

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF LOUISIANA  
3 NEW ORLEANS, LOUISIANA  
4

5 IN RE: VIOXX PRODUCTS \* Docket MDL 1657-L  
6 LIABILITY LITIGATION \*  
7 \* May 23, 2005  
8 \* 9:00 a.m.  
\* \* \* \* \*

9  
10 STATUS CONFERENCE BEFORE THE  
11 HONORABLE ELDON E. FALLON  
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 For the Plaintiffs: Herman, Herman, Katz & Cotlar  
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23  
24 Proceedings recorded by mechanical stenography, transcript  
25 produced by computer.



1 dockets to take care of. I respect that. Certainly they need  
2 to proceed as they feel they need to proceed with their cases,  
3 and it's not the intention of the MDL to interfere in any way  
4 with them. We recognize, all of us, that we can contribute to  
5 the process and we will cooperate with each other and hopefully  
6 help the litigants in the process of doing that. All of us  
7 have our dockets to take care of and particularly, from the MDL  
8 standpoint, I'm very conscious of it. I'm delighted to be able  
9 to work with these renown jurists and get from them their  
10 counsel and suggestions because they have been with this case  
11 longer than I have. If anyone has any comments to make, we  
12 certainly would be receptive to it.

13 JUDGE ROCHESTER: Nothing from Alabama.

14 JUDGE HIGBEE: I just want to say that it's been a  
15 delight to be here. Judge Fallon is an extremely respected  
16 jurist and we are very happy to have been able to meet with him  
17 and talk with him. We have been speaking on the telephone  
18 before this. We have, both, links to New Jersey and the MDL,  
19 our web sites, links to each other's sites. We intend to  
20 continue, through this litigation, to try to cooperate, to work  
21 together as much as possible to help the lawyers facilitate the  
22 rapid movement of the cases.

23 In some places there has been certainly friction  
24 between the state courts and the federal courts, and I'm  
25 delighted to tell you that's not going to occur here.

1 Judge Fallon has been very courteous and very understanding of  
2 the needs of the state courts, just as we understand the need  
3 that he has to handle the very complex MDL, which is I'm sure  
4 going to grow by leaps and bounds. I'm happy that I can  
5 reassure those people who are involved in the New Jersey  
6 litigation that the New Jersey litigation is going to go  
7 forward as scheduled and that we have a spirit of working  
8 together and not against each other. Thank you very much. I'm  
9 delighted to be able to tell you that.

10 THE COURT: Thank you, Judge Higbee. I appreciate  
11 you being here. I appreciate the other judges also being here.  
12 Also, before we begin, I visited with the FDA representatives  
13 this morning with counsel for defense, counsel for plaintiffs,  
14 and the United States Attorney's Office here in New Orleans.  
15 Some progress has been made. A lot needs to be done, but the  
16 plaintiffs and the defendants will be meeting with the FDA this  
17 coming week to work out a protocol to get the material that is  
18 necessary to be received to move this case forward. Let me  
19 hear from the parties first. Lexis Nexis File & Serve.

20 MR. WITTMANN: Yes, Your Honor. With the Court's  
21 permission, I think it would be helpful to start with a case  
22 count and give everyone present an idea of what we are dealing  
23 with on a nationwide basis. As of Friday afternoon, we had 637  
24 cases in this MDL that have actually be transferred to the  
25 Eastern District of Louisiana. We have another 493 cases on

1 the way and conditional transfer orders have been issued, but  
2 they have not arrived here yet. There are another 145 cases  
3 pending in state courts, excluding New Jersey and California,  
4 and I gave you lists of those cases this morning. I did not  
5 give you a list of the New Jersey cases. There are, by our  
6 count, 1,740 cases pending in New Jersey in the state court  
7 system. Those are all under Judge Higbee's coordinated  
8 administration, as I understand it. There are 153 in  
9 California, but don't be deceived by that because there are  
10 1,000 plaintiffs involved in those 153 cases. So that gives  
11 you an update on the numbers that I think are significant. On  
12 Lexis Nexis --

13 THE COURT: Before you leave that, with regard to the  
14 class actions, I understand there are presently 109 class  
15 actions in the United States.

16 MR. WITTMANN: I think there are 111. I think that's  
17 right, 111.

18 THE COURT: 109 was on Thursday, so we have 111 on  
19 Monday. Over 90 class actions are either in this Court or on  
20 the way.

21 MR. WITTMANN: In this Court or on the way, that's  
22 right, Your Honor.

23 THE COURT: I understand from the plaintiffs that  
24 they anticipate some 100,000 individual cases, though it's hard  
25 at this point to get a handle on it, but that's the anticipated

1 amount.

2 MR. WITTMANN: That's correct. Judge, on Lexis  
3 Nexis, they went live on Wednesday, May 11. The system seems  
4 to be working very well. We had 75 defense lawyers who had not  
5 registered as of the time of our meeting last Monday with the  
6 Lexis Nexis people. I'm pleased to report they have all now  
7 registered and we are 100 percent signed up on the defense  
8 side. Notwithstanding all of that, Russ and I are going to  
9 continue to serve our respective groups through the end of this  
10 month, but effective June 1 neither Russ nor I will be sending  
11 any further notification. It will all be handled through  
12 File & Serve.

13 THE COURT: I'll put that on the web site. Also,  
14 give me an order to that effect. It's very significant, very  
15 important for the attorneys who are interested in keeping up  
16 with the documents that have been filed in this case to get on  
17 the File & Serve Lexis Nexis program because they can log on  
18 and they can see what has been filed. They can download  
19 whatever information they need. A calendar will be kept. I'll  
20 have the site on my web site and you can get into it. If you  
21 don't get into it soon, at the end of the month you are not  
22 going to be receiving any longer a hard copy of any documents  
23 that liaison counsel is required to serve on you. They will  
24 satisfy their requirements by serving Lexis Nexis, which will  
25 upload their material. Everybody in the Lexis Nexis program

1 will get an e-mail to that effect, and they can log on and look  
2 at the material, download it, copy it, do whatever they need to  
3 do for it, but it's essential that you get on that program.

4 MR. WITTMANN: I think Russ wanted to add something  
5 on the File & Serve.

6 MR. HERMAN: May it please the Court. We will, out  
7 of necessity, continue to serve pro se applicants who are  
8 institutionalized and who do not have access to e-mail  
9 identification. Thus far, there are four pro se individuals  
10 who have advised the Court or counsel.

11 THE COURT: The next item on the agenda is trial  
12 settings.

13 MR. WITTMANN: Your Honor, there are three cases that  
14 are set now that I know of. We have the Rogers case that was  
15 set in Alabama and has been postponed. The Ernst case was set  
16 for trial on May 31. That's been postponed and reset for  
17 July 11, 2005. The New Jersey case, the Humeston case, has  
18 been set for trial on August 1, 2005. I'm also advised that  
19 the Guerra case in Texas has been tentatively set for late  
20 September or early October of 2005. Those are the only trial  
21 settings that I know of, Your Honor.

22 THE COURT: The way I see it, from the standpoint of  
23 the MDL, I would like to try to move into the trial mode with  
24 some cases. This is not new litigation. A lot of material has  
25 been discovered. A lot of depositions have been taken. Some

1 7 million documents now have been migrated into the database of  
2 the plaintiffs in the MDL proceeding and a large number of  
3 depositions have been set, so I do want to move forward with  
4 some trials. Realistically, I think the best I can do with the  
5 trial settings would be in the latter part of the year,  
6 November, December, something of that sort. I don't see, from  
7 the MDL standpoint, beginning trials before these settings, but  
8 I will do my best to get some trials set in the latter part of  
9 this coming year and certainly next year and move into a trial  
10 mode.

11 In that regard, I will be talking with liaison  
12 counsel for each side regarding a policy and a program for  
13 selecting those trials. I will look to you for input, look to  
14 you for some suggestions as to how we select those trials. You  
15 know them better than I from the standpoint of the cases, but  
16 there should be some cases that are ready for trial. You'll  
17 know that and I'll talk with you on it, but that's for another  
18 day, at last from the MDL standpoint.

19 MR. HERMAN: Good morning, Judge. On behalf of the  
20 bar of Louisiana and the other attorneys here, as officers of  
21 this Court and your Court, we want to welcome Judge Hardin from  
22 Texas, Judge Higbee from New Jersey, and Judge Rochester from  
23 Alabama. We appreciate it. On behalf of the MDL, we will do  
24 everything we can to cooperate and coordinate and as Judge  
25 Fallon will so direct us. Your Honor, first I want to thank



1 Ms. Loretta Whyte, who has given extra staff and attention to  
2 this case. I noted that there were at least three other  
3 workers from the Clerk's Office outside this morning. We thank  
4 you.

5 In terms of selection of cases for early trial,  
6 Your Honor has indicated to both plaintiffs and defendants that  
7 Your Honor does not wish to have delay in the MDL in terms of  
8 trial settings. We are undertaking a survey now of Louisiana  
9 Eastern District filings to determine which attorneys have  
10 cases which may be expeditiously set for trial and we will be  
11 reporting to the Court.

12 Your Honor has also undertaken to have the  
13 Food & Drug Administration meet with us and that meeting is set  
14 for June 2. Mr. Tisi and I will meet with representatives of  
15 the FDA in Washington and attempt to facilitate and expedite  
16 FDA discovery. With that discovery and marketing discovery, we  
17 believe that a number of cases may be selected for early trial.  
18 Today, after court, the plaintiffs and defendants will meet to  
19 further discuss a production protocol. We are very close to  
20 agreement in that regard.

21 THE COURT: The next item is class actions. Any  
22 comments on class actions?

23 MR. WITTMANN: If I could say one thing on the  
24 selection of cases, Your Honor. As you know, we have given you  
25 a preliminary view of what we think might be a workable

1 schedule for trials of individual cases in the MDL. I  
2 recognize Mr. Herman has not had an opportunity to review that,  
3 but hopefully we will have a chance to discuss it over the  
4 course of the next week and we can come back here with  
5 something that will work.

6 MR. HERMAN: I looked at it very closely this weekend  
7 and it's like turning a telescope the wrong way. With respect  
8 to class actions, Your Honor, Mr. Wittmann served on us Friday  
9 an additional 30 to 40 class actions. Members of our committee  
10 have undertaken to group them by issue, geographically, and  
11 otherwise. For example, medical monitoring, a review of the  
12 medical monitoring cases indicate, for example, that  
13 West Virginia, Pennsylvania, and Louisiana have had substantial  
14 experience with opportunities either to class or not class  
15 medical monitoring cases. It's anticipated that those cases  
16 certainly will be broken out, as will the consumer and third  
17 party cases.

18 Your Honor has expressed to us in very direct  
19 and imperative terms that plaintiffs and defendants should meet  
20 and have a CMO effected. Our various representatives will be  
21 meeting after this conference today in order to attempt to  
22 reach an agreement on a full CMO; and, if not, a partial CMO.

23 THE COURT: I need that done within five days. If  
24 it's not, then I'm going to construct the CMO. It's been my  
25 experience that the lawyers, as experienced as we have before

1 us here today, can do a better job on the CMO than the Court  
2 can. You know your case better and you know the requirements  
3 of it. It requires that you listen to each other and that you  
4 try to recognize the difficulties and problems that your  
5 colleague on the other side has and that you deal with those in  
6 a way that protects your client, but also satisfies their  
7 needs. If you do that, you can come up with a program and a  
8 road map which will run the case in a way that you feel it  
9 should be run. If you default on that, if you fail in that and  
10 I look upon it as a failure, then I will step in and impose my  
11 CMO on you. It's not going to be as good a CMO as you can both  
12 construct, so I urge you to first try it. If it fails and you  
13 fail, then I will do it, but I urge that you do it. Individual  
14 cases is the next item.

15 MR. WITTMANN: Your Honor, we had previously  
16 furnished to you a proposed case management order for  
17 individual cases. We then received a single case management  
18 order from plaintiffs. We are talking with them about that.  
19 The biggest area of disagreement, quite frankly, I think is in  
20 the area of the class actions. We have a very different view  
21 of the discovery and the certification process than the  
22 plaintiffs do at this point. We are trying to expedite and  
23 move quickly on the class actions. There are now 111 of them.  
24 We gave the additional actions to Mr. Herman last week, as we  
25 said, and there have been 70 of them or so and now they are

1 all -- in fact, these have all been out there all along, we  
2 just haven't gotten copies for the plaintiffs.

3 Our view is the class action scheduling process  
4 should move quickly. I don't think we will be that far apart  
5 on the individual cases, but it's hard to tell. We understand  
6 Your Honor has given us five days to do it and that's it, so we  
7 will work very diligently to do that starting right after this  
8 conference today, Your Honor.

9 THE COURT: With the class actions, we have got to  
10 get a focus on the census of the class actions. It's a moving  
11 target at the present. When we get to a point where it either  
12 slows down or we are able to get our hands around the class  
13 actions, then I need your input on whether they can be grouped  
14 by issue or whether they can be grouped by state. If we can  
15 group them, then my interest would be in taking a class action  
16 from a group and trying at least a certification aspect of that  
17 group. If it's representative of the group, then I will simply  
18 "Me, too" it and adopt that ruling for the rest of the group so  
19 that I won't have to try 109 or 111 or 200 class actions.  
20 Hopefully, it will be fewer than that. We need to at least get  
21 a census and get a better feel on the class actions, but the  
22 individual cases it seems to me we ought to be able to come up  
23 with some road map for dealing with those. Document discovery  
24 directed to Merck is the next item on the agenda.

25 MR. WITTMANN: We are very close on that, Judge. We

1 have been working with representatives of the plaintiffs'  
2 steering committee. They furnished a copy of an order that  
3 was, as I understand it, crafted in connection with the  
4 New Jersey proceedings. Our people are here today, so are the  
5 plaintiffs, and I think we will be able to work something out  
6 on that before the day is out.

7 THE COURT: Meet after this conference and then get  
8 to me sometime by the end of the day and let me know whether or  
9 not you are able to work it out.

10 MR. WITTMANN: Okay.

11 MR. HERMAN: I'm sorry, Your Honor. I have a comment  
12 about the CMOs and class actions that I make on behalf of the  
13 plaintiff bar. Your Honor has always, as all judges do, placed  
14 a high premium on intellectual honesty, and the faster you get  
15 to cert. the more advantageous it is for the defendants,  
16 particularly in American Pipe states. Though American Pipe  
17 would interrupt statutes of limitations, there's a big  
18 question -- particularly in federal court -- what happens when  
19 cert. is denied, and it may mean that the statute begins to  
20 run. We have got statutes of limitation that run one year,  
21 some run two years, some without a discovery rule. While I  
22 understand that we must move to class certification issues  
23 quickly, we don't want to do that in jeopardy of client rights.  
24 In terms of marketing information with detailers nationwide, we  
25 have a dispute. That dispute impacts learned intermediary, it

1 impacts reliance, and it impacts the statute of limitations.

2           The dispute is legitimate. I don't say that  
3 it's not. I only say that, from a plaintiff's point of view,  
4 we have to proceed with caution in terms of class discovery,  
5 while in a single case, where you are only dealing with a  
6 single jurisdiction or one or two jurisdictions, the issue is  
7 not as complex. It has calculable effects, but when you are  
8 dealing with the statute of limitations and defenses in 50  
9 states, it poses a problem. We will work closely with the  
10 defendants and with Your Honor to get a schedule for class  
11 cert. discovery that bothers us before that hearing takes  
12 place.

13           With regard to Merck employee information, which  
14 is the next issue, there's a dispute and the dispute is this.  
15 It's not the whole dispute, but it's a significant dispute.  
16 The defendants say, "We only want to give you detailer  
17 information in filed cases." We say, "We want detailer  
18 information on all the detailers that represented Merck with  
19 respect to this product." Again, it impacts statute of  
20 limitations. It impacts reliance. It impacts learned  
21 intermediary. If we were dealing with just the federal court  
22 and the state of Rhode Island, that issue would be quite  
23 different, but in order to prove a nationwide misconduct and  
24 protect the rights of plaintiffs nationwide we feel that we  
25 must have this information. Defendants, on the other hand,

1 have said, "No. It's burdensome. Why should we have to  
2 produce it before in cases that aren't filed?" We believe  
3 they're legitimate reasons, they don't believe they're  
4 legitimate reasons, and we are at loggerheads as to that issue.

5 THE COURT: Let me hear from the defendant on that.

6 MR. WITTMANN: Your Honor, the defendants are  
7 perfectly willing to produce the detailer information as a part  
8 of case-specific discovery, but to go into production of the  
9 documents that the plaintiffs want at this point in time on all  
10 10,000 people who touched Vioxx at one point in time is  
11 tremendously burdensome and, frankly, unnecessary at this stage  
12 of the litigation. We would propose to provide that  
13 information when we provide the defendant fact sheet, which we  
14 will get to in a few moments, but we want to do that in  
15 connection with case-specific discovery and not produce  
16 documents that may never be looked at and never be used in  
17 connection with those cases. So we do have a very sharp  
18 dispute over that issue. We will be bringing it to the Court  
19 for resolution, I'm sure.

20 MR. HERMAN: Your Honor, one more comment. Excuse  
21 me, Phil. We are faced with not only the most articulate and  
22 well-armed adversaries in this case, but they think ahead. If  
23 we only get that information when we get defendant fact sheets,  
24 cases will be prescribed. The statute will have run. For  
25 example, in Louisiana we filed an action which defendants

1 removed naming two detailers, but in order to prove a plan of  
2 misrepresentation and omission we would have to virtually  
3 depose all of the detailers of Louisiana. That applies  
4 nationwide, as well. We think that it is a critical issue.

5           As of September, the drug was withdrawn from the  
6 market and the statute will run in a number of states,  
7 including Louisiana. For that reason, we will file before the  
8 30<sup>th</sup> our master request for production and the information we  
9 seek can then be teed up in motion practice and brought to  
10 Your Honor in the proper form.

11           MR. WITTMANN: We don't see the need for this  
12 information as affecting statute of limitation issues at all,  
13 Judge. As you know, we are working on a tolling agreement now,  
14 what we believe are the serious cases and we think, quite  
15 frankly -- we have a different view of American Pipe, as well,  
16 with respect to the class actions that have already been filed.  
17 I do not believe that this is something that's needed or  
18 necessary at this point in the litigation. It's a tremendous  
19 burden.

20           THE COURT: I understand the issue, but I want to  
21 resolve it as quickly as possible. I would like it briefed and  
22 sent to me and I will rule on it. I would like to rule on it  
23 before the next status conference. The plaintiffs will have  
24 two weeks to get the brief to me, the defendants will have 10  
25 days after that to respond, and then I will decide the case. I



1 do understand the issue. I don't need a lot of briefing. You  
2 don't need to give me *War and Peace* on this issue, just hit the  
3 highlights on it. I know the cases. If you have any other  
4 areas that I need to look at, give it to me.

5 MR. WITTMANN: Thank you, Your Honor.

6 THE COURT: The next item on the agenda is insurance  
7 information.

8 MR. WITTMANN: Yes, Your Honor. Friday we delivered  
9 to Mr. Herman the 21 insurance declaration pages in hard copy  
10 and electronic format dealing with Merck's insurance carriers  
11 over the period in question, so that's been accomplished.

12 THE COURT: Anything on that from the plaintiffs?

13 MR. HERMAN: Yes, Your Honor. We appreciate the  
14 delivery of the dec. pages. Now that we have those, we will  
15 call at some point for the entire policies. We are  
16 particularly interested in whether or not there's any officers  
17 or directors insurance and what exceptions or limitations and  
18 definitions may apply in that regard. We do appreciate the  
19 quick delivery without the necessity of protracted motion  
20 practice. With respect to discovery directed to the FDA,  
21 Your Honor has addressed that.

22 THE COURT: The next item of the agenda, we have  
23 already talked about that, so the next item is the discovery  
24 directed to third parties. Anything on that?

25 MR. HERMAN: Your Honor, we haven't filed discovery

1 directed to third parties. Essentially, our discovery, which  
2 will be filed before May 30, will be directed to Merck. Once  
3 we have the discovery to Merck in place and FDA discovery in  
4 place, we'll then submit a separate set of interrogatories and  
5 production directed to third parties.

6 THE COURT: The next item is the deposition  
7 guidelines and scheduling. I've issued an order, after  
8 conferring with counsel, setting forth the first and third week  
9 of each month for the taking of depositions. It doesn't matter  
10 whether you take them in addition to those two weeks, but those  
11 two weeks are set aside so that everybody can clear their  
12 calendars who are going to be taking the depositions. Those  
13 are the deposition dates that you will be committed to. If  
14 there are additional ones you decide, you can work them in. We  
15 set some guidelines, also. That's already been done.  
16 Plaintiff profile forms.

17 MR. WITTMANN: Before we leave the depositions,  
18 Your Honor, in your earlier pretrial order you said that  
19 deposition discovery could go forward. Both plaintiffs'  
20 counsel and defense counsel have sort of held off on  
21 depositions. There are a few depositions going forward in  
22 New Jersey. I think there are five Merck employees in  
23 New Jersey that Mr. Buchanan wants to depose, and I understand  
24 the Court agreed to a cross notice in this MDL. So the first  
25 MDL depositions will be going forward as a cross notice in some

1 depositions that are being taken in New Jersey.

2 THE COURT: All right.

3 MR. WITTMANN: Those are the only ones I know of  
4 going forward at this point. We have not yet selected a date  
5 when we are really going to begin taking depositions or when  
6 that first date will be. We'll be talking to Mr. Herman about  
7 that during the course of the day.

8 THE COURT: I would like to get some schedule on  
9 that. We have to start the depositions. Also, it gives me an  
10 opportunity to again reinforce the fact that, as I see the MDL,  
11 we ought to be cooperating as much as we possibly can with the  
12 states so that any depositions taken in the MDL ought to be  
13 able to be used in any state litigation. In that regard, I  
14 have appointed state liaison counsel to keep an eye on this  
15 litigation from their respective states and from the state view  
16 entirely.

17 I would appreciate the state liaison counsel  
18 being present at these meetings. Give me your input. I will  
19 always ask for your input. If you run into any particular  
20 problems, this is the forum to bring it up in and I will  
21 attempt to resolve those particular problems. Make sure you  
22 have a copy of all of the litigation that has been filed so you  
23 can keep up with it and have access to all of the documents and  
24 all of the databases.

25 MR. HERMAN: With respect to XII, which is the

1 plaintiff profile form, there are three issues outstanding that  
2 have not been agreed to. We will meet today. With respect to  
3 the defendant profile or fact form, there are a large number of  
4 substantial issues outstanding and our various representatives  
5 will meet about those today.

6 THE COURT: Each side take five days to do it. If  
7 you don't do it within five days, then I will do it, but we  
8 need that done within five days. Medical records from  
9 healthcare providers.

10 MR. HERMAN: Mr. Wittmann will address that,  
11 Your Honor. I have to *mea culpa*. It's my responsibility to  
12 make sure that our reply brief was filed on Friday. I  
13 neglected to do it. I apologize to counsel and the Court. I  
14 have the original brief and copies for the Court. May I  
15 approach?

16 THE COURT: Yes. That has to do with the contact or  
17 communication of claimants' healthcare providers?

18 MR. HERMAN: Yes.

19 THE COURT: The next one is the medical records from  
20 healthcare providers. You said you continue to discuss a  
21 master repository for medical records.

22 MR. WITTMANN: I'm prepared to address that,  
23 Your Honor.

24 THE COURT: Okay.

25 MR. WITTMANN: There's an Internet site for medical

1 records that is going on line and being tested in New Jersey  
2 this week. We believe that we will be able to use that system  
3 in the MDL and have available to plaintiffs' counsel on an  
4 Internet web site the records of their clients they can get.  
5 It will be confidential. They can't get records that are not  
6 their clients' records. That's being tested up in New Jersey.  
7 We hope it's going to work out well and be used in this  
8 litigation. I think it will work here.

9           The only medical records we have in Louisiana  
10 right now are in the Merrick case, Mr. Singleton's case. I  
11 think we have already given hard copies of those records to  
12 Mr. Singleton. We don't have any medical records other than  
13 those. When we get them, we will put them on that web site, as  
14 well, in the MDL.

15           THE COURT: That's something that the states might be  
16 interested in, so keep an eye on it and make sure you have  
17 access to it. Contact or communication with the healthcare  
18 providers, that's an issue that I understand this is a brief  
19 on. I haven't, obviously, seen the brief. It just came in.  
20 I'll look it over. I understand the issue.

21           The point that is a little different in this  
22 particular case that concerns me -- and hopefully the briefs  
23 flesh it out for me. There's the usual issues of privacy and  
24 usual issues of the scope of privilege and various statutes  
25 which may or may not be applicable. The difference in this

1 particular case is that some of the healthcare providers,  
2 particularly the ones who prescribed the drug, are potential  
3 defendants. That doesn't give access of the defendants to the  
4 plaintiffs' healthcare provider, but the question is should the  
5 plaintiffs have access to that individual, who is or may well  
6 be a defendant or a potential defendant in the lawsuit. That's  
7 an issue that is different than the usual one where the  
8 question is should the defendants have access to healthcare  
9 providers. That's the nuance in this particular case as I see  
10 it. I won't rule on it today, but I'll look at the brief and I  
11 should be able to rule on it within the week. I understand the  
12 issue. Plaintiff depository is the 15<sup>th</sup> item on the agenda.

13 MR. HERMAN: Yes, Your Honor. We have space under  
14 lease. The computers have been ordered to be reconfigured. In  
15 the meantime, the Seeger Weiss law firm in New York depository  
16 and the Beasley Allen depository in Birmingham or Montgomery is  
17 up and operating. We have had more than 80 requests by  
18 attorneys other than PSC attorneys to serve on the discovery  
19 committee. Those individuals are going to be given specific  
20 assignments in the next week to go to those two depositories  
21 and to begin reviewing documents within certain parameters that  
22 internally the PSC established.

23 THE COURT: The next item is the confidentiality  
24 agreement. Any progress on that?

25 MR. WITTMANN: Yes, Your Honor. We have reached

1 agreement on the confidentiality agreement and will be  
2 submitting it to you at the conclusion of the conference for  
3 signature.

4 THE COURT: Thank you. Remand issues.

5 MR. HERMAN: There's been one request from  
6 plaintiffs' counsel in Linda Johnson, et al v. Narendrea  
7 Dabhade, Docket 05-1005, transferred to the MDL from the  
8 Northern District of Illinois. The matter has been briefed.  
9 Counsel has requested a hearing on that issue.

10 THE COURT: I'll deal with it. Any report on tolling  
11 agreements? That's the 18<sup>th</sup> item on the agenda.

12 MR. WITTMANN: Your Honor, the tolling agreement is  
13 under active discussion. We will be meeting again today at the  
14 conclusion of this conference and I'm hopeful we will be able  
15 to reach agreement on the tolling agreement with the conditions  
16 we discussed with the Court earlier.

17 THE COURT: That's a significant issue. It's very  
18 important that every attempt be made to deal with the tolling  
19 agreement. I think it's helpful to both sides. If tolling  
20 agreements are not forthcoming very shortly, I would anticipate  
21 a large number of suits having to be filed because of the  
22 prescriptive concerns. If those concerns will be manifested  
23 particularly in one-year statute states in September, the  
24 lawyers will have to begin now to process those cases. It's  
25 not as if they have only one case. If they have a large number

1 of them, they will have to start processing those cases in the  
2 immediate future. So I urge that, if you are going to get with  
3 tolling agreements, that you do everything possible to expedite  
4 that. It is an agreement between the parties and the Court is  
5 not going to force agreements such as these, but I do urge that  
6 you look at it seriously. I do feel that it would be helpful  
7 to both sides that you do so.

8 MR. WITTMANN: We are working on it, Judge.

9 THE COURT: State/federal coordination.

10 MR. HERMAN: Your Honor has recently issued an order  
11 appointing your committee for state/federal coordination. We  
12 note that the states which have been most active in Vioxx  
13 litigation are New Jersey, Texas, Alabama, Pennsylvania, and  
14 California. Each of those states are represented on  
15 Your Honor's state liaison committee. There is a practitioner  
16 from each one of those states which Your Honor has selected to  
17 the plaintiffs' steering committee.

18 THE COURT: Any of the members of the plaintiffs'  
19 steering committee, would you just introduce yourself to the  
20 Court.

21 MR. GIRARDI: Good morning, Your Honor. My name is  
22 Tom Girardi from Los Angeles.

23 MS. BARRIOS: Dawn Barrios from New Orleans.

24 MR. WITKIN: Justin Witkin from Pensacola.

25 MR. SINGLETON: Willis Singleton, Your Honor, from



1 Shreveport, Louisiana.

2 MR. BURG: Michael Burg from Denver, Colorado.

3 MR. WEISS: Sol Weiss, Your Honor, from Philadelphia  
4 and New York. Nice to see you again.

5 MR. LANIER: Your Honor, Mark Lanier from Texas.

6 THE COURT: Anyone else? I appreciate you serving on  
7 this committee. Again, the purpose of having a committee is so  
8 you can focus on the states and make sure that the state has  
9 access to this information. If you have any particular  
10 problems or you see any particular problems or anticipate any  
11 particular problems, bring it to my attention and I will try to  
12 work with you on it.

13 MS. BARRIOS: Excuse me, Your Honor. Dawn Barrios  
14 for the state committee. May we have an opportunity to be  
15 heard on the issue of the discovery of the Merck employees? We  
16 would like to be given 10 days to file a brief on that.

17 THE COURT: That will be fine.

18 MS. BARRIOS: Thank you, Your Honor.

19 THE COURT: Waiver of service of process, pretrial  
20 order.

21 MR. WITTMANN: We have agreed on that, Judge, and  
22 given the order to you. I think you may have signed it.

23 THE COURT: I signed it and it's part of the record.  
24 The next one is the pretrial order regarding direct filing of  
25 cases into the MDL. Traditionally the way the cases get into

1 the MDL is that they are filed in their respective states.  
2 They are then transferred by the MDL on a conditional transfer  
3 first, giving the parties an opportunity to object, a hearing  
4 is held, and the ruling is made whether or not to make the  
5 transfer permanent, then it's sent to the MDL. A number of  
6 lawyers wanted to short-circuit that process and file directly  
7 in this proceeding. My concern initially with that was issues  
8 of venue, issues of jurisdiction, issues of prescription, and I  
9 mentioned that to the parties. I understand they have worked  
10 out a pretrial order which allows that to be done without  
11 causing any concern or problems to the people who are filing.  
12 I have been presented with an order to that effect and I have  
13 signed the order and it's part of the record. The next item is  
14 the pro se claimants.

15 MR. HERMAN: Your Honor, we have four pro se  
16 plaintiffs thus far. What we have done is we have written to  
17 each one of them. All four are institutionalized and we have  
18 directed them to lawyers who are handling Vioxx plaintiff cases  
19 in their states for direct communication. In the event that  
20 they do not retain counsel, they're to get back to us, and at  
21 that point we will present the issue to Your Honor and request  
22 that Your Honor appoint an attorney to represent the interests  
23 of pro se claimants.

24 We expect that if we do not hear anything that  
25 we will present such a request at the next MDL hearing because

1 plaintiff profile forms will be due and those folks will have  
2 to respond and they will need counsel in order to respond. In  
3 that regard, we will make available to whomever Your Honor  
4 appoints the plaintiffs' updated position paper, which we have  
5 not yet presented to the Court. Whoever Your Honor appoints,  
6 we will work with them to bring them up to speed on what their  
7 clients' rights are.

8 THE COURT: Before I pick the next status conference  
9 date, is there anything else, any other item on the agenda that  
10 needs to be discussed?

11 MR. ALLEN: Your Honor, I would like to be heard.

12 THE COURT: Yes.

13 MR. ALLEN: I'm Scott Allen from Houston, Texas. I  
14 actually represent prescribers in these cases and I have  
15 approximately, at this time, nine doctors before the Court.  
16 Also here today is Mr. Russ Thornton from Dallas, Texas, who is  
17 representing prescribing doctors. I know one of the issues the  
18 Court is considering now is the issue of the case management  
19 order. I, in fact, wrote a letter to counsel for the PSC and  
20 the DSC concerning issues the doctors had concerns about. I  
21 have received agreement from Mr. Seeger and Mr. Lewis, on  
22 behalf of the PSC, yesterday that they concur with the  
23 suggestions that I made. Primarily, those suggestions have to  
24 do with limiting the unnecessary expense and time in discovery  
25 unless and until the doctors' cases are set for trial.

1                   I corresponded with Mr. Wittmann and Mr. Marvin  
2 and the entire DSC. I have worked with Mr. Marvin, from  
3 Washington, on other occasions. I have received their  
4 statements that they have taken my suggestions under  
5 consideration, which until someone agrees I often consider that  
6 a rejection. I don't know if it is or not. I heard the Court  
7 today discuss the issue of the case management order and the  
8 Court said it would enter its own if the parties could not  
9 agree, which makes me feel like I need to bring my concerns to  
10 the Court. May I approach, Your Honor?

11                   THE COURT: Yes. Before you do that, what's the  
12 response from the defendants on this situation?

13                   MR. WITTMANN: I think Mr. Allen is right. We had  
14 his request under consideration. We had gotten a letter  
15 initially from the plaintiffs' liaison counsel saying that they  
16 opposed his request, so we just sat back and looked. I now  
17 hear they have accepted his request. I think, in the context  
18 of the case management order and setting cases for trial,  
19 that's certainly something that will come up and we'll be more  
20 than happy to get with Mr. Allen and talk with him about trying  
21 to allay his concerns.

22                   THE COURT: Let's do that, then, within five days,  
23 Mr. Allen.

24                   MR. ALLEN: I have no problem. I tried to do it this  
25 morning, if they will just promise to contact me so I can get a

1 firm position one way or another. I would like to approach. I  
2 wrote the letter on May 11, Your Honor. This provision I am  
3 proposing in the case management order comes from experience.  
4 I have represented -- it sounds a little daunting, but I  
5 promise you it's true -- doctors in well over 5,000 cases  
6 involving breast implants, Fen-Phen, Propulsid, Baycol,  
7 Norplant. I could go on.

8           The proposal that I have asked to be placed in  
9 the case management order is identical to the provisions that  
10 we had in the Texas state court coordinated litigation in  
11 Fen-Phen, Baycol, and Propulsid. I stopped looking after that  
12 point. I think my point was made. I would also note that the  
13 firm of Williams & Connolly, who represented the defendants in  
14 both Fen-Phen and Baycol, was familiar with my proposal and  
15 agreed to it, it's my recollection. I know it's entered in  
16 those cases I represented doctors on in Texas. I would like  
17 the Court to have, since the Court may have to enter its order,  
18 my letter with my suggestions.

19           THE COURT: Just give it to us. I'll look at it. I  
20 appreciate your interest in it.

21           MR. ALLEN: All right, Your Honor. I appreciate your  
22 time.

23           THE COURT: Sure.

24           MR. HERMAN: The plaintiffs certainly have no  
25 objection. Actually, what I wrote was we couldn't agree at

1 this time, but if learned counsel would show up on the 23<sup>rd</sup> we  
2 would discuss it. Mr. Seeger was able to do it by phone.  
3 Plaintiffs have no objection. We certainly don't need another  
4 defense lawyer who has defended 5,000 cases on the other side,  
5 so we are happy to cooperate.

6 Your Honor, I did have one remark with regard to  
7 the direct filing of cases in the MDL. We'll meet with defense  
8 counsel and see if we can come up with a list of factors  
9 relating to in what way a federal forum would be chosen or  
10 guidelines that Your Honor may wish to consider.

11 THE COURT: You're talking there about the reference  
12 back in the event it's necessary to send it back?

13 MR. HERMAN: That's correct, on XXII.

14 MR. SEEGER: For the record, Chris Seeger. I just  
15 want to use 10 seconds of your time to ask the people from the  
16 new state/federal committee to stay behind so we can meet with  
17 them today.

18 THE COURT: Also, with that, Ms. Barrios, I would  
19 like to meet with all of your committee members at a time  
20 convenient with them. Just coordinate that with the other  
21 committee members and with the Court. I would like to meet  
22 with them either at a time like this or, if it's more  
23 convenient, at another time.

24 MR. HERMAN: On behalf of the plaintiffs' steering  
25 committee, we would welcome any briefing material and ideas

1 from the state liaison committee regarding detailed  
2 information. If Your Honor would permit, the PSC would like to  
3 have a brief meeting. If Your Honor has a conference room  
4 available where we might meet when we adjourn, we would  
5 appreciate it. Thank you, Your Honor.

6 THE COURT: I'll make that available. Anything else?  
7 Anything from anyone? We have these conferences in open court  
8 not only to keep you advised, but also to allow you to speak.  
9 It's on the record. I'm interested in your observations. Any  
10 comments you have, feel free to make them. Mr. Becnel.

11 MR. BECNEL: Judge, assuming that tolling agreement  
12 is in effect, then that eliminates this comment. But if it's  
13 not in effect, then would the Court consider allowing multiple  
14 filings in one lawsuit provided they meet, for example, all in  
15 the Eastern District are filed in that particular case, all in  
16 the Western, all in the Middle, and something, and then sever  
17 those out at a time when you want to try those or do something  
18 else to eliminate having to file, let's say, 300 of them in the  
19 Eastern District one at a time?

20 THE COURT: Well, the thing about the Louisiana cases  
21 is that there's a question in civil law whether or not you can  
22 even agree to toll. In other states you don't have that  
23 difficulty, but in Louisiana it's a question of whether you can  
24 even do it. So notwithstanding a tolling agreement, there is a  
25 legitimate concern of parties whether or not it can be done.

1 In order to give some comfort to the parties and accomplish the  
2 same objective, the easiest way of doing it is to have one  
3 person file and then the other people join in so that you have  
4 one proceeding rather than a thousand proceedings. It works  
5 the same way of interrupting prescription, but then we  
6 freeze-frame that particular proceeding and it stays in limbo  
7 until it's activated. That can be done in Louisiana. The  
8 Clerk's Office will be agreeable to that.

9 The next status conference will be on June 23.  
10 This time it will be at 9:30 because we have been running a  
11 little late with our prestatus meetings and I don't want to  
12 keep you waiting unduly, so 9:30 instead of 9:00. Thank you  
13 very much. Court will stand in recess.

14 THE DEPUTY CLERK: Everyone rise.

15 (WHEREUPON, the Court was in recess.)

16 \* \* \*

17 CERTIFICATE

18 I, Toni Doyle Tusa, CCR, Official Court Reporter,  
19 United States District Court, Eastern District of Louisiana, do  
20 hereby certify that the foregoing is a true and correct  
21 transcript, to the best of my ability and understanding, from  
22 the record of the proceedings in the above-entitled and  
23 numbered matter.

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Toni Doyle Tusa, CCR  
Official Court Reporter