



## APPEARANCES (Continued)

Stone Pigman Walther Wittmann L.L.C.  
BY: DOROTHY H. WIMBERLY  
546 Carondelet Street  
New Orleans, Louisiana 70130  
(504) 581-3200

For Eric Weinberg: Robert E. Arceneaux, Attorney at Law  
BY: ROBERT E. ARCENEUX  
47 Beverly Garden Drive  
Metairie, Louisiana 70001  
(504) 833-7533

For Alaska and Montana: Hare, Wynn, Newell & Newton, LLP  
BY: SCOTT A. POWELL  
2025 3rd Avenue North, Suite 800  
Birmingham, Alabama 35203  
(205) 328-5330

Reported By: Arlene Movahed, CCR  
OFFICIAL COURT REPORTER  
500 Poydras Street, Room 406  
New Orleans, Louisiana 70130  
(504) 589-7777

Proceedings recorded by mechanical stenography;  
transcript produced by dictation.

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

**MORNING SESSION**

**(June 25, 2013)**

1  
2  
3  
4 (The following is a transcript of the Status Conference and  
5 Motion to Compel taken on June 25, 2013.)

6 (Open court.)

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

9 Dean, we have people on the phone, too?

10 COURTROOM DEPUTY: Yes, sir.

11 THE COURT: This is our bi-monthly meeting, or every  
12 two months' meeting of the Vioxx Litigation matter and I met  
13 with the Liaison Lead Counsel a moment ago to discuss the  
14 agenda with them. I'll take it in the order that's given to  
15 me. Anything from the Liaison Counsel?

16 MR. HERMAN: May it please the Court, with regard to  
17 class actions under Item Number 1, Page 1, there's nothing new  
18 to report. There are ongoing discussions with respect to the  
19 consumer issues, consumer settlement.

20 THE COURT: There's a matter before me, Merck's  
21 motion on the pleading. I ruled on that.

22 I have another Motion to Alter the Judgment. I have  
23 that under submission. But this is really going to be  
24 dependent upon the settlement that apparently has been reached,  
25 or at least is in the process of becoming, and then if that

1 settlement is approved then that motion will be moot so I won't  
2 need to take that up.

3           I have before me several motions that actually I have  
4 grouped them into two categories. One is Merck's motion to  
5 take a 30(b)(6) Deposition from the various states involved.  
6 And another motion by Merck to stay or stop a motion by the  
7 Attorney Generals to a 30(b)(6) by Merck's company.

8           With regard to the latter, I am advised that the  
9 parties are discussing it. I do feel that much of the material  
10 may well be relevant, but I think the parties ought to see  
11 whether or not the material has already been produced.

12           It seems to me that the way to go about it is for  
13 Merck, who's position is that the material has been produced,  
14 to tell the Attorney Generals where the material is and give  
15 them some direction as to the witness that has testified to  
16 that, or the documents that have been already offered into  
17 evidence at the various trials so that the Attorney Generals  
18 will be able to have access to that material.

19           And if there's some issues that develop from that  
20 material which are case specific that the parties can't  
21 resolve, then I will get involved in it. But relevancy is a  
22 very difficult objection in the discovery aspect of the case.  
23 I make no judgment on whether it's relevant for trial, but  
24 relevancy is really a weak excuse for not producing the  
25 material in the discovery phase of the case. But if it has

1 already been produced, there's no sense in having to produce it  
2 again in the sense of a 30(b)(6), so the parties are  
3 negotiating that. Hopefully, that will be resolved.

4           With regard to the first motion, I will take that up  
5 after we go through our status conference here.

6           On January the 9th, Commonwealth of Pennsylvania filed  
7 an opposition to Merck's motion. The motion was heard on March  
8 20, 2003 and was under submission. I issued an order on that  
9 motion. It was the Plaintiffs' Steering Committee and  
10 government liaison filed a motion for an order imposing the  
11 common benefit obligation. I ruled on that. I just don't know  
12 what the status of it is.

13           MS. BARRIOS: Good morning, Your Honor. Dawn Barrios  
14 for the Plaintiffs' Steering Committee and Attorney General  
15 Committee.

16           We have drafted and are getting ready to serve upon  
17 the Commonwealth some discovery, some written discovery to get  
18 that ball rolling because we would like to bring it to a head  
19 as soon as possible.

20           THE COURT: Let's keep that on the agenda, Dawn, so  
21 that I can focus on it. I don't want that to slip through the  
22 cracks.

23           MS. BARRIOS: Yes, Your Honor.

24           THE COURT: The third party payors, there was a fee  
25 dispute on the third party payor cases. What I do in trying to

1 find what the appropriate common benefit fee is, is I go  
2 through a procedure. First, right after I appoint a committee  
3 to handle the case, the first week or so of the litigation I  
4 appoint a CPA and I put out Court orders requiring anybody who  
5 does common benefit work, whether they're on the PSC or in  
6 states or on subcommittees, to keep their time and to submit it  
7 contemporaneously to the CPA. Also, if they have some common  
8 benefit expense that they feel is for the benefit of the whole,  
9 then they are to submit records of the common benefit expense  
10 to the CPA. They have a two month window to do it. If they  
11 don't do it within a two month window, or unless some other  
12 circumstances, good cause is shown, then they can't recover the  
13 amount. It's up by order of the Court.

14           The CPA then collects that material monthly or weekly  
15 and puts it in a report form. He submits, under seal, to me a  
16 copy of that monthly. I look it over and I meet with him every  
17 month and discuss it with him, who's put up the money, how much  
18 money is put up, who's logged the time, and what's the amount  
19 of the time each person has logged, what they have done with  
20 that time. And to some extent I am able to monitor it, I know  
21 who appeared at trial, I know who appeared in court, I know  
22 what depositions have been taken and I know who's taking them  
23 basically. And if I see somebody putting in time that I  
24 haven't seen before, I don't even know, I talk with the CPA and  
25 liaison counsel and ask them to look into it because I am

1 concerned about it. So in some way I am able to monitor that.

2           At the end of the month he prepares for me a summary  
3 of all that material in a summary form. I file those documents  
4 under seal because it's not fair for the other side to know  
5 what the plaintiffs are doing or what the other side is doing,  
6 so that's under seal until the case is finished or the fee  
7 application is made.

8           I get that material, then I appoint an Allocation  
9 Committee. I appoint people on the Allocation Committee from  
10 the PSC as well as from the states, as well as from the  
11 subcommittees, those individuals that I know have done the  
12 work. I feel that they know who has done the work with them  
13 and what type work they have done and the significance of that  
14 work.

15           So the Allocation Committee meets with everyone who's  
16 submitted an application for common benefit fee, tries to  
17 discuss it with them, gets information, prepares a record, all  
18 of this is done on the record, it's recorded by a court  
19 reporter. Documents are submitted, they look them over and  
20 they come up with an allocation. Oftentimes they meet in the  
21 meantime and discuss the allocation with the person who's  
22 making the application. In any event, they finally make an  
23 allocation and I post it on my website and make it available to  
24 everyone.

25           In addition, I appoint a Special Master, somebody who

1 hasn't done the work, somebody who's outside of the litigation,  
2 has no interest in the litigation, to also look into this  
3 matter, take evidence, if necessary, discuss the matter with  
4 the parties, prepare a record and that person then makes a  
5 report to me. At that point, I have two reports. One from the  
6 inside group and one from the outside group. I get that  
7 material, I look over the summary that my CPA has given to me  
8 and I bring to bear the experience that I have had with the  
9 litigation and the individuals and I issue my ruling deciding  
10 who gets what.

11           And the third party matter fee dispute has arisen. I  
12 am at the juncture now where the Special Master has convened a  
13 hearing and has taken testimony, or at least has given people  
14 an opportunity to argue their positions and he's got that  
15 together. We had a little hiccup on it in the sense that the  
16 plaintiffs felt that they needed some material that they did  
17 not receive so I have another meeting with counsel in a week to  
18 discuss that aspect of the case. But that's where we are with  
19 the third parties.

20           Personal injury cases.

21           MR. HERMAN:    May it please the Court --

22           THE COURT:    Yes. Wait, we have somebody. Go ahead.

23           MR. HERMAN:    Mr. Arceneaux requests --

24           THE COURT:    Okay. Good.

25           MR. HERMAN:    That's all right. Go right ahead.



1           MR. ARCENEUX:    Your Honor, Robert Arceneaux for Eric  
2 Weinberg.

3           THE COURT:     Right.

4           MR. ARCENEUX:    I am loathe to make this request to  
5 you.

6           THE COURT:     That's all right.

7           MR. ARCENEUX:    But you had ordered that we prepare  
8 our opposition to this motion that you will hear on the 1st by  
9 the 26th.

10          THE COURT:     Yes.

11          MR. ARCENEUX:    Yesterday I had double minor surgical  
12 procedures and I didn't realize it would take all day to get  
13 over the anesthesia. I was non compos mentis yesterday and  
14 lost the day.

15          THE COURT:     What do you need?

16          MR. ARCENEUX:    Another day and I've asked opposing  
17 counsel, Your Honor.

18          MR. HERMAN:     We don't have a problem with that, Your  
19 Honor.

20          THE COURT:     That's fine.

21          MR. ARCENEUX:    We will file our opposition by the  
22 end of the 27th.

23          THE COURT:     Fine.

24          MR. ARCENEUX:    Thank you very much.

25          THE COURT:     I hope everything is all right.

1 MR. ARCENEUX: The tests were good.

2 MR. HERMAN: I have been non compos for 47 years of  
3 practice. Certainly I am not going to object to that.

4 THE COURT: We have pending personal injury cases,  
5 Ann, PTOs 28, 29 and 43.

6 MS. OLDFATHER: Thank you, Your Honor. Ann Oldfather  
7 for certain pending personal injury cases.

8 The main focus right now, or had been, is how we were  
9 going to try the 29 VTE cases given the Court's ruling  
10 regarding the Daubert motions made by Merck. But, in the  
11 meantime, Merck has filed a Motion for Reconsideration of that  
12 Daubert ruling. We're in the process of drafting our  
13 opposition and we will be submitting that, I think, certainly  
14 within the next week or two, if not sooner.

15 And Your Honor has indicated until that's resolved it  
16 might make more sense to hold off on the decision of a trial  
17 plan.

18 Also, with regard to moving forward when it's timely  
19 on that trial plan issue, we are working to talk with all of  
20 the 29 pro se claimants and/or attorneys in the VTE cases in  
21 order to figure out who's willing to waive the lexicon issue  
22 and consent to trial in Louisiana. We are not quite finished  
23 with that project and we will certainly appreciate the Court's  
24 encouragement that anyone who hasn't contacted us yet about  
25 that should do so.

1 THE COURT: How many cases are you dealing with?

2 MS. OLDFATHER: There are 29 VTE cases. And, Your  
3 Honor, I neglected to hand out our case census in our pre-  
4 meeting and I can certainly hand that out now or simply state  
5 that according to our list there are 37 total remaining  
6 personal injury cases and they break down to three heart  
7 attacks, four strokes, 29 VTE cases, and one other, Mr.  
8 Harrison's bone injury healing case. So I'll tender this.

9 THE COURT: Just give that to Dean.

10 These cases you all know from past experience with me  
11 what I generally do is to try to put my hands around the census  
12 of the litigation, divide it up into various groups and then  
13 try to bellwether a case from each of those groups hoping that  
14 the bellwether experience will help the parties get an overview  
15 of the entire litigation to permit them to analyze it and see  
16 whether or not it's able to be globally resolved.

17 These cases may present a little different problem  
18 because it looks like that we may be over the bellwether  
19 opportunity, at least that's what the parties seem to tell me.  
20 So I don't want to waste time if we bellwether them and it's  
21 totally useless.

22 So the next approach is to group them together and to  
23 try, say, four or five of them together. I have done four  
24 sometimes and what I try to do is to try the four and we  
25 package them in twos and you argue to the jury and they go out

1 on those two and come back and you argue the other two and they  
2 go out and resolve it that way. That way the parties are able  
3 to try all of their cases but as quickly as possible and with  
4 minimal expense. The experts appear once as opposed to four  
5 different trials. But that requires the cooperation of the  
6 parties. It's better if that scheme is approached to have some  
7 commonality of those four cases. But we can get to that later,  
8 but that's a way of doing it in an expeditious fashion.

9 MS. OLDFATHER: Thank you, Your Honor. And certainly  
10 I hope that those listening will consider that in deciding the  
11 question of waiving venue to allow us to conclude as many of  
12 those as possible down here in New Orleans.

13 THE COURT: And I think we need to know how many have  
14 been filed here directly.

15 MS. OLDFATHER: Not many.

16 THE COURT: How many require transfer or agreement so  
17 that we can deal with that accordingly?

18 MS. OLDFATHER: We have got that data also, Your  
19 Honor.

20 THE COURT: Thank you.

21 MS. OLDFATHER: Thank you, Judge.

22 THE COURT: Other pending motions, what's next, Russ?

23 MR. HERMAN: Your Honor --

24 THE COURT: We have the matter involving Michael  
25 Stratton on another aspect of the case, he worked the case out,

1 took a fee on it. There has been some objection to his fee  
2 because it wasn't approved by the Court and that's a legitimate  
3 objection so I'll be dealing with that. I'll get Mr. Stratton  
4 to submit to the Court an accounting of the fee and what he has  
5 done and why he deserves it. We will take it from there.

6 We have a matter, Mr. Percy Harris, that's a Motion to  
7 Dismiss for Failure to Prosecute. I haven't received a  
8 response from Mr. Harris. We have given him notice so I will  
9 grant that motion. There has been some appeals. I received  
10 from the Court of Appeal recently a ruling in the Roach case  
11 affirming this Court's dismissal of it. There's another case  
12 on appeal, Strujan. I haven't heard from the Court of Appeal  
13 yet on that one.

14 Anything further other than the motions?

15 Next status conference is August 14th. I will meet  
16 with the Liaison Lead in the morning at 8:30 and we will have  
17 our regular meeting at nine o'clock.

18 MR. HERMAN: Please the Court, Your Honor, that  
19 concludes the business. Mr. Marvin, Doug Marvin and John  
20 Beisner, Mr. Davis, and I would like to meet with you about an  
21 ongoing discussion.

22 THE COURT: Fine. Let's turn to the motion then. I  
23 have before me Merck's Motion to Compel the taking of the 30 --  
24 hold on. We have to get somebody else on the line, I  
25 understand. Let's take just a five minute break and we will

1 come back.

2 (Recess.)

3 (Open court.)

4 THE COURT: Be seated, please. We now have a motion  
5 before me. I actually had two but as I mentioned at the outset  
6 the second one the parties have asked that that be continued to  
7 give them an opportunity to resolve the matter and that's  
8 Merck's Motion for Protective Order for the Attorney Generals  
9 getting in a 30(b)(6) Deposition of Merck.

10 But the motion before me then is Merck's Motion to  
11 Compel the taking of a 30(b)(6) Deposition for the various  
12 states. I have a number of states' attorney generals on the  
13 line. Would they come in at this point and tell me who they  
14 are, please. Who's on the phone? Hello? Anyone on the phone?

15 MS. CABRASER: Yes, Elizabeth Cabraser, just  
16 listening in.

17 THE COURT: Okay, Elizabeth.

18 MR. HARRISON: Harrison is still here.

19 THE COURT: Okay, Mr. Harrison.

20 MR. RILEY: William Riley, just listening in, Your  
21 Honor.

22 THE COURT: All right. Any Attorney Generals?

23 MS. BARRIOS: Your Honor, I had notified all of them  
24 yesterday and Ms. Bosier specifically said she was going to be  
25 on the phone. So I will step outside and call her.

1 THE COURT: Okay.

2 MR. HERMAN: Your Honor.

3 THE COURT: Yes.

4 MR. HERMAN: May it please the Court, Your Honor, I  
5 understand that there were 11 folks on this call and I think  
6 only three have identified themselves.

7 MR. MARVIN: And, Your Honor, when you and Katy were  
8 out of the room when they came on they said 11 on the call.

9 THE LAW CLERK: I think some people had hung up. I  
10 don't know.

11 MS. BARRIOS: I am getting an e-mail asking what time  
12 it's going to start. I will notify them right now.

13 THE COURT: We will wait a moment while they join the  
14 call.

15 (Pause).

16 THE COURT: Any attorney generals have joined the  
17 call yet? Who are we expecting, the attorney general from  
18 Mississippi?

19 MS. BARRIOS: Yes, Your Honor, and I know someone  
20 from Montana and from Mr. Powell's office.

21 THE COURT: Hello, this is Judge Fallon. Who's on  
22 the line? Hello?

23 MR. HARRISON: Harrison here.

24 THE COURT: Okay, Mr. Harrison. I've got you.

25 MS. WATSON: Leila Watson listening in.

1 THE COURT: What was the first name?

2 MS. WATSON: Leila, L-E-I-L-A.

3 THE COURT: Watson. Who are you with, ma'am?

4 MS. WATSON: Cory Watson. I have three of the VTE  
5 cases, Your Honor.

6 THE COURT: Okay.

7 MS. CABRASER: Elizabeth Cabraser.

8 THE COURT: Elizabeth Cabraser.

9 MR. RILEY: William Riley, Your Honor.

10 THE COURT: Who are you representing, Mr. Riley?

11 MR. RILEY: I am just listening in with regard to the  
12 fee dispute, Your Honor.

13 THE COURT: Well, this is the motion, we're not going  
14 to be discussing that.

15 Anyone else? I thought they said we had nine.

16 MS. BARRIOS: Yes, Your Honor. Well, I just got an  
17 e-mail saying the security card code won't work.

18 THE LAW CLERK: It won't let me into the new security  
19 code.

20 THE COURT: Let's try it again. Who's on the line?  
21 Mr. Harrison, I have you. Who else?

22 MS. WATSON: Leila Watson.

23 THE COURT: Leila Watson. Elizabeth Cabraser?

24 MS. CABRASER: Yes.

25 MR. RILEY: William Riley, Your Honor, and I can



1 leave, it's not necessary for me to stay.

2 THE COURT: Well, it doesn't matter, Mr. Riley, but  
3 you're welcome. But we're talking about Merck's Motion to  
4 Compel the taking of the 30(b)(6) Depositions.

5 MR. RILEY: Then, Your Honor, I think I'll leave.  
6 Thank you.

7 THE COURT: Okay. Anyone else? Are you ready to  
8 argue for the attorney generals?

9 MR. POWELL: For Alaska and Montana, yes, Your Honor,  
10 I am.

11 THE COURT: We are going to have to start, folks.  
12 This is Merck's Motion to Compel the taking the of a 30(b)(6)  
13 Deposition from the various states.

14 I invited anyone to participate who had an interest in  
15 either listening or saying anything on this particular motion.  
16 I will hear from the moving parties at this time. Merck.

17 MR. BEISNER: Good morning, Your Honor. John Beisner  
18 on behalf of Merck.

19 Your Honor, we believe this is a very important motion  
20 in terms of preparing for trial in this matter for the  
21 following reasons. These cases are a little unusual in the  
22 sense that when we get to trial each of the AGs will stand  
23 before the Court and jury and state that there are particular  
24 acts that they allege Merck engaged in that they contend  
25 violate the law because, in most instances, they're going to be

1 saying that these were unfair, false, misleading or deceptive  
2 acts.

3           And what we're sensing so far from the discovery is  
4 there may be a fair number of those instances and they will ask  
5 the jury to make that determination with respect to each of  
6 those acts. And, presumably, will be saying to the jury here  
7 are facts that explain why the Attorney General is taking that  
8 position.

9           With respect to each of those, if the violation is  
10 found, there will be some multiple violations to be determined.  
11 If they're saying Merck sent a letter that they're saying  
12 constituted an illegal act, there will be some multiplier of  
13 the number of those letters and then they will ask the Court to  
14 impose a penalty, depending on the state, of \$2,000, or  
15 whatever for each of those violations. But, in essence, they  
16 will be asking for penalties of millions of dollars perhaps for  
17 each of those alleged violations.

18           And really, Your Honor, what we're trying to get here  
19 is the old style bill of particulars, that's all we're asking  
20 for. I know those don't exist anymore but they don't exist  
21 anymore because you're supposed to be able to get that through  
22 discovery. And what we want to know, with some specificity,  
23 because the AG will be standing before each Court and jury and  
24 being very specific about that, what are the acts and what are  
25 the facts that they're pointing to that indicate that these

1 acts are unfair, false, misleading or deceptive.

2           And, Your Honor, we think that we have tried this, as  
3 Your Honor has dealt with previously through the interrogatory  
4 process, and what we have gotten are in some instances some  
5 lists of documents but they say the same thing about each  
6 document, they basically say they're unfair, false, misleading,  
7 or deceptive. But we need to understand what about those  
8 documents, what are the facts that are indicative, what's the  
9 problem with each of those acts. The documents are mainly what  
10 they're looking at but they're also pointing to advertisements.  
11 In some instances are pointing to contacts between marketing  
12 representatives and physicians in some of the cases as well.  
13 And that's why we have noticed the 30(b)(6) Depositions to try  
14 to get to the bottom of that, try to get some specificity about  
15 exactly what is being alleged here and what are the facts.  
16 That's all we're looking for, just facts that they're pointing  
17 to that they see as the basis for this contention.

18           THE COURT:

19           The AGs state the position that they only person who knows  
20 the facts are the attorneys and that they have attorney/client  
21 privilege. How do you see that?

22           MR. BEISNER: Well, Your Honor, what we're asking  
23 for, as you do in any 30(b)(6) Deposition, is the position of  
24 the government in the case. 30(b)(6) specifically says that  
25 government agencies are subject to these depositions. And this

1 is not privileged information, Your Honor. This is what  
2 they're going to stand before the jury and allege and what are  
3 the facts, which are not privileged, what are the facts that  
4 support these positions. So there really is no privilege issue  
5 here.

6           And as we have seen in other cases, particularly the  
7 CyberSpy Software case that we cite where the requesting party  
8 is simply trying to get specificity about the government's  
9 allegations and the facts supporting that allegation. That's  
10 permissible. We're not asking how did you investigate this,  
11 we're not asking for details about things of that nature, we're  
12 not asking for thought process, just the facts, that's what  
13 we're looking for and those are not privileged here.

14           And as I said, Your Honor, even if we did get into an  
15 argument that we're really asking for a counsel deposition  
16 here, an attorney deposition, I mean, they're basically arguing  
17 immunity and in the Attorney General's Office, they're all  
18 attorneys, so they're sort of saying you can't ask us any  
19 questions. Well, that can't be right. The Attorney General is  
20 a public official. They have made allegations here which are  
21 quasi criminal in nature and we're entitled to some specificity  
22 about what they're talking about.

23           So even if you get to the Shelton analysis of the  
24 Eighth Circuit which talks about when can you take an  
25 attorney's deposition, we think we satisfied those

1 requirements. We have got no other way to get this  
2 information. It's certainly relevant, it's non-privileged,  
3 we're asking for facts. And they don't really contest that  
4 it's crucial to the preparation of our case so we think that we  
5 satisfied those requirements.

6           Your Honor, there has also been argumentation here  
7 about, well, maybe this should be, this can all be handled  
8 through expert deposition. Well, the experts here are not the  
9 government. The allegations are being made by state  
10 governments by the Attorney General. We have a right to hear  
11 the Attorney General's position in the same way as a request to  
12 a corporation in a 30(b)(6) Deposition. We're trying to  
13 establish the position of the corporation on certain issues  
14 with respect to litigation. We're entitled to do the same  
15 thing here.

16           The expert depositions may elaborate and provide  
17 evidence with respect to that but we're entitled to hear  
18 directly from the Attorney General on those issues.

19           So, Your Honor, we're left with a bit of a hide the  
20 ball game unless we get these depositions. There is a very  
21 considerable amount of penalties at stake here and we think  
22 before trial we're entitled to know with specificity, what are  
23 the alleged violations, what are the facts you're pointing to  
24 in support thereof. And that's all we're trying to do in these  
25 depositions.

1           And, Your Honor, on one other point with respect to  
2 privilege, you know, we're not asking here for a Court order  
3 saying you have to answer all the questions in the deposition.  
4 If the AGs feel that the questioning is offtrack and is calling  
5 on them to divulge something that is privileged, they certainly  
6 have the right to object. But we believe we at least ought to  
7 be able to get into the deposition mode.

8           THE COURT: Thank you very much. Let me hear from  
9 the AGs. How do you see it?

10          MR. POWELL: Good morning, Your Honor. Scott Powell  
11 for Alaska and Montana.

12           What I do agree with Mr. Beisner is that before trial  
13 they're entitled to the information. Our position is that  
14 Merck has got the cart before the horse.

15           And it was interesting to me to listen when they  
16 talked about facts and why they're false, deceptive, or  
17 misleading and that's the crux of it. The "why" is the subject  
18 of an expert opinion which we will disclose, according to the  
19 Court's scheduling order, in a timely fashion.

20           For example, why is a particular ad false? Well, it  
21 may be the position that it's false because it doesn't mention  
22 that VIOXX may have a profibrotic effect. Well, to prove that  
23 it has a profibrotic effect requires expert testimony, expert  
24 opinion. That's all we're talking about. And we are under a  
25 duty to supplement the interrogatories, which we will do, once

1 the expert reports have been sent to Merck. And I think the  
2 deadline is in about two weeks.

3           So we certainly agree that they're entitled to what  
4 we're claiming. The problem is doing it now or doing it, you  
5 know, most of this, or if not all of it, will be answered in a  
6 timely way and so, you know, there's no reason to take the AGs'  
7 depositions when all this information is going to be provided  
8 to them through supplementation of interrogatory answers  
9 accompanied with the expert reports.

10           The number of violations falls into that category as  
11 well. And that's the key to, I think, for the Court to focus  
12 on. And Mr. Beisner said why is a fact false or misleading.  
13 Well, the only way that it can be proven why it's false or  
14 misleading is for an expert to talk about why it is false or  
15 misleading. And it's also very very dicey to get up and say,  
16 well, if you think we're going too far in the testimony or too  
17 far in the questioning, you can always object. And that makes  
18 me very concerned that they are looking for things more than  
19 just facts because the facts in and of themselves are really  
20 non-consequential unless they're coupled with an allegation and  
21 evidence that they're false, deceptive or misleading, and  
22 that's what violates the Consumer Protection Act of Alaska and  
23 Montana.

24           So for those reasons we filed a Motion for Protective  
25 Order after they filed a Motion to Compel. We tried to work it

1 out, we have been unsuccessful to do that. And what I would  
2 suggest to the Court is that the appropriate way of handling it  
3 is let's go through this expert process, let's go through the  
4 supplementation process, let them look at it and if there is an  
5 issue that they still think they don't have the facts in toto  
6 that they need for trial, we can discuss it. If we cannot  
7 reach an accommodation, we can come back and bring it to the  
8 Court's attention and the Court get involved.

9 THE COURT: Any response?

10 MR. BEISNER: Your Honor, that's a little bit  
11 different position than is taken in the papers earlier. I  
12 think they're resisting these depositions across the board.

13 But here's the problem. The expert testimony is  
14 coming at the end of the day. We have a schedule and I think,  
15 as counsel was noting, the sort of thing we're looking for is,  
16 well, there is an ad. Okay. Well, maybe the problem is that  
17 certain facts are missing from the ad. Well, okay, maybe the  
18 expert will elaborate on what they contend is missing from the  
19 ad but they know now what it is that they're contending is  
20 missing from those ads. But there is a serious timing issue  
21 here, Your Honor. I mean, it's basically let's not disclose  
22 for as long as we possibly can the specifics of these  
23 allegations. And what we're asking for are the facts that  
24 they're relying on to support, okay. They may need to  
25 supplement but we need a basic list with specificity now.



1           We have asked repeatedly. There already have been  
2 several supplementations of the interrogatories, we still don't  
3 have that, Your Honor.

4           THE COURT: I have read all the material that you all  
5 have given to me and the cases that you have cited and I do  
6 appreciate all the work that each of you have done. It has  
7 been very helpful to me.

8           The first thing is the scope of 30(b)(6). There's no  
9 question that a 30(b)(6) can be taken of an agency, the  
10 30(b)(6) says it. It's notice 30(b)(6). "In its notice or  
11 subpoena a party may name as deponent a public or private  
12 corporation, a partnership, an association, a governmental  
13 agency, or other entity and must describe with reasonable  
14 particularity the matter for examination." So it is possible  
15 to take the 30(b)(6) of a governmental agency. In fact, the  
16 cases are replete in those instances.

17           The allegation of the Attorney Generals come in many  
18 ways but basically they allege that Merck communicated the  
19 risks, profile, benefits and efficacy of VIOXX in an unfair or  
20 deceptive manner. That's what I read in most of the  
21 complaints. They also allege that Merck presented information  
22 concerning the safety profile and efficacy of VIOXX in an  
23 unfair and deceptive manner. It comes in all shapes and sizes,  
24 but basically that's the allegation.

25           Merck wants to know the evidence or facts supporting

1 these allegations, not the deliberative process, not  
2 necessarily the why, but what's the facts that you say are  
3 deceptive, what are the facts that you feel are unfair or  
4 deceptive. They need to know what practices the AG claims  
5 violated the law, what conduct the AG seeks to enjoin, and what  
6 acts for which the AG seeks penalties.

7           The penalties in this case could be significant  
8 depending upon the number of acts that they allege Merck  
9 performed. It seems to me that they're not asking for theory  
10 of liability or strategy from the attorneys or anyone, the  
11 witness, they just want to know what supports the allegations.

12           Also, I tried one case involving the Attorney General,  
13 a Louisiana case, and I understood that oftentimes when these  
14 drugs were submitted for reimbursement they were submitted to a  
15 committee, generally the committee is a committee of doctors or  
16 a committee of pharmacists or someone who knows something about  
17 it and they make the decision on it. I don't necessarily feel  
18 that it has to be an Attorney General or an attorney testifying  
19 as a 30(b)(6), maybe someone else can say what they feel the  
20 facts are, what statements are misleading or unfair, as I say,  
21 what acts the party seeks to enjoin on which they base their  
22 penalties. Not how, but why.

23           Merck tried this first with interrogatories.  
24 Interrogatories are really a poor discovery device. We all  
25 know that. They're always drafted by an attorney who asks

1 everything and the interrogatories are answered by an attorney  
2 who wants to give nothing and they're just ships passing in the  
3 night, generally. They're wonderful for getting the names of  
4 witnesses, the addresses of witnesses, but other than that it  
5 has been my experience that it's almost a vain and useless  
6 thing to prepare interrogatories. They just don't work in the  
7 real world and I see that happening in this time.

8           Okay, I think the way I see it is if a 30(b)(6)  
9 Deposition can be taken of a governmental agency, then we're  
10 dealing with the type of material that is sought and it seems  
11 to me that Merck is right in asking for the facts. Now if  
12 Merck's questions are loosely phrased or if Merck's questions  
13 impinge on deliberation, that question can be objected to and  
14 I'll rule on that particular question.

15           But if I say no 30(b)(6) Depositions can be taken, it  
16 seems that I am going against the Federal Rule 30(b)(6) because  
17 30(b)(6) says you can take them. And if I delay it, this  
18 aspect of the case, we have got to get it over with, we have  
19 been here ten years now. So to put it off is not really fair  
20 to either party.

21           I know the AGs are interested and they have a right to  
22 be interested in trying to get this resolved and I am sure  
23 Merck feels the same way.

24           I will grant the Motion to Compel 30(b)(6) Depositions  
25 for the reasons that I just mentioned.

1           Again, I thank the parties for their work.

2           MR. POWELL:    Your Honor, may I?

3           THE COURT:    Sure.  Go ahead, Scott.

4           MR. POWELL:    With regard to the Court's ruling, I  
5 know you mentioned and said that, you know, of course, if the  
6 questioning goes beyond the factual matters that they said  
7 they're trying to get that we have a right to object.

8           THE COURT:    Sure.

9           MR. POWELL:    Of course, you know the horse is out of  
10 the barn if an answer is -- if the Court is not available to  
11 rule on the objection right then and the answer is given, of  
12 course, the horse is out of the barn and that objection is --

13          THE COURT:    If you all alert me as to when you're  
14 taking the deposition, I will be able to monitor it or be  
15 available for your call.  So just call me immediately and I  
16 will hear you and I will rule on it and the court reporter, who  
17 is taking the deposition, can take down my ruling and we will  
18 do it that way.

19          MR. POWELL:    Thank you.

20          THE COURT:    Again, before I leave you all, I do feel  
21 that experienced attorneys, and you all are very experienced  
22 and very capable, oftentimes are able to work through these  
23 things and work them out.  Hopefully my ruling will encourage  
24 you or assist you in working these matters out, if you can, of  
25 course.  Court stands in recess.  Thanks again.

1 (End of proceedings.)

2

**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