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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS  
LIABILITY LITIGATION

\* Docket MDL 1657-L  
\*  
\* March 23, 2006, 10:00 a.m.  
\*  
\* New Orleans, Louisiana

\* \* \* \* \*

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 Defendants: Stone Pigman Walther Wittmann  
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Proceedings recorded by mechanical stenography, transcript  
produced by computer.



1           **THE COURT:** One of the challenges in a case of this  
2 sort, where you have so many numbers, is that you have to rely  
3 on technology; otherwise, we spend all our time with  
4 housekeeping chores. That's why Lexis/Nexis is important in  
5 this particular litigation. It sometimes has to be tweaked and  
6 streamlined, but the parties know that, having worked with it.  
7 If they are in agreement, I will amend it.

8           **MR. HERMAN:** We conferred with Mr. Wittmann. We have  
9 no disagreement with the amendment.

10           **THE COURT:** Prepare an amendment and I will take care  
11 of it. State court trial settings. There are a number of  
12 cases in the state courts. As I mentioned several times, many  
13 times in these MDL's, the MDL court and the state court get the  
14 case about the same time. Because of the ease of the discovery  
15 rules in the federal system, it's not unusual for a lot of  
16 discovery to proceed in the federal system and the state courts  
17 occasionally don't schedule trials.

18           In this particular case, these cases have been  
19 lodged in state court for many years, discovery has been  
20 completed, and the state courts are proceeding with the trials.  
21 That's one of the reasons I speeded up the process in the MDL  
22 and am anxious to try some cases, so that we can also be at the  
23 same setting as the state court trials. I do notice that  
24 there's a number of state court trials. I'm in touch with most  
25 of the courts. I send them material and they send me material.

1 We are trying to exchange ideas and concepts so that the  
2 litigation can be efficiently and effectively handled, both  
3 state and federal courts.

4           The selection of cases for an early federal  
5 court trial date. I started out in this matter mentioning to  
6 counsel for both sides that it was the intention of the Court  
7 to set some dates. I looked to them originally to pick the  
8 date, pick the trials, and we would go with them. We had some  
9 difficulty, for logistical and other reasons, so what we have  
10 done is go to Plan B. I've instructed each side to select four  
11 cases, each side will have two strikes, and the remaining cases  
12 will be tried early on. I selected some dates for those  
13 trials.

14           I've been advised by counsel that they have  
15 exercised their strikes and we have four cases that are ready  
16 for trial. The Cruell case, the Dedrick case, the Barnett case,  
17 and the Mason case are the four cases. The way we are going to  
18 do it is the plaintiff will have the first opportunity to  
19 select one of those cases for trial, then the defendant, then  
20 plaintiff and defendant. They will meet with their trial  
21 counsel and let me know in a week which cases are picked on  
22 which dates.

23           **MR. WITTMANN:** Yes, Your Honor. It's not the Cruell  
24 case. It's the Smith case.

25           **THE COURT:** I'm sorry.

1           MR. HERMAN: It's the Smith case. Barnett, Mason,  
2 Dedrick, and Smith.

3           MR. WITTMANN: And Diaz.

4           MR. HERMAN: With respect to state court trial  
5 settings, the settings will be posted as this Joint Report 12  
6 is posted on your website so that attorneys may look at it and  
7 if they want to monitor those trials they are able to. Also, I  
8 did clarify with Mr. Robinson the California trial set for  
9 June 21, the Court has designated four cases, three of which  
10 will go to trial -- as it stands now -- simultaneously.

11 Mr. Robinson's case is one of those four cases. I understand  
12 from Mr. Robinson that Merck in those cases has requested the  
13 Judge try only one case, but as of now three cases are being  
14 tried simultaneously.

15           With regard to the selection of cases for early  
16 federal court trial, Your Honor has indicated this morning that  
17 the Diaz case will proceed to trial on June 12, 2006. I will  
18 notify plaintiffs' counsel. Respecting the candor of the  
19 Court, I am going to strongly recommend to Diaz counsel that  
20 she notice a full hearing before the Court with witnesses on  
21 why that case should not be tried on June 12. Respecting  
22 Your Honor's order, I believe it would be appropriate for Diaz  
23 counsel to file such a motion and request a hearing.

24           Your Honor has indicated that the dates for  
25 trial settings are July 24, 2006, September 11, 2006,

1 October 30, 2006, and November 27, 2006. I'm also advised,  
2 Your Honor, that the Barnett case is Mr. Mark Robinson's case,  
3 the Mason case is Mr. Blizzard's case, the Dedrick case is  
4 Mr. Birchfield's case, and the Smith case is Mr. Ranier's case.  
5 I will be in conference with those counsel on those cases in  
6 the coming week and notify Your Honor and Mr. Wittmann as early  
7 as possible next Friday as to what the plaintiffs' selection of  
8 the first case is so that the defendants may then select a case  
9 to be tried on the second day, et cetera, which I believe is  
10 what Your Honor has directed.

11 **THE COURT:** My thinking is that the lawyers ought to  
12 know when their case is going as opposed to having just four  
13 cases and these dates and saying we'll take one of them and  
14 then take another one and take another one and take another  
15 one. They ought to know when they are going so that they can  
16 begin their final trial preparation, so I do want to have  
17 specific cases set on those specific dates.

18 I'm not adverse in the future to trying multiple  
19 cases at the same time, but at this stage I think it would be  
20 helpful for counsel to focus on one case at a time so we can  
21 get over some of the preliminary issues that are important to  
22 all of the cases. We'll be dealing with that in another area  
23 of this report, but basically there are a number of issues --  
24 Daubert, there are some evidentiary issues -- and I think that  
25 by the time we try a couple more of these cases those issues

1 will be nonissues for the rest of the litigation. We will be  
2 able to move a little faster on it, and perhaps we can then  
3 begin trying several cases at one time.

4 **MR. WITTMANN:** Just so we are clear on that point,  
5 Judge, if I may, my thought was that next Friday the defendants  
6 would pick the cases for the September 11 and November 27 time  
7 frames and the plaintiffs would pick the cases for the July 24  
8 and October 30 time frames, pick all cases next week and not  
9 just wait around.

10 **THE COURT:** Right. I do want to have all of the  
11 cases selected. Let's pick all of the cases. The plaintiff  
12 gets to choose first, the 24<sup>th</sup>, and then defendant, and then  
13 plaintiff again. So that would be October 30 for the  
14 plaintiff, those two cases, then the defendants will select the  
15 case to be tried on September 11 and November 27. We'll have  
16 all of those cases by next week.

17 **MR. WITTMANN:** We can do that by next Friday, Judge,  
18 no problem.

19 **THE COURT:** Class actions. I've heard presentations  
20 and received some material on the class actions. I'm working  
21 on that now. Anything further on the discovery directed to  
22 Merck? It's the next item on the agenda.

23 **MR. HERMAN:** Your Honor, we understand the heavy  
24 burden of the voluminous documents Your Honor has to consider  
25 under privilege. If at all possible, we would ask the Court

1 that before these four cases are tried, if Your Honor could  
2 rule on those, it would be appreciated. We would like to get  
3 whatever Your Honor rules is not privileged to our experts in  
4 plenty of time for them to consider.

5 **THE COURT:** I will be doing that and I will give you  
6 a wave of it soon. As you mentioned, there are some 30,000 or  
7 40,000 documents that I'm dealing with, so some of it has taken  
8 me a little longer. I do have the advantage of having it on  
9 CD-ROM so I can pull it up.

10 **MR. HERMAN:** I also want to say -- and I speak, I  
11 believe, for both sides -- that we appreciate that Your Honor  
12 has considered the gravamen of the issue and undertaken to do  
13 this judicial labor yourself rather than assigning it  
14 elsewhere. We greatly appreciate the Court's personal  
15 consideration of the issue.

16 **THE COURT:** FDA.

17 **MR. HERMAN:** With respect to the FDA, Your Honor, I  
18 want to report to the Court that attorney Mike Levy  
19 representing the FDA in D.C. and Sharon Smith of the  
20 U.S. Attorney's Office here have done a wonderful job  
21 cooperating and attempting to resolve this matter, which we  
22 appreciate. The cost issue has been resolved. Of the 59  
23 documents at issue, the FDA will produce a number of those  
24 documents, relieving or waiving any privilege in the coming  
25 week. There will be a number of documents in which the FDA



1 still claims privilege which we would request that the Court  
2 review in camera, and we expect to have documents by Monday.

3           **MS. SMITH:** Good morning, Your Honor. Sharon Smith  
4 with the U.S. Attorney's Office here on behalf of the FDA. I  
5 just noticed this morning, when I reviewed a copy of the joint  
6 status report, that section regarding the discovery directed to  
7 FDA contains the agreement between the FDA and the plaintiffs  
8 with one fine point that's not completely accurately reflected,  
9 and that is that the FDA has agreed that if the Court wishes to  
10 review the documents in camera we'll produce them on March 27  
11 for the Court's review. If the Court doesn't want to, we  
12 won't. So if someone could just let us know whether it's the  
13 Court's pleasure to review those documents, we'll make sure it  
14 has them.

15           **THE COURT:** I'll let you know right now. Send the  
16 material you can't agree to me and within a day or two I'll  
17 finish the review and give it back to you. I've got some time  
18 between 9:00 and 10:00 at night, so I'll get on that right  
19 away.

20           **MS. SMITH:** Thank you, Your Honor.

21           **THE COURT:** Thank you very much. Before you leave,  
22 let me express the Court's appreciation to you. I know you  
23 have a lot on your plate. This is sort of an additional thing  
24 that you are doing and I appreciate your work.

25           **MS. SMITH:** It's our pleasure, Your Honor.

1           **MR. HERMAN:** I would like Ms. Smith to know I did  
2 advise the Court in advance of the right statement.

3           **THE COURT:** Discovery directed to third parties.

4           **MR. HERMAN:** Yes, Your Honor. We received a brief  
5 yesterday from Merck. We want to reply to that brief on  
6 Monday. We will have it by close of business on Monday to  
7 Your Honor, and then Your Honor may consider the discovery  
8 issues regarding the assertion of privilege by Merck's  
9 contended contracted marketing folks.

10           **THE COURT:** Monthly production pursuant to Pretrial  
11 Order 17 is the next item.

12           **MR. WITTMANN:** That's going forward, Judge, on a  
13 rolling basis, trying to comply as best we can with the  
14 plaintiffs' prioritization. We are producing the deposition  
15 testimony in full text, searchable copies of transcripts and  
16 exhibits if available. So far as I know, there are no open  
17 issues on that at this point.

18           **THE COURT:** Anything from the plaintiffs on that?

19           **MR. HERMAN:** We have requested a clarification of  
20 Pretrial Order 17, but it's not something to bring to the  
21 Court's attention at this point. We expect it to be resolved.

22           **THE COURT:** Deposition scheduling, IX.

23           **MR. HERMAN:** We don't have a problem. We have  
24 advised the defendants. At their request, we will notify  
25 Doug Marvin and Phil Wittmann, whomever is available at the

1 time, for the proposed date of Dr. Graham's deposition. After  
2 we have advised them of the proposed dates, then we will file  
3 the notice.

4 **THE COURT:** Plaintiff profile forms and Merck profile  
5 forms, anything on that?

6 **MR. HERMAN:** Yes. The plaintiffs have indicated that  
7 Mr. Davis has been in touch with plaintiffs' counsel who  
8 represent plaintiffs whose cases Merck has moved to dismiss for  
9 failure to comply with plaintiff profile forms. We believe  
10 that as of last night that there were five such individuals.  
11 Mr. Wittmann advises me this morning there may only be three.  
12 At any rate, we are going to object to dismissal at this point  
13 until we have had an opportunity to clear up Lexis/Nexis  
14 problems that may have played into either Merck's receipt of  
15 compliant PPF's or plaintiffs' inability to post or contribute  
16 PPF's. We would like to ask that the motion be postponed until  
17 the next hearing date.

18 **MR. WITTMANN:** Well, we filed I think motions against  
19 53 plaintiffs. After filing those motions and notifying  
20 counsel for those plaintiffs, we resolved a great number,  
21 either by having them file corrected plaintiff profile forms or  
22 in some cases the plaintiffs agreed to dismissal of the case.  
23 We have whittled it down now to I think there are three  
24 remaining plaintiffs who have not filed any plaintiff profile  
25 form at all and those are the only three that are remaining on

1 the Court's docket to be dealt with at the hearing this  
2 afternoon. I'm going to meet with Mr. Davis after we have  
3 finished here and see if we can resolve those three cases.

4 As I told Your Honor this morning, we have been  
5 not overly technical in construing the requirements of  
6 Pretrial Order 18. Really, any plaintiffs' lawyer who says he  
7 knows a Merck lawyer, saw one on television, whatever, they  
8 have gotten an extension. We haven't pressed that at all.  
9 Those that are outstanding and have not complied, we think we  
10 at least need to get an order from the Court giving them 60  
11 days to do it or else. We can address that with the Court this  
12 afternoon if Mr. Davis and I can't agree.

13 **THE COURT:** Let me know if you all can't agree and  
14 we'll deal with it. I don't want to willy-nilly dismiss cases.  
15 On the other hand, if a litigant has had sufficient time,  
16 sufficient prodding, sufficient notice and opportunity to  
17 express themselves to the Court in writing or personally and is  
18 not interested in exercising those opportunities, then I'm  
19 going to dismiss the cases with prejudice. I think that, in a  
20 case of this sort, there are sometimes individuals who  
21 initially file a claim and then decide that they do not wish to  
22 pursue it. That ought not slow the other litigation or the  
23 other people who do want to pursue it.

24 I do want to make sure that they're noticed. I  
25 do want to make sure they have an opportunity to express

1 themselves. I want to give them every opportunity before I  
2 dismiss the case. Once I do that and dismiss the case, then  
3 we'll move on with it. Get with Mr. Davis and let me hear from  
4 you shortly. The next item is XI, state/federal coordination,  
5 state liaison committee.

6 **MR. HERMAN:** There's one other issue. Merck has  
7 requested a modification of the Merck profile form, which we  
8 have not agreed to. If the matter is not resolved by the next  
9 meeting, it will be brought to Your Honor, as well as a matter  
10 of medical authorizations directly to Litigation Management,  
11 Inc., which is a company contracted by Merck. That issue  
12 hasn't been resolved.

13 **THE COURT:** We ought to do it before the next  
14 meeting.

15 **MR. WITTMANN:** I think Your Honor said two weeks. We  
16 will get with you if we can't resolve it within two weeks.

17 **THE COURT:** In two weeks get with me, and if you  
18 can't resolve it I'll resolve it and we'll move on.  
19 State/federal coordination. Anything from liaison?

20 **MS. BARRIOS:** Yes, Your Honor. Good morning,  
21 Your Honor. Dawn Barrios for the state liaison committee.  
22 There are a couple of little housekeeping matters from the  
23 suggested agenda and the joint report. Someone from Kathy  
24 Snapka's office is present in court today. She came to visit  
25 with us and to participate in the status conference. She

1 advises that the Garza case that's currently on trial in Texas,  
2 the trial schedule has been increased to two weeks instead of a  
3 week a month that the state court judge had given her, so at  
4 least it will move along a little quicker.

5 I have prepared, Your Honor, as I generally do,  
6 all the remand orders and the remand motions. This is a  
7 cumulative CD, so you may toss the other ones that I have given  
8 you away. If you will recall, I had on these CDs grouped them  
9 by state and by issues. I raise this with Your Honor this  
10 morning particularly because I have gotten an overwhelming  
11 number of calls from state court litigants asking when  
12 Your Honor was going to rule on the motions to remand or at  
13 least do a procedure as you indicated earlier. The second, in  
14 terms of volume of number of calls I get, is about deficient  
15 Merck profile forms. I saw that was on the agenda today.  
16 Mr. Herman didn't specifically address it, but I do get an  
17 incredible number of calls concerning the deficiency of the  
18 Merck profile form.

19 **THE COURT:** How can we handle that? Can you get with  
20 Mr. Wittmann on that?

21 **MS. BARRIOS:** Yes, Your Honor, I can.

22 **MR. WITTMANN:** I'll be happy to, Judge. We are  
23 dealing with plaintiffs' counsel. If they have an objection,  
24 let us know, or we have counsel at Hughes Hubbard Reed also  
25 available.

1           **THE COURT:** If you can facilitate it, Ms. Barrios --

2           **MS. BARRIOS:** Yes, Your Honor.

3           **THE COURT:** If you can, get these folks together, and  
4 if you have problems you can't resolve bring it to me and I  
5 will resolve it.

6           **MS. BARRIOS:** Yes, Your Honor. With regard to the  
7 deposition scheduling, I want to publicly thank both Merck, the  
8 PSC, and New Jersey for their cooperation. They have been  
9 incredible in keeping me in the loop, particularly Mr. Tisi,  
10 Mr. Buchanan, and Mr. Mayer. We were able to handle that all  
11 very amicably, making sure the state court litigants get the  
12 extra time they have requested. The issue that arose at the  
13 last status conference is, to my knowledge, totally resolved.

14           **THE COURT:** I received a call not too long ago from  
15 one of the state judges expressing some interest in making sure  
16 that the people, particularly the ones from Texas -- that's  
17 where he is from -- had some opportunities. I do feel that  
18 it's important for the states to have an opportunity to  
19 question or deal with any witness at those depositions. Let's  
20 keep an eye on that. I said you would be in touch with the  
21 issue and were working on it. If there is any issue, get it to  
22 me before I hear from the court.

23           **MS. BARRIOS:** I've been in touch with Mr. Fibitch's  
24 office and Mr. Blizzard's office almost daily on updating them  
25 on deposition schedules. I would like to take this opportunity

1 to request from Merck a complete list of all state court cases  
2 that have been filed to date. They had generously given us one  
3 before, but we would like to get an update or a cumulative  
4 listing.

5 **THE COURT:** When can that be done?

6 **MR. WITTMANN:** This afternoon.

7 **THE COURT:** Let's do it, then.

8 **MS. BARRIOS:** Thank you, Your Honor. The only other  
9 issue that I have is that we are awaiting Your Honor's ruling  
10 on the additional state liaison committee members from Texas.  
11 That issue went to you several months ago and we are awaiting  
12 that.

13 **THE COURT:** Yes. You and Mr. Herman get with me  
14 after this meeting so I can deal with that. I'll deal with  
15 that immediately.

16 **MS. BARRIOS:** Thank you. I will give your clerk the  
17 CD. For the record, I have previously given Merck and the PSC  
18 their CD.

19 **THE COURT:** Great.

20 **MR. HERMAN:** I want to thank Ms. Barrios for her  
21 usual excellent job. Dawn, if you let me know who the state  
22 lawyers are that are complaining about the Merck profile forms,  
23 I would like to know that, also.

24 **MS. BARRIOS:** Yes.

25 **MR. HERMAN:** Your Honor, I understand that the



1 profile form issues which are unresolved and the litigation  
2 management issue needs to be resolved by April 6, which would  
3 be two weeks. We'll discuss that in the interim and hope we  
4 can resolve it.

5 I do want to mention something about remand,  
6 although it's not here. I've had requests from the lawyers  
7 whose cases Merck has not agreed to try in the MDL that their  
8 cases either be transferred back to the home court or remanded  
9 so that they can get on with their trials. We'll be bringing  
10 that motion at the next schedule conference, Your Honor.

11 **THE COURT:** Let's file that motion because that's  
12 important. If they want to try their case and Merck doesn't  
13 want to try it here, we'll try it some other place.

14 **MR. HERMAN:** With regard to pro se claimants,  
15 Your Honor, we are continuing to receive pro se cases and  
16 dealing with them as Your Honor had ordered.

17 **THE COURT:** Also, I need to know that with some  
18 specificity because I may be going back with the case. I may  
19 go to that area and try the case if it's in federal court. I  
20 at least want that option.

21 **MR. HERMAN:** We'll provide you with a list by Friday  
22 of next week. I think we already have it in the database so it  
23 will be easy for us to pull up. I wonder if the defendants can  
24 tell us the number of state cases there are now and the cases  
25 in the MDL? We have had since the last conference a number of

1 transfer orders. Do you have those figures, Phil?

2 **THE COURT:** Anybody have an up-to-date figure? I  
3 think I have received something like 4,800 or 5,000 cases so  
4 far.

5 **MR. WITTMANN:** I've got something here, Judge, if you  
6 give me a minute. Your Honor, can we give this to you at a  
7 later date? Later this week we'll give you an exact, correct  
8 number.

9 **THE COURT:** Sure.

10 **MR. WITTMANN:** We'll send it to Russ, too.

11 **MR. HERMAN:** Thank you. I appreciate it. I might  
12 add, defense counsel who have been on TV make a much better  
13 appearance in person.

14 **THE COURT:** XII.

15 **MR. HERMAN:** We finished pro se. We will provide  
16 Your Honor with a list. XIII, Mr. Moll has filed a motion and  
17 the PSC is not involved in that issue.

18 **THE COURT:** Right. Mr. Moll, if you would wait, we  
19 are almost finished with this and then we will take your motion  
20 and deal with it at that time. The new VICTOR data.

21 **MR. HERMAN:** We are advised by Merck that the data  
22 will probably be completed this month and that we'll get it as  
23 soon as it is completed.

24 **THE COURT:** What's the target date for when you are  
25 going to get the material?

1           **MR. WITTMANN:** The material on VICTOR?

2           **THE COURT:** Yes.

3           **MR. WITTMANN:** I'll defer to Mr. Barnett.

4           **THE COURT:** Mr. Barnett.

5           **MR. WITTMANN:** I frankly don't know.

6           **THE COURT:** Mr. Barnett usually knows these things.

7           **MR. BARNETT:** Good morning, Your Honor. This is data  
8 that's held by Oxford University. The original projected  
9 delivery date for the final VICTOR data was March 2006. We're  
10 now told it is not going to arrive in March 2006 and we are not  
11 told when Oxford is going to give it to us. Obviously, we have  
12 already agreed that whenever we do get the final data we will  
13 promptly produce it to the PSC, but at this point we don't know  
14 when we will have the data from Oxford.

15           **THE COURT:** Let's get the name of somebody that you  
16 can deal with. I'll get you and Mr Herman with this individual  
17 on the phone and we'll see what they say about it. I would  
18 like to hear when he is going to deliver it. I really need him  
19 to deliver it.

20           **MR. HERMAN:** Your Honor, I would like Mr. Seeger to  
21 address the issue.

22           **MR. SEEGER:** Just so you have a fully understanding,  
23 Your Honor, this issue came up about the VICTOR data probably  
24 about a year ago. I'm trying to confirm this. We were then  
25 supposed to get it in March, as Mr. Barnett said, and it has

1 been pushed off for quite sometime. It is important data that  
2 really puts into perspective their last three clinical trials.

3 **THE COURT:** Give me the name of someone that you are  
4 dealing with and his telephone number, and then I will get you  
5 all on the phone and I'll talk to them.

6 **MR. BARNETT:** That's fine. We will get a contact  
7 name and we'll arrange a call promptly. Just to be clear,  
8 whatever data we have from Oxford we have produced.

9 **THE COURT:** I understand. It's not you. You haven't  
10 gotten it. I understand. That's what the plaintiffs tell me.

11 **MR. SEEGER:** Can we just put a time frame?

12 **THE COURT:** When can you do that?

13 **MR. BARNETT:** We'll try to set up the call next week  
14 if that works for the Court.

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

16 **MR. HERMAN:** As Your Honor can understand, there's a  
17 great deal of concern among plaintiffs -- particularly now that  
18 we are again meeting with experts, that there will be Daubert  
19 hearings and 702 hearings -- that the data be produced in  
20 sufficient time to have our experts review it and make a  
21 meta-analysis and consider that information. We appreciate  
22 counsel's cooperation in getting this data to us as soon as  
23 possible.

24 The next issue is a motion to rule on a 54(b)  
25 motion to remand in the Juannell v. McBrayer Wilkes case. We

1 are not participating in that.

2           **THE COURT:** That's item XV on the agenda. Anyone  
3 wish to speak on that?

4           **MR. WITTMANN:** Your Honor, I think it's a motion to  
5 dismiss that's been filed by a physician in a case over in  
6 Alabama. The doctor's lawyer wants to set it for hearing and  
7 get it taken care of. He thinks he is entitled to be  
8 dismissed. The case is here in the MDL. I suppose that what  
9 should be done, if Your Honor is inclined to do it, is to hear  
10 the motion to dismiss.

11           **THE COURT:** Okay. I'll deal with it. The next item  
12 is XVI, generic trial issues, 702 and Daubert. I've been  
13 discussing with both liaison counsel, as well as the committees  
14 for both sides, the opportunity which they have -- and I have  
15 urged them to utilize it -- to see if we can focus on some  
16 issues that are generic to the litigation, particularly the  
17 Daubert issues and also some of the evidence presentation  
18 issues. Much of this case is presented by deposition. We  
19 ought to have those depositions in the form and fashion that  
20 they are going to be presented to the jury, vetted by both  
21 sides well in advance of the trials. I'll make rulings on them  
22 so you can put those in a can and you know that they are  
23 admitted and the objections have been taken care of and there's  
24 no issues involving that portion of the testimony. We ought to  
25 be able to do that. If there are some issues that come up,

1 I'll rule on those issues, but we'll put that to the side. You  
2 won't have to worry about any objections during the course of  
3 the trial.

4 I think that can be done also with the Daubert  
5 issues. I don't see this as a real difficult Daubert question.  
6 It's mostly from the qualification standpoint that both sides  
7 have had some bumps in the road, at least from my standpoint  
8 with Daubert, but it's not a complicated Daubert question. It  
9 just seems to me that we ought to be able to "pre-Daubertize,"  
10 if you will, a number of experts so that you know these experts  
11 are going to be able to testify. They may be attacked on  
12 cross-examination. They may be attacked with their  
13 qualifications or lack of qualifications or whatever it is, but  
14 that's something that will be done in cross and not excluded on  
15 Daubert. It seems to me that it's easier to do it that way and  
16 any other issues that are evidence issues that we can deal  
17 with.

18 With the exhibits, I don't like to preadmit  
19 exhibits, but I like to have the exhibits admissible, meaning  
20 that it's your choice. If you want to admit them, they are  
21 admitted. If you don't want to admit them, then they are not  
22 admitted. You ought to know what is admissible into evidence.  
23 Those documents that I have looked at and ruled on I am not  
24 going to keep ruling on in every case. We ought to know those  
25 documents and those documents are admissible, we have a list of

1 them, and we use them in all the cases.

2 I don't see a trial just open-ended. I give the  
3 litigants a defined time to try the case. It makes sense to me  
4 because you need to prioritize when you are at trial.  
5 Discovery is finished at that time, so you need to prioritize.  
6 Whatever you can do before the trial starts is to your benefit,  
7 it seems to me, and I'm willing to work with both sides on  
8 that. Let's keep that in mind. If you can bring me any  
9 generic issues you feel I can rule on, I'll rule on them.

10 **MR. HERMAN:** Your Honor, the PSC met this morning.  
11 We'll be meeting this afternoon after this conference. We are  
12 going to list issues that we believe are generic and that can  
13 be ruled on well in advance of any trial. They fall into three  
14 categories: (1) document admissibility; (2) trial presentation  
15 issues such as blowups, what can be used in opening as an  
16 example; and (3) expert issues. We will provide Mr. Wittmann  
17 that list before Wednesday. He can add whatever defense issues  
18 the defense wants to have heard in advance. We intend to bring  
19 our motion and briefing certainly before April 6 and will ask  
20 for expedited hearing. Your Honor, we would like you to  
21 consider a full day of hearings at a minimum.

22 **THE COURT:** With the Daubert things, too, I would  
23 like some heads up on that because I have talked to several of  
24 the state court judges and there's some interest from their  
25 standpoint in participating in the Daubert hearing. They can

1 do that either by coming here and participating in person or  
2 they can do that by phone or they can do that by having a  
3 record, but I would like them to at least have the opportunity  
4 to participate in the hearing, if they wish, so that we can do  
5 the Daubert, both state and federal, one time.

6 **MR. HERMAN:** Your Honor, there's one other issue  
7 that's come up. I received an e-mail and a phone call from  
8 attorney Oldfather, who I believe has motions, who is  
9 participating by phone. I was unable to reach Ms. Oldfather,  
10 but Lenny Davis did. There are two issues that she has to  
11 bring to the Court's attention and would like to address the  
12 Court on those issues.

13 **THE COURT:** Okay. Hello.

14 **MS. OLDFATHER:** Judge, can you hear me?

15 **THE COURT:** Yes, I can.

16 **MS. OLDFATHER:** Thank you very much for allowing me  
17 to participate by phone. I'm getting a little feedback, so I  
18 hope I will sound intelligible on that side.

19 **THE COURT:** How is that now?

20 **MS. OLDFATHER:** That's so much better. Thank you,  
21 Judge. To move from the rather more important matters of trial  
22 to the more mundane, one of our motions has to do with  
23 modification of Pretrial Order 18-B. This was discussed  
24 briefly at the last status conference and to my knowledge has  
25 not been fully resolved at this point, but we filed a motion in



1 that regard and I think some of the other plaintiffs' counsel  
2 have chimed in, also.

3 To cut to the chase, Judge, we are asking not  
4 that we get rid of the very efficient electronic method of  
5 transferring information, but that we give the plaintiff the  
6 option of either filing their PPF through Lexis/Nexis, as has  
7 been done, or providing all of the same documents on CD to  
8 Mr. Coronado. There are two reasons for that request, Judge.

9 First of all, the actual physical process of  
10 doing the uploading of lengthy medical records on Lexis/Nexis  
11 is very time-consuming. We have cases where it takes three  
12 hours, and that doesn't include all of the time to break the  
13 medical records down into a two-megabyte packet that  
14 Lexis/Nexis requires. We have right now 50 cases that are all  
15 due the same day in April. If they take an average of two  
16 hours a piece just to upload and to prepare for upload, that is  
17 two and a half weeks of one staff person's time to do the  
18 upload as compared to the fact we can burn them directly onto  
19 the CD. We don't have to break them down into two-megabyte  
20 packets. We don't have to sit there and wait for the broadband  
21 to churn the documents through. We can provide that document  
22 to Mr. Coronado and then Merck, if they want to put that  
23 information centrally so that their five or six firms can  
24 access it, they can certainly do that. Right now it's  
25 plaintiffs' counsel that are bearing the burden of getting that

1 information in a central location solely, really, for the  
2 purpose of multiple defense counsel to be able to access it.

3           The second reason, Your Honor, is because of the  
4 way Lexis/Nexis is working right now -- and we have been  
5 watching this for about three months. We have 55 cases that  
6 came in on a final transfer from the JCML on February 15. They  
7 have all been assigned MDL numbers by the clerk. That happens  
8 within a day, very efficient. 13 of those cases are now live  
9 on Lexis/Nexis. That's only 13 and we are, what, five weeks  
10 past that date. If Ms. Wimberly does her seven-day extension,  
11 that means we have 55 cases to file within seven days, and  
12 literally it just cannot be done. We are being compressed into  
13 a very short period of time to do a very lengthy project, which  
14 we would like to have the option of either doing the upload or  
15 providing it on disk to Merck's counsel.

16           **THE COURT:** Let me hear from Merck.

17           **MR. WITTMANN:** Yes, Your Honor. I'm sympathetic with  
18 Ms. Oldfather, but uploading is time-consuming for us, too. We  
19 spend many, many days every month uploading documents from the  
20 defense side on Lexis/Nexis so that they will be accessible by  
21 not just defense counsel, but plaintiffs' counsel. Frankly, to  
22 furnish us with a CD and trying to keep track of disparate  
23 plaintiffs on CD's or then going to have to put it on  
24 Lexis/Nexis ourselves is a tremendous burden on the defendants.

25           What I would suggest doing is let's go to

1 Lexis/Nexis, to the extent that there are problems with the  
2 document being uploaded, and let's increase the amount they can  
3 take onto Lexis/Nexis and deal with it with Lexis/Nexis. Merck  
4 would be totally opposed to changing the system we have in  
5 place. We think it's working. It's had some fits and starts,  
6 as the Court knows, but by and large it does work. I think  
7 having two systems would be very, very disruptive and very,  
8 very difficult to keep track of.

9 **MR. HERMAN:** Your Honor, I would like to speak to the  
10 issue.

11 **MS. OLDFATHER:** Your Honor --

12 **THE COURT:** Yes. Mr. Herman wants to speak to the  
13 issue.

14 **MR. HERMAN:** First of all, we support the plaintiff  
15 in this. All plaintiffs have had this problem. The  
16 defendants' uploading is purely for their benefit. It doesn't  
17 benefit plaintiffs at all. I'm certain that no plaintiff firm  
18 has got \$700 million to spend on the clerical work and other  
19 work incumbent. Many of us have worked electronically, but  
20 there should be no problem with the provision of the  
21 information on a CD timely to the defendants and then have the  
22 defendants deal with it as they see fit. When we get a profile  
23 sheet, it's different. We are getting Bates numbers. So  
24 that's an easier process for the defendants than it is for the  
25 plaintiffs. There is an economic playing field always in these

1 cases, and we just feel that the economic burden of having to  
2 do it when a firm is faced with 50 or so forms that have to be  
3 filed in a short period of time when they can burn a CD and  
4 send it and get the defendants the information they need seems  
5 an appropriate relief.

6 **THE COURT:** This is what we are going to do. I want  
7 to talk with Lexis/Nexis with you all on the line, so set up a  
8 meeting with Lexis/Nexis and counsel for the plaintiff in these  
9 cases. I'll talk with them and see whether or not they can  
10 come up with some solution to the problem that solves economics  
11 as well as time.

12 **MR. WITTMANN:** I'll get Ms. Oldfather and Mr. Herman  
13 and I'll get a Lexis/Nexis representative to set that up.

14 **THE COURT:** Okay.

15 **MS. OLDFATHER:** Thank you, Your Honor. Our second  
16 motion has to do with an order that was entered by the Court  
17 before we had a chance to respond. Very briefly put,  
18 Your Honor, this involves one of our cases that arose out of  
19 Kentucky. It was remanded by Judge Hood to the state court  
20 before Judge Hood had been made aware of the entry of the PTO.  
21 Merck made a motion to Judge Hood to vacate the remand order,  
22 which he declined to do. Apparently on March 6 at a status  
23 conference -- at which, of course, we were not present -- Merck  
24 must have mentioned this situation because Ms. Wimberly hand  
25 delivered to the Court on March 10 a motion to vacate Judge

1 Hood's remand order. Unfortunately, she did not e-mail it to  
2 me or fax it to me or even tell me this had come up and we got  
3 it by mail on March 15. On March 13 Your Honor entered their  
4 tendered order.

5 We have a very strong objection to this because  
6 we don't believe that Merck could succeed in convincing  
7 Your Honor this Court has jurisdiction to hear the case,  
8 particularly in light of the ruling of the Kentucky judge that  
9 remand is appropriate. I don't want to get into arguing the  
10 merits at this point, but our motion is to set aside the order  
11 that was entered we think prematurely and give us an  
12 opportunity to respond.

13 **MR. WITTMANN:** If I may respond, Your Honor, the  
14 motion was actually sent and uploaded via Lexis/Nexis. The  
15 unfortunate thing is that the Hendershot case was not on  
16 Lexis/Nexis because it had been remanded by the judge to state  
17 court. So counsel is correct she did not get notice of that  
18 filing, and we have no objection to Your Honor considering her  
19 arguments at a later date. We still think Your Honor's order  
20 was proper. If it was not proper, we have another route we can  
21 take with respect to staying that case, but we are amenable  
22 certainly to argument, Your Honor, and giving counsel an  
23 opportunity to be heard.

24 **THE COURT:** I don't need any oral argument, but  
25 what's reasonable for you to write a brief, Ms. Oldfather?

1           **MS. OLDFATHER:** Your Honor, I'm not familiar with  
2 your Local Rules, but I would imagine two weeks will be fine.

3           **THE COURT:** Let's do it in two weeks.

4           **MS. OLDFATHER:** I'm curious about the upload on  
5 Lexis/Nexis because when they are not live there's no way to  
6 upload on Lexis/Nexis. I remain very concerned about the lack  
7 of effort to contact us.

8           **THE COURT:** Ms. Wimberly, do you want to respond to  
9 that?

10          **MR. WITTMANN:** Let Ms. Wimberly deal with that  
11 directly.

12          **MS. WIMBERLY:** I'm the one that handled it. I do  
13 apologize to Ms. Oldfather that she did not receive it. We  
14 have a process whereby we upload, in accordance with  
15 Pretrial Order 8, every filing we make to Lexis/Nexis. We had  
16 a slipup in the system. What happens is if a case is not on  
17 Lexis/Nexis when my assistant goes to upload it, they tell me  
18 that and we mail a copy, which we did on the day that we made  
19 the filing, which was March 8<sup>th</sup> or 10<sup>th</sup>. I don't recall the  
20 exact date. We mailed a copy to Ms. Oldfather at that time.  
21 It was certainly never our intent that they not have an  
22 opportunity to respond. When Mr. Wittmann said it was  
23 uploaded, it was not. The attempt was made. As he indicated  
24 previously, the case was not on Lexis/Nexis. It couldn't be  
25 because it wasn't here.

1           **MS. OLDFATHER:** I'm certain there was no intent to  
2 delay it, giving the judge an opportunity to rule sooner. I  
3 understand that, and I just wanted a clarification.

4           **MS. WIMBERLY:** You're correct, it was not uploaded.  
5 The attempt was made. It was mailed as opposed to uploading on  
6 Lexis/Nexis. That is what we do whenever a case is not on  
7 Lexis/Nexis, we mail it.

8           **THE COURT:** I understand. Anything else?

9           **MR. HERMAN:** Mr. Moll has his issue. I want to  
10 congratulate Dorothy and Phil. Dorothy, Lenny treats me the  
11 same way and I appreciate it.

12           **MR. WITTMANN:** The problem really was, Judge, you  
13 just move too quickly.

14           **THE COURT:** That concludes our status conference.  
15 The next meeting will be on April 27 at 10:00. I have some  
16 motions before me. Mr. Becnel.

17           **MR. BECNEL:** The Court asked that I get with  
18 Mr. Wittmann about getting the Parrott case up. I supplied all  
19 of the information to Mr. Meunier and Mr. Herman, to virtually  
20 everybody on the PLC. Mr. Mark Robinson even had his nurse go  
21 through all of the files. I'm trying to get a case that was  
22 here a long time tried.

23           **THE COURT:** Well, Mr. Becnel, you have mentioned that  
24 several times, but then Mr. Wittmann said that you didn't send  
25 him material, you didn't have any of the forms filled out, they

1 couldn't deal with it, and then he got back to you, but you  
2 still haven't done it.

3 **MR. BECNEL:** That's not correct. That is absolutely  
4 not correct.

5 **MR. WITTMANN:** We don't have all the medicals for  
6 Mr. Parrot, Your Honor, and we have told Mr. Becnel we are  
7 working through setting cases in the MDL and to work with the  
8 plaintiffs' liaison counsel to give us a case if that's what  
9 they want to do. We have gotten cases from the PLC. The  
10 Parrot case is not among the cases they have proposed.

11 **MR. BECNEL:** Mr. Meunier has the records.  
12 Mr. Herman's office has it. Mr. Robinson's office has it.  
13 Everybody has the medical records. I have delivered them to  
14 their office by hand.

15 **MR. WITTMANN:** We have some of the medical records.  
16 We by no means have all the records, Your Honor, on Mr. Parrot.

17 **MR. BECNEL:** Well, I can't get a case to trial if the  
18 Court asks me to get one and Mr. Wittmann won't contact me  
19 because they don't want this case because it's a long-term case  
20 and it's circled where the blood clot is.

21 **MR. WITTMANN:** I have never not talked to Mr. Becnel,  
22 Your Honor.

23 **MR. HERMAN:** We would be happy to have Mr. Becnel's  
24 case tried on June 12, Your Honor.

25 **MR. BECNEL:** I've been trying to get it there,



1 Your Honor.

2 THE COURT: Do you want to try your case on June 12?

3 MR. BECNEL: I don't know if I can right now  
4 because --

5 THE COURT: See, the last time we talked about it you  
6 told me you couldn't try cases in June, July, or August because  
7 you had other MDL proceedings.

8 MR. BECNEL: No, because I have 1,200 depositions.  
9 We are taking five a day, three a day.

10 THE COURT: You're taking all the depositions?

11 MR. BECNEL: Our office is.

12 THE COURT: I don't know how to deal with that,  
13 Mr. Becnel. You tell me you're interested, but then at the  
14 same time I don't have dates from you. I can't get in touch  
15 with you. You have got a date, June 12, if that's --

16 MR. BECNEL: Could I get a date in September?

17 THE COURT: We have trials already.

18 MR. BECNEL: Can you remand my case to another judge  
19 here?

20 THE COURT: Why don't you file your motion and I'll  
21 look at it.

22 MR. BECNEL: Thank you very much.

23 MR. HERMAN: I just want to indicate that whatever  
24 medical records liaison counsel has received, they have been  
25 furnished to the defense. The defense indicates the records

1 aren't complete. I want to assure the Court, also, that the  
2 PSC reviewed what records we had, but based on what we had we  
3 could not, as a PSC, recommend the case go in this batch for  
4 trial. We certainly have no objection to Mr. Becnel trying his  
5 case based on the records that he feels are complete. He ought  
6 to get together with Mr. Wittmann. Maybe the defendants will  
7 try a case on incomplete records with him. I don't know.

8 **THE COURT:** Mr. Becnel, you get with Mr. Wittmann and  
9 anybody from the PSC, Mr. Herman or Mr. Meunier, and we'll see  
10 if we can get a case up for you. You have to give some dates  
11 that you are available and you have to file whatever is  
12 necessary to file.

13 **MR. HERMAN:** I think the matter would move very  
14 swiftly if he met with Mr. Meunier instead of me, Your Honor.

15 **THE COURT:** Okay. Let's do that. Mr. Becnel, meet  
16 with Mr. Meunier and Mr. Wittmann and we'll deal with it.  
17 Anything further on this particular meeting? I'll hear the  
18 motions, then. Thank you very much. Those who are not  
19 interested in the motions may leave.

20 **(END OF STATUS CONFERENCE)**

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CERTIFICATE

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

\_\_\_\_\_  
Toni Doyle Tusa, CCR  
Official Court Reporter