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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS * Docket MDL 1657-L
LIABILITY LITIGATION * *
 * May 18, 2006, 10:00 a.m.
 * *
 * New Orleans, Louisiana
* * * * *

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

APPEARANCES:

For the Plaintiffs: Seeger Weiss
 BY: CHRISTOPHER SEEGER, ESQ.
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 New York, New York 10004

For the Plaintiffs: Herman, Herman, Katz & Cotlar
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For the Defendants: Stone Pigman Walther Wittmann
 BY: PHILLIP A. WITTMANN, ESQ.
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Also Participating: DAWN M. BARRIOS, ESQ.

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Proceedings recorded by mechanical stenography, transcript
produced by computer.

PROCEEDINGS

(May 18, 2006)

1
2
3 **THE DEPUTY CLERK:** Everyone rise.

4 **THE COURT:** Be seated, please. Good morning, Ladies
5 and Gentlemen. Call the case.

6 **THE DEPUTY CLERK:** MDL 1657, In Re: Vioxx.

7 **THE COURT:** Counsel make their appearance for the
8 record, please.

9 **MR. SEEGER:** Good morning, Your Honor. Chris Seeger
10 covering for Russ Herman this morning.

11 **MR. WITTMANN:** Good morning, Your Honor. Phil
12 Wittmann representing Merck, defense liaison counsel.

13 **THE COURT:** We are here today for our monthly status
14 conference. I met with liaison counsel to discuss the agenda.
15 I will take them in order. The first is Lexis/Nexis File &
16 Serve. Anything on that, Mr. Wittmann?

17 **MR. WITTMANN:** There's only one thing, Judge. It's
18 pretty much the same report we give every time. With the entry
19 of Pretrial Order 8-A, there may have been some confusion and
20 some counsel have been submitting new counsel contact forms
21 even though that's not required. The only time you need to
22 send in a new counsel contact form is if the information
23 changes with respect to your address, phone number, or
24 something like that. There's no need to submit new forms. I
25 wanted to make that clear on the record, that that Pretrial

1 Order does not require any new action unless there's been a
2 change in your basic information.

3 **THE COURT:** Okay. Mr. Davis, did you have anything
4 to add on that?

5 **MR. DAVIS:** The only comment that I have, Your Honor,
6 is that if you are a new lawyer to the MDL the contact
7 information still is required and must come in.

8 **MR. WITTMANN:** That's right.

9 **MR. DAVIS:** I just want lawyers to be aware of that.

10 **THE COURT:** All right. Anything the Court can do on
11 it, you need to bring it to my attention so I can get involved;
12 if not, I won't get involved. State court trial settings. You
13 have given me a number of state court cases that are scheduled
14 for trial. Anything on that?

15 **MR. SEEGER:** Your Honor, right now the June trial in
16 New Jersey appears to be going forward, and then you have the
17 September 11 setting right behind that. In addition, in
18 yesterday's status conference in New Jersey, Judge Higbee set
19 the Local 68 class action for trial. Jury selection is to
20 commence in that case on March 5, 2007.

21 **THE COURT:** I have been trying, with the state court
22 settings, to put this as part of the report so that we look at
23 this matter as a unit. I've been advising the state courts as
24 to our trials so that everybody can be on the same page. Both
25 state and federal are aware that you have coordination problems

1 in these cases, and we are trying to make it as easy for the
2 litigants and the lawyers as possible. One of the first steps
3 is to know what's on the board so that we don't set trials at
4 the same time, if possible, or the discovery is able to go
5 forward in some reasonable manner.

6 **MR. SEEGER:** Your Honor, just as a reminder, we are
7 in the process of having Russ Herman appointed as a liaison
8 between the Local 68 nationwide class action and this Court to
9 further facilitate that.

10 **THE COURT:** Okay. We'll get to that with the class
11 action report, so that we can talk about that a little bit more
12 at that time.

13 **MR. SEEGER:** Okay.

14 **THE COURT:** The next item is selection of cases for
15 early federal court trial. I've set four cases -- one in July,
16 one in September, one in October, and one in November -- so we
17 are moving forward on that. I put out some scheduling orders
18 in several of the cases, and I will be meeting with the people
19 in the Dedrick case to work out a scheduling order.

20 We have a limited time to try a case. I'm aware
21 of that. What I am trying to do is to get as much done prior
22 to trial as possible so that trial is all trial, all witnesses,
23 all litigation, as opposed to evidentiary arguments. We have
24 to anticipate some of that at the trial, but as much as I can
25 do from the standpoint of looking at documents, dealing with

1 Daubert, dealing with depositions, dealing with logistics in
2 some way prior to trial, I want to be able to do that. That's
3 the reason for the scheduling orders, so that we can get all of
4 this stuff well in advance and we are not dealing with it at
5 the last minute.

6 **MR. SEEGER:** Your Honor, something just occurred to
7 me -- I don't mean to back up -- that you ought to be aware of
8 with regard to the class action in New Jersey. It's
9 anticipated in the next week a notice package will be provided
10 to Judge Higbee -- which she will look at, and if it is
11 acceptable to her she will approve -- and notice should be
12 going out to the class in about 30 days or so.

13 **THE COURT:** Let's get to that, then. That's the
14 class action part that I wanted to talk about. There's a
15 nationwide state court class action on the third-party payor
16 claims that has been certified in New Jersey, and the appellate
17 courts have affirmed Judge Higbee on that. We have a class
18 action filed here on the third-party payor claims. Of course,
19 there's always a question of whether, when you have a
20 nationwide class action in the federal and a nationwide class
21 action in the state, do you have them both go at the same time
22 or does one go first. Rather than come to grips with that
23 problem at this time, it seems to me that the state court class
24 action has an early trial date, so I'm going to let that case
25 go forward and take a look at it and see what we do after that.

1 I'm not going to have two class actions going on
2 at the same time involving the same issues. You have problems
3 with proof, you have problems with logistics, and I don't see
4 any reason for creating those problems. I do want to be kept
5 advised of what's happening in that state court class action.
6 That's why I'm happy that liaison counsel from here will also
7 be liaison counsel for that. I think that both sides will be
8 able to profit from that information.

9 Discovery directed to Merck. I made some
10 rulings. The rulings were appealed to the circuit. The
11 circuit has had, as I understand, an opportunity to look at the
12 material or at least look at the briefs and have oral argument
13 via telephone conference with the parties, and they are waiting
14 for a ruling from the court. Anything further on that?

15 **MR. SEEGER:** No, Your Honor.

16 **MR. WITTMANN:** No, Your Honor.

17 **THE COURT:** Discovery directed to the FDA. I looked
18 over the material given to me, and I felt that three documents
19 were either not privileged or that the privilege had been
20 waived and I released those three documents. The other
21 documents I returned to the FDA. On that same matter,
22 Dr. David Graham from the FDA was deposed, as I understand, on
23 May 9, 2006.

24 **MR. SEEGER:** That's correct, Your Honor.

25 **THE COURT:** Deposition scheduling, anything on that?

1 **MR. WITTMANN:** No, Your Honor. The depositions are
2 being cross noticed and there don't seem to be any problems.

3 **THE COURT:** One aspect of the MDL that hopefully is
4 helpful to the litigants, as well as the lawyers, is to try to
5 coordinate the discovery and try to coordinate the depositions.
6 It's essential that everybody be notified so that they can do
7 the coordination. The purpose is to have the depositions taken
8 one time and used in state and federal courts throughout the
9 country. That poses some difficult problems for the lawyers,
10 and I understand that because you are dealing to some extent
11 with different judges and rulings on different issues.

12 Happily, the federal and state rules, at least
13 on these types of matters, are pretty consistent; but even so,
14 there's some nuances that judges in different areas may take a
15 different view on. That complicates matters, but hopefully
16 that downside is outweighed by the advantage of just having it
17 done one time as opposed to two or three times.

18 It's not only problematic to the witnesses when
19 you have to take their deposition two and three times on the
20 same issues, but it makes it just very difficult for the
21 lawyers to deal with. During trial, when those depositions are
22 either introduced or used for cross, if you have two or three
23 depositions that you are trying to cross the witness on and he
24 says one thing in one, one thing in another, and one thing in a
25 third -- and it's the same, but it's just a different word --

1 it just introduces havoc into the process. So it's not good
2 for either side. No one, other than an actor who memorizes
3 lines, is going to be able to say the same thing on the same
4 issue in the same way two and three times. So it's not only
5 the way to do it efficiently, but it's also the way to do it
6 effectively. I'm interested always in hearing from the states,
7 if you are getting the notice that you need and things of that
8 nature.

9 **MS. BARRIOS:** Yes, Your Honor. Dawn Barrios for the
10 state committee. Merck communicates with me a couple of times
11 a week on the scheduling of depositions. We had sent out a
12 newsletter to all state counsel telling them, if they wanted
13 notice, to notify me. I have an E-mail string and I notify
14 everyone who has asked to be notified, and so far I think
15 everything is going very smoothly.

16 **MR. WITTMANN:** There's one thing, if we could go back
17 to the discovery directed to third parties.

18 **THE COURT:** Yes.

19 **MR. WITTMANN:** We have had an issue with respect to
20 whether Merck has a right to review documents in the possession
21 of Ogilvey, DDB, and Millward Brown. That's been briefed.
22 There's going to be a further briefing with respect to the
23 burden of proof issue. It's agreed we will have simultaneous
24 briefing submitted to the Court on Monday.

25 **THE COURT:** That's Item VII on the agenda and it's

1 discovery to third parties. The issue there is whether or not
2 Merck has the right to view the material before the material is
3 either given or privilege claimed on it. The third parties
4 involved are independent contractors. The issue is whether or
5 not an independent contractor who is so intricately involved
6 with Merck becomes, in essence, an employee. If they are an
7 employee, then it's Merck's privilege. If they are an
8 independent contractor, perhaps the privilege is waived and is
9 not viable any longer. The issue is whether state law is
10 applicable or whether federal law is applicable in this
11 particular issue.

12 You all know that 501 has a difficult history.
13 Congress decided, when the Rules of Evidence were put into
14 effect, that the compromise was that the privilege law would be
15 the law of the states unless it's inconsistent with federal
16 law, so you look to the law of the states. In this particular
17 case, the law of the state is Pennsylvania. The issue is
18 whether or not there's a burden of proof, whether or not the
19 burden is on the seeker of the documents or the person or
20 entity claiming the privilege, and there's some nuance in that
21 particular state. I have asked the parties to look it over and
22 to give me the benefit of their thinking. So that's what's
23 being done at this time. Where are we? We have covered
24 Item VIII. We are on Item IX, plaintiff profile form and
25 Merck's profile form. Anything on that?

1 **MR. SEEGER:** Just to mention, Your Honor, that
2 Russ Herman, as liaison counsel, last week sent a notice out to
3 plaintiffs just sort of detailing the core information that's
4 needed to trigger Merck's production of their fact sheet
5 procedure.

6 **THE COURT:** It's important that we get a profile form
7 from each side because the profile form is serving multiple
8 purposes. One purpose, obviously, is to give each side
9 information, but the other side is to use in place of
10 interrogatories. So the profile form is rather detailed, but
11 it's necessary certainly from the plaintiffs' standpoint. They
12 have to give the material to the defendant before the
13 defendant's profile form is triggered, before they have to
14 submit their profile form. So it's important that it be
15 accurate and be given at the appropriate time.

16 **MR. WITTMANN:** I would just add to what Chris said,
17 Your Honor, that I know counsel on both sides -- Mr. Davis
18 representing the PLC and Mr. Barnett for our side -- have been
19 working diligently to tweak some of the information in the
20 Merck profile form and to come up with a new amended Pretrial
21 Order 18-C to submit to the Court. I know they worked, for
22 example, all day yesterday and have been communicating back and
23 forth regularly, and a lot of work and a lot of progress has
24 been made in that respect. It seems to be going pretty
25 smoothly, and we hope to have it resolved completely by the

1 next meeting.

2 **THE COURT:** I do urge each side to keep an open mind
3 when you do this. Even though theoretically, when you get it
4 off the drawing board, the profile form is looked upon as being
5 terrific and the best form that any profile form can be drafted
6 in, when you take that and put it in the real world and begin
7 getting information and having difficulty with it, you have to
8 be flexible enough to be able to tweak that and put it in a
9 different form that's more suitable. Each side has to be aware
10 of this. Item X, state/federal coordination.

11 **MS. BARRIOS:** Thank you, Judge. For your
12 convenience, I handed to your law clerk a list of the names and
13 addresses and telephone numbers of all the judges in Vioxx
14 state cases that are set for trial. Merck had provided some of
15 that information to us and we modified the form. I wanted to
16 report that I met with Judge Randy Wilson, who is the MDL judge
17 in Texas, and he expresses his anticipation at meeting you and
18 talking with you personally and he is committed to the
19 cooperation and coordination between the two MDLs.

20 We have no new remand motions filed or orders to
21 report to you this cycle, but I did get a call from the
22 attorney general in Texas, who's very anxious to have its
23 remand motion decided. He has a trial date in January. I told
24 them that I would raise the issue with Your Honor this morning
25 and I should be back in touch with them shortly after the

1 conference.

2 **THE COURT:** Okay. Any comments on that remand motion
3 with the Texas attorney general?

4 **MR. WITTMANN:** That's one of the motions that's been
5 under submission to the Court, I believe. I think it's been
6 fully briefed.

7 **THE COURT:** It has been. I've looked at it. The
8 issue is whether or not that's any different than the other
9 ones. As I mentioned the last time, the first wave of trials
10 will be finished the latter part of this year. From my
11 standpoint, I will have had five trials -- one twice and four
12 others hopefully just once -- and we should be able to have
13 some experience that we can share with counsel and the
14 litigants. The state courts will have had experience on a
15 number of cases. We may have 10 or 15 cases that have been
16 tried and got the so-called "jury cure." At that point I think
17 the judges ought to be able to look at these results and see
18 whether or not any trends can be detected, whether any
19 information can be gleaned from that experience.

20 If so, I will be amenable to meeting with the
21 lawyers and litigants and sharing these views with the lawyers
22 and litigants to see whether or not the whole or any part of
23 this litigation can be looked at globally and dealt with in
24 some global fashion to assist the litigants on both sides.
25 That's what I think would be beneficial to everybody.

1 Now, if that's not going to be successful, then
2 I have to, with dispatch, focus on the remand motions and see
3 where we go with it. That's why I haven't jumped at the remand
4 because I think everybody profits from the above-mentioned
5 approach. If they are not in the fold, they are not going to
6 have the benefit of that approach. That's, at least, my
7 thinking. The issue is whether or not the attorney general of
8 the state's cases profits from that, and that's what I'm
9 dealing with right now.

10 **MS. BARRIOS:** Yes, Your Honor. I will pass on your
11 thoughts to the office.

12 **THE COURT:** Thank you. Pro se claimants?

13 **MR. SEEGER:** No, Your Honor.

14 **MR. WITTMANN:** No, Your Honor.

15 **THE COURT:** The next item is the motion to dismiss
16 foreign class action complaints on *forum non conveniens*
17 grounds. This matter is being briefed. I'm expecting the
18 plaintiffs' brief May 22 and I understand that Merck's brief is
19 due June 21.

20 **MR. WITTMANN:** That's correct, Your Honor. If you
21 will put that in your order, we will have our brief on June 21.

22 **THE COURT:** The next item is the VICTOR data.
23 Anything on that?

24 **MR. SEEGER:** We don't really have much, just that as
25 a general comment, Your Honor, on the VICTOR, APPROVe, and some

1 of the facts database items, we are going to have somebody on
2 our side meet with somebody on Phil's side just to make sure
3 that the counsel in the trial cases are getting what they need.
4 There's been some confusion.

5 **THE COURT:** That's critical because we have four
6 cases set for trial in federal court. That's got to be our
7 primary focus at this time. That goes to the top of the list,
8 those four cases. We have to be able to be sure that both
9 sides have all of the information that's necessary for them to
10 be prepared and ready for those trials. They move fast, as you
11 know, during the course of the trial, so it's not one of those
12 situations where we will take four or five weeks or two or
13 three months so that you can learn in the process. It's going
14 to be a little rapid from that standpoint, so I want everybody
15 to have all that information well in advance so they can plan
16 their trial strategy.

17 **MR. WITTMANN:** Your Honor, just to be clear on that,
18 I know that we produced the VICTOR data and the APPROVe data to
19 the plaintiffs' liaison counsel. I heard this morning that
20 some trial counsel didn't have that information. We will make
21 sure he gets it today.

22 **THE COURT:** Okay. I understand that's more of a
23 logistical problem than a real problem, so let's take care of
24 that. Mr. Davis, get to me by Monday so that I'm comfortable
25 that everybody has what they needed. We talked about the

1 generic trial performance issues yesterday. I made some
2 rulings or suggestions to counsel on certain things. They have
3 asked for more time and some different formats. One issue that
4 they are going to look into and brief me on is the scope or
5 ability or power -- whatever the right word is -- for the MDL
6 Court to compel a witness from another state to come to
7 New Orleans to testify at trial. I hope it's in New Orleans
8 this time rather than in Houston or some other place due to
9 hurricanes.

10 We all know the Rule 45 issue, that the Court
11 can compel one within state to come to trial any place within
12 state and 100 miles outside the area, so that takes care of
13 those courts that are right on the border of two states. The
14 person at issue here obviously is outside of those two limits,
15 so the issue is whether the MDL statute tweaks that in any way,
16 shape, or form. That's one issue.

17 The other issue is, if it does not, then whether
18 we can have instant communication with that witness via
19 television, sort of a "News Hour" approach where that person is
20 put on the screen and the parties and the litigants are in this
21 courtroom, with the jury seated in the courtroom, and can ask
22 him questions. In this instance he would be in New Jersey and
23 trial will be here, but the questioning will be going on
24 instantaneously and not a deposition format; live, so to speak.

25 As you know, an MDL court sits as a court in

1 various states, so I can go to New Jersey or go to some other
2 place and try the case, or at least when I issue an order I'm
3 looked upon as being the judge from that area. The issue
4 really is whether I can be the judge of that area and compel
5 that individual to go down the block to sit in front of a
6 camera and give his testimony at trial here in Louisiana; that
7 is to say, whether the scope of Rule 45 deals with convenience,
8 deals with money outlay, things of that sort. If that is the
9 thrust of Rule 45, then the argument is that the latter can be
10 done. In any event, the parties are looking into that and will
11 give me a short brief on that subject shortly. We talked about
12 the APPROVE data. The IMS data, anything different on that?

13 **MR. WITTMANN:** That's all been produced to trial
14 counsel, Your Honor, and the case is set for trial.

15 **THE COURT:** Discovery in the nontrial cases. We
16 talked a little bit about that at the pre-meeting, but why
17 don't we discuss that at this time. Anything on that?

18 **MR. WITTMANN:** Your Honor, as we said at the meeting
19 back in chambers, Merck would like to take the depositions of
20 approximately six of the plaintiffs in the stroke cases that
21 have not been set for trial. As Your Honor knows, no stroke
22 case has been set for trial. We feel we need to explore that
23 class of cases because they comprise a significant number of
24 the cases that have been filed. I think it's something like 35
25 percent constitutes stroke cases. So the six cases or so that

1 we are talking about are cases that would let us get some
2 discovery from plaintiffs who have filed stroke cases.

3 We won't be issuing any additional written
4 discovery. We are going to rely on the plaintiff profile
5 forms. We are going to meet and confer with Mr. Davis and give
6 him a list of those cases that we intend to go forward with and
7 try and make sure that we don't in any way interfere with the
8 lawyers who are preparing the cases for trial in the MDL. We
9 do feel strongly we need to go forward and pursue discovery in
10 those stroke cases so at the end of the day, as Your Honor
11 mentioned earlier, we will have some idea what these cases are
12 about at the end of this year.

13 **MR. SEEGER:** I just have a brief comment.
14 Your Honor, if there was any aspect of this case that has been
15 around for a long time -- and it predates the MDL, as you know,
16 Your Honor. If there's one aspect of the case that was not as
17 well-developed, it was probably the stroke part of the case in
18 terms of discovery, so there is still substantial discovery
19 plaintiffs need in that. On the other hand, as the science
20 comes out the company itself is putting out, the case begins to
21 look, from our perspective, a lot stronger on the science. The
22 most recent data seems to confirm that there is a stroke hazard
23 and that makes it's pretty clear.

24 Having said that, we do have a problem with sort
25 of Merck saying, "Well, we would like to pick six cases and we

1 are going to push those six cases and we will make those the
2 cases Your Honor has to rule on." As Phil did report, I think
3 the way this has all come out is we are going to meet and
4 confer, talk about it, and try to come up with some kind of
5 proposal for you.

6 **THE COURT:** I'm aware of the issues that counsel
7 raises on both sides. I do think, in the first place, we have
8 to concentrate on the trial cases. I understand that. This
9 case is big enough and there are enough lawyers involved that
10 we don't need to just focus on one aspect of the case. We have
11 to have several circles going on at one time. One of those is
12 the other cases.

13 Now, I hope you all can get there by discussing
14 it. If not, bring it to me and I will resolve it. It makes
15 sense to me that Merck has some opportunity to look at the
16 entire case and be able to focus their attention on the global
17 aspect of the entire case. Whether it's successful or not,
18 they have to at least know what the case is about. You have to
19 know what the case is about, likewise. The cases have to be
20 representative, and I understand the problem of an ongoing
21 discovery process.

22 All of us in litigation like to do it in an
23 organized fashion. We like to file a lawsuit. We like to
24 answer the lawsuit. We like to conduct discovery; paper
25 discovery, then deposition discovery, and all that sort of

1 thing. When we are finished with the discovery, then we like
2 to try the case. It's the best of all possible worlds, but
3 it's not able to be done all the time.

4 This case is a little different in, as I said
5 several times, the state courts have had three or four years in
6 this case. I've been in it now a year, a year and a half,
7 whatever it is, so I've got to catch up a lot. We have to try
8 some cases even though discovery is still in process. I'm
9 sensitive to that and I'm aware of that.

10 **MR. SEEGER:** Thank you. Just to confirm we
11 understand the agreement, we are going to meet and confer. In
12 the meantime, I assume there isn't going to be any discovery
13 going on in these six cases until we have gotten back to the
14 Court with a plan?

15 **THE COURT:** That's my understanding.

16 **MR. WITTMANN:** We have noticed some depositions, but
17 we will meet and confer with counsel before we take any of
18 those.

19 **THE COURT:** Anything further?

20 **MR. WITTMANN:** Just a date for the next status
21 conference.

22 **THE COURT:** The date, as I understand, is June 16
23 that is most convenient with the parties. June 16, 9:00 a.m.
24 I'll meet with liaison counsel and the committees, and then
25 I'll meet at 10:00 with everyone.

1 **MR. WITTMANN:** That's all we have, Your Honor.

2 **THE COURT:** Anything from anyone else in the
3 courtroom? Anything from the states? Anything? Thank you
4 very much. Court will stand in recess.

5 **THE DEPUTY CLERK:** All rise.

6 (WHEREUPON, the Court was in recess.)

7 * * *

8 **CERTIFICATE**

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

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Toni Doyle Tusa, CCR, FCRR
Official Court Reporter