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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: XARELTO (RIVAROXABAN) \* 14-MD-2592  
PRODUCTS LIABILITY LITIGATION \*  
\* Section L  
\*  
Relates to: All Cases \* November 7, 2019  
\*  
\* \* \* \* \*

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

Appearances:

For the Plaintiffs: Herman Herman & Katz, LLC  
BY: LEONARD A. DAVIS, ESQ.  
820 O'Keefe Avenue  
New Orleans, Louisiana 70113

For the Defendants: Irwin Fritchie Urquhart &  
Moore, LLC  
BY: KIM E. MOORE, ESQ.  
400 Poydras Street, Suite 2700  
New Orleans, Louisiana 70130

Also Participating: Andy Birchfield, Esq.  
Susan Sharko, Esq.  
Mike Love, Esq.  
Gerald Meunier, Esq.

Official Court Reporter: Toni Doyle Tusa, CCR, FCRR  
500 Poydras Street, Room B-275  
New Orleans, Louisiana 70130  
(504) 589-7778

Proceedings recorded by mechanical stenography using  
computer-aided transcription software.



09:36

1 I would encourage those individuals that are on the phone that  
2 if they have questions specifically regarding matters, in  
3 particular those who have not enrolled in the settlement, to  
4 contact lead or liaison counsel on the plaintiffs' side.

5 We are available, and they should feel free to  
6 reach out to us rather than addressing those matters today,  
7 unless Your Honor cares to deal with those matters today, which  
8 I know you may have. We are available to answer questions  
9 specifically with respect to some of the Court's orders and the  
10 applications which the plaintiffs have done with respect to  
11 trial package, remand, and things like that.

12 **THE COURT:** Right. Okay. We have now 33,000  
13 individual claims that have been filed in this matter. We have  
14 gone through six bellwether trials, one in Mississippi as well  
15 as five in this area. We have also had some in state court  
16 with my brothers and sisters in the state court bench. The  
17 parties have had an opportunity now to discover the case for a  
18 number of years. They have produced thousands of depositions.  
19 I have had maybe 1,500 motions that I have dealt with.

20 About three or four months ago the parties began  
21 discussing a global resolution of this matter, and they have  
22 apparently reached a satisfactory global resolution. I will  
23 hear from the parties as to what's happening with the  
24 settlement.

25 **MR. BIRCHFIELD:** Good morning, Your Honor. Andy

09:38

1 Birchfield.

2 On behalf of the plaintiffs' leadership, we are  
3 pleased with the current status of events. The response from  
4 the plaintiffs and plaintiffs' firms has been overwhelmingly  
5 favorable.

6 Where we are in the process of finalizing the  
7 settlement agreement now is that BrownGreer is vetting the  
8 enrollment documents. There are some deficiencies that need to  
9 be cleared up, and then the defendants will have an opportunity  
10 to verify the information.

11 I cannot say anything official, but from the  
12 plaintiffs' leadership standpoint, from our viewing the  
13 enrollment process and working with BrownGreer through the  
14 process, it has been an overwhelmingly favorable response. I  
15 foresee us moving forward and issuing points awards in the near  
16 term. I anticipate that we will be in a place to start getting  
17 payments to claimants in the first half of next year.

18 I'm pleased with where we are and how the  
19 overall litigation is progressing. I understand that there are  
20 a handful of firms who represent claimants who chose not to  
21 participate, and the Court urged those firms to either appear  
22 today or be here by phone.

23 I understand that the Court is wanting to move  
24 forward with those cases in a rapid fashion. I'm here and  
25 Brian Barr is available and Jerry Meunier and Lenny Davis. If

09:40

1 you want us to work with them in developing a scheduling order  
2 or something along these lines, we can certainly do that based  
3 on our experience of what the Court has done in the past.

4 **THE COURT:** This settlement is an opt-in settlement.  
5 Anybody who doesn't want the settlement doesn't have to opt  
6 into the settlement. The deadline for doing it is passing.  
7 Once the settlement gets solidified, which looks like that it  
8 will be done by the end of December, then there will be no  
9 further opportunities to get into the settlement because the  
10 amount will be locked in.

11 The amount is \$775 million. That amount will be  
12 allotted based on various criteria to the individuals inside of  
13 the settlement. So once that's done, then there will be no  
14 further opportunity to get into the settlement.

15 What will happen at that point is that we will  
16 start trials as quickly as possible with the individuals who  
17 have chosen to opt out of the settlement. I would like to have  
18 a status conference on December 12 with those individuals who  
19 intend to try their cases so that I can work with them on a  
20 scheduling order for them to begin getting their cases ready  
21 for trial.

22 They will have the opportunity to have at least  
23 six of the trial transcripts from the various trials that have  
24 been going on in this case. They will know the experts. They  
25 will see the experts who have testified at the trials. They

09:42

1 will have an opportunity, then, to contact those experts and  
2 decide whether or not they are going to use those experts at  
3 the trial.

4           Hopefully I will get finished with the trials in  
5 a matter of months after the scheduling. We will do what we  
6 can do in the MDL area. I will have a number of motions that  
7 undoubtedly will be focused on the MDL aspect of the case.  
8 Some of the deadlines are closing in or are imminent. Those  
9 deadlines, if they haven't been met, I expect that the  
10 defendants will be filing motions to dismiss. I will have a  
11 rule to show cause why the case should not be dismissed. If  
12 the cases survive those motions to dismiss, then we will be  
13 able to get them on a trial track as quickly as possible.

14           I will deal with the MDL motions. Those cases  
15 that I will be remanding to state court, I've already talked to  
16 the judges in state court. They are ready to proceed, and they  
17 hope to finish those cases within six months to a year. We  
18 will fast-track them, and hopefully the entire litigation will  
19 be able to be resolved in a short manner.

20           **MR. BIRCHFIELD:** Your Honor, you had entered a minute  
21 entry encouraging the lawyers representing those claimants that  
22 had elected not to enroll to be here today for the purpose of  
23 discussing that schedule. For December 12, is it your  
24 anticipation that those lawyers and the defendants be proposing  
25 a scheduling order?

09:44

1 If that's the case, Your Honor, I know that  
2 Mike Love and maybe other lawyers representing claimants that  
3 opted out have appeared here today. I can meet with them after  
4 the status conference, give them the vantage point that I have  
5 about what the Court will be looking for in a scheduling order,  
6 and I will be glad to provide that assistance.

7 **THE COURT:** It seems to me that those individuals who  
8 are going to be trying their case ought to be meeting as  
9 quickly as possible with lead counsel to find out what's  
10 available, if they don't know what's available, and which cases  
11 have been tried, how to access those records, what records they  
12 don't need to access because they already have copies of them,  
13 things of that nature so that they are able, then, to be able  
14 to, on December 12, have some idea of what's doable in a  
15 scheduling order that needs to be put in place.

16 So I would urge that they get in contact with  
17 lead liaison counsel to at least discuss some of the parameters  
18 to inform them as to what's available because they will be  
19 trying their cases. They ought to know what has been utilized  
20 or what is available for them to have in the trial of their  
21 case.

22 **MR. BIRCHFIELD:** Yes, Your Honor. So the executive  
23 committee, we will meet with those after the status conference,  
24 those that are here, and then we can follow up with those that  
25 are attending by phone. Thank you.

09:45

1           **THE COURT:** Let me also hear from the defendant on  
2 this.

3           **MS. SHARKO:** Thank you, Judge. On behalf of the  
4 defendants, we are pleased with the overwhelming positive  
5 response to the settlement. We look forward to getting to  
6 December, when we make our final decision on whether to go  
7 forward with it.

8           As to the cases who have chosen at this point to  
9 proceed with litigation, I would just like to emphasize that  
10 the CMOs in place -- and I think maybe Mr. Davis will go  
11 through those in a little more detail -- provide a very clear  
12 statement of what has to be done before a case can be actually  
13 listed for trial and that we on the defense side intend to  
14 aggressively enforce those deadlines that Your Honor set many  
15 months ago.

16           I would note for the record that the deadlines  
17 are on a rolling basis, but for the people who have deadlines,  
18 virtually all of them are delinquent.

19           There's a filing fee payment deadline. I can't  
20 speak to that. I suspect those fees have not been paid to the  
21 Court.

22           The preservation order requirement, 89 out of 93  
23 plaintiffs have failed to meet that deadline.

24           The affidavit of compliance and medical records,  
25 92 out of 93 plaintiffs have failed to meet that.

09:47

1 The PFS and consent form and records,  
2 production of medical records, 352 out of 442 plaintiffs have  
3 failed to meet that deadline. The short form PFS, 351 out of  
4 442 plaintiffs have failed to meet those deadlines.

5 The defense firms have sent deficiency notices  
6 out and will continue to send deficiency notices out. We  
7 intend to move for dismissal with prejudice and orders to show  
8 cause for people who don't comply.

9 Then thereafter we have a robust list of motions  
10 that will need to be addressed, either here by Your Honor or in  
11 the remand courts, including a renewal of our preemption  
12 motion, which we think is very significant post the recent  
13 Supreme Court decision that came down after the settlement was  
14 announced. There's statute limitations motions, which  
15 Your Honor has granted before under Louisiana law, learned  
16 intermediary motions, and Michigan case motions, among others.  
17 So we intend to pursue people aggressively on that, and we are  
18 starting because a certain number of plaintiffs have indicated  
19 that they are not going to proceed with the program.

20 I would urge these plaintiffs, to the extent  
21 they don't understand the deadlines in the orders or what they  
22 are supposed to do or how they are supposed to do it, to please  
23 talk to Andy Birchfield, Brian Barr, or really anybody on the  
24 PSC so they can offer their guidance.

25 **THE COURT:** Yes. Case Management Order 11 details

09:49

1 all the requirements of the parties. There are several  
2 requirements that the parties have to deal with in order to be  
3 eligible for trial in the case.

4 In these matters, we try to streamline them. We  
5 have fact questionnaires as opposed to interrogatories. There  
6 are various motions that need to be dealt with. I have set all  
7 the deadlines in CMO 11. If you have any questions at all,  
8 anybody who is thinking about not opting in, please contact  
9 lead liaison counsel to discuss it with them so that you have  
10 access to whatever information they have.

11 **MS. SHARKO:** Thank you.

12 **MR. DAVIS:** Your Honor, just so that it's very clear,  
13 the joint report, specifically at page 3, Section 4(c)  
14 addresses CMO 11 and CMO 11A.

15 I point out that CMO 11 was entered about seven  
16 months ago, back in March, and 11A was in September. There  
17 were certain deadlines that are set forth in those CMOs. I  
18 won't go through what each of the requirements are, but there  
19 were deadlines that began on October 4 for preservation notice  
20 requirements. Those are laid out in the order as well as in  
21 the joint report. There's also a deadline of October 9, 2019,  
22 which required certain services, and then another deadline of  
23 October 21. Those deadlines have passed.

24 I point out that there is another deadline  
25 that's coming up soon, which is January 2 for case-specific

09:51

1 reports, all of which Your Honor has ruled upon in prior  
2 orders. Individuals who are not enrolled in the settlement  
3 need to be aware of those.

4 **THE COURT:** We are talking about deadlines and CMOs.  
5 This is an MDL matter, a multidistrict litigation matter. As  
6 we all know, the MDL was created in the '30s. It has taken a  
7 very active role since the 1990s. Presently 40 percent of  
8 every case filed in the United States courts is in an MDL  
9 proceeding, and it looks like that it is growing.

10 These cases have to be managed by one court.  
11 The court is designated by the MDL court, which is a court of  
12 seven judges appointed by the Chief Justice of the  
13 United States. One court then is designated, and all of the  
14 cases filed in the federal system, from wherever they may have  
15 been filed, are transferred to that particular court. I am the  
16 MDL court for the *Xarelto* case. All of the cases in the  
17 United States federal courts throughout the country have been  
18 forwarded to us.

19 We have to have some method of doing it. To  
20 alert everybody and to make it easier, I created a website for  
21 this particular case. I put everything on the website. I have  
22 status conferences every month. We have a transcript prepared  
23 of that status conference. I invite anybody who wishes to  
24 participate to come to court. If they can't come to court, I  
25 give them a phone number for them to come. I have oftentimes

09:53

1 hundreds of people on the phone listening in.

2 In addition to that, the transcripts then are  
3 posted on the website for those individuals who may not have  
4 had an opportunity to listen to the monthly proceeding. They  
5 can look at it. In addition to the transcripts, I post the  
6 calendar. I alert everybody. Every deposition that is being  
7 taken is placed on that calendar, so anybody who's interested  
8 in the deposition will know when it is taking place.

9 I put all of the Court orders on the website so  
10 that they have access to those Court orders. All of the  
11 decisions that the Court has made are on the website. The  
12 website is available to everyone. Everyone can access the  
13 website and know what's going on in this case.

14 Once I put the material up and once the  
15 deadlines are established, then I have to enforce the  
16 deadlines. I don't do it willy-nilly. I give people an  
17 opportunity to show cause why their case should not be  
18 dismissed if they haven't followed the deadlines, if they  
19 haven't followed what the requirements are. I invite them to  
20 court. I listen to them. If they don't show up or don't wish  
21 to proceed, I dismiss the case. I have to enforce the  
22 deadlines to keep this matter moving.

23 Litigation has to come to an end. It can't just  
24 linger forever. This case, I hope we will be seeing the end of  
25 it if not this year, hopefully next year.

09:55

1 Anything further from anyone?

2 I will have a status conference on December 12.

3 On that date we ought to have significant motions filed.

4 Is anybody in the courtroom that wishes to speak  
5 at this time? Sure. Come forward, please.

6 **MR. LOVE:** Your Honor, Mike Love.

7 My office represents a number of  
8 nonparticipating plaintiffs. I just want to make the Court  
9 aware that we are anticipating filing today or tomorrow an  
10 objection to certain terms of the settlement agreement and  
11 requesting relief from the Court with regard to that.

12 **THE COURT:** Okay.

13 **MR. LOVE:** Those issues play into some of the  
14 scheduling issues that we have talked about. There are a  
15 number of terms in the settlement agreement that have nothing  
16 to do with compensating plaintiffs that are settling or the  
17 release of the defendants. There are terms that are punitive  
18 to everyone outside of that agreement, the nonsettling  
19 plaintiffs.

20 Specifically as relates to what you are talking  
21 about today, Your Honor, there's numerous terms that say that  
22 everybody that's participating, which includes the PSC, is not  
23 going to have anything to do with ongoing litigation. They are  
24 not going to assist ongoing litigation. They are not going to  
25 provide discovery. They are not going to provide experts.

09:56

1 They are going to tell their experts not to help. If those  
2 terms are allowed to stand when we are asking -- the motion we  
3 will be filing will be asking the Court to strike those terms.  
4 But if those terms are allowed to stand, then we are going to  
5 have to essentially start a do-over. We are going to have to  
6 do new depositions, new experts, all kinds of things.

7           We talked about discovery being made available.  
8 I'm hoping the Court will order those terms be stricken so we  
9 have access to it. In my request to the PSC for all the  
10 discovery and stuff that's been filed -- because my firm is new  
11 to this litigation -- I was told no. I was told that all that  
12 would be available was the transcripts from trial and the  
13 expert testimony depositions that were played at the trial; not  
14 everything they did, just the things that somebody else decided  
15 to play is all that would be made available.

16           If those terms are allowed to stand to the  
17 detriment of nonsettling plaintiffs, we are going to have  
18 motions in front of the Court to start all over again. One of  
19 those things is going to be to appoint additional PSC members  
20 that can represent nonsettling plaintiffs. There's some issues  
21 with that that I will bring in my motion, but I just wanted the  
22 Court to be aware of that. We have some struggles.

23           **THE COURT:** No, I appreciate you bringing that to my  
24 attention. Let's file your motion.

25           What I would suggest that you do, Mike, is

09:57

1 contact the PSC, discuss it with them so that you can at least  
2 in your motion -- if there is an issue, I will get involved in  
3 it because it's not my intention that you have to start all  
4 over again.

5 **MR. LOVE:** Thank you, Your Honor.

6 **THE COURT:** Do you want to respond, Andy?

7 **MR. BIRCHFIELD:** Yes, Your Honor.

8 I will be glad to sit down and discuss this with  
9 Mr. Love because it's apparent that there is some  
10 misinformation about the terms of the settlement agreement.  
11 There is no provision that says the PSC will instruct our  
12 experts not to cooperate. That's misinformation.

13 There is a tremendous amount of information that  
14 has been put together through the trials of the bellwether  
15 cases, both the cases here in New Orleans and Mississippi and  
16 in Philadelphia, that is available to nonparticipating  
17 claimants. All that is available will be made available to  
18 these.

19 So I will be glad to discuss this with Mr. Love  
20 and the terms of the settlement agreement, and we will respond  
21 to the motion as filed.

22 **THE COURT:** Yes. It's the intention of the Court  
23 that anybody who opts out of the settlement will have access to  
24 material that has been developed during the process. It's just  
25 not fair for them to have to start all over again. I will be

09:59

1 interested in monitoring that. Whatever it is, let's talk to  
2 make sure that there's a problem first.

3 **MR. BIRCHFIELD:** Thank you, Your Honor.

4 **MR. LOVE:** Your Honor, just so the Court understands  
5 what I'm looking at, in Section 1024 of the settlement  
6 agreement it says: No member of the XPCL -- which includes the  
7 PSC -- will make any experts retained by them for the *Xarelto*  
8 litigation available to other plaintiffs' counsel with claims  
9 in the *Xarelto* litigation or facilitate the retention of  
10 experts by any other plaintiffs' counsel.

11 That's a contractual term that they have agreed  
12 to, and that's my concern.

13 **THE COURT:** I think the way that at least I  
14 interpreted that is that you have a right to contact the  
15 experts and to make arrangements with the experts to work with  
16 you as opposed to having the PSC contact the experts and pay  
17 the experts to work for you. At this point they're off the  
18 hook from the experts' costs. You're on the hook for the  
19 experts' costs, but you have access to the experts. I don't  
20 see how you can't have access to the experts.

21 If that needs to be clarified with me, I will do  
22 so, but see whether or not it's a problem first. It's not my  
23 intention that you have to start all over again. That's not  
24 the process that we go through.

25 **MR. BIRCHFIELD:** Your Honor, your interpretation

10:01

1 certainly aligns with mine and the plaintiffs' leadership  
2 committee.

3 Just two issues. We can address that. Then the  
4 second part is that the master settlement agreement itself is a  
5 confidential agreement, and all the parties agreed to maintain  
6 the confidentiality. It's available to every lawyer and  
7 claimant, but it's not for public consumption. I just want to  
8 make sure that everyone is reminded of that fact.

9 **MR. LOVE:** Your Honor, it does contain a  
10 confidentiality agreement, but I'm not a party to it. I'm not  
11 bound by that. I have complaints about it. I need to file it  
12 as an exhibit potentially.

13 **THE COURT:** File it in the record. That's fine.

14 **MR. LOVE:** I will. Thank you, Your Honor.

15 **MS. SHARKO:** On behalf of the defendants, this is a  
16 private settlement agreement. It was not a Court settlement  
17 agreement, number one. We will deal with the motion when we  
18 see it.

19 Number two, it is a confidential document. I  
20 understand that the plaintiffs' lawyers had to sign something  
21 to get access to it, and so I would ask that it be filed under  
22 seal.

23 **THE COURT:** Well, you need to file it for sure.  
24 Let's do this. To make sure that you get it filed, let's file  
25 it under seal. I'm not going to keep the seal forever. To get

10:02

1 you in court, I don't want to have to deal with this issue, so  
2 let's file it. You can file it under seal with the  
3 understanding that I may lift the seal immediately, but let's  
4 not create an issue that doesn't exist.

5 **MR. LOVE:** I understand, Your Honor. I will file it  
6 under seal as directed. I do not believe it should be  
7 confidential and should be public record.

8 **THE COURT:** I understand. I'm not making any  
9 decision on that at this point. I just want you to be able to  
10 file your motion as quickly as you can so that I can take it  
11 up.

12 **MR. LOVE:** Thank you, Your Honor.

13 **MR. DAVIS:** Your Honor, Mr. Norris said he would be  
14 filing that motion soon. We would ask that it be set for the  
15 December 12 date, please.

16 **THE COURT:** Are you okay with that?

17 **MR. LOVE:** He said "Norris," but he meant me?

18 **MR. DAVIS:** Yes.

19 **MR. LOVE:** I didn't know if there was somebody else  
20 we were talking about. I will be filing it very soon.

21 **THE COURT:** Why don't you do that, and I will set it  
22 for December 12. I hate to ask you to come back again, but it  
23 would be helpful if you would be in person to argue the matter.

24 **MR. LOVE:** I will be, Your Honor.

25 **THE COURT:** Okay. Great.

10:03

1 Anything else from anybody?

2 **MR. MEUNIER:** Judge, specifically there are rules for  
3 filing an opposition, deadlines in the Local Rules of the  
4 Court. I think it's 15 days before the hearing for motions and  
5 eight days before the hearing for opposition. If we could stay  
6 as close to that as possible, I think it would be appreciated.

7 **THE COURT:** That's fine.

8 **MR. LOVE:** You're talking about filing it before so  
9 you have time? Absolutely. Absolutely.

10 **THE COURT:** I suggest, Mike, that you talk to Andy or  
11 someone at least to find out whether or not there's an issue.  
12 On the issues, bring them to me and I will deal with them. On  
13 the issues that are nonissues, get something in writing that  
14 makes it plain that it's a nonissue and we don't have to deal  
15 with it.

16 **MR. LOVE:** I will follow that instruction,  
17 Your Honor.

18 **THE COURT:** Good. Anything else?

19 Folks, thank you very much. The next status  
20 conference, then, is December 12 at 9:00 a.m.

21 **MR. MEUNIER:** 8:30 in chambers, 9:00 a.m. in open  
22 court, and then we will have the motion practice after the  
23 status conference?

24 **THE COURT:** Right.

25 **MR. MEUNIER:** Thank you, Judge.

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**THE COURT:** Court will stand in recess. Thank you.

**THE DEPUTY CLERK:** All rise.

(Proceedings adjourned.)

\* \* \*

**CERTIFICATE**

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

/s/ Toni Doyle Tusa  
Toni Doyle Tusa, CCR, FCRR  
Official Court Reporter