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

IN RE: LIPITOR 2:14-MN-2502

TRANSCRIPT OF STATUS CONFERENCE  
THURSDAY, July 23, 2015  
BEFORE THE HONORABLE RICHARD M. GERGEL,  
UNITED STATES DISTRICT JUDGE

APPEARED FOR PLAINTIFFS:

Blair Hahn, Esquire  
Christian Marcum, Esquire  
Josh Mankoff, Esquire  
Ann Rice Ervin, Esquire  
Mark Tanenbaum, Esquire  
Lisa Ann Gorshe, Esquire  
Mitchell Breit, Esquire

APPEARED FOR DEFENDANTS:

Mark Cheffo, Esquire  
Michael Cole, Esquire  
Rachel Passaretti, Esq., Esquire

Court Reporter: Amy C. Diaz, RPR, CRR  
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Proceedings recorded by mechanical shorthand,  
Transcript produced by computer-aided transcription.

1 THE COURT: Ms. Eunice, are we on the telephone?

2 MS. RAVENEL-BRIGHT: They are on the phone.

3 THE COURT: Very good. Thank you. We are in the  
4 July 2015 monthly status conference in *In Re Lipitor* MDL  
5 Number 2:14-2502.

6 Could counsel who will be speaking identify  
7 themselves for the record, please?

8 MR. HAHN: Blare Hahn for the plaintiffs, Your  
9 Honor.

10 MR. CHEFFO: Mark Cheffo for Pfizer.

11 THE COURT: Okay. First of all would -- Mr. Hahn,  
12 do you want to start? Any matters you want to bring to the  
13 Court's attention?

14 MR. HAHN: Thank you, Your Honor.

15 We have submitted a joint status report that I  
16 believe covers most of the issues before the Court. We have  
17 one other issue that Mr. Cheffo and I have discussed, and  
18 with the Court's permission, when we do the pretrial schedule  
19 that is due at the end of this month, that we are going to  
20 break out the *Hempstead* dispositive motions and make those  
21 staggered a little bit later since that trial is later. And  
22 that will give us a little bit of breathing room, if that's  
23 appropriate.

24 THE COURT: I think that's a reasonable thing to do.

25 MR. HAHN: Thank you.

1 THE COURT: Okay.

2 MR. HAHN: And then other than that, Your Honor,  
3 it's just the matters at the end of our report in paragraph  
4 D --

5 THE COURT: Okay.

6 MR. HAHN: -- dealing with Dr. Handshoe's reports.

7 THE COURT: Okay. Mr. Cheffo, anything you want to  
8 bring to the Court's attention?

9 MR. CHEFFO: No, Your Honor. I think, as Mr. Hahn  
10 said, I think it's been covered in our report. And you know  
11 we'll be filing motions this Friday with respect to *Daubert*.  
12 We've covered some of the issues with Your Honor's guidance  
13 on some of the page limits we talked about, and also --

14 THE COURT: And the absence thereof?

15 MR. CHEFFO: Yes. Exactly.

16 And also with respect to sealing certain information  
17 that's, you know, protected. And I think those housekeeping  
18 matters I think are well under order, Your Honor.

19 THE COURT: Good. I know that there is a motion --  
20 I'll be glad to hear from you about seeking to strike -- the  
21 defendant seeking to strike Dr. Handshoe's rebuttal report,  
22 one of the plaintiffs' experts.

23 Do you want to be heard anymore on that?

24 MR. CHEFFO: Your Honor, I guess I would say this:  
25 You know, you were -- really I think on consent of the

1 parties -- were ready to tee this up on an expedited basis,  
2 both in our motion and our replies and their opposition. So  
3 I think that we've probably put forth our position and laid  
4 it out I think as best as I probably could. I would  
5 certainly be happy to answer any questions Your Honor may  
6 have, but I think I would rest on the papers with respect to  
7 that issue.

8 THE COURT: Very good. The plaintiffs want to have  
9 anything additional other than what they've already  
10 submitted?

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

12 THE COURT: Well, let me -- and of course counsel  
13 knows that we had some discussion in chambers about this  
14 yesterday afternoon. You know, exactly where that line is  
15 on a rebuttal report has always been one of those mysteries  
16 that everybody struggles with from time to time in the  
17 provisions under Rule 26 for rebuttal reports. And I think  
18 this one is rather close, but I -- after a lot of reflection,  
19 I think it is a rebuttal -- I've ruled that it is -- it  
20 satisfies the requirements of a rebuttal report and I will  
21 not strike it. And most notable to that is that Dr.  
22 Handshoe appears to be responding. This is the so-called FH  
23 issue, familial hypercholesterolemia. We'll use the "FH" to  
24 save our multisyllable pronunciations of that thing -- of  
25 that term.

1 But the -- the issue is -- that issue, the failure  
2 of Dr. Handshoe to address the treating physician's diagnosis  
3 of FH, was pointed out as a -- as part of the critique by one  
4 of defendant's experts, Dr. Lopez-Varela on pages 28 and to  
5 page 30, but particularly on page 29, criticizes Dr.  
6 Handshoe's failure to address that issue as part of the  
7 criticism of Dr. Handshoe's opinions. And I think  
8 responding to that is appropriate.

9 I'm always mindful in making a number of these  
10 discovery decisions that though this is one bellwether case,  
11 the *Daniels* case, one case, it is a bellwether case for many  
12 others, and that we want the jury to get the best  
13 information.

14 So considering it in full, I think the better  
15 judgment and decision, it is a rebuttal and I decline to  
16 strike it.

17 Additionally, defendants object to two letters that  
18 were signed by Dr. Handshoe outside of the report process  
19 that were -- that were to the life care planner.

20 One of them -- let's just focus right now, since we  
21 are sort of focused here, on *Daniels* for a moment. The  
22 letter essentially validates the life care plan and the  
23 findings. But my understanding, Mr. Cheffo, is that Dr.  
24 Handshoe had not disclosed that in his expert report, his  
25 review of and his opinions regarding the life care plan?

1 MR. CHEFFO: Yes, Your Honor.

2 THE COURT: And, you know, so the question is: Can  
3 we sort of through the back door allow an opinion on a whole  
4 other area for which he had not addressed in his expert  
5 report? And I think if we do that, we just have -- we just  
6 toss all the expert reports, all the standards and all the  
7 procedures we have for deadlines for expert opinions and  
8 depositions based on those and all of that, and I just don't  
9 think that's proper.

10 So as to -- I'm not quite sure if you are asking me  
11 to strike it or it would eventually be a motion in limine,  
12 but it's not that -- Dr. Handshoe is not allowed to offer an  
13 opinion on that subject. He didn't timely offer it. And  
14 I -- I think under the circumstances it's just not a proper  
15 way to express an opinion and process it under the rules,  
16 Federal Rules of Civil Procedure, or the rules of the Court's  
17 many Scheduling Orders on this matter.

18 So I do strike it or grant the motion in limine to  
19 the extent I need to do that at this point. But it's not  
20 going to be used. And I want plaintiffs to know that it's  
21 not going to be able to be used in that manner.

22 Now, do you all wish me to address the *Hempstead*  
23 matter in this? It's a slightly different issue.

24 Mr. Cheffo, would you like me to address that, as  
25 well?

1 MR. CHEFFO: Yes, Your Honor. I think, as we've  
2 discussed and laid out, really the same, similar analysis.  
3 I mean, he does go farther --

4 THE COURT: It's actually a much broader -- even  
5 broader opinion. It does both the life care plan and then it  
6 launches off that Mrs. Hempstead's primary vascular disease  
7 is attributable to her diabetes. That is a, you know, I'm  
8 sure could well be an issue of debate. I haven't had all the  
9 expert reports. I don't know if other people are saying  
10 that. But it's -- to simply offer that opinion in a letter  
11 after and not included in an expert report. It's a  
12 significant and complicated issue medically and to offer it  
13 in writing for the first time in the -- in a letter to the  
14 life care planner just, in my view, just doesn't -- doesn't  
15 comply with the rules and I'm not going to allow that.

16 Let me understand this: Is that an issue --  
17 Mr. Hahn, maybe you can explain this to me -- is the role of  
18 Mrs. Hempstead's diabetes and producing her primary vascular  
19 disease, are you going to have other experts address that  
20 issue?

21 MR. HAHN: It's a damages issue only, Your Honor.  
22 And we had planned, yes, on having the damages --

23 THE COURT: It's a proximate cause issue. I mean  
24 obviously, as I understand the plaintiffs' theory, the  
25 Lipitor proximately caused the diabetes, which then

1 proximately causes other problems among them, you would  
2 allege?

3 MR. HAHN: Yes, sir.

4 THE COURT: And obviously to assert that you would  
5 need expert opinion. Do you have expert opinions saying  
6 that?

7 MR. HAHN: Our position, Judge, wasn't that  
8 these -- this letter was -- was not offered as an expert  
9 opinion of Dr. Handshoe's; it was simply correspondence with  
10 the life care planner.

11 THE COURT: You don't need it then. It's just a  
12 letter back and forth. She doesn't need it. You can't use  
13 it.

14 But do you have other experts who would be  
15 testifying to that?

16 MR. HAHN: Our intention, Judge -- and it was  
17 inartfully written -- was that Dr. Handshoe was linking PVD  
18 to diabetes.

19 THE COURT: Well, he should have done that in his  
20 expert report.

21 MR. HAHN: It was ambiguous at best in his expert  
22 report. He did testify to that in his deposition and then  
23 Pfizer chose not to follow up on that.

24 THE COURT: Because he didn't have it in his expert  
25 report. You know, I like to tell lawyers, listen, when you

1 file briefs, don't let low level associates in your firm do  
2 it because it's, like, really important. And when you do  
3 expert reports, they are really important, and particularly  
4 in a case like this they are really important.

5 And listen, I have been there working with experts  
6 trying to make sure the report is comprehensive, but this is,  
7 like, a really complicated issue. I mean, this is not like  
8 a throwaway, easy, obvious, not debatable issue; this is  
9 complicated: What causes vascular disease? And you've got  
10 someone who smokes, who is obese, has other risk factors.

11 I'm not saying that you couldn't perhaps establish  
12 that it's the diabetes as the most predominant cause, but  
13 that's a really complicated issue that should be set forth in  
14 the -- in a -- in the expert report, the basis of that  
15 opinion laid out clearly, so it could be thoroughly addressed  
16 in discovery and then subject to *Daubert*.

17 I just -- I just think, you know, backdooring it  
18 like this is not appropriate. And I'm -- again, however you  
19 want to rule that, it's not coming in in this manner.  
20 Certainly if you have other experts who would put it in their  
21 expert reports, you know, we'll deal with that at the *Daubert*  
22 stage. But at this point it doesn't even get there because  
23 it's not a proper way to present that opinion.

24 MR. HAHN: Yes, sir. Thank you, Your Honor.

25 THE COURT: Okay. Folks, the August status

1 conference is set for August 27th. And I know it comes as a  
2 complete surprise to y'all, but you are not the only case on  
3 my docket, okay? And I have a lot of complicated things  
4 going on, and among them is a criminal trial that begins the  
5 Monday of that week that would likely run through that  
6 Thursday, you know, the day -- and I can give y'all a couple  
7 of options: I could meet you at 8:30 that morning, I could  
8 perhaps do it one day the week before. I will be -- two  
9 weeks before -- I will be gone the week immediately before,  
10 or I can do it the following week, perhaps somewhere between  
11 the 2nd and the 4th.

12 Do y'all have a preference about which we would do  
13 there?

14 MR. HAHN: Your Honor, I've spoken with Mr. Cheffo  
15 about this, and this is what we would propose, if the Court's  
16 okay with it: That we would be -- that we would reach out to  
17 Your Honor if we need you on the week of the 10th, and I  
18 expect that we will on some pretrial issues dealing with our  
19 pretrial schedule submission, and that we could deal with  
20 those the week of the 10th. If that happens, Your Honor,  
21 the parties are more than happy to then skip the status  
22 conference and then just resume in September.

23 THE COURT: I think that's fine. And, you know, we  
24 can talk about and there may well just in development be  
25 unnecessary. I think we already skipped one month because

1 we just determined it wasn't necessary. And as we have  
2 always done, when we have a weighty issue during the month  
3 that we feel like we don't want to wait because it's slowing  
4 us up, we have been more than willing to address matters in  
5 August.

6 So why don't we do it like this: Let's say we are  
7 cancelling August subject to a call by y'all for a hearing on  
8 any matter that you need addressed. How does that sound?

9 MR. CHEFFO: Very good, Your Honor. Thank you.

10 THE COURT: And obviously, September is a busy month  
11 for us, right? I believe we do the *Daubert* argument in our  
12 September status conference, and that ought to be something  
13 that we'll all spend a lot of time focusing on, and it will  
14 be a priority for all of us.

15 Okay. For counsel within the courtroom, are there  
16 other matters that need to be brought to my attention?

17 Mr. Hahn?

18 MR. HAHN: Your Honor, I would like to just clarify  
19 on the record, because we've got a lot of people that are  
20 listening to this today --

21 THE COURT: Yes, sir.

22 MR. HAHN: -- about our discussion yesterday dealing  
23 with the CMO and the disclosure of documents.

24 What we discussed was for the sales rep depositions,  
25 that we are following the CMO you've previously set forth

1 with a five-day disclosure time for any exhibits that we  
2 think we are going to use. Of course if a document becomes  
3 at issue during the deposition that was not disclosed, we can  
4 use that, but there is an opportunity for opposing counsel to  
5 first break and review that document.

6 THE COURT: Mr. Cheffo, how do you feel about that?

7 MR. CHEFFO: I think following the procedures that  
8 we followed all along for both sales reps, and we also talked  
9 about treating and prescribing physicians, both in discovery  
10 and trial depositions, I think following those procedures make, you  
11 know, a lot of sense.

12 THE COURT: And let me just say this: Obviously  
13 there could be a situation that something arises that none of  
14 us anticipate. And if those procedures present a problem  
15 where you need me to immediately address some issue that  
16 comes up -- I have been there in a deposition where you get  
17 kind of a crisis and everybody has a different understanding  
18 of how the rule is and how it should go forward. I'm  
19 around, you know, I'm generally available. So I'm glad to  
20 address it. But I think the procedure y'all have been using  
21 has worked up to this point. And if for some reason a  
22 circumstance arises that doesn't work, you will let me know  
23 about it and we'll try to address it at the time.

24 I mean, y'all have been, I would say, you know,  
25 incredibly cooperative with each other. You recognize you

1 can be adversaries and vigorously disagree about each other's  
2 respective positions but treat each other with courtesy and  
3 with a mutual respect. And that's been kind of, frankly, a  
4 model and it's been a pleasure working with both of y'all on  
5 that.

6 MR. HAHN: Thank you, Your Honor.

7 MR. CHEFFO: One further clarification with that.  
8 As to the trial depositions that we are currently taking of  
9 the treaters, we are going to apply the same CMO. However,  
10 if a document comes up that was not anticipated that's used,  
11 we are recognizing that opposing counsel would have an  
12 opportunity to take a break and review that document, but  
13 they are not talking to the witness.

14 THE COURT: Well, let's just talk about it. I  
15 mean, part of all the rules are sort of a sense of good faith  
16 and fair dealing with each other. And, you know, if  
17 something is a genuine surprise -- and all of us have had  
18 that situation where someone will make some random comment  
19 and suddenly a whole issue opens up, perhaps for one or the  
20 other it is a great opportunity, and nobody anticipated it,  
21 but the door is open, and you need a bit to walk through it;  
22 documents have been produced but you didn't really anticipate  
23 it, I do think the courtesy would be to take a break and talk  
24 to counsel. That you don't have -- you know, we are trying  
25 to avoid ambush here. And to the extent that presents --

1 that situation presents sort of an immediate crisis, get me  
2 on the telephone; we'll deal with it. But I think the  
3 system generally has worked.

4 But remember this is the trial. These are not  
5 discovery, these are trial depositions. Am I right about  
6 this?

7 MR. HAHN: Yes, sir.

8 THE COURT: Y'all have already done the discovery.  
9 So we want to minimize the situation where you have a gotcha  
10 surprise. We want, you know -- the whole modern system of  
11 the Federal Rules of discovery is that we try to eliminate  
12 surprise and we try to make decisions on the merits. And  
13 that's what we are trying to accomplish here.

14 Okay. Any other matters to bring to my attention  
15 within the courtroom?

16 Let me ask anyone on the telephone. Are there any  
17 matters any counsel on the telephone would like to raise with  
18 the Court? Let the record show no one has responded. We  
19 don't know if we woke them up or not.

20 And let us -- so we will definitely next be together  
21 in September and subject to call if sooner, okay?

22 Thank you very much.

23 MR. CHEFFO: Thank you, Your Honor.

24 MR. HAHN: Thank you, Your Honor.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

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Amy C. Diaz, RPR, CRR July 23, 2015  
S/ Amy Diaz