

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

MDL No. 1657
Section: "L"
New Orleans, Louisiana
Thursday, April 12, 2007

TRANSCRIPT OF MONTHLY STATUS CONFERENCE AND MOTION 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

(STATUS CONFERENCE AND MOTIONS)

(THURSDAY, APRIL 12, 2007)

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5 THE COURT: Good morning, ladies and gentlemen. Be
6 seated, please.

7 THE DEPUTY CLERK: MDL No. 1657, in re: Vioxx.

8 THE COURT: Counsel make their appearance for the record.

9 MR. HERMAN: May it please the court, Russ Herman for
10 plaintiffs.

11 MR. WITTMANN: Good morning, your Honor, Phil Wittmann for
12 the defendants.

13 THE COURT: In addition, we have a number of individuals
14 who are monitoring our meeting here today. The courtroom is full.
15 We have in addition, as I said, people on the phone monitoring. I
16 might say at the outset that the monitoring system, I try to
17 accommodate counsel who want to keep up with the goings on by
18 allowing them to monitor it. My difficulty is that if they
19 participate and wish to speak, they're welcome to speak but they
20 need to come to the meetings so that we can have some order. If I
21 have people speaking on the phone and also people speaking in the
22 courtroom, it gets confusing and we lose the record.

23 I make a record of this, I post it on my web site, all of
24 the goings on are recorded, and anyone who is interested can
25 participate by reading it or they can monitor it or, of course, they

1 can appear in open court.

2 I have met previously with liaison counsel and the
3 committees to discuss an agenda today and prepared an agenda for me.
4 I meet monthly with counsel in open court, and we review the process
5 and what has happened in the past month. I have an agenda, I have
6 seven motions this morning, and also various items on the agenda.
7 I'll take the agenda items first and then I will be dealing with the
8 motions. First item on the agenda.

9 MR. WITTMANN: State Court Trial Settings.

10 THE COURT: State Court Trial Settings.

11 MR. WITTMANN: We had one case, the Berwick case set in
12 California Superior Court on April 10th, 2007; that case was
13 voluntarily dismissed by the plaintiffs.

14 We have two cases set in May, the Ledbetter case set in
15 Texas MDL in Houston on May 14th, and the Schramm case is set to be
16 tried in the Philadelphia Court of Common Pleas on May 21st, 2007.
17 And we have three cases set in September, the Donohoo case on
18 September 10th in Madison County, Illinois; the Frederick case on
19 September 17th in Birmingham, Alabama; and the Kozic case on
20 September 17th in Tampa, Florida.

21 In October we have four cases set, the Crandall case,
22 October 1 in Washoe County, Nevada; the Smith case on October 1 in
23 Mingo County, West Virginia; the Zajicek case set October 22nd in
24 Jackson County, Texas; and the Auslander case set on October 29th in
25 Madison County, Illinois.

1 THE COURT: Still as I understand it, the states of Texas,
2 California and New Jersey and the MDL account for the majority of
3 the cases.

4 MR. WITTMANN: That's correct, your Honor.

5 THE COURT: Is that still the case? I know one time we
6 figured it to be something like 97, 98 percent of the cases. I
7 assume it's still in the 90s?

8 MR. WITTMANN: I think that's correct, Judge.

9 MR. HERMAN: May it please the court, the next non-motion
10 issue is at page 3, it's Item No. 4, it's Discovery Directed to
11 Merck, it mainly relates to the privilege issue. Your Honor has
12 indicated that Dr. Rice will perform as special master.

13 Mr. Wittmann and I will exchange ideas, we're going to meet on
14 Monday and present something to the court by week's end, and will
15 also have jointly some recommendations to the court for local
16 counsel.

17 THE COURT: Fine. As I mentioned to counsel, I intend to
18 appoint Dr. Paul Rice as special master. Professor Rice is a well
19 qualified and a widely recognized scholar in the field, and I look
20 forward to working with him on this matter. I have asked counsel to
21 give me a proposed order setting forth their views as to the scope
22 of Professor Rice's duties, responsibilities. Also I would like
23 them to confer and give me some names of a local attorney who can
24 serve as a counsel to Professor Rice, someone who has facilities,
25 copying facilities, conference room facilities, other logistical

1 facilities that might be of assistance to Professor Rice so that we
2 can move this matter.

3 I know Professor Rice is enthusiastically willing to get
4 into this and to deal with it, and hopefully as quickly as he can.
5 Next item.

6 MR. HERMAN: May it please the court, the next non-motion
7 on the agenda is at page 4, VII, Plaintiff Profile Form and Merck
8 Profile Form. Merck has submitted to us last evening suggested
9 revision. We will work on that and meet with defense counsel in
10 hopes of presenting to the court a mutually agreeable suggested
11 order.

12 In terms of the Oldfather law firm issue, we also believe
13 we've come to an agreement on how to resolve that matter and will
14 have to put it in writing and get it to the court along with the
15 suggestions we previously discussed.

16 MR. WITTMANN: Yes, I think we can do that, Judge. By
17 limiting the scope of the specific authorizations to the extent of
18 the HIPAA waiver which was provided in Pretrial Order No. 18(c).

19 MR. HERMAN: And without a waiver or modification of 18(c)
20 as to all other matters.

21 MR. WITTMANN: That's correct.

22 THE COURT: These are important issues. In matters of
23 this sort where we have 50 or so thousand cases, it doesn't make
24 sense to have the traditional interrogatories going back and forth.
25 To shortcut that we have come up with the concept of profile forms

1 where the plaintiffs give material initially and then the defendants
2 also give material. We get all of the documentation as quickly as
3 we can, at the same time preserve the rights and privacy and other
4 interests that the plaintiffs may have.

5 So this is a short circuit, but it's an important short
6 circuit to make these matters at the MDL level workable.

7 State and Federal Coordination - State Liaison Committee.
8 Anything?

9 MR. WITKIN: Good morning, your Honor. Justin Witkin on
10 behalf of the State Liaison Committee. Dawn Barrios is absent. We
11 have, as we do every month, updated the court's remand list. If I
12 can approach.

13 THE COURT: Yes.

14 MR. WITKIN: Just a few brief matters, your Honor, if I
15 can bring to the court's attention this morning. We've had several
16 calls, as we do every week, and one of the matters that was brought
17 to our attention was a state litigant who had 200 plaintiff profile
18 forms that were due on the same date, and we just wanted to point
19 out that we were able to, with Merck's assistance, they were able to
20 work out an accommodation for this lawyer. And we appreciate Merck
21 working with this lawyer. And just for the court and for those
22 listening, anyone who may be in that situation, Merck was very
23 accommodating.

24 Secondly, we had a question from a litigant as to whether
25 or not a PPF had to be filed on behalf of a derivative claimant, and

1 as I understand, the answer is no. So there is no PPF due for a
2 derivative claimant.

3 THE COURT: Okay.

4 MR. WITKIN: Third, the question was raised for someone
5 whose got cases that are going to be remanded to the consolidated
6 proceedings in California, would the PPF that they filed here be
7 sufficient once the case as remanded. As I understand the answer
8 from Merck at this time, it's not clear whether or not the PPF file
9 here will be sufficient in California, if the case be remanded to
10 California.

11 THE COURT: Why is that? What we're trying to do is just
12 do this one time. Why would we have to do it twice?

13 MR. MARVIN: Your Honor, as you may recall, when we put
14 together the plaintiff profile form for the MDL it was more of a
15 bare bones order that was put in place with the anticipation that
16 there would be supplementation sometime later. With some of the
17 states there are forms there that do require more information, and
18 it's easier to get that information through a plaintiff profile form
19 than to be serving subpoenas and document requests and other
20 information. So it sort of depends on the state.

21 If the state's form is the same as the MDL, then obviously
22 we will take the MDL form and no further requirement. But if there
23 are additional discovery procedures, then we need to consider the
24 best way to handle that.

25 THE COURT: All right. I understand.

1 MR. WITKIN: The next question we had that was raised was
2 whether a person with a pending motion to remand has to file their
3 plaintiff profile form. We understand that the court's previously
4 instructed that that is the case. But again, the question was
5 raised.

6 THE COURT: That's important. Because pending the motion
7 to remand, I think that hopefully the plaintiffs will get some
8 benefit out of remaining here. I am just not keeping them here to
9 waste their time. I hope by their remaining, even though they want
10 to get back to where they came from, I think that they have and
11 hopefully will receive some benefit from being here.

12 MR. WITKIN: And finally, the No. 1 question that we get,
13 at least a couple of calls on each week, is how can I have my remand
14 motion heard, and of course the court's addressed this many times,
15 but again just to bring it to the court's attention. That's all.
16 Thank you.

17 THE COURT: I appreciate that. What we have tried to do
18 over the period is to recognize that a lot of cases are in state
19 court and they have not been removed to this court, so instead of
20 having the states have to do the same thing that we are doing in the
21 MDL, I've tried to appoint a State Liaison Committee. They've done
22 very well for their brothers and sisters in the states to keep them
23 up with what's going on in the MDL.

24 I've opened the discovery process to the states and they
25 know what's going on, they can participate in the discovery, they

1 can utilize the material that is discovered in the MDL to their
2 benefit in the states, and I get input each month at the meeting
3 from the states; and I try to work with them so that even though
4 they're not here, they are getting some benefit from the MDL
5 process. And a vital part of that is the State Liaison Committee,
6 and I do appreciate their work on it.

7 Next item -- I'm sorry, you wanted to speak.

8 MS. SHAHANI: Anita Shahani for Kathy Snapka. The court
9 will recall her request from the last status conference that the
10 court consider those cases that were removed to federal court and
11 then remanded and then removed again as a special subset for remand.

12 Since the time of the last status conference we have been
13 in contact with Mr. Wittmann who assured us that he will look into
14 it. We don't know how many other cases there are in this category,
15 but we would, once again, like to reurge the court to consider the
16 Nettles cases and other multi-removal cases like it as a special
17 subset for remand.

18 THE COURT: Do you have a list of those types of cases?

19 MR. WITTMANN: Your Honor, I spoke to Ms. Snapka several
20 times this week. The only case that I know of right now is the
21 Nettles case. I don't think there are any others that I am aware of
22 anyway that are in that category of multiple removals.

23 THE COURT: All right. I'll deal with that case.

24 MS. SHAHANI: Thank you, your Honor.

25 MR. WITTMANN: And I am talking to Ms. Snapka on a regular

1 basis.

2 THE COURT: Okay.

3 MR. BIRCHFIELD: Your Honor, I do know that there are
4 additional cases that have multiple removals. If I understand
5 correctly, the list that Dawn Barrios would reflect that; but we
6 will be glad to check into that and identify those.

7 THE COURT: Check into that and give me a list of them.

8 MR. BIRCHFIELD: Yes, your Honor.

9 MR. BEISNER: Your Honor, if I may speak briefly. I just
10 wanted to note --

11 THE COURT: State your name for the record.

12 MR. BEISNER: John Beisner for Merck. The Nettles case,
13 the situation there, and I know you don't want to hear argument on
14 this now, that's not my intent, but just to explain in a nutshell,
15 is a situation where physicians and other third parties have been
16 named by defendants, ultimately were either dismissed or not pursued
17 under Tedford, a second removal has occurred; and so I am not
18 certain that in the universe here those are deserving of any special
19 attention by the court, and because of the fact that this is a
20 situation where parties were named to avoid removal who disappeared
21 from the case and, therefore, federal jurisdiction exists.

22 I'd note that in another case, Davis v. Merck, which is
23 reported at 357 F. Sup. 2d 974, Judge Clark in the Eastern District
24 of Texas has dealt with one of these cases and specifically found
25 jurisdiction existed because the parties that supposed destroy

1 diversity disappeared and probably shouldn't have been named in the
2 first place. So I would just note that in the galaxy of those cases
3 that are out there. I'm not sure these warrant any special
4 attention.

5 THE COURT: What we need is a list of those and then I
6 will give everybody an opportunity to speak on it.

7 MR. HERMAN: In the liaison counsel, in the universe of
8 non-argument, Mr. Beisner has advised and noted the court. I am
9 certainly certain that Ms. Snapka and others would have an other
10 "non-argument" as such.

11 MR. BEISNER: It was two minutes and I didn't argue
12 anything about any Greek philosophers.

13 MR. HERMAN: That's all right, we appreciate that.

14 MS. SHAHANI: There is another party besides Merck in the
15 case, but this is not the time for argument.

16 THE COURT: Sure. Okay. And I'll give you an opportunity
17 when I get the universe or the small numbers, whichever it is.

18 MR. WITTMANN: I'm prepared to argue another part of it,
19 your Honor, but I won't.

20 THE COURT: Sure. You'll be the neutral party. What's
21 the next item? Pro Se Claimants.

22 MR. HERMAN: Pro Se Claimants, your Honor. We have a
23 request and we will be submitting an order dealing with any
24 information Mr. Harrison gets from the depository as a non-waiver of
25 privilege and operative under the clawback provision.

1 THE COURT: Okay. IMS data.

2 MR. HERMAN: No issue as to that, your Honor.

3 MR. WITTMANN: I think the next thing, Judge, on the
4 non-motion list is the Tolling Agreements.

5 THE COURT: Tolling Agreements, okay.

6 MR. WITTMANN: And the deadline for submission of claims
7 under the Tolling Agreement was April 9th and that deadline has
8 passed. There were, oh, over 1,000 forms filed in the last few days
9 in connection with the tolling agreement. But that now is past us.

10 THE COURT: How many tolling agreements do we have now?
11 Tolling agreements are cases where prescription is tolled for a
12 period of time.

13 MR. WITTMANN: We had about 14,180, but I think that's
14 gone up by a little bit over 1,000, so we probably got around 15,000
15 all total.

16 THE COURT: When those cases have to be filed --

17 MR. WITTMANN: It's actually closer to -- yeah, I guess
18 that's about right, 14,700 something. 15,000 is close enough.

19 THE COURT: When the cases need to be filed, give me some
20 heads up so I can talk to the clerk's office and see how we can
21 stagger them so they are not confronted with 15,000 cases in one day
22 having to file those.

23 MR. WITTMANN: We are going to talk with Mr. Herman about
24 that in the form of an order later on.

25 THE COURT: All right.

1 MR. HERMAN: Your Honor, I am not going to comment on that
2 issue. On the statistics, No. 8 -- I'm sorry, No. 13, page 7 would
3 be next on the report, and Mr. Birchfield, who is coleading the
4 case, is liaisioning with the states of California and New Jersey on
5 the cross notice issue and he will be prepared to make a report when
6 next we meet.

7 THE COURT: I understand we had some difficulty at one
8 time with Texas, but that's worked itself out and now we're dealing
9 with --

10 MR. HERMAN: Yes, Ms. Sanford for the PSC was able to work
11 that out and mediate it successfully.

12 THE COURT: Now it's the same issue with New Jersey and
13 Texas?

14 MR. HERMAN: Correct, your Honor. With respect to No. 14,
15 Vioxx Suit statistics. I believe either Mr. Wittmann or Mr. Marvin
16 has that information for the record.

17 MR. WITTMANN: We have approximately 27,200 suits pending,
18 including about 45,700 plaintiffs. Of that group about 8,300 cases
19 are pending in the MDL with approximately 23,700 plaintiffs.

20 THE COURT: In addition to the 8,000 there is, what,
21 15,000 tollings?

22 MR. WITTMANN: 15,000, roughly, tollings, yes, that's
23 correct.

24 MR. HERMAN: The next issue is No. 15 at page 8, your
25 Honor. And Mr. Ranier for the PSC is still in discussions about the

1 depositions, 30(b)(6) depositions that have been ordered and we're
2 attempting to work out dates and parameters. And we should be able
3 to work that out before the next status conference. If we're not,
4 then we will present on behalf of PSC our subpoenas, et cetera.

5 THE COURT: Okay. I made some rulings on the Merck
6 insurance issues and we are following that up with depositions as a
7 result of the rulings, depositions for both sides.

8 Further Proceedings is the next item.

9 MR. WITTMANN: Your Honor, there are no further
10 proceedings at this point actually scheduled in the MDL, no trial
11 proceedings.

12 THE COURT: All right.

13 MR. WITTMANN: And the rest of the items on the agenda
14 appear to me to be motion related.

15 THE COURT: One issue is with the -- wait, that's a motion
16 too, okay.

17 MR. WITTMANN: And the next status conference your Honor
18 has selected is May 31st?

19 THE COURT: May 31st. I am told that I have a small
20 matter in the early morning, so I will have the meeting with counsel
21 at 9:00 and then we will start this meeting at 9:30.

22 With regard to the motions, I have seven motions before
23 me. I've had an opportunity to receive thorough briefing from the
24 parties on the motions. Some of them I can take on briefs.

25 The first motion is the PSC's Motion to Amend Personal

1 Injury Master Complaint. The motion seeks to add a class
2 representative from the state of Iowa. In the original master
3 complaint it was intentionally left blank, a class representative
4 for Iowa, because the MDL at that time didn't include class actions
5 from this state. This does come late, but I think the reason that
6 it comes late is excusable. I will grant that motion.

7 Proposed Appointment of Professor Rice. I've given notice
8 to the parties, they've had an opportunity to comment on Professor
9 Rice, both sides recognize his qualifications and look forward to
10 working with him on these difficult matters, so I am intending to
11 appoint Professor Rice. I will need some input from the parties
12 regarding the motion appointing him, or the order appointing him, I
13 should say. So those two motions are granted.

14 The third motion, the PSC's Motion for Protective Order on
15 Depositions. The defendants would like to take some de bene esse
16 depositions, some depositions to be used at the trials, both in the
17 MDL as well as the various states, of a number of their witnesses.
18 They have a number of states that are coming on stream with trials
19 now, and it's becoming somewhat difficult or problematic to have the
20 same witnesses appearing, sometimes on the same day, across the
21 country. So they have reason to feel that it would be helpful to
22 them if they took some depositions and preserved those depositions
23 for use at trial.

24 The plaintiffs have no problem with taking the
25 depositions, but they feel that they may be untimely at this time

1 because the witnesses, they would anticipate, would be
2 cross-examined with various documents that are now in the privileged
3 set of documents which the defendants have not turned over or agreed
4 to turn over to the plaintiffs. The plaintiffs would like to delay
5 the matter until they have at least had an opportunity to either see
6 those documents or be told that those documents are clearly
7 privileged. So they seek to delay the deposition.

8 I think that the defendants have the superior interest in
9 going forward with the depositions. I do think as a realistic
10 matter the states are coming on board and having a number of trials
11 that present significant logistical problems, but I am not able
12 to fully evaluate the issue. My preference would be that the
13 documents be produced first. If this can be done in the reasonably
14 foreseeable future, then I would hold the depositions in abeyance.
15 If it takes a longer time, then we will go forward with the
16 depositions with the understanding that they may well have to be
17 retaken or certainly supplemented by any documents that are
18 released.

19 So to get a better handle on it, I am going to grant the
20 motion for at least a month and visit the matter again. So I am
21 going to grant the plaintiffs' motion for protective order until
22 next month, that'll give Dr. Rice an opportunity to at least begin
23 looking at the documents and perhaps give me some view as to when
24 some of these documents can be ruled on. So that motion is granted
25 for a month.

1 PSC's Request to Certify the Martin Report for Appeal.
2 The court ruled on this matter. The PSC wishes to have the court's
3 ruling certified. I am going to deny that ruling. I think that
4 that is not appropriate for me to certify.

5 Jumping to No. 6, attorney Michael Hingle's Motion to
6 Withdraw. I am going to deny that motion, but I instruct the
7 defendant to file a Rule to Show Cause why these cases should not be
8 dismissed, set it for 30 days hence, give Mr. Hingle an opportunity
9 to appear on that date and show why the matter should not be
10 dismissed.

11 MR. HERMAN: May it please the court?

12 THE COURT: Yes.

13 MR. HERMAN: I'd appreciate it if defense counsel would
14 e-mail me that order as soon as they present it so that I can notify
15 Mr. Hingle.

16 THE COURT: Let's do that. And also let's notify
17 Mr. Hingle by certified mail but also serve liaison counsel with it.

18 MR. WITTMANN: We will serve both of them, Judge.

19 THE COURT: So the two motions that I haven't ruled on is
20 the motion for grab back or to Compel Return of Work-Product and
21 also Merck's motion on the Rule to Show Cause to dismiss the various
22 cases. I am going to listen to Merck's last motion and I will rule
23 on it dismissing the cases, but we'll go one case at a time.

24 But before I do that, let me hear some brief argument on
25 the Motion to Compel Return of Work-Product.

1 MR. HERMAN: Mr. Levine for the PSC will argue plaintiffs'
2 position.

3 THE COURT: Okay.

4 MR. LEVIN: Arnold Levine. Your Honor, you were one of
5 the first to know about this issue; in fact, you knew about this
6 issue before any of us knew about the issue because you were called
7 during the deposition. There is no question that the document
8 that's in question is work product. No question that there is an
9 attorney-client privilege there. And there is no question that it
10 was an inadvertent disclosure to an expert, two experts, and a
11 massive amount of information.

12 THE COURT: Let's at least state the facts of it. The
13 plaintiffs' committee, one of the plaintiffs' committee is the Law
14 and Science Committee, very talented individuals who meet
15 periodically and review the science aspect of this particular case.
16 They came together, met, talked about various things, made some
17 comments back and forth. Their comments were recorded or noted and
18 it was memorialized in the form of a memo, a memorandum of the
19 plaintiffs' committee.

20 The memorandum of the plaintiffs' committee was internal
21 material, internal thoughts, internal suggestions back and forth
22 thinking out loud about strategy and other matters. It also
23 contained various questions that should be posed to experts and the
24 like.

25 This material came into the hands of a third person

1 provider that the plaintiffs have been utilizing to organize, help
2 select, help designate, help contact various experts. The expert,
3 one of the experts for the plaintiffs, several of the experts for
4 the plaintiffs were selected and this internal memo, as well as a
5 lot of other material, was given to one or more of the plaintiffs'
6 experts.

7 Several of the experts indicated that they had reviewed
8 the material, and one of the things that they reviewed was this
9 detailed memorandum, multipaged memorandum. And this material, they
10 indicated, was one of the things that they looked at or that was
11 provided to them in advance of their giving their testimony. So
12 they indicated that they had, that this was one of the items, and
13 the defendants asked, as they have a right to ask under the Federal
14 Rules, for copies of all of the items that were given to the expert.

15 These items, including the internal memo, were given to
16 the defendant by this third party institution or organization which
17 was serving as an intermediary between plaintiffs and the experts.
18 And the issue came up during the deposition of the expert when he
19 was asked and questioned on material that he had reviewed in
20 formulating his opinion, and the issue there was whether or not this
21 was given intentionally, inadvertently; and if it was given
22 inadvertently, should it be gotten back from the defendants or not.
23 And that's really what we're talking about.

24 MR. LEVIN: Except, your Honor, I respectfully disagree
25 with the court's statement of the facts.

1 THE COURT: Okay.

2 MR. LEVIN: The experts obtained this particular document
3 but they didn't utilize it, they have no recollection of it, it was
4 a piece of paper that they discarded because it was of no moment to
5 them in determining the report that they were about to write. It
6 was like a pile of papers comes in, and you say, well, this is
7 nothing and you push it aside. And the experts have so testified
8 either by affidavit or by deposition.

9 THE COURT: Right. Well, that's the way I came to the
10 matter because it was presented to me in the form that I just
11 mentioned. And I asked the attorney to first ask the expert whether
12 or not he had utilized it. He said that he had not utilized it, so,
13 therefore, I prevented them from using that material on this
14 particular expert going into it because the expert didn't utilize
15 it, hadn't even seen it; or if they had seen it, it was just in
16 passing. The issue really at this point is whether or not this memo
17 should be gotten back.

18 MR. LEVIN: Yes, sir. And this occurred in connection
19 with a plaintiffs' attorney in Texas from the Abraham Watkins firm,
20 David Matthews, who is coordinated with the PSC, but the experts
21 that it was disclosed to were his own experts. And this was brought
22 before Judge Wilson in Texas, and Judge Wilson cut the baby in half.
23 Judge Wilson said it's work product, you can't use it, don't use
24 it -- I'm paraphrasing his opinion -- but you don't have to give it
25 back.

1 We're here, your Honor, to ask that not only the
2 defendants not be capable of using it -- first of all, the Texas
3 attorneys are coordinated with the PSC, they will be cross notice
4 depositions when they're used -- but that they also have to give the
5 document back for the following reason: There's already been one
6 inadvertent disclosure. If the document stays in the defendant's
7 hands and they can't use it but they have the document, there is no
8 purpose for them having it; and we run the risk of another
9 inadvertent disclosure, and it can happen very easily because the
10 deposition takers are not the lawyers that are in this courtroom
11 right now.

12 These depositions are being taken for and to be utilized
13 by lawyers throughout the country who are in the MDL or coordinated
14 with the plaintiffs. So very easily a defense counsel unfamiliar
15 with the order or having forgotten the order and with no intention
16 to violate the order might use that document in a case with a
17 plaintiffs' attorney who is one of thousands of plaintiffs attorneys
18 that doesn't know about the order, doesn't know about the initial
19 inadvertent disclosure, and there it goes on the record again.

20 If in accordance with the federal rules, the document has
21 to be returned, that will not happen, your Honor. And that's
22 basically our position.

23 Now, you know, there is a split of authority on whether or
24 not documents such as this can even be obtained by the defendant
25 even if the expert utilizes it, but we don't have to go that far, we

1 have Fifth Circuit jurisprudence here. And that Fifth Circuit case,
2 sir, is set forth beginning at page 12 of our -- 11 of our initial
3 brief. And it's the Alldread decision. It talks about
4 reasonableness or precautions taken. We have Mr. Matthews'
5 affidavit that he took all precautions and somehow it went from his
6 file to an expert service to two experts. I would imagine Judge
7 Wilson has already looked at that issue because he had Matthews
8 before him and has come down and decided that we meet the test of
9 (1).

10 The amount of time to remedy the error is No. 2. Well, we
11 brought -- the first we knew about this was at the Farquhar
12 deposition, and we brought it to the court's attention immediately.
13 So that's been decided.

14 The scope of discovery or the process in question, there
15 was five CD's of material, it's not like just one page went there,
16 and they are experts that don't even remember seeing it, although
17 they obviously had it, they certainly didn't use it. So we met the
18 test of the third prong.

19 The fourth, the extent of disclosure. Again, they didn't
20 use it.

21 And the last is the overriding issue of fairness. How
22 fair is it in this massive amount of paper where one document goes
23 through in an MDL involving 60,000 cases for the defendants to keep
24 it, especially when the federal rules say give it back. That's
25 basically the plaintiffs' position, your Honor. Do you have any

1 questions?

2 THE COURT: One thing. Let me get your view on this. The
3 issue really is depending upon the type witness. There is no
4 question that if matters are given inadvertently, and I have to
5 assume that this is inadvertent, it doesn't make any sense to me it
6 was intentional. So it's inadvertent, clumsy, maybe negligent, but
7 inadvertent, not from the standpoint of the plaintiffs but from the
8 standpoint of the third party provider. So it's inadvertent.

9 Clearly if it's given to a regular witness, then the
10 clawback is clear. The thing that makes it a little fuzzy here is
11 that the witness is an expert witness, and if the witness sees it,
12 if it's given to the witness, whether the witness uses it or doesn't
13 use it it's available to the witness, and the issue really is with
14 regard to experts does such disclosure result in a waiver of
15 disclosure or clawback. The Federal Rules allows the other side to
16 look at and review and question the expert's testing his or her
17 credibility on material that was available to them, whether or not
18 they used it. The issue is whether that supersedes the question of
19 inadvertence in a clawback situation.

20 There's some cases that take the position that when an
21 expert is presented with material, the other side ought to be able
22 to examine the material and question the witness regarding the
23 material. Do you see any difference with regard to experts as
24 opposed to the regular witness?

25 MR. LEVIN: Well, it's a fact intensive question whether

1 it's an expert or regular witness. And the Fifth Circuit says there
2 is no per se rule, it's fact intensive. There are cases that say
3 that you don't even have to, an expert doesn't even have to disclose
4 what counsel gives them.

5 But assuming that an expert does for the purpose of your
6 Honor's question, you've got to look at the facts of this case.
7 These experts didn't utilize this information. They formed no
8 judgment as a result of it. It made no mental impression on them
9 with regard to their writing of their reports. When Dr. Farquhar
10 was posed the question, he never saw it because he wasn't one of
11 those two experts. The only two experts that had it were
12 Dr. Plunkett and Moye, that's it. And those doctors are in the case
13 before Judge Wilson in Texas, and Judge Wilson looked at the
14 record -- and you're not bound by Judge Wilson, there is a concept
15 of federalism in our jurisprudence -- but it was a very fact
16 intensive inquiry that he made and he came down on the side that
17 this was truly work product and not to be used. It's truly governed
18 by the attorney-client privilege and not to be used.

19 The only thing that he said was you don't have to give it
20 back. Now, I don't know what argument was made in front of him with
21 regard to "you don't have to give it back" and I am not a Texas
22 lawyer, obviously from my accent, your Honor, but certainly the
23 federal rules provide in a circumstance like that you do have to
24 give them back. And I would imagine you find a Law Review article
25 that say why you can't give them back. And the why you can't give

1 them back is so that it's not used again, even if it's inadvertent,
2 even if the attorney doesn't intend to do something wrong, even if
3 the plaintiff doesn't even know that it's work-product and
4 attorney-client privilege from the PSC, that's the difference.

5 THE COURT: Let me hear from the other side and I will
6 give you an opportunity to rebut that.

7 MR. BEISNER: Your Honor, I think you put your finger on
8 the real problem here, and that is that even though there is a lot
9 of discussion here about inadvertent production, the key issue here
10 is under Rule 26 and the provision on what is provided to an expert.
11 Rule 26 requires that the other side in a case be allowed access to
12 all data or other information considered by the witness in forming
13 his opinion. And the advisory committee note to the 1993 amendments
14 says, and I quote, "Given this obligation of disclosure, litigant
15 should no longer be able to argue that materials furnished to their
16 experts to be used in forming their opinions, whether or not
17 ultimately relied upon by the expert, are privileged or otherwise
18 protected from disclosure when such persons are testifying or being
19 deposed."

20 THE COURT: And that's in the Pioneer case, 238 F. 3d
21 1370, as I remember.

22 MR. BEISNER: Yes. And the point, your Honor, is this, is
23 to avoid this notion of you give the expert a bunch of documents and
24 then they can say, well, some of these I didn't rely upon or I
25 didn't use in any way, to avoid making a full disclosure of what

1 they were given access to to the other side. So I think the
2 inadvertent disclosure analysis here really is misplaced, but it's
3 particularly misplaced because of the facts here.

4 When this issue first came to you, as was noted earlier,
5 with witness Farquhar, you had a situation where the witness said I
6 didn't see it. Okay, that's fine. That's not what we have here
7 now. Dr. Moye's expert report lists the items that they reviewed,
8 and the very first item on that list is this document. He's
9 testified twice that he looked at every single document in that
10 list, and so to say that this was nowhere in the analysis or he
11 doesn't remember, whatever, his expert report says it was part of
12 what he looked at in forming his opinions.

13 THE COURT: Let's assume that it's privileged and let's
14 assume that it was inadvertently given. Does that change anything
15 for you?

16 MR. BEISNER: I don't think that's relevant here, your
17 Honor, because I don't think that's pertinent under Rule 26.

18 THE COURT: Even if it's privileged and even if it's
19 inadvertent you feel that he used it, relied on it, and therefore,
20 it's discoverable.

21 MR. BEISNER: And even if he didn't rely on it, as the
22 Advisory Committee note says and the Pioneer court noted, that's
23 besides the point, he had access to it, he said he read it, he
24 looked at the document.

25 But what's even more important, your Honor, is that what

1 the document is is talking about what the experts, what the intent
2 was to have the experts saying, including Dr. Moye. And if you
3 compare the document to what's in his expert report, some of the
4 same language is there. And I think that's what makes a big
5 difference between this case and the ones split of authority that
6 plaintiffs cite, the mySimon case where the court said that the
7 document didn't have to be returned. In that case an expert was
8 given a document inadvertently that had nothing to do with that
9 expert's testimony.

10 But the decision, if you read the part the plaintiffs
11 don't quote, it says that the situation, "the documents
12 inadvertently provided to the expert witness in that case had
13 nothing to do with the subject matter of her testimony. "If the
14 documents in question had laid out mySimon's counsel's theories on
15 damages issues," which is what that expert in that case was dealing
16 with, "or had contained factual information that counsel had
17 gathered from witnesses on the issue of damages, the court would
18 have little difficulty concluding that plaintiff would be entitled
19 to see the documents for the purpose of cross-examining the expert."

20 That's our case. The document does address what they
21 wanted Dr. Moye to be saying and he saw. And so he may say I don't
22 remember, I don't know, but we have a right to have access to that
23 document. And we would argue further the right to cross-examine him
24 about that, your Honor, but that's not on the docket for today.

25 THE COURT: Okay. Any response?

1 MR. LEVIN: Yes. Mr. Beisner is now an expert on
2 Dr. Moye's state of mind. We have the best evidence of Dr. Moye's
3 state of mind, and most of us were born and all of us were not born
4 yesterday.

5 Dr. Moye was subject to cross-examination and Dr. Moye
6 testified he had no recollection of the document. It was one of a
7 two page document, I believe, in five CD's, and it was one of these
8 documents that you just cast aside and it formed no part of his
9 mental process in writing the report.

10 You know, it had the word "signal" in it, that's what has
11 upset them. And signal is a very good English word, and attorneys
12 use it and doctors use it. And if it said broken bone, attorneys
13 use that word and doctors use that word. That in itself is not
14 enough to overcome the fact that everybody, at least everybody
15 should realize this was inadvertent and it wasn't core work product,
16 even though that's not necessary I believe in the Fifth Circuit.
17 And it's totally an unfair advantage for the defendant to have that
18 document now.

19 You know, as reminded, as I said, these were not even PSC
20 experts that came up with the document. I mean, something like this
21 just putting it in a practical sense, your Honor, we're being
22 charged with coordinating with state and federal lawyers throughout
23 the country. Now the MDL is a federal process and of late in the
24 last five, six, seven years there has been a lot of coordination
25 with state attorneys, and that's to the benefit of the dockets in

1 both state and federal courts. And that's to be encouraged.

2 If a state attorney who is coordinated with the PSC
3 inadvertently gives a flimsy piece of work product to one of the
4 state attorney's experts, that's going to have a chilling effect on
5 how the PSC deals with all of the state attorneys. And that's
6 important not only for the court, for the plaintiffs, but that's
7 something that the defendants want from the get go in the MDL is for
8 the MDL court to wrap its hands around the state cases so that there
9 is no duplication of discovery, there is no duplication of experts.

10 And what we have is, we don't have five law firms over
11 there sitting there together. We have a PSC and 1,000 lawyers
12 throughout the country that we are giving work product to, and if
13 it's inadvertently disclosed, that cooperation is just going to
14 vanish and not exist.

15 THE COURT: Okay. I see the issue as a significant one,
16 and I do want to take what counsel has mentioned from both sides and
17 think about it more and look at the material again.

18 As I said, the issue in this particular case as I see it
19 is whether the work product privilege is, in fact, waived by
20 disclosure of documents to a retained expert. The federal courts,
21 of course, have been divided at least before the 1993 amendments to
22 Rule 26. There is some agreement or seems to be some agreement that
23 most decisions hold that at least the intentional disclosure of
24 opinion work-product to the testifying expert waives the work
25 product privilege. The issue here is a little more complex, it's an

1 inadvertent disclosure. Whether that waives the privilege or
2 whether the Rule 26, the disclosure requirements trump the
3 privilege, so to speak.

4 Further, the issue is whether in the present context, the
5 MDL context, the coordination context, whether that issue should be
6 scrutinized with a little more care. But I do understand the issue,
7 and I'll take the briefs again and look at them again and look at
8 the material; and I will be coming out with an opinion on it
9 hopefully that assist counsel in the future in dealing with these
10 issues.

11 The final motion that I have is the motion, Merck's motion
12 to show cause, which is set for today, why some cases should not be
13 dismissed for failure to file the appropriate forms, notwithstanding
14 notice to the parties. I'll hear from counsel at this time.

15 MR. WITTMANN: Yes, your Honor. We originally moved to
16 dismiss 25 plaintiff cases, and we've either withdrawn that rule
17 without prejudice or we've entered into stipulations of dismissal
18 without prejudice to all but 10 cases that was subject to our
19 original rule.

20 In three of those cases, despite notice, plaintiffs didn't
21 file any opposition or submit a related plaintiff profile form, and
22 those cases are the case of Steele, Matthews Steele on behalf of
23 Betty Steele, which is Docket No. 2:06-CV-03070. And the first
24 deficiency notice was sent September 12th, 2006, that's Exhibit F;
25 the second deficiency notice was sent December 21st, 2006, Exhibit

1 EE attached to our motion. And a certified receipt returned on
2 March 26th, 2007. And we've heard nothing from that plaintiff at
3 all, we move to dismiss the Steele complaint.

4 THE COURT: Anybody here for the case? I'll dismiss that
5 case, and I'll explain my reasons after I'm dealing with all of
6 them. Case dismissed.

7 MR. DAVIS: Your Honor, just so it's clear, the PSC
8 communicated with Jason McCoy, counsel for Matthews Steele on March
9 25, 2007. We also had discussions on March 28th in an attempt to
10 advise plaintiffs counsel.

11 THE COURT: Okay. All right. And for the record, I'll
12 note that the Plaintiffs Committee objects to these matters being
13 dismissed, and certainly objects to their being dismissed with
14 prejudice. I'll overrule that objection and dismiss it with
15 prejudice. Next item.

16 MR. WITTMANN: Second case is the case of Ronald Goodman
17 v. Merck, Docket No. 2:06-CV-00858. The first deficiency notice was
18 September 12th, 2006, Exhibit N; the second deficiency notice was
19 sent December 21st, 2006, Exhibit MM. Certified receipt was
20 returned March 26th, 2007. There has been no response, we would ask
21 dismissal with prejudice on the Goodman case.

22 THE COURT: Anything from plaintiff counsel?

23 MR. DAVIS: Yes, your Honor. On March 28th, Plaintiff
24 Liaison Counsel communicated with counsel for the plaintiff and
25 advised them regarding this motion and requested that they do

1 something in response. Again the PSC opposes.

2 THE COURT: All right. Overrule the objection and dismiss
3 with prejudice the Ronald Goodman case.

4 MR. WITTMANN: The next case, your Honor, is the case of
5 Esma Destinvil, in the case of Destinvil v. Merck, Docket No.
6 2:05-CV-2003. First deficiency notice was September 12th, 2006,
7 that's Exhibit Q; the next deficiency notice was sent on December
8 21st, 2006, which is Exhibit PP. And that was certified return
9 receipt and received March 26, 2007.

10 Services of the order for deadline for the Rule to Show
11 Cause of the hearing date was posted on Lexis/Nexis File & Serve and
12 also sent by United States mail via certified mail, and we've
13 received no response.

14 MR. DAVIS: Your Honor, on March 25, Plaintiffs Liaison
15 Counsel communicated by e-mail with counsel for the plaintiff and
16 advised them also. A telephone call was made on March 28th and left
17 a message. Again the PSC opposes the dismissal.

18 THE COURT: Overrule the objection and dismiss the Esma
19 Destinvil case with prejudice.

20 MR. WITTMANN: Your Honor, we then have seven cases in
21 which the plaintiffs are represented by the law offices of
22 Mr. Lawrence Biondi. Those cases are the case of Angelos Psomos,
23 which is Docket No. 2:05-CV-03876; the case of Peter Stagias v.
24 Merck, Docket No. 05-3875; the case of Dionysios Patrakas, Docket
25 No. 05-3870, versus Merck; the case of Vasilios Patrakas v. Merck,

1 05-3869; and the case of Effie Patrakas v. Merck, Docket No.
2 05-3871; the case of Fotis Miltalios, Docket No. 05-03878; and the
3 case of Petros Ikonomidis, Docket No. 05-03884.

4 I really should have had Mr. Herman pronounce these Greek
5 names for me, but I did the best I could.

6 MR. HERMAN: It's all Greek to me, Mr. Wittmann.

7 MR. WITTMANN: These cases were all served via File &
8 Serve and certified mail, and Mr. Biondi received the rule and the
9 order because he timely filed an opposition in accordance with the
10 court's order. But that opposition doesn't offer any valid excuse
11 for not filing, it simply argues that Mr. Biondi should be permitted
12 to withdraw and the cases stayed for another 90 days.

13 In their opposition Mr. Biondi admits that the delay in
14 filing the PPF's for these plaintiffs was due to the fact that he
15 has gotten no response from his clients. Despite the fact that
16 these plaintiff profile forms were first due over a year ago and
17 Mr. Biondi has now admitted to rejecting these cases for his
18 client's non-responsiveness, he is now asking the court for a 90 day
19 stay of these proceedings. But the full record in these cases, your
20 Honor, shows a pattern of dilatoriness and complaisance I think puts
21 him in the same category of case your Honor just dismissed.

22 More than a year has passed and nothing has happened,
23 despite multiple warnings, plaintiffs' counsel ignored each and
24 every one of Merck's letters, and it turns out that the plaintiffs
25 have not responded even to their own counsel's exhortations to comply

1 with the court's order.

2 For counsel to now say they are rejecting these cases and
3 ask for a stay, it seems to me, your Honor, it's something that
4 should not be allowed. In fact, this is the first time we received
5 notice of Mr. Biondi's intent to withdraw. And plaintiffs who have
6 repeatedly and categorically ignored not only Merck but their own
7 counsel, your Honor, should not be rewarded by now having more time
8 to comply with the court's orders.

9 THE COURT: Anything from any of the parties?

10 MR. HERMAN: Your Honor, in an effort to help Mr. Wittmann
11 and learned counsel, Mr. Davis will follow me. I want to point out
12 that there is a movie called the 300 now where the King of Sparta
13 with 300 men faces the Persian hoard, and in New Orleans discussion
14 as we murder Melpomene and Melpomene; Leonidas, we call Leonidas. I
15 hope that helps.

16 MR. WITTMANN: That does help. Thank you very much,
17 Mr. Herman.

18 MR. DAVIS: Your Honor, with respect to this one, on March
19 28th we communicated with plaintiffs' counsel. Again we spoke to
20 them on that same date and were told that they were aware of the
21 ruling.

22 MR. WITTMANN: And, your Honor, just to lineup, in
23 connection with our rule with respect to those cases, we would file
24 into the record Exhibits S, T, V, W, X, Y, Z and Exhibits RR, SS,
25 TT, UU, VV, XX, and the return receipts from the letters of

1 deficiency.

2 THE COURT: I am going deny the stay, I am going to deny
3 the motion to withdraw, and dismiss those cases with prejudice. Any
4 other cases?

5 MR. WITTMANN: No, your Honor, that's it.

6 THE COURT: In dismissing all of these cases, I have
7 considered the public interest in an expeditious resolution of the
8 litigation. I've also consider the court's need to manage its own
9 docket, particularly significant in these MDL matters. I've also
10 considered the risk of prejudice to the defendants. I've given
11 these plaintiffs every opportunity to respond both from the court's
12 urging as well as various letters and various notices.

13 Also during the pretrial conferences, which I also hold in
14 open court, I've taken the opportunity on numerous occasions to talk
15 about the need to respond to these profile forms. It's for
16 everyone's benefit, it's a way of conducting easy discovery in
17 moving the case along, and it's necessary to get this information so
18 that we can move the case along.

19 I've also considered the risk of prejudice to the
20 defendants, the public policy favor in disposition of cases on their
21 merits. I've done everything I could to push that, but no response,
22 no cooperation, and also I have considered the availability of a
23 less drastic sanction has been considered. I've notified these
24 plaintiffs on a number of occasions, I've posted the material on our
25 web site, but no response has been forthcoming.

1 Those cases in which there is no response after numerous
2 attempts, both from the court, from the defendant, from the
3 plaintiffs' counsel, I have no alternative but to dismiss the cases
4 and I dismiss them with prejudice. Anything further?

5 MR. WITTMANN: No, your Honor.

6 THE COURT: Thank you. The court will stand in recess.

7 THE DEPUTY CLERK: Everyone rise.

8 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

13

14 I, Karen A. Ibos, CCR, Official Court Reporter, United States
15 District Court, Eastern District of Louisiana, do hereby certify
16 that the foregoing is a true and correct transcript, to the best of
17 my ability and understanding, from the record of the proceedings in
18 the above-entitled and numbered matter.

19

20

21

22

Karen A. Ibos, CCR, RPR, CRR

23

Official Court Reporter

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25