

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

MDL No. 1657
Section: "L"
New Orleans, Louisiana
Thursday, April 28, 2005

TRANSCRIPT OF MONTHLY STATUS CONFERENCE 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

(THURSDAY, APRIL 28, 2005)

(MONTHLY STATUS CONFERENCE)

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

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

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

10 MR. HERMAN: May it please the court, good morning, Judge
11 Fallon, Russ Herman for plaintiffs.

12 MR. WITTMANN: Good morning, your Honor, Phil Wittmann for
13 Defense Liaison Counsel.

14 THE COURT: We are here today in connection with our
15 monthly status conference. I met with the liaison counsel to
16 discuss the logistics of the meeting and also the logistics of the
17 case. I apologize for being a little late, but our meeting took a
18 little longer than I expected it would. I will go down the list of
19 items that are of interest to the parties as well as to the court.

20 The first item is a Service List of Counsel and
21 Lexis/Nexis Electronic Application. Let me hear from counsel
22 regarding that issue.

23 MR. WITTMANN: Your Honor, we have been working with
24 Lexis/Nexis for the past few weeks, Mr. Davis from Mr. Herman's
25 office has been working with me, and we sent out on April 21st, 2005

1 the service list that Lexis/Nexis needed to go forward and get
2 cranked up with this litigation. We also sent out to all counsel in
3 the case a Lexis/Nexis welcome kit and the registration training
4 information, together with a file and server brochure so everyone
5 will understand what the service is all about.

6 We have finally concluded a pricing list, which we just
7 concluded yesterday afternoon actually, and we will send that out
8 today. I think it's self-explanatory how the pricing works. It
9 will be a maximum of \$40 per transaction, \$35 for liaison counsel to
10 be filed for each transaction that has to be served on the parties
11 through Lexis. It will be a lesser amount if you have fewer
12 services to make, but basically you got a maximum per transaction of
13 \$35 for liaison counsel and \$40 for individual attorneys.

14 Now, counsel in the MDL were advised by liaison counsel
15 for plaintiff and liaison counsel for the defendant that they should
16 complete the registration process prior to May 6, 2005, and we
17 expect to have the electronic service implemented on May the 9th.
18 If there are any questions I will be happy to try and answer them,
19 or Mr. Davis can, but that's the plan right now.

20 THE COURT: One task in a case of this sort is to give the
21 litigants and their counsel in the most economic way possible an
22 opportunity to access to find out what has been served and to
23 download any material that they need to download.

24 The case started by my appointing liaison counsel and
25 assigning to them the task of notifying everybody in this litigation

1 of all of the documents that have been filed and are to be filed.
2 That gets a bit cumbersome if you're going to do it either with
3 regular mail or with fax. So the most economical way of doing it
4 and the fastest way of doing it is through e-mail and an outside
5 provider such as Lexis/Nexis, who took over Verilaw, is a vendor
6 that performs that kind of service.

7 I am interested, the court is interested, in keeping the
8 costs down as much as possible. Lexis needs to know that, that the
9 court is interested in, not from the court's expense standpoint but
10 from the litigant's expense standpoint. It's one thing to cost, to
11 charge for serving something that needs to be filed, but I hope that
12 that cost is lesser for someone who wants to log on to Lexis/Nexis
13 and find out what has been filed and download some information that
14 they either need an extra copy of or need in their files.

15 MR. WITTMANN: If counsel is registered on the system it
16 will be a free ticket to go in the system and log on and see what's
17 there.

18 Counsel have been serving their respective service lists
19 as your Honor directed in an earlier pretrial order. I'd be curious
20 to know if everybody is satisfied with that, getting information,
21 not getting information.

22 THE COURT: Any problems that we have from anybody in the
23 audience that have not been receiving or has some difficulty in
24 doing that? If so, then you need to let liaison counsel know so
25 that they can work on that. I want everybody to have access to

1 what's going on and to be able to download any information that they
2 need in this particular matter.

3 MR. HERMAN: We have had two communications, your Honor,
4 from individuals that were not receiving your Honor's orders, and
5 those individuals had not filed their e-mail information. They've
6 now been filed and we haven't had, at least in the four or five
7 days, any communication that someone isn't receiving orders.

8 THE COURT: Okay. All right. The next item on the agenda
9 is Trial Settings With Regard to Class Actions. Let me hear
10 something further on that.

11 MR. HERMAN: Your Honor, the Rogers case in Alabama has
12 been continued by agreement of the parties. There is no agreement
13 in the Ernst case in Texas. Mr. Seeger will be discussing that with
14 the court and with defense lead counsel, and it's our recommendation
15 that Mr. Lanier, who is lead counsel in the Texas case, have a
16 direct communication with defense counsel regarding that matter.
17 And Mr. Seeger is available today to discuss that matter with your
18 Honor.

19 THE COURT: Let me comment or make some general comments.
20 In litigation of this nature, the most problematic aspect of it is
21 preventing chaos. Chaos can occur in various forms. One form in
22 which it can occur is to have the litigation pieced out to the 50
23 states into both state and federal forums and to have matters going
24 on simultaneously or in the same time frame at least. This is
25 problematic for both sides. It's problematic for the litigants and

1 is not the way to handle litigation.

2 I do feel that it's to the benefit of all litigants that
3 for the time being, and I am not saying forever, but for the time
4 being that we focus on the litigation in this forum and let's get a
5 handle on it, let's look at it. It is not going to be in this forum
6 as a black hole. It is not going to be here forever. I hope to get
7 this entire litigation finished in approximately four to a maximum
8 of five years.

9 There is a lot been going on in the case, we can piggyback
10 on a lot of the information developed in the state courts, we can
11 migrate a lot of that information into this proceeding's database
12 and move forward with the trials and class actions and
13 certifications more quickly than if we were just beginning in the
14 litigation.

15 But I do think until we get a handle on it and scope of
16 all of the problems in this litigation, everybody would be better
17 served if we proceeded in this forum rather than other forums. And
18 I will be talking with the parties to at least discuss it further
19 with them.

20 MR. WITTMANN: I would just add to that, your Honor, that
21 we are going to continue to discuss with counsel in the Ernst case
22 the possibility of doing something about that case as well.

23 THE COURT: Let me hear the next item on the Steering
24 Committees.

25 MR. HERMAN: As your Honor can tell, there's a large

1 interest in the plaintiffs bar in this case. As I look around I
2 would say 70 percent or more of the lawyers that are in this
3 courtroom have been appointed to committees, and as of last night
4 those committees were approved by the Plaintiffs Steering Committee.
5 And for the benefit of the lawyers in the courtroom, you will be
6 receiving notices within the next two or three days as to your
7 committee appointments.

8 In addition to that, Mr. Johnson from Vermont has written
9 requesting that the interest whom he represents be protected,
10 Ms. Cabraser, is chair of that committee. That committee is
11 composed of individuals who receive notice that protect every
12 interest and we invite Mr. Johnson to discuss with Mr. Seeger and
13 Ms. Cabraser his participation as soon as we adjourn today.

14 THE COURT: Okay. Let me comment about that.

15 MR. HERMAN: I just wanted to make one other comment.
16 Your Honor directed liaison counsel and then lead counsel for
17 plaintiff to make sure that every individual who had applied to
18 serve on the Plaintiff Steering Committee would be given a committee
19 appointment and an opportunity to participate fully in the case, and
20 I want to assure your Honor that every individual, and I believe
21 there are 101 who requested that they be considered for the
22 Plaintiff Steering Committee, which you chose, have been assigned
23 committee appointments.

24 THE COURT: That's the point that I wanted to reinforce.
25 I had to limit the numbers officially, the numbers of Plaintiffs

1 Steering Committee. I did that knowing that there were a lot of
2 very talented individuals who could contribute greatly to this case
3 who would not be able to get on the committee. I took into
4 consideration various factors, geographical factors, type of case
5 factors and other factors, and came up with a number that I think is
6 workable. The number 12 works for juries, it was used to define the
7 12 tribes, it was used to define the number of apostles, it's a
8 sacred number and I think that that number is very workable. So I
9 had to zero in on a number and I picked that number.

10 But that does not mean that those are the only people who
11 will have an opportunity, have a responsibility, have a duty to work
12 on this case, and it does not mean that those are the only people
13 who will reap the benefits of this litigation, if it comes to that
14 part. So I am interested and have directed the Plaintiffs Steering
15 Committee to reach out and get anyone who is interested in
16 participating.

17 Mr. Johnson from Vermont, I need your input, I want you
18 working on this particular aspect of the case, and I need you to
19 focus on the people that you represent to give input and to give
20 direction to this litigation. I want everybody in the tent, it just
21 needs to be a little more organized and I had to do it in that
22 fashion.

23 Let me hear from the Defendant Steering Committee.

24 MR. WITTMANN: Currently Defendants Steering Committee is
25 a leaner group, we've only got five members on our steering

1 committee. I will take a moment to introduce them the group, if I
2 may, so that not everybody is familiar. Rick Stanley sitting here,
3 John Beisner, Ted Mayer, Tony DiLeo, and Doug Marvin.

4 THE COURT: Good. Thank you.

5 MR. WITTMANN: And the five of us have divided up
6 responsibilities in various aspects of the case, and others, of
7 course, are working with us around the country. We are not
8 organized in exactly the same way the plaintiffs bar is, but that's
9 understandable, we only have basically one client.

10 So that's our situation, Judge, and we met yesterday with
11 you, you know what we're about and what we're doing, and we will be
12 working hard to move this case forward as fast as we can.

13 THE COURT: I had an opportunity a couple of days earlier
14 to meet with the Plaintiffs Steering Committee and then I met with
15 the Defendants Steering Committee separately to at least give them
16 my views of what their responsibilities and duties are. Both sides
17 have to recognize that they have a duty to represent their clients,
18 but they also have a duty to deal with this case in a professional
19 and proper manner.

20 All of us represent somebody. You represent the parties,
21 your plaintiffs, you represent your defendants. I too represent
22 somebody, I represent this room. And this room includes over 200
23 years of jurisprudence, the flags behind us and all that they stand
24 for, and all of our history, and I am interested in promoting that
25 aspect of the case. And I need your help. I need your help on

1 doing it in an efficient and professional way, in listening to each
2 other, in discussing the issues and reaching agreement when you can
3 make an agreement and dealing with other issues in a proper,
4 appropriate way.

5 The lawyers in our country occupy a special role. You
6 occupy a very, very special role in our country. I respect that. I
7 hold lawyers in the highest possible regard. You make our country
8 work. But it works best when the issue is the battle ground and not
9 personalities, not political philosophies or anything of that sort.
10 So I need your help but I need your help in focusing on the issues.
11 I will give you my best, but I also expect the best from you.

12 Let's go to the Master Complaints, please.

13 MR. HERMAN: Your Honor, in the spirit of cooperation as
14 your Honor can observe, I'll stipulate that the defendants are a
15 leaner and meaner group. And in the words of Shakespeare, beware,
16 crasses. He has a lean and hungry look.

17 Your Honor, with regard to master complaints and master
18 answers, we have met and conferred for several hours yesterday.
19 We're continuing to meet and confer. Essentially the defendants
20 have agreed to provide us, and will receive shortly, all of the
21 class action complaints and then we will undertake with our
22 committees to review those complaints to make sure that we are in
23 tune with the various causes of action that are asserted. That's
24 going to take some time, but we are in the process of getting those
25 complaints and reviewing them and categorizing them.

1 In addition, we've discussed with your Honor and defense
2 counsel the 90 day motion for certification, and we will be moving
3 to certify at some future date when we have had an adequate time to
4 review these complaints and report to your Honor and reach some
5 agreement with defense counsel.

6 Defense counsel, there is under consideration that
7 plaintiff lawyers from other jurisdictions may file directly in this
8 venue, and basically that's where we are at this point.

9 THE COURT: Master complaints are a significant
10 advancement in this type litigation because it allows for
11 amendments, it allows for tweaking, so to speak, without having to
12 refile thousands and thousands and thousands of documents.

13 In this particular litigation it's a little different in
14 that we have some issues that might require separate master
15 complaints. So instead of just one master complaint, we may have to
16 have two or three master complaints.

17 Also from the standpoint of the class actions. We need to
18 get a handle on the class actions and to find out whether or not
19 there are any class actions that can be grouped. I would hope that
20 we can group them by states and I would hope that we could, if
21 necessary, group them by issue and then decide on the certification
22 aspect. I am interested in your input as to whether this court
23 ought to deal with certification, whether this court ought to send a
24 case back to the state for certification or whether this court
25 should deal with certification and then try the case either in this

1 state or in other states, if necessary.

2 So that's what we are going to be discussing. But at this
3 point we need to get a census together, and I've directed the
4 defendants who would know probably more accurately and have more
5 accurate information to get together all of the class actions and
6 meet with the plaintiffs and see if we can group them in some
7 fashion.

8 MR. WITTMANN: Yes, your Honor. Just to follow-up on
9 that. We will prepare a census of the existing class actions and
10 get that to your Honor early next week, hopefully by Monday.
11 Listing not only the class actions that have been filed, but giving
12 your Honor some information as to the type of classes and claims and
13 be able to group them yourself and see from the census what kind of
14 cases we're dealing with.

15 We have agreed to provide the plaintiffs with copies of
16 the class action complaints that have been filed and served on
17 Merck, and we're in the process of copying those and we will give
18 those to Mr. Herman probably Monday morning.

19 We've also furnished to plaintiffs our proposed schedule
20 for dealing with the class action issues, including filing of master
21 complaints, following through with filing of master answers and
22 going on through class discovery and class certification, suggested
23 schedules. They have that under consideration. I'm sure Mr. Herman
24 and I will be talking about it in the weeks to come.

25 THE COURT: And I will be meeting with you also and honing

1 that down. I'd like to get that information by next week, by
2 Wednesday of next week if possible.

3 MR. WITTMANN: I think we can do that, Judge. Our
4 interest, I might just add, we would like to move as expeditiously
5 as possible on the class action issue so that we can get that before
6 the court at an early date.

7 THE COURT: Discovery directed to Merck, that's the next
8 item on the agenda.

9 MR. HERMAN: Yes, your Honor. Also does relate to the
10 class action schedule. Basically what we've agreed on the
11 plaintiffs side is if the defendants, that we will serve our request
12 for production. The defendants may answer the request by stating
13 the Bates numbers of the documents they've already produced and the
14 date of production. We have not yet agreed on the way in which that
15 production is going to come forward.

16 On behalf of the plaintiffs, we know that there's been
17 substantial production. What we are primarily concerned with are
18 several issues that will be in the request for production that has
19 been previously served in other litigation, including complete
20 information on all detailed persons nationwide who are employed by
21 Merck during certain periods of time. Very difficult for us to move
22 forward with class certification until we have that information, the
23 FDA information, which is another subject.

24 THE COURT: Let's get that first matter discussed. What's
25 the problem there?

1 MR. HERMAN: There is no problem that I know of.

2 THE COURT: When can that be done from the defendant's
3 standpoint, when can you get that information that he is talking
4 about?

5 MR. WITTMANN: I am not entirely sure what information he
6 is talking about. We have produced 7,000,000 pages of documents
7 already.

8 THE COURT: The names of the --

9 MR. HERMAN: The names, addresses and other information,
10 including dates of employment of every detail person employed by
11 Merck since the inception of the drug through today.

12 MR. WITTMANN: Frankly, your Honor, I am not sure. This
13 is the first time I've had that request made.

14 THE COURT: Fair enough. Let me hear from you on that
15 information, talk with your people, see when you can do it. Let me
16 hear from you by Wednesday of next week as to when you can do it and
17 give me some deadline that's doable.

18 Let's move on to the second item, you said something about
19 FDA.

20 MR. HERMAN: Yes, your Honor, it's the next item on the
21 agenda. The discovery directed to the FDA. We've given your Honor
22 details, subpoenas were issued in September, FOIA requests were made
23 in December, and it's the FDA's position that this litigation has to
24 wait for all other requests that they have before they respond.
25 We've given in our report your Honor the names of the individuals at

1 the FDA, Mr. -- they have both, they have Ms. Carmelina Allis, who
2 is an attorney for the FDA, and Mr. Harold Streeper, the paralegal
3 specialist of the FDA. The statutory requirement under FOIA is long
4 past, and we are now six, seven months down the road and still
5 don't --

6 THE COURT: I understand the issue. By next meeting I am
7 going to order the FDA, the people that you mentioned to appear in
8 person and explain to the court what the situation is. Give me
9 their names and addresses, I will issue an order to them today.

10 MR. HERMAN: Thank you, your Honor.

11 THE COURT: Let's go to the next item is Discovery
12 Directed to Third Parties.

13 MR. HERMAN: We have only advised the defense counsel that
14 there will be other third party discovery forthcoming. We intend to
15 file our initial discovery earlier than 30 days from this date.

16 THE COURT: Okay. Communicate that with the defense so
17 that they are not surprised, discuss it with them and tell them what
18 the situation is so that before you do it they know that it's
19 coming.

20 MR. HERMAN: We will provide the initial drafts of the
21 discovery to Defense Liaison Counsel in advance of filing and
22 attempt to have at least defense lead counsel, Defense Liaison
23 Counsel and the steering committee members involved on conference
24 call to discuss each issue, we will bring the problems to your Honor
25 even before, that is Mr. Wittmann and I, even before the filing and

1 then only will we file. But we will be prepared to go through that
2 process within 30 days.

3 THE COURT: Deposition Guidelines and Scheduling. I put
4 out with the assistance of liaison counsel for both sides the
5 deposition guidelines, Pretrial Order No. 9. Any movement on the
6 scheduling of the depositions?

7 MR. HERMAN: There was an agreement that we would postpone
8 several depositions and that agreement was reached through mutual
9 discussion, and we don't intend in the MDL the deposition should be
10 taken by either side of the MDL without prior conference and an
11 attempt to have a schedule placed.

12 We have a number of committee members and some members on
13 the PSC that have to be brought up to speed on the document
14 production and the more than 60 depositions, which have already been
15 taken. We have scheduled in mid May a work session for that
16 purpose, and once we're through with that work session we will meet
17 with liaison counsel for the defendants and defendants lead counsel
18 and attempt to work out a schedule.

19 Depositions that have been scheduled based on state
20 requirements, we'll attempt to work those out so that to the maximum
21 extent possible, although the MDL may have to pick up a portion of
22 the work in those depositions, we will attempt to coordinate those
23 depositions as your Honor has directed.

24 THE COURT: I'll be meeting with liaison counsel for
25 defendants and plaintiffs. I am interested in your input as to

1 whether or not we should set aside certain weeks in every month for,
2 say, the next year and to freeze those weeks for depositions. I
3 don't care which depositions you fill them in with, but we ought to
4 have by court order those times frozen in place for depositions. I
5 am interested in whether or not that is a feasible way of dealing
6 with it. Any comments on that?

7 MR. WITTMANN: Well, certainly freezing weeks is something
8 that's been done in past cases and it's worked pretty well, and it
9 would probably be helpful in this case. So all counsel would have
10 an idea of what their schedule is going to be like going out a year
11 in the future. It worked well in the tobacco litigation and I think
12 it would work well here.

13 THE COURT: Get with plaintiff liaison and then I will
14 meet with you with regard to which weeks, whether they ought to be
15 together or the first week and the last week of the month or
16 something of that sort. We may have to have some flexibility
17 built-in, but I like the idea that everybody understands these are
18 the weeks during which depositions will be taken, and they can work
19 their trial schedules and work their other things around those
20 particular weeks. And I would like to step it out at least for a
21 year. Hopefully at the end of a year we ought to be finished with
22 those depositions.

23 MR. WITTMANN: And I just add, we have been working with
24 Plaintiffs Steering Committee on dealing with depositions that have
25 been set. Some have been postponed. Chris Seeger up in New Jersey

1 has really been working with Ted Mayer primarily on the New Jersey
2 depositions which is where more than of them have been set than any
3 other place. We have not encountered a problem yet, I think that's
4 fair to say, in terms of negotiating the dates, pretty well working
5 with Chris on that.

6 MR. MAYER: We have some challenges right now.

7 MR. WITTMANN: We have some challenges, that's true. We
8 are trying to avoid cross noticing at this point, your Honor,
9 because Pretrial No. 9 gives us the right to cross notice at this
10 point. Plaintiffs have said they are not ready to go forward with
11 MDL depositions and we are trying to accommodate their position as
12 well as our own on that, and we are working the best we can on that.

13 THE COURT: The reason I like the idea of weeks during a
14 particular month is so that I can communicate that to the state
15 courts so that they know that this is what we're going to be doing
16 in the MDL. And I can send that to the judges in the state courts
17 that are handling cases or have cases pending before them so they
18 have some idea.

19 I am not interested in having depositions taken, the same
20 deposition twice or three times. I just want it one time as opposed
21 to several times so that I want everybody's input and give an
22 opportunity to the states to participate, but I'd like it taken only
23 one time.

24 MR. SEEGER: Your Honor, could I just respond. I just
25 wanted to make the court aware, and we will be following up on this.

1 THE COURT: Make you appearance for the record.

2 MR. SEEGER: Chris Seeger, thank you, your Honor. The
3 schedule in New Jersey is a tight one. Discovery is scheduled to be
4 completed on the cases going to trial, it's supposed to be trial
5 ready by July, probably be going to trial sometime in September. So
6 we are working on separate schedule there.

7 Putting that aside, we are doing all we can to try to
8 coordinate all of the schedules with the defense. I think we have
9 done a good job on that.

10 On the schedule going forward, was it your Honor's idea
11 that in terms of scheduling depositions monthly going forward that
12 we take a week or two out?

13 THE COURT: No. What I am saying is it doesn't matter.
14 You know the case better than I at this point. But I am interested
15 in having about two weeks in every month. Now, we can put the first
16 two weeks in the month, the last two weeks in the month, or the
17 first week and the last week in the month, something of that sort;
18 but if we freeze those weeks and know that those are deposition
19 weeks, they're available. Sometimes it may not be workable, you may
20 not be able to put any depositions in those weeks. But those are
21 the weeks that you have to work with and fill in the blanks with
22 whatever depositions you want to take, those are the weeks you take
23 them in.

24 MR. SEEGER: Thank you, your Honor.

25 THE COURT: Plaintiff Profile Form is the next item on the

1 agenda. The defendants as well as the plaintiffs need to know the
2 census of the case, they need to know how many, they need to know
3 what the claims are, they need to know who the people are. The
4 challenge in this situation is that we need that information, but if
5 it's in encyclopedic form it will be too late in coming, people
6 don't live long enough to fill out a complicated form or just things
7 change.

8 So we need some forms that are manageable, but the
9 defendant needs the information. And it doesn't mean that there's
10 only one form. If you agree on a form and you need some additional
11 information, the fact that you got one form doesn't foreclose
12 getting another form if you need additional information. But we
13 need to focus on a manageable form.

14 Let me hear from the parties.

15 MR. HERMAN: The plaintiffs and defendants met for several
16 hours yesterday. We received a plaintiff profile form presented by
17 the defendants. We furnished the defendants a defendants fact
18 sheet, and it's now the plaintiffs job to submit its version of a
19 plaintiff's profile form to the defendants, and the defendants to
20 present to us their version of a defendants fact sheet.

21 As a general matter, the plaintiffs' position is that the
22 form ought to be short, intelligible and a lay person can have the
23 ability without much labor to fill out the initial form, that there
24 should be medical authorizations attached that would allow
25 defendants to get whatever records they need, both from any

1 healthcare provider or pharmacy, and that would be the best
2 evidence, not the recollection of an individual plaintiff as to the
3 dates he took pills and dosages, et cetera, et cetera.

4 We expect that as soon as that exchange takes place we
5 will negotiate those two issues, and if we can't resolve them we
6 will bring them to the court. Mr. Wittmann will speak to the
7 defendant's position.

8 MR. WITTMANN: Your Honor, it's our position that the
9 plaintiff profile forms should provide as much information as we
10 need to evaluate these claims. And we feel that the more
11 information we have, the less motion practice we are going to have,
12 the less follow-up discovery, written discovery we are going to have
13 and we will be able to proceed a lot quicker.

14 We don't know about these individual plaintiffs nearly as
15 much as plaintiffs know about Merck, and we are trying to develop
16 that information we have. As Russ said giving him our suggested
17 profile form, it's long but it's easy to understand, and they are
18 going to give us their proposal back and hopefully we will be able
19 to reach agreement on a form. And we were given I think it was day
20 before yesterday a defendant fact sheet which we are looking at and
21 we will be back to Russ on that, too. But we are working together
22 on that and trying to develop information we need to evaluate these
23 cases.

24 THE COURT: What's a reasonable time frame?

25 MR. WITTMANN: I think probably next week Russ will be

1 back to us on the plaintiff profile form.

2 MR. HERMAN: We certainly will be back. But my
3 understanding of that profile form, and of course I'm limited in my
4 abilities as it has more polysyllabic word syllables than the word
5 Tchoupitoulas.

6 I really don't think that anybody's client -- we are
7 expecting 100,000 cases in this litigation, and for a lawyer to have
8 to spend his career with a client, several hundred clients answering
9 a form that recalls every single drug by whatever name that they've
10 ever taken or that they've taken in the last ten years is a problem.
11 So I expect we have, we will return a patient profile sheet that in
12 our opinion is reasonable. And we still believe that the records
13 and a deposition of the treating physician are the best evidence.

14 THE COURT: Okay. Let's take two weeks to do that. If
15 you can't do it within two weeks, then gave me two plaintiff profile
16 forms, one from the defendant and one from the plaintiffs, and I
17 will come up with a profile form to use and we will have it by next
18 meeting for sure.

19 The Medical Records from Healthcare Providers.

20 MR. HERMAN: There is a virtual medical records depository
21 being negotiated and instituted by plaintiff and defense counsel in
22 connection with the New Jersey litigation. And yesterday we
23 discussed the potential for having a virtual medical depository in
24 which plaintiff's counsel would only be able to access their own
25 client's information, but that all medical and pharmacy records of

1 any claimant would be stored in the virtual depository. I believe
2 we have New Jersey defense counsel here who is more familiar with
3 that process than I certainly am.

4 THE COURT: Any comments from anyone?

5 MR. WITTMANN: No, your Honor. I think we do have a
6 system in place in New Jersey, our plan is to use the same system
7 here. It doesn't seem to be broken in New Jersey, so we are not
8 going to try to fix it.

9 THE COURT: The next item is Communicating With Plaintiff
10 Healthcare Providers. We discussed that a little bit in the
11 conference.

12 MR. HERMAN: Yes, we did. Plaintiffs' position very
13 simply is that in no federal MDL case should defendants or any of
14 their representatives, directly or indirectly, be allowed to
15 interview or confer with the treating physician or other healthcare
16 providers administering to their clients. The defense liaison
17 counsel and defense lead counsel have requested that they be allowed
18 to brief that issue and bring it before your Honor.

19 THE COURT: That's fine. I'll allow that. Let's get that
20 to me in a week.

21 MR. WITTMANN: Will do, your Honor.

22 THE COURT: Plaintiff and Defendant Depositories.

23 MR. HERMAN: Plaintiffs' depository has been established,
24 it's 4310 Place St. Charles. The computers for that central
25 depository have been ordered and on are on their way. They will be

1 sent to New Jersey where Mr. Buchanan liaison counsel in New Jersey
2 litigation will configure those computers. It's contemplated that
3 all of the documents and depositions which have been taken to date
4 will be available in virtual plaintiffs' depository for access by
5 special password with security implemented by plaintiff lawyers who
6 have cases.

7 We expect that the depository will be up and running at
8 full blast by your Honor's next scheduled status conference.

9 THE COURT: Next item is Confidentiality Agreement -- do
10 you have anything on the depository that you need to say?

11 MR. WITTMANN: Just to mention, Judge, we don't plan to
12 establish a formal depository for the defendant. We have our
13 records, we know where they are, we can access them and we see no
14 need at this point to do that.

15 On the Confidentiality Agreement Mr. Herman and I have
16 talked about it. We anticipate being able to reach an agreement on
17 the confidentiality which will be forthcoming shortly. I think I
18 owe him a draft of the confidentiality agreement and he owes me one,
19 too. But I think we will be able to work that out.

20 MR. HERMAN: Each side has appointed an individual to work
21 on the confidentiality order. From the plaintiffs' point of view
22 there are two specific issues, one is a Favored Nations Clause so
23 that if any document which is marked confidential in any litigation
24 is then released, that the MDL have advantage of it. And the second
25 is a periodic hopefully monthly log of documents that have been

1 listed as confidential so that no counsel on either side in any case
2 before the MDL will make the mistake of releasing inadvertently a
3 document that has been marked confidential and to which there has
4 been no removal of the confidentiality.

5 THE COURT: Okay. This issue is being raised more and
6 more in this type litigation than other type litigation. We've got
7 a conflict always between the First Amendment and the Sixth
8 Amendment. I believe in the First Amendment. The public has a
9 right to know, but I also believe in the Sixth Amendment, a fair
10 trial. And there is a clash to some extent there.

11 The way that it's worked out is to give effect to both
12 amendments. First, it is necessary to give some confidential
13 comfort to the party when they're concerned about proprietary
14 information and limit the information to this particular litigation.
15 Otherwise, there is such a reticence to disclose information that it
16 retards the development of this case before this court, and it makes
17 it unmanageable. So that's the purpose of allowing confidentiality
18 agreements; it's not the purpose to keep the public out, it's the
19 purpose of delaying that information, it's distribution perhaps
20 until a later time. If that information becomes significant.

21 But at this point its only significance is for this
22 litigation, and we need to have it come forward so that this
23 litigation can proceed and that's the manner of doing it.

24 Let me hear from the parties on the Remand Issues.

25 MR. HERMAN: May it please the court, the Stallworth case,

1 we had a remand motion set for May 11th, 2005. It's our firm's
2 case, it's a Louisiana medical monitoring case essentially, and
3 we've consented to not to have that case heard.

4 I do want to make the statement that not just on behalf of
5 myself but for those attorneys who have had their cases removed to
6 federal court, that the fact that removal is not decided, that
7 remand has not been decided that we would resist efforts to have
8 those cases which we believe properly belong in state court on
9 issues that are purely state issues, not swept up in class
10 certification with other cases that are pure federal cases.

11 I know this is a difficult area for the court, we, of
12 course, will abide whatever rules the court sets. We have agreed
13 that in accordance with your Honor's practice the remand motions as
14 a group will be dealt with as your Honor sees fit at some future
15 date.

16 THE COURT: Anything from the defendants on that?

17 MR. WITTMANN: Just one add-on to the Stallworth matter.
18 We also agree the briefing deadlines would be extended so nobody
19 would be prejudiced by that, and your Honor has indicated you will
20 deal with the remand issues as they come up and you will set a
21 procedure for us to deal with.

22 THE COURT: It's a little early for me to focus on it at
23 this point, but my thinking generally is to see what the lay of the
24 land is, to see how many remand motions there are and see whether or
25 not I can group them. And then I'll treat one from each group at an

1 appropriate time and give you my view of that particular issue, and
2 hopefully it will deal with all of those in the group and simply
3 being a following opinion of, me, too, opinion, but I will deal with
4 it at the appropriate time, not at this time.

5 Class Action Cases is the next item on the agenda.

6 MR. WITTMANN: I think we've really discussed that already
7 in a sense, your Honor. The only thing I would just add again, it's
8 our interest from the defense side to move that process forward as
9 rapidly as we can in this court. And I can't say that often enough.

10 THE COURT: We need to get a handle on the census is the
11 first issue that I mentioned to you, the defendants have the ball
12 there. Get with the plaintiffs, give them the lay of the land, then
13 let's get focused on a master complaint, and then get focused on the
14 grouping so that I can deal with the certification in each of the
15 groups.

16 Tolling Agreements is the next item on the agenda.

17 MR. HERMAN: Thus far, your Honor, the defendants have not
18 agreed to a tolling agreement. As I understand it, they have it
19 under consideration. The plaintiffs' viewpoint is without tolling
20 agreements statutes of limitation problems occur, the Plaintiffs
21 Steering Committee have discussed how will it deal with that in
22 alerting lawyers nationwide and litigants that they must get their
23 cases filed in the event that there is no tolling agreement. We're
24 hopeful that something can be worked out, we're willing to discuss
25 how it can be worked out.

1 In addition to that, without tolling agreements based on
2 other were pharmaceutical litigation in the Eastern District, we
3 would expect a minimum of 30 to 40,000 claims, and we believe
4 100,000 claims eventually being filed. It would be very difficult
5 to have a master complaint on individual cases with that many cases
6 being filed and the burden on plaintiffs to file 100,000 individual
7 petitions with the defendants only having to answer one master
8 complaint is an issue we need to deal with.

9 And your Honor, we've suggested, and hopefully I want to
10 thank clerk's office again for the outstanding job that they're
11 doing, I know it's a burden, but we would hope, for example, that a
12 lawyer that has 20 cases in Arizona, for example, or Louisiana could
13 file all of his plaintiffs' claims under one petition and have it
14 filed here before this MDL court. It would certainly facilitate
15 cases being filed by plaintiffs; and, secondly, the amount of time
16 that it takes to get to the transfer court, then to this court, then
17 the notification can be avoided and the burden could be lessened on
18 the clerk's office and the court in that regard.

19 THE COURT: We did that in the Achord case, but let me
20 hear from you on the tolling agreements.

21 MR. WITTMANN: We've gone a little beyond tolling
22 agreements in those remarks, but --

23 THE COURT: Talk to me first about tolling agreements.

24 MR. WITTMANN: Tolling agreements, your Honor, we have
25 under consideration the possibility of a tolling agreement. Not in

1 a general sense, an overall tolling agreement, but we are looking at
2 a specific subset of tolling agreements that might be feasible in
3 this case.

4 But we're interested in getting our arm's around this case
5 and knowing what's out there. We don't want to have a general
6 tolling agreement that's going to warehouse claims and down the road
7 come forward with thousands of claims that we don't know about. So
8 we are trying to work on some procedures that will be acceptable to
9 the plaintiffs and the court for us to come up with a tolling
10 agreement that might work from our standpoint.

11 We are looking at it very carefully, we know your Honor is
12 interested in, and we are going to pursue it with all due diligence.

13 THE COURT: Let me comment on that. I understand there
14 are problems from the standpoint of the defendant and they are
15 different problems than from the plaintiffs. But I do urge that you
16 take a look at it and see whether or not you can get some common
17 ground so that tolling agreements can be put into place. I think
18 it's best for this type litigation, and I think it's best for both
19 sides of this litigation.

20 I understand that you may look at tolling agreements a
21 little differently and come at it from a different vantage point,
22 but there is some benefit from your standpoint and a considerable
23 benefit from your standpoint as well as from the plaintiffs. So I
24 urge you to look at it and see if you can come up with something.

25 I directed a member of the Plaintiffs Steering Committee

1 to meet with a member of the Defendant Steering Committee and talk
2 about tolling agreements, and get back to me sometime before the
3 next meeting. Let's see if we can get one in place.

4 MR. WITTMANN: We will, Judge.

5 THE COURT: I talked with the parties about a proposed
6 case management order, how far have you all moved on that?

7 MR. HERMAN: Well, we've exchanged portions of a case
8 management order. We've reached agreement on some, on a number we
9 haven't. Yesterday -- I'm sorry, I think it was yesterday.

10 MR. WITTMANN: Day before yesterday.

11 MR. HERMAN: Day before yesterday we met and the
12 defendants gave us an overall proposed CMO. One of the difficulties
13 we have is actually, there actually is a defense proposal for a CMO
14 as regards class action cases and another CMO for individual cases.
15 That may be a procedure that's been used in other cases, we don't
16 know. None of us are really familiar with how in the context of
17 this litigation you could have CMOs and what scheduling problems
18 that would cause, but we've appointed members of the Plaintiff
19 Steering Committee to specifically exchange with defense counsel CMO
20 schedules.

21 There is also an item of motions or motion practice,
22 that's the next item on the agenda. And similarly, both sides have
23 conferred already and we've each appointed individual members of the
24 defense team and the plaintiff team to try and resolve a motion
25 schedule.

1 THE COURT: When can we get that in final shape, what's
2 realistic there?

3 MR. HERMAN: I would say within two weeks.

4 THE COURT: Are you comfortable with that?

5 MR. WITTMANN: Yes, your Honor. We originally when we
6 first got started in this litigation furnished your Honor with a
7 proposed CMO that was rather extensive, then your Honor said we
8 weren't quite there yet so we backed off of it. We carved portions
9 of that order out and put it into Pretrial Order No. 9 with the
10 deposition guidelines, and what we did with the rest of that
11 skeleton is to take a segment out dealing with the class actions and
12 a segment dealing with the individual actions and the motion
13 practice. We broke them down really for ease of consideration more
14 than anything else. We would be perfectly happy to have them go
15 together. They do have to be integrated I think.

16 But we do have proposals in plaintiffs' hands and they
17 said they would get back to us and I think two weeks is probably a
18 reasonable schedule.

19 THE COURT: Let me hear from you in two weeks, and I will
20 get a proposed case management order from you and work from that.

21 MR. HERMAN: Plaintiffs also had an a proposed case
22 management order that we've exchanged much earlier, and we
23 anticipate two weeks we will be able to do that.

24 THE COURT: All right. The next item is State/Federal
25 coordination. This case, as often happens, poses challenges with

1 regard to the coordination. It's to the benefit of the states as
2 well as the MDL court to have matters coordinated so that we can
3 deal with issues only one time hopefully.

4 And toward that end, I am going to be designating a state
5 liaison committee. I am going to ask the people on the state
6 liaison committee to attend these meetings, to participate in the
7 meetings, to bring to the court any particular problems that they
8 have so that we can resolve them at this meeting, and keep in touch
9 with the litigation as it's proceeding. Hopefully you can take
10 advantage of the material that is developed in this litigation and
11 it'll make your cases, if they do remain in state court, proceed a
12 little better and more efficiently.

13 But I will be naming a state liaison committee in the
14 immediate future. It will be in place by the time we have the next
15 meeting.

16 Courtroom Connect is the next item on the agenda, that's
17 an outside provider which will provide internet deposition services,
18 one of several that does this. It's helpful in this litigation. If
19 anybody who wants to participate in the deposition, either to the
20 point of asking questions or at least monitoring the depositions as
21 it is going on this technology affords them and opportunity to do
22 so. Particularly depositions that are taken in either other states
23 or for that matter in foreign countries.

24 When this is done by internet depositions an attorney of
25 record can pull it up, the deposition as it is going on on his or

1 her computer screen either at their office or other place and watch
2 the deposition as it's proceeding. On the right-hand side is real
3 time, on the left side is voice and image. I anticipate the
4 plaintiffs to have their chat rooms, the defendant to have their
5 chat rooms, the experts on each side to have their chat rooms and be
6 able to discuss what's going on the deposition is going on. If they
7 have any input, they can give the input to the person next to the
8 questioner at the deposition, it'll appear on his lap top that New
9 Orleans or Arizona or Hawaii or wherever has a suggestion to cover
10 something in greater detail. At the appropriate time that
11 individual can get to the questioner and tell them what the input
12 is. That is able to done.

13 In addition, I'll be talking to the providers to see
14 whether or not there is an ability for me to monitor the deposition.
15 In particularly problematic depositions where I know and the parties
16 know that it's going to be pregnant with a lot of objections and
17 evidentiary calls, I will watch the deposition as it's going on and
18 immediately rule on those objections so they can continue on with
19 the deposition. This will facilitate the operation of this type of
20 a case.

21 So I am interested in their presentation, I will be
22 listening to them immediately after this meeting.

23 One or two other items that I call to your attention. I
24 have been receiving some letters from people who are incarcerated in
25 many state and federal prisons throughout the country who apparently

1 feel they have cases. So they're interested in participating in the
2 litigation. I can't allow them to be present at these meetings, but
3 they should be represented.

4 So I am going to direct those individuals to liaison
5 counsel, who will be contacting counsel in the various states and
6 giving these individuals an opportunity to have some representation
7 if they desire to be represented.

8 Also I am receiving some letters from attorneys who want
9 to file their cases in this court as opposed to their local court.
10 That is to say, for example, a case in Texas. Instead of filing in
11 the Texas court, either federal or state, being removed if it's in
12 state into the federal system and then transferred to the MDL to be
13 transferred here, they want to short circuit that and file it in
14 this court initially.

15 Under our local rules an attorney from another state need
16 to do certain procedural things. He may ask to be admitted pro hac
17 vice and things of that nature. We have local rules on that. My
18 concern initially is to make sure that the parties focus on whether
19 or not this court has jurisdiction and/or venue. I'm not saying it
20 does, I'm not saying it doesn't. But that's an issue at least that
21 an attorney ought to get across, so that if it is filed here that at
22 least you've thought about whether or not the statutes of limitation
23 have been tolled or interrupted, whether or not this court has
24 jurisdiction or not in doing it that way. Obviously I have it if
25 you file in your local court then it's transferred here by MDL.

1 Question do I have it if it comes directly here? I may, I
2 may not. I just want you to at least focus on that. But if you do
3 wish to do it that way, we will try to accommodate you. But at
4 least keep that in mind.

5 Anything further on any issues that we have not covered,
6 either from liaison counsel, lead counsel, or for that matter any of
7 our people in the courtroom here today?

8 I appreciate your presence, I urge you to continue to be
9 present and any issues that you want to raise, please feel free to
10 raise them.

11 I also have some people on the phone, do you need to make
12 any comments on the phone?

13 MS. TEJEDOR: No thank you, your Honor. Marie Tejedor
14 from Florida.

15 THE COURT: Yes, Mr. Becnel.

16 MR. BECNEL: Your Honor, there's been -- I'm sorry, go
17 ahead first.

18 MR. WITTMANN: Your Honor, I was going to say I forgot to
19 give you yesterday and forgot to give Mr. Herman also an index of
20 cases part of the MDL as of April 21, 2005. And people on the phone
21 might be interested in this, too. There are 477 cases that have
22 been transferred down by the MDL, from the Multi District Panel to
23 this court. There are another 382 cases that have been served on
24 Merck have been not yet transferred to this MDL, so the total over
25 800 cases now in the MDL or coming through the MDL.

1 I wanted to give this list to your Honor and I forgot to
2 give Mr. Herman a copy as well.

3 MR. HERMAN: Your Honor, I had one or two comments for the
4 record. First of all, liaison counsel is going to direct any pro
5 se, whether they are prisons or not, going to give them a list of
6 the lawyers in their state who applied to the PSC for appointment
7 with their contact information and leave it up to the pro se to
8 contact a lawyer that they choose. Liaison counsel will not place
9 liaison counsel in the position of gathering any cases from pro se
10 people, we will let those folks choose attorneys that they desire.

11 In the event that they don't want an attorney, don't
12 choose one, we will bring that back to your Honor.

13 The other matter that I wanted to bring to your Honor's
14 attention is that we will probably need to confer with your Honor
15 over the next week by telephone or in person, and I will be meeting
16 with Mr. Wittmann and perhaps we can have some mutual times that we
17 can provide to the court so that your Honor may discuss with us any
18 problems that we have.

19 THE COURT: That's fine. Good. Yes, sir.

20 MR. JOHNSON: Thank you, your Honor, I am Mr. Johnson from
21 Vermont.

22 THE COURT: Sure, Mr. Johnson. I appreciate you being
23 here.

24 MR. JOHNSON: I am happy to be back and thank you for
25 letting me address the matter. I personally would find it helpful

1 if each member of the PSC would just simply stand up and introduce
2 themselves, I have the pleasure of working with them all that I can
3 match the face with the name.

4 THE COURT: Good point.

5 MR. JOHNSON: The other thing I will just raise, I think
6 the committees is a great idea. I want to move ahead quickly with
7 Ms. Cabraser and Mr. Seeger, particularly in light of the
8 discussions today regarding the plaintiff profile forms, which to
9 the extent there are any such forms relating to the economic cases
10 will obviously look dramatically different than those. Thank you,
11 your Honor.

12 THE COURT: Good, I appreciate your input and I thank you
13 for being here.

14 MR. SEEGER: Chris Seeger for those of you who don't know
15 me. By the way, your Honor, I don't think we are discussing a fact
16 sheet on economic cases at this point. We will talk about it.

17 MR. BIRCHFIELD: Andy Birchfield.

18 MS. CABRASER: Elizabeth Cabraser.

19 MS. LEWIS: Carlene Lewis.

20 MR. RAFFERTY: Troy Rafferty.

21 MR. ARSENAULT: Richard Arsenault.

22 MR. RANIER: Drew Ranier.

23 MR. MUNIER: Jerry Munier.

24 MR. LEVIN: Arnold Levin.

25 MR. ROBINSON: Mark Robinson.

1 MR. KLINE: Tom Kline.

2 MR. HERMAN: Russ Herman.

3 THE COURT: Anything further from anyone? Mr. Becnel.

4 MR. BECNEL: Your Honor, I think one of the issues because
5 of the Bextra recall now that many of the clients of mine, and I'm
6 sure of everyone else's, have taken three types of medications,
7 Ansaid, Bextra, Celebrex and Vioxx in combinations at certain times.

8 I would ask the court to consider putting on the agenda
9 the coordination because it's going to be very difficult, especially
10 if they're taking them within a very short period of time, might
11 have taken Ansaid or Bextra and Vioxx how to handle that, and ask
12 the court to address that with the plaintiffs counsel and defense
13 counsel in a coordinated fashion.

14 THE COURT: Okay. I'll wait until that works itself out a
15 little bit further.

16 MR. HERMAN: May it please the court, initially I want to
17 say the Plaintiffs Steering Committee is absolutely against
18 coordinating with Bextra or any other case. We've got enough to
19 deal with this case. We also believe there are some legal issues
20 that we do not wish to liaison with or communicate with or discuss,
21 it would be detrimental to the plaintiffs' positions in this case.
22 Might as well bring that to your Honor's attention now.

23 THE COURT: I appreciate both comments. I am not going to
24 rule on that at this point or make my decision on that point, I'll
25 wait until later to make that decision.

1 MR. HERMAN: I do have one more request, and that is that
2 any attorney who is interested in serving on a committee, they don't
3 get a notice that they're on a committee, please send in a CV,
4 attached to it your preference to serve on what committee you want
5 to serve on, and the PSC will look at it and attempt to accommodate
6 those requests.

7 THE COURT: Okay. Fine. Give me some dates for the next
8 meeting.

9 MR. HERMAN: May 23rd, your Honor.

10 THE COURT: Monday, May 23rd. Same time, nine o'clock, I
11 will see liaison counsel at 8:30. Anything further?

12 I am reminded, anyone who has not signed in, please sign
13 in as you leave so that we have a record of your presence here
14 today. And I thank everybody for being here today, and the court
15 will be in recess.

16 THE DEPUTY CLERK: Everyone rise.

17 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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1
2 REPORTER'S CERTIFICATE

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

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11 _____
12 Karen A. Ibos, CCR, RPR

13 Official Court Reporter
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