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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS * Docket MDL 1657-L
LIABILITY LITIGATION * *
 * December 14, 2006
 * *
 * 9:00 a.m.
* * * * *

STATUS CONFERENCE BEFORE THE
HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Herman Herman Katz & Cotlar
BY: RUSS M. HERMAN, ESQ.
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New Orleans, Louisiana 70113

For the Defendant: Williams & Connolly
BY: DOUGLAS R. MARVIN, ESQ.
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Official Court Reporter: Toni Doyle Tusa, CCR, FCRR
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Proceedings recorded by mechanical stenography, transcript
produced by computer.

1 Pleas, the McCool case on February 26 and the Schramm case on
2 May 21. Finally, there's one case in Nevada set for June 11
3 and the Slatton case in Alabama set for June 18.

4 **MR. HERMAN:** May it please the Court. Good morning,
5 Your Honor.

6 **THE COURT:** Good morning.

7 **MR. HERMAN:** Russ Herman for the plaintiff committee.
8 Chris Seeger, a member of our executive committee, will be
9 trying the New Jersey cases and will report to you of any
10 issues at the next status conference. There's a case currently
11 being tried in California. As of last night, I understand that
12 that case may go to the jury next week, probably around
13 Tuesday.

14 **THE COURT:** Tuesday or Wednesday. The court called
15 me on that one. The cases in New Jersey, are they multiples?

16 **MR. HERMAN:** Yes, as I understand it. Chris, do you
17 want to address this?

18 **MR. SEEGER:** I'm sorry, Your Honor. What was the
19 question?

20 **THE COURT:** Multiple plaintiffs?

21 **MR. SEEGER:** Yes. Four plaintiffs. There are four
22 plaintiffs.

23 **THE COURT:** How about the other states other than
24 California? I know California has two.

25 **MR. MARVIN:** All the other cases are single-plaintiff

1 cases that are set for 2007. The case that's currently under
2 way is a two-plaintiff case. All the other cases that are set
3 for next year outside of New Jersey are single-plaintiff cases
4 with the possible exception of the Nevada case, where there are
5 currently three plaintiffs, but the court said it would be
6 entertaining motions to sever.

7 **THE COURT:** Anything on the federal court cases? We
8 finished the five cases we had set. We had six trials, but
9 five cases. We tried one twice.

10 **MR. HERMAN:** Your Honor has under consideration
11 various briefing --

12 **THE COURT:** I do.

13 **MR. HERMAN:** -- in one of the cases.

14 **THE COURT:** Right. The next one is class actions.

15 **MR. HERMAN:** There's discussion of that to take place
16 between plaintiffs and defendant; Arnold Levin from plaintiffs'
17 side and I think John.

18 **THE COURT:** Anything further on that?

19 **MR. LEVIN:** I don't believe there's anything further.
20 There's no motion pending on class certification because in the
21 medical-monitoring cases there's Rule 12 motions pending and we
22 haven't been told to move on the state classes and the personal
23 injury.

24 **THE COURT:** What's the status of the New Jersey class
25 action that's pending now before the supreme court?

1 **MR. SEEGER:** Your Honor, I believe -- John, correct
2 me if I'm wrong. I think briefing is complete. We get a new
3 brief every week from Merck.

4 **MR. BEISNER:** I think Judge Fallon is familiar with
5 that pattern. Oral argument has not been set, but the
6 briefing --

7 **THE COURT:** Probably earlier next year?

8 **MR. BEISNER:** That's our understanding.

9 **MR. SEEGER:** That's what we're thinking.

10 **THE COURT:** The fifth item is discovery directed to
11 Merck. I know I have the Martin report and the motions before
12 me. I have reset those for January 17 at 9:00 and I will be
13 dealing with that.

14 **MR. HERMAN:** We have insurance discovery outstanding.
15 We have agreed to postpone any argument dealing with insurance
16 responsiveness. There's a meeting planned with Mr. Marvin by
17 our folks on December 22 to discuss insurance issues, including
18 arbitration that's currently being conducted, but certainly
19 before mid January -- if for some reason the discussion doesn't
20 go forward on December 22 because of the holidays, certainly
21 before mid January there will be a face-to-face meeting with
22 our folks and Doug Marvin. I know that Lenny Davis and
23 Drew Ranier from our folks are going to be dealing with that
24 issue.

25 **THE COURT:** If there is any impasse, before you

1 decide to file motions, set a status conference with me so you
2 can flesh it out. If I have feelings on it and don't need
3 briefing, I'll let you know at that time so you can brief the
4 issues that I am most interested in.

5 **MR. HERMAN:** Yes, Your Honor. There are no issues
6 regarding FDA discovery. We might want to remove that at least
7 temporarily.

8 **THE COURT:** We can remove that from the agenda next
9 time. Discovery directed to third parties is item VII.

10 **MR. HERMAN:** Yes, Your Honor. Your Honor has under
11 consideration third-party discoveries directed to Ogilvy and
12 DDB. There's no other issue pending before Your Honor
13 regarding that.

14 **THE COURT:** Okay. I'll be dealing with that shortly.
15 Deposition scheduling.

16 **MR. HERMAN:** The Court granted an order postponing
17 the perpetuation deposition of Dr. Barr. At some point, when
18 Your Honor has had an opportunity to rule on privilege
19 documents, that deposition will go forward.

20 **THE COURT:** I'm turning to privilege documents now.
21 I just briefly looked at it yesterday, but I'll be getting more
22 on it. With the holidays, I'll have a little time and I'll
23 deal with the privilege documents.

24 **MR. MARVIN:** Your Honor, we had some discussions with
25 respect to those depositions so they could be rescheduled. I

1 had those discussions with Lenny Davis this morning. We are
2 going to continue to have continuing discussions with the PSC
3 and perhaps it's something we can resolve without intervention
4 by the Court.

5 **THE COURT:** Okay. State/federal coordination.
6 Anything from the state liaison?

7 **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios
8 for the state liaison committee. I have given to defense
9 counsel and plaintiffs' counsel our updated CD-ROM on the cases
10 with motions to remand. Because of the two-year anniversary of
11 the withdrawal of the drug from the market, there was an influx
12 of conditional transfer orders, some as recently as Tuesday
13 evening, so we have a lot of motions to remand on the CD.

14 In connection with the two-year anniversary,
15 Your Honor, the attorneys and the plaintiffs in the country are
16 getting anxious about the remands. I receive call after call
17 inquiring as to the status of Your Honor addressing the remand
18 issue. I would appreciate it if you would remark on the record
19 so I can pass that information back to the various attorneys
20 who give me a call.

21 **THE COURT:** I will. The three that I'm most
22 interested in all of you focusing on involve three doctors:
23 Dr. Ankur Sarkar in John Ochoa v. Merck, 06-1048; Dr. Rudy
24 Zarate in Jeffries v. Merck, 06-1987; and Dr. Randolph Schrodtt
25 in Nichols v. Merck, 06-1951. One is from Ohio, one is from

1 Texas, and one is from Louisiana.

2 These doctors indicate that they either want out
3 of the case or they want it back in state court. It's a
4 problem immediately for them from the insurance situation.
5 They have to constantly report it. They have to deal with that
6 issue and disclose it and it's a problem. I'm going to have to
7 focus on those cases unless there's some agreement to either
8 dismiss them or deal with them. Those are immediate matters.
9 I do appreciate you mentioning it to me and I will take that
10 seriously and begin at least considering some of those matters.

11 **MS. BARRIOS:** Thank you, Your Honor. The third issue
12 I would like to bring to your attention is I know at the last
13 status conference you had talked about coordinating with the
14 various state court judges, and the state liaison committee is
15 interested in assisting in that in any regard. Please feel
16 free to call upon us for any help.

17 **THE COURT:** I will. I think there is some reason for
18 coordinating. The MDL and the judges in Texas, New Jersey, and
19 California have approximately 95, 97 percent of all claims and
20 maybe 98 percent of all claimants, so there's a lot of
21 coordination that can be done. If we can do a master calendar,
22 at least, so that we know what each other's docket is, we might
23 be able to be of assistance to the litigants in that way. We
24 have been talking about it.

25 **MS. BARRIOS:** Thank you, Your Honor.

1 **THE COURT:** Pro se claimants. I know some of the
2 pro se claimants have been a problem.

3 **MR. HERMAN:** We have been receiving pro se inquiries,
4 letters, hand-drafted complaints. Our practice has been if
5 these folks are unrepresented -- and some of them may be in
6 what euphemistically we call the "system" -- we have directed
7 them to attorneys who are handling cases in that area and
8 directed them to the Court's website. If they don't have
9 access to a website -- and some do not -- then we provide them
10 with orders that they have requested.

11 **THE COURT:** I just have to do the best I can with
12 those. I get those letters and I try to either deal with them
13 or pass them on.

14 **MR. HERMAN:** I might add that at least in the last
15 two months we have not received the number of pro se materials
16 or documents that we were receiving earlier in the case,
17 Your Honor.

18 **THE COURT:** Okay. The next item is IMS data.
19 Anything there?

20 **MR. HERMAN:** Nothing to report on that, Your Honor.

21 **THE COURT:** Do we need that in the future?

22 **MR. HERMAN:** We have some discussions under way that
23 hopefully will resolve some issues. If Your Honor pleases, we
24 would prefer to keep that on the list.

25 **THE COURT:** Okay. The next item is Merck's motion

1 for summary judgment.

2 **MR. HERMAN:** This is the preemption issue.

3 **THE COURT:** Have we finished briefing or are we still
4 in the briefing stage?

5 **MR. LEVIN:** It depends on the next opinion that comes
6 from another court, Your Honor, but other than that it's
7 finished and it's in your hands.

8 **THE COURT:** I've done some preliminary work on that
9 and I'll deal with it.

10 Tolling agreements. Anything on the tolling
11 agreements, item XIV?

12 **MR. HERMAN:** Mr. Doug Marvin and I continue to
13 discuss tolling agreement issues. It's my understanding at
14 this time that we still have a question as to what is an
15 effective tolling in accord with completeness of a plaintiff
16 profile form.

17 **MR. MARVIN:** There are some, Your Honor, claimants
18 who have asked to have their claims tolled and now they would
19 like to actually file a case. In those instances, they filed a
20 plaintiff profile form and they would like to be relieved of
21 the obligation to also file a plaintiff profile form. We think
22 we can work that out. There are some logistical issues we need
23 to take care of. The chief one is where they went ahead and
24 filed a claim under the tolling agreement, some of the
25 agreements for the authorization of the release of medical

1 records may have lapsed in the meantime. So we just need to
2 work out some of those issues, but we expect to be able to do
3 so.

4 **THE COURT:** There may be some supplemental things,
5 but I would think that would be easy to work out.

6 Issues relating to Pretrial Order 9. Is that
7 what I have dealt with?

8 **MR. HERMAN:** We need to discuss that with Shelley,
9 but what I can say is there's an attempt being made to avoid
10 this Court's intervention on the issue that has to do with
11 cross noticing MDL depositions that have been noticed. If
12 Your Honor would go to the next issue -- I'm advised that that
13 matter will probably be resolved next week and we'll report
14 back.

15 **THE COURT:** The 15th one, is that what we are talking
16 about?

17 **MR. HERMAN:** Yes, XV.

18 **THE COURT:** I appreciate Judge Wilson's help in that
19 regard. I need to mention it to him.

20 Vioxx suit statistics. Anything?

21 **MR. MARVIN:** Your Honor, I can update those suit
22 statistics. As of November 30 there were 27,200 lawsuits filed
23 as of that date involving approximately 45,900 plaintiff
24 groups. Of those lawsuits, approximately 8,250, representing
25 approximately 23,600 plaintiff groups, are slated to be in the

1 MDL here and approximately 18,950 lawsuits, representing 22,300
2 plaintiff groups, have been filed in the state courts. As for
3 tolling, as of November 30 there were 14,100 claimants who had
4 entered into tolling agreements.

5 **THE COURT:** Where are they, Doug, mostly in MDL, the
6 tolling?

7 **MR. MARVIN:** All of them are in the MDL, every single
8 one.

9 **THE COURT:** Okay. The next item is Merck insurance,
10 item XVII on the agenda.

11 **MR. HERMAN:** Yes, Your Honor. We have given a
12 voluntary extension to December 31. Hopefully coming out of
13 the December 22 meeting we'll be able to resolve a number of
14 the insurance issues whenever that meeting is rescheduled and
15 at that time will jointly notify the Court of where we are on
16 the insurance issue. If we reach an obstacle, we'll relay it
17 to the Court and get Your Honor's direction.

18 **THE COURT:** Okay. The next item is further
19 proceedings, item XVIII.

20 **MR. MARVIN:** Plaintiffs and the defendant have been
21 talking about further proceedings and those discussions are
22 continuing.

23 **THE COURT:** Okay. As you know, item XIX, we are
24 going to have mandatory electronic filing in this district.
25 It's nothing too unusual. We are finding that throughout the

1 country now. If it's a problem for anyone, we'll work through
2 that so it's not an insurmountable problem. I have posted it
3 on the website several times and I know you all know that. I
4 simply mention it for the record.

5 We have something on statute of limitations,
6 which is item XX on the agenda.

7 **MR. MARVIN:** Your Honor, we have filed some motions
8 with respect to the statute of limitations. I know that Arnie
9 and John are going to get together with respect to a schedule
10 for responding to those motions.

11 **MR. LEVIN:** That's correct.

12 **MR. BEISNER:** (NODS HEAD)

13 **THE COURT:** There was one motion for --

14 **MR. HERMAN:** Item XXII.

15 **THE COURT:** Well, XXI is a request for a writ of
16 mandamus. Anything on that?

17 **MR. HERMAN:** I think Your Honor has already ruled on
18 that.

19 **THE COURT:** I've ruled on that.

20 **MR. HERMAN:** The court of appeals also ruled,
21 confirming Your Honor.

22 **THE COURT:** Right. Mr. Anstice testified a couple
23 days ago here in person. The new item is Harrison v. Merck.
24 Is Mr. Harrison here? We received a call. His plane was
25 delayed. He got his luggage and was on the way. Let's see if

1 he comes in. He said something about he lost his luggage and
2 so he is going to try to make it here as quickly as he can.

3 There was also before me a motion to vacate a
4 dismissal in a matter. The reasons that the plaintiff wishes
5 me to reconsider it are really twofold: One, the plaintiff
6 attorney indicates that the reason he apparently didn't get the
7 e-mail notices was that he has some block on his computer that
8 stopped him from getting them; secondly, that the plaintiff is
9 either old, infirm, or both, is blind, has difficulty
10 understanding it, and so he has been delayed because of that.

11 With regard to the first explanation, as one
12 judge said, it's somewhat like "the dog ate my homework" sort
13 of defense. I can't recognize that as a fair reason. If you
14 don't get e-mail because you put a block on your computer,
15 that's going to be your problem not the Court's problem. If an
16 individual, a claimant, is infirm, is blind, has difficulty
17 communicating with his attorney, I do want to revisit that.
18 That's a situation that has got to be sui generis, but it's not
19 something I'm expecting everybody to run through the door and
20 say, "Reconsider my claim," because I take these things
21 seriously.

22 We give people three, four, and five notices
23 before I act on dismissing their case. There's a lot of
24 litigants in this case that want prompt attention from the
25 Court. If people who are in it don't even respond to the

1 process and we give them two and three notices and they still
2 don't respond, then I order them to show up and explain
3 themselves and they still don't show up, I've got to cut them
4 out of the case. If I don't, it's going to slow down
5 everything. It's not good for the litigants who are interested
6 in pursuing their case.

7 There are occasions when I do act and then they
8 get notice like this one. I would expect this to be the only
9 one, but I will reinstate this claim and rescind my order as to
10 this claim. I really ought to speak on that issue. I won't be
11 too wordy on it, but I do want to make it clear that I look at
12 this as just a sui generis case and not an indication that I'm
13 in the mood for reconsidering things.

14 I have before me a motion dealing with amending
15 or changing Pretrial Order 18-C. I looked it over yesterday
16 and last night, and I do feel that I'm ready to rule on that.
17 I'm going to be issuing the order. Primarily the order drafted
18 by Merck I think is the way to go on it, but I'll issue a Court
19 order on that.

20 The next status conference is January 25.

21 **MR. HERMAN:** Thursday, January 25.

22 **THE COURT:** 8:30 we'll start with liaison counsel,
23 9:00 the general meeting.

24 I don't know what to do about Mr. Harrison. I
25 hate for him to come all the way to New Orleans and miss the

1 meeting, but it's now five minutes to 10:00. The meeting
2 started about 9:20 or so, so we did give him some time. If he
3 does show up and you all are still around, we can try to
4 regroup.

5 **MR. HERMAN:** Your Honor, as liaison counsel for
6 plaintiffs, I don't have a problem waiting around for at least
7 an hour to see if he shows.

8 Your Honor, I neglected to point out under
9 motions -- and I apologize -- that Your Honor has set the
10 Martin argument discovery issues for argument at 9:00 on
11 Wednesday, January 17.

12 **THE COURT:** Right.

13 **MR. HERMAN:** Doug Marvin and I, on behalf of all the
14 lawyers and their staffs, want to congratulate your law clerk
15 Jeremy Grabill on his recent marriage. We both observed, as
16 have the other lawyers, that he was working very late in this
17 Court up until he left to get married the next day, and I would
18 say that he certainly has a spouse who will understand that the
19 law is a taskmaster. Congratulations from all of us to you,
20 Jeremy.

21 **THE COURT:** Well, we are proud of Jeremy. I
22 unfortunately had to ask him to continue his honeymoon, but I
23 didn't want him to continue his wedding. In the next day or
24 two he is going to be launched off to Jamaica and hopefully
25 will have some downtime. I appreciate all of his work and help

1 on this matter. Anything else? Court will stand in recess.

2 Thank you.

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

4 (WHEREUPON, the Court was in recess.)

5 * * *

6 **CERTIFICATE**

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

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15 Toni Doyle Tusa, CCR, FCRR
16 Official Court Reporter
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