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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

IN RE: \*  
CHANTIX (VARENICLINE) \* Case No. 2:09-cv-02039  
PRODUCTS LIABILITY \*  
MDL 2092 \*  
\* Florence, Alabama  
\* March 4, 2011  
\* 10:00 a.m.  
\*

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TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE INGE P. JOHNSON  
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G

1  
2 THE CLERK: Could y'all for the Plaintiffs  
3 state your names, the attorneys?

4 MR. WILSON: Sure. Gary Wilson for the Plaintiffs.

5 MR. CORY: Ernie Cory for the Plaintiffs.

6 MR. HAHN: Blair Hahn for the Plaintiffs.

7 MR. DRAKE: Jack Drake, Plaintiff's liason counsel.

8 THE CLERK: For the Defendants, please.

9 MR. PETROSNELLI: Joe Petrosnelli for the  
10 Defendants.

11 MR. BROWN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. BROWN: I'm Loren Brown for the Defendants.

14 MR. HASTON: Tripp Haston for the Defendants.

15 MR. JOINER: John Joiner.

16 MR. HOLIAN: Good morning, Your Honor. Matt Holian.

17 THE COURT: Good morning. We're especially glad to  
18 see you, Jack.

19 MR. DRAKE: Thank you.

20 THE COURT: I'm glad you're up and with us.

21 MR. DRAKE: Thank you.

22 THE COURT: Has everybody called in who was supposed  
23 to be calling in?

24 MR. DRAKE: Judge, there's some people who called in  
25 and did not give us their names as they are supposed to so

1 somebody may be on that you don't have the name if that makes  
2 a difference.

3 THE COURT: Okay. I have Maryam Danishwar. Is she  
4 on there? Elizabeth Chambers.

5 MS. CHAMBERS: Yes, Your Honor.

6 THE COURT: John Cantor.

7 MR. CANTOR: Yes, Your Honor.

8 THE COURT: Beth Burke. Koren Cohen.

9 MS. COHEN: Here.

10 THE COURT: Anna Petosky.

11 MS. PETOSKY: Here.

12 THE COURT: Tara Sutton.

13 MS. SUTTON: Here.

14 THE COURT: Clint Fisher.

15 MR. FISHER: Yes, Your Honor.

16 THE COURT: Jennifer Gonzalez-Frisbie.

17 MS. FRISBIE: Here.

18 THE COURT: Kristin Rasmussen.

19 MR. RASMUSSEN: Good morning, Your Honor.

20 THE COURT: Good morning. And Randi Kassan. No.

21 Is that everybody? Dan Johnson.

22 MR. JOHNSON: Here, Your Honor.

23 THE COURT: Katie Covington.

24 MS. COVINGTON: Yes, Your Honor.

25 THE COURT: And Ken Huitt.

1 MR. HUITT: Yes, Your Honor.

2 THE COURT: Okay. Is there anybody whose name I  
3 have not called out on the conference call?

4 MS. DANISHWAR: Good morning, Your Honor. Did you  
5 say Maryam Danishwar?

6 THE COURT: Yes, you were the first person I called  
7 out, but I may not have pronounced your name right, which  
8 would be -- since it had Danish in it, I should have. But  
9 anyway, I know you are here. Anyone else?

10 MS. TROOSDALA: Yes, Your Honor, Briget Troosdala  
11 from the Lanier Law Firm.

12 THE COURT: Okay. Anyone else? Okay. This is the  
13 monthly conference in MDL No. 2092, master file no. 09-2039,  
14 and the proposed joint agenda for the conference today has as  
15 the first item, a report by the parties regarding the status  
16 of the litigation, including litigation in state court.

17 Mr. Petrosnelli.

18 MR. PETROSNELLI: Your Honor, good morning. Joe  
19 Petrosnelli again for the Defendants. There's not really much  
20 to report there. We put it on the agenda because we do every  
21 month, but in terms of the state court litigation, we have not  
22 yet heard from the New York coordinating justice who has been  
23 assigned to the New York State Court cases and so, therefore,  
24 we have nothing to report with respect to that proceeding.

25 There are, as Your Honor knows, a couple of individual

1 state court cases in other states, and those are proceeding  
2 along generally slowly and in coordination with the discovery  
3 that we've done here, so I think we're fine with respect to  
4 the state court proceeding.

5 THE COURT: All right. Could you hear what Mr.  
6 Petrosnelli was saying?

7 MS. DANISHWAR: Not very well, Your Honor.

8 THE COURT: Okay. Speak up. Now, this is Mr. Cory.

9 MR. CORY: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. CORY: Your Honor, our survey of the number of  
12 cases filed in the MDL currently indicates there are about  
13 1603 cases that we have a record of. We reported to you  
14 earlier that we thought there would be eventually 2500. We  
15 think that is probably the number that we still think is where  
16 we will end up.

17 THE COURT: Okay. All right. The next issue on the  
18 agenda is a report by the parties regarding the status of  
19 discovery pursuant to pre-trial order number four, and the  
20 first subitem is Plaintiff's request to extend certain  
21 deadlines in PTO 4. And Mr. Cory or Mr. Hahn? Mr. Cory?

22 ("Is joining the meeting.")

23 MR. CORY: Your Honor, Mr. Hahn will address the  
24 status of the depositions and the documents in a minute, but  
25 with respect to PTO 4, Your Honor, we need to make an

1 amendment to it. Joe and I have spoken yesterday. We are in  
2 agreement on how to modify, and with the Court's indulgence,  
3 we will get it to you by next Wednesday.

4 THE COURT: Okay. That's fine. The status of the  
5 production of Plaintiff's fact sheets. Is that what you're  
6 going to address, Mr. Hahn?

7 MR. HAHN: No, ma'am. I was going to talk about --  
8 am I out of order?

9 MR. CORY: No, generally what's going on with  
10 documents.

11 MR. HAHN: Just documents and depositions.

12 THE COURT: Okay.

13 MR. HAHN: When we were here last time, Your Honor,  
14 we had an issue of additional documents that we had produced  
15 under the need to be reviewed.

16 We have since worked very hard to review those documents  
17 and expect that they will all be finished by the middle of  
18 April and have been talking with Defendants and will start  
19 depositions on May 16th for fact witness depositions, and that  
20 will give us a month after we finish reviewing the documents  
21 to prepare deposition packages and do our second cut of the  
22 documents.

23 And then there was one other issue while I'm here, Your  
24 Honor, as to fact sheets with CTO 4 that, with Your Honor's  
25 permission, we will deal with when we submit the new order,

1 and that is that currently the fact sheets are due 60 days  
2 after a conditional transfer order is issued.

3 The problem that some litigants are having is that they  
4 are challenging the conditional transfer, and they want  
5 remand. So there's no jurisdiction in this court until the  
6 final transfer order is issued.

7 So we were just going to make the 60 days start to run  
8 when the final order is issued instead of the conditional  
9 order.

10 THE COURT: Either that or else 45 days after the  
11 final order? Would that --

12 MR. HAHN: I think that would probably work, Your  
13 Honor, but I have gotten phone calls from people that don't  
14 even know that the order exists because they are fighting  
15 remand.

16 THE COURT: Okay. That's fine. Just leave it like  
17 you suggest. That's fine. Make it after the final order of  
18 transfer.

19 MR. HAHN: Thank you, Your Honor.

20 THE COURT: Okay.

21 MR. HASTON: Your Honor, I'm Tripp Haston for the  
22 Plaintiffs. Good morning.

23 THE COURT: Good morning.

24 MR. HASTON: Just in general on the PFS, you'll  
25 recall last time we were here, Judge, we talked about the fact



1 that there were a number of delinquent, deficient PFS's and  
2 that we would be moving quickly on those to try to keep  
3 everybody on track.

4 As Your Honor knows, we filed a number of motions; the  
5 Court granted those motions.

6 At this point we have received PFS's for about 2/3 of the  
7 cases on file. There are close to 200 that are delinquent,  
8 close to 70 that are deficient. We have got letters out to  
9 Plaintiffs on that.

10 We don't have any motions that are ripe to file yet, but  
11 we have about 40 that are moving in that direction. But we  
12 think that given the motions and the Court's Order, we're  
13 going to be able to keep moving forward without hopefully the  
14 need to file anything else.

15 THE COURT: Okay.

16 MR. HASTON: Thank you, Judge.

17 MR. HAHN: Your Honor, one more issue --

18 THE COURT: This is Mr. Hahn.

19 MR. HAHN: -- with the depositions. If possible,  
20 because we're getting to know each other, when these first two  
21 or three depositions go forward, if you could be available by  
22 telephone.

23 THE COURT: I will.

24 MR. HAHN: So that if we have any problems, if  
25 you'll just let us know how to contact you, we will just

1 contact you.

2 THE COURT: Yes. If you contact my office, they  
3 have my cell phone; they can contact me wherever I am. That's  
4 fine.

5 MR. HAHN: Thank you, Your Honor.

6 THE COURT: And schedule for submission of parties'  
7 joint proposal and/or competing proposals regarding the  
8 process for selecting cases and including in discovery and  
9 trial pools.

10 MR. PETROSNELLI: Your Honor, Joe Petrosinelli  
11 again. Mr. Cory and I have spent a bunch of time talking  
12 about this, and with Your Honor's permission, I think we have  
13 general agreement on pretty much everything in the discovery  
14 pool proposal, and so we would like to submit to Your Honor a  
15 proposed order next Wednesday when we submit the proposed  
16 amended PTO 4 if that would work with Your Honor's schedule.

17 THE COURT: Okay. That's fine. I want to make sure  
18 when you present the -- e-mail me the proposed PTO 4 amendment  
19 that you address specific causation experts.

20 MR. CORY: Yes, ma'am.

21 THE COURT: Okay. All right. Then their motions.  
22 And there is a motion to compel pending for production of  
23 allegedly privileged or non-privileged --

24 MR. HAHN: Before we get to that, there is one issue  
25 that I've been involved with Mr. Petrosnelli and Mr. Cory and

1 the bellwether selection process. There's one issue that we  
2 have an issue with and wanted to ask for the Court's guidance,  
3 and that is at the end of the process when we're trying  
4 bellwether Plaintiffs, whether or not we're going to trying  
5 one Plaintiff at a time or whether we would be able to try  
6 potentially multiple Plaintiffs.

7 I've been involved in MDL's where we have tried multiple  
8 Plaintiffs at once, and it's worked very well, and from my  
9 perspective, I believe it's worked better in individual  
10 trials.

11 I don't think we have enough information from either side  
12 today to effectively argue this point, and my suggestion would  
13 be that we do everything but that in this next order that's  
14 submitted to the Court and then allow us after we have  
15 selected the trial pool to come back to you once we have the  
16 individual information on those Plaintiffs to argue multiple  
17 trials -- multiple Plaintiff trials versus individual  
18 Plaintiff trials.

19 The reason is in all of these cases, the generic experts  
20 are the same; the fact witnesses are the same; the documents  
21 are the same. We will, in all likelihood, use the same  
22 specific causation experts for similarly-situated Plaintiffs,  
23 suicide Plaintiffs, for instance.

24 And so the only difference then becomes mitigating  
25 factors the Defendants are going to highlight as to why an

1 individual committed suicide or attempted to commit suicide,  
2 their past medical history; and we think that can be dealt  
3 with easily in the context of a multiple-Plaintiff trial.

4 The other issue that usually arises in these cases is  
5 choice of law. These cases are failure to warn cases. The  
6 choice of law for failure to warn is uniform throughout the  
7 United States, and if there are minor differences, they can  
8 easily be dealt with through special interrogatories to the  
9 jury.

10 So we would just ask if you would be open to us arguing  
11 that to you at a later date.

12 THE COURT: Well, first of all, I want to tell you  
13 that I am always open to you arguing anything you file in a  
14 motion. I think that's my job to listen to.

15 I would like to start off by saying that at least the  
16 very first case in both the suicide and neuropsychiatric  
17 injury cases should be tried separately, just because that  
18 would -- I tried -- it was not an MDL, but it had 1700  
19 Plaintiffs.

20 I've tried a case that I inherited from Judge Pointer  
21 when he retired, and we had eight Plaintiffs that the parties  
22 had picked the bellwether plaintiffs, and they had agreed we  
23 were going to try them together, and as we had been into the  
24 case for four weeks, it really turned problematic.

25 I mean I'm not saying eight is equal to two, but it was a

1 chore. And eventually the parties settled, so we never did  
2 get to jury instructions and that sort of thing.

3 I also want to tell you that I just got some cases back  
4 in the Prempro hormone therapy cases from MDL, and the lawyers  
5 in that case agreed to try those three cases together.

6 Well, all of a sudden, I get a motion to stay one of them  
7 because it turns out that that Plaintiff had a her2 gene which  
8 is different from the other two Plaintiffs, and all of a  
9 sudden, they get askewed, so let's start with one.

10 MR. HAHN: Fair enough, Your Honor.

11 THE COURT: Go from there. If it turns out that you  
12 think it's still appropriate to try two the next time  
13 together, you know, file a motion. And if you disagree with  
14 me, file a motion. I'll look at it then. It's okay.

15 MR. HAHN: Thank you, Judge.

16 THE COURT: But there will be differences in the  
17 Plaintiffs I can assure you.

18 MR. HAHN: Oh, yes, ma'am.

19 THE COURT: I mean even in the same category, there  
20 will be differences, you know. At least I would like to have  
21 a clean case the first time and just try it and see -- and  
22 also to see how long trying one case will take. Hope it won't  
23 take too long.

24 MR. HAHN: We hope not. Joe assures us that four  
25 weeks is the maximum.

1 THE COURT: We can do it faster than that. Okay.  
2 The motions.

3 MR. WILSON: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. WILSON: Gary Wilson from --

6 THE COURT: Good morning to you. Before you do  
7 anything, I want to tell you it's been a pleasure to read the  
8 parties' briefs. I go like this. Okay, they are right.  
9 Okay, they are right. They were excellent briefs on both  
10 sides.

11 MR. WILSON: I appreciate that. I want to start by  
12 reporting on a meet and confer we had for most of Tuesday in  
13 Minneapolis. We met to see if there's a way to streamline  
14 this matter for you because I concede to you it's a very  
15 complex motion.

16 What we did is we went over some claims. We went over  
17 some challenges. Pfizer showed us some documents, refused to  
18 show us others, and each side moved a little bit. Pfizer  
19 withdrew some claims of privilege, the Plaintiffs withdrew  
20 some challenges, so we pared it down a little bit even though  
21 it took most of the day to go through approximately 50 or 60  
22 documents.

23 We did learn a couple things, though, from that process.  
24 One is there is a way to pare it down somewhat because many of  
25 the documents we're learning are inconsequential. Privileged

1 or not privileged, who cares, because they are not going to  
2 matter.

3 We also learned that the logs are not always helpful to  
4 give an indication of what the document is about. There's  
5 some problems with that. And finally we learned that it's a  
6 painstaking process to go document by document.

7 So we made some progress, but I just want to be open with  
8 you, Your Honor, that we still have a big dispute, and it's  
9 probably going to require your intervention. And what I want  
10 to do, if I could, just take a few minutes to go over the  
11 issues we're stuck on.

12 THE COURT: Yes.

13 MR. WILSON: And go over the remedies that the  
14 Plaintiffs think they are entitled to.

15 THE COURT: Okay.

16 MR. WILSON: First, the logs are poor. They are  
17 lousy. If I could, I would like to give you an example. I  
18 have a sheet here of just a few examples of some of the  
19 entries.

20 (Off the record discussion between Mr. Wilson and Mr.  
21 Petrosnelli.)

22 MR. WILSON: Rule 26, Your Honor, requires that a  
23 party asserting privilege has to provide enough information so  
24 there can be a meaningful challenge to that assertion. And  
25 what we see with Pfizer's logs is first there's an incantation

1 of the magic words. Every entry says it's confidential.  
2 Every entry says it's either to provide, to seek or containing  
3 legal advice.

4 Now, there's a case in this district, Primark, that says  
5 you can't get by just saying the magic words. You've got to  
6 provide some kind of subject matter description to allow a  
7 party challenging it to make a meaningful challenge.

8 And we get stuck on that as well, Your Honor, because a  
9 lot of the descriptions are identical. There's over 200  
10 entries where it's the magic words are incanted and then it's  
11 about or regarding safety information. There's no meaningful  
12 way for us to distinguish which of those claims might be valid  
13 and which might be invalid.

14 And if I can just go over a couple examples, on the page  
15 I just gave you, if you look at the third one down, Your  
16 Honor, and that's Vanderburg, reference no. 10, Vanderburg --  
17 he's a medical director; he's not an attorney. And if you  
18 read the description, all it says is confidential, and I was  
19 providing it to an attorney for the purpose of obtaining legal  
20 advice.

21 There's zero subject matter description. There's no way  
22 we can tell what the advice is about. The same with the next  
23 one down, Wilson, reference no. 28. Gary Wilson. He's not a  
24 lawyer. He's in the risk management department. He's  
25 communicating with Edmond Harrigan, who is a physician, not a



1 lawyer; and again the description tells us nothing.

2 We cite a case in our papers from the Southern District  
3 of New York, and it says courts have to really be aware that  
4 if there's a log that seems calculated more to describe a  
5 document's privilege rather than to describe what the document  
6 really is, that's a red flag, and, Your Honor, now I'm not  
7 trying to be negative about anybody here, but I think the logs  
8 are deficient in that way.

9 THE COURT: I will just tell you I agree with you.  
10 There's no if's, and's, or but's about it. I compared it to a  
11 case I tried recently, and it was an employment litigation  
12 case, and they had a privilege log, and the Defendant's  
13 witnesses could not remember when they got notice of the EEOC  
14 charge. It was a retaliation -- in retaliation for filing the  
15 EEOC charge or they had forgotten, and the Plaintiff's lawyer  
16 referred to the privilege log which was furnished by the  
17 Defendant, which said privileged document, legal advice  
18 regarding the EEOC charge filed on such-and-such a date, and  
19 it shows the copies to so-and-so which were some of the  
20 Defendants' witnesses.

21 So the Plaintiffs' lawyer said pursuant to the privilege  
22 log, you should have gotten a copy of the EEOC charge by  
23 e-mail on such-and-such a day without going into the legal  
24 advice, which, of course, I mean it was privileged. I didn't  
25 let anybody see it. But they knew that it was regarding the

1 EEOC charge; they knew -- the Plaintiffs knew when the  
2 defendants' witnesses got a notice of the EEOC charge, and  
3 that's what you're supposed to do -- I mean not you but the  
4 Defendants.

5 MR. WILSON: When you compare that to the phrase,  
6 regarding safety information, we just don't know what to do  
7 with that.

8 THE COURT: No, I agree with you.

9 MR. WILSON: So the question then on that point,  
10 Your Honor, is what is the remedy. And we cite to several  
11 cases in our brief where it's the party asserting privilege,  
12 it's their obligation to do a good log, and if they don't, the  
13 courts can find that there is a failure to establish  
14 privilege.

15 So we're going to ask you -- Exhibit 6 in our pages is a  
16 list of the documents we think are very poorly described, and  
17 we are going to ask you to order that those be produced.

18 THE COURT: For in camera inspection.

19 MR. WILSON: Well, I believe, Your Honor --

20 THE COURT: I know what you've asked for, but how  
21 can you say that they have -- I feel very uncomfortable saying  
22 at this point that we have waived it.

23 MR. WILSON: Okay. I understand that.

24 THE COURT: I would rather look at it.

25 MR. WILSON: It's a very harsh remedy.

1 THE COURT: It is.

2 MR. WILSON: The reason why it exists, though, is  
3 because otherwise it's so easy for a party to frustrate the  
4 judgment of the claims. You can win by default by having a  
5 poor log.

6 THE COURT: Okay. So you want Exhibit No. 16, you  
7 want to say that the privilege is waived.

8 MR. WILSON: Sure, in the perfect world, but I hear  
9 what you're saying and --

10 THE COURT: Okay.

11 MR. WILSON: -- we would ask you to look at those.

12 THE COURT: Okay.

13 MR. WILSON: There is a fundamental -- apart from  
14 the descriptions on the logs, Your Honor, there's a  
15 fundamental difference on the scope of the privilege between  
16 us. We set forth in our brief the basic law that privilege is  
17 strictly construed. It has to be predominantly for the  
18 purpose of legal advice. The communication has to be seeking  
19 information or providing information for the purposes of legal  
20 advice.

21 THE COURT: Do you agree with the District Court in  
22 the Eastern District of Louisiana in the In Re: Vioxx  
23 products liability litigation with the criteria that's set  
24 forth?

25 MR. WILSON: Yes, I agree with most of that, yes, I

1 do.

2 THE COURT: Because I read that. I thought it was  
3 very logical and reasonable and --

4 MR. WILSON: Yes.

5 THE COURT: Okay.

6 MR. WILSON: And let me just continue on with my  
7 point. I just want to point to Exhibit 1 in Pfizer's brief  
8 that kind of highlights the fundamental difference the parties  
9 have with respect to the scope of privilege. They say here's  
10 documents that could be privileged, are privilege, but in the  
11 spirit of cooperation, we're not claiming they are privileged.

12 And one of them is a regulatory submission. It's a  
13 document that's called a periodic safety update report that  
14 Pfizer's obligated to provide annually to the European Union.  
15 For the life of me, I can't see how that communication is for  
16 the purpose of giving or receiving legal advice.

17 A second document in that exhibit is meeting minutes. I  
18 read the meeting minutes. I couldn't find any provision of  
19 legal advice in the minutes. I don't know if their claim is  
20 based on a lawyer being present, which we know is  
21 insufficient, or what.

22 And then there's the subject matter categories of some of  
23 their claims, Your Honor. I want to take you back to the last  
24 status conference when there was this issue of those documents  
25 that had been set aside because there was lawyer involvement.

1 I think there were 700,000 documents that had been set aside  
2 for a privilege review.

3 Now, of course, Pfizer doesn't claim privilege over all  
4 of those, but I think what that shows is the scope of the  
5 attorney involvement at Pfizer with this product. There was  
6 initial attorney involvement in that many documents, but they  
7 go way beyond the world of what's privileged because they are  
8 not on the log. We're going to have -- at their present pace,  
9 we're going to have 11,000 claims, not 700,000. And there's  
10 nothing wrong with that.

11 You have mentioned the Vioxx case. Professor Rice has a  
12 very illuminating comment there. He says of course lawyers go  
13 beyond what's primarily legal because a lot of times lawyers  
14 are the smartest people in the company, and the company turns  
15 to them.

16 What that means, though, is it creates a line-drawing  
17 problem. Where does the privilege end; where does it start.  
18 And there's a body of common law that has sprung up around  
19 that, and that's what I try to put forth in our briefs, that  
20 there is certain categories of documents where it's just too  
21 far afield to be privileged.

22 And I set forth in separate exhibits four areas. Science  
23 and safety, some business records, mainly the meeting minutes,  
24 publicity and promotional documents, and then some regulatory  
25 documents.

1           And then the reason we set it forth in those categories,  
2 Your Honor, is that's what the case law justifies. I don't  
3 want to take you out on a limb, and so we're stuck with  
4 concededly a lot of documents that are suspect, and I can tell  
5 you from my lesson on Tuesday it was helpful to meet, it's  
6 very helpful to meet, but it's not going to be possible to go  
7 through them one by one.

8           THE COURT: I still am unclear about what you  
9 resolved Tuesday.

10           MR. WILSON: On Tuesday what we did is -- you'll see  
11 in my brief there's an Exhibit 1 --

12           THE COURT: Yes.

13           MR. WILSON: -- a list of documents. We went  
14 through about a third of that, and sometimes we looked at the  
15 log entry; sometimes Joe and Matt were looking at the very  
16 documents and explaining to us what they were.

17           So we went through a bunch of documents one by one, and  
18 sometimes we said well, that's got to go to the Judge.  
19 Sometimes we said, you know, that might be privileged but who  
20 cares on a topic that has nothing to do with the litigation.

21           And sometimes we said well, you're right; it's  
22 privileged. We're going to withdraw our claim. Sometimes  
23 Pfizer says it's not privileged; we're going to withdraw ours.

24           So that's what we did. We sat down to march through  
25 Exhibit 1.

1 THE COURT: So Exhibit 1 is done?

2 MR. WILSON: Well, it's about a third done, and --

3 MR. PETROSNELLI: Half.

4 MR. WILSON: Half. Thank you. It's half done, but  
5 it's not resolved.

6 THE COURT: Okay.

7 MR. WILSON: There are still documents there that  
8 are -- I hate to ask you to do it, but it's going to need your  
9 judgment.

10 THE COURT: Well, what I'm trying to figure out is  
11 based on what you did Tuesday, if I order the defendants to  
12 produce what is in your Exhibit No. 1 for in camera  
13 inspection, is there an agreement between you and Mr.  
14 Petrosnelli about what documents should be submitted to me so  
15 I don't review what you already have agreed to or stipulated  
16 is not privileged or you say it is, you know, as a result of  
17 your meeting?

18 MR. WILSON: Yeah, we're halfway through with that.

19 THE COURT: Okay.

20 MR. WILSON: Now, what I want to do, though, Your  
21 Honor --

22 THE COURT: Are y'all going to continue doing that?

23 MR. WILSON: We hope to.

24 MR. PETROSNELLI: Yes, Your Honor.

25 THE COURT: All right.

1 MR. WILSON: But what I would like to do is kill  
2 more birds with the stones and take a little broader approach.  
3 I would like to have you order in camera review of a sample  
4 from those four categories.

5 THE COURT: For?

6 MR. WILSON: Four categories.

7 THE COURT: I mean you asked in your motion for all  
8 of the documents in Exhibit No. 1 to be produced for in camera  
9 inspection, all of the documents in 6 through 9 to be produced  
10 for in camera inspection, and samples from Exhibit 2 through  
11 5.

12 MR. WILSON: Yes.

13 THE COURT: Are you changing that?

14 MR. WILSON: No, I am not.

15 THE COURT: Okay. Okay.

16 MR. WILSON: If we can have you do that, then I  
17 believe, Your Honor, you're going to be in a safe position to  
18 know what kind of privilege claims they are making, and I  
19 think you're going to be able to make a really good,  
20 principled ruling on their claims.

21 THE COURT: Okay. All right. How many total  
22 exhibits are in Exhibits 2 through 5?

23 MR. WILSON: I have that here.

24 THE COURT: I should have counted it, but I didn't.

25 MR. WILSON: I have it right here.



1 MR. PETROSNELLI: I believe it's more than a  
2 thousand, Your Honor, but I don't think Mr. Wilson is asking  
3 you to review all of them, just samples.

4 THE COURT: No, no, just samplings. I'm trying to  
5 find out whether I want to review every tenth, every  
6 fifteenth.

7 MR. WILSON: It's 679 plus 79 plus 333 plus 145, so  
8 about 1100.

9 THE COURT: Okay. All right. Anything else?

10 MR. WILSON: No, unless I can answer any questions  
11 you might have.

12 THE COURT: No, I think you're on the right track,  
13 if that helps you any.

14 MR. WILSON: Yeah, it does. Thank you, Your Honor.

15 THE COURT: Yeah.

16 MR. PETROSNELLI: Your Honor, I'll be brief because  
17 although we have a disagreement about the law, I don't have  
18 any -- I think it was very helpful to meet on Tuesday. I flew  
19 up to Minnesota myself, and Mr. Wilson was a gracious host.

20 We -- what we did was go through half of Exhibit 1  
21 basically and resolve maybe a third of the half. I think what  
22 would make sense just in terms of a process, putting aside for  
23 a second what exactly Your Honor's going to review, but if one  
24 of the things is going to be the documents on the revised  
25 Exhibit 1, seems to me what we ought to do is finish our meet

1 and confer on the other half.

2 THE COURT: Yeah, but I can't just give you time and  
3 time and time.

4 MR. PETROSNELLI: No, I think what we need to do, my  
5 proposal would be that we do that first thing next week, get  
6 what we can resolve, and then whatever is left of Exhibit 1 we  
7 submit that to Your Honor a week from today. That way you  
8 have the documents in seven days, and unless the Plaintiffs  
9 aren't available again this week that should be workable  
10 because it certainly is workable for us.

11 Now, the question I think that Your Honor raised -- it's  
12 a good one -- is what to review beyond Exhibit 1 and what  
13 would give you a representative-enough sample.

14 I personally don't believe sort of a random sample of the  
15 Exhibits 2 to 5 makes a whole lot of sense because you're  
16 dealing with -- I'm no expert in statistics but you're dealing  
17 with the nature of the randomness, which is you may end up  
18 getting, as Mr. Wilson said, when you actually look at these  
19 documents, a lot of the documents have nothing to do with the  
20 issues in this case. They are privileged, but they don't have  
21 anything to do with the case, and I don't think the Plaintiffs  
22 or we want to, as you said --

23 THE COURT: Well, why would you put them on the  
24 privilege log if they have nothing to do with the case?

25 MR. PETROSNELLI: Because they were -- and this is

1 part of the issue, which is why the privilege logs are so big.  
2 The Plaintiffs in this case wanted a very broad production,  
3 meaning they wanted us to produce any document that said the  
4 word "Chantix."

5 THE COURT: Okay.

6 MR. PETROSNELLI: No matter what it was about, and  
7 so there are a lot of documents in the privilege log that say  
8 the word "Chantix." They have nothing to do with  
9 neuropsychiatric symptoms, but because that's what the  
10 Plaintiffs wanted in terms of the breadth of their production  
11 that's what they got. And so a lot of these documents ended  
12 up having not much to do with the case.

13 I think if you end up doing a random sampling, it's a  
14 luck of the draw, right? You might end up picking documents  
15 that have nothing to do with this case, and that's not going  
16 to help the Plaintiffs or the Defendants or the Court. Our  
17 proposal, therefore, was take Exhibit 1, then take -- the  
18 Plaintiffs in their motion flagged about 140 additional  
19 documents that cut across all these categories that they are  
20 talking about.

21 And so I thought if you took Exhibit 1, which is a  
22 hundred and some documents, and you took all the documents  
23 cited in their motion, which is another 150 documents, so  
24 you're going to have 250 or so documents, when you look at the  
25 MDL cases, the Avandia litigation, Seroquel and what the MDL

1 judges did there, that's about the number of documents they  
2 took. It seems to be that sort of 150 to 250 range that the  
3 judges in the pharmaceutical MDL's seem to be taking.

4 I don't know if that's right or wrong, but that's what  
5 MDL school seems to be teaching them, and to me, if you take  
6 -- and these aren't documents we're picking. The Plaintiffs  
7 picked these documents that they cited in their brief. And if  
8 you take that combination, to me that might give the Court a  
9 pretty representative sample of what we're talking about as  
10 opposed to just randomly picking documents and you're going to  
11 end up with a bunch of documents that have nothing to do with  
12 the case. So that's what I would suggest in terms of the  
13 Court selecting it.

14 And I want the Court to understand what we want to do,  
15 and again this is exactly what they did in Vioxx and all the  
16 other MDL's. When the Court says these are the documents I  
17 want to review, and we give you the documents in camera, we  
18 would also give you -- if necessary, depending on which  
19 documents they are -- the affidavits from the lawyers who were  
20 involved in the communications establishing what we believe is  
21 the claim of privilege, and then Your Honor will have in front  
22 of you the evidence to make whatever judgment the Court is  
23 going to make.

24 Now, I don't know if Your Honor -- in those cases, they  
25 don't end up doing a document-by-document ruling because there

1 are just too many documents.

2 THE COURT: No, it would be categories.

3 MR. PETROSNELLI: Categories and guidance, and I  
4 think that's what we need. And once we get that from the  
5 Court, we can apply that to the remainder of the privilege  
6 claims.

7 THE COURT: Okay.

8 MR. PETROSNELLI: So that's what I would suggest on  
9 that. The only other thing I want to tell the Court is I  
10 agree with Mr. Wilson. One of the biggest issues that I want  
11 to flag for the Court when you look at these documents is  
12 this. And we came across this repeatedly on Tuesday. And  
13 it's discussed in the Vioxx opinion at length.

14 And that is when Pfizer gets a request from a regulatory  
15 agency like the FDA or the EU for a submission of some sort or  
16 a comment on a draft of some sort, and the medical people at  
17 the company consult with the lawyers, either at the company or  
18 outside counsel, meaning me, about seeking advice on how to  
19 respond or what are the bounds of what they can say and can't  
20 say or the legal implications of what they say to the  
21 regulator -- question; is that privileged; answer, I think all  
22 the cases say -- and I think the Plaintiffs agree with us on  
23 this -- maybe. Maybe not. It depends on what the  
24 communication is, and that's why the Court has to look at the  
25 documents.

1 But what I want to tell the Court is that will -- in  
2 terms of categories, that cuts across a large number of the  
3 documents that we're talking about here -- and I'll tell the  
4 Court that -- and in the Vioxx opinion, this is discussed at  
5 some length -- that there are documents where the Pfizer  
6 employees consulted outside counsel, meaning us, about the  
7 legal implications of submissions to regulators because the  
8 regulatory agencies were asking for submissions on issues that  
9 are the issues in this litigation and, therefore, they needed  
10 to consult with litigation counsel.

11 That was purely legal advice. And the Vioxx Court, if  
12 you look at Footnote 12 in the Vioxx opinion, what Special  
13 Master Rice said there was that anything that involved outside  
14 litigation counsel and advice was privileged. It wasn't even  
15 an issue. The only issue in Vioxx was the communications with  
16 the in-house lawyers.

17 And so -- and on that, Your Honor, that's where, I think,  
18 a lot of the disputes will be, and the Court will see those in  
19 what we give to the Court, and the affidavits we'll have to  
20 provide from the in-house lawyers who were involved, and Your  
21 Honor will judge the claims.

22 And I think -- so to me it comes down to just what size  
23 sampling the Court wants to do. It doesn't matter to us.  
24 Really it doesn't. I think but from the Court's perspective,  
25 you want to make sure that it is a representative sample, and

1 to me, the thing that makes the most sense is the Exhibit 1  
2 that we have produced plus the very documents they cite in  
3 their motions as quote-unquote suspicious, and if we give  
4 those to Your Honor within a week after we try to work out  
5 whatever we can work out with respect to those and then get  
6 Your Honor's feedback whenever Your Honor has the time to get  
7 to it, we'll be in good shape.

8 THE COURT: Okay. Well, you obviously don't agree  
9 with that.

10 MR. WILSON: Yes. Could I just have one more  
11 minute?

12 THE COURT: Yes, absolutely, because you did put  
13 certain categories in your brief.

14 MR. WILSON: Yes. And, Your Honor, I really  
15 believe -- and I think the case law is more supportive of the  
16 fact that your decision looking at samples from those discrete  
17 categories is going to be more easily extrapolated to a larger  
18 number of documents.

19 THE COURT: And you're not concerned about getting  
20 irrelevant documents as the result of the random sampling?

21 MR. WILSON: Well, I think we can fix that pretty  
22 easily, Your Honor, and that is, you tell us which one's  
23 you're going to look at, and we'll meet and confer, and we'll  
24 go through the documents for the express purpose of cutting  
25 out the irrelevant ones. So we won't be taking your time on

1 things that don't matter.

2 THE COURT: What makes you think they are going to  
3 show it to you if they won't show it to you now and not take  
4 it out as one of the random documents I want to look at, and  
5 you say well, we will look at it together?

6 MR. WILSON: Well, no, that's what we did on Tuesday  
7 in Minnesota.

8 THE COURT: Well, I understand that.

9 MR. WILSON: We did it on Tuesday. Joe would sit at  
10 his computer and say this is a document involving "XXX."

11 THE COURT: Okay.

12 MR. WILSON: And we were able to say why would we  
13 give that to the Judge. That will be a waste of her time.

14 So I think if we get one cut at cutting out the stuff  
15 that's inconsequential, then you will have a very  
16 representative sample from the categories in 2 through 5.

17 THE COURT: Okay. Just to make sure I understand  
18 you, so you're saying pick random documents from Exhibits 2  
19 through 5, let me have a chance to go through those documents  
20 that you have picked with Joe, and we will take out what we  
21 don't think you need.

22 MR. WILSON: Correct.

23 THE COURT: Okay. All right. I think it's amazing  
24 when you ask me to look and see what you need and that you're  
25 going to take out what you don't think I need. I mean it's



1 just kind of --

2 MR. WILSON: Well, Your Honor, I'm not making myself  
3 clear.

4 THE COURT: No, you're not -- well, I understand  
5 what you're talking about.

6 MR. WILSON: If there's a document about delivery of  
7 raw materials in China, you know, and Joe says this is  
8 privileged and I say oh, it's not privileged, what we're -- we  
9 can sit down and say who cares. Let's not submit this one to  
10 the Judge because it's not relevant to the issues in the case.

11 That's what we found. A lot of the documents on the  
12 privilege logs are not smoking gun documents. A lot of them  
13 don't really matter that much.

14 THE COURT: It just seems to me that I can make that  
15 decision too, and I can just say documents that concern  
16 such-and-such are not relevant to this litigation so this  
17 group of documents --

18 MR. WILSON: That would be our preference to leave  
19 it all up to you.

20 THE COURT: Okay. Okay.

21 MR. WILSON: That would be our preference.

22 THE COURT: All right.

23 MR. WILSON: And then yes, I can meet next week,  
24 Joe.

25 THE COURT: All right.

1           MR. PETROSNELLI: Do I have to go up to Minnesota  
2 again? It was 10 degrees.

3           THE COURT: Why don't you come to DC? Well, it's  
4 cold in DC too, isn't it?

5           I will tell you this, though. You will get an order next  
6 week from me on this.

7           MR. WILSON: Okay, excellent.

8           THE COURT: I'm sure you will get the order the same  
9 time y'all send me proposed orders.

10          MR. WILSON: We appreciate your efforts, Your Honor.

11          THE COURT: Okay. The last thing, if I'm not  
12 mistaken, is setting a briefing schedule for Pfizer's motion  
13 to compel documents from third-party subpoena recipients; for  
14 example, the Institute of Safe Medication Practices, and  
15 related persons and/or entity, and that, I guess, is a motion  
16 to come?

17          MR. HASTON: Yes, Your Honor. We're trying to give  
18 you a bit of a review. We're hoping we'll be able to work it  
19 out, but if we don't, just like the last time we were up here,  
20 I think there was a preview of motions that were ultimately  
21 filed; we want to get a scheduling order in place.

22          Judge, about the middle part of last year, I stood up  
23 here and said that both sides are working real hard to keep  
24 discovery disputes away from the Court.

25          THE COURT: And you've done real well.

1           MR. HASTON: I think you can hold this MDL up  
2 against a lot of them, and I think we have worked real hard.  
3 We have a few bumps in the road, and this is a potential bump  
4 we wanted to give the Court a heads up about.

5           You know, there's wide-open discovery going on right now  
6 with Pfizer and soon Noval. We're through the PFS process and  
7 the Plaintiffs as well.

8           The other really important set of next discovery that's  
9 going to go on is third-party discovery about reports and  
10 studies that have been done outside of these two sort of  
11 groups of sources of information.

12           We have served third-party subpoenas on a group of  
13 individuals and entities that have done this report that was  
14 cited in support of some of the Plaintiffs' claims, and  
15 similarly the Plaintiffs have also third-party subpoenaed a  
16 number of independent researchers who've done studies about  
17 the product. And we haven't stood in their way of getting any  
18 information from those third-party subpoenas.

19           And when we served our subpoenas -- and that would be the  
20 subject of the motion back in August -- we favored the  
21 Plaintiffs with copies of those subpoenas and there was no  
22 objection.

23           A couple weeks after serving the subpoenas, I got a call  
24 from a lawyer in Virginia who said he represented all the  
25 parties who had been subpoenaed; that at least, to his

1 knowledge, none of them had been retained as experts yet. And  
2 one of the reasons that we had served these subpoenas was to  
3 best understand -- probably like the Plaintiffs with these  
4 other studies that they've done for the reports that were the  
5 subject of our subpoenas -- why the report was put together  
6 and how it was put together because we didn't understand that.

7 And one of the reasons we served them is because the two  
8 lead authors often appear as Plaintiffs' experts in this type  
9 litigation so we wanted to understand all that.

10 THE COURT: You wanted to get it in before they were  
11 retained.

12 MR. HASTON: What's that?

13 THE COURT: You want to get your subpoena in before  
14 they were retained.

15 MR. HASTON: Well, we didn't know if they had been  
16 retained, Judge, and that's why we served the subpoenas.

17 THE COURT: Well, you wouldn't have served them in  
18 August of this year if you didn't want to -- well, never mind.  
19 Just go on.

20 MR. HASTON: Judge, this was one of the only things  
21 cited in the Plaintiffs' complaint.

22 THE COURT: Yeah, I remember. We talked about the  
23 science day, remember?

24 MR. HASTON: I do. And we wanted to understand  
25 that. So in any event, Judge, we negotiated with this lawyer

1 in Virginia to accept a subset of the information because he  
2 was unwilling to make a full production.

3 THE COURT: Now, what was his reason?

4 MR. HASTON: What was his reasons?

5 THE COURT: Since there were no objections filed by  
6 the Plaintiff, they had not been retained as experts by the  
7 Plaintiffs, so why was he? He didn't file a motion to quash  
8 the subpoena, did he?

9 MR. HASTON: No, he didn't, Judge. And so I'm not  
10 sure I understood his reasons, but in an effort to move  
11 through that, we said look, if you won't give us everything,  
12 give us a subset; we'll look at it, and if we can understand,  
13 you know, how this report was put together and why it was put  
14 together, we're done. If not, we're going to reserve our  
15 rights to come back and get everything else, or ask, at least,  
16 for everything else.

17 So after several weeks, we finally get a stack of  
18 documents; we look at them; they don't answer the questions  
19 that we're trying to understand about why the report was done,  
20 how it was done. We call him back; we send him a letter. And  
21 after several weeks go by, no response from him, I follow up  
22 with him, and he says well, the author has been retained, Mr.  
23 Tom Moore, by one of the Plaintiffs' counsel Mr. Cory, and  
24 you'll have to deal with Mr. Cory now. So that's fine.

25 So since that time, Ernie and I have talked about what

1 they would be willing to give us, what we have asked for, and  
2 what wasn't produced in the first instance. And we have  
3 closed the gap to some extent, but we still have a gap and  
4 we're not there yet.

5 And all we want to do is just get a briefing schedule for  
6 the Court in case Ernie and I can't resolve the issue. Ernie  
7 and I spoke this morning about a schedule, I think, that will  
8 work for both of us. We're going to have another week to meet  
9 and confer, try to resolve it. We'll file our motion a week  
10 from today; give Ernie a couple of weeks to respond, if  
11 necessary, and then give us a week, and we'll all be available  
12 for Your Honor to resolve the next time we get together.

13 THE COURT: That's fine. Y'all are going to submit  
14 something joint by next Wednesday, a briefing schedule?

15 MR. HASTON: Yes. Sure. We'll do that.

16 MR. CORY: Yes.

17 THE COURT: All right. I mean if all you want is  
18 just a briefing schedule from me at this point, that will be  
19 fine.

20 MR. HASTON: At this point. And, you know, if we're  
21 not able to resolve it, then we'll ask you to help us get the  
22 documents we have asked for.

23 THE COURT: Did the lawyer from Virginia by any  
24 chance tell you we think we're going to be retained, that's  
25 why they're not --

1 MR. HASTON: No, Your Honor. And that's a really  
2 important point. That's a really important point because, you  
3 know, if he had told us when we asked for it, sorry, these  
4 guys have been retained; you'll have to talk with Mr. Cory --

5 THE COURT: No, they obviously had not been retained  
6 at the time.

7 MR. HASTON: That was the representation that was  
8 made to us.

9 THE COURT: Right.

10 MR. HASTON: And that would have resolved a lot of  
11 this delay if we had been told that, but we weren't. That's  
12 why we dealt with him for months waiting for him to --

13 THE COURT: Okay. I need to know what information  
14 you've asked for, but I assume you're going to put that in  
15 your motion.

16 MR. HASTON: It will all be laid out in our motion.

17 THE COURT: Okay.

18 MR. CORY: Your Honor, I'll be real brief. I guess  
19 to assist us in the scheduling order, we need to get a date  
20 for the next hearing because I assume this will be a matter  
21 before the next hearing, and I would hope it would not be the  
22 first of April.

23 THE COURT: That's fine. That's fine. The next  
24 hearing -- since everybody likes to come to Florence and  
25 that's where I live --

1           MR. HASTON: I told them I'd never get them back to  
2 Birmingham, Judge.

3           THE COURT: And Fridays are always my day where I  
4 don't schedule anything. I will never have a conflict unless  
5 I'm in trial on Friday. I suggest we start doing them on  
6 Friday at 10:00 o'clock in Florence. The next one will be on  
7 the 15th of April.

8           MR. PETROSNELLI: That will be fine with us.

9           THE COURT: Is there anybody with an objection to  
10 that? And I don't know how much people can hear because  
11 you're soft-spoken. We may have to move the phone out closer  
12 to the podium. Can you hear everything that's being said?

13           MR. CANTOR: No, Your Honor. The sound is really  
14 very poor.

15           THE COURT: Yeah, that's what I was afraid of.

16           MR. CORY: I'll speak up.

17           THE COURT: Well, I'll try to get our IT people to  
18 work on that before the next conference.

19           MR. CANTOR: We can hear Your Honor just fine, but  
20 we can hear almost nothing of what the attorneys are saying.

21           THE COURT: Okay. We'll move the equipment before  
22 the next conference because it's frustrating for you to sit  
23 there by phone and participate and not be able to hear what's  
24 being said, and I'm sorry about it, and I apologize. These  
25 are brand new phones, and we'll try to get it worked out



1 before the next conference.

2 MR. CORY: Your Honor, I'm not trying --

3 MR. CANTOR: Thank you.

4 MR. CORY: -- to belabor anything that Tripp  
5 mentioned to you, but I just want to call your attention to  
6 one thing. Request number one in the subpoena is all  
7 documents relating to IMP reports relating to Chantix. That  
8 is about 10 million documents.

9 THE COURT: Okay.

10 MR. CORY: And if that's not a vague request, and if  
11 that's -- if researchers are required to produce 10 million  
12 documents that these guys have access to on their own, there's  
13 something wrong with the system, and we'll be prepared to  
14 argue it if we can't work it out.

15 THE COURT: Okay. But there are problems if the  
16 subpoenas are served in August and there were no objections  
17 filed at any time, there are some problems with the rules.

18 MR. CORY: I understand my problems. My problems as  
19 well.

20 THE COURT: Okay.

21 MR. HASTON: We're not asking him to send the  
22 documents, but we will weigh all this out in our motion if  
23 Ernie and I can't resolve it.

24 THE COURT: I'm sure you will explain it, and that's  
25 fine.

1           Okay. Is there anything else? April the 15th at 10:00  
2 o'clock. And I will get you an order regarding the motion to  
3 compel on the privilege documents by Wednesday. Okay. Thank  
4 you.

(Proceedings concluded.)

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT  
TRANSCRIPT OF THE PROCEEDINGS HAD IN THE ABOVE-REFERENCED  
CAUSE.

A large, dark, handwritten signature in black ink, appearing to be 'ANITA McCORVEY', written over the printed name below.

ANITA McCORVEY, UNITED STATES COURT REPORTER