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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: VIOXX PRODUCTS  
LIABILITY LITIGATION

MDL DOCKET NO. 1657  
NEW ORLEANS, LOUISIANA  
APRIL 27, 2006, 10:00 A.M.

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TRANSCRIPT OF MONTHLY STATUS CONFERENCE PROCEEDINGS  
HEARD BEFORE THE HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

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1 but I should have an order fashioned within a week that will  
2 allow you to file in an electronic format so you won't need to  
3 deal with the paper thereafter. That's what we were dealing  
4 with. That's why I'm a little late getting started.

5           The first item on the agenda is LexisNexis File and  
6 Serve. Anything on that one?

7           MR. WITTMANN: Just one thing, Your Honor. We've  
8 submitted to the Court jointly a proposed pretrial order  
9 Number 8A, which will deal with that situation of attorneys who  
10 are withdrawing or dismissing voluntarily lawsuits being required  
11 to certify and notify LexisNexis to that effect before the orders  
12 were signed permitting them.

13           THE COURT: For the record, do you want to explain what  
14 the problem was with the attorneys who were withdrawing.

15           MR. WITTMANN: The problem was attorneys were  
16 withdrawing from specific cases or were voluntarily dismissing  
17 certain cases but not notifying LexisNexis. So everyone thought  
18 they were still in the case, no one knew what was happening with  
19 the case, and it created a lot of confusion.

20           And the pretrial order 8A will now require  
21 certification from counsel before you sign an order that will  
22 certify that they have notified LexisNexis so that they can be  
23 removed from the LexisNexis list.

24           THE COURT: The whole concept with the LexisNexis is to  
25 be of assistance, and in order for it to be effective, we have to

1 have the people who are currently in the litigation receiving the  
2 notice. Not the entire world to receive it. If the entire world  
3 gets the material, then nobody gets it, and that's one of the  
4 reasons that we have to continue to policing it.

5 Anything from the plaintiffs on that?

6 MR. HERMAN: No, Your Honor.

7 THE COURT: The next item State Court Trial Settings.

8 MR. HERMAN: There are eight case settings in state  
9 trial courts between now and December 11th in four different  
10 states: New Jersey, California -- I'm sorry, five states --  
11 Mississippi, Alabama, and Texas, and Your Honor has set  
12 four cases during the same time period for trial in the MDL.

13 MR. WITTMANN: In Florida as well. The Cosey case is  
14 set for trial in Florida on the Court's July 31st and August 21st  
15 trial docket.

16 THE COURT: That's a good representative number. When  
17 we get finished with those cases, both the states and federal  
18 courts, hopefully the judges can meet and confer and see whether  
19 or not there are any trends that we see that we would be able to  
20 discuss with the attorneys and hopefully look at this matter  
21 globally, but I'll keep in touch with the state courts and watch  
22 the cases, too.

23 The next item is Class Actions.

24 MR. HERMAN: As Your Honor is aware, there had been a  
25 class action certified that, in New Jersey, the defendants Merck

1 have either initiated a writ to the highest court in that state  
2 or are in the process of doing so.

3 THE COURT: Right. The question for this court is what  
4 effect, if any, the New Jersey case has on the similar class  
5 actions filed in this court. I don't know whether I will be  
6 getting to that. It's an issue that I'm not prepared to speak  
7 on, whether it has an effect or does not have an effect, but it  
8 looks to me like the matter is going forward fairly rapidly in  
9 New Jersey, and it may be appropriate to watch that case and see  
10 where we go after a reasonable period of time, but I would like  
11 to have this MDL kept apprised of the development and with  
12 liaison or some method so that both sides in the MDL know what's  
13 going on and how it's going on.

14 MR. WITTMANN: Your Honor, we also have under advisement  
15 with you the Rule 12 motion to dismiss the master complaints for  
16 medical monitoring --

17 THE COURT: Right. Mr. Seeger had something.

18 MR. SEEGER: Your Honor, consistent with your last  
19 comment about the bridge in communications, we're going to ask  
20 Judge Higbee to have Russ Herman appointed as a liaison to the  
21 class action to the MDL court here.

22 THE COURT: I'll touch base with her on that, too. I've  
23 been trying to keep her apprised, and I've been sensitive to her  
24 litigation, and I know she has been to mine, so we have been  
25 keeping in touch, but I think it's helpful if the litigants, the

1 lawyers also have some interface with that so that we know what's  
2 going on, and we won't have any problems with scheduling and  
3 things of that nature. So I think the defendants also should  
4 have some liaison contacts with that case so that we are able to  
5 keep in touch with them.

6 You were saying, Mr. Whitman?

7 MR. WITTMANN: You have under submission right now the  
8 defendant's motion to dismiss the master complaints for medical  
9 monitoring --

10 THE COURT: I do.

11 Discovery Directed to Merck is the fifth item.

12 MR. HERMAN: Your Honor, yes, it is, but I wanted to  
13 give the cite of the New Jersey Court of Appeals case, just for  
14 the record. It's 2006 New Jersey SUPER Lexis 95, 2006.

15 The privilege, there is no issue as to the general  
16 discovery that's been directed to Merck and their production.  
17 There are some specific discovery issues which we get to later  
18 on, and which really affect primarily the four cases that are set  
19 for trial, and we're currently trying to work those issues out.

20 The issue of the privileged documents is now pending  
21 before the Fifth Circuit Court of Appeals. It has been briefed  
22 by both sides. A temporary stay order has been issued, and we  
23 have been advised telephonically by the Court of Appeals that  
24 they will handle the matter expeditiously.

25 THE COURT: Okay. The next item is Discovery Directed

1 to the FDA. Any report on that?

2 MR. HERMAN: Yes, Your Honor. There are 45 documents at  
3 issue. They have been narrowed down from a number. There is a  
4 privileged log. Your Honor has those documents in camera.

5 The Graham deposition, as Your Honor is aware, is set  
6 for May 9, 2006, and Your Honor has been substantially burdened  
7 with privilege issues. If Your Honor is able to deal with these  
8 45 documents in advance of Graham's deposition, it would be  
9 helpful.

10 THE COURT: I've just been through 500,000 pages, so I  
11 should be able to get through 48. I'll get through them this  
12 weekend for sure.

13 The FDA had some difficulty or reluctance disclosing  
14 various documents. They have asserted a privilege, but I have  
15 suggested that they file the documents with me. They have done  
16 so under seal, and I'll look them over and decide which are  
17 privileged.

18 MR. HERMAN: I am advised also that the several  
19 subpoenas that were issued to what I call the *Kaiser healthcare*  
20 *entities*, the subpoenas issued by Merck in connection with the  
21 Graham deposition that we will -- Mr. Doug Marvin has assured me  
22 that he'll provide me with these documents the day that he  
23 receives them, and then I'll undertake to distribute them to the  
24 four team captains.

25 THE COURT: That's important to do because otherwise

1 you're going to have to issue subpoenas, and it's going to just  
2 be just wasteful work. So I do appreciate the defendants giving  
3 them, as soon as you get them, send them to Mr. Herman and he can  
4 disseminate them.

5           Discovery Directed to Third Parties. That's an issue  
6 that I'm dealing with now.

7           MR. HERMAN: Yes, Your Honor. It's a substantial issue.  
8 Basically the controversy is is that Merck has contended that  
9 advertising or marketing entities have the same status as  
10 employees and, therefore, a privilege applies and have, to our  
11 understanding, been vetting documents before they are produced.

12           Our position is they are not employees. There is no  
13 privilege here. We've briefed the issue. Mr. Longer is prepared  
14 to argue it, Your Honor.

15           THE COURT: Yes, I would profit from some oral argument.  
16 I've directed my law clerk to talk with you folks about it, a  
17 date early next week. I start a trial on Monday, but I should be  
18 finished shortly, and I'll take oral argument.

19           MR. WITTMANN: There is another issue on the third-party  
20 documents, Your Honor. Both sides have collected documents  
21 basically from subpoenas issued to third parties, and we think it  
22 would be helpful, really essential to get a privileged log or a  
23 log prepared of those third-party documents so that we all know  
24 what the universe of the documents are. We're willing to provide  
25 a log to the plaintiffs. We think they should be required to

1 furnish a log to us.

2 THE COURT: Yes, that makes sense to me. We've got to  
3 know what the census is, what we're dealing with, so let's get  
4 together on that.

5 MR. HERMAN: We have no problem in producing a log of  
6 any third-party documents; although, we don't claim any of those  
7 third parties as our employees.

8 THE COURT: When can you-all do that?

9 MR. HERMAN: I'll --

10 MR. WITTMANN: We can do it pretty quickly, I believe,  
11 from our standpoint, Judge.

12 THE COURT: Ben.

13 MR. BARNETT: Good morning, Your Honor. I'm Ben Barnett  
14 on behalf of Merck. We should be able to put together a log in a  
15 week or so. I would think in 10 days we could do a mutual  
16 exchange, if that works for you.

17 MR. DAVIS: Leonard Davis from Herman Herman Katz and  
18 Cotlar. With respect to the third-party documents, we will have  
19 a log together, and we'll produce that by Monday to Mr. Barnett.

20 And then hopefully, as Your Honor requested, we'll have  
21 a face-to-face meeting. We'll get together and we'll do that not  
22 only in connection with the third-party but we've also addressed  
23 doing some type of reconciliation of all the Merck production  
24 thus far.

25 Mr. Barnett and I have spoken about that. We've also

1 talked to New Jersey counsel about tying it into that production  
2 so that we have a reconciliation of all documents that had been  
3 produced not only from third parties but also from Merck in this  
4 litigation.

5 MR. BARNETT: Mr. Davis just changed my weekend plans,  
6 Your Honor, but that's fine. We'll have our list together by  
7 Monday as well, and I'm happy to come down and visit with  
8 Mr. Davis.

9 As perhaps the Court is aware, we do universal  
10 productions both for the MDL and New Jersey. We're happy to  
11 prepare a universal production log which they are then free to  
12 examine and make sure they have all the documents not only that  
13 we produced in the MDL but in New Jersey.

14 MR. DAVIS: And I'm not trying to change his weekend.  
15 That's not what I intended by that. What I meant was I'll get  
16 the log by Monday and then will get together.

17 THE COURT: Let's try to finish it up by Wednesday and  
18 get to me on that. Ben, you and Lennie have to get together.  
19 Lennie, get with Ben on this and work that out. You have to do  
20 it face to face. You can't do it by letters. We just don't have  
21 time for that.

22 MR. HERMAN: Let me talk to *Mr. Herman (sic)*. I have  
23 been suitably advised and chastised.

24 THE COURT: Our next is Monthly Productions Pursuant to  
25 Pretrial Order Number 17. Anything on that?

1 MR. WITTMANN: That's going, I think, smoothly.  
2 Your Honor, we've made two productions already. I don't think  
3 there is really anything to discuss on that point.

4 THE COURT: Deposition Scheduling.

5 MR. HERMAN: We have no problems with the continuing  
6 depositions, Your Honor.

7 THE COURT: Anything from the states on that? Are you  
8 getting notice?

9 MS. BARRIOS: Yes, Your Honor, we are. We're in  
10 communication with Mr. Mayer from Merck and dealing with the PSC  
11 pretty much on a weekly basis so everybody is satisfied with it.

12 THE COURT: Plaintiff Profile Form and Merck Profile  
13 Form. Anything?

14 MR. HERMAN: Speaking for the plaintiffs, particularly  
15 those folks that have cases set for trial before Your Honor,  
16 Mr. Tommy Jacks, who is here and part of one of the trial teams,  
17 a lawyer from Texas with whom I'm personally acquainted, has  
18 undertaken to compare the Merck Profile Form as ordered by the  
19 Court with the type of form that Merck has been submitting.

20 I'm going to give Mr. Wittmann a copy, and I'm going to  
21 give a copy to -- I don't know on who's side but I guess  
22 Mr. Beck, Phil, to you, and I'm going to give you two copies,  
23 Phil, in case someone else needs it. I'm going to present one to  
24 Bob, Mr. Wynne.

25 These are the matters that the four trial counsel will

1 be negotiating in order to see if some resolution can take place.  
2 The language of difficulty is outlined in red, and I give this to  
3 Your Honor in advance. We hope we don't have to present it to  
4 you, but if we can't resolve it, we'll bring it.

5 THE COURT: Again, this is a face-to-face sort of thing.  
6 You've got to get together on this. This doesn't seem to me to  
7 be something that's going to stop the world from turning. It's  
8 something that --

9 MR. WITTMANN: As we told Your Honor back in chambers  
10 this morning, this is a work in progress. It's been going on for  
11 some six months now and we will be meeting --

12 THE COURT: And I understand it crops up sometimes  
13 because computer programs need to be tweaked, and they don't give  
14 it the same way, and so you have to deal with those issues that  
15 are really technologically pregnant.

16 MR. WITTMANN: That's correct, Your Honor, and  
17 Mr. Barnett is here to address that with the plaintiffs today.

18 MR. BARNETT: Your Honor, we will talk to plaintiffs  
19 today, and we will be happy to do so next week as well. Just to  
20 be clear, though, and the annotation that you have just been  
21 handed and distributed is something we did ourselves months ago  
22 in an effort to try to explain to the PSC those changes that were  
23 necessitated by the Merck computer systems.

24 So while this may be helpful; in fact, it's something  
25 we took upon ourselves to do to explain to them why we needed

1 slight modifications to the form, but we actually would like to  
2 resolve this issue, and I've been trying to do so for several  
3 months.

4 THE COURT: You have the people who are trying the next  
5 four cases. Let's get with them and see if we can deal with  
6 that. If we can't, then give it to me and I'll resolve it, but  
7 we have to move on this one quickly.

8 Also, with the Plaintiff Profile Form and Merck Profile  
9 Form, the concept that I see with the profile forms is that it's  
10 a product of both sides. Both sides have had some input on these  
11 profile forms and it's informational. It doesn't tie anybody to  
12 anything. It's not proof of anything. It's just information.

13 But the purpose of it is to do away with the necessity  
14 for interrogatories. I mean, there is no sense in having profile  
15 forms by either side, both sides, and then have detailed sets of  
16 interrogatories by both sides. It's just double work. So when  
17 you filled out the profile form, hopefully there is no need for  
18 interrogatories.

19 You know, there are some cases that are different and  
20 may have to be tweaked or you may have to meet and confer on a  
21 particular issue that you didn't anticipate because it's just a  
22 sui generis, you can do that. But basically generally if you  
23 prepare a profile form, either side, defendants submit a profile  
24 form to the plaintiffs, plaintiffs don't need to file  
25 interrogatories on the defendant and vice versa. It's easier

1 that way.

2 MR. WITTMANN: Just one other point I wanted to mention  
3 while on the profile forms. We continue to have a lot of  
4 problems with the Plaintiff Profile Forms being deficient. And  
5 we issue a deficiency notice. It's a time-consuming process for  
6 Merck counsel to go through these forms, and they are not  
7 properly filled out.

8 If Your Honor could just urge the plaintiffs, we notify  
9 them if they are deficient, if they could take the time and  
10 provide the information that's requested on the form, it would  
11 make it easier.

12 THE COURT: You need to copy me on those letters. When  
13 you send a deficiency letter, copy me on it so that I can keep a  
14 file on it and I'll know what the situation is, and I'll get  
15 involved in it after I see several letters not being answered.

16 MR. HERMAN: Your Honor, we have undertaken to collect  
17 hundreds of Merck deficiency letters, but we believe there are no  
18 deficiencies. We believe this is like an elephant hunting gnats.

19 And the primary problem with it is that every time,  
20 most respectfully to Merck, they send a deficiency letter with  
21 little nitpicks on it, it delays the response we get from them on  
22 the Merck Profile Form.

23 And we intend to brief the issue fully to bring the  
24 examples. Mr. Wittmann has already replied to our letter. We  
25 think it's a matter, unfortunately, that Your Honor is going to

1 have to review at some point because --

2 THE COURT: Bring it to me sooner than later so that I  
3 should have something.

4 MR. HERMAN: Yes, Your Honor.

5 MR. BARNETT: Very briefly, Your Honor, there are  
6 certain core criteria that the plaintiffs have to supply to us in  
7 order to do an MPF; for example, if they don't identify who this  
8 prescribing physician is, we can't do it, and there is about four  
9 or five pieces of data that we need. We are absolutely not  
10 delaying production of the MPF's for other parts of the PPF that  
11 are not there. We're not delaying the production at all. We're  
12 continuing to produce hundreds of them a week.

13 THE COURT: All right.

14 MR. HERMAN: We'll bring it to Your Honor's attention.

15 THE COURT: I just urge both sides to recognize that  
16 this is a tool. It's a helpful tool. Let's not make it a hurt  
17 instead of a help. It's got to be something that helps you, not  
18 something that is an additional hurt, so we've got to keep that  
19 in mind when we're doing it.

20 The State/Federal Coordination, anything from the state  
21 liaison on that?

22 MS. BARRIOS: Yes, Your Honor. Good morning,  
23 Your Honor. Dawn Barrios for the state liaison committee. I've  
24 just handed Mr. Wynne the update on the remand CD as well as the  
25 charts.

1           With reference to your earlier comments about getting  
2 together with the state court judges after the new round of  
3 trials, I will provide to Your Honor a list of and contact  
4 information for every one of those judges. As a case appears on  
5 your joint agenda, I'll provide you with the information so that  
6 you will have it readily available if you find the need to  
7 contact any of those judges, if you desire.

8           I would also like to thank Texas counsel. They've been  
9 incredibly forthcoming to put up trials on your trial schedule,  
10 and there are probably, I venture to say, more Texas attorneys in  
11 the courtroom than Louisiana attorneys today, and I would be  
12 remiss in my duties not to acknowledge them because they've done  
13 a great job of coordinating those proceedings.

14           And I would like to take a moment to respond to  
15 something about the Merck Profile Forms and the Plaintiff Profile  
16 Forms because I do get an incredible number of calls. I'm  
17 understanding from Merck now that there are four or five items  
18 that's the only items that they require of the plaintiffs and  
19 then that will start triggering their 90 days to reply, and if I  
20 could find out what those five items are and get those on the  
21 record so I can notify the plaintiff attorneys to continue to  
22 call me to explain about that.

23           MR. BARNETT: Your Honor, this issue originally came up  
24 in December of last year, and in discussions with Mr. Herman and  
25 Mr. Davis we explained to them that in order to do our job, we

1 needed these four or five pieces of information.

2 We talked it through and we actually sat down and wrote  
3 a letter to Mr. Herman, not only explaining what those, what that  
4 information was, we drafted a letter that he could then turn and  
5 send to other members of the PSC to educate them as to what that  
6 is.

7 I don't know whether that letter that we drafted for  
8 Mr. Herman ever went out, but we have tried to be as transparent  
9 as possible as to what it is we need in order to produce a Merck  
10 Profile Form. If we need to recirculate a letter, I'm happy to  
11 do so.

12 MR. HERMAN: Unfortunately Mr. Herman is translucent and  
13 not transparent, and if you would just state the five items, we  
14 could just get through this without a lot of correspondence.

15 MS. BARRIOS: Your Honor, I'm happy to get with them  
16 after the conference so we don't delay.

17 THE COURT: This is an easy issue. Let's not make it  
18 more complicated.

19 MS. BARRIOS: Thank you, Your Honor.

20 THE COURT: Also, I do, from the court's standpoint, I  
21 appreciate Texas's interest in monitoring this litigation and  
22 helping us move it along. I think this is an advantage, frankly,  
23 of having the MDL. One is to coordinate discovery, but it's also  
24 an opportunity that it affords the litigants, as well as their  
25 counsel, to look at matters globally. Everything cannot be

1 handled globally, and I don't suggest it can, but it is an  
2 opportunity, and I hope that everybody takes advantage of that  
3 opportunity. It's the only place that you can look at something  
4 globally and at an appropriate time hopefully we can look at it  
5 and see whether anything can be done. If it can, fine; if it  
6 can't, then we'll move on to another area, but hopefully it gives  
7 that opportunity. So I do welcome and appreciate the cooperation  
8 of Texas.

9 VICTOR Data.

10 MR. HERMAN: Your Honor, we have an order that we are  
11 discussing. If we can't resolve it by the end of the day, we'll  
12 bring it to you before the end of the day.

13 THE COURT: The other item is Generic Trial Performance  
14 and Rule 702 and Daubert in Limine Issues.

15 MR. HERMAN: As I understand it, Your Honor will be  
16 meeting with trial counsel in the four cases at one o'clock this  
17 afternoon, and on behalf of the PSC and trial counsel, I would  
18 like to address those issues at that time.

19 THE COURT: That's fine.

20 I'm told we skipped 12 and 13, I'm sorry.

21 Pro Se Claimants. Let's go back there first and  
22 deal with that.

23 MR. HERMAN: Merck is going to file a motion with regard  
24 to pro se claimants and LexisNexis website acts.

25 THE COURT: Yes, we've had some interest by some pro se

1 litigants to have access to LexisNexis. The difficulty that I  
2 have from the Court's standpoint is that I want everybody to have  
3 access but there are some documents that are sensitive, both from  
4 the standpoint of the plaintiff and the defendant, and they are  
5 not for open dissemination.

6           And I'm not concerned with the attorneys because they  
7 agree that they will not disclose the materials, certain  
8 materials, but it's difficult to police that from the Court's  
9 standpoint with pro se litigants from all over the country, as  
10 well as some being housed at the government's expense. I don't  
11 know how I deal with that, and so I'm just concerned about that  
12 situation.

13           So I may have to approach it a different way. I do  
14 believe in transparency, but at the same time, there are certain  
15 issues that are confidential that only lawyers should have access  
16 to.

17           Motion to Dismiss Foreign Class Action Complaints on  
18 Forum Conveniens Grounds.

19           MR. WITTMANN: Yes, Your Honor, the opposition brief is  
20 due to be file on May 22nd, and we've spoken to Ken Moll, who is  
21 representing the plaintiffs in that litigation, and we would  
22 agree with him that Merck would have 30 days from May 22nd to  
23 couch a reply subject Your Honor's approval, and if you'll  
24 approve it, it would be entered in the order.

25           THE COURT: I'll get right on it.

1                   Now we're at 14, the VICTOR Data.

2                   MR. WITTMANN: Mr. Herman is correct. We're working on  
3 a formal order that would restrict access to that data, but it  
4 will be produced, no question about it.

5                   THE COURT: 15 is Generic Issues.

6                   It seems to me that another advantage of having a  
7 court try a number of these cases with the experienced counsel as  
8 I've been fortunate to have is that you learn something in each  
9 case that hopefully makes it easier for the attorneys.

10                  I don't see the role of a judge to make life harder for  
11 lawyers. I see the exact opposite. It's my role, and I try hard  
12 at it, to make it easier for lawyers, so I like to meet with  
13 counsel after the trials, talk about the issues. I'm interested  
14 in your input to make it easier, streamline some of the process,  
15 and make the presentation of proof easier.

16                  In that regard, if we can do something once, it makes  
17 more sense to me than have me constantly do it. Some of these  
18 *Daubert* issues might be able to be looked at globally, so to  
19 speak, in some areas. I know some specifics might have to be  
20 dealt with, but that might be for the cross-examination more than  
21 *Daubert*, but there are some evidentiary matters, some logistical  
22 matters, time limitations, things of that sort that we might be  
23 able to deal with and just cookie-cut that out for all of the  
24 cases. So I would be interested in talking with the lawyers in  
25 the four cases as well as the lawyers who have tried the Plunkett

1 case and see what they can do to work this matter up.

2 I try to, as much as I can, deal with issues before  
3 trial, so that at trial, you just need to worry about getting it  
4 to the Jury. You know what you're going to get into evidence and  
5 that's been taken care of. You know what witnesses are going to  
6 be presented. With regard to depositions, they should be cleaned  
7 up so that you know what's coming in, and how it's coming in, and  
8 so we don't have to deal with those issues during trial, so  
9 hopefully we can deal with some of that globally.

10 I have coming to the meeting the Clerk's Office  
11 personnel and the jury personnel so that we can talk with them  
12 about the numbers that we need to pull in and also the method of  
13 dealing with the questionnaire.

14 16 is the APPROVe Data.

15 MR. WITTMANN: Yes, Your Honor. We delivered the  
16 interim APPROVe data yesterday to counsel in the four trial  
17 cases. They now have that and the final APPROVe data will be  
18 forthcoming shortly so that is under control.

19 THE COURT: Any problem with the plaintiffs with that?

20 MR. HERMAN: We have some problem of translating it  
21 through the right software, but we expect to work that out.

22 THE COURT: 17, the IMS Data?

23 MR. WITTMANN: Same thing, Judge. The IMS data for the  
24 four trial cases have been produced, and I think that's taken  
25 care of.

1           MR. HERMAN: Well, I do have a footnote, Your Honor. I  
2 understand that there are at least another dozen categories of  
3 information that relate to specific physicians and physician  
4 practices, et cetera, who are investigating that. It would  
5 probably bring another, have to have another meet and confer with  
6 IMS and defense counsel as soon as we have been able to pin that  
7 down.

8           THE COURT: Let me hear from you by next time so that we  
9 can see whether or not there is an issue. If so, I'll resolve  
10 it; if not, okay.

11           The next item is a Motion to Implement Procedure  
12 For Rapid Remand.

13           I assume this has two aspects to it. One concerns  
14 the cases that were removed from state court that are before me,  
15 and secondly, those cases that were filed in federal court that  
16 were sent to me because of the MDL.

17           That has to be done. I'm going to be moving on  
18 that, but I would like to get through the cases first to see  
19 where we are. I think that after the four cases, and after the  
20 states have had a chance to do their cases, if we have some  
21 difficult or whatever, that the global approach doesn't work,  
22 then I'm going to have to be moving the case along.

23           I don't see the MDL as just a black hole. I will do  
24 everything I can to satisfy my duty and responsibility for the  
25 discovery of the case, for packaging the case, and for looking at

1 the case globally, but once I've exerted myself on those areas, I  
2 will have done my job, and it then will be up to other judges or  
3 other districts. I may be going back to some of those districts  
4 to try cases, but that is a different story. But the point is,  
5 I'm not going to be dealing with this immediately. I'll be  
6 dealing with this at another time.

7 19 is Physician Call Notes.

8 MR. WITTMANN: Your Honor, we've produced all of the  
9 call notes with prescribers, and all of the facts and database  
10 material to the four trial counsel and four MDL trials that are  
11 coming up.

12 There was a request for custodial files that we got the  
13 day before yesterday for the first time, and I told Mr. Davis we  
14 were going to meet and confer about that. Custodial files are a  
15 completely different situation than the call notes. Could be  
16 very burdensome. We wanted to talk about it.

17 THE COURT: Let's see the scope of the problem first and  
18 see if is there a problem.

19 MR. HERMAN: Your Honor, we were going to bring the  
20 issue up this afternoon. I just want to make one short statement  
21 that the custodial files are extraordinarily important because  
22 those are the files of the detailed persons and regional  
23 salespeople employed by Merck in the geographic areas in which  
24 the plaintiffs cases arise, so they are case specific in that  
25 sense.

1           THE COURT: All right. The way you need to deal with  
2 this is let's look at it from the standpoint of the four cases,  
3 and I'm not going to assume that whatever we do on the four cases  
4 we're going to do for the rest, for the other hundred thousand  
5 cases. I'm mainly interested in four cases, so just look at this  
6 issue from four cases, with the understanding on both sides that  
7 that's not precedent. The four cases are ready to roll at this  
8 time, and so that has to be my immediate objective and yours,  
9 too.

10                           Discovery Directed to Plaintiffs.

11           MR. HERMAN: Yes, Your Honor, I'm going to meet with  
12 Mr. Marvin, and we'll resolve together this issue of  
13 interrogatories that are contemplated or have been sent in  
14 addition to profile forms, both sides.

15           THE COURT: Yes, that's my view from the standpoint of  
16 both sides. It seems to me that when we spend a lot of time on  
17 the profile forms, we're doing that for a purpose, and the  
18 purpose is so that you don't have to spend a lot of time on  
19 interrogatories, and so if you do both of them, it's just double  
20 work, and that's not the purpose of it.

21                           That doesn't mean that there is not going to be a time  
22 or a case that sui generisly that you need some additional  
23 information, but the whole general purpose is instead of  
24 interrogatories, to do this. So it cuts both ways so just keep  
25 that in mind.

1           MR. HERMAN: Your Honor, I have one short personal  
2 privilege, if I might. I read with interest and heard with  
3 interest your discussion about Thucydides, and I found the origin  
4 meet and confer. Thucydides was a true historian, and he  
5 rejected the Xenophobia of Xenophor, who wasn't much of a  
6 historian, and Thucydides reports in Periclaste's funeral oration  
7 as follows: "We differ from other states in regarding the  
8 citizen who holds aloof from public life not as merely quiet but  
9 as useless. We discuss all matters of state carefully and in  
10 person holding not that words and deeds go ill together but that  
11 any act is far doomed to failure when undertaken undiscussed."  
12 Given the origins of our democracy, it seems to me that the  
13 Greeks were meeting and conferring at a very early point in time.

14           THE COURT: Do you want to cite Herodotus?

15           MR. WITTMANN: Just another statement by Mr. Herman  
16 that's Greek to me, Your Honor.

17           THE COURT: What's your next date?

18           MR. HERMAN: May 18th.

19           THE COURT: May 18th at 10 o'clock again. I'll meet  
20 with the liaison counsel on the committees at 9:00.

21                     Anything from anybody that I haven't talked about?  
22 Mr. Becnel.

23           MR. BECNEL: I know a lot of people have reservations  
24 back to the airport. The President is in town. The highway is  
25 blocked. The best way to go is U.S. 61 because most of us have

1 been in traffic for two hours, so I just wanted to, if you're  
2 going to go, that's the way to go.

3 THE COURT: Let's keep that in mind. We have some  
4 people in the basement that are dealing with that.

5 Anything from anybody else, other than travel  
6 arrangements?

7 Thank you very much. Court will stand in recess.

8 THE DEPUTY CLERK: Everyone rise.

9 (END OF COURT)

10 \* \* \*

11 REPORTER'S CERTIFICATE

12

13 I, Cathy Pepper, Certified Realtime Reporter, Registered  
14 Professional Reporter, Certified Court Reporter, Official Court  
15 Reporter, United States District Court, Eastern District of  
16 Louisiana, do hereby certify that the foregoing is a true and  
17 correct transcript, to the best of my ability and understanding,  
18 from the record of the proceedings in the above-entitled and  
19 numbered matter.

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23

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Cathy Pepper, CCR, RPR, CRR

24

Official Court Reporter

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United States District Court