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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: XARELTO (RIVAROXABAN)
PRODUCTS LIABILITY LITIGATION

Docket No. MDL-2592
Section "L"

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New Orleans, Louisiana

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THIS DOCUMENT RELATES TO:
ALL CASES

Thursday, November 8, 2018

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TRANSCRIPT OF MONTHLY STATUS CONFERENCE PROCEEDINGS
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(THURSDAY, NOVEMBER 8, 2018)

(MONTHLY STATUS CONFERENCE PROCEEDINGS)

09:00:47 5 (OPEN COURT.)

09:00:47 6 THE COURT: Be seated, please. Good morning, ladies and
09:00:49 7 gentlemen. Let's call the case, Dean.

09:00:52 8 THE DEPUTY CLERK: MDL No. 2592, *in re: Xarelto Products*
09:00:55 9 *Liability Litigation.*

09:00:56 10 THE COURT: Counsel, make their appearance for the
09:00:58 11 record, please.

09:00:58 12 MR. MEUNIER: Jerry Meunier, co-liaison counsel for
09:01:01 13 plaintiffs.

09:01:01 14 MS. MOORE: Kim Moore, co-liaison counsel for the
09:01:05 15 defendants.

09:01:05 16 THE COURT: We are here today for our monthly status
09:01:08 17 conference. I met a moment ago with lead and liaison counsel to
09:01:12 18 discuss the proposed agenda. I'll take them in the order
09:01:16 19 presented.

09:01:16 20 MR. MEUNIER: Thank you, your Honor.

09:01:18 21 The joint report begins by identifying two Pre-Trial
09:01:22 22 Orders which have been entered since the last status conference,
09:01:25 23 and it's PTO No. 28B, which is Record Doc. 11123, and it deals with
09:01:33 24 contacting physicians who are involved with the discovery pool
09:01:37 25 cases under CMO 6; and Pre-Trial Order No. 10C, which is Record

09:01:44 1 Doc. 11124, which corrects an address with respect to service on
09:01:48 2 certain Bayer defendants.

09:01:52 3 Case Management Orders, Judge, CMO 6 is still the primary
09:01:56 4 structure for the processing of cases that have been selected for
09:02:00 5 discovery and potential trial on remand. There have been several
09:02:07 6 supplements to CMO 6 which are entered since the last conference,
09:02:12 7 CMO 6A which sets forth the protocol for taking depositions in the
09:02:16 8 discovery phase for those cases, and that's Record Doc. 10660.

09:02:22 9 Associated with that there is an order the Court entered
09:02:25 10 on September 13 of this year, which sets forth the order for the
09:02:30 11 taking of prescribing and treating physicians, and certainly
09:02:35 12 counsel who have Wave 1 and Wave 2 cases should tend to that. It's
09:02:38 13 been entered as Record Doc. 10882.

09:02:42 14 And then, finally, there's CMO 6B, which is Record
09:02:46 15 Doc. 11051, which addresses the issue of whether counsel need to
09:02:51 16 make special appearances for the record in the case specific
09:02:56 17 discovery activity under CMO 6.

09:02:58 18 Otherwise, your Honor, as you know, the selection phase
09:03:03 19 of Wave 1 and Wave 2 is done. We have now identified those
09:03:09 20 1,200 cases and the activity is centered on the plaintiff fact
09:03:13 21 sheets. Those have to be completed in full, not just the core
09:03:17 22 section, for those cases to then trigger the obligation of the
09:03:21 23 defendant to do a fact sheet in those cases and that in turn
09:03:25 24 triggers the discovery period.

09:03:27 25 In Section 5 of today's report we've recited a number of

09:03:32 1 motions that the defendants have brought to address deficiencies,
09:03:36 2 late filings with respect to those fact sheets, and we've talked to
09:03:41 3 the Court this morning about an effort we'll make on our side to
09:03:44 4 present to you a more streamlined approach to handling fact sheets
09:03:49 5 that are not completed timely and not sufficient to allow them to
09:03:54 6 proceed under CMO 6.

09:03:55 7 THE COURT: We've talked today about the question of
09:04:00 8 culling and that's always an important thing in a case of this
09:04:04 9 nature. There are some cases that for various reasons are filed,
09:04:08 10 but later on or as the case proceeds, the cases have to be culled
09:04:15 11 or removed from the process for a number of reasons. And one thing
09:04:20 12 we've done is early culling with some areas of whether or not you
09:04:27 13 took the drug, that is the first step in the culling.

09:04:32 14 We have to keep our eyes on the litigation as it proceeds
09:04:36 15 because there are some opportunities as the case goes further on
09:04:42 16 looking closely at the cases to see whether or not some of those
09:04:46 17 can be culled before counsel for each side invests a lot of money
09:04:51 18 and time in trying to get the case ready, only to find out that
09:04:55 19 they don't have a case or that the client is not available any
09:04:59 20 longer or not willing to proceed any longer. So we're in the
09:05:03 21 process of doing that, and counsel for both sides are getting
09:05:08 22 together, keeping an eye on that type of situation.

09:05:12 23 MR. MEUNIER: Your Honor, again, just to identify orders
09:05:15 24 that have been entered since the last conference. We do have an
09:05:19 25 aging population and there is the issue that's come up with a

09:05:22 1 number of fact sheets is the authority of a representative of the
09:05:27 2 deceased plaintiff to fill out the fact sheet and sign the
09:05:30 3 necessary documents, so the Court has entered just recently
09:05:33 4 November 2nd an order applicable to CMO 6 cases -- non-CMO 6 cases,
09:05:42 5 rather, to streamline the method by which the authority of people
09:05:46 6 to sign the fact sheets can be addressed. And that's Record
09:05:51 7 Doc. 11525, and we think that will, again, avoid unnecessary motion
09:05:56 8 practice on that issue of authority of a representative.

09:06:00 9 I think Jake Woody is here to report on the inventory and
09:06:03 10 fact sheet totals.

09:06:04 11 THE COURT: Jake.

09:06:06 12 MR. WOODY: Good morning, Judge Fallon. Jake Woody from
09:06:20 13 BrownGreer. I have a quick update for you on plaintiff fact sheets
09:06:24 14 in this MDL.

09:06:25 15 As of yesterday, we had 22,390 plaintiff fact sheets
09:06:29 16 submitted. That number is for open cases. We don't count
09:06:33 17 dismissed cases in that total. The 22,390 is an increase of 45
09:06:38 18 since the last status conference. We've received more than 45, but
09:06:42 19 with the dismissals, the net increase was 45.

09:06:45 20 We have another 1,364 fact sheets in progress that
09:06:50 21 haven't been submitted yet, which makes our total plaintiffs in our
09:06:53 22 system 23,753.

09:06:57 23 This slide shows the monthly submissions for the last two
09:07:03 24 years, almost two years. As you can see in July of 2018, the total
09:07:08 25 started to go down every month. Previously there had been almost

09:07:13 1 500 a month and since then in October we received 280, in September
09:07:19 2 286, August 298, and back in July 355, so they are going down.
09:07:26 3 Again, there is a pretty clear trend over the last four or five
09:07:30 4 months of a decrease in submissions.

09:07:33 5 THE COURT: I think the parties ought to take a look at
09:07:35 6 that because it looks to me like we're getting to the point of
09:07:38 7 where there is a closed package, and that sometimes is significant,
09:07:47 8 it at least lends itself to that observation, so we may be dealing
09:07:53 9 with an end of the grouping at this time.

09:07:57 10 MR. WOODY: And then CMO 6, I have an update on that. As
09:08:02 11 you know there were 1,200 cases selected for CMO 6. Of those, 863
09:08:07 12 are open, meaning they haven't been dismissed, that's 72 percent of
09:08:11 13 the total; 337 have been dismissed, which is 28 percent. Of the
09:08:15 14 dismissals, 195 were defendant selections, 113 were random
09:08:21 15 selections, and 29 were plaintiff selections.

09:08:23 16 And finally, just an update on our sort of key statistics
09:08:28 17 in this case. Plaintiffs who are 70 years or older make up
09:08:34 18 61 percent of the MDL, 53 percent of the plaintiffs in the MDL took
09:08:39 19 Xarelto for a reduction of risk of stroke, and 49 percent alleged
09:08:44 20 GI bleed. So those are sort of our key metrics.

09:08:48 21 As you can see from this slide, the CMO 6 percentages are
09:08:52 22 a little bit higher than the MDL, but they were intentional, they
09:08:56 23 were weighted to select those people. And these numbers are static
09:09:00 24 for the most part, they're not changing. We're getting more fact
09:09:03 25 sheets as you saw, but these statistics are not changing.

09:09:07 1 THE COURT: Two things there: One is, obviously, we have
09:09:10 2 an aging population, so we have to try to speed up the trial
09:09:15 3 aspects of the case to get these cases finished while the people
09:09:19 4 are still with us. And secondly, for both sides, we're dealing
09:09:26 5 with a population that has limited wage loss for the most part.
09:09:34 6 That's something that I think is significant, too. I am not saying
09:09:38 7 there's no wage loss because some people work after they're 70, but
09:09:44 8 that's something that at least the majority of them may have a
09:09:49 9 limited wage loss, if any, which is something.

09:09:54 10 MR. WOODY: And that's my update for this month, your
09:09:57 11 Honor.

09:09:57 12 THE COURT: Okay. Thanks.

09:09:58 13 MR. WOODY: If you have any questions, I'll be happy to
09:10:02 14 answer them.

09:10:03 15 THE COURT: No, I don't.

09:10:04 16 In that regard, too, I met with counsel a moment ago to
09:10:07 17 talk about with the Louisiana cases, or the cases that are before
09:10:10 18 this Court. I've got to focus on trying those cases or at least
09:10:15 19 some method of disposing of those cases. And we talked about,
09:10:25 20 first of all, getting our hands around the numbers of cases that
09:10:29 21 we're dealing with and then coming up with some plan to resolve
09:10:34 22 those cases. We can do it with either multiple trials or we can do
09:10:39 23 it in some mini trials or some method that can be dealt with that
09:10:48 24 can resolve the cases, either by trial or by some sort of mediation
09:10:55 25 or mixed process so we can get the cases over.

09:11:01 1 Anything else, Jerry?

09:11:05 2 MR. MEUNIER: Judge, I want to mention Section 8,
09:11:05 3 Preservation Order, just because new lawyers come into the case,
09:11:10 4 there's CMO 6, and I want them to be aware of the obligation of all
09:11:13 5 parties to preserve voicemail, instant messaging, text messaging,
09:11:17 6 et cetera, pursuant to that earlier order of the Court.

09:11:20 7 Judge, the appeals in the Fifth Circuit of the three
09:11:28 8 bellwether trials that were before you - *Boudreaux, Orr, and*
09:11:32 9 *Mingo* - those appeals are consolidated. The briefing has started.
09:11:37 10 There is still one remaining issue with respect to the completeness
09:11:41 11 of the record before that appeal can be perfected and submitted for
09:11:46 12 argument and decision.

09:11:47 13 Jake mentioned the CMO 6 case dismissals, that's also
09:11:53 14 mentioned in Section 11 of the report.

09:11:55 15 On State/Federal, your Honor, we gave you this morning
09:11:59 16 Dawn Barrios' spreadsheet showing not only the Philadelphia but
09:12:04 17 also other state court matters where Xarelto cases are pending.
09:12:09 18 Clearly in the Pennsylvania proceeding with 1,917 cases you have by
09:12:14 19 far the largest collection of cases pending outside of the MDL.

09:12:20 20 And we also report on the status of the Philadelphia case
09:12:25 21 and trial proceedings, there are appeals pending on some of the
09:12:30 22 earlier verdicts for defendants that were entered in those cases,
09:12:35 23 as well as a JNOV dismissal. And then we have the next trial,
09:12:40 24 which is the *Rush* case, and that is now set for trial on May 6th of
09:12:47 25 2019.

09:12:48 1 There are some cases selected for a discovery pool in
09:12:51 2 Philadelphia. We understand that ultimately six of those will be
09:12:55 3 picked for trial and those trials are due to start in the summer of
09:12:59 4 2019 in fairly close proximity to one another.

09:13:02 5 THE COURT: Do you know the method that the judge is
09:13:05 6 using, either Judge New or someone else in picking the trial?
09:13:09 7 Brian, do you know? Susan?

09:13:12 8 MR. MEUNIER: I think Brian knows.

09:13:12 9 MR. BARR: Susan can correct me if I am wrong, your
09:13:15 10 Honor, but it's primarily first in, first out on the way they're
09:13:19 11 going to be picked is the order after the defendant's strikes.
09:13:22 12 They have the right to strike I think it's four cases of the group
09:13:25 13 of 12. Some have already been dismissed. We may end up with just
09:13:29 14 six and then they're going to be tried in the order of first in,
09:13:33 15 first out.

09:13:35 16 MS. SHARKO: That's almost right. Judge New let the
09:13:37 17 plaintiffs pick the cases for the pool subject to certain
09:13:41 18 restrictions - they had to be GI bleed cases, the plaintiff took
09:13:44 19 the medicine for atrial fibrillation, and they couldn't have any
09:13:51 20 complicating factors, I believe that's generally what the standards
09:13:53 21 were. Plaintiffs then got to pick 12; two dropped out because
09:13:59 22 they, in fact, had complicating factors; we get to strike four; and
09:14:03 23 then Brian is right, they will be tried in order of filing.

09:14:06 24 THE COURT: I see. Okay. All right. Thank you very
09:14:08 25 much.

09:14:10 1 MR. MEUNIER: Your Honor, it just remains to set the
09:14:12 2 January conference. The status conference in December 12th at
09:14:16 3 9:00 A.M.

09:14:16 4 THE COURT: We talked about January the 23rd at
09:14:19 5 9:00 A.M., that seems to be convenient for everyone.

09:14:23 6 Okay. Anybody else have any comments or anything?

09:14:26 7 MR. MEUNIER: Thank you, Judge.

09:14:27 8 THE COURT: All right folks, thank you -- yeah, go ahead,
09:14:28 9 Susan.

09:14:29 10 MS. SHARKO: Just an update on the wave cases. Wave 1 is
09:14:33 11 deep in discovery now. Mr. Birchfield has been extraordinarily
09:14:37 12 helpful in resolving issues so there's one person we have to go to.
09:14:44 13 230 of the cases have been dismissed so far. There are about 50 to
09:14:49 14 70 cases that are stalled in discovery for a variety of reasons,
09:14:55 15 jurisdiction or estates or document issues, and Mr. Birchfield has
09:15:01 16 been cutting through those issues. So Wave 1 is well underway.

09:15:05 17 THE COURT: So that's the 1,200 cases, Susan?

09:15:08 18 MS. SHARKO: That's 600.

09:15:10 19 THE COURT: I'm sorry, 600.

09:15:12 20 MS. SHARKO: The next 600, Wave 2, so far 110 have been
09:15:16 21 dismissed and then more than half of what remains have issues.
09:15:20 22 We're early in the process. There are 175 where we don't have a
09:15:25 23 PFS, there's eight with jurisdiction issues, 22 with service
09:15:29 24 issues, et cetera. And again, we've been working through the list
09:15:33 25 with Mr. Birchfield on a fairly regular basis.

