

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: XARELTO (RIVAROXABAN) * MDL 2592 *
PRODUCTS LIABILITY LITIATION * *
* Section L *
* *
THIS DOCUMENT RELATES * July 6, 2016 *
TO ALL CASES * *
* *

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

Appearances:

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computer-aided transcription software.

1 *** STATUS CONFERENCE ***

2 (July 6, 2016)

3 DEPUTY CLERK: 14-MD-2592, In re: Xarelto Products
4 Liability Litigation.

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

7 MR. DAVIS: Good morning, Your Honor. Leonard Davis
8 for Herman Herman & Katz, plaintiffs' co-liaison counsel.

9 MR. IRWIN: And Jim Irwin for defendants.

10 THE COURT: This is our monthly status conference. I
11 had met a moment ago with the lead liaison counsel. I
12 apologize for being a little late. We had a lot of discussion
13 on the Bellwether selection and hopefully resolved that; but
14 while we moved in the direction of accomplishing that, it took
15 us a little longer than it usually does.

16 I'll hear from the parties as to the discussion.

17 MR. BIRCHFIELD: Good morning, Your Honor. This is
18 Prejoint Report No. 17. The first order of business is
19 pretrial order.

20 Since the last status conference there have been
21 two new pretrial orders that have been issued, the first being
22 Pretrial Order 10-A. What pretrial order 10-A does is extend
23 the time to serve a complaint in essence to 90 days, which is
24 set forth in the order. And that's a result of the clerk's
25 office primarily being inundated.

09 : 4 3 1 **THE COURT:** Yep.

09 : 4 3 2 **MR. BIRCHFIELD:** I make this announcement so that
09 : 4 3 3 folks, particularly those on the phone, are aware of that
09 : 4 3 4 issue. We had a number of calls by plaintiff lawyers who were
09 : 4 3 5 having issues with respect to service and wanted to make sure
09 : 4 3 6 that it was done timely. But that is so that folks do know
09 : 4 3 7 about that.

09 : 4 3 8 **THE COURT:** Yes, we did have to extend that, both at
09 : 4 3 9 the clerk's office as well as to accommodate some counsel who
09 : 4 3 10 had some issues. So, we extended that.

09 : 4 3 11 **MR. BIRCHFIELD:** The other pretrial order that is new
09 : 4 3 12 is Pretrial Order No. 30, which sets forth the procedure for
09 : 4 3 13 withdrawal of a plaintiff's counsel. And I suggest that anyone
09 : 4 3 14 who is filing a motion to withdraw look closely at that order
09 : 4 3 15 because it dovetails into the rules set forth in the federal
09 : 4 4 16 rules and local rules.

09 : 4 4 17 The next two items, case management orders
09 : 4 4 18 Nos. 2, 3, 4 and bellwether selection we can take together,
09 : 4 4 19 which is in line with what Your Honor began by talking about,
09 : 4 4 20 the bellwether selection process, which the parties have
09 : 4 4 21 discussed and did discuss in the pre-conference. The parties
09 : 4 4 22 will be working together to follow Your Honor's directives, and
09 : 4 4 23 we will be presenting something to the Court in the near future
09 : 4 4 24 with respect to a selection process.

09 : 4 4 25 **THE COURT:** I think we have a method for selecting,

0 9 : 4 4 1 and we may have to massage some of the discovery dates to
0 9 : 4 4 2 accommodate that, but we will deal with that after the
0 9 : 4 4 3 selection. I would like to get the draft of that order setting
0 9 : 4 4 4 it forth within a week, ten days at most.

0 9 : 4 4 5 **MR. BIRCHFIELD:** Yes, Your Honor, the parties will do
0 9 : 4 5 6 that, get together and submit something to you.

0 9 : 4 5 7 Next item is the counsel contact information
0 9 : 4 5 8 form. That's a repeat. It's been at every conference, and all
0 9 : 4 5 9 counsel are encouraged to look at PTO 4(a) and submit that. We
0 9 : 4 5 10 continue to receive those on a regular basis, and anyone new to
0 9 : 4 5 11 the litigation should make themselves familiar with the Court's
0 9 : 4 5 12 website and get the pretrial orders and comply with them.

0 9 : 4 5 13 The next item I can take together, plaintiff
0 9 : 4 5 14 factsheet and defendant fact sheets. Again PTO 27 deals with
0 9 : 4 5 15 those issues with respect to new file cases, and I encourage
0 9 : 4 5 16 parties to look at PTO 27 and complete profile forms as
0 9 : 4 5 17 appropriate.

0 9 : 4 5 18 Item No. 7 on the agenda is bundling of
0 9 : 4 5 19 complaints. As of May 26th there are no new filings of bundled
0 9 : 4 6 20 complaints, and that is on the Court's website. Again if you
0 9 : 4 6 21 look at Pretrial Order No. 11, in particular 11(e) dealing with
0 9 : 4 6 22 that matter, there is nothing new on preservation order. There
0 9 : 4 6 23 is nothing new on No. 9, the parties' interactions with MDL
0 9 : 4 6 24 plaintiff prescriber and treatment physicians.

0 9 : 4 6 25 On discovery, which is Item 10, there are a

0 9 : 4 6 1 number of issues that are ongoing. We still have
0 9 : 4 6 2 confidentiality challenges that are at issue. That's being
0 9 : 4 6 3 dealt with. There is nothing to deal with at this time.

0 9 : 4 6 4 There was a recent 30(b)(6) notice of deposition
0 9 : 4 6 5 and subpoena served on Janssen regarding study samples. That
0 9 : 4 6 6 was done on June the 29th. There is nothing for the Court to
0 9 : 4 6 7 do on that. That's just for informational purposes. We are
0 9 : 4 6 8 proceeding with that.

0 9 : 4 6 9 On July the 5th -- this is not in the joint
0 9 : 4 7 10 report. But on July the 5th the PSC filed a response to the
0 9 : 4 7 11 Bayer Pharma German privilege or privacy log. That has been
0 9 : 4 7 12 submitted to the Court. So, that information is now in the
0 9 : 4 7 13 Court's possession; and that matter can proceed.

0 9 : 4 7 14 On June the 24th, the PSC served preemption
0 9 : 4 7 15 interrogatories. Those will be due -- responses will be due in
0 9 : 4 7 16 the near future. We await receipt of those. And the PSC is
0 9 : 4 7 17 proceeding with other discovery, including those to third
0 9 : 4 7 18 parties. That's my report on discovery.

0 9 : 4 7 19 With respect to No. 11, deposition guidelines,
0 9 : 4 7 20 there is nothing new; and I might suggest that we can delete
0 9 : 4 7 21 that from future reports if that's okay.

0 9 : 4 8 22 **MR. IRWIN:** (Nods affirmatively)

0 9 : 4 8 23 **MR. BIRCHFIELD:** On No. 12, on discovery issues to
0 9 : 4 8 24 third parties, there was a recent filing on a motion to compel
0 9 : 4 8 25 as to Pharma. That was filed on June the 28th. That matter is

0 9 : 4 8 1 set for hearing on July the 20th. We have had meet and confers
0 9 : 4 8 2 with Pharma, and we await responses with Pharma, and we will
0 9 : 4 8 3 deal with that as appropriate.

0 9 : 4 8 4 **THE COURT:** Just keep me in the loop on that. In
0 9 : 4 8 5 case there is a hiccup there, I can weigh in on it.

0 9 : 4 8 6 **MR. BIRCHFIELD:** Will do, Your Honor.

0 9 : 4 8 7 I think the next item is No. 13, which is state
0 9 : 4 8 8 and federal coordination, I believe. Ms. Barrios is present.

0 9 : 4 8 9 **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios
0 9 : 4 8 10 for the state federal defendant. Excuse me. I want to thank
0 9 : 4 9 11 the defense for continuing to timely provide us with the state
0 9 : 4 9 12 court cases. We have prepared the stats as of 7-5. Nothing
0 9 : 4 9 13 really has happened, Your Honor. The California judge has not
0 9 : 4 9 14 been selected yet. There are no new judges that you need to
0 9 : 4 9 15 concern yourself with.

0 9 : 4 9 16 The most important is just the increase in
0 9 : 4 9 17 number of filings from our last status conference. There is an
0 9 : 4 9 18 increase of 128 cases and an increase of 216 Xarelto users
0 9 : 4 9 19 since our last conference.

0 9 : 4 9 20 **THE COURT:** Where is the increase, in Delaware?

0 9 : 4 9 21 **MS. BARRIOS:** A lot in Pennsylvania. Pennsylvania
0 9 : 4 9 22 has 129, and then Missouri has 41. Delaware, as Your Honor
0 9 : 5 0 23 remarked, those are the big -- the big states.

0 9 : 5 0 24 **THE COURT:** Okay.

0 9 : 5 0 25 **MS. BARRIOS:** And I will continue to keep you

0 9 : 5 0 1 updated, Your Honor. Thank you.

0 9 : 5 0 2 **THE COURT:** Thank you very much.

0 9 : 5 0 3 **MR. BIRCHFIELD:** Your Honor, I failed to mention
0 9 : 5 0 4 something with respect to third party discovery. On June 30,
0 9 : 5 0 5 PSC served a notice of deposition on Robert Cave; and that's
0 9 : 5 0 6 been updated to centrality. That update is scheduled, and
0 9 : 5 0 7 we'll report if necessary on that.

0 9 : 5 0 8 There are a couple of matters that are set for
0 9 : 5 0 9 hearing following the status conference, and the only other
0 9 : 5 0 10 thing is the next status conference dates.

0 9 : 5 0 11 **THE COURT:** Next status conference is August the 4th,
0 9 : 5 0 12 and the following is September the 20th.

0 9 : 5 1 13 **DEPUTY CLERK:** Both at 9:00 o'clock, Judge.

0 9 : 5 1 14 **THE COURT:** Yeah, both at 9:00 o'clock; and I'll meet
0 9 : 5 1 15 liaison here at 8:30.

0 9 : 5 1 16 Okay. Anything from anyone?

0 9 : 5 1 17 Let's go into the motions then. I have a trial
0 9 : 5 1 18 starting in half an hour. So, let me take the motions. The
0 9 : 5 1 19 motions -- the folks on the phone, who is on the phone?

0 9 : 5 1 20 **MR. PINEDO:** Your Honor, Chris Pinedo for the
0 9 : 5 1 21 plaintiffs Hinton.

0 9 : 5 1 22 **THE COURT:** Okay. Anyone else on the phone for the
0 9 : 5 1 23 motions?

0 9 : 5 1 24 **MR. BROOKS:** Yes, Your Honor, this is attorney Scott
0 9 : 5 1 25 Brooks. Hello?

0 9 : 5 1 1 **THE COURT:** Yes, hello. Go ahead. Let's take the
0 9 : 5 1 2 first case then. Let's take the first case. What's the first
0 9 : 5 2 3 case that we are dealing with, Jim?

0 9 : 5 2 4 **MR. IRWIN:** I believe the first case, Your Honor, is
0 9 : 5 2 5 Teresa Foret. It's No. 2-16, Civil Action 764.

0 9 : 5 2 6 **THE COURT:** Is the attorney for the plaintiff on the
0 9 : 5 2 7 line? What is the motion?

0 9 : 5 2 8 **MR. IRWIN:** Your Honor, it is a motion to dismiss
0 9 : 5 2 9 without prejudice. I can give you the history of the motion.
0 9 : 5 2 10 It was filed on March 31, 2016. It was a motion on the Rule
0 9 : 5 2 11 41(a)(2). No memorandum was filed. No reasons were offered
0 9 : 5 2 12 for the proposed dismissal without prejudice.

0 9 : 5 2 13 We opposed that motion on April 14, 2016, citing
0 9 : 5 2 14 primarily the *Elbaor versus Tripath* case, the Fifth Circuit
0 9 : 5 2 15 case, which requires an explanation of the reason that the
0 9 : 5 2 16 "without prejudice" motion is sought and also information as to
0 9 : 5 3 17 where it might be refiled, the jurisdiction in which it might
0 9 : 5 3 18 be refiled.

0 9 : 5 3 19 On May 18, Your Honor entered Pretrial Order
0 9 : 5 3 20 24(a) which required with respect to this process, trying to
0 9 : 5 3 21 make it a little more structured, that the plaintiff must say
0 9 : 5 3 22 two things: No. 1, they have attempted to get consent from the
0 9 : 5 3 23 defendant to file a motion; and No. 2, that they have explained
0 9 : 5 3 24 where they will be refiled, the jurisdiction, and -- excuse
0 9 : 5 3 25 me -- the payment of filing fees.

0 9 : 5 3 1 On June 2, 2016, you entered an order
0 9 : 5 3 2 specifically enforcing PTO 24(a) with respect to this Teresa
0 9 : 5 3 3 Foret case. On July 5, on yesterday, the plaintiffs refiled
0 9 : 5 3 4 their March 31 motion to dismiss. They did attach a memo.
0 9 : 5 4 5 They basically offered the same explanations. They have still
0 9 : 5 4 6 not explained what the reason is for the dismissal. And so, we
0 9 : 5 4 7 believe that under *Elbaor* they have not complied with the
0 9 : 5 4 8 requirements of the Fifth Circuit, nor have they complied with
0 9 : 5 4 9 PTO 24(a) or with the order of June 2, 2016.

0 9 : 5 4 10 **THE COURT:** Anybody on the phone for the Foret case?

0 9 : 5 4 11 **MR. BROOKS:** Yes, Your Honor.

0 9 : 5 4 12 **THE COURT:** Who is it?

0 9 : 5 4 13 **MR. BROOKS:** Can you hear me?

0 9 : 5 4 14 **THE COURT:** Yes. Give us your name, please.

0 9 : 5 4 15 **MR. BROOKS:** It's attorney Scott Brooks.

0 9 : 5 4 16 **THE COURT:** All right. What is the answer to that at
0 9 : 5 4 17 this time?

0 9 : 5 4 18 **MR. BROOKS:** Essentially, Your Honor, when we
0 9 : 5 4 19 received the defendant's memorandum in opposition of the
0 9 : 5 4 20 motion, they offered an alternative as if they would have set
0 9 : 5 4 21 the motion to dismiss without prejudice on the condition that
0 9 : 5 5 22 the refiling of the incident case would be in federal court.
0 9 : 5 5 23 We filed a reply to that memorandum agreeing to those terms;
0 9 : 5 5 24 and then yesterday in the refiling the motion and addendum
0 9 : 5 5 25 attached to it, we explained that we do accept those terms.

0 9 : 5 5 1 **MR. IRWIN:** Your Honor, if I can explain, we opposed
0 9 : 5 5 2 their motion to dismiss without prejudice. This was before the
0 9 : 5 5 3 entry of PTO 24(a). We suggested in the alternative, if the
0 9 : 5 5 4 Court was inclined to grant the motion without prejudice, that
0 9 : 5 5 5 the Court, with its power under *Elbaor*, could require that they
0 9 : 5 5 6 indicate that they would refile in federal court. They did
0 9 : 5 5 7 that.

0 9 : 5 5 8 Your Honor never signed that order. Your Honor
0 9 : 5 5 9 never accepted that alternative argument that we made. All
0 9 : 5 5 10 along we opposed the dismissal without prejudice primarily for
0 9 : 5 5 11 the reason they never offered an explanation as to why they
0 9 : 5 6 12 wanted to dismiss this case, and they still have not done that.

0 9 : 5 6 13 **THE COURT:** Why do you want to dismiss the case, sir?

0 9 : 5 6 14 **MR. BROOKS:** We have received further medical
0 9 : 5 6 15 records; and as of right now we have the payee actually show up
0 9 : 5 6 16 as a user, Mallie Akers, the mother of Susan Foret.

0 9 : 5 6 17 **THE COURT:** Go a little slower, please. We are
0 9 : 5 6 18 having difficulty. I don't know whether you are on a cell
0 9 : 5 6 19 phone or not, but you are not coming across totally.

0 9 : 5 6 20 **MR. BROOKS:** I apologize, yes. And so, we have
0 9 : 5 6 21 received more medical records for Mallie Akers which is the
0 9 : 5 6 22 Xeralto user in this case. That's the mother of Susan Foret.
0 9 : 5 6 23 And after our nurses' review of the records, we found out that
0 9 : 5 6 24 she did not have a qualifying injury with Xarelto. And so,
0 9 : 5 6 25 that is why we are trying to dismiss.

0 9 : 5 6 1 **MR. IRWIN:** Your Honor, that is first time why we
0 9 : 5 6 2 have heard that explanation and all the more reason why it
0 9 : 5 6 3 should be dismissed with prejudice.

0 9 : 5 6 4 **THE COURT:** I've heard the motion. I'm going to
0 9 : 5 6 5 dismiss it with prejudice and not without prejudice. Thank you
0 9 : 5 7 6 very much. Let's take up the next case.

0 9 : 5 7 7 **MR. IRWIN:** Your Honor, next case is James Hinton.
0 9 : 5 7 8 It's Civil Action No. 2:15-CV-6544.

0 9 : 5 7 9 **THE COURT:** Anybody on the phone for Mr. Hinton?

0 9 : 5 7 10 **MR. PINEDO:** Yes, Your Honor, Chris Pinedo for the
0 9 : 5 7 11 plaintiffs Hinton. Your Honor, our motion -- may I explain the
0 9 : 5 7 12 plaintiff's motion?

0 9 : 5 7 13 **THE COURT:** Yeah, sure, and give me the background.

0 9 : 5 7 14 **MR. PINEDO:** The plaintiff had requested us to file a
0 9 : 5 7 15 lawsuit. We filed the lawsuit. Shortly thereafter he asked us
0 9 : 5 7 16 to discontinue the lawsuit. Then shortly thereafter he asked
0 9 : 5 7 17 us to reinstitute the lawsuit. We had not filed our motion to
0 9 : 5 7 18 dismiss. Then he asked us to go ahead and dismiss the case.
0 9 : 5 7 19 And we do not want to dismiss this case with prejudice. We
0 9 : 5 7 20 request it without prejudice because our client is 81 years of
0 9 : 5 8 21 age. He seems to have memory problems, and he goes back and
0 9 : 5 8 22 forth on what his desires are.

0 9 : 5 8 23 If this Court dismisses it with prejudice and he
0 9 : 5 8 24 changes his mind again, he will be ever forestalled from
0 9 : 5 8 25 refiling the lawsuit. That is why we are requesting his case

0 9 : 5 8 1 to be dismissed without prejudice. I think some of this might
0 9 : 5 8 2 be due to his memory issues. But that's the reason we are
0 9 : 5 8 3 requesting this lawsuit to be dismissed without prejudice in
0 9 : 5 8 4 case he changes his mind again or perhaps his memory is
0 9 : 5 8 5 refreshed on circumstances and he can remember with greater
0 9 : 5 8 6 specificity when the events took place related to his drug
0 9 : 5 8 7 administration.

0 9 : 5 8 8 **MR. IRWIN:** Your Honor, that's the first time we have
0 9 : 5 8 9 heard that. I'll give the Court the background very briefly.

0 9 : 5 8 10 They filed the motion on May 11th, 2016, again
0 9 : 5 8 11 under 41(a)(2). There was no memorandum in support of the
0 9 : 5 8 12 motion. No reasons were offered in support of the motion. On
0 9 : 5 9 13 May 18, Your Honor issued PTO 24(a) requiring them to advise if
0 9 : 5 9 14 we had offered consent and a payment of filing fee.

0 9 : 5 9 15 On June 2, 2016, you specifically ordered them
0 9 : 5 9 16 to comply with PTO 24(a). On June 23, 2016, they filed an
0 9 : 5 9 17 amended motion to dismiss without prejudice. Once again, it
0 9 : 5 9 18 did not offer any explanation or reason for doing this. It did
0 9 : 5 9 19 indicate that we had not advised them about consent. I believe
0 9 : 5 9 20 that was an inadvertent mistake on their part because we told
0 9 : 5 9 21 them on June 15 -- and I have the e-mail -- that we did not
0 9 : 5 9 22 agree because they have not given a reason.

0 9 : 5 9 23 We filed our opposition yesterday for the same
0 9 : 5 9 24 reason that we did earlier, that there is no explanation for
0 9 : 5 9 25 the reason and until this very moment, and no information about

1 refiling it. So, we believe under *Elbaor* and going back and
2 forth and back and forth on this case, that this should be
3 dismissed with prejudice.

4 **THE COURT:** I understand the issue. It's just a --
5 I've got to listen to the plaintiff. I mean the plaintiff
6 wants this case dismissed. He instructs his lawyer. The
7 lawyer vigorously has presented the matter to the Court. It's
8 not the lawyer's fault. The lawyer is bound to carry out the
9 wishes of the plaintiff, of his client. Notwithstanding that,
10 the lawyer has done his best to preserve the claim for the
11 plaintiff in the event the plaintiff changes his mind.

12 But that's not the way that it ought to be. If
13 the plaintiff wants to -- the plaintiff now has said twice to
14 the lawyer: Dismiss my case, I don't want to proceed. People
15 want to move on with their lives and certainly an octogenarian
16 has a right to do that. I'm going to dismiss this with
17 prejudice over the strenuous objection of plaintiff's counsel,
18 who has done his best to preserve his client's case.

19 **MR. IRWIN:** Thank you very much, Your Honor.

20 **THE COURT:** Is that the end of the motions? Okay.
21 Thank you very much. We'll stand in recess.

22 **DEPUTY CLERK:** All rise.

23 (Proceeding adjourns.)
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CERTIFICATE

I, Donna A. Goree, RPR, CRR, 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/ Donna A. Goree
Donna A. Goree, RPR, CRR
Official Court Reporter