

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR : 2:14 MN 2502

Status Conference in the above-captioned matter
held Thursday, November 13, 2014, commencing at 10:11 a.m.,
before the Honorable Richard M. Gergel, in Courtroom I,
United States Courthouse, 83 Meeting Street, Charleston,
South Carolina, 29401.

REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
Official Reporter for the U.S. District Court
P.O. Box 835
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A P P E A R A N C E S

APPEARED FOR PLAINTIFFS:

Joshua M. Mankoff, Esquire
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Blair H. Hahn, Esquire
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APPEARED FOR DEFENDANTS:

Michael T. Cole, Esquire
Mark S. Cheffo, Esquire
Mara C. Cusker Gonzalez, Esquire
Julie Fink, Esquire

1 THE COURT: We're in In Re: Lipitor MDL 2:14-2505.

2 Counsel who will be speaking today, could they identify
3 themselves for the record, beginning with plaintiffs' counsel.

4 MR. HAHN: Blair Hahn for the plaintiffs, Your Honor.

5 MR. CHEFFO: Mark Cheffo, Your Honor, for Pfizer.

6 THE COURT: Very good. Okay. Who wants to go first;
7 issues they'd like to raise with me.

8 MR. HAHN: Your Honor, we've got a number of small
9 issues we would just like to put on the record. At this time
10 we're not asking the Court to make any rulings or decisions,
11 we just want the Court to be aware --

12 THE COURT: I appreciate that. Go right ahead.

13 MR. HAHN: -- what has happened. Over last week --
14 well, primarily. First is we're continuing to get
15 supplemental productions from Pfizer of clinical trial data.
16 We are reviewing that and adding that to the discovery as it
17 comes in. We are concerned that if this doesn't stop soon, we
18 will not be able to get our expert reports written and get our
19 experts ready.

20 THE COURT: Seems like last month I had the same
21 complaint from the defendants about the plaintiffs not
22 producing things.

23 MR. HAHN: Yes, sir. So we're just putting the Court
24 on notice that we're working with the defendants, we're having
25 conversations about this, but it's continuing to trickle in.

1 THE COURT: Well, I appreciate that, and I -- there's
2 no secret that lead counsel met, has been meeting with me
3 routinely the day before these. We did meet yesterday, we
4 discussed this issue. I was satisfied from the explanations
5 that just like I didn't think the plaintiff was intentionally
6 hiding the ball, I don't think the defendant is hiding the
7 ball. This is a lot of work. Everybody keep working real
8 hard to supplement. There will be some events like this, but
9 provide everything you can and to supplement as promptly as
10 you can.

11 But I appreciate you bringing it to my attention, Mr.
12 Hahn.

13 MR. HAHN: Thank you, Your Honor. We have, along
14 that same line, we have had supplemental discovery related to
15 Pfizer fact witnesses this week. We received 300 pages of
16 documents on Wednesday -- excuse me -- on Tuesday at
17 11:00 a.m. for a Wednesday deposition, which we looked through
18 and went forward with the deposition.

19 We had an additional production last night noticed for
20 three other depositions, one today and two on Friday, and
21 those were the Gully, Laskey and Aghen depositions.

22 MR. CHEFFO: You've gotten supplement materials; are
23 the depositions going forward?

24 MR. HAHN: No, sir. The deposition for today was
25 canceled because the documents weren't actually available to

1 be looked at until today. One of the depositions for tomorrow
2 has also been canceled. The other deposition for tomorrow, we
3 are looking at the documents, we just got them by e-mail, and
4 we are going to attempt to go through them and move forward
5 with the deposition. I can't answer that question to the
6 Court until after we've looked at the documents.

7 THE COURT: Very good.

8 MR. HAHN: Two other issues, Your Honor. One is the
9 Court ruled at the last status conference dealing with each of
10 the parties' ability to contact treating physicians ex parte.
11 We have an agreement with Pfizer that allows their legal
12 assistants to contact treating doctors solely for the purpose
13 of setting the deposition date.

14 We became aware that one of the contacts to one of the
15 physicians potentially went a little bit further than that and
16 discussed substantive issues. Out of an abundance of caution,
17 Mr. Cheffo and I have discussed that issue, and we have
18 entered into an agreement that I would like to read into the
19 record --

20 THE COURT: Very good.

21 MR. HAHN: -- setting forth what we can and cannot
22 do. The parties have agreed as follows: Pfizer legal
23 assistants are approved to schedule depositions of plaintiffs'
24 physicians. It is specifically understood that no lawyers for
25 Pfizer will participate in the calls, and the legal assistants

1 are instructed not to discuss any substantive issues with the
2 physician's office. In the event a legal assistant is
3 connected directly to a physician for any reason, they are to
4 say that they are only authorized to speak with office
5 personnel about scheduling the deposition. If there is no one
6 available, they will say that they will call back and will
7 notify plaintiff's lead counsel immediately.

8 THE COURT: Mr. Cheffo, does that accurately reflect
9 the stipulation?

10 MR. CHEFFO: It absolutely does, Your Honor. And I
11 don't disagree really with Mr. Hahn's kind of recitation. I
12 think the only thing I would say is just to be clear on the
13 record, what I think we both understood is during -- you know,
14 we've always had a situation, to avoid any issues where legal
15 assistants have been calling, there's never been lawyers,
16 that's just good practice. And there was one situation where
17 I think a doctor answered the phone and, you know, kind of my
18 understanding of what happened, he said, what is this all
19 about, can you send me a copy of the complaint.

20 THE COURT: And instead of saying, I can't talk about
21 it, the person gave apparently some response?

22 MR. CHEFFO: I'm not sure. Basically the person
23 said -- my understanding is, did say I can't talk about it and
24 said, you know, basically contacted us, then we contacted
25 plaintiffs saying the doctor wants a copy of the complaint.

1 And then that is -- we didn't send a copy and there was no
2 further communication. But that led to this issue of saying
3 kind of what can we do, you can't hang up on a doctor. But I
4 think the general theme in the instructions are consistent
5 with that is these are really solely for the purpose of --

6 THE COURT: Administerial function, basically,
7 because the substantive discussion with a doctor of a
8 plaintiff in this action must be in a form of a deposition
9 with everyone present.

10 So I think everyone understands the rules. I think the
11 stipulation's fine. I think it adopts the prior discussion I
12 had, which is in this state there is a privilege and that
13 there cannot be these ex parte communications.

14 Thank you, Mr. Hahn.

15 MR. HAHN: Thank you, Your Honor. One final issue is
16 dealing with medical record production. We have agreed to use
17 a company called Marker to order the medical records of the
18 plaintiffs. Pfizer has hired a separate medical record
19 production company called MRC to do their chronologies of
20 those medical records. And as MRC identifies additional
21 doctors that were not identified by the plaintiff, that those
22 records would be ordered, but giving the plaintiffs first a
23 seven-day notice period where we could object, if for whatever
24 reason we thought that those records were not appropriate to
25 be ordered; psychiatric records, mental health records, that

1 type of thing, Your Honor.

2 Unfortunately, there was some type of miscommunication.
3 MRC instructed the Marker company to order records on 13 of
4 the 14 bellwethers, without giving plaintiffs the seven-day
5 notice period. We have stopped that from going forward. We
6 are looking at the medical records this week to see if any
7 protected medical records have been produced. Right now we
8 don't believe they have, but we wanted the Court to be aware
9 of that issue.

10 THE COURT: Thank you. And again, y'all getting your
11 protocol, this is a mechanical thing here, sometimes there are
12 going to be glitches. But obviously these record requests
13 are -- the protocol y'all have adopted is to avoid invasive
14 nonrelevant medical records being made part of this discovery.
15 And, you know, I'm satisfied, I know we talked about this, I
16 didn't think anything sounded intentional, and I'm satisfied
17 that this protocol will be followed.

18 Mr. Cheffo, am I getting that right?

19 MR. CHEFFO: You are, Your Honor, absolutely. And
20 there is a protocol, we agreed to it, and I think as Mr. Hahn
21 said, you know, we actually found out, we, the lawyers, found
22 out about it, immediately told Mr. Hahn and his crew. And,
23 you know, to my knowledge, because the depositions, many of
24 them have been taken, we haven't seen those kind of documents,
25 but they're going to go and review, and if they think there's

1 any that need to be addressed or clawed back, we told them
2 that we'll certainly work with them in doing that in good
3 faith. But the good news is everybody now understands this
4 procedure, and frankly, you know, I think it just diverts you
5 of so much paper and e-mails flying back and forth. But it is
6 something that needed to be corrected and I believe it has
7 been corrected.

8 THE COURT: Thank you very much. Anything further,
9 Mr. Hahn?

10 MR. HAHN: That brings us, Your Honor, I believe, on
11 the agenda to the four items under section (d), they've all
12 been briefed, and we had a discussion yesterday about those
13 issues, Your Honor, and we're prepared to move forward however
14 you see fit.

15 THE COURT: Do you want to just go through each of
16 those issues and let's just address those?

17 MR. HAHN: Yes, sir. The first issue is Pfizer's
18 motion to quash the 30(b)(6) deposition on the AER discovery.

19 THE COURT: Mr. Cheffo, do you want to have anything
20 to say about that?

21 MR. CHEFFO: You know, I think, Your Honor, we did
22 address some of these issues yesterday. And I think we would
23 kind of -- I'm happy to answer any questions that Your Honor
24 has. I think we -- frankly, I probably would tell you what we
25 briefed this already and put in our papers. You know, our

1 view is that we believe the, you know, appropriate course here
2 is to try and focus on kind of what it is the plaintiffs think
3 they need ultimately in terms of source files. We also -- and
4 as I think we've spelled out in our papers, we have tried both
5 informally between the lawyers and put folks on the phone to
6 deal with it and explained.

7 I also, you know, understand the plaintiffs have said that
8 they would like to have, you know, a limited deposition to try
9 to address some of these issues and understand them on the
10 records, sort of the mechanics of it.

11 And I think the one main concern that we've had to the
12 extent that the Court was inclined to allow that, that
13 limited 30(b)(6) on those issues, is just that we have
14 appropriate safeguards for privilege issues.

15 So I think with that, Your Honor --

16 THE COURT: Yes, I am -- you know, this whole AER
17 issue has been spoken of a lot in abstractions. Because I,
18 for one, haven't looked at any of them. And the original
19 order, I believe, was CMO-14, I said go get 25 of them, let's
20 look at them; if they seem to be material information beyond
21 other information already produced, then we'll talk about how
22 we might retrieve some representative sample. If there were
23 17,000 of them, I was trying to find a balance. I never
24 intended that 25 to be the end game. I thought we would all
25 inform ourselves whether further evaluation was worthwhile,

1 and that someone would bring back to me some evidence about
2 why the prior provided information of the defendant wasn't
3 satisfactory, the reports and so forth to the Government.

4 As I understand this request by the plaintiff is a single
5 30(b)(6) deposition to give a better understanding of what is
6 the nature of those records, which I take it with beyond the
7 25 plaintiffs, don't have much of an idea what's there either,
8 Mr. Hahn, is that basically correct?

9 MR. HAHN: That's correct, Your Honor.

10 THE COURT: Yeah. So what I don't want is -- I'm
11 going to deny the motion to quash. But I don't want it to be
12 mistaken that we're on sort of, A, a fishing expedition here.
13 I need to be shown, if the plaintiff wants to go further, some
14 real documents showing me what was reported previously, these
15 adverse event reports to the government, and what's in here
16 that's materially different from that or important and
17 relevant to our case, or lead to relevant information, so that
18 further exploration of those records is appropriate. And if
19 so, then we need to think about how much further do we need to
20 go getting some representative sample, rather than having to
21 burden everybody with 17,000 files, and God knows how many
22 pieces of paper more you all want to review.

23 So I'm trying to -- so, A, I want to -- I find this is
24 like no big deal about this single deposition. But I'm not --
25 I don't want that to be interpreted that I'm about to turn

1 y'all loose to require the defendant to produce all the
2 underlying source files in 17,000 cases, I'm just not. I'm
3 not any closer there than I was when I told y'all to go look
4 at the 25. But let me see what you got. Bring back the
5 documents, show me why they're material. And I just don't
6 want this to be the sort of bugaboo in the case or some secret
7 files that the Court's not letting the plaintiff get to that
8 would be the Holy Grail, if only you could get to it. Show me
9 that, if there's actually any merit to that.

10 Secondly, I am concerned about privilege. And what I
11 suggest to you is that you coordinate with my office and do
12 the deposition on a day that I'm mostly in chambers and
13 available. And I'm glad, if there's an issue y'all can't work
14 out at the deposition, y'all call me on a speaker phone and
15 tell me what's going on and I'll make a ruling. I do that all
16 the time, it's not a big deal. I'm glad to do that, if y'all
17 can't sort it out among yourselves. But this is not -- we're
18 kind of getting close here to privilege issues. And I am
19 respectful of that. At the same time, I want to allow the
20 plaintiffs to get the records that are potentially probative
21 of their claims.

22 So we're trying to do a balance here, and I hope it's --
23 as to the motion to quash, that motion's denied. Which was
24 reflected, I believe, in the defendant's -- there's a letter
25 at docket number 630, plaintiffs' position at docket number

1 646. Okay?

2 Next issue.

3 MR. HAHN: Thank you, Your Honor. It is our
4 understanding the Court does not wish to address the issue
5 dealing with motion for summary judgment as to the Texas
6 plaintiffs today.

7 THE COURT: Correct.

8 MR. HAHN: So we're passing on that.

9 THE COURT: Correct.

10 MR. HAHN: The next issue is the --

11 THE COURT: We'll do that -- December, we'll intend
12 to do that. I had a few other things on my plate this week.

13 MR. HAHN: Yes, sir. The next one is Pfizer's motion
14 to quash plaintiffs' notice for the deposition of Joe Feczko,
15 and we are resting on our papers on that issue, Your Honor.

16 THE COURT: Does defense wish to say anything about
17 that?

18 MR. CHEFFO: I would say this, Your Honor. Also, I
19 think we've kind of briefed the legal issue, so I won't argue
20 that. I think that there really is a few concerns that we've
21 had with Dr. Feczko. One is, he was the chief medical
22 officer, and as you know, Pfizer makes products other than
23 Lipitor. And, you know, while this is an MDL, I think the
24 concern is to the extent that we're going to have folks being
25 deposed kind of over and over again in other litigations

1 that's always a concern.

2 I also think that, you know, there's one issue here of
3 figuring out whether someone actually knows to test. And
4 again, I think that it's somewhat a Catch 22. Because if
5 somebody submits limited documents, and then in a deposition
6 saying -- I'm sorry -- in a declaration or affidavit saying I
7 don't know; the answer could be, well, how would we ever know
8 unless we take his deposition? But if that was true, there
9 never would be an Apex doctrine. So there is a little bit of
10 tension with the idea of saying, well, you said you don't know
11 a whole lot, but now you're going to take a deposition to find
12 that out.

13 So I do I think that that is a concern. But probably even
14 more concern is really the reason or the rationale, you know,
15 asking yourself, if the plaintiffs have 25 depositions, one
16 is, is timing right now the right thing to do? You know, some
17 of the case law has talked about, well, even if you're
18 inclined to take it, why don't we see, there's a lot of folks
19 in the chain right there in this litigation who are going to
20 be deposed from commercial, pharmacovigilance, medical, all
21 kind of across the board here.

22 And to the extent then that there was deposition testimony
23 or other testimony saying, you know, this sole person or the
24 person involved was Dr. Feczko, I don't think that's been
25 established here. I think essentially we have a few

1 references at a very high level for Dr. Feczko, which show
2 really no -- even the documents, as I've looked at them and
3 seen them, there's nothing related to the specifics here.
4 Shouldn't be a surprise that, of course, the chief medical
5 officer would have documents that say Lipitor, or may have
6 been involved in certain things. And no one is suggesting
7 there's an ivory tower here and he has no idea what's going on
8 with things at Pfizer. But that's very different than being
9 the right person on day to day. So I do think there is that
10 concern.

11 Then the second prong of it is even were the Court to
12 allow some type of deposition, you know, I think there's a few
13 parts of the Apex doctrine, whether it's the Court was to
14 determine it specifically applies here to former witnesses or
15 not, or whether there's some distinction in MDL, but I think
16 that the gestalt, if you will, is really to avoid kind of busy
17 people having to be deposed for reasons that are really
18 strategic. I wouldn't say harassment, but more strategic.

19 Then the other point is to basically subject somebody to a
20 deposition where, you know, you ask a few basic questions,
21 were you involved in this, were you involved with that, and
22 they get their answers. But what often happens at these
23 depositions, and we've seen it in a few here, and these are
24 very good lawyers and they're able to prosecute the case as
25 they see fit. But if you take, you know, someone and you say,

1 well, were you aware of this, you know, were you aware of
2 this, were you aware of that, and knowing that they didn't see
3 documents, they weren't involved in that, to create the
4 impression amongst jurors or perhaps the Court or others,
5 that, you know, they should have been aware of that. And
6 frankly, some of that has happened. You know, in terms of
7 even the depositions we've seen, you know, a statistician was
8 asked a whole bunch of documents, hours of documents on
9 regulatory issues, or Japanese label. And then the second
10 deposition was, aren't you surprised that Dr. X didn't know
11 about that? So it becomes this, you know, kind of cascade
12 of -- and the first person saying, well, no, in my normal
13 life, I'm a statistician, I wasn't even at the company when
14 that was there. And so you didn't know about this?

15 THE COURT: Your witness handled himself or herself
16 very well.

17 MR. CHEFFO: I think -- well, I think they testified
18 honestly, Your Honor, so in that --

19 THE COURT: That's usually -- then they did
20 testify --

21 MR. CHEFFO: And I think they handled themselves
22 well. So in that regard, absolutely. And that's why, you
23 know, we're not running into court with, you know, we didn't
24 direct not to answer, but I just -- that's a real concern when
25 you get to these types of depositions, is that, you know, if

1 they're really going to take a deposition to test where he
2 was, what he knew, what the scope was, and then if he says I
3 did have involvement, ask those questions, you know, if Your
4 Honor were to allow the deposition, I think that's one thing.
5 It's another to ask that, and then basically have four hours
6 more of saying, well, you didn't know why, here's a document
7 that you never would have seen.

8 So I think I would ask for two things. One is, you know,
9 that either Your Honor not allow the deposition, or defer on
10 it. To the extent that Your Honor is going to allow it, I
11 would set certain time limits and parameters. And I would
12 also, without certainly creating a deposition outline for the
13 plaintiffs, we're not suggesting that, you know, kind of guide
14 the plaintiffs and the parties. And again, this is a
15 nonparty, also, he's not a Pfizer employee. To basically say
16 to the extent you want to ask these questions about scope, you
17 know, this should not be for some theatrical purpose, Your
18 Honor.

19 THE COURT: Imagine that, lawyers doing something for
20 dramatic purposes. I can't even imagine that would happen.

21 Mr. Hahn, you can sit down. I'm not going to grant the
22 motion.

23 You know, there's a big debate about whether Apex even
24 applies in MDLs, because the benefit of the Apex doctrine is
25 we have far-flung litigation, multiple jurisdictions, and the

1 six people who potentially would be executives, people might
2 want to be deposed, would spend the next year having their
3 depositions taken and it's ridiculous. MDLs largely avoid
4 that problem by consolidating the discovery. It doesn't
5 eliminate, of course, the Court's supervision of the discovery
6 to avoid some abusive, inappropriate discovery.

7 But you know, this is the most prescribed drug in the
8 world. This guy who the plaintiff wants to depose was the
9 chief medical officer during a very relevant time period. If
10 he doesn't know anything, that could cut several different
11 ways in how the plaintiffs wish to develop their case. I
12 can't forecast it right now, Mr. Cheffo. I don't know what
13 their theory is. I'm not going to try to choreograph this
14 deposition, because I don't know that their theories are.
15 It's just part of the process, people, even big shots get
16 deposed when they have potentially probative evidence, and
17 they get questioned. And I would be absolutely shocked if we
18 didn't have a little theatrics in every deposition; it would
19 be a stunning development and restraint that I've never seen
20 lawyers on either side ever being allowed to keep themselves
21 within it.

22 So I'm not going to sit there and be a nanny at the
23 deposition. If there's something that requires -- we have
24 very limited circumstances under our rules in which witnesses
25 can be directed not to answer. Otherwise, you know, we'll --

1 we have some confidence in the judgment and professionalism of
2 lawyers.

3 So the motion to quash as to Dr. Feczko is denied.

4 MR. HAHN: Thank you, Your Honor. The last issue we
5 have on the agenda is the plaintiff Hempstead's motion for
6 leave to file an amended short form complaint to add
7 consortium claim. Miss Hempstead's lawyer, Matt Mokwa, is in
8 the courtroom and is prepared to address that issue.

9 THE COURT: I've read the briefs. What's the
10 defendant's view on that?

11 MR. CHEFFO: I think, Your Honor, with the statement,
12 or at least the point in their reply that they would allow for
13 a limited deposition on the consortium claim, that we don't
14 object to the amendment, Your Honor.

15 THE COURT: I just, you know, and I talked to the
16 lawyers about this yesterday, this is one of our 14 potential
17 bellwethers. And we want representative cases robustly
18 litigated, everybody putting up all their appropriate claims
19 and defenses, because we want it to mean something. And I
20 think this is -- I don't see any real prejudice here with the
21 reopening of the discovery regarding the plaintiff on the
22 issues of consortium, because obviously defendant didn't have
23 notice.

24 So I grant the motion to amend. Okay?

25 Other issues?

1 MR. HAHN: Thank you, Your Honor. That's all from
2 the plaintiffs.

3 MR. CHEFFO: That's it for us, Your Honor, too.

4 THE COURT: Okay. Y'all had an easy day today. I
5 think we all deserve that. And our next, I think our next one
6 is December 18th.

7 Good to see everybody. See you in a month.

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9 (Court adjourned at 10:35 a.m.)

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REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court
Reporter for the United States District Court for the District
of South Carolina, hereby certify that the foregoing is a true
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S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR