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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 on Thursday, June 25, 2015, commencing at 10:00 a.m., before the Honorable Richard M. Gergel, in Courtroom III, United States Courthouse, 83 Meeting Street, Charleston, South Carolina, 29401.

REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
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A P P E A R A N C E S

APPEARED FOR PLAINTIFFS:

Mitchell M. Breit, Esquire
Joshua M. Mankoff, Esquire
Mia L. Maness, Esquire
Ann Estelle Rice Ervin, Esquire
Blair H. Hahn, Esquire
Ramon R. Lopez, Esquire

APPEARED FOR DEFENDANTS:

Michael T. Cole, Esquire
Mark S. Cheffo, Esquire
Rachel B. Passaretti-Wu, Esquire
Lynn Pruitt, Esquire

1 THE COURT: Miss Ravenel, are we on the telephone?

2 THE CLERK: Yes, sir.

3 THE COURT: Very good. Okay. We are in the June
4 status conference in the matter of In Re: Lipitor, 2:14-2502.

5 Could counsel identify themselves for the record who will
6 be speaking during the hearing.

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

8 MR. CHEFFO: Morning, Your Honor, Mark Cheffo for
9 Pfizer.

10 THE COURT: Thank you.

11 Okay. Plaintiff counsel, Mr. Hahn, do you want to share
12 with me any issues you'd like to raise with me?

13 MR. HAHN: Thank you, Your Honor.

14 On our joint status report under paragraph (a), we have an
15 order that we take the 30(b)(6) deposition on or before
16 July 17th, pursuant to CMO 33.

17 By agreement of the parties, I believe we have now set the
18 deposition -- if not, I know we're working on it -- for the
19 second week of August; just wanted the Court to be aware of
20 that.

21 THE COURT: Good.

22 MR. HAHN: That's outside of your order.

23 THE COURT: As long as it's agreeable to everyone, it
24 suits me fine. Thank you for mentioning it.

25 MR. HAHN: Yes, sir.

1 I would then move to paragraph (d) on the agenda. Number
2 one on the Jennings case, we have withdrawn our errata sheet,
3 and are going to proceed without pushing this issue, Your
4 Honor. So I mean, from plaintiffs' perspective there's no
5 need to rule on that issue.

6 THE COURT: Yeah, thank you.

7 Let me just say for the record, because I know perhaps
8 other courts have taken a different view than our local court
9 on these issues, so let me just, for the benefit of folks from
10 away, as they say. We have a rule that -- and it's local
11 rule, for everyone's edification, it's local rule 30.04(e),
12 that prohibits counsels and witnesses from engaging in any off
13 the record discussions during depositions or during any breaks
14 or recesses.

15 Until that errata sheet is signed, the deposition is
16 active. And you can't have a lawyer meeting with a witness,
17 coaching them to change their answers on an errata sheet, and
18 then submit that, because that undermines the integrity of the
19 deposition. The deposition is the witness' testimony. It
20 is -- many times I've said it's like the party being on the
21 witness stand, and can anyone imagine a lawyer running up to
22 the witness stand and answering the question or changing the
23 answer. And the answer, of course, and response, of course,
24 is no, you can't do that.

25 That doesn't mean that plaintiffs, if they wish to explain

1 something, they could not find some method, plaintiffs'
2 counsel, to explain something. Interrogatory responses are
3 commonly prepared by counsel. So you could supplement a
4 response and explain something about something in a
5 deposition. You could write a letter to counsel; you could
6 file that, if you wished to. But you can't, as they say, go
7 messing with the deposition. That is something different,
8 that's a different animal. Obviously with a party it is --
9 can be used under the Federal Rules for any purpose, and can
10 be published, et cetera, and you just can't have a lawyer
11 stepping in and doing it.

12 I don't for a moment think anyone is attempting to violate
13 a rule or to be unethical in any way, but I think just the
14 answer is, that is not where you make a point like that, it's
15 not on that errata sheet. I expect people, and there's -- of
16 course, we anticipate witnesses to read their draft
17 depositions, to make corrections as needed in court, but the
18 rules -- but that's not something for a lawyer to be involved
19 in. That is not -- that is a problem for a lawyer to be
20 involved in. And it is something that the witness must do
21 themselves uncoached. Just like you can't sit in the
22 deposition and whisper in their ear. Because by going and
23 doing that, you are essentially doing that.

24 Okay. Again, 30.04(e), that's my interpretation, and I
25 don't want anyone in the future, any counsel discussing errata

1 sheets with their witnesses. With their party witnesses.

2 Yes, go ahead.

3 MR. HAHN: Thank you, Your Honor.

4 Under paragraph (d), number two, Pfizer has chosen to file
5 a reply brief. And once that brief has been filed, we will
6 contact your chambers to set, probably telephonic --

7 THE COURT: This is the issue of the privilege of the
8 former employee?

9 MR. HAHN: Yes, sir.

10 THE COURT: I would like, you know, there are issues
11 relating to what law controls here, which is actually more
12 interesting than you might think. And so I think we do need
13 to sort out, you know, which state law controls, is there a
14 federal common law control, does that matter? There are some
15 variances, even among the circuits, on this issue. The Second
16 Circuit and the Fourth Circuit have a somewhat -- taken a
17 somewhat different view.

18 I will tell you that to the extent I'm applying federal
19 common law, I will apply the law of this circuit. This
20 circuit. So you need to know that. But whether that is
21 actually what law I apply, as opposed to state law, I want
22 to -- I'm looking forward -- I know you've briefed some of
23 this, and I will expect a response from the defendant.
24 Because I think it's an interesting legal question, and I
25 think we need a fairly prompt response to it. We've got

1 discovery ongoing, and I will try to give you as close to real
2 time as I can. I will try to do that. Okay.

3 MR. HAHN: Thank you, Judge.

4 The final issue is number three, deals with case-specific
5 expert reports. Plaintiffs have narrowed our general
6 causation experts, at the request of Pfizer, and we had hoped
7 that the same thing would happen here, Your Honor, given the
8 number of experts that have been noticed, and the time limits
9 that we have to deal with it.

10 THE COURT: Well, you know, this is, of course, a
11 difficult issue for a trial judge to know, I mean, I don't
12 even know the substance of these expert reports. There is
13 obviously a lot at stake. We're dealing with two bellwether
14 trials. But that they have a broader implication, practical
15 implication, so I am not surprised that either party would be
16 using more experts than one might call at trial.

17 I have considerable control over this, of course, at
18 trial. Rule 403, I'm not going to allow the same testimony to
19 be by multiple experts, we're just not doing that. It would
20 wear our jury out, it would be unhelpful. But we're way
21 ahead, that's way ahead of this. I have no idea what these
22 witnesses are going to say. I think they need -- they've been
23 noticed, they've been timely noticed, they need to be deposed.
24 Appropriate motions in limine could be filed in the future, to
25 the extent there's a 403 issue.

1 I think practically, most experienced counsel would not
2 want to put up repetitive witnesses, because in many cases as
3 technical as this case, more sometimes is less, okay? You
4 wear the jury out, you bore them, you lose their attention.
5 And with the skill of counsel on both sides, I don't
6 anticipate that problem. But at this stage, I'm stepping
7 back, you guys have got to do your discovery, and I would only
8 intervene really at a trial stage, frankly, at this point.
9 Okay?

10 MR. HAHN: Thank you, Your Honor.

11 Going back to the privilege issue, Judge, it has been
12 pointed out to me that once we receive their reply, it's
13 possible we might want to -- or once their response, we might
14 want to file a short reply.

15 THE COURT: When is the response due? Mr. Cheffo, do
16 you know?

17 MR. CHEFFO: I think it's due July 1st or 2nd, Your
18 Honor.

19 THE COURT: Okay. Can't we -- I'm, frankly, out of
20 town until July 7th. So why don't you, by the end of the day
21 July 6th, why don't you get -- if you want to do a reply, why
22 don't you do it then.

23 MR. HAHN: Thank you, Judge.

24 THE COURT: And I welcome the briefing, but let's do
25 it and get it over with. And I'll try -- if I need argument,

1 I'll be glad to -- I'll let you folks know, but my tendency on
2 an issue like this is generally just deal with it on the
3 briefs. I'm sure y'all will adequately brief the thing.

4 MR. CHEFFO: I would just say that it would actually
5 be a surreply for the plaintiffs. I don't have an objection
6 to that, but under the processes, we actually had to move,
7 they did have a chance to respond, so we'll reply, but if they
8 want a surreply --

9 THE COURT: If they have something else they want to
10 add, I'm fine. Sometimes people will write me and say, Judge,
11 can I go beyond the 30-page limit or something, and I tell
12 them, you certainly can, I'm just going to quit reading at 30
13 pages.

14 MR. CHEFFO: I'm happy to let them file, as long as
15 Your Honor's not going to read it. Works well for us then,
16 Your Honor.

17 MR. HAHN: I believe, Judge, that's the Bubba Ness
18 rule.

19 THE COURT: Bubba Ness was my cousin, so that is a
20 pretty good rule.

21 Anything further, Mr. Hahn?

22 MR. HAHN: No, sir, Your Honor.

23 THE COURT: Mr. Cheffo?

24 MR. CHEFFO: Just very briefly. I think we've
25 covered the substance. We have talked about the dates for

1 this new deposition. I think the only issue we'll work around
2 is the witnesses and the lawyer who is supposed to be
3 defending that has a trial coming up, but I'm confident we'll
4 be able to work that out, as we always do with counsel.

5 Not to belabor the point on the experts, the only thing I
6 would just highlight for the Court is at the end of the day,
7 if you kind of line up their experts, general and specific, on
8 the two cases, and ours, they have 14, we have 13. There may
9 be some quibbling about --

10 THE COURT: Don't buy it back now, Mr. Cheffo, I'm
11 not getting in the middle of this.

12 MR. CHEFFO: Understood. And with respect to our
13 brief, we'll file that certainly on time, and then be
14 prepared, to the extent Your Honor wants to have argument;
15 otherwise --

16 THE COURT: If I feel it's necessary, fine. But I
17 kind -- you know, we're moving pretty fast here on discovery,
18 and y'all need to know what the answer is. So unless there's
19 something that is sort of I feel like argument will help, I'm
20 going to, shortly after I return, we'll issue an order in the
21 case.

22 MR. HAHN: Thank you, Judge. Fine from the
23 plaintiffs' perspective.

24 MR. CHEFFO: That's fine for us.

25 Nothing else, other than, as you'd expect, things are

1 moving, and there's a lot of depositions and work being done
2 kind of outside the courtroom.

3 THE COURT: I'll bet they are.

4 Now, let me talk to y'all a bit about the second
5 bellwether trial. First one, of course, is -- we're going to
6 draw a jury in November and commence immediately with the
7 trial. And the second trial is January.

8 Mr. Tanenbaum helpfully advised me that he had a case in
9 front of Judge Duffy on Judge Duffy's January term, and that
10 he was concerned about that. Well, the good news is that
11 Judge Duffy and I have talked to each other, and Mr. Tanenbaum
12 does not have a problem, okay?

13 And we will -- I'm not ready today to set exact day in
14 January. I mean, I don't even know I'm aware of what our jury
15 draw day is. Do we know that? We won't even know yet. But
16 I'm going to encourage an early January jury draw date. And
17 unless something comes up like a speedy trial obligation or
18 something that makes me do it, my inclination would be to
19 commence in the same time we did before, with the second
20 bellwether trial in January. So no long Christmas vacations,
21 folks. At least know we got -- And the good news is, you
22 know, it will be so close to the other trial, you won't have
23 to relearn the medicine and everything and all the facts,
24 y'all will be really expert. And I am going to measure how
25 much time y'all take in the second trial versus the first one,

1 because my betting is we're going to save about six days in
2 the second trial, but we'll see.

3 And I'm advised that our friends in Missouri that were out
4 towards like May or something on their trial, is that correct?

5 MR. HAHN: Correct.

6 THE COURT: So we'll have two bellwether trials under
7 our belt by that point.

8 And, folks, we're going to have to talk about once those
9 two trials are completed, what, you know, what further utility
10 there is in an MDL. I have, I don't know, 60, 65 cases filed
11 in South Carolina. And unless there's a reason y'all give me,
12 and I've disposed of the preliminary pretrial matters, my
13 inclination would be to send the cases back to the districts
14 from which they came, and to start trying my South Carolina
15 cases. I mean, that would be my plan, unless y'all have any
16 strong feeling, you'll let me know to the contrary.

17 MR. CHEFFO: I think as we get closer to that, I
18 think we may have a view. I certainly understand Your Honor's
19 position on that, and I don't know that I'm, today, prepared
20 to kind of look into the future.

21 I would just say that depending on obviously Daubert
22 issues, certain other rulings, you know --

23 THE COURT: I mean, to the extent there are
24 preliminary issues, I'm going to deal with every one of them.
25 But I think we're going to have a pretty healthy dose of

1 Daubert rulings between the first two cases. Okay? I mean,
2 there might be other twists and turns, but I think we'll have
3 a good feel for where we're going on that, and to the extent
4 there are dispositive motions, a pretty good feel for that.

5 So, you know, sometimes these MDLs hang around for years,
6 with the hope by the District Judge that the parties will find
7 a way to resolve the cases. I don't want to interfere with
8 the resolution of the cases, but to the extent that doesn't
9 look like that is promising, it's just not going to camp on
10 this docket, it's going back to districts from which it came.

11 And I tell you that only because I don't want y'all
12 saying, well, maybe sometime in the distant future we want to
13 think about settlement, but we don't want to think about it
14 now, this is not going to sit in Charleston forever. Y'all
15 need to know I take my duties very seriously in terms of
16 getting these cases ready for trial, but I don't try 2000
17 cases, you know? That's not possible and it's not going to
18 happen.

19 So I've got a pretty good docket here for these cases,
20 just South Carolina cases. And I will, shortly thereafter,
21 we'll just start trying these individual cases, and we'll work
22 through them, to the extent we need to do that, we will do
23 that.

24 Mr. Cheffo, I know that would be quite a challenge for
25 your client to deal with things in 48 jurisdictions, and I

1 don't seek to -- I recognize that. There is obviously some
2 utility for the MDL, but the MDL is not designed to try 2000
3 cases, you know, that's just not the way it's going to work
4 and it's certainly not possible.

5 So I want y'all to understand sort of my view. And to the
6 extent there is a utility of dealing with certain issues that
7 we haven't perhaps in the first two bellwether cases, that
8 might be preliminary, I'm open to hearing those out and
9 addressing those, but it's not going to stay here
10 indefinitely.

11 MR. CHEFFO: And I hear you loud and clear and I
12 understand and that makes sense. I guess the only thing,
13 again, as we get a little closer, the devil may be in the
14 details. It's less about certainly burden on lawyers,
15 clients, I know that's maybe less of a consideration. I guess
16 just figuring out, if we got to that point, how it impacts
17 certain districts. In other words, if you have a smaller
18 district, and there's a number of cases, that court could
19 feel --

20 THE COURT: The greatest impact, of course, is on my
21 district. Thank y'all for that.

22 MR. CHEFFO: This massive district with 2000, that's
23 really what I was saying, is there's sometimes a consideration
24 about staging and how those cases would get remanded in a way
25 that doesn't burden --

1 THE COURT: I'm completely open to all that, but, you
2 know, I know that among MDL judges, we talk about strategies
3 when, you know, obviously this is a method by which most of
4 these cases get resolved, right? Either by dispositive
5 motions or by settlement. And the jury's out yet on whether
6 that happens in this case. But if it doesn't, we're not going
7 to tread water here, we're just not doing that. And I want
8 y'all to be organizing your thoughts and plans on the basis
9 that we're looking at sometime in 2016 of sending the cases
10 back to the districts from which they came.

11 So is there anything further anyone in the courtroom would
12 like to raise any matters with the Court at this point?

13 (No response.)

14 THE COURT: Anyone on the telephone wish to raise any
15 matters with the Court at this point?

16 (No response.)

17 THE COURT: Having heard no response, the next status
18 conference is July 23rd. If I don't see you before then, I
19 will see you then. Thank you very much.

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21 (Court adjourned at 10:25 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 and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR