

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

MDL No. 1657
Section: "L"
New Orleans, Louisiana
Thursday, June 28, 2007

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

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(STATUS CONFERENCE)

(THURSDAY, JUNE 28, 2007)

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

7 THE DEPUTY CLERK: In re: MDL 1657, Vioxx.

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

9 MR. WITTMANN: Good morning, your Honor, Phil Wittmann
10 representing Merck.

11 MR. HERMAN: Good morning, Judge Fallon, Russ Herman
12 representing the Plaintiffs Steering Committee.

13 THE COURT: I apologize for all of the work being done in
14 the building, I hope it didn't inconvenience anyone. We are trying
15 to bring it up to speed or up to code, something of that sort, but
16 it's taking a longer time, which is not unusual in our area.

17 I met with the liaison counsel and I received from them
18 their monthly status suggested agenda and gone over some aspects of
19 it. I will take them in order.

20 First, the State Court Trial Settings. Any report on
21 that?

22 MR. WITTMANN: Yes, judge, there hasn't really been any
23 change since last month. We have four cases set, we have the Kozic
24 case in Tampa, Florida on September 17th. We have a case as yet
25 unidentified set for trial on September 27th from a pool of cases in

1 the California Coordinated proceeding. The Crandall case is set for
2 October 1st in Washoe County, Nevada. And Zajicek case on October
3 22nd in Jackson County, Texas. And the Donohoo case is still set
4 for October 29th in Madison County, Illinois.

5 THE COURT: Anything from State Liaison Counsel, any
6 problems that you know of in those states?

7 MS. BARRIOS: No, your Honor, not at all.

8 THE COURT: Further Proceedings in the Early Trial Cases,
9 anything on that?

10 MR. HERMAN: The only thing to add is that on June 20th,
11 Mr. Barnett filed a Notice Accepting a Remittitur.

12 THE COURT: We are preparing the judgment as we speak.
13 The Class Actions is the next area.

14 MR. LEVIN: Your Honor, there is nothing new to report
15 other than what's in the report.

16 THE COURT: Discovery Directed to Merck is the fourth item
17 on the agenda.

18 MR. WITTMANN: Your Honor, that relates to the privilege
19 documents which have been under review by Professor Rice. I think
20 he may be the person to give this report better than me.

21 THE COURT: Yes, let's hear from Professor Rice.

22 MR. WITTMANN: I yield my time to Professor Rice.

23 THE COURT: By way of preliminaries, the court received in
24 camera approximately 84 boxes of documents, consuming about 500,000
25 pages, perhaps 30,000 or so documents. The court went through them,

1 the Circuit felt that it should be gone over again in a different
2 fashion. The defendants were instructed to collect about 2,000 of
3 those 30,000 documents; 2,000 hopefully were representative of the
4 entire census of the documents. They packaged them in a little more
5 orderly fashion and the court appointed Professor Rice, a well-known
6 scholar in this area of the law to assist the court. Professor
7 Rice, with the help of Brent Barriere, have been going through those
8 documents and they are in the process of compiling a report at this
9 time.

10 I'll hear from you, Professor Rice.

11 SPECIAL MASTER RICE: Thank you, your Honor. I am pleased
12 to report that we have met, or virtually met, the time period that
13 we had talked about in the last status call. We had finished the
14 opinion on the Special Master. We are now in the final throws of
15 trying to get all of the data input and proofreading of the data for
16 all of the 2,000 recommendations and proofreading that, and it's
17 taking just a little more time than we thought. So the opinion and
18 that first appendix of recommendations will be filed either Friday
19 or Monday.

20 There will be a second appendix to the opinion which will
21 have all litigation papers that have been filed properly noting and
22 segregating the in camera submissions by Merck and the sealed
23 document that was provided to us by judge Higbee from New Jersey,
24 which was a transcript of a deposition taken of Joann Laner
25 (PHONETIC) one of Merck's senior attorneys.

1 I should note that none of this -- only our opinion is
2 going to be filed electronically with the court, just for assurances
3 of parties who are concerned. We are going to provide the two
4 appendices physically to the judge and the judge can decide how and
5 when any given portions of both appendices will be filed with the
6 court.

7 I am assuming the first appendix will be made part of the
8 record. We could do that if the court chose, but at this point we
9 are going to provide it physically with a CD ROM so it can be just
10 transferred to the court record.

11 I am assuming that after this point the role of the
12 Special Master will be significantly less, because this process was
13 set up to give direction on sample documents and then those would be
14 the standard by which the remaining 58,000 privilege claims would be
15 resolved. We are waiting instructions from the judge on that after
16 having examined my decision and my recommendations. And so I am
17 assuming that today may be my last time to be before the court in
18 this regard, I would like to make a few comments if the court would
19 indulge me.

20 I certainly want to that court for its confidence in me in
21 ruling on these matters. This is a very unique process and may set
22 a standard for the future of how large complex cases address these
23 kinds of volumes of privilege claims. I certainly want to thank
24 Brent Barriere for his assistance. He has been invaluable for me.
25 Unlike a judge, I had a lawyer I can talk to and bounce ideas off

1 of, and he sort of in the spirit of Wimbledon was serving some real
2 hard balls at me making sure my theory was consistent and my
3 application was consistent to the documents. And I certainly want
4 to thank him for his help.

5 His firm, Phelps Dunbar has accommodated me in every
6 conceivable way, and many ways I just didn't anticipate I would
7 need. Barbara Airis has been in charge of paralegals keeping track,
8 ordered everything, and I wanted to thank her for her help.

9 But the staff of paralegals, I know that when we were in
10 practice, your Honor, years ago the practice was very different.
11 For the first time it's been brought home to me very vividly that
12 paralegals are the backbone of litigation today. And the staff of
13 paralegals that were provided to me by Phelps Dunbar were very
14 professional, intelligent and quite driven to do this within the
15 time period that we had noted during the last status call. That was
16 headed up by Nancy Heeder (PHONETIC), and she is probably
17 responsible for half of the quality of what we're producing to you
18 on Friday or Monday.

19 I have been involved in many major cases, the AT&T
20 divestiture case, the consolidated Microsoft cases, and I must say
21 this has been one of the more enjoyable professional experiences I
22 have had. Perhaps that's part being brought back to the south where
23 people seem to be so much nicer than they are in the rest of the
24 country. But for whatever reason that may be, I want to thank the
25 court for this experience.

1 THE COURT: Okay. Well, thank you, Professor. I
2 appreciate all of the work that you've done on it.

3 This is an area that is to some extent in the formative
4 stages as to how to go about dealing with the mass of documents that
5 present themselves, both in the MDL as well as in the electronic
6 age, and some of it has been exploratory. I like the model that
7 we've created, I think it's very helpful to have a Special Master.
8 I think it's very helpful to have a Special Master who has the
9 academic credentials that Professor Rice has.

10 I also think it's a good model to have an attorney working
11 with the Special Master. Hopefully a local attorney so that you can
12 have the staffing that's required, as well as the logistical aspects
13 that go with this type of matter. Frankly, it's very difficult, if
14 not impossible, for a court and a court staff to deal with this mass
15 of documents because you need to carve out so much time and you need
16 to deal with so many aspects of the documents that it presents
17 problems.

18 Also packaging becomes very significant in these types of
19 matters, particularly e-mail strings. When you send an e-mail
20 string that eight people receive, that's eight papers in essence and
21 if they are strewn throughout 84 boxes, that's problematic in and of
22 itself. So it's better to have all of those documents collected in
23 one file folder rather than pick them up from this division and this
24 section and the other section, and some more thought has to be given
25 when you pick those documents and there is a string of e-mails, what

1 aspect of that e-mail string is privileged. Is it all privileged or
2 one part of it, and that has to be focused on because it's costly
3 and time consuming and it is necessary to deal with it. So a lot
4 more thought has to be given.

5 Hopefully I will be able to share some of these
6 experiences with my colleagues in the MDL, but I think we've done
7 well because of the assistance that we received from the professor
8 on this.

9 Let me say what I plan to do with this material. As I see
10 it, the professor has given me a draft of his report early on. It's
11 general comments and observations on the law and some specific
12 comments on various categories of documents and he has a lot of
13 consistency with those and reasons behind those rulings on
14 categories. That's the report which is about 20, 30 pages.

15 Then Appendix A will be his rulings on each of the
16 documents. The rulings are about three feet thick with paper. It's
17 a monumental collection of both work and documents. But he has
18 rulings on each document and justification for the rulings on each
19 document. That is Appendix A. I've asked him to give to me an
20 original and two copies of those appendices.

21 I will then serve the appendices, which has the rulings,
22 Appendix A, the rulings, the recommendations on the documents from
23 the professor, I will give those to plaintiff liaison and defendant
24 liaison. I'll give them 15 days thereafter in which to file any
25 objections in accordance with Federal Rule 53(f) and (g). Give me

1 an objection, I don't need a book on the objection, just a sentence
2 or so will do with some justification for it. If you have a case,
3 cite the case.

4 Then I will review the objection in accordance with the
5 federal rules, come out with my ruling on any objections and deal
6 with the report and accept or modify, reject, whatever the
7 recommendations made.

8 After I have made my ruling on those, with those issues,
9 I'll convene another conference immediately with liaison counsel and
10 they'll have an opportunity to give me some input as to where we go
11 from here.

12 The whole purpose of pulling 2,000 documents from the
13 30,000 documents was to have those documents serve as a
14 representative, a bellwether if you will, of the other documents.
15 My best hope is that it will make the rest of the privilege claims
16 on the other documents moot. They will either be privileged or not
17 privileged and nobody will have any problem with that. But that's
18 generally not the real world, so I suspect that there may well be
19 some difficulty or that the defendants may maintain some privilege
20 on the other 30,000 or a portion of it. Hopefully, if not all of
21 them, can be resolved and made moot, most of them can.

22 But in the event there are any that need to be reviewed
23 again by Professor Rice, I am going to then ask him to come in and
24 look over those documents on which the claim of privilege is still
25 maintained. The documents that he has not reviewed yet, not the

1 2,000, but the other 28,000 documents and I think it's another
2 400,000 pages. But I am going to consider, I am going to consider
3 shifting costs and shifting the cost to the defendant full-time at
4 this time. I am not making any firm statements on that. I want to
5 see how it goes, but that is potentially what my thinking will be.

6 The next item on the agenda is Discovery Directed to Third
7 Parties

8 MR. HERMAN: Your Honor, there is nothing new on that to
9 be addressed by counsel.

10 I do want to make one statement, particularly in
11 advance of the rulings, that we appreciate the professionalism that
12 Charlie Cohen and the other Merck attorneys have illustrated during
13 the process, particularly also appreciate the folks who have worked
14 on the plaintiffs' side. And it goes without saying that it gives
15 counsel and the folks we represent comfort to know that Professor
16 Rice and Brent Barriere have been involved in the process and have
17 gone about it in-depth and with diligence, because whatever comes
18 out of the process is going to be healthy for the future course of
19 this litigation, and perhaps others.

20 So we appreciate Merck's attorneys' efforts as well
21 as our own and the Special Master's.

22 I would like to move to Deposition Scheduling

23 THE COURT: Yes. Let's skip that and go to the rest of
24 them and then we will come back to that because that's the one with
25 the arguments.

1 Plaintiff Profile Form.

2 MR. WITTMANN: Your Honor, you've issued Pretrial Order 24
3 which established a deadline for submission of plaintiff profile
4 forms by Louisiana residents affected by Hurricane Katrina and their
5 counsel, as well as pro se plaintiffs. And we will be filing some
6 more rules to show cause and set it for hearing at the next status
7 conference for plaintiffs who have filed deficient profile forms in
8 contravention to Pretrial Order 18C.

9 MR. HERMAN: Phil's office has been very diligent in
10 providing us with the names of attorneys who have not responded,
11 which has enabled us to send them a contact from the PSC saying you
12 need to get this done.

13 THE COURT: The next item is State/Federal Coordination -
14 State Liaison Committee.

15 MS. BARRIOS: Good morning, your Honor, Dawn Barrios for
16 the State Liaison Committee. Over the past month we have directed
17 our efforts to dealing with the remand issues with hopes that your
18 Honor will take that issue up shortly. We have cleaned up our CD
19 ROM that we've given you. The district court staff has been
20 particularly helpful to me in teaching us how to search on the web
21 site, and we've been able to pick up about 25 remanded, or cases
22 with motions to remand we didn't have. I do not have your Honor
23 today a CD ROM for you, I will deliver it to yourself and to both
24 counsel next week. We had some difficulty burning the CD in my
25 office yesterday.

1 We have been particularly grateful to the PSC because they
2 have reached out to us to ask us to select cases to urge your Honor
3 to look at those for early remand, and we've been devoting
4 substantial amount of time on that project.

5 I'd also like to thank Merck's attorneys, particularly
6 Ms. Wimberly because she has extended some time on plaintiff profile
7 forms for an attorney out in California who had a great deal, number
8 of cases and was having difficulty in completing them. So on his
9 behalf, we send our appreciation to Merck as well.

10 THE COURT: Okay. Thank you very much. Anything on IMS
11 data or we have a pro se claimant.

12 MR. HERMAN: Yes. We have an agreement that
13 Mr. Wittmann's firm and our firm have worked out with regard to
14 Mr. Harrison's request, and we will be submitting an order to the
15 court in that regard that we've both looked at and preapproved the
16 court to consider.

17 THE COURT: And the issue, of course, with his problem is
18 that nobody denies that he is badly injured and badly disabled. The
19 issue is whether or not Vioxx played any role in that disability.
20 This type of disability is not a stroke and it's not a heart attack
21 or cardiovascular matter, it's a little different than that. The
22 science has not been developed in that particular area, so I am
23 going to be looking at the case once he has an opportunity to at
24 least review the material, that that's in essence where his review
25 must be centered, not the nature and extent of his injuries.

1 Everyone recognizes that, it is the origin and cause of his injuries
2 that are problematic, at least from the standpoint of evidence. And
3 that's what needs to be focused on.

4 IMS Data.

5 MR. WITTMANN: There is nothing new to report on that,
6 Judge. The PSC has been advised that orders were issued in the New
7 Jersey state court regarding IMS data, and they're reviewing the
8 orders further. There is not much to report to this court of that.

9 THE COURT: Merck's Motion for Summary Judgment.

10 MR. WITTMANN: That's under submission, your Honor, and
11 we've had some notices of supplemental authority that have been
12 filed by both sides, and I think you have that under advisement.

13 THE COURT: I do and I am working on it now as we speak,
14 and hopefully it will be at the final draft stage shortly. This has
15 to do largely with preemption and whether or not the comments of the
16 FDA, in fact, preempted all state laws applicable to the warning
17 aspect or the warning claims cases.

18 Tolling Agreements.

19 MR. HERMAN: With respect to tolling agreements, Doug
20 Marvin on behalf of Merck submitted a proposal to the PSC, it's
21 acceptable. We've advised Mr. Marvin of that and something will be
22 submitted to the court that your Honor is assured is acceptable.

23 MR. WITTMANN: What that'll do, Judge, basically is allow
24 conversion of a claimant profile form to a plaintiff profile form
25 with just the completion of a conversion form which will simplify

1 that process for all of the tolling claimants.

2 THE COURT: Do you anticipate the tolling claimants to
3 eventually file? We have about 13,500 total claims in the federal
4 MDL, we have about 9,000 cases that have been filed, so 20 some odd
5 thousand claims in addition to the hundred and 200 class actions
6 that are pending here. But those are being withheld at present.

7 The point I make is that if they need to be filed, you
8 need to stagger them because my clerk's office will quit en masse if
9 we file 13,000 claims.

10 MR. WITTMANN: Well, they are required to file, I think,
11 in this MDL as a condition of having submitted the claimant profile
12 form and signed the tolling agreement. So if they are going to
13 file, they will be coming here.

14 THE COURT: That's what I mean. Let's try to stagger
15 them, Doug, so that we can deal with them.

16 MR. HERMAN: I'll work that out with Mr. Wittmann.

17 THE COURT: Okay. Issues Relating to Pretrial Order
18 No. 9.

19 MR. LEVINE: Your Honor, as you know I'm from the north,
20 so I don't want to disappoint anybody. I am not praising anybody
21 except the Court.

22 THE COURT: Okay.

23 MR. LEVIN: Judge, we are attempting to work out in New
24 Jersey and California what we have worked out in Texas. But what we
25 are doing is we're keying every notice of deposition to Pretrial

1 Order No. 9, whether it be in the state court or the federal court,
2 and we'll see what happens when somebody shows up that's not
3 supposed to show up.

4 THE COURT: Okay. I think the coordination is really very
5 helpful in these cases. Recently the judges from California and New
6 Jersey came down and met with me and we discussed some common
7 concerns and we've tried to keep in touch with each other, as I have
8 with several of the other state judges. So I think coordination can
9 help the litigants in this case, as well as the courts.

10 MR. HERMAN: Your Honor, I've encouraged Arnold to move
11 south to help his personality.

12 MR. LEVIN: I did slide out to South Philadelphia, but
13 that may not be far enough south for you folks.

14 THE COURT: Vioxx Suit Statistics is the next item.

15 MR. WITTMANN: There has been no change since the last
16 report, Judge. We will have new figures next month when they get
17 released by Merck. And I don't think there's going to be much of a
18 change from what's been reported in the past.

19 THE COURT: Merck Insurance issues.

20 MR. WITTMANN: The 30(b)(6) deposition was taken of the
21 Merck representative on, just a week or so ago, May 23rd of 2007.

22 MR. HERMAN: Must have been an intervening bar convention.
23 No, I mean between then and last week.

24 MR. WITTMANN: All right. Anyway, last month and that
25 matter now is under submission to the court I believe.

1 THE COURT: All right. A Motion to Conduct Case Specific
2 Discovery.

3 MR. HERMAN: Your Honor, it's pending but there's been no
4 request by the PSC that Merck has to respond to that motion at this
5 time. We ask it be deferred.

6 THE COURT: Okay. All right. Let's go back to the
7 Deposition Scheduling and give me your thoughts on it.

8 MR. HERMAN: Your Honor, we initiated in the MDL -- well,
9 let me summarize the argument first. The MDL's contention is that
10 the de bene esse depositions noticed by Merck should not go forward.
11 And there are several reasons for that.

12 I was wondering this morning how to argue this and not
13 having made groceries in awhile was looking at the difference
14 between Cheerios and Vioxx. See, Cheerios reduce cardiac problems,
15 Merck increases them. Cheerios are nutritious, Merck/Vioxx is not.
16 And the representations made on the box of Cheerios are accurate.
17 And as I was having my Cheerios this is fella fell out (INDICATING),
18 and it reminded me of Merck's brief that was filed last night
19 because its contentious, it's an ugly argument. And I think that
20 from our perspective it's short on facts. I'm going to offer this
21 to my learned opponent.

22 On a more serious note, there are two essential discovery
23 issues which require, in our judgment, the depositions not go
24 forward. One issue relates to what I'll refer to as Protocol 203
25 and the Oxford/Merck material. The second deals with privilege

1 rulings and documents and some privilege documents that have already
2 been released. The third deals with the fact that an expert for
3 Merck whose deposition is noticed, Dr. Rarick, has never had any
4 discovery prior to her perpetuation deposition, as an example.

5 But beginning in late 2005 there were attempts made to get
6 what I'll call the Oxford material. By March 23rd, 2006, it had
7 been brought to the PSC's attention and at our hearing on March
8 23rd, 2006, Mr. Barnett on behalf of Merck indicated that the Oxford
9 study wasn't complete, it had done delayed and that plaintiffs would
10 get the material as soon as the study was complete.

11 Then on May 3rd, 2006, the issue came up again, and your
12 Honor requested that plaintiffs be provided the information and that
13 Merck, and Merck assented, we get someone from Oxford on the phone
14 so the court could speak with the Oxford representative. Of course,
15 very difficult for us to do discovery and have to work our way
16 through the Haig Convention even to get to the Oxford principles,
17 and at various times Oxford has been represented as an independent
18 contractor, controlling everything, the correspondence between Merck
19 and the FDA in which Victor, for example, is a Merck sponsored trial
20 or study and it should be able under those circumstances to provide
21 the information.

22 And what was Oxford to do, as we understand it? Well,
23 there were three studies at issue, in effect they were colorectal
24 and other cancer type studies, but with cardiac events, presumably
25 caused or reported to have been caused by Vioxx. They were placebo,

1 blind placebo studies, the three studies were Victor, which was
2 Protocol 145 or VIP study and the APPROVe study. Oxford was to take
3 the information and report.

4 What we have not received, and I understand this morning
5 that an article is about to be published are what are termed the SAF
6 files. These are the statistical analysis files, presumably that
7 Oxford used, has possession of and Merck may now have received them.
8 We do not know whether the publishers of any article has ever
9 received those files in order to look in-depth at whatever Oxford's
10 reporting, we don't have the analytical protocols that we've done
11 pursuant to the 203, and we have no correspondence been returned,
12 principle correspondence, whether it's electronic or otherwise, as
13 between Oxford and Merck which would enable us to determine the real
14 relationship and whether or not the study was actually an
15 independent.

16 In addition to that, not having the material and being
17 informed this morning that there is about to be a publication in a
18 "learned journal", we don't have the opportunity to even interrogate
19 the authors of that article and the study before these critical
20 depositions on perpetuation are taken

21 THE COURT: They say that you've got all of the material
22 that is available.

23 MR. HERMAN: Well, your Honor, we're all officers of the
24 court. I believe that when that statement was made it was made in
25 good faith. Having been made in good faith, if those documents that

1 I just stated are produced in this record by Monday and deposited,
2 then I suppose my argument will fail. If they're not, I can assure
3 your Honor that to our knowledge they have not been produced and,
4 indeed, on June 27th a comprehensive letter was sent to Judge Higbee
5 with a copy to all Merck counsel involved by David Buchanan of the
6 Seeger Weiss firm stating what the problems were and not having
7 received data. I have a copy of that for opposing counsel and a
8 copy of that for the court.

9 Now, I don't want to be an arbiter as to this, nor do I
10 think the court should have to do it. If Merck says it's produced
11 all of this material, it ought to be available to be produced in
12 this record very quickly and that issue goes away.

13 I will say this. In the last trial Humeston trial, Merck
14 put up as a defense that the plaintiffs' analysis of the material it
15 had was incomplete and invalid because there was never a completed
16 published Oxford Protocol 203 study at that time. We certainly, at
17 least in the MDL, would not want to be faced with similar defenses
18 in the future.

19 Also that brings up the issue of real coordination. Why
20 should the MDL have to coordinate this issue when there are no MDL
21 cases present, although the MDL court has function, and particularly
22 this court extraordinarily well in coordinating with states, and
23 since Judge Higbee I understand has the same issue or a similar
24 issue before Judge Higbee, perhaps it might be beneficial for your
25 Honor and the other state court judges whom you have been

1 coordinating to weigh in on this.

2 THE COURT: How about the privilege documents, that was
3 another issue that you raised.

4 MR. HERMAN: Yes. I am advised from the PSC individuals
5 that at least two of the documents that Merck has released now as a
6 result of the work done by the Special Masters that at least two of
7 those documents are extraordinarily important in moving forward to
8 take discovery depositions before perpetuation depositions are
9 taken. Particularly as regards Dr. Morrison, who has testified in a
10 number of cases, and an expert by the name of Rarick in which no
11 Rule 26 report has been furnished in this MDL, who has never been
12 deposed, and a discovery deposition as of June 27th of Dr. Rarick
13 has been requested, a two day deposition.

14 Now, I have a copy of that request for counsel and the
15 court. And I'm sorry for the delayed presentation, but this thing
16 has erupted in the last 24 hours to cause a great deal of
17 communication between liaison counsel and the MDL and counsel,
18 various counsel in state court actions. Having received Merck's
19 reply brief, as I gather, essentially their arguments are, well, we
20 have these cases set and we can't produce these experts in all of
21 these cases, so we need these perpetuation depositions. Well, it
22 would be extraordinarily difficult for the MDL to coordinate and be
23 bound in any way by depositions in which they haven't had an
24 adequate opportunity to prepare cross-examination.

25 Merck says, well, we'll produce them again. Even were

1 Merck to produce them again, what happens in the interim before
2 they're produced? What about the time and expense of preparing to
3 retake those depositions and the limitation that we only can take
4 those depositions again based upon new material, when the new
5 material may effect testimony that's already been given, and we do
6 not, you know, the MDL has its burden.

7 Now, the third argument, as I understand it, that Merck
8 says, well, all we want is an even playing field. So I said, gee,
9 what information have you requested from plaintiffs that we haven't
10 given you? What is it that you need from the MDL that you're
11 entitled to? Privileged documents? I don't know of any that you
12 haven't requested them? Some study we've conducted that you haven't
13 requested? There is a difference between us preparing a trial
14 package based on prior discovery and then followed by perpetuation
15 depositions, after the other side's got full opportunity to
16 cross-examine. I don't think it's an even playing field.

17 The Oxford material has been pending since March. I find
18 it remarkable that it comes forth now and we're told this morning
19 it's about to be published tomorrow. And based on history, learned
20 treatise have to have accepted Merck material before for
21 publication, and then after it's fully investigated and the material
22 is already produced fully to generally provoke by some expert Merck
23 didn't retain, the learned treatise has revoked its prior article or
24 amended it. Now, based on Merck's history in the Vioxx litigation,
25 I don't think the fact that they've got, now produced an Oxford

1 study after we've got trials set and it's going to be published
2 ought to be some basis for noticing in the MDL these perpetuation
3 depositions.

4 THE COURT: Let me hear from your opponent on this. Thank
5 you very much.

6 He's obviously not objecting to the depositions, he is
7 objecting to the timeliness of the depositions. And primarily he
8 says that there is nothing pending in the MDL proceeding, so what's
9 the rush?

10 MR. MARVIN: Several things, your Honor. First of all, on
11 the Victor data. We produced everything we have. The SAF data, the
12 files that Russ is talking about, we produced it in October; and
13 we'll take Russ up on his offer and have to him by Monday a letter
14 showing both the transmittal letter as well as the Bates numbers for
15 those documents. So they have had those documents since October.

16 It's not a rush, your Honor. We brought this issue to the
17 PSC last January, if not last January, last February. And at that
18 time we explained we simply were going to be doing the same kinds of
19 things they were doing, mainly preserving the testimony of
20 witnesses. At every status conference we have, the PSC has reported
21 on putting together a trial package and it talked about the
22 importance of the trial package, which includes de bene esse
23 depositions that they've taken. All we want to do is the same
24 thing, we just want it to be a two-way street.

25 We raised this issue with the PSC, in fact, I did it when

1 I spoke to, I think Lenny first and then Russ, back in February and
2 said that we would like to go ahead and proceed with the
3 depositions, we were talking about dates in March and April. And at
4 every step of the way this has been blocked, and at the last
5 conference we raised the issue again. And at that conference your
6 Honor asked us to move the dates for two of the depositions that
7 were set for June, we did that. But your Honor indicated that the
8 other depositions could proceed. Those depositions are now set for
9 July and August.

10 The reason why we have noticed those depositions in the
11 MDL is because we think that makes the most sense. The MDL is a
12 national court and it is the court that has taken on the
13 responsibility for coordinating the discovery in this litigation.
14 It would not make sense for us to schedule de bene esse depositions
15 in one state and then schedule the same de bene esse depositions in
16 a second state and then in a third state somewhat later. And then
17 come to the MDL somewhere down the road and schedule them again. It
18 does make sense to notice those depositions here in the MDL and to
19 do it once.

20 Now, why do it now? The reason is is because we have
21 trials coming up in the fall, and, in fact, the plaintiffs are
22 seeking to stack those trials so that there can be four or five or
23 six trials going on simultaneously. And if that's the case, what
24 they're essentially doing is putting us in the position of not being
25 able to have our witnesses available. So that's why it is important

1 to proceed with those depositions as scheduled in July and August.
2 Otherwise, we're put to the situation where they've got their trial
3 package, they've got their witnesses, they've got their de bene esse
4 depositions and we don't. That's essentially what's happening here.

5 As for the privilege documents. The plaintiffs had the
6 opportunity to designate documents for Professor Rice's review and
7 they had the opportunity to designate documents that had been
8 prepared by some of the deponents for whom we're seeking to take de
9 bene esse depositions. And they went ahead and took that
10 opportunity, they took advantage of that opportunity and did
11 designate those kinds of documents, so those documents have been
12 reviewed. Yes, there are probably more, but the fact is that they
13 had the opportunity to designate the ones that they thought were
14 most important. That review is now completed and we will learn the
15 results next week.

16 But even if there are additional documents to be produced,
17 the fact is is that there really is no prejudice here because we are
18 willing to bring back the witnesses whose de bene esse depositions
19 are being taken, we are willing to do that without any cause,
20 without any reason being given so that they can go ahead and take
21 those depositions without disclosing any questions or any other
22 information. So we do now have a window of opportunity. We want to
23 take advantage of the window of opportunity just as they have.

24 We've been cooperating with them in the depositions that
25 they want to take for their trial package and we just want to do the

1 same thing. And as I say, on Monday they will have, we will show
2 them where they have the Victor files

3 THE COURT: Okay.

4 MR. HERMAN: Your Honor, I really -- I have the utmost
5 respect for learned counsel, however, at 6:30 last night I received
6 this communication: Further to our call this afternoon: (A) Merck
7 represented to the FDA that it was a sponsor of the Victor trial,
8 which as sponsor means Merck had the right to access all of the
9 Victor data, including the case report forms. The case report forms
10 summarize the individual patient level information. We're asking
11 for these because our review of CV events from this trial
12 demonstrates that Merck and Oxford may have engaged, and I'll just
13 state, in some improper conduct. We do not have all of the CRF's
14 and SAF data. We're also lacking the definitions which we requested
15 in order to analyze the SAF's. Further, this communication cites 21
16 CFR 312.62(b), which requires clinical investigators to maintain all
17 CRF's. Also cites 21 CFR 312.58(a) that an IND "sponsor shall upon
18 request from any properly authorized officer or employee of FDA at
19 reasonable times permit officers or employees to have access to and
20 copy and verify all records."

21 The importance of this is that the IND 46984 from Merck,
22 which was a combined analysis from myocardial vascular events and
23 placebo controlled studies, clearly indicates that Merck was the IND
24 sponsor and not Oxford and there should have been no problem in
25 getting this material at an earlier time. This material came to us

1 by Fed-Ex.

2 So again, your Honor, when we say Merck will deposit with
3 the registry of the court, what we're saying is we want the
4 definitions, we want the complete statistical analysis materials,
5 and we want the CRF's. If they have it and they produce it, this
6 argument will go away. If they can't produce it or don't produce
7 it, then I maintain the argument is correct.

8 We are not saying the depositions shouldn't be taken,
9 they should be taken. But not now. I will repeat the offer that I
10 have made. If Merck will forego any appeals on privilege documents
11 that your Honor ultimately, and based upon the Special Master's
12 report, they'll give up their right to appeal those rulings, we will
13 too, and maybe those depositions can move forward at a much faster
14 pace.

15 THE COURT: All right. Thank you very much. I understand
16 the issue. I have heard argument from both counsel, I am going to
17 permit the depositions to go forward starting in August with the
18 following restrictions: The defendant shall make the witnesses
19 available again, if necessary, upon reasonable notice by the
20 plaintiff. The plaintiff doesn't need to show good cause, they
21 don't need to disclose prior information or information that they
22 intend to reask the witnesses, but the witnesses have to be
23 presented, brought back to the deposition.

24 The deposition, the re-depositions will be at the
25 defendant's cost, and it will start no sooner than August. Thank

1 you very much. The court will stand in recess

2 MR. WITTMANN: Your Honor, we have one other matter.

3 MR. HERMAN: Do we have a date?

4 THE COURT: Excuse me. The next date will be July 27th on
5 Friday, starting at nine o'clock and 930.

6 MR. WITTMANN: 9:30 for the status conference.

7 THE COURT: Right. Nine o'clock for the status conference
8 in chamber, 9:30 for the general meeting.

9 MR. WITTMANN: In open court.

10 THE COURT: Thank you very much, the court will stand in
11 recess.

12 MR. HERMAN: Your Honor, I apologize but I stood and
13 Arnold had the same thought. The one expert that we don't have a
14 report from or a discovery deposition --

15 THE COURT: Need a report for that. That expert needs to
16 give a report. He also may have to subject himself to a discovery
17 deposition beforehand.

18 MR. MARVIN: They will have that report Monday or Tuesday.

19 THE COURT: And discovery deposition before at a
20 reasonable time before the de bene esse depositions.

21 MR. HERMAN: Thank you, your Honor.

22 MR. MARVIN: Your Honor, if we can have the opportunity to
23 talk to him about the -- this same witness has already been deposed
24 several times, but we will talk to the plaintiffs and try to work
25 that out.

1 THE COURT: All right. Thank you.

2 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

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

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Karen A. Ibos, CCR, RPR, CRR

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Official Court Reporter

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