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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

* Docket MDL 1657-L
*
* December 1, 2005, 8:00 a.m.
*
* Houston, Texas

* * * * *

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

APPEARANCES:

For the Plaintiffs: Herman, Herman, Katz & Cotlar
BY: RUSS M. HERMAN, ESQ.
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For the Defendants: Stone Pigman Walther Wittmann
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PROCEEDINGS

(December 1, 2005)

THE DEPUTY CLERK: Everyone rise.

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

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

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

MR. HERMAN: Good morning, Judge Fallon. Russ Herman for plaintiffs.

MR. WITTMANN: Phil Wittmann for the defendant.

THE COURT: We are here today in connection with our monthly status conference in this matter. I met with liaison counsel for both sides previously and reviewed with them some of the things that we will be talking about today. I'll hear from the parties at this time. First is Lexis/Nexis File & Serve. Any report on that?

MR. HERMAN: Because of the work of the Clerk's Office and Lexis/Nexis, the backlog situation has been cured. Ms. Wimberly of Mr. Wittmann's office is designated to receive notices, and we believe that this situation is in much better shape. We thank Ms. Wimberly, Mr. Davis, and particularly the Clerk's Office and Lexis/Nexis for their continuing attention.

MR. WITTMANN: Russ has taken my line or basically that's right. The Clerk's Office, after being somewhat behind

1 because of the hurricane situation, has pretty much cleared up
2 the backlog. There's still some delay, but counsel shouldn't
3 have any trouble getting on Lexis/Nexis within a matter of a
4 few days after cases are filed. Russ is right, if you can't
5 get something on Lexis/Nexis, please contact Dorothy Wimberly
6 at my firm and she will take care of handling it for you.
7 There is one other thing on Lexis/Nexis with respect to the
8 plaintiff profile forms and we'll get to it maybe later. I'll
9 wait.

10 **THE COURT:** The next item on the agenda is state
11 court trial settings.

12 **MR. HERMAN:** I don't mind taking Mr. Wittmann's line;
13 I just don't want to take his bait. Phil, do you want to talk
14 about this?

15 **MR. WITTMANN:** Yes. On the trial settings, Judge, we
16 have the Zajicek case set for trial in Texas District Court on
17 March 20, 2006. The Guerra case is set for trial on April 17,
18 2006, in Hidalgo County, Texas. The Kozic case is set in
19 Florida Circuit Court in Hillsborough County on May 1, 2006.
20 Subject to briefing in New Jersey as to whether the court
21 should hold consolidated trials, Judge Higbee has scheduled
22 trials of the following cases: The Cona and the McDarby cases
23 on February 27, 2006; Hatch, McFarland, and LoPresti on
24 April 24, 2006; and Doherty and Klug on June 5, 2006. A trial
25 of one or more plaintiffs is set for June 21, 2006, in the

1 California coordinated proceeding in Los Angeles County.
2 Finally, the Anderson case is set for trial in Tribal Court of
3 the Mississippi Band of Choctaw Indians on August 7, 2006.

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

5 **MR. HERMAN:** No, Your Honor.

6 **THE COURT:** After we get some experience to see what
7 the juries do, I'm going to see whether or not the Court can
8 meet with the state court judges and see if we can make some
9 sense out of what's happening in the various trials and whether
10 or not the parties can profit from the experience and look at
11 the case a little more globally.

12 **MR. HERMAN:** We are going to ask Ms. Cabraser and
13 Mr. Levin of our team to also look at issues of common thread
14 in connection with Your Honor's direction this morning.

15 **THE COURT:** Anything from state liaison counsel on
16 the state trials?

17 **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios
18 for the state liaison committee. Judge Higbee has reached out
19 and asked New Jersey state liaison counsel if this Court or any
20 of the litigants could provide her with an update on a daily
21 basis of what's happening at the trial. I met with Mr. Seeger
22 and Mr. Buchanan. We thought we would ask Your Honor if it
23 would be okay to have the court reporter send Judge Higbee
24 under seal a copy of the daily transcript so she could keep
25 abreast of the litigation at her request.

1 **THE COURT:** Anybody have any problem with that? I'm
2 in touch with her. She has been kind enough to keep me posted
3 on her trials, and I've tried to do the same with this trial.
4 I haven't had a chance to speak with her, but I'll be doing
5 that. I don't have any problem with it if neither counsel has
6 any problem.

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

8 **MS. BARRIOS:** We talked to Merck this morning. They
9 didn't have a problem with it either, Your Honor.

10 **THE COURT:** Selection of cases for early federal
11 court trial.

12 **MR. HERMAN:** Your Honor has under advisement some
13 feedback with regard to additional members of state liaison --

14 **MR. WITTMANN:** We have provided you with the
15 selection that we would recommend to the Court, the Louisiana
16 case to be tried.

17 **THE COURT:** I'll hear from the plaintiffs on that.
18 Get me in a week your response to their letter, which I just
19 received yesterday, discussing the next federal court trial.

20 **MR. HERMAN:** Yes, Your Honor. Counsel for Merck will
21 advise the Court of their position with regard to the trial of
22 the Louisiana attorney general case.

23 **MR. WITTMANN:** Your Honor, let me correct one thing
24 about the state settings. The Zajicek case set for trial on
25 March 20, 2006, has been taken off the trial calendar. I

1 wanted to correct the record on that point. That was one of
2 the ones I mentioned earlier.

3 **THE COURT:** What about class actions?

4 **MR. HERMAN:** Defendants have served interrogatories
5 on ten class reps. I'm advised by Mr. Levin and Ms. Cabraser
6 they will endeavor to answer those interrogatories.

7 **MR. WITTMANN:** Truthfully, without the intervention
8 of Russ and myself, class action counsel on both the
9 plaintiffs' side and defense side have gotten on very well, so
10 I don't have anything to report on the class actions.

11 **THE COURT:** The next item is discovery directed to
12 Merck. Anything on that?

13 **MR. HERMAN:** Your Honor has under advisement
14 privilege log issues, and Mr. Wittmann is going to give us
15 30(b)(6) deposition dates. We do want to state that we believe
16 that the MDL plaintiffs' committee produced some very important
17 discovery not heretofore produced in the nature of key
18 depositions and documents, and discovery is moving in the MDL.

19 **MR. WITTMANN:** We have been working diligently,
20 continuously to produce on a rolling basis what the plaintiffs
21 tell us they want priority to be produced. Mr. Barnett and his
22 folks have been working very, very hard to get that done.

23 **THE COURT:** I'm glad to hear that. With regard to
24 the privilege log, I've received all of the material, some
25 80,000 or thereabouts documents. Right after this trial I'll

1 get on that and get through it. The next item on the agenda is
2 discovery directed to the FDA.

3 **MR. HERMAN:** Yes, Your Honor. It's ongoing. We are
4 attempting to resolve a cost problem with the FDA. If we can't
5 resolve it, we will advise Your Honor.

6 **THE COURT:** Get to me on that. I think they will be
7 receptive to some reasonable way of handling that. I'll get
8 involved in it if need be. Discovery directed to third
9 parties.

10 **MR. HERMAN:** Right now we are waiting on some
11 deposition dates. As soon as we have them, we have folks ready
12 to go take those depositions. We really need to get on that.
13 Those types of depositions that we're requesting information on
14 have not been taken in state court or in the MDL and we really
15 need to proceed with those.

16 **THE COURT:** Anything from the defendant on that?

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

18 **THE COURT:** Deposition scheduling is the next item.

19 **MR. WITTMANN:** We have provided dates for the
20 depositions of sales reps that have been requested by the
21 plaintiffs' steering committee except for one, which we are
22 opposed to because the person has been sick, and we are talking
23 about trying to have that notice withdrawn. Subject to that, I
24 don't think there's any problem with deposition scheduling at
25 this point.

1 **MR. HERMAN:** I believe that's correct, Your Honor.

2 **THE COURT:** Plaintiff profile form and Merck profile
3 form.

4 **MR. WITTMANN:** The only thing on that, Judge, is that
5 during that interim period when we were hampered by the
6 hurricane we had agreed with plaintiffs that plaintiff profile
7 forms, authorizations, and medical records could be served on
8 me and on Will Coronato rather than uploaded in the File &
9 Serve. That goes back to the delays we were experiencing in
10 the Clerk's Office. That's now gone and we have about 44
11 plaintiff profile forms out there that have been served on us
12 hard copy, not uploaded. We are going to try to get an
13 agreement with Mr. Herman to give us 90 days from today to get
14 those up and running on our Merck profile form responses. I
15 think that Mr. Herman --

16 **MR. HERMAN:** We'll work that out.

17 **MR. WITTMANN:** -- will work that out with us. From
18 now on, we would like everyone to make sure that when they file
19 the plaintiff profile forms and the medical authorizations you
20 get them into Lexis/Nexis so we can get them quickly to the
21 third parties we are working with to get our records searched
22 and medical records pulled so we can start preparing the
23 medical profile form. That's very important to get that done
24 electronically.

25 **THE COURT:** Let me also say in this proceeding we

1 have not only dealt with the plaintiff profile form, but also
2 the Merck profile form that is due at a certain period after
3 they have received the plaintiff profile form. For them to get
4 theirs in at the appropriate time in the appropriate way, they
5 have to have accurate information. They have to have it filled
6 out. The plaintiff profile form, I tell you it's essential
7 that you fill in the appropriate blanks with the correct
8 information. I want to keep this moving because it's important
9 that we have two profile forms. I do commend Merck for their
10 willingness to provide that more or less voluntarily. I think
11 that moves the litigation faster.

12 **MR. HERMAN:** I don't know if I mentioned it,
13 Your Honor, and I'm not sure where it comes on the agenda, but
14 we do need a complete service list and a list of the tolling
15 agreement cases and the lawyers that represent them. We have
16 talked to Mr. Wittmann about that and I would like to get that
17 as soon as we can.

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

19 **MR. WITTMANN:** That can be done just about as quickly
20 as I get back to New Orleans.

21 **THE COURT:** Let's do it within a week. State/federal
22 coordination, state liaison committee. Anything further?

23 **MS. BARRIOS:** Your Honor, we continue to update the
24 Court and the parties with the remand issues, and I've given
25 hard copies of the updated remand orders both to plaintiff and

1 defense. I would like to give it to Mr. Wynne for the Court.
2 We will be delivering to Your Honor and to both a CD-ROM with a
3 hyperlink to the new documents, but because the status
4 conference was moved up this morning FedEx could not deliver it
5 this early. We will do that for you tomorrow.

6 **THE COURT:** Fine. In this case the states have had
7 the case for a number of years before the federal court got
8 into the case, so as you see from the prior conversation the
9 states have a number of cases set for trial. Several cases
10 have already gone to trial. Realistically, in this litigation,
11 I think there's going to have to be a lot of cooperation
12 between the states and the federal court in trying to look at
13 this matter as quickly as possible. State liaison counsel will
14 play an important role in working with and through the
15 plaintiff committee. I'm going to see if we can do something a
16 little differently in this MDL, see if we can profit from each
17 other's experience and take a look at this case globally, more
18 or less. Pro se claimants, anything on that?

19 **MR. HERMAN:** Your Honor, we really have not seen any
20 number of pro se claims since the last status conference. They
21 have trickled off. We are handling them the same way we have
22 been, basically advising them to get independent counsel,
23 letting them know who the lawyers are that are listed who have
24 cases in whatever state they come from, give them the names of
25 those lawyers and their addresses, their e-mails, but we really

1 have not seen any increase in pro se filings since the last
2 conference. We may have had three.

3 **MR. WITTMANN:** We have had contact from a couple of
4 pro se plaintiffs, and our practice is simply to refer them to
5 Mr. Herman to have counsel retained for them or selected.

6 **THE COURT:** The next item is the motion for
7 clarification of Pretrial Order 19. I have received the motion
8 in that regard. Anything on that?

9 **MR. HERMAN:** The plaintiffs' steering committee
10 requests, Your Honor, that that matter be deferred. We need to
11 consider it and we need to have some further discussion before
12 it's set. I would rather not state the position of the PSC at
13 this time.

14 **THE COURT:** I'll do that. I do instruct the PSC to
15 contact the attorney in this case and discuss it.

16 **MR. HERMAN:** We have had contact, but we need some
17 face-to-face meetings.

18 **THE COURT:** I'll defer it. Anything further?
19 Anything that is not on the agenda that we should take up?

20 **MR. HERMAN:** None from plaintiff, Your Honor.

21 **MR. SEEGER:** I just wanted to thank you for
22 rescheduling this. I've been watching you work the last three
23 days and I think you're going around the clock, but I wanted to
24 thank you for accommodating us.

25 **MR. WITTMANN:** Nothing further from the defendant.

1 **MR. BECNEL:** Judge, Mr. Barasac (ph.), Mr. Harvey
2 Kirk from Kentucky and Tennessee and Oregon, we are not part of
3 the PLC, although we are doing some work within the structure.
4 We would like to know if we could get some of our cases set and
5 do flights of them, especially in Oregon, either with you
6 sitting or referring it to some other judge there, or even
7 bringing those cases to New Orleans and doing flights of them,
8 because they don't have all the discovery rules that they have
9 everywhere else and we are ready to go with more than a hundred
10 cases just out of Oregon.

11 **THE COURT:** I would be receptive to talking with you.
12 I would ask that you discuss it specifically with the plaintiff
13 committee and let me get some input.

14 **MR. HERMAN:** Your Honor, we would ask Mr. Becnel and
15 the other gentlemen to please meet immediately following this
16 conference with Mr. Tom Klein, who will advise them of the
17 process, which is to submit a case summary as well as records
18 for review. We will endeavor to assist them in placing those
19 cases on a list.

20 **THE COURT:** Let's get with them, Mr. Becnel. If
21 necessary, I will meet with both sides and we will talk about
22 it.

23 **MR. BECNEL:** Thank you, Your Honor.

24 **THE COURT:** Anything else?

25 **MR. HERMAN:** A date, Your Honor.

