of that. I
14 think that a couple of things I should note is
15 that I am not -- I don't think it is fair to
16 state at this point that there is a large
17 number that are going to be of any great news
18 to Plaintiffs' counsel. A lot of the
19 production is going to be duplicative of
20 materials that have been. We have done cross
21 checks of documents that have been produced.
22 In a large document production, people may
23 have changed position over time, maybe several
24 years of this production going on, and so some
25 of these are documents we are releasing now

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1 Plaintiffs already have. I can't give you the
2 precise percentages on this.
3 I think, Your Honor, the approach
4 is we get them the documents as soon as we
5 can, and we will need to respond, Your Honor,
6 if there is follow-up and so on, which we are
7 committed to do on these issues to make sure
8 that gets done before the Irvin trial gets
9 started.

10 JUDGE FALLON:
11 Let me talk to the Plaintiffs.
12 How do I deal with this with the
13 Irvin trial?

14 MR. ARSENAULT:
15 Quite frankly I am not sure, Your
16 Honor.

17 JUDGE FALLON:
18 We have several thousand
19 documents. We are talking about 50,000
20 documents, or thereabouts?

21 MR. ARSENAULT:
22 Yes, Your Honor.
23 Certainly one of the options
24 available to Your Honor is that they waive the
25 privilege. Three months ago, very clearly, we

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1 indicated to them, and cited the Paps case out
2 of the Eastern District and advised if we got
3 the same log here we got in New Jersey, it
4 would not comply with the federal rules, and
5 we cited to them a number of cases that stood
6 for the proposition that if we got the same
7 kind of New Jersey log here, they would be
8 risking waiving the privilege. That is
9 certainly an option.

10 Another option we brought to Your
11 Honor's attention is we've identified eight
12 specific categories that we think are
13 problematic and a corresponding list of Bates
14 numbers of documents that fall into those
15 categories which Your Honor or a designee or a
16 Special Master or one of your magistrates
17 might look at in camera to determine the
18 efficacy of the privileges asserted for those
19 categories, and perhaps Your Honor could make
20 rulings category wide with regard to those.

21 Those are some of the
22 suggestions, but quite frankly, we worked very
23 hard for three months now to get to a point to
24 where we would be able to intelligently
25 determine whether these privileges have been

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1 appropriately asserted, and we've gotten
2 nowhere.

3 MR. MARVIN:
4 Your Honor, if I may, there seems
5 to be an assumption operating here that there
6 is a substantial problem with the list that
7 was provided in New Jersey. As in any major
8 document production, we volunteered to go
9 through and tried to respond to the issues the
10 Plaintiffs made to add to the log and also to
11 go through to identify documents where we can
12 that we believe can be released.

13 To suggest there has been some
14 default here with the overall privilege log I
15 think is absolutely wrong. This issue was
16 raised with us at the end of July. In
17 addition to doing everything else we have been
18 having to do on the production front, we have
19 worked on this issue. The solution of you
20 release all of the privileged documents

21 doesn't help with respect to the Irvin trial.
22 That makes it more of a problem.

23 JUDGE FALLON:

24 with the overall case, what I
25 would do with the overall issue is that I

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1 would order the Defendants to produce, in
2 camera, the documents that are privileged and
3 designate them by the eight categories that
4 you-all apparently feel they fit into. I
5 would then have a Magistrate randomly select a
6 representative sample from each of those
7 categories and give it to me. I review that
8 random sample, and if the Defendant, who has
9 the burden, sustains the percentage of the 51
10 percent of the documents, then I would declare
11 that area privileged. If the Defendant fails
12 to do that, then I would deny the privilege.
13 That would be a way of handling
14 the general approach. It's not like looking
15 at each document. I don't mind looking at
16 each document if there is a reasonable amount,
17 but I am not going to be able to look at
18 80,000 documents. It doesn't make sense to
19 me.

20 My concern is the Irvin case. I
21 don't know how to deal with Irvin and get them
22 to have some feeling that they have done their
23 due diligence looking at the documents. How
24 do I deal with that? That's what I am
25 struggling to find the solution to.

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1 Are there any documents that are
2 more germane to Irvin?

3 MR. MARVIN:

4 Not that I am aware of, Your
5 Honor.

6 JUDGE FALLON:

7 How about Plaintiff?

8 MR. ARSENAULT:

9 obviously, Your Honor, there is
10 no way for us to know that. We don't know
11 what documents are in there. That is exactly
12 why, Judge, three months ago, even before the
13 privilege log was due, we anticipated this
14 problem. We knew from the beginning of the
15 MDL that Your Honor was going to tee up a
16 trial early on. We wanted to get a look at
17 those privilege logs early on and get some
18 resolution.

19 weeks before the privilege log
20 was due we went into tremendous detail. We
21 outlined the law. We gave them specific
22 examples of the problems with the New Jersey
23 log and said, "Please, don't send us that New
24 Jersey log. It's inappropriate, inadequate
25 and doesn't comply with Federal Rule 26."

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1 Despite that, here we are three months later,
2 and all that has fallen on deaf ears to the
3 detriment of what's happening in the Irvin
4 trial.

5 MR. MARVIN:

6 Your Honor, I am a little
7 puzzled. It seems to me there are several
8 issues. The documents for which there is no
9 claim for privilege going forward, they will
10 have those documents next week.

11 JUDGE FALLON:
12 Let's do that by the 3rd, and I
13 will hear from the parties by way of telephone
14 on the 4th. Give me a conference, a telephone
15 conference on the 4th, and I will decide what
16 to do from their standpoint.
17 I want you-all to think about the
18 Irvin case as well as the overall matter. The
19 overall aspect I can deal with at least by
20 procedure that I am comfortable with. I don't
21 know how I will deal with that with the Irvin
22 case.

23 MR. HERMAN:
24 Your Honor, may I be heard for a
25 minute?

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1 JUDGE FALLON:
2 Sure.
3 MR. HERMAN:
4 I don't know what can be done
5 about the Irvin case. It may be water under
6 the bridge. I know we are entitled to a
7 Federal Fifth Circuit privilege log.
8 Now, maybe they can't get us a
9 Fifth Circuit privilege log by November 3rd or
10 December 15th or whatever, but the one thing
11 that we would like the Court to rule on is
12 that we are entitled to a true privilege log.
13 When matters are set in camera,
14 Plaintiffs play blind man's bluff. We don't
15 know if we are dealing with a trunk or a leg
16 of an elephant. All we have to go by is a
17 privilege log that the rules require.

18 JUDGE FALLON:
19 I got the point.
20 What is your situation with that?

21 MR. MARVIN:
22 Your Honor, that's what I was --

23 JUDGE FALLON:
24 I thought you agreed with him.

25 MR. MARVIN:

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1 We agree with that. We believe
2 that the log that was produced earlier
3 complied, but we are trying to make changes to
4 it, to address issues Plaintiffs have raised
5 and provide that by Monday, November 7th.

6 JUDGE FALLON:
7 That's what I need by that
8 Thursday.

9 MR. MARVIN:
10 By the 3rd?

11 JUDGE FALLON:
12 The 3rd. That, and which
13 documents are not being asserted privileged.
14 We all know because we've been
15 there. We've done that. When you are looking
16 at logs, when you are looking at documents of

17 this nature, this number, you've got a staff
 18 of thousands to look it at, and when in doubt,
 19 they make it privileged. They are generally
 20 not lawyers. It doesn't mean they are not
 21 good, but it just means they are looking at it
 22 from a different vantage point. So when in
 23 doubt, they put a privilege on it. But some
 24 lawyers have to look at it and deal with it.
 25 The privilege really is -- the

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1 focus has to be on the document, whether it
 2 seeks legal advice, whether it receives legal
 3 advice, whether it's acting on legal advice,
 4 whether it's passing on legal advice from one
 5 employee to another employee. That is what's
 6 necessary.
 7 It can be waived. It has to be
 8 done by attorneys who are meting the legal
 9 advice. While the attorney is the attorney
 10 for the party, that information has to be
 11 confidential. It's hard to generalize and say
 12 that it's not necessary clearly for the
 13 attorney to sign the document. If it's
 14 information that is being passed on from one
 15 employee to another passing on legal advice
 16 that that person got from the attorney, that
 17 may well be covered. The fact that an
 18 attorney signs something does not mean that it
 19 is within the privilege. It has to be legal
 20 advice. It can't be commenting on the weather
 21 or something that is not significant.
 22 We all know the scope of the
 23 privilege. We are not dealing with, at this
 24 point, whether it's admissible into evidence.
 25 We are dealing at this point whether it is

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1 discoverable, whether it has anything to do
 2 with an issue for defense in the lawsuit.
 3 It's broader and a hard row to hoe for the
 4 person who's urging the privilege, but it is a
 5 privilege, and it is a legitimate privilege,
 6 and I recognize that. But you have to be
 7 descriptive, and if you are not descriptive,
 8 then I am going to say it is not descriptive
 9 enough. It's just discoverable. You've got
 10 to be descriptive.
 11 I will talk to the parties, as I
 12 said, by phone on that Friday. Give me a copy
 13 of what you give to the Plaintiffs. That will
 14 be resolved one way or the other at that time.

MR. HERMAN:

16 If counsel will permit, Your
 17 Honor, if you would serve me and Mr. Arsenault
 18 who have carried the ball on this with those
 19 responses, I would appreciate it.

JUDGE FALLON:

21 We talked a little bit about the
 22 cases being set for trial. You wanted to say
 23 something for the record in this regard.

MR. HERMAN:

25 Your Honor, the Plaintiffs' and

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1 Defendants' committees have had some

2 productive discussion this morning with
3 alternatives. We would like to have further
4 discussion with Mr. Marvin and Mr. Wittmann
5 about case selection. Mr. Kline and
6 Mr. Balefsky are going to look into a
7 suggestion that Mr. Marvin made and see if we
8 can come to an agreement, and in addition to
9 that, Mr. Marvin and I have discussed some
10 Louisiana stroke and MI cases that I am going
11 to endeavor to cull through with Louisiana
12 attorneys and see which plaintiffs and which
13 plaintiff physicians may be available for
14 trial.

15 JUDGE FALLON:

16 As I said earlier on, we are at
17 the stage where we have to try cases, and I am
18 going to be trying cases. There is no
19 question we are going to be trying cases
20 shortly. One of the first steps, as I
21 mentioned earlier, was to pick the categories.
22 We are not interested in trying cases so that
23 we can just keep trying cases, thousands and
24 thousands and thousands of cases. We are not
25 going to be here long enough for that. We

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1 have to begin this journey with the view that
2 the purpose of it is to resolve those several
3 cases. That's one purpose. But the other
4 purpose has to be to see whether or not that
5 can be productive to resolving the whole group
6 of cases. That's what I am interested in in
7 trying to give you information so that both
8 sides can look at it in three or four months
9 and say: What have we learned from this, and
10 get something from it and see whether or not
11 we can take a look at this whole group of
12 cases with that intelligence behind us.
13 To do that, we need cases that
14 are ready for trial. Even if they are
15 wonderful cases and very descriptive and would
16 be informative, if they are not ready for
17 trial, we can't deal with that. The purpose
18 is not to just hurry up and try cases. We
19 have over a hundred thousand of them to do.
20 You can't resolve it that way. I need cases
21 that are ready for trial.
22 Who is best at that? The
23 litigants. You folks who have been doing it.
24 You have to know which cases are ready for
25 trial.

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1 Also, I would hope you would know
2 which cases are instructive. We don't want to
3 try the case if it's the only case of its
4 kind. What do you get out of that other than
5 just a couple of weeks of trial? That doesn't
6 make sense to me. I am looking to you-all to
7 deal with that, but you've got to have a
8 meeting of the minds on it. You can't say: I
9 want to try the "X" case, and they say: If
10 they want to try the "X" case, we don't want
11 to try the "X" case, because they picked the
12 "X" case because it's the best case for them.

13 we want to try the "Y" case. And the other
14 side says the same thing about them. You have
15 to listen to each other and talk it out. If
16 you can't do it, then I will do it. My
17 solution is not going to be as sound as your
18 solution.
19 I felt this morning in talking
20 with both sides that there was some renewed
21 interest in trying to do that, and I would
22 urge that be done.
23 When can I hear from the parties?
24 MR. HERMAN:
25 Next week, Your Honor.

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1 JUDGE FALLON:
2 Let's do that by Friday, too.
3 The motion to defer depositions.
4 The Merck employees. I think that is your
5 motion.
6 MR. MARVIN:
7 Yes, Your Honor, it is. I
8 believe there is correspondence before the
9 Court that was issued, but let me very briefly
10 note that Plaintiffs noticed depositions for
11 seven Florida sales representatives, former
12 sales representatives, in early November. The
13 notices, I would note, Your Honor, are rather
14 curious. If you look at the document demand
15 that went with the subpoena or with the notice
16 of the deposition, it refers to a request for
17 information, in many cases about a plaintiff's
18 prescribing physician, as though it were part
19 of some particular case where this information
20 was being sought. But the notice itself says
21 that it's for purposes of all cases, and
22 nowhere in the notice is there reference to
23 any particular individual case for which the
24 notice is being issued.
25 We are left with some confusion

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1 about what is the purpose of these
2 depositions. Mr. Herman's response to Your
3 Honor on this doesn't clear it up much. It
4 says in there that the plaintiff in the
5 scheduled trial was residing in Florida at the
6 time of ingestion of Vioxx, referring to the
7 Irvin case. "There is no reason to consider
8 to continue those depositions whether they are
9 taken in connection with the upcoming trial or
10 otherwise." That doesn't exactly clarify it,
11 either.
12 I think the point here is as
13 follows: To the extent these depositions are
14 intended to be used in the Irvin case,
15 discovery in that case is closed. In any
16 event, none of the sales representatives had
17 anything to do with the Irvin case. They
18 didn't call on any of the physicians that were
19 prescribing to Mr. Irvin.
20 If they are not attached to that
21 case, then the purpose is completely unclear
22 at this point. What we are asking, Your
23 Honor, is that, given the fact we are to be

24 focusing on getting ready specific trials, we
25 believe that when it comes to sales reps, we
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1 ought to be doing the depositions of the sales
2 reps who are involved in the cases that are
3 scheduled for trial coming up to get those
4 done. Those are related to a particular
5 matter.

6 To be willy-nilly and just going
7 out taking sales reps depositions, seven in
8 Florida in this instance, really doesn't
9 connect to anything that is of urgency in this
10 case, and we think that is a rule that should
11 be adopted as we are doing these in connection
12 with the cases that are being scheduled for
13 trial.

14 JUDGE FALLON:

15 I read the parties' comments.
16 The way I understand they are approaching this
17 is they feel that you have urged learned
18 intermediary and various other defenses that
19 knowing what the representatives knew and who
20 they told and whether or not they should have
21 told or whether or not they should have said
22 something differently is germane to those
23 particular issues and those particular
24 defenses.

25 You make the point -- it's a

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1 valid one -- that it's more instructive to
2 find out what the sales reps of that
3 particular case said or knew or could have
4 known or should have said. On their side of
5 it they say: well, then the other aspect of
6 the depositions are for credibility purposes
7 to test that person. He says he knew
8 something. If he didn't know something,
9 everybody else knew it. He must have known,
10 so that is a valid point, also.

11 It seems to me, and I am mindful
12 of the fact that one problem in this
13 particular issue is having to take the same
14 depositions generally and then having to take
15 the deposition specifically. That's adverse
16 to the purpose of the MDL, but it's hard to
17 rule that they don't have a right in the
18 discovery process to take the depositions of
19 somebody who may shed some light or that deals
20 with an issue or a defense in a lawsuit,
21 particularly a defense. It's a significant
22 defense in all drug cases.

23 I think that the depositions are
24 discoverable or appropriate and should go
25 forward, but it seems to me that in scheduling

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1 the depositions, it makes more sense to me to
2 begin taking depositions in those cases that
3 are set for trial. I am not saying that I am
4 going to rule that you can't take other
5 depositions in other cases. That you are
6 going to not be able to take the reps involved
7 in other cases, but it seems to me that the
8 way to start this is to take all of the reps

9 who are involved in the cases where we have
10 the trial and then look at it. If you need to
11 take other reps that are not in cases that are
12 set for trial, that may be doable. It doesn't
13 seem to be as urgent as the first ones.

14 MR. HERMAN:

15 If it please the Court, with all
16 due respect, our perspective is very
17 different. Very different.
18 We raised this issue in June. We
19 indicated to the Defendants that we had not
20 had the opportunity in any pharmaceutical case
21 to destroy the learned intermediary defense,
22 which is the most vicious defense. It's a
23 defense that the Fifth Circuit adopted and
24 written in concrete.

25 The only way to deal with that

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1 defense is to show that there was a nationwide
2 directive by Merck to its detailers to subvert
3 the truth to physicians, hospitals, and the
4 medical community.

5 We sought detailer information as
6 early as June. We finally got the detailer
7 information. The original order that the
8 Defendants consented to said they were
9 perfectly willing to double track depositions.
10 They have listed 300 law firms, 30 of them in
11 this litigation. 30 law firms have appeared
12 one way or the other with more than 8,700
13 attorneys.

14 I don't think there is any
15 relationship between the Irvin case. Counsel
16 says that the Irvin case discovery is over
17 with. Let's suppose we set, and I hope we
18 can, a trial every two months in the MDL. Are
19 we ever going to get to this issue? Will the
20 discovery of detailer information in a single
21 case destroy the learned intermediary defense
22 that's been alleged in every one of their
23 cases? No, because we have to show a
24 nationwide pattern.

25 We listed well in advance seven

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1 depositions in Florida. It's not incumbent
2 upon us to tell them what our thinking is,
3 what our strategy is, and by citing only a
4 portion of the subpoena for documents doesn't
5 really give the flavor of what we believe we
6 have to do as plaintiffs. I point out that
7 the only way this can be done is in an MDL.

8 It cannot be done in State Courts on a
9 state-by-state basis. This gives the MDL a
10 rightful plaintiff discovery which adds weight
11 to the efforts that we are doing here. They
12 could dismiss cases, have cases thrown out on
13 learned intermediary issue, because we haven't
14 had sufficient time to take depositions, and I
15 don't think they ought to be linked to
16 specific cases. If it has to do with a
17 specific case Mr. Kline is handling, they can
18 notice those depositions and take them with
19 the trial teams they have got.

20 Your Honor has preached that MDLs
21 be open to lawyers across the country to
22 participate, submit their hours. We have 60
23 lawyers in training sessions. We have had to
24 hire two outside counsel for ethics opinions
25 as to whether we could statementize or take

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1 depositions of former detailers.
2 We have done all that work. We
3 are ready to roll now. We are ready to give
4 the 60 or 70 lawyers that want to work in the
5 MDL work to do that is meaningful directed at
6 a defense that, in all due respect, is
7 vicious. It says that an HMO physician with
8 ten minutes with a patient has to read a label
9 every time something comes out and warn every
10 patient that goes through his office, and they
11 don't do it. They haven't done it for me.
12 They haven't done it for anybody in this room.
13 We never get warnings. The physicians can't
14 read the warnings they are so long and
15 convoluted.
16 This was an archaic defense that
17 has grown into a poisonous tree, and we mean
18 to chop it down if we are allowed. I don't
19 see any reason why seven depositions that have
20 been noticed in the State of Florida can't go
21 forward and then in Ohio and Pennsylvania and
22 Louisiana and every state. At least we need
23 the opportunity in the MDL to take on this
24 defense fairly and squarely for the first time
25 in pharmaceutical litigation. That's what we

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1 are asking. They got plenty of lawyers. They
2 have more lawyers than we do. We've got 60
3 lawyers to deal with this issue.
4 I respectfully ask Your Honor
5 that we be allowed to double track as the
6 order originally said, to notice depositions
7 fairly in advance, and send our folks out in
8 the field to take depositions that are
9 germane, that are relevant, that will lead to
10 discoverable and admissible evidence. I
11 understand why the Defendants would like to
12 delay it. They have been delaying it for 40
13 years now. The time has come to deal with the
14 learned intermediary issue. And, Your Honor,
15 we believe this is the case to deal with it.

16 JUDGE FALLON:

17 Let me hear from the Defendant.

18 MR. MARVIN:

19 Well, Your Honor, I think that
20 the rhetoric here about trying to change the
21 law of the Fifth Circuit or any other circuit
22 on this issue is interesting. We have a hard
23 core discovery issue to deal with here. What
24 I hear counsel saying is we will take seven
25 depositions in Florida. If I understand

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1 correctly, now we are talking about doing that
2 in 50 states with 350 depositions.
3 There needs to be some sort of
4 program and priority here. You can double

5 track these, but we are not going to get
 6 anything else done that needs to be done in
 7 these cases. That's why it's not clear to me
 8 the relevancy of depositions of what sales
 9 reps told physicians in Florida when you have
 10 a case coming out of Ohio or other
 11 jurisdiction. What is relevant to a
 12 particular case, what may be relevant in the
 13 case is the communication of the sales reps
 14 for the prescribing physicians in that
 15 particular case. There may be some back drop
 16 for this, but I think it's, among other
 17 things, we have a real question of
 18 proportionality here about how many of these
 19 depositions are going to be taken and when
 20 they are going to be fit into the priority.

21 We seem to be in a mode here
 22 where everything is top priority. We need all
 23 privileged documents. We need all other
 24 documents. We need 350 depositions. There is
 25 a limit to how many different things can get

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1 done at the same time, and that is part of the
 2 problem we are facing here.

3 JUDGE FALLON:

4 I understand the issue. I am
 5 going to allow him to go forward with the
 6 seven in Florida. I do urge, though, that
 7 counsel take a look at prioritizing the reps,
 8 just from the standpoint of making sense. It
 9 makes sense to me that some thought be given
 10 to prioritizing. But insofar as the ones in
 11 Florida, I will grant the motion to take those
 12 depositions. If it becomes a problem from the
 13 standpoint of burdensome, if it becomes a
 14 difficulty with taking depositions that have
 15 no rational basis, I will entertain a motion
 16 to do something about it. Insofar as these
 17 depositions, they seem to me to be relevant on
 18 the issues that Counsel have brought up and
 19 made in the pleadings. I am going to grant
 20 that motion. Anything further?
 21 Thank you very much.

22 * * *

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 2 REPORTER'S CERTIFICATE
 3
 4

5 I, NANCY LAPORTE, Certified Court
 6 Reporter, State of Louisiana, do hereby
 7 certify that the above-mentioned witness,
 8 after having been first duly sworn by me to
 9 testify to the truth, did testify as
 10 hereinabove set forth;

11 That the testimony was reported by me in
 12 shorthand and transcribed under my personal
 13 direction and supervision, and is a true and
 14 correct transcript, to the best of my ability
 15 and understanding;

16 That I am not of counsel, not related to
17 counsel or the parties hereto, and not in any
18 way interested in the outcome of this matter.
19
20

21 NANCY LAPORTE
 Certified Court Reporter
 State of Louisiana

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23
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