



## APPEARANCES (Continued)

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Proceedings recorded by mechanical stenography;  
transcript produced by dictation.

**P R O C E E D I N G S**

**MORNING SESSION**

**(April 23, 2013)**

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4 (The following is a transcript of the Status Conference  
5 taken on April 23, 2013.)

6 (Open court.)

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

9 THE CLERK: MDL No. 1657, In Re: Vioxx Products  
10 Liability Litigation.

11 THE COURT: Counsel make their appearance for the  
12 record. Liaison.

13 MR. DAVIS: Good morning, Your Honor. Leonard Davis  
14 from the Law Firm of Herman, Herman, Katz on behalf of my  
15 partner, Russ Herman, Plaintiffs' Liaison Counsel.

16 MR. MARVIN: Good morning, Your Honor. Douglas  
17 Marvin representing Merck.

18 THE COURT: This is our every two month conference.  
19 Now we're down to two months and we only have about half a  
20 dozen or a dozen people and some on the phone. We have got a  
21 couple of issues to discuss today. I met with Liaison Counsel  
22 in a meeting a moment ago and I have a Joint Report No. 76.  
23 Anything on class actions?

24 MR. MARVIN: No new developments, Your Honor.

25 THE COURT: What's the development on government

1 actions?

2 MR. DAVIS: Your Honor, Mr. Juneau is here with  
3 respect to that. Also, I mean, there are a couple of things  
4 that are going on. Number one, the discovery is ongoing and  
5 the parties continue to speak regarding your February order and  
6 other discovery matters. And if Mr. Juneau has anything to  
7 add.

8 THE COURT: Anything on the discussions?

9 MR. JUNEAU: Yes, Your Honor. The matter which was  
10 referred to me as Special Master had to do with the dispute  
11 regarding the Third Party Payor claims amongst lawyers. I have  
12 activated, as a matter of fact, the meeting, or conference call  
13 to be held tomorrow. I am going to receive the input from both  
14 sides in so far as the protocol. I am trying to put this on a  
15 fast track so this matter can be addressed, but we will come up  
16 with a protocol and immediately thereafter activate whatever  
17 filings they have got to make to me so that I can be in a  
18 position to evaluate the matter and report to the Court.

19 THE COURT: That's the Third Party Payor matters.  
20 The government actions, I know there have been some issues with  
21 discovery and I understand that the parties have either worked  
22 that out or are working that out. Do you want to say anything  
23 about that?

24 MR. MCKENNA: Yes, Your Honor. Don McKenna with  
25 Hare, Wynn for Alaska, Montana.

1           For those two states, we have reached an agreement  
2 with Merck on the production of the FACTs database and then we  
3 are going to take the FACTs database and try to further whittle  
4 down the custodial files. We're working with Merck  
5 understanding that we need those documents to take depositions  
6 on a potential extension of the FACTs discovery deadline  
7 without impeding the other deadlines.

8           THE COURT: As I was saying, Don, I would like to, if  
9 I could, facilitate the parties, meaning both sides, with the  
10 discovery. But we're getting to the point now where the  
11 discovery is nearing an end and the motions that I can deal  
12 with, I will have to deal with and then send the cases for  
13 trial.

14           I kept everybody here because I really do think that a  
15 lot has been accomplished, many of the states have been able to  
16 resolve the matter and it can be done in this area a little bit  
17 better, a little easier. And also with discovery, if you join  
18 together it's an easier way than going by yourself on it. But  
19 we're getting to the point where I will have done as much as I  
20 can for the parties and you will have to go on your own soon.

21           MR. MCKENNA: Yes, Your Honor, we appreciate your  
22 help and cooperation in that regard.

23           THE COURT: And with regard to the Third Party  
24 Payors, as Mr. Juneau was mentioning, there's an issue of fee  
25 dispute. And what I do with that, as many of you know, I,

1 first of all, appoint an Allocation Committee comprised of the  
2 people who have done the work in that area of the litigation  
3 and they either invite comment from the parties who are  
4 requesting a fee, deal with any discovery that they need, any  
5 interviews that are necessary, and then they make a  
6 recommendation. I post the recommendation, get input from the  
7 people involved.

8           If the objections can't be worked out, then I appoint  
9 a Special Master so that I can get the view of someone who is  
10 not involved in the case and will not benefit from it and  
11 that's where we are at this stage.

12           And then when I get the Allocation Committee's  
13 recommendation, Special Master's recommendation, I meet with  
14 the accountant, Phil Garrett in this case, and then I take all  
15 of that into consideration and bring into focus my own  
16 experience with the litigation and with the work being done and  
17 then I make a ruling dealing with it. That's where we are at  
18 this point.

19           The next item on the agenda is the pending personal  
20 injury cases subject to 28, 29 and 43.

21           MR. DAVIS: Ms. Oldfather will deal with it.

22           MS. OLDFATHER: Thank you, Your Honor. Good morning  
23 to the Court and counsel.

24           We have circulated the updated Vioxx case census  
25 report and there are 37 personal injury cases remaining. Three

1 of those are heart attack cases, four are stroke cases, 29 are  
2 VTE, Venous Thromboembolism cases. And one is in the other  
3 injury category and that would be Mr. Harrison with the bone  
4 injury issue.

5 On April 9th, the Court issued a ruling regarding the  
6 Daubert challenges that Merck had made to plaintiffs' causation  
7 experts on the general causation issue for the VTE cases and  
8 the Court overruled the Daubert motions made by Merck.

9 The plaintiffs had also issued Daubert challenges as  
10 to two of Merck's experts and the Court overruled those motions  
11 also.

12 So we are at the point where it's appropriate to  
13 develop a trial plan for the resolution of these 29 cases. Mr.  
14 Marvin and I have had some preliminary efforts at discussion  
15 over the last week and it's my understanding that the Court  
16 would like to address that topic with us following this  
17 conference.

18 THE COURT: Yes. The heart attack and stroke cases  
19 might be easier if you can focus on that and see whether or not  
20 they can be resolved. The VTE cases might present more of a  
21 challenge. But those particular cases, first of all, I think  
22 the parties have to decide whether I have jurisdiction over  
23 these cases for trial. I don't think any of them have been  
24 filed here so I would have to have the parties enter into some  
25 kind of stipulation or agreement in view of Lexicon.

1           But assuming that can be done, then there are three  
2 ways of doing it. I have done them all. The bellwether  
3 approach, which has been used in this litigation successfully  
4 in the past, but that is only advantageous to give the parties  
5 some input as to the cost involved, the method of trying the  
6 cases, what the jury's view is of this type of litigation and  
7 so forth. We can do summary trials, if that's possible. That  
8 also gives more information. The other approach is just to try  
9 them.

10           And with this number they would probably lend  
11 themselves to grouping. We would have to kind of think about  
12 how to group them. When you're grouping cases, it's best if  
13 you have got some similarity in the cases that you group. I  
14 would look to the parties, if we go that route, for some  
15 guidance on how many could be done, three to four generally is  
16 doable. And that may take some discussion as to how we go  
17 about that. But it can be done so I think the first step would  
18 be for the parties to at least think about it and then for us  
19 to meet and talk about it. But I will meet further at the end  
20 of this hearing and talk a little bit more with you all.

21           MS. OLDFATHER:    And, Your Honor, I believe the other  
22 items are all on track or are pending for submission to the  
23 Court.

24           THE COURT:        Okay.

25           MS. OLDFATHER:    Thank you.



1           THE COURT:    I know we have a notice of appeals.  
2 Anything on the appeals?

3           MR. BEISNER:   No.

4           THE COURT:    There have been some appeals filed.  I  
5 know I have received some opinions from the Fifth Circuit  
6 dismissing the ones that I have seen.

7           Anything else or any other pending motions or matters  
8 that we need to talk about?

9           MR. DAVIS:    That's it, Your Honor.

10          THE COURT:    Our next status conference then is June  
11 25th.  Folks, we're getting down to the nitty gritty here.  The  
12 stalwarts are showing up, but we don't have that many cases  
13 left in this litigation.  It's been able to be handled up until  
14 this point.  Thank you very much.  Court stands in recess.

15          (End of proceedings.)

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**REPORTER'S CERTIFICATE**

I, Arlene Movahed, Official Court Reporter, for the United States District Court for the Eastern District of Louisiana, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date herein before set forth and I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/ Arlene Movahed  
ARLENE MOVAHED, CCR  
Official Court Reporter  
United States District Court  
Eastern District of Louisiana